

14-0247

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

2014 JUN 15 PM 4: 16

ALEX ENERGY, INC.

Petitioners,

and

THOMAS L. CLARKE,
Director, Division of Mining and Reclamation,
West Virginia Department of Environmental
Protection,

Appellee Below,

v.

WEST VIRGINIA HIGHLANDS
CONSERVANCY and SIERRA
CLUB,

Respondents.

Civil Action No. 13-AA-132
Judge Tod J. Kaufman

RECEIVED
6/17/14

APPEAL FROM THE
ENVIRONMENTAL QUALITY BOARD
Appeal No. 12-33-EQB

FINAL ORDER

Before the Court is the Petitioner's Petition for Appeal filed on September 30, 2013,
appealing the Environmental Quality Board's decision.

FINDINGS OF FACT

Background and Procedural History:

1. The Peachorchard Surface Mine is a surface coal mining facility located in the Twentymile Creek of the Gauley River and Buffalo Creek of the Elk River watersheds and operated by Alex Energy, Inc. ("Alex"). C.R. at 4.
2. The West Virginia Department of Environmental Protection ("WVDEP") issued WV/NPDES Permit WV1024809 ("the permit"), to Alex on August 21, 2012. C.R. at 4.

3. WV/NPDES Permit WV1024809 authorizes discharges from thirty-seven on-bench outlets into Twentymile Creek, Beech Fork, and their unnamed tributaries. Tr. 36:5-8 (Hansen Direct); Appellants' (hereinafter "Aplt.") Ex. 4; C.R. at 4.

4. The permit does not contain an enforceable effluent limit for selenium on any outlets. C.R. at 5-41, 57.

5. Appellants filed a Notice of Appeal of WV/NPDES Permit WV1024809 on September 19, 2012.

6. The West Virginia Environmental Quality Board ("Board") held a hearing on March 14, 2012, at which the parties presented testimonial and documentary evidence.

7. The Board used its role as fact-finder to credit the testimony of Evan Hanson, which established that discharges from the Peachorchard Surface Mine have a reasonable potential to cause or contribute to exceedances of the selenium water quality standard under the Selenium Guidance. Final Order, p. 9.

8. The Board unanimously found that WVDEP's issuance of the permit was unlawful because the permit failed to include enforceable effluent limits sufficient to ensure compliance with West Virginia's selenium water quality standards. Final Order, p. 6, 13.

9. Alex filed a petition for judicial review of the Board's decision on August 29, 2013.

Selenium

10. West Virginia maintains a chronic water quality standard for selenium of 5 µg/L and an acute water quality standard for selenium of 20 µg/L. 47 CSR 2, App'x. E, Table 1.

11. The Selenium Implementation Guidance from the Division of Mining and Reclamation Permit Handbook, Aplt. Ex. 8, (hereinafter “Selenium Guidance”) is the policy of WVDEP. Tr. 116:3-5 (Parsons Cross).

12. The Selenium Guidance is not a legislative rule authorized by the West Virginia Legislature, nor did it go through the proper procedures to become an interpretive or procedural rule.

Coal Seams

13. The Selenium Guidance states that a “proposed activity will initially be deemed to have” a reasonable potential if the “proposed mining is in the Winifrede to Upper No.5 Block coal seam interval” as defined by the West Virginia Geologic and Economic Survey. Aplt. Ex. 8.

14. The Winifrede to Upper No.5 Block coal seam interval includes the Winifrede, Coalburg, Stockton, Upper Mercer, Stockton A, No. 5 Block, and Upper No. 5 Block seams. Aplt. Ex. 6.

15. The Peachorchard Surface Mine is permitted to mine the Coalburg and Stockton coal seams. C.R. at 4; Tr. 33:13-16 (Hansen Direct).

Impaired Receiving Stream

16. The Selenium Guidance states that a “proposed activity will initially be deemed to have” a reasonable potential if “the receiving stream for a proposed discharge is listed on the operable Section 303(d) List for use impairment related to selenium.” Aplt. Ex. 8.

17. Twentymile Creek, a direct receiving stream for the Peachorchard Surface Mine, has been identified by WVDEP as impaired for selenium in its Draft 2012 303(d) list that WVDEP submitted to the U.S. Environmental Protection Agency for approval. Aplt. Ex. 13.

18. The Draft 2012 303(d) list that WVDEP submitted to the U.S. Environmental Protection Agency for approval is the current list of impaired streams in West Virginia. Tr. 60:10-12 (Wirts Redirect).

19. The data used by WVDEP to determine impairment was in WVDEP's possession as of July 2011. Tr. 60:18-22 (Wirts Redirect).

20. The 2012 303(d) list is the operable 303(d) list that WVDEP must consider in its permitting decisions. Final Order, p. 5; Tr., p. 140 (Parsons).

Core Hole Sampling

21. The Selenium Guidance states that “[s]urface and deep mining operations initially deemed to have potential to cause or contribute to selenium water quality criteria violations may be required to perform overburden sampling....If the total selenium concentration of any strata is equal to or greater than 1 mg/kg, then the activity will be deemed to have reasonable potential to violate selenium WQC...” Aplt. Ex. 8.

