

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STEPHANIE R. TIMMERMEYER,  
Secretary, WEST VIRGINIA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,

Appellant/Cross-Appellee,

v.

Civil Action No. 07-AA-27  
(Consolidated with 07-AA-56)  
Judge Louis H. Bloom

GOALS COAL COMPANY,

Appellee,

and

COAL RIVER MOUNTAIN WATCH,

Appellee/Cross-Appellant.

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**ORDER AFFIRMING  
THE MARCH 13, 2007,  
ORDER OF THE SURFACE MINE BOARD**

On the 13th day of July 2007, came the parties, by their respective counsel, for oral argument in the above-styled consolidated administrative appeals relating to the Final Order of the Surface Mine Board, dated March 13, 2007 (hereafter "SMB Order"). The SMB-Order resolved issues that arose when the appellee, Goals Coal Company (hereafter "Goals Coal"), requested that appellant West Virginia Department of Environmental Protection (hereafter "DEP") approve a permit revision (hereafter "Revision 9") that would allow Goals Coal to build a second coal storage silo on the property where Goals Coal was operating under Permit No. D-66-82. DEP and Coal River Mountain Watch (hereafter "CRMW") each filed an administrative appeal in the Circuit Court of Kanawha County challenging different aspects of the SMB Order. These appeals have been consolidated for hearing and decision under Civil Action No. 07-AA-27.

DOCKETING STATEMENT  
EXHIBIT A  
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During oral argument on July 13, DEP appeared by counsel, Thomas L. Clarke, CRMW appeared by counsel, Derek O. Teaney, and Goals Coal appeared by counsel, Robert G. McLusky. The critical facts are not disputed. Rather, resolution of this consolidated appeal pivots on disputed questions of law. Specifically, DEP challenges whether the Surface Mine Board (hereafter "the SMB") correctly applied the provisions of West Virginia Code sections 22-3-1 *et seq.*, and more particularly section 22-3-22(d)(4), in deciding that DEP should have granted Goals Coal's Revision 9 and allowed the company to build a second coal storage silo on the permitted property. For its part, CRMW challenges whether the SMB erred in accepting and approving an amended map of the area covered by Permit No. D-66-82, where the western boundary of the permitted area was established by reference to an end-of-mine-site marker previously installed by the engineer who submitted the original permit application in the 1980's.

Having reviewed and given due consideration to the record, the memoranda of the parties, the arguments of counsel, and the pertinent law, the Court is of the opinion that the Final Order of the Surface Mine Board, dated March 13, 2007, should be affirmed for the reasons set forth more fully below.

#### FACTUAL AND PROCEDURAL BACKGROUND

This appeal has its genesis in the Revision 9 application submitted to DEP by Goals Coal. As noted, Goals Coal sought this revision to Permit No. D-66-82 to allow the company to construct the second of two coal storage silos at the processing, storage, and loading facility Goals Coal operates under said permit.

Surface mining activities and permits are regulated by DEP under the West Virginia Surface Coal Mining and Reclamation Act ("the SCMRA"). W. Va. Code §§ 22-3-1 *et seq.* Passage of the SCMRA ushered in a new era for the coal industry by requiring coal operators to submit detailed

applications to obtain permits to conduct mining operations or to revise an existing permit. When submitting an original permit application, a coal operator is required to include, among a myriad of other things, a map delimiting the boundaries of the area to be covered by the permit and a plan for reclaiming the property to restore it to either its original use or a higher use. W. Va. Code § 22-3-9 and 10 (2007). When a permit is granted, the mining activities are limited to the permit area, as reflected on the map submitted with the application.

There has been coal mining activity on the property covered by Permit No. D-66-82 since approximately 1976, prior to the enactment of the SCMRA. Armco Steel Company (hereafter "Armco") applied for the first required surface mining permit for the subject property in 1982. Thereafter, Goals Coal succeeded to the permit in the mid-1990s.

#### 1982 Permit Map

The original 1982 permit application included a map (hereafter "Permit Map") that was prepared by Clarence Waller (hereafter "Mr. Waller"), a registered professional engineer and licensed land surveyor who worked for Armco. Using a United States Geological Survey (hereafter "USGS") map, which was enlarged to a 1" = 500' scale, Mr. Waller sketched, by hand, the line enclosing the permit area. His intention was to include those areas that Armco had already disturbed when it developed its original coal preparation facility at the site in question.

