

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA
TEXAS EASTERN TRANSMISSION, LP,¹

Appellant below/Respondent,

v.

Case No: 09-CAP-1K

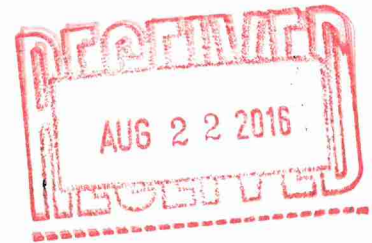
**WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
DIVISION OF MINING AND RECLAMATION,**

Appellee below/Respondent,

and

McELROY COAL COMPANY,

Intervenor/Appellee below/Respondent.



FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

On December 23, 2008, Texas Eastern Transmission, LP ("Texas Eastern"), appealed to the West Virginia Surface Mine Board ("SMB") the WVDEP's approval of McElroy Coal Company's request for Revision 33 to Permit No. U003383, held by McElroy Coal Company. The SMB consolidated Texas Eastern's appeal with an appeal filed by Columbia Gas Transmission Corporation ("Columbia") based on the WVDEP's approval of the same permit revision.

Concurrently, an earlier appeal filed by Columbia involving substantially the same legal issues was pending before the SMB. Columbia had appealed the WVDEP's June 28, 2008,

¹Both Texas Eastern Transmission, LP, and Consolidation Coal Company, original parties to this appeal, have filed stipulations of dismissal of their respective appeals.

renewal of the mine Permit No. U200601 and the WVDEP's March 27, 2008, approval of Revision 31 to Permit No. U102591, both held by Consolidation Coal Co. ("Consol"). The parties to appeal filed by Texas Eastern which involve approval of Revision 33 entered into a stipulation that the appeal would be resolved by the final order of the SMB in the appeal of the approval of Revision 31 to the permits held by Consol.

On February 18, 2009, the SMB issued a final order in the appeals involving Consol. On March 31, 2009, the SMB issued a final order in the appeals of Revision 33 to McElroy's permit. The orders issued by the SMB effectively disposed of the appeal of Revision 33 to McElroy's permit. Specifically, the final orders of the SMB effectively held as follows:

1. The application for Revision 33 to McElroy's permit was required to describe the measures to be taken to either mitigate subsidence damages to pipelines prior to mining or to remedy subsidence damage, but was not required to describe both.
2. Regardless of common law deed waivers, McElroy is required to "either correct material damage caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from subsidence," in accordance with WV CSR § 38-2-16.c.2.
3. The Board does not have the authority to decide McElroy's argument that WV CSR § 38-2-16.c.2 is impermissible more stringent than parallel provision of federal law.

Texas Eastern filed an appeal of the SMB's final order to the Circuit Court of Kanawha County on April 29, 2009. Columbia also filed a separate appeal of the SMB's final order in the Circuit Court of Kanawha County. McElroy and Consol appealed the final orders of the SMB to the Circuit Court of Marshall County. Pursuant to an Order entered on July 20, 2010, by the Circuit Court of Kanawha County, the appeals of Texas Eastern and Columbia were consolidated with the appeals of McElroy and Consol and were transferred to the Circuit Court of Marshall County. Subsequently, both Columbia Consol filed a stipulation of dismissal of its respective appeals, thus leaving the appeals of Texas Eastern and McElroy remaining.

This matter was considered by the Court on briefs and oral argument held on March 11, 2016.

JURISDICTION AND VENUE

This Court has jurisdiction to hear this appeal pursuant to the implementing statutes of the SMB and the West Virginia Administrative Procedures Act, W.Va. Code §§ 22B-1-9, 22B-4-3 and 29A-5-4. Venue in the Circuit Court of Marshall County is proper pursuant to W.Va. Code § 22B-4-3.

