

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

POTOMAC RIVERKEEPER, INC.,
GERRARDSTOWN PRESBYTERIAN
CHURCH, and WASHINGTON HERITAGE
TRAIL, INC.,

Petitioners,

v.

Civil Action No. 12-AA-1
(Appeal Below 11-02-SMB)
Hon. John C. Yoder

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

Respondent,

and

NORTH MOUNTAIN SHALE, LLC

Intervenor-Respondent.

ORDER

FACTUAL AND PROCEDURAL BACKGROUND

On January 26, 2011, Thomas L. Clarke, Director, Division of Mining and Reclamation, West Virginia Department of Environmental Protection ("WVDEP") issued Permit No. Q-2004-08 ("Permit") to North Mountain Shale, LLC ("NMS") to conduct shale quarrying activities in Gerrardstown, Berkeley County, West Virginia. Certified Record Submitted in the Matter Below ("CR") at p. 1. As a condition of the Permit, NMS is required to conduct all quarrying operations "as described in and in compliance with the complete application and only on those lands specifically designated on the map(s) submitted." *Id.* On February 25, 2011, Potomac Riverkeeper, Inc., Gerrardstown Presbyterian Church, and Washington Heritage Trail, Inc. ("Petitioners") filed a notice of

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appeal with the Surface Mine Board ("SMB" or "Board") and raised a number of specific objections to WVDEP's issuance of the Permit.

The SMB held an evidentiary hearing in Martinsburg, West Virginia on June 6 and June 7, 2011 and an additional day of hearing on July 11, 2011 in Charleston, West Virginia. January 25, 2012 SMB Final Order at p. 1 ("Final Order") (unnumbered). Some of the issues raised by Petitioners below were decided via a directed verdict issued by the SMB at the hearing on June 7, 2011; and the remaining issues were decided in the Final Order. The Final Order affirmed the permit, with additional conditions to address Petitioners' concerns as follows:

1. NMS shall not remove more than five (5) truckloads of shale from the Permit area per working shift at Continental Brick Company's brick plant, with a maximum of two (2) shifts per day at the brick plant.
2. Above the 900' elevation mineral extraction limit already in the Permit, NMS shall not disturb the surface except as is reasonably necessary to construct stormwater diversion berms.
3. Exclusive of non-extraction areas such as ponds, stockpile areas and roads, NMS shall not expand its open and unreclaimed shale extraction areas beyond five (5) acres without first commencing reclamation on an area equivalent to any expansion beyond five (5) acres.
4. Consistent with the Permit requirements on Pages 16D, 16E, and 16G, North Mountain Shale shall actively reclaim wooded areas by planting between 400-450 stems per acre. North Mountain Shale shall actively plant grasses to reclaim hayfield/pasture areas consistent with the Permit.
5. In the first year of active mining, North Mountain Shale shall not disturb more than two (2) acres of the mineral area.
6. In the first year of active mining, North Mountain Shale shall not disturb more than one (1) acre of the topsoil storage area.
7. North Mountain Shale shall start its mining operation in the lower elevations of the southern pit, subject to the haulage and open pit restrictions.

Final Order at ¶ 34.

In seeking judicial review of the Final Order in this Court, Petitioners raise only two issues: (1) the SMB committed factual and legal error by concluding that the proposed sediment control structures will adequately control sediment discharges; and (2) the SMB committed legal error by preventing Petitioners from challenging WVDEP's decision regarding historic, cultural, and aesthetic impacts. Petitioners' Petition at pp. 9, 19. This Court held a hearing on October 23, 2012 to consider the parties' oral argument and ordered the parties to file proposed orders by December 1, 2012.

STANDARD OF REVIEW

In judicial review of the final order of an administrative body, the Court shall reverse, vacate or modify the order if the substantial rights of the petitioner 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 an abuse of discretion or clearly unwarranted exercise of discretion.

W.Va. Code § 29A-5-4(g). The Court reviews conclusions of law *de novo* and gives deference to findings of fact, reversing them only if they are clearly wrong or not supported by substantial evidence or a rational basis. *Martin v. Randolph Co. Board of Education*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995). The Court will not substitute its own judgment for that of the administrative body and will uphold findings of

fact unless they are clearly wrong. *Frank's Shoe Store v. West Va. Human Rights Comm'n*, 179 W.Va. 53, 56, 365 S.E.2d 251, 253-254 (1986). Furthermore, "credibility determinations are binding unless patently without basis in the record." *Martin*, 195 W.Va. at 304.

