



## West Virginia E-Filing Notice

CC-19-2021-AA-6

Judge: David Hammer

**To:** Christopher Stroeck  
cstroeck@arnoldandbailey.com

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# NOTICE OF FILING

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA  
Jefferson County Foundation, Inc. v. West Virginia Department of Environmental Protection  
CC-19-2021-AA-6

The following complaint was FILED on 12/2/2021 4:02:09 PM

Notice Date: 12/2/2021 4:02:09 PM

Laura Storm  
CLERK OF THE CIRCUIT COURT  
Jefferson County  
PO Box 1234  
CHARLES TOWN, WV 25414

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# COVER SHEET

E-FILED | 12/2/2021 4:02 PM  
CC-19-2021-AA-6  
Jefferson County Circuit Clerk  
Laura Storm

## GENERAL INFORMATION

IN THE CIRCUIT COURT OF JEFFERSON COUNTY WEST VIRGINIA

**Jefferson County Foundation, Inc. v. West Virginia Department of Environmental Protection**

**First Plaintiff:**  Business  Individual  Government  Other

**First Defendant:**  Business  Individual  Government  Other

**Judge:** David Hammer

## COMPLAINT INFORMATION

**Case Type:** Administrative Appeal

**Complaint Type:** N/A

**Origin:**  Initial Filing  Appeal from Municipal Court  Appeal from Magistrate Court

**Jury Trial Requested:**  Yes  No **Case will be ready for trial by:** \_\_\_\_\_

**Mediation Requested:**  Yes  No

**Substantial Hardship Requested:**  Yes  No

Do you or any of your clients or witnesses in this case require special accommodations due to a disability?

- Wheelchair accessible hearing room and other facilities
- Interpreter or other auxiliary aid for the hearing impaired
- Reader or other auxiliary aid for the visually impaired
- Spokesperson or other auxiliary aid for the speech impaired
- Other: \_\_\_\_\_

I am proceeding without an attorney

I have an attorney: Christopher Stroeck, 208 N George St, Charles Town, WV 25414

## SERVED PARTIES

**Name:** West Virginia Department of Environmental Protection  
**Address:** 601 57th Street, SE, Charleston WV 25304  
**Days to Answer:** 20                      **Type of Service:** Plaintiff - Certified Mail

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**Name:** Roxul USA, Inc.,d/b/a Rockwool  
**Address:** c/o Kenneth Cammarato 4594 Cayce Road, Byhalia MS 38611  
**Days to Answer:** 30                      **Type of Service:** Plaintiff - Certified Mail

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**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA**

**JEFFERSON COUNTY FOUNDATION, INC.,  
CHRISTINE WIMER, KAREN MICHELLE FREER and  
GAVIN PERRY,**

*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**

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

*Intervenor-Appellee.*

**PETITION FOR APPEAL**

Petitioners, the Jefferson County Foundation, Inc., Christine L. Wimer, Karen Michelle Freer and Gavin Perry, by counsel, Christopher P. Stroeck, Esq., hereby file this appeal from the October 27, 2021 Final Order of the West Virginia Environmental Quality Board ("EQB") in Appeal No. 20-02-EQB, in accordance with all applicable law. The Appellants received the Final Order on November 2, 2021, and a copy is attached to this Petition.

In support of this appeal, the 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. Venue in the Circuit Court of Jefferson County is proper pursuant to W.Va. Code 29A-5-4(b).

## Statement of Procedural Background

1. On 12/05/12, 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 01/04/13. The 2012 Permit remained in effect through 2017, was extended through 2019, before being replaced by the revised 2019 Permit. This Permit regulates stormwater discharge associated with construction and development activities by various industries and businesses.
2. General Permits provide certain conditions under which all registered entities are required to comply.
3. On 07/31/17, Roxul USA, Inc., (“Rockwool”) submitted its initial site registration application for coverage under the 2012 Permit for control of stormwater associated with construction activities at its site located in Ranson, Jefferson County, West Virginia.
4. No public notice or comment period was provided for at that time because the information provided by Rockwool to the DEP on Limits of Disturbance (“LOD”) (<100 acres at an applied-for acreage of 98.9) and “duration of construction” [<1 year at an applied-for duration of seventeen (17) weeks] did not trigger a requirement for public comment. The failure to provide public comment denied the public the opportunity to point out fatal flaws in the siting of the plant, including but not limited to the existence of karst topography and the likelihood that sinkholes would impact the construction site and present significant risk to the waters of Jefferson County.
5. Notwithstanding that this review process typically takes months to complete, the DEP finished its review in eleven (11) days.

6. On 10/19/17, the DEP issued Rockwool its registration under the 2012 Permit for the discharge of stormwater associated with its construction activities.
7. Thereafter, the DEP issued a Draft Revised Construction Stormwater General Permit (the "2019 Permit"). Public comment was open from 09/05/18 until 10/19/18, and a public hearing was held on 10/19/18,
8. On 09/11/18, the DEP identified sinkholes at the Rockwool construction site.
9. On 10/02/18, the DEP sent a letter to Rockwool requesting that a sinkhole remediation plan to be submitted by 10/25/18. The letter cited the Groundwater Protection Act § 22-12 and noted that "facility or activity designs must adequately address the issues arising from locating in an area of potentially more vulnerable groundwater resource."
10. On 10/16/18, Rockwool submitted the "Rockwool Ran-5 Project Supplemental Sinkhole Repair Procedure," which was approved by the DEP on 10/19/18.
11. On 06/21/19, Rockwool submitted an application for reissuance of its registration under the 2019 Permit.
12. On 09/19/2019, the DEP issued public notice for Rockwool's registration application to work under the 2019 Permit.
13. On 10/23/19, a public hearing was held with public comment in opposition to the above-mentioned permit applications. Over 205 members of the public attended the hearing at Shepherd University, 47 gave public comment, and 573 public comments were submitted during the public comment period, additionally over 443 signed on to a single set of comments.
14. On 02/25/20, the DEP issued Rockwool its registration under the 2019 Permit.
15. The Appellants timely appealed this registration to the EQB, asserting that the DEP acted in an arbitrary and capricious manner, and/or in clear violation of state and federal law. The

Appellants raised seven (7) specific objections. These objections not only challenged the specific findings made by the DEP as related to Rockwool’s application but also raised general challenges to the review procedures utilized by the DEP when reviewing applications for industrial facilities that are to be located on karst terrain.

16. An evidentiary hearing was ultimately held over four (4) days between December and March, 2021; with testimony from three (3) expert witnesses and nine (9) other fact witnesses.

17. The subject Final Order was issued by the EQB on October 27, 2021 and received by the Appellants on November 2, 2021.

### **Assignments of Error**

Petitioners file this appeal, challenging both issues of fact and law as follows:

- I. The EQB acted arbitrarily and capriciously when it concluded that Rockwool adequately addressed the issues arising from locating its heavy industrial facility in areas of karst pursuant to §47 CSR 58-4.10 and submitted an adequate Karst Mitigation Plan (“KMP”) as required by the 2019 Permit.
  
- II. The EQB erred by making clearly wrong factual findings in light of reliable, probative and substantial evidence as set forth on the record.
  
- III. The EQB erred by making factual findings related to issues predating the 2019 Reissuance Application despite concluding that it lacked jurisdiction over the Appellants’ specific objections directed to acts or omissions predating the 2019 Reissuance Application.

### **Points and Authorities Relief Upon and 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 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.

Pursuant to W.Va. Code §29A-5-4(g), the circuit court may affirm the order of the decision of an agency or remand the case for further proceedings. Specifically, “[t]he circuit court shall reverse, vacate or modify the order of decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: (1) In violation of constitutional or statutory provisions, or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law, or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion,” Syllabus Point 1, Smith v. Bechtold, 190 W. Va. 315, 438 S.E.2d 347 (1993), quoting Syllabus Point 2, Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). “[T]he task of the circuit court is to determine ‘whether the [agency’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’” Frymier-Halloran v. Paige, 193 W.Va. 687, 695, 458 S.E.2d 780,788 (1995), quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136, 153 (1971) [(citations omitted)] the



Supreme Court interpreting the judicial review of the Federal Administrative Procedures Act, 5 U.S.C. §701, *et. seq.*

The Court decides questions of law *de novo*. Muscatell v. Cline, 196 W. Va. 588, 594 (1996), Butcher v. Gilmer County Board of Education, 189 W.Va. 253, 429 S.E.2d 903 (1993); Martin v. Pugh, 175 W.Va. 495, 334 S.E.2d 633(1985). However, the Court must accord deference to the findings of fact made by the Board, unless clearly erroneous. Noble v. W. Virginia Dept. of Motor Vehicles, 223 W. Va. 818, 821 (W.Va. 2009).

This appeal raises issues of law and fact. The relevant findings of fact relied upon by the EQB are clearly erroneous.

- I. **The EQB acted arbitrarily and capriciously when it concluded that Rockwool adequately addressed the issues arising from locating in areas of karst pursuant to §47 CSR 58-4.10 and submitted an adequate Karst Mitigation Plan as required by the 2019 Permit.**
  - A. **The EQB acted arbitrarily and capriciously when it concluded that Rockwool adequately addressed the issues arising from locating in karst pursuant to §47 CSR 58-4.10.**

In its Final Order, the EQB found as a matter of fact, that Rockwool, “met its obligation to consider karst in the siting of its facility under Legislative Rule § 47-58-4.10 by undertaking a number of karst-specific measures for site investigation and design.” (Final Order, at Pars. 4 and 27) However, the law requires that in areas, such as Jefferson County, which is deemed “to be vulnerable based on geologic or hydrogeologic information,...” *“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.”* Id. (emphasis added.)

Contrary to the conclusions of the EQB in its Final Order, the evidence at the hearing clearly demonstrated that the DEP staff did nothing to determine whether Rockwool adequately addressed the issues arising from locating its facility in karst, an undeniably vulnerable

groundwater resource, at the time Rockwool originally declared its intention to build in the area, or at any time relevant to the siting provision requirements of the Rule and the requirements of §47-58-4.10. The following relevant evidence was elicited on this issue during the evidentiary hearing:

- Rick Adams, the primary permit reviewer on the Rockwool application, testified that "[n]othing 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. (T1, Pg. 215)<sup>1</sup>
- Notwithstanding Legislative Rule § 47-58-4.10, which clearly requires that karst be considered for the siting and design of industrial establishments in vulnerable terrain; and admitting that he was to follow this Rule, Rick Adams did not consider karst in any way in his review of Rockwool's 2017 application. (T1, Pgs. 251-254)
- Yogesh Patel, the Assistant Director of Permitting, Division of Water and Waste Management, testified that there were no requirements to consider karst mitigation under the 2012 Permit. (T2, Pg. 159)
- Larry Board, Environmental Regional Program Manager for Stormwater Permitting, and Rick Adams direct supervisor, confirmed that there were no requirements to consider karst mitigation under the 2012 Permit (INT Ex.49, Pg. 25) In fact, Mr. Board testified that he knows of no requirements under any statute, rule or regulation to consider karst prior to the 2019 Permit. (Id.)
- Andrew Parsons, another DEP permit reviewer, testified that there was no requirement to consider karst mitigation under the 2012 Permit. (INT Ex.50-00004)
- Director Katherine Emery stated that the Agency was "not able to deviate from legislative requirements and that "shall" mean something is a requirement." (T1, Pgs. 172- 173), and karst mitigation plans were so required.
- Yogesh Patel testified that his permit reviewers were required to use Legislative Rule § 47-58 when reviewing applications for industrial establishments. (T2, Pgs. 152-153) Rick Adams was at first unable to recall how he considered karst in his review of Rockwool's 2019 application, other than the inclusion of the 2018 Sinkhole Remediation Plan (T1, Pg. 217)

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<sup>1</sup> Petitioners cite to the record herein, indicating relevant testimony by T1, T2, T3 or T4 ("Transcript Days 1-4"); the Certified Record produced by the DEP ("CR"); or Exhibits admitted during the evidentiary hearing.