Before he prepared the Permit Map, Mr. Waller had installed a permanent end-of-mine-site marker at the western boundary of the area that Armco had originally blasted in order to prepare the site for construction of a railway track serving its preparation facility. This disturbed area was readily visible due to the highwall that remained after the blasting was completed. Mr. Waller then referenced the permanent marker on the Permit Map to establish the western boundary of the permit area. *See* 1982 Permit Map (attached as Exh. A to Goals Coal' Resp. Brief 6/19/07). As recently

as 2006, Mr. Waller was able to confirm that the marker he had installed, at the western boundary, was still in its original location.

### **The First Silo**

In 2003, Goals Coal obtained a permit revision that allowed it to construct a coal storage silo (hereafter "First Silo") within the permit area. The First Silo was built within the boundary of the original permit area. However, it is located within approximately 240 feet of Marsh Fork Elementary School.

### **The Second Silo**

In 2005, Goals Coal submitted its Revision 8 request. If granted, Revision 8 would have allowed Goals Coal to build an additional silo (hereafter "the Second Silo") within 300 feet of Marsh Fork Elementary School. Initially, Revision 8 was approved. However, shortly thereafter, DEP rescinded its approval based on inconsistencies in maps submitted over the years by Goals Coal in connection with the company's various permit revision requests.

Ultimately, Goals Coal appealed DEP's rescission order to the SMB. The CRMW, a non-profit membership organization concerned with social, economic, and environmental justice in the southern coalfields of West Virginia, intervened in the matter. The only issue in the appeal of Revision 8 was whether Goals Coal had adequately demonstrated that the proposed location of the Second Silo was within its permit boundary.

By final order dated May 15, 2006, (hereafter "the May 15 Order") the SMB affirmed the DEP's rescission because of inconsistencies in maps submitted by Goals Coal. May 15 Order, ¶ 7. Noting that the location of the 1981 end-of-mine-site marker was significant and "should be considered by [Goals Coal] and the DEP", the SMB further ordered Goals Coal to submit a new map showing the original permit boundary, along with a plan for installing permanent markers along the

western edge of the permitted area. May 15 Order, ¶¶ 8 through 10 (Exh. B to Goals Coal' Resp. Brief 6/4/07). No party appealed the May 15 Order.

#### Revision 9

Thereafter, Goals Coal submitted Revision 9, again seeking DEP's approval to build the Second Silo. This application was accompanied by a newly prepared map of the permitted area, which relied upon the end-of-mine-site markers to define the western boundary. There is an outstanding question regarding the accuracy of the location of a bridge crossing the Marsh Fork of the Coal River on the eastern end of Goals Coals' permit area depicted on said map. That disputed portion of the map, however, does not pertain to any of the issues in dispute in this administrative appeal. Therefore, the accuracy *vel non* of the portion of the map depicting the bridge's location need not be resolved herein.

As memorialized in an order issued on August 11, 2006, (hereafter "August 11 Order") DEP determined that the pertinent portion of the map submitted with Goals Coal's Revision 9 application illustrates that the location for the proposed Second Silo falls within the boundaries of the original permitted area, as reflected in Mr. Waller's Permit Map. Nonetheless, DEP also determined that it could not grant the requested revision because the Second Silo did not qualify for the "existing operation" exception to the prohibition against conducting mining operations within 300 feet of a school. August 11 Order at 4-6.

Under the SMCRA, certain areas are declared unsuitable for surface mining, including land within 300 feet of schools, public buildings, and other designated structures. W.Va. Code 22-3-22(d). There are exceptions, however, to the prohibition of mining in these protected areas, including the "existing operation" exception described more fully below.

