

**WEST VIRGINIA AIR QUALITY BOARD
CHARLESTON, WEST VIRGINIA**

RECEIVED

**ROXUL USA, INC., d/b/a
ROCKWOOL,**

FEB 07 2024

AIR QUALITY BOARD

Appellant,

v.

Appeal No. 23-01-AQB

**DIRECTOR, DIVISION OF
AIR QUALITY, DEPARTMENT
OF ENVIRONMENTAL
PROTECTION,**

Appellee,

and

**JEFFERSON COUNTY
FOUNDATION, INC., et al.,**

Intervenors.

**ROCKWOOL'S RESPONSE TO JCF'S CONSOLIDATED
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**

Appellant Roxul USA, Inc., d/b/a/ ROCKWOOL, respectfully submits this response to JCF's¹ consolidated 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 ("Motion to Continue" or "Mo."). ROCKWOOL does not object to JCF's request to consolidate Appeals 23-01-AQB and 23-02-AQB. However, for the reasons set forth below, JCF's Motion to Continue should otherwise be denied.

¹ As used herein, the term "JCF" means or refers to intervenors Jefferson County Foundation, Inc., Karen Freer, Gavin Perry, and Sharon Wilt.

RELEVANT PROCEDURAL HISTORY

On November 16, 2023, DAQ² issued Modification Permit R14-0037A to ROCKWOOL (the “Modified Permit”).

On December 11, 2023, ROCKWOOLL filed its Notice of Appeal.

On December 13, 2024, and in accordance with West Virginia Code § 22B-1-7(f), *which requires the Board to hold an evidentiary hearing on ROCKWOOL’s appeal within 30 days of the filing of the Notice of Appeal*, the Board entered an Order scheduled the evidentiary hearing in this case for January 3, 2023. In the same Order, and on its own motion, the Board continued the evidentiary hearing in this case to February 7, 2024.

On December 18, 2023, JCF filed its Notice of Appeal in Appeal No. 23-02-AQB. In its Notice, JCF contends that in allowing ROCKWOOL to modify the Pre-Construction Permit to be regulated as a synthetic minor source rather than a major stationary source, DAQ acted unreasonably, arbitrarily and capriciously, and/or exceeded its authority by intentionally disregarding the environmental laws of the state.

On December 20, 2023, and in accordance with West Virginia Code § 22B-1-7(f), *which requires the Board to hold an evidentiary hearing on JCF’s appeal within 30 days of the filing of the Notice of Appeal*, the Board scheduled an evidentiary hearing in 23-02-AQB for January 5, 2023. In the same Order, and on its own motion, the Board continued the evidentiary hearing in 23-02-AQB to February 7, 2024.

On January 5, 2024, JCF filed a Motion to Intervene in this case.

On January 12, 2024, ROCKWOOL filed its Notice of Intervention in 23-02-AQB. As the permittee, ROCKWOOL is a real party in interest and is entitled to participate in 23-02-AQB as

² “DAQ” means or refers to the West Virginia Department of Environmental Protection’s Division of Air Quality.

an Intervenor—Appellee pursuant to West Virginia Code § 22B-1-7(e) and W. Va. C.S.R. § 52-1-2.2.e. ROCKWOOL also informed the Board that it would not be filing a response to JCF’s Motion to Intervene in this case. *See* Jan. 12, 2024 email from David L. Yaussy, Esq. to Kenna M. DeRaimo, a copy of which is attached hereto as Exhibit A.

On January 18, 2024, DAQ informed the Board that it would not be filing responses to JCF’s Motion to Intervene in this case or ROCKWOOL’s Notice of Intervention in 23-02-AQB. *See* Jan. 18, 2024 email from Charles S. Driver, Esq. to Kenna M. DeRaimo, a copy of which is attached hereto as Exhibit B.

On January 19, 2024, ROCKWOOL filed a Motion to Dismiss in 23-02-AQB.

On January 23, 2024, ROCKWOOL filed a Motion for Leave to File an Amended Appeal in this case (the “Motion for Leave”). In its proposed Amended Notice of Appeal, ROCKWOOL sought to add, for the first time, an appeal of permit Condition 4.1.4(a) which improperly sets a hydrochloric acid limitation for the Melt Furnace (IMF01) at 0.62 tons per year.

On January 25, 2024, DAQ informed the Board that the hydrochloric acid limitation ROCKWOOL seeks to appeal in its proposed Amended Notice of Appeal in this case was the result of a clerical error and will be promptly fixed through an administrative update to the Modified Permit. *See* Jan. 24, 2024 email from Charles S. Driver, Esq. to Kenna M. DeRaimo, a copy of which is attached hereto as Exhibit C. As a result, ROCKWOOL’s appeal of permit Condition 4.1.4(a) is moot, and the hydrochloric acid limitation will not be an issue in this appeal.

Also on January 25, 2024, JCF informed the Board that it will not be filing a response to ROCKWOOL’s Notice of Intervention in 23-02-AQB. *See* Jan. 25, 2024 email from Andrew Early, Esq. to Kenna M. DeRaimo, a copy of which is attached hereto as Exhibit D. On the same day, JCF filed its Motion to Continue in this case.

