

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,

RECEIVED

FEB 23 2024

Environmental Quality
Board

Appellee.

**SUPPLEMENTAL BRIEF IN SUPPORT OF
MOTION FOR STAY PENDING APPEAL**

On February 16, 2024, Appellant West Virginia Water Resources, Inc. (“WVWR”) filed its Notice of Appeal in this matter, appealing the issuance on January 12, 2024, by the Director of the Division of Water and Waste Management, West Virginia Department of Environmental Protection (“DEP”), of Solid Waste/NPDES Permit No. WV0116521 (“the NPDES Permit”) covering WVWR’s Dent’s Run Landfill. In particular, this appeal challenges the inclusion in the NPDES Permit of numerous provisions incorporating requirements of 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”). WVWR’S appeal explains that the SWMA and Solid Waste Management Regulations may not be legally applied to the Dent’s Run Landfill because that facility only receives waste material from an adjacent acid mine drainage treatment plant (“R/O Plant Reject”), and the R/O Plant Reject does not constitute “solid waste” within the meaning of the SWMA. *See* Notice of Appeal, pp. 4-6.

On the same day the Notice of Appeal was filed, WVWR moved for a Stay of the Solid Waste Permit Provisions¹ found in the NPDES Permit. *See* Motion for Stay Pending Appeal (“Stay Motion”). Although no written opposition has been submitted, WVWR understands that DEP opposes the Stay Motion. In advance of the hearing scheduled for February 23, 2024, and for the Board’s convenience, WVWR files this Supplemental Memorandum to more fully address the Board’s requirements for issuance of a Stay.

I. The Board’s Standards for Issuance of a Stay.

In evaluating a Motion for Stay, the Board has adopted the four-part test for issuance of a temporary restraining order as set forth in *Camden-Clark Memorial Hospital v. Turner*, 575 S.E.2d 362, 366 (W.Va. 2002) (which cited, indirectly, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985)). Specifically, in *Camden-Clark* the Court undertook a “balancing” test in which it applied, in “flexible interplay” the following factors:

- (1) The likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff’s likelihood of success on the merits; and (4) the public interest.

Camden-Clark, 575 S.E.2d at 366 (citations omitted). *See, e.g., Cleveland-Cliffs Weirton LLC v. DEP*, Stay Order, Appeal No. 22-06-EQB (Sept. 19, 2022).

II. Additional Support for Issuance of a Stay in this Appeal.

A. WVWR Will Suffer Irreparable Harm Without a Stay.

Compliance with the groundwater monitoring, analysis and reporting requirements related found in the Solid Waste Provisions will require WVWR to expend significant financial resources, as well as the commitment of WVWR employee time and effort to manage that process. In addition, the NPDES Permit requires (in Sections D.1 and D.2.a) that WVWR use an inappropriate

¹ The “Solid Permit Waste Provisions” that WVWR seeks to have removed from the NPDES Permit are identified in the proposed “Order Granting Stay Pending Appeal,” filed by WVWR with the Stay Motion.

inter-well comparison for purposes of statistical analyses of groundwater monitoring results, which is likely to lead to erroneous determinations of statistically significant increases in various parameters and the need to undertake additional, expensive assessment monitoring and remedial actions.

Should the Board find that DEP was wrong to deny WVWR's request to remove the Solid Waste Permit Provisions, WVWR will have no possibility of seeking reimbursement for any such monetary expenditures. *See W. Va. Dep't. of Env'tl. Prot. v. Dotson*, 856 S.E.2d 213, 219-221 (DEP entitled to immunity for discretionary administrative actions). By definition, such a monetary loss without the possibility of recovery constitutes irreparable harm. Hughes Network Systems, Inc. v. Interdigital Communications Corp., 17 F.3d 691, 694 (4th Cir.1994). Here, such losses are particularly "unjust" (within the meaning of *W. Va. Code* § 22B-1-7(d)) because it is so clear that the Solid Waste Permit Provisions do not belong in the NPDES Permit.

B. The DEP Will Suffer No Harm from a Stay.

The only possible harm to the DEP from issuance of a Stay would be with respect to its authority to administer the SWMA or the Solid Waste Management Regulations. However, staying the Solid Waste Permit Provisions during the pendency of this appeal will have no effect on the DEP's authority to apply those laws and regulations in other contexts, or against any person other than WVWR. Moreover, DEP retains full authority to require compliance monitoring and to enforce the West Virginia Water Pollution Control Act, *W. Va. Code* § 22-11-1, et seq ("WPCA") and related regulations, and to take such actions as it deems necessary to ensure that discharges to State waters protect human health and the environment.

C. WVWR Is Likely to Succeed on the Merits of this Appeal.

As described in the Notice of Appeal, there is no question that under the SWMA, the R/O Plant Reject deposited at the Dent's Run Landfill does not constitute "solid waste." The facility has a NPDES Permit – issued under "Chapter 22 of the West Virginia Code" – and it only handles waste resulting from the production, recovery and storage of coal (i.e., R/O Plant Reject). *See W.Va. Code § 22-15-2 (31)*.

As expressed in the DEP's January 12, 2024 letter accompanying the NPDES Permit, the DEP's only argument against this conclusion is that the Solid Waste Management Regulations go *beyond* the SWMA by requiring that a facility handling coal-related waste materials be covered by a permit issued under one of the articles found in Chapter 22 *other than* the WPCA in order to be exempt. *See* January 12, 2024 letter, Katheryn Emery, Director (citing W.Va. C.S.R. § 33-1-2.119.f) (Notice of Appeal, Ex. A). In other words, according to the DEP, holding an NPDES permit issued under the WPCA is insufficient.

As explained in the Notice of Appeal, such an interpretation of the SWMA is invalid because it exceeds the DEP's statutory authority. *See* Notice of Appeal, pp. 5-6. The DEP cannot promulgate regulations that go beyond the clear intent of the Legislature expressed in the words of a statute. *Jones v. West Virginia State Bd. of Educ.*, 622 S.E.2d 289, 297 (W.Va. 2005).

Moreover, DEP has taken a different position – *identical* to WVWR's position in this appeal – in a pending case in which plaintiffs allege that the DEP itself has failed to obtain a solid waste permit for its work in reclaiming a forfeited mine site. *See* Brief of Appellee, October 10, 2023, in *Living Lands, LLC, et al. v. DEP*, Appeal No. 23-1641 ("*DEP Living Lands Brief*," attached as Exhibit A), pp. 2-3, 15-16 (asserting that "solid waste" under the SWMA does not include material resulting from the "exploration, development, production, storage and recovery

of coal” that is placed or disposed of at a facility which is regulated under Chapter 22, including “the State Water Pollution Control Act [*W.Va. Code 22-11-1, et seq.*], pursuant to which [the DEP] has obtained a NPDES permit....”) (emphasis added). In that case, DEP placed AMD sludge into unlined drying pits. *DEP Living Lands Brief*, p. 6. In response to Plaintiffs’ claims that it was illegally conducting those operations without a SWMA permit, DEP argued that it did not need such a permit because “the sludge is ultimately part of the regulated facilities and practices at the [subject property], which are in turn subject to the [NPDES] permit under Chapter 22, with which [the DEP] is in full compliance.” *Id.*, p. 20.

The DEP’s position in *Living Lands* is correct, and for the same reason, WVWR is correct in stating that it should not be required to comply with the Solid Waste Permit Provisions of the NPDES Permit.² This is further proof that WVWR is likely to succeed on the merits of this appeal.

