

BEFORE THE WEST VIRGINIA SURFACE MINE BOARD

POTOMAC RIVERKEEPER, INC.;
GERRARDSTOWN PRESBYTERIAN CHURCH;
WASHINGTON HERITAGE TRAIL, INC.,

Appellant,

v.

Appeal No. 2011-02-SMB

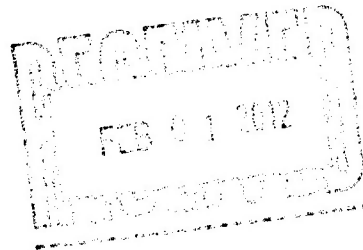
DIRECTOR, DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Appellee,

and

NORTH MOUNTAIN SHALE, LLC,

Intervenor/Appellee.



FINAL ORDER

The Potomac Riverkeeper, Inc., Gerrardstown Presbyterian Church, and the Washington Heritage Trail, Inc. ("Appellants") filed the above referenced appeal on February 25, 2011. The West Virginia Surface Mine "Quarry" Board ("Board") conducted three days of hearing on this matter. At the Appellants's request, the Board held its evidentiary hearing in Martinsburg, West Virginia on June 6-7, 2011. The evidentiary hearing continued on July 11, 2011 in Charleston, West Virginia.

During the evidentiary hearing in Martinsburg, Appellants called three fact witnesses, Harriet Kopp, Diana Gaviria, M.D., and Roger Palmer, and three expert witnesses, Micheal Reis, Stanley Hayes, and S. James Cousins. Tr. 6/6/11 at pp. 5-6. The West Virginia Department of Environmental Protection ("WVDEP") called one expert witness, Michael Shank, and North Mountain Shale ("NMS") called on fact witness, Dr. Donald Sult. Tr. 6/7/11 at p.5. During the hearing Charleston, the Appellants called one expert witness, Charles Andrews and WVDEP

called on fact witness, Clarence Wright, and NMS called two fact witnesses, William Drinkard and Dr. Sult. Tr. 7/11/11 at p.3.

The certified record was submitted by WVDEP and accepted as evidence in this matter. The Appellants were represented by Mr. R. Juge Gregg, Esq. and Mr. James R. Wedeking of Sidley Austin, LLP. Christopher Stroeck, Esq. of Arnold and Bailey served as local counsel for the Appellants. Ms. Jennifer Hughes, Esq. of the WV DEP Legal Services Division represented the WVDEP in this matter. Mr. Robert McLusky, Esq. and James Snyder, Esq. of Jackson Kelly, PLLC represented North Mountain Shale in this appeal.

Quarry Board members Ron Crites, C.K. Meadows, Jon Blair Hunter, Dr. Henry Rauch, James Smith. and Chairman, Don Michael participated in the hearing¹ and decision in this matter. After a careful review of the proposed findings of fact, conclusions of law, transcripts, exhibits, certified record, and arguments of counsel the Board unanimously **AFFIRMS** the Permit as **MODIFIED** by this Final Order.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All argument of counsel, proposed findings of fact and conclusions of law have been considered and reviewed in relation to the aforementioned record, as well as to applicable law. To the extent that the proposed findings of fact, conclusions of law and arguments advanced by the parties are in accordance with these findings of fact, conclusions and legal analysis of the Board and are supported by evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions, and arguments are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or necessary to a proper decision. To the extent

¹ Don Michael and Jon Blair Hunter reviewed the June 6-7, 2011 transcripts and attended the July 11, 2011 hearing.

that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

FINDINGS OF FACT

1. On January 27, 2011, WVDEP issued Quarry Permit Q-2004-08 (the "Permit") to North Mountain Shale, LLC ("NMS"). The Permit authorizes the removal of shale by non-blasting methods in Berkeley County, West Virginia. The total Permit area is 100 acres, but shale will be extracted from only about 41 acres. See SMB's Certified Record ("C.R."), pp. 1 & 3; SMB Tr., 6/7/11, p. 143.

2. NMS plans to transport the shale to a brick production plant in Martinsburg, West Virginia owned by its sister company, Continental Brick.