## Appeals to the SMB

CRMW appealed to the SMB, challenging that portion of the August 11 Order wherein DEP determined that the end-of-mine-site marker shown on the Permit Map could be used to establish the western boundary of the D-66-82 permit area. CRMW argued that the permit boundary had to be determined solely from the Permit Map, without reference to the "end of mine site marker." As memorialized in the SMB Order, at issue herein, the SMB resolved this issue in favor of DEP, holding that

the DEP determination that the proposed map submitted with Revision 9 accurately depicts the permit boundary on the western end of permit number D-66-82 and ... approving the placement of permanent boundary markers at the location of the end of mine site marker and along Marsh Fork, as shown in the proposal map for Revision 9 is lawful, reasonable and supported by substantial evidence.

SMB Order at 1-2.

Goals Coal also appealed the August 11 Order to the SMB. The issue raised by Goals Coal centered around the following provisions of the SCMRA, upon which DEP relied in denying permission for the Second Silo:

(d) After the **third day of August, one thousand nine hundred seventy-seven**, and subject to valid existing rights, **no surface-mining operations, except those which existed on that date, shall be permitted:**

**[w]ithin three hundred feet of any public building, school, church, community or institutional building, public park, or within one hundred feet of a cemetery[.]**

W. Va. Code § 22-3-22(d)(4) (emphasis added).

There is no dispute that the Second Silo would be built within 300 feet of Marsh Fork Elementary School. However, Goals Coal claims that it is entitled to the statutory "existing operation" exception to the 300-foot restriction that is available to surface mining operations that were in existence on August 3, 1977.

Both the First Silo and the Second Silo would be used to stockpile coal and then load it onto railcars for shipment. As set forth in its August 11 Order, DEP reasoned that Goals Coal could not rely upon the "existing operation" exception because neither Goals Coal nor its predecessors had stockpiled coal or loaded it onto railcars at the specific location where Goals Coal proposed to build the Second Silo. August 11 Order at 4-6.

Goals Coal argued that DEP's application of the "existing operation" provision of West Virginia Code section 22-3-22(d) was too narrow and that such a restrictive reading would effectively "freeze" operations to old technology, unreasonably inhibiting normal operational changes that the legislature intended to allow.

The SMB resolved this issue in favor of Goals Coal. In explaining its reasoning, the SMB acknowledged that the Supreme Court of Appeals of West Virginia has directed that "courts should construe exceptions to the statute [*i.e.*, the Surface Coal Mining and Reclamation Act] narrowly." SMB Order at 12, ¶28 (quoting *Cogar v. Faerber*, 371 S.E.2d 321, 324 (W. Va. 1988)). Nonetheless, the SMB rejected the narrow interpretation espoused by DEP, namely that the existing operation exception only extended to the exact types of surface mining **activities** that were in use at the site on August 3, 1977. SMB Order at 12, ¶27 (emphasis added).

Rather like Goldilocks, the SMB found DEP's reading of the exception to be too narrow, while it found Goals Coal's reading of the exception to be too broad, with both having the potential to "lead to absurd results." SMB Order at 12, ¶30. It appears that dissatisfaction with the parties' respective analyses of the existing operation exception led the SMB to create its own analysis, for which it does not cite any statutory basis. Specifically, the SMB made a unanimous determination "that the appropriate analysis is to determine if the activity exists anywhere on the property, then the

question is whether it can be moved into the protected area [*i.e.*, within 300 feet of a school] without placing a significant burden on public health and the environment." SMB Order at 13, ¶31.

Neither DEP nor CRMW were fully satisfied with the SMB Order. On March 15, 2007, DEP filed its appeal, Civil Action No. 07-AA-27, challenging the SMB's determination that Goals Coal could build the Second Silo. Then, on April 11, 2007, CRMW instituted an appeal, Civil Action No. 07-AA-56, challenging the SMB's decision regarding the use of the end-of-mine-site marker to determine the western boundary of the permitted area. These are the two legal issues that are before the Court in this consolidated appeal.

### STANDARD OF REVIEW

An appeal from the SMB is brought pursuant to the provisions of the West Virginia Administrative Procedures Act, West Virginia Code section 29A-5-4. W. Va. Code §§ 22B-1-9(a) and 22B-4-3. In reviewing a contested case, this Court

may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g).

With regard to the review of factual findings and legal conclusions made by the SMB, this Court reviews questions of law *de novo*, whereas findings of fact are accorded deference unless such findings are clearly wrong. Syl. pt. 1, *Muscatell v. Cline*, 196 W.Va. 588 (1996).