Finally, it is significant that *leachate from the Dent’s Run Landfill is treated at the Northern WV R/O Facility* that generates the R/O Plant Reject. *See* NPDES Permit, p.1 (penultimate paragraph), found at Notice of Appeal, Ex. A. As noted in WVWR’s appeal, WV/NPDES Permit No. WV0065269 (applicable to the Northern WV R/O Facility) applies EPA’s Effluent Limit Guidelines for the “Coal Mining” Point Source category. This means that a portion of the discharge from the Dent’s Run Landfill is subject to treatment designed for coal facilities, and it is treated on the grounds of the Northern WV R/O Facility -- a facility permitted under the West Virginia Surface Coal Mining and Reclamation Act, *W.Va. Code 22-3-1, et seq.* This too supports a finding that the SWMA should never have been applied to the Dent’s Run Landfill, and that WVWR is likely to succeed on the merits of this appeal.

² The federal district court’s decision in the *Living Lands* case, granting summary judgment to DEP, has been appealed to the U.S. Court of Appeals for the Fourth Circuit. Oral argument is scheduled for March 21, 2024.

D. Issuance of a Stay Is in the Public Interest.

The DEP does not contend that the Dent's Run Landfill has a history of violating DEP Groundwater Protection Standards ("GPS") set forth in W.Va. C.S.R. § 47-12-1, et seq. Indeed, with the exception of the barium GPS (which the DEP concedes, groundwater at the facility is unlikely to exceed³), the DEP has not imposed monitoring in the NPDES Permit for any of the GPS parameters.

In the great majority of groundwater monitoring reports filed under the existing permit, the *upgradient* monitoring well (MW1R) has experienced far more statistically significant increases of monitored parameters than any of the downgradient wells – strongly suggesting that the operation of the Dent's Run Landfill is not causing any increase in concentrations of those parameters. Moreover, there are no known groundwater users in the area of the Dent's Run Landfill, and there is no reason to believe that any groundwater from that area presents a risk to aquatic life or the environment.

The facility has a 60 mil HDPE primary geomembrane liner and a second 40 mil HDPE secondary membrane liner to monitor for any breaches of the primary liner. There have been no breaches detected through the occurrence of water in the secondary liner.

In short, granting a Stay of the Solid Waste Provisions in the NPDES Permit will not threaten the public interest in any way. To the contrary, it is in the public interest that the DEP administer the environmental statutes in a manner that is authorized by the plain language of those enactments, commensurate with the level of risk presented by regulated activities, and consistent with other similar facilities.

³ See January 12, 2024 letter, Katheryn Emery, Director, p. 2 (Notice of Appeal, Ex. A).

III. Conclusion.

Forcing WVWR to comply with the Solid Waste Permit Provisions of the NPDES Permit during the pendency of this appeal presents a substantial likelihood of causing it to incur irreparable harm. This is virtually beyond debate. On the other hand, issuance of a Stay would present no risk of harm to the DEP, the public or the environment.

Perhaps equally important, a Stay is warranted because WVWR is likely to prevail on the merits of this appeal. The NPDES Permit requires extensive monitoring, analyses and reporting of the groundwater well network, and the development of site-specific groundwater standards for a long list of parameters at very low levels that will never present any risk (even if there were nearby receptors, which there are not). As the DEP has acknowledged in a similar case filed against it, to impose such a regime on a facility that merely disposes of AMD treatment waste plainly exceeds the DEP's statutory authority and is otherwise contrary to law.

WHEREFORE, for the reasons expressed in the Motion for Stay and as otherwise described above, WVWR renews its request that the Board issue a Stay in accordance with the previously submitted proposed Order.

Respectfully submitted,

West Virginia Water Resources, Inc.
By counsel



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BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

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Appellant,

Appeal No.: 24-01-EQB

v.

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

Appellee.

CERTIFICATE OF SERVICE

I, Robert M. Stonestreet, counsel for Appellant West Virginia Water Resources, Inc., do hereby certify that copies of the foregoing Supplemental Brief in Support of Motion for Stay Pending Appeal has been served upon the Appellee this 22nd day of February, 2024, via e-mail and first-class mail, addressed to the following:

Scott Driver, Esq.
Director
Office of Legal Services
West Virginia Department of Environmental Protection
601 57th Street, S.E.
Charleston, West Virginia 25304



Robert M. Stonestreet (W. Va. Bar No. 9370)

Exhibit A

NO. 23-1641

In The
**United States Court Of Appeals
For The Fourth Circuit**

**LIVING LANDS, LLC, a West Virginia
Limited Liability Company; D. C. CHAPMAN VENTURES, INC., a
West Virginia Business Corporation,**
Plaintiffs – Appellants,

v.

**HAROLD WARD, In his official capacity as the
Cabinet Secretary of the West Virginia Department of
Environmental Protection, an instrumentality of the State of
West Virginia,**
Defendant – Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by all parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)

In criminal and post-conviction cases, a corporate defendant must file a disclosure statement. In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)

Any corporate amicus curiae must file a disclosure statement.

Counsel has a continuing duty to update the disclosure statement.

No. 23-1641 Caption: Living Lands, LLC, et al. v. Harold Ward

Pursuant to FRAP 26.1 and Local Rule 26.1,

Harold Ward, in his official capacity as the Cabinet Secretary of the West Virginia
(name of party/amicus)

Department of Environmental Protection, an instrumentality of the State of West Virginia

who is , makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

- 1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

- 2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

- 3. Is 10% or more of the stock of a party/amicus owned by a publicly held c
other publicly held entity?
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim? YES NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ J. Zak Ritchie

Date: J 2023

Counsel for: Harold Ward

TABLE OF CONTENTS

	Page:
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
JURISDICTIONAL STATEMENT	2
STATEMENT OF THE ISSUES	2
STATEMENT OF THE CASE	3
I. Plaintiff-Appellants purchase interests in a coal mine reclamation site and then file suit	3
A. Plaintiff-Appellants see opportunity	4
B. Plaintiff-Appellants sue Secretary Ward over his agency’s reclamation work	5
II. After Secretary Ward moves for summary judgment, Living Lands tries to change their claims	8
III. The District Court grants summary judgment to Secretary Ward, and Living Lands seeks reconsideration, changing tack once again	9
SUMMARY OF ARGUMENT	11
ARGUMENT	13
I. The District Court correctly granted summary judgment to Secretary Ward on Count II.....	13
A. The reclamation work undertaken by WVDEP is excluded from the state law prohibition on open dumping.....	15

B.	Living Lands’ preemption argument fails for numerous reasons	20
1.	Judicial estoppel precludes Living Lands’ arguments on appeal	22
2.	Even if successful, the preemption argument is alone insufficient to justify reversal.....	23
3.	There is no preemption here	24
4.	The District Court properly construed 40 C.F.R. § 257.1(c)(6)	25
C.	WVDEP has not violated RCRA’s opening dumping criteria for groundwater	30
D.	There is no RCRA liability because Living Lands alleges a violation of the groundwater criteria based on a substance <i>with no MCL</i>	35
	CONCLUSION	37
	STATEMENT ON ORAL ARGUMENT	37
	CERTIFICATE OF COMPLIANCE	38

TABLE OF AUTHORITIES

Page(s):

Cases:

<i>Black & Decker Corp. v. Comm’r</i> , 986 F.2d 60 (4th Cir. 1993)	18
<i>Cox v. City of Dallas</i> , 1999 WL 33756552 (N.D. Tex. Aug. 4, 1999)	31
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000)	18
<i>Hackensack Riverkeeper, Inc. v. Delaware Ostego Corp</i> , 450 F. Supp. 2d 467 (D.N.J. 2006), <i>amended on reconsideration in part on other grounds</i> , No. CIV A 05-4806 DRD, 2006 WL 3333147 (D.N.J. Nov. 16, 2006)	32
<i>Inland Steel Company v. EPA</i> , 901 F.2d 1419 (7th Cir. 1990)	28
<i>Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste</i> , 1995 WL 911821	28
<i>June v. Town of Westfield, New York</i> , 370 F.3d 255 (2d Cir. 2004)	34
<i>Living Lands, LLC v. Cline</i> (“ <i>Living Lands I</i> ”), 591 F. Supp. 3d 79 (S.D. W. Va. 2022)	1, 8
<i>Living Lands, LLC v. Cline</i> (“ <i>Living Lands II</i> ”), No. CV 3:20-0275, 2023 WL 2142981 (S.D. W. Va. Feb. 21, 2023)	<i>passim</i>

