

Editor's note: 96 I.D. 455; Appealed -- Civ.No. 90-0006 (ND W.VA), settled (Oct. 21, 1991)

VALLEY CAMP COAL CO.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 84-632

Decided November 16, 1989

Appeal from a decision of Administrative Law Judge Joseph E. McGuire denying applications for review of and temporary relief from Notice of Violation 80-I-38-23 and Cessation Order 80-I-38-10 (CH O-268-R and CH O-310-R).

Affirmed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." The stockpiling of coal from an underground mine will be considered a surface coal mining operation subject to the prohibitions in sec. 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e) (1982), where the evidence establishes that such stockpiling was incident to the surface operations of the mine.

2. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

A coal stockpiling operation which was conducted on two occasions, first in 1974 and again in 1980, was

not "in existence" on Aug. 3, 1977, so as to be excepted from the prohibition against conducting surface coal mining operations within 100 feet of a public road embodied in sec. 522(e)(4) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e)(4) (1982).

3. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

In West Virginia, to have valid existing rights in 1980 to stockpile coal within 100 feet of a road, in violation of sec. 522(e)(4) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e)(4) (1982), a person must demonstrate property rights in existence on Aug. 3, 1977, that were created by a legally binding document authorizing the applicant to produce coal by surface coal mining operations, and a good faith effort to obtain all permits required to conduct such operations, or that the coal is both needed for and adjacent to an ongoing surface coal mining operation.

4. Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

An applicant for valid existing rights bears the burden of proving entitlement.

APPEARANCES: Ronald B. Johnson, Esq., Wheeling, West Virginia, for appellant; Richard H. McNeer, Esq., and Angela F. O'Connell, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Valley Camp Coal Company (Valley Camp) has appealed from a decision by Administrative Law Judge Joseph E. McGuire, dated May 16, 1984, denying its

applications for review of and temporary relief from Notice of Violation (NOV) No. 80-I-38-23 and Cessation Order (CO) No. 80-I-38-10, issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) pursuant to section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(3) (1982).

On May 12, 1980, OSMRE issued NOV No. 80-I-38-23 to appellant for conducting surface coal mining operations in violation of section 522(e)(4) of SMCRA, 30 U.S.C. § 1272(e)(4) (1982), by stockpiling coal within 100 feet of the outside line of a public road right-of-way (U.S. Route 40) without a mining permit. 1/ OSMRE required appellant to remove the stockpiled coal, beginning no later than May 23, 1980, and ending no later than June 20, 1980, and to either reclaim the disturbed area or obtain the necessary mining permit no later than August 8, 1980. On May 27, 1980, appellant filed

1/ In this NOV, OSMRE Inspector Pettito stated further that Valley Camp had engaged in such stockpiling "without permit from regulatory authority after public notice and opportunity for public hearing with written finding that the interests of the public and the landowners affected will be protected." Section 522(e)(4) of SMCRA provides that "the regulatory authority may permit * * * the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected * * *." There is no evidence in the record that Valley Camp attempted to obtain such a permit. The record contains no evidence that Valley Camp holds the requisite SMCRA permits to conduct surface coal mining operations in connection with the No. 3 underground mine. OSMRE Inspector Pettito did not refer to any permit number in issuing the subject NOV and CO. The Judge in his decision at 7 makes reference to appellant's failure to amend "current or subsequently issued permits," and OSMRE asserts in its response to the Board's show cause order that "the stockpile was immediately adjacent to the permitted mine site" (Response at 10). However, at the beginning of the hearing, counsel for Valley Camp pointed out to Judge McGuire that there was no permitted area since the operation was not, in Valley Camp's opinion, subject to SMCRA (Tr. 10).

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an application for review of and temporary relief from NOV No. 80-I-38-23 pursuant to section 525 of SMCRA, 30 U.S.C. § 1275 (1982).

On July 29, 1980, OSMRE issued CO No. 80-I-38-10 to appellant for failure to abate the violation cited in NOV No. 80-I-38-23, requiring appellant to remove the stockpiled coal "as expeditiously as possible" and to reclaim the disturbed area. On August 4, 1980, appellant filed an application for review of and temporary relief from CO No. 80-I-38-10.

The applications for review and the applications for temporary relief were consolidated for hearing before Judge McGuire, which hearing was held on August 12, 1980, in Wheeling, West Virginia. In his May 16, 1984, decision, Judge McGuire denied appellant's application for review of NOV No. 80-I-38-23 2/ and its application for review of and temporary relief from CO No. 80-I-38-10, concluding that appellant's stockpiling operations constituted surface coal mining operations in violation of section 522(e)(4) of SMCRA, and that appellant had engaged in such operations without possessing a valid existing right (VER).

Section 522(e)(4) of SMCRA provides in relevant part:

After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted--

* * * * *

2/ In his May 16, 1984, decision, Judge McGuire does not address Valley Camp's application for temporary relief from NOV No. 80-I-38-23.

(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected * * *.

By order dated February 25, 1986, this Board ruled that "[o]n the facts of the case, [it] would conclude that appellant, by stockpiling coal, was engaged in 'surface coal mining operations'" (Order dated Feb. 25, 1986, at 2). However, the Board suspended consideration of this case for the following reasons:

In his May 1984 decision, Judge McGuire reached and decided the question of a valid existing right, concluding that appellant did not have such a right which permitted it to stockpile coal in violation of section 522(e) of SMCRA, supra. In so deciding, Judge McGuire applied the definition of "[v]alid existing rights" set forth at 30 CFR 761.5 (1980). However, that regulation was amended in part effective October 14, 1983, by OSM. See 48 FR 41349 (Sept. 14, 1983). We would ordinarily give appellant the benefit of the amended regulation where to do so does not contravene intervening rights or matters of public policy. James E. Strong, 45 IBLA 386 (1980); B. B. Wadleigh, 44 IBLA 11 (1979); see also Elbert O. Jensen, 39 IBLA 62 (1979). However, on March 22, 1985, the court in In re Permanent Surface Mining Regulation Litigation, Civ. No. 79-1144 (D.D.C. Mar. 22, 1985), remanded the amended regulation to the Secretary because the final rule was promulgated without notice and comment. As a result, the Board is of the position that there is no regulation to apply in this case in determining whether appellant has a valid existing right. We have not been advised what the Department intends to do in response to the March 1985 court order.

In order that appellant may have the benefit of the Department's current interpretation of "valid existing rights" under section 522(e) of SMCRA, supra, we have decided to suspend consideration of this case pending promulgation of a final rule defining that statutory term. Cf. Grace Cooley Coleman, 35 IBLA 236 (1978). The Board will afford the parties an opportunity to brief the Board on the question of valid existing rights as

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applied to this case once a final rule has been promulgated. A Board decision on all issues will then follow.

(Order dated Feb. 25, 1986, at 2-3).

On September 29, 1988, OSMRE filed a "Motion to Lift Stay of Proceedings" in the instant case. OSMRE pointed out that in In re Permanent Surface Mining Regulation Litigation, 22 E.R.C. 1557 (1985), Judge Flannery remanded the "taking" test for VER (48 FR 41312, 41349 (Sept. 14, 1983)) for proper notice and comment, and that OSMRE suspended that test on November 20, 1986 (51 FR 41952). In the suspension notice, the Secretary explained that for non-Federal lands in states which have obtained permanent program approval, "State programs will remain in effect until the Director of OSMRE has examined the provisions of each State program to determine whether changes are necessary and has notified the State regulatory authority * * * that a State program amendment is required." 51 FR 41952 (Nov. 20, 1986).

In its September 29, 1988, motion, OSMRE explained that the State of West Virginia obtained State program approval in January 1981, and that with regard to non-Federal lands in West Virginia, in accordance with the above-referenced suspension notice, the State's definition of "valid existing rights" should be used in making VER determinations. OSMRE stated further that West Virginia's permanent program contains the following VER definition, which was not affected by the District Court's remand of 30 CFR 761.5 for lack of notice and comment:

Valid Existing Rights exists, except for haulroads, in each case in which a person demonstrates that the limitation provided for in Section 22(d) of the Act would result in the unconstitutional taking of that person's rights. For haulroads, valid existing rights means a road or recorded right-of-way or easement for a road which was in existence prior to August 3, 1977. A person possesses valid existing rights if he can demonstrate that the coal is immediately adjacent to an ongoing mining operation which existed on August 3, 1977 and is needed to make the operation as a whole economically viable. Valid existing rights shall also be found for an area where a person can demonstrate that an SMA number had been issued prior to the time when the structure, road, cemetery or other activity listed in Section 22(d) of the Act came into existence.

(W.Va. Code of State Regulations § 38-2-2.119 (1987)). OSMRE requested the Board to lift the stay and render a decision in the instant case using the VER regulation set forth above.

On October 25, 1988, appellant filed a response to OSMRE's motion, concurring in the request that the Board lift the stay. Appellant, however, requested the Board to reverse Judge McGuire's decision on the basis that he applied an incorrect definition of "valid existing rights," and to remand the case to him.

By order dated November 10, 1988, the Board responded to OSMRE's motion to lift the stay in these proceedings as follows:

Consistent with our order of February 25, 1986, whether or not this case should continue in suspended status depends upon whether a clear standard exists for determining whether Valley Camp had valid existing rights to stockpile the coal in violation of section 522(e)(4) of SMCRA, supra. OSMRE issued the NOV involved in this case on May 12, 1980, and issued the related CO on July 29, 1980. OSMRE moves to reinstate this case to active status, and to apply West Virginia's regulation, when West Virginia's permanent program was not approved until January

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1981. OSMRE has not suggested that new Federal regulations now exist. Neither OSMRE nor Valley Camp explains why or how West Virginia's permanent program regulation would apply rather than the Federal regulation in effect when the NOV and related CO were issued.

The Board directed that within 30 days from receipt of its November 10, 1988, order, OSMRE file a brief with this Board support-ing its motion, responding to a number of specific questions relating to whether a clear standard exists for determining whether Valley Camp had VER to stockpile the coal.

OSMRE did not submit a brief as directed. Rather, on January 11, 1989, OSMRE filed a motion requesting the Board to vacate the NOV and the CO issued to appellant in 1980. Therein, OSMRE notes that section 522(e)(4) of SMCRA prohibits surface coal mining operations within 100 feet of the outside line of a public right-of-way, with two excep-tions: (1) where the operator has VER; and (2) where the subject opera-tion was in existence on the date of enactment of SMCRA. OSMRE explains its motion as follows:

Throughout the development of this case Valley Camp's defense has been that it is exempt from the proscriptions of Section 522(e)(4) of SMCRA because it had "valid existing rights" ("VER") to mine the area in issue. However, Valley Camp is not required to establish valid existing rights under Section 522(e) if its operations were in existence on the date of enactment of SMCRA. OSMRE permit files, as well as factual findings made by the Administrative Law Judge at the hearings level, establish

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that Valley Camp's operations were indeed in existence both on and before the date of enactment of SMCRA.

