

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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PATRIOT MINING COMPANY, INC.,

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Petitioner,

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

and

THOMAS L. CLARKE, DIRECTOR,
DIVISION OF MINING AND RECLAMATION,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

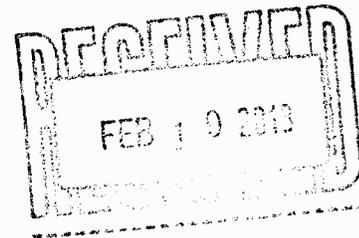
Civil Action No. 11-AA-102
Civil Action No. 11-AA-104
(Consolidated)
Judge James C. Stucky

Petitioner,

v.

SIERRA CLUB,

Respondent.



FINAL ORDER

This matter comes before the Court on Petitioner Patriot Mining Company, Inc. (hereinafter "Patriot") and Petitioner Thomas L. Clarke, Director, Division of Mining and Reclamation, West Virginia Department of Environmental Protection (hereinafter "WVDEP") "Petitioner for Appeal" filed August 30, 2012, from a Final Order of the Environmental Quality Board (hereinafter "EQB"). After reviewing the Petition, the entire record, and the applicable legal authority, this Court **REVERSES** the decision of the EQB.

1. This Court's review is governed by the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-1 *et seq.* West Virginia Code § 29A-5-4(g) states:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been

prejudiced because the administrative findings, inferences, conclusions, 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 abuse of discretion or clearly unwarranted exercise of discretion.

2. The Court must give deference to the administrative agency's factual findings and review those findings under a clearly wrong standard. Further, the Court applies a de novo standard of review to the agency's conclusions of law. *Muscatell v. Cline*, 196 W.Va. 588, 595, 474 S.E.2d 518, 525 (1996).

3. The West Virginia Supreme Court has stated that, in administrative appeals:

A reviewing court must evaluate the record of the agency's proceedings to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is to be conducted pursuant to the administrative body's findings of fact regardless of whether the court would have reached a different conclusion on the same set of facts.

Donahue v. Cline, 190 W.Va. 98, 102, 437 S.E.2d 262, 266 (1993) (per curiam) (citing *Gino's Pizza of West Hamlin v. West Virginia Human Rights Comm'n*, 187 W.Va. 312, 317, 418 S.E.2d 758, 763 (1992)).

FACTS AND DISCUSSION

Patriot and WVDEP are appealing the same Final Order of the EQB, relying on the same underlying facts and raising similar legal issues in their appeals. On September 12, 2012, this Court granted Patriot's Motion to Consolidate Civil Action

Number 12-AA-104 into Civil Action Number 12-AA-102.

On September 3, 2010, Respondent filed an appeal of Petitioner's decision to approve National Pollutant Discharge Elimination System (hereinafter "NPDES") Permit Number WV1017535 Modification Number 9 (hereinafter "Permit") on August 9, 2010. An evidentiary hearing on the matter was held before the EQB on December 14, 15, 16, and 17, 2010. The EQB issued a Final Order on March 25, 2011, that remanded the permit to WVDEP with instructions to modify the permit. WVDEP and Patriot Mining Company, Inc. (hereinafter "Patriot") filed a timely appeal to the Court concerning conductivity, sulfates, and total dissolved solids (hereinafter "TDS").

On September 20, 2011, this Court remanded EQB's Final Order of March 25, 2011, and ordered EQB to file supplemental findings and conclusions related to conductivity, sulfates, and TDS. On July 30, 2012, majority of the EQB remanded the Permit for action consistent with its prior order and supplemental order.

Notably, EQB's Supplemental Order orders WVDEP to do the following: (1) conduct a reasonable potential analysis for conductivity, sulfate, and TDS; (2) add enforceable effluent limits for conductivity, sulfate, and TDS to the permit; (3) "[U]se the EPA guidance, coupled with Dr. Ziemkiewicz's calculated yields of solids, sulfate, and conductivity from the New West Hill sites as a roadmap toward setting effective conductivity limits on the New West Hill permit"; and (4) "[U]se Dr. Ziemkiewicz's calculations as basis for setting numerical permit limits for sulfate and conductivity. In-stream values for these parameters measured downstream of the outfall(s) should not exceed the values immediately upstream of the outfall(s) by more than 2 percent."