Living Lands, LLC v. Cline (“*Living Lands III*”),
 No. CV 3:20-0275,
 2023 WL 3470902 (S.D. W. Va. May 15, 2023) *passim*

Meghrig v. KFC W., Inc.,
 516 U.S. 479 (1996) 13-14

New Hampshire v. Maine,
 532 U.S. 742 (2001) 3, 22

S. Rd. Assocs. v. Int’l Bus. Machines Corp.,
 216 F.3d 251 (2d Cir. 2000) 34, 35, 36

Scarlett & Assocs., Inc. v. Briarcliff Ctr. Partners, LLC,
 2009 WL 3151089 (N.D. Ga. Sept. 30, 2009)..... 31

State v. PVS Chems., Inc.,
 50 F. Supp. 2d 171 (W.D.N.Y. 1998)..... 28

The Courtland Co., Inc. v. Union Carbide Corp.,
 No. 2:18-CV-01230,
 2023 WL 6331069 (S.D. W. Va. Sept. 28, 2023) 32

W. Va. Highlands Conservancy, Inc. v. Huffman,
 625 F.3d 159 (4th Cir. 2010) 7

Wetzel Cnty. Solid Waste Auth. v. W. Virginia Div. of Nat. Res.,
 462 S.E.2d 349 (W. Va. 1995) 14

Statutes:

28 U.S.C. § 1291 2

28 U.S.C. § 1331 2

33 U.S.C. § 1365..... *passim*

42 U.S.C. § 6903(14) 31, 32

42 U.S.C. § 6907(a)(3)..... 31

42 U.S.C. § 6944..... 31

42 U.S.C. § 6944(a) 21, 31, 32

42 U.S.C. § 6945(a) 31, 34

42 U.S.C. § 6972..... 31

42 U.S.C. § 6972(a)(1)(A)..... 5, 13

42 U.S.C. § 6972(a)(1)(B)..... 5

42 U.S.C. § 9607(a) 5, 8

42 U.S.C. § 9613(g) 5, 8

CWA § 402 11, 17, 25, 28

RCRA § 1008(a)(3) 33

RCRA § 4004(a)..... 33

RCRA § 4005(a)..... 33

W. Va. Code § 20-5F-1, *et seq.* 14

W. Va. Code Ch. 22 *passim*

W. Va. Code § 22-2-1, *et seq.* 4

W. Va. Code § 22-3-1, *et seq.* 4

W. Va. Code § 22-11..... 3, 16

W. Va. Code § 22-15-1 *et seq.*..... 14, 17, 19

W. Va. Code § 22-15-2..... *passim*

W. Va. Code § 22-15-10(a) *passim*

Regulations:

40 C.F.R. § 122.2.....	29
40 C.F.R. § 257.1.....	32
40 C.F.R. § 257.1(a)	33
40 C.F.R. § 257.1(a)(1).....	33
40 C.F.R. § 257.1(a)(2).....	33
40 C.F.R. § 257.1(c).....	27
40 C.F.R. § 257.1(c)(6)	<i>passim</i>
40 C.F.R. § 257.2.....	6
40 C.F.R. § 257.3-1	9
40 C.F.R. § 257.3-4.....	30, 33, 34
40 C.F.R. § 257.3-4(a)	33
40 C.F.R. § 257.3-4(c)(2)	34, 35, 36
40 C.F.R. § 257.3-4(c)(2)(i)	36
40 C.F.R. § 257.3-4(c)(4)(i).....	33
40 C.F.R. § 257.3-4(c)(4)(ii).....	33
40 C.F.R. § 257.3-4(c)(5)	33
40 C.F.R. § 257.4.....	33
40 C.F.R. §§ 257.1-257.4.....	32, 33
40 C.F.R. Pt. 257	16
40 C.F.R. Pt. 257, App. I.....	36

40 C.F.R. § 261.4(a) 27

40 C.F.R. § 261.4(a)(2) 26, 28, 29

Rules:

Fed. R. Civ. P. 54(b) 2, 10

W. Va. C.S.R. § 33-1-1.6.a 13

W. Va. C.S.R. § 33-1-1.6.b 15

W. Va. C.S.R. § 33-1-2.84 17

W. Va. C.S.R. § 33-1-2.119.c 16, 20

W. Va. C.S.R. § 33-1-2.119.f 16, 20

W. Va. C.S.R. § 33-1-5.4 20

W. Va. C.S.R. § 33-1-5.5 20

W. Va. C.S.R. § 33-1-7.1.a 13

W. Va. C.S.R. § 33-1-7.2.a 17, 18, 19

W. Va. C.S.R. § 33-1-7.2.a.1 13, 15

Other Authorities:

44 Fed. Reg. 53438 16

61 Fed. Reg. 9451 (March 8, 1996) 14, 25

65 Fed. Reg. 36792 (June 12, 2000) 14, 25

Regular Session 1983, Acts of the Legislature of West Virginia 14

INTRODUCTION

This appeal arises from an effort by real estate investors (Plaintiff-Appellants) who purchased an interest in real property *they knew* to be an abandoned mine site subject to reclamation work by the West Virginia Department of Environmental Protection, in an effort to profit from their purchase by suing its Secretary for violations of federal “open dumping” law, among other things.

The District Court granted summary judgment to the Secretary, concluding that the “open dumping” prohibition found in the Resource Conservation and Recovery Act (“RCRA”) and incorporated state law lacked merit. And despite bringing a slew of state and federal claims against the Secretary—all disposed of summarily¹—Appellants appeal the judgment only as to one subpart of a single count under RCRA. That is, they claim violations of state law that were enacted to satisfy the federal requirements for approval of West Virginia’s solid waste management

¹ See *Living Lands, LLC v. Cline*, No. CV 3:20-0275, 2023 WL 2142981, at *8 (S.D. W. Va. Feb. 21, 2023) (hereinafter “*Living Lands II*”) (granting summary judgment to the Secretary on the remaining claims), *reconsideration denied*, No. CV 3:20-0275, 2023 WL 3470902 (S.D. W. Va. May 15, 2023) (hereinafter “*Living Lands III*”); *Living Lands, LLC v. Cline*, 591 F. Supp. 3d 79, 84 (S.D. W. Va. 2022) (hereinafter “*Living Lands I*”) (granting in part the Secretary’s motion to dismiss).

program based on a dubious preemption argument and otherwise unreasonable readings of federal law. The appeal lacks merit.

Although the opening brief is fairly inscrutable, the upshot is that Appellants have not challenged every basis for which the District Court rendered summary judgment to the Secretary on Count II. And so, both the lack of argument (and evidence) presented by Appellants, and the numerous, independent grounds that exist to sustain the judgment, mean that this Court's path to affirmance can be a short one. For these reasons and those that follow, the District Court's judgment as to Count II should be affirmed.