STANDARD OF REVIEW

In judicial review of an order of the Board, this Court shall reverse, vacate or modify the order if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusion, decision or order are:

1. In violation of constitutional or statutory provisions;
2. In excess of the statutory authority or jurisdiction of the agency;
3. Made upon unlawful procedures;
4. Affected by other error of law;
5. Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

6. Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

W.Va. Code § 29A-5-4(g).

The Court reviews questions of law *de novo* and reverses findings of fact that are clearly wrong or not supported by substantial evidence or a rational basis. *Martin v. Randolph Co. Board of Education*, 195 W.Va. 297, 304 (1995)

FINDINGS OF FACT

1. On or about August 11, 2008, McElroy submitted an application to the WVDEP for Revision 33 to Permit No. U003383 whereby McElroy proposed to add mining area for developmental and longwall mining at McElroy Deep Mine in Marshall County, West Virginia.
2. As part of its application for Revision No. 33, McElroy submitted a Subsidence Control Plan, as required by WV CSR § 38-2-3 *et seq.* See Subsidence Control Plan attached as Exhibit A.
3. The Subsidence Control Plan submitted by McElroy contained language stating that, “[i]f subsidence does occur as a result of the longwall mining, that caused material damage or reduces the value or reasonable foreseeable use of the surface lands, McElroy will restore the land or structure(s) or compensate the surface owner.” See Subsidence Control Plan at p. 2.
4. The Subsidence Control Plan submitted by McElroy contained language stating that, “[m]ining beneath gas pipelines will be handled per common law practices and

severance deeds between the pipeline owner and McElroy Coal Company.” *See* Subsidence Control Plan at p. 4.

5. On September 4, 2008, McElroy supplemented its application for Revision 33 with its Natural Gas/Petroleum Pipelines Subsidence Procedures which states that McElroy intended to (I) prepare and provide pipeline operators with mining maps and updates; (ii) give pipeline operators six-months’ advance notice of undermining; and (iii) meet with pipeline operators to discuss “mitigation procedures that will be implemented by the [pipeline]. . . owner.” *See* McElroy Letter and Natural Gas/Pretroleum Pipelines Subsidence Procedures attached as Exhibit B.
6. On November 25, 2008, the WVDEP, in accordance with West Virginia Code § 22-3-19, approved McElroy Coal Company’s request for Revision No. 33 to Mine Permit No. U003383. *See* Significant Revision Approval attached as Exhibit C.
7. On December 23, 2008, Texas Eastern appealed the WVDEP’s approval of Revision 33 to the West Virginia Surface Mine Board² asserting, among other things, that the application submitted by McElroy failed to demonstrate that its mining operations will be conducted in a manner which minimizes damage, destruction, or disruption of services provided by pipelines which pass over the permit area and that McElroy failed to specify in its subsidence control plan the measures that it will take to protect pipelines from material damage.

²SMB Appeal No. 08-19-SMB.

8. The SMB subsequently consolidated Texas Eastern's appeal with an appeal of the same approval of Revision 33 that was filed by Columbia Gas Transmission Corporation³.
9. The parties stipulated that the appeals of Revision 33 would be resolved by a Final Order to be entered by the Board in connection with an earlier proceeding which involved the same legal issues (SMB Appeal Nos. 2008-05-SMB and 2008-13-SMB). *See* Exhibit D.
10. On February 18, 2009, the SMB entered a Final Order in SMB Appeal Nos. 2008-05-SMB and 2008-13-SMB. *See* Final Order in 2008-05-SMB and 2008-13-SMB attached as Exhibit E.
11. On March 26, 2009, the Board entered a Final Order in SMB Appeal Nos. 2008-16-SMB and 2008-19-SMB which applied its Final Order in SMB Appeal Nos. 2008-05-SMB and 2008-13-SMB, as stipulated by the parties. *See* Final Order in 2008-16-SMB and 2008-16-SMB attached as Exhibit F.
12. The SMB's Final Order in SMB Appeal Nos. 2008-05-SMB and 2008-13-SMB, as applied to Texas Eastern and McElroy, held that pursuant to WV CSR §§ 38-2-3.12.a.6 and 38-2-3.12.d.2, McElroy's Subsidence Control Plan was required to describe the measures to be taken to either mitigate subsidence damages to pipelines prior to mining or to remedy subsidence damage, but was not required to describe both, thus affirming the WVDEP's approval of Revision 33 and dismissing the appeal. *See* Final Order in 2008-05-SMB and 2008-13-SMB at p. 5-6.
13. The SMB's Final Order also determined that WV CSR § 38-2-16.2.c.2 requires McElroy to either repair or compensate for any post-mining subsidence-induced damage to

³SMB Appeal Nos. 2008-16-SMB and 2008-19-SMB

pipelines, regardless of its common law property rights. *See* Final Order in 2008-05-SMB and 2008-13-SMB at p. 6.

14. Texas Eastern appealed the SMB's Final Order to the Circuit Court of Kanawha County, challenging the SMB's determination that McElroy was not required to conduct pre-mining subsidence mitigation.⁴
15. McElroy appealed the SMB's Final Order to this Court, challenging the SMB's determination that McElroy must either repair or compensate for any post-mining subsidence-induced damage to pipelines, even if it possesses common law deed-waivers.
16. On July 20, 2010, an Order was entered transferring Texas Eastern's appeal to this Court and consolidating it with McElroy's appeal.

CONCLUSIONS OF LAW

I. SUBSIDENCE CONTROL PLAN REQUIREMENTS

1. Pursuant to WV CSR § 38-2-3.12.a.6, applications for an underground coal mining permit are required to contain a subsidence control plan which must include the following:

A description of the measures to be taken, in accordance with subdivisions 16.2.a, 16.2.c, and 16.2.d of this rule, to mitigate *or* remedy any material damage or diminution in value or foreseeable use that may occur to surface lands, structures, or facilities due to subsidence;

W. Va. Code R. § 38-2-3.12.a.6. (2008) (emphasis added).

⁴Appeal No. 09-AA-78 (Kanawha Co. Circuit Court)

2. The subsections of WV CSR § 38-2-3.16 referenced in WV CSR § 38-2-3.12.a.6 that are applicable to this matter state as follows⁵:

16.2.a. General. Each person who conducts underground mining activities shall either adopt measures consistent with known technology which prevent subsidence from causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of surface lands; or adopt mining technology which provides for planned subsidence in a predictable and controlled manner. Nothing in this part shall be construed to prohibit the standard method of room-and-pillar mining.

16.2.c Material Damage. Material damage in the context of this section and 3.12 of this rule means: any functional impairment of surface lands, features, structures or facilities; any physical change that has a significant adverse impact on the affected land's capability to support current or reasonably foreseeable uses or causes significant loss in production or income; or any significant change in the condition, appearance or utility of any structure from its pre-subsidence condition. The operator shall:

16.2.c.2. Either correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. Compensation may be accomplished by the purchase prior to mining of a non-cancelable premium-prepaid insurance policy. The requirements of this paragraph only apply to subsidence related damage caused by underground mining activities conducted after October 24, 1992;

W. Va. Code R. §§ 38-2-16.2 *et seq.* (2008).

⁵Subsections 16.2.c.1, 3 & 4 and Subsection 16.2.d are not applicable to this matter.