### FINDINGS OF FACT

The Court hereby finds as follows:

1. Prior to August 3, 1977, Armco was engaged in surface mining operations on property that was subsequently permitted under Permit No. D-66-82.
2. After West Virginia implemented a permitting program for surface mining operations, Armco submitted an application for a permit for the aforementioned property on which it was already conducting surface mining activities.
3. Included with said application was the Permit Map prepared by Mr. Waller, who was a registered professional engineer and licensed land surveyor employed by Armco.
4. Mr. Waller used a USGS map to a 1" = 500' scale, upon which he delineated the property that Armco was asking to be included within the permit area. This encompassed the areas that Armco had already disturbed on the subject property.
5. The Permit Map contained a reference to an end-of-mine-site marker that Mr. Waller had already installed at the western boundary of the area Armco had originally blasted in order to prepare the site for construction of a railway track for coal transportation.
6. Mr. Waller was able to ascertain that, as recently as 2006, the end-of-mine-site marker was still in its original location. The location was recognizable because it was located near an extant highwall that had been created when Armco blasted to create the railway bed.
7. Goals Coal is a successor to Permit No. D-66-82.

8. On or about June 30, 2006, Goals Coal submitted, for DEP's approval, Revision 9 to Permit No. D-66-82. If granted, Revision 9 would allow Goals Coal to construct a Second Silo on the permitted property but within 300 feet of Marsh Fork Elementary School.

9. The Revision 9 application contained a revised map (hereafter "Revised Map") that was intended to cure inconsistencies that appeared on the face of different maps that had been submitted to DEP over the years as parts of various revision requests.

10. As reflected in the order issued August 11, 2006, DEP approved the Revised Map.

11. DEP found that the proposed location for the Second Silo fell within the permitted area.

12. Nonetheless, DEP refused to grant Revision 9 on the grounds that, because the proposed location for the Second Silo had never been used to stockpile or load coal, the existing operation exemption of the SCMRA, as contained in West Virginia Code section 22-3-22(d), did not relieve Goals Coal from the prohibition against conducting surface mining operations within 300 feet of a school.

13. Goals Coal appealed to the SMB, challenging DEP's refusal to grant the Revision 9 application.

14. CRMW also appealed to the SMB from DEP's August 11 Order, challenging DEP's acceptance of the Revised Map. CRMW asserted that the permit boundary must be gleaned from the lines drawn on the Permit Map without reference to the end-of-mine-site marker.

15. The SMB is composed of seven members appointed by the Governor. West Virginia Code section 22B-4-1(b) mandates that the SMB be composed of members drawn from each of the following areas of expertise: 1) environmental advocacy; 2) modern forestry; 3) agriculture; 4) water

pollution or conservation; 5) mining; and 6) engineering. The final member serves as a representative of the general public.

16. The SMB conducted a consolidated *de novo* evidentiary hearing on the two appeals. The parties, however, included the evidentiary record previously developed in Appeal No. 2005-23-SMB before the SMB in connection with Goals Coal's Revision 8 request. Specifically, the transcripts of the Revision 8 hearings, which were held on March 14 and March 15, 2006, were incorporated, by reference, into the proceedings relating to Revision 9.

17. The SMB unanimously affirmed DEP's decision that the map submitted with the Revision 9 proposal accurately depicts the permit boundary on the western end and that the end-of-mine-site marker depicted on the 1982 Permit Map establishes the western boundary of the permitted area. SMB Order, at 1-2.

18. In affirming DEP's decision on the permit boundaries, the SMB relied upon the definition for permit area set forth in West Virginia Code section 22-3-3(q), which allows permit boundaries to be determined by reference to both maps and appropriate markers on the site. SMB Order at 7, ¶¶13-14. In this case, Goals Coal's Permit Map was drawn with reference to, and reliance upon, the location of the end-of-mine-site marker installed by Mr. Waller. Further, the SMB noted that the scale of the Permit Map makes it difficult to precisely locate boundaries absent reliance on such markers. SMB Order at 7, ¶¶15.