(Motion to Vacate at 2-3). Thus, OSMRE concluded that because appellant's stockpiling operation existed on the date of enactment of SMCRA, appellant had no obligation to "secure a surface mining permit under either the West Virginia State Law or under SMCRA. Nor were its surface mining operations subject to the prohibitions of Section 522(e). OSMRE's enforcement action, therefore, must be set aside." Id. at 3.

By order dated May 11, 1989, the Board granted OSMRE's September 29, 1988, motion to lift the stay in this case, and denied OSMRE's motion to vacate the subject NOV and CO. The Board then considered the merits of OSMRE's September 29, 1988, motion that the Board lift the suspension previously imposed in this case. In granting OSMRE's motion, the Board announced the legal standard to be applied in evaluating whether Valley Camp had VER to stockpile coal within 100 feet of U.S. Route 40:

OSMRE pointed out that on November 20, 1986, it promulgated a final rule at 51 FR 41952 suspending the definition of "valid existing rights" which the District Court in In re Permanent Surface Mining Regulation Litigation, [22 E.R.C. 1557 (1985) (the "taking" test)], remanded for proper notice and comment. In the suspension notice, the Secretary explained that for non-Federal lands in states which have obtained permanent program approval, "State programs will remain in effect until the Director of OSMRE has examined the provisions of each State program to determine whether changes are necessary and has notified the State regulatory authority * * * that a state program amendment is required." 51 FR 41952 (Nov. 20, 1986).

OSMRE explains in its motion that the State of West Virginia obtained State program approval in January 1981, and that with regard to non-Federal lands in West Virginia, in accordance with the above-referenced suspension notice, the State's definition

of "valid existing rights" should be used in making valid existing rights determinations. As the State program was not approved when the NOV was issued we are not persuaded that the State definition is applicable in this case. On reviewing the record in this appeal the Board has reconsidered its position to stay consideration of this appeal. In doing so, the Board is of the opinion that the definition of "valid existing rights" to be applied herein is the one in effect at the time the NOV was issued. Thus, in determining whether Valley Camp has valid existing rights to stockpile coal in violation of section 522(e)(4), the Board will apply "the 1979 test, including the 'needed for and adjacent' test, as modified by the August 4, 1980, suspension notice which implemented the District Court's February 1980 opinion in In Re: Permanent (I) [, 14 E.R.C. 1083 (D.D.C. 1980)]." 51 FR 41954 (Nov. 20, 1986).

(Order dated May 11, 1989, at 5-6). The Board granted the parties 30 days from receipt of its order to show cause why, in deciding this appeal, it should not apply the definition of "valid existing rights" extant when the NOV was issued. Both OSMRE and Valley Camp filed responses to the Board's order to show cause. While Valley Camp did not challenge the Board's decision to apply the VER definition existing when the NOV and CO were written, it made clear that it agreed with OSMRE's position that it was exempt from the application of section 522(e)(4).

[1] As a preliminary matter, we find no merit in Valley Camp's argument that in stockpiling the coal at issue herein it was not engaged in "surface coal mining operations" as defined at section 701(28) of SMCRA, 30 U.S.C. § 1291(28) (1982). Section 701(28) of SMCRA provides as follows:

"surface coal mining operations" means--

(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 1266 of this title surface operations and surface impacts incident to an underground coal mine, the products of

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which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the minesite * * *; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such 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 such 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 such activities; * * *. [Emphasis added.]

In its initial brief filed with the Board, Valley Camp argued, as set forth below, that its stockpiling activity does not meet this definition:

Subparagraphs (A) and (B) set forth a two-prong test for determining whether an operator is engaged in "surface coal mining operations." Subparagraph (A) sets forth the "activities" that constitute surface coal mining operations and subparagraph (B) refers to geographic "areas upon which such activities occur or where such activities disturb the natural land surface." Thus, to be engaged in surface coal mining operations, an operator must be engaged in the specific "activities" set forth in subparagraph (A) and such activities must occur upon the area set forth in Subparagraph (B) and must result from, or be incident to the activities set forth in Subparagraph (A) * * *. In this case, there is no evidence in the record that the operator was engaged in any of the activities set forth in Subparagraph (A). Nor did the ALJ make any finding that it was engaged in any such activities. [Emphasis added.]

(Valley Camp's Brief at 17-18).

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Valley Camp's interpretation of section 701(28) of SMCRA is unduly narrow. The use of the phrases "[s]uch activities" in subsection (A) and "[s]uch areas" in subsection (B) indicates that Congress did not intend to provide an exhaustive list of activities or areas which meet the definition. As OSMRE pointed out in its initial brief before the Board, in Roberts Brothers Coal Co., 2 IBSMA 284, 293, 87 I.D. 439, 444 (1980), the Board stated that subsection (B) of section 701(28) "is apparently intended to define additional areas to be covered, not to describe, define, or limit the activities included in the first subsection" (emphasis in original).

Even if we were to accept Valley Camp's restrictive interpretation of section 701(28), we would still conclude that Valley Camp's stockpiling operation is subject to SMCRA. Among the activities specifically included in subsection 701(28)(A) are "the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the minesite" (emphasis added). Below is Valley Camp's own description of its surface activities:

As the ALJ noted, Valley Camp has operated this deep mining facility, known as No. 3 mine, together with its surface coal preparation plant and loading facility since the 1930's or 1940's * * *." The surface facilities included the mine opening; a wet process preparation plant equipped with thermal dryer; a coal storage silo having a capacity of 10,800 tons, with an overhead conveyor belt connecting it to a unit train loading facility; an area devoted to the above-ground storage of mining equipment; a

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unit train loading facility, or surge bin; * * *. [Emphasis added.]

