IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

BLUE EAGLE LAND ,LLC, et al.

Petitioners,

v. Case No: 08-CAP-171

WEST VIRGINIA OIL AND GAS
CONSERVATION COMMISSION,
CHESAPEAKE APPALACHIA, LLC,
EASTERN AMERICAN ENERGY CORPORATION, and
PETROEDGE RESOURCES (WV), LLC,

Respondents,

v.

WEST VIRGINIA SURFACE OWNER'S RIGHTS ORGANIZATION,

Proposed Interveners.

INTERVENER'S
ANSWER TO PETITION FOR APPEAL
and
CROSS-PETITION FOR APPEAL

Comes now the West Virginia Surface Owners' Rights Organization, Intervener, by counsel, in answer to the "Petition for Appeal from the West Virginia [Oil and Gas] Conservation Commission and the West Virginia Supreme Court", and with its cross-petition for appeal and says:

ANSWER TO PETITION FOR APPEAL

1. Intervener denies the allegations of the "A. Introduction".

2. Intervener denies all of the reasoning for the existence of the Shallow Gas Well Review Board; denies the geologic or engineering importance of the Onondaga Group formation as a dividing line between statutory "shallow wells" and statutory"deep wells"; denies that there is any legal definition of "completion" and therefore that the activities into the Onondaga are not part of completion of modern Marcellus Shale gas wells; denies that the sole reason the Supreme Court had for sending the case back to Circuit Court was the sufficiency of the record in that it noted "Under the applicable statutory language, it cannot be said, from the limited record before this Court, that the Commission's exercise of its jurisdiction is clearly erroneous."; and otherwise admits the allegations of the "B. Nature of Proceeding and Ruling of State Agency".

3. Regarding "C. Errors Committed by the Shallow Gas Well Review Board", the Intervener does not agree with #1, has no standing with regard to #2, believes that #3 is immaterial, and states that the Commission had insufficient evidence to find #4 and #5.

4. Intervener admits the allegations of Paragraphs 6, 7, 8, 9, 10 and 11.

5. Intervener denies the allegations of Paragraph 12 that there is a shallow formation, only that there are statutory "shallow wells" and statutory "deep wells".

6. Intervener admits the allegations of Paragraphs 13 and 14.

7. Intervener is without knowledge or information sufficient to form a belief as to Paragraph 15.

8. Intervener admits the allegations of Paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26.

9. Intervener denies the allegations of Paragraph 27.

10. Intervener is without knowledge or information sufficient to form a belief as to whether the decision is catastrophic, but admits the further allegations of Paragraph 28.

11. Intervener admits the allegations of Paragraphs 29 and 30.

12. Intervener denies the final sentence of Paragraph 31 regarding the bases for the request, and admits the further allegations of that Paragraph.

13. Intervener admits that the Special Field rules will have a significant impact on the Petitioners' coal reserves but is without knowledge or information sufficient to form a belief as to the further allegations of paragraph 32.

14. Intervener admits the allegations of Paragraph 33.

15. Intervener takes the position that the "LEGAL ANALYSIS" of the Petition is in the nature of a memorandum of law and not appropriate for admissions or denials in this answer.

CROSS-PETITION FOR JUDICIAL REVIEW OF A CONTESTED CASE BEFORE THE WEST VIRGINIA OIL AND GAS CONSERVATION COMMISSION PURSUANT TO THE STATE ADMINISTRATIVE PROCEDURES ACT.

Comes now the West Virginia Surface Owner Rights Organization seeking judicial review of an agency decision that will allow gas wells to be spaced more closely together when they are drilled than is justifiable, and therefore be more numerous on surface owners' land and wasteful to all other interests by leaving otherwise recoverable gas in the ground, and says:

Background.

16. Generally the "Rule of Capture" applies to oil and gas wells drilled in West Virginia. Any gas that comes out of a conventional, vertically drilled gas well belongs to the owner of the gas well and to the owner of the land where the gas well is located. This is true even if it is known with scientific certainty that the gas coming out of the well is draining into the gas well bore from the land of adjoining mineral owners. There are only a few exceptions.

17. One exception is that by statute, statutory "deep wells" are subject to "forced" well spacing and royalty sharing, which the statute confusingly calls, "unitization and pooling". (One other exception to the Rule of Capture which can only be exercised by certain coal operators for certain statutory "shallow wells" will be discussed later. Another exception for coal bed methane wells is not relevant to this proceeding.)

18. “Forced” pooling (where the parties do not agree to do so) for statutory “deep wells” is controlled by West Virginia’s Oil and Gas Conservation Commission (the “Commission”).

19. The parties drilling the well, or neighboring mineral owners or operators, can apply to the Commission for a forced pooling order requiring that the mineral land that will be drained by one well be declared a “unit”. W.Va. Code §22C-9-7(a)(1) and (b)(1). (Note that this statutory requirement is not “mandatory pooling” that would require all wells to be spaced, but forced pooling in which spacing only happens when an affected party requests it.)

20. The number of acres in the unit is supposed to depend on the characteristics of the gas bearing formation. The number of acres in the unit determines, by the application of simple algebra, the distance or “spacing” between wells.

21. All of the parties owning minerals inside the boundaries of the unit are then entitled to a share of the royalties depending on how many acres of the minerals in the unit they own. They can also participate in the financing of the drilling of the well and get a proportion of the profits.

22. In a large gas field where many wells are expected, it would be cumbersome for each well to be determined that way, so a Rule of the Commission allows for the commission to set “special field rules” that set a presumptive spacing of all wells in a

field. 39 C.S.R. 1-2.19. Parties interested in a particular well can then move for an exception. 39 C.S.R. 1-4.3.

23. This cross-petition is an appeal of 4 orders of the Commission setting spacing for an astonishing 489,000 acres in 7 counties.

24. The decision of the Court in this case will be authority that the Commission will almost certainly rely upon in ruling on additional petitions pending before the Commission as set out in Blue Eagle's petition covering land in *twenty one* additional counties.

25. Exhibit #2 which is a map of West Virginia showing the topographic quadrants which were listed in the proceedings before this Court and still awaiting the Commission's decision.

Issues

26. The issue raised by this appeal is whether there was substantial evidence to support the Commission's orders granting of "special field rules" in several contested cases. The Commission's orders required only 1000 foot well spacing, instead of 3000 or 1500 foot well spacing.

27. The Blue Eagle petition raises the issue whether the wells drilled to the Marcellus Shale formation are statutory "deep wells" as defined by in W.Va. Code 22C-9-2(a)(11) and (12) at all and therefore whether those wells are subject to the Commission's jurisdiction to order well spacing and royalty sharing ("unitization and

pooling") and special field rules, and are subject to surface owner consent provided in W.Va. Code 22C-9-7(b)(4).

Timeliness

28. Blue Eagles Petition was timely, and the timeliness of the Intervener's Motion to Intervene is addressed in that motion.

Parties Petitioner

29. The Petitioner, formerly an unincorporated association, is now West Virginia Citizen Action Group d.b.a West Virginia Surface Owner's Rights Organization, an application for trade name having been filed with and approved by the Secretary of State on June 18, 2008.

30. The West Virginia Surface Owner's Rights Organization ("WVSORO") will represent the owners of small tracts of surface land in West Virginia. Generally these small surface owners have title to only the surface and not the oil and gas or other minerals under the surface, or if they own the minerals they are already subject to long-standing leases to oil and gas operators. Around 30% to 40% of its members do also own small mineral/royalty interests.

31. The surface owners represented by WVSORO are the surface owners upon whom gas and oil wells are drilled. Attached as Exhibit #1 is an aerial photograph showing the impact on the surface owner of a typical, modern, vertical Marcellus Shale well being recently drilled in Upshur County, West Virginia.