JURISDICTIONAL STATEMENT

This is an appeal from an order of the U.S. District Court for the Southern District of West Virginia certified as final under Federal Rule of Civil Procedure 54(b). The District Court had federal question jurisdiction under 28 U.S.C. § 1331, and this Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. State solid waste management law expressly provides that “solid waste” includes *neither* “industrial discharges which are point sources and have [NPDES] permits” *nor* “material resulting from ... the exploration, development, production, storage, and

recovery of coal ... placed or disposed of at a facility which is regulated under Chapter 22 ... of this code,” so long as it conforms with a permit issued under those chapters. W. Va. Code § 22-15-2. Chapter 22 includes the State Water Pollution Control Act, W. Va. § 22-11, pursuant to which the WVDEP has obtained a NPDES permit pertaining to the Reclamation Site. There is no claim that WVDEP is violating its permit. Because “solid waste” does not include the materials and discharges being disposed of by WVDEP at the Reclamation Site, has the Secretary violated state solid waste management law prohibiting open dumping?

2. Judicial estoppel is designed to “protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001). In the District Court below, Living Lands expressly disclaimed it was arguing that any provision of state law is preempted by RCRA. But on appeal, Living Lands argues that the Supremacy Clause makes unenforceable certain state statutes and regulations that are contrary to, or “fail to comply with,” RCRA. Should the Court refuse to entertain Living Lands’ preemption arguments on appeal?

STATEMENT OF THE CASE

I. Plaintiff-Appellants purchase interests in a coal mine reclamation site and then file suit.

This case concerns real property located within the Right Fork Spruce Run Watershed in Nicholas County, West Virginia, that was subject to underground and related surface coal mining activities from the 1960s to the 1990s. After certain mining defendants² ceased

² Defendants Jack Cline, Brady Cline Coal Co., and Spruce Rune Coal Co. were alleged operators at the site (“Coal Mining Defendants”). They are not participants in this appeal.

operations at the site and forfeited their reclamation bonds, the West Virginia Department of Environmental Protection (the “WVDEP”) was left with the responsibility to reclaim the site. *See generally Living Lands II*, 2023 WL 2142981, at *1. For purposes of this brief, the subject property will be referred to as the “Reclamation Site” or the “Site.”

A. Plaintiff-Appellants see opportunity.

In 1999, Plaintiff-Appellant D.C. Chapman Ventures, Inc. purchased a fee simple interest in the Reclamation Site, where the WVDEP has been and continues to conduct, reclamation activities. *See id.* Then in 2019, Living Lands, LLC—a purported real estate investment, management, and redevelopment company—obtained an option to purchase fee simple title to the Reclamation Site, also knowing full-well that it constituted property long abandoned by coal operators and subject to ongoing reclamation efforts by the WVDEP. *See id.*

The reclamation work by WVDEP is performed in accordance with its authority under the West Virginia Surface Coal Mining and Reclamation Act (“WVSMCRA”), *see* W. Va. Code § 22–3–1, *et seq.*, and the West Virginia Abandoned Mine Lands and Reclamation Act (“WVAML”), *see* W. Va. Code § 22–2–1, *et seq.*

B. Plaintiff-Appellants sue Secretary Ward over his agency's reclamation work.

This appeal concerns one count alleged against Defendant-Appellee Harold Ward, in his official capacity as Cabinet Secretary of the WVDEP ("Secretary Ward"), in connection with his agency's ongoing reclamation work at the Site.

Plaintiff-Appellants (together, "Living Lands") initially brought six state and federal claims against Secretary Ward, including alleged violations of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9607(a) and 9613(g) (Count I); the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6972(a)(1)(A) and (B) (Counts II and III, respectively); the Clean Water Act, 33 U.S.C. § 1365 (Count IV); common law per se public nuisance (Count V); and common law public nuisance (Count VI). *See Living Lands II*, 2023 WL 2142981, at *2.

The gist of Living Lands' case is that Secretary Ward's reclamation work (along with the past acts of the Coal Mining Defendants) caused or contributed to the release of contaminants into the subsurface soils, groundwater, and surface waters of the watershed encompassing the Reclamation Site, thereby introducing toxic

contaminants at levels that present an imminent and substantial danger to human health or the environment. *See id.* Specifically, Living Lands claims the WVDEP uses unlined surface impoundments to hold acid mine drainage (“AMD”); collects AMD-contaminated leachate³ and surface runoff in unlined ditches; and places sludge contaminated with AMD into unlined drying pits. *See id.* at *1–2. They allege that these “open dumps” on the Site have created AMD that flows into the Right Fork Spruce Run and the Spruce Run Watersheds. Living Lands claimed that the WVDEP has not taken adequate steps to contain waste materials, and that this movement of material therefore violates the Clean Water Act and RCRA. *Id.*

Now for the details. The unlined structures at issue comprise two ditches, several surface impoundments (one “original” and two allegedly created by WVDEP), and a number of drying pits. Living Lands alleges the three surface impoundments are located within Right Fork Spruce Run. *See id.* at *2. Ditch 1 is similarly connected to the waterway, as it flows into a surface impoundment created by Coal Mining Defendants sometime during the 1960s and which the WVDEP still uses to treat

³ “Leachate means liquid that has passed through or emerged from solid waste and contains soluble, suspended or miscible materials removed from such wastes.” 40 C.F.R. § 257.2.

influent AMD. *See id.* Influent in Ditch 1 and the corresponding impoundment discharge through an outfall permitted by the National Pollutant Discharge Elimination System (NPDES) program of the Clean Water Act. *See id.*⁴ There is no dispute that WVDEP has complied with the applicable NPDES permit while reclaiming the site. *See id.* Even so, Living Lands alleged that not all influent is drained through this outfall, as some influent seeps from the ditches and impoundments directly into groundwaters within the subject watershed. *See id.*

Ultimately, Living Lands alleges that seepage from the ditches, the impoundments, and drying pits form a “comingled, single plume of mine waste” within the groundwater aquifer at a point upgradient from Right Fork Spruce Run. *See id.* Any seepage, Living Lands asserts, discharges into the Right Fork Spruce Run and constitutes the functional equivalent of a direct discharge to surface waters for purposes of the Clean Water Act. *See id.* They allege that seepage to Right Fork Spruce Run impairs Spruce Run and Muddlety Creek, both of which are allegedly waters of the United States under the Act. *See id.*

⁴ WVDEP is required to obtain NPDES permits when performing reclamation activities at abandoned coal mining sites. *See W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159 (4th Cir. 2010).

II. After Secretary Ward moves for summary judgment, Living Lands tries to change their claims.

The District Court first dismissed Counts I (CERCLA), V (public nuisance per se), and VI (public nuisance). *See Living Lands I*, 591 F. Supp. 3d at 99. Following the conclusion of discovery, Secretary Ward moved for summary judgment on all remaining counts.

Several weeks later, Living Lands responded by moving to file a second amended complaint, noting that the operative, Amended Complaint referenced an inapplicable maximum contaminant level (“MCL”) for beryllium. *See Living Lands II*, 2023 WL 2142981, at *2. Living Lands acknowledged that, in the Amended Complaint, they had referred to an MCL for beryllium under appendix I of RCRA, when they should have referenced the MCL for beryllium under a different statute.⁵ *See id.* The District Court later denied Living Lands leave to amend the Amended Complaint because the request was made well-after the close of discovery and would unduly prejudice Secretary Ward. *See id.* at *3. Living Lands does not challenge that decision on appeal. JA595.

⁵ Secretary Ward had moved for summary judgment on the grounds that, among other things, there was no MCL for beryllium under appendix I of the RCRA.

Simultaneously, Living Lands tried to constructively amend their RCRA claims in their summary judgment briefing to pivot, alleging a violation of the *floodplain* criteria for open dumping—an entirely different regulatory prohibition than the ground water criteria actually alleged by Living Lands to have been violated by the Secretary’s “open dumping.” *See* 40 C.F.R. § 257.3-1 (“Floodplains”). But the District Court refused to permit the gambit. *See Living Lands II*, 2023 WL 2142981, at *5 (“Plaintiffs’ move to a floodplain theory of violation at the summary judgment stage constitutes an impermissible attempt to constructively amend the Amended Complaint,” which “Plaintiffs introduce[d] . . . too late in the game.”).