- Rick Adams was further able to recall that he also considered pond liners in his review of Rockwool's 2019 application. In any event, he confirmed that both of these karst considerations were "reactive to sinkholes", not proactive (T1, Pg. 228).
- Rockwool's Sinkhole Remediation Plan was prepared and submitted to DEP only after sinkholes had already formed at the site, were identified by the DEP, and after the WVDEP requested Rockwool to submit one. (T1, Pgs. 213, 215-216, APP Ex.32-1502-1506)
- Rick Adams confirmed that the first time he considered karst as related to the Rockwool site was in response to sinkholes forming at the site. (T1, Pgs. 253-254)
- Sinkholes continued to develop requiring remediation. (APP Ex.32-1502-1506, APP Ex.33-1507, APP Ex.35-1519, APP Ex.39-1533, APP Ex.41-1546)
- The DEP did not require Rockwool to conduct any site investigations related to karst. (T1, Pgs. 221, 256-257) Rick Adams testified that a site investigation in 2017 would have "made sense." (T1, Pg. 256)
- Even though retention ponds are a discouraged practice, Rick Adams permitted Rockwool to use large retention and wet ponds on karst terrain. (T1, Pgs. 250-251)
- As of the first day of the evidentiary hearing in October, 2021, 22 sinkholes had formed at the Rockwool site. (T1, Pg. 230)

In sum, the EQB ignored the undisputed evidence that the DEP did not consider the appropriateness of siting a heavy industrial facility in vulnerable karst hydrogeology, or the adequacy of any planned mitigating measures. Instead, the EQB relied upon evidence offered during the hearing, but never considered by the DEP at the time of siting, that in 2017 Rockwool sought the work of a consultant company, Specialized Engineering, Inc., to consider the risks of construction in karst, and decided that was adequate to meet the rule. (INT Ex.05) This conclusion about the facts is so flawed as to be clearly erroneous, arbitrary and capricious.

The Specialized Engineering Report, prepared in 2017, and *never submitted to or reviewed by* the DEP, did not address whether siting of Rockwool was appropriate given the vulnerable conditions of karst. The Report itself repeatedly cautions that it should not be relied

upon before construction planning, and construction and design decisions should not be based on the report. (INT-Ex.05)

There was no evidence offered that the DEP ever considered any information about the risks or mitigation of siting the facility in karst. Specifically, the testimony and exhibits confirm that Rockwool was sited and constructed on a well-developed karst aquifer with potential for sinkhole development and groundwater contamination. The expert testimony of Dr. Chris Groves confirmed the vulnerability of the karst geology under Rockwool's facility, including its ponds and facilities, and that a DEP assessment should have been carried out in time for the DEP to have considered the adequacy of the siting or adequate compensatory measures. To cite some of his relevant testimony:

- Dr. Chris Groves, expert witness for Appellants, was certified as an expert professional geologist with an emphasis on karst landscapes and aquifers and reached all his opinions to a reasonable degree of scientific certainty. (T1, Pgs. 54, 123)
- Dr. Groves testified, and it is un rebutted, that Rockwool sits on well-developed karst aquifer with potential for sinkhole development and structural collapse, that the site "is very highly vulnerable to contamination," and that the consequences of a contaminant release would include both human impacts and ecological impacts. (T1, Pgs. 68-69, 113)
- Dr. Groves testified that if there was contaminate release from the Rockwool site, it is impossible to know where the release will flow as the radial flow pattern from the site could impact the Potomac River, Shenandoah River, Opequon Creek, and groundwater in these same areas. The best method that can be used to determine the likely endpoints for contamination is dye tracing. (T1, Pgs. 90, 101-103)
- Dr. Groves reviewed Rockwool's groundwater protection plans and opined that both Rockwool's and the WVDEP's review of the same as related to karst was  *cursory*. (T1, Pgs. 110-112) (emphasis added)
- Dr. Groves testified that a sufficient hydrogeologic investigation of the Rockwool site has not been performed. (T1, Pg. 120)
- Dr. Groves further testified that the four groundwater monitoring wells installed by Rockwool, and approved by the WVDEP, will not adequately monitor the karst groundwater system for leaks or contaminants due to the varying conduit flow patterns for the site. (Hearing Transcript Day 4 "T4", Pgs. 66-80)

- Dr. Timothy Bechtel, expert witness for Rockwool, had no issues with the opinions of Dr. Groves. (INT Ex.51-00012) As such, they remain unrebutted.

The failure of the DEP to ensure that issues arising from siting Rockwool in vulnerable karst terrain was clear error and an abuse of discretion by the DEP. The EQB sidesteps the failure of the DEP to timely meet its obligations under § 47-58-4.10 by substituting its own post-construction assessment long after the siting consideration should have occurred as required by the Rules. Further to that point, “[a]s a general rule, an administrative agency action is deemed to be “arbitrary” if it is taken without a sound basis in reason and generally without regard to the facts.” Wade Painter v. David Ballard, Warden, 237 W.Va. 502 (Sup. Ct of Appeals 2016). That is exactly what happened in this case.

**B. The EQB acted arbitrarily and capriciously when it concluded that Rockwool submitted an adequate Karst Mitigation Plan as required by the 2019 Permit.**

In further recognition of the significance of protecting the groundwater from the risks of contamination in karst, and pursuant to Section II.I.2.c of the 2019 Permit, a Karst Mitigation Plan (“KMP”) was required to be submitted by Rockwool. However, the DEP had no statutory or regulatory definition of what constitutes a KMP. In the absence of any definition, the DEP allowed Rockwool to submit something called a Sinkhole Repair Plan, and the EQB accepted it as a KMP. Of course, mitigating risks before they occur (required by the Permit) is far different than repairing the harm once it has already occurred. Yet that is what the DEP did, and what the EQB rationalized and accepted.

The issue of the KMP became a highly contested evidentiary issue at the hearing. The evidence was undisputed that the DEP staff had, in fact, developed a KMP Template, built by the Permit Reviewer staff, in response to queries by the public and permit applicants for what was supposed to be included in a KMP. And, while numerous other permit applicants submitted

KMPs that met the standards the staff promulgated, Rockwool did not. Yet, at the hearing, the DEP senior staff completely rejected the Template, and during the hearing removed it from the website and disavowed its guidance. Having completely excised the standards it was using, the EQB agreed with the DEP staff that since no standards existed, any standards would do. This enabled the EQB to conclude that the reactive Sinkhole Repair Plan qualified as a KMP, and thus Rockwool had met the requirements of a KMP. Petitioners disagree.

As the evidence established, after the 2019 Permit was issued, the DEP did not have any applicable standards to define what constitutes an acceptable KMP. In response, the DEP Staff developed a standard, issued it on its web site, and used it in reviewing and approving permits – except, the Staff did not apply it to Rockwool. Instead, it allowed Rockwool to simply submit a Sinkhole Repair Plan, and then accepted it as meeting the requirement to have a KMP.

While the standards for a KMP were issued by the DEP Staff without following a formal regulatory process, and thus DEP rejected it at the hearing as having any controlling effect, the facts clearly established that having a standard is required. And, in fact, clear standards already exist in the form of a significant piece of work called the Chesapeake Bay Bulletin (the “Bulletin”), which sets out recommendations and warnings about construction in karst and the risks to groundwater. Both experts testified that it was the best, and only, guidelines for what measures should be followed when constructing in karst.

However, once it abandoned the previously published standards during the hearing, the DEP was able to change the requirements by applicant, permit reviewer, or the whims of the Agency. This allowed the “exercise of regulatory authority without defining critical terms” resulting in “an unfettered exercise of agency discretion.” This is exactly like the situation the EQB itself rejected in Scott Mandirola, Director, Division of Water and Waste Management,

West Virginia Department of Environmental Protection v. City of White Sulpher Springs and Town of Hillsboro, Civil Action No. 10-AA-132, Final Order, Kanawha County, WV, June 28, 2011.<sup>2</sup>

The record in this case clearly shows that, like the White Sulpher Springs case, the DEP's failure to "further define or rationalize critical language" allows "critical ambiguities" and would be "clearly wrong, contrary to the substantial evidence on the whole record, and founded on an irrational basis." Id.

The EQB recommended in its Final Order in the underlying case that the DEP issue standards for what constitutes a KMP; but it was only a suggestion. Petitioners believe that this Court should remand the matter to the DEP with clear directions that the DEP's actions in this matter were "arbitrary and capricious," require the DEP to issue standards for what constitutes a Karst Mitigation Plan, and ensure that Rockwool complies with such standards.

The following relevant evidence was elicited on this issue during the evidentiary hearing:

- WVDEP Director Emery testified, and it remains undisputed, that the 2019 Permit "does not reference any specific rules or regulations," that she was unaware of any rules or regulations that would provide guidance as to what should be include in an appropriate KMP (T1, Pg. 184), and that the 2019 Permit does not define a KMP. (T1, Pgs. 198-199)

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<sup>2</sup> In that case, the EQB issued a decision requiring the DEP to "establish a clear standard," for alga growth. On appeal by the DEP, the Circuit Court of Kanawha County, ruled in support of the EQB's decision that the DEP was required to define and establish standards. Notably, as in this case, in which the DEP failed to identify standards that applicants must meet in preparing a required Karst Mitigation Plan, the Court agreed with the EQB that:

"..the WVDEP was basically setting water quality standards as it went and that the WVDEP could do whatever it wanted, whenever it wanted and cite to the catchall phrases for support of its actions. ...Moreover, the EQB recognized that the WVDEP's exercise of regulatory authority without defining critical terms resulted in an unfettered exercise of agency discretion." (Citations omitted)

Mandirola, at 12.

- Andrew Parsons, permit reviewer, agreed that 'KMP' has not been defined. (INT Ex.50-00010)
- Scott Mandirola, Deputy Cabinet Secretary for the WVDEP, testified that he was unaware of any guidance that the WVDEP provides to applicants as to what should be included in a KMP. (T3, Pg. 53)
- WVDEP Director Emery confirmed that a template or guidance document is reference material for the public to use when developing information for applications. (T1, Pg. 185)
- Rick Adams agreed that templates and guidance documents, as found on the WVDEP website, help permittees determine what to submit in their applications. (T1, Pgs. 206-207)
- Deputy Mandirola agreed that templates are guidance documents for the public to determine what needs to go into their applications. [Hearing Transcript Day 3 ("T3"), Pg. 42]
- Deputy Mandirola confirmed that if a form is uploaded to the ESS, it would have to be approved. (T3, Pg. 48)
- The Karst Guideline Documents were not only used by the permit reviewers, but also shared by a geologist in the Groundwater Protection Program of the DWWM with other entities outside of the WVDEP. (CR P2272)
- The KMP Template was incorporated, word for word, from the template that was published on the DEP website (APP Ex.93) to the Electronic Submission System (ESS) application form as GPP: Section J. (APP Ex.137)
- Following the first two days of the evidentiary hearing in December 2020, Section (a) and (b) were removed from ESS Section J: GPP Section J. [App Ex.93] The removed Sections had stated:

(a) "The preliminary and detailed site investigation(s) shall be completed as noted in the latest version of the Chesapeake Stormwater Network Technical Bulletin No. 1, "Stormwater Design Guidelines for Karst Terrain in the Chesapeake Bay Watershed". This should be considered the minimum requirement in applicable to all karst areas in West Virginia.