3. Water leaving areas disturbed by mining within the Permit area will be routed through two sets of sediment control ponds. See C.R., p. 80 (map of surface water monitoring location). Mining will start first in the southern half of the Permit area and under current plans will take approximately twenty-five years at current market projections to complete mining in this section before it proceeds to mining in the northern section of the Permit. SMB Tr., 6/7/11, p. 162 (testimony of Dr. Don Sult). Water from the sediment control ponds in the southern section of the mine will discharge into an unnamed tributary of Mill Creek. Water from the sediment ponds in the northern section of the Permit area will discharge to another unnamed tributary of Mill Creek.

4. An appeal to this Board was taken by Potomac Riverkeeper, Inc., Gerrardstown Presbyterian Church and Washington Heritage Trail, Inc. (jointly "Appellants"). The Appellants claimed that:

- a. the Permit failed to require adequate control of fugitive particulate matter as a result of expected dust emissions from stockpiles and haul roads (Appeal, ¶¶ 10-15 & 16-24);

- b. WVDEP failed to investigate the potential impact of discharge of pollutants to surrounding waters (Appeal, ¶¶ 17, 19-26);
- c. truck traffic from the quarry will constitute a public nuisance (Appeal, ¶¶ 28-32);
- d. the permitted haul road does not comply with the provisions of W.Va. Code § 17-4-19 for the access points to public roads from industrial driveways (Appeal, ¶¶ 33-37);
- e. the quarry will adversely affect historic and cultural resources in Gerrardstown (Appeal, ¶¶ 39-50);
- f. the quarry will constitute a public nuisance incompatible both with Gerrardstown and the Gerrardstown Presbyterian Church (Appeal, ¶¶ 53-66); and
- g. NMS failed to provide sufficient reclamation bonding (Appeal, ¶¶ 68-74).

5. In response to public comments, WVDEP imposed a series of conditions on the Permit. C.R., p. 12. They include:

- a. a requirement to prepare and implement a landscaping and revegetation plan to minimize visual impacts of the quarry to the Gerrardstown Historic District.
- b. the deletion of areas above 900' elevation for shale removal;
- c. a limitation on mineral excavation to the months May through October;
- d. a limitation on mineral excavation and mineral excavation and haulage from the Permit area to daylight hours Monday through Saturday; and
- e. a requirement that NMS make reasonable efforts to avoid conflicts with funeral services.

C.R., p. 2.

Dust Issues and Truck Traffic Environmental Impact

The Permit includes a plan for controlling fugitive dust. SMB C.R., p. 4 (permit supervisor's findings).

6. To support their claim that the Permit does not require adequate controls of fugitive particulate matter, Appellants called Mr. Stanley Hayes as an expert witness in the preparation of air impact assessments. SMB Transcript, 6/6/2011, pp. 183-189. Mr. Hayes assumed that:

- a. there were about three (3) million tons of recoverable shale on site;
- b. fifty (50) percent of the recoverable tonnage would be removed over a fifteen (15) year period;
- c. NMS would remove twenty (20) truckloads of shale per day from the site using twenty (20) ton trucks, thereby resulting in 150,000 truck trips per year.

SMB Tr., 6/6/11, pp. 195-201. Based on these assumptions, he calculated the amount of dust that could be produced by quarry operations and by trucks hauling shale from the mine both annually and over the life of the mine. SMB Tr., 6/6/11, pp. 205-209. However, Mr. Hayes did not conduct any analysis to determine what the concentrations of airborne dust would be at any particular location. SMB Tr., 6/6/11, p. 219. The Board finds that without that information, his estimates of gross dust production provided little usable or useful information for assessing the potential for dust levels to exceed national ambient air quality standards or for having any particular impact at any particular location. Mr. Hayes also conceded that the largest producers of fugitive dust in the region are the agricultural lands which pre-dominate the area. SMB Tr., 6/6/11, p. 220; *see* SMB Certified Record (C.R.), p. 105 (aerial photo).