(Valley Camp's Brief at 2). Given Valley Camp's own description of the surface activities it conducts in connection with its underground mine, we fail to comprehend the assertion that it was not engaged in any of the activities mentioned in subsection 701(28)(A).

We have no difficulty with Valley Camp's contention that "surface operations and surface impacts incident to an underground coal mine" for purposes of the definition at section 701(28) of SMCRA are defined with reference to section 516 of SMCRA. However, we reject Valley Camp's notion that in order to have found that Valley Camp was engaged in "surface coal mining operations," Judge McGuire was required to "make a specific finding in his decision that the mining activities of [Valley Camp] were 'subject to the requirements of § 516'" (Valley Camp's Brief at 21). The definition at section 701(28) specifically refers to section 516. Judge McGuire's specific finding that Valley Camp was engaged in "surface coal mining operations" as defined at section 701(28) implies a finding that such operations were subject to the requirements of section 516. In subsection (a) of section 516, Congress provided that the Secretary shall promulgate rules and regulations directed toward the surface effects of underground coal mining operations, and in subsection (b), it made clear that such operations are subject to SMCRA's permitting requirements, and set forth what a permit related to underground coal mining must require of the operator. Section 516 of SMCRA in no way relieves Valley Camp from the application

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of SMCRA; indeed, section 516 explains how SMCRA applies to Valley Camp's operations.

In concluding that Valley Camp conducted "surface coal mining operations" within the meaning of section 701(28) of SMCRA, Judge McGuire made the following statement, with which we are in complete agreement:

[E]ven when granting to the applicant the benefits of all reasonable doubts by way of rendering to the statutory/regulatory language employed the strictest interpretation allowable, as well as assigning to those definitional words their plain meanings, one is persuaded that in having conducted the stockpiling activity in the manner described in this administrative record, applicant clearly engaged in "surface coal mining operations" and, in doing so, subjected itself to the provisions of the Act as well as the implementing regulations.

(Decision at 6).

The inevitable conclusion that in stockpiling coal Valley Camp conducted "surface coal mining operations" leads to certain consequences. Foremost among those consequences is that its operations are subject to the permitting requirements of SMCRA. At the hearing, Judge McGuire asked counsel for Valley Camp whether the stockpiling activity was taking place "on the permitted area," and he responded, "[i]f the Court is using the term 'permitted area' within the nature of the Act, we would only have to say that we do not think that any surface mining activity is taking place" (Tr. 10). During cross-examination, when counsel for OSMRE asked James L. Litman, Vice President of the Eastern Division of Valley Camp, if he was "aware of any contact that might have been made by Valley Camp Coal Company

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to anybody in the Office of Surface Mining with respect to the stockpile area," he stated, "I am not" (Tr. 52, 53). Upon redirect examination, when counsel for Valley Camp asked Litman why he "didn't * * * contact anyone from the OSM," he responded, "I had no idea that anything we were doing would affect the Office of Surface Mining" (Tr. 53). Subsequently, counsel for OSMRE asked Richard L. Burghy, Construction Engineer for Valley Camp's Eastern Division, if he "[w]ere * * * aware of the presence of the Office of Surface Mining as a regulatory authority in this general field of surface and deep mine operations," and he answered, "yes" (Tr. 64-65).

Despite its admitted awareness of OSMRE's existence and the nature of its responsibilities regarding surface impacts of underground mining, Valley Camp made no effort to contact OSMRE with regard to its stockpile. However, Valley Camp inquired of the West Virginia Department of Natural Resources (WVDNR) "whether or not there would be any objection to [its] utilizing the stockpile area for stocking coal," in order "[t]o make sure that [Valley Camp] wouldn't be opening [it]self up to a violation of the law and a subsequent penalty" (Tr. 42). WVDNR did not provide Valley Camp with "any type of written document or waiver or permit that would approve the use of this stockpile" (Tr. 52), but simply "voiced no objection" (Tr. 60). The responsibilities of the WVDNR official whom Valley Camp contacted concerning the stockpile were "almost entirely restricted to water quality issues" (Tr. 76). Moreover, he had no "authority to grant individual companies waivers or exemptions from the requirements of the Act or regulations, either under West Virginia or the Federal law" (Tr. 77-78); he does not "get involved in OSM regulations, as a practical matter" (Tr. 79); and

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he "didn't intend to say anything or imply anything along * * * the lines" that Valley Camp was not subject to section 522(e)(4) of SMCRA (Tr. 79).

In its January 11, 1989, motion to vacate the NOV and CO, OSMRE asserts that "[b]ased on the factual finding that Valley Camp's surface coal mining operation existed on the date of the enactment of the SMCRA, Valley Camp had no obligation on this interim program site to secure a surface mining permit under either the West Virginia State Law or under SMCRA. Nor were its surface mining operations subject to the prohibitions of Section 522(e)" (Motion to Vacate at 3). The error of OSMRE's assertion is made apparent from a quick review of relevant SMCRA and regulatory provisions. Section 516(a) of SMCRA provides that "[t]he Secretary shall promulgate rules and regulations directed toward the surface effects of underground coal mining operations * * *." Those implementing regulations include the requirement that "[a]ll underground coal mining and associated reclamation operations conducted on lands where any element of the operations is regulated by a State shall comply with the initial performance standards of this part according to the time schedule specified in § 710.11." 30 CFR 717.11. The State of West Virginia has regulated certain aspects of underground coal mining since at least 1906. See, e.g., Gawthorp v. Fairmont Coal Co., 70 S.E. 556 (W. Va. 1911) (construing W. Va. Code 1906, ch. 79, § 7, which prohibits an owner or tenant of land containing coal from opening, sinking, digging, excavating, or working in any coal mine or shaft within 5 feet of the line dividing said land from that of another person or persons, without the consent, in writing, of every person interested in, or having title to, such adjoining lands). Thus, any

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surface coal mining operations conducted by Valley Camp in connection with its underground mine are subject to 30 CFR 710.11, which provides:

(2) General obligations. (i) A person conducting coal mining operations shall have a permit if required by the State in which he is mining and shall comply with State laws and regulations that are not inconsistent with the Act and this chapter.

