

**BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD**

**WEST VIRGINIA WATER RESOURCES, INC.,**

**Appellant,**

v.

**Appeal No.: 24-01-EQB**

**JEREMY BANDY<sup>1</sup>, DIRECTOR,  
DIVISION OF WATER AND WASTE MANAGEMENT,  
WEST VIRGINIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,**

**Appellee,**

**ORDER GRANTING WVDEP'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING WEST VIRGINIA WATER RESOURCES'  
MOTION FOR SUMMARY JUDGMENT**

This matter arises from an appeal by West Virginia Water Resources, Inc. ("WVWR"); filed on or about on February 20, 2024, alleging that it is aggrieved by the reissuance of WVWR's Solid Waste/NPDES Permit No. WV0116521 (the "Permit").

Specifically, WVWR complains that WVDEP (1) included "various requirements under the West Virginia Solid Waste Management Act" and its accompanying regulations in the Permit and (2) imposed "monitoring and reporting requirements for Total Residual Chlorine ("TRC") without any demonstration of need, and contrary to the DEP's" response to comment "that said limits had been removed from Section A" of the Permit. (See WVWR's Notice of Appeal, at p. 1).

The parties agreed that this matter was ripe for disposition pursuant to cross-motions for summary judgment and, on July 9, 2024, the EQB established a briefing schedule for the parties'

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<sup>1</sup> Kathryn Emery no longer holds office as Director of the Division of Water and Waste Management. Pursuant to Rule 25(d) of the W.V. Rules of Civil Procedure, Emery's successor, Director Jeremy Bandy, is automatically substituted as a party.

motions, responses and replies thereto. After the EQB received all written pleadings, oral argument took place before the EQB on September 4, 2024.<sup>2</sup>

Upon consideration of the written pleadings, oral argument, exhibits, and evidence, the EQB hereby makes the following makes the following findings and conclusions:

### **FINDINGS OF FACT**

1. In August 2009, a large fish kill occurred in Dunkard Creek, being a tributary of Buffalo Creek, being a tributary of the Monongahela River.

2. As a result of that fish kill, in 2011, Consolidation Coal Company (“Consol”) entered into a federal Consent Decree with the U.S. Environmental Protection Agency and the WDEP (the “Consent Decree”).

3. The Consent Decree required Consol to “design, construct, and operate a wastewater treatment plant, landfill, and pipeline collection system.” (Consent Decree, at p. 9.<sup>3</sup>)

4. More specifically, the Consent Decree stated that the “landfill shall be designed in accordance with 33 C.S.R. 1 as an industrial solid waste disposal facility.” (*Id.* at p. 10).

5. The Consent Decree also stated that “[a]pplications for permits necessary for the construction and operation of the landfill shall be submitted no later than February 1, 2011. (*Id.*)

6. On January 31, 2011, Consol submitted an “Industrial Solid Waste Class F Facility Application” for “the proposed Dents Run Solid Waste Facilities.” (C.R., pp. 370-1121, at p. 395).

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<sup>2</sup> All arguments of counsel and pleadings have been considered and reviewed with reference to the evidentiary record before the EQB, as well as applicable law. To the extent that the arguments advanced by the parties are in accordance with these findings of fact, conclusions and legal analysis of the EQB and are supported by the evidence, they have been adopted. To the extent that the arguments advanced by the parties are inconsistent therewith, they have been rejected. Certain arguments have been omitted as not relevant or necessary to a proper decision.

<sup>3</sup> The Consent Decree is attached to WVDEP’s Motion for Summary Judgment as Exhibit 1, and it is attached to WVWR’s Motion for Summary Judgment as Exhibit G.

7. WVDEP issued the Permit, Solid Waste/NPDES Permit No. WV0116521, to Consol on March 2, 2012. (*See* WVDEP’s Report of Compliance Evaluation (Dec. 13, 2018), C.R., pp. 1286-1300).

8. Thereafter, Consol constructed a wastewater treatment plant (the “Northern WV R/O Facility”) to treat mine water from “the wastewater streams which are permitted for discharge” pursuant to various NPDES permits. (Consent Decree, at p. 5).

9. The Northern WV R/O Facility generates reject material that is then disposed of at the Dents Run Solid Waste Facilities (“Dents Run Landfill”).

10. Since disposal at the Dents Run Landfill began, that reject material has been handled as an industrial solid waste.

11. In 2016, Consol transferred ownership of the Dents Run Landfill to Murray American Energy, Inc. (*See* C.R., pp. 1286-1300).

12. On November 17, 2017, the Permit was reissued to Murray American Energy, Inc., with an effective date of January 1, 2018. (*Id.*)

13. On July 5, 2018, the Consent Decree was terminated. (*See* WVWR’s Motion, Exhibit H).

14. In 2021, the Permit was transferred from Murray American Energy, Inc. to WVWR. (WVDEP’s Motion, p. 5); (WVWR’s Memorandum in Opposition to WDEP’s Motion, p.5).

15. On May 11, 2022, WVWR applied for reissuance of the Permit for its “Solid Waste disposal facility of water treatment byproducts.” (C.R., pp. 349-367, at p. 364).

16. On December 8, 2023, WVWR submitted comments to the draft Permit, including a comment arguing that the detection of chlorides in monitoring wells at the Dents Run Landfill and the correlation that WVDEP drew between TRC and chlorides in groundwater monitoring

wells at other facilities is “tenuous,” and that measurement of TRC is subject to interference from common constituents in water. The comment asked that TRC be removed from the draft permit. (C.R., pp. 171-174).

17. On January 12, 2024, WVDEP approved the reissuance of the Permit. (C.R., p. 27).

18. Also on January 12, 2024, WVDEP sent a letter wherein WVDEP responded to WVWR’s comment regarding the TRC as follows: “[t]he agency agrees that the chemistry is complex; however, believes that a potential exists for residual chlorine to result from the landfilled materials. However, based on the concerns in the comment letter the permit has been revised. Total Residual Chlorine has been removed from Section A and replaced with a requirement in Section B to collect quarterly samples and add TRC to the semi-annual Phase II program if detected.” (C.R., pp. 27-29, at p. 28).

19. The Permit contains requirements made pursuant to the West Virginia Solid Waste Management Act and its accompanying regulations, W.Va. Code § 22-15-1 *et seq.* and W.Va. Code R. § 33-1-1 *et seq.*, respectively.

20. Section A of the Permit contains monitoring requirements for TRC for surface water inspectable units, but it does not impose those same requirements for the groundwater monitoring wells. (C.R., pp. 70-95).

### **CONCLUSIONS OF LAW**

1. A party is entitled to summary judgment where the record establishes “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56, W.Va. R. Civ. P.; *Short v. Appalachian OH-9, Inc.*, 203 W.Va. 246; 507 S.E.2d 124 (1998).

2. A “dispute about a material fact is genuine only when a reasonable jury could render a verdict for a nonmoving party if the record at trial were identical to the record compiled in the summary judgment proceedings.” *Crum v. Equity Inns, Inc.*, 224 W.Va. 246, 253; 685 S.E.2d 219, 226 (2009).

**WVDEP’s Inclusion of Solid Waste Permit Provisions in the Permit’s Reissuance.**

3. W.Va. Code R. § 33-1-2.28 defines a “Class F Solid Waste Facility” as “any industrial solid waste disposal facility.”

4. W.Va. Code R. § 33-1-2.59 defines an “Industrial Solid Waste Landfill” as “any solid waste disposal facility that is owned, operated, or leased by an industrial establishment for the land disposal of industrial solid waste created by that person or such person and other persons on a cost-sharing or nonprofit basis. The term ‘industrial solid waste landfill’ does not include land application units, surface impoundments, or injection wells.”

5. Section 6, Article 1, Chapter 33 of the West Virginia Code of State Rules establishes the closure and post-closure requirements for solid waste facilities.

6. Unless a permittee transfers a permit to another person in accordance with W. Va. Code R. § 33-1-3.19, the permittee is bound to continue to maintain and operate the solid waste facility until all closure and post-closure requirements have been met. *See* W.Va. Code § 22-15-10(b), proscribing the abandonment of a solid waste facility, unless done so in accordance with the code, plans, specifications, orders, instructions, and rules.

7. WVWR has cited no law or authority that allows an industrial solid waste landfill to be converted into any other type of disposal facility.

8. Beginning in 2011-2012, the Dents Run Landfill was designed, permitted, and constructed as an industrial solid waste landfill in accordance with and pursuant to the Solid Waste Management Act and Solid Waste Management Regulations.

9. Since then, the Dents Run Landfill has been operated and continuously permitted as an industrial solid waste landfill in accordance with and pursuant to the Solid Waste Management Act and Solid Waste Management Regulations.

10. When WVWR acquired the Dents Run Landfill in 2021, WVWR knew, or with due diligence should have known, that the facility was and always has been permitted and operated as an industrial solid waste landfill in accordance with and pursuant to the Solid Waste Management Act and Solid Waste Management Regulations.

11. Because the Dents Run Landfill was permitted and constructed, and has been operated, as an industrial solid waste landfill, it is subject to the requirements of the Solid Waste Management Act and Solid Waste Management Regulations until all closure and post-closure requirements have been met and the Permit is released.