7. Appellants did not introduce any evidence by which the Board could find or conclude that operations approved by the Permit would cause statutory air pollution under WVCSR § 47-17-31 (WVDEP rule under Air Pollution Control Act prohibiting the discharge of

fugitive particulates beyond permit boundaries which causes “statutory air pollution”) and W.Va. Code § 22-5-2(c) (defining “statutory air pollution” as discharges “in a locality, manner and amount as to be injurious to human health or welfare, animal or plant life, or property, or which would interfere with the enjoyment of life or property”) or would give rise to any of the conditions listed in W.Va. Code § 22-4-8 (listing conditions which can give rise to a prohibition on quarrying). Nor did Appellants introduce evidence sufficient to show that the Permit failed to require NMS to design, construct, utilize or maintain roads outside of the mineral extraction area of process areas to minimize air pollution. *See* WVCSR § 38-3-5.1 (requiring permittees to design and maintain roads to minimize dust).

8. To further minimize the effects of trucking on dust production and generally, NMS stipulated at the evidentiary hearing that, except as changed by major permit modification, it would limit off-site shale transport to five truckloads of shale (ten truck trips) per shift with a maximum of two shifts per day. SMB Tr., 6/6/11, p. 69. As set forth below, the Board accepts this stipulation and by this Order modifies the Permit accordingly. This condition reinforces the Board’s findings that Appellants offered insufficient evidence to carry their burden of proof with respect to claims that the Permit inadequately controls dust emissions.

Water Impacts, Water Runoff and the Church

9. A representative of the Gerrardstown Presbyterian Church testified that the Church’s main concern was flooding as a result of runoff from the Permit. SMB Tr., 6/6/11, p. 83 (Harriett Kopp). However, Appellants produced no evidence to show that drainage from the proposed mining would have any effect on the Church property. Moreover, the Board finds the Permit is designed to pass all drainage from areas disturbed by mining through sediment ponds which discharge into tributaries of Mill Creek. *See* C.R., p. 5 (drainage would flow through “full factor” sediment ponds) & 78 (map). Accordingly, as announced during the

hearing, the Board granted a directed verdict to WVDEP and Intervenors on this issue at the close of Appellants' evidence. SMB Tr., 6/6/11, p. 64.

10. Appellants also called Dr. Diana Gaviria of the Berkeley County Department of Health. SMB Tr., 6/6/11, p. 223. Dr. Gaviria wrote letters to WVDEP expressing concern about the impact of the quarry on air and groundwater. SMB Tr., 6/6/11, pp. 226-234. She remains concerned. *Id.*, p. 234. She did not, however, know what affect a quarry might have on any particular groundwater parameter. SMB Tr., 6/6/11, pp. 245-46. She conceded, also, that a public service district which is not a party to this proceeding provides drinking water to area residents from groundwater wells, but that she did not know where those wells were in relation to the quarry. *Id.*, p. 246. She also conceded that the Board of the Health Department takes no position on whether the NMS quarry should be constructed and operated. *Id.*, p. 243. Overall, Dr. Gaviria expressed only concerns and presented no evidence that the quarry would adversely affect air or water quality.

Viewshed Impacts

11. The Board finds that the viewshed impacts of the quarry will be minimal, and the quarry will not destroy aesthetic values, recreational areas or the future use of surrounding areas. The Board members conducted a view by visiting the site of the quarry and driving through the Gerrardstown Historical District (with stops at the Gerrardstown Presbyterian Church and Prospect Hill). Based on this view, it was evident that the view of the quarry site from most of the Gerrardstown Historical District is blocked by buildings. In addition, the active areas of the quarry will look much like a sight common to the area—plowed fields. SMB Tr., 6/7/11, p. 161 (Dr. Don Sult). After reclamation, the mineral removal area will look like the agricultural lands already surrounding the area. SMB Tr., 6/7/11, pp. 149-156 (Dr. Sult discussing Intervenor Exhibits 1-4) & Ex. 1 & 2 (photographs of shale pits at NMS's sister

company, Continental Brick) and Exs. 3 & 4 (photographs of “Carr’s Shale Pit” on NMS property from 2007 (open pit) and 2011 (volunteer vegetation)).

12. The Permit contains a reclamation plan which requires mined areas to be graded to a gentle slope and revegetated. SMB Tr., 6/7/11, pp. 146-48.

