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WEST VIRGINIA AIR QUALITY BOARD
CHARLESTON, WEST VIRGINIA

JAN 25 2024

Jefferson County Foundation, et al.,

ENVIRONMENTAL QUALITY BOARD
AIR QUALITY BOARD

Appellant,

v.

Case No. 23-02-AQB

LAURA M. CROWDER, DIRECTOR,
DIVISION OF AIR QUALITY,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Appellee,

and

Roxul USA, Inc., DBA ROCKWOOL

Appellee – Intervenor.

**MOTION TO CONTINUE EVIDENTIARY HEARING, CONDITIONAL OBJECTION TO
ROCKWOOL'S MOTION FOR LEAVE TO FILE AN AMENDED NOTICE OF APPEAL, and
MOTION TO CONSOLIDATE APPEALS**

Jefferson County Foundation, Karen Freer, Gavin Perry, and Sharon Wilt ("JCF et al."), by counsel, respectfully request that this Board convert the evidentiary hearing presently scheduled for February 7, 2023, to a Status Conference whereupon the Board can hear various pending motions and determine a Scheduling Order in this case. The Board has authority to grant continuances for good cause under W. Va. Code § 22B-1-7. Additionally, to promote judicial efficiency and for the economic benefit of the parties, JCF et al. request that 23-01-AQB and 23-02-AQB be consolidated into a single matter under R. 42 of the W. Va. R. Civ. P. For the reasons more fully explained below, this Board should continue the evidentiary hearing to a later date and consolidate these matters.

1. JCF et al. and Rockwool each appealed Modification Permit R14-0037A as issued to Rockwool's facility in Ranson, WV (herein referred to as "RAN-5").
2. Rockwool filed their original Notice of Appeal on December 11, 2023, which was docketed as 23-01-AQB.
3. JCF et al. filed their appeal on December 18, 2023, which was docketed as 23-02-AQB.
4. Both JCF et al. and Rockwool have sought intervention in the other party's appeal. JCF et al. sought permissive intervention, which has not been objected to by any of the parties. Rockwool sought intervention by right, which has also not been objected to.
5. On or around January 22, 2023, Rockwool filed a Motion to Dismiss JCF et al.'s appeal under W. Va. R. Civ. P. 12(b)(6).
6. Rockwool also filed a Motion for Leave to File an Amended Notice of Appeal on or around January 23, 2024. This amendment asserts a wholly new claim related to hydrochloric acid limits within the Melt Furnace (IMF01) and substantively amends Rockwool's other existing claims.
 - I. **The Board should continue the February 7, 2023 Evidentiary Hearing for good cause.**
7. Good cause exists to continue the evidentiary hearing for a number of reasons.
8. Rockwool's recent Motion for Leave to File an Amended Notice of Appeal is reason enough to continue the evidentiary hearing. Rockwool notes that three factors support granting motions to amend as appropriate under Rule 15 – when the amendment: (1) permits the presentation of the merits of the action; (2) does not prejudice the adverse parties by the sudden assertion of the amendment; and (3) the adverse parties can be

given ample opportunity to meet the issue. *Donahue v. Mammoth Restoration & Cleaning*, 246 W. Va. 398, 406, 874 S.E.2d 1, 9 (2022).

9. Here, factors two and three are not present.
10. JCF et al. are prejudiced by the sudden assertion of this amendment. Rockwool asserts an entirely new claim related to emissions of hydrochloric acid limits within the Melt Furnace and substantively amends their other existing claims just two weeks before the presently set evidentiary hearing.
11. JCF et al. cannot be given ample opportunity to meet the issue unless the evidentiary hearing is continued to a later date.
12. JCF et al. concede that all three factors would be present if the Evidentiary Hearing is continued to a later date. Because factors two and three are not presently met, JCF et al. must object to the Motion for Leave to File an Amended Complaint but would withdraw that objection if the Evidentiary Hearing is continued to a sufficiently later date.
13. The parties have not exchanged discovery in this case yet. Under W. Va. Code § 22B-1-8, each party is entitled to certain discovery. Under this Board's procedural rules, each party is entitled to 20 days to respond to the discovery requests. At this stage, those 20 days cannot happen before the February 7, 2023.
14. JCF et al. will also seek permissive discovery in this matter, particularly related to determinations made by permit reviewers and engineers.
15. Additionally, JCF et al. have retained an expert witness who can, and should be permitted to, produce an expert report related to JCF's appeal and potentially rebut any

expert report submitted by Rockwool. This, too, will require more time than is permitted by the February 7, 2023, hearing date.