DISCUSSION

I. **The SMB did not commit factual and legal error by concluding that the proposed sediment control structures will adequately control sediment discharges**

The Final Order sets forth the evidentiary basis for its findings of fact regarding the adequacy of the sediment ponds to retain surface water to prevent sedimentation of local streams. Final Order at ¶¶ 21-24. As described in the Final Order, the SMB weighed the testimony of the witnesses called by Petitioners, WVDEP and NMS to testify on this issue and found WVDEP's and NMS's witnesses to be more credible than Petitioners' witness. *Id.* at ¶¶ 22-23. Petitioners' witness, although qualified as an expert in hydrology, had limited experience with surface water hydrology, was not familiar with the technical support documents he based his opinion on and conceded he did not know how the quarry would operate. *Id.* at ¶ 22. Conversely, the three witnesses called by Respondents had years of experience in the design and use of sediment ponds in the extractive industries. *Id.* at ¶ 23. Having ample evidence within the record to make the above credibility determination, the SMB's determination is binding upon the Court because it cannot be said it is without basis in the record. *Martin*, 195 W.Va. at 304.

Respondents' more credible witness testimony lead to the SMB's rational conclusion that "[t]he coal and quarrying industries have generally been able to meet

the total suspended solids limits imposed on NMS through the use of similarly sized retention ponds supplemented as needed with flocculants.” Final Order at ¶ 23. Petitioners’ challenge to this conclusion was based on less credible testimony; thereby, the SMB appropriately afforded less weight thereto and the Court is bound by that determination when supported in the record.

The Petitioners attempt to avoid the credibility issue by raising an issue with the notice of the use of flocculants.¹ However, this argument ignores and avoids the SMB’s *de novo* review authority. When a permit is appealed to the SMB, it reviews WVDEP’s decision *de novo*, meaning that in addition to the evidence considered by WVDEP in making its decision, the SMB is legally authorized to consider additional evidence outside of that administrative record. W.Va. Code § 22B-1-7(e); *WVDEP v. Kingwood Coal Co.*, 200 W.Va. 734, 745, 490 S.E.2d 823, 834 (1997).

In addition to WVDEP’s ability to make clarifications and correct deficiencies in the permit during the evidentiary hearing under *de novo* review, Petitioners had actual notice of the possible use of flocculants well before the evidentiary hearing. In the “Permit Supervisors’ Findings,” issued on July 14, 2010, and part of the certified record made available to Petitioners on March 17, 2011, the Permit Supervisor indicated that “[f]locculant may be needed for settling of clay material associated with the Martinsburg Shale formation and should work well with the ponds in series concept.” CR at p. 3.

¹ The Court notes that many arguments raised by Petitioners, including the argument that NMS was required to disclose its intent to use flocculants in its application for an NPDES permit, are not properly before the Court. The NPDES permit was not before the SMB nor could it be. Petitioners appealed the NPDES permit to the appropriate board, the Environmental Quality Board (“EQB”), and have appealed the EQB’s final order to the Circuit Court of Kanawha County, Civil Action No. 12-AA-28. Therefore, any failure of NMS to indicate in its NPDES permit application that it intended to use flocculants is not relevant to this proceeding.

Having known about the potential use of flocculants months before the evidentiary hearing, Petitioners had the opportunity to present evidence regarding the use thereof, and in fact, did present evidence at the hearing below. Unfortunately, Petitioners' own witness testimony established that the use of flocculants is an appropriate and safe method of reducing sediment discharges. Therefore, Petitioners have failed to show the predicate prejudice to their substantial rights necessary for the Court to reverse, vacate or modify the Final Order. W. Va. Code §29A-5-4(g); *Johnson v. W. Va. Dep't of Motor Vehicles*, 173 W.Va. 565, 569, 318 S.E.2d 616 (1984) (*per curiam*).

Based on the credible, extensive experience of WVDEP with mining and quarrying operations and WVDEP's knowledge that the use of flocculants is a common and an appropriate treatment method for sediment, the SMB's decision was not clearly wrong in light of the substantial evidence in the record, nor was it arbitrary and capricious or characterized by an abuse of discretion.

II. Petitioners were not prevented from challenging WVDEP's decision regarding historic, cultural and aesthetic impacts

Pursuant to W. Va. Code R. § 38-3-3.4.d, WVDEP is required to obtain approval from the State Historic Preservation Office ("SHPO") for projects with the potential to adversely affect any place listed on the National Register of Historic Places. The proposed quarry is located near Oban Hall, Prospect Hill and the Gerrardstown Historic District, all of which are on the National Register of Historic Places. Final Order at ¶ 19. Therefore, WVDEP sought SHPO's approval. *Id.* at ¶ 20. SHPO made a finding of "conditional no adverse effect," meaning that the proposed quarry would have no adverse effect on the historic resources, provided that certain conditions were added to

the quarry permit. CR at pp. 33-36. WVDEP added all of the conditions identified by SHPO to the permit. CR at p. 2.

At the conclusion of the Petitioners' case in chief, WVDEP moved for a directed verdict on numerous issues that were before the SMB, including the issue of the potential impacts of the quarry on historic, cultural, and aesthetic resources. The SMB granted in part and denied in part WVDEP's motion for a directed verdict. With regard to the impact of the quarry on the historic, cultural and aesthetic resources of the surrounding area, the SMB ruled that WVDEP had met the legal requirement contained in WVSCR § 38-3-3.4.d that it must obtain approval from SHPO for projects with the potential to adversely affect any place listed on the National Register of Historic Places. Final Order at ¶ 20. The SMB ruled only that WVDEP met its obligation under W. Va. Code R. § 38-3-3.4.d, not that SHPO's conclusion ended WVDEP's or the SMB's analysis of the potential impact of the quarry on historic, cultural or aesthetic resources.