13. Appellants’ expert prepared a “bare earth” viewshed model to project the impacts of the quarry on the Gerrardstown Historic District and environs. SMB Tr., 6/6/11, pp. 273-75 (James Cousins). Based on that model, Appellants’ expert opined that one half of the residents in Gerrardstown will be able to see at least one third of the quarry. SMB Tr., 6/6/11, p. 270. However, the Board finds that the bare earth model overstates impacts because it does not take into account buildings, tree trunks/branches or anything other than pure topographical visual obstructions. SMB Tr., 6/6/11, pp. 274-75 & 290 (James Cousins conceding bare earth model presumes there is nothing on the ground and that you can see through structures). Likewise, Mr. Cousins’ projections of the quarry’s appearance (SMB Tr., 6/6/11, pp. 265-66) do not accurately depict the visual impact the quarry will have. SMB Tr., 6/7/11, pp. 102-106 (WVDEP Visual Impact Expert Michael Carl Shank) (cannot accurately place location of quarry into photograph); SMB Tr., 6/6/11, pp. 291-92 (Appellants’ visual impact expert conceding his exhibit depicts visual impacts extending to 1,200’ elevation while mineral removal is limited to 900’ elevation). Overall, the Board found that its own view and the photographs of a similarly situated revegetated shale quarry better informed its judgment about the visual impacts of the quarry than did the various models prepared by the parties.

14. Excluding areas allowed for non-extraction activities such as stockpiling, pond construction and roads, NMS’s manager testified that: a) NMS would not have more than five acres of mineral removal area open and unreclaimed at any one time; and b) the only activities NMS planned to conduct inside the permit area above the 900’ elevation restriction on

mineral removal was the construction of a stormwater diversion berm of approximately 30' in width. SMB Tr., 6/7/11, pp. 188-91 (Don Sult).

Industrial Driveway Issue

15. Appellants contended that the Permit was legally deficient because the quarry's proposed haulroad failed to meet the State's design requirements for industrial driveways and because WVDEP failed to notify the West Virginia Department of Transportation of the Permit application. *See* Appellants' Motion for Partial Summary Judgment. Specifically, they claimed that NMS's permitted haulroad qualified as an "industrial driveway" under DOT guidance, and that the haulroad entered "Destiny Drive," which they characterized as a "public road." *Id.* They claimed that in such circumstances, the access point of the haulroad to Destiny Drive must meet the DOT's design criteria as required by W.Va. Code §§ 17-4-47 to -49. *Id.*

16. Intervenor's noted that W.Va. Code § 17-4-49 applies only to "new" points of access to "state" roads, and argued that the points at which the haulroad meets Destiny Drive or the point that Destiny Drive meets Dominion Road are not "new" nor is Destiny Drive a "state" or "public" road. *See* SMB Tr., 6/6/11 pp. 22-25 (Intervenor's counsel's argument); NMS's Reply to Appellants' Motion for Partial Summary Judgment.

17. The Board finds that, based on the affidavits submitted by NMS, Destiny Drive is not a State road because it is privately owned, is not shown as part of the State road or highway system, and WVDOT/DOH has not and does not spend public funds on maintenance or other work on Destiny Drive. *See* NMS's Reply to Appellants' Motion for Partial Summary Judgment, Exhibits A-C. In addition, the Board finds that the planned haulage of shale out of Destiny Drive by NMS is not a new activity; shale has been transported over Destiny Drive in the past. *Id.*, Ex. D& E (Aff'ts. of Daniel Gantt and Marvin Butts).

Impacts on Gerrardstown Historic District

18. WVDEP's quarry rules provide that where a proposed quarry will adversely affect places listed on the National Register of Historic Places the agency shall transmit applicable portions of the application to the State Historic Preservation Office ("SHPO") for approval. WVCSR § 38-3-3.4.3.

19. The National Register of Historic Places includes Prospect Hill, Oban Hall, the Hays-Gerrard House and the Gerrardstown Historic District. SMB Tr., 6/6/11, pp. 121-24 (Michael Reis). Appellants did not seek to quantify the impacts of truck haulage from the quarry through Gerrardstown on the Gerrardstown Historic District or the other site located on the National Register of Historic Places. SMB Tr., 6/6/11, pp. 172-73 (assumed "fairly heavy industrial traffic," but did not know size or number of trucks that might drive through Gerrardstown).