(b) "All necessary site investigations, as noted in the above-referenced Bulletin shall be completed by a qualified professional engineer or geologist, licensed by the State of West Virginia and experienced working in Karst Terrain.



After the mid-hearing removal, the only remaining section left was section (c) regarding sinkhole mitigation. (*Compare* APP Ex.137 to Ex.138)

- Rick Adams testified that that the KMP Template (APP Ex.93) is a template for preparing a Groundwater Protection Plan and help guide applicants as to what needs to be in the application. [Hearing Transcript Day 2 ("T2"), Pgs. 75-76]
- Yogesh Patel, Assistant Director for the WVDEP's Division of Water and Waste Management, testified that he had never seen the KMP Template (APP Ex.93) before the hearing. (T2, Pgs. 161-162)
- However, in the Response to Public Comment on the 2019 Permit, signed by Acting Director Emery on January 10, 2019, the DEP committed to provide a template (*See* APP Ex.93) when it stated: "DEP RESPONSE 43: A form on which to submit the elements of the GPP will be provided on the Electronic Submission System application for coverage under this general permit." (App Ex.97-2767)
- Larry Board testified that he created the KMP Template (APP Ex.93) for use as a template for a groundwater protection plan. (INT Ex.49, Pgs. 45-46) He did this because he was "getting a lot of phone calls from permittees and consultants wanting to know if we had any type of guidance document that they could refer to and that they could use and we did not." (INT Ex.49, Pg. 47) He stated that he sent the draft template to Rick Adams, Andy Parsons and Jackie Peterson and the "feedback from everybody was it looked good." (INT Ex.49, Pg. 49)
- Larry Board modified the KMP Template (APP Ex.93) and referenced the Bulletin as a "good plan" for karst mitigation. (INT Ex.49, Pg. 57) In fact, he was unable to identify any other resource for karst mitigation. (INT Ex.49, Pgs. 57-58). He further requested that both the KMP Template and Bulletin be uploaded to the WVDEP website. (CR P2395) These documents were indeed posted on the WVDEP website and made available to the public. (INT Ex.49B-00001)
- Larry Board testified that the karst mitigation techniques as set forth in the KMP Template and Bulletin are only "suggestions." (INT Ex.49, Pg. 62)
- Andrew Parsons, permit reviewer, testified that he uses the documents on the DEP website (the KMP Template and Bulletin) to help evaluate karst mitigation. (INT Ex.50-00005, 00010) He clearly stated that if an applicant has any questions about the required plans, he has directed them to the WVDEP website. (INT Ex.50-00006) Indeed, Mr. Parsons has directly referred applicants to the KMP Template that was posted on the WVDEP website. (Ex.50-00014)
- Rick Adams testified that the templates and guidance documents, as found on the WVDEP website, would comport with the applicable regulations and General Permit requirements, with only "slight differences." (T1, Pg. 207)

- Rick Adams testified that the [Chesapeake Bay] Bulletin, which he had reviewed prior to reviewing Rockwool's 2019 Registration application, "goes over the cautions that needs to be employed when constructing it -- inside the Chesapeake Bay watershed especially in karst terrain." (T1, Pg. 209) However, he further testified that he did not use the Bulletin directly as part of his review of Rockwool's 2019 application. (T1, Pg. 222)
- Andrew Parsons testified that he considers the Bulletin as guideline for an applicant to use in preparing its KMP. (INT Ex.50-00006) Mr. Parsons could not identify other resources for evaluating karst mitigation (Id.)
- Dr. Tim Bechtel, *expert witness for Rockwool*, testified about the Bulletin as follows:
 

"This is pretty much the best document. It's got the best management practices for doing construction in karst areas. That was written by a number of karst experts, some of them serving on the Karst Commission, and it's really the - it's the best - current state of art. You know, science changes all the time...But certainly, those are the best practices - that outlines the best practices for projects in karst terrain." (INT Ex.51-00011) (emphasis added)
- Indeed, the WVDEP referenced the Bulletin in providing comments to Rockwool's 2019 Registration application, specifically stating as follows: "Revise sediment pond specifications to comply with the Chesapeake Stormwater Network Technical Bulletin No. 1, "Stormwater Design Guidelines for Karst Terrain in the Chesapeake Bay Watershed..." (CR P 659)
- James Hemme, P.E., consultant for Rockwool, used the Bulletin as a guidance document for Rockwool's Registration applications. (CR P2251)
- Both the Bulletin and the KMP Template were included by the WVDEP in the certified record for this case, suggesting that they were used as reference documents. (CR P2272)
- Rick Adams, the primary Permit Reviewer on the Rockwool applications, had "little experience" in karst mitigation in 2017 and gained his experience by reading other KMPs and conducting "self-research." He had not taken any classes on karst mitigation but did consult with "a couple of geologists." (T1, Pgs. 220-221).
- Larry Board testified that he learned about karst by reading the USGS website. (INTEx.49, Pg. 23) He stated the WVDEP has not offered any classes or other training on karst mitigation. Besides his own internet research, he had no other training in karst mitigation. (INT Ex.49 Pg. 24)
- Andrew Parsons testified that he was offered no training or classes on karst mitigation. (INT Ex.50-00005)

- When asked how the WVDEP ensures that permit reviews are consistent throughout the State, Andrew Parsons stated: "I can't answer. I don't know. I don't know how they do it." (INT Ex.50-00013)
- Larry Board testified that permit reviewers "use their own professional judgment when they're doing a review." (INT Ex.49, Pg. 33) He stated that "each one has their own styled of review and they have their own professional judgment and I do not re-review their applications." (INT Ex.49, Pg. 41)
- Deputy Mandirola testified that is important for permits to be reviewed and approved in a consistent manner. (T3, Pg. 45)
- Deputy Mandirola stated that is it the policy of the WVDEP that all applications and applicants are held to the same standard by "putting policies in place through the appropriate channels that are used across the agency." (T3, Pgs. 57-58)
- Andrew Parsons was asked if it would be helpful for permit reviewers to have a definition of what a karst mitigation plan is. He responded as follows: "I think there might be some guidance perhaps for all reviewers because sometimes we use. Again, we have three primary reviewers, but sometimes other people help out if we get inundated with permits. So, it would probably help everybody if we had some type of agreement, definition, instruction on that." (INT Ex.50-00013)
- Regarding the KMP Template (APP Ex.93-Section J), when asked if he considered the location of underground utilities in relation to karst features, Rick Adams could not recall. (T2, Pg. 78)
- Regarding the KMP Template (APP Ex.93-Section J), when asked if he considered the application prohibition of fertilizers, pesticides, or chemicals within 100 feet of a sinkhole, Rick Adams could not recall. (T2, Pgs. 78-79)
- Regarding the KMP Template (APP Ex.93-Section J), when asked if he considered the immediate stabilization of disturbed soil, Rick Adams could not recall. (T2, Pg. 79)
- Regarding the KMP Template (APP Ex.93-Section J), when asked if he required the submission of at least on subsurface cross section, Rick Adams could not recall. (T2, Pg. 79)
- Regarding the KMP Template (APP Ex.93-Section J), when asked if he considered the protection of natural karst swales, Rick Adams could not recall. (T2, Pg. 79)

As stated above, during the hearing, the DEP abandoned the KMP Template that it had provided to other permittees on what constitutes an adequate KMP. No explanation was offered

for this curious step, which deleted the only standards that seemed to exist. The DEP further disregard the Bulletin, as outlined herein above.

In order to effect such a change in position and past practice, an agency must justify its departure from its own prior precedent by providing a “reasoned analysis.” Ramaprakash v. FAA, 346 F.3d 1121, 1124–25 (D.C. Cir. 2003). *See also* Friedman v. Sebelius, 686 F.3d 813, 828 (D.C. Cir. 2012) (agency decision arbitrary and capricious because “it failed to explain its departure from the agency’s own precedents”). That in turn “necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent.” *See* Dillmon v. Nat’l Transp. Safety Bd., 588 F.3d 1085, 1089–90 (D.C. Cir. 2009).

The DEP’s explanation for disavowing the KMP Template and Bulletin are pre-text or without merit. It did not provide an adequate explanation for its actions in removing the KMP Template from the Electronic Submission System (“ESS”) mid-way through the hearing. This is particularly odd because the DEP’s specific responses to public comments indicated that a KMP template would be provided on the website. The KMP Template had been posted and used by other permittees and permit reviewers for over a year before the hearing. The DEP did not argue that its contents were inappropriate or wrong, or otherwise provide any other reasoned basis for ignoring such guidance.

The DEP also acted inconsistently when implementing the KMP requirement. It required some permittees constructing on karst sites to have and use KMPs consistent with the guidance documents posted on its website. With respect to Rockwool however, the permit reviewer insisted that such guidance was not applicable and only required a responsive sinkhole repair plan after sinkholes had developed. The DEP never articulated a reasonable basis for this inconsistent regulatory action.

The evidence at the hearing, and summarized above, confirm that the KMP Template was created by Larry Board, supervisor of permit reviewers, reviewed with his peers and other permit reviewers, posted on the DEP website, and offered to applicants for guidance on preparing KMPs. The Bulletin was posted on the DEP website as the primary guidance document, used by permit reviewers for over a year, cited to by Rockwool's personnel, and referenced as a leading authority on karst mitigation by Dr. Bechtel, expert witness for Rockwool. Both the KMP Template and Bulletin require an applicant to consider not only sinkhole repair, but many other factors important for karst mitigation, including but not limited to adequate site investigations, facility siting, use of basins and the avoidance of large-scale infiltration.<sup>3</sup>

The evidence produced by Petitioners further demonstrated, and the DEP did not rebut, that Rockwool failed to adequately protect the groundwater during its construction phase. Rockwool did not conduct adequate site investigations for the purpose of karst mitigation. Rockwool did not follow the existing KMP Template, or take actions consistent with the recommendations of the Bulletin. Rockwool had unlined ponds for well over one year during construction. In fact, as the evidence established, Rockwool employed many measures that are prohibited or discouraged by the Bulletin, including the use of basins and large-scale infiltration.

Based upon a full review of the hearing, Petitioners provided substantial evidence that the DEP did not comply with the statutory and regulatory requirements in considering Rockwool's 2019 Registration application, and failed to act in accordance with those requirements to ensure the protection of the groundwater during construction in vulnerable karst hydrogeology. The

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<sup>3</sup> Rick Adams testified believes water infiltration from the surface is "good" in that "it feeds the groundwater system," but had no understanding as to the impacts of large-scale infiltration above karst. (T1, Pgs. 249-260) He also approved a dewatering technique for the rainwater reuse pond. This dewatering technique emptied into the nearest natural drain. (T1, Pgs. 243-244, CR P2355-2356, P2352-P2354, P2181-P2183)

failure of the DEP to do so is arbitrary and capricious in multiple ways as noted above, and is likely to continue to repeat itself in other permit applications..

It is highly instructive how the U.S. Supreme Court has interpreted the term “arbitrary and capricious” under the federal equivalent of the State Administrative Procedures Act. According to the Supreme Court, a court must evaluate whether the agency “considered the relevant factors and articulated a rational connection between the facts found and the choice made.” Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 105 (1983) (citing Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281 (1974) at 285–86). An agency must “examine the relevant data and articulate a satisfactory explanation for its action.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The Supreme Court also advises that courts should overturn agency action where the agency has “entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency.” Id.

That the DEP did not do. Instead, it abandoned its own working karst mitigation standards that existed, and were routinely required of other applicants, and approved Rockwool’s Registration even in light of the sinkhole development. It took no actions, such as requiring dye testing, to determine the path of groundwater contamination, and did not require any other mitigating measures that exist and are recognized as best management practices. The EQB ignored all of these facts, acknowledged that the DEP had no standards, and accepted the flawed trial testimony of Dr. Bechtel on one mitigating measure as satisfactory to substitute for that required by the rules and permit.

**II. The EQB erred by making clearly wrong factual findings in light of reliable, probative and substantial evidence set forth on the record.**

The EQB erred by making several clearly wrong factual findings despite clear and

reliable contrary evidence. More specifically, and as set forth in the Final Order:

- Paragraph 16 concludes as follows: “[t]he same was true for a roadway that ROCKWOOL had not disturbed or planned to disturb.” Rockwool did disturb the access roadway, as confirmed by the following:
  - Rick Adams confirmed that “any access roads” should be included in the LOD. (APP Ex.83, Pg.41, Lines 11-19) There are at least three access roads that Rockwool used for construction purposes, but Rockwool did not include any of them in its LOD calculations. (T2, Pgs. 91-92) (APP Ex.18-0587, 0588, 0591, APP Ex.48-1843, CR P2325-P2327, scandisk)
  - No comment was made, or correction requested by Rick Adams for Rockwool to include the construction access roads referenced in Paragraph #169 in the LOD in 2017 or 2019. These roads were not covered by any other NPDES permit at the time Rockwool employed them. (CR P571)
- Paragraph 19 concludes as follows: “...certain modifications could require public notice under § C.11. C.R. 730. DEP's Modification Guidance Policy (the "Modification Policy") identifies four circumstances where a modification could trigger public notice: (a) increases or decreases to the LOD of more than one-half acre; (b) redesign, removal, or addition of sediment basins or permanent stormwater ponds; (c) changes to the grading plan or project activity that would require redesign of sediment basins or stormwater ponds; or (d) other specific circumstances, such as administrative compliance orders or legal action, that would make documentation important. C.R. 2235-2236. None of those four circumstances applied to the submission of ROCKWOOL's Supplemental Sinkhole Repair Plan in October 2018.” Rockwool did redesign the stormwater ponds in 2018 as confirmed by a comparison of the Rainwater Reuse Pond design in the 2017 maps of post development site map (CR P779 and P780) and cite package (CR P1300 and P1315) vs the 2018 site package (CR P663 and CR P681) and 2019 cite package (CR P1604 and P1622) clearly the design of the pond was changed between 2017 application and the fall

of 2018. A major modification should have been required in 2018 when the Pond design was changed.

- Paragraph 21 concludes “Specialized Engineering to perform soil test borings, air track drilling, and electrical resistivity and shear wave testing. Intervenors' Ex. 5. Dr. Timothy Bechtel testified that these investigations provide information regarding subsurface voids and are considered to be best practices in karst. Bechtel Dep. Tr. 35:12-35:20,46:23-47:3 & 59:15-59:20.” These studies were not focused on the stormwater system. In the Specialty Engineering Report, it shows that the bore holes, air track drilling, SE resistivity survey, and shear wave testing investigation were all focused on the building locations and not the stormwater system. (Intervenors EX05 00036, 00037, and 00105) The studies that were done in the area of the stormwater system revealed large voids (40 feet void under the Rainwater for Reuse Pond) (Intervenors EX05 00092). No design changes were made following this information. The CSN Bulletin specifically suggests that ponds be moved away from such karst features. It states: Sediment traps and basins should only be used as a last resort after all other erosion and sediment control options have been considered and rejected. In the rare instance they are employed they should serve small drainage areas (2 acres or less) and be located away from known karst features. (Appellant Ex10 JCF TE 0263 emphasis added).
- Paragraph 22 concludes that the liner system for the permanent ponds represents the standards recommended by the Chesapeake Stormwater Network Bulletin No. 1 (the "CSN Bulletin") plus two additional factors of safety. BechtelDep.Tr.60:16-60:23&Day2Hr'g Tr. 57:12-57:17.” This is not the standard represented by the Bulletin. The standard is that there should not be ponds, they are “discouraged,” and no large-scale



infiltration it is “prohibited.” Rockwool has both. No testimony supported these actions, and the EQB ignored the issue.

- Paragraph 38 concludes that Larry Board "did not inform the permit reviewers." Board Dep. Tr. 117:15-117:17. He did not inform industry, environmental, consulting, or academic organizations. Board Dep. Tr. 117:19-118:20. He also did not inform current permittees. Board Dep. Tr. 118:13-118:14. As Board testified, the only way someone would have known that the GPP Template existed is if they had been specifically informed or had stumbled upon it on the DEP website. Board Dep. Tr.117:24-118:4." Larry Board did notify the permit reviewers and asked for their input. He also notified industry in the response to comments and his supervisors should have known from this too.
- Paragraph 41 concludes “Larry Board, who prepared the GPP Template cited by the Appellants as the standard for a Karst Mitigation Plan, testified that his purpose in referencing the CSN Bulletin in that document was to direct applicants to review and understand it.” The Template actually directs them to follow it as a “minimum standard.”
- Paragraph 59 discusses pond liners. The ponds are not the only place where infiltration happens, and the pond liners do not exceed the recommendations as set forth in the Bulletin.

**III. The EQB erred by making factual findings related to issues predating the 2019 Reissuance Application despite concluding that it lacked jurisdiction over the Appellants’ specific objections directed to acts or omissions predating the 2019 Reissuance Application.**

In its Final Order, the EQB concluded that it lacked jurisdiction over the Appellants’ specific objections directed to acts or omissions predating the 2019 Reissuance Application. The Board determined that it “cannot review any alleged acts or omissions associated with the

registration under the 2012 General Permit, nor can the Board grant relief based on permit terms and conditions that have been superseded by the 2019 General Permit.” (Final Order, Pg. 24, Par. 54)

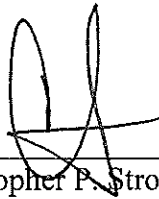
Although the Petitioners take issue with this determination, they are not appealing the same. However, Petitioners do contend that it was therefore inappropriate for the Board to make any factual findings as related to acts or omission predating the 2019 Reissuance Application. Specifically, and as set forth in Paragraph Nos. 13, 14, 15, 16, 17, 18 and 19, the Board made several factual findings that may be improperly cited as having some precedential effect. Petitioners believe that these findings of fact should be stricken from the Final Order.

**Conclusion and Request for Relief**

For all the reasons asserted herein, as well as additional argument and facts contained in the record, to be submitted in further briefing and argument, the Petitioners seek a ruling to overturn the decision of the EQB and remand the matter to the DEP for actions consistent with the law and requirements of the Permit.

Respectfully submitted,

**APPELLANTS**  
**By Counsel**



---

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

JEFFERSON COUNTY FOUNDATION, INC.,  
CHRISTINE WIMER, KAREN MICHELLE FREER and  
GAVIN PERRY,

*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

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

*Intervenor-Appellee.*

**DESIGNATION OF THE RECORD**

Pursuant to Rule 4 of the Rules for Administrative Appeals, the Appellants hereby designate the entire record in this matter, including the complete certified record, the hearing transcript and all admitted Exhibits.



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Respectfully submitted,

**APPELLANTS**  
**By Counsel**

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

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*Appellee,*

and

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

*Intervenor-Appellee.*

**CERTIFICATE OF SERVICE**

I, Christopher P. Stroeck, Esq., counsel for Petitioner, do hereby certify that I have served a true copy of the foregoing PETITION FOR APPEAL, ADMINISTRATIVE APPEALS DOCKETING STATEMENT AND DESIGNATION OF THE RECORD upon the following parties via U.S. Mail, Certified Mail – Return Receipt Requested, this 2<sup>nd</sup> day of December, 2021:

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A handwritten signature in blue ink, appearing to be 'C. Stoeck', written over a horizontal line.

Christopher P. Stoeck, Esq.

In the Circuit Court of JEFFERSON 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 27, 2021 - Received by Appellants NOVEMBER 2, 2021

Date of filing of petition for appeal: DECEMBER 2, 2021

**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. Petitioner Wimer resides at 3546 Old Leetown Pike, Ranson, West Virginia, 25438

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? \_\_\_\_\_

**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).

\*PLEASE SEE ATTACHED.

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).

\*PLEASE SEE ATTACHED.

**CASE MANAGEMENT INFORMATION**

Name of Party filing this appeal (Petitioner): JEFFERSON COUNTY FOUNDATION, INC., CHRISTINE 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: 12/2/21

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:**

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA**

**JEFFERSON COUNTY FOUNDATION, INC.,  
CHRISTINE WIMER, KAREN MICHELLE FREER and  
GAVIN PERRY,**

*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

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

*Intervenor-Appellee.*



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

Petitioners, the Jefferson County Foundation, Inc., Christine L. Wimer, Karen Michelle Freer and Gavin Perry, by counsel, Christopher P. Stroeck, Esq., hereby file this appeal from the October 27, 2021 Final Order of the West Virginia Environmental Quality Board ("EQB") in Appeal No. 20-02-EQB, in accordance with all applicable law. The Appellants received the Final Order on November 2, 2021, and a copy is attached to this Petition.

Petitioners file this appeal, challenging both issues of fact and law as follows:

- I. The EQB acted arbitrary and capricious when it concluded that Rockwool adequately addressed the issues arising from locating in areas of karst pursuant to §47 CSR 58-4.10 and submitted an adequate Karst Mitigation Plan ("KMP") as required by the 2019 Permit.
- II. The EQB erred by making clearly wrong factual findings in light of reliable, probative and substantial evidence as set forth on the record.
- III. The EQB erred by making factual findings related to issues predating the 2019 Reissuance Application despite concluding that it lacked jurisdiction over the Appellants' specific objections directed to acts or omissions predating the 2019 Reissuance Application.

Petitioners seek a ruling to overturn the decision of the EQB and remand the matter to the DEP for actions consistent with the law and requirements of the Permit.

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1/20/21 11:44

**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.**

**FINAL ORDER**

The West Virginia Department of Environmental Protection (“DEP”) is charged with enforcing the State Water Pollution Control Act. See W. Va. Code § 22-11-1 *et seq.* As part of that charge, the DEP administers National Pollution Discharge Elimination System Water Pollution Control Construction General Permit No. WV 0115924, which is also known as the construction stormwater general permit. The current version of that permit, the 2019 General Permit referenced above, was issued on January 10, 2019.

This matter arises from a timely appeal filed by the Jefferson County Foundation, Inc., Christine Wimer, Karen Michelle Freer, and Gavin Perry (the “Appellants”) challenging the DEP’s reissuance of ROCKWOOL’S registration authorizing it to discharge stormwater associated with construction activities under the 2019 General Permit. At the time of the

reissuance ROCKWOOL was building a mineral wool manufacturing facility (“RAN-5”) in Jefferson County West Virginia.

Appellants allege that stormwater controls at the RAN-5 facility did not sufficiently account for karst terrain. Appellants further allege they had been denied the chance to raise this objection earlier, with the initial registration under the 2012 edition of the General Permit.

