

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0247

ALEX ENERGY, INC.
Petitioner (Petitioner Below),

and

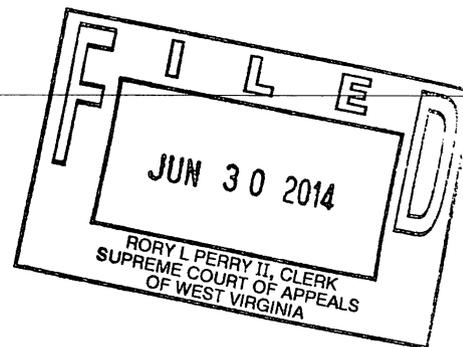
THOMAS L. CLARKE,
Director, Division of Mining and Reclamation,
West Virginia Department of Environmental Protection,
Petitioner

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)

RESPONDENTS' BRIEF



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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE1

A. Legal Background 1

B. Procedural History..... 4

SUMMARY OF ARGUMENT5

STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....7

STANDARD OF REVIEW.....7

ARGUMENT8

I. The Board Properly Concluded that the Permit Must Contain Effluent Limits for Selenium. 8

II. The Circuit Court Correctly Found That The Board Provided Ample Findings, Supported By the Record, to Justify Its Conclusions that Limits are Necessary for Selenium. . 9

III. The Circuit Court Correctly Found That The Board Gave the Proper Consideration to WVDEP’s Interpretation of the Selenium Guidance. 12

IV. Alex Did Not Provide Additional Information That Demonstrated That There Was No Reasonable Potential to Violate Selenium Water Quality Standards. 15

CONCLUSION18

TABLE OF AUTHORITIES

West Virginia Cases

<i>Appalachian Power Co. v. State Tax Department</i> , 195 W.Va. 573, 466 S.E.2d 424 (1995) ..	12, 13
<i>Citizens Bank of Weirton v. W. Va. Bd. of Banking and Fin. Inst.</i> , 160 W.Va. 220, 233 S.E.2d 719 (1977).....	11
<i>Cookman Realty Group v. Taylor</i> , 211 W.Va. 407, 566 S.E.2d 294 (2002)	12
<i>Frymier-Halloran v. Paige</i> , 193 W.Va. 687, 458 S.E.2d 780 (W.Va. 1995)	7
<i>Hominy Creek Pres. Ass'n, Inc. v. W. Va. Dep't of Env'tl. Prot.</i> , 230 W. Va. 151, 737 S.E.2d 48 (2012).....	7
<i>Muscatell v. Cline</i> , 196 W.Va. 588, 474 S.E.2d 518 (1996).....	11
<i>Noble v. W. Virginia Dept. of Motor Vehicles</i> , 223 W. Va. 818, 679 S.E.2d 650 (W.Va. 2009) ..	7
<i>Patriot Mining Co., Inc. v. Sierra Club</i> , Civ. Action No. 11-AA-102 at 7 (J. Stucky)	12
<i>Tenant v. Callaghan</i> , 200 W.Va. 756, 490 S.E.2d 845 (1997)	7
<i>W. Va. Div. of Env'tl. Prot. v. Kingwood Coal Co.</i> , 200 W.Va. 734, 490 S.E.2d 823 (1997).....	3, 7
<i>Webb v. West Virginia Bd. of Medicine</i> , 212 W.Va. 149, 569 S.E.2d 225 (W.Va. 2002).....	14
<i>Wetzel County Solid Waste Auth. V. Chief, Office of Waste Management, Div. of Env'tl. Protection</i> , Civil Action No. 95-AA-3 (Circuit Court of Kanawha County, 1999)	17

Federal Cases

<i>Am. Iron & Steel Inst. v. E.P.A.</i> , 115 F.3d 979 (D.C. Cir.1997).....	17
<i>Anderson v. Bessemer City, N.C.</i> , 470 U.S. 564, (1985)	7

West Virginia Statutes

W Va. Code § 22B-1-7	3
W. Va. Code § 22-11-4.....	1
W. Va. Code § 22-11-8.....	2
W. Va. Code § 22B-1-7(e).....	3
W. Va. Code § 22B-1-7(g)(1).....	4
W. Va. Code § 22B-3-1(B).....	4
W. Va. Code § 29A-5-3	8, 9

Federal Statutes

33 U.S.C. § 1251(a)	1
33 U.S.C. § 1311(a)	1
33 U.S.C. § 1311(b)(1)(C)	2
33 U.S.C. § 1313(a)-(c).....	2
33 U.S.C. § 1342.....	1
33 U.S.C. § 1342(a)	2
33 U.S.C. § 1362(14)	1

West Virginia Regulations

47 C.S.R. § 2 App. E, Tbl. 1 2
47 C.S.R. § 2-2.21 2
47 C.S.R. § 30-5.1.f 2

47 C.S.R. §§ 10-6.1 – 6.3.d 2

Federal Regulations

40 C.F.R. § 122.44(d)(1) 2
40 C.F.R. § 122.44(d)(1)(i) 2, 3, 10
40 C.F.R. § 123.25(a)(15) 2

Other Authorities

47 Fed. Reg. 22,363 (May 24, 1982) 1

STATEMENT OF THE CASE

In August 2012, the West Virginia Department of Environmental Protection (“WVDEP”) issued a West Virginia National Pollutant Discharge Elimination System (“WV/NPDES”) permit to Alex Energy, Inc. (“Alex”), under the Clean Water Act (“CWA” or “the Act”). A.R. 7. That permit, WV1024809, authorizes the discharges of pollution from Alex’s Peachorchard Surface Mine. Id. West Virginia Highlands Conservancy and Sierra Club (collectively “the Conservancy”) appealed WVDEP’s decision to the West Virginia Environmental Quality Board (“the Board”), contending that WVDEP unlawfully failed to include enforceable selenium limits in the permit sufficient to ensure compliance with state numeric water quality standards. A.R. 3–4. The Conservancy sought an order from the Board directing WVDEP to revise the permit to comply with Clean Water Act permitting requirements, state water quality standards, and WVDEP’s own Selenium Guidance. That appeal was docketed before the Board as “Appeal No. 12-33-EQB.” A.R. 1.

A. Legal Background

To achieve its goal of protecting “the chemical, physical, and biological integrity of the Nation’s waters,” 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 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 except when they are authorized by a section 402 permit, also known as a WV/NPDES permit. W. Va. Code § 22-11-8.

WV/NPDES permits contain numerical limits called “effluent limitations” that restrict the amounts or concentrations of specified pollutants that may be discharged by a permittee.

WV/NPDES permits must contain effluent limits sufficient to ensure that the streams receiving a permittee’s discharges will meet 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). The WV/NPDES rules for coal mining facilities specifically apply this federal requirement: “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.

Section 303 of the CWA requires States to adopt water quality standards to protect the existing uses of a water body, and to limit the concentrations of harmful pollutants in those water bodies. 33 U.S.C. § 1313(a)-(c); 47 C.S.R. § 2-2.21. In the present case, the relevant West Virginia water quality standard is that which prohibits chronic concentrations of selenium over 5 µg/L. 47 C.S.R. § 2 App. E, Tbl. 1. Effluent limits are required in permits for all pollutants that “are or may be discharged at a level [that] 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). Thus, a permit must include enforceable effluent limits not merely for those pollutants that the available evidence shows will definitively cause a violation of a standard, but also for any pollutant that the evidence demonstrates has a reasonable potential to cause or contribute to a violation of a standard. 40 C.F.R. §

122.44(d)(1)(i). The process for determining whether water quality-based effluent limits are necessary is called a “reasonable potential analysis.”

The Selenium Implementation Guidance from the Division of Mining and Reclamation

Permit Handbook, A.R. 424–428, is the policy of WVDEP and is used to determine reasonable potential for selenium. A.R. 373. The Selenium Guidance lists four factors, any of which establishes an initial reasonable potential: 1) the proposed mining is in the Winifrede to Upper No.5 Block coal seam interval (seams known to be high in selenium), 2) site-specific or adjacent water quality data that show exceedances of the chronic water quality standard, 3) the receiving stream is listed on the operable Section 303(d) List for selenium impairment, and 4) the receiving stream or downstream waters have an approved Total Maximum Daily Load for selenium. A.R. 426. After a finding of initial reasonable potential, if the selenium concentration of any strata, including coal, is equal to or greater than 1 mg/kg, then the mine will be deemed to have reasonable potential to violate selenium water quality standards. A.R. 427. Any operation found to have reasonable potential must implement a selenium encapsulation plan and the WV/NPDES permit must include selenium effluent limitations. A.R. 427–28.

Permitting decisions made by the WVDEP, including decisions about what effluent limits to include in a WV/NPDES permit, may be appealed to the Board. West Virginia Code section 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.” W Va. Code § 22B-1-7. The Board 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]. The board is not required to afford any deference to the DEP decision but shall act independently on the evidence before it.”). The Board is made up of “persons who by reason of previous training and experience are knowledgeable in the husbandry of the state’s water resources and with at least one member with experience in industrial pollution control.” W. Va. Code § 22B-3-1(B). When reviewing a WV/NPDES permit, the Board 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 Board held a hearing on the permit challenge on March 14, 2013, in which Alex called no witnesses and WVDEP only called one witness—the program manager for the NPDES program for WVDEP’s Division of Mining and Reclamation. The permit writer did not testify. On August 27, 2013, the Board issued a 13-page decision agreeing with the Conservancy and concluding that WVDEP had erred in issuing the WV/NPDES Permit for the Peachorchard Surface Mine without including enforceable selenium limits to ensure compliance with the state’s water quality standard. A.R. 1–14. The Board remanded the permit to WVDEP with instructions to modify the permit consistent with the Board’s order. A.R. 13.

Alex appealed the Board’s Final Order to the Circuit Court of Kanawha County. That appeal was docketed as Civil Action No. 13-AA-132 and assigned to Judge Tod J. Kaufman. A.R. 18. Judge Kaufman issued a final order on January 15, 2014, affirming the final order of the Board and its instructions to WVDEP. A.R. 27–28. Alex appealed the decision of the Circuit Court of Kanawha County.

SUMMARY OF ARGUMENT

The Circuit Court correctly concluded that the Board rightly remanded the Permit to WVDEP to add enforceable selenium limits on all outfalls. To support this conclusion, the Circuit Court found, “[T]he Board considered all of the evidence before it, and reached a reasoned and unanimous decision.” A.R. 27–28. The Board correctly applied the Selenium Guidance to the facts of the case and found that selenium limits were required. A mining operation is only required to meet one factor, in the four factor test for initial reasonable potential. The Peachorchard Surface Mine meets three. That reasonable potential was confirmed by core samples showing high concentrations of selenium. Neither Alex nor WVDEP presented any evidence to disprove the finding of reasonable potential required under the Selenium Guidance.

Alex is trying to raise the bar for agency decision-making, arguing that the order from the Board does not meet the requirements of West Virginia administrative law. In fact, the Board’s order addressed the various pieces of evidence produced at the hearing and laid out specific findings of fact and conclusions of law. The Board found that WVDEP failed to consider the required information when setting the selenium limits on WV/NPDES Permit WV1024809, and stated, “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, therefore answered the question of reasonable potential. The reasonable potential analysis exists to determine if effluent limits are required to ensure compliance with water quality standards. The Board determined that such limits are necessary.

The Selenium Guidance is not a legislative rule, under West Virginia law. It is not even an interpretive rule. As a result, the most deference WVDEP’s interpretation of the guidance can

merit, is that based upon its inherent persuasiveness. That is the level of deference that the Board applied. WVDEP interprets the Selenium Guidance to mean that a finding of no reasonable potential can be made if a permittee provides additional information that

demonstrates there is no reasonable potential to violate selenium water quality standards. The Board found that interpretation to be persuasive and confirmed it; but found that no additional information was provided to WVDEP or to the Board and reasonable potential was not disproved. The other positions WVDEP has taken in this litigation have been confused, contradictory, and developed only for the purposes of this litigation. As a result, the Board had no agency interpretation to defer to on “adjacent” water quality data or the “operable” 303(d) list.

The Conservancy provided sufficient evidence to support a finding that WVDEP erred in the permitting process. The burden was on Alex and WVDEP to disprove reasonable potential. Neither party introduced any evidence to that end. A few samples from a nearby/adjacent mine that did not have selenium exceedances is not sufficient. The attorneys for Alex and WVDEP have argued that the type of mining, structure of outfalls, and material handling plan establish that no reasonable potential exists. No evidence on the effect of those factors on selenium discharges was present in the permitted record or was introduced at the hearing. Alex and WVDEP have not met their burden to demonstrate no reasonable potential.

Because the Peachorchard Surface Mine meets the Selenium Guidance factors for reasonable potential and no evidence disproving that finding has been presented, the Peachorchard Surface Mine has the reasonable potential to violate selenium water quality standards and the Board correctly remanded the permit to WVDEP to add water quality based effluent limits for selenium to all outfalls. The Circuit Court correctly upheld the Board’s decision.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument under Rev. R.A.P. 19 is appropriate in this case because it involves assignments of error in the application of settled law. The legal principle of the degree of deference owed by an environmental board to an agency decision was decided by this Court in *West Virginia Division of Environmental Protection v. Kingwood Coal Company, infra*. 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 (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). Such review accords deference to the findings of fact made by the administrative decision-maker – here, the West Virginia Environmental Quality Board – unless “clearly wrong.” *Noble v. W. Virginia Dept. of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (W.Va. 2009). The “clearly wrong” standard of review is a deferential one which presumes a decision maker's actions are valid as long as the decision is “supported by substantial evidence or by a rational basis.” *Frymier-Halloran v. Paige*, 193 W.Va. 687, 695, 458 S.E.2d 780, 788 (W.Va. 1995). Furthermore, “[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.” *Id.* at n. 13 (quoting *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 574 (1985)).

The Environmental Quality Board was created by the legislature to hear appeals of permitting and enforcement decisions made by WVDEP. Here, the Board applied its expertise and reached a unanimous decision in favor of the Conservancy. *See* A.R. 1–17. The 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).

ARGUMENT

I. The Board Properly Concluded that the Permit Must Contain Effluent Limits for Selenium.

Alex Energy would have the Court ignore the clear evidence that led the Board to find that selenium effluent limits are necessary for the Peachorchard Surface Mine. It is unassailable that the Peachorchard Surface Mine meets the requirements of WVDEP's own Selenium Guidance, showing that it has a reasonable potential to violate selenium water quality standards. The Selenium Guidance sets out four factors, and the existence of even one factor establishes an initial reasonable potential. A.R. 426. The Peachorchard Surface Mine meets three of those factors. First, mining is occurring in coal seams known to be high in selenium, specifically the Coalburg and Stockton. A.R. 367. Second, adjacent water quality data show selenium exceedances. A.R. 430, 432. Third, the mine is discharging into a stream listed by WVDEP as impaired for selenium. A.R. 436. The Selenium Guidance clearly states that an initial reasonable potential is then confirmed by core samples. Core sample analyses for this mine show multiple strata of both coal and rock that exceed WVDEP's

threshold for confirming reasonable potential for selenium. A.R. 38. Once a reasonable potential is found, WVDEP guidance and state and federal regulations require that enforceable limits be imposed.

WVDEP's failure to perform a reasonable potential analysis is impermissible. There is no evidence anywhere in the record showing that a reasonable potential does not exist. The Board correctly found that selenium effluent limits are required. The Circuit Court supported this finding, agreeing that the permit was unlawful "because it fails to include enforceable selenium effluent limits sufficient to ensure protection of West Virginia's numeric water quality standards." A.R. 27. The Court, therefore, should reject Alex's request for a reversal.

II. The Circuit Court Correctly Found That The Board Provided Ample Findings, Supported By the Record, to Justify Its Conclusions that Limits are Necessary for Selenium.

As the Circuit Court found, the Board's Final Order contains sufficient findings to support its conclusions. A.R. 27. The record clearly shows a reasonable potential under the Selenium Guidance and the proceedings before the Board established that the limited evidence provided by Alex and WVDEP was insufficient to demonstrate a lack of reasonable potential. Under the West Virginia Administrative Procedures Act, "Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law." W. Va. Code § 29A-5-3. The West Virginia APA further requires that "Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." *Id.*

As an initial matter, the Board's Final Order contains an explicit statement from the Board attesting that it fully considered all of the proposed findings submitted by the respective parties:

All 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. Throughout the Final Order, the Board identified the evidence that contributed to its final decision. The Board credited the testimony of Evan Hansen that demonstrated a reasonable potential for selenium exceedances under the Selenium Guidance. A.R. 9. There was no dispute over the coal seams or selenium concentrations from corehole samples and the Board determined that a receiving stream of the Peachorchard Mine was on the operable 303(d) list. A.R. 5. These facts were sufficient under the Selenium Guidance to find a reasonable potential that requires effluent limits on selenium.

Alex criticizes the Board for failing to make an affirmative finding of reasonable potential. Petr. Br. 15. To the contrary, the Board found that WVDEP failed to consider the required information when setting the selenium limits on WV/NPDES Permit WV1024809, and specifically stated, “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. That is simply another way of saying that WVDEP failed to “control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which...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.” 40 C.F.R. § 122.44(d)(1)(i). As a result of that finding, the Board voted unanimously to remand the permit and require applicable

enforceable limits for selenium. That is, in itself, a reasonable potential finding. The Circuit Court agreed that the Board's statements included a sufficient finding of reasonable potential. A.R. 27. Alex is splitting hairs, insisting that the Board must use the magic words "reasonable potential." If the permit cannot ensure compliance with the selenium water quality standard, however, then selenium discharges from the permit have a reasonable potential to violate water quality standards.

Alex also attacks the Board for stating that "selenium limits in the Permit would not constitute an undue burden on [Alex]" A.R. 13. Alex is correct that such a finding is not related to the evidence presented at the March 14 hearing, but neither was it material to the Board's decision. If it was error, it was harmless. *See* W.Va. Code § 29A-5-4(g) (conditioning relief on the prejudice of substantial rights). The Circuit Court agreed that any error in that finding was harmless. A.R. 27.

Alex's arguments are attempting to raise the bar for the Board's decision. While the Board is required to address "direct conflict[s] in the critical evidence," it is not required to address every conflicting legal argument. *See* syllabus point 6, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). Alex repeatedly cites to *Citizens Bank of Weirton v. W. Va. Bd. of Banking and Fin. Inst.*, 160 W.Va. 220, 233 S.E.2d 719 (1977), and asserts that it sets the standard for an agency's findings of fact and conclusions of law. Petr. Br. 6, 7, 9, 15. The findings of fact and conclusions of law at issue in that case were short enough that this Court reproduced them in its decision. *Citizens Bank of Weirton*, 160 W.Va. at 224–25. There were six findings of fact, one simple sentence each, and one conclusion of law. *Id.* That is a far cry from the 13-page order from the Board in this case. A.R. 1–13. The order in *Citizens Bank of Weirton* contained no citations. 160 W.Va. at 224–25. Here, the Board order cited to the hearing

testimony of both substantive witnesses, hearing exhibits, the certified record, the controlling statutes and regulations, and case law. A.R. 2–13. The Board order in the instant case addresses the evidence presented and sets forth the reasons for its decision. The order therefore meets the requirements of West Virginia administrative law.

III. The Circuit Court Correctly Found That The Board Gave the Proper Consideration to WVDEP’s Interpretation of the Selenium Guidance.

Alex alleges that the Board failed to consider WVDEP’s interpretation of its Selenium Guidance. Alex specifically claims that the Board disregarded the following interpretations:

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 I 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).

Petr. Br. 21. Alex misunderstands the deference due to the WVDEP, citing to *Cookman Realty Group v. Taylor*, 211 W.Va. 407, 411, 566 S.E.2d 294, 298 (2002).¹ *Cookman Realty*, however, only addresses deference to agency interpretation of legislative rules. *Id.* This Court drew a clear line between “legislative rules” – which “must be authorized by the West Virginia Legislature” – and “interpretive rules” – which “need not go through the legislative authorization process” in *Appalachian Power Co. v. State Tax Department*, 195 W.Va. 573, 582, 466 S.E.2d 424, 434 (1995). This Court held that interpretive rules are not “irrevocably binding on the agency or the court” and “are entitled on judicial review only to the weight that their inherent persuasiveness commands.” *Id.*

¹ Alex’s quote actually comes from *Patriot Mining Co., Inc. v. Sierra Club*, Civ. Action No. 11-AA-102 at 7 (J. Stucky), Circuit Court of Kanawha County, West Virginia (February 13, 2013), which misquoted *Cookman Realty*. Petr. Br. 21.

Here, there is no question that the Selenium Guidance is not a legislative rule authorized by the West Virginia Legislature. Thus, it is not due the high level of *Chevron* deference required by *Appalachian Power* for such rules. *Id.* at 583-84. Moreover, the Selenium Guidance was not even promulgated in accordance with the procedures required of interpretive and procedural rules under W. Va. Code §§ 29A-3-4 and 29A-3-8. Accordingly, the Selenium Guidance should not command any deference under West Virginia's statutes and case law. However, even if the Court finds that some deference is appropriate, the maximum deference due to WVDEP's interpretation would be that commanded by its inherent persuasiveness.

WVDEP's interpretation of the Selenium Guidance has negligible inherent persuasiveness. The arguments from WVDEP's attorneys, the testimony of the Division of Mining and Reclamation's program manager for NPDES permitting, M. Jeffrey Parsons, and the permitting record did not create a coherent interpretation. Therefore, there was no interpretation to which the Board could defer. Rather, the Board used its role as fact-finder to weigh the arguments and evidence presented.

The Board's findings are not entirely clear regarding "nearby," "site-specific," or "adjacent" water quality data, but neither are WVDEP's positions. No single interpretation was provided by WVDEP that could warrant deference from the Board or from this Court. Regardless of the differing interpretation of "site-specific or adjacent water quality data," the Board was not required to address that factor. Only one of the four initial factors in the Selenium Guidance must be met to find an initial reasonable potential, and there was no dispute that the first criterion—high selenium coal seams—was met by the Peachorchard mine. In addition, under the Selenium Guidance, "[s]ite-specific or adjacent water quality data" is used to indicate reasonable potential. A.R. 426. Under that section, such data can only prove reasonable

potential; site-specific or adjacent water quality data with selenium concentrations under 5 µg/L cannot disprove reasonable potential. Alex introduced data to demonstrate a lack of reasonable potential, as provided for in the guidance's introduction. That provision allows for the use of "historical water quality or other data" to demonstrate that there is no reasonable potential, and does not include the modifier "site-specific or adjacent". A.R. 425. As a result, the Board was not required to make any findings with regard to "nearby," "site-specific," or "adjacent" water quality data.

Alex argues that the Board should have accorded deference to the position that draft 303(d) listings are not deemed "operable" under the Selenium Guidance. Alex notably only cites to interpretations of WVDEP's attorneys submitted to the Board after the March 14 hearing. The testimony of WVDEP's personnel at the March 14 hearing conflicts with those interpretations. *Post hoc* positions taken solely for the purposes of litigation do not warrant deference. *See Webb v. West Virginia Bd. of Medicine*, 212 W.Va. 149, 158, 569 S.E.2d 225, 234 (W.Va. 2002). Instead, the Board listened to the best authority available on WVDEP's interpretation of the issue, testimony of the Division of Mining and Reclamation's program manager for NPDES permitting. Mr. Parsons testified that the draft 303(d) list must be taken into consideration when drafting a permit. A.R. 5. The Board found this testimony compelling and accepted Mr. Parsons's contention. *Id.* The Circuit Court affirmed. A.R. 20–21.

Contrary to Alex's allegations, the Board did not ignore WVDEP's position that a finding of no reasonable potential can be made if an applicant "demonstrates there is no reasonable potential to violate the selenium WQC." A.R. 70. In fact, the Board specifically agreed that the Selenium Guidance provides for such an alternative. A.R. 4. When the Board applied the facts to this interpretation, it found that the certified record and the sole WVDEP witness did not

provide any additional information to prove the lack of reasonable potential. A.R. 10.² Alex maintains in its opening brief that such evidence was offered, but only cites to statements made in previous briefing. Petr. Br. 17–18. That is because no such evidence exists. At no point did Alex or WVDEP introduce evidence to the Board demonstrating a lack of reasonable potential and so the Board cannot have failed to consider such evidence.

IV. Alex Did Not Provide Additional Information That Demonstrated That There Was No Reasonable Potential to Violate Selenium Water Quality Standards.

Alex and WVDEP rely on one sentence in the Selenium Guidance in an attempt to allow WVDEP to avoid performing an adequate reasonable potential analysis: "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." See A.R. 35-36, 68-69, 425; Petr. Br. 16. The Board agreed with Alex and WVDEP that this alternative to multi-step analysis in the Selenium Guidance exists. A.R. 4. The Circuit Court agreed with this finding. A.R. 21.

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. The only dispute is over whether Alex demonstrated a lack of reasonable potential for the Peachorchard Mine. The Board correctly found "that WVDEP and Alex Energy did not supply documentation or information in the application or at the hearing in this matter that would demonstrate there is no reasonable potential to violate the selenium water quality criteria." *Id.* Instead, the Board specifically found,

² See also A.R. 4–5 ("[T]he Board finds that WVDEP and Alex Energy did not supply documentation or information in the application or at the hearing in this matter that would demonstrate there is no reasonable potential to violate the selenium water quality criteria. It discussed the materials handling plan during the hearing but the plan was not introduced or cited in the record or briefs. The Surface Mining Control and Reclamation permit may have required a materials handling plan as part of the Hydrologic Reclamation Plan or the Cumulative Hydrologic Impact Assessment but those components of the application were not included in the record for this appeal. Also the WVDEP did not offer the testimony of the Permit writer to offer an understanding of what was considered.")

The certified record did not contain any additional information provided by the Intervenor. All of the data referenced in the Permit rationale was required by the WV/NPDES permitting application. CR. pg. 58. During the evidentiary hearing on March 14, 2013, the only witness for Appellee was unable to provide any additional information proving the lack of reasonable potential. The only information offered was a one-time sample from an adjacent operation and the materials handling plan.

A.R. 10. The writer of WV/NPDES Permit WV1024809 did not perform any kind of reasonable potential analysis. A.R. 289. Not only did he not follow the WVDEP's Selenium Guidance, there is no evidence in the record of any analysis whatsoever. A.R. 293–94. In the permit rationale, the writer simply listed facts about the mining operation. In the middle of the section on selenium, the permit writer wrote, “Report only requirements for selenium are assigned to all outlets of this application,” but provided no explanation as to why those requirements were imposed. See Id.

Alex now claims that the Board ignored evidence that showed the failure to place effective selenium limits on WV/NPDES Permit WV1024809 was justified. Petr. Br. 16. Alex identifies the facts that the majority of the mining proposed is highwall mining and that the proposed outlets are on-bench and precipitation induced as some such evidence. Petr. Br. 17. While there is no dispute over these facts, the permit rationale only mentioned them in relation to violations of the narrative water quality criteria, not selenium. A.R. 135. In the hearing in front of the Board, the only mention of highwall mining was to clarify that the Selenium Guidance did in fact apply to that method of mining. A.R. 298–99. No evidence or testimony was presented relating on-bench, precipitation induced outfalls to an absence of reasonable potential. Instead, WVDEP's witness, Mr. Parsons, testified that there is no reason not to place selenium limits on an outfall on the basis of it being on-bench. A.R. 391–92. The Board had no responsibility to consider Alex's claims regarding highwall mining and on-bench, precipitation induced outlets, because neither the permitting record from WVDEP nor the evidence and testimony at the hearing support those claims. Given that the Conservancy 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 Envtl. Protection*, Civil Action No. 95-AA-3 (Circuit Court of Kanawha County, 1999). Alex and WVDEP did not meet this burden; both the Board and the Circuit Court concurred. See A.R. 4, 22.

Alex objects to the Board's assessment of the water quality samples Alex presented at the March 14 hearing. Petr. Br. 18-19. Alex specifically claims that the Board did not explain why the data was or was not relevant, *id.* at 19, but the Board explained why it did not credit adjacent water quality samples. A.R. 10. The Board found that adjacent samples alone were not sufficient to conclude that the Peachorchard Mine had no reasonable potential, without evidence showing that the selenium concentrations in the sediments from the two locations are homogeneous. *Id.* Reasonable potential is a protective determination. *See Am. Iron & Steel Inst. v. E.P.A.*, 115 F.3d 979 (D.C. Cir.1997). The burden is justifiably high to prove that discharges do not have a reasonable potential to cause or contribute to an exceedances of water quality standards. No matter the number of samples, water samples from an adjacent site that show low selenium concentrations are not alone sufficient to demonstrate that there is no reasonable potential, and so the Board found. A.R. 10.

WVDEP recognized the presence of the materials handling plan in its issuance of WV/NPDES permit WV1024809, but it did not link the plan to a finding of no reasonable potential. No testimony or evidence presented at the March 14 hearing linked the materials handling plan to an absence of reasonable potential. The Board found "that a materials handling plan to encapsulate selenium cannot be used to disprove reasonable potential, since it is a requirement imposed after a reasonable potential has been determined." A.R. 11. This is a reasonable interpretation of an ambiguity in the Selenium Guidance, for which no reasonable interpretation has been provided by WVDEP or Alex. In addition, nowhere in the record has any party demonstrated that "alternative handling procedures" on the Peachorchard Mine mean that there is no reasonable potential for the

mine to cause or contribute to exceedances of the selenium water quality criteria. As a result, the Board reasonably decided not to credit Alex and WVDEP's simplistic references to the materials handling plan as disproving reasonable potential.

CONCLUSION

For the foregoing reasons, the Conservancy respectfully requests that this Court affirm the reasonable and justified Final Order of the Circuit Court, as well as the Board's Final Order.

Respectfully submitted,



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