* * * * *

(3) Performance standards obligations. (i) A person who conducts any coal mining operations under an initial permit issued by a State on or after February 3, 1978, shall comply with the requirements of the initial regulatory program. Such permits shall contain terms that comply with the relevant performance standards of the initial regulatory program. [3/]

(ii) On and after May 3, 1978, any person conducting coal mining operations shall comply with the initial regulatory program * * *.

(iii) A person shall comply with the obligations of this section until he has received a permit to operate under a permanent State or Federal regulatory program.

The permanent program permit referred to in 30 CFR 710.11(a)(3)(iii) must be issued in accordance with section 502(d) of SMCRA, 30 U.S.C. § 1252(d) (1982), which provides:

Not later than two months following the approval of a State program pursuant to section 1253 of this title * * * all operators of surface coal mines in expectation of operating such mines after the expiration of eight months from the approval of a State

3/ The initial regulatory program includes the environmental performance standards of 30 CFR Parts 715 through 718, the inspection and enforcement procedures of 30 CFR Parts 720 through 723, and the reimbursements to States provisions of 30 CFR Part 725. See 30 CFR 710.1.

program * * * shall file an application for a permit with the regulatory authority.

In addition, section 506(a) of SMCRA, 30 U.S.C. § 1256(a) (1982), provides:

No later than eight months from the date on which a State program is approved by the Secretary, pursuant to section 1253 of this title * * * no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program * * *; except a person conducting surface coal mining operations under a permit from the State regulatory authority, issued in accordance with the provisions of section 1252 of this title, may conduct such operations beyond such period if an application for a permit has been filed in accordance with the provisions of this chapter, but the initial administrative decision has not been rendered.

Valley Camp and OSMRE appear to assume that if a surface coal mining operation otherwise prohibited by section 522(e) is "in existence" on August 3, 1977, or if the permittee has VER to conduct such an operation, that operation is exempt from the requirements of SMCRA and implementing regulations. This assumption is false. If the prohibited operation is "in existence," or if the permittee has VER to conduct such operation, section 522(e)(4) merely exempts the operation from the prohibition. The permittee is still required to conduct that operation in compliance with SMCRA and applicable regulations. Regardless of whether Valley Camp's stockpiling operation was in existence on August 3, 1977, that operation, plus any other surface coal mining operations conducted in connection with the underground mine, are subject to the provisions of SMCRA, including those governing the issuance of permits. Moreover, even if an operator has VER to conduct certain surface coal mining operations, those operations must

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be conducted in accordance with SMCRA pursuant to a permit issued by the appropriate regulatory authority. VER only confers the right to conduct a certain operation; that operation must be conducted in accordance with SMCRA.

Another consequence of Valley Camp's conducting surface coal mining operations in connection with its underground mine is that it may not conduct such operations within 100 feet of a public highway except pursuant to certain exemptions embodied in section 522(e)(4) of SMCRA. As noted supra, that statute provides: "After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted * * * within one hundred feet of the outside right-of-way line of any public road * * *." Valley Camp concedes that it stockpiled coal within 100 feet of U.S. Route 40 (Tr. 50).

[2] We will first address OSMRE's contention that Valley Camp's stockpiling operation is exempt from the prohibition at section 522(e)(4) because it is incident to a "pre-existing" underground mining operation, i.e., that the operation was "in existence" on August 3, 1977. In its response to the Board's show-cause order, OSMRE recognizes that the sweeping definition of "surface coal mining operations" at section 701(28) of SMCRA, 30 U.S.C. § 1291(28) (1982), "draws a broad array of mining and related activities, and the lands they occupy, into the permitting and reclamation requirements of SMCRA," but argues that Congress then exempted those activities and areas from the prohibitions of section 522(e) "when it partially 'grandfathered' pre-existing 'surface coal mining operations'"

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(OSMRE's Response at 4). In OSMRE's view, that Valley Camp "had a plan to stockpile coal near the road, if necessary," is sufficient to bring the stockpiling activity within the exemption of section 522(e)(4).

The Board rejected this argument in its May 11, 1989, order denying OSMRE's motion to vacate the NOV and the CO. The Board's reasoning is repeated below:

Appellant has operated a deep mine facility together with an adjoining surface coal preparation plant since the 1930's or 1940's. The record is void of any evidence to support OSMRE's argument that appellant's stockpiling activity existed on the date of enactment of SMCRA. This activity was described by the Administrative Law Judge in his decision as follows:

The unplanned, impromptu stockpiling effort in 1974 was occasioned by an emergency * * * which was not experienced again until February 1980. The informal designation of the offending stockpile storage area was never documented and the area in question was not so designated by way of an appropriate amendment to the then current or subsequently issued mining permits.