12. The EQB makes no finding as to whether the reject material deposited at the Dents Run Landfill constitutes waste resulting from coal mining operations that is excluded from the Solid Waste Management Act's definition of "solid waste."

13. Based upon the foregoing, the EQB **GRANTS** WVDEP's Motion for Summary Judgment, in part, finding that it was lawful and reasonable, and was neither arbitrary nor capricious, for the WVDEP to include solid waste permit provisions in the Permit's reissuance.

### **WVDEP's Inclusion of Total Residual Chlorine in Schedule A of the Permit.**

14. It appears to the EQB there are genuine issues of material facts regarding WVDEP's inclusion of Total Residual Chlorine monitoring and reporting requirements in Schedule A of the Permit.

15. The EQB **DENIES** Each party's motion for summary judgment, as it pertains to this issue.

### **CONCLUSION**

1. WVDEP is entitled to summary judgment concerning the issue of WVDEP including various requirements under the West Virginia Solid Waste Management Act and its accompanying regulations in the reissuance of WVWR's Solid Waste/NPDES Permit No. WV0116521 because there is no genuine issue as to any material facts pertaining to this issue, and because the WVDEP's actions pertaining to this issue were not arbitrary, capricious, or otherwise in violation of the law. WVWR's Motion for Summary Judgment on this issue is denied.

2. Neither party is entitled to summary judgment on the issue of WVDEP's inclusion of Total Residual Chlorine monitoring and reporting requirements in Schedule A of the Permit because genuine issues of material fact are disputed between the parties.

3. The EQB hereby extends the Stay, initially granted by Order entered on February 23, 2024, until further order.

4. WVWR, by counsel, notes its objections to this Order as to omitted Findings of Fact; misstated or unsupported Findings of Fact; omission of descriptions and rulings on key questions of law; misapplication of substantive law (especially, the West Virginia Solid Waste Management Act, W.Va. Code § 22-15-1, *et seq.*); and misapplication of Rule 56 of the W.Va. R. Civ. P.

14. It appears to the EQB there are genuine issues of material facts regarding WVDEP's inclusion of Total Residual Chlorine monitoring and reporting requirements in Schedule A of the Permit.

15. The EQB **DENIES** Each party's motion for summary judgment, as it pertains to this issue.

### CONCLUSION

1. WVDEP is entitled to summary judgment concerning the issue of WVDEP including various requirements under the West Virginia Solid Waste Management Act and its accompanying regulations in the reissuance of WVWR's Solid Waste/NPDES Permit No. WV0116521 because there is no genuine issue as to any material facts pertaining to this issue, and because the WVDEP's actions pertaining to this issue were not arbitrary, capricious, or otherwise in violation of the law. WVWR's Motion for Summary Judgment on this issue is denied.

2. Neither party is entitled to summary judgment on the issue of WVDEP's inclusion of Total Residual Chlorine monitoring and reporting requirements in Schedule A of the Permit because genuine issues of material fact are disputed between the parties.

3. The EQB hereby extends the Stay, initially granted by Order entered on February 23, 2024, until further order.

4. WVWR, by counsel, notes its objections to this Order as to omitted Findings of Fact; misstated or unsupported Findings of Fact; omission of descriptions and rulings on key questions of law; misapplication of substantive law (especially, the West Virginia Solid Waste Management Act, W.Va. Code § 22-15-1, *et seq.*); and misapplication of Rule 56 of the W.Va. R. Civ. P.

It is so **ORDERED** and **ENTERED** this 20<sup>th</sup> day of December 2024.



**ENVIRONMENTAL QUALITY BOARD**



**Dr. Edward Snyder, Chairman**

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

**WEST VIRGINIA WATER RESOURCES, INC.,**

**Appellant,**

**v.**

**Appeal Nos. 24-01-EQB**

**JEREMY W. BANDY, DIRECTOR,  
DIVISION OF WATER AND WASTE  
MANAGEMENT, WEST VIRGINIA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,**

**Appellee.**

**CERTIFICATE OF SERVICE**

I, Kenna M. DeRaimo, Clerk for the Environmental Quality Board, hereby certify that on this day, the 23<sup>rd</sup> day of December, 2024, a true copy of the foregoing **ORDER GRANTING WVDEP'S MOTION FOR SUMMARY JUDGMENT AND DENYING WEST VIRGINIA WATER RESOURCES MOTION FOR SUMMARY JUDGMENT** has been served upon the following:

Christopher B. Power, Esq.  
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*Via Certified First-Class Mail  
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Kenna M. DeRaimo, Clerk