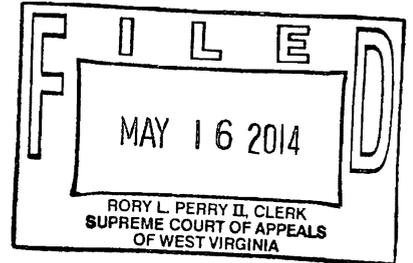


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0247



**ALEX ENERGY, INC.,
Petitioner, (Petitioner Below),**

v.

**WEST VIRGINIA HIGHLANDS CONSERVANCY,
and SIERRA CLUB
Respondents (Respondents Below).**

**(Appeal from a final order of the Kanawha County Circuit Court
Civil Action No. 13-AA-132)**

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE EQB ADEQUATELY IDENTIFIED THE EVIDENCE THAT CONTRIBUTED TO ITS FINAL DECISION.
2. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE EQB MADE A SUPPORTABLE FINDING OF REASONABLE POTENTIAL.
3. THE CIRCUIT COURT ERRED WHEN IT FAILED TO CONSIDER AN ABUNDANCE OF EVIDENCE RELATED TO WVDEP'S SELENIUM GUIDANCE THAT THE EQB IGNORED WITHOUT EXPLANATION.
4. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE EQB GAVE PROPER CONSIDERATION TO WVDEP'S INTERPRETATION OF WVDEP'S SELENIUM GUIDANCE.

STATEMENT OF THE CASE

In August 2012, the West Virginia Department of Environmental Protection (“WVDEP”) issued a West Virginia National Pollutant Discharge Elimination System (“NPDES”) permit to Alex Energy, Inc. (“Alex”), under the Clean Water Act (“CWA” or “the Act”). A.R. 1.¹ Alex’s permit, known as NPDES Permit No. WV1024809 (the “permit”), allows Alex to discharge runoff from rainfall after it passes through sediment control ponds or sumps pursuant to the West Virginia Water Pollution Control Act, W. Va. Code § 22-11-1, *et seq.* These discharges are controlled by “effluent limits” imposed on the concentrations of substances such as iron and manganese which are generally associated with mining-related disturbance.

Upon WVDEP’s issuance of the permit, the Sierra Club and West Virginia Highlands Conservancy appealed WVDEP’s decision to the West Virginia Environmental Quality Board (“EQB” or “the Board”), contending that WVDEP improperly failed to include enforceable effluent limits for selenium. A.R. 3-4. The Sierra Club alleged that WVDEP did not perform an adequate analysis to determine whether there was a “reasonable potential” that Alex

¹ References to the Appendix Record – the contents of which were agreed to by the parties – are set forth as “A.R. ___.”

would discharge selenium at levels violating West Virginia's water quality standards. That appeal was docketed before the Board as "Appeal No. 12-33-EQB." A.R. 1.

A. Legal Background

The CWA prohibits "the discharge of any pollutant by any person" unless it is consistent with the requirements of the Act. 33 U.S.C. §§ 1251(a), 1311(a). One of those requirements is Section 402, which authorizes the U.S. Environmental Protection Agency ("EPA") to issue permits for pollutant discharges from point sources, which include sediment ponds and other conveyances at surface coal mines. 33 U.S.C. §§ 1342, 1362(14). EPA has approved West Virginia's Section 402 permitting program under the CWA, and permits in West Virginia are issued by WVDEP under the West Virginia Water Pollution and Control Act. 47 Fed. Reg. 22,363 (May 24, 1982); W. Va. Code § 22-11-4. Like the federal program, the West Virginia program prohibits discharges unless they are authorized by a Section 402 permit, also known as an NPDES permit. W. Va. Code § 22-11-8.

NPDES permits contain numerical limits called "effluent limitations" that restrict the amounts or concentrations of specified substances that may be discharged by a permittee. NPDES permits must contain effluent limits sufficient to maintain the receiving streams' compliance with state "water quality standards." 33 U.S.C. §§ 1311(b)(1)(C), 1342(a); 40 C.F.R. § 122.44(d)(1); 47 C.S.R. §§ 10-6.1 – 6.3.d. This federal requirement is applicable to approved state programs. 40 C.F.R. § 123.25(a)(15).

Pursuant to the federal regulations applicable to West Virginia's NPDES program, WVDEP must apply effective effluent limits to NPDES permits for any pollutants (such as selenium) deemed to have a "reasonable potential" to cause or contribute to violations

of State water quality standards. 40 C.F.R. § 122.44(d)(1)(i)-(iii) (applicable to state NPDES programs pursuant to 40 C.F.R. § 123.25).

WVDEP has developed a “Selenium Implementation Guidance” document establishing permitting procedures for determining whether a permit has the reasonable potential to cause or contribute to selenium water quality criteria violations. A.R. 424-428. The Guidance provides that “[m]ining activities initially deemed to have the potential to cause or contribute to selenium violations will be required to provide information, as set forth below in Section 1.” A.R. 425. Section 1 of the Guidance provides a four-factor analysis to determine whether a proposed activity will be initially deemed to have a reasonable potential for selenium exceedances. A.R. 426.

