BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

WEST VIRGINIA WATER RESOURCES, INC.,
Appellant,

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

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

APPELLEE'S RESPONSE IN OPPOSITION TO APPELLANT'S MOTION FOR RECONSIDERATION

The Appellant's reconsideration motion raises issues that are immaterial to the Board's award of summary judgment, a conclusion of law that was supported by clear and unambiguous statutory language, and an "implicit ruling" that is the obvious result of that conclusion of law. Even if the Appellant's arguments had merit – and they do not – the motion fails to raise any arguments that the Appellant did not already raise in arguing the underlying cross-Motions for Summary Judgment filed by the parties and the Board has already had the opportunity to consider those arguments. The motion should be denied.

Legal Standard

"While Rule 59(e) [of the West Virginia Rules of Civil Procedure] does not itself provide a standard under which a circuit court may grant a motion to alter or amend, other courts and commentators have set forth the grounds for amending earlier judgments. For instance, the *Litigation Handbook on West Virginia Rules of Civil Procedure* states that a Rule 59(e) motion should be granted where: (1) there is an intervening change in the controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy

a clear error of law or (4) to prevent obvious injustice. . . . Under Rule 59(e), the reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W.Va. 48, 56, 717 S.E.2d 235, 243 (2011) (internal punctuation and citations omitted).

Also relevant to the Board's consideration is the standard for Motions for Summary Judgment. As the Board found in its December 20, 2024 Order ("Partial SJ Order"), 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). 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). As the Appellant points out in its Motion for Summary Judgment, to meet its burden in opposing a motion for summary, it must "[point] to specific facts demonstrating that there is a trial-worthy issue which is not only a genuine issue but also is an issue that involves a material fact." *Crum,* 224 W.Va. at 254; 685 S.E.2d at 227; *see Appellant's Motion for Summary Judgment*, p. 7.

Argument

1. **The Appellant's reprise of its argument that the reject material is not solid waste does not justify reconsideration.**

The Appellant argues once again that the reject material deposited at the Dents Run Landfill is excluded from the Solid Waste Management Act's ("SWMA") definition of "solid waste" and is, therefore, not subject to the SWMA or its related regulations. The Appellant contends that this is a genuine issue of material fact. In its Partial SJ Order, however, the Board

explicitly addressed this issue: "[t]he EQB makes no finding as to whether the reject material deposited at the Dent's Run Landfill constitutes waste resulting from coal mining operations that is excluded from the Solid Waste Management Act's definition of 'solid waste.'" Partial SJ Order, p. 6.

It is clear from the Partial SJ Order that the Board declined to address the issue of whether the reject material constitutes solid waste because the Board recognizes the legal effect of the Dent's Run Landfill having been permitted as an industrial solid waste landfill. That is, the Dent's Run Landfill is an industrial solid waste landfill and the law requires it to continue to be maintained and operated as an industrial solid waste landfill until all closure and post-closure requirements have been met.

The Appellant does not allege that there has been any intervening change in the controlling law, nor that any new evidence not previously available has come to light. Therefore, the Appellant's Motion must demonstrate that reconsideration is "necessary to remedy a clear error of law" or to "prevent obvious injustice." *Mey*, 228 W.Va. at 56, 717 S.E.2d at 243.

To prevail on those theories, the Appellant must establish that the Board's error is so blatant that it "strike[s] [the Board] as wrong with the force of a five-week old, unrefrigerated dead fish." *TFWS, Inc. v. Franchot*, 572 F.3d 186, 194 (4th Cir. 2009) (finding that the Appellant failed to demonstrate that the prior decision was clearly erroneous and would work manifest injustice). Crucially, a motion for reconsideration "may not be used . . . to raise arguments which could have been raised prior to the issuance of the judgment." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (citations omitted).[1] And it is "improper to file a motion

[1] *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.* is a decision by the United States Court of Appeals for the Fourth Circuit and involved Rule 59(e) of the Federal Rules of Civil Procedure. Rule 59(e) the West Virginia Rules of Civil

for reconsideration simply to ask the Court to rethink what the Court had already thought through – rightly or wrongly." *Norfolk S. Ry. Co. v. Nat'l Union Fire Ins.*, 999 F.Supp.2d 906, 918 (S.D. W.Va. 2014) (citations omitted).[2]

The Appellant argued this very issue at the September 4, 2024 hearing. As its counter to the Appellant's argument, the DEP argued that the nature of the reject material is irrelevant to the Board's determination because the Dent's Run Landfill is a solid waste facility and must continue to be maintained and operated as such. Following that hearing, the Board's Partial SJ Motion addressed this issue explicitly. The Appellant's Motion to Reconsider does little more than "tell[] the [Board] that its decision is wrong, and often for the same reasons [Appellant] opposed the motion to dismiss initially." *Fayette Cnty. v. Nat'l Grid Ne Holdings 2 LLC*, No. 2:21-cv-00307, 2023 WL 2918760, at *2 (S.D.W.Va. Apr. 11, 2023) (Johnston, C.J.).

In asking the Board to second-guess its analysis of the SWMA and its regulations, the Appellant does not even pretend to invoke new authority. It simply argues that the Board got it wrong. The Board did not. The Board determined that it did not need to address this issue (e.g. that it is not a material fact) because the Dent's Run Landfill was permitted and constructed, and has been operated, as an industrial solid waste landfill.

It is entirely appropriate for a tribunal to exercise judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—by only ruling on the narrow issues

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Procedure is identical to its federal counterpart, except that the federal rules specifies a longer time period for filing the motion, 28 days versus 10 days.

[2] Although *Norfolk S. Ry. Co. v. Nat'l Union Fire Ins.* is a decision by the United States District Court for the Southern District of West Virginia and involved Rule 54(b) of the Federal Rules of Civil Procedure (which is substantively the same as the West Virginia rule), and although the Appellant in the case *sub judice* has filed its Motion pursuant to Rule 59(e), courts acknowledge that they are "guided by the same principles of Rules 59(e) and 60(b)" when deciding Rule 54(b) motions. *Id.*; *see also Fayette Cnty. v. Nat'l Grid Ne Holdings 2 LLC,* holding that the two standards are the same, except in instances where the circumstances involve the discovery of new evidence.

necessary to resolve the case at hand. Briefly, the Board made its decision on grounds independent from the issue of whether the reject material is a "solid waste," and so that issue cannot be a genuine issue of material fact.

2. The cause and/or effect of the 2009 fish kill at Dunkard Creek are not genuine issues of material fact.

The Appellant tries to make a mountain out of a molehill by putting words in the Board's mouth and recharacterizing facts that the Appellant previously admitted in its own briefings. In its Response Brief to the DEP's Motion for Summary Judgment, the Appellant argues that the 2009 fish kill was caused by a golden algae outbreak caused by "a number of factors *beyond* the chloride concentrations of the mine drainage." Appellant's Response Brief, p. 7 (*emphasis added*). The Appellant also admits that, following the 2009 fish kill, Consol entered into a "federal Consent Decree with the U.S. Environmental Protection Agency and the DEP" that required Consol to construct a wastewater treatment plant, landfill, and pipeline collection system. *Id.*, at p. 3 (parentheticals omitted).

Now, the Appellant argues that the "2009 fish kill was unrelated to the DEP's issuance of an industrial solid waste permit for the Dent's Run Landfill." Appellant's Motion to Reconsider, p. 5. This argument flies in the face of the Appellant's own arguments and must be rejected.

Not only does the Appellant contradict itself with this argument, but it takes an enormous leap by arguing that the Board's use of undisputed facts relating to the 2009 fish kill—that the fish kill occurred and that Consol entered into the Consent Decree as a result of that fish kill—in its Partial SJ Order "suggest[] that the Board found that the Dent's Run Landfill must remain permitted under the SWMA because . . . the R/O Plant Reject deposited at the facility comprises 'material…responsible for the Dunkard Creek fish kill.'" *Id.*

Later in its argument, the Appellant shifts gear by stating that the DEP argues that the inclusion of the Solid Waste Provisions was driven by the characteristics of the mine water treated at the Northern WV Treatment Facility. This claim can be easily dispensed with as the question for this Board to consider is not what the DEP may have argued, but instead whether the Board erroneously adopted such an argument. This argument is also meritless since the Board's Partial SJ Order makes no finding as to how the characteristics of the mine water treated at the Northern WV Treatment Facility justify or otherwise support the inclusion of Solid Waste Provisions in the permit for the Dent's Run Landfill.