22. Core hole sampling for the Peachorchard Surface Mine revealed selenium concentrations in coal and rock strata above 1 mg/kg, with multiple samples showing concentrations over 4 mg/kg. C.R. at 362-66; Tr. 56:13-17.

No Reasonable Potential Analysis

23. The Selenium Guidance states, “Applicants not wishing to implement the described procedures must provide additional testing of materials, alternative handling procedures, historical water quality or other data that demonstrates there is no reasonable potential to violate the selenium WQC.” Aplt. Ex. 8.

24. There is no debate over whether an applicant has the opportunity to demonstrate that there is no reasonable potential to violate the selenium water quality criteria.

25. The permit record and hearing testimony do not include any evidence that Alex Energy submitted any additional information in the NPDES application process to demonstrate that a reasonable potential did not exist.

26. Neither Alex nor WVDEP provided additional information to the Board that demonstrated that there was no reasonable potential for the Peachorchard Mine to violate selenium water quality standards.

27. The permit record includes no evidence that WVDEP performed a reasonable potential analysis for selenium, despite the above-described information available to the permit writer which shows a reasonable potential under the Selenium Guidance. C.R. at 58; Tr. 34:14 (Hansen Direct).

CONCLUSIONS OF LAW

Standard of Review/Burden of Proof

1. This Court reviews questions of law de novo. Muscatell v. Cline, 196 W.Va. 588, 594 (1996).

2. The Court must accord deference to the findings of fact made by the Board, unless clearly erroneous. Noble v. W. Virginia Dept. of Motor Vehicles, 223 W. Va. 818, 821 (W.Va. 2009); see also Frymier-Halloran v. Paige, 193 W.Va. 687, 695 (W.Va. 1995).

3. This Court may reverse, vacate or modify the order of the Board only:

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; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (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.

W.Va. Code §29A-5-4(g).

Deference to WVDEP

4. WVDEP's interpretation of the Selenium Guidance is not due Chevron deference.

See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984);

Appalachian Power Co. v. State Tax Department, 195 W.Va. 573, 582 (1995).

5. The Board was at most required to give WVDEP's interpretation of the Selenium Guidance the deference commanded by its inherent persuasiveness. See Appalachian Power Co. v. State Tax Department, 195 W.Va. 573, 582 (1995).

6. The Board gave the proper consideration to WVDEP's interpretation of the Selenium Guidance.

Sufficiency of the Permit to Ensure Protection of State Water Quality Standards

7. Under the Selenium Guidance, the Peachorchard Surface Mine has a reasonable potential to cause or contribute to violations of the selenium water quality standards.

8. The permit issued on August 21, 2012 does not comply with the Selenium Guidance and therefore should not have been issued by WVDEP without immediately effective and enforceable effluent limitations of the selenium concentrations in discharges regulated by the permit.

9. The Selenium Guidance provides that a proposed activity should be presumed to have a reasonable potential to violate selenium water quality criteria if any of the following are met: 1) the mining is in the Winifrede to Upper No. 5 Block Coal seam interval, 2) site-specific or adjacent water quality data (associated with mining in the same geologic strata) shows selenium concentrations of 5 µg/l or greater, 3) the receiving stream is listed on the Section

303(d) List for selenium impairment, or 4) there is a selenium Total Maximum Daily Load for the receiving or downstream waters. Only one of these criteria must be met for an initial reasonable potential conclusion. Aplt. Ex. 8.

10. WV/NPDES Permit WV1024809 meets at least the first and third of the guidance policy's criteria for determining initial reasonable potential. Accordingly, WVDEP should have determined that the mine has a reasonable potential.

11. The presumption of reasonable potential established by the above criteria can be overcome through appropriate core sampling. "If the total selenium concentration of any strata [tested from the core sample] is equal to or greater than 1 mg/kg, then the activity will be deemed to have reasonable potential to violate selenium WQC. . ." Aplt. Ex. 8.

12. Many strata tested from core samples have total selenium concentrations of greater than 1 mg/kg. Consequently, the activity has a reasonable potential to violate selenium water quality standards.

13. "The WV/NPDES Permit for any activity determined to have reasonable potential to cause or contribute to selenium exceeding the current WQC will include selenium effluent limitations and self-monitoring requirements," and a selenium encapsulation plan must be implemented. Aplt. Ex. 8

14. Evidence presented at the hearing demonstrates that, based on the WVDEP Selenium Guidance, there is a reasonable potential for discharges authorized under the permit to cause or contribute to violations of the numeric water quality standard for selenium.

15. The WVDEP Selenium Guidance provides that "[a]pplicants not wishing to implement the described procedures must provide additional testing of materials, alternative handling procedures, historical water quality or other data that demonstrates there is no

reasonable potential to violate the selenium WQC.” Aplt. Ex. 8. Neither Alex Energy nor WVDEP provided such additional information in the NPDES permitting process nor did they demonstrate in the proceedings before the Board that there is no reasonable potential to violate the selenium water quality standard.

16. WVDEP failed to follow its own Selenium Guidance, despite the Peachorchard Surface Mine operating in high selenium seams, a receiving stream’s impairment for selenium as determined by WVDEP, and core samples from the mine with concentrations of selenium above 1 mg/kg.

17. Given that Sierra Club has provided sufficient evidence to support a finding that WVDEP erred in the permitting process, the burden is on Alex and WVDEP to produce evidence demonstrating that WVDEP’s permitting decision was correct. See Wetzel County Solid Waste Auth. V. Chief, Office of Waste Management, Div. of Env’tl. Protection, Civil Action No. 95-AA-3 (Circuit Court of Kanawha County, 1999).

18. Alex has not met its burden to produce evidence demonstrating that WVDEP’s permitting decision was correct.

19. A reasonable potential analysis performed on the Peachorchard Surface Mine would have shown that each outfall has the reasonable potential to cause or contribute to selenium water quality violations.

20. The CWA and its implementing regulations require that the limits WVDEP places in an NPDES permit must ensure compliance with all applicable water quality standards. See 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1).

21. The WV/NPDES rules for coal mining facilities specifically apply and carry out this federal requirement, stating “The discharge or discharges covered by a WV/NPDES permit

are to be of such quality so as not to cause violation of applicable water quality standards adopted by the Department of Environmental Protection, Title 47, Series 2.” 47 C.S.R. § 30-5.1.f. See also 47 C.S.R. § 30-3.2.a.7 (“A WV/NPDES permit may not be issued . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states”); id. § 30-6.2.c (requiring permits to include “[a]ny more stringent requirements necessary to achieve water quality standards”).

22. The U.S. Court of Appeals for the District of Columbia Circuit has observed, “the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits.” American Paper Institute, Inc. v. U.S. E.P.A., 996 F.2d 346, 350 (D.C. Cir. 1993).

23. When issuing a WVNPDES permit, DEP is required to ensure that the effluent limits in the permit “control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which [DEP] determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.” 40 C.F.R. § 122.44(d)(1)(i).

24. In conducting this “reasonable potential” analysis, DEP must “use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.” 40 C.F.R. § 122.44(d)(1)(ii).

25. For those pollutants for which the state has promulgated a numeric standard, should DEP determine that there is a reasonable potential that a discharge will “cause[], ha[ve]

the reasonable potential to cause, or contribute[] to an in-stream excursion above the allowable ambient concentration . . . , the permit must contain effluent limits for that pollutant.” 40 C.F.R. § 122.44(d)(1)(iii).

26. A reasonable potential finding does not require proof that water quality standards will be violated.

27. The inclusion in the permit of report-only monitoring requirements for selenium is inadequate because those monitoring requirements are not enforceable effluent limits.

28. The permit is unlawful because it fails to include enforceable selenium effluent limits sufficient to ensure protection of West Virginia’s numeric water quality standards.

The Final Order of the Board

29. The Board adequately identified the evidence that contributed to its final decision.

30. If the Board’s finding that “selenium limits in the Permit would not constitute an undue burden on [Alex]” Final Order, p. 13, were error, it would constitute harmless error. *See W. Va. Code §29A-5-4(g)* (conditioning relief on the prejudice of substantial rights).

31. The Board’s finding that, “the permit cannot ensure compliance with all applicable state water quality standards, specifically the numeric chronic selenium standard, as required by law,” Final Order, p. 13, is a sufficient finding of reasonable potential.

32. The Board properly concluded that the Permit must contain effluent limits for selenium.

RULING

For the above reasons, the Court hereby **AFFIRMS** the Final Order of the Environmental Quality Board. The Board correctly remanded the Permit to WVDEP to apply enforceable numeric effluent limits on selenium on all outfalls. The record shows that the Board considered

all of the evidence before it, and reached a reasoned and unanimous decision. Petitioner has failed to establish that any of the findings of fact made by the Board in its Final Order are "clearly wrong." Noble v. W. Virginia Dept. of Motor Vehicles, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009). Accordingly, this Court AFFIRMS the Board's Final Order and its instructions to WVDEP. This case is hereby DISMISSED and STRICKEN from the docket of the Circuit Court.

The Circuit Clerk shall send a certified copy of this Order to all counsel of record:

Douglas Crouse, Esquire
500 Lee St. East
Suite 1600
Charleston, WV 25301

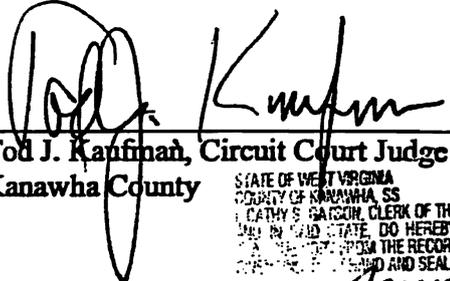
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Enter this Order this 15 day of January, 2014.



Todd J. Kaufman, Circuit Court Judge for
Kanawha County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND BY SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY OF THE RECORDS OF SAID COURT
AND SEAL OF SAID COURT THIS 16th
DAY OF January 2014

Cathy S. Gatson, CLERK
COUNTY OF KANAWHA, WEST VIRGINIA