ENVIRONMENTAL QUALITY BOARD

APPALACHIAN LABORATORIES, INC.,

Appellant,

v. **Appeal No. 14-17-EQB**

SCOTT G. MANDIROLA, DIRECTOR, DIVISION OF WATER AND WASTE MANAGEMENT, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellee.

FINAL ORDER

Appeal No.14-17-EQB was filed with the West Virginia Environmental Quality Board ("Board") on October 23, 2014. The evidentiary hearing in the matter was held before a court reporter and full complement of the Board on December 11, 2014. The following members of the Board were present for the hearing:

Dr. Edward M. Snyder, Chairman *Dr. D. Scott Simonton*

Dr. Charles C. Somerville *Mr. William H. Gillespie*

Dr. B. Mitchel Blake, Jr.

The following individuals were also present for the hearing:

Joseph L. Jenkins, Esquire and Brittany Fink, Esquire, representing Appalachian Laboratories, Inc. ("Appellant");

Jason Wandling, Esquire, representing West Virginia Department of Environmental Protection ("WVDEP"); and

Derek O. Teaney, Esquire, representing Appalachian Mountain Advocates, Appalachian Mountain Advocates, Sierra Club, Ohio Valley Environmental Coalition, West Virginia Highlands Conservancy, Coal River Mountain Watch, and Appalachian Voices ("Intervenors").

At the conclusion of the evidentiary hearing, the parties were directed to submit proposed findings of fact and conclusions of law. After careful consideration of the proposed findings and conclusions, arguments of counsel, and evidence presented at hearing, the Board finds as follows:

Standard of Review

When hearing an appeal, pursuant to W. Va. Code §22B-1-7(e), the board "shall hear the appeal *de novo*, and evidence may be offered on behalf of the appellant, appellee and by any intervenors." In accordance with *Syl. Pt. 2, W. Va. Div. of Envt'l Protection v. Kingwood Coal Co.*, 200 W. Va. 734, 745, 490 S.E.2d 823, 834 (1997), the board "is not required to afford any deference to the DEP decision but shall act independently on the evidence before it."

When ruling on an Appeal, pursuant to 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."

Was it Lawful for the WVDEP to Revoke the Appellant's Laboratory Certification

Appellant contends that WVDEP did not act in accordance with applicable law when it revoked Appellant's laboratory certification.

Pursuant to W. Va. Code §22-1-15(a): "The director shall promulgate rules to require the certification of laboratories conducting waste and wastewater tests and analyses to be used for purposes of demonstrating compliance under the covered statutory programs..."

Pursuant to W. Va. CSR 47-32-3.12.4 "a laboratory's certification may be revoked if the laboratory commits any falsification relating to certification, testing, or reporting of analytical results or for failing to comply with the provisions in 3.10."

Under the current facts, on October 9, 2014, John Shelton, an employee of Appellant, pleaded guilty to criminal charges brought by the United States District Court for the Southern District of West Virginia. Mr. Shelton pleaded guilty to engaging in violations of the Federal Clean Water Act:

> 2. **RESOLUTION OF CHARGES.** Mr. Shelton will plead guilty to a violation of 18 U.S.C. § 371 (conspiracy to violate clean water act) as charged in said information.

Certified Record, Pg. 8

Mr. Shelton's specific plea agreement states that he conspired with another employee of the lab to commit the following crimes:

> commit offenses against the United States, that is: to knowingly tamper with, cause to be tampered with, falsify and render inaccurate monitoring methods required to be maintained under the Clean Water Act, namely that samples and measurements taken shall be representative of the monitored activity (40 CFR 122.4(j)(1)), and that samples (to be analyzed for certain pollutants) must be preserved at or below six degrees Celsius (40 CFR 136.3 Table II), in violation of 33 U.S.C. § 1319(c)(4)..

Certified Record, pg. 18-21

The facts of the plea agreement state that Mr. Shelton and the other lab employee intentionally failed to refrigerate water samples taken in the field:

> When it came time for the annual DEP inspection, the First Known Person instructed John Shelton and other field technicians to make sure there was ice in their coolers. The annual inspections were the only time ice was put in the coolers to make it appear as if Appalachian regularly cooled its samples to the required temperature. Each time John Shelton, the First Known Person, and other employees at Appalachian failed to preserve the water samples at the required temperature they tampered with a method required to be followed by the CWA.

Certified Record, pg. 23 - 24

The plea agreement also states that Mr. Shelton and the other lab employee had diluted water samples taken in the field and/or substituted water samples taken in the field with samples from known locations that would guarantee compliant test results:

> John Shelton was responsible for conducting the sampling and field testing at multiple mine sites. Several of these mine sites had outlets with discharges that would often or always test above permit limits. John Shelton could often tell by looking at the water whether it would likely test within permit limits for certain pollutants. At times when he knew the water would likely not be within permit limits, Shelton would dilute the water by adding some distilled water to the sample.

Certified Record, pg. 24

> Appalachian employees used the term "honeyhole" to refer to water from certain sites that would always test within permit limits and could be used in place of or to dilute bad water. John Shelton used a particular "honeyhole" at an inactive mine site that the First Known Person had shown to him. The First Known Person had explained to Shelton that this water was always within permit limits. On at least one occasion, the First Known Person specifically directed John Shelton to use water from the inactive mine site in place of a sample from another site.

Certified Record, pg. 24

On or about October 16, 2014, WVDEP became aware of the guilty plea by Mr. Shelton. On October 21, 2014, WVDEP issued an order revoking the Appellant's laboratory certification, citing the plea agreement as the basis of its revocation:

> 1. A sampling agent for APPALACHIAN LABORATORIES, INC. has pleaded guilty to conspiracy to violate the federal Clean Water Act and admitted that, from February 2008 until approximately July 2013, he knowingly conspired with a person from APPALACHIAN LABORATORIES, INC. and others (known to the United States Attorney) to knowingly tamper with, cause to tamper with, falsify, and render inaccurate monitoring methods required to be maintained under the federal Clean Water Act.
>
> 2. As a result of this action, APPALACHIAN LABORATORIES, INC. submitted false, inaccurate data to its clients and to the Department of Environmental Protection.

Certified Record, pg. 28

This order by WVDEP was appealed by Appellant to this Board.

The Board finds that the decision in WVDEP's order revoking the Appellant's certification was lawful and reasonable under the facts. WVDEP has been afforded the authority to make rules for certifying the state's environmental laboratories pursuant to W. Va. Code §22-

1-15(a). WVDEP has made a rule that a laboratory may have its certification revoked for "any falsification" relating to "testing, or reporting of analytical results" pursuant to W. Va. CSR 47-32-3.12.4. Evidence shows that the acts of the laboratory employee, John Shelton, as described in his plea agreement, constitutes falsification of testing and falsification of reporting of analytical results given that the falsified tests were used by WVDEP to determine the quality of wastewater.

Appellant contends that the plea agreement is inadmissible hearsay pursuant to Rule 802 of the W. Va. Rules of Evidence:

> 9. Shelton's plea agreement is inadmissible hearsay because it is a statement made outside of the evidentiary hearing and has been offered in evidence to prove the truth that Appalachian committed falsification of data. WVRE 801 & 802.

Appellant's Brief, Pg. 8

The Board disagrees with this contention. Pursuant to Rule 801(d)(2)(D) of the W. Va. Rules of Evidence, a statement made against an opposing party and "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed" is not hearsay. Mr. Shelton made a statement against the laboratory by swearing as part of the plea agreement that he and at least one of his superiors had falsified/tampered with samples. Mr. Shelton was an employee of the laboratory during the time he made the statement (Mr. Shelton agreed to the plea on August 22, 2014) and remained an employee up until September 2014:

12	Q When did Mr. Shelton resign?
13	A I don't have the exact date, but sometime in
14	September.
15	Q Of 2014?
16	A Yes.

John Fox Testimony, Pg. 34, Line 12

Finally, Mr. Shelton's statement against the laboratory involved a matter within the scope of his employment given that the statement was directly related to his duties and responsibilities as field sampler for the laboratory. Thus, the statements made by Mr. Shelton in the plea agreement are not hearsay and were admissible during the hearing.[1]

Appellant also contends that there is no evidence that the laboratory committed any of the above referenced falsification/tampering outside of what Mr. Shelton has admitted:

> 13. Without Shelton's plea agreement, WVDEP lacks evidence that Appalachian falsified data.

Notice of Appeal, pg. 9

However, as mentioned, Mr. Shelton's admission is evidence of falsification/tampering within the lab, regardless of how many additional employees, if any, were involved. Also, the certification rules give WVDEP authority to revoke the certification if "any" falsification has occurred. W. Va. CSR 47-32-3.12.4. Thus, the regulation does not require that the falsification/tampering be undertaken by a certain number of employees and/or by an employee who fills a certain hierarchy within the lab in order for WVDEP to issue a revocation order.

As a result of the forging, it is **ORDERED** by the Board that WVDEP's order is affirmed. The parties have a right to judicial review of this order pursuant to W. Va. Code §22B-3-3 and W. Va. Code §29A-5-4. The Party seeking judicial review must file its appeal within 30 days after the date the party received notice of this final order.

Entered: 3/11/2015

Environmental Quality Board

Dr. Edward Snyder, Chairperson

[1] Even if the statements contained in the plea were hearsay, under the State Administrative Procedures Act, the Board has discretion to admit the evidence not otherwise admissible "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.

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Appellee,

and

APPALACHIAN MOUNTAIN ADVOCATES, SIERRA CLUB, OHIO VALLEY ENVIRONMENTAL COALITION, WEST VIRGINIA HIGHLANDS CONSERVANCY, COAL RIVER MOUNTAIN WATCH, AND APPALACHIAN VOICES,

Intervenors.

CERTIFICATE OF SERVICE

This is to certify that I, Jackie D. Shultz, Clerk for the Environmental Quality Board, have this day, the 12th day of March, 2015, served a true copy of the foregoing **Final Order** in Appeal No. 14-17-EQB, by mailing the same via United States Mail, with sufficient postage, to the following address:

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Jackie D. Shultz

Jackie D. Shultz, Clerk