20. WVDEP sought and obtained from SHPO a conditional finding that the quarry would have no adverse effect on any of the properties listed on the National Register of Historic Places. SMB Tr., 6/6/11, pp. 152 & 162. Because this approval was all WVDEP was required to obtain, the Board granted a directed verdict at the end of Appellants' case to WVDEP and NMS on the issue of whether WVDEP met its obligations to protect historic resources in the area. SMB Tr., 6/7/11, pp. 63-64.

Pond Size Issue

21. WVDEP determined that NMS had designed sediment control ponds which met or exceeded the design criteria established by its rules at WVCSR § 38-3-7.4. C.R., p. 3. It noted, however, that the use of flocculants "may be needed for settling clay material associated with the Martinsburg Shale formation and should work well with the ponds in service concept. C.R., p. 3. It also noted that there was an additional area readily available for more sediment control structures if needed. C.R., p. 3.

22. Appellants called Dr. Charles Andrews as an expert in hydrology. SMB Tr., 7/11/11, pp. 10-14. He testified that the sediment ponds as described in the Permit documents he reviewed are unlikely always to achieve the effluent limits for suspended solids of 35 milligrams per liter (mg/l)/monthly average and 70 mg/l/daily maximum. SMB Tr., 7/11/11, p. 48. The Board finds this testimony unpersuasive for a number of reasons. While Dr. Andrews has published extensively about hydrology, his resume touts his background as a groundwater, rather than surface water, hydrologist. SMB Tr., 7/11/11, p. 65. Likewise, his publications are almost all related to groundwater rather than surface water. *Id.* He conceded that flocculants might work to control sediment to effluent limits, that they are used by public water systems for this purpose in water delivered for public drinking, but that his only experience with them was to use them in the laboratory to clear up cloudy samples. *Id.*, pp. 60-61 & 72. He was likewise not very familiar with the technical support documents on which he based his opinion and confessed to having first reviewed them for this case. *Id.*, pp. 69 (first looked at publication “a couple of months ago”) & 74-79. He also conceded that “I don’t know how the mine is going to operate.” *Id.*, pp. 79-80.

23. Overall, the Board finds the testimony of engineers called as witnesses by the WVDEP and NMS to be more credible. They have years of experience with the design and use of sediment ponds in the extractive industries. SMB Tr., 7/11/11, pp. 116-117 (P. E. Clarence Wright); 139-146 (P.E. Wm. Drinkard, who has a mining engineering degree from Virginia Tech and an environmental engineering degree from Marshall); & 158-164 (Don Sult, P.E. with Ph.D. in mineral economics testifying about at-source sediment control and use of ponds and flocculants). The coal and quarry industries have generally been able to meet the total suspended solids limits imposed on NMS through the use of similarly sized retention ponds supplemented as needed with flocculants. SMB Tr., 7/11/11, pp. 118-121, 123 & 134 (WVDEP

Engineer Clarence Wright testifying based on his experience with hundreds of quarry and coal mine permits); pp. 139-147 (testimony of Registered Professional Engineer Wm. Drinkard).

24. Even if the sediment at NMS contains fine clay particles, then it is likely the existing ponds supplemented with the use of flocculants can achieve the effluent limits. *Id.*, p. 139-146.

CONCLUSIONS OF LAW

Dust Issues and Truck Traffic

25. NMS's operations, including truck haulage, will not cause "statutory air pollution" within the meaning of the West Virginia Air Pollution Control Act, W.Va. Code § 22-5-2(c) or conditions giving rise to a prohibition on mining under W.Va. Code § 22-4-8.

Industrial Driveway Issue

26. W.Va. Code § 17-4-49(a) prohibits "new" points of access to and from "state highways" from and to real property to be used for commercial or industrial purposes without a plan approved by the Department of Highways. NMS's planned haulroad and Destiny Drive area existing, privately owned roads that have historically been used for shale haulage. NMS's haulage will thus not constitute a "new point of access," and Destiny Drive is not a public or state road. Accordingly, the approved provisions of W.Va. Code § 17-4-49 do not apply to NMS's planned haulage. Because Appellants produced no evidence contrary to these findings, the Board found and concluded at the evidentiary hearing at the end of Appellants' case that WVDEP and NMS are entitled to a directed verdict on this issue. SMB Tr., 6/7/11, p. 63.