The Board's Partial SJ Order clearly explains that the reason that the Appellant is obligated to maintain and operate the Dent's Run Landfill pursuant to the provisions of the SWMA and its regulations is because it "was permitted and constructed, as has been operated, as an industrial solid waste landfill in accordance with" those provisions and that it remains subject to those provisions "until all closure and post-closure requirements have been met and the Permit is released." Partial SJ Order, p. 6. No part of the Board's conclusions of law draws upon any of the facts pertaining to the 2009 fish kill.

Even if the Board omitted its findings pertaining to the fish kill, it would have no effect on the decision. For the Appellant to meet its burden on its Motion to Reconsider, it must "[point] to specific facts demonstrating that there is a trial-worthy issue which is not only a genuine issue but also is an issue that involves a material fact." *Crum,* 224 W.Va. at 254; 685 S.E.2d at 227. The Appellant has failed to demonstrate either.

3. The Appellant's argument that upon reissuance all of the provisions of the former permit are subject to removal is meritless.

The DEP concedes that when the permit expires and is being reissued "the entire permit is reopened" (W.Va. Code R. §§ 47-10-9.1.c.2 and 9.3), but the DEP can only "issue renewal permits in compliance with rules promulgated by the director" and "in compliance with the requirements of § 22-15-1 et seq., its rules and § 22-11-1 et seq. of this code and [its] rules." W.Va. Code § 22-15-10(c); *see also* W.Va. Code R. § 33-1-3.5.b. It is obvious that the applicable statutes and rules require that certain provisions be included in a permit; it is unnecessary to enumerate all such requirements. *See, e.g.,* W.Va. Code R. § 33-1-3.17.b and § 47-10-10.1.c. Suffice to say, contrary to the Appellant's claim, some provisions are never "subject to removal." Appellant's Motion, p. 7.

Even if the Appellant's broad (and clearly incorrect) pronouncement is ignored, the Appellant's argument must still fail. A permittee must comply with its permit and the law, and so the permittee must maintain and operate its solid waste facility until all closure and post-closure requirements of the permit and the law have been met. W.Va. Code § 22-15-10(b).

The Dent's Run Landfill was "designed in accordance with 33 C.S.R. 1 as an industrial solid waste disposal facility." *See* Paragraph 24(b) of the 2011 Federal Consent Decree, Exhibit 1 of Appellee's Motion for Summary Judgment. It was initially permitted as an industrial solid waste landfill. *Id.*, at Paragraph 25.a.(i) (Consol was required to submit "[a]pplications for permits necessary for the construction and operation of the landfill"); *see also* C.R. at page 395 (Alliance Consulting, Inc., on behalf of the Appellant's predecessor in interest, stating that it is submitting an "Industrial Solid Waste Class F Facility Application"). Since the permit's issuance, the facility has been operated as an industrial solid waste landfill. Even in the Appellant's 2022 reissuance application—the approval of which is the subject of this appeal—the Appellant acknowledges that it submitted the application "to obtain a permit to operate

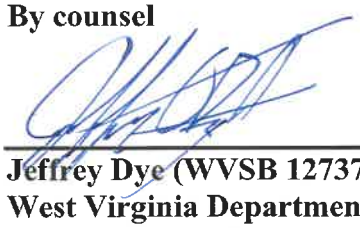
and/or monitor an Industrial Solid Waste Disposal Facility" and the Appellant describes the facility as a "Solid Waste disposal facility of water treatment byproducts." C.R., pp. 362 and 364. There is no authority that allows the DEP to convert a solid waste landfill into something else, and so the permitee of a solid waste landfill must comply with the requirements integral to a solid waste landfill permit during the life of that landfill.

Conclusion

Pursuant to the foregoing, the Appellant's Motion for Reconsideration should be denied.

Respectfully Submitted,

JEREMY BANDY,
DIRECTOR, DIVISON OF WATER AND WASTE MANAGEMENT,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
By counsel



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WEST VIRGINIA DEPARTMENT OF
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Appellee,

CERTIFICATE OF SERVICE

I certify that on January 21, 2025, I served a true and exact copy of the foregoing Appellee's Response in Opposition to Appellant's Motion to Reconsider upon the following in the manner indicated:

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