

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 REPLY MEMORANDUM
IN SUPPORT OF MOTION TO RECONSIDER
THE BOARD'S DECEMBER 20, 2024 ORDER**

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 *W. Va. R. Civ. P.* 59(e), on January 3, 2025, Appellant West Virginia Water Resources, Inc. ("WVWR") moved 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."

On January 21, 2025, DEP filed its Response in Opposition to WVWR's Reconsideration Motion (the "DEP Response"). This memorandum replies to the DEP Response.

1. **Contrary to the DEP Response, the Board did not find that it is immaterial whether the R/O reject material deposited at the Dent's Run Landfill constitutes "solid waste" under the SWMA.**

DEP argues that the Board obviously "declined to address the issue of whether the [R/O] reject material [the only material deposited at the Dent's Run Landfill] constitutes solid waste" because the Board found that the Dent's Run facility was originally permitted under the SWMA as a solid waste landfill. DEP Response at 3. Noticeably absent from the DEP Response, however, is any reference to a statement in the Partial SJ Order where such an explanation is actually made by the Board.

WVWR agrees with the DEP: reconsideration is warranted whenever a change in the underlying decision is "necessary to remedy a clear error of law." DEP Response at 2, 3 (citing *Mey v. Pep Boys-Manny, Moe & Jack*, 717 S.E.2d 235, 243 (W.Va. 2011)). Here, the Board clearly erred because after being presented with: (1) an appeal that was based upon the assertion that the material deposited at the Dent's Run Landfill does not constitute "solid waste"; and (2) issuance of a permit by the DEP based upon the agency's contrary determination, the Board decided to merely make "no finding" on the issue. Partial SJ Order at 6 (¶ 12). Moreover, it did *not* find that this issue is *immaterial* – which was a necessary prerequisite to granting summary judgment to the DEP. *See* W.Va. R. Civ. P. 56(c). Nor did the Board find that "*inquiry concerning [this fact] is not desirable to clarify the application of the law.*" *Pritt v. Republican Nat. Committee*, 557 S.E.2d 853, 859 (W.Va. 2001). As a result, the Partial SJ Order should not have been entered. *Id*; *see also* *TFWS, Inc. v. Schaefer*, 325 F.3d 234, 241 (4th Cir. 2003) (the requirement that there be no genuine issue of material fact "does not change when, as in this case, both parties move for summary

judgment;” even though both parties argue there is no genuine issue of fact, this “does not establish that a [hearing] is unnecessary thereby empowering the [Board] to enter judgment as it sees fit”) (internal citations omitted).

2. The Board clearly erred in concluding, without citing any supporting legal authority, that WVWR must seek coverage under the SWMA in applying for a new NPDES permit for the Dent’s Run facility.

Under the law, a WV/NPDES permit expires at the end of its five-year term. *W. Va. Code* § 22-11-11(c). Upon expiration, the permittee must apply for a “new permit” in order to avoid violating the provision of the West Virginia Water Pollution Control Act, *W. Va. Code* § 22-11-1, et seq (“WPCA”) that requires a NPDES permit be obtained prior to the discharge of pollutants to waters of the State. *Id.*; *W. Va. Code* § 22-11-8. DEP does not dispute this.

Here, WVWR is seeking a new NPDES permit for the Dent’s Run facility in compliance with the WPCA and DEP regulations under that statute. Since the SWMA does not apply to the Dent’s Run facility, WVWR requested that the DEP omit any provisions based upon the SWMA or associated regulations and *only* issue a NPDES permit. This is WVWR’s option, as the proposed operator of the facility. If the DEP determines that this leaves WVWR in a position of operating without a required permit, the agency is free to pursue an enforcement action in that regard.

Despite this, adopting word-for-word the language set forth in DEP’s proposed Order, the Partial SJ Order grants summary judgment to the DEP based on the following conclusion of law:

Because the Dent’s Run Landfill was permitted and constructed, and has been operated, as an industrial solid waste landfill, it is subject to the requirements of [the SWMA] and [SWMA regulations] until all closure and post-closure requirements have been met and the Permit is released.

Partial SJ Order, at 6. *See also* DEP Proposed Order, Conclusions of Law, ¶ 11. The effect of this conclusion of law is to hold that whenever a permit has been erroneously issued under an

inapplicable statute, the permittee is legally obligated to continue to permit its facility in the same illegitimate manner for the life of the facility. What's more, the Partial SJ Order makes this remarkable conclusion of law without citing any supporting legal authority – and ignoring the directly applicable statutory provision (at *W.Va. Code* § 22-11-11(c)) that requires a contrary determination. This constitutes legal error in two ways.

First, the Partial SJ Order offers no *legal authority* for this “conclusion of law.” The statute that governs this appeal requires that the Board include in its Final Orders “conclusions of law as specified in [W.Va. Code] § 29A-5-3....” *W.Va. Code* § 22B-1-7(i).² Because it is not possible for the Board to provide a conclusion of law without mentioning some law, the Partial SJ Order violates *W.Va. Code* § 22B-1-7(i).

Second, the controlling provisions of the WPCA and DEP regulations governing NPDES permits make it clear that WVWR was seeking a “new permit” when its former NPDES permit expired. (See the discussion above.) This law stands in stark contrast to the Board’s position that in seeking that permit WVWR must seek coverage under the SWMA and incorporation of inapplicable SWMA provisions. Especially in light of this directly contrary statutory and regulatory law, the lack of any legal analysis or support for this ruling represents legal error in and of itself.

² Though the Partial SJ Order is not a “final order” for appeal purposes, the same requirement should apply, since it presumably represents the Board’s final ruling on the issue addressed (i.e., the evidentiary hearing on the Solid Waste Permit Provisions portion of the appeal has been canceled).

3. Conclusion.

The DEP Response rightly points out that reconsideration should be limited to those cases where there has been a clear error of law. The Partial SJ Order reveals that such is the case here.

The Board failed to address disputed material facts that preclude the entry of the Partial SJ Order and entered “conclusions of law” that do not address the law at all. In these circumstances, it would be well within the Board’s discretion and an exercise in judicial restraint for the Board to reconsider the Partial SJ Order and, in the interests of fairness and justice, rescind it in favor of an evidentiary hearing on all of the issues raised by this appeal.

Respectfully submitted,

West Virginia Water Resources, Inc.

By Counsel



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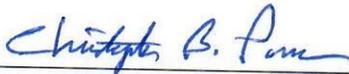
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CERTIFICATE OF SERVICE

As counsel for the Appellant, West Virginia Water Resources, Inc., I do hereby certify that on the 29th day of January, 2025, I served a true and exact copy of the foregoing Appellant's Reply Memorandum in Support of Motion to Reconsider 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



Christopher B. Power (W. Va. Bar No. 4286)