32. Generally mineral owners have the right pursuant to their severance deeds to do what is "reasonably necessary", but only what is reasonably necessary, to the surface owner's interest in order to develop the oil and gas. *See,* "Disturbing Surface Rights: What does 'Reasonably Necessary' mean in West Virginia?" 85 *West Virginia Law Review*, 817.

33. WVSORO began organizing itself in August 2007, and has hundreds of dues paying members in 50 West Virginia counties, 20 states, and 3 countries. Its web site can be found at www.wvsoro.net.

34. The issues before this Court are whether well spacing and royalty sharing will be applied to more than 1,800 Marcellus Shale gas wells that are planned to be drilled on more than one-half million surface acres of West Virginia in the determinations of the Commission being directly appealed, on more hundreds of thousands of acres in those cases pending. And if well spacing and royalty sharing applies, the issue becomes the determination of the distance used for spacing these wells, resulting in what total number of wells drilled on surface owners.

35. Surface owners will be greatly affected by the determination of these issues.

36. If well spacing and royalty sharing applies, then wells will be rationally spaced (and all mineral owners will share proportionately in the royalties from each well).

37. If the Rule of Capture applies, then after a mineral owner/operator drills a successful initial gas well, other operators/mineral owners can drill extra "offset" gas

wells, closer to the initial gas well than geologically justified. These extra wells will be drilled because neighboring mineral owners/operators cannot "force" well spacing and royalty sharing, and so instead will try to protect their mineral tracts from being drained by the initial wells drilled. (In fact there is an implied covenant in an oil and gas lease to drill offset wells to protect the mineral owner from having his gas drained by drilling on neighboring tracts. See, Robert Tucker Donley, *The Law of Coal, Oil and Gas, in West Virginia and Virginia*, §96.) Extra unnecessary wells may also be drilled by drillers who get paid by the well by uninformed investors. These drillers make money "on the push" and do not care about production. The result if Marcellus Shale wells are determined to be statutory "shallow wells" will be the drilling of more wells than are necessary on surface owners' land.

38. If modern Marcellus Shale wells are determined to be statutory "shallow wells" then the only occurrence that could prevent extra, unnecessary offset wells, or too narrow spacing, would be if there is also coal on the tract and if the coal owner/operator objects and forces pooling and unitization pursuant to W.Va. Code §22C-8-1 et seq. Only coal owners/operators can force well spacing and royalty sharing for statutory shallow wells, and only those own coal in the tract upon which the well is located, not on neighboring tracts. (As noted above, coal bed methane wells have also been made subject to well spacing and royalty sharing by the more recently enacted statues governing them. W.Va. Code 22-21-17 (1994).)

39. In addition, if the Marcellus wells are found to be statutory "deep wells", the consent of the well site surface owner may be required for some of those wells, although the agency's interpretation of the Code provisions and authority results in very few wells being subject to this provision. W.Va. Code 22C-9-7(b)(4). But see *Ashland Exploration, Inc. V. Walter N. Miller*, Circuit Court of Kanawha County, Misc. 82-715 (1985), and *State ex rel. Lovejoy v. Callaghan*, Albright, Justice, concurring, 576 S.E.2d 246 at Page 4 (W.Va. 2002)

40. Other public interests and the interests of other citizens will also be affected if modern Marcellus Shale wells are declared to be statutory "shallow wells" not subject to well spacing and royalty sharing. These other public and citizen interests are will not have representation in this case. WVSORO's brief will also identify and state the interests of other public and private interests because the ruling in this case that will benefit surface owners will also benefit these other unrepresented interests. These other public and private interests will be summarized in the following paragraphs.

41. Un-spaced, unnecessary, extra wells will cause more surface disturbance on the tract of land where they are drilled and will cause additional erosion and sediment down streams and rivers.

42. Each un-spaced, unnecessary, extra well will cause more risks of harm to groundwater as each well penetrates groundwater strata on its way to the oil and gas bearing strata.