19. CRMW appealed the SMB's decision on the boundary issue.

20. The SMB reversed DEP's denial of Revision 9, rejecting DEP's limitation of the "existing operation" exemption to the precise **activities** that had previously taken place within the 300-foot restricted area around schools and other protected structures. SMB Order at 12, ¶ 27 (emphasis added). It likewise rejected Goals Coal's contrary suggestion that simply because any type

of surface mining had occurred in a protected area prior to 1977 (such as road construction) then the mine operator could utilize that activity to claim that an entirely new operation (such as a mountaintop removal mine) qualified for the "existing operation" provision. SMB Order at 11-12, ¶¶ 24 - 26.

21. The SMB developed and applied its own test to determine whether Goals Coal should be allowed to build the Second Silo. SMB Order at 12-13, ¶¶ 29 - 31. Under the SMB's test, a permittee claiming an existing operations exemption and seeking a revision that would take place within a statutorily protected zone of a permitted area, must

- a. propose alterations that are "part and parcel of the same 'existing operation'";
- b. establish that the same type of activity (here coal storage) has previously been conducted somewhere within the existing permit area; and
- c. establish that allowing this pre-existing activity to be conducted in the protected areas will not place a significant burden on public health.

SMB Order at 12-13 ¶¶ 29 - 31.

22. The SMB found that the Second Silo proposed in Revision 9 application "is a tool for decreasing and minimizing dust[.]" SMB Order at 13, ¶¶ 32 - 34.

23. The SMB concluded that Goals Coal's Revision 9 application met the foregoing criteria for application of the existing operation exemption. SMB Order at 13, ¶¶ 32 - 34.

24. Appeals from the SMB Order were brought to circuit court by DEP and by CRMW.

## DISCUSSION

### Western Boundary of Permitted Area

CRMW maintains that the SMB erred in affirming DEP's approval of the placement of permanent boundary markers at the end-of-mine-site marker on the western boundary. CRMW

Petition for Judicial Review, ¶18 (hereafter "CRMW Petition"). Also, CRMW asserts that the SMB erred by concluding that, under federal and state law, the permit boundary is determined by boundary markers and not solely by the original Permit Map submitted by Goals Coals. CRMW Petition at ¶18. CRMW, however, has failed to prove that the SMB Order is subject to any of the potential defects enumerated in the APA, West Virginia Code section 29A-5-4(g).

As the SMB correctly noted, state and federal law both approve of the use of an approved proposal map and boundary markers, at the site, to determine the permit area. Pursuant to West Virginia Code section 22-3-3(q), a permit area is "the area of land indicated on the approved proposal map submitted by the operator as part of the operator's application showing the location of perimeter markers and monuments and shall be readily identifiable by appropriate markers on the site." *See also* 30 U.S.C. 1291(17) (2000).

In this case, the original Permit Map referenced the end-of-mine-site marker installed by Mr. Waller to establish the western edge of the area disturbed by Armco. While it may not have been perfectly depicted in the manner CMRW would have preferred, the western boundary was "indicated" on the Permit Map by reference to an "appropriate" marker. Therefore, the statutory requirements of West Virginia Code section 22-3-3(q) were satisfied. Accordingly, that portion of the SMB Order addressing the western boundary of the area covered by Permit No. D-66-82 must be affirmed.

#### **The Existing Operation Exemption**

DEP argues that Goals Coal's construction of the Second Silo within 300 feet of Marsh Fork Elementary is statutorily prohibited under the SCMRA, contained in West Virginia Code section 22-3-22(d). In support of this argument, DEP notes that neither Goals Coal, nor its predecessor, used the area contiguous to the elementary school for coal storage or loading operations prior to the

pivotal date of August 3, 1977. Because the proposed Second Silo site would be used for those purposes, DEP claims that the pre-existing operation exemption is inapplicable to Revision 9, despite DEP's prior approval of the First Silo.

Conversely, Goals Coal argues that the statutory prohibition against conducting surface mining operations within 300 feet of the elementary school does not apply to the property covered by Permit No. D-66-82 because Armco was conducting surface mining activities on the permitted area on August 3, 1977. As a consequence, Goals Coal claims that it is entitled to the benefit of the SCMRA's "existing operation" exemption that is afforded to surface mining operations that were extant as of that date. There is no dispute that if Goals Coal could successfully claim entitlement to the "existing operation" exemption, there would no longer be a statutory impediment to construction of the Second Silo, despite the fact that it would be built within 300 feet of Marsh Fork Elementary School.

