



west virginia department of environmental protection

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Joe Manchin III, Governor
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August 11, 2006

Goals Coal Company
Post Office Box 309
Naoma, WV 25140

Re: Goals Coal Company Permit D-66-82
Findings, Decision and Order - Revision No. 9

Dear Sir/Madam:

The application for permit Revision No. 9 of Goals Coal Company's surface mine permit no. D-66-82 seeks to make two changes to this permit. First, in accordance with paragraph 8 of the Surface Mine Board's Final Order in Appeal No. 2005-23-SMB, Revision No. 9 seeks to correct its proposal and drainage map of record for this permit with new, more accurate maps depicting the western permit boundary. Second, Revision No. 9 seeks approval for the construction of a coal silo on the western end of the permit area shown in the corrected maps, within 300 feet of Marsh Fork Elementary School. Upon the application, the certified record, transcript and exhibits of Surface Mine Board Appeal No. 2005-23-SMB, a visit to the site to ground check the maps submitted with Revision No. 9, the agency's files on this permit and the comments received during the public comment period and at the informal conference on this permit held on July 24, 2006, the DEP makes the following findings, decision and order with respect to the changes proposed by Revision No. 9:

I. Findings With Respect To The Corrected Maps

Permit no. D-66-82 was originally issued to the coal mining division of Armco Steel Company in 1982 for an existing preparation plant site. The western end of the area that was permitted at that time is within three hundred (300) feet of Marsh Fork Elementary School. The permit boundary in the area near the school has been shown in differing locations on the proposal maps that have been submitted as part of different revisions of this permit. The Surface Mine Board concluded that those maps contain "inconsistencies, conflicts, and ambiguities to the extent that those maps cannot be used to identify the permit boundary along the western edge of the permit." *Goals Coal Company v. Timmermeyer, et al.*, Final Order, May 15, 2006. The Board ordered Goals to submit a corrected map showing the location of the permit boundary in this area and to propose the location of permanent boundary markers along this boundary. Id.

Two issues must be addressed in connection with the corrected maps submitted by Goals. First, the location of the boundary in the western end of the permit area must be determined.

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Second, a determination must be made as to whether the maps submitted by Goals and the boundary markers it has proposed accurately depict the permit boundaries.

A. The Location of the Western Permit Boundary

Although the western permit boundary has been depicted in different locations on the maps Goals has submitted in a recent series of permitting transactions, none of the revisions of permit no. D-66-82 approved by the DEP have authorized any change of the permit boundary within 300 feet of the school. Accordingly, the permit boundary in this area is in the same location as it was when this site was first permitted in 1982. If the corrected map submitted with the application for Revision 9 is to be approved, it must accurately reflect the permit boundary as approved in 1982. Before the Surface Mine Board in Appeal No. 2005-23-SMB, the issue of the location of the boundary at the western end of the permit area was disputed. There, the Board heard evidence and arguments as to the location of this permit boundary but made no conclusions as to its location, instead leaving this issue to be addressed by this agency upon Goals Coal's submission of a corrected map.

The law does not define "permit boundary". However, because the permit boundary is the outer limit of the "permit area", which is a term that is defined in the law, the definition of this latter term provides guidance in determining the permit boundary at Goals. The definition of "permit area" states:

Permit area means that area of land shown 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.

W.Va. Code § 22-3-3-(q). Thus, the law calls for the permit boundary to be determined by reference to both the proposal map and perimeter markers at the site.

The proposal and drainage map included with the original permit application is drawn on a "blue line" 7.5 minute USGS map that was blown up from a scale of 1" = 2,000' to a scale of 1" = 500'. This map was prepared by Clarence V. Waller, P.E. According to Waller, he physically placed perimeter markers at the eastern and western ends of the disturbed area associated with the preparation plant facility before preparing and submitting the map. 3/14/06 Tr. 45 - 46. His intent was to include all of the disturbed area associated with the preparation plant as of the passage of the federal surface mining act within the perimeter markers he located on the ground. *Id.* Then, he sketched the permit area onto the blown-up USGS map, showing it to extend between the two markers he had placed. 3/14/06 Tr. 45, 48. None of the features Waller placed on this map were surveyed. 3/14/06 Tr. 47, 49. Given the source map used and the technology employed to produce it, this map was reasonably accurate. However, it cannot be used to locate points on the ground with precision.

The perimeter marker for the western end of the permit can be found next to a road, at the end of a highwall that was established when material was cut to make room for the construction of the rail line into the Goals preparation plant when it was first built. 3/14/06 Tr. 53 - 54, 58 - 61, 63. Waller testified that this marker is in the same location where he initially placed it. 3/14/06 Tr. 58, 84, 94 - 95. Mike Furey of the DEP verifies that the marker is in the same

location as when he inspected the Goals preparation plant site in the early to mid-1980's, shortly after it was first permitted. 3/14/06 Tr. 101 - 102.

