

COMMONWEALTH OF KENTUCKY  
ENERGY AND ENVIRONMENT CABINET  
FILE NOS. TRH-41137-039  
PERMIT NO. 898-0806

SIERRA CLUB; KENTUCKIANS FOR  
THE COMMONWEALTH

PETITIONERS

VS.

**ORDER VACATING GRANT OF  
TEMPORARY RELIEF**

ENERGY AND ENVIRONMENT CABINET;  
CAMBRIAN COAL CORPORATION

RESPONDENTS

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This matter is before the Secretary on the Request of Respondent, Cambrian Coal Corporation (“Cambrian”), for review of an Order granting Temporary Relief entered herein by Hearing Officer Steve Blanton on September 29, 2010. In the Order, the Hearing Officer required Cambrian to cease all active surface coal mining and reclamation operations on Permit No. 898-0806, including the creation of any new disturbances other than ongoing reclamation and monitoring operations. The Order was to remain in effect until either the entry of a Final Order resolving the underlying action pending in PDH-41137-048, or upon entry of an Order vacating temporary relief. The Secretary having considered the Temporary Relief Order, the record of proceedings, Cambrian’s Request for Review, the Petitioners’ Response to Review, having heard argument of counsel, and being otherwise fully and sufficiently advised, hereby makes the following findings, conclusions, and Order.

The Petitioners, Sierra Club and Kentuckians for the Commonwealth filed the underlying Petition for Hearing in PDH-41137-048 contesting the issuance Cambrian’s Permit No. 898-

0806, and specifically attacking the sufficiency of the Cabinet’s Cumulative Hydrologic Impact Assessment (“CHIA”) performed as part of the review of the application for permit. All the parties subsequently filed Motions for Partial Summary Disposition, which were pending at the time the Petitioners filed their Petition for Temporary Relief. Because the issues were presented as issues of law rather than issues of fact, no evidentiary hearing was held on the Temporary Relief Petition, but the Hearing Officer did accept oral argument.

In order to grant temporary relief, the Hearing Officer must find that that there is a substantial likelihood the person requesting the relief will prevail on the merits of the final determination of the underlying proceeding, and that the relief will not affect adversely the public health or safety, or cause significant, imminent environmental harm to land, air, or water resources. 405 KAR 7:092, Section 12. Additionally, in order to prevail on summary disposition, a movant must establish that there is no disputed issue as to any material fact and the moving party is entitled to a summary disposition as a matter of law. 405 KAR 7:091§ 4(b).

After oral argument, the Hearing Officer entered the Order Granting Temporary Relief. The stated bases for the Order were that the controlling statutes and regulations require that potential impacts of total dissolved solids (“TDS”), sulfates and conductivity values be assessed for the active phase of all anticipated mining operations within the cumulative impact area, and his finding that a statement at page 20 of the CHIA: “Increases [of TDS and conductivity] during mining vary widely from site to site and are not addressed here” meant that the required assessment had not been adequately performed.

A fair reading of the Hearing Officer’s Order shows that these findings were in turn dependent on, or influenced by, a number of factual and legal findings and assumptions that are not established by evidence in the record, or supported by statute, regulation or case law. For

instance, at pages 3, 11-12, 56 and 87 of the Order, the Hearing Officer assumed that during the period of active mining, operations would “likely be contributing the greatest amount of pollutants to the watersheds and having the greatest impact on the hydrologic balance.” (Order, pp. 3-4). The frequent reference to this assumption throughout the Order indicates this was an important factor in the Hearing Officer’s conclusion that the Cabinet’s CHIA was deficient. But there was no testimony or documentary evidence placed of record that establishes that this assumption is correct for all water quality parameters during active mining operations within the cumulative impact area.

The Hearing Officer also erroneously referred to Cambrian’s operations approved in the Permit as “mountaintop removal” operations. (Order, pp. 2, 32).<sup>1</sup> “Mountaintop removal” is a very specific method of mining described in 405 KAR 20:050. But the record here establishes that the approved methods of mining were contour, auger and area mining, and that, as the Petitioners acknowledge, much of the overburden material would be returned to approximate original contour. The Hearing Officer further assumed that the post-reclamation water quality in the receiving streams will be different than the water quality exhibited by the background monitoring data (Order p. 86), and thus concluded that the Cabinet’s purported failure to consider impacts to the “changed” water quality rendered the CHIA deficient. Again, however, there was no testimony or documentary evidence in the record demonstrating that this assumption is scientifically accurate. The Hearing Officer challenged the Cabinet’s reliance on the Probable Hydrologic Consequences (PHC) analysis contained in Cambrian’s approved

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<sup>1</sup> The Petitioners also seemed to have made this incorrect designation at page 4 of their Request to uphold the Temporary Relief Order, but clarified at oral argument before the Secretary that they were not contending that the Permit approved a mountaintop removal operation.

permit, because certain details were not specifically set out in the PHC and it therefore “lacks predictive or useful TDS information.” (Order, pp. 45, 54-55, 86 at fn 26). However, the Hearing Officer pointed to no statute, regulation or judicial authority requiring that this specific information be stated on the face of the PHC. Finally, the Hearing Officer concluded that “ongoing required water monitoring for this permit will not be sufficient to avoid possible environmental harms...” and “monitoring reports of the discharges themselves will not measure the environmental harm caused by the cumulative impacts,” without reference to supporting scientific testimony or documentary evidence of record. Because of these erroneous and unsupported findings and conclusions, the Hearing Officer incorrectly found that there were no disputed issues of fact and that the Petitioners were likely to prevail as a matter of law in the underlying administrative action. Thus, the Order granting temporary relief must be vacated.

Although the issue was not part of the Hearing Officer’s grant of temporary relief, the Petitioners disagreed with the Hearing Officer’s conclusion that the Cabinet’s standard for measuring “material damage” to the hydrologic balance was supported by prevailing legal authority. Based on arguments and materials contained in the record, the Secretary finds that the Cabinet’s standard is reasonably supported by legal precedent and persuasive legal authority and so DECLINES to grant temporary relief on this basis.

Likewise, the Secretary DECLINES to vacate the Order granting temporary relief on the basis of Cambrian’s argument that cessation of operations “will cause devastating harm to Cambrian, its employees, the people and economy of Pike County...” The only considerations applicable to the grant of temporary relief are set forth in 405 KAR 7:092, Section 12. The regulation does not allow consideration of economic harm to a coal company in this temporary

relief proceeding, unlike other kinds of environmental cases. See, for instance, *Winter v. Natural Resources Defense Council, Inc.* 129 S.Ct. 365 (2008).

Based on the foregoing, the Order Granting Temporary Relief in File No. TRH-41137-039 is hereby VACATED, effective IMMEDIATELY.

So ENTERED this the 12/4<sup>th</sup> day of October, 2010.

ENERGY AND ENVIRONMENT CABINET



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LEONARD K. PETERS, SECRETARY

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing ORDER VACATING GRANT OF TEMPORARY RELIEF was on this \_\_\_ day of \_\_\_\_\_, 2010, mailed, postage prepaid, to the following:

Hon. Mary V. Cromer  
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Louisville, KY 40202-3363

and hand-delivered to:

Tamara J. Patrick  
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DOCKET COORDINATOR

Distribution:

Division of Mine Reclamation and Enf.  
Division of Mine Permits  
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Hearing Officer