

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

**JEFFERSON COUNTY FOUNDATION, INC., et al.,**

*Appellants,*

v.

**Appeal No. 20-02-EQB**

**KATHY EMERY, DIRECTOR  
DIVISION OF WATER AND WASTE MANAGEMENT,  
WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,**

*Appellee,*

**and**

**ROXUL USA, INC., d/b/a ROCKWOOL,**

*Intervenors.*

**APPELLANTS' RESPONSE IN OPPOSITION TO INTERVENOR  
ROCKWOOL'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Appellants, by and through counsel, Christopher P. Stroeck, Esq. and the law firm of Arnold and Bailey, PLLC, hereby respond as follows to the Intervenor Rockwool's October 5, 2020 Motion for Partial Summary Judgment.

Intervenor Rockwool requests that the Environmental Quality Board ("EQB" or "the Board") grant its request for partial summary judgment, on the basis that it lacks jurisdiction, over the approval of Rockwool's "original registration under the 2012 Construction Stormwater General Permit (the 2012 CSGP) and its subsequent administration." (October 5, 2020 Rockwool's Motion for Partial Summary Judgment, at 1), and limit the hearing on this matter to

the modified registrations under the 2019 Construction Stormwater General Permit (the 2019 CSGP), which it also claims has no evidentiary support. (Id.) Rockwool also seeks to preclude the introduction of any of evidence or information relating to the pre-2019 Registration Modification. (October 5, 2020, Rockwool’s Motion To Preclude Evidence Relating To Pre-2019 Registration Modification Conduct, p.1).

For the reasons set out below, the Appellants believe that such an Order would be clear error. The fact below establish that Intervenor Rockwool, and the Department of Environmental Protection (DEP) staff, engaged in “gamesmanship” designed to deny the Appellants their statutory right and opportunity to challenge the initial NPDES permit under the 2012 CSGP. This Board has jurisdiction over the well-founded issues raised by the Appellants in their Notice of Appeal.

Notwithstanding, and as demonstrated herein below, genuine issues of material fact exist that must be properly evaluated by the Board. Indeed, at a previous hearing before the Board, in response to Appellants request that certain discovery be permitted (written discovery to all parties, depositions, etc.), the Board Chairman and its counsel stated that discovery was limited in this type of proceeding as the parties can present their evidence and examine witnesses at the evidentiary hearing. The Board significantly limited additional discovery in this matter. It would be improper to now grant the Motion for Summary Judgment, notably filed by only the Intervenor Rockwool.

### **Standard of Review**

“The summary judgment rule is designed to provide a method of promptly and speedily disposing of the controversy if there is no triable issue of fact.” *Crum v. Equity Inns, Inc.*, 685

S.E.2d 219, 224 W.Va. 246 (2009). “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify application of the law.” *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 736 S.E.2d 91, 230 W.Va. 91 (2012).

### **Facts in Dispute**

Rockwool’s Motion for Partial Summary Judgment sets out a partial, distorted and disputed set of facts in support of its request. There are significant material facts in dispute that should be presented to the Board, at a hearing, for its consideration and resolution.

Appellants contend, and the facts will demonstrate, that the DEP ignored, manipulated, and failed to enforce the requirements of the environmental statutes and permit requirements with respect to Rockwool’s various permitting actions and inaction, that it far exceeded the bounds of discretion, and became arbitrary and capricious, violating Appellants’ rights to public participation assured by statutory law. As the facts will show, Rockwool orchestrated its application process to avoid the requirement of public participation and now claims the benefit of its manipulation. The DEP acquiesced in Rockwool’s quest to avoid public participation.

The failure of the DEP to address the flaws in Rockwool’s initial application for registration under the 2012 NPDES General Permit, and subsequent modifications, should have triggered the right to contest the issuance of the original CSGP. Instead, the permitting process DEP engaged in for Rockwool so violated the requirements set out in the statutes that it was an abuse of the Agency’s discretion. In order to determine the appropriate remedy in this case, it is necessary for the Board to hear all the facts on the issues in dispute. The Appellants were denied the right to appeal in this process until the first opportunity to do so. Every earlier attempt was thwarted by

the DEP's failure to act in accordance with the law. First, the DEP failed to correctly identify the size of the actual Limits of Disturbance (LOD), always allowing Rockwool to keep it under 100 acres and thus avoid public participation. Second, the DEP ignored the timeliness that triggers public participation; in some cases actually changing the permit expiration dates without any authority to do so, and otherwise accepting implausible representations by Rockwool without any critical inquiry. If the history of the Rockwool permitting only had a few errors or omissions, Appellants would concede that human error and regulatory workload do not establish an abuse of discretion. But in this case, at every juncture, the DEP has acted to protect Rockwool from the public participation required by the law and supported by the facts. Failing to do so will sanction the conduct that generated this controversy and set the stage for other applicants and the DEP to engage in similar maneuvers to avoid public participation in the review process.