A quorum of the Board heard evidence<sup>1</sup> over four days between December and March 2021, from the following witnesses:

**JCF et al. – Appellants**

- 1) Doctor Christopher Groves – Expert, Geology & Karst Terrain & Aquifers
- 2) Kathryn D. Emery – Director, DEP Division of Water and Waste Management
- 3) Rick Adams – Technical Analyst, Division of Water and Waste Management
- 4) Travis Hays – DEP Inspector
- 5) Tommy George – DEP Inspector
- 6) Yogesh Patel – Assistant Director of Permitting, Division of Water and Waste Management

**DEP – Appellee**

The Board having granted latitude in cross-examination of Appellant witnesses Ms. Emery, Mr. Adams, Mr. Hays, Mr. George, and Mr. Patel, all DEP employees, DEP declined to recall them as witnesses.

**ROCKWOOL – Intervenor**

- 1) Scott G. Mandirola – Deputy Cabinet Secretary of External Affairs and former Director, Division of Water and Waste Management
- 2) Larry Board – DEP Environmental Regional Program Manager for Stormwater Permitting.
- 3) Doctor Timothy Bechtel – Expert, Karst Hydrology, Sinkholes, and Best Management Practices
- 4) Peter Regenberg – Vice President of US Operations for ROCKWOOL

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<sup>1</sup> The parties also submitted video evidentiary depositions of witnesses.

### **Appellant's Rebuttal**

- 1) Dr. Christopher Groves [Expert]
- 2) Andrew Parsons, DEP Permit Reviewer

At the conclusion of the evidentiary hearing the parties were directed to submit proposed findings of fact and conclusions of law and reply briefs. After consideration of the proposed findings and conclusions, reply briefs, the evidence of record, expert testimony and arguments of counsel,<sup>2</sup> the Board hereby denies the appeal and finds the DEP acted lawfully when it reissued Rockwool's registration under the 2019 General Permit. The Board further finds Rockwool's stormwater controls sufficiently accounted for karst terrain and that best management practices were in place. According the appeal is dismissed from the docket.

At the heart of this case is whether ROCKWOOL submitted a sufficient karst mitigation plan with its application for reissuance under the 2019 General Permit. The evidence presented shows ROCKWOOL submitted a document that the DEP considers to be a karst mitigation plan. The DEP permit reviewer, directed ROCKWOOL to submit its Supplemental Sinkhole Repair Plan as its karst mitigation plan for this site, and ROCKWOOL did as directed. The question instead is whether a sinkhole mitigation plan meets the standards for a karst mitigation plan. There is no statutory or regulatory definition to guide the Board, and the so-called GPP Template (Appellants' Exhibit 93) is not a statute, regulation, or official DEP guidance. Moreover, the

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<sup>2</sup> All argument of counsel, proposed findings of fact and conclusions of law have been considered and reviewed with reference to the evidentiary record before the Board, as well as applicable law. To the extent that the proposed findings of fact, conclusions of law and arguments advanced by the parties are in accordance with these findings of fact, conclusions and legal analysis of the Board and are supported by the evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions, and arguments are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credible.

DEP requires industrial facilities to consider karst under W. Va. Code R. §47-58-4.10, and ROCKWOOL met that obligation here by undertaking a number of karst-specific measures for site investigation and design. The Appellants failed to show that the measures that ROCKWOOL took will not prevent contaminants from infiltrating into the groundwater.

The Board is guided in part by testimony from Dr. Christopher Groves and Dr. Timothy Bechtel, two karst experts who both emphasized the importance of sinkhole prevention and mitigation to protecting groundwater in karst. The Board accordingly finds that the sinkhole mitigation plan at the ROCKWOOL site, as a karst mitigation plan, meets statutory or regulatory requirements. Any remaining objections predate the reissuance application on appeal here and fall outside the Board's jurisdiction. The Board therefore affirms. The Board, however, does recommend that the DEP review its stormwater construction permitting process as it relates to karst terrain, in that the DEP should develop official guidance for what may qualify as a Karst Mitigation Plan.

#### **FINDINGS OF FACT**

##### **A. The Construction General Permitting Program**

1. As part of its responsibility for administering the State Water Pollution Control Act, W. Va. Code § 22-11-1 *et seq.* (the "State WPCA"), and the State Groundwater Protection Act, W. Va. Code § 22-12-1 *et seq.* (the "State GPA"), the DEP has issued National Pollutant Discharge Elimination System Water Pollution Control Construction General Permit No. WV0115924 ("General Permit No. WV0115924") to regulate stormwater associated with construction activity.

2. The 2019 General Permit is the current version of General Permit No. WV0115924. It was issued on January 10, 2019, with a stated effective date of February 9, 2019. C.R. 2071.<sup>3</sup> That effective date was continued to June 28, 2019, as part of an appeal in *West Virginia Manufacturers Association et al. v. Director, Division of Water & Waste Management*, Appeal Nos. 19-03-EQB & 19-04-EQB.

3. Before the 2019 General Permit took effect, the operative version of General Permit No. WV0115924 was the 2012 General Permit, which had been issued on December 5, 2012, with an effective date of January 4, 2013. C.R. 726. The 2012 General Permit was extended several times, with its last extension deferring its expiration until March 31, 2019. See January 1, 2019, Letter from Harold D. Ward to Permittees, *available at* <https://bit.ly/3dZVazU> (last accessed Apr. 28, 2021).

#### **B. ROCKWOOL's Permitting History**

4. On July 31, 2017, ROCKWOOL submitted an application for registration under the 2012 General Permit (the "2017 Registration Application"). C.R. 750.

5. The DEP approved ROCKWOOL's 2017 Registration Application on October 19, 2017. C.R. 750.

6. On June 21, 2019, ROCKWOOL submitted an application for reissuance under the new 2019 General Permit (the "2019 Reissuance Application"). C.R. 1348.

7. The DEP submitted the 2019 Reissuance Application to public comment on September 18, 2019, and to public hearing on October 23, 2019. C.R. 1985. The DEP received

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<sup>3</sup> All citations to the Certified Record are to the Second Supplemental Certified Record submitted on February 12, 2021.

573 written comments and an additional 47 spoken comments during the public hearing. C.R. 1986.

8. The DEP approved ROCKWOOL's 2019 Reissuance Application on February 25, 2020. C.R. 1346. It issued a written response to the public comments that same day. *See* C.R. 1985.

#### **C. Notice of Appeal and Specific Objections**

9. On March 26, 2020, the Appellants filed a Notice of Appeal from the DEP's approval of ROCKWOOL's 2019 Reissuance Application. C.R. 2.

10. The Notice of Appeal raised specific objections in two general categories. In the first category, the Appellants alleged the DEP should have required public notice and comment earlier than September 2019 because (a) the true limits of disturbance ("LOD") in the 2017 Registration Application exceeded 100 acres, (b) the addition of a sinkhole mitigation plan in October 2018 was a major modification, and (c) construction activity exceeded one year in October 2018. C.R. 11-12. In the second category, the Appellants alleged that both applications allowed for inappropriate stormwater controls in karst terrain with potential harm. *Id.*

#### **D. Evidentiary Hearing**

11. The evidentiary hearing served to narrow the issues from the specific objections set forth in the Appellants' Notice of Appeal. All parties are now in general agreement that this appeal turns on the answer to two questions: (1) Was ROCKWOOL required to submit a karst mitigation plan as part of its 2019 Reissuance Application? And (2) Did ROCKWOOL submit a karst mitigation plan as part of its 2019 Reissuance Application? The Board nonetheless



discusses below specific objections from the Appellants' Notice of Appeal that predate the 2019 Reissuance Application.

**E. Relevant Testimony**

**1. Pre-2019 Reissuance Application**

12. The Appellants' Notice of Appeal raised two types of specific objections pertaining to ROCKWOOL's 2017 Registration Application. First, the Appellants alleged that DEP allowed ROCKWOOL to avoid public notice and comment for that application by approving inaccurate information about the limits of disturbance and grading timeline and allowing the submission of a Supplemental Sinkhole Repair Plan without a major modification. C.R. 11-12. And second, the Appellants alleged that the DEP did not give proper attention to the construction activities' location in karst. *Id.*

**a. Public Notice and Comment**

13. All parties agree that ROCKWOOL's 2017 Registration Application was not submitted for public notice and comment.

14. Under § G.4.b.5 of the 2012 General Permit, which was in effect when the 2017 Registration Application was submitted, public notice and comment was required if any one of three circumstances was met: (a) the project was expected to discharge to Tier 3 waters; (b) the project was expected to disturb 100 or more acres; or (c) the project's grading phase of construction was expected to last for more than one year. C.R. 740. Only the second two circumstances were at issue here.

15. In instructions for applicants using the agency's Electronic Submission System ("ESS"), the DEP directed applicants to calculate the LOD by "[including] ALL disturbed areas

directly related to construction of the entire project (offsite borrow areas, offsite waste sites, access roads, utility installation, sediment controls etc.).” Appellants’ Ex. 17. The DEP also directed applicants in those same instructions to check the box for public comment “[i]f the **major phase of grading will last for 1 year or longer.**” Intervenor’s Ex. 15 (emphasis added).

16. ROCKWOOL’s 2017 Registration Application identified 98.8 acres as the LOD. C.R. 753. Rick Adams testified that he had no reason to believe that this LOD was inaccurate. Day 1 Hr’g Tr. 245:23-246:1. He also testified that utility lines connecting to ROCKWOOL’s facility were covered by a separate registration under the DEP’s construction stormwater permitting program, meaning that they did not need to be considered in the LOD. Day 1 Hr’g Tr. 246:5-246:11. The same was true for a roadway that ROCKWOOL had not disturbed or planned to disturb. Day 2 Hr’g Tr. 100:4-100:17. ROCKWOOL was never issued a notice of violation for exceeding its approved LOD. Day 2 Hr’g Tr. 50:4-50:7.

17. Peter Regenberg testified that the major phase of grading at the RAN-5 facility was completed between an approximately 10-11 month period starting in October or November 2017 and ending in September 2018. Day 4 Hr’g Tr. 21:12-21:14 & 22:2-22:11. It was during that period that ROCKWOOL prepared the site to become “pad-ready” for construction. Day 4 Hr’g Tr. 21:15-21:22. ROCKWOOL was never issued a notice of violation associated with its timeline for grading activity. Day 2 Hr’g Tr. 38:12-38:15.

18. Rick Adams testified that nothing in the 2012 General Permit tied permit coverage to the timeline of grading activity; the registration issued to ROCKWOOL under the 2012 General Permit spanned the entire period for which that permit was effective. Day 2 Hr’g

Tr. 42:9-42:12 & 44:6-44:8. Adams similarly testified that violation of a permit condition does not terminate coverage. Day 2 Hr'g Tr. 23:22-23:24.

19. In addition to the grounds for public notice under § G.4.b.5 of the 2012 General Permit, certain modifications could require public notice under § C.11. C.R. 730. DEP's Modification Guidance Policy (the "Modification Policy") identifies four circumstances where a modification could trigger public notice: (a) increases or decreases to the LOD of more than one-half acre; (b) redesign, removal, or addition of sediment basins or permanent stormwater ponds; (c) changes to the grading plan or project activity that would require redesign of sediment basins or stormwater ponds; or (d) other specific circumstances, such as administrative compliance orders or legal action, that would make documentation important. C.R. 2235-2236. None of those four circumstances applied to the submission of ROCKWOOL's Supplemental Sinkhole Repair Plan in October 2018. *See, e.g.*, C.R. 2220. Rick Adams also testified that it is common to perform redline modifications to Stormwater Pollution Plans. Day 2 Hr'g Tr. 48:16-48:21.

**b. Consideration of Karst**

20. All parties agree that the 2012 General Permit did not require applicants to submit a Karst Mitigation Plan. *See, e.g.*, Day 1 Hr'g Tr. 215-5:-215:6 & Board Dep. Tr. 25:5-25:9. The 2012 General Permit also did not require applicants to submit a Groundwater Protection Plan, although its preparation was required under § G.4. C.R. 739.

21. Before starting construction, ROCKWOOL retained Specialized Engineering to perform soil test borings, air track drilling, and electrical resistivity and shear wave testing. Intervenor's Ex. 5. Dr. Timothy Bechtel testified that these investigations provide information

about subsurface voids and are considered to be best practices in karst. Bechtel Dep. Tr. 35:12-35:20, 46:23-47:3 & 59:15-59:20.

22. Dr. Bechtel also testified about design choices ROCKWOOL made to account for karst. Its permanent rainwater reuse and stormwater ponds at RAN-5 were designed with a triple-liner system. At the top is a 60 mil high-density polyethylene ("HDPE") liner that was double-welded at the seams and then vacuum tested during installation. Bechtel Dep. Tr. 19:5-19:11. Underneath the polyethylene liner is a geosynthetic clay liner ("GCL") containing powdered bentonite that will swell and expand if a leak were to develop in the HDPE liner. Bechtel Dep. Tr. 19:12-19:20. And underneath the GCL is a high-strength geotextile mesh that supports the weight of the other liner systems and any water in the ponds. Bechtel Dep. Tr. 19:21-20:2. Dr. Bechtel and Rick Adams both testified that the ponds at RAN-5 are designed to maintain a shallow water level that minimizes head pressure and reduces the potential for leaks. Bechtel Dep. Tr. 20:9-20:19 & Day 2 Hr'g Tr. 57:18-57:24. Each also acknowledged that the liner system for these permanent ponds represents the standards recommended by the Chesapeake Stormwater Network Bulletin No. 1 (the "CSN Bulletin") plus two additional factors of safety. Bechtel Dep. Tr. 60:16-60:23 & Day 2 Hr'g Tr. 57:12-57:17.

23. Two other design choices that Dr. Bechtel identified as accounting for karst were the placement of several buildings on micropiles, which are helical rods cast in concrete through the bedrock, and the installation of a liner system under one of the production buildings. Bechtel Dep. Tr. 50:20-51:3 & 52:12-52:18. Peter Regenberg similarly testified that ROCKWOOL investigated soil and subsurface conditions at RAN-5 to ensure that it would not be placing heavy buildings on top of voids. Day 4 Hr'g Tr. 37:18-38:4.

24. Dr. Bechtel also testified about stormwater discharge and groundwater monitoring at RAN-5. He testified that ROCKWOOL had reduced discharges below predevelopment levels by reusing much of the stormwater and then directing the remainder in diffused flow to a vegetated swale. Bechtel Dep. Tr. 56:18-56:20. He also testified that ROCKWOOL had installed four groundwater monitoring wells. Bechtel Dep. Tr. 53:21-54:11. Dr. Bechtel testified that reducing and diffusing stormwater discharge are sinkhole mitigation measures in karst, and groundwater monitoring wells are a standard way to monitor groundwater impacts. Bechtel Dep. Tr. 54:16-55:1 & 56:15-56:23.

25. Dr. Christopher Groves did not offer any opinions on the stormwater controls or sinkhole mitigation measures implemented under either the 2017 Registration Application or the 2019 Reissuance Application. Day 1 Hr'g Tr. 132:8-132:16 & 138:12-138:19. Though his report notes that "there are strategies and practices that can help to mitigate these risks [from construction in karst]," he testified that these strategies and practices were outside his area of expertise. Appellants' Ex. 11 \*26 & Day 1 Hr'g Tr. 56:19-57:9. He also testified that he did not evaluate the nature of any impact from a release to the groundwater under ROCKWOOL's facility. Day 1 Hr'g Tr. 122:17-122:21. Instead, he testified that stormwater in karst can rapidly infiltrate and then flow through the groundwater, which makes karst aquifers highly vulnerable to contamination. Day 1 Hr'g Tr. 46:23-57:5 & 69:3-69:13. Dr. Groves criticized the materials submitted with ROCKWOOL's application for not having performed a literature review for karst in Jefferson County and representing an inadequate understanding of karst groundwater flow. Day 1 Hr'g Tr. 117:7-117:12 & 120:15-120:17. Dr. Groves opined that ROCKWOOL should have performed dye tracing to confirm the direction and rate of groundwater flow underneath its

facility. *See, e.g.*, Day 1 Hr'g Tr. 120:13-121:1. To the extent that Dr. Groves disagreed with Dr. Bechtel, however, it was on minor points: he believed that Dr. Bechtel had minimized the significance of certain sinkholes and had mischaracterized groundwater monitoring wells as a good, rather than standard, way for monitoring groundwater. Day 4 Hr'g Tr. 83:8-85:2.

**2. 2019 Reissuance Application**

26. The Appellants' Notice of Appeal focused its specific objections to the 2019 Reissuance Application on the attention given to the construction activities' location in karst. As noted above, the Board and the parties are now in general agreement that these are the only remaining objections and this appeal turns on two questions: (a) whether ROCKWOOL was required to submit a Karst Mitigation Plan with its 2019 Reissuance Application and (b) whether ROCKWOOL submitted a Karst Mitigation Plan with its 2019 Reissuance Application.

27. The parties also agree that ROCKWOOL's 2019 Reissuance Application was submitted for public comment and hearing. The DEP received 573 emails, and 47 of the 205 attendees at a public hearing in Shepherdstown on October 23, 2019, offered some form of spoken comment. *See* C.R. 1985-1986. The DEP responded to these comments in a February 25, 2020, letter. C.R. 1985.

**a. Whether a Karst Mitigation Plan was required with the 2019 Reissuance Application**

28. In contrast to the 2012 General Permit, which required the preparation of a Groundwater Protection Plan but not its submission, § III.1 of the 2019 General Permit requires applicants to both prepare and submit a Groundwater Protection Plan as a stand-alone document. C.R. 2092.

29. Section II.I.2.c of the 2019 General Permits provides that “[a] GPP containing a Karst Mitigation Plan shall be submitted with applications for registration under this NPDES General Permit for all areas with Karst topography.” C.R. 2092. This section is included in Part II of the 2019 General Permit, which is entitled “Pre-Construction Requirements.” C.R. 2078.

30. Kathy Emery, Yogesh Patel, Rick Adams, Larry Board, and Andrew Parsons all testified that the 2019 General Permit requires a Karst Mitigation Plan. Day 1 Hr’g Tr. 184:1-184:2 (Emery); Day 2 Hr’g Tr. 165:2-165:6 (Patel); Day 1 Hr’g Tr. 205:22-206:2 (Adams); Board Dep. Tr. 25:1-25:3 (Board); Parsons Dep. Tr. 52:24-53:3 (Parsons). Emery, however, testified that she had no role in drafting the 2019 General Permit. Day 1 Hr’g Tr. 176:16-176:17. And Patel testified that he reviewed the 2019 General Permit but did not participate in drafting it. Day 2 Hr’g Tr. 164:4-164:10.

31. Both Rick Adams and Larry Board were involved in drafting the 2019 General Permit. Day 1 Hr’g Tr. 204:17-204:20 & Board Dep. Tr. 21:21-22:2. Adams, who reviewed ROCKWOOL’s 2019 Reissuance Application, and Board, who approved it, distinguished between registration applications and reissuance applications. Adams, for instance, referred to ROCKWOOL having applied for a registration under the 2012 General Permit when it submitted its 2017 Registration Application. Day 2 Hr’g Tr. 28:15-28:16. But he referred to that registration having been reissued under the 2019 General Permit when ROCKWOOL submitted its 2019 Reissuance Application. Day 2 Hr’g Tr. 30:19-31:6. Rick Adams testified the 2019 Reissuance Application was identified in ESS as “Type: Reissue NPDES/State Stormwater Construction No. 2.” Day 2 Hr’g Tr. 32:17-32:20. Board similarly testified that the 2019 Reissuance Application was an application for a “reissuance” rather than an application for a

“registration.” Board Dep. Tr. 94:1-94:8. He testified there is a distinction between the two types of applications, and the 2019 General Permit, which requires a Karst Mitigation Plan of registration applications, would not require them of reissuance applications. Board Dep Tr. 94:9-94:11, 94:20-95:15, 97:2-97:5 & 103:3-103:6. To the extent that the DEP had requested reissuance applicants to submit a Karst Mitigation Plan under the 2019 General Permit, Board testified that it had done so without express authority under the permit. Board Dep. Tr. 97:6-97:9.

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32. In an effort to rebut Board’s testimony on the DEP’s authority to require a Karst Mitigation Plan of reissuance applicants under the 2019 General Permit, the Appellants introduced an October 31, 2019, letter from Catherine Libertz, the Director of the Water Division at Region III of the Environmental Protection Agency (“EPA”), to Kathy Emery (the “Libertz Letter”). Appellants’ Ex. 136. In that letter, the EPA objected to a proposed modification of the 2019 General Permit that would have allowed certain permittees to continue operations under the terms and conditions of the 2012 General Permit. *Id.* \*2. The EPA’s objections were unrelated to the phrasing of the Karst Mitigation Plan requirement under § II.I.2.c, and the Board takes judicial notice that the DEP withdrew the proposed modification referenced in the Libertz Letter.

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**b. Whether ROCKWOOL submitted a Karst Mitigation Plan with the 2019 Reissuance Application**

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<sup>4</sup> The Board notes that requiring a Karst Mitigation Plan may signify a substantive change in permitting requirements or conditions necessitating a re-registration.

<sup>5</sup> The Board agrees with the EPA’s objection.



33. In comments to the 2019 Reissuance Application submitted on January 21, 2020, Rick Adams directed ROCKWOOL to submit a stand-alone Groundwater Protection Plan and stated: "II.I.2.c requires the Karst Mitigation Plan (Structure [sic] Sinkhole Repair document as stated on Pg. 8 of SWPPP) is required [sic] to be part of the GPP." C.R. 1980. On or about January 27, 2020, ROCKWOOL complied with Adams' directive and updated its 2019 Reissuance Application to include a stand-alone Groundwater Protection Plan. C.R. 1482. Section 2.2.2 of that Groundwater Protection Plan discusses sinkhole repair and incorporates the Supplemental Sinkhole Repair Plan referenced in Adams' comment as Appendix A. C.R. 1488 & 1493-1496. That plan had been available to the public to review since it was first uploaded to ESS in October 2018. *See, e.g.,* C.R. 2220.

**i. The Groundwater Protection Plan Template**

34. There is no statutory or regulatory definition of a Karst Mitigation Plan and, in its absence, the Appellants rely on a document entitled "Format for the Groundwater Protection Plan" (the "GPP Template") Appellants' Ex. 93. Section J of the GPP Template is entitled "Karst Mitigation Plan" and contains ten "design requirements" prefaced by three preliminary statements (emphasis in original):

- (a) The preliminary and detailed site investigation(s) shall be completed as noted in the latest version of the Chesapeake Stormwater Network Technical Bulletin No. 1, "Stormwater Design Guidelines for Karst Terrain in the Chesapeake Bay Watershed". [sic] **This should be considered the minimum requirement and applicable to all Karst areas in West Virginia.**
- (b) All necessary site investigations as noted in the above-referenced bulletin shall be completed by a qualified professional engineer or geologist, licensed by the State of West Virginia and experienced working in Karst Terrain.
- (c) Sinkhole Mitigation **shall be** carried out according to the WVDEP Sinkhole Mitigation Guidance Document (August

2005, revised 2018), or other applicable standards as recommend by the G or PE and approved by the West Virginia Department of Environmental Protection (WVDEP).