The boundary drawn on the original proposal and drainage map conflicts with the boundary established by the perimeter marker. When the map is compared to a map drawn from the DEP's survey of readily identifiable features on the ground, including the western perimeter marker, it is clear that the location of the perimeter marker is not accurately depicted on the original proposal map. The location of the western perimeter marker shown on the original proposal map would have this perimeter marker in a steep area on the undisturbed hillside to the south of the area that is actually disturbed. Strict adherence to the boundary shown on the map would have absurd results. The permit area would exclude area that has been used continuously as part of the preparation plant operation at this site since before SMCRA was enacted, but would include forested hillside that has never been disturbed.

Additional guidance in resolving the conflict between boundary shown by the map and that dictated by the perimeter marker is provided by *A&S Coal Co., Inc. v. OSM*, 96 IBLA 338 (April 7, 1987). There, the Interior Board of Land Appeals ("IBLA") vacated a Notice of Violation OSM had issued to a coal company for a disturbance outside its permit boundaries on the basis that the area was, indeed, within the permit boundary. As in the present case, there were conflicting indicia of the permit boundaries. The area in question was included in the calculation of the reclamation bond for the permit, but was not included in the permit area on the most recent permit map. IBLA credited the existence of permit markers and the intent of the coal company over what was shown on the permit map. It said: "while not marked on the map as being within the boundary of the permit area, it was clearly marked and there is ample evidence of A&S's intent that it be a part of the permitted area." *Id.*, at 345.

At the Goals preparation plant site, the clear intention was to establish a permit boundary that included the disturbed area at the time the site was first permitted. The perimeter marker was placed in an obvious, readily identifiable location - at the end of the disturbance from the highwall that had been cut for the construction of the rail line into the preparation plant area. The material that was cut away for construction of the rail line had been shoved into Marsh Fork. From the perimeter marker, the boundary extended to Marsh Fork, where the disturbance from this shoved material existed. Although the original proposal map cannot be used to locate points on the ground with precision, this map does, however, sufficiently reflect the intent that the permit boundary extend to the perimeter marker that had been placed at the end of the area that was disturbed at the time. See, 3/14/06 Tr. 45, 49. Any attempt to use the original proposal map, without any reference to perimeter markers that are in place on the ground, as the sole determinant of the permit boundary leads to absurd results. Thus, the WVDEP concludes that the permit area in the western end of permit no. D-66-82 is defined by the perimeter marker that is in place there.

The use of perimeter markers as the indicator of permit boundaries is consistent with the law dealing with property boundaries generally. Monuments are entitled to great weight. *Somon v. Murphy Manufacturing & Erection Company*, 160 W.Va. 84, 232 S.E.2d 524 (1977). The general rule in boundary disputes is that monuments, natural and artificial, prevail over courses and distances or mistaken descriptions of lands in surveys or conveyances. *West Virginia Pulp and Paper Co. v L. Natwick & Co.*, 123 W. Va. 753, 21 S.E.2d 368 (1941). 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. *Bain v. Woods*, 145 W.Va. 297, 115 S.E.2d 88 (1960); *Conner v. Jarrett*, 120 W.Va. 633, 200 S.E. 39 (1938). A plat or map that is obviously erroneous will yield to other descriptions, especially where it is contrary to the evident intent of the grantor. *Clonch v. Tabit*, 122 W. Va. 674, 12 S.E.2 521 (1940).

B. Accuracy of the Corrected Maps and Boundary Markers

Having concluded that the perimeter marker at the western end of the Goals preparation plant area establishes the permit boundary in this area, the DEP must further determine that the maps Goals submitted with its application for Revision No. 9 and the boundary markers proposed therein accurately depict the boundaries of permit no. D-66-82. The proposal and drainage map Goals submitted refers to a Site Plan and Profile Map. The DEP has ground-proofed these maps and proposed boundary marker locations in a visit to the Goals preparation plant site and compared the maps to overlays prepared by surveyors hired by the DEP. The DEP finds and concludes that these maps and boundary markers accurately portray the permit boundary in the western end of the Goals permit area. However, the DEP is unable to approve Revision No. 9 as it pertains to the corrected map because, according to the DEP's comparison of the maps submitted by Goals to a map drawn from the DEP's survey of readily identifiable features on the ground, the maps submitted by Goals do not accurately portray the permit boundary in the area of the bridge over Marsh Fork on the eastern portion of Goals' permit area.

II. Findings With Respect To The Second Silo

Previously, the DEP approved Goals' application for IBR 8 of this permit, allowing Goals to construct a silo, part of which is within 300 feet of Marsh Fork Elementary School. This IBR was approved by the DEP's regional office. In the review of the application for Revision 9 at the DEP headquarters, the agency has taken the opportunity to fully and maturely consider the law and policy which underlies the application of the prohibition of surface mining within 300 feet of a public building, school, church, community or institutional building. The findings and discussion below reflect the agency's interpretation of the prohibition and its appropriate application in order to more fully achieve the public protection purposes behind it.

