

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

SIERRA CLUB,

Appellant,

vs.

APPEAL NO. 10-34-EQB

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

Appellee,

and

PATRIOT MINING COMPANY, INC.,

Proposed Intervenor/Appellee.

THURSDAY, MARCH 10, 2011
8:30 A.M.

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF AIR QUALITY
601 57TH STREET, S.E.
CHARLESTON, WEST VIRGINIA

Nancy Danesi Wolfe
Certified Court Reporter

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POST OFFICE BOX 20200. CHARLESTON WEST VIRGINIA 25362 (304)346-0460 FAX (304)757-7425

Board Members Present:

DR. EDWARD SNYDER, CHAIRMAN
DR. D. SCOTT SIMONTON
MR. EDWARD C. ARMBRECHT, JR.
DR. JAMES VAN GUNDY
MR. WILLIAM H. GILLESPIE

On behalf of the Appellant:

JOSEPH LOVETT, ESQUIRE
Appalachian Center
Post Office Box 468
Lewisburg, West Virginia 24901

PETER MORGAN, ESQUIRE (via speakerphone)
Sierra Club
Environmental Law Program
1650 38th Street, Suite 102W
Boulder, Colorado 80301

On behalf of the Appellee:

JENNIFER HUGHES, ESQUIRE
West Virginia Department of Environmental Protection
Department of Legal Services
601 57th Street, SE
Charleston, West Virginia 25304

On behalf of the Proposed Intervenor/Appellee:

ROBERT G. MCLUSKY, ESQUIRE
JAMES R. SNYDER, ESQUIRE
Jackson Kelly, PLLC
Post Office Box 553
Charleston, West Virginia 25322

Also Present:

WENDY RADCLIFF, ESQUIRE, Legal Counsel
JACKIE SHULTZ, Clerk of the Board

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P R O C E E D I N G S

(The following is an excerpt from the
aforementioned matter which is the
subject of this transcript.)

BOARD RULING

CHAIRMAN SNYDER: Thank you for waiting.

I do want to indicate on the record the decisions, both
of them, presented are unanimous decisions of the Board.

First, we deny the motion in limine. The Board
makes this ruling on the motion in limine because the
late filing did not give the parties an opportunity to
respond before the hearing began; therefore, the Board
allowed the parties to consider these documents to be
draft documents and recognizes these documents solely for
the scientific literature that they cite.

The Board has carefully considered the
arguments of counsel, evidence, and statutes and
regulations in making its decision and therefore issues
the following order; in this regard, the Board
understands the weight of its decisions and the
implications that its decisions have on the people of the
state.

The Board finds that the mining operation has
the opportunity and potential to improve water quality

1 while the Board agrees with the appellant on the majority
2 of issues presented. However, the Board does not agree
3 that 300 microsiemens per centimeter is necessarily an
4 appropriate limit for this permit. Investigation and
5 data review, coupled with the scientific evidence
6 presented at hearing, should lead the WVDEP to quickly
7 develop appropriate permits for Scotts Run.

8 The Board finds that there is a strong positive
9 correlation between conductivity and diminishing
10 macroinvertebrate community health. While this decision
11 is permit specific, the Board understands that headwater
12 stream communities may require a more strict conductivity
13 standard than streams of higher stream order, such as
14 Scotts Run.

15 The Board finds that DEP erred in issuing the
16 permit without conducting a reasonable potential analysis
17 and without including effluent limits necessary to ensure
18 compliance with the State's narrative and numeric water
19 quality standards. The Board remands this permit
20 modification to the WVDEP to take action within 45 days,
21 with the written order of this Board. The Board remands
22 this modification to require a reasonable potential
23 analysis conducted for arsenic, conductivity, sulfate,
24 and total dissolved solids.

1 The Board finds that there is evidence of
2 impairment for conductivity of Scotts Run according to
3 WVDEP's use of the West Virginia Stream Condition Index.
4 The Board remands this modification to require
5 enforceable limits for conductivity, sulfate, and total
6 dissolved solids. The Board remands the permit
7 modification to WVDEP to include an appropriate limit for
8 manganese based on the agreement of the parties and
9 selenium based on the evidence offered. The Board
10 remands the permit modification to WVDEP to include WET
11 limits conducted with the WVDEP justification and
12 background for permitting guidance for surface coal mine
13 operations to protect West Virginia Narrative Water
14 Quality Standards.

15 we thank you very much, and the written order
16 will be issued as soon as we possibly can. We are making
17 this a high priority so we can get this in the works as
18 quickly as possible. And, again, I thank everyone for --

19 MR. LOVETT: I have one question.

20 CHAIRMAN SNYDER: Okay.

21 MR. LOVETT: I see that that you read
22 your decision, and I wonder if that's available or not --
23 or will be available.

24 MS. RADCLIFF: We are going to issue a

1 written order that will -- you know, that will be part of
2 the transcript because she --

3 MR. LOVETT: Right. But it will take
4 awhile to get the transcript, and I was just wondering if
5 that would be more immediately available than the
6 transcript.

7 MS. RADCLIFF: No.

8 DOCTOR SIMONTON: He's got notes written
9 on here and everything else.

10 CHAIRMAN SNYDER: This way, when it gets
11 in the transcript, as you know -- as I always tell me
12 students, "what's in the syllabus is in the syllabus.
13 what I say is not in the syllabus." We will go off the
14 record with that one.

15 (Hearing adjourned at 12:50 p.m.)

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit,

I, Nancy Danesi Wolfe, Certified Court Reporter and Notary Public, hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcription of proceedings had and testimony taken on March 10, 2011.

Given under my hand this 10th day of March, 2011.

Nancy Danesi Wolfe, Notary Public
Certified Court Reporter

My commission expires August 11, 2020.