Limits of Disturbance ("LOD"):

One of the most outrageous examples of the DEP's failure to apply the rules to Rockwool, with the specific result of denying the public participation in the initial review for the CSWP registration, deals with the LOD for the Rockwool construction site. If acreage for a construction site is in excess of 100 acres, the law requires public notice and a public hearing. (2012 CSGP permit condition G.4.b.5.) Appellants contend Rockwool manipulated the information provided on its application in order to avoid public notice, and a hearing; and that the DEP acquiesced in that conduct in its review of Rockwool's application for registration under the 2012 Permit. (Notice of Appeal, paras. 42 and 43). Such actions by the DEP staff exceed the authority of the Agency and must be addressed by the Board in this hearing.

1. The facts will demonstrate that the actual LOD at the Rockwool facility, including all the regulatorily required parameters, exceeded 100 acres at the time of its original request for registration under the 2012 permit, but the LOD was misrepresented in its application to be 98.8 acres.<sup>1</sup>
2. In order to keep the acreage under 100 acres in the original application under the 2012 permit, Rockwool did not include its construction access road, the road that was being purposely built for Rockwool by the Department of Highways (Northport Avenue Extension), utility installation including water, sewer, and natural gas, or any waste and borrow sites.<sup>1</sup>
3. Rockwool continued to manipulate the acreage under the application for registration under the 2012 CSGP. For example, Rockwool did not include the construction access road, a clearly marked construction road within the property, and not enough land was included to complete the construction of the ponds.<sup>2</sup>
4. A thorough and competent review by the DEP would have shown that the LOD maps and the information submitted (and excluded) by Rockwool prove that the LOD

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<sup>1</sup> In the 2012 CSGP “disturbed areas” is defined as “the total area of land disturbing activity that will take place during all phases of a construction project, including, but not limited to, all waste and borrow sites, utility installation, road building, mass grading, and site developments. JCF # 91 2012 CSGP, p. JCF 3061; and “disturbed areas” are defined in the instructions of the application as “offsite borrow areas, offsite waste sites, access roads, utility installation, sediment controls etc. JCF # 3 Directions for Use (2017) (LOD), p. JCF 0140.

<sup>2</sup> The Instructions and Definitions for both the 2012 CGP and 2017 applications define the “total acreage to be disturbed” (application ) and the “disturbed area” (2012 CGP). (See, Roxul USA Electronic Submission System, CSW GP RA, p. JCF 0136; Instruction to Question Number 5 of 2017 application, p. JCF 0140; and, the Definition of “Disturbed Area” for the 2012 permit registration. See, p. JCF 3061)

exceeded 100 acres, in accordance with the 2012 and 2017 permit condition descriptions. This included the information that:

- a. the construction site access road was not included in the LOD;
  - b. there was not enough land included to build the ponds;
  - c. a clearly marked construction road within the Rockwool property was not included in the LOD.
5. Rockwool itself acknowledged in at least one 2017 document that the LOD was 103 acres; thus, putting into significant dispute the size of the LOD at the time of its initial applications under the 2012 permit. (See, Soil Map – Roxul LOD, p. JCF 0146)
6. Intervenor Rockwool claims that both Yogesh Patel, the Assistant Director of the Permitting Section of the DEP Division of Water and Waste Management and Rick Adams, the DEP technical analyst most responsible for review and approval of the Rockwool request for registration, testified that “they had no evidence that Rockwool’s limits of disturbance exceeded 100 acres.” (Motion, at 3) This quotation is taken out of context. Adams actually testified that he relied upon the information that was provided by Rockwool to him as truthful and complete, (73481 Adams, Ricky D FULL, Page 37 Line 12 to Page 38 Line 21); and Patel testified that he was uninvolved in the evaluation of the permit. (73481 Patel, Yogesh FULL, Page 75 Line 21 to Page 76 Line 9). (See, Attachment A, Deposition of Rick Adams, attached to this Response.)
7. The DEP review and handling of the LOD by Rick Adams is the subject of dispute. Appellants assert that the facts will show that Adams did not perform an adequate or accurate permit review, and that his failure to do so was an abuse of Agency discretion.