35. Rick Adams and Yogesh Patel testified on Hearing Day 2 that they did not recall having seen the GPP Template before that day. Day 2 Hr'g Tr. 75:18-75:21 (Adams) & 169:13-169:16 (Patel). Adams testified, however, that the preliminary and detailed site investigation referenced in ¶¶ (a) and (b) of the GPP Template would be performed before construction starts. Day 2 Hr'g Tr. 68:22-69:15. Adams further testified that the window for ROCKWOOL to perform such an investigation had been closed for nearly two years by the time it submitted the 2019 Reissuance Application. Day 2 Hr'g Tr. 70:15-70:19.

36. Subsequent testimony on Hearing Day 3 noted the GPP Template had been prepared by Larry Board in response to questions from permittees and consultants about the requirement for a GPP under the 2019 General Permit. *See* Board Dep. Tr. 47:5-47:18 & 48:1-48:5.

37. Board testified he did not have the responsibility or authority for preparing guidance documents or DEP policy, nor was he tasked by any of his supervisors with preparing the GPP Template. Board Dep. Tr. 113:16-113:21 & 122:9-122:11. He testified his immediate supervisor, Yogesh Patel, was not aware he had prepared the GPP Template or caused it to be posted to the DEP's website. Board Dep. Tr. 116:23-117:8 & 122:9-122:14. Patel, Board, and Rick Adams and all agreed that the GPP Template had not gone through the statutory rulemaking process, it did not represent DEP policy, and it had no regulatory force. Day 2 Hr'g Tr. 19:9-20:8 (Adams) & 169:17-170:20 (Patel); Board Dep. Tr. 121:20-122:22 (Board). Scott Mandirola, the Deputy Director of External Affairs for DEP, similarly testified that the GPP Template had not

gone through the rulemaking process, nor had the CSN Bulletin referenced in Section J. Day 3 Hr'g Tr. 38:2-38:21 & 59:6-59:13. Mandirola further testified that DEP policy affecting Groundwater Protection Plans in the Eastern Panhandle of West Virginia would need to have been approved by Yogesh Patel, as the head of the NPDES Permitting Division, and Kathy Emery, as Director of the Division of Water and Waste Management. Day 3 Hr'g Tr. 36:5-36:15.

38. As for the GPP Template itself, Board testified that he spent three to four lunch hours looking for a suitable document on the internet that he could use as a template. Board Dep. Tr. 109:11-18. He could not recall where he found the original template, nor which modifications he made to make it applicable to West Virginia. Board Dep. Tr. 43:8-43:10, 47:19-47:24 & 48:6-48:10. He estimated that he spent a week or two, working during his free time, to complete the process. Board Dep. Tr. 108:8-108:23. Board testified that he did not have formal training in the development of Best Management Practices specific to karst, such as would be required to evaluate the standards under Section J of the GPP Template, nor did he consult anyone with that background or experience. Board Dep. Tr. 115:9-116:12. Board also was clear that, although he had sent Rick Adams a copy of the GPP Template in March 2019, none of his colleagues submitted any written comments or redlines. Board Dep. Ex. 49H & Board Dep. Tr. 112:1-112:4. Board did not submit it to his supervisors for review, and so he did not receive any comment or feedback from them. Board Dep. Tr. 112:5-112:11. And Board did not submit it to review by internal DEP councils or to external environmental, industry, or academic groups. Board Dep. Tr. 112:20-113:11. Board's testimony was that no one else assisted him with identifying, modifying, or reviewing the GPP Template. Board Dep. Tr. 48:1-48:5. Board had not provided any formal notice that the GPP Template had been prepared or uploaded to the DEP website. Board Dep. Tr.

117:15-118:23. He did not inform the permit reviewers. Board Dep. Tr. 117:15-117:17. He did not inform industry, environmental, consulting, or academic organizations. Board Dep. Tr. 117:19-118:20. He also did not inform current permittees. Board Dep. Tr. 118:13-118:14. As Board testified, the only way someone would have known that the GPP Template existed is if they had been specifically informed or had stumbled upon it on the DEP website. Board Dep. Tr. 117:24-118:4.

39. Concerning the GPP Template, the Appellants moved the admission of two screenshots from ESS relating to an application by the West Dunbar Public Service District for coverage under the 2019 General Permit (the “West Dunbar PSD Application”). *See* Appellants’ Exs. 137 & 138. Each exhibit is entitled “Section J: GPP Section J,” each exhibit contains the same ten “design requirements” from the GPP Template, and each exhibit shows an application effective date of April 21, 2020. *Id.* But the West Dunbar PSD Application post-dates the approval of the 2019 Reissuance Application, and there was no testimony that the inclusion of Section J in ESS was authorized by Yogesh Patel or Kathy Emery.

**ii. Sinkhole Mitigation Plan as an Element of a Karst Mitigation Plan**

40. Rick Adams, who reviewed ROCKWOOL’s 2019 Reissuance Application, testified that he received on-the-job training about karst mitigation when the DEP started to request Karst Mitigation Plans for major pipeline projects in 2017. Day 1 Hr’g Tr. 220:5-220:8 (read *topline* as *pipeline*). He also testified to reading Karst Mitigation Plans, doing independent research, and consulting with Nick Shear and Justin Painter, two DEP geologists. Day 1 Hr’g Tr. 220:11-221:3. Adams testified that “the most important quality of a Karst Mitigation Plan is ... if

a sinkhole is present or a sinkhole develops during the construction process, how will you handle stormwater associated with the construction activities.” Day 1 Hr’g Tr. 211:6-211:10. Specific to the 2019 Reissuance Application, Adams also testified to having gathered information about sinkholes at the site, as well as information about dye tests. Day 1 Hr’g Tr. 221:9-221:19. Adams testified that ROCKWOOL’s Supplemental Sinkhole Repair Plan was an improvement on the DEP’s own guidance document. Day 2 Hr’g Tr. 65:23-66:10. He also testified that ROCKWOOL’s decision to line the rainwater reuse and stormwater ponds represented karst mitigation measures. Day 1 Hr’g Tr. 228:14-228:22.

41. Larry Board, who prepared the GPP Template cited by the Appellants as the standard for a Karst Mitigation Plan, testified that his purpose in referencing the CSN Bulletin in that document was to direct applicants to review and understand it. Board Dep. Tr. 58:5-58:22. Board also identified a number of Best Management Practices that applicants can employ to protect surface and groundwater, such as silt fences, compost filter socks, straw waddles, rock check dams, and sediment traps and basins. Board Dep. Tr. 66:6-66:20. Board, who approved the 2019 Reissuance Application, further testified that Adams’ acceptance of a sinkhole mitigation plan as a Karst Mitigation Plan was consistent with his own practice. Dep. Tr. 103:15-103:21. Like Rick Adams, whom he supervises, Board testified that he considered a sinkhole mitigation plan to qualify as a Karst Mitigation Plan. Board Dep. Tr. 17:22-17:24 & 29:21-24. Board testified that he considered a sinkhole mitigation plan and a Karst Mitigation Plan to be synonymous.<sup>6</sup> Board Dep. Tr. 129:7-129:8.

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<sup>6</sup> The Board notes that sinkholes are a component of karst geomorphology, but do not encompass all aspects of karst. Sinkhole mitigation should be an element of a Karst Mitigation Plan, but not substituted for a full Karst Mitigation Plan.

42. Andrew Parsons, another permit reviewer under Larry Board's supervision, has a Master's in Environmental Science from Marshall University and more than 20 years' experience in the environmental health and safety industry. Parsons Dep. Tr. 8:14-8:17 & 10:3-10:6. He testified that he voluntarily takes continuing education classes in stormwater management and holds two certifications; Certified Professional Erosion & Sediment Control and Certified Professional Municipal Stormwater Manager. Parsons Dep. Tr. 27:21-28:1 & 29:4-29:7. Parsons' testimony was that sinkholes represent the primary conduit for water into underground aquifers, and he agreed with Adams and Board that a sinkhole mitigation plan is synonymous with a Karst Mitigation Plan. Parsons Dep. Tr. 19:8-20:3.

43. Dr. Christopher Groves and Dr. Timothy Bechtel, who were qualified as experts on karst landscapes, both highlighted the significance of sinkholes to stormwater. Dr. Groves noted succinctly that "where you have sinkholes, you have karst and you have ... the potential for these environmental problems." Day 1 Hr'g Tr. 17:18. He also specifically identified sinkholes as one of two challenges for development in Jefferson County, with the other being rapid infiltration of stormwater through soils. Day 1 Hr'g Tr. 68-21-69:13. Dr. Bechtel similarly testified that the key to safe development in karst is preventing concentrated infiltration, which will prevent the development of sinkholes that create structural issues and pathways for contaminants to enter the groundwater. Bechtel Dep. Tr. 13:16-24, 14:14-16:4 & 16:19-17:1. In his opinion, "the most important aspect of mitigation in karst is preventing sinkholes in the first place, because once something gets into the aquifer, it's gone ... The most important thing is putting in place practices to prevent sinkholes." Bechtel Dep. Tr. 45:20-46:4.

### 3. Construction Progress and Performance

44. Peter Regenbergh testified that ROCKWOOL is done with construction on site and expects to terminate coverage under the 2019 General Permit when vegetation meets the permit standards, likely in May or June 2021. Day 4 Hr'g Tr. 20:10-21:7.

45. During the course of construction, ROCKWOOL identified 22 sinkholes. *See, e.g.,* Day 1 Hr'g Tr. 241:16-242:1. Dr. Timothy Bechtel testified that sinkholes are quite common in karst because grading activity can change the way that water moves through the environment. Bechtel Dep. Tr. 45:2-45:5. Rick Adams testified that each sinkhole has since been repaired. Day 2 Hr'g Tr. 51:6-51:12.

46. When the first sinkhole was identified, ROCKWOOL failed to timely report it and received a notice of violation (“NOV”) for this and five other issues on September 11, 2018. Appellants’ Ex. 29. DEP and ROCKWOOL then worked together to develop the Supplemental Sinkhole Repair Procedure submitted in October 2018. Day 1 Hr'g Tr. 216:3-216:8. The DEP has not issued any additional NOVs to ROCKWOOL. Day 2 Hr'g Tr. 54:2-54:5. Tommy George, one of the inspectors responsible for monitoring compliance at the ROCKWOOL facility, testified that a single NOV would be low for a project of its size. Day 2 Hr'g Tr. 138:10-138:14. Travis Hays, the other DEP inspector who testified, described ROCKWOOL’s environmental performance as “above par.” George similarly noted that ROCKWOOL took environmental compliance seriously and was proactive in calling him to provide notice of sinkholes and their planned repair. Day 2 Hr'g Tr. 113:10-113:15 (Hays) & 136:22-137:20 (George). Both Hays and George testified that they would have written additional NOVs if they had been warranted. Day 2 Hr'g Tr. 112:14-112:21 (Hays) & 138:15-138:19 (George).

47. The Appellants did not introduce any evidence that environmental or ecological harm had resulted from the sinkholes or the presence or absence of any stormwater controls. Their expert, Dr. Christopher Groves, specifically stated that he could not offer opinions on the risk and potential significance of any groundwater contamination, nor could he offer opinions on the relationship between any such risk and the stormwater controls implemented at the site. Day 1 Hr'g Tr. 122:14-122:21, 132:8-132:16 & 138:12-138:19. And though Dr. Groves did testify that the introduction of contaminants into the groundwater could harm the Madison Cave Isopod, a threatened species under federal law, he did not opine that the Madison Cave Isopod was present at the site or had actually been harmed. *See* Day 1 Hr'g Tr. 113:20-114:2.