Essentially, the parties' dispute centers on the definition of "surface mining operations" in the SCMRA. The definitional section of the SCMRA provides, in pertinent part, that "surface mining operations" are

(1) **Activities** conducted on the surface of lands for the removal of coal, or, subject to the requirements of section fourteen of this article . . . . The activities include: Excavation for the purpose of obtaining coal, including, but not limited to, common methods as contour, strip, auger, mountaintop removal, box cut, open pit and area mining; the uses of explosives and blasting; reclamation; in situ distillation or retorting, leaching or other chemical or physical processing; the cleaning, concentrating or other processing or preparation and loading of coal for commercial purposes at or near the mine site; and

(2) The **areas** upon which the above activities occur or where the activities disturb the natural land surface. The areas also include any adjacent land, the use of which is incidental to the activities; all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of the activities and for haulage; and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm

banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to the activities[.]

W. Va. Code § 22-3-3(u)(exclusions omitted) (emphasis added).

Based upon the above-quoted statutory language, DEP argues that, because “surface mining operations” are first defined as “activities” all mining activities that were not in place on August 3, 1977, are prohibited within the 300-foot restricted area specified by the SMCRA. Goals Coal, on the other hand, argues that the term “surface mining operations” is not limited to activities, but also includes “areas” of land disturbed by mining. Therefore, if an area was used for mining prior to August 3, 1977, that area of land qualifies for the “existing operation” exception as to all types of surface mining operations.

The SMB did not agree with either parties’ interpretation. Rather, the SMB found that the “appropriate analysis is to determine if the activity exists anywhere on the property and, if it does, if it can be moved into the protected area without placing a significant burden on public health and the environment.” SMB Order at 13, ¶ 31. Although the SMB’s “significant burden” test does not appear to have any legal basis, this Court need not address that test because the SMB’s analysis—focusing on whether the **activity** existed anywhere on the **property** on August 3, 1977—is supported by the SCMRA’s definition of “surface mining operations” as both “activities” and “areas of land.”

### CONCLUSIONS OF LAW

The Court hereby concludes as follows:

1. This Court reviews the SMB Order under the “judicial review of contested cases” provision of the West Virginia Administrative Procedures Act, West Virginia Code section 29A-5-4. See W. Va. Code §§ 22B-4-3 and 22B-1-9(a) (2007). Conclusions of law are to be reviewed for

simple error while findings of fact are entitled to a more deferential standard. W. Va. Code § 29A-5-4(g).

### "BOUNDARY DISPUTE" ISSUE

2. The parties agree that the location of a permit boundary turns on the definition of "permit area," which is defined by the SCMRA as follows:

(q) "Permit area" means the area of land indicated on the approved proposed map submitted by the operator as part of the operator's application showing the location of perimeter markers and monuments and shall be readily identified by appropriate markers on the site.

W. Va. Code § 22-3-3(q). CRMW argues that this statute requires DEP to rely solely on the sketched permit boundaries drawn by Mr. Waller on the 1982 Permit Map and to ignore the objectively locatable end-of-mine-site markers altogether. Essentially, it argues that the map "trumps" the marker.

There is no need to consider in this case whether an unsurveyed line on a map "trumps" a marker. Here, the 1982 Permit Map clearly depicts and relies on the "end of mine site marker" to establish the objectively locatable western edge of the permitted areas. Thus, the marker is a part of the map and the two (map and marker) are not divorced from one another, as CRMW argues. Because the map depicts and relies on the end-of-mine-site marker, the map and marker are not separate, divisible indicators. Rather, having been incorporated into the Permit Map, the end-of-mine-site marker serves as an appropriate indication of the boundary line even though the line on the map was simply hand sketched.

