

**WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA**

GREEN VALLEY COAL COMPANY,

Appellant,

v.

Appeal No. 06-33-EQB

Appeal No. 06-36-EQB

**DIRECTOR, DIVISION OF WATER
AND WASTE MANAGEMENT, WEST
VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

Appellee.

FINAL ORDER

Green Valley Coal Company (hereinafter "Appellant" or "Green Valley") has appealed two WV/NPDES permits for its surface and deep mine operations in Nicholas County. Appeal No. 06-33-EQB concerns WV/NPDES Permit No. WV002984, and Appeal No. 06-36-EQB concerns WV/NPDES Permit No. WV0001104.

The point-source discharges that are at issue in this matter discharge into three different streams or unnamed tributaries thereof – Panther Creek, Grassy Creek, and Brushy Meadow Creek. In both permits, the West Virginia Department of Environmental Protection (hereinafter "DEP" or "Appellee") imposed water quality-based effluent limits (hereinafter "WQBELs") on those discharges, based upon a determination by DEP, in conjunction with the Division of Natural Resources (hereinafter "DNR"), that the receiving streams are "trout waters," as defined in the legislative rules regarding water quality standards. 47 CSR 2-2.18. Green Valley admits that

Panther Creek is a trout stream, but disagrees with DEP's and DNR's assessment that Grassy Creek and Brushy Meadow Creek are trout streams.

An evidentiary hearing before a quorum of the members of the Environmental Quality Board (hereinafter "EQB" or "Board") was held on January 10, 2008. At the hearing, the Board announced that it had consolidated Green Valley's two appeals.¹ (Transcript [hereinafter "Tr."] at 5). Leonard B. Knee, Esquire of Bowles, Rice, McDavid Graff & Love represented the Appellant. Jennifer L. Hughes, Esquire, Heather A. Connolly, Esquire, and Roland T. Huson, Esquire of the DEP Office of Legal Services represented the Appellee. The Board was comprised of Dr. Edward Snyder, Chairman, Dr. D. Scott Simonton, Dr. James Van Gundy and Mr. William Gillespie. At the hearing, Appellant's Exhibits 1 through 13 and Appellee's Exhibits 1 through 3 were admitted into evidence.

In deciding this appeal, the Board reviewed and considered the certified file, the relevant law and regulations, the Notice of Appeal, all written filings and memoranda, the testimony of the witnesses, exhibits, and arguments by counsel. 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

¹ In this ORDER, the Board will distinguish between the two appeals when citing to the Certified Record.

extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

The Board hears appeals of permits issued by Appellee *de novo* and in accordance with W. Va. Code §22B-1-7. The Board does not afford deference to the Director's decision. W. Va. Division of Env'tl. Protection v. Kingwood Coal Co., 200 W. Va. 734, 745, 490 S.E.2d 823, 834 (1997). Under W. Va. Code § 22B-1-7(g), the Board "shall 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."

To prevail in the appeal, the Appellants must raise an issue with sufficient evidence to support a finding that the Appellee's decision was incorrect. If sufficient evidence supported such a finding, then the Appellee would have to produce the evidence demonstrating why its decision was sound, regardless of the Appellants' evidence. The Appellants have an opportunity to show that the evidence produced by the Appellee is pre-textual or otherwise deficient. This shifting burden of proof standard was set out in a case before the Circuit Court of Kanawha County, *Wetzel County Solid Waste Authority v. Chief, Office of Waste Management, Division of Environmental Protection*, Civil Action Number: 95-AA-3 (Circuit Court of Kanawha County, 1999). The Kanawha County Circuit once again approved the use of the *Wetzel County* burden-shifting rule in environmental appeals in *Sierra Club v. Benedict*, Civ. Action No. 07-AA-42, Slip Op. at 6 (Kanawha County Circuit Ct. June 29, 2007). While *Wetzel County* is merely persuasive authority, the Board agrees with the analysis and has used that test here.

FINDINGS OF FACT

1. On November 6, 2006, DEP issued WV/NPDES Permit No. WV0002984 to Green Valley to operate and maintain a coal preparation/cleaning plant and refuse disposal area in Nicholas County. (Certified Record [hereinafter "CR"], Appeal No. 06-33-EQB, p. 6-7)
2. Permit No. WV0002984 contained WQBELs for Outlets 001, 010, 011, and 015. (CR, 06-33-EQB, p. 8-13)
3. Outlets 001, 010, 011, and 015 discharge into Panther Creek. (Tr. 29-30)
4. On October 25, 2006, DEP issued WV/NPDES Permit No. WV0001104 to Green Valley to operate and maintain a deep mine in Nicholas County. (CR, Appeal No. 06-36-EQB, p. 1-2)
5. Permit No. WV001104 contained WQBELs for Outlets 001, 005, 006, 007, 009, 011, 014, 015, 017, 022, and 023. (CR, 06-36-EQB, p. 3-20)
6. Outlets 001, 005, and 006 discharge into an unnamed tributary of Brushy Meadow Creek. Tr. p. 30. Outlets 007, 009, 014, 015, and 017 discharge into Grassy Creek. Id. Outlet 011 discharges into an unnamed tributary of Grassy Creek. Id. Outlets 022 and 023 discharge into Panther Creek. (CR, 06-36-EQB, p. 636)
7. DNR is the state agency charged with "the exploration, conservation, development, protection, enjoyment and use of the natural resources of the State of West Virginia." W. Va. Code §20-1-1. DNR's duties include studying and investigating wildlife, including fish. W. Va. Code §20-1-7.
8. DEP consults with DNR to obtain information about trout streams in general and, during the permitting process, for assistance in determining whether or not a particular stream is a trout stream. (Tr. 200, 252)

9. At the evidentiary hearing before the EQB, Appellee's witness Mike Shingleton was qualified as an expert in trout fisheries management. (Tr. 186)
10. Appellant's witness Karri Rogers was qualified as an expert in stream assessment. (Tr. 83)
11. Appellant's witness Ron Mullenex was qualified as an expert in hydrogeology and water quality. (Tr. 108)
12. In determining whether a stream supports a year-round trout population, DNR considers a wide variety of information, including fish surveys performed by itself, the U.S. Forest Service, and the fisheries program at West Virginia University. (Tr. 188-189)
13. When conducting a fish survey for the purpose of determining the absence or presence of trout, DNR looks at various factors, including fish size, young-of-the-year, multiple year classes, stocking history, and suitable habitat, which includes adequate cover, adequate food supply, suitable temperatures, suitable water quality, and presence of pools and/or riffles. (Tr. 186-191)
14. Appellant's witness, Ms. Rogers, made only two visits to the area at issue in this appeal, in June and August of 2007. (Tr. 99-100) Appellant's witness, Mr. Mullenex, has also made only two visits to the area at issue in this appeal, on the same dates as Ms. Rogers. (Tr. 111-112)
15. Neither Ms. Rogers nor Mr. Mullenex conducted any fish surveys during their visits to the area at issue in this appeal. (Tr. 92-93, 102-04)
16. Appellee's witness, Mr. Shingleton, has made numerous visits to the area at issue in this appeal and has conducted numerous fish surveys in the streams at issue in this appeal. See generally, Direct Testimony of Shingleton, p. 185-272.

17. Numerous fish surveys conducted in Panther Creek have found the existence of trout, including brook trout and tiger trout. (DEP Ex. 2; Tr. 208)
18. The habitat of Panther Creek includes areas with stable flow, low siltation, and excellent instream cover, which are conditions that are suitable for supporting a year-round trout population. (DEP Ex. 2; Tr. 91)
19. All three expert witnesses agree that Panther Creek, including the portion on which Green Valley's outlets 001, 010, 015, 022, and 023 are located, has the characteristics of a trout stream and is a trout stream. (Tr. 86-87, 90-91, 100, 128, 209)
20. Panther Creek is a trout stream. (Tr. 209, 222)
21. Several different fish surveys conducted in Brushy Meadow Creek and on unnamed tributaries of Brushy Meadow Creek, have found the existence of trout, including brown trout and brook trout. (DEP Ex. 2)
22. The habitat of Brushy Meadow Creek includes areas with heavy shade, which is conducive to supporting a year-round population of trout. Id.
23. Brushy Meadow Creek is a trout stream. (Tr. 221-22)
24. Several different fish surveys conducted in Grassy Creek and on unnamed tributaries of Grassy Creek have found the existence of trout, including brown trout of at least three different age classes and young-of-the-year, indicating reproduction. (DEP Ex. 2; Tr. 214)
25. The habitat of Grassy Creek includes areas with excellent instream cover, good gradient, stable flow, low siltation, riffles, pools, and refuge, which are conditions that are suitable for supporting a year-round trout population. (DEP Ex. 2; Tr. 93, 214)
26. Grassy Creek is a trout stream. (Tr. 215, 222)

27. Brushy Meadow Creek is a tributary of Grassy Creek, and Grassy Creek is a tributary of Hominy Creek. (Green Valley Ex. 10, 12)
28. Several fish surveys have found trout in Hominy Creek, including brown trout. (DEP Ex. 2; Tr. 261)
29. The habitat of Hominy Creek includes areas with excellent shade and moderate to good gradient, which are conditions that are suitable for supporting a year-round trout population. (DEP Ex. 2)
30. Hominy Creek is listed as a Category B-2 trout water in Appendix A of 47 CSR 2.
31. Hominy Creek is a trout stream. (Tr. 26, 270-271)
32. There has never been any instance in which DNR has considered a downstream portion of a stream to be a trout stream, while not considering the upstream portion of the stream to be a trout stream. (Tr. 201)
33. If DEP were to consider an upstream segment of a stream not to be a trout stream, that would not be protective of a year-round trout population that exists downstream. (Tr. 216)
34. There are some instances in which DNR considers an upstream segment to be a trout stream, while not considering a segment further downstream to be a trout stream. Id.
35. It is possible that a stream that does not currently support a year-round trout population did support a year-round trout population at some point in the past. (Tr. 99, 159, 229)
36. It is impossible to determine from only two site visits during a drought year whether or not a stream has ever supported a year-round trout population at some point in the past. (Tr. 100, 156-57, 193-94)
37. Flow conditions in streams can change over time. (Tr. 156)

38. Poor water quality upstream can adversely affect trout that live downstream. (Tr. 101)
39. There are situations in which a year-round trout population could survive if water quality was improved. (Tr. 229-31)
40. It is possible for Green Valley to improve the efficiency of iron removal in its treatment ponds by using chemical treatment or flocculant, obviating the need to build more ponds. (Tr. 77)

CONCLUSIONS OF LAW

41. 60 CSR 5-4.1 states that “existing uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.”
42. 47 CSR 2-2.5 defines “existing uses” as “those uses actually attained in a water body on or after November 28, 1975, whether or not they are included in the water quality standards.”
43. 60 CSR 5-4.2 states that “Tier 1 protection applies to all waters of the state.”
44. 47 CSR 2-4.1.a reads as follows: “Tier 1 Protection. Existing water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included as designated uses within these water quality standards.”
45. 47 CSR 2-2.18 defines “trout waters” as “streams or stream segments which sustain year-round trout populations. Excluded are those streams or stream segments which receive annual stockings of trout but which do not support year-round trout populations.”
46. 47 CSR 2-6.1.c requires that “the State shall take into consideration the quality of downstream waters and shall assure that its water quality standards provide for the attainment

of the water quality standards of downstream waters.”

47. Appendix A of 47 CSR 2 (“Category B-2 trout waters”) is intended to be a “representative list.” 47 CSR 2-6.3.b
48. Appendix A of 47 CSR 2 (“Category B-2 trout waters”) states: “This list contains known trout waters and is not intended to exclude any waters which meet the definition in Section 2.18.”
49. A stream or stream segment that has supported a year-round trout population at any point since November 28, 1975 meets the definition of “trout waters” in 47 CSR 2-2.18.
50. A stream or stream segment that has supported a year-round trout population at any point since November 28, 1975 is deemed to have an “existing use” as a trout water.
51. A stream or stream segment that has supported year-round trout at any point since November 28, 1975 falls into Category B2 of the Water Use Categories.
52. A stream or stream segment can be considered a “trout water” whether or not the stream appears on the Category B-2 list in Appendix A of 47 CSR 2.
53. A stream or stream segment that does not currently support a year-round trout population still meets the definition of “trout waters” if it has supported a year-round trout population at any time since November 28, 1975.
54. DEP is required to protect “existing uses” of waters in the state.
55. If a stream has supported a year-round trout population at any point since November 28, 1975, DEP is required to protect that as an “existing use.”
56. DEP is required to protect downstream uses of waters in the state.
57. DEP and DNR had substantial evidence to support their conclusion that Panther Creek,

- Grassy Creek, Brushy Meadow Creek, and unnamed tributaries thereof are “trout waters.”
58. Panther Creek, including that portion of the stream on which Green Valley’s outlets 001, 010, 011, 015, 022, and 023 are located, meets the definition of “trout waters.”
 59. Grassy Creek, including that portion of the stream on which Green Valley’s outlets 007, 009, 014, 015, and 017 are located, meets the definition of “trout waters.”
 60. Brushy Meadow Creek, including that portion of the stream on which Green Valley’s outlets 001, 005, and 006 are located, meets the definition of “trout waters.”
 61. DEP acted lawfully when it imposed WQBELs applicable to trout waters in Permit Nos. WV0002984 and WV0001104.
 62. It is not protective of trout to consider a downstream segment of a stream to be a trout water, while not considering an upstream segment of the stream to be a trout water.

DISCUSSION

This case comes down to one issue: Whether or not Panther Creek, Grassy Creek, and Brushy Meadow Creek are trout streams, as DEP and DNR have concluded. The Board’s decision with regard to the appeal of Permit No. WV0002984 is to affirm the decision of DEP to impose WQBELs applicable to trout waters in that permit. The Board agrees with DEP that Grassy Creek and Brushy Meadow Creek meet the definition of “trout waters.”

Green Valley wants the Board to segment Grassy Creek and Brushy Meadow Creek so that the segments on which Green Valley’s point-source discharges are located are *not* considered to be “trout waters,” while the segments immediately downstream of its point-source discharges *are* considered to be trout waters. The Board agrees with the Appellee that such an outcome would run contrary to DEP’s duty to protect the trout waters of the state. A stream segment does not exist in

a vacuum – it is part of a continuous, flowing channel of water.

DEP is required to protect existing and downstream uses of the waters of the state. It makes absolutely no sense to not adequately protect a stream segment that is immediately upstream of a “trout water.” Green Valley would have the Board reach the illogical conclusion that the water at the top of the falls on Grassy Creek and on Brushy Meadow Creek does not have to meet the same water quality standards as the water at the bottom of those falls. The Board finds that the water immediately upstream of a stream segment that is a “trout water” must maintain water quality that is conducive to the continued survival of that trout population.

The Board agrees with the testimony of Mike Shingleton of the DNR, the reverse situation might be reasonable in some instances – that an upstream segment could be considered to be a trout stream but a downstream segment not considered to be a trout stream. In that case, the trout population in the upstream segment would not be adversely affected by lower water quality in the downstream segment. A situation like this is also more likely to actually exist in nature, since generally speaking, the further upstream one goes, the more likely one is to find trout, due to cooler water temperatures.

Allowing dischargers of pollutants to carve out “non-trout” segments where their point-source discharges are located would harm the trout population around the state. Chopping up streams within the same watershed into “trout” and “non-trout” segments is not a reasonable way to protect the trout population in that watershed.


CONCLUSION

Based upon the foregoing, and finding it necessary and proper to do so, the WQBELs in Permit Nos. WV0002984 and WV0001104 are AFFIRMED.

In accordance with §22B-1-7(j) of the *West Virginia Code*, you are hereby notified of your right to judicial review of this FINAL ORDER in accordance with §22B-1-9(a) and §22B-3-3 of the *West Virginia Code*. If appropriate, an appeal of this final order may be made by filing a petition in the appropriate circuit court within thirty (30) days from your receipt of this final order in the manner provided by §29A-5-4 of the *West Virginia Code*.

ORDERED and **ENTERED** this 21st day of September, 2008.

ENVIRONMENTAL QUALITY BOARD



Dr. Edward Snyder, Chairman