3. The plain language of Subsection 3.12.a.6 states that a proper subsidence control plan shall describe what measures, according to the subsections of Section 16.2, an operator will take to either mitigate **or** remedy material damage.
4. Subsection 16.2.c.2 states that an operator shall do one of two things; either correct material damage resulting from subsidence caused to any structures by repairing the damage **or** compensate the owner of such structures in the full amount of the diminution in value resulting from the subsidence.
5. WV CSR § 38-2-3.12.d.2 states as follows:
 - 3.12.d. Where longwall mining or room and pillar mining with 80% recovery or greater is proposed, the following information shall be made a part of the plan:
 - 3.12.d.2. For all areas identified by the survey, indicate what measures will be taken to minimize material damage **or** reduction in value **or** reasonably foreseeable use. Indicate those areas in which measures are to be taken. Such measures may include, but not be limited to, relocating panels, mining without interruption, exposing gas lines, supporting foundations of structures, and insuring that any damage is repaired.
- W. Va. Code R. § 38-2-3.12 (2008).
6. Subsection 3.12.d.2 refers to certain types of mitigation measures which may be undertaken but does not require any particular mitigation action.
7. WV CSR § 38-2 *et seq.* was promulgated pursuant to the West Virginia Surface Coal Mining and Reclamation Act (“WVSMCRA”), W.Va. Code §§ 22-3-1 *et seq.*

8. When the language of a regulation promulgated pursuant to the [WVSMCRA], W.Va. Code, 22A-3-1 *et seq.*, is clear and unambiguous, the plain meaning of the regulation is to be accepted and followed without resorting to the rules of interpretation or construction. *Curnutte v. Callaghan*, 425 S.E.2d 170, 175 (W.Va. 1992)
9. McElroy's application for Revision 33 included a Subsidence Control Plan which states the following:

Due to the mining method (longwall) utilized in the mining of the areas proposed in this application, it is expected that there will be planned subsidence of the above-mentioned surface features and renewable resource lands. **If subsidence does occur as a result of the longwall mining, that causes material damage or reduces the value or reasonable foreseeable use of the surface lands, McElroy will restore the land or structure(s) or compensate the surface owner** (emphasis added).
10. The plain language of the applicable code provisions does not require that a subsidence control plan must specify affirmative measures that will be taken to minimize damage to structures, surface lands, or facilities, before a permit or permit revision can be issued, provided that the subsidence control plan instead contains a description of measures to be taken to remedy material damage or diminution in value.
11. The Subsidence Control Plan submitted by McElroy clearly states that if damage occurs due to subsidence, McElroy will restore the land or structures or compensate the owner, thus satisfying the requirements set forth in WV CSR § 38-2-3.12.a.6, WV CSR § 38-2-3.16.c.2, and WV CSR § 38-2-3.12.d.2.
12. Given the clear and unambiguous legal authority before it, the SMB was correct in ruling that WV CSR § 38-2-3.12.a.6 and WV CSR § 38-2-3.12.d.2 require subsidence control

plans in permits to describe the measures to be taken to either mitigate subsidence damages to pipelines prior to mining or to remedy subsidence damage, but do not require mine operators to describe both. Final Order, p.5.

II. DUTY TO COMPENSATE FOR SUBSIDENCE DAMAGE

13. The Federal Surface Mining Control and Reclamation Act of 1977 (“SMCRA”) contains the following language regarding subsidence control:

(3) Repair or compensation for damage to other structures. The permittee must, **to the extent required under applicable provisions of State law**, either correct material damage resulting from subsidence caused to any structures or facilities not protected by paragraph (c)(2) of this section by repairing the damage or compensate the owner of the structures or facilities for the full amount of the decrease in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities....

30 C.F.R. § 817.121(c)(3) (emphasis added).

14. As stated above, WV CSR § 38-2-16.2.c.2 requires an operator conducting underground mining activities to do the following:

Either correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. Compensation may be accomplished by the purchase prior to mining of a non-cancelable

premium-prepaid insurance policy. The requirements of this paragraph only apply to subsidence related damage caused by underground mining activities conducted after October 24, 1992;