(Decision at 7). He concluded that by stockpiling coal Valley Camp was engaged in surface coal mining activities that subjected it to section 522(e) of SMCRA. Nowhere did the Judge conclude that this activity was in existence on the date of the enactment of SMCRA. If an operator was not engaged in a particular operation on the date of the enactment of SMCRA, the "in existence" exception of section 522(e) would not apply. Unless appellant can demonstrate that it had "valid existing rights" to engage in this particular activity, it cannot escape the restriction set forth in section 522(e)(4). Thus, we discern no legal justification for vacating the NOV and CO based on the theory advanced by OSMRE in its motion.

(Order dated May 11, 1989, at 4-5).

We conclude that Valley Camp's stockpiling operations were not "in existence" on August 3, 1977. The fact that Valley Camp stockpiled coal within 100 feet of the public road on two occasions, once in 1974 and again in 1980, notwithstanding the fact that such coal was produced by an underground mine which Valley Camp has operated since the 1930's or 1940's, does not mean that the stockpiling operation was "in existence" on August 3, 1977. The offending operation must be "in existence" on August 3, 1977, to be exempt from the prohibition of section 522(e)(4). We reject the argument that Valley Camp or any other operator has the authority to conduct any of the activities proscribed in section 522(e)(4) as long as they are incident to some other operation which existed on August 3, 1977.

[3, 4] Since Valley Camp has failed to demonstrate that its stockpiling activity was "in existence" on August 3, 1977, we must, contrary to the argument advanced by OSMRE and Valley Camp, determine whether Valley Camp had VER to conduct such activity in the spring of 1980, when OSMRE issued the subject NOV. As stated in our May 11, 1988, order we will apply the definition of VER which was in effect on the date when the violation took place: "the 1979 test, including the 'needed for and adjacent' test, as modified by the August 4, 1980, suspension notice which implemented the District Court's February 1980 opinion in In Re: Permanent (I)." 51 FR 41954 (Nov. 20, 1986). According to the 1979 definition, VER means:

(a) Except for haulroads,

(1) Those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorized the applicant to produce coal by a surface coal mining operation; and

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(2) The person proposing to conduct surface coal mining operations on such lands either

(i) Had been validly issued, on or before August 3, 1977, all State and Federal permits necessary to conduct such operations on those lands, or

(ii) Can demonstrate to the regulatory authority that the coal is both needed for, and immediately adjacent to, an on-going surface coal mining operation for which all mine plan approvals and permits were obtained prior to August 3, 1977[.]

On judicial review, Judge Flannery remanded to the Secretary the "all permits" test (30 CFR 761.5(a)(2)(i)), and indicated that "a good faith attempt to obtain all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test." In re Permanent Surface Mining Regulation Litigation, 14 E.R.C. at 1090. The Secretary modified 30 CFR 761.5(a)(2)(i) accordingly:

To comply with the court's 1980 opinion, OSMRE suspended the definition only insofar as it required that to establish VER all permits must have been obtained prior to August 3, 1977. (45 FR 51547, 51548, August 4, 1980). The notice of suspension stated that, pending further rulemaking, OSMRE would interpret the regulation as including the court's suggestion that a good faith effort to obtain permits would establish VER.

51 FR at 41954. ^{4/}

^{4/} We note that in Federal program states where OSMRE is the regulatory authority, the effect of suspending the "all permits" component of 30 CFR 761.5(a)(2)(i) (1979), and adopting the "good faith attempt to obtain all permits" standard suggested by Judge Flannery, left in place the same test which we find applicable herein. OSMRE summarized that test as follows:

"OSMRE will make VER determinations on a case-by-case basis after examining the particular facts of each case, and will consider property rights in existence on August 3, 1977, the owner of which by that date had made a good faith effort to obtain all permits, as one class of circumstances which would invariably entitle the property owner to VER. VER would also exist when there are property rights in existence on August 3, 1977, the owner of which can demonstrate that the coal is both needed for

Initially, we note that the record is barren of any evidence of "property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorized [Valley Camp] to produce coal by a surface coal mining operation" under 30 CFR 761.5(a)(1) (1979). At the hearing, counsel for Valley Camp simply stated that "the No. 3 mine has been in existence and the Preparation Plant as an adjunct to the mine, has been mining coal back into the 1930's and '40's" (Tr. 9). The record does not contain "a legally binding conveyance, lease, deed, contract or other document" as called for by the regulation.

In order to meet the criterion of 30 CFR 761.5(a)(2)(i), as modified in accordance with Judge Flannery's remand, Valley Camp must demonstrate "a good faith attempt to obtain all permits before the August 3, 1977 cut-off date." 51 FR at 41954. As previously discussed, the only evidence introduced by Valley Camp with regard to obtaining approval to conduct its stockpiling operations concerned its dealings with the WVDNR official, who simply "voiced no objection" to the activity. Otherwise, Valley Camp introduced absolutely no evidence of any attempt to obtain any permit prior to, or even after, August 3, 1977.

Alternatively, to qualify for VER under 30 CFR 761.5(a)(2)(ii) (1979), Valley Camp must "demonstrate * * * that the coal is both needed _____
fn. 4 (continued)
and immediately adjacent to a mining operation in existence prior to August 3, 1977."
51 FR at 41955.

for, and immediately adjacent to, an on-going operation for which all permits were obtained prior to August 3, 1977" (emphasis added). As noted, Judge Flannery rejected the "all permits" test, stating that a showing of a good faith attempt to obtain all permits would be sufficient to confer VER to conduct the questioned operation. His modification of the "all permits" test is relevant in applying 30 CFR 761.5(a)(2)(ii) as well, since as promulgated, that provision required the operator to have obtained all permits prior to August 3, 1977, for conducting the ongoing surface coal mining operation. Based upon Cogar v. Faerber, 371 S.E.2d 321 (W. Va. 1988), discussed infra, we conclude that in order to meet the "needed for, and immediately adjacent to" test, Valley Camp must demonstrate that it had made a good faith effort at obtaining all necessary permits prior to August 3, 1977, for conducting the "on-going surface coal mining operation."