Goals Coal has claimed that the existing operations exception to the prohibition of surface mining operations within 300 feet of a school provides it with a blanket exemption from this prohibition which allows it to construct a second silo in this protected zone. See, *West Virginia Code § 22-3-22(d)(4)*. The statutory language which establishes this exception clearly limits the operations that are entitled to the exception to "those which existed" on August 3, 1977. *Id.* OSM has taken the position that the exceptions to the prohibitions in the federal counterpart to *W.Va. Code 22-3-22(d)* are to be interpreted to provide the greatest protection to the protected structures. See, e.g., *64 FR 70766, 70776* (1999 rulemaking dealing with the prohibitions and exceptions to them). Similarly, the West Virginia Supreme Court of Appeals favors limited interpretation of the exceptions to these prohibitions: "[T]he courts should construe exceptions to the statute narrowly." *Cogar v. Faerber*, 179 W.Va. 600, 603, 371 S.E.2d 321, 324 (1988) (addressing claims that both the existing operations and VER exceptions to the prohibitions were applicable).

At the time the Goals operation was initially permitted, there were no coal silos on the western corner of the site, nor were there any plans for coal silos or associated coal loading

activities there. The photograph from May 1977 depicting the operation existing at that time, and relied upon by Goals Coal in the pending application, depicts no activity on the site of the proposed silo. Photographs taken on subsequent dates also fail to demonstrate coal loading or other activities on the site of the proposed silo. In addition, the August 4, 1981 "Plan View" map submitted by the original permit applicant, Armco Inc., to provide the inspector "a working copy of the area," does not show any coal loading, handling or storage facilities in the area where the second silo is proposed. Although there is some evidence to suggest that coal fines may have been temporarily stored in the area where the silo is proposed on random occasions, the only consistent use of this area has been for rail access to the site.

The portion of OSM's 1999 rulemaking Goals cites as support for its contention that all land within its permit boundary is totally exempt from the 300 foot prohibition does not deal with the situation where a mine operator is proposing a major expansion of operations, well beyond what existed when the federal surface mining law was passed, in the protected zone. Indeed, the interpretation urged by Goals is contrary to the understanding of the existing operations exception expressed by OSM in this rulemaking:

In other words, the exception for existing operations applies in those circumstances in which the regulatory authority does not need to take any additional action before the operator may continue or commence surface coal mining operations on the newly protected lands.

64 FR 70766, 70788. Construction and operation of the proposed coal silo in the protected zone was not allowed under the permit which was originally granted for this mining operation. With Revision No. 9, Goals Coal is not seeking to replace ongoing coal loading facilities in the western end of its permit area. For the life of the permit, the use of the area where the silo is proposed has typically been limited to rail line access. The proposed silo is an expansion of coal preparation facilities which will encroach within the 300 foot protected zone around the school.

Of all the different kinds of activities which are defined as "surface mining operations," only "those which existed" on August 3, 1977 qualify for the existing operations exception to the 300 foot prohibition. The exception allows Goals to continue the type of operations that were conducted within 300 feet of the school in 1977 but does not allow it to either make substantial changes in the type of operations being conducted in this protected zone or undertake substantial expansion of such operations. The existing operation exception does not allow Goals to construct the silo it proposes.

III. Decision and Order

The DEP hereby finds and concludes, as a final agency decision, that the corrected maps that are part of the application for Revision No. 9 and the boundary markers proposed therein accurately depict the western permit boundary in the area that lies within 300 feet of Marsh Fork Elementary School. However, the maps fail to accurately depict the permit boundary in the area of the bridge over Marsh Fork. Because of this inaccuracy, the DEP is unable to make the finding required by *W. Va. Code § 22-3-18(b)(1)*, that Goals has affirmatively demonstrated that its application is complete and accurate. Accordingly, the DEP is unable to approve Revision No. 9 as to the corrected maps.

W.Va. Code § 22-3-18(b)(4) requires an applicant for a significant revision of a surface mine permit to affirmatively demonstrate that what it seeks to permit is not subject to a determination of unsuitability for surface mining under *W.Va. Code § 22-3-22(d)*. As the DEP interprets the prohibitions of *W.Va. Code § 22-3-22(d)*, Goals has failed to make this demonstration.

Revision No. 9 of surface mine permit no. D-66-82 is APPROVED only as to the location and placement of the permanent boundary markers proposed therein. As to the remainder of the permit revisions proposed therein, Revision No. 9 is DENIED.

Paragraph 8 of the Surface Mine Board May 15, 2006 Final Order in *Goals Coal Company v. Timmermeyer, et al.*, Appeal No. 05-23-SMB required Goals to submitted a corrected map showing the permit location of the permit boundary on the western edge of permit no. D-66-82 to the DEP. Because the DEP is unable to approve the corrected maps submitted as part of Revision No. 9, this requirement of the Surface Mine Board's Final Order remains unsatisfied. Accordingly, upon the authority of *W.Va. Code St. R. § 38-2-3.28.c*, Goals is hereby ORDERED to submit an application for revision of surface mine permit no. D-66-82 which includes a proposal map which accurately depicts the boundaries of this permit in all locations within thirty (30) days of its receipt of this letter.

Sincerely,



Randy Huffman
Director

cc: Thomas Cook