W. Va. Code R. §§ 38-2-16.2 *et seq.* (2008).

15. WV CSR § 38-2-16.2.c.2 was promulgated pursuant to the West Virginia Surface Coal Mining and Reclamation Act (“WVSMCRA”), W.Va. Code §§ 22-3-1 *et seq.*
16. When the language of a regulation promulgated pursuant to the [WVSMCRA], W.Va. Code, 22A-3-1 *et seq.*, is clear and unambiguous, the plain meaning of the regulation is to be accepted and followed without resorting to the rules of interpretation or construction. *Curnutte v. Callaghan*, 425 S.E.2d 170, 175 (W.Va. 1992).
17. The SMB determined that WV CSR § 38-2-16.2.c.2 requires McElroy to either repair or compensate for damage resulting from subsidence caused to any structures or facilities regardless of its common law property rights. Final Order p.6.
18. McElroy claims that WV CSR § 38-2-16.2.c.2 is impermissibly more stringent than 30 C.F.R. § 817.121(c)(3), thus running afoul of West Virginia Code Section 22-1-3a which states:

Except for legislative rules promulgated for the purpose of implementing the provisions of section four, article twelve, section six, article seventeen, and section six, article eighteen [§§ 22-12-4, 22-17-6 and 22-18-6], all of this chapter, and notwithstanding the provisions of section four [§ 22-5-4], article five of this chapter, legislative rules promulgated by the director which become effective on or after the first day of July, one thousand nine hundred ninety-four, may include new or amended environmental provisions which are more stringent than the counterpart federal rule or program to the extent that the director first provides specific written reasons which demonstrate that such provisions are

reasonably necessary to protect, preserve or enhance the quality of West Virginia's environment or human health or safety. . .

W. Va. Code § 22-1-3a. (2002).

19. However, W. Va. Code § 22-1-3a is not applicable, as 30 C.F.R. § 817.121(c)(3) specifically defers to State law to provide the requirements by which it must comply.
20. Pursuant to 30 C.F.R. § 817.121(c)(3), a permittee must correct material damage resulting from subsidence or compensate the owner for the full amount of decrease in value, *to the extent required under applicable provisions of State law*
22. The applicable provisions of State law in this instance are those contained in WV CSR §§ 38-2-16.2 *et seq.*, which mandate that a permit holder is required to repair or compensate any subsidence damage.
23. WV CSR §§ 38-2-16.2 *et seq.* does not contain any provisions that absolve the permittee from liability in cases where the permittee holds common law deed waivers.
24. Thus, McElroy is required to comply with the provisions set forth in WV CSR § 38-2-16.2.c.2 by correcting material damage resulting from subsidence as directed by the applicable code provisions, even in instances where McElroy holds common law deed waivers.
22. Accordingly, the SMB was correct in ruling that WV CSR § 38-2-16.2.c.2 requires McElroy to either repair or compensate for damage resulting from subsidence caused to any structures or facilities regardless of its common law property rights

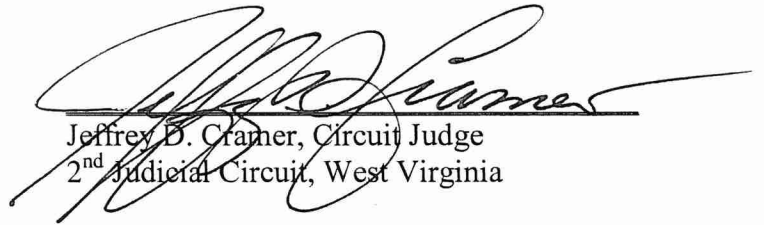
CONCLUSION

For the above-stated reasons, this Court finds that neither Texas Eastern Transmission, LP, nor McElroy Coal Company has established a basis for remanding, reversing, vacating or modifying the SMB's Final Order. As such, the SMB Final Order is hereby **AFFIRMED**.

This matter is hereby dismissed and dropped from the Court's docket.

The Marshall County Circuit Clerk's Office is Ordered to forward a copy of this Order to all counsel of record and any pro-se parties.

ENTERED THIS 5th day of August, 2016.



Jeffrey D. Cramer, Circuit Judge
2nd Judicial Circuit, West Virginia