

ENVIRONMENTAL QUALITY BOARD

SIERRA CLUB,

Appellant,

v.

Appeal No. 10-34-EQB

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

Appellee,

and

PATRIOT MINING COMPANY, INC.,

Intervenor.

**ORDER GRANTING INTERVENOR'S MOTION TO DISSOLVE STAY OR IN THE
ALTERNATIVE DENYING APPELLANT'S MOTION FOR STAY**

Appeal No. 10-34-EQB was filed with the West Virginia Environmental Quality Board ("Board") on September 3, 2010. On November 17, 2010, the Sierra Club ("Appellant") filed a Motion for Stay. The Board entered a Stay order on November 18, 2010, and directed the parties that the Stay shall be in effect until a final order is issued by the Board.

The Board entered a final order in this case on March 25, 2011, and thereby jurisdiction over the matter was closed. The West Virginia Department of Environmental Protection ("Appellee") and Patriot Mining Company, Inc. ("Intervenor") filed separate appeals of the Board's final order in Kanawha County Circuit Court. The appeals were consolidated and transferred to Circuit Court Judge James Stuckey's court. At the request of the Petitioners, Judge Stuckey entered a Stay of the

portions of the Board's order that were under review by the court. However, certain terms and conditions of the Board's order remained in effect and were not subject to Stay or appeal.

On September 20, 2011, Judge Stuckey remanded this case back to the Board to supplement its prior order. However, Judge Stuckey also dismissed the matter from his court docket and thereby transferred jurisdiction back to the Environmental Quality Board.

On September 30, 2011, Intervenor filed a Motion to Clarify the Stay of Patriot's NPDES Permit, Or in the Alternative, To Dissolve the Stay if It Still Has Legal Effect. The Board requested briefs from the parties and conducted a hearing on the Motion on October 14, 2011, before a court reporter and the full-quorum of the Board.

Intervenor argued that the standard for review of Stay requests applied by the Board in November of 2010 was no longer the legal standard in West Virginia. Further, that under the new standard, the Board must find that the party seeking the Stay is likely to succeed on the merits of the case. Intervenor argued that even if the Board chose to apply the old standard, new evidence developed during the evidentiary hearing in this matter would lead the Board to a different result on the question of irreparable harm and balancing of harms test.

In *Jefferson County Bd. Of Educ. V. Jefferson County Educ. Ass'n.*, the West Virginia Supreme Court looked to the lead of the Fourth Circuit of Appeals and applied a balance of hardship test.

In making this "balancing" inquiry, we have followed the lead of the Fourth Circuit Court of Appeals: Under the balance of hardship test the [lower] court must consider, in "flexible interplay," the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest.

Jefferson County Bd. Of Educ. v. Jefferson County Educ. Ass'n, 183 W.Va. 15, 24, 393 S.E. 2d 653, 662 (1990) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985) (citation omitted) (additional citations omitted).

However, the Fourth Circuit decision that is the basis of the Jefferson County Bd. of Education case has been modified by the circuit which now chooses to follow a different test, one which places greater influence on the question of which party is likely to prevail on the merits of the case.

In *Real Truth About Obama, Inc. v. Federal Election Com'n*, the Fourth Circuit applied the standard for preliminary injunctions stated by the United States Supreme Court in *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 374-76, 172 L.Ed. 2d 249 (2008). The Fourth Circuit of Appeals concluded that a plaintiff must show “[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Real Truth About Obama, Inc. v. Federal Election Com'n*, 575 F.3d 342, 345 (2009) quoting *Winter*, 129 S.Ct. at 374.

While the West Virginia Supreme Court of Appeals is yet to adopt the new Fourth Circuit Standard, the Board does not find it necessary to reject the new standard simply because it has not been cited as law in West Virginia.

I. Likelihood to Prevail on the Merits

Applying either test, the Board finds that Appellant is likely to prevail on the merits of the case. On March 25, 2011, this Board (with the same members) issued a thoughtful and detailed decision which agreed with the arguments of the Appellants in almost every area of the Sierra Club's appeal. The order was appealed to Kanawha County Circuit Court and in its decision the Court did

not vacate or over-turn the decision of the Board. Rather, the Court sent the order back to the Board to make more complete findings and directions to the WVDEP on how to comply with the Board's order. Given that the circumstances have not substantially changed in the past six months, the Board finds that the Appellant is likely to prevail on the merits of the case.

II. Irreparable Injury or Harm

The *Winter* and *Obama* cases require that the plaintiff make a clear showing that it is likely to be irreparably harmed absent preliminary relief. *Obama*, 575 F.3d 342, 345 (2009) quoting *Winter*, 129 S. Ct. at 374-76. The Board has reconsidered the irreparable injury or harm that may be suffered from entering or not entering a Stay in this matter. At the stay hearing in November of 2010 the circumstances surrounding the impact of a Stay were less proximate to the Board's decision. Discussion related to what may occur more than a year down the road. The Board recognized that a decision would and could be made by the Board prior to any economic harm being caused to Patriot Mining, LLC in the event of a Stay. Nearly eleven months later the circumstances have changed and the Board received evidence of the company going from New Hill West facility going from a \$1.85 million net income to a net loss of a quarter million dollars per month. (Appeal 10-34-EQB, Hearing on Motion to Dissolve Stay or in the Alternative Denying Stay, pg. 7, 10/14/2011) (Exhibit 1, Intervenor's *Motion to Clarify the Status of the Stay of Patriot's NPDES Permit, or in the alternative, to Dissolve the Stay If It Still Has Legal Effect*, Affidavit of Vaughn R. Miller, pg.2.)

The Board has learned more about the conditions of the receiving waters in the area. The Board learned during four days of testimony that the receiving stream is highly degraded. While the Board learned from Dr. Bernhardt that an increase or additional loading of pollutants of concern may cause additional damage to the macro invertebrate community in the affected area and may also