While Adams testified that he approved the LOD after reviewing a “shape map” that was emailed directly to him by Rockwool, that map is not in the Certified Record, was not produced in discovery, or available for his deposition. (Adams Depo., Page 32 Lines 10-17)<sup>3</sup> (Only after a specific request made at and after the deposition, did the DEP produce a shape map, but it was of an entirely unrelated construction project. Then it produced a shape map for the Rockwool project, but it was not the map that Adams said he reviewed in 2017. Appellee still has not produced the shape map that Rockwool allegedly sent to Adams in 2017, and upon which he made his decision that the LOD was not over 100 acres.)<sup>4</sup>

8. It should have been obvious to the DEP Permit Reviewer, as he reviewed the original applications, that Rockwool’s LOD was in excess of 100 acres. Had the DEP reviewed the original application with even minimal rigor it would have identified that Rockwool had not included the land disturbed for the Northport Avenue Extension in its LOD, although it was shown on the submitted plans.<sup>5</sup>
9. One day after the DEP issued Rockwool its registration under the 2017 permit, Rockwool executed a Right-of-Way Easement between it and Jefferson Orchards, Inc. The Agreement gave “a temporary access and construction easement to Roxul for use of the right-of-way prior to construction of the access road by the WV DOH.”<sup>6</sup> Rockwool did not apply to DEP to modify its application, which would have triggered public

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<sup>3</sup> Deposition Testimony of Rick Adams, Attachment A, p. 32.

<sup>4</sup> Appellants continue to work on this matter with the DEP staff.

<sup>5</sup> JCF Production Number 12 Roxul Ran 5 Project SWPPP, p. JCF 0664.

<sup>6</sup> See, JCF Production Document Number 20, Deed of Transfer (1197-672), p. JCF 0734.

notice, and the DEP did not require them to do so. Thus, the work done by Rockwool on the right of way was not covered by any permit at all, because the Northport Avenue Extension right-of-way was not permitted to start construction until February 6, 2019.<sup>7</sup>

10. Other facts, not mentioned by Rockwool in its Motion, which bear significantly on the actual size of the LOD, included the inadequacy of the LOD to accommodate the construction work to build the rainwater for reuse ponds,<sup>8</sup> a clearly marked construction road on the west side of the property which the DEP identified as disturbed during an inspection report on November 14, 2018,<sup>9</sup> the land disturbed for the Northport Avenue Extension, the land disturbed for the installation of utilities, including natural gas<sup>10</sup>, and water infrastructure installed by Jefferson Utilities, Inc.<sup>11</sup>

11. Rockwool's approach to the LOD consistently was, at a minimum, deceptive. When Rockwool was forced to include additional disturbed land as a result of the November 14, 2018 DEP inspection, the LOD was "adjusted" to include only 0.49 more acres.

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<sup>7</sup> JCF production document 109 City of Ranson Northport Avenue Extension Construction Plan (selected maps), p. JCF 3988.

<sup>8</sup> See, JCF Production Document Number 70, Changes to LOD Update Map, 06.21.19, p. JCF 2602.

<sup>9</sup> See, JCF Production Document Number 49, Rockwool Site Inspection Report 11-14-2018, p. JCF 2257.

<sup>10</sup> The LOD for the Mountaineer Gas pipeline was 25.38 acres, including an area on Rockwool's property that was not included in the Rockwool LOD, JCF Production Number 119 10115573\_1\_1800619 Rt 9 Extension NPDES Plan See, p. JCF 4251.

<sup>11</sup> See, DEP CGP Registration application Permit Number WVR109150, Question 5. In JUI's SVR109150 stormwater CGP application it states that "[w]ithin the Roxul site boundaries the proposed site work shown will be covered under NPDES permit WV0115924, which was processed for the Roxul Site Plan." JUI did not count the Rockwool property crossing LOD in its application, and Rockwool never included it in theirs, even though JUI said it did. This was an additional 0.48 acres never included in the Rockwool CSW permit.



Adams confirmed that if Rockwool had added 0.5 acres, it would have had to apply for a major modification, triggering a public notice and hearing. (See, DEP Modification Guidance Policy for CSW GP, p. JCF 3958.) (See, Adams Depo at page 47, lines 10-16 and page 86, lines 5-13)

Construction Timeline:

12. Likewise, the material facts regarding the information by Rockwool provided to DEP regarding the timeline for grading are also in dispute. The law states that if grading takes longer than one year, public notice and provision for public comment is required. (2012 CSWP permit condition G.4.b.5.) Rockwool's original application for registration stated that grading would take less than 21 weeks.<sup>12</sup>
13. Appellants contend that Kenneth Cammarato, Rockwool's Vice President who signed the application, under oath, knew or should have known, that the grading timeline noted on the application was never achievable.<sup>13</sup>
14. The Construction Sequence for the current application under the 2017 Permit reports that mass grading was not complete until January 2019, and that Fine Grading is still continuing through October, 2020.<sup>14</sup>

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<sup>12</sup> JCF Production 2 2017 Electronica Submission System Roxul USA Inc. CSW GP RA, p. JCF 0135.