III. The District Court grants summary judgment to Secretary Ward, and Living Lands seeks reconsideration, changing tack once again.

The District Court confronted Living Lands’ remaining claims against Secretary Ward on summary judgment. *See Living Lands II*, 2023 WL 2142981. In its memorandum opinion and order, the District Court thoroughly analyzed Living Lands’ remaining claims against Secretary Ward, concluding that plaintiffs had presented no genuine

issue as to any material fact and that Secretary Ward was entitled to judgment as a matter of law. *See id.*

As to the only claim at issue on appeal—subpart two of Count II (RCRA)—the District Court concluded that summary judgment was proper as to Secretary Ward for at least two primary, and independently sufficient, reasons. The District Court held that, first, the open dumping criteria for groundwater did not apply to the WVDEP’s activities at the Reclamation Site. Next, the District Court concluded that even if the groundwater criteria did apply, the plaintiffs failed to present evidence to even suggest that the WVDEP had violated those criteria. *See id.*, at *4–10.

Thereafter, Living Lands moved for reconsideration of the summary judgment order, but only challenged one of the at least two independent grounds on which the District Court awarded judgment to Secretary Ward as to Count II. *See Living Lands III*, 2023 WL 3470902, at *1. The District Court denied the motion to reconsider and certified its summary judgment decision as final under Federal Rule of Civil Procedure 54(b), *see id.*, from which Living Lands now appeals, *see* JA595.

SUMMARY OF ARGUMENT

The District Court was right to grant summary judgment to Secretary Ward on the single RCRA claim that Living Lands challenges on appeal.

First, the District Court correctly concluded that the reclamation efforts by the Secretary and his agency are textually exempt from the state and federal provisions prohibiting open dumping. Specifically, the prohibitions on open dumping do not apply to industrial discharges that are point sources subject to permits under section 402 of the Clean Water Act—that is, permits issued under the National Pollutant Discharge Elimination System (“NPDES” permits). And as there is no dispute in this case that WVDEP is in compliance with the relevant permits, Living Lands’ open dumping claim under Count II fails for this reason alone.

Second, the District Court properly applied 40 C.F.R. § 257.1(c)(6)—which, as noted, generally exempts permitted discharges from the federal regulations that govern open dumping. Although it is difficult to follow at times, Living Lands appears to argue that the District Court should have recognized that RCRA somehow preempts the state law exclusion, and if preempted, the Secretary’s conduct would violate state law.

This argument can be rejected without attempting to ascertain its bounds, as Living Lands *expressly disclaimed* below that it was arguing that any provision of state law is preempted by RCRA. Judicial estoppel prevents the sort of about-face Living Lands takes on appeal.

What is more, the court need not address its preemption argument because Living Lands does not challenge the District Court's alternative and additional basis for judgment—namely, that Living Lands has, as a matter of fact, failed to show a probable risk of harmful contamination at the Reclamation Site from groundwater contamination, much less at a level that presents an imminent and substantial endangerment within the confines of RCRA. In short, Living Lands has not produced any evidence of an unlawful exceedance at the Site such that it would violate the open dumping criteria, which would be necessary to overturn the District Court's judgment.

Finally, Living Lands' preemption argument is baseless on its own terms because it unnecessarily confuses the distinct solid waste management regimes adopted by the federal government (RCRA) and the state of West Virginia (WVSWMA).

ARGUMENT

I. The District Court correctly granted summary judgment to Secretary Ward on Count II.

On appeal, Living Lands appears to only challenge the District Court's conclusion that the plaintiffs failed to show a violation of the West Virginia Solid Waste Management Act ("WVSWMA") and the West Virginia Solid Waste Management Rule ("WVSWMR"), to support a violation of RCRA § 6972(a)(1)(A).

In their operative pleading, Living Lands presented several theories of violation to support Count II, which alleges a claim for a violation of RCRA § 6972(a)(1)(A). Section 6972(a)(1)(A) permits individuals to bring actions against "any person ... alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to [RCRA]." Count Two contains "Part Two," in which Living Lands alleged a theory of RCRA violation based on the WVSWMA, W. Va. § 22-15-10(a) as implemented by WVSWMR, W. Va. C.S.R. §§ 33-1-1.6.a, 7.1.a, and 7.2.a.1. JA069–073.

"RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghri*

v. KFC W., Inc., 516 U.S. 479, 483 (1996). The same goes for the state analogue, the WWSWMA. *See* W. Va. Code § 22–15–1 (the purpose of the act is to “establish a comprehensive program of controlling all phases of solid waste management”). The WWSWMA, enacted in 1983, was adopted to satisfy the minimum requirements of Subtitle D and has been approved by the EPA. *See* 61 Fed. Reg. 9451 (March 8, 1996); 65 Fed. Reg. 36792, 36793 (June 12, 2000) (concluding that West Virginia’s application “meets all of the statutory and regulatory requirements established by RCRA.”).⁶

Relevant to Living Lands’ appeal, the WWSWMA makes it unlawful “for any person to create, contribute to, or operate an open dump or for any landowner to allow an open dump to exist on the landowner’s property unless that open dump is under a compliance schedule approved by the director.” W. Va. Code § 22-15-10(a). It defines an open dump as “any solid waste disposal which does not have a

⁶ The WWSWMA was originally codified under W. Va. Code § 20–5F–1, *et seq.* *See* Regular Session 1983, Acts of the Legislature of West Virginia, at 902-08. During the 1994 legislative session, the Legislature enacted Chapter 22 in the West Virginia Code, which consolidated, revoked, and renumbered most environmental articles including the WWSWMA. *See Wetzel Cnty. Solid Waste Auth. v. W. Virginia Div. of Nat. Res.*, 462 S.E.2d 349, 351 n.1 (W. Va. 1995).

permit under this article, or is in violation of state law, or where solid waste is disposed in a manner that does not protect the environment.” W. Va. Code § 22-15-2. The applicable regulation in turn provides that “solid waste facilities or activities failing to satisfy this subsection are considered open dumps.” W. Va. C.S.R. § 33-1-1.6.b.

Living Lands alleges that Secretary Ward engaged in open dumping by “allowing any of the unlined Surface Impoundments, or any components of them, or the unlined Drying Pits to exist on the Subject Property.” JA071. The unlined ditches, drying pits, and surface impoundments, Living Lands argues, constitute open dumps under WWSWMR, W. Va. C.S.R. § 33-1-7.2.a.1, which provides that “any site” where no protective measures have been taken “to prevent the discharge of pollutants from the accumulated waste into the waters of the State” constitutes an “open dump.” JA071. These arguments are without merit.

A. The reclamation work undertaken by WVDEP is excluded from the state law prohibition on open dumping.

The activities of the WVDEP at the Reclamation Site do not fall under the WWSWMA or WWSWMR’s definition of “open dump.” State law expressly provides that “solid waste” includes *neither* “industrial

discharges which are point sources and have [NPDES] permits” *nor* “material resulting from ... the exploration, development, production, storage, and recovery of coal ... placed or disposed of at a facility which is regulated under Chapter 22 ... of this code,” so long as it conforms with a permit issued under those chapters. W. Va. Code § 22-15-2; see also W. Va. C.S.R. §§ 33-1-2.119.c, 2.119.f (same). Chapter 22 includes the State Water Pollution Control Act, W. Va. § 22-11, pursuant to which the WVDEP has obtained a permit pertaining to the Reclamation Site. See *Living Lands*, 2023 WL 3470902, at *4. Notably, Living Lands has not and does not argue that WVDEP is violating its duly issued permits in connection with its work at the Reclamation Site.

