

BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

WEST VIRGINIA WATER RESOURCES, INC.,

Appellant,

Appeal No.: 24-01-EQB

v.

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

Appellee.

**APPELLANT’S MOTION TO RECONSIDER
THE BOARD’S DECEMBER 20, 2024 ORDER
and MEMORANDUM IN SUPPORT OF MOTION**

Pursuant to *W. Va. Code* §§ 22B-1-6(d) and 22B-1-7, Rules 5.3 and 5.4 of the Environmental Quality Board (“Board”)’s Procedural Rules, and Rule 59(e) of the West Virginia Rules of Civil Procedure, Appellant West Virginia Water Resources, Inc. (“WVWR”) moves the Board to reconsider its Order entered on December 20, 2024 (the “Partial SJ Order”). The Partial SJ Order granted the summary judgment motion of Appellee West Virginia Department of Environmental Protection (“DEP”) and denied the summary judgment motion of WVWR regarding that part of WVWR’s appeal challenging the DEP’s incorporation of various conditions implementing the West Virginia Solid Waste Management Act, *W. Va. Code* § 22-15-1, et seq (“SWMA”) as a part of WV/NPDES Permit No. WV0116521 issued on January 12, 2024, for WVWR’s Dent’s Run Landfill (“the Dent’s Run NPDES Permit”).¹

¹ WVWR’s Notice of Appeal, Certified Record (“C.R.”) at 17-18, specifically identifies the challenged “Solid Waste Permit Provisions.”

Rule 56 of the West Virginia Rules of Civil Procedure permits the granting of summary judgment *only* when there are no disputed material facts and resolution of a case involves a question of law. *See* Rule 56(c), W.Va. R. Civ. P. The Partial SJ Order is in error both because it was entered in the face of disputed material facts regarding the DEP Summary Judgment Motion (“DEP Motion”) and because the Board failed to identify the “question of law” under the SWMA upon which its decision rests. To remedy these and other errors, the Board should rescind the Partial SJ Order, enter a new Order denying both the DEP Motion and the WVWR Motion, and conduct an evidentiary hearing on the entirety of this appeal.²

1. Procedural Authority and Standard of Review.

The Board’s Procedural Rules incorporate the West Virginia Rules of Civil Procedure as part of the appeal process. W. Va. C.S.R. § 46-4-6.13. Under Rule 59(e), W.Va. R. Civ. P., when a motion for reconsideration is filed within ten (10) days of its issuance, it will be treated as motion to alter or amend a judgment. *Id.*; *Pritt v. Republican Nat. Committee*, 557 S.E.2d 853, 858 (W.Va. 2001). The standard for review of such a motion is the same standard applied by the adjudicatory body to the matter that was the subject of the order for which reconsideration is sought. *Pritt*, 557 S.E.2d at 859. Although the Partial SJ Order is not equivalent to a final judgment under the Rules of Civil Procedure, it is within the Board’s authority and discretion to entertain this motion and apply the same standard as would apply in a civil proceeding. *See* Procedural Rule 6.13.

The Board applies *de novo* review of all matters brought before it, which means the order under appeal is considered “anew,” with the DEP’s decision given no deference. *W.Va. Code*

² WVWR is filing a Motion to Continue the January 16, 2025 hearing in this appeal contemporaneously with the filing of this motion, so that the Board will have time to rule on this motion and (if granted) to allow the parties to adequately prepare for a hearing involving many more issues than the single issue left for hearing following entry of the Partial SJ Order.

§22B-1-7(e); *W. Va. Div. of Env't'l. Protection v. Kingwood Coal Co.*, 490 S.E.2d 823, 834 (W.Va. 1997) (explaining *de novo* review). In evaluating the parties' cross-motions for summary judgment, however, the Board's duty was heightened beyond simply making factual findings to support its decision. Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is to be granted only "if the pleadings show that there is no genuine issue of material fact" and that "the moving party is entitled to a judgment as a matter of law." *Id.* In other words, entry of the Partial SJ Order was proper only if it is "*clear* that there is *no* genuine issue of [material] fact" to be considered at a hearing, and "*inquiry concerning the facts is not desirable to clarify the application of the law.*" Rule 56(c), W.Va. R. Civ. P.; *Pritt*, 557 S.E.2d at 859 (internal citations omitted) (emphasis added). Neither of those requirements is satisfied here.