<sup>13</sup> The failure of the Board to provide the Appellant's discovery into this, and other, facts in support of its case is a significant denial of the Appellants statutory rights to a fair adjudicated hearing. Appellant's sought discovery into the facts regarding what information Rockwool knew about the length of time grading would actually take, versus the time it put into its registration application. (See Appellant's Request for Additional Discovery to Intervenor Rockwool, filed June 30, 2020, seeking, inter alia, "... the basis for Rockwool's representations that construction activity was only going to take 17 weeks;..." (Int. No. 1); denied by the Board on August 6, 2020.)

15. The best, and most accurate information about the site schedule comes from Rockwool’s own filing in a lawsuit before the Jefferson County Circuit court. In that case, Rockwool filed a pleading, including images, making it clear that large scale grading actually continued for between 114 and 127 weeks, compared to the less than 21 weeks that Rockwool reported to the DEP.<sup>15</sup>
16. The facts at the hearing will show that “fine grading” continues through at least mid-October, 2020, or around 154 weeks; as compared to the 21 weeks identified in the original 2017 application – more than 7 times what was included in the original application for registration.
17. The facts will also include that Rockwool’s representation in its original application were not based in reality, that site grading at other Rockwool facilities, including the Byhalia, MS “sister” plant, made the time frames used on the 2017 application unrealistic, and that no extraordinary weather events or contract interruptions delayed the site work from the time of the initial application to now.
18. The inaccurate grading information was not identified by the DEP review of the original application. Instead, it appears that there was, at a minimum, no critical review or analysis of the information Rockwool submitted. (Adams Depo., at p. 38, lines 5-10).  
  
The DEP apparently never questioned Rockwool for clarification on how a complex site

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<sup>14</sup> JCF Production Document 62 2019 Rockwool Construction Sequence Update, Jan 2020, p. JCF 2305.

<sup>15</sup> JCF Production Document 114, August 2, 2020 Rockwool’s Response to JCV ‘s Motion to Amend Pleadings in *JCV, Inc. v. Ranson City Council*, Civil Action No. 2018-C-201, p. JCF 4072.

could be graded to 70% completion in less than 21 weeks. Grading is still not complete almost 3 years later.<sup>16</sup>

19. Yet, at no time did the DEP require Rockwool to stop grading and reapply for a permit; even when it was abundantly clear that Rockwool had exceeded the time it specified for grading in the original application had expired. This failure by the DEP resulted in foreclosing a statutory requirement of public notice and denied the Appellants the ability to challenge the permit.

Adequacy of DEP Staff Review:

20. As outlined below, the facts regarding the adequacy and validity of the permitting review of Rockwool's registration application under the 2012 permit were so lacking as to have exceeded the bounds of regulatory discretion or innocent mistake, and demonstrate arbitrary and capricious conduct that deprived the Appellants, and the public at large, of their rights to have any meaningful participation in the public review process of Rockwool. As such, the Board must consider whether the adequacy and actions of the DEP, in failing to require Rockwool to comply with original 2012 permitting requirements, should address its failure to comply with its duties.

21. The DEP electronic data base shows that the review only took 11 days.<sup>17</sup>

22. However, Adams testified that was sufficient time, and that he may have done some work outside of that time frame. (Adams Depo., p. 41, line 23 to p. 44, line 8)

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<sup>16</sup> JCF Production Document 62 2019 Rockwool Construction Sequence Update Jan 2020, p. JCF 2305.

<sup>17</sup> JCF Production 18 Application Activities Rockwool Initial CSW GP RA 2017, p. JCF 0730.

23. Yet, there is no evidence that Adams actually did any review outside of the time frame, and the weight of the testimony and documentary evidence to be presented at the hearing demonstrates otherwise.
24. For example, the public notice required by the conditions of the permit is that an official notice is supposed to be posted in the official newspaper of record.<sup>18</sup> It was not. The DEP posted the original notice to the public of the original application in the wrong newspaper of record. The paper of record for Jefferson County is *The Spirit of Jefferson*. The paper the notice was published in was the Berkeley County of Record, *The Journal*.
25. In the absence of a correct public notice in the paper of record, citizens should be provided the opportunity to see a “public notice sign.” (2012 Permit Condition, G.4.b.8.) The sign is required to be posted within 24 hours of applying for CGO coverage, outside the project, where the public can see it. (Id.)
26. The facts will show that Rockwool posted a sign on the east side of its LOD, along the site for future Northport Avenue extension. In 2017, when the sign was posted, it was a dead end road. It had been previously used as a road to access the orchard fruit and pie stand, but been unused since the Orchard closed in 2015.
27. While Adams may not have known that the Public Notice was posted on a dead end road that could not be seen from any travelled road, the evidence will show, the initial