ARGUMENT

According to JCF, ROCKWOOL's Motion for Leave "is reason enough to continue the evidentiary hearing" because ROCKWOOL's attempt to add an appeal of the hydrochloric acid limitation in permit Condition 4.1.4(a) two weeks before the February 7, 2024 hearing is prejudicial to JCF and does not give JCF enough time to "meet the issue." *See* Mo. at ¶¶ 8-12. To enable it to "meet the issue", JCF wants the Board to continue the February 7 hearing so that JCF can engage in fact and expert discovery. *See* Mo. at ¶¶ 13-16. After JCF filed its Motion to Continue, and to ensure that the February 7 hearing takes place as scheduled without any prejudice to JCF, ROCKWOOL has withdrawn its Motion for Leave and it will not attempt to appeal permit Condition 4.1.4(a)'s hydrochloric acid limitation. For that reasons, JCF's Motion to Continue should be denied.

Finally, to the extent JCF contends that good cause exists for a continuance even after ROCKWOOL withdrew its Motion for Leave, JCF's Motion to Continue should be denied as untimely. Proceedings before the Board are governed by West Virginia Code § 22B-1-1, *et seq.* (the "Code") and 52CSR1 (the "Procedural Rules"). Under the Code, the Board is required to hold an evidentiary hearing on an appeal within 30-days of the filing of a Notice of Appeal. *See* W. Va. Code § 22B-1-7(f). The Board may, upon its own motion or pursuant to an application by a party upon a showing of good cause, postpone or continue the hearing. *Id.* Under the Procedural Rules, however, if a party desires to continue the hearing, it must, "***immediately upon receipt of a notice of hearing, or as soon thereafter as practicable***, file a written motion with the [B]oard stating in detail the reasons why such a continuance is necessary." *See* 52CSR6.2 (emphasis added).

In this case, the Board entered an Order on December 13, 2023 scheduling the evidentiary hearing for January 3, 2023. In the same Order, and on its own motion, the Board continued the hearing in this case to February 7, 2024 at 9:00 a.m.

In 23-02-AQB, the Board entered an Order on December 20, 2023 scheduling the evidentiary hearing in that case for January 5, 2023. In the same Order, and on its own motion, the Board continued the hearing in 23-02-AQB to February 7, 2024 at 9:30 a.m.

JCF filed its Motion to Continue on January 25, 2024, long after the February 7 evidentiary hearing was scheduled but just two weeks before the hearing will take place. By any measure, JCF did not file its Motion to Continue *“immediately upon receipt of a notice of hearing, or as soon thereafter as practicable”*, and for that reason, the motion must be denied as untimely pursuant to 52CSR6.2.

CONCLUSION

For the foregoing reasons, ROCKWOOL respectfully requests that Board consolidate appeals 23-01-AQB and 23-02-AQB and otherwise deny JCF’s Motion to Continue.

ROXUL USA, INC., d/b/a ROCKWOOL



James A. Walls (WV Bar # 5175)
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Ph. 304.291.7947
Fax 304.291.7979
jwalls@spilmanlaw.com

David L. Yaussy (WV Bar # 4156)
Joseph C. Unger (WV Bar # 13699)
SPILMAN THOMAS & BATTLE, PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301

Ph. 304.340.3829
Fax 304.340.3801
dyaussy@spilmanlaw.com
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**WEST VIRGINIA AIR QUALITY BOARD
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Appellee,

and

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Intervenors.

CERTIFICATE OF SERVICE

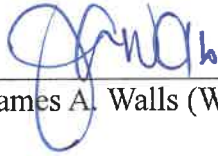
I hereby certify that on the 29th day of January, 2024, I caused the foregoing **ROCKWOOL'S RESPONSE TO JCF'S CONSOLIDATED MOTION TO CONTINUE EVIDENTIARY HEARING, CONDITIONAL OBJECTION TO ROCKWOOL'S MOTION FOR LEAVE TO FILE AN AMENDED NOTICE OF APPEAL, AND MOTION TO CONSOLIDATE APPEALS** to be served upon the following parties by email and First Class United States mail:

Jason E. Wandling, Esquire
Charles S. Driver, Esquire
WVDEP - Office of Legal Services
West Virginia Department of Environmental Protection
601 57th Street, SE
Charleston, WV 25304

WVDEP – Director, Division of Air Quality
West Virginia Department of Environmental Protection
601 57th Street, SE
Charleston, WV 25304

Andrew C. Earley
Fair Shake Environmental Legal Services

232 Capitol Street, Ste. 14
Charleston, WV 25301



James A. Walls (WV Bar # 5175)

20591432

James A. Walls

From: David L. Yaussy
Sent: Friday, January 12, 2024 11:12 AM
To: 'DeRaimo, Kenna M'
Cc: 'aearley@fairshake-els.org'; 'charles.s.driver@wv.gov'; Joseph C. Unger; James A. Walls; Wandling, Jason E (Jason.E.Wandling@wv.gov)
Subject: ROCKWOOL Notice of Intervention [STB-WORKSITE.FID605575]
Attachments: 2024-01-12 Appeal No. 23-02-AQB - Rockwool's Notice of Intervention.pdf

Ms. DeRaimo:

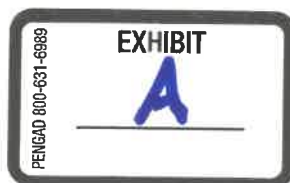
I am attaching a courtesy copy of Rockwool's notice of intervention in AQB Appeal No. 23-02-AQB. This has been sent by regular US mail this morning.

Rockwool will not be filing a response to Jefferson County Foundation's motion to intervene in Rockwool's appeal, No. 23-01-AQB.

Thank you for your attention to this matter. Please let me know if you have any questions regarding the filing.

Dave

David L. Yaussy
Spilman Thomas & Battle, PLLC
O 304.340.3829
M 304.552.6658
DYaussy@spilmanlaw.com



James A. Walls

From: Driver, Charles S <charles.s.driver@wv.gov>
Sent: Thursday, January 18, 2024 7:54 AM
To: DeRaimo, Kenna M
Cc: David L. Yaussy; aearley@fairshake-els.org; Joseph C. Unger; James A. Walls; Wandling, Jason E (Jason.E.Wandling@wv.gov)
Subject: Re: 23-01-AQB and 23-02-AQB re: ROCKWOOL Notices of Intervention

EXTERNAL SENDER

Kenna, we won't be filing responses to either motion.

Scott

On Fri, Jan 12, 2024 at 12:35 PM DeRaimo, Kenna M <kenna.m.deraimo@wv.gov> wrote:

Thank you, Mr. Yaussy.

Counselors, please note, any responses to Mr. Earley's Motion to Intervene filed on January 8, 2024 regarding **23-01-AQB**, are due on or before 4 p.m. on January 19, 2024. If counsel does not plan to file a response, please let me know by replying to this email.

Also, with regard to Mr. Yaussy's Notice of Intervention filed today regarding **23-02-AQB**, responses are due on or before 4 p.m. on January 25, 2024. Again, if counsel does not plan to file a response to Mr. Yaussy's Notice of Intervention, please let me know by replying to this email.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Kenna

*Kenna M. DeRaimo, Clerk
Air Quality Board
Environmental Quality Board
Surface Mine Board
601 57th Street, SE
Charleston, West Virginia 25304
Office Desk Phone: (304) 414-1128
Office Cell Phone: (304) 993-8562*

On Fri, Jan 12, 2024 at 11:12 AM David L. Yaussy <DYaussy@spilmanlaw.com> wrote:

Ms. DeRaimo:



I am attaching a courtesy copy of Rockwool's notice of intervention in AQB Appeal No. 23-02-AQB. This has been sent by regular US mail this morning.

Rockwool will not be filing a response to Jefferson County Foundation's motion to intervene in Rockwool's appeal, No. 23-01-AQB.

Thank you for your attention to this matter. Please let me know if you have any questions regarding the filing.

Dave

David L. Yaussy

Spilman Thomas & Battle, PLLC

O 304.340.3829

M 304.552.6658

DYaussy@spilmanlaw.com

James A. Walls

From: Driver, Charles S <charles.s.driver@wv.gov>
Sent: Wednesday, January 24, 2024 11:03 AM
To: Kenna M DeRaimo
Cc: Jason E Wandling; James A. Walls; David L. Yaussy
Subject: Fwd: Appeal No. 23-02-AQB [STB-WORKSITE.FID605575]
Attachments: 2024-01-24 Appeal No. 23-02-AQB - Letter to Clerk DeRaimo with Rockwool's Motion for Leave to File an Amended Notice of Appeal and Appellant's Amended Notic.pdf

EXTERNAL SENDER

Kenna, the value referred to in paragraph 7 of the attached motion was the result of clerical error. Accordingly, WVDEP will be promptly fixing the mistake through an administrative update.

Scott

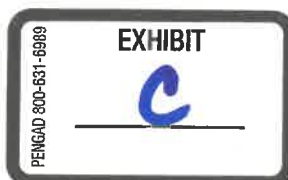
----- Forwarded message -----

From: **Rachelle Morrison** <RMorrison@spilmanlaw.com>
Date: Tue, Jan 23, 2024 at 4:17 PM
Subject: Appeal No. 23-02-AQB [STB-WORKSITE.FID605575]
To: jason.e.wandling@wv.gov <jason.e.wandling@wv.gov>, charles.s.driver@wv.gov <charles.s.driver@wv.gov>, aeareley@fairshake-els.org <aeareley@fairshake-els.org>
Cc: James A. Walls <JWalls@spilmanlaw.com>, David L. Yaussy <DYaussy@spilmanlaw.com>

On behalf of James Walls and David Yaussy, attached is correspondence to Clerk DeRaimo of the Environmental Quality Board with Rockwool's Motion for Leave to File an Amended Notice of Appeal and Appellant's Amended Notice of Appeal in the above-referenced Appeal. The attached is also being distributed via United States Mail on today's date. If you have any questions, please contact Mr. Yaussy at 304.340.3829 or dyaussy@spilmanlaw.com.

Rachelle Morrison
Legal Secretary
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East (