

BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

WEST VIRGINIA WATER RESOURCE'S, INC.,

Appellant,

Appeal No.: 24-01-EQB

v.

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

Appellee.

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Environmental Quality
Board

MOTION FOR STAY PENDING APPEAL

Pursuant to *W. Va. Code* § 22B-1-7(d) and Rule 5.3 of the Board's Procedural Rules, Appellant West Virginia Water Resources, Inc. ("WVWR"), by counsel, hereby MOVES for the entry of a Stay of a certain provision of Solid Waste/NPDES Permit No. WV0116521 issued by the Director of the Division of Water and Waste Management, West Virginia Department of Environmental Protection ("DEP"), on January 12, 2024, with an effective date of March 1, 2024, ("the NPDES Permit"), on the following grounds:

1. By this appeal, WVWR is challenging the incorporation of requirements under the West Virginia Solid Waste Management Act, *W. Va. Code* § 22-15-1, et seq ("SWMA") and the DEP's solid waste management regulations, *W.Va. C.S.R.* § 33-1-1, et seq., ("Solid Waste Management Regulations") into the NPDES Permit. *See* WVWR's Notice of Appeal (filed contemporaneously with this Motion, and incorporated herein by reference).
2. As described in the Notice of Appeal, the NPDES Permit authorizes discharges from WVWR's Dent's Run Landfill.

3. The Dent's Run Landfill is used to dispose of waste material ("R/O Plant Reject") generated at WVWR's adjacent Wastewater Treatment Facility (a.k.a., the "Northern WV R/O Facility").
4. The Northern WV R/O Facility generates the R/O Plant Reject as a part of its operations in treating acid mine drainage ("AMD") associated with several underground coal mines operated by WVWR affiliates. The R/O Plant Reject that is placed at the Dent's Run Landfill therefore constitutes waste "resulting from . . . the exploration, development, production, storage and recovery of coal." Because the Dent's Run Landfill is subject to a permit issued under Chapter 22 of the West Virginia Code (i.e., the NPDES Permit, issued under W.Va. Code 22-11-1, et seq.) this means the R/O Plant Reject does not qualify as "solid waste" subject to the SWMA. *See W. Va. Code* § 22-15-2 (31).
5. Since it cannot be properly subject to the SWMA or the Solid Waste Management Regulations, DEP's incorporation of the Solid Waste Permit Provisions¹ into the NPDES Permit for the Dent's Run Landfill was in violation of statutory provisions; exceeded the DEP's statutory authority or jurisdiction; was arbitrary, capricious, or an abuse of discretion; was clearly wrong in view of the entire record; and/or was affected by other error of law. Under *W. Va. Code* § 29A-5-4(g), this means that the NPDES Permit must be modified or otherwise revised so as to remove those provisions from it.
6. In the alternative, even assuming, *arguendo* and without conceding, that the Solid Waste Permit Provisions were otherwise properly included in the permit, the groundwater protection standards and Phase II assessment monitoring requirements

¹ The "Solid Waste Provisions" that WVWR seeks to have removed from the NPDES Permit are identified in the accompanying Notice of Appeal.

found in Section D of the NPDES Permit (which are a part of the Solid Waste Permit Provisions) should be removed because statistically significant increases over background have not been determined. As a result, DEP's imposition of these provisions in the NPDES Permit was arbitrary, capricious, or an abuse of discretion; was clearly wrong in view of the entire record; and/or was affected by other error of law within the meaning of *W. Va. Code* § 29A-5-4(g), and they should be removed.

7. WVWR has used *intra-well* comparisons of concentrations for its quarterly statistical analysis in complying with parts of the Solid Waste Permit Provisions, due to detections of certain parameters in the groundwater at the site from the beginning of monitoring at the facility. Even assuming, *arguendo* and without conceding, that the Solid Waste Permit Provisions were otherwise properly included in the permit, the requirement in the NPDES Permit that WVWR use *inter-well* comparisons to determine statistically significant increases over background concentrations was arbitrary, capricious, or an abuse of discretion; was clearly wrong in view of the entire record; and/or was affected by other error of law. Under *W. Va. Code* § 29A-5-4(g), this requirement should be removed.
8. In the absence of a Stay, the Solid Waste Permit Provisions in the NPDES Permit will become effective on March 1, 2024. *See* NPDES Permit, p. 1; Section D.
9. Should the incorporated Solid Waste Permit Provisions become effective before the Board has had an opportunity to consider and rule on WVWR's appeal, WVWR will be required to expend substantial resources that it would not otherwise have been required to devote to that purpose, while this Board may determine that such requirements should not have been imposed in the first place. The monitoring, reporting

and analysis that is required to be completed in order to comply with the Solid Waste Permit Provisions is expensive and burdensome to WVWR. This includes but is not limited to monitoring well sampling, chemical analysis, and statistical sampling in accordance with U.S. EPA's "Statistical Analysis of Groundwater Monitoring Data at RCRA Facilities, Unified Guidance" (March 2009), using an inter-well statistical comparison methodology that WVWR believes is scientifically inappropriate and that has not been required prior to the issuance of the NDPEs Permit. In addition, WVWR would likely be forced to engage in an expensive program of assessment monitoring, and would be subject to site-specific groundwater standards under the Solid Waste Management Regulations, that would require further steps to be taken that are expensive to design, plan and implement and have no bearing on any risk of environmental harm at the site.² Should the Board find that WVWR's appeal is meritorious and that its requested relief should be granted, WVWR will have incurred these expenses and suffered these burdens without valid cause, and without any hope of recompense. This constitutes "unjust hardship" sufficient to warrant issuance of a Stay of the relevant provisions of the NPDES Permit under *W. Va. Code* § 22B-1-7(d).

10. In addition, the DEP's January 12, 2024 letter stated its intent to remove all monitoring and reporting requirements from Section A pertaining to Total Residual Chlorine, and it appears that such requirements were left in Section A through inadvertence.

* * *

² Allowing WVWR to defer compliance with these provisions will not present any significant risk of environmental harm, because there is no reason for concluding that the Dent's Run Landfill has caused material contamination of the groundwater to date, and there are no groundwater users anywhere in the vicinity of the Dent's Run Landfill.

WHEREFORE the Appellant asks that the Board issue an Order that grants a Stay of (1) the Solid Waste Permit Provisions in the NPDES Permit; and (2) those parts of Section A requiring monitoring or reporting for Total Residual Chlorine, until such time as the Board issues a final order in this appeal.

Respectfully submitted,

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By counsel

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