43. In addition, if unnecessary, extra gas wells are drilled, the larger number of gas wells will deplete the gas reservoir pressure more quickly. As a result there will be less total gas produced from the pool of gas being developed! The significance of this geologic and engineering fact cannot be overstated.

44. Less total gas produced as a result of the drilling of unnecessary, extra wells means less gas sold which adversely affects a number of other interested parties:

a. Royalty owners will receive less money.

b. Investors in well drilling will receive less money.

c. If one subscribes to the economic theory that all costs will be passed on to consumers, then the extra costs of drilling extra wells will be passed on to individual and business consumers.

d. Even operators as a class will probably benefit if well spacing and royalty sharing applies to the Marcellus wells, though some individual operators may be adversely affected if they make their profit "on the push" charging investors for drilling the extra wells, or if they profit extra by beating other operators to pools where offset wells are not economical thereby draining gas from neighboring mineral owners.

Parties Respondent

45. The West Virginia Oil and Gas Conservation Commission is the state agency whose decisions are being appealed.

46. Named Respondents include the named parties in four orders made by the Commission.

47. Named Respondents include other parties who sought a Writ of Prohibition before the West Virginia Supreme Court of Appeals in this matter.

48. Numerous other proceedings are pending below with even perhaps even more parties. They have been held in abeyance by the Commission until a determination of the legal issues can be made by the Courts.

Titles before Agency

49. In the matter of the request by Eastern American Energy Corporation for an order from the Commission establishing special field rules [for 30,000 acres] in Boone, Lincoln, and Logan Counties, West Virginia covering the Logan, Amherstdale, Henlawson, Clotheir, Madison and Mud Quadrangles, Docket 175, Cause 160, Order #1. Order granted December 21, 2006. See Exhibit #3 attached.

50. In the matter of the request by Chesapeake Appalachia, L.L.C., for an order from the Commission establishing special field rules [for 427,000 acres] in Boone, Kanawha, Lincoln, Logan and Mingo Counties, West Virginia covering the Nestlow, Branchland, Hager, Julian, Griffithsville, Radnot, Kiahsville, Ranger, Big Creek, Mud,

Webb, Wilsondale, Trace, Chapmanville, Kermit, Naugatuck, Myrtle, holder, Williamson Delbarton and Barnabus Quadrangles, Docket 179, Cause164, Order #1. Order granted July, 2007. See Exhibit #4 attached.

51. In the matter of the request by Chesapeake Appalachia, L.L.C. for an order from the Commission establishing special field rules [for 17,000 acres] in Boone, Lincoln, and Logan Counties, West Virginia covering the Logan, Amherstdale, Henlawson, Clothier, Madison and Mud Quadrangles, Docket 180, Cause 165, Order #1. Order granted July 10, 2007.

52. In the matter of the request by Chesapeake Appalachia, L.L.C. for an order from the Commission establishing special field rules [for 15,000 acres] in McDowell, Mingo, and Wyoming Counties, West Virginia covering the Man, Mallory, Wharncliffe, Gilbert, Iaeger and Davy Quadranges, Docket 181, Cause 166, Order #1. Order granted July, 2007. See Exhibit #5 attached.

Kind of Proceeding and Nature of the Ruling by the State Agency

53. Granting of an application to the Oil and Gas Conservation Commission for "special field rules" for 489,000 acres in 7 counties order requiring only 1000 foot spacing of modern Marcellus Shale formation gas wells.

54. This would allow the drilling of up to 9 wells on a surface owner's single 100 acre tract.

Statement of the Facts

55. In all of the above cases the party making the application to the Commission proposes to drill modern wells up to 75 feet into the Onondaga limestone to enable the logging/completion of the entire Marcellus Shale section.

56. The applicants state that they will not perforate or produce any formation below the base of the Marcellus Shale formation; however, by definition, since the proposed wells will be drilled in excess of twenty feet into the Onondaga Limestone, they will be statutory deep wells.