Separate and apart from WVDEP's obligations under WVCSR § 38-3-3.4.d, the SMB pointed out that W.Va. Code § 22-4-8 establishes that a quarry permit can be denied if it would cause "destruction of aesthetic values." June 7, 2011 Hearing Transcript at p. 65. The SMB then specifically ruled that it wanted "to hear from the DEP and from [NMS] on how it intends to deal with the aesthetic issues." *Id.* at p. 66. Subsequently, WVDEP and NMS were required by the SMB to present extensive evidence regarding the potential impact of the quarry on the aesthetic resources of the surrounding area.

WVDEP conducted a viewshed analysis to determine the visual impact of the quarry on the surrounding area. Based upon the most realistic model, WVDEP

concluded that the visibility of the entire permitted area would be minimal. CR at p. 4. The SMB found this conclusion to be more credible because Petitioners' expert used a bare earth model which ignored reality by removing all trees and vegetation and assumed you could see through buildings. Final Order at ¶ 13. WVDEP's evidence was found to be even more credible because Petitioners' expert evaluated the viewshed with regards to mineral removal at a 1200' elevation when mining would only progress to a 900' elevation. *Id.* In addition to the parties' evidence regarding viewshed impacts, the SMB conducted a site visit as well. The SMB noted that based on its visit, it was evident that the view of the quarry site from most of the historic district is blocked by buildings. *Id.* Given the substantial evidence in the record, coupled with the SMB's on the ground observations, it was not clearly wrong for the SMB to find that viewshed impacts to historic, cultural and aesthetic resources would be minimal. *Id.* at ¶ 11.

In addition to the viewshed impacts, the SMB also addressed Petitioners' concerns regarding impacts to the historic, cultural and aesthetic resources caused by truck traffic. The SMB considered Petitioners' evidence and found it to be insufficient. Final Order at ¶ 8. Specifically, Petitioners' assumptions of the amount of truck traffic, without any attempt to quantify the impacts of truck haulage on historic, cultural and aesthetic resources, were insufficient. *Id.* at ¶ 19. However, in light of NMS's stipulation regarding the actual amount of truck traffic, the SMB modified the permit by conditioning the number of truckloads leaving the permit area per working shift at five per shift, two shifts per day. *Id.* at ¶¶ 8, 34(a). The SMB specifically held that this limited amount of truck traffic supported its finding that Petitioners failed to present sufficient evidence of potential impacts caused by the anticipated truck traffic.

Contrary to Petitioners' arguments, the SMB considered and addressed their concerns regarding potential impacts to historic, cultural and aesthetic resources by: 1) allowing Petitioners to present such evidence; 2) requiring WVDEP and NMS to put on evidence; and 3) conducting a site visit. This substantial evidence in the record supports the SMB's rational findings that the impact on historic, cultural and aesthetic resources would be minimal. Regardless of the substantial evidence in the record supporting the SMB's decision, the SMB went on to impose additional conditions directly addressing Petitioners' concerns regarding potential impacts to historic, cultural and aesthetic resources. Final Order at ¶ 34. It therefore cannot be said that the SMB's decision was arbitrary and capricious or characterized by an abuse of discretion because Petitioners had adequate opportunity to present their case regarding impacts to historic, cultural and aesthetic resources.

CONCLUSION

WHEREFORE, for the foregoing reasons, the SMB was not clearly wrong in light of the substantial evidence in the record nor was its decision arbitrary and capricious or characterized by an abuse of discretion. Substantial evidence in the record below supports the SMB's rational decision to affirm WVDEP's issuance of Permit No. Q-2004-08 to NMS. Petitioners have also failed to show the predicate prejudice to their substantial rights because many of Petitioners' concerns are addressed by the conditions imposed by the SMB. The Court declines to substitute its judgment for that of the SMB and accordingly, the decision of the SMB is hereby **AFFIRMED** and this matter is stricken from the Court's docket.

The Clerk is hereby ORDERED to provide copies of this order to all counsel of record.

ENTER this ORDER the 20th day of December, 2012.

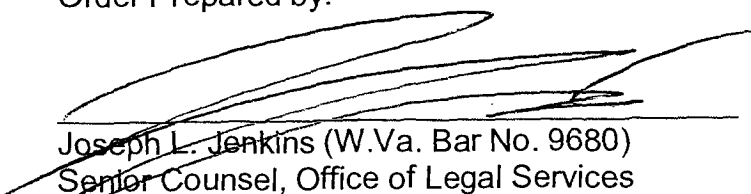

Honorable John C. Yoder

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Virginia M. Sine
Clerk Circuit Court

By: 
Deputy Clerk

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