As the District Court concluded, RCRA regulations contain analogous exclusions. In order to prevent “conflicting RCRA and CWA requirements concerning the adverse effects of solid waste disposal on surface waters,” EPA has specifically *exempted* permitted Clean Water Act discharges from the RCRA regulations that govern open dumping. 44 Fed. Reg. 53438, at 53444. Accordingly, the “open dumping” regulations located at Part 257 of Title 40 of the Code of Federal Regulations “*do not apply* to industrial discharges which are point

sources *subject to permits under section 402 of the Clean Water Act*, as amended.” 40 C.F.R. § 257.1(c)(6) (emphasis added).

In any event, because “solid waste” does not include the materials and discharges being disposed of by WVDEP at the Reclamation Site, Secretary Ward has not violated the WWSWMA or the WWSWMR. The WWSWMA and the WWSWMR define an open dump such that it requires the disposal of solid waste. W. Va. Code § 22-15-2 (defining “open dump” as “any solid waste disposal which does not have a permit under this article, or is in violation of state law, or where solid waste is disposed in a manner that does not protect the environment”); W. Va. C.S.R. § 33-1-2.84 (defining “open dump” as “any solid waste disposal that does not have a permit under W. Va. Code § 22-15-1 *et seq.*, and is not otherwise authorized by an order of the Secretary; or is in violation of state law; or where solid waste is disposed in a manner that does not protect the environment”).

Living Lands appears to argue that the activities of WVDEP at the Site constitute “open dumping” under state law because W. Va. C.S.R. § 7.2.a. provides that “[a]ny site at which the following protective measures have not been instituted will be classified as an open dump.”

Opening Br. 32–33. They contend that it does not matter whether the material is “solid waste” or that the facilities at the site are not “industrial solid waste disposal facilities” because § 7.2.a. defines an open dump as any site without protective measures. *Id.* In other words, despite the WVSWMA and the WVSWMR’s specific inclusion of “solid waste” in their definitions of “open dump,” Living Lands would have the court interpret § 7.2.a. so as *not* to require “solid waste.”

As the District Court correctly determined, such an interpretation is unreasonable. Living Lands’ view is inconsistent with the text and context of this provision within the overall regulatory scheme.

“Regulations, like statutes, are interpreted according to the canons of construction.” *Black & Decker Corp. v. Comm’r*, 986 F.2d 60, 65 (4th Cir. 1993). “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (cleaned up).

To interpret § 7.2.a. as to *not* require solid waste would be to ignore the text and structure of the WVSWMA, and the accompanying regulatory scheme set forth in the WVSWMR—that is, to “establish a

comprehensive program of controlling all phases of solid waste management.” W. Va. Code § 22-15-1. Living Lands themselves advanced this reading both in their Amended Complaint and during summary judgment. *See Living Lands III*, 2023 WL 3470902, at *4. Like the District Court, this Court should refuse to interpret § 7.2.a. to apply to any site, *regardless* of whether it includes solid waste.

Living Lands also appears to argue that the industrial point source exclusion does not apply to the disposal in drying pits at the site of sludges periodically removed from the surface impoundments at the Reclamation Site, “because those sludges are no longer in any conveyance connected to an NPDES point source discharge” into waters of the United States. Opening Br. at 33. Because the drying pits should not be excluded from the definition “solid waste” set forth in the WWSWMA and WVSMR, they argue the District Court improperly applied the industrial point source exclusion to drying pits at the site.

The state law exclusions, however, do apply to the WVDEP’s activities at the site, because they exclude materials “placed or disposed of at a facility which is regulated under [the State Water Pollution Control Act]” from the definition of “solid waste.” W. Va. Code § 22-15-2;

see also W. Va. C.S.R. §§ 33-1-2.119.c, 2.119.f. Under Living Lands' preferred interpretation of the text, the phrase "placed or disposed of at a facility regulated under [the State Water Pollution Control Act]" would be rendered surplusage if not read to extend to materials upstream of, but ultimately disposed of, at a point source.

What Living Lands misses is that the sludge is ultimately part of the regulated facilities and practices at the Subject Property, which are in turn subject to the permit under Chapter 22, with which the Secretary is in full compliance. What is more, the lack of specific liner requirements for these facilities and practices is telling. Rather, the presence of specific liner requirements for other facilities, and the absence of any similar requirement for the facilities in question, demonstrates that these requirements were not intended to be imposed on the WVDEP's activities at the Reclamation Site. *See, e.g.*, W. Va. C.S.R. §§ 33-1-5.4, 33-1-5.5.

B. Living Lands' preemption argument fails for numerous reasons.

The byzantine argumentation presented by Living Lands makes its opening brief difficult to apprehend at times. Although Living Lands claims that its appeal is limited to Count II "only to the extent that that

claim is based upon violations of WV state law,” it appears that Living Lands is also arguing that the District Court erroneously applied 40 C.F.R. § 257.1(c)(6)—which, as explained above, generally exempts permitted Clean Water Act discharges from the RCRA regulations that govern open dumping. Opening Br. at 25, 42.

It seems that Living Lands is contending that this federal regulatory exclusion, as well those provided under the West Virginia Solid Waste Management Act (“WVSWMA”),⁷ are preempted by RCRA’s statutory requirement that open dumping regulations eliminate any “reasonable probability of adverse effects on health or the environment.” 42 U.S.C. § 6944(a). But for the District Court’s allegedly erroneous application of 40 C.F.R. § 257.1(c)(6), Living Lands appears to contend, the court would have been compelled to conclude that the alleged (and unproven) conduct violates RCRA and therefore that the state law exclusions are invalid under the Supremacy Clause because they

⁷ Under the WVSWMA, the following two items are excluded from the definition of “solid waste”: (1) “industrial discharges with are point sources and have [NPDES] permits” and (2) “material resulting from . . . the exploration, development, production, storage and recovery of coal . . . placed or disposed of at a facility which is regulated under Chapter 22” so long as it conforms with a permit issued thereunder. W. Va. Code § 22-15-2.

conflict with RCRA and its implementing regulations. *See* Opening Br. at 42.

There are several obstacles to this argument.

1. Judicial estoppel precludes Living Lands' arguments on appeal.

To begin with, Living Lands should be precluded by judicial estoppel from making what is effectively a preemption argument on appeal that they disavowed below. *See New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001) (judicial estoppel is designed to “protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment”).

In the District Court below, Living Lands expressly disclaimed it was arguing that *any* provision of state law is preempted by RCRA. *See* Dist. Ct. Dkt. No. 133, at *17 (“Plaintiffs have never asserted herein that any provision of W. Va. law is preempted by any provision of RCRA.”). The District Court noted it as well on reconsideration. *See also Living Lands III*, 2023 WL 3470902, at *5 (“Plaintiffs seek to distance themselves from any argument as to state waste management law being preempted by RCRA.”).

2. Even if successful, the preemption argument is alone insufficient to justify reversal.

What is more, this Court need not address the preemption argument for another reason—namely, Living Lands does not even challenge the District Court’s conclusion that Count II “fail[s] for the simple reason that Plaintiffs have failed to show a probable risk of harmful contamination at the Subject Property from groundwater contamination, much less at a level that presents an imminent and substantial endangerment within the confines of RCRA.” JA465; *see also* JA473 (“Plaintiffs have not produced any evidence of an exceedance at the Subject Property such that it would violate the open dumping criteria in Subtitle D.”).⁸

That is because even if Living Lands’ argument on appeal had merit—that state law is preempted or somehow displaced by RCRA—their claim would fail under RCRA itself, on its own terms. Because they do not challenge this independent basis for the judgment, the District Court’s judgment as to Count II should be affirmed.