Valley Camp originally argued before Judge McGuire that since its operation was an underground mine, it was not subject to SMCRA, and accordingly that there was no "permitted area" as such (Tr. 10). Now Valley Camp and OSMRE contend that there is an "on-going surface coal mining operation" for which the stockpiled coal is needed and to which such coal is adjacent. We conclude that if Valley Camp were conducting "on-going surface coal mining operation[s]" on August 3, 1977, they must be its surface operations incident to its underground mine, i.e., its preparation plant and related activities, as set forth at section 701(28) of SMCRA, and as discussed supra.

In Cogar v. Faerber, *supra*, the Supreme Court of Appeals of West Virginia applied the "needed for, and adjacent to an on-going surface coal mining operation" test, as it appears in West Virginia's permanent regulatory program. To the extent that we are now applying the same test, the court's guidance is helpful. In Cogar, certain citizens objected to the modification of the permanent program permit issued to Spring Ridge Coal Company (Spring Ridge) in 1983 to operate the Smoot Mine. The modification would allow new openings to an underground mine to be created within 100 feet of a public road and within 300 feet of occupied dwellings, in violation of West Virginia Code § 22A-3-22(d)(3) and (4) (1985 Replacement Volume). ^{5/} West Virginia's Board of Reclamation Review argued that Spring Ridge had VER to create the new openings on August 3, 1977.

The court found that under OSMRE's suspension notice dated November 20, 1986 (51 FR 41952), the definition of VER included in West Virginia's permanent program controlled the issue. Under that definition, "a person possesses valid existing rights if he can demonstrate that the coal is immediately adjacent to an ongoing mining operation which existed on August 3, 1977 and is needed to make the operation as a whole economically viable." W. Va. Code of State Reg. § 38-2-2.119 (1983). The Board of Reclamation and Spring Ridge argued that Spring Ridge _____
^{5/} The relevant portions of that statute declare that after Aug. 3, 1977, "subject to valid existing rights, no surface mining operations, except those which existed on that date, shall be permitted * * * [w]ithin one hundred feet of the outside right-of-way line on any public road * * *," or "[w]ithin three hundred feet from any occupied dwelling." In addition, W. Va. Code § 22A-3-3(w)(1)(1985 Replacement Vol.) provides that surface mining operations include the surface impacts incident to an underground coal mine.

had VER to create the mine openings on three bases: (1) the entire 1,825-acre tract for which Spring Ridge has mineral rights should be considered a single mining operation; (2) since mining has been conducted on various locations on that tract since before August 1977, the various activities on the tract should be considered a single ongoing operation which has been in existence since before that date; and (3) without this modification of the permit, the Smoot mine would have to be closed within a brief period of time, but that with it, the mine can be productively worked for another 20 years, thus making the modification necessary for continued economic viability.

The Cogar court observed that "the term 'surface mining operations' is most often used in connection with activities occurring within an area currently under permit or for which a permit application has been filed." 371 S.W.2d at 324. Thus, the court concluded that "[i]n the context of valid existing rights, we read the statute to mean that an operation includes only that area covered by a permit or permit application." Id. The court noted that "some mining" has been conducted on the 1,825-acre tract since well before August 1977. However, there was no showing that any of that 1,825-acre tract was permitted prior to 1983, when the Smoot mine was permitted under West Virginia's permanent regulatory program. The Board of Reclamation and Spring Ridge argued that "because the entire tract should be treated as a single mining operation, the fact that the Smoot mine was only begun in 1983 is irrelevant to our decision today." Id. at 323. The court rejected their argument, reasoning that the modification sought by Spring Ridge was not "adjacent" to an "on-going surface

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mining operation," since the new mine opening would not be "adjacent" to an area covered by a permit issued prior to August 3, 1977. The court did not state that the operator must have all permits in fact for the ongoing surface mining operation, but that the operator must have applied for them by August 3, 1977. The court's ruling on the VER issue, which reflects Judge Flannery's "good faith" modification, is as follows:

Therefore, in order to have valid existing rights so as to provide an exception to West Virginia Code § 22A-3-22(d), an operator must have, by August 3, 1977, completed its portion of the application process for all the necessary state and federal permits to conduct surface coal mining in an area contiguous to the proposed operation.

371 S.W.2d at 324.

Certain activities constitute "surface coal mining operations" because they meet the definition of SMCRA whether or not they are covered by a permit. The Cogar court defines an "on-going surface mining operation" in terms of whether it is subject to a permit. Under the Cogar court's reasoning, which we find persuasive, in order to qualify for VER under the "needed for, and immediately adjacent to, an on-going surface coal mining operation" test, as modified by Judge Flannery, Valley Camp must still have made a good faith attempt to secure the requisite permits for conducting its "on-going surface coal mining operation" prior to August 3, 1977. Again, other than seeking oral approval from WVDNR for its stockpiling operation, Valley Camp has made no showing that it made any effort to obtain any permit with regard to the surface impacts of the underground mining operation. Under the reasoning of Cogar, we conclude that Valley

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Camp's stockpiling activity is not being conducted "immediately adjacent to an on-going surface coal mining operation."