Section 301(a) of the Federal Water Pollution Control Act (hereinafter "CWA"), 33

U.S.C. § 1311(a), prohibits the discharge of any pollutant into the waters of the United States unless the discharge complies with CWA provisions. Section 402 permits, known as NPDES permits, monitor the discharge of pollutants pursuant to the CWA. See U.S.C. § 1342. NPDES permits are issued by the EPA, unless a state has an approved program, subject to limited oversight by U.S. EPA. See U.S.C. § 1342(d). WVDEP has possessed the authority to issue NPDES permits in West Virginia since EPA approved WVDEP's regulatory program in 1982. See WVDEP's Brief, p. 8; 47 Fed. Reg. 22, 363 (May 24, 1982).

Pursuant to 33 U.S.C. § 1313, in accordance with Section 301 of the CWA, NPDES permits normally contain "effluent limitations" that restrict the amount or concentrations of specified pollutants that may be discharged by a permittee. "Water quality based effluent limitations are required for all pollutants that the permitting authority determines 'are or may be discharged at a level [that] will cause, have the reasonable potential to cause, or contribute to an excursion above any [applicable] water quality standard, including state narrative criteria for water quality.'" 40 C.F.R. § 122.44(d)(1)(i). The procedure for determining the need for effluent limits is called a reasonable potential analysis. *Id.* In accordance with Section 303 of the CWA, if the discharge does have the reasonable potential to cause an excursion, the states may establish either numeric or narrative limitations to ensure compliance with water quality standards. 33 U.S.C. § 1311(b)(1)(A) & (C).

WVDEP and Patriot mutually contend that the EQB (1) acted arbitrary and capriciously by according no deference to WVDEP's interpretation of water quality standards; (2) exceeded authority by attempting to impose *de facto* water quality

standards; and (3) unlawfully instructed WVDEP to follow illegal EPA guidance.

First, WVDEP and Patriot contend that the EQB acted arbitrary and capriciously by according no deference to WVDEP's interpretation of water quality standards. West Virginia Water Pollution Control Act (hereinafter "WPCA") authorizes WVDEP to adopt, modify, repeal and enforce rules "preventing, controlling and abating pollution" and "facilitating the state's participation in the 'National Pollutant Discharge Elimination System.'" W.Va. Code § 22-11-4(a)(16). Further, W.Va. Code § 22-11-7b(a) provides that "all authority to promulgate rules and implement water quality standards is vested in the Secretary of the Department of Environmental Protection. Pertinent portion of W.Va. Code § 22-11-7b(f), as amended, which took effect on passage on March 10, 2012, provides the following:

(f) The secretary shall propose rules measuring compliance with the biologic component of West Virginia's narrative water quality standard requires evaluation of the holistic health of the aquatic ecosystem and a determination that the stream: (i) Supports a balanced aquatic community that is diverse in species composition; (ii) contains appropriate trophic levels of fish, in streams that have flows sufficient to support fish populations; and (iii) the aquatic community is composed of benthic invertebrate assemblages sufficient to perform the biological functions necessary to support fish communities within the assessed reach, or, if the assessed reach has insufficient flows to support a fish community, in those downstream reaches where fish are present... Rules promulgated pursuant to this subsection may not establish measurements for biologic components of West Virginia's narrative water quality standards that would establish standards less protective than requirements that exist at the time of the enactment of the amendments to this subsection by the Legislature during the 2012 regular session.

Water quality standards to protect aquatic life come in two forms: numeric standards and narrative standards. "Numeric" standards consist of allowable concentrations of particular pollutants. W.Va. Code St. R. § 47-2-8-15. West Virginia's narrative standards provide, in pertinent part,

[T]he following general conditions are not to be allowed in any of the waters of the state:

3.2.e. Materials in concentrations which are harmful, hazardous, or toxic to man, animal or aquatic life;

3.2.i. Any other condition, including radiological exposure, which adversely alters the integrity of the waters of the State including wetlands; no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.

W.Va. Code St. R. § 47-2-3.2.

EPA provides states with instructions to help permit writers conduct a reasonable potential analysis for compliance with numeric standards. Patriot's Brief, p. 10. In order to conduct a reasonable potential analysis to protect numeric water quality standards, WVDEP's permit writers look at the concentrations of a pollutant in the stream that will receive a discharge. Next, the permit writers evaluate the observed or likely pollution characteristics of the effluent discharge, then calculate the probability that the effluent discharge will cause the concentration of the pollutant in the receiving stream to exceed the numeric water quality standard for that pollutant. If the likelihood of an in-stream violation is too high, an effluent limit is placed in the permit for the pollutant. *Id.*

Conducting a reasonable potential analysis to protect narrative standards is more complex. Narrative standards can vary widely from state to state and are by their very nature subjective. *Am. Paper Inst. v. EPA*, 996 F.2d 346, 351 (D.C. Cir. 1993). Moreover, EPA has stated that "a [State] permitting authority has a significant amount of flexibility in determining whether a particular discharge has a reasonable potential to cause an excursion above a water quality criterion." 54 Fed. Reg. 23868, 23873 (June 2, 1989). Further, it is recognized that WVDEP utilizes the West Virginia Stream

Condition Index (hereinafter “WVSCI”) to allow the narrative standards to be enforced. WVSCI compares the number and types of aquatic insects in a stream with those that exist in undisturbed “reference” streams. Patriot’s Brief, p. 11. Additionally, WVDEP developed a Narrative Guidance document that requires additional WVSCI scores collected from the stream from which a permittee wishes to discharge in an effort to further ensure surface coal mining operations do not violate narrative water quality standards.

“When a regulation contains an ambiguity, a reviewing court is required to afford deference to the interpretation of the administrative agency that is responsible for promulgating and enforcing that regulation.” *Cookman Realty Group v. Taylor*, 211 W.Va. 407, 411, 566 S.E.2d 294, 298 (2002). In this case, it appears the EQB considered EPA guidance, rather than any material provided by WVDEP.

WVDEP and Patriot contend that EQB exceeded its statutory authority by attempting to impose *de facto* water quality standards on the WVDEP. Additionally, WVDEP and Patriot argue EQB erred as a matter of law by ordering WVDEP to use EQB Guidance declared unlawful by the United States District Court for the District of Columbia.

In *National Min. Ass’n v. Jackson*, 880 F.Supp.2d 119 (D.D.C., 2012), the court held that the EPA exceeded its authority in interfering with WVDEP’s process of authorizing mining permits. Furthermore, the court held that the EPA’s Final Guidance was a *de facto* legislative rule, and additionally, not consistent with existing statutory and regulatory authority. *Id.* at 136 and 142. The court reasoned that the “Final Guidance constitutes final agency action because it is both the consummation of the

EPA's decision making process, and, even if facially nonbinding, it has been applied by the regional field offices in their review of draft permits in a manner that has had the practical effect of changing the obligations of the state permitting authorities." This Court agrees.

After a thorough review of the record, it is evident that the EQB accorded no deference to WVDEP's interpretation of water quality standards. In fact, the EQB orders that the EPA's Narrative Guidance be followed, instead of using WVDEP's Narrative Guidance. This Court finds that to apply EPA's Narrative Guidance would infringe on the authority afforded to WVDEP. Therefore, the Court concludes that the EQB's decision was arbitrary and capricious.

RULING

Accordingly, this Court **ORDERS** the following: The Final Order and Supplemental Order of the Environmental Quality Board is **REVERSED**. Therefore, this matter is hereby **DISMISSED** and **STRICKEN** from the open docket of the Court.

The clerk of the court shall distribute copies of this Order to

Joe Lovett, Esquire
Appalachian Center for the Economy
and the Environment
P.O. Box 507
Lewisburg, WV 24901

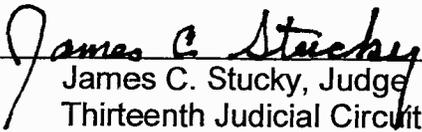
Peter Morgan, Esquire
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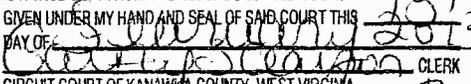
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Charleston, WV 25322

West Virginia Environmental Quality Board
601 57th Street
Charleston, WV 25304

Enter this Order the 13th day of February, 2013.


James C. Stucky, Judge
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 13th
DAY OF February 2013
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 12