2. The Partial SJ Order Should Be Rescinded Because There Are Disputed Issues of Material Fact that Preclude Ruling on Either Motion for Summary Judgment.

Because it falls within the Coal Waste Exemption³, the material deposited at the Dent's Run Landfill (a.k.a. "R/O Plant Reject") does not constitute "solid waste" under the SWMA. WVWR's appeal was centered on this fact. *See* Notice of Appeal, (Certified Record, pp.19-21; 23); WVWR Motion, pp. 1-2, 7-11; WVWR Memorandum in Opposition to DEP Motion, pp. 1-2. In issuing the Dent's Run NPDES Permit that is the subject of this appeal, the DEP refused to remove the challenged Solid Waste Permit Provisions because staff in its Solid Waste Management Unit disagreed with WVWR's position on this point.⁴

³ Under the SWMA, certain materials are specifically excepted from the definition of "solid waste" subject to regulation under that statute. *See W. Va. Code* § 22-15-2 (31). The exception that applies in this case (the "Coal Waste Exemption") is for material that: (1) results from "the exploration, development, production, storage and recovery of coal" and (2) is disposed of "in conformance with a permit issued" under Chapter 22, 22A or 22B of the West Virginia Code. *Id.*

⁴ The DEP Solid Waste Management Unit staff argued that the *regulatory* definition of the Coal Waste Exemption was more stringent than the *statutory* exemption. *See* DEP's January 12, 2024 letter, Certified Record, p.99. In

In participating in this appeal, however, DEP took a different approach. It did not disagree with the statement in the WVWR Motion (p. 7) that “the Coal Waste Exemption applies to the material placed at the Dent’s Run Landfill.” *See* DEP Response to WVWR Motion, p. 2 (declining to address the issue, but conceding that “the underlying facts are not in dispute”); DEP Motion, p. 5 (asserting that the applicability of the Coal Waste Exemption is “irrelevant” to this appeal). It was only in its *Reply* Brief supporting its own motion that DEP, *for the first time in this appeal*, stated that it does not “concede” that the R/O Plant Reject placed at the Dent’s Run Landfill falls within the Coal Waste Exemption. *See* DEP Reply Brief, at 1-2.

Quite obviously, whether the R/O Plant Reject falls within the Coal Waste Exemption is a “material” fact. If the Board found that the R/O Plant Reject does *not* fall within that exception to the SWMA’s definition of “solid waste,” WVWR would have no basis for this appeal and the DEP Motion would have to be granted. If the Board found that the R/O Plant Reject *does* fall within that exception, DEP would have no authority to impose the challenged Solid Waste Permit Provisions and the WVWR Motion would have to be granted. And as discussed below, to the extent that the Board concluded that WVWR has waived its right to request that the Solid Waste Permit Provisions be removed (because some of those provisions were in an earlier permit), the applicability of the Coal Waste Exemption as a matter of fact will be an important consideration in determining the legal validity of such a ruling.

Unfortunately, as of the filing of its Reply Brief (and as further demonstrated in the statements made by its counsel during oral argument), the DEP now again *disputes* the applicability of the Coal Waste Exemption. Because this is a genuine issue of material fact, the Board exceeded its authority in ruling on either the WVWR Motion or the DEP Motion. *See* Rule

doing so, the DEP staff took a position directly contrary to the arguments made by the DEP in federal court in the 2023 *Living Lands* litigation, as described in the WVWR Motion. *See* WVWR Motion, p. 11, Ex. F.

56(c), W.Va. R. Civ. P.; *Pritt*, 557 S.E.2d at 859 (citing *Williams. v. Precision Coil, Inc.*, 459 S.E.2d 329, 335-336 (W.Va. 1995) (summary judgment must be reversed when a review of the entire record shows that a genuine issue of material fact exists).

Similarly, the Partial SJ Order (p. 2) recounts a “large fish kill” that occurred in Dunkard Creek in 2009, and cites a 2011 federal Consent Decree involving Consolidation Coal Company (“Consol”), the U.S. Environmental Protection Agency, and the DEP (the “Consol CD”) as support for its ruling. This suggests that the Board found that the Dent’s Run Landfill must remain permitted under the SWMA because, as the DEP claimed, the R/O Plant Reject deposited at the facility comprises “material...responsible for the Dunkard Creek fish kill.”⁵

WVWR disputed this unfounded claim in its Response Brief to the DEP Motion (pp. 6-8). In addition, as shown by the Incidental Boundary Revision for Mining Permit No. UO-431 (that paved the way for issuance of the Dent’s Run NPDES Permit)⁶, as of October 18, 2011, the DEP viewed it as perfectly acceptable to keep the Dent’s Run Landfill under the jurisdiction of its Division of Mining and Reclamation. This is yet further evidence that the cause of the 2009 fish kill was *unrelated* to the DEP’s issuance of an industrial solid waste permit for the Dent’s Run Landfill. In short, DEP’s claim (apparently developed for purposes of this litigation) that the characteristics of the mine water treated at the Northern WV Treatment Facility drove the inclusion of the Solid Waste Permit Provisions in the Dent’s Run NPDES Permit is yet another disputed question of fact that the Board ignored in entering the Partial SJ Order.

⁵ DEP Motion at 6-7.

⁶ Attached as Exhibit A.

3. The Partial SJ Order Should Be Rescinded Because the Board Made No Ruling on the Key Legal Issues Raised by the Cross-Motions for Summary Judgment.

Even if the Board somehow considers the applicability of the Coal Waste Exemption to be a question of law, it was incumbent upon the Board to state that conclusion, make the necessary factual findings and to issue a ruling on that legal question. The Partial SJ Order includes no such statements. The Board, therefore, could not conclude “as a matter of law” that either party was entitled to summary judgment under Rule 56(c), W.Va. R. Civ. P.

For the same reason, the Board’s legal conclusion that “an industrial solid waste landfill [may not be] converted into any other type of disposal facility” (Partial SJ Order, at 5) cannot justify its grant of summary judgment to the DEP. The Board *never found that the Dent’s Run Landfill was properly permitted as a solid waste industrial landfill* in the first place. Further, WVWR never requested that the DEP (or the Board) “convert” the Dent’s Run Landfill from one type of facility to another. As expressed in WVWR’s Reply Memorandum in support of its motion (p. 3):

The *only* relevant law – the SWMA – specifies that the Dent’s Run Landfill may *not* be “permitted, operated or closed” under the SWMA, because the material deposited there does not constitute “solid waste” under its plain language.

Id. (emphasis in original). Clearly, the facility was erroneously permitted under the SWMA when it was first constructed and should have been permitted solely under the NPDES program. *Id.*

The Partial SJ Order attempts to mask these omissions through a sweeping conclusion of law (No. 11) holding that because the Dent’s Run facility was originally permitted and constructed as a facility subject to the SWMA, it must remain permitted as such. (Partial SJ Order, at 6.) This ruling essentially adopts the DEP’s argument that WVWR forever waived its right to object to the contents of the Dent’s Run NPDES Permit when it accepted the transfer of the permit in 2021.

DEP Motion, p. 5. As with the DEP, *the Board cites no legal authority and provides no legal analysis supporting this proposition*, calling into question its labeling as a “conclusion of law.”

In reaching this purported legal conclusion, the Board also fails to acknowledge that this appeal was taken from the DEP’s “reissuance” of the Dent’s Run NPDES Permit. Under controlling law, this signifies that the previous permit “expired” and WVWR’s application sought issuance of a “new permit.” *See W.Va. Code § 22-11-11(c); also see W.Va. Code § 22-15-10(c)* (Joint NPDES/SWMA permits subject to fixed five (5) year terms, and NPDES permitting provisions apply to both). The DEP legislative rules implementing these statutory directives confirm that in considering WVWR’s application, *all* of the provisions of the former permit (i.e., including the Solid Waste Permit Provisions) were reopened and subject to removal. *See W.Va. C.S.R. §§ 47-10-9.1.c.2, 47-10-9.3*. The Board could not properly grant the DEP Motion without concluding as a matter of law that these legal authorities do not apply, and explaining why. The Partial SJ Order fails to do so, and as a result its entry was in error.

