IN THE SUPREME COURT OF WEST VIRGINIA

WEST VIRGINIA LAND RESOURCES, INC., and MARION COUNTY COAL RESOURCES, INC., Petitioners,

v. **No. 21-0845**

AMERICAN BITUMINOUS POWER PARTNERS, LP, WEST VIRGINIA DEPT. OF ENVIRONMENTAL PROTECTION, and WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD, Respondents.

AND

AMERICAN BITUMINOUS POWER PARTNERS, LP, Petitioner,

v. **No. 21-0885, 21-0893**

WEST VIRGINIA LAND RESOURCES, INC., MARION COUNTY COAL RESOURCES, INC., WEST VIRGINIA DEPT. OF ENVIRONMENTAL PROTECTION, and WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD, Respondents.

BRIEF OF THE RESPONDENT, WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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I. SUMMARY RESPONSE

The West Virginia Department of Environmental Protection (hereinafter "DEP") submits this Summary Response in support of the Environmental Quality Board's ("EQB") November 12, 2021 Final Order. The EQB acted within its discretion. The Board's decision should be afforded deference and should not be disturbed. Additionally, since entry of the Final Order and in accordance with it, the DEP modified the permit at-issue in a manner consistent with the Final Order.

Pursuant to Rule 10(e) of the West Virginia Rules of Appellate Procedure, the DEP hereby tenders its summary response to the Petitioners' Briefs filed in this matter. DEP does so in lieu of filing a full Respondent's Brief and consents to the waiver of oral argument.

II. STATEMENT OF THE CASE

Pursuant to Rule of Appellate Procedure 10(d), the DEP states that, generally, both Statements of the Case submitted by the Petitioners are accurate and a mere repetition of the procedural history or statement of facts in this Brief is unnecessary insofar as they relate to these Appeals. To the extent that each brief contains factual allegations that are the positions of the respective parties and are not conclusions reached by the Environmental Quality Board (hereinafter "EQB"), the DEP does not adopt those allegations unless explicitly stated herein.

III. STANDARD OF REVIEW

The Court should afford deference to the decisions by the Environmental Quality Board ("EQB") and should affirm the Final Order unless certain errors have been committed. Pursuant to *W.Va. Code* § 29A-5-4(g), made applicable to EQB decisions by *W.Va. Code* § 22B-5-4(a), the

Court "may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision, or order are: (1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority or jurisdiction of the agency; (3) Made upon unlawful procedures; (4) Affected by other error of law; (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." "'[C]learly wrong' and 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or a rational basis." Syl. pt. 3, *In re Queen*, 196 W.Va. at 444, 473 S.E.2d at 485 (1996).

IV. SUMMARY ARGUMENT

A. Responses to Assignments of Error of Petitioners, West Virginia Land Resources, Inc. and Marion County Coal Resources, Inc. (21-0845).

1. Response to Assignment of Error No. 1: The EQB should not have vacated the permit.

West Virginia Land Resources, Inc. ("WVLR") and Marion County Coal Resources, Inc. ("MCCR") argue that the EQB should have vacated the permit; this is unsupported by law. While the WVLR and MCCR (collectively, "ACNR") cite *Klamath-Siskiyou Wildlands Ctr.* to support their argument that vacatur is the appropriate remedy, that case is wholly inapplicable to this matter. *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine Fisheries Serv.* 109 F. Supp.3d 1238 (N.D. Cal. 2015).

In *Klamath-Siskiyou Wildlands Ctr.*, the reviewing court was tasked with considering the judicial review of a federal agency pursuant to the federal Administrative Procedures Act when the federal agency improperly issued permits. *Id.* at 1239. The decision does state that "when a court finds an agency's decision unlawful under the Administrative Procedures Act, vacatur is the standard remedy." *Id* at 1241. However, the federal Administrative Procedures Act states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) *hold unlawful and set aside agency action, findings, and conclusions* found to be--
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C.A. § 706 (West 1966) (emphasis added). Therefore, when a permit is issued, the federal Administrative Procedures Act only authorizes a court affirm or vacate that permit. Clearly, when a statute only provides for vacatur of an unlawfully issued permit, then "vacatur is the standard remedy." The federal statute is inapplicable to this state matter, however, and the state's statutes on review of agency decisions are dissimilar to the federal counterpart.

West Virginia's State Administrative Procedures Act provides that a reviewing court has the authority to affirm, reverse, vacate, or modify the order or decision of the agency, or the court can remand the case for further proceedings. *W.Va. Code* § 29A-5-4(g). With respect to the argument of ACNR, the applicable statute is *W.Va. Code* § 22B-1-7(g)(1) which provides that the EQB has the authority to affirm, modify, or vacate the order, permit, or official action of the DEP. The EQB acted within its authority by holding a de novo hearing and, upon consideration of the evidence, modifying the at-issue permit to correct the deficiencies it believed existed in the permit's reissuance. *W.Va. Code* § 22B-1-7(e), (g)(1). The EQB did not err in declining to vacate the UIC permit.

2. Response to Assignment of Error No. 2: The EQB Did Not Err by Summarily Addressing Immaterial Issues in the Case.

Footnote 5 of the EQB's Final Order succinctly addresses the many Findings of Fact and Conclusions of Law submitted by the parties, as well as other evidence presented and arguments made. JA001046 n.5. ACNR argue that the EQB's Final Order was deficient because it did not specifically address every legal and factual argument that ACNR raised in their appeal. WVLR and MCCR's Petitioners' Brief, p. 24. It is true that there are certain proposed findings that were not enumerated in the Final Order, but this is not required by statute or otherwise required by law.

ACNR argue that the EQB violated *W.Va. Code* § 29A-5-3, which requires that the EQB "include a ruling on each proposed finding" and that it make an "explicit statement of the underlying facts supporting the findings." WVLR and MCCR's Petitioners' Brief, p. 22. The "ruling on each proposed finding" in the Final Order below was contained either in the body of the order, or in Footnote 5 which states, *inter alia,* that "[c]ertain proposed findings and

conclusions have been omitted as not relevant or necessary to a proper decision." JA001046 n.5. The EQB clearly ruled that omitted findings were either irrelevant or not necessary to render a decision. *Id.*

The EQB must only include an "explicit statement" of facts that support the findings it adopts. *W.Va. Code* § 29A-5-3. In the Final Order, the EQB details the findings it has adopted and supports those findings with explicit statements of the underlying facts. The EQB's Final Order satisfies the requirements of *W.Va. Code* §§ 29A-5-3.

The ACNR further argue that the EQB violated *W.Va. Code* § 22B-1-7(g)(1), which provides that the EQB hear and consider "all the testimony, evidence and record in the case" before it issues a written order. WVLR and MCCR's Petitioners' Brief, p. 22. In essence, ACNR argue that they cannot trust the EQB's statement that it considered all of the proposed findings or fact and conclusions of law; the record; and arguments of counsel. *Id.* at p. 24; JA001046 n.5. Instead, ACNR demand an exhaustive recital of every appeal ground it raised, the evidence it presented regarding each ground, and how the EQB considered each and every ground in connection with the evidence presented on that issue. WVLR and MCCR's Petitioners' Brief, p. 22. This sort of recital is not required by law.

ACNR once again argue that the EQB should have vacated the underground injection control ("UIC") permit because of the deficiencies that the EQB found existed in the permit application. *Id.* at 25. The EQB, however, hears appeals of permit issuances *de novo,* and has the authority to take evidence offered by any of the parties. *W.Va. Code* § 22B-1-7(e). The EQB took evidence during three separate days of hearings and, at the conclusion of that evidence, the EQB chose to modify the UIC permit. JA001045 and JA001062. It is clear from the Final Order that any deficiencies that the EQB believed existed in the permit application were corrected through

the evidence presented and the sole issue outstanding was the injection volumes, which the EQB modified. JA001045-67. Subsequent to the entry of the EQB's Final Order, DEP modified the UIC permit in compliance with the order.

3. Response to Assignment of Error No. 3: The EQB Acted Within its Discretion and its Decision is Appropriate.

ACNR argue that the EQB "treated" the UIC permit as a modification rather than a reissuance application. WVLR and MCCR's Petitioners' Brief, p. 25-27. ACNR's argument is conclusory and inaccurate. The EQB's decision to modify the injection volumes contained within the permit were based on factual findings that are within the sound discretion of the Board as the finder of fact. JA001045-67; *In re Queen*, 196 W.Va. at 447, 473 S.E.2d at 488 (1996). Again, subsequent to the entry of the EQB's Final Order, DEP modified the UIC permit in compliance with the order.

B. Responses to Assignments of Error of Petitioner, American Bituminous Power Partners, LP. (21-0885 and 21-0893).

1. Response to Assignment of Error No. 1: The EQB Acted Within its Discretion and its Decision is Appropriate.

AMBIT argues that the EQB erred when it denied AMBIT's multiple motions to dismiss the appeal because MAEI and ACNR lacked standing. AMBIT's Petitioner's Brief, p. 15-22. The EQB's decision to deny AMBIT's dispositive motions were based on factual findings that are within the sound discretion of the Board as the finder of fact. JA001045-67; *In re Queen*, 196 W.Va. at 447, 473 S.E.2d at 488 (1996).

2. Response to Assignment of Error No. 2: The EQB Acted Within its Discretion and its Decision is Appropriate.

DEP does not have the authority to adjudicate a dispute regarding property rights. *See W.Va. Code* §§ 22-3-9(a)(9) and 22-3-18(b)(5). AMBIT's second assignment of error deals largely with just that, specifically contractual relationships and monetary disputes. AMBIT's Petitioner's Brief, p. 22-24. To the extent that AMBIT's brief addresses matters pertaining to property rights disputes, DEP abstains in its response and neither accepts nor rejects those contentions. The EQB found that MAEI and ACNR's "injury will likely be redressed by a favorable decision" because "a reduction in the volume of water injected into the Fairmont Mine Pool would reduce the volume of water that Appellants have to pump and treat. . . ." JA001061. The EQB's decision to deny AMBIT's dispositive motions were based on factual findings that are within the sound discretion of the Board as the finder of fact. JA001061; *In re Queen*, 196 W.Va. at 447, 473 S.E.2d at 488 (1996). Not only does the DEP agree with that finding, the agency has already modified the Permit.

3. Response to Assignment of Error No. 3: The EQB Did Not Err by Summarily Addressing Immaterial Issues in the Case.

Footnote 5 of the EQB's Final Order succinctly addresses the many Findings of Fact and Conclusions of Laws submitted by the parties, as well as other evidence presented and arguments made. JA001046 n.5. AMBIT argues that the EQB's Final Order was deficient because it did not specifically address all of "AMBIT's evidence, arguments, and objections, and [Appellants'] admissions against interest." AMBIT's Petitioner's Brief, p. 22-24. It is true that some evidence, arguments, and objections were not specifically enumerated in the Final Order, but this is not required by statute or otherwise required by law.

The "ruling on each proposed finding" in the Final Order below was contained either in the body of the order, or in Footnote 5 which states, *inter alia,* that "[c]ertain proposed findings and conclusions have been omitted as not relevant or necessary to a proper decision." *See W.Va. Code* § 29A-5-3; JA001046 n.5. The EQB clearly ruled that omitted findings were either irrelevant or not necessary to render a decision. *Id.*

The EQB must only include an "explicit statement" of facts that support the findings it adopts. *W.Va. Code* § 29A-5-3. In the Final Order, the EQB details the findings it has adopted and supports those findings with explicit statements of the underlying facts. The EQB's Final Order satisfies the requirements of *W.Va. Code* §§ 29A-5-3.

It is clear from the Final Order that any deficiencies that the EQB believed existed in the permit application were corrected through the evidence presented and the sole issue outstanding was the injection volumes, which the EQB modified. JA001062. Subsequent to the entry of the EQB's Final Order, DEP modified the UIC permit in compliance with the order.

4. Response to Assignment of Error No. 4: The EQB Did Not Err in Denying AMBIT's Motions to Amend the Final Order.

AMBIT made two Motions after the EQB entered its Final Order. JA001068-84 and JA001085-90. Those Motions asked the EQB to amend its Final Order to reflect certain evidence, arguments, and objections that AMBIT made during the pendency of the case below. *Id.* EQB denied those Motions. JA001091-93 and JA001094-97.

Although DEP recognizes that the Final Order was not explicit in its ruling on AMBIT's dispositive motions, read together with the transcript, it is clear that the EQB denied AMBIT's dispositive motions and the EQB's specific findings as they relate to standing are set forth in the Final Order. Evidentiary Hearing Tr., 559-60; JA001050-53, 59-61. The EQB's rulings on

AMBIT's dispositive motions were clearly stated on the record and the EQB's findings are explained in detail in the Final Order. The EQB did not err in refusing to amend its Final Order and DEP has modified the UIC permit in compliance with the order.

V. CONCLUSION

For the foregoing reasons, the Court should affirm the EQB's Final Order in its entirety and grant such other relief as it deems just and appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of December, 2021, a true copy of the foregoing Brief of the Respondent, West Virginia Department of Environmental Protection, was served upon counsel of record for all parties and upon the Clerk of the Environmental Quality Board, by U.S. mail, first class prepaid (courtesy copy via email) as follows:

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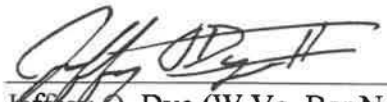

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