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<sup>18</sup> § 22-22-17 (a)(b) and §59-3-2-(c), contain the list of WV qualified newspapers prepared by the Secretary of States office, and lists *The Spirit of Jefferson-Farmer's Advocate* and *The Shepherdstown Chronicle* as the qualified papers for Jefferson County. This advertisement was published in the *Martinsburg Journal*.

posted sign provided to the DEP as part of the SWPPP contained the wrong date (July 28, 2016 instead of a July 28, 2017),<sup>19</sup> was posted where it could not be seen by the public, and contained a POLISH phone number! It strains credulity to believe that any DEP review of the sign was conducted at all, or one would think Adams at least would have noticed the sign contained a Polish phone number, or noticed that the date was off by an entire year.

28. As the facts will establish, the public notice sign was eventually moved to the intersection of Northport Avenue Extension and Route 115, but not until the late summer of 2018, following a DEP inspection, and well after the 30-day window of appeal from October 19 to November 20, 2017.<sup>20</sup> Even then the posted sign was not compliant, either as to size of the sign, the size of the type, or its legibility.

DEP's Actions in Denying Appellant Rights to Appeal Rockwool's Registration Under the 2012 Permit:

29. Rockwool argues in its Motion for Partial Summary Judgment that the Appellant did not timely appeal its application for registration under the 2012 CSWP, and that all the facts regarding its errors, omissions, inaccuracies, mistakes and intentional and misleading information supplied to or withheld from the DEP is now moot, and that the time for Appellants to have raised those issues was in opposition to the 2012 permit registration. However, as set forth elsewhere in this response, Appellants have been

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<sup>19</sup> JCF Production Document 16 2017 PUBLIC NOTICE SIGN, p. JCF 0728.

<sup>20</sup> JCF Production Document 73 2019 Public Notice Sign, p. JCF 2605.

denied the opportunity to challenge the original Rockwool registration as a result of the DEP's abuse of its discretion.

30. Rockwool and the DEP should not be able to first frustrate the Appellants' opportunity to engage in public participation to challenge Rockwool's siting and safety risk, and then be able to claim the issues are moot, after succeeding in its deception.
31. Rockwool should have applied several times for a modification or reissuance of its CGP registration between October 20, 2017 and February 2020. The DEP failed to require Rockwool to do so.<sup>21</sup> The failure of the DEP in this case effectively removed any avenue for the public to seek relief from Rockwool's inappropriate CGP registration.<sup>22</sup>
32. When Rockwool accepted the Right-of-Way from Jefferson Orchards, Inc. on October 20, 2017, which was greater than 0.5 acres, Rockwool should have notified the DEP and applied for a major modification of its CGP registration. This is required by the DEP guidance on CGP registration modification.<sup>23</sup> Rockwool can be seen using this land in its own video<sup>24</sup> prior to the time that the construction for the Northport Avenue

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<sup>21</sup> 47 CSR 10-9.2.b, 47CSR 10-9-2.b.2 , and/or 47 CSR 10-9.4. *Suspension and revocation of permits*. 9.4.a. "The following are causes for revocation or suspension of a permit or for denying a permit renewal application:

9.4.a.1. Noncompliance by the permittee with any condition of the permit;

9.4.a.2. The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time.

<sup>22</sup> W. Va. Code § 22B-1-7(c).

<sup>23</sup> JCF production document 107 DEP Modification Guidance Policy for CSW GP, p. JCF 3985.

<sup>24</sup> JCF production 125 Rockwool time lapse construction video, minute 1:48-2:05.

Extension had started construction.<sup>25</sup> The failure of the DEP in this case effectively removed any avenue for the public to seek relief from Rockwool's actions.

33. When Rockwool's grading went beyond one year, it should have applied for reissuance of the CGP registration. Initially Rick Adams requested that Rockwool re-apply, and Rockwool did reapply.<sup>26</sup> However, Rockwool then withdrew the re-application. Yogesh Patel reported in his deposition that Rockwool told the DEP it withdrew the application "because they were finished grading."<sup>27</sup> It was not.
34. The definition in the 2012 CGP, states "Grading" means changing surface contours by removing soil and stone from one place and building it up in another."<sup>28</sup> The images from Rockwool's August 10, 2020 filing in Response in opposition to JCV's Motion to amend first amended complaint, *JCV vs the Ranson City Council*, Civil Action No. 2018-C-201, clearly show that grading was continuing well beyond November of 2018. The video Rockwool produced in the *JCV v Ranson* case shows grading activity in November of 2017 through the third quarter of 2019 (when the video ends).<sup>29</sup> The DEP failed to require Rockwool to stop construction and require it to obtain a reissuance of

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<sup>25</sup> The construction of Northport Avenue Extension was first permitted by the DEP on 2-6-2019 however when Ranson applied for a reissuance of this registration in on June 6, 2019, Ranson certified that they would start construction on June 10, 2019.

<sup>26</sup> JCF production document 57 Rockwool Start Date, p. JCF 2293

<sup>27</sup> Yogesh Patel Depo., pp. 86 – 104.

<sup>28</sup> JCF production document 91 2012 Construction Stormwater GP, p. JCF 3061.

<sup>29</sup> JCF production 125 Rockwool time lapse construction video.

its CGP registration at this time.<sup>30</sup> The failure of the DEP to do so effectively removed any avenue for the public to seek relief from Rockwool's actions.

35. When Appellants' brought these facts up to the DEP, they were provided a variety of excuses in an attempt to justify why the DEP allowed Rockwool to continue working without a permit.<sup>31</sup> Patel stated in his deposition that he was notified that Rockwool had started construction later than originally planned, and was therefore given allowance to continue work beyond one year.<sup>32</sup> However this is not true either. The email from Rockwool's Environmental Manager Matte Meldahl Drejstel to DEP's Rick Adams on October 4, 2018 stated "I can confirm we started grading on 1<sup>st</sup> Nov 2017".<sup>33</sup> Also, the video Rockwool produced shows grading activity in November of 2017 through the third quarter of 2019 (when the video ends).<sup>34</sup> The failure of the DEP to require Rockwool to comply with the terms and conditions of the permit, effectively denied the public its right to seek relief from Rockwool's actions.

36. The DEP should have also had Rockwool apply for a modification when, on October 2, 2018, the DEP required Rockwool to add a sinkhole remediation plan to its CGP

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<sup>30</sup> 47 CSR 10-9.4. and 9.4.a.2. "The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time."

<sup>31</sup> JCF production document 58 Yahoo Mail - Rockwool Meeting Follow-Up, p. JCF 2294; and JCF production document 59 December 20, 2019 Stormwater Permit Status from DEP General Counsel, p. JCF 2296.

<sup>32</sup> Yogesh Patel Depo., p. 97, line 19.

<sup>33</sup> JCF Production Document 57 Rockwool Start Date, p. JCF 2291.

<sup>34</sup> JCF Production 125, Rockwool time lapse construction video.



registration.<sup>35</sup> At the time Rockwool had started applying for a reissuance of its registration under the 2012 CGP, because its grading phase had gone beyond one year. However, Rockwool arbitrarily withdrew this application. The DEP should have told Rockwool at that time that they would not be allowed to continue construction under the issued registration unless it resubmitted the application for modification and reissuance of the permit registration to include the sinkhole remediation plan. This was not done. Instead, the DEP allowed Rockwool to incorporate the sinkhole remediation plan into the expired registration, and continue construction, including grading as defined by the 2012 CGP, without a valid NPDES permit or permit registration. The failure of the DEP to require Rockwool to comply with the terms and conditions of the permit, and allow Rockwool to continue construction without any permit at all, was an abuse of its discretion and effectively denied the public its right to seek relief from Rockwool's actions.

37. The DEP should have required Rockwool to stop construction and apply for a modification, when in 2018, the DEP required that it increase its LOD to include the construction road on the west side of the site. As discussed in more detail elsewhere in this Response, a DEP site inspection performed on November 14, 2018, found that Rockwool had disturbed land outside of its LOD.<sup>36</sup> The DEP required that Rockwool

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<sup>35</sup> JCF production Document 45 October 2, 2018 DEP Letter from Harold Ward (Re Sinkholes) p. JCF 2239, 47 CSR 10-9.4. Suspension and revocation of permits. 9.4.a. The following are causes for revocation or suspension of a permit or for denying a permit renewal application: 9.4.a.3. A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or revocation.

<sup>36</sup> JCF production document 49 Rockwool Site Inspection Report 11-14-2018, p. JCF 2257, 47 CSR 10-9.4. and 9.4.a.2. The permittee's failure in the application or during the permit issuance

increase its LOD, but also allowed it to avoid going over 0.50 acres, allowing it to only declare a 0.49 acre increase and avoid being required to apply for a major modification. If the increase were 0.01 acres more Rockwool would have been required to apply for a modification and reissuance of its CGP registration and would have been required to go to public notice and public comment.<sup>37</sup> (Since Rockwool did not even have a valid registration at this time, the more appropriate terminology would be to say that Rockwool apply for a reissuance of a CGP registration.) But because this was not done the DEP took no official action. This failure was an abuse of the DEP's discretion, and effectively denied the public its right to seek relief from Rockwool's actions, and again the public was deprived of an avenue of relief from the inappropriate conditions of Rockwool's 2017 CGP registration.