## CONCLUSIONS OF LAW

### A. Standard of Review

48. The Appellants' right to appeal is conferred by the state Water Pollution Control Act ("WPCA") and state Groundwater Protect Act ("GPA"). Under the State WPCA, "[a]ny person ... aggrieved by the terms and conditions of a permit granted under the provisions of this article, may appeal to the environmental quality board, pursuant to the provisions of article one, chapter twenty-two-b of this code." W. Va. Code § 22-11-21. Similarly, under the State GPA, "[a]ny person ... who is aggrieved ... by the issuance or denial of a permit issued to implement this article or by such permit's term or conditions ... may appeal to the environmental quality board as provided in article one, chapter twenty-two-b of this code." W. Va. Code § 22-12-11.

49. Under W. Va. Code § 22B-1-7(e) & W. Va. Code R. § 46-4-6.8, the Board conducts a *de novo* review of the Appellants' specific objections. The Appellants bear the burden of production and persuasion. *See, e.g.*, W. Va. Code R. § 46-4-6.8.



50. Upon consideration of the testimony and evidence presented during the evidentiary hearing, together with the certified record submitted by the DEP, the Board “shall make and enter a written order affirming, modifying or vacating the order, permit or official action of the chief or secretary, or shall make and enter such order as the chief or secretary should have entered, or shall make and enter an order approving or modifying the terms and conditions of any permit issued.” W. Va. Code § 22B-1-7(g)(1). The Board’s order must also consider the “economic feasibility” of any relief. W. Va. Code § 22B-1-7(h).

**B. Construction Stormwater General Permitting Program**

51. The DEP is responsible under the State WPCA for administering the National Pollutant Discharge Elimination System (“NPDES”) program, 33 U.S.C. § 1342, as part of its delegated authority from the EPA under the Federal Water Pollution Control Act, 33 U.S. C. § 1251 *et. seq.* (the “Federal CWA”). W. Va. Code § 22-11-4(a)(1).

52. The DEP is responsible under the State GPA for protecting the State’s groundwater. W. Va. Code § 22-12-4 *et seq.* In contrast to the State WPCA, which is intended in part to administer the federal NPDES program under delegation from the EPA, the DEP has “the sole and exclusive authority” over the State GPA. *Id.*

53. The DEP issued the 2012 General Permit and the 2019 General Permit to enforce Water Quality Standards under the State WPCA, *see* W. Va. Code R. § 47-2-1 *et seq.*, and Groundwater Standards under the State GPA, *see* W. Va. Code R. § 47-2-12 *et seq.* C.R. 728 (2012 General Permit) & 2075 (2019 General Permit).

**C. Specific Objections**

**1. Pre-2019 Reissuance Application Objections**

54. The Board concludes that it lacks jurisdiction over the Appellants' specific objections directed to acts or omissions predating the 2019 Reissuance Application. The Board's jurisdiction is limited to a review of the permit that was appealed. *See* W. Va. Code § 22-11-21 and W. Va. Code § 22-12-11. Here, that permit is the reissuance approved under the 2019 General Permit. The Board cannot review any alleged acts or omissions associated with the registration under the 2012 General Permit, nor can the Board grant relief based on permit terms and conditions that have been superseded by the 2019 General Permit.

**2. 2019 Reissuance Application Objections**

**a. Whether a Karst Mitigation Plan Was Submitted**

55. The Board concludes that ROCKWOOL provided sufficient information to satisfy DEP's requirement for a Karst Mitigation Plan with its 2019 Reissuance Application.

56. In comments submitted on the 2019 Reissuance Application in January 2020, Rick Adams directed ROCKWOOL to submit its Supplemental Sinkhole Repair Plan as its Karst Mitigation Plan. ROCKWOOL did just that several days later, submitting a stand-alone Groundwater Protection Plan that incorporated that Supplemental Sinkhole Repair Plan as Appendix A. This issue accordingly turns in part on a definitional dispute: whether ROCKWOOL's Supplemental Sinkhole Repair Plan qualifies as a Karst Mitigation Plan.

57. The 2019 General Permit does not define the term "karst mitigation plan," and there is no statutory or regulatory definition either. It is significant, however, that each DEP employee who testified to having provided input into the 2019 General Permit considered a

“karst mitigation plan” to be synonymous with a sinkhole mitigation plan when considering this site. The authors’ understanding of their own work should be given significant weight by the Board.

58. The Board is also persuaded by the testimony of Dr. Timothy Bechtel, who emphasized the significance of sinkhole prevention and management to protecting karst. Dr. Bechtel made the connection between sinkhole mitigation and karst mitigation, testifying that “the most important aspect of mitigation in karst is preventing sinkholes in the first place, because once something gets into the aquifer, it’s gone.” Bechtel Dep. Tr. 45:20-45:23. Testimony from Dr. Bechtel supports the DEP’s acceptance of ROCKWOOL’s Supplemental Sinkhole Repair Plan as its Karst Mitigation Plan for this site or location.

59. Though the submission of a sinkhole mitigation plan is sufficient for the Board’s conclusion as this site, given that it addresses the primary concern for karst, it also notes that ROCKWOOL addressed Dr. Groves’ and Dr. Bechtel’s secondary concern for infiltration in karst. ROCKWOOL installed a three-liner system for its permanent rainwater reuse and stormwater ponds that exceed the Chesapeake Bulletin recommendation by two factors of safety, and Rick Adams testified without rebuttal that he considered this system to be part of ROCKWOOL’s Karst Mitigation Plan.

60. The Board is not persuaded by the Appellants’ argument, presented first through Dr. Groves and then through the GPP Template, that a Karst Mitigation Plan requires applicants to perform and then discuss a preliminary and detailed site investigation incorporating dye tracing. This notion is at odds with the definition of “mitigation,” which is “the process or result of making something less severe, dangerous, painful, harsh, or damaging.” Mitigation,

Merriam-Webster.com Dictionary, *available at* <https://bit.ly/3eCytqp> (last accessed Apr. 27, 2021). It also is not supported by any statute or rule, and the Board finds the GPP Template to be wholly unpersuasive for two independent reasons.

61. First, the GPP Template is not official guidance and it has not been promulgated as a legislative rule and, under West Virginia law, cannot be enforced by either the DEP or the Board. *See* W. Va. Code § 29A-3-2(b).

62. Second, even if the Board overlooked the fact that the GPP Template was not subjected to rulemaking, it is not entitled to any weight or deference. The Supreme Court of Appeals has held that guidance or policy lacks the force of law; rather it is “entitled on judicial review only to the weight that [its] inherent persuasiveness commands.” *Appalachian Power Co. v. State Tax Dep’t*, 195 W. Va. 573, 583, 466 S.E.2d 424, 434 (1995). That weight will “depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The un rebutted evidence is that the GPP Template was prepared by single DEP employee from a document of unknown provenance or reliability, found from an internet search over two to three lunch hours and then modified off and on over the next one to two weeks. That employee not only lacked the authority to prepare the GPP Template, he had no specific expertise to judge the karst-specific measures and then failed to consult anyone who did, just as he failed to inform anyone in his chain-of-command that he had caused the GPP Template to be uploaded to the DEP website.

63. This issue would undoubtedly have been simpler if the 2019 Reissuance Application included an attachment to the Groundwater Protection Plan entitled “karst mitigation plan.” But the Board will not place form over substance. It is mindful that ROCKWOOL did what the DEP requested: it submitted its Supplemental Sinkhole Repair Plan as its Karst Mitigation Plan. And for the reasons discussed above, the Board concludes at this ROCKWOOL site the Supplemental Sinkhole Repair Plan qualifies as a Karst Mitigation Plan under the 2019 General Permit.

**b. Whether a Karst Mitigation Plan Was Required**

64. ROCKWOOL argued in summation that it was not required to submit a Karst Mitigation Plan with its 2019 Reissuance Application because the 2019 General Permit requires a Karst Mitigation Plan only of *registration* applications, and it submitted a *reissuance* application. The Appellants argued that this interpretation of the 2019 General Permit would represent an unlawful continuation of the 2012 General Permit. As noted above, in light of its conclusion that ROCKWOOL in fact submitted a Supplemental Sinkhole Repair Plan meeting the needs of a Karst Mitigation Plan at this site, the Board finds it unnecessary to resolve this dispute.

65. The Board concludes the DEP requires industrial facilities to consider karst under W. Va. Code R. § 47-58-4.10, and ROCKWOOL met that obligation by undertaking a number of karst-specific measures for site investigation and design.

**3. Human, Ecological, and Environmental Harm**

66. The Board concludes that the Appellants did not meet their burden of proving human, ecological or environmental harm from the presence or absence of any stormwater controls approved under the 2019 Reissuance Application.

67. Dr. Christopher Groves, the only one of Appellants' witnesses to address this issue, spoke at most in terms of potential and admitted that he was not qualified to offer testimony on the risk of groundwater contamination or its relationship to the Best Management Practices employed at the site. Dr. Groves similarly failed to demonstrate that the Madison Cave Isopod was actually present at the site, let alone that it had been harmed by construction activity.

**ORDER**

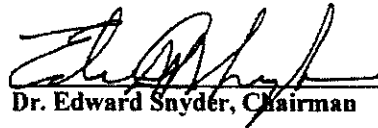
For the reasons set forth above, the Board hereby **ORDERS** that the DEP's approval of the 2019 Reissuance Application is **AFFIRMED** and this appeal is hereby **DISMISSED**.

The Board, however, does recommend the DEP consider developing official guidance documents addressing stormwater construction permits and karst terrain.

The Clerk is directed under W. Va. Code R. § 46-4-6.11 to send a copy of this order to the parties and their attorneys by registered or certified mail and to cause it to be published in the State Register in accordance with W. Va. Code § 29A-2-9.

ENTERED this 27<sup>th</sup> day of October 2021.

**West Virginia Environmental Quality Board**

  
Dr. Edward Snyder, Chairman

**ENVIRONMENTAL QUALITY BOARD  
WEST VIRGINIA**

***NOTICE OF RIGHT TO APPEAL FINAL ORDER***

In accordance with §22B-1-7(j) of the *West Virginia Code*, you are hereby notified of your right to judicial review of this FINAL ORDER in accordance with §22B-1-9(a) and §22B-3-3 of the *West Virginia Code*. If appropriate, an appeal of this final order may be made by filing a petition in the appropriate court within thirty (30) days from your receipt of this final order in the manner provided by §29A-5-4 of the *West Virginia Code*.



**ENVIRONMENTAL QUALITY BOARD**

**THE JEFFERSON COUNTY FOUNDATION, INC.,  
CHRISTINE L. WIMER, KAREN MICHELLE FREER,  
and CALVIN PERRY,**

**Appellants,**

**v.**

**Appeal Nos. 20-02-EQB**

**DIRECTOR, DIVISION OF WATER  
AND WASTE MANAGEMENT, DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,**

**Appellee,**

**and**

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

**Intervenor-Appellee.**

**CERTIFICATE OF SERVICE**

I hereby certify that I, Jackie D. Shultz, Clerk for the Environmental Quality Board, have this day, the 27<sup>th</sup> day of October, 2021, served a true copy of the foregoing **Final Order** via certified first-class U.S. Mail and hand delivery to the following:

*via certified first-class U.S. Mail to:*

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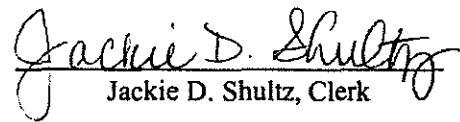
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Jackie D. Shultz, Clerk