

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

CENTRAL WEST VIRGINIA REGIONAL
AIRPORT AUTHORITY,

Appellant,

v.

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

Appellee.

Appeal No. 25-03-EQB

RECEIVED

JAN 31 2025

Environmental Quality
Board

**WVDEP'S MOTION TO DISMISS AND STAY
PREPARATION OF CERTIFIED RECORD**

COMES NOW, the Appellee, Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection ("WVDEP"), by counsel, and respectfully moves this Board, pursuant to West Virginia Code of State Rules § 46-4-1 *et seq.*, and Rules 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure, to enter an Order dismissing the above-styled Appeal. In support, the WVDEP states as follows:

1. Appellant filed the above-styled appeal seeking the Board to vacate Notice of Violation No. W24-20-152-MLA ("NOV") which was issued on December 4, 2024, by the WVDEP's Division of Water and Waste Management a violation under the West Virginia Groundwater Protection Act.
2. In the case of *John Benedict, Director of the Division of Air Quality v. Capitol Cement Corporation*, 02-AA-129 (2004), the Circuit Court of Kanasha County held that there is no statutory authority for an appeal of a NOV.¹

¹ A courtesy copy of the Circuit Court's Order is attached.

3. This Board has previously determined that a NOV issued by the WVDEP's Division of Water and Waste Management does not constitute an Order subject to the jurisdiction of the Board under W.Va. Code §22-11-21. See Order in *Wheeling-Pittsburgh Steel Corporation and Mountain State Carbon, LLC v. Director, Division of Water Resources, Department of Environmental Protection*, Appeal No. 08-01-EQB (May 22, 2008).²
4. The Board's rationale in *Wheeling-Pittsburgh Steel Corporation* is applicable to this matter as the appeal procedures set forth in the W.Va. Groundwater Act, W.Va. Code §22-12-11, are substantively the same as the appeal procedures contained in W.Va. Code §22-11-21.

Wherefore, pursuant to the previous Circuit Court ruling, as well as the precedent set by this very Board, the WVDEP prays that this matter be dismissed for lack of jurisdiction and for such other relief as this Board deems just and equitable.

Additionally, the WVDEP moves this Court to stay the requirement for preparation of the certified record in this matter until a ruling is made by the Board on the WVDEP's Motion to Dismiss, as the Board's decision will determine the necessity of a certified record in this proceeding.

**Respectfully submitted,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION
by counsel,**

/s/Jon Frame

Jonathan C. Frame (WVSB 10182)
Charles Scott Driver (WVSB 9846)
West Virginia Department of
Environmental Protection,
Office of Legal Services
601 57th St. SE
Charleston, WV 25304
Phone: 304-926-0499

² A courtesy copy of the EQB Order is attached.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JOHN BENEDICT, Director,
Division of Air Quality, Department of
Environmental Protection,
Petitioner,

v.

CAPITOL CEMENT CORPORATION,
Respondent.

Civil Action No. 02-AA-129
Judge Charles E. King, Jr.

KANAWHA COUNTY CIRCUIT COURT
CLAY S. PATSON, CLERK

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FILED

And

CAPITOL CEMENT CORPORATION,
Petitioner,

v.

JOHN BENEDICT, Director,
Division of Air Quality, Department of
Environmental Protection,
Respondent.

Civil Action No. 02-AA-130
Judge Charles E. King, Jr.

And

JOHN BENEDICT, Director,
Division of Air Quality, Department of
Environmental Protection,
Petitioner,

v.

CAPITOL CEMENT CORPORATION,
Respondent.

Civil Action No. 02-AA-168
Judge Charles E. King, Jr.

FINAL ORDER REVERSING DECISION OF BOARD

The Director of the Division of Air Quality, Department of Environmental Protection
(hereinafter "Director") filed action number 02-AA-129 with this Court on October 16, 2002.
Each of the above actions has been consolidated and all are posted as action number 02-AA-129.

This appeal is based on a decision rendered by the Air Quality Board (hereinafter "Board") on August 7, 2002 in favor of Capitol Cement Corporation (hereinafter "Capitol Cement").

Having reviewed the record below, the petition, the memoranda and the pertinent law, the Court is of the opinion, as more fully explained herein, that the Board's Decision should be reversed.

STANDARD OF REVIEW

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the Petitioner or Petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

ISSUES AND DISCUSSION

The heart of this appeal surrounds a notice of violation (hereinafter "NOV") letter sent from the Director to Capitol Cement on April 19, 2002. Capitol Cement filed a notice of appeal with the Board on May 23, 2002 asking it to set aside the NOV. The Director moved to dismiss Capitol Cement's appeal on the grounds that there was no statutory authority for an appeal of a NOV. The Board denied the Director's motion to dismiss Capitol Cement's appeal and gave three reasons for finding that the Director's NOV was appealable. First, the Board found that the

NOV was an implied cease and desist order, hence appealable pursuant to W. Va. Code § 22-5-5. Second, the Board found that the requirement in the notice that the corporation prepare a written response to the notice, was an order. Third, the Board found that Capitol Cement had a constitutional procedural due process right to appeal the NOV. These reasons form the three issues before this Court.

The first issue before this Court is whether the Board erred when it determined that the NOV issued by the Director to Capitol Cement was an implied cease and desist order. The

Director contends that the letter was a NOV and that such document was *not* appealable to the

Board. Thus, Director asserts that the Board did not have jurisdiction to render a decision.

Capitol Cement contends that the Board was correct, that such document was an implied cease and desist order and that such letter was appealable to the Board. Therefore, Capitol Cement asserts that the Board had jurisdiction to render a decision.

The parties dispute as to which W. Va. Code statute governs the NOV. The Director asserts that W. Va. Code § 22-5-6 governs while Capitol Cement proposes that W. Va. Code § 22-5-5 is the applicable statute. The pertinent provisions of both statutes are as follows:

If, from any investigation made by the director or from any complaint filed with him or her, the director is of the opinion that a person is violating the provisions of this article, or any rules promulgated pursuant thereto, *he or she shall make and enter an order directing the person to cease and desist the activity, unless the director determines the violation is of a minor nature or the violation has been abated. The director shall fix a reasonable time in such order by which the activity must stop or be prevented. The order shall contain the findings of fact upon which the director determined to make and enter the order.* § 22-5-5. (emphasis added).

Any person who violates any provision of this article, any permit or any rule or order issued pursuant to this article or article one [§§ 22B-1-1 et seq.], chapter twenty-two-b of this code is subject to a civil penalty not to exceed ten thousand dollars for each day of such violation, which penalty shall be recovered in a civil action brought by the director in the name of the state of West Virginia in the circuit court of any county wherein the person resides or is engaged in the activity complained of or in the circuit court of Kanawha County. The amount of the penalty shall be fixed by the court without a jury:

Provided, That any person is not subject to civil penalties unless the person has been given *written notice* thereof by the director: Provided, however, That for the first such minor violation, if the person corrects the violation within the time as was specified in the *notice of violation* issued by the director, no civil penalty may be recovered: Provided further, That if the person fails to correct a minor violation or for any serious or subsequent serious or minor violation, the person is subject to civil penalties imposed pursuant to this section from the first day of the violation notwithstanding the date of the issuance or receipt of the *notice of violation*. The director shall, by rule subject to the provisions of twenty-nine-a [§§ 29A-1-1 et seq.] of this code, determine the definitions of serious and minor violations. The amount of any penalty collected by the director shall be deposited in the general revenue of the state treasury according to law. § 22-5-6(a) (emphasis added).

The Board concluded that the notice received was an implied order to cease and desist, hence § 22-5-5 governed the April 19, 2002 letter. However, the Board was incorrect.

Substantial and logical evidence, factors and circumstances lead to the conclusion that such document is clearly a NOV. First, as correctly established, the violation was minor and upon discovery was immediately corrected. According to § 22-5-5 a cease and desist order should *not* be made, in the current situation, because such statute suggests that if the director is of the opinion that a violation is occurring then he or she "shall make and enter an order directing the person to cease and desist . . . *unless* the director determines the violation is of minor nature or the violation has been abated." (emphasis added). In this situation, the violation was minor and was abated, hence a cease and desist order should *not* be made. On the other hand, a NOV should have been issued due to the necessity of Capitol Cement completing remedial measures. The NOV clearly puts Capitol Cement on notice that correction of the violation *may* not have been fully satisfied. Hence, a NOV is necessary to inform Capitol Cement of such ongoing violation(s). The NOV states that "DAQ [or Division of Air Quality] requires . . . written confirmation stating that the remedial measures have been completed." § 22-5-6 permits NOV's to assert such information as the violation, the time in which to correct the violation, the potential for civil penalty and the possibility of avoiding such penalty.

Second, according to § 22-5-5 if the director "is of the opinion that a person is violating the provisions of this article . . . he or she shall make and enter an order directing the person to cease and desist the activity." In this situation, the violations were immediately remedied, hence the Director *cannot* demand Capitol Cement to cease and desist if such violation has already been allegedly halted and subsequently corrected. However, one may question as to how a Director can issue a NOV if the violation has been corrected. It has already been established that remedial measures were not complete and that a cease and desist order was not appropriate in

this situation; hence the issuance of a NOV was, in deed, proper.

Further, a careful reading of § 22-5-6(a) suggests that the statutory language reveals that a notice of violation is to be sent before a violation can be corrected. Here, between the inspection date of February 14, 2002 and the date that Capitol Cement informed the Director that such violation was corrected, February 26, 2002, the situation was already remedied. The Director had not yet sent a NOV due to Capitol Cement quickly responding to the violation. There is no statute which governs a document sent in-between this questionable period. Further, there is no statute which governs the actual issuance or contents of a NOV. Therefore, § 22-5-5, which governs the issuance of cease and desist orders must initially be examined. § 22-5-5 requires that cease and desist orders must *order* and direct persons to *cease and desist the activity*. Further, such order "shall contain the findings of fact upon which the director determined to make and enter the order." In this situation, the NOV never ordered Capitol Cement to stop or halt any activity nor did it contain findings of fact.

If the NOV does *not* fit within the parameters of the "issuance of a cease and desist order" statute we can only conclude that the NOV was *not* a cease and desist order, but simply a "notice of violation" or another document other than an order. Nevertheless, the NOV at issue,

simply stated the facts along with pertinent information, in compliance with 22-5-6, the closest statute which governs NOV's. The NOV included that such violation was detected, that Capitol Cement may be subject to civil penalties, that Capitol Cement's letter had been received, that remedial measures had been acknowledged and that any further measures be submitted to the Director within ten days. § 22-5-6(a) shows that this information is correctly within the parameters of a NOV letter. Therefore, in drafting a NOV, the director can include the nature of

the violation, the possibility of civil penalties *and* a specified time for any corrections without being labeled a cease and desist order.

Finally, to make it more apparent that this document was a NOV, issued pursuant to § 22-5-6 and not an appealable implied cease and desist order issued pursuant to §22-5-5, it cannot be forgotten that § 22-5-5 language does *not* appear within the NOV, that the word "order" does *not* appear in the NOV, that the NOV is clearly labeled "NOTICE OF VIOLATION, that there are no findings of fact within the NOV which are required by §22-5-5; and that §22-5-6(b)(1) and (b)(2) represent the closure of the NOV. Hence, the Board erred when it determined that the NOV issued by the Director to Capitol Cement was an implied cease and desist order. Likewise, the Board lacked jurisdiction to hear Capitol Cement's appeal because administrative agencies only have the authority given to them by statute and there is no statutory authority for the Board to hear an appeal of a NOV.

The second issue before this Court is whether the Board erred when it determined that the requirement in the notice that the corporation prepare a written response to the notice, was an order. The NOV requested Capitol Cement to file written responses to several questions or to submit a "written confirmation stating that the remedial measures have been completed with the

actual completion date(s).” Due to this requirement, the Board *incorrectly* concluded that such notice, was an order. According to W. Va. Code § 22-5-4(a)(14)

[t]he director is authorized: [t]o require any and all persons who are directly or indirectly discharging air pollutants into the air to file with the director such information as the director may require in a form or manner prescribed by him or her for such purpose, including, but not limited to, location, size and height of discharge outlets, processes employed, fuels used and the nature and time periods of duration of discharges. Such information shall be filed with the director, when and in such a reasonable time, and in such a manner as the director may prescribe[.] (emphasis added).

~~Thus, the director has discretion to demand the information he requested. If a director requests such information one cannot translate it to represent an appealable cease and desist order. W. Va. Code § 22-5-4(a)(14) authorizes the director to request such information at his discretion. The statute does not suggest that such request is equivalent to a cease and desist order nor does it suggest that such request is appealable. The Board contends that merely because the NOV requested a “written confirmation stating that the remedial measures have been completed with the actual completion date(s)” suggests that an implied cease and desist order was issued. However, the Board is incorrect. Such information requested by the Director is clearly within his authority and judgment per W. Va. Code § 22-5-4(a)(14). The director is unquestionably authorized to request such information concerning any procedures employed, completed or any improvements or such *processes employed* without having the request be labeled a cease and desist order or an appealable document. As a result, the Board erred when it determined that the requirement in the notice that Capitol Cement prepare a written response to the notice, was an order.~~

The third, and final, issue before this Court is whether the Board erred when it determined that Capitol Cement had a constitutional due process right to appeal the NOV. The Board held that Capitol Cement “has a due process right to appeal a NOV that is the equivalent

of a Cease and Desist Order." The Director specifically asserts that it was error to find that the NOV was appealable due to the constitutional right to *procedural* due process. However, on page 25 of its brief, Capitol Cement contends that the Board was correct because Capitol Cement "would lose its . . . right to challenge the state's conclusion as to its non-compliance and its right to continue to operate without fear of a conclusion of knowingly violating the agency's unreviewable determination as to its status of non-compliance."

The Board merely held that Capitol Cement had a due process right to appeal a NOV or the "implied cease and desist order." However, the Board not only failed to explain its decision but it also failed to clarify as to what process was due and as to if Capitol Cement was truly deprived of a right.

Within the parties memoranda they mutually determined that the Board was referring to *procedural* due process as oppose to *substantive* due process. It has long been established that procedural due process claims do not implicate the egregiousness of the action itself, but only question whether the process accorded prior to the deprivation was constitutionally sufficient. In addition, although the existence of a "protected" right must be the threshold determination, the focus of the inquiry centers on the *process* provided, rather than on the nature of the *right*. Hence, in actuality the Board is initially suggesting that the *process* afforded to Capitol Cement was not constitutionally sufficient or that the process of the received fair hearing, notice, etc. was not constitutionally adequate. The Board is incorrect. It is evident that Capitol Cement has been afforded constitutionally sufficient procedural due process as Capitol Cement has clearly been given the same opportunities as the Director and each has been heard in a meaningful manner. It is commonly known that the goals of procedural due process are to minimize the risk of substantive error, to assure fairness in the decision-making process, and to assure that one has a

participatory role in the process. There is no evidence, nor has Capitol Cement put forth any evidence, that they were not given the above or afforded adequate procedural due process.

Further, Capitol Cement has *not* been deprived of a life, liberty or property interest. It must be remembered that procedural due process violations must "deprive" an individual of a "protected" interest. In this situation, Capitol Cement was not deprived of a constitutional right or interest. The Director correctly points out that there was no due process right to appeal the

~~notice of violation because the notice did not take away or limit any liberty or property interest.~~

~~The NOV does not have the status of law, there is no penalty for its violation and does not affect~~

the rights of the Capitol Cement. Capitol Cement is free to ignore the NOV and if the Director wishes to enforce it, he must take other separate enforcement actions where Capitol Cement will have the right to defend itself on all issues.

Aside from all else, due process represents fundamental fairness and such was afforded to Capitol Cement. Hence, the Board's determination that Capitol Cement had a constitutional due process right to appeal the NOV was in error because the process provided to Capitol Cement was constitutionally sufficient and the NOV did not affect any liberty or property right(s) of Capitol Cement.

After due and mature consideration of the memoranda, the record, the pertinent law and the decision of the Board, the Court is of the opinion that a hearing on this matter is not necessary for the Court to render its decision. The decision is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record. The decision is contrary to law, specifically W. Va. Code §§ 22-5-6(a); 22-5-5; and 22-5-4(a)(14).

DECISION

For the reasons set forth herein, the Court hereby **ORDERS** that the decision, dated August 7, 2002, is hereby **REVERSED** and that this action is **DISMISSED** and **STRICKEN** from the open docket of this Court.

The Court hereby **REMANDS** this case back to the Board to reverse their order denying the Director's motion to dismiss Capitol Cement's notice of appeal and to grant the motion on the grounds that the Board had no jurisdiction to hear the appeal for reasons consistent with this

Court's decision.

The objection of any party aggrieved by the entry of this Order is hereby noted and preserved.


The Clerk of the Court is **DIRECTED** to close this file in conformity with the directions set forth above. In addition, the Clerk of the Court is **DIRECTED** to forward a certified copy of this Order to the following:

Kathy G. Beckett
Jackson Kelly PLLC
1600 Laidley Tower
Post Office Box 53
Charleston, West Virginia 25322


Thomas H. Zerbe
Senior Counsel
Office of Legal Services
WV Department of Environmental Protection
1356 Hansford Street
Charleston, West Virginia 25301

Stephanie Timmermeyer
Division of Air Quality
7012 McCorkle Avenue, SE
Charleston, West Virginia 25304

ENTERED this 29TH day of Jan 2004.



CHARLES E. KING, JR. Circuit Judge
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT,
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 29
DAY OF JANUARY 2004


CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

**WHEELING-PITTSBURGH STEEL CORPORATION
and MOUNTAIN STATE CARBON, LLC**

APPELLANT,

v.

Appeal No. 08-01-EQB

**DIRECTOR, DIVISION OF WATER RESOURCES,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,**

APPELLEE.

ORDER

Wheeling-Pittsburgh Steel Corporation and Mountain State Carbon, LLC (“Appellant”) filed the above-styled appeal on March 26, 2008, seeking the Board to vacate and set aside Notice of Violation No. W-NW-SFC-112807-003 (“NOV”), issued November 28, 2007, by the West Virginia Department of Environmental Protection (“WVDEP”) Division of Water and Waste Management.

On April 28, 2008, the Appellee filed a Motion to Dismiss arguing that an NOV is not an Order subject to the jurisdiction of the Board pursuant to West Virginia Code §22-11-21 and therefore the Board should dismiss the appeal from its docket. The Appellant filed a response and stated that it did not oppose the Motion but requested the Board to make a ruling on the matter.

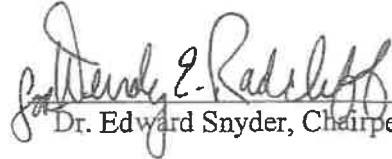
The NOV appears to have been issued pursuant to West Virginia Code §22-11-6 and not an implied cease and desist order issued pursuant to §22-11-12. The language of §22-11-12 does not appear within the NOV. The word “Order” does not appear in the NOV. The NOV is

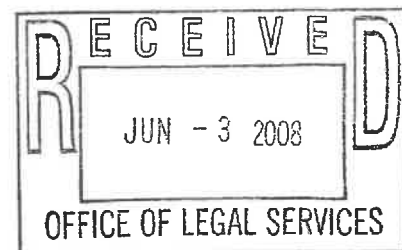
clearly labeled "NOTICE OF VIOLATION" and the WVDEP made no findings of fact associated with this NOV.

A Notice of Violation without the requisite language, Order, and findings of fact required in §22-11-12 does not constitute an Order conferring the jurisdiction of this Board pursuant to §22-11-21. Therefore the Board finds it necessary and proper to **GRANT** the Appellee's Motion to Dismiss and hereby **DISMISSES** Appeal No. 08-01-EQB from its docket.

ENTERED and ORDERED this 22nd day of May, 2008.

Environmental Quality Board


Dr. Edward Snyder, Chairperson



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

**WHEELING-PITTSBURGH STEEL CORPORATION
and MOUNTAIN STATE CARBON, LLC,**

APPELLANT,

v.

Appeal No. 08-01-EQB

**DIRECTOR, DIVISION OF WATER RESOURCES,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,**

APPELLEE.

CERTIFICATE OF SERVICE

This is to certify that I, Jackie D. Shultz, Clerk for the Environmental Quality Board, have this day, the 3rd day of June, 2008, served a true copy of the foregoing "Order" to all parties in Appeal No. 08-01-EQB, by mailing the same via United States Mail, with sufficient postage, to the following address:

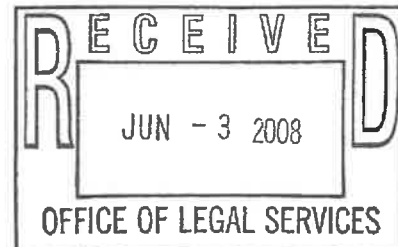
via certified first-class mail:

Kenneth S. Komoroski, Esquire
Kirkpatrick & Lockhart Preston Gates Ellis LLP
Henry W. Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222-2312

Certified Mail # 7160 6690 2530 0000 7893

via personal service:

Lisa A. McClung, Director
Division of Water and Waste Management
WV Department of Environmental Protection
601 57th Street, S.E.
Charleston WV 25304



Jon Frame, Esquire
Office of Legal Services
WV Department of Environmental Protection
601 57th Street, S.E.
Charleston WV 25304

Jackie D. Shultz
Jackie D. Shultz, Clerk

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

**CENTRAL WEST VIRGINIA REGIONAL
AIRPORT AUTHORITY,**

Appellant,

v.

Appeal No. 25-03-EQB

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

Appellee.

CERTIFICATE OF SERVICE

I, Jonathan C. Frame, do hereby certify that service of the foregoing **WVDEP'S
MOTION TO DISMISS AND STAY PREPARATION OF CERTIFIED RECORD** has
been made this 31st day of January, 2025, via U.S. mail and/or electronic service, postage
prepaid, to the following:

Kenna M. DeRaimo, Clerk
West Virginia Environmental Quality Board
601 57th Street, SE
Charleston, West Virginia 25304

*Via Hand Deliver and Electronic
Mail*

Mychal S. Schulz, Esq.
Robert M. Stonestreet, Esq.
Babst Calland Clements and Zomnir, P.C.
Truist Square
300 Summers Street, Suite 1000
Charleston, WV 25301

Via U.S. and Electronic Mail

/s/Jon Frame
Jonathan C. Frame (WVSB 10182)