38. The DEP should have required Rockwool to stop construction in response to the information the DEP found in its inspections, as documented in the November 14, 2018,<sup>38</sup> January 29, 2019,<sup>39</sup> May 5-8, 2019,<sup>40</sup> September 12, 2019,<sup>41</sup> January 22, 2020,<sup>42</sup>

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process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time.

<sup>37</sup> JCF production document 107 DEP Modification Guidance Policy for CSW GP, p. JCF 3985.

<sup>38</sup> JCF Production Document 49 Rockwool Site Inspection Report 11-14-2018, p. JCF 2257.

<sup>39</sup> JCF Production Document 50 Rockwool Site Inspection Report 1-29-2019, p. JCF 2259.

<sup>40</sup> JCF Production Documents 51 and 52 Rockwool Site Inspection Report 5-8-19, p. JCF 2264-2267.

<sup>41</sup> JCF Production Document 53 Rockwool Site Inspection Report 9-12-19, p. JCF 2269.

<sup>42</sup> JCF Production Document 54 Rockwool Site Inspection Report 1-22-2020, p. JCF 2273.

and February 6, 2020<sup>43</sup> DEP inspection reports. As stated in those reports, when it was discovered that Rockwool was grading (as defined by the 2012 permit) without valid coverage under the 2012 CGP, the DEP should have required Rockwool to apply for a reissuance of permit coverage under the 2012 or 2019 (whichever applied at the time) CGP.<sup>44</sup> Instead the DEP arbitrarily allowed Rockwool to continue to operate without a valid CGP registration from October 20, 2018 to February 25, 2020.

39. In order to explain how allowing Rockwool to continue to operate without any valid permit at all could possibly be authorized, the DEP arbitrarily changed the Permit expiration dates on the inspection notices cited above, to make it appear as if the permit expiration was after the date of inspection. However, there is no valid or legitimate DEP authority to arbitrarily “pencil whip” and change an expiration date of a permit in order to make it falsely appear as if Rockwool was working under a valid permit. Rockwool was, at this time, operating under an invalid registration, and should have been required to stop construction and apply for a valid registration. These actions exceed any legitimate authority of the DEP, and because of this abuse of discretion and direct assistance to Rockwool to avoid public participation in the permit review process, the public was deprived of any timely avenue of relief from the inappropriate conditions of Rockwool’s 2017 CGP registration.

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<sup>43</sup>JCF Production Document 55 Rockwool Site Inspection Report 2-6-2020, p. JCF 2276.

<sup>44</sup> 47 CSR 10-9.4. and 9.4.a.2. The permittee’s failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee’s misrepresentation of any relevant facts at any time.

40. Rockwool should also have been required to stop construction and reapply for registration under the 2019 CGP when it decided to dewater its rainwater for reuse pond. From the information provided by the DEP, Rockwool first requested permission to dewater its ponds in September of 2019.<sup>45</sup> At this time Rockwool was concurrently applying for CGP registration. Rockwool should have been required to include this in that application. Instead this practice was arbitrarily approved by the enforcement department of the DEP and never included in the registration. Because this was not done, the public was completely unaware that this was occurring, and could make no public comment or raise any concern. This meant that the sediment laden water that was leaving the LOD was an unpermitted discharge. These actions exceed any legitimate authority of the DEP, and because of this abuse of discretion the public was deprived of an avenue of relief from the inappropriate conditions of Rockwool's 2017 CGP registration.

The EQB Stay and Final order in EQB Case 19-03 Do Not Apply to Rockwool:

41. Intervenor Rockwool asserts in its Motion at Para. 8 that its permit status was "stayed" by virtue of the Stay and Order issued in EQB case 19-03/1904. That is not true. Rockwool was not eligible for the stay or the final order because they were not covered under the 2012 CGP at that time.
42. Rockwool was not eligible for coverage under the stay granted by the EQB in 19-03 and 19-04. Rockwool was also not eligible for coverage under the June 10 final order of the

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<sup>45</sup> Evidence of this conversation is contained in a September 13, 2019 email from Rick Adams to James Hemme (Rockwool), within an email chain included with the documents attached to DEP's Motion to Amend the Certified Record; however, there are no bate stamps or page numbers on this information.

EQB in those cases. Rockwool had no coverage under any NPDES permit for construction stormwater from November 1, 2018 to February 25, 2020. Therefore, Rockwool cannot assert that they were operating under the stay or order at any point in time.<sup>46</sup>

43. Because Rockwool had no valid coverage under the 2012 CGP when the stay of the 2019 permit went into effect Rockwool was not covered by the Stay. While the language in the Stay is not specific as to what entities it applies to; it cannot be asserted that the Stay applied, *carte blanche*, to all entities in West Virginia operating large construction sites without applying for any NPDES coverage at all for construction stormwater discharge. Nor is it reasonable to expect that the Stay was intended to provide coverage for entities operating illegally without NPDES permit coverage for construction stormwater discharges at the time the Stay was issued. This was Rockwool's situation when the Stay took effect. Rockwool was operating illegally without a NPDES coverage, at all, for its construction stormwater discharge when the stay took effect.