The Guidance’s four-factor analysis includes the following: 1) the proposed mining is in the Winifrede to Upper No. 5 Block coal seam interval; or 2) site-specific or adjacent water quality data (associated with mining in the same geologic strata) shows concentrations equal to or more than 5 µg/l; or 3) the receiving stream for a proposed discharge is listed on the operable Section 303(d) List for use impairment related to selenium; or 4) there is an approved selenium Total Maximum Daily Load for the receiving stream or downstream waters that mandates regulation of selenium in the discharges from the activity. A.R. 426.

However, the Guidance also 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.” A.R. 425.

Permitting decisions made by WVDEP, including decisions about what effluent limits to include in an NPDES permit, may be appealed to the EQB. West Virginia Code

§ 22B-1-7 provides that “[a]ny person authorized by statute to seek review of an order, permit or official action of the ... chief of mining and reclamation, ... may appeal to the ... environmental quality board ... in accordance with this section.” The EQB hears such appeals *de novo*, which means that it acts independently on the evidence before it. W. Va. Code § 22B-1-7(e); *see also* Syll. Pt. 2, *W. Va. Div. of Env’tl. Prot. v. Kingwood Coal Co.*, 200 W. Va. 734, 736, 490 S.E.2d 823, 825 (1997) (“Appeals of a final agency decision issued by the director of the division of environmental protection shall be heard *de novo* ... as required by W. Va. Code § 22B-1-7(e) [1994].”). When reviewing an NPDES permit, the EQB is empowered to “make and enter a written order affirming, modifying or vacating the order, permit or official action of the chief or secretary, or shall make and enter such order as the chief or secretary should have entered.” W. Va. Code § 22B-1-7(g)(1).

B. Procedural History

The EQB held a hearing on the permit challenge on March 14, 2013. Over the course of the hearing, the focus of the testimony and evidence concerned the application of WVDEP’s Selenium Guidance to the underlying facts related to Alex’s permit. Alex and WVDEP conceded that the first factor under Section 1 as well as the Section 2 of the Guidance applied to Alex’s permit. A.R. 37-38. Nonetheless, Alex and WVDEP offered information to rebut any presumption of a reasonable potential as set forth in the Guidance. This information included data from adjacent mining operations that did not indicate selenium exceedances as well as evidence that the mining methods to be employed by Alex and the nature of the precipitation-induced outlets at the Peach Orchard Mine would further limit the possibility that selenium-laden material would be discharged. A.R. 38-41, 71-72.

The Board issued its written Final Order on August 29, 2013. A.R. 1-17. The Order provided little to no analysis regarding how WVDEP applied its Selenium Guidance in relation to Petitioner's Permit. Its ultimate conclusion requires WVDEP to place enforceable effluent limits for selenium on Petitioner's Permit without explaining how the Guidance mandates such a result.

Petitioner appealed the EQB's final order to the Circuit Court of Kanawha County. The appeal was docketed as Civil Action No. 13-AA-132 and assigned to Judge Tod J. Kaufman. A.R. 853. Judge Kaufman issued a Final Order on January 15, 2014, adopting the Respondents' proposed findings of fact and conclusions of law verbatim and affirming the EQB's final order. A.R. 18-28.

Petitioner appealed the Circuit Court's January 15, 2014, Final Order and now respectfully requests that the Court reverse Judge Kaufman's Final Order as well as the EQB's Final Order.

SUMMARY OF ARGUMENT

The Board's Final Order did not examine whether there is a "reasonable potential" to cause selenium exceedances. Rather than grapple with the parties' opposing arguments, the Board simply concluded that imposing effective selenium limits upon Alex's permit would not constitute an "undue burden." The Board chose a path of convenience instead of conducting a thorough examination of the evidence and rendering a well-reasoned decision. Accordingly, the Circuit Court's conclusion that the Board adequately identified the evidence that contributed to its final decision is incorrect and contrary to the relevant statute and binding precedent of this Court interpreting that statute.

This Court has held that “in every contested case, W. Va. Code § 29A-5-3 (1964) contemplates a decision in which the agency sets forth the underlying evidentiary facts which lead the agency to its conclusion, along with an explanation of the methodology by which any complex scientific, statistical, or economic evidence was evaluated.” *Citizens Bank of Weirton v. W. Va. Bd. of Banking and Fin. Inst.*, 160 W. Va. 220, 230, 233 S.E.2d 719, 727 (1977). This Court has also held that “[t]he purpose [of W. Va. Code § 29A-5-3] is to allow a reviewing court (and the public) to ascertain that the critical issues before the agency have indeed been considered and weighed and not overlooked or concealed.” *Muscatell v. Cline*, 196 W. Va. 588, 598, 474 S.E.2d 518, 528 (1996).