27. Appellants also contended that NMS was required by WVDEP Quarry Rule WVCSR § 38-3-3.4(c) to notify the Department of Highways of its intended use of Destiny Drive for truck haulage. That rule is broadly entitled "Fish and Wildlife Resources Information," and requires WVDEP to provide notice to government agencies with authority to issue licenses

and quarries. The Board concludes that the rule did not require WVDEP to provide notice to the WVDOH for two reasons. First, as discussed above, no license, permit or other approval from WVDOH was necessary here. Second, the types of permits or approvals that the WVDOH is charged with providing under W.Va. Code § 17-4-49 are public-safety related while the notification procedure contemplated under WVDEP's quarry rule § 38-4-3.4.c relates to fish and wildlife.

Bond Pooling Issue

28. Appellants argue that NMS is not entitled to the benefit of the Bond Pooling Fund because the Company has not been in business long enough to meet the requirements of W. Va. Code § 22-4-22 which allows quarry operators who have operated for five years without a serious violation to participate in the bond pooling fund. However, WVDEP's Quarry Handbook states:

Qualification [for the Bond Pooling Fund] is not restricted to the permittee. If any officer, or on-site individual in a managerial or supervisory capacity for the permittee, can meet the qualification, then the permittee is considered to qualify. Any necessary explanation shall be included in the signed statement referenced in item 2 above.

Quarry Handbook p. 6-2. In accordance with this provision, C. Lynch Christian, Manager of NMS, certified to WVDEP that neither he nor Donald B. Sult, NMS's Engineer and on-site manager, had a serious violation of West Virginia's mining laws in the previous five years. C.R. 99.

29. The Appellants claim that because the statutory language regarding eligibility for the bond pool requires that the "operator" have the requisite compliance history and because "operator" is defined as a person who is required to have the permit, W. Va. Code § 22-4-3, the compliance history of NMS's managers does not count for Bond Pool Fund

purposes. They further contend that WVDEP and NMS cannot rely on the Quarry Handbook because to do so would contravene the statute. This argument is wrong for two reasons. First, the Quarry Handbook does not contravene the statute. ~~It merely states under what circumstances~~ “the permittee [or operator] is considered to qualify.” Handbook at 6-2.

30. Second, the Appellants overlook the provisions of WVDEP’s regulations. WVDEP’s quarry regulations, approved by the West Virginia Legislature, provide that bond pool eligibility extends to “[o]perators or persons who have operated for five (5) or more years under West Virginia’s mining laws without a serious violation. . . .” W. Va. CSR § 38-3-4.2. This regulation was enacted pursuant to the Legislature’s specific direction to WVDEP to promulgate “[a]dditional bond procedures” in legislative rules. W. Va. Code § 22-4-20(i).

31. This regulation, as well as the other quarry rules, was subject to the legislative rulemaking process described in the West Virginia Administrative Procedures Act. W. Va. Code §§ 29A-1-1 *et seq.* This process required that the proposed regulation go through two stages of review. First, the regulation was reviewed by legislative rulemaking committee. W. Va. Code § 29A-3-11. The Committee is charged with making a recommendation to the full legislature. W. Va. Code § 29A-3-11(b). The Committee is required to make a number of determinations including whether the agency’s rules exceed the scope of the agency’s authority; whether the rule is in conformity with the legislative intent of the statute; whether the rule conflicts with any other provision of the West Virginia Code; whether the rule is necessary to fully accomplish the objectives of the statute; and whether the rule is reasonable. W. Va. Code § 29A-3-11(b). Following this procedure, the Committee is either to recommend that the Legislature authorize promulgation of the rule; authorize promulgation of part of the rule; authorize the promulgation of the rule with certain amendments or recommend that the proposed rule be withdrawn. W. Va. Code § 29A-3-11(c). In this case, the regulations were approved by

the Legislature on April 14, 2001, Ex. G, with amendments directed by the Legislature. Ex. H. Section 64-3-1(o).