Moreover, we reject the argument that Valley Camp has demonstrated that the stockpiling activity is "needed for" the underground mining operation. In support of this argument, OSMRE points to the following definition of VER contained in the Department's permanent program regulations promulgated on September 14, 1983, at 30 CFR 761.5(c):

A person possesses valid existing rights if the person proposing to conduct surface coal mining operations can demonstrate that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation which existed on August 3, 1977. A determination that the coal is "needed for" will be based upon a finding that the extension of mining is essential to make the surface coal mining operation as a whole economically viable.

In the preamble to the above rule, OSMRE explained that "[w]here a person claims VER on the basis that the coal from the proposed operation is 'needed for' an ongoing operation, information regarding the size of the proposed site and the proportion it represents of the whole operation is helpful to evaluate this claim." 48 FR 41316 (Sept. 14, 1983). ^{6/}

In its response to the Board's show-cause order, OSMRE couches its argument that Valley Camp's stockpiling operation is "needed for" its underground coal mining operation in terms of the "economically viable"

^{6/} In In re Permanent Surface Mining Regulation Litigation, 22 E.R.C. 1557 (1985), Judge Flannery remanded this regulation because it had been promulgated without notice and comment. The Department formally suspended the regulation on Nov. 20, 1986 (51 FR 41954).

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language of the 1983 VER definition. We think that such an application of the "needed for" test is reasonable. In its response, OSMRE quotes the following passage from Judge McGuire's decision:

On that occasion [1974], the coal had been stockpiled in order to avoid a shutdown of the mine. * * * Between the years 1974 and 1980 the demand for applicant's coal was such that stockpiling was unnecessary. However, in February 1980, due to slack-ened demand, applicant found it necessary to again stockpile some 8,200 tons of coal rather than close the mine and the area selected for storage in February 1980 was the same area that had been utilized in 1974 except that some of the employees parking lot was also utilized on the latter occasion. [Emphasis added by OSMRE].

(Decision at 3-4).

Apparently, Judge McGuire found that Valley Camp stockpiled the coal in 1974 and again in 1980 because of a "slackened demand." He did not make this finding in the context of an application of the "adjacent to and needed for" test. At the hearing, James Litman, Vice President of the Eastern Division of Valley Camp, gave the following testimony which raises a serious question as to whether it was "necessary" to stockpile the coal:

JUDGE McGUIRE: How much of the coal [6,000 to 6,200 tons] has been moved during that period [August 6, 1980 through August 12, 1980], sir?

THE WITNESS: About 2,000 tons, totally, between the sale to [J. E. Baker's power plant in Millersville, Ohio,] and removal to the silo.

* * * * *

JUDGE McGUIRE: Let's see; now, you removed 2,000 tons to date and where have you stored it, sir?

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THE WITNESS: In the storage silo for clean coal at the No. 3 Preparation Plant facility. We put it right back in the silo we took it out of when we had no sale for it.

JUDGE McGUIRE: When did the room in the silo at the No. 3 plant first become available for storage purposes for that coal, sir?

THE WITNESS: I can't answer that. The silo is up and down in capacity continuously; and if you're asking was there capacity in the silo for the coal between February the 22nd and now, the answer is yes. We took --

JUDGE McGUIRE: When was it -- when was this first available for placement in the silo had you chosen to do so?

THE WITNESS: As soon as we took it out; there was room to put it back in.

JUDGE McGUIRE: In other words, there was no actual need to stockpile the coal in the manner in which you did?

THE WITNESS: No, sir. We took -- the normal operation of the mine requires that we have silo capacity, that we have a location for the cleaned product. Now, if the cleaned product is not removed from the silo through sales, then we cannot operate the preparation plant and, therefore, cannot operate the mine.

When we removed the 8,200 tons from the silo in February, it gave us capacity to operate for the balance of February. Our sales then allowed us to keep up with mine production until April of 1980. In April of 1980, we still were unable to sell enough coal to keep the mine in operation; so, the mine was idle for two weeks. [Emphasis added].

(Tr. 84-86).

Even if we were to find that Valley Camp's surface operations at the No. 3 underground mine qualified as "on-going surface coal mining operations" for VER purposes, we would reject the argument that stockpiling

coal on two occasions, first in 1974 and again in 1980, is sufficient to demonstrate that such activity is "needed for" an ongoing surface coal mining operation. In In re Permanent Surface Mining Regulation Litigation, 14 E.R.C. at 1091, Judge Flannery stated in response to an argument that the "needed for" test be eliminated from the VER definition, "the need and adjacent test requires a valid existing right exemption when denial of mining on the adjacent area will rob the mining operation, as a whole, of its value." Valley Camp has not demonstrated that denial of the right to stockpile coal along U.S. Route 40 will rob underground mine No. 3 of its value. We could explain the fact that the mine was idle for 2 weeks on any number of other equally convincing bases, *i.e.*, the capacity of the storage silo is insufficient to accommodate the coal produced from the mine, or Valley Camp was producing more coal than its market required. We reject the argument that stockpiling this coal is "needed for" any "on-going surface mining operation" conducted by Valley Camp.

Accordingly, we conclude that Valley Camp has not shown that its stockpiling activity was "in existence" on August 3, 1977, or that it had VER to conduct such activity under 30 CFR 761.5(a) (1979), as modified by Judge Flannery in In re Permanent Surface Mining Regulation Litigation, *supra*.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed 12 IBLA 49

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from is affirmed, and this case is remanded to OSMRE for action consistent with this decision.

Gail M. Frazier
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge