

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

JEFFERSON COUNTY EMERGENCY SERVICES AGENCY,

APPELLANT,

V.

APPEAL NO. _____

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

APPELLEE.

NOTICE OF APPEAL



Action Complained Of: The appellant(s) named above respectfully represent(s) that it is aggrieved by (identify the order, failure or refusal, or permit, and give date of the order or permit):

The JCESA is the subject of an Order in this case numbered 8701 and dated May 2, 2017.

(See copy of May 2, 2017 Order attached as exhibit 1).

Relief Requested: The appellant therefore prays that this matter be reviewed and that the Board grant the following relief (describe the relief sought):

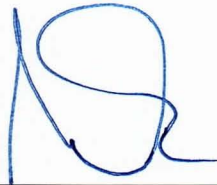
The Appellant requests that the Environmental Quality Board reverse and vacate the Order and the application and enforcement of the order issued on May 2, 2017, and all other relief that the Board determines is just and proper in accord with West Virginia law.

Specific Objections: The specific objections to the action, including questions of fact and law to be determined by the Board, are set forth in detail in separate numbered paragraphs and attached hereto. The objections may be factual or legal.

See attached document titled "Memorandum in Support of Notice of Appeal" and other arguments and evidence to be produced at a hearing in this matter.

Amendment of this Notice of Appeal may be had only by leave of the Board, and only for good cause shown.

Dated this 26th day of May, 2017.

A handwritten signature in blue ink, consisting of a large, stylized 'N' followed by a series of loops and a final flourish.

Office of the Jefferson County Prosecuting Attorney
Nathan P. Cochran
Assistant Prosecuting Attorney
West Virginia State Bar Number 6142
Post Office Box 729
Charles Town, West Virginia 25414
304-728-3346 Telephone
304-728-3353 Facsimile

EXHIBIT

1



west virginia department of environmental protection

Division of Water and Waste Management
601 57th Street SE
Charleston, WV 25304
Phone: (304) 926-0470
Fax: (304) 926-0488

Jim Justice, Governor
Austin Caperton, Cabinet Secretary
www.dep.wv.gov

**ORDER
ISSUED UNDER THE
WATER POLLUTION CONTROL ACT
WEST VIRGINIA CODE, CHAPTER 22, ARTICLE 11**

TO: Jefferson County Emergency Service Agency
Denise Pouget, Director/Official Representative
419 16th Avenue
Ranson, WV, 25438

DATE: May 2, 2017
ORDER NO.: 8701

INTRODUCTION

The following findings are made and Order issued to Jefferson County Emergency Service Agency (hereinafter, "JCESA") pursuant to the authority vested in the Director of the Division of Water and Waste Management under Chapter 22, Article 11, Section 1 et seq. of the Code of West Virginia.

FINDINGS OF FACT

In support of this Order, the Director hereby finds the following:

1. JCESA operates a wastewater treatment system located in Ranson, Jefferson County, West Virginia.
2. On May 16, 2016, West Virginia Department of Environmental Protection (WVDEP) personnel sent an email to JCESA advising that a WV/NPDES permit was needed for the Stormceptor oil/water separator at the aforementioned facility. The oil/water separator discharges treated wastewater from vehicle washing activities into a storm water basin located off-site at Lakeland Place. In the email correspondence, WVDEP personnel provided instructions for completing the WV/NPDES permit application.
3. On September 12, 2016, WVDEP personnel sent an email to JCESA to request an update regarding the status of its WV/NPDES permit, since a response to the previous May 16, 2016 email correspondence had not been received.

4. On September 15, 2016, WVDEP personnel received a response to the aforementioned September 12, 2016 email correspondence which stated that the request would be forwarded to the appropriate representative at JCESA.
5. On September 27, 2016, WVDEP personnel conducted an inspection of the facility. During the inspection, a violation of the following sections of WV State Code and WV Legislative Rules was observed and documented:
 - a. 47CSR10 Section 3.1 and 22-11-8(b)-Without authorization pursuant to a valid WV/NPDES permit, JCESA made/caused an outlet or substantially enlarged/added to the load of an existing outlet for the discharge of effluent from industrial waste into the waters of the State.

As a result of the aforementioned violation, Notice of Violation (NOV) No. w16-02-075-mkk was issued to JCESA.

6. On January 3, 2017, WVDEP personnel conducted an inspection of the facility. During the inspection, a violation of the following sections of WV State Code and WV Legislative Rules was observed and documented:
 - a. 47CSR10 Section 3.1 and 22-11-8(b)- Without authorization pursuant to a valid WV/NPDES permit, JCESA made/caused an outlet or substantially enlarged/added to the load of an existing outlet for the discharge of effluent from industrial waste into the waters of the State.

As a result of the aforementioned violation, NOV No. w17-02-010-mkk was issued to JCESA.

ORDER FOR COMPLIANCE

And now, this day of May 2, 2017, JCESA is hereby ORDERED by the Director as follows:

1. JCESA shall immediately take measures to initiate compliance with all pertinent laws and rules.
2. Within thirty (30) days of the effective date of this Order, JCESA shall electronically submit an administratively complete application for WV/NPDES permit coverage for the regulated activity. Any questions regarding the application process shall be directed to WVDEP DWWM-Permitting Section at (304) 926-0495.

OTHER PROVISIONS

1. Compliance with the terms and conditions of this Order shall not in any way be construed as relieving JCESA of the obligation to comply with any applicable law, permit, other order, or any other requirement otherwise applicable. Violations of the terms and

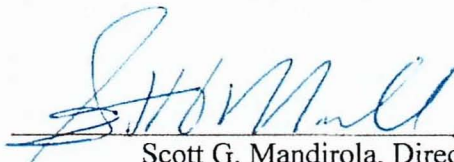
conditions of this Order may subject JCESA to additional enforcement action in accordance with the applicable law.

2. The provisions of this Order are severable and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.
3. This Order is binding on JCESA, its successors and assigns.
4. This Order shall terminate upon JCESA's notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.

RIGHT OF APPEAL

Notice is hereby given of your right to appeal the terms and conditions of this Order which you are aggrieved to the Environmental Quality Board by filing a NOTICE of APPEAL on the form prescribed by such Board, in accordance with the provisions of Chapter 22, Article 11, Section 21 of the Code of West Virginia within thirty (30) days after receipt of this Order.

This Order shall become effective upon receipt.

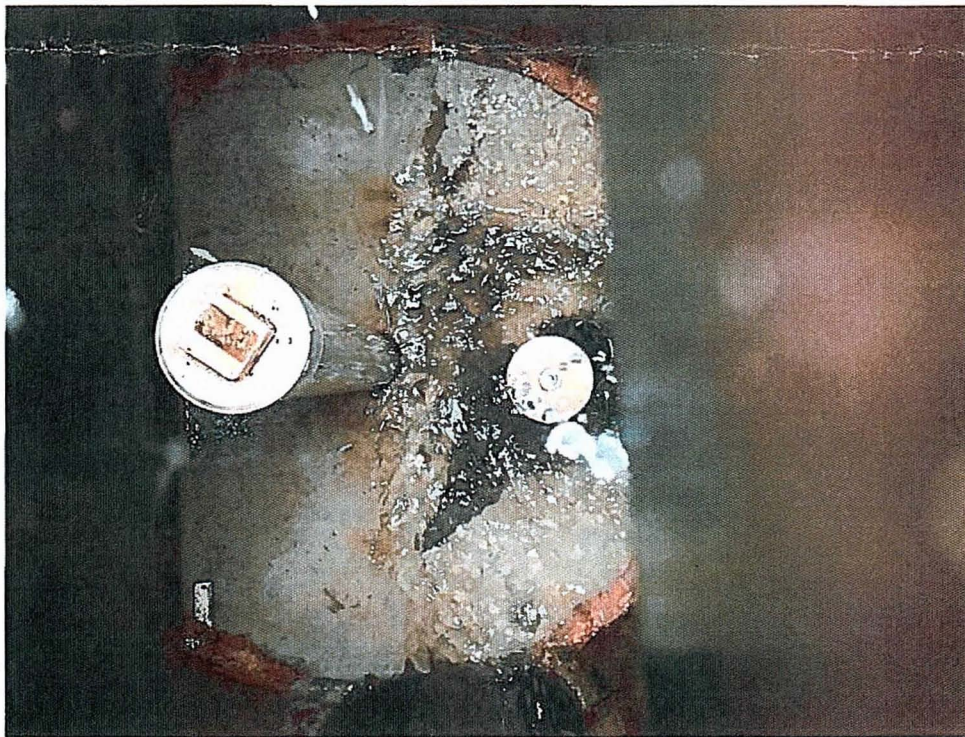


Scott G. Mandirola, Director
Division of Water and Waste Management

JCESA
1/3/17



Discharge from JCESA property into storm water basin



Stormceptor oil/water separator

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

JEFFERSON COUNTY EMERGENCY SERVICES AGENCY,

APPELLANT,

V.

APPEAL NO. _____

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

APPELLEE.

MEMORANDUM IN SUPPORT OF NOTICE OF APPEAL

COMES NOW the Jefferson County Emergency Services Agency, Appellant in the above styled matter, and files this Memorandum in Support of its Notice of Appeal before the Environmental Quality Board from the Order in this case numbered 8701 and dated May 2, 2017 for the following reasons:

I. FACTUAL BASIS FOR APPEAL AND OBJECTIONS

1. The Appellant, Jefferson County Emergency Services Agency, (herein "JCESA") is an agency of the Jefferson County Commission and is located in Jefferson County, West Virginia.

2. The JCESA is a support agency for the volunteer fire and ambulance companies in Jefferson County, often supporting and augmenting the volunteer departments by staffing and other methods.

3. The JCESA is the subject of an Order in this case numbered 8701 and dated May 2, 2017 (herein "Order"). (See copy of May 2, 2017 Order attached as exhibit 1).

4. The JCESA office is located at 419 Sixteenth Avenue, Ranson, in Jefferson County. (See photographs of JCESA office building attached as exhibit 2).

5. Although the JCESA office does contain a three bay garage, which was originally designed as an ambulance garage, the site has evolved into an office building which typically only contains two SUV or passenger car type vehicles which are primarily used to transport supervisors to meet ambulances at fire or accident scenes. (See photograph of garage bays at the JCESA office building attached as exhibit 3).

6. The Order cites “vehicle washing activities” as the potential basis for the need for an oil/water separator, however, the Order is factually wrong because the JCESA typically has only two SUV or passenger car type vehicles at the site, which are washed occasionally, similar to a residential homeowner who owns two vehicles. There is no intensive vehicle washing activity performed at the JCESA site. The enforcement of these rules in this manner would require the prohibition of car washing by citizens in their own driveways.

7. There is typically no vehicle maintenance or vehicle oil changes performed at the JCESA site.

8. The JCESA conducts no ongoing industrial activity onsite that would mandate the need or existence of an oil/water separator.

9. Upon information and belief, when this site was constructed, the local DEP representative required oil/water separators for many commercial sites with a parking area, regardless of size or use.

10. Jefferson County is not an MS4 community and, upon information and belief, the oil/water separator installed at the JCESA site would not be required if the site were to be constructed today.

11. Upon information and belief, similar facilities in Jefferson County, such as volunteer fire stations that were constructed long after the JCESA site, were not required to install

oil/water separators.

12. The JCESA acted in a good faith belief that an oil/water separator was not required, as demonstrated by a series of emails in March 2017 between Joe Kent of the Jefferson County Department of Engineering, Planning & Zoning and various members of the DEP. The members of the DEP seemed to agree with the JCESA that the oil/water separator was not needed and could in fact be removed. (See emails from Connie Anderson and John Perkins to Joe Kent attached as exhibit 4).

II. LEGAL ISSUES AND OBJECTIONS

13. It is the position of the JCESA that the requirement of an oil/water separator exceeded the authority of the DEP under the groundwater protection rule, 47 CSR 58, which defines "Industrial Establishment" in relevant part as:

2.7. "Industrial Establishment" means any mill, factory, tannery, paper or pulp mill, mine, colliery, breaker or mineral processing operation, quarry, refinery, electric power generating facility, well, and each and every industry or plant or works, or activity in the operation or process of which industrial wastes, sewage, or other wastes are produced. Furthermore, any facility or activity not set forth above may be subject to any or all of the requirements of this rule at the director's discretion pursuant to section 5 of this rule. This definition does not include private or publicly owned sewage treatment operations.¹

14. The JCESA conducts no ongoing industrial activity onsite that would mandate the existence of an oil/water separator, since no onsite activity would put the ESA within the definition of "Industrial Establishment" under 47 CSR 58. Said another way, the JCESA does not participate in industrial uses at the site that would produce effluent from industrial waste to be discharged into

¹ 47 CSR 58 seems to state that any facility or activity, such as car washing, may be a facility or activity that the Director can mandate as regulated by simply declaring it subject to the rule under 47 CSR 58 section 5. However, the enforcement of the rule requires a written declaration pursuant to section 5 and upon information, no written declaration by the Director designating the JCESA site as an industrial establishment or car washing at the JCESA facility as a prohibited activity within the meaning of 47 CSR 58 section 5 was ever provided to the ESA. In any event, the rule seems to allow unbridled discretion and a failure of equal protection in the enforcement of the directive.

the waters of the state in a manner that would require a permit within the meaning of West Virginia law or regulations, including 47 CSR 58, 47CSR10 Section 3.1 and W.Va. Code 22-11-8(b).

15. Alternatively, to require the oil/water separator at the JCESA site to control the minor effects of the occasional washing of two consumer grade vehicles is arbitrary and capricious and violates the principles of equal protection² and due process,³ since other similar facilities in Jefferson County are not regulated in this manner. The enforcement of this rule in this manner is clearly wrong, lacks a rational basis and is not supported by substantial evidence. The enforcement of these rules in this manner would require the prohibition of car washing by citizens in their own driveways. *Adkins v. W. Virginia Dept. of Educ.*, 556 S.E.2d 72, 75 (W. Va. 2001).

16. Further, this requirement is overbroad, vague, and/or standardless and may be unenforceable as unconstitutional because it does not provide fair notice of what may be illegal or subject to regulation. Alternatively, the requirement is a standardless delegation of administrative discretion.

² “. . . the constitutionality of a statute, challenged under the Equal Protection Clause, is subject to the traditional standard requiring that the state law be shown to bear some rational relationship to legitimate state purposes. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16. Under this test, the court must consider whether the classification is a rational one based on social, economic, historic or geographical factors; whether the classification bears a reasonable relationship to a proper governmental purpose; and whether all persons within the classes established are treated equally.” (210 S.E.2d at 490)

State ex rel. Piccirillo v. City of Follansbee, 233 S.E.2d 419, 422–23 (W. Va. 1977)

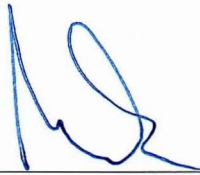
³ The right to due process of law is succinctly stated in Article III, § 10 of the West Virginia State Constitution: “No person shall be deprived of life, liberty, or property, without due process of law, and judgment of his peers.” This Court has recognized that “[d]ue process of law, within the meaning of the State and Federal constitutional provisions, extends to actions of administrative officers and tribunals, as well as to the judicial branches of the governments.” Syl. pt. 2, *State ex rel. Ellis v. Kelly*, 145 W.Va. 70, 112 S.E.2d 641 (1960). *Lamar Outdoor Advert. v. W. Virginia Dept. of Transp., Div. of Highways*, 717 S.E.2d 255, 260 (W. Va. 2011)

III. PRAYER FOR RELIEF

The Appellant requests that the Environmental Quality Board reverse the order issued on May 2, 2017, and reverse the application and enforcement of the Order, and all other relief that the Board determines is just and proper in accord with West Virginia law.

Respectfully Submitted,
JCESA

By Counsel:



Office of the Jefferson County Prosecuting Attorney
Nathan P. Cochran
Assistant Prosecuting Attorney
West Virginia State Bar Number 6142
Post Office Box 729
Charles Town, West Virginia 25414
304-728-3346 Telephone
304-728-3353 Facsimile

EXHIBIT

1



west virginia department of environmental protection

Division of Water and Waste Management
601 57th Street SE
Charleston, WV 25304
Phone: (304) 926-0470
Fax: (304) 926-0488

Jim Justice, Governor
Austin Caperton, Cabinet Secretary
www.dep.wv.gov

**ORDER
ISSUED UNDER THE
WATER POLLUTION CONTROL ACT
WEST VIRGINIA CODE, CHAPTER 22, ARTICLE 11**

TO: Jefferson County Emergency Service Agency
Denise Pouget, Director/Official Representative
419 16th Avenue
Ranson, WV, 25438

DATE: May 2, 2017
ORDER NO.: 8701

INTRODUCTION

The following findings are made and Order issued to Jefferson County Emergency Service Agency (hereinafter, "JCESA") pursuant to the authority vested in the Director of the Division of Water and Waste Management under Chapter 22, Article 11, Section 1 et seq. of the Code of West Virginia.

FINDINGS OF FACT

In support of this Order, the Director hereby finds the following:

1. JCESA operates a wastewater treatment system located in Ranson, Jefferson County, West Virginia.
2. On May 16, 2016, West Virginia Department of Environmental Protection (WVDEP) personnel sent an email to JCESA advising that a WV/NPDES permit was needed for the Stormceptor oil/water separator at the aforementioned facility. The oil/water separator discharges treated wastewater from vehicle washing activities into a storm water basin located off-site at Lakeland Place. In the email correspondence, WVDEP personnel provided instructions for completing the WV/NPDES permit application.
3. On September 12, 2016, WVDEP personnel sent an email to JCESA to request an update regarding the status of its WV/NPDES permit, since a response to the previous May 16, 2016 email correspondence had not been received.

4. On September 15, 2016; WVDEP personnel received a response to the aforementioned September 12, 2016 email correspondence which stated that the request would be forwarded to the appropriate representative at JCESA.
5. On September 27, 2016, WVDEP personnel conducted an inspection of the facility. During the inspection, a violation of the following sections of WV State Code and WV Legislative Rules was observed and documented:
 - a. 47CSR10 Section 3.1 and 22-11-8(b)-Without authorization pursuant to a valid WV/NPDES permit, JCESA made/caused an outlet or substantially enlarged/added to the load of an existing outlet for the discharge of effluent from industrial waste into the waters of the State.

As a result of the aforementioned violation, Notice of Violation (NOV) No. w16-02-075-mkk was issued to JCESA.

6. On January 3, 2017, WVDEP personnel conducted an inspection of the facility. During the inspection, a violation of the following sections of WV State Code and WV Legislative Rules was observed and documented:
 - a. 47CSR10 Section 3.1 and 22-11-8(b)- Without authorization pursuant to a valid WV/NPDES permit, JCESA made/caused an outlet or substantially enlarged/added to the load of an existing outlet for the discharge of effluent from industrial waste into the waters of the State.

As a result of the aforementioned violation, NOV No. w17-02-010-mkk was issued to JCESA.

ORDER FOR COMPLIANCE

And now, this day of May 2, 2017, JCESA is hereby ORDERED by the Director as follows:

1. JCESA shall immediately take measures to initiate compliance with all pertinent laws and rules.
2. Within thirty (30) days of the effective date of this Order, JCESA shall electronically submit an administratively complete application for WV/NPDES permit coverage for the regulated activity. Any questions regarding the application process shall be directed to WVDEP DWWM-Permitting Section at (304) 926-0495.