32. In *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 466 S.E. 2d 424, 436 (W.Va. 1995), the West Virginia Supreme Court noted that a regulation which is legislatively approved “has the force of a statute itself . . . [b]eing an act of the West Virginia legislative [sic] it is entitled to more than their deference; it is entitled to controlling weight.” In *Appalachian Power*, the regulation was subjected to additional scrutiny because it was part of an omnibus legislative rulemaking bill—a practice the Supreme Court had found prospectively unconstitutional. However, when the rulemaking bill is not constitutionally infirm, the analysis is straightforward:

Having concluded above that the exemption is a valid legislative enactment, the legislative rule under discussion can only be deemed unenforceable if the regulation was beyond the constitutional or statutory authority extended to the agency involved or if the rule is determined to be arbitrary or capricious. *See id.*

What Appellees overlook in advocating the invalidity of the exemption is the legal effect of a validly enacted legislative rule. In syllabus point five of *Smith v. West Virginia Human Rights Commission*, 216 W.Va. 2, 602 S.E. 2d 445 (2004), we held that “[a] regulation that is proposed by an agency and approved by the Legislature is a “legislative rule” as defined by the State Administrative Procedures Act, *W.Va. Code*, 29A-1-2(d) [1982], and such a legislative rule has the force and effect of law.”

Swiger v. UGI/Amerigas, Inc. 613 S.E. 2d 904, 911 (W.Va. 2005), *also see State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 699 S.E. 2d 730 (W. Va. 201).

33. Here, the use of the words “or persons” is not beyond WVDEP’s authority as it was clearly tasked to adopt “additional bond procedures,” nor is it arbitrary or capricious. As a result, WVDEP’s Handbook provision making the compliance history of persons other than the permittee relevant for determining eligibility for the Bond Pool Fund is consistent with the

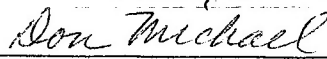
legislative rule and lawful. For these reasons, the Board granted a directed verdict on this issue to WVDEP and NMS at the conclusion of Appellants' evidence.

General

34. WVDEP properly issued the Permit to NMS in accordance with all provisions of the West Virginia Quarry Reclamation Act, ~~W.Va. Code § 22-4-1 to -29.~~ Nonetheless, to minimize potential impacts of the quarry, the Board hereby imposes the following additional conditions on the Permit which shall not be changed except by significant permit revision:

- a) NMS shall not remove more than five (5) truckloads of shale from the Permit area per working shift at Continental Brick Company's brick plant, with a maximum of two (2) shifts per day at the brick plant.
- b) Above the 900' elevation mineral extraction limit already in the Permit, NMS shall not disturb the surface except as is reasonably necessary to construct stormwater diversion berms.
- c) Exclusive of non-extraction areas such as ponds, stockpile areas and roads, NMS shall not expand its open and unreclaimed shale extraction areas beyond five (5) acres without first commencing reclamation on an area equivalent to any expansion beyond five (5) acres.
- d) Consistent with the Permit requirements on Pages 16D, 16E, and 16G, North Mountain Shale shall actively reclaim wooded areas by planting between 400-450 stems per acre. North Mountain Shale shall actively plant grasses to reclaim hayfield/pasture areas consistent with the Permit.
- e) In the first year of active mining, North Mountain Shale shall not disturb more than two (2) acres of the mineral area.
- f) In the first year of active mining, North Mountain Shale shall not disturb more than one (1) acre of the topsoil storage area.
- g) North Mountain Shale shall start its mining operation in the lower elevations of the southern pit, subject to the haulage and open pit restrictions.

In conclusion the Board **AFFIRMS** the Permit as issued and **MODIFIES** the Permit to require additional provisions as agreed to by North Mountain Shale. In addition the Board **MODIFIES** the Permit to include additional conditions requested by the Appellants but not agreed to by North Mountain Shale. It is so **ORDERED** this 25th day of January 2012.



Don Michael, Chairman
WV Quarry Board

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Intervenor.

CERTIFICATE OF SERVICE

I, Fran Ryan, clerk to the Surface Mine Board do hereby certify that the Final Order was served upon the Appellants and Intervenor by certified U. S. Mail on this 25th day of January, 2012 to:

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