



ARNOLD & BAILEY

ATTORNEYS AT LAW

S. Andrew Arnold, Esq. PARTNER
Gregory A. Bailey, Esq. PARTNER
J. Daniel Kirkland, Esq. ATTORNEY
Christopher P. Stroeck, Esq. ATTORNEY

208 N. George Street
Charles Town, WV 25414

T: 304 725 2002
F: 304 725 0282

November 25, 2020
By Hand Delivery

Ms. Cathy S. Gatson, Circuit Clerk
Kanawha County Circuit Court
111 Court Street
Charleston WV 25301

Re: Jefferson County Foundation Inc. and Christine L. Wimer, Appellants v.
Kathy Emery, Director, Division of Water and Waste Management,
West Virginia Department of Environmental Protection, Appellee, and
City of Charles Town and Charles Town Utility Board, Snyder
Environmental Services and Roxul USA, Inc., d/b/a
Rockwool, Intervenor-Appellees
WVEQB Appeal No. 20-04-EQB
Administrative Appeal No. 20-
Circuit Court of Kanawha County, West Virginia

Dear Ms. Gatson:

Enclosed for filing please find an original and one photocopy of the ***Petition for Appeal, Civil Case Information Statement and Administrative Appeals Docketing Statement*** for filing in the above matter. Also enclosed is our firm's check in the amount of \$200.00 payable to the "Kanawha County Circuit Court" representing the filing fee for this appeal. Please mark it "filed".

Thank you for your assistance in this matter.

Very truly yours,

Christopher P. Stroeck, Esq.

CPS:djh
Enclosures

In the Circuit Court of KANAWHA County

ADMINISTRATIVE APPEALS DOCKETING STATEMENT

Style of case (use from agency final order including case number):

***PLEASE SEE ATTACHED.**

Agency: WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

TIMELINESS OF APPEAL

Date of entry of order appealed from: OCTOBER 20, 2020 - Received by Appellants OCTOBER 27, 2020

Date of filing of petition for appeal: NOVEMBER 25, 2020

VENUE: If appeal is not filed in Kanawha County, do you reside in or do business in this County?

☐ Yes

☐ No

If so, provide the street address and telephone number for your residence or business in this County. _____

If not, explain your reason(s) for filing this appeal outside of Kanawha County. _____

FINALITY OF ADMINISTRATIVE ORDER

Is the order appealed from a final decision on the merits as to all issues and parties?

☐ Yes

☒ No

If not, what type of order are you appealing? ORDER DISMISSING UNDERLYING APPEAL AS MOOT

CASE INFORMATION

State briefly the nature of the case, the relief sought and the outcome at the agency. (Attach an additional sheet if necessary). ***PLEASE SEE ATTACHED.**

Does the agency decision contain factual (evidentiary errors)?

☐ Yes

☒ No

If so, please list the evidentiary errors briefly. (Attach an additional sheet if necessary). _____

Does the agency order contain legal errors (errors of law)?

☒ Yes

☐ No

If so, please list the errors of law briefly. (Attach an additional sheet if necessary). _____

THE WVEQB ERRED IN DISMISSING THE UNDERLYING APPEAL AS MOOT.

CASE MANAGEMENT INFORMATION

Name of Party filing this appeal (Petitioner): JEFFERSON COUNTY FOUNDATION, INC. and CHRISTINE L. WIMER

Do you wish to make an oral presentation to the court?

☒ Yes ☐ No

List counsel for each party to the case at the agency. If a party is not represented by counsel, provide the requested information for that party. Include name, firm name, address and telephone number. (Attach an additional sheet if necessary).

*PLEASE SEE ATTACHED.

Name of attorney or individual filing this Administrative Appeals Docketing Statement:

CHRISTOPHER P. STROECH, ESQ.

☒ Attorney ☐ Non-Attorney
(self represented)

Will you be handling the appeal?

☒ Yes ☐ No

If yes, provide name, firm name address and telephone number.

ARNOLD & BAILEY, PLLC; 208 N. GEORGE STREET, CHARLES TOWN, WV 25414; 304-725-2002

304-725-0282 (FAX); cstroech@arnoldandbailey.com

If there are multiple Petitioners add their names on an additional sheet, accompanied by a certification that all Petitioners concur in this filing.

Signature: 

WV Bar Number. 9387

Date: 11/24/20

Remember to attach:

1. Additional pages, if any, containing extended answers to questions on this form.
2. A copy of the agency final order or decision from which the appeal is taken.
3. A certificate of service, verifying that you have served this Administrative Appeals Docketing Statement upon all of the parties to the agency proceeding, the agency itself and the Attorney General's Office.

STYLE OF CASE:

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

JEFFERSON COUNTY FOUNDATION, INC., et al.,

Appellants,

v.

Appeal No. 20-04-EQB

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

Appellee,

and

CITY OF CHARLES TOWN and the CHARLES TOWN UTILITY BOARD,

Intervenors,

ROXUL USA, Inc., d/b/a ROCKWOOL,

Intervenor,

SNYDER ENVIRONMENTAL SERVICES, INC.,

Intervenor.

NATURE OF THE CASE, THE RELIEF SOUGHT AND THE OUTCOME AT THE AGENCY:

The Petitioners, the Jefferson County Foundation, Inc. and Christine L. Wimer, hereby appeal the West Virginia Environmental Quality Board's ("EQB") "Order Granting Intervenor City of Charles Town and Charles Town Utility Board's Motion to Dismiss Appeal." The EQB granted the Intervenor-Appellees' Motion to Dismiss the underlying appeal as moot. Petitioners request that the Circuit Court reverse the Order of the EQB as the substantial rights of the Petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision and order are (1) in violation of statutory provisions; (2) in excess of the statutory authority or jurisdiction of the agency; (3) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; and/or (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Petitioners asserted that Unilateral Order No. 9080, issued by the West Virginia Department of Environmental Protection (DEP), acting through its Division of Water and Waste Management, to the City of Charles Town on March 2, 2020, was issued beyond its statutory authority, was illegal, and was an abuse of discretion. Order No. 9080 allowed Charles Town to construct a sewer line to the Rockwool facility without proper coverage under the 2019 Construction Stormwater General Permit or its general permit conditions. Indeed, Order No. 9080 allowed Charles Town to construct the sewer line under the expired 2012 Construction Stormwater General Permit conditions in clear violation of federal and state law.

Petitioners timely appealed the issuance of Order No. 9080. The EQB scheduled an evidentiary hearing for October 8-9, 2020. The parties conducted discovery, filed dispositive Motions on the legality of Order No. 9080 and otherwise expended significant time and resources to prepare for the evidentiary hearing. On September 1, 2020, the DEP issued a

General Permit Registration to Charles Town for coverage under the 2019 Construction Stormwater General Permit, following a nineteen (19) - month gap in proper permit coverage. Based upon this Registration, Charles Town moved to dismiss the appeal as moot. The EQB granted this Motion to Dismiss, and it is from this Order that Petitioners now appeal.

COUNSEL FOR EACH PARTY TO THE CASE AT THE AGENCY:

Charles S. Driver
WVDEP
601 57th Street, SE
Charleston, WV 25304
Charles.S.Driver@wv.gov
304-926-0460 x1453
Counsel for Appellee DEP

Richard L. Lewis, Esq.
Marissa G. Nortz, Esq.
Steptoe & Johnson, PLLC
707 Virginia Street, East
Charleston, WV 25326
304-353-8000
Counsel for Appellee-Intervenors Charles Town and Charles Town Utility Board

Joseph V. Schaeffer, Esq.
SPILMAN THOMAS & BATTLE, PLLC
301 Grant Street, Suite 3440
Pittsburgh, PA 15219
412-325-3303
Counsel for Appellee-Intervenor Roxul USA, Inc. d/b/a Rockwool

James A. Walls, Esq.
SPILMAN THOMAS & BATTLE, PLLC
48 Donley Street, Suite 800
Morgantown, WV 26501
Counsel for Appellee-Intervenor Roxul USA, Inc. d/b/a Rockwool

David L. Yaussy, Esq.
SPILMAN THOMAS & BATTLE, PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301
Counsel for Appellee-Intervenor Roxul USA, Inc. d/b/a Rockwool

Robert G. McLusky, Esq.
Chris M. Hunter, Esq.
JACKSON KELLY
500 Lee Street East, Suite 1600
Charleston, WV 25301
304-340-1203
Counsel for Appellee-Intervenor Snyder Environmental Services

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CIVIL CASE INFORMATION STATEMENT
(Civil Cases Other than Domestic Relations)

I. CASE STYLE:

Case No. 20-AA-

Plaintiff(s)

Judge: _____

JEFFERSON COUNTY FOUNDATION INC.

AND CHRISTINE L. WIMER

vs.

Defendant(s)

Days to

Answer

Type of Service

KATHY EMERY, DIRECTOR, DIV. OF WATER

Name

& WASTE MANAGEMENT, WEST VIRGINIA

Street Address

DEPT. OF ENVIRONMENTAL PROTECTION

City, State, Zip Code

II. TYPE OF CASE:

☐ General Civil

☐ Mass Litigation [As defined in T.C.R. 26.04(a)]

☐ Asbestos

☐ FELA Asbestos

☐ Other: _____

☐ Habeas Corpus/Other Extraordinary Writ

☐ Other: _____

☐ Adoption

☒ Administrative Agency Appeal

☐ Civil Appeal from Magistrate Court

☐ Miscellaneous Civil Petition

☐ Mental Hygiene

☐ Guardianship

☐ Medical Malpractice

III. JURY DEMAND: ☐ Yes ☒ No CASE WILL BE READY FOR TRIAL BY (Month/Year): / /

**IV. DO YOU OR ANY
OF YOUR CLIENTS
OR WITNESSES
IN THIS CASE
REQUIRE SPECIAL
ACCOMMODATIONS?**

☐ Yes ☒ No

IF YES, PLEASE SPECIFY:

☐ Wheelchair accessible hearing room and other facilities

☐ Reader or other auxiliary aid for the visually impaired

☐ Interpreter or other auxiliary aid for the deaf and hard of hearing

☐ Spokesperson or other auxiliary aid for the speech impaired

☐ Foreign language interpreter-specify language: _____

☐ Other: _____

Attorney Name: Christopher P. Stroeck, Esq., WVSB #9387

Firm: Arnold & Bailey, PLLC

Address: 208 North George Street, Charles Town WV 25414

Telephone: (304) 725-2002

Representing:

☒ Plaintiff

☐ Defendant

☐ Cross-Defendant

☐ Cross-Complainant

☐ 3rd-Party Plaintiff

☐ 3rd-Party Defendant

☐ Proceeding Without an Attorney

Original and _____ copies of complaint enclosed/attached.

Dated: 11 / 24 / 20

Signature: 

Plaintiff: JEFFERSON COUNTY FOUNDATION INC. , et al
vs.

Case Number: 20-AA-

Defendant: KATHY EMERY, DIRECTOR, DIV. OF WATER, et al

**CIVIL CASE INFORMATION STATEMENT
DEFENDANT(S) CONTINUATION PAGE**

CITY OF CHARLES TOWN AND

Defendant's Name

CHARLES TOWN UTILITY BOARD

Street Address

Days to Answer: _____

Type of Service: _____

City, State, Zip Code

Defendant's Name

SNYDER ENVIRONMENTAL SERVICES

Street Address

Days to Answer: _____

Type of Service: _____

City, State, Zip Code

Defendant's Name

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

Street Address

Days to Answer: _____

Type of Service: _____

City, State, Zip Code

Defendant's Name

Street Address

Days to Answer: _____

Type of Service: _____

City, State, Zip Code

Defendant's Name

Street Address

Days to Answer: _____

Type of Service: _____

City, State, Zip Code

Defendant's Name

Street Address

Days to Answer: _____

Type of Service: _____

City, State, Zip Code

Defendant's Name

Street Address

Days to Answer: _____

Type of Service: _____

City, State, Zip Code

Rec'd 10/27/2020

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

**JEFFERSON COUNTY FOUNDATION, INC., and
CHRISTINE L. WIMER,**

Appellants,

v.

Appeal No. 20-04-EQB

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

Appellee,

and

**CITY OF CHARLES TOWN and CHARLES TOWN
UTILITY BOARD, SNYDER ENVIRONMENTAL
SERVICES, and ROXUL USA, INC. d/b/a ROCKWOOL,**

Intervenor-Appellees.

**ORDER GRANTING INTERVENORS CITY OF CHARLES TOWN AND
CHARLES TOWN UTILITY BOARD'S MOTION TO DISMISS APPEAL**

Introduction

Intervenors, City of Charles Town (hereinafter "City") and Charles Town Utility Board (hereinafter "Utility") (collectively "Intervenors"), by counsel, Richard L. Lewis, Marissa G. Nortz, and the law firm of Steptoe & Johnson PLLC, moved the West Virginia Environmental Quality Board (hereinafter "Board"), pursuant to West Virginia Code of State Rules §§ 46-4-5.2, 46-4-5.3, and 46-4-6.13, and Rule 12(b)(1) of the West Virginia Rules of Civil Procedure, to dismiss Appellants' Jefferson County Foundation, Inc. and Christine Wimer's (hereinafter

"Appellants") Notice of Appeal for lack of subject matter jurisdiction in that the appeal is now moot.¹

The basis for Appellants' Notice of Appeal is the West Virginia Department of Environmental Protection's (hereinafter "Appellee" or "WVDEP") issuance of Order No. 9080 to Intervenor by correspondence dated March 2, 2020. On September 1, 2020, WVDEP issued General Permit Registration No. WVR109958 to Intervenor for coverage under the 2019 National Pollutant Discharge Elimination System Water Pollution Control Permit No. WV0115924 for Stormwater Associated with Construction Activities, which terminated Order No. 9080, which is the subject matter of this appeal.

A prehearing conference took place on September 24, 2020, to address Intervenor's motion and other matters relating to this appeal. After considering the written pleadings, oral arguments, Order No. 9080, the recently issued General Permit Registration No. WVR109958 to Intervenor for coverage under the 2019 National Pollutant Discharge Elimination System Water Pollution Control Permit No. WV0115924 for Stormwater Associated with Construction Activities, WVDEP General Permit No. WV0116815, and other documents or information presented, the Board hereby grants Intervenor's Motion to Dismiss because the issue on appeal is moot. As such, the appeal is dismissed in its entirety.

Discussion

The West Virginia Legislature has authorized this Board to hear appeals of orders, permits, or official actions of WVDEP. *See* W. Va. Code § 22B-1-7. Parties to an appeal before this Board may move for dismissal or make other such motions as necessary and appropriate. *See* W. Va. Code R. § 46-4-5.3.

¹ WVDEP, Intervenor Rockwool, and Intervenor Snyder Engineering presented legal argument that the appeal is now moot.

This Board has the authority to rule on such motions which tend to regulate the course of the hearing, simplify the issues, and dispose of procedural requests or similar matters. *See* W. Va. Code R. § 46-4-5.2 (“The board may, in its administrative discretion, and in the interests of fairness and justice, rule on motions which tend to regulate the course of hearing, simplify the issues, and dispose of stay requests, procedural motions, discovery motions, and any other request which tends to regulate the course of the hearing.”).

In evaluating such motions, this Board has determined that the West Virginia Rules of Civil Procedure shall apply. *See* W. Va. Code R. § 46-4-6.13 (“[T]he appropriate Rules of Civil Procedure will guide the appeals process before this Board.”).

Article III of the United States Constitution limits the jurisdiction of the federal courts to the adjudication of cases and controversies. U.S. Const. art. III, § 2, cl.1; *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (*per curiam*). The doctrine of mootness, which is embedded in Article III’s case or controversy requirement, requires that an actual, ongoing controversy exist at all stages of federal court proceedings. *See Burke v. Barnes*, 479 U.S. 361, 363 (1987) (emphasis added).

A case becomes moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The requirement that a case involve an actual, ongoing controversy extends throughout the pendency of the action. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

Like federal courts, West Virginia courts are reluctant to exercise jurisdiction over a case unless presented with a live, justiciable controversy. *See* Syl. Pt. 2, *Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991) (*quoting Mainella v. Board of Trustees of Policeman’s Pension or Relief Fund of City of Fairmont*, 126 W. Va. 183, 185-86, 27 S.E.2d 486, 487-88

(1943) ("Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes. The pleadings and evidence must present a claim of legal right asserted by one party and denied by the other before jurisdiction of a suit may be taken."); cf., *Snyder v. Callaghan*, 168 W. Va. 265, 275, 284 S.E.2d 241, 248 (1981) ("The question of standing to sue is whether the litigant has alleged such a personal stake in the outcome of the lawsuit so as to present the court with a justiciable controversy warranting judicial resolution of the dispute . . .").

Like the doctrine of mootness employed by federal courts, West Virginia law provides that a case becomes moot when the issues presented are "no longer live or the parties lack a legally cognizable interest in the outcome." *Bluestone Coal Corp. v. Mazzone*, 226 W. Va. 148, 155, 697 S.E.2d 740, 745 (quoting *Powell, supra*). Furthermore, West Virginia jurisprudence directly provides that moot cases are not cognizable by its courts. See Syl. Pt. 1, *Lilly v. Carter*, 63 W. Va. 684, 60 S.E.2d 873 (1908) ("Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted right of persons or of property, are not properly cognizable by a court.").

In the present case, on March 2, 2020, WVDEP issued Order No. 9080 to Intervenor. See Order No. 9080. On April 1, 2020, Appellants filed Appeal No. 20-04-BQB with this Board challenging the issuance of Order No. 9080 to Intervenor and requesting that this Board grant the following specific relief:

Relief Requested: Appellants therefore pray that this matter be reviewed and that the Environmental Quality Board ("the Board") grant the following relief: (1) vacate and terminate Order No. 9080 issued to the City of Charles town; (2) immediately order that the City of Charles Town stop work until they have been issued a Construction Stormwater General Permit Registration under the 2019 Construction Stormwater General Permit; and (3) provide all other necessary and appropriate relief.

See Notice of Appeal, pg. 2 (Filed April 1, 2020). The evidentiary hearing in this matter was scheduled for October 8, 2020.

On September 1, 2020, WVDEP issued General Permit Registration No. WVR109958 to Intervenor for coverage under the 2019 National Pollutant Discharge Elimination System Water Pollution Control Permit No. WV0115924 for Stormwater Associated with Construction Activities. With the issuance of this General Permit Registration to Intervenor, Order No. 9080 has terminated and Appellants' appeal is moot:

4. This Order shall terminate upon the following events, whichever should occur first:

- a. Coverage under the effective Construction Stormwater General Permit is obtained for the aforementioned site.
- b. Six (6) months after the effective date of this Order.

See Order No. 9080, Other Provisions, ¶ 4, pg. 4 (emphasis added).

With the termination of Order No. 9080, this Board no longer has jurisdiction to hear this appeal. See W.Va. Code § 22B-1-7(b) ("*Any person authorized by statute to seek review of an order, permit or official action of the chief of air quality, the chief of water resources, the chief of waste management, the chief of mining and reclamation, the chief of oil and gas, or the secretary may appeal to the air quality board, the environmental quality board or the surface mine board, as appropriate, in accordance with this section.*"). Further, the Order's termination eliminates the existence of a justiciable controversy warranting resolution of this Board, as this Board can no longer grant any of the relief requested by Appellants. As such, Appellants' appeal is moot and must be dismissed in its entirety.