The Circuit Court also erred when it concluded that the EQB had made a sufficient finding of reasonable potential. The only finding that the Board made with respect to whether a reasonable potential existed was its conclusory statement that “the permit cannot ensure compliance with all applicable state water quality standards, specifically the numeric chronic selenium standard, as required by law.” A.R. 13. The Board’s conclusory statement merely restated statutory language without explaining how that conclusion was derived from the evidence. Instead of making an affirmative finding of reasonable potential that was based on evidence, the Board imposed effective selenium limits on Alex because it did not believe that limits would be an “undue burden.” *Id.* This conclusion is inconsistent with the law.

Furthermore, the Circuit Court ignored several pieces of evidence presented by Alex and WVDEP relating to the application of the Selenium Guidance. The Board dismissed this evidence without explanation. This Court has held that an “agency must rule on the issues raised by the opposing parties with sufficient clarity to assure a reviewing court that all those findings have been considered and dealt with, not overlooked or concealed.” *Muscatell v. Cline*,

196 W. Va. 588, 598, 474 S.E.2d 518, 528 (1996) (citation omitted). The Circuit Court did not explain why the Board's dismissal of Alex and WVDEP's evidence was not clearly erroneous.

Finally, the Board failed to consider WVDEP's interpretation of the Selenium Guidance. The Circuit Court concluded that the Board "gave the proper consideration to WVDEP's interpretation" of the Guidance, but the Board gave no consideration at all. This is also inconsistent with the law. *See Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 583, 466 S.E.2d 424, 434, n.7 (1995) ("We are obligated to give appropriate consideration to all agency interpretations ... To say that we give it 'no deference' implies that we do not even consider the interpretation, which is not the case.").

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument under R.A.P. 19 is appropriate in this case because it involves assignments of error in the application of settled law as well as an unsustainable exercise of discretion where the law governing that discretion is settled. The Circuit Court's decision, adopting verbatim the Sierra Club's proposed findings of fact and conclusions of law, implicates the West Virginia Administrative Procedures Act as well as a prior decision of this Court requiring an agency's findings of fact and conclusions of law to be reasoned and articulate, explaining the underlying facts and evidence that serve as the basis of the agency's final decision. W. Va. Code § 29A-5-3; *Citizens Bank of Weirton v. W. Va. Bd. of Banking and Fin. Inst.*, 160 W. Va. 220, 229-31, 233 S.E.2d 719, 725-727 (1977). Because of the need for clarification regarding the application of law in similar circumstances, a memorandum opinion is not appropriate in this case.

STANDARD OF REVIEW

This Court reviews decisions by the circuit court in an administrative appeal *de novo*. *Hominy Creek Pres. Ass'n, Inc. v. W. Va. Dep't of Env'tl. Prot.*, 230 W. Va. 151, 737 S.E.2d 48, 52 (2012) (citing *Tennant v. Callaghan*, 200 W. Va. 756, 761, 490 S.E.2d 845, 850 (1997)). In conducting that review, this Court is subject to the same governing standards of review that controlled the circuit court's actions. *Id.* (citing *Kingwood Coal*, 200 W. Va. at 736, 490 S.E.2d at 825).

Those standards are:

Upon judicial review of a contested case under the West Virginia Administrative Procedure[s] Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court 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, decisions 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.”

Id. at 52-53 (quoting Syllabus Point 2 of *Shepardstown Volunteer Fire Department v. State ex rel. State of West Virginia Human Rights Commission*, 172 W. Va. 627, 309 S.E.2d 342 (1983)).

ARGUMENT

I. THE CIRCUIT COURT ERRONEOUSLY CONCLUDED THAT THE EQB ADEQUATELY IDENTIFIED THE EVIDENCE THAT CONTRIBUTED TO ITS FINAL DECISION.

During the evidentiary hearing the parties presented evidence and testimony entirely related to WVDEP's application of its Selenium Guidance to Alex's Permit, which

formed the basis of the Sierra Club's appeal. Yet, the Board's Final Order neither applied the Guidance nor otherwise found that a reasonable potential existed. In fact, the Board's ultimate conclusion was completely beyond the scope of both the Guidance and the testimony presented at the hearing. Rather than apply the underlying facts and evidence to the Guidance, the Board simply concluded that "selenium limits in the Permit would not constitute an undue burden on [Alex]...." A.R. 13. The Board failed to explain how the evidence informed its conclusion or why it chose not to issue its decision within the context of the Selenium Guidance.

The West Virginia Administrative Procedures Act, W.Va. Code § 29A-5-3, requires that "[f]indings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." The West Virginia Supreme Court has made clear that an agency's findings of fact and conclusions of law must be reasoned and articulate, and must explain the underlying facts and evidence that serve as the basis of the agency's final decision. *Citizens Bank of Weirton v. W. Va. Bd. of Banking and Fin. Inst.*, 160 W.Va. 220, 229-231, 229-31, 233 S.E.2d 719, 725-727 (1977). An agency order can only be upheld "on the same basis articulated in the order by the agency itself," and not by any *post-hoc* rationalizations or explanations. If the grounds the agency provides are "inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Webb v. W. Va. of Med.*, 212 W.Va. 149, 158, 569 S.E.2d 225, 234 (2002).