4. Conclusion.

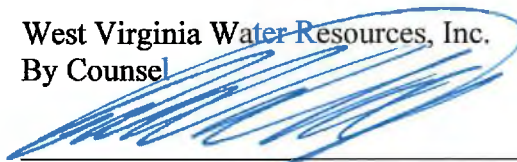
Rule 56 of the West Virginia Rules of Civil Procedure permits the granting of summary judgment when there are no disputed material facts and resolution of a case clearly involves only a question of law. *See Rule 56(c), W.Va. R. Civ. P.* Here, the parties dispute the *key* material fact: whether the R/O Plant Reject deposited at the Dent’s Run Landfill constitutes “solid waste” under the SWMA. They also dispute the DEP’s claim that the Solid Waste Permit Provisions were imposed due to the circumstances surrounding the Dunkard Creek fish kill and a concern with the constituents of the R/O Plant Reject.

In the final analysis, the Partial SJ Order fails to acknowledge that the parties dispute these material facts and does not identify the conclusion of law that supports the Board's decision on the cross motions. It also neglects to provide any true ruling on the legal question of whether the Solid Waste Permit Provisions may be removed from the Dent's Run NPDES Permit upon its expiration and re-issuance (i.e., issuance of a new permit), and gives no explanation for its implicit ruling that WVWR permanently waived its right to challenge the contents of the permit by accepting its transfer. Instead, the Board parroted the DEP's unfounded position that because the Dent's Run facility was originally permitted and constructed as a facility subject to the SWMA, the Solid Waste Permit Provisions must remain in the Dent's Run NPDES Permit forever.

As a result of these errors, it is appropriate for the Board to reconsider the Partial SJ Order and, in the interests of fairness and justice, rescind it. This will allow the Board to conduct an evidentiary hearing on all of the issues raised by this appeal and enter a Final Order following that hearing, after it has made a final determination as to all of the critical facts and has the benefit of a thorough understanding of the law that applies to those facts.

Respectfully submitted,

West Virginia Water Resources, Inc.
By Counsel



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CERTIFICATE OF SERVICE

As counsel for the Appellant, West Virginia Water Resources, Inc., I do hereby certify that on the 3rd day of January, 2025, I served a true and exact copy of the foregoing Appellant's Motion to Reconsider and Memorandum in Support of Motion on the following counsel by electronic mail and via regular first-class mail at the below address:

Jeffrey Dye, Esq.
West Virginia Department of Environmental Protection
601 57th Street, S.E.
Charleston, WV 25304



Robert M. Stonestreet (W. Va. Bar No. 9370)

EXHIBIT A



west virginia department of environmental protection

Division of Mining and Reclamation
105 S Railroad Street, Suite 301
Philippi, WV 26416

Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
dep.wv.gov

October 18, 2011

SIGNIFICANT INCIDENTAL BOUNDARY REVISION APPROVAL

Consolidation Coal Company
1 Bridge Street
Monongah, WV 26554

RE: Permit U043100 IBR 5
Nailler No. 79 Deep Mine

Dear Permittee:

This office has reviewed your recent request for permission to revise the terms and conditions of the above referenced permit. This revision is determined to be significant in nature and a list detailing the findings of the Director is attached.

In accordance with Section 19, Article 3, Chapter 22 of the Code of West Virginia, your request for an Incidental Boundary Revision (IBR) to the above referenced permit located in Mannington District of Marion County, to add 0.0 and delete 257.57 acres, in order to delete area for a reverse osmosis treatment plant facility is hereby **APPROVED, subject to the following conditions:**

A permit must be obtained for this area through the Division of Water and Waste or DMR jurisdiction will be reasserted.

Outlet 002 must be sampled until WV0065269 Modification 2 is approved.

The proposal map has been reviewed and found to be consistent with the proposed operation. With approval of this IBR, total bonded acreage for this permit is now 465.30. All other terms and conditions of the permit shall remain in full force and effect.

Sincerely,

Randy Moore
Permit Supervisor

C: Alliance Consulting, Inc.
John G. Britvec - DWWM
Inspector Mike Nunan