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Environmental Quality
Board

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

LACKAWANNA TRANSPORT COMPANY,
d/b/a WETZEL COUNTY LANDFILL and
FLUID MANAGEMENT SOLUTIONS, INC.

Appellants,

v.

Appeal No.: 24-04-EQB

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

Appellee.

APPELLANTS' MOTION FOR STAY

COMES NOW Lackawanna Transport Company, d/b/a Wetzel County Landfill (hereinafter "Wetzel Landfill") and Fluid Management Solutions, Inc. (hereinafter "FMS") (together the "Appellants"), by counsel, Armando F. Benincasa, Marissa G. Nortz, Allyn G. Turner, and the law firm of Steptoe & Johnson PLLC, and hereby move the West Virginia Environmental Quality Board (hereinafter "Board"), pursuant to West Virginia Code § 22B-1-7(d) and West Virginia Code of State Rules § 46-4-5.5, for a stay of Appellee West Virginia Department of Environmental Protection's (hereinafter "Appellee" or "WVDEP") denial of Wetzel Landfill's Minor Permit Modification Renewal request to accept and dispose of special waste as generated by FMS (hereinafter "FMS Renewal") and WVDEP's denial of Wetzel Landfill's minor permit modification to accept and dispose of special waste as generated by Rehdyro LTD (hereinafter "Rehdyro denial"). Both the FMS Renewal denial and Rehdyro denial were received by Wetzel Landfill on February 20, 2024, and are attached as *Attachments C* and *E* to Appellants' Notice of Appeal as filed contemporaneously herewith.

In support of this Motion, Appellants state as follows:

1. Appellants have timely appealed WVDEP's FMS Renewal denial and the Rehydro denial.
2. Appellants have timely filed this Motion for Stay, as it has been filed contemporaneously with Appellants' Notice of Appeal dated March 20, 2024.
3. In the Notice of Appeal, Appellants have objected to WVDEP's FMS Renewal denial and Rehydro denial as inappropriate and not in accordance with established law, specifically as it relates to WVDEP's assertion that Wetzel Landfill may not accept and dispose of oil and gas completion or production wastes as generated by FMS and Rehydro because such waste contains radiation.
4. Pursuant to West Virginia Code § 22B-1-7(d), if this Board determines that an "unjust hardship to the appellant will result from the execution or implementation of [the appealed agency action] [it] may grant a stay or suspension of the order, permit, or official action and fix its terms." W.Va. Code § 22B-1-7(d).
5. When reviewing a Motion for Stay, this Board has adopted the four-part standard from the Supreme Court of Appeals of West Virginia's decision in *Camden Clark Memorial Hospital v. Turner*, 212 W. Va. 752, 575 S.E.2d 362 (2002), which is derived from the United States Court of Appeals for the Fourth Circuit's analysis in *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 726 F.2d 1048 (4th Cir. 1985). Under this standard, "a party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay. *Crab Orchard-MacArthur Public Service District v. Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection*, Order Granting Motion to Stay, Appeal No. 14-14-EQB (Aug. 6, 2014) (citing *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970); *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119 (1987)).
6. Appellants' Motion for Stay satisfies each of the required factors.
7. The first and most critical factor that must be analyzed when considering Appellants' Motion is whether Appellants will suffer direct and immediate irreparable harm if the FMS and Rehydro minor permit modification denials are not stayed. Both Wetzel Landfill and FMS will suffer such harms.
8. If the minor permit modification denials are not stayed during the pendency of this Appeal, Wetzel Landfill becomes immediately subject to potential enforcement from WVDEP because it is currently accepting, and has accepted, oil and gas waste that contains radiation at its facility despite receiving direct approvals from WVDEP for the acceptance of these wastes through previously issued and currently active minor permit modifications.

9. As noted in Appellants' Notice of Appeal, Wetzel Landfill has been accepting oil and gas completion or production waste through special waste minor permit modifications for approximately seven (7) or more years. In addition to previously being authorized to accept such wastes from FMS, Wetzel Landfill is actively accepting these wastes from other generators through special waste minor permit modifications that were issued by WVDEP and remain in effect, as WVDEP, to Appellants knowledge and belief, has taken no action to rescind these active approvals.
10. As such, Wetzel Landfill faces the potential for immediate noncompliance or other third-party involvement based on WVDEP's newly changed (and unsupported) position that radioactive waste material is prohibited from disposal in West Virginia solid waste facilities. Penalties for noncompliance under the West Virginia Solid Waste Management Act range from \$5,000 for each day of the violation to \$25,000 for each day of the violation depending on whether the penalty action is administrative or civil. W. Va. Code §§ 22-15-15(c), 22-15-15(d). Wetzel Landfill will suffer irreparable harm in having to respond to and challenge any alleged noncompliance and faces potential harm through third-party litigation that seeks to enforce WVDEP's newly created position.
11. To avoid this alleged and unsupported noncompliance, Wetzel Landfill would likely be faced with the need to cease the acceptance of this waste from other generators, despite the fact that Wetzel Landfill has received direct approval from WVDEP to continue accepting these wastes through active minor permit modifications, as WVDEP has taken no action to rescind these valid permits.
12. Further, for each day that WVDEP's denials are allowed to stand, Wetzel Landfill is losing income generated from the acceptance of this waste from FMS and Rehydo, which is income that is used to improve the facility and ensure continued operational compliance with applicable statutes and regulations. By having to cease the acceptance of this waste from other generators who are validly permitted to dispose of this waste at the facility, Wetzel Landfill will also be losing the income from those generators, despite holding valid permits that allows Wetzel Landfill to accept this waste. Wetzel Landfill will be unable to recoup this lost income.
13. The harm to Wetzel Landfill without a stay is irreparable, as it will be unable to recoup fees generated from the acceptance of these wastes and faces the potential for noncompliance for its continued acceptance of this waste from other generators despite being permitted to do so.
14. FMS will also suffer an irreparable harm if the FMS Renewal denial stands during the pendency of this Appeal.
15. FMS provides a valuable service to West Virginia's oil and gas industry, as it provides an avenue for the recycling and reuse of oil and gas wastes so that these wastes are not retained on site.


16. If FMS is prohibited from disposing oil and gas completion or production waste in West Virginia solid waste facilities, it will have to find an alternative disposal option, which will require the expenditure of significant funds for transportation and disposal to out of state facilities. Such costs are prohibitive and could require FMS to close its doors. This loss of funds cannot be recouped by FMS even if this Board later determines that the FMS Renewal denial must be rescinded.
17. Second, the issuance of a stay of the FMS and Rehydro denials will result in no harm to WVDEP. Notably, WVDEP has previously approved special waste minor permit modifications that permit the disposal of radioactive wastes in West Virginia solid waste facilities, with many of these permits currently active. To Appellants' knowledge and belief, WVDEP has not yet taken actions to rescind these permits, implying at a minimum that the Agency does not view its new position on radioactive wastes as requiring urgent action to reverse ongoing permitted disposal activities pursuant to its rules and statute. Further, WVDEP's own rules explicitly permit the disposal of these wastes, revealing that the West Virginia Legislature, who approves these rules, does not consider this a harm to the public or the environment.
18. Next, this Board must consider whether the public interest will be served by the issuance of a stay in this matter. Appellants believe that a granting of a stay will directly serve the public interest, as the West Virginia Legislature's enactment of W. Va. Code § 22-15-8 and W. Va. Code R. § 33-1-5.6 and § 33-1A-1 *et seq.* providing for the disposal of these wastes in solid waste facilities demonstrates the position of the State.
19. Further, the granting of a stay ensures that West Virginia continues to have a reliable disposal option for the oil and gas waste generated by West Virginia's Marcellus/Utica shale industry. Without these disposal options, oil and gas sites (1) will be required to retain these wastes on site until alternative disposal can be arranged, (2) will likely be hindered or even halted in the State, and (3) will potentially increase risks to the environment by barring the normal transport and disposal of these wastes to an appropriate, permitted, solid waste facility. By allowing solid waste facilities to continue to accept these wastes in dedicated cells subject to stringent performance and design standards, that harm is eliminated.
20. The final factor that this Board must consider is whether Appellants will succeed on the merits of the appeal. While this Board has repeatedly held that it does not like to consider the outcome of an appeal at such an early stage of consideration, Appellants believe that the Notice of Appeal makes it clear that they will succeed on the merits of this action, as WVDEP's position is directly contrary to established law.

WHEREFORE, for the reasons set forth more fully above, Appellants respectfully request that this Board GRANT this Motion for Stay and Order that WVDEP's FMS Renewal denial and Rehydro denial be stayed throughout the pendency of this action.

Respectfully submitted,

**Lackawanna Transport Company, d/b/a
Wetzel County Landfill, and Fluid
Management Solutions, Inc.**

By counsel:


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CERTIFICATE OF SERVICE

I, Marissa G. Nortz, counsel for Appellants, do hereby certify that I have filed the foregoing “Appellants’ Motion for Stay” with the West Virginia Environmental Quality Board and have served true and exact copies of the same upon all counsel of record via electronic, hand delivery, and U.S. Mail, postage prepaid, on this 20th day of March, 2024.

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