

ENVIRONMENTAL QUALITY BOARD

PAUL A. STERN,

Appellant,

v.

Appeal No. 12-38-EQB

**DIRECTOR, Division of Water and
Waste Management, Department of
Environmental Protection,**

Appellee,

and

**POTOMAC RIVERKEEPER and
FOOD & WATER WATCH,**

Intervenors.

FINAL ORDER

Appeal No. 12-38-EQB was filed with the West Virginia Environmental Quality Board ("Board") on October 29, 2012. The evidentiary hearing in the matter was held before a court reporter and full complement of the Board on April 11, 2013. Dr. Edward M. Snyder, Chairman; Dr. Charles C. Somerville; Dr. B. Mitchel Blake, Jr.; Dr. D. Scott Simonton and Mr. William H. Gillespie attended the hearing in person or via teleconference. Charles S. Driver, Esquire, appeared on behalf of the Director of the West Virginia Department of Environmental Protection's Division of Water and Waste Management ("Appellee" and/or "WVDEP"). Paul A. Stern ("Appellant") represented himself *pro se*. Susan J. Kraham, Esquire, of Morningside Heights Legal Services Inc. and J. Michael Becher, Esquire, represented the Potomac Riverkeeper and Food & Water Watch

(“Appellant Intervenors”). The Board heard testimony of three witnesses: Paul Stern, Yogesh Patel, and Matthew Sweeney. Appellant’s Exhibit One was admitted into evidence in addition to the certified record prepared by the Appellee.

Prior to conducting the evidentiary hearing, the Board heard arguments on Cross Motions for Summary Judgment relating to the authority of the WVDEP to issue a “zero discharge” National Pollutant Discharge Elimination System Permit (“Permit”). The Board concluded that it was within the WVDEP’s authority to issue a Permit that did not allow for any discharge into the waters of the state.

At the conclusion of the evidentiary hearing the parties were directed to submit proposed findings of fact and conclusions of law. The final briefs were submitted to the Board on June 28, 2013. After careful consideration of the proposed findings and conclusions, arguments of counsel, and evidence presented at hearing, the Board unanimously decided to **REMAND** the Permit for modification consistent with this Order.

Standard of Review

The Board hears appeals of permits issued by Appellee *de novo* and in accordance with *West Virginia Code* §22B-1-7. The Board does not afford deference to the Director’s decision. *W. Va. Division of Env’tl. Protection v. Kingwood Coal Co.*, 200 W. Va. 734, 745, 490 S.E.2d 823, 834 (1997). Under *West Virginia Code* §22B-1-7(g), 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.”

The Board hears appeals of final decisions or actions issued by the Appellee in accordance with W.Va. Code § 22B-1-7(e) which provides for the Board to hear appeals *de novo*. The West

Virginia Supreme Court confirmed the de novo status of environmental board appeals in *W.Va. Division of Environmental Protection v. Kingwood Coal Co.*, 200 W.Va. 734, 745, 490 S.E.2d 823, 834 (1997). The Court cited Black's Law Dictionary, saying that the Board must try the matter afresh, as if no decision had previously been made. *Id.* "Clearly authorizing the Board to try the case anew, the legislature intended that the Board be the ultimate finder of fact and to act independently on the evidence before it." *Id.*

The West Virginia Supreme Court also stated, "[I]n a *de novo* hearing, the Board 'is not concerned with what took place below. . . [a]s no presumption of correctness attaches to the action of the [WVDEP].'" *Id.* *Quoting Big Form Mining Co. v. Tenn. Water Quality Control Bd.*, 620 S.W.2d 515, 521 (Tenn.Ct.App. 1981).

DISCUSSION

Mountain Springs Public Utility, LLC applied for a WV/NPDES Permit to construct and operate its proposed new facility. Certified Record ("CR") at 409. The proposed wastewater treatment system will serve a population of approximately 1,900 people in the Sleepy Creek and Mountain Springs developments. *Id.* The Permit application and design specifications indicate discharge of nitrogen, phosphorus, fecal coliform, dissolved oxygen and suspended solids. CR at 49.

After initially rejecting the application, WVDEP issued a permit to Mountain Springs Public Utility, LLC to acquire, construct and install a waste water collection and treatment system that, following a permit modification to allow operation, will discharge nutrients, sediment, fecal coliform, and other pollutants into Sleepy Creek at a designed average flow of 0.1573 million gallons per day. CR at 14.

The Board finds that while the language states that there is to be no discharge associated with this Permit, the terms and conditions are confusing. Appellee argues that the apparent contradictions in the Permit can be explained by the fact that many of the sections are “boilerplate.” The Board finds the boilerplate explanation unsatisfactory. It is confusing to state no discharge in some of the Permit but place limits and reporting requirements in other sections. WVDEP argues that the plain language makes it clear that this is not a Permit to discharge but later asks the Board to ignore the plain language of the Permit conditions for compliance reporting, flow, BOD, suspended solids, and fecal coliform. The “plain language of the Permit” argument cannot be one-sided. The “boilerplate” explanation is unacceptable.

The Board finds that this Permit was hastily written and must be modified to make the intent clear to the public and the Permittee. Boilerplate language is easily removed. Keeping the boilerplate language in the Permit is contradictory and creates confusion as to whether this operator has a license to discharge into the waters of the state.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All argument of counsel, proposed findings of fact and conclusions of law have been considered and reviewed in relation to the aforementioned record, as well as to 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 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 credited.

Findings of Fact

1. On October 1, 2012, WVDEP issued NPDES Permit No. WV0105911 (“the Permit”) to Wade Clements, Mountain Springs Public Utility. CR at 406.
2. The Permit specifically provides an effluent limitation for fecal coliform. On page four of the Permit, it provides a monthly geometric mean effluent limitation of 200 and a maximum daily limitation of 400. While the Permit states that the facility may not operate until the permittee identifies phosphorous and nitrogen offsets and applies for and receives a Permit modification. However, the fecal coliform effluent limitation already has been established and therefore would not be subject to the major modification.
3. Section A.001 of the Permit states that “during the period beginning 11/1/2012 and lasting through midnight 9/30/2017 the permittee is authorized to discharge from Outlet Number(s) 001. . . .” The Permit then goes on to provide limitations for various pollutants, including Biological Oxygen Demand (“BOD”) (26.26 pounds max daily), suspended solids (78.76 pounds max daily), and fecal coliform (400 pounds max daily). CR at 412.
4. Section C21 of the Permit states that “[u]nless otherwise authorized under Section A of this Permit, any discharge from any point other than a permitted treatment outfall or permitted combined sewer system is expressly prohibited..” CR at 417.
5. Section C23 of the Permit states that “[t]he average daily design flow of the new wastewater treatment plant has been established at 0.1573 million gallons per day. However, the permittee has not provided any offsets for total nitrogen or total phosphorus at this time.

Therefore, this Permit currently only authorizes the acquisition, construction, and installation of the wastewater treatment plant and does not authorized the operation of the wastewater treatment plant or any discharge from Outlet 001. Refer to Section D3 for further details.”

Id.

6. Section D3 of the Permit again states that “[t]he average daily flow of the new wastewater treatment plant has been established at 0.1573 million gallons per day.” Later, in section a of the same paragraph, the Permit states that “[i]n the future, expansion of the wastewater treatment plant beyond the maximum daily flow of 0.0 million gallons per day and/or its average design flow shall require the permittee to obtain additional offsets. Said offsets shall be submitted to the Director for approval, and the Permit subsequently modified prior to any expansion.” CR at 419.
7. Section D5 of the Permit imposes certain reporting requirements on the permittee, stating that “. . . the permittee shall report the total annual mass load for total nitrogen and total phosphorous based on monthly totals from November 1st through October 31st on its October DMR.”
8. Section D6.a of the Permit states that “[t]he permittee shall summarize the previous year’s nutrient data. This may be accomplished in letter form and shall include all calculations of the year’s mass loadings reported. In general this report shall include a table depicting the monthly loadings discharged for the previous year as well as an assessment of compliance with the nitrogen and phosphorus annual limitations in Section A.001. CR at 419.

Conclusions of Law

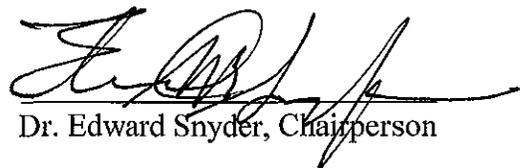
1. The Board hears appeals of permits issued by Appellee *de novo* and in accordance with *West Virginia Code* §22B-1-7. The Board does not afford deference to the Director's decision. *W. Va. Division of Env'tl. Protection v. Kingwood Coal Co.*, 200 W. Va. 734, 745, 490 S.E.2d 823, 834 (1997).
2. Under *West Virginia Code* §22B-1-7(g), 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."

Conclusion

The Board finds that the Permit as written is confusing and contradictory. The Permit language referred to as boilerplate by the Appellee must be removed to make the Permit consistent with the sections that do not allow for any discharge into the waters of the state. The Board hereby **REMANDS** the Permit for modification consistent with this order.

It is so Ordered and Entered this 12th day of September 2013.

Environmental Quality Board



Dr. Edward Snyder, Chairperson

**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 circuit 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*.

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CERTIFICATE OF SERVICE

This is to certify that I, Jackie D. Shultz, Clerk for the Environmental Quality Board, have this day, the 13th day of September, 2013, served a true copy of the foregoing **Final Order** to all parties in Appeal No. 12-38-EQB, by mailing the same via United States Mail, with sufficient postage, to the following address:

via certified first-class mail:

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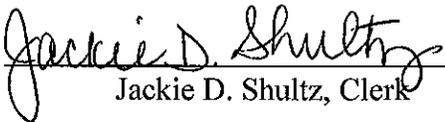
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Jackie D. Shultz, Clerk