This construction is clearly consistent with, and required by, the language of West Virginia Code section 22-3-3(q), which provides that permit application maps are to show the location of monuments. The arguments of CRMW which portray this as a struggle between the "map" and the

"marker" are therefore irrelevant to this discussion. This is particularly true in light of the fact that the original marker installed by Mr. Waller still remains in its original location. Moreover, as the SMB observed, CRMW's argument ignores the practical realities of the mapping required by DEP's regulations and historic practices. The scale of the maps required by DEP's regulations in 1982 simply did not provide sufficient clarity to be able to accurately locate on the ground a sketched, unsurveyed line without resort to pre-installed markers of the sort Mr. Waller installed and referenced on the 1982 map. See SMB Order ¶ 15.

### "EXISTING OPERATIONS" ISSUE

3. DEP argues that the definition of "surface mining operations" set forth in the SCMRA, West Virginia Code section 22-3-3(u), clearly and unambiguously limits the scope of the "existing operations" provision within the protected zones to precisely those same *activities* that occurred before August 3, 1977. In this case, Goals Coal and its predecessors used the proposed location of the Second Silo for the construction and operation of a rail line to transport coal from the preparation plant and for storing fine coal refuse dipped out of an adjacent pond. The area, however, was not used for coal stockpiling or open railcar loading. Open stockpiling and loading operations did take place within the permitted area but were outside the 300 feet "protected zone." Through construction of the First Silo and Revision 9, Goals Coal is attempting to replace those open storage operations with enclosed silos, thereby reducing the amount of dust produced. Both silos would be within the ambit of the protected zone, but within the permitted area. See Goals Coal Brief 9/9/07, pp. 8-9 & 11-13.

4. The Court's analysis here must be guided by the framework set out in *Appalachian Power Co. v. State Tax Dept.*, 195 W.Va. 573, 466 S.E.2d 424 (1995), which adopts the two prong test of *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837

(1989). Under that analysis, the Court first looks to the statute itself to determine if the Legislature has "directly spoken to the precise question at issue." *Appalachian Power Co.*, 195 W.Va. at 582. If so, that is the end of the matter. If not, and the statute is silent or ambiguous on an issue, then the Court must determine if the agency position is a permissible construction. *Appalachian Power Co.*, 195 W.Va. at 582-583.

5. The definitional section of the SCMRA, West Virginia Code section 22-3-3(u), does not clearly and unambiguously yield the result urged by DEP. That statute defines "surface mining operations" broadly for the purpose of prescribing those activities and land disturbances that are regulated. However, it does not provide any guidance on the application of the existing operations exemption found in West Virginia Code section 22-3-22(d). The definition of "surface mining operations" under West Virginia Code section 22-3-3(u), is not limited to "activities" but includes also "areas" disturbed by mining. The statute does not, on its face, require that DEP limit the scope of the existing operations provision to particular activities that have occurred previously as part of an operation. Instead, it suggests that the scope of the existing operation exemption includes all *areas* previously utilized or permitted to be disturbed as part of the same operation.

6. DEP has not previously considered the statute to be as limiting as it now argues. For example, on this same permit, DEP previously approved the construction of both the First Silo and Second Silo inside the protected zone as part of the existing operation simply because they were connected to the original processing/loading facility and were inside the historic permit boundary. *See Goals Coal Br. of 6/4/07 at. 10-13; DEP Reply Br. of 6/18/07 at. 15-16.* DEP's prior reading of these statutes lends support to the notion that the statutes do not clearly require the narrow construction now argued by DEP.

It cannot be concluded, therefore, that the text of the statute itself mandates the result argued by DEP. Utilizing the first prong of the *Chevron* analysis, the Court must next determine whether extra-textual sources such as legislative history, extrinsic discussions and the over-arching design of the statute yield a degree of clarity that requires the Court to conclude that the legislature commanded a specific reading of the existing operations provision. *See, e.g., Appalachian Power Co.*, 195 W.Va. at 586-587 (adopting generally the two prong test of statutory interpretation adopted in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)).

7. The stated purposes of the SCMRA are not only to protect the environment, but also to “[a]ssure that the coal production essential to the nation’s energy requirements and to the state’s economic and social well-being is protected.” W.Va. Code § 22-3-2(b)(8). For example, when Congress enacted the Federal Surface Mining Control and Reclamation Act, on which the SCMRA is patterned, it deliberately limited the application of its prescriptions to avoid infringement of existing property rights. *See National Wildlife Federation v. Hodel*, 839 F.2d 694, 799-50 (D.C. Cir. 1988). These extra textual sources suggest that Congress did not intend the narrow construction argued by DEP and that the statute does not narrowly limit the existing operations provision in the manner argued by DEP. Thus, the Court cannot conclude, under the first prong of *Chevron*, that the DEP’s position is mandated by the statute.

