

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PATRIOT MINING COMPANY, INC.,

Petitioner,

and

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

Petitioner,

v.

SIERRA CLUB,

Respondent.

FILED
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JATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

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SEP 26 2011

Civil Action No. 11-AA-59
Civil Action No. 11-AA-60
(Consolidated)
Judge James C. Stucky

FINAL ORDER REMANDING CASE

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 April 25, 2011, from a Final Order of the Environmental Protection Board (hereinafter "EQB"). After reviewing the Petition, the entire record, and the applicable legal authority, this Court **REMANDS** this case back to 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 May 25, 2011, this Court granted Patriot's Motion to Consolidate Civil Action number 11-AA-60 into Civil Action number 11-AA-59.

A brief recitation of the facts is as follows. On August 9, 2010, WVDEP granted a request by Patriot to modify its existing West Virginia National Pollutant Discharge Elimination System (hereinafter "NPDES"). This request was pursuant to Patriot's addition

of two hundred twenty-five (225) acres to an existing surface mine. However, before Patriot could begin mining, Sierra Club (hereinafter "Respondent") challenged the modification to Patriot's NPDES permit to the EQB and the EQB issued a stay, thereby ending work at the mine pending the EQB's Final Order. Patriot and WVDEP argue that the EQB erroneously ruled that WVDEP was obligated to impose limits on discharges of conductivity, sulfate, and total dissolved solids (hereinafter "TDS").

Except in compliance with various provisions of the statute, the discharge of any pollutant into waters of the United States is prohibited by section 301(a) of the Federal Water Pollution Control Act (hereinafter "CWA"), U.S.C. § 1311(a). The U.S. Environmental Protection Agency (hereinafter "EPA") administers the CWA through the NPDES. In the West Virginia Water Pollution Control Act (hereinafter "WPCA"), W.Va. Code § 22-11-1, *et seq.*, the state legislature authorized 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). The legislature further entrusted in WVDEP the authority to establish and implement procedures that "have the potential to affect water quality." W. Va. Code § 22-11-7b(a).

In West Virginia, water quality standards are established by WVDEP. W.Va. Code § 22-11-7b. These standards act to preserve varying stream uses. W.Va. St. R. § 47-2-6. Numeric and narrative standards are relevant to protect aquatic life. Neither West Virginia nor the EPA has adopted numeric standards for conductivity, TDS or sulfate. West Virginia's narrative standards, in pertinent part, provide that:

[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.

47 C.S.R. § 2-3.2. WVDEP argues that none of the operative words or phrases contained in these narrative criteria are defined anywhere in WPCA or legislative rule.

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, WVDEP implements the "West Virginia Stream Condition Index" (hereinafter "WVSCI") to assist in the regulation of narrative standards in determining whether narrative criteria have been exceeded.

In order to comply with the EQB's Final Order, WVDEP would have to determine the specific levels of conductivity, TDS, and sulfate that have reasonable potential to cause or contribute to an excess of narrative criteria. WVDEP concedes that it is impossible to establish a numeric benchmark that will ensure the protection of the narrative criteria. Although the EQB commanded WVDEP to establish effluent limits for conductivity, TDS, and sulfate, they failed to explain through what CWA mechanism it was regulating these parameters, mention WVSCI, or explain a basis which to proceed. Additionally, while the EQB rejected Respondent's proposed effluent limits, they provided no clear guidance on how to contrive these effluent limits.

An agency's findings of fact and conclusions of law must be reasoned, articulate the underlying evidentiary facts which lead to the conclusion, and explain any complex, statistical, or economic evidence. *Citizens Bank of Weirton v. W.Va. Bd. Of Banking and Fin. Inst.*, 160 W.Va. 220, 229, 233 S.E.2d 719, 725 (1977). Moreover, when a contested case in front of an administrative agency involves complex scientific matters which cannot adequately be evaluated by laymen, the West Virginia Supreme Court has found that every

final order or decision should contain:

(1) the agency's basic value judgments which are dictated by its interpretation of the statutory purposes; (2) the random facts which have been presented to the agency in support of various positions which the agency determines to be relevant to the agency decision; (3) the methodology by which those facts have been evaluated, i.e., credibility of witnesses, validity of tests and statistical data, accuracy of expert predictions, etc.; (4) an integrating theory which organizes the random evidentiary facts in an intelligent and comprehensible way; and, (5) a conclusion based upon the theory developed, supported by the facts, concerning whether a proposed action is in furtherance of the purposes set forth in the statute, along with an explanation of any change in agency policy from former practice.

Citizens Bank of Weirton v. W.Va. Bd. of Banking and Fin. Inst., 160 W.Va. 220,229-30, 233 S.E.2d 719, 725-726 (1977).

It is apparent that this case involves complex facts and policy making coupled with scientific matters which require a more detailed explanation of the methodology utilized in the EQB's evaluation. After reviewing the Petition, the entire record, and the applicable legal authority, this Court finds that the EQB failed to set forth a reasoned and articulate decision that can be subject to effective judicial review.

RULING

This Court **ORDERS** the following. This case is **REMANDED** with the following directions: the EQB shall provide written supplemental findings detailing a reasoned and articulate decision in the Final Order. Additionally, these findings should include guidance to calculate threshold values for regulating conductivity, TDS, and sulfate. This matter is **DISMISSED** and **STRICKEN** from the docket of the Court. The Clerk of the Court shall send copies of this Order to all counsel of record:

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Enter this Order the 20th Day of September 2011.


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
DAY OF September 2011
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA