

**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' RESPONSE TO PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW SUBMITTED BY THE WVDEP AND ROCKWOOL**

The Appellants, by counsel, Christopher P. Stroech, Esq., do hereby submit the following response to the Appellee's Proposed Findings of Fact and Conclusions of Law and Rockwool's Post-Hearing Brief and Proposed Findings of Fact of and Conclusions of Law. Appellants respond as follows:

I. Standard of Review and Burden of Proof

It should be noted that all parties agree that the Board hears appeals of permits issued by the Appellee WVDEP *de novo* and does not afford deference to the Director's decision.

However, the Appellants alone have cited the burden shifting analysis that the Board has previously used in analyzing such challenges. Consistent with Wetzel County Solid Waste Authority v. Chief Office of Waste Management, Division of Environmental Protection, Civil Action Number 95-AA-3 (Circuit Court of Kanawha County, 1999), the Appellants must raise an

issue with sufficient evidence to support a finding that the WVDEP's decision was incorrect. If sufficient evidence supports such a finding, then the Appellee would have to produce evidence demonstrating why its decision was sound, in light of the Appellant's evidence. The Appellants then have an opportunity to show that the evidence produced by the Appellee is pre-textual or otherwise deficient. Id.

Appellants have produced sufficient evidence, much of it unrebutted, to support a finding that the WVDEP's decision to grant Rockwool a Registration under the 2019 Permit was incorrect. Appellants further assert that the Appellee failed to produce evidence that this decision was sound, regardless of the Appellants' case, and that the evidence offered by Rockwool was either immaterial to the basis of the WVDEP's decision or not based in fact or law.

Based upon all evidence presented, as summarized by the proposed findings of fact and conclusions of law, many of the relevant facts established by the Appellants remain unrebutted. Rockwool did not adequately consider the risks of construction in vulnerable karst terrain prior to beginning construction, and the WVDEP never reviewed any evidence that it had. While Rockwool had a geotechnical evaluation performed (INT Ex.0005), it was not done to address the risks of construction in karst, and, more importantly, it was never submitted to the WVDEP for its consideration. It is telling that the Geotechnical Report is NOT in the WVDEP's Certified Record; and there is no evidence Rockwool ever submitted it to, or that it was considered by, the WVDEP at any point in the application process.

Further, it is undisputed that Rockwool failed to submit a Karst Mitigation Plan ("KMP"), and that only *after* sinkholes developed did the WVDEP require only a Sinkhole Repair Plan. The WVDEP's testimony that it considered the two as interchangeable is simply pre-text and not

supported by any credible evidence. As Appellants' evidence clearly establishes, for Rockwool, and Rockwool alone, the WVDEP accepted a post-sinkhole development "Sinkhole Repair Plan" as a KMP. This is not the 2019 Permit condition, nor does it fulfill the regulatory requirements for considering karst in industrial establishment siting and design.

By any name or description, Rockwool did not meet or exceed the "best practices" set out in the Chesapeake Bay Bulletin, referenced in the now-abandoned WVDEP Karst Mitigation Template for submission of a Groundwater Protection Plan. The Bulletin provides the only karst mitigation guidance available, and was relied upon by Rockwool's expert, Dr. Timothy Bechtel, in support of his opinion and testimony.

In short, the WVDEP was required to determine whether Rockwool met the terms and conditions of the 2019 Permit under which it was seeking to register. WVDEP has not carried its burden of proof on the evidence, and Rockwool did not carry it for them.

The WVDEP failed to call any witnesses at the evidentiary hearing, following the submission of an inadequate certified record.¹ While the WVDEP asked some questions of the witnesses, it did not present an affirmative case.

¹ The first version of the Certified Record was supplied in mid-June 2020. That version contained Rockwool's 2018 application which was withdrawn and no documents from the 2019 application—the subject of this appeal—were included. Subsequent to the Appellants' concerns raised at the July 30, 2020 hearing, the Appellee amended the Certified Record on August 20, 2020. The amended Certified Record provided 10 new email strings and several pictures. One of the email strings and several of the pictures pertained to a different case before the EQB at the time. Prior to the evidentiary hearing, the record was rescanned to address page number issues, but the documents from the earlier amendment were not included and never numbered. Following the first two days of the hearing and the conclusion of the Appellants' case in chief, the Appellee admitted the deficiencies and supplied amendments on January 20, February 12, February 24, and March 17 of 2021. Each time these amendments came days or weeks after promised, and twice caused the continuance of the hearing. At the time the Appellants conducted depositions in July 2020 and presented their case in chief, the Certified Record was less than 800 pages and contained no documents from the permit being appealed. Most of the relevant documents were identified by the Appellants from other sources. At the time the Intervenor presented their case in chief, the Certified Record was well over 2400 pages and contained critical information about the 2019 Permit application and Registration not contained in the original Certified Record.

Rockwool's expert witness, Dr. Timothy Bechtel, used generalizations to opine that Rockwool exceeded the karst mitigation guidance as set forth in the Bulletin, without providing much, if any, detail. Indeed, the Appellants' proposed findings regarding Rockwool's noncompliance with the recommendations, cautions, and discouraged and prohibited practices set out in the Bulletin (APP Ex.10) and Karst Mitigation Template (APP Ex.93) remain uncontested. *See* Appellants' FFCL, Pg. 23, Pars. 116-174. Rockwool's only corporate designee, Peter Regenberg, essentially used a promotional drone video and animated model, with very little substantive testimony, to seemingly "wow" the Board and suggest that this case is moot due to its stage of construction.

In contrast, the Appellants presented facts in support of their case, and most remain unrebutted. The WVDEP has also not produced sufficient evidence justifying its decision to issue the 2019 Registration to Rockwool. And despite whatever evidence it has produced, its justifications are pre-textual and deficient. As was made clear via the overall record, Rockwool was fast-tracked through an inadequate WVDEP permit review,² and the risks of construction in vulnerable karst terrain were not considered until too late.

This Board must recognize and acknowledge that the WVDEP did not take any action to implement the Legislative Rules and regulations to protect the groundwaters of the State from construction in vulnerable karst terrain. The actions that were taken -- from the failure to ensure

² The original application review under the 2012 permit was completed in only 11 days (Appellants' FFCL, Pg. 12, Pars. 12, 15) Rockwool was also allowed to operate without a permit entirely from 7-28-2019 until 2-25-2020. No rationale or explanation was provided for the WVDEP's allowing this inadequacy. As detailed throughout the Appellants' Findings of Fact, the WVDEP did not review the maps submitted that demonstrated Limits of Disturbance ("LOD") issues, nor did it consider the karst concerns.

public notice and comment were provided when required,³ to the lackadaisical Certified Record production, to the inconsistent reliance on an unauthorized Karst Mitigation Template posted for use by the public and permittees, to the lack of qualifications and training for the Staff in evaluating karst risks, and the abject failure of the Director to ensure that the permitting process and rules were followed -- must not be allowed to continue. Most importantly, the combination of all of these issues denies any reasonable assurance that the groundwaters of Jefferson County will be adequately protected from the risks inherent in construction in vulnerable karst terrain.

II. Consideration of Karst Mitigation

Legislative Rule § 47-58-4.10 requires that karst mitigation be considered in the siting and design of industrial establishments. It specifically states as follows:

4.10. Site Selection Criteria -- Facilities or activities must determine if they are planning to locate or expand into areas of karst, wetlands, fault(s), subsidence, or delineated wellhead protection areas, as determined by the Bureau of Public Health. If areas of *karst*, wetlands, fault(s), subsidence, delineated wellhead protection areas or other areas determined by the director to be vulnerable based on geologic or hydrogeologic information, are determined to exist then the facility or activity design must adequately address the issues arising from locating in the area(s) of a *potentially more vulnerable groundwater resource*. (emphasis added)

³ While the parties disagree over whether the Board has jurisdiction to determine if the Appellee violated the rights of the Appellants to have received public notice and opportunity to comment on Rockwool's 2017 Registration, there is nothing that prevents the Board from commenting on the facts before it that establish the failure of the WVDEP to comply with permitting requirements for public notice and direct that the WVDEP comply with these requirements, without engaging in the deceptive shell game demonstrated on this record. The facts are undisputed in the record that Rockwool exceeded the time for grading and the LOD on numerous occasions, but did not post public notice or allow for public comments. The record is replete with demonstrative examples, as cited in the Appellants' opening brief, (Appellants' FFCL, Pg. 13, Pars. 25-29; Pg. 32, Par. 32; Pgs. 29-30, Pars. 175-194) It remains undisputed that the public was not granted the opportunity to provide public comment until the 2019 Registration application, and that the rules, regulations and permit conditions require such notice. Rewarding the WVDEP's failure to require Rockwool, or other applicants, to engage in behaviors that skirt the rules to avoid public participation in the environmental regulatory process is a violation of the rights provided by these laws.

This Legislative Rule was in effect and had to be followed by the WVDEP for all industrial establishment applications under both the 2012 and 2019 Permits. This authority remains undisputed by the WVDEP and Rockwool.

The WVDEP agrees that it cannot alter its duties or authority to administer the NPDES program without the permission of the appropriate overseeing authority, in this case the West Virginia Legislature. WVDEP's Proposed Findings of Fact and Conclusions of Law ("FFCL"), Pg. 8, Par. 16.

The WVDEP contradicts itself as to whether karst mitigation had to be considered by Rockwool under its initial 2017 Registration application. It first adopts the testimony of Larry Board, that prior to 2019, there was no regulatory or permit requirement for consideration of karst-specific concerns. WVDEP FFCL, Pg. 17, Par. 63. However, it later confirms that Rockwool's Registration was issued pursuant West Virginia's Groundwater Protection Rule 47 CSR 58. WVDEP FFCL, Pg. 20, Par. 4. The Appellee further confirms the requirements of Rule 47-58-4.10, but fails to identify how Rockwool considered karst in its site selection and design. In fact, to the contrary, WVDEP permit reviewer Adams stated, "nothing was required in the 2012 General Permit to address construction in karst terrain," and that he did not consider karst in his review of Rockwool's 2017 application. Appellants' FFCL, Pg. 21, Par. 95.

Rockwool seems to confirm the authority of Rule 47, but curiously states that the WVDEP is not responsible for ensuring that the facility "adequately" considers karst in its site selection and design. If the WVDEP does not ensure that applicant's plan is adequate to comply with this Rule, then who does? Rule 47-58-4.10 requires all industrial establishments to adequately consider whether it is going to site its facility in an area of vulnerability and increased risk as a result of, among other things, karst. This requirement exists for consideration in all

facility siting and design, notwithstanding what may be required in a groundwater protection plan or what may be required in a General Permit. Rule 47-58-4.

Rockwool argues that it did adequately considered karst risks to the groundwater as evidenced by the Geotechnical Investigation Report. INT Ex.5. However, this report was never submitted to the WVDEP as part of its application. Rockwool states that it performed soil test borings, air track drilling, and electrical resistivity and shear wave testing. However, it is clear from the Report that the purpose of these studies was to comply with the IBC 2015 Building Code to determine how the facility buildings should be placed - not to investigate and ensure how the groundwater should be protected, and what actions to take in design and siting to avoid sinkholes or catastrophic collapse. INT Ex.5-00002-7. Notably, Rockwool did not call any witnesses to testify about the Geotechnical Report it now relies upon, and produced no witnesses to say its site evaluation was adequate under the hydrogeologic conditions it encountered. No one described the Geotechnical Investigation Report's purpose or whether even Rockwool considered it in the design of the facility. It is undisputed that the WVDEP did not make any evaluation of the adequacy of the design, nor did it rely upon the Report during the application review process because it was never submitted to the WVDEP. The Board cannot now conclude, without any evidentiary support, and knowing that the WVDEP never reviewed, that the Report met the regulatory purpose.

Rockwool states that it situated its facility to "avoid placing heavy buildings over subsurface voids...." Rockwool's FFCL, Pg. 24, Par. 64. However, the air track and boring test holes were located under the proposed facility buildings, with only a few under the proposed basin areas which, had the testing been done to mitigate the risk to groundwater, would logically have been tested and studied. INT Ex.5-00036-37. The air track results showed numerous

voids. INT Ex.5-00090-91. Most notably, AIR TRACK HOLE NO. 4, LOCATED UNDER THE RAINWATER REUSE POND, SHOWED A VOID OF AT LEAST 40 FEET, WITH NO DETERMINED TERMINUS. INT Ex.5-00092. So, Rockwool either knowingly situated its Rainwater Reuse Pond over a bottomless pit, without any engineering analysis that this was an acceptable design placement – or, it did not consider its own air track results and tests and make any modifications. In any event, it is undisputed that the WVDEP did nothing to make sure the regulations were followed.

Rockwool also states that it lined its ponds. Rockwool's FFCL, Pg. 24, Par. 64. However, it is uncontested that Rockwool did not line its ponds until September 2019. Appellants' FFCL, Pg. 26, Par. 142. In other words, these ponds were not lined for *two (2) years* during construction. *Id.* Also, the rainwater for reuse pond, which was a stormwater pond during construction, filled to its maximum depth (10.5 feet) many times during construction, and had to be de-watered at least three times. CR P2352-2356. Further, the temporary stormwater ponds were never lined. T4, Pg. 32. And the testimony of Dr. Bechtel about the linings was mischaracterized in Rockwool's brief. Dr. Bechtel testified that liners could be vacuum tested, not that they ever were. Bechtel Depo., at Tr.19:5-19:11.

Rockwool contends that the use of basins, and the resulting large-scale infiltration, is best practice in karst. Rockwool's FFCL, Pg. 24, Par. 64. However, the Bulletin, which is undisputedly an industry-wide standard for best practice in karst, clearly states that traps and basins should be used only *as a last resort*, and large drainage areas are strongly discouraged, even when liners are used. Appellants' FFCL, Pg. 26, Pars. 145-157. No evidence was offered by the Appellee that the use of basins of the size and depth of Rockwool's basins were ever considered at all by the WVDEP staff, and certainly were never determined to be an acceptable

design for this location. The WVDEP had no permit reviewer with expertise in karst and – based on the certified record – never conducted any critical analysis of the risks presented by construction of the facility in vulnerable karst terrain at all.

It is clear from the undisputed evidence that Rockwool did not consider karst mitigation in its facility siting and design, notwithstanding the regulatory requirement to do so by Rule 47-58-4.10, and notwithstanding its attempts to after-the-fact retrofit its actions into a self-serving fact pattern. Simply repeating the mantra that it did consider the risks, sufficiently so that the WVDEP could rely upon it --- without any supporting evidence – does not provide the WVDEP an evidentiary basis to support its burden of proof.

III. Rockwool was Required to Submit a KMP

In addition to the requirements of Rule 47-58-4.10, the WVDEP does not dispute that Rockwool was required to submit a KMP under the 2019 Permit. As set forth in its proposed findings:

"The parties agree that per the terms and conditions of the 2019 permit, a KMP is required, resolving the first issue." WVDEP's FFCL, Pg. 5.

"The 2019 Permit requires an applicant to submit, among other materials, a separate GPP, and additionally a KMP if the operations are situated in karst terrain. Day 1 Tr. 205-06. Jefferson County is one of the counties for which a KMP is required. Day 1 Tr. 206." WVDEP's FFCL, Pg. 9, Par. 21.

"The parties agree and the record confirms that a KMP is required under the 2019 Permit. Accordingly, the first issue is resolved without controversy. The sole remaining issue, therefore, is whether Rockwool submitted an appropriate Karst Mitigation Plan." WVDEP's FFCL, Pg. 21, Par. 6

This Board should recognize that the WVDEP clearly agrees that Rockwool was required to submit a KMP under the 2019 Permit.

Regarding this question, Rockwool first makes an argument that there is somehow a distinction between registration applications and reissuance applications, notwithstanding the

fact the Rockwool applied first under the 2012 Permit and then under the 2019 Permit. Rockwool's FFCL, Pg. 12, Par. 34. However, Rockwool then seems to abandon this argument later by stating that the Board does not need to address it. Rockwool's FFCL, Pg. 24, Par. 65; Pg. 29, Par. 77. Indeed, the Board does not need to address this argument as it is clear under both federal and state law that permittees cannot operate under different General Permits⁴, and the WVDEP agrees that Rockwool was required to submit a KMP under the 2019 Permit.

Appellants contend that there is no difference in any of the input fields provided in a new registration as opposed to a reissued registration. Moreover, every item that is required to be compliant with the reissued 2019 Permit is required in a reissued CSGP Registration. In fact, it is commonplace that a reissued application must be revised to comply with the new General Permit requirements. Neither the WVDEP nor Rockwool have offered any statutory authority, regulatory authority, permit language or interpretative law that suggests that Rockwool was only required to comply with certain provisions of the 2019 Permit, but could be exempt from others.

IV. Other Issues

A. Economic Feasibility:

Rockwool has raised the issue of economic feasibility for a decision that would require remedial action. Rockwool's Post-Hearing Brief, Pg. 4. This concern is without merit. First, because Rockwool managed to avoid compliance with the terms and conditions of the 2019 Permit, and has now benefited from that action, does not change the requirements. This Board is making its decision *de novo*, and Rockwool was on notice of its deficiencies and the failure of

⁴ The EPA has made clear permittees cannot operate under expired General Permit conditions, stating "[t]he proposed permit modification allows for permittees to continue to operate under the terms of the 2012 CGP and modifies the February 2019 CGP to continue allowing permittees to follow terms and conditions of the 2012 CGP, extending the effective date of the 2012 CGP beyond five years, as well as having two permits in effect simultaneously. Both practices are inconsistent with federal regulations." APP Ex.136-3622.

the WVDEP since, at least, the public comments on this permit. Its decision to ignore the issues should not now be rewarded by getting a regulatory “free pass.”

Second, consideration of the issue of economic feasibility is meant to address those situations where small companies face economic hurdles that would make development cost prohibitive. That is not the case for Rockwool. It is a multi-billion multinational corporation which claims to be spending \$150 million in this facility already. Requiring it to meet the requirements it was well aware of would not be cost prohibitive nor disproportionately costly for it. Further, the remedy proposed by the Appellants in this case, would provide a rational, engineering-based recommendation on what, if any, are the necessary steps that should be taken to ensure the factory operates in a manner consistent with the rules, regulations and requirements of this state.

B. Public Notice and Comment:

Rockwool continues to assert in its brief that “Appellants failed to demonstrate that public notice and comment were required” for the 2019 Reissuance Application. Rockwool’s Post-Hearing Brief, Pg. 22. The evidence is hotly contested, and Appellants have submitted ample evidence of the failure of WVDEP to require public notice and comment.

V. **Conclusion**

Appellants provided substantial evidence that the WVDEP's determination that Rockwool met all karst mitigation requirements or otherwise adequately protected the groundwater was made in error and without regard to information plainly available. Analogously applying the Appellee’s line of reasoning to the hypothetical example of an agency’s permitting of construction occurring in an earthquake-prone zone would result in a permittee being allowed to construct without submitting its earthquake risk mitigation plans to an overseeing agency; and instead, only needing to have a “destruction repair plan,” i.e., a plan to be used once an

earthquake hit and impacted its facility. This example, ridiculous on its face, illustrates why the WVDEP's actions in accepting only a *responsive* sinkhole repair plan instead of a karst mitigation plan is flatly wrong, and indeed inconsistent with the karst mitigation plan elements that it has required of other permittees constructing in karst.⁵

One of the most telling references in the WVDEP's proposed findings and final argument is its highlighting of Dr. Groves testifying that he could not identify specific contaminants that might be of concern other than "soil." WVDEP's FFCL, Pgs. 6-7, Par. 7. This is shocking. One primary purpose of stormwater construction permits is to prevent "soil" from entering the waterways of the State.⁶ For the WVDEP to flippantly disregard "soil" in such a manner is very telling of how it dealt with the entire registration process. This Board must act to dispel such indifference.

Appellants have provided sufficient evidence to support the Board's finding that WVDEP's decision was clearly wrong, and that the Appellee, based on its own or the Intervenor's evidence, has not met their burden of proof to show otherwise. Therefore, the Board must find that the WVDEP's actions in this respect were arbitrary and capricious, and clearly wrong in light of the evidence in the record.

For all these reasons, the Board should vacate the Registration issued to Rockwool, and remand back to the WVDEP, with the instructions to require Rockwool to hire an independent

⁵ See, Intervenor Exhibits 49(e) 00001 and 00003, 49(d) 00001-00002, and 49(f) 00001-00010, 49(g) 00001 – 00003. See, also, CR P2317-2318; and testimony of Andrew Parsons, INT Ex 50-00014.

⁶ On the EPA webpage entitled "Construction General Permit (CGP) Frequent Questions" the EPA states when referring to its own Construction Stormwater General permit that "This permit requires operators of such construction sites to implement stormwater controls and develop a Stormwater Pollution Prevention Plan (SWPPP) to minimize the amount of sediment and other pollutants associated with construction sites from being discharged in stormwater runoff." <https://www.epa.gov/npdes/construction-general-permit-cgp-frequent-questions>. Last accessed May 5, 2021.

engineering and design firm ("IEDF") to review the status of the current site against engineering best practices for construction in karst, and to make such recommendations for any modifications as are necessary to protect the groundwaters of Jefferson County.⁷ The Board must further remand this matter back to the WVDEP to create clear and consistent guidelines as to what should be included in a KMP, using the Karst Mitigation Template and Bulletin as best guidance.

The Appellants are concerned that the Board might not take any action at this point due to the progress of Rockwool's construction. Indeed, Rockwool maintained an obvious strategy of delay through this appeal. The issue raises a practical consideration which should be considered in deciding a remedy, not in determining whether the WVDEP failed to require Rockwool to comply with the terms of the applicable permit. It is an obvious strategic advantage for applicants and the WVDEP to frustrate the review process, while continuing a race to the finish, and then claim mootness. Allowing this strategy of delay to prevail denies the due process rights of the Appellants to appeal any decision of the WVDEP. Combined with the difficulty of obtaining a stay of construction, such that the permittee will usually (as it was here) be allowed to continue to build during the appeal, if the issues are complex, as they were in this case, the appeal continues for months. If the WVDEP fails to produce a complete certified record, as it failed to do in this case, the appeal continues for months. Once the Board is finally able decide on the appeal, construction could have progressed to a point where the permittee or WVDEP argues the claims are moot, as Rockwool has suggested in this case. The Board must make a substantive decision here to prevent this same procedural maneuvering from occurring time and time again.

⁷ Appellants urge this Board to make a ruling that Rockwool failed to adequately protect the groundwater during its construction phase for the reasons set forth herein, notwithstanding what, if any, remedial measures are ordered by the Board at this time. The Board should do this to set a clear precedent.

Rockwool proceeded with its construction at its own risk; but the true risk is to the groundwaters of Jefferson County.

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