8. When this Court cannot discover an unmistakably clear expression of legislative intent, it is obligated to advance to the second prong of the *Chevron* analysis, which is to determine whether the agency’s position is a permissible construction of the statute. *Appalachian Power Co.*, 195 W.Va. at 582. Some level of deference may be accorded to the position or interpretation of the administrative agency and generally accord it some level of deference. *Id.*

9. DEP's interpretation of the existing operations exemption would ordinarily be given deference by this Court under the second step of the *Chevron* analysis. However, when current agency position appears to be a recently adopted litigation position, the agency's litigation position is entitled to little or no deference. See, e.g., *Appalachian Power Co.*, 195 W.Va. at 588 n.17 (little weight given litigation position of agency). Here, the Court finds that DEP's position is a recently derived litigation position entitled to little or no deference because:

- a. DEP has pointed to no instance in which it has ever construed the existing operations provision to limit future mining in the protected zones to certain specific activities;
- b. DEP previously applied the provision to authorize the construction of both the First Silo and the Second Silo as part of the existing operation;
- c. DEP's permit supervisor advised the DEP Director that limiting the existing operation provision to precisely the same activities that historically occurred in a permitted area was contrary to DEP's long-standing policy; and
- d. Both the DEP Director and his lawyers have described the test of the existing operations provision as one which focuses on the "scope and intensity" of the proposed change in operation.

See Goals Coal' Resp. Br.6/4/07 at 6, 11-13 & 18-21. Given these circumstances, the Court is inclined to give more weight to DEP's past practices than to DEP's position in this case.

10. Under the second step of the *Chevron* analysis, the Court cannot say, that DEP's position in this case is a permissible construction. Accordingly, the SMB properly rejected DEP's narrow construction of the "existing operation" provision and properly concluded that Goals Coal' planned silo qualified as an "existing operation."

24. Notwithstanding this ruling as it relates to the legal issues raised, the Court is sympathetic to the concerns of those with school children in the Marsh Fork Elementary School.

The issue before the Court, however, is a straightforward legal issue, and the Court is bound to review this matter in accordance with the law as it is written.

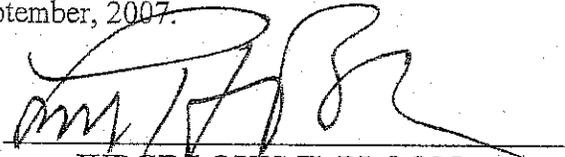
### CONCLUSION

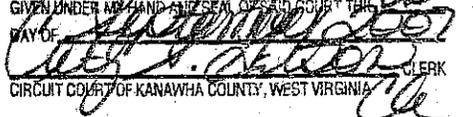
For the reasons set forth above, the Court **ORDERS** that the decision of the SMB both as to location of the permit boundary and as to its application of the "existing operations" provision is hereby **AFFIRMED** and that this action is **DISMISSED** and **STRICKEN** from the docket of this Court.

The objection of any party aggrieved by the entry of this Order is hereby noted and preserved.

The Clerk of the Court is **DIRECTED** to forward a certified copy of this Order to all counsel of record and to the West Virginia Surface Mine Board at 601 57<sup>th</sup> Street, Charleston, West Virginia 25304.

ENTERED this 25 day of September, 2007.

  
JUDGE LOUIS H. BLOOM

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS  
DAY OF SEPTEMBER 2007  
  
CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Date: 9/25/07  
Certified copies sent to  
\_\_\_ counsel of record  
\_\_\_ parties J. Lovett  
\_\_\_ other T. Clarke  
By: J. Sammons  
certified true copy  
\_\_\_ fax  
\_\_\_ hand delivered  
\_\_\_ internet  
Other directives and comments  
B. Adams  
Deputy Clerk

DOCKETING STATEMENT  
EXHIBIT A  
21 OF 21