

**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,

Intervenor.

**APPELLANTS' MOTION TO REOPEN THE EVIDENTIARY RECORD
AND AMEND THE CERTIFIED RECORD**

The Appellants, by and through the undersigned counsel, and pursuant to 46 CSR §4-3.4, 46 CSR 6.13, and W. Va. Code § 22B-1-8(e), petition the Environmental Quality Board (“Board”) to reopen the record in the above-styled case for the purpose of amending the Certified Record (“CR”) and including the attached document, and allowing further targeted testimony regarding it, and supplemental briefing as to its implications. The document is directly relevant to the appeal in this case but was never produced by the West Virginia Department of Environmental Protection (“DEP”) to be included in the Certified Record. Instead, the document has recently come to light

when it was provided by the DEP in the Certified Record of the appeal of the Rockwool Multi Sector General Permit appeal (Appeal No. 20-13-EQB).

Given the relevance and gravity of the implications of the document contents, particularly the January 14-21 DEP e-mail string, Appellants seek to reopen the Evidentiary Record, amend and add the document to the Certified Record of the case, conduct such additional testimony as appropriate, and provide supplemental briefing in the case.

LEGAL STANDARD

The procedural rules governing appeals to the EQB state that “[i]n order to remedy an omission, any party may request an amendment to the certified record upon written application to the board.” 46 CSR § 46-4-3.4. In addition, “as a matter of policy and to assure fairness,” the EQB generally applies the West Virginia Rules of Civil Procedure. 46 CSR §46-4-6.13.

The West Virginia courts have long held that whether a party shall be permitted to introduce further evidence after the case has been closed and before (or after) a decision is issued is a matter of sound discretion of the trial court. See, generally, Syl.pt.4, State v. Littleton, 77 W. Va. 804, 88 S.E. 458 (1916). The factors relevant to the decision to allow further evidence include whether there is good cause to reopen the record; whether the new evidence is significant; whether the new evidence would if admitted at this stage be given undue emphasis to the point of being prejudicial; and whether the evidence is controversial. Syl.Pt.4, State v. Sandler, 175 W.Va. 572 S.E.2d 535 (1985). These standards have been used in criminal, civil and administrative matters. See, also, Adams v. Sparacio, 156 W.Va. 678, 196 S.E.2d 647 (1973).

ARGUMENT

Here, all four factors weigh in favor of the EQB allowing for the reopening of the record and the other requested actions.

First, there is good cause for such reopening. Through no fault of Appellants and indeed despite our repeated requests, the DEP failed to produce highly relevant documents for the Certified Record and as noted below the Appellants have been harmed by the failure. The adequacy of the Certified Record in this case has been the subject of several motions¹ and several hearing delays occurred as a result of the DEP's failing to provide a complete and accurate Certified Record.² Second, it is apparent that the new evidence is significant given the implications that there was political pressure on DEP staff to expedite the issuance of Rockwool's permit. Third, the EQB has the expertise and judgement to consider appropriately any new evidence without the risk of prejudice to any party. And fourth, it is not controversial - this new document is undeniably authentic since the DEP has itself produced it in another proceeding.

Now, after the Evidentiary Record is closed, and proposed Findings of Fact and Conclusions of Law have been filed in this case, the Appellants have received – in the certified record in the Jefferson County Foundation, et.al., v. Kathy Emory, DEP, Multi-Sector General Permit (MSGP) case, Appeal 20-13-EQB, documents that are important and relevant to this case, i.e., the appeal of the construction stormwater case, Appeal 20-02-EQB. The failure to provide these documents has harmed the Appellant, undermined the integrity of the hearing process, and has denied the Appellants, the Board, and the public from understanding the basis for the DEP

¹ See, January 4, 2021 Appellants Motion To Compel the DEP to Produce An Accurate and Complete Certified Record; January 6, 2021 Appellee's Unopposed Motion to Continue Hearing; January 26, 2021 WVDEP/Appellee's Motion to Amended CR; and February 9, 2021, Appellee's Unopposed Motion To Continue Hearing from February 1, 2021 to March 18-19, 2021, and February 12, 2021 Motion To Amend Certified Record. .

² In its February 12, 2021 Motion the DEP itself recognized the importance of having a complete and accurate record:

“...the WVDEP so moves because after further investigation, it is evident that its preparation of the corrected certified record will require additional time, and that corresponding additional time is appropriate and necessary for the Appellants and the Intervenor to review recently provided information, to provide additional time for investigation, and to prepare their cases accordingly.”

Motion, at 1.

staffs' actions in granting the construction permit without fully considering the risks presented by Rockwool's application.

Specifically, Exhibit 1, Document 3039 from the 20-13-EQB Certified Record, was produced on May 26, 2021 in an updated CR, and identified during the Appellant's review of the additional 2,000 pages produced at that time. It provides important insight into how the DEP made its decision on the issuance of the Construction Stormwater permit at issue in this case and whether it was based on a technical evaluation of the information provided by Intervenor Rockwool, or something else.

According to Exhibit 1, on January 14, 2020, Yogesh Patel, the Assistant Director of the Division of Water and Waste Management, advised the three permit reviewers that the “[p]ermit need (sic) to get it out on or before 01/24/2020.” And, when Adams object and stated that he doesn't think that they can “get the permit out by Friday, Patel responded “We have too. (sic) Cabinet Secretary has committed, we do not have any choice....”

Based on that instruction, the DEP staff's technical corrections questions and requests were sent out that afternoon. Additional technical corrections and questions were also sent out on February 3, 2020. Rockwool responded on January 27, and February 6, 2020. and the Permit was issued on February 25, 2020.

The email string described above was never produced from any of the DEP employees on the e-mail string, which included Patel, Rick Adams, Larry Board, and Connie Anderson. Patel, Board, and Adams were all either deposed or testified, or both, in the case. None of them mentioned this event or circumstances, and even though questions were asked about any pressure on them to issue the permit, none of them identified this event.

Since Appellants did not have this document, they were unable to probe what commitment had been made by the Cabinet Secretary and to whom; who communicated the ‘commitment’ to Patel; and what influence did Patel’s instruction have on the work of the Permit Reviewers in completing their technical review and the production of the response to public comments. It stands to reason that such inappropriately expedited review directly contributed to the gross inadequacy of the Responsiveness Summary document,³ which in some cases is nonsensical in its failure to explain the DEP’s answers to legitimate and appropriate questions. All of these issues would have been explored in discovery and at the hearing, for the benefit of EQB’s decision-making, had this document been timely produced into the record. Based on the current record it is unclear how the Permit Reviewers responded to the above-described instruction from their second level supervisor Patel, and how it influenced their review of the technical concerns about the permit.

Frankly, it is difficult to understand how the DEP’s failure to produce this document could be an innocent oversight of a single email string, since the DEP went through several iterations of producing an allegedly complete Certified Record, produced numerous emails from the individuals identified in this email string, and the Appellants requested specific information about pressure from the Cabinet Secretary during depositions. Yet this email string is glaringly absent from any of the CRs or amended CRs.

The Appellants have been substantially harmed by the DEP’s failure to produce this document. Not only have the Appellants expended substantial resources (including lawyer and other personnel time as well as funds which have to be raised by a non-profit organization) on the preparation of and presentation on the case, while being denied critical evidence on how the

³ Appellant’s Trial Exhibit15 JCF TE 0335 – 0420.

construction permit was made; but the failure of the DEP to produce this document before now has undermined the integrity of the hearing process itself.

If the DEP is allowed to selectively and without consequences withhold documents from the Certified Record, the process is without credibility. Presumably that is why the Legislature set as the first requirement after an appeal is filed in an environmental case, the production of a full and complete record. §46-4-3 The Certified Record. 29A-5-4(d).

This revelation and action by the DEP renders the Rules meaningless. The signature or affirmation by the Director is meaningless, as she testified. Although the statute requires the Director to certify the accuracy of the CR, her certification is meaningless.⁴ As such, the CR was incomplete and unreliable. Since the DEP's decision is the subject of the appeal, and it is also responsible for the disclosure of the record of its actions, without any oversight, it is not surprising that this type of thing has happened. However, the evidence that it did renders the reliance on the CR worthless.

This situation has also placed the Board, and its members, in a completely untenable, and totally avoidable, situation. The Board, and indeed all the parties, should have had access to this email string before all parties concerned expended thousands of dollars of taxpayer funds and private monies conducting a hearing without the benefit of a full and complete record.⁵ The failure to produce this document is itself unacceptable, indicates further the capricious nature of DEP's actions, and violates the expectations set forth in the statute. The disclosure of political influence on the permit review process, apparently exerted by the former Secretary, are matters of significant

⁴ See, Testimony of Kathy Emory, December 10, 2020, Page 166, Lines 5 through Page 168, Line 17.

⁵ "There can be significant costs to the Agency in compiling an inadequate record. An incomplete record may mean that the Agency action is overturned by a reviewing court or remanded for additional explanation. That in turn can require additional staff time and resources. In addition, some courts faced with an inadequate record will allow supplementation of the record by the opposing parties or will allow discovery, which can also be very time-and-resource intensive." EPA's Action Development Process; Administrative Records Guidance September, 2011.

concern and information about same should properly have been put before the EQB and should have been available during the hearing process.

As Appellants have repeatedly demonstrated throughout the case, Rockwool was treated differently than other permit applicants: it was allowed to deviate from the substantive expectations set for other applicants and it received significantly less scrutiny and more deference from DEP. The email string contained in the document we seek to be added to the record in this matter – which should have been timely included by the DEP in the Certified Record -- opens the window as to the reasons why Rockwool received this extraordinary treatment, but it does not close it – because it is now obvious that the extra special treatment impacted the permit review process.

The failure of the DEP to produce this document requires the underlying record to be re-opened. And the issues raised by this document should be pursued through targeted testimony of Patel, Emory (if she is the person who communicated the former Secretary’s “commitment”), and follow-up testimony of Adams and Board regarding their actions between January 14, 2020 and the issuance of the Permit on February 24, 2020.

FOR ALL REASONS STATED HEREIN, Appellants request the Board reopen the record in this matter, and allow additional testimony to be taken surrounding this document, as well as further testimony regarding who failed to produce this document, and why, in the 20-02-EQB Certified record.

Appellants request expedited consideration of this motion.



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

APPELLANTS
By Counsel

Adams, Rick D

From: Patel, Yogesh P
Sent: Tuesday, January 21, 2020 3:32 PM
To: Adams, Rick D; Anderson, Connie J; Board, Larry D
Subject: RE: Permit

Please go ahead. Tell them to submit ASAP to move forward.

From: Adams, Rick D <Rick.D.Adams@wv.gov>
Sent: Tuesday, January 21, 2020 3:17 PM
To: Patel, Yogesh P <Yogesh.P.Patel@wv.gov>; Anderson, Connie J <Connie.J.Anderson@wv.gov>; Board, Larry D <Larry.D.Board@wv.gov>
Subject: RE: Permit

Technical corrections are ready to go out. Should I send?

From: Patel, Yogesh P <Yogesh.P.Patel@wv.gov>
Sent: Tuesday, January 21, 2020 10:44 AM
To: Adams, Rick D <Rick.D.Adams@wv.gov>; Anderson, Connie J <Connie.J.Anderson@wv.gov>; Board, Larry D <Larry.D.Board@wv.gov>
Subject: RE: Permit

We have too. Cabinet Secretary has committed, we do not have any choice. Let Connie and Larry help you out. Get correction letter out today via email if you seeing something on permit.

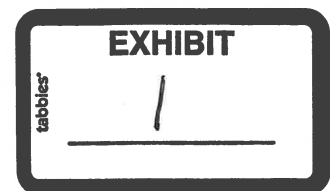
From: Adams, Rick D <Rick.D.Adams@wv.gov>
Sent: Tuesday, January 21, 2020 10:42 AM
To: Patel, Yogesh P <Yogesh.P.Patel@wv.gov>; Anderson, Connie J <Connie.J.Anderson@wv.gov>; Board, Larry D <Larry.D.Board@wv.gov>
Subject: RE: Permit

There are a lot more email comments than I expected. Many of them are related to the multi-sector but they all will have to be processed. I don't think we can get permit out by Friday

From: Patel, Yogesh P <Yogesh.P.Patel@wv.gov>
Sent: Tuesday, January 14, 2020 5:08 PM
To: Adams, Rick D <Rick.D.Adams@wv.gov>; Anderson, Connie J <Connie.J.Anderson@wv.gov>; Board, Larry D <Larry.D.Board@wv.gov>
Subject: Permit

Permit need to get it out on or before 01/24/2020.

Yogesh P. Patel, P.E.
Assistant Director
Division of Water and Waste Management
601 57th Street, S.E.
Charleston, WV 25304-2345
Phone (304)-926-0499 Ext. 1014



**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,

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

Intervenor.

CERTIFICATE OF SERVICE

I, Christopher P. Stroeck, Esq., counsel for Appellants, do hereby certify that I have served a true copy of the foregoing APPELLANTS' MOTION TO REOPEN THE EVIDENTIARY RECORD AND AMEND THE CERTIFIED RECORD upon the following parties via email this 10th day of June, 2021:

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

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

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



/s/Christopher P. Stroeck
Christopher P. Stroeck, Esq.