16. The discovery sought in this case will, first and foremost, allow the Board to hear the merits of this case more fully. Additionally, the discovery sought will help streamline the evidentiary hearing.
17. Finally, Rockwool's Motion to Dismiss is a dispositive motion. Additional motions, including this Motion to Continue and JCF et al.'s Motion to Intervene, remain pending before the Board. Each of those Motions should be heard by the Board in advance of any evidentiary hearing. Hearing these Motions, and then determining when the evidentiary hearing will take place, advances principles of efficiency and fairness.
18. Rockwool is not unduly prejudiced by this continuance. Rockwool can continue operating the facility as they have been since the permit was issued. Additionally, Rockwool requested, and received, a partial stay of Permit R14-0037A, allowing them to further maintain their "status quo," despite the changes to certain permit conditions deemed necessary by the Department of Environmental Protection. A continuance in this matter will not change that.
19. As a result of any and all of the above, good cause exists for this Board to continue the evidentiary hearing currently scheduled for February 7, 2023.

II. The Board should consolidate these matters because they involve common questions of fact or law.

20. Consolidation of the issues in 23-01-AQB and 23-02-AQB is appropriate because each appeal is being heard by the West Virginia Air Quality Board and both appeals involve

common questions of law or fact. Rule 42 of the West Virginia Rules of Civil Procedure provides as follows:

“Consolidation of actions in same court. - When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. An action is pending before the court within the meaning of this subdivision if it is pending before the court on an appeal from a magistrate.”

21. Additionally, consolidating these matters will allow for a judicially efficient resolution of these matters and will help both parties save costs.

WHEREFORE, JCF et al. request the following relief:

- A. Continue the February 7, 2023 Evidentiary Hearing to a later date;
- B. Convert the February 7, 2023 Evidentiary Hearing to a Status Conference and Motions Hearing whereupon the Board can hear various pending motions and determine a Scheduling Order in this case.
- C. Establish a Scheduling Order in this matter for discovery and dispositive motions;
- D. An Order consolidating 23-01-AQB and 23-02-AQB;
- E. An Order DENYING Rockwool’s Motion for Leave to File an Amended Notice of Appeal if this Motion to Continue is denied.

Respectfully Submitted,

Jefferson Co. Foundation, Karen Freer, Gavin

Perry, and Sharon Wilt,

By Counsel,

A handwritten signature in blue ink, appearing to read "Andrew C. Earley", is written over a horizontal line.

Andrew C. Earley (WVSB No. 14055)
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**WEST VIRGINIA AIR QUALITY BOARD
CHARLESTON, WEST VIRGINIA**

JEFFERSON COUNTY FOUNDATION, ET AL.,

Appellant,

v.

Case No. 23-02-AQB

**LAURA M. CROWDER, DIRECTOR,
DIVISION OF AIR QUALITY,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,**

Appellee,

and

ROXUL USA, INC., DBA ROCKWOOL

Appellee – Intervenor.

Certificate of Service

I, Andrew Earley, do hereby certify that I served the foregoing *Motion to Continue Evidentiary Hearing, Motion to Consolidate Appeals, and Conditional Objection of Rockwool's Motion for Leave to File an Amended Notice of Appeal* on the Clerk of the West Virginia Air Quality Board by personal service, and on the Appellant and the Appellee by First Class U.S. Mail, postage prepaid, at the following addresses on January 5, 2024:

Kenna M. DeRaimo
Clerk of the Board
West Virginia Air Quality Board
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