Order

For these reasons, the Board hereby grant Intervenor's Motion to Dismiss in its entirety as the termination of Order No. 9080 has rendered this appeal moot. As such, this Board does not have jurisdiction to hear this appeal and therefore, it is dismissed from the docket with prejudice.

ORDERED and ENTERED this 20th day of October, 2020



Dr. Edward Snyder, Chairperson
Environmental Quality Board

ENVIRONMENTAL QUALITY BOARD

**JEFFERSON COUNTY FOUNDATION, INC., and
CHRISTINE L. WIMER,**

Appellants,

v.

Appeal No. 20-04-EQB

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

Appellee,

and

**CITY OF CHARLES TOWN and CHARLES TOWN
UTILITY BOARD, SNYDER ENVIRONMENTAL
SERVICES, and ROXUL USA, INC. d/b/a ROCKWOOL,**

Intervenor-Appellees.

CERTIFICATE OF SERVICE

I hereby certify that I, Jackie D. Shultz, Clerk for the Environmental Quality Board, have this day, the 22nd day of October, 2020, served a true copy of the foregoing Order Granting Intervenor City of Charles Town and Charles Town Utility Board's Motion to Dismiss Appeal by *certified US Mail and Interdepartmental Mail* to the following:

via certified US Mail:

Christopher P. Stroeck, Esquire
Arnold & Bailey, PLLC
208 N. George Street
Charles Town, WV 25414

Certified Mail: 9489 0090 0027 6201 3848 77

Richard L. Lewis, Esquire
Marissa G. Nortz, Esquire
Steptoe & Johnson, PLLC
707 Virginia Street, E.
Charleston, WV 25301

Certified Mail: 9848 0090 0027 6201 3848 84

Joseph V. Schaeffer, Esquire
Spilman Thomas & Battle, PLLC
301 Grant Street, Ste. 3440
Pittsburgh, PA 15219

Certified Mail: 9489 0090 0027 6201 3848 91

James A. Walls, Esquire
Spilman Thomas & Battle, PLLC
48 Donley Street, Ste. 800
Morgantown, WV 26501

Certified Mail: 9489 0090 0027 6201 3848 07

David L. Yaussy, Esquire
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301

Certified Mail: 9489 0090 0027 6201 3848 14

Christopher M. Hunter, Esquire
Robert G. McLusky, Esquire
Jackson Kelly PLLC
P.O. Box 553
Charleston WV 25322

Certified Mail: 9489 0090 0027 6201 3848 21

via Interdepartmental Mail:

Charles S. Driver, Esquire
Office of Legal Services
WV Department of Environmental Protection
601 57th Street, S.E.
Charleston, WV 25304

Katheryn Emery, P.E., Acting Director
Division of Water and Waste Management
WV Department of Environmental Protection
601 57th Street, S.E.
Charleston, WV 25304


Jackie D. Shultz, Clerk

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**JEFFERSON COUNTY FOUNDATION, INC. and
CHRISTINE WIMER,**

Appellants,

v.

**Administrative Appeal No.: _____
(WVEQB Appeal No.: 20-02-EQB)**

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

Appellee,

and

CITY OF CHARLES TOWN and the CHARLES TOWN UTILITY BOARD,

Intervenor-Appellees,

ROXUL USA, Inc., d/b/a ROCKWOOL,

Intervenor-Appellee,

SNYDER ENVIRONMENTAL SERVICES, INC.,

Intervenor-Appellee.

PETITION FOR APPEAL

Petitioners, the Jefferson County Foundation, Inc. and Christine L. Wimer, by counsel, Christopher P. Stroeck, Esq., hereby file this appeal from the October 20, 2020 final Order of the West Virginia Environmental Quality Board ("EQB") in Appeal No. 20-04-EQB, in accordance with West Virginia Code §§22B-1-9 and 22B-3-3 and the West Virginia Administrative Procedures Act, W.Va. Code §29A-5-4. A copy of the Board's Order is attached with this Petition to the Administrative Appeals Docketing Statement. In support of this appeal, Petitioners state as follows:

Jurisdiction and Venue

This Court has jurisdiction to hear this appeal pursuant to the implementing statutes of the EQB and the West Virginia Administrative Procedures Act. W.Va. Code §§22B-1-9, 22B-3-3, 29A-5-1 through -5. Venue in the Circuit Court of Kanawha County is proper pursuant to W.Va. Code §§22B-3-3 and 29A-5-4(b).

Statement of Facts and Procedural Background

1. On December 5, 2012, the Construction Stormwater General Permit was issued by the West Virginia Department of Environmental Protection ("DEP") (WV/NPDES Water Pollution Control Permit No. WV 0115924; the "2012 Permit"), and went into effect on January 1, 2013. The 2012 Permit remained in effect through 2017 and was extended into 2019 before being replaced on February 9, 2019 by the 2019 Construction Stormwater General Permit (the "2019 Permit"). This Permit regulates stormwater control associated with construction and development activities by varying industries and businesses.
2. The 2012 Permit provided certain conditions under which all registered entities were required to operate. Although a state permit, the United States Environmental Protection Agency ("EPA") must agree to the terms and conditions set forth in the Permit as part of the regulatory process that allows the DEP to implement and enforce the NPDES program under the federal Clean Water Act.
3. On June 18, 2018, the application for the relevant registration (WVR109958) under the 2012 Permit was submitted on behalf of the City of Ranson to construct the Route 9 Sewer Project to the Rockwool facility¹ (the "Subject Project" or the "Sewer

¹ The Appellee-Intervenor, Roxul USA, Inc. d/b/a Rockwool is constructing an industrial facility in Jefferson County, West Virginia.

Line"). On August 31, 2018, the Registration was approved by the DEP and issued to the City of Ranson.

4. On January 1, 2019, the DEP issued a letter extending the expiration date of the 2012 Permit to March 31, 2019. On January 10, 2019, the DEP released its new Construction Stormwater General Permit to be effective February 9, 2019. The DEP advised that any entity, to include Ranson, would be covered under the 2012 Permit if it registered for work prior to February 9, 2019. All covered entities had ninety (90) days therefrom to submit a full application for continued coverage or submit a notice of termination.

5. On February 8, 2019, the Contractors Association of West Virginia filed an appeal of the proposed 2019 Permit to the EQB and requested a stay of the same. Jefferson Asphalt Products joined the Appeal.

6. On April 29, 2019, the EQB granted a stay for the 2019 Permit, effective from the permit effective date of February 9, 2019 to sixty (60) days past the date of stay, or June 28, 2019. Conditions from the previous 2012 Permit applied during the stay.

7. On April 20, 2019, Charles Town took over the Subject Project from Ranson as part of their sewer service consolidation.

8. Charles Town did not apply for continuation of coverage under the 2019 Permit within ninety (90) days of the permit taking effect.

9. On May 31, 2019, a settlement between the DEP, Jefferson Asphalt Products and the Contractors Association of West Virginia was reached regarding the proposed 2019 Permit. This settlement was approved by the EQB, and public comment was accepted from August 9, 2019 through September 13, 2019. This revision allowed permittees with

projects authorized under the 2012 Permit before February 9, 2019, such as Charles Town, to modify or complete remaining authorized construction activities under the 2012 Permit terms and conditions for up to an additional eighteen (18) months.

10. The EPA had ninety (90) days to comment on the proposed 2019 Permit.

11. By letter dated October 31, 2019, the EPA objected to the proposed 2019 Permit. The EPA then directed that the DEP to not issue its revised permit until it clears the EPA objections, and further gave the DEP ninety (90) days to do so. The EPA specifically noted that no entity, which included Charles Town, may continue to operate under the expired 2012 Permit or its conditions.

12. On January 7, 2020, the DEP notified the EPA that it withdrew its proposed draft revised 2019 Permit from EPA consideration; and advised the EPA that entities would have two choices: either to apply for an individual permit or apply for registration under the EPA approved February 2019 permit.

13. On February 4, 2020, Charles Town initiated an application for reissue of its now expired 2012 Permit Registration under the 2019 Permit.

14. On February 18, 2020, the construction for the Subject Project was formally awarded to Snyder Environmental Services Inc. ("Snyder") and groundwork began almost immediately, but not any later than February 21, 2020. As such, Charles Town began the Sewer Line construction without the required permit registration under the 2019 Permit.

15. On February 21, 2020, the Jefferson County Foundation, Inc. ("JCF") filed a complaint with the DEP that Charles Town was constructing the Subject Project without a proper registration under the 2019 Permit.

16. On March 2, 2020, the DEP issued Unilateral Order No. 9080 (the "Order"), allowing Charles Town to continue to operate without a permit registration for up to six (6) months. *See* Order No. 9080 attached hereto as Exhibit A. Admittedly, this Order allows Charles Town to construct without any individual permit or permit registration under any General Permit.

17. On September 1, 2020, Charles Town finally received its Registration under the 2019 Permit. According to the application activities and comments on the DEP's Electronic Submission System, there was no application activity from March 3, 2020 to August 17, 2020. Based upon this Registration, Charles Town moved and the EQB granted its request to dismiss the underlying appeal as moot.

18. All work done on this project until September 1, 2020 was performed pursuant to the expired 2012 permit conditions. Upon information and belief, on September 1, the Subject Project was near completion but not entirely finished. As such, a great majority of the Sewer Line was installed pursuant to the expired 2012 Permit conditions.

19. The 2019 Permit requires certain conditions not required by the 2012 Permit, including but not limited to requiring that any work completed under the 2019 Permit include an adequate karst mitigation plan. Such a plan is vitally important to any construction in Jefferson County due to its karst topography and potential adverse impacts to the groundwater system.

20. The DEP does not dispute that Charles Town was operating without a permit from February 9, 2019, the date of the expiration of its permit coverage, to September 3, 2020, when the new 2019 General Permit Registration was issued.

21. Neither the DEP nor Charles Town has required that the Sewer Line construction meet the terms and conditions of the 2019 Permit, including those regarding construction on karst topography.

22. Even if the DEP had the proper authority to issue Order No. 9080, the conditions therein should have been the 2019 Permit conditions, *not* the expired 2012 Permit conditions.

Assignments of Error

In judicial review of an order of the EQB, this Court shall reverse, vacate or modify the order if the substantial rights of the Petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority or jurisdiction of the agency; (3) made upon unlawful procedures; (4) affected by other error of law; 5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. W.Va. Code §29A-5-4(g).

Petitioners' specific assignments of error are as follows:

A. The Board's decision to dismiss the appeal as moot based upon the DEP's issuance of the September, 2020 Registration was made in violation of statutory provisions, in excess of the statutory authority of the DEP, and arbitrary and capricious and characterized by an abuse of discretion and clearly unwarranted exercise of discretion.

Discussion of Law

Pursuant to Rule 2 of the West Virginia Rules of Procedure for Administrative Appeals, Petitioners are providing the following discussion of law, including points and authorities to be relied upon. Petitioners reserve the right to cite additional points and authorities in its brief, to be filed pursuant to Rule 5 of the West Virginia Rules of Procedure for Administrative Appeals at a later date.

- A. The Board's decision to dismiss the appeal as moot based upon the September, 2020 Registration was made in violation of statutory provisions, in excess of the statutory authority of the DEP, and arbitrary and capricious and characterized by an abuse of discretion and clearly unwarranted exercise of discretion.**

Petitioners contend that this matter is not moot, as it remains undisputed that the subject Sewer Line was constructed, almost in its entirety, under the expired 2012 Permit conditions, which allowed Charles Town to avoid compliance with important karst mitigation measures. Although Charles Town has recently received its Registration under the 2019 Permit, all construction up until the 2019 Registration date was not properly permitted.

Additionally, the DEP did not have the legal authority to issue Order No. 9080 to substitute as a "bridge permit" between the 2012 and 2019 Permits.

As explained in State ex rel. Bluestone Coal Corporation v. Mazzone, 226 W.Va. 148 (2010):

Whether a case has been rendered moot depends upon an examination of the particular facts of a case. Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. Powell v. McCormack, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969). Thus, mootness may occur when the circumstances of the case change during the course of its pendency. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189, 120 S.Ct. 693, 708, 145 L.Ed.2d

610 (2000) ('A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' (quoting United States v. Concentrated Phosphate Exp. Ass'n, Inc., 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968)). A case also may be rendered moot when the parties thereto experience a change in status. See Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 593–94, 104 S.Ct. 2576, 2596, 81 L.Ed.2d 483 (1984)

A moot case generally cannot properly be considered on its merits. Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court." Syl. pt. 1, State ex rel. Lilly v. Carter, 63 W.Va. 684, 60 S.E. 873 (1908); Syl. pt. 1, Tynes v. Shore, 117 W.Va. 355, 185 S.E. 845 (1936) ("Courts will not ordinarily decide a moot question."). Nevertheless, a court may determine that an otherwise moot case may be considered due to the nature of the issues raised or the manner in which such issues are presented. See Syl. pt. 1, Israel v. Secondary Schs. Activities Comm'n, 182 W.Va. 454, 388 S.E.2d 480 (1989) ("Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.").

Alternatively, although changes may occur during the course of litigation that typically would render a case moot, the particular circumstances attending such changes may preserve the merits of the case so as to save it from mootness and to permit its consideration by the presiding tribunal. See Hart v. National Coll. Athletic Ass'n, 209 W.Va. 543, 548, 550 S.E.2d 79, 84 (2001)(per curiam) ("[T]he simple fact of apparent mootness, in and of itself, does not automatically preclude our consideration of [a] matter."). Thus, a case may survive mootness upon a change of circumstances. "When collateral effects of a dispute remain and continue to affect the relationship of litigants, the case is not moot." Firefighters Local, 467 U.S. at 585, 104 S.Ct. at 2591, 81 L.Ed.2d 483 (O'Connor, J., concurring) (footnote and citations omitted). A case also may survive mootness despite a change in party status. "As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot[.]" Finally, "[a] case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if

such issues are capable of repetition and yet will evade review.” Syl. pt. 1, State ex rel. M.C.H. v. Kinder, 173 W.Va. 387, 317 S.E.2d 150 (1984)

In any event, once the issue of mootness has been raised, “[t]he ‘heavy burden of persua[ding]’ the court that the [case has been rendered moot] lies with the party asserting mootness.” Friends of the Earth, 528 U.S. at 189, 120 S.Ct. at 708, 145 L.Ed.2d 610 (quoting Concentrated Phosphate, 393 U.S. at 203, 89 S.Ct. at 364, 21 L.Ed.2d 344).

Under the specific circumstances of this case, this dispute is not moot. First, as outlined below, there are collateral consequences that will result from the DEP decision in the construction and completion of the Sewer Line, which present real risks to the community from the failure of the DEP to comply with the relevant statutory requirements. Second, if the DEP is allowed to abuse its enforcement authority instead of requiring companies to comply with the terms and conditions of permits, this situation will continue to exist as a means to avoid environmental regulations. Specifically, the DEP will continue to use these "bridge permits" to allow entities to construct their projects under expired, and often less stringent, terms and conditions.

The DEP has allowed over 700 entities to operate without a valid permit because it admittedly lacked the resources to issue the permits. Thus, it certainly did not have the resources to enforce the Order. The DEP must follow the state and federal statutes and regulations regarding the issuance of valid permits. The EQB allowed the DEP to avoid these requirements by denying this case as moot. If the Court does not require the EQB to hear this case, the situation will continue to arise. Again, the DEP will continue to use enforcement orders as “bridge permits” instead of following the law requiring the issuance of valid permits.

B. The facts of the underlying case are undisputed, and the actions taken by the DEP in case exceed its statutory authority.

The supporting facts of this case are undisputed. It is undisputed that the DEP allowed Charles Town, and at least 733 other West Virginia entities, to operate without a valid NPDES permit. It is undisputed that Order No. 9080 was developed by the DEP in order to "bridge the permits" between the complete expiration of the 2012 Permit and the issuance of a valid 2019 permit. It is also undisputed that Order No. 9080, an enforcement order, actually incorporated the terms and conditions of the expired 2012 Permit, effectively extending the terms of the 2012 Permit by way of the issuance of a DEP enforcement order, instead of a valid permit. This is a violation of, and an abuse of the authority of the DEP.

The State of West Virginia, through the DEP, does not have the authority to waive conditions required by federal law; in this case the terms and conditions of the 2019 Permit, effective 02/09/19. Yet, that is exactly what the DEP did in this case, thus permitting Charles Town, any many other entities, to construct their projects pursuant to the expired, and in many cases less stringent, 2012 Permit conditions. The EQB erred in dismissing the underlying appeal as moot, thereby allowing the DEP to so act.

The federal Clean Water Act prohibits the discharge of pollutants from a point source to waters of the United States except in compliance with a NPDES permit. 33 U.S.C. §§ 1311, 1342. Permits are required for all discharges "associated with industrial activity" and this includes construction projects greater than five (5) acres. 40 C.F.R. §122.26 (a)(1)(ii) and 40 C.F.R. § 122.26 (b)(14)(x). All discharges from the Subject Project have been illegal, as the Sewer Line construction was not covered by a valid

NPDES permit until September 1, 2020; after the majority of construction was completed.

The risk to groundwater has not ended because a permit registration has now been issued. The entire approximately five (5) mile project is in an area of well-developed karst hydrogeology². Therefore, discharges to the groundwater via direct infiltration have been possible at any point in the construction project due to development or progression of karst features, such as sink holes or wells. The groundwater in this location has been shown to rapidly communicate with surface water structures in the area, all of which are tributaries of the Potomac River. A USGS dye test performed at the northern end of this project site found that contaminants in the groundwater traveled four miles to surface water structures in less than two weeks and a similar USGS dye test performed at the southern end of this project site found that groundwater contaminants traveled approximately one mile in less than 31 days³. This is both a short conveyance distance and a short conveyance time. Thus, discharge to the ground water in this location constitutes a discharge to navigable waters. *See Rapanos v. United States*, 547 U. S. 715 (2006) and *County Of Maui, Hawaii V. Hawaii Wildlife Fund*, et al., 140 S.Ct. 1462 (2020).

² Doctor DH, Doctor KZ. Spatial analysis of geologic and hydrologic features relating to sinkhole occurrence in Jefferson County, West Virginia. Carbonates and evaporites. 2012 Jun 1;27(2):143-52. Doctor DH, Weary DJ, Brezinski DK, Orndorff RC, Spangler LE. Karst of the Mid-Atlantic region in Maryland, West Virginia, and Virginia. Field Guides. 2015 Sep 1;40:425-84. Doctor DH, Weary DJ, Orndorff RC, Harlow, Jr GE, Kozar MD, Nelms DL. Bedrock structural controls on the occurrence of sinkholes and springs in the northern Great Valley karst, Virginia and West Virginia. In Sinkholes and the engineering and environmental impacts of karst 2008 (pp. 12-22).
³ Kozar MD, Hobba WA, Macy JA, Geohydrology, water availability, and water quality of Jefferson County, West Virginia with emphasis on the carbonate area, US GEOLOGICAL SURVEY, 1991.

The 2019 Permit requires a site-specific Groundwater Protection Plan and Karst Mitigation Plan. However, as the Sewer Line did not have a registration under the 2019 Permit, or any valid NPDES permit, Charles Town did not have an approved site specific Groundwater Protection Plan or a Karst Mitigation Plan. Charles Town intentionally, and without regard to the requirements, continued to operate this construction site without a valid NPDES permit.

Under federal and West Virginia law, no person may discharge pollutants to waters of the United States or the waters of West Virginia without a NPDES permit. 33 U.S.C. § 1311(a); W.Va. §22-11-8 (2020) requires that Charles Town, as the constructor of the sewer line, must have a valid NPDES permit. Although the CWA is a federal law, each state may, upon approval by EPA and pursuant to 42 U.S.C. § 1342(b) and 40 C.F.R. § 123.61, receive delegated authority to administer the NPDES permit program. The precursor state agency of the DEP was approved to administer the NPDES program in West Virginia by EPA on May 10, 1982.

It is undisputed that Charles Town operated without a valid permit from the expiration of the 2012 permit (including valid extensions), on February 9, 2019. On March 2, 2020, the DEP issued Order No. 9080, allowing Charles Town to continue to operate without a NPDES permit or registration for up to six (6) months. Under this Order, the City is operating under the more general permit conditions of the expired 2012 Permit. The Order states: "City of Charles Town shall comply with the Stormwater Pollution Prevention Plan (SWPPP) previously approved by the WVDEP...". This Order refers to the SWPPP that was approved as part of the original Construction Stormwater General Permit registration under the 2012 permit conditions, and it does not meet the

2019 permit conditions. The 2012 Permit conditions expired and were replaced by the 2019 permit on February 9, 2019.

Therefore, Charles Town constructed the Sewer Line without a valid NPDES permit; allowed unpermitted discharges to the waters of the state; and did not comply with the requirements for a site-specific hydrogeology examination and report. Most of the subject sewer line was completed pursuant to the expired 2012 Permit conditions.

Petitioners requested that the EQB order that Charles Town and its agents to reevaluate the entire sewer line construction pursuant to the 2019 Permit conditions, the enacted Permit when construction on this project began. Upon such further evaluation, if it is determined that additional mitigation steps should be taken, Charles Town should perform any and all such action before the sewer line becomes operational. As such, the issues set forth in the appeal were not moot, as the EQB determined.

Perhaps most importantly, the legality of utilizing an enforcement order, i.e., Order No. 9080, and all similarly issued enforcement Orders, instead of Permits, is an arbitrary and capricious use of the DEP's authority. Petitioners contend that the DEP does not have the authority to issue such enforcement orders, thus "bridging the gap" between the 2012 and 2019 Permits, or any such permits for that matter. Federal law and the agreement between the federal EPA and the DEP forbids it.

The DEP could have simply required Charles Town to apply for an individual permit, or required Charles Town to construct the subject sewer line pursuant to the 2019 Permit conditions. It did not, and by not doing so, allowed Charles Town to construct the sewer line under the expired, less stringent, 2012 Permit conditions.

The law and public policy therefore requires that the Circuit Court reverse the decision of the EQB to dismiss the underlying appeal as moot, and require the EQB to consider the merits of the issues raised in the underlying appeal. This request seeks the Court to require the EQB to consider the collateral effects of its precipitous dismissal of the subject EQB appeal, specifically with respect to mitigation of the risks of construction in karst hydrogeology. Finally, this appeal seeks instruction to the DEP regarding the improper issuance of an enforcement order as a “bridge permit,” in contravention of state and federal law as applicable to the DEP’s NPDES responsibilities.

Prayer for Relief

For the foregoing reasons, as well as the arguments to be presented in Petitioners' brief to be filed at a later date, Petitioners respectfully pray that this Court REVERSE the Order of the EQB dismissing the underlying appeal as moot and REMAND the matter back to the EQB for further proceedings on the merits of the appeal.

Respectfully submitted,

APPELLANTS
By Counsel



Christopher P. Stroeck, Esq. (WVSB #9387)
Arnold & Bailey, PLLC
208 N. George Street
Charles Town, WV 25414
304-725-2002
304-725-0283 (Fax)
ctroeck@arnoldandbailey.com



west virginia department of environmental protection

Division of Water and Waste Management
601 57th Street SE
Charleston, WV 25304
Phone: (304) 926-0470
Fax: (304) 926-0452

Austin Caperton, Cabinet Secretary
dep.wv.gov

**ORDER
ISSUED UNDER THE
WATER POLLUTION CONTROL ACT
WEST VIRGINIA CODE CHAPTER 22, ARTICLE 11**

TO: City of Charles Town
ATTN: Jane E. Arnett
661 South George St, Ste 101
Charles Town, WV 25414

DATE: March 2, 2020

ORDER NO.: 9080

INTRODUCTION

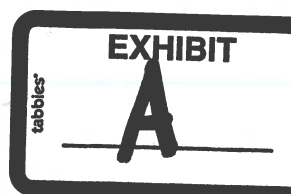
The following findings are made, and Order issued to City of Charles Town pursuant to the authority vested in the Director of the Division of Water and Waste Management under West Virginia State Code 22-11-1 et seq.

FINDINGS OF FACT

In support of this Order, the Director hereby finds the following:

1. On December 5, 2012, the 2012 Construction Stormwater General Permit, WV/NPDES Water Pollution Control Permit No. WV0115924, was issued. On January 4, 2013, the WV/NPDES Permit became effective.
2. As a result of engaging in land disturbance operations associated with construction activities, the City of Ranson was registered under the 2012 Construction Stormwater General Permit. WV/NPDES Water Pollution Control Permit No. WV0115924, Registration No. WVR109958, was issued to the City of Ranson for the discharge of stormwater from this site.
3. On January 1, 2019, West Virginia Department of Environmental Protection (WVDEP) provided notice that the 2012 Construction Stormwater General Permit was extended until March 31, 2019.

Promoting a healthy environment.



4. On January 10, 2019, the 2019 Construction Stormwater General Permit was issued, with an effective date of February 9, 2019.
5. On February 8, 2019, the February 2019 Construction Stormwater General Permit was appealed before the Environmental Quality Board (EQB) in Appeal Nos. 19-03-EQB and 19-04-EQB.
6. On April 20, 2019, the aforementioned WV/NPDES permit was transferred from the City of Ranson to the City of Charles Town.
7. On May 31, 2019, the EQB entered an order approving a settlement agreement resolving the appeals received in response to the February 2019 Construction Stormwater General Permit. The settlement agreement required WVDEP to revise the February 2019 Construction Stormwater General Permit, resulting in a modified draft permit. In accordance with federal statute and regulations, the modified draft permit was submitted to the United States Environmental Protection Agency (USEPA) for review and comment. On October 31, 2019, USEPA's review of the proposed modification resulted in the issuance of a specific objection letter. On January 1, 2020, WVDEP requested that the proposed draft modification be withdrawn from consideration, leaving the February 2019 Construction Stormwater General Permit in effect.
8. On February 4, 2020, City of Charles Town submitted an application for coverage for the aforementioned site under the 2019 Construction Stormwater General Permit.

ORDER FOR COMPLIANCE

And now, this day of March 2, 2020, City of Charles Town is hereby ORDERED by the Director as follows:

1. City of Charles Town shall immediately take measures to initiate compliance with all pertinent State laws and rules and the Clean Water Act. This Order does not modify any permit or relieve City of Charles Town from obligations to comply any applicable requirements.
2. Upon the effective date of this Order, City of Charles Town shall comply with the measures in this Order and take all steps necessary to control stormwater at the aforementioned site. Compliance with this Order and the measures identified below shall continue until coverage under the February 2019 Construction Stormwater General Permit is obtained.
 - a. City of Charles Town shall ensure that discharges from the site will not create conditions not allowable in waters of the State, as described in WV Legislative Rule 47CSR2 Section 3.2.
 - b. City of Charles Town shall comply with the Stormwater Pollution Prevention Plan (SWPPP) previously approved by WVDEP, until the new SWPPP is approved by WVDEP and becomes effective in association with the February 2019 Construction Stormwater General Permit.

- c. City of Charles Town shall modify the approved SWPPP whenever there is a change in design, construction, scope of operation, or maintenance which has the potential to adversely affect surface waters of the State, or if the SWPPP proves to be ineffective in achieving the general objectives of controlling pollutants in stormwater discharges associated with construction activities.
- d. City of Charles Town shall develop a description of erosion and sediment controls appropriate for the project and implement such controls.
- e. City of Charles Town shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances).
- f. City of Charles Town shall inspect all erosion and sediment controls on the site at least once every seven (7) calendar days and with twenty-four (24) hours after any storm event of greater than 0.5 inches of rain per twenty-four (24) hour period. Written records of all inspections shall be maintained onsite and shall be made available to WVDEP personnel upon request.
- g. City of Charles Town shall report any noncompliance which may endanger health or the environment immediately after becoming aware of the circumstances by using the designated spill alert telephone number, 800-642-3074.
- h. City of Charles Town shall ensure that sediment-laden water does not leave the site without going through an appropriate best management practice.
- i. City of Charles Town shall ensure that proper interim and permanent vegetative stabilization practices are being conducted. Specifically:
 - i. Stabilization practices may include temporary seeding, permanent seeding, mulching, geotextiles, sod stabilization, vegetative buffer strips, protection of trees, preservation of mature vegetation, and other appropriate measures.
 - ii. Stabilization measures shall be initiated no more than seven (7) days after the construction activity in a portion of the site has permanently ceased.
 - iii. Stabilization measures shall be initiated on any portion of the site by the seventh day after construction activities temporarily cease, unless construction activities will resume within fourteen (14) days after activities first ceased.
 - iv. Areas where seed has failed to germinate adequately (uniform perennial vegetative cover with a density of 70%) within thirty (30) days after seeding and mulching must be reseeded immediately or as soon as weather conditions allow.
 - v. Clean water diversions shall be stabilized prior to use.

OTHER PROVISIONS

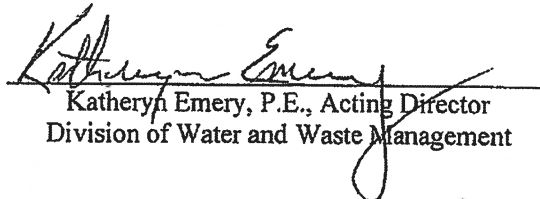
1. Compliance with the terms and conditions of this Order shall not in any way be construed as relieving City of Charles Town of the obligation to comply with any applicable law, permit, other order, or any other requirement otherwise applicable. Violations of the terms and conditions of this Order may subject City of Charles Town to additional enforcement action in accordance with the applicable law.

2. The provisions of this Order are severable and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.
3. This Order is binding on City of Charles Town, its successors and assigns.
4. This Order shall terminate upon the following events, whichever should occur first:
 - a. Coverage under the effective Construction Stormwater General Permit is obtained for the aforementioned site.
 - b. Six (6) months after the effective date of this Order.

RIGHT OF APPEAL

Notice is hereby given of your right to appeal any terms and conditions of this Order by which you are aggrieved to the Environmental Quality Board by filing a NOTICE of APPEAL on the form prescribed by such Board, in accordance with the provisions of West Virginia State Code 22-11-21 within thirty (30) days after receipt of this Order.

This Order shall become effective upon receipt.


Kathryn Emery, P.E., Acting Director
Division of Water and Waste Management

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JEFFERSON COUNTY FOUNDATION, INC. and
CHRISTINE WIMER,

Appellants,

v.

Administrative Appeal No.: _____
(WVEQB Appeal No.: 20-02-EQB)

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

Appellee,

and

CITY OF CHARLES TOWN and the CHARLES TOWN UTILITY BOARD,

Intervenor-Appellees,

ROXUL USA, Inc., d/b/a ROCKWOOL,

Intervenor-Appellee,

SNYDER ENVIRONMENTAL SERVICES, INC.,

Intervenor-Appellee.

CERTIFICATE OF SERVICE

I, Christopher P. Stroeck, Esq., counsel for Appellants, do hereby certify that I have
served a true copy of the foregoing **PETITION FOR APPEAL, CIVIL CASE**
INFORMATION STATEMENT AND ADMINISTRATIVE APPEALS

DOCKETING STATEMENT upon the following parties by United States mail, postage prepaid, the 25th day of November, 2020:

Jackie Shultz, Clerk
Environmental Quality Board
601 57th Street, SE
Charleston, WV 25304
Jackie.D.Shultz@wv.gov

Office of the WV Attorney General
State Capitol Complex, Bldg. 1, Room E-26
Charleston WV 25305

Charles S. Driver
WVDEP
601 57th Street, SE
Charleston, WV 25304
Charles.S.Driver@wv.gov

Richard L. Lewis, Esq.
Marissa G. Nortz, Esq.
Steptoe & Johnson, PLLC
707 Virginia Street, East
Charleston, WV 25326
Marissa.Nortz@Steptoe-Johnson.com

Joseph V. Schaeffer, Esq.
SPILMAN THOMAS & BATTLE, PLLC
301 Grant Street, Suite 3440
Pittsburgh, PA 15219
jschaeffer@spilmanlaw.com

James A. Walls, Esq.
SPILMAN THOMAS & BATTLE, PLLC
48 Donley Street, Suite 800
Morgantown, WV 26501
jwalls@spilmanlaw.com

David L. Yaussy, Esq.
SPILMAN THOMAS & BATTLE, PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301
dyaussy@spilmanlaw.com

Robert G. McLusky, Esq.
Chris M. Hunter, Esq.
JACKSON KELLY
500 Lee Street East
Suite 1600
Charleston, WV 25301



Christopher P. Stroeck, Esq.