OTHER PROVISIONS

1. Compliance with the terms and conditions of this Order shall not in any way be construed as relieving JCESA of the obligation to comply with any applicable law, permit, other order, or any other requirement otherwise applicable. Violations of the terms and


conditions of this Order may subject JCESA to additional enforcement action in accordance with the applicable law.

2. The provisions of this Order are severable and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.
3. This Order is binding on JCESA, its successors and assigns.
4. This Order shall terminate upon JCESA's notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.

RIGHT OF APPEAL

Notice is hereby given of your right to appeal the terms and conditions of this Order which you are aggrieved to the Environmental Quality Board by filing a NOTICE of APPEAL on the form prescribed by such Board, in accordance with the provisions of Chapter 22, Article 11, Section 21 of the Code of West Virginia within thirty (30) days after receipt of this Order.

This Order shall become effective upon receipt.

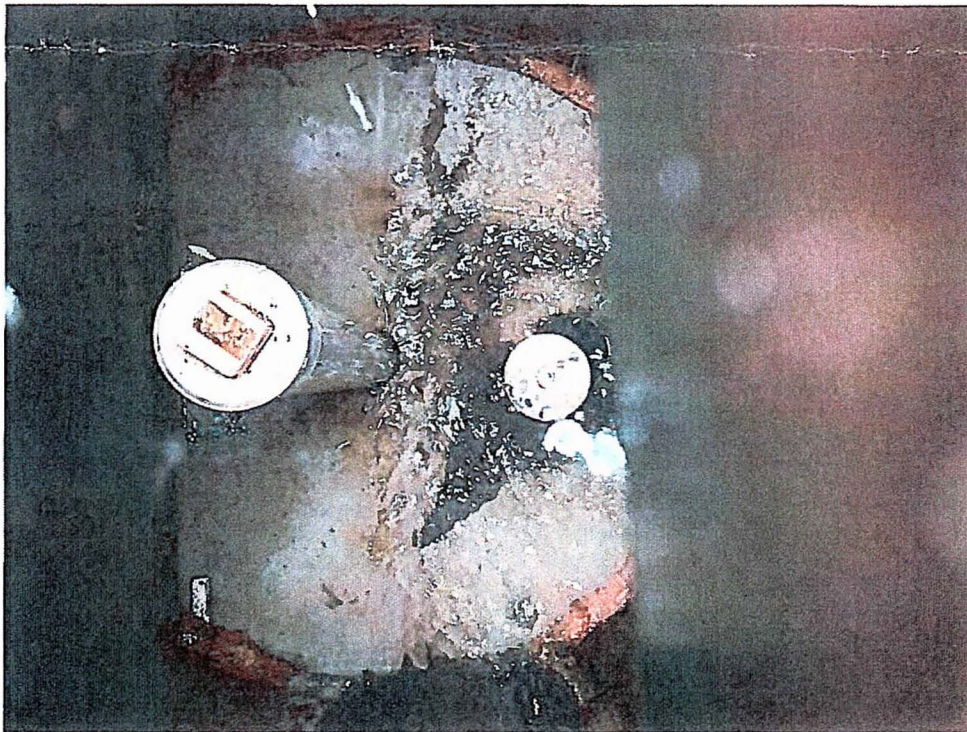


Scott G. Mandirola, Director
Division of Water and Waste Management

JCESA
1/3/17



Discharge from JCESA property into storm water basin