Even if evidence in the record ultimately supports an administrative agency's order, the order cannot be upheld by a reviewing court unless the agency clearly shows how their order was derived from the evidence. The West Virginia Supreme Court has ruled that "a court cannot uphold a decision by an administrative agency ... if, while there is enough evidence in the

record to support the decision, the reasons given by the trier of fact do not build an accurate and logical bridge between the evidence and the result.” *Preston Mem’l Hosp. v. Palmer*, 213 W. Va. 189, 193, 578 S.E.2d 383, 387 (2003) (quoting *In re Queen*, 196 W.Va. 442, 447, 473 S.E.2d 483, 488 (1996)). Therefore, “[i]f there is a direct conflict in the critical evidence ... the agency may not elect one version of the evidence over the conflicting version unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering the decision capable of review by an appellate court.” *Choma v. W. Va. Div. Motor Vehicles*, 210 W.Va. 256, 259, 557 S.E.2d 310, 313 (2001), *overruled on other grounds by Miller v. Epling*, 229 W.Va. 574, 729 S.E.2d 896 (2012) (quoting *Muscatell v. Cline*, 196 W.Va. 588, 598, 474 S.E.2d 518, 528 (1996)).

Here, rather than apply the evidence and testimony to WVDEP’s Selenium Guidance, the Board chose the easy route and simply rationalized that effective selenium limits would not constitute an “undue burden” on Alex. A.R. 13 (“The Board finds that if a material handling plan will prevent discharge of selenium, as argued by the Appellee and Intervenor, then selenium limits in the Permit would not constitute an undue burden on the Intervenor since the Permit already requires ‘monitor only’ limits”); A.R. 6 (“If a materials handling plan will fix any potential problem and prevent potential violation of the selenium water quality criteria then there should be no problem with including an enforceable limit in the Permit as a safety net to prevent future violations of the water quality criteria for selenium in the stream”). The Sierra Club conceded that this finding is not related to the Guidance or the evidence presented to the Board. A.R. 131. Yet, the Circuit Court adopted the Sierra Club’s proposed conclusion that “[i]f 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.” A.R. 27.

However, the Board's opinion that selenium limits would not be an "undue burden" on Alex is a material finding because it is the Board's only real articulation of the reasoning behind its decision. As such, it is a prejudicial error that harms Alex.

Contrary to the Circuit Court's Final Order, the EQB did not "adequately identif[y] the evidence that contributed to its final decision." A.R. 27. First, the Board's Order offers a blanket statement discrediting any evidence, testimony, and arguments that are inconsistent with its final decision.² This catch-all provision does not sufficiently demonstrate that the EQB considered and dealt with the issues raised by the respective parties. The Board's statement is simply a boilerplate disclaimer that fails to explain how the Board evaluated the facts, evidence, and legal arguments in arriving at this particular decision. Such statements prevent the Court or the public from clearly ascertaining that the issues dismissed by the Board were considered and weighed, and therefore provide no evidence of a fully-reasoned decision. *See, e.g., Muscatell*, 196 W.Va. at 598, 474 S.E.2d at 528 (*citing St. Mary's Hosp. v. State Health Planning and Development Agency*, 178 W.Va. 792, 364 S.E.2d 805 (1987)) ("We have said, with respect to decisions of administrative agencies following from findings of fact and conclusions of law proposed by opposing parties, that the agency must rule on the issues raised by the opposing parties with sufficient clarity to assure a reviewing court that all those findings have been considered and dealt with, not overlooked or concealed").

² Specifically, the Board stated that "[a]ll proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All argument of counsel, proposed findings of fact and conclusions of law have been considered and reviewed in relation to the aforementioned record, as well as to applicable law. To the extent that the proposed findings of fact, conclusions of law and arguments advanced by the parties are in accordance with these findings of fact, conclusions and legal analysis of the Board and are supported by evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions, and arguments are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited." A.R. 6-7.