⁸ *See infra* Part I.C & Part I.D.

3. There is no preemption here.

Living Lands' preemption argument is baseless on its own terms. It unnecessarily intertwines and frankly confuses the distinct solid waste management regimes adopted by the federal government (RCRA) and the state of West Virginia (WVSWMA).

Conduct that violates the federal open dumping criteria articulated through RCRA and its implementing regulations could give rise to federal RCRA claims. And conduct that violates the WVSWMA and the related state rules could give rise to claims for violation of the WVSWMA. Indeed, this argument was so haphazardly conceived that it was not until after the summary judgment briefing was complete that Living Lands raised their half-baked preemption contention at oral argument and then later on reconsideration. *See Living Lands II*, 2023 WL 2142981, at *9–10; *Living Lands III*, 2023 WL 3470902, at *5 (denying reconsideration).

Living Lands' argument appears to be that RCRA invalidates (by preemption) the exclusionary provisions of the WVSWMA, and that when those state law provisions are excised, potentially successful state law claims will remain. The District Court reviewed the RCRA claims

based on RCRA and its regulations, and assessed the WWSWMA claims based on the WWSWMA and its regulations. *See Living Lands II*, 2023 WL 2142981, at *10. That approach was appropriate. Particularly where the state solid waste program has been reviewed and approved by EPA, there is no support for Living Lands' convoluted effort to use RCRA to somehow strike out the portions of state law with which they have policy disagreements. *See* 61 Fed. Reg. 9451 (March 8, 1996); 65 Fed. Reg. 36792, 36793 (June 12, 2000) (concluding that West Virginia's application "meets all of the statutory and regulatory requirements established by RCRA.").

4. The District Court properly construed 40 C.F.R. § 257.1(c)(6).

To the extent it is relevant to Living Lands' arguments on appeal, the District Court did not err in applying 40 C.F.R. § 257.1(c)(6), which exempts facilities and practices from regulation under Subtitle D of RCRA, stating that "[t]he criteria do not apply to industrial discharges which are point sources subject to permits under § 402 of the CWA."

Although Living Lands argued below that the exception in 40 C.F.R. § 257.1(c)(6) applies only narrowly—that is, to the specific discharge from a permitted point source rather than WVDEP's facilities

and practices at-large—the District Court rightly rejected that contention. Living Lands had argued that the Subtitle D solid waste exclusion should be treated identically to the Subtitle C hazardous waste exclusion. *See* 40 C.F.R. § 261.4(a)(2).

But, as the District Court correctly observed, the language of the Subtitle C hazardous waste exclusion is very different from the Subtitle D solid waste exclusion. The hazardous waste exclusion is applies “only to the actual point source discharge” and “does not exclude industrial wastewaters while they are being collected, stored or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment.” *Living Lands II*, 2023 WL 2142981, at *7.

Despite Living Lands’ contention that Subtitles C and D are “parallel, identically worded provisions” such that the comment in Subtitle C applies equally to Subtitle D, the District Court was right to find that the presence of the comment in Subtitle C and the absence of it in Subtitle D indicate just the opposite. That is, the comment in Subtitle C was *not* meant to apply to the exclusion in Subtitle D. Under well-settled canons of interpretation, the District Court interpreted the omission of the comment in Subtitle D as intentional.

Applying the comment to point sources subject to Subtitle C but not to Subtitle D makes sense, because Subtitle C is fairly read to be a *more* stringent set of guidelines to protect human health and the environment from hazardous waste. As the District Court concluded, it would therefore be logical to regulate more material—i.e., narrow the exclusion—when regulating hazardous materials that have much greater potential for harm. *See Living Lands II*, 2023 WL 2142981, at *7.

What is more, the two provisions differ in what is being excepted and how the exception applies the Clean Water Act. After all, the provision in Subtitle D refers to facilities and practices to which the criteria for open dumping do not apply, *see* 40 C.F.R. § 257.1(c) (“These criteria apply to all solid waste disposal facilities and practices with the following exceptions”), while the provision in Subtitle C refers to materials that do not constitute solid wastes, *see* 40 C.F.R. § 261.4(a) (“The following materials are not solid wastes for the purpose of this part”). Put another way, Subtitle D exempts facilities and practices, while Subtitle C only limits what materials constitute “solid waste.” This distinction further aligns with the narrower exclusions in Subtitle C, as exempting a certain

type of material at a given site results in more material being regulated than exempting a facility or practice.

As far as the application to the Clean Water Act, Subtitle D refers to “[i]ndustrial discharges which are point sources subject to *permits* under § 402 of the CWA,” 40 C.F.R. § 257.1(c)(6) (emphasis added), while Subtitle C refers to “[i]ndustrial wastewater discharges that are point source discharges subject to *regulation* under section 402 of the CWA,” 40 C.F.R. § 261.4(a)(2) (emphasis added).

Regardless of any potential distinction between “point sources” and “point source discharges,” the operative difference between the two is that Subtitle C refers to industrial discharges *subject to regulation*, whereas Subtitle D refers to industrial discharges *subject to permits*. EPA has interpreted the “subject to regulation” language to refer to point sources that “should have a NPDES permit in place, whether in fact they do or not.”⁹ *Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste*, 1995 WL 911821, at *1.

⁹ The District Court observed that other federal courts, including a Circuit, have adopted this interpretation. *See, e.g., Inland Steel Company v. EPA*, 901 F.2d 1419, 1423 (7th Cir. 1990); *State v. PVS Chems., Inc.*, 50 F. Supp. 2d 171, 178 (W.D.N.Y. 1998).

On the other hand, the Subtitle D language only applies to facilities and practices that, like the Reclamation Site, are actually subject to a NPDES permit, as opposed to facilities and practices that are subject to Clean Water Act liability at-large.

The exclusion in Subtitle C for industrial discharges subject to the Clean Water Act regulation, as EPA has clarified, is not meant to absolve alleged polluters entirely—rather, it was meant to avoid overlap of regulatory schemes. After all, “[u]nder EPA’s interpretation of the ‘subject to’ language, a facility that should, but does not, have the proper NPDES permit is in violation of the CWA, not RCRA.” *Id.*

Further, Subtitle C considerably narrows the scope of what constitutes a “point source.” EPA’s NPDES regulations define point sources to include any “ditch ... from which pollutants are or may be discharged” and “discharge of pollutants” to include “surface runoff which is collected or channeled by man.” 40 C.F.R. § 122.2. However, though Subtitle C refers to “point source discharges,” the comment clarifies that the exclusion does not include “industrial wastewaters while they are being collected, stored or treated before discharge.” 40 C.F.R. § 261.4(a)(2).

Given the desire to avoid overlap between the Clean Water Act and RCRA and Subtitle's C narrower use of "point source," the District Court was correct to conclude that Subtitle C's exclusion of all point source discharges subject to regulation, rather than subject to permits, does not unreasonably expand its scope. Living Lands' theories of violation under RCRA, therefore, must be rejected. *See Living Lands II*, 2023 WL 2142981, at *8.

C. WVDEP has not violated RCRA's opening dumping criteria for groundwater.

Although Living Lands largely purports to challenge the District Court's decision as to state solid waste law, the Secretary does not wish to leave open any potential ambiguity that may be caused by Living Lands' opaque opening brief. The Secretary, through his agency, has not violated RCRA either, for the many reasons assigned by the District Court, even apart from the regulatory exclusion. The principal reasons bear mentioning here in further support of affirmance.