57. The applicants therefore requested the Commission to set spacing for any proposed wells drilling under the requested special field rules to conform to the following: 1000' between wells and 100' from a lease line or unit boundary.

58. The Oil and Gas Conservation Commission ordered the special field rules on the terms for which the applicants applied.

Assignments of Error

59. The decision below is clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or more specifically, the lack thereof.

60. The decision below is arbitrary and capricious.

Points and Authorities Relied Upon

61. Generally statutory "deep wells" must be drilled at least 3000 feet apart in order to prevent "waste" and so on as explained in the Background section of this Petition. 39 C.S.R. 1-4.2

62. "Special field rules" can grant an exception to this spacing. Ibid.

63. The required evidence to allow the Oil and Gas Conservation Commission to grant this exception includes, "Reservoir data anticipated for an average proposed drilling unit within the spaced area; and . . . A comparative economic evaluation of spacing patterns, based on estimated production and rate of production of oil and/or gas of the average proposed drilling unit within the spaced area." 39 C.S.R. 1-6.2.d and e.

64. The Commission can order spacing on a temporary basis as allowed by W. Va. Code 22C-9-7(a)(5) based on the testimony and other evidence before it, and then if there was a need for 1000 foot spacing, an exception could have been sought.

Discussion of Law.

65. The required evidence to support spacing at less than 3000 feet was not present.

66. The Chesapeake witness himself said that asking for 1000 feet was "arbitrary". Tr. 48.

67. There were no reservoir studies done. Page 49, Transcript of May 17, 2007, hearing on Docket No. 179. No comparative economic evaluation or estimated production rates were submitted.

68. The applicants had no documentation or reports that they could not effectively produce the Marcellus at 3000 foot spacing. Tr. 50

69. Chesapeake said that their plans were for 1700 wells on 427,000 acres based on 1500 foot spacing. That was want they were intending. This 1500 foot spacing was not based on the required studies etc., It was arrived at by the applicant only because it was their current practice. Tr. 47 and 48.

70. The only engineering or scientific evidence is that they have been drilling wells every 1500 feet so far and have not seen any "communication" between those wells so far. Tr. 49.

71. This does not meet the evidential standard to allow spacing at less than 3000 feet.

72. In the alternative, there was no substantial evidence to allow spacing of less than 1500 feet – the distance Chesapeake actually planned, based on their weak evidence that there had been no communication between 1500 foot spaced wells.

73. Chesapeake only wanted 1000 foot spacing if they wanted to get closer together than 1500 feet because of topography, existing wells, coal issues, etc. Tr. 50

74. The Commission, if it did not grant only 3000 foot spacing, should only have granted 1500 foot spacing, and that should only be on a temporary basis as allowed by W. Va. Code 22C-9-7(a)(5) based on the testimony and other evidence before it, and then if there was a need for 1000 foot spacing, an exception could have been sought.

Relief Prayed For

WHEREFORE the Petitioner prays that the Circuit Court:

A. Deny the remedies sought by the Blue Eagle petitioners,

B. Modify the orders below to require 3000 foot spacing, or

C. In the alternative, modify the orders below to allow 1500 foot spacing only on a temporary basis, or

D. In the alternative, modify the orders below to allow only 1500 foot spacing in its orders, and

E. Grant such other and further relief as to the Court may seem just and proper.

West Virginia Surface Owner Rights Organization
Intervener,
By Counsel

_____

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Exhibit #1

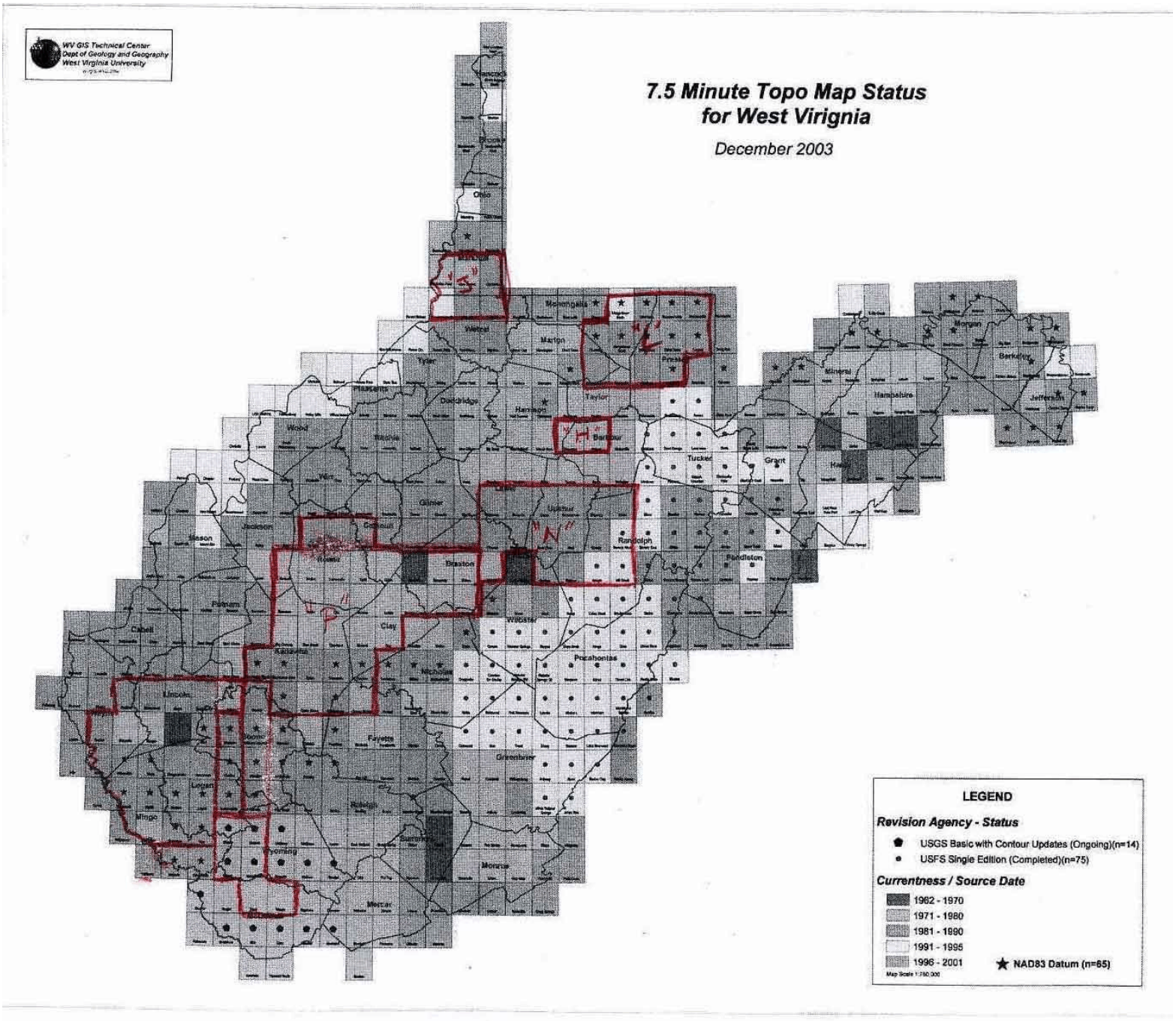
WV GIS Technical Center
Dept of Geology and Geography
West Virginia University
7.5 Minute Topo Map Status
for West Virginia
December 2003
LEGEND
Revision Agency - Status
USGS Basic with Contour Updates (Ongoing)(n=14)
USFS Single Edition (Completed)(n=75)
Currentness / Source Date
1962 - 1970
1971 - 1980
1981 - 1990
1991 - 1995
1996 - 2001
NAD83 Datum (n=65)

Exhibit #2