44. The June 10, 2019 final order of the EQB in the 19-03 and 19-04 case stated specifically:

“With regard to persons and entities who were previously authorized to discharge stormwater in accordance with the terms and conditions of the prior version of

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<sup>46</sup> “47 CSR 10-9.4. Suspension and revocation of permits. 9.4.a. The following are causes for revocation or suspension of a permit or for denying a permit renewal application: 9.4.a.1. Noncompliance by the permittee with any condition of the permit; or 9.4.a.2. The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time; or 9.4.a.3. A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or revocation; or...”

WV Permit No. WV0115924, issued in 2012 ("the 2012 permit"), the Parties hereby agree to allow permittees under the 2012 permit to continue discharges of stormwater pursuant to the terms of the 2012 permit for up to 18 months.”<sup>47</sup>

Because Rockwool was not covered by any CGP registration or other NPDES coverage for Construction Stormwater at the time of the final order, the stay of the final order clearly does not apply to them.

45. Rockwool seems to be invoking a portion of the June 10 final order, which states:

“With regard to persons and entities who were previously authorized to discharge stormwater in accordance with the terms and conditions of the prior version of WV Permit No. WV0115924, issued in 2012 ("the 2012 permit"), the Parties hereby agree to allow permittees under the 2012 permit to continue discharges of stormwater pursuant to the terms of the 2012 permit for up to 18 months. **Modifications of such permit registrations (i.e., those registrations originally approved prior to February 9, 2019) will be reviewed in accordance with, and subject to, the terms and conditions of the terms of the 2012 permit. That authorization will relate back to the effective date of this Permit.**”<sup>48</sup> (emphasis added)

This does not apply to Rockwool because as described above the Final Order does not apply to them.

46. By the time Rockwool’s permit was approved on February 25, 2020, the EPA had told the DEP that no one could continue to operate under the 2012 permit<sup>49</sup> and the DEP

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<sup>47</sup> JCF production document 97 19-03-EQB and 19-04-EQB - Final Order, pp. JCF 3291, JCF 3292.

<sup>48</sup> JCF production document 97 19-03-EQB and 19-04-EQB - Final Order, pp. JCF 3291, JCF 3292

<sup>49</sup> JCF production document 99 WVDEP\_SO\_10\_3\_2019.pdf, p. JCF 3384; JCF production document 100 Fact Sheet 2019 Reissued WV0115924\_wEPAcomments\_09-09-19.pdf, p. JCF 3385; JCF production document 101 Modified 2019 Permit WV0115924 7\_wEPAcomments09-09-19.pdf, p. JCF 3386; JCF production document 02;SP\_WVDEP\_Enclosure\_10\_31\_2019.pdf, p. JCF 3431.

advised the EPA that they were enforcing the 2019 CGP, and all new permits would be approved under that permit.<sup>50</sup> Rockwool could have no expectation that this CGP registration was simply “a modification” under the 2012 CGP registration. If Rockwool somehow thought this, then they would have had to give the DEP notice that they wanted to continue operating under the June 10 final order 45 days in advance of that date that they wanted a 6-month extension on the 12-month continuation of the 2012 CGP. Appellants have no record that Rockwool did so, and there is nothing in the Certified Record or provided in discovery to indicate this was done.

47. The permits are very clear about continuing coverage when a new permit replaces a previous version.

“C2. Duty to Reapply

If the permittee seeks to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for a new permit or General Permit registration as detailed in permit reissuance.”<sup>51</sup>

48. Therefore, the most recent application, June 21, 2019, is an application for reissuance under the 2019 CGP, and NOT simply a modification of Rockwool’s 2012 CGP registration. Rockwool argues that this Application should be treated as an application for modification, so the only portion of the application for registration that should be appealable is the change in the LOD; however, because this application is for a reissuance after a lapse in coverage, and under a new CGP (2019) the entire application

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<sup>50</sup> JCF production document 120 January 7, 2020 DEP letter to EPA withdrawing draft revised permit, p. JCF 4275.

<sup>51</sup> JCF document production 91 2012 Construction Stormwater GP, p. JCF 3061, C.2.

and registration is open for comment and appeal.<sup>52</sup>

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<sup>52</sup> 47 CSR 10-9.2. b. and 47 CSR 10-9.3.