In this case, Living Lands alleged that WVDEP violated RCRA's open dumping criteria set forth in 40 C.F.R. § 257.3-4 respecting groundwater.

Title 42 U.S.C. § 6945(a) provides as follows:

Upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. The prohibition contained in the preceding sentence shall be enforceable under section 6972, [the citizen suit provision,] of this title, against persons engaged in the act of open dumping.

(emphases added). See *Cox v. City of Dallas*, 1999 WL 33756552, at *12 (N.D. Tex. Aug.4, 1999) (“Section 6945(a), by its terms, only authorizes suits against those persons ‘engaged in the act of open dumping.’”); *Scarlett & Assocs., Inc. v. Briarcliff Ctr. Partners, LLC*, 2009 WL 3151089, at *11 (N.D. Ga. Sept. 30, 2009) (same).

RCRA’s statutory definitions define “open dump” as “[a]ny facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated *under section 6944* of this title and which is not a facility for disposal of hazardous waste.” 42 U.S.C. § 6903(14) (emphasis added). Section 6944(a) grants EPA the authority

to promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps within the meaning of this chapter. At a minimum, such criteria shall provide that a facility may be classified as a sanitary

landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility.

42 U.S.C. § 6944(a).

Notwithstanding RCRA's statutory definition of open dump as set forth above in § 6903(14), courts have observed that “[a]lthough RCRA prohibits open dumping, and sanctions the filing of citizen suits, RCRA does not specifically define what open dumping is.” *Hackensack Riverkeeper, Inc. v. Delaware Ostego Corp.*, 450 F. Supp. 2d 467, 485 (D.N.J. 2006) (emphasis added), *amended on reconsideration in part on other grounds*, No. CIV A 05-4806 DRD; 2006 WL 3333147 (D.N.J. Nov. 16, 2006); *The Courtland Co., Inc. v. Union Carbide Corp.*, No. 2:18-CV-01230, 2023 WL 6331069, at *87 (S.D. W. Va. Sept. 28, 2023) (same).

Instead, as set forth in the statutory provisions, “Congress conferred this task on the EPA Administrator.” *Id.* (quoting *Hackensack*, 450 F. Supp. 2d at 485). EPA “accomplishes this task via 40 C.F.R. §§ 257.1 through 257.4”—the regulatory open dumping criteria. Indeed, 40 C.F.R. § 257.1 provides:

(a) *Unless otherwise provided*, the criteria in §§ 257.1 through 257.4 are adopted for determining which solid waste disposal facilities and practices pose a reasonable probability of adverse effects on health or the environment under

sections 1008(a)(3) and 4004(a) of the Resource Conservation and Recovery Act (The Act).

40 C.F.R. § 257.1(a) (emphasis added). Therefore, facilities and practices failing to satisfy any of the criteria set forth in §§ 257.1 through 257.4 are deemed, respectively, open dumps and open dumping in violation of RCRA § 4005(a). *See* 40 C.F.R. § 257.1(a)(1)-(2).

Here, the sole regulatory prohibition that Living Lands alleged was violated—the groundwater criteria for open dumping—is not satisfied as a matter of law. *See* 40 C.F.R. § 257.3-4. As noted, the operative pleading alleges that the Secretary is in violation of 40 C.F.R. § 257.3-4, which provides (in relevant part) that “[a] facility or practice shall not *contaminate* an underground drinking water source beyond the solid waste boundary.” 40 C.F.R. § 257.3-4(a) (emphasis added).

In addition to failing to show the existence of an “underground drinking water source” and chemical expansion “beyond the solid waste boundary,” as respectively defined in 40 C.F.R. § 257.3-4(c)(4)(i)–(ii) and 40 C.F.R. § 257.3-4(c)(5)—themselves independent reasons to affirm—Living Lands has more fundamentally failed to demonstrate that the Secretary has “contaminate[d]” the groundwater, as that term is defined.

According to Living Lands, it is the fact of MCL exceedances—allegedly caused by the Secretary’s remediation work—that constitutes a violation of the provision requiring that a facility or practice “not contaminate” the groundwater beyond the boundaries of the site. But “that is not enough” to maintain a violation of § 257.3-4, as the Second Circuit concluded when faced with a similar argument. *S. Rd. Assocs. v. Int’l Bus. Machines Corp.*, 216 F.3d 251, 256 (2d Cir. 2000).

The Second Circuit’s analysis is instructive. The term “contaminate” is defined by regulation. It means to “*introduce a substance that would cause*” MCL exceedances. 40 C.F.R. § 257.3-4(c)(2) (emphasis added). The plain meaning of “introduce” in this context implies the addition of a substance not previously present.

As the Second Circuit explained, “[w]hat is prohibited by the statute and the regulation (read together) is the act of *introducing a substance that causes MCL exceedances, not the action of the MCL exceedances on the environment.*” *S. Rd. Assocs.*, 216 F.3d at 256 (emphasis added). In short, a “historical act cannot support a claim for violation of 42 U.S.C. § 6945(a).” *June v. Town of Westfield, New York*, 370 F.3d 255, 259 (2d Cir. 2004) (quoting *S. Rd. Assocs.*, 216 F.3d at 257).

Indeed, as the Second Circuit put it, Living Lands has not shown that the Secretary's remediation efforts constitute anything more than "the movement of soil (with or without contaminants) from here to there pursuant to a state-sponsored or state-authorized plan or program," which "does not constitute 'introduction' for the purposes of RCRA." *S. Rd. Assocs.*, 216 F.3d at 257. The same goes here.

Accordingly, Living Lands has failed to show that the Secretary is engaged in the forbidden act of open dumping in violation of groundwater criteria because they have not demonstrated that the Secretary is "introduce[ing]" any substances at all, let alone any substances that would cause exceedances. 40 C.F.R. § 257.3-4(c)(2).

D. There is no RCRA liability because Living Lands alleges a violation of the groundwater criteria based on a substance *with no MCL*.

Even if the Court concludes that the WVDEP could by its activities considered to have introduced substances, Living Lands has failed to present any evidence suggesting the WVDEP did so in violation the groundwater criteria. Specifically, the only substance they identify as contaminating the underground drinking water source—beryllium—*has no maximum contaminant level*. See *S. Rd. Assocs.*, 216 F.3d at 256-

57 (“[T]he complaint does not plead that IBM is engaged in the forbidden act of open dumping unless the complaint alleges that IBM is introducing substances that would cause exceedances”). As was apparent below during a hearing with the District Court, Living Lands realized its fundamental error underlying their RCRA claims far too late in the day. *See, e.g.*, JA351, JA364 This is yet another ground for affirmance.

After the close of discovery below, the Secretary moved for summary judgment. There, the Secretary pointed out that Living Lands’ theory of groundwater contamination was based on alleged introduction of beryllium (the concentration of which allegedly exceeded the maximum contaminant level specified in appendix I, 40 C.F.R. § 257.3-4(c)(2)–(2)(i)), but that *there is no maximum contaminant level for beryllium specified in appendix I. See* 40 C.F.R. Pt. 257, App. I. In response, Living Lands moved for leave to again amend their complaint to alter their theory of RCRA violation, which the District Court denied.¹⁰

Because Living Lands does not appeal or otherwise challenge that decision here, the fact that their RCRA claim is solely dependent on the

¹⁰ *See* Dist. Ct. Dkt. No. 115.

theory that the Secretary's alleged open dumping has introduced a substance that cannot cause exceedances *as a matter of law* is also independently fatal.

CONCLUSION

For the foregoing reasons, the District Court's order should be affirmed.

STATEMENT ON ORAL ARGUMENT

Oral argument will not help the Court to decide this appeal. The facts and legal arguments are adequately presented in the briefs and record.

October 10, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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