Stormceptor oil/water separator

EXHIBIT

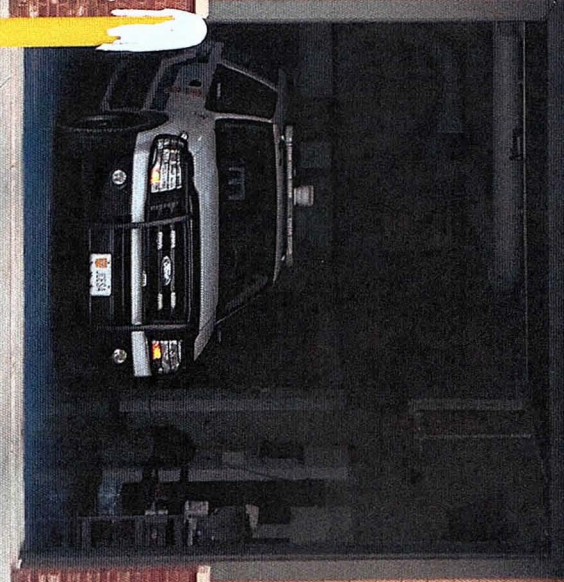
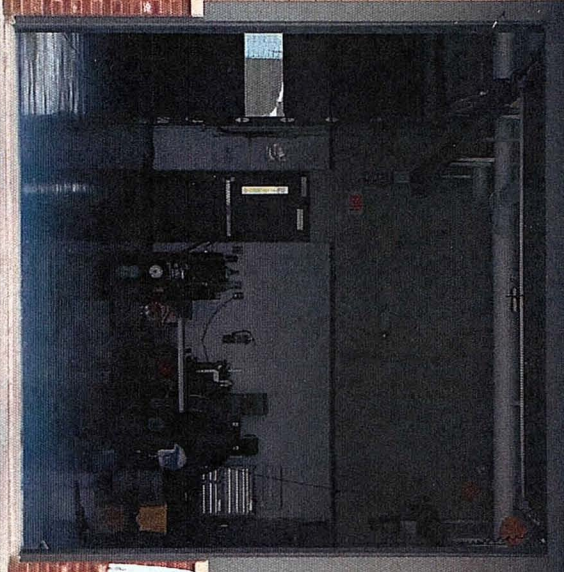
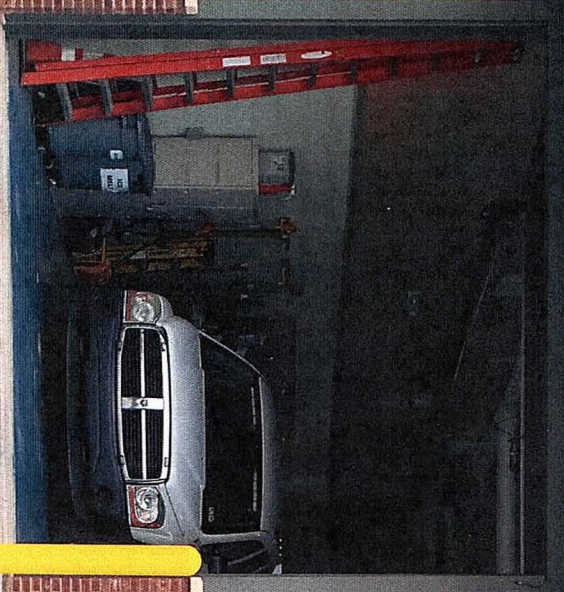
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EXHIBIT

3



419

EXHIBIT

4

From: [Joe Kent](#)
To: [Roger Goodwin](#)
Subject: FW: 17.03.28 Emergency Services site in Jefferson County
Date: Tuesday, March 28, 2017 10:53:54 AM

From: Perkins, John M [mailto:John.M.Perkins@wv.gov]
Sent: Tuesday, March 28, 2017 10:50 AM
To: Anderson, Connie J; Joe Kent
Cc: Kanehl, Michael K
Subject: RE: 17.03.28 Emergency Services site in Jefferson County

I concur. If there is no industrial activity occurring onsite that requires an oil/water separator, then they may remove it as desired.

John M. Perkins
Supervisor
General Permits & Support Team
WVDEP, DWWM
601 57th Street SE
Charleston, WV 25304
Ph: 304-926-0499 X-1031
Fax: 304-926-0496
E-mail: john.m.perkins@wv.gov

From: Anderson, Connie J
Sent: Tuesday, March 28, 2017 10:45 AM
To: Joe Kent <jkent@jeffersoncountywv.org>
Cc: Kanehl, Michael K <Michael.K.Kanehl@wv.gov>; Perkins, John M <John.M.Perkins@wv.gov>
Subject: FW: 17.03.28 Emergency Services site in Jefferson County

If the oil water separator is removed due to not having a need for a regulated discharge, I agree with the below.