Additionally, the Board made no findings regarding which of the four factors listed in Section 1 of WVDEP's Guidance³ applied to Alex's Permit. The Circuit Court adopted the Sierra Club's proposed finding that the Board "credited the testimony of Evan Hansen, 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." A.R. 19 (citing EQB Final Order, A.R. 9). Yet, the Board's Order simply noted Mr. Hansen's testimony regarding the four factors as a finding of fact without adopting his opinion regarding their application. A.R. 9. Beyond that, the Board summarized Mr. Hansen's direct examination regarding the four factors without recognizing the conflicting positions of Alex and WVDEP that were raised during Mr. Hansen's cross-examination and in Alex and WVDEP's proposed findings of fact and conclusions of law. A.R. 39-45, 69, 71-73. An agency's decision cannot be upheld if it adopts one party's position on an issue over another party's "unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court." *Muscatell v. Cline*, 196 W.Va. 588, 598, 474 S.E.2d 518, 528 (1996). *See also Miller v. Epling*, 229 W.Va. 574, 583, 729 S.E.2d 896, 905 (2012) ("[T]here remains [a] necessity for the [agency] to rule on the issues raised by the opposing parties with sufficient clarity to assure the reviewing court that all those findings have been considered. A sufficiently articulate decision setting forth the underlying evidentiary facts which lead the agency to its conclusion is crucial for purposes of meaningful appellate review"). Thus, the Board's mere reference to Mr. Hansen's direct

³ The four-factor analysis includes the following: 1) the proposed mining is in the Winifrede to Upper No. 5 Block coal seam interval; or 2) site-specific or adjacent water quality data (associated with mining in the same geologic strata) shows concentrations equal to or more than 5 µg/l; or 3) the receiving stream for a proposed discharge is listed on the operable Section 303(d) List for use impairment related to selenium; or 4) there is an approved selenium Total Maximum Daily Load for the receiving stream or downstream waters that mandates regulation of selenium in the discharges from the activity. A.R. 426.

testimony does not demonstrate that it fully considered evidence and arguments related to application of the Guidance.

Further, the Board ignored Alex and WVDEP's arguments concerning coal seams and selenium concentrations from corehole samples. The parties did not dispute the fact that coal seams and corehole samples implicated the Guidance. A.R. 37-38. However, the fact that the parties did not dispute this aspect of the Guidance is not itself sufficient evidence to make an affirmative finding of reasonable potential. Indeed, the EQB's Final Order does not address Alex and WVDEP's arguments that, despite the coal seams and corehole samples, WVDEP had demonstrated that the decision not to place effective selenium limits on the Permit was justified. A.R. 97-99. Therefore, the undisputed fact regarding coal seams and corehole samples cannot be used to support the EQB's decision because the EQB never explained in its Order whether this fact was sufficient, despite Alex and WVDEP's arguments, to establish a finding of reasonable potential. See *Preston Mem'l Hosp. v. Palmer*, 213 W.Va. 189, 193, 578 S.E.2d 383, 387 (quoting *In re Queen*, 196 W.Va. 442, 447, 473 S.E.2d 483, 488 (1996)) (“[A] court ‘cannot uphold a decision by an administrative agency ... if, while there is enough evidence in the record to support the decision, the reasons given by the trier of fact do not build an accurate and logical bridge between the evidence and the result’”).

The Circuit Court also found that WVDEP's 2012 Draft 303(d) stream impairment list “is the operable 303(d) list that WVDEP must consider in its permitting decisions.” A.R. 256 (citing EQB Final Order, A.R. 5; EQB hearing transcript, A.R. 397 (Parsons)) (emphasis added). This finding is not supported by the evidence or by the Board's Final Order. WVDEP's Selenium Guidance provides that presumption of reasonable potential exists if “the receiving stream for a proposed discharge is listed on the operable Section 303(d)

List for use impairment related to selenium.” A.R. 426 (emphasis added). The Board’s Order only refers to testimony by a WVDEP staffer regarding whether a “draft” list should be reviewed during the permit application process. A.R. 5. That testimony never affirmatively answered whether such “draft” lists are considered “operable.” *Id.* At the hearing before the Board, the parties disputed whether “draft” 303(d) lists (as opposed to “final” 303(d) lists) qualified as “operable” under the Guidance. A.R. 102-103. The Board’s Order credits the WVDEP’s staffer’s testimony, but that testimony does not resolve the parties conflicting theories regarding what constitutes the “operable” 303(d) list.⁴ Therefore, this passage in the Board’s Order provides no support for its final decision or for the Circuit Court’s finding.

“ “[A]n agency’s discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself[.]” *Webb v. W. Va. Bd. of Med.*, 212 W.Va. 149, 158, 569 S.E.2d 225, 234 (2002) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962)). If the grounds the agency provides are “inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.” *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Here, the Board’s Order contains no clear rationale explaining how its conclusion was derived from the evidence through application of WVDEP’s Guidance. Accordingly, it provides no basis for the Circuit Court’s conclusion that the Board adequately applied WVDEP’s Selenium Guidance to identify the evidence that contributed to its final decision.

⁴ Alex additionally argued that, as a matter of law, “draft” 303(d) lists are not “operable.” A.R. 102-103, n.7; A.R. 44-45. As further explained *infra*, the Board disregarded this argument without explanation, and the Circuit Court’s Final Order does not address this argument.

II. THE CIRCUIT COURT ERRONEOUSLY CONCLUDED THAT THE EQB'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," IS A SUFFICIENT FINDING OF REASONABLE POTENTIAL.

As explained above, effluent limits for a pollutant are required when there is a reasonable potential to violate water quality standards for that pollutant. In West Virginia, WVDEP has developed its own Guidance to assess whether specific permits have a reasonable potential to violate water quality standards for selenium. A.R. 96. Here, WVDEP found no such potential. The Board's Order discards WVDEP's finding and imposes effective selenium limits without ever explaining why. The Circuit Court concluded that the Board's conclusory paragraph, which recites statutory language⁵ regarding the permit's ability to comply with applicable state water quality standards, qualifies as a sufficient finding of reasonable potential. A.R. 27 (quoting EQB Final Order, A.R. 13). Without providing any further explanation, the Board's statement is insufficient to constitute a reasoned finding. *Citizens Bank of Weirton v. W. Va. Bd. of Banking and Fin. Inst.*, 160 W.Va. 220, 231, 233 S.E.2d 719, 727 (1977) ("Whenever an agency may be permitted to state its findings of fact in bare statutory language, the decision may be rendered by a clerk or secretary who has been given the agency's ultimate conclusion, i.e., in this case, 'application granted,' and assigned the task of filling in the appropriate form. This is not the rational thought process contemplated by the Administrative Procedures Act"). The Board's Final Order does not explain how the evidence supports a finding of reasonable potential, and the Circuit Court's Order provides no further rationale or support for such a finding. Accordingly, both the Board's and Circuit Court's Final Orders are erroneous.

⁵ See 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(1)-(2) (requiring effluent limits that ensure compliance with water quality standards).

III. THE CIRCUIT COURT ERRED WHEN IT FAILED TO CONSIDER AN ABUNDANCE OF EVIDENCE RELATED TO WVDEP'S SELENIUM GUIDANCE THAT THE EQB IGNORED WITHOUT EXPLANATION.

The Board failed to apply the underlying facts surrounding WVDEP's decision to issue Alex's Permit with the Selenium Guidance. In doing so, the Board failed to issue reasoned findings on the evidence presented by the parties relating to WVDEP's application of the Guidance in issuing Alex's permit.

1. Coal Seam and Overburden Data in the Context of WVDEP's Selenium Guidance

Section 1 of WVDEP's Selenium Guidance contemplates four factors, the first of which is whether the "proposed mining is in the Winifrede to the Upper No. 5 Block coal seam interval." A.R. 426. Here, the parties did not dispute that this factor is met, as the proposed mining will occur in the Stockton and Coalburg seams, which are seams within the Winifrede to Upper No. 5 Block interval. A.R. 37-38.

Section 2 of WVDEP's Selenium Guidance, as described above, analyzes whether overburden sampling exceeds 1 mg/kg for selenium. A.R. 427. The parties did not dispute that this factor had been met, as overburden sampling conducted at the Peach Orchard site yielded some strata exceeding 1 mg/kg for selenium. A.R. 37-38.

The Guidance also provides that "[a]pplicants not wishing to implement the described procedures must provide additional testing of materials, alternative handling procedures, alternative handling procedures, historical water quality or other data that demonstrates there is no reasonable potential to violate the selenium WQC." A.R. 425. The parties did not dispute that this clause allows a finding of no reasonable potential,

notwithstanding satisfaction of Sections 1 and 2 of the Guidance, if an applicant otherwise “demonstrates there is no reasonable potential to violate the selenium WQC.” A.R. 55.

In issuing Alex’s NPDES permit, WVDEP acknowledged both that “overburden tests ... do show concentrations of selenium above the threshold level of 1 mg/kg,” and that “[t]he Coalburg and Stockton coal seams are to be mined in this operation,” and “[h]istorically, this stratigraphic region has contained selenium levels in excess of the 1 mg/kg.” A.R. 38.

Despite these acknowledgements, however, Alex and WVDEP offered evidence to demonstrate that there was no need to place effective selenium limits on Alex’s permit. A.R. 38-41, 71-72. For example, Alex and WVDEP offered site-specific and adjacent water quality data that showed no selenium exceedances. A.R. 39-41, 69, 71-72.

WVDEP also recognized that a significant majority of the mining proposed at the Peach Orchard site is highwall mining. A.R. 38. Further, it noted that all proposed outlets are on-bench and will discharge in response to precipitation only. *Id.* The facility will not include any excess spoil fills. WVDEP has included a materials handling plan as part of Alex’s associated SMCRA Permit (No. S300811) at the Peach Orchard Mine, which “is designed to encapsulate any material containing elevated levels of selenium or other material deemed toxic that is encountered during the mining procedure.” *Id.* Therefore the outlets associated with this permit will have little, if any, exposure to potentially selenium-laden material.

Thus, as Alex and WVDEP argued, to the extent the above facts implicated the Selenium Guidance, WVDEP recognized that measures to avoid excessive selenium discharges had been incorporated into Peach Orchard’s associated SMCRA permit through the materials handling plan. A.R. 39. Beyond that, WVDEP explained that the highwall mining methods to be employed at the Peach Orchard Mine and the nature of the on-bench, precipitation-induced

outlets greatly limit the possibility that selenium-laden overburden from the Coalburg and Stockton seams will cause selenium exceedances. *Id.* WVDEP also observed that site-specific and adjacent data suggested that selenium should not be a concern with Alex's Permit. A.R. 40.

The Board's Order provided no finding regarding the application of the first factor under Section 1 and Section 2 of the Guidance. Further, the Board disregarded the full context of WVDEP's rationale that no reasonable potential existed despite the overburden samples and the proposed mining in the Coalburg and Stockton seams. The Board acknowledged the existence of the materials handling plan, but ignored Alex's argument pointing out the facts that the proposed highwall mining methods and nature of the precipitation-induced outlets combined to significantly limit the possibility that selenium-laden overburden from the Coalburg and Stockton seams would be exposed to Alex's discharges.⁶ By not conducting any analysis or making any finding regarding the applicability of this information in the context of the Guidance, the Board's Final Order is legally erroneous.

2. Site-Specific and Adjacent Water Quality Data

The second of the four factors set forth in Section 1 of WVDEP's Selenium Guidance provides that an initial finding of reasonable potential will be made if "[s]ite-specific or adjacent water quality data (associated with mining in the same geologic strata) shows concentrations equal to or more than 5 µg/l. This water quality data may include, but is not limited to, application water quality data (e.g. PHC, anti-degradation BWQ sampling), effluent data from adjacent mining operations (e.g. NPDES Table 2 IV C analysis) and instream monitoring data from DEP Trend Stations, DMRs, and DEP Stream Assessments...." A.R. 426.

⁶ Specifically, the Board incorrectly stated that "[t]he only information offered was a one-time sample from an adjacent operation and the materials handling plan." A.R. 10.

The Board largely ignored site-specific and adjacent selenium data provided by both Alex and WVDEP. A.R. 99-102. The Board failed to acknowledge this abundance of data, instead finding that “the Appellee and Intervenor argued that a single sample taken from an adjacent location did not indicate selenium contamination.” A.R. 10 (emphasis added).⁷ By committing this factual error and not recognizing the full collection of Alex and WVDEP’s proffered data or explaining why that data is or is not relevant, the Board’s Final Order is deficient. The Circuit Court did not address this error in its Final Order.

3. Receiving Streams on the Operable 303(d) List as Impaired for Selenium

As described above, the third factor set forth in Section 1 of WVDEP’s Selenium Guidance provides that an initial finding of reasonable potential will be made “if the receiving stream for a proposed discharge is listed on the operable Section 303(d) List for use impairment related to selenium....” A.R. 426 (emphasis added). Here, Alex’s permit discharges into two receiving streams: Beech Fork and Twentymile Creek. Beech Fork is not listed on the Final 2010 303(d) List or any Draft version of the 2012 303(d) List as impaired for selenium. A.R. 102. Twentymile Creek was not listed on the Final 2010 303(d) List as impaired for selenium. Nor was Twentymile Creek listed on the publically-available Draft 2012 303(d) List at the date of the Permit’s issuance and at the date of the Board’s evidentiary hearing. *Id.*

Alex argued that, regardless of Twentymile Creek’s current status on any Draft version of the 2012 303(d) List, it does not appear on the “operable” 303(d) List as required by

⁷ Beyond incorrectly stating that Alex and WVDEP provided a single adjacent water quality sample, the Board disregarded Alex and WVDEP’s proffered data “because the sediments are heterogeneous.” A.R. 10. The Board did not explain what it meant by the term “heterogeneous” sediments or how it relates to the Selenium Guidance.

the Selenium Guidance. A.R. 44-45.⁸ The Board, however, did not address Alex’s argument. Its only reference to Twentymile Creek’s status on the Draft 2012 303(d) List in the Final Order stated that “preparation of the 2012 list was based upon data collected and submitted through July of 2011 – well before the Permit was issued in this matter.” A.R. 5-6. Because the Board did not make a finding that resolved the parties’ conflicting theories regarding what constitutes an “operable” 303(d) List in the context of the Guidance, its Final Order is insufficient. *Choma v. W. Va. Div. Motor Vehicles*, 210 W. Va. 256, 259, 557 S.E.2d 310, 313 (2001) (requiring agency to provide a “reasoned and articulate decision, weighing and explaining the choices made and rendering the decision capable of review by an appellate court.”); *Muscatell v. Cline*, 196 W. Va. 588, 598, 474 S.E.2d 518, 528 (1996). The Circuit Court did not address these conflicting positions; instead, it simply adopted the Sierra Club’s proposed finding that the 2012 Draft 303(d) List is the “operable” 303(d) list. A.R. 25.

IV. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT THE EQB GAVE PROPER CONSIDERATION TO WVDEP’S INTERPRETATION OF WVDEP’S SELENIUM GUIDANCE.

Because the Board evaded any meaningful analysis of the facts as they relate to WVDEP’s Selenium Guidance, it gave no consideration to WVDEP’s interpretation of the Guidance. The Board’s total failure to recognize how WVDEP interprets and applies its own Selenium Guidance prevented it from issuing a sound decision that applied the relevant evidence to the Guidance.

⁸ Alex specifically argued that WVDEP’s Draft 2012 list is not legally “operable” under the Clean Water Act (“CWA”). Section 303(d)(2) of the CWA requires states to submit draft lists of impaired waters to USEPA for approval. 33 U.S.C. § 1313(d)(2). USEPA is then required to consider any public comments it receives and make any revisions to the list that it deems appropriate. 40 C.F.R. § 130.7(d)(2). USEPA then transmits the list to the state, which is required to incorporate the list into its water quality management plan. *Id.* Therefore, Alex argued, the earliest that any part of the 2012 303(d) List could be deemed “operable” would be after: (a) the public comment period has ended, (b) USEPA has transmitted the list to WVDEP, and (c) WVDEP has incorporated USEPA’s revised 303(d) List into its water quality management plan. As of the date of the evidentiary hearing USEPA had still been seeking public comments on the Draft 2012 303(d) List. A.R. 44-45. The Board’s Final Order makes no mention of this argument.

Specifically, WVDEP provided the following interpretations of potentially-ambiguous provisions in the Guidance: 1) that, notwithstanding satisfaction of Section 1’s four-factor analysis and Section 2’s overburden sampling, a finding of no reasonable potential may be made if an applicant otherwise “demonstrates there is no reasonable potential to violate the selenium WQC.” (A.R. 70); 2) that “nearby” as opposed to “site-specific or adjacent” data is beyond the scope of the second factor under Section 1 of the Guidance (A.R. 72); and 3) that “draft” 303(d) listings are not deemed “operable” pursuant to the third factor under Section 1 of the Guidance (A.R. 72-73). The Board completely disregarded these interpretations without explanation.⁹

The Circuit Court attempted to justify the Board’s disregard of WVDEP’s interpretation of its own internal Guidance by concluding that “[t]he Board gave the proper consideration to WVDEP’s interpretation of the Selenium Guidance.” A.R. 23 (citing *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 582, 466 S.E.2d 424, 433 (1995)). Yet, the Board’s Final Order contains no indication that the Board gave any consideration to WVDEP’s interpretation.

This Court has held that “[w]hen 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, 556 S.E.2d 294, 298 (2002). The *Cookman* court’s discussion of deference flows from this Court’s prior decision which held that even bodies conducting *de novo* factual

⁹ The Board found, consistent with WVDEP’s interpretation, that the Guidance allows WVDEP to issue a finding of no reasonable potential notwithstanding application of Sections 1 and 2 of the Guidance. A.R. 4. Though the Board found that such an exception exists, it seems to have done so on its own reading of the Guidance rather than WVDEP’s. A.R. 10. (“The Board finds that the Selenium Implementation Guidance Policy contains a provision that requires a threshold question of reasonable potential before requiring a formal reasonable potential analysis but it conflicts with a provision that allows the applicant to offer additional information to avoid limits.”).

review “must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion.” *Appalachian Power Co. v. Tax Dept. of West Virginia*, 195 W.Va. 573, 582, 466 S.E.2d 424, 433 (1995).

Beyond that, *Appalachian Power* held that agency interpretations of non-statutory authorities such as WVDEP’s Selenium Guidance are due recognition and at least some degree of deference. *Id.* at 434, n.7 (“We are obligated to give appropriate consideration to all agency interpretations (which many of our cases have referred to as deference).... To say that we give it ‘no deference’ implies that we do not even consider the interpretation, which is not the case.”) (emphasis added). Therefore, the Board’s refusal to even acknowledge WVDEP’s interpretations of its own Selenium Guidance is in direct conflict with binding West Virginia Supreme Court precedent. Here, the Board did not indicate that it had even considered WVDEP’s interpretation of its own Selenium Guidance that it applies every day. Therefore, the Circuit Court’s conclusion that the Board gave “the proper consideration” to WVDEP’s interpretation is erroneous. Accordingly, it should be reversed.

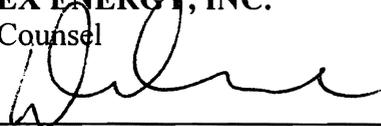
CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the Final Order of the Circuit Court as well as the EQB’s Final Order.

Respectfully submitted,

ALEX ENERGY, INC.

By Counsel



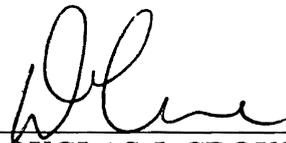
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2014, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in postage-paid envelopes addressed to counsel for all other parties to this appeal as follows:

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