

TAYLOR ENVIRONMENTAL
ADVOCACY MEMBERSHIP, INC.

Appellant,

v.

Appeal No. 2008-06-SMB

WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Appellee,

and

ICG TYGART VALLEY, LLC,

Intervenor-Appellee.

FINAL ORDER

I. PROCEDURAL HISTORY

This matter originally came before the Board pursuant to an appeal filed by Taylor Environmental Advocacy Membership Inc. (“TEAM” or “Appellant”) on July 3, 2007. Appeal Number 2007-06-SMB involved the West Virginia Department of Environmental Protection (“WVDEP” and “Appellee”) decision to grant permit number U-2004-06 to ICG Tygart Valley, LLC (“ICG” and “Intervenor”). This Board held an evidentiary hearing in the matter on November 13-14, 2007 and issued a written final decision on December 10, 2007. The Board’s order ruled that the stream monitoring plan was inadequate in one particular aspect; the PHC inadequately documented the likely concentrations of post-mining iron seeps; and the Board ordered that WVDEP should revise the CHIA to assess the impacts of a proposed refuse disposal

area. However, the Board did not rule on the other issues raised in the appeal. Because the Board did not issue a ruling on the other matters, the Board declined to limit the scope of the present appeal, Appeal Number 2008-06-SMB. On April 1, 2008 the WVDEP approved a modified permit in response to the Board's order. TEAM filed an appeal of WVDEP's modification of the permit, appeal number 2008-06-SMB, on April 30, 2008. By order dated June 30, 2008 the Board combined the record and testimony of the prior appeal into the record of this matter. At a hearing of a quorum of the Board on July 8, 2008 the Board accepted the certified record as evidence in this case. Board members Tom Michael, Paul Nay, Ed Grafton, James Smith, and Mark Schuerger attended the hearing and participated in the decision of this matter. Board member, Dr. Henry Rauch, reviewed the transcript and participated in the decision of this matter. Joseph Lovett, Esquire, of the Appalachian Center for the Economy and the Environment represented the Appellant. Andrew "Fenway" Pollack, Esquire, of the West Virginia Department of Environmental Protection Office of Legal Services represented the Appellee. Robert McLusky, Esquire, of Jackson Kelly PLLC represented the Intervenor. After a careful review of the evidentiary record, the arguments of counsel, and the statutes and regulations governing surface mining in West Virginia, the Board does not believe by a preponderance of the evidence that the mining plan will prevent iron seepage in excess of 1.5 mg/L and the permit does not have an adequate Contingency Plan to either prevent or treat that seepage in the event of an exceedance. Therefore, the Board hereby unanimously **REVERSES** the permit decision of the WVDEP and **DENIES** the permit as written.

II. STATEMENT OF THE CASE

The Appellant's notice of appeal centered on the following areas: 1.) Whether the polluted mine drain discharges will move both underground and above ground. 2.) Whether

subsidence will occur on the surface. 3.) Whether subsidence will damage the surface of the land as well as wells and springs and will capture surface stream flows and pool other surface stream flows damaging the hydrologic balance. 4.) Whether the polluted mine drainage discharges will require treatment in perpetuity.

III. STANDARD OF REVIEW

Appeals are heard *de novo* by the Surface Mine Board as required by West Virginia Code §22B-1-7(e). The Board is not required to afford any deference to the WVDEP decision but shall act independently on the evidence before it. *West Virginia Div. of Environmental Protection v. Kingwood Coal Co.*, 200 W.Va. 734, 490 S.E.2d 823 (1997).

IV. FINDINGS OF FACT

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.

1. ICG proposes to open a new underground mine in the Lower Kittanning coal seam in Taylor County, West Virginia. The mine is projected to employ about 350 persons at peak production and to maintain production of about 3.5 million tons per year for 12 to 13 years. 11/14/07 Tr., 7-8 (Gene Kitts).
2. The proposed mine will utilize longwall mining technologies. On June 5, 2007, WVDEP originally issued Permit No. U-2004-06 to the mine. SMB Record, Appeal 2007-06, pp. 1 & 2.
3. ICG submitted a permit modification to address the deficiencies identified by this Board.
4. On April 1, 2008, WVDEP re-issued Permit Number U-2004-06 by approving Revision Number 1, and Appellant filed this appeal. SMB Record, Appeal 2008-06, p. 1.
5. In its original application that was the subject of the first appeal, ICG did not calculate the impacts of the iron in the post-mining seepage on the small receiving streams.
6. In its revised application, IGC specifically calculated these impacts. In its Supplement to the PHC in Section J-6, a new section called "Potential Impact to Receiving Streams" includes an untitled table that calculates "Maximum Iron Control of Seepage, to keep <1.49 mg/L in stream"
7. Paragraphs 26 of Appellant's Petition for Appeal specifically raised questions concerning the permit's failure to prevent off-site material damage to the hydrologic balance.
8. West Virginia's iron water quality numeric criterion is 1.5 mg/L for warm water fisheries. (47 CSR 2 Appendix E).
9. SMCRA requires permittees to show that their operations will prevent material damage to the hydrologic balance outside the permit area. *W.Va. Code R.* §§ 38-2-3.32.d.5
10. In its revised PHC, ICG's predicted post-mining seepage iron concentration of less than 1.4 mg/L is based upon the initial iron concentration used in the model.

11. ICG's model assumes the polluted mine water is stratified in the mine. ICG has no basis on which to project the iron levels within the stratification.
12. The second flaw in ICG's model is that it assumes that iron concentrations in the mine will start at 4.25 mg/L. This assumption was based strictly on the iron level in the Martinka mine without adequate support or explanation.
13. It is undisputed that after mining has concluded and after the mine fills up with water, flow of mine water will occur upwards through the mine overburden, creating post-mining seepage (land surface discharge) of this mine water. ICG projects post-mining seepage via overburden outcrops of 433 gallons per minute (CR. at 13).
14. In its original PHC, ICG predicted that the expected iron concentration in the post-mining seepage would be between 1.0 and 1.4 mg/L. (CR at 3 and 5)
15. In its revised PHC, ICG did not modify this prediction, nor did it provide additional supporting evidence to back up this calculation as requested by the Board December Order.
16. Instead ICG added a Contingency Plan to treat the mine pool after it fills up.
17. Mr. Mullenex, who was responsible for the calculations of iron concentrations in post-mining seepage, was not called to testify at the July 2008 hearing and therefore the Board's understanding of these calculations must be based on the information contained in the PHC.
18. The Board finds that the Contingency Plan offered by ICG is inadequate. The application contained information that the monitoring will occur "as the mine recharges," a condition that would allow implementation in or above deeper portions of the mine before mining is finished and a maximum period of monitoring record. In the Memorandum in Support of the Findings of Fact and Conclusions of Law the argument is made that monitoring will occur "as the mine pool

- risers” but only after “the mining is complete.” Exactly when monitoring will occur and when the potential problem may be identified and addressed is unclear from the Contingency Plan.
19. The Board finds that the current Contingency Plan is open-ended with no clear limits, timelines, or monitoring regime required by the permit.
 20. The Board finds that the Contingency Plan offers no description of how it can or will be used to identify conditions that, unaddressed, would result in material damage to the hydrologic balance.
 21. The Contingency Plan offers no enforceable monitoring requirements that would control any portion of any version of the Plan for the permit.
 22. The Board finds that the water chemistry assumptions for surface seepage of mine water made by ICG and the WVDEP assumed the best case scenario and offered very little, if any, margin for error.
 23. The Board finds the potential for error in the assumptions to be too great without a more detailed Contingency Plan and monitoring requirements.
 24. Based on the record before the Board it is not possible to project the time to full flooding, the time it will take to achieve a long-term observation of final equilibrium conditions, and the associated outcrop seepage that will result from the proposed mining.

V. CONCLUSIONS OF LAW

1. The Board has jurisdiction to consider these appeals pursuant to *W. Va. Code* §22B-1-1 et seq.
2. The Board is empowered to consider appeals, subpoena witnesses, administer oaths, make investigations and hold hearings relevant to matters properly pending before the board. *W.Va. Code* §22B-1-5(1).

3. The *West Virginia Rules of Evidence* as applied in civil cases in the circuit courts of this state are followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible there under may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. *W.Va. Code* §29A-5-2.

4. Appeals are heard *de novo* by the Surface Mine Board as required by *W. Va. Code* §22B-1-7(e). The Board is not required to afford any deference to the WVDEP decision but shall act independently on the evidence before it. *West Virginia Div. of Environmental Protection v. Kingwood Coal Co.*, 200 W.Va. 734, 490 S.E.2d 823 (1997).

5. *W.Va. Code* §22B-1-7(g)(2) states that the Surface Mine Board shall make and enter a written order affirming the decision appealed from if the board finds that the decision was lawful and reasonable, or if the board finds that the decision was not supported by substantial evidence in the record considered as a whole, it shall make and enter a written order reversing or modifying the decision of the secretary.

6. *W.Va. Code R.* §§ 38-2-3.32.d.5 requires that the Secretary make an assessment of the probable cumulative impacts of all anticipated coal mining on the hydrologic balance in the cumulative impact area and determine that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

7. *W.Va. Code R.* §§ 38-2-14.5 requires “All surface mining and reclamation activities shall be conducted to minimize the disturbance of the hydrologic balance within the permit and adjacent areas, to prevent material damage to the hydrologic balance outside the permit area, to assure the protection or replacement of water supplies, and to support the approved post mining land use.”

SUMMARY

After a careful review of the certified record, the evidence offered by the Appellant, arguments of counsel, and the proposed findings of fact and conclusions of law submitted by the parties, the Board unanimously finds that the decision of the WVDEP was unlawful and unreasonable. The Board agrees with the Appellant's objection and concern regarding the calculation of the potential environmental impacts of the iron seeps and the inadequacy of the Contingency Plan offered by the Intervenor and Appellee. The Board **DENIES** the permit because it fails to adequately assess the iron seeps and iron concentrations associated with the seeps and because the Contingency Plan offered by the Intervenor does not adequately prevent off site damage to the waters of the state.

The Appellants, Appellee, and Intervenor presented numerous legal arguments related to the issuance of permit U-2004-06. However, after finding reason to reverse the decision of the Appellee on one argument, the Board declines to rule on the remaining questions and considers them moot as the arguments relate to this permit. Finding it necessary and proper to do so, the Board does hereby **REVERSE** the decision of the WVDEP to issue permit U-2004-06.

ORDERED and **ENTERED** this 7th day of October 2008.


Thomas R. Michael, Chairman