The permitting manager is John Perkins so I am cc him to make sure.

Thanks

Connie Anderson
WV DEP – DWWM
601 57th St SE
Charleston, WV 25301
304.926.0499 x 1073
304.926.0497 fax
connie.j.anderson@wv.gov

From: Joe Kent [<mailto:jkent@jeffersoncountywv.org>]
Sent: Tuesday, March 28, 2017 10:42 AM
To: Anderson, Connie J <Connie.J.Anderson@wv.gov>
Subject: RE: 17.03.28 Emergency Services site in Jefferson County

Connie,

The inspector is Michael Kanehl, out of the Romney office.

Joe

From: Anderson, Connie J [<mailto:Connie.J.Anderson@wv.gov>]
Sent: Tuesday, March 28, 2017 10:29 AM
To: Joe Kent
Subject: RE: 17.03.28 Emergency Services site in Jefferson County

Who is the inspector so I can cc on my reply? Thanks

From: Joe Kent [<mailto:jkent@jeffersoncountywv.org>]
Sent: Tuesday, March 28, 2017 10:26 AM
To: Anderson, Connie J <Connie.J.Anderson@wv.gov>
Subject: 17.03.28 Emergency Services site in Jefferson County

Connie,

The Jefferson County Emergency Services Agency constructed a site in 2009 for the Ambulance Authority. Originally intended as an ambulance garage, the site has evolved into an office building. The only vehicles stored at this site are two SUV vehicles used by supervisors to meet ambulances at the scene. I have attached a photo of the site.

When this site was constructed, Twilla Carr was in charge of the GPP program in this area, and required the submittal, and approval of a GPP for all development sites. At that time, she was requiring oil/water separators for all commercial sites with a parking area, regardless of size, or use. It is the understanding of the Jefferson County Engineering Department, that these requirements exceeded the authority of the Ground Water Protection Rule, under 47CSR58. It is also our understanding that since Jefferson County is not an MS4 community, that the "stormceptor" oil/water separator installed at this site would not be required if the site were to be constructed today. This is evidenced by several similar facilities, such as volunteer fire stations, that were constructed long after the site in question, that were not required to install such a structure. Therefore, in order to reduce the on-going expense of maintenance, and to avoid the necessity of obtaining an Industrial Discharge NPDES Permit (based on the premise that the structure is a "water treatment facility" by the WVDEP inspector,) the County wishes to remove the requirement for the structure in question from the GPP.

Please provide any guidance that you can share as to the process necessary to accomplish the removal of the requirement to install the oil/water separator, and amend the GPP for this site. I have attached the original GPP for your reference.

Thank you for your consideration of this issue,
Joe

Joseph W. Kent

Land Development Inspector

Jefferson County Department of Engineering, Planning & Zoning

116 E. Washington Street

P.O. Box 716

Charles Town, WV 25414

304-728-3257

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

JEFFERSON COUNTY EMERGENCY SERVICES AGENCY,

APPELLANT,

V.

APPEAL NO. _____

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

APPELLEE.



CERTIFICATE OF SERVICE

I, Nathan P. Cochran, Assistant Prosecuting Attorney, do hereby certify that I, on this 26th day of May, 2017, served by United States Mail, postage prepaid, the attached Notice of Appeal and Memorandum In Support of Notice of Appeal to all parties listed below:

Jackie Shultz, Clerk
Environmental Quality Board
601 57th Street, SE
Charleston, WV 25304

WVDEP
Office of Legal Services
601 57th Street, SE
Charleston, WV 25304

Scott G. Mandirola, Director
Division of Water and Waste Management
601 57th Street, SE
Charleston, WV 25304

A handwritten signature in blue ink, appearing to be "Nathan P. Cochran", written over a horizontal line.

Nathan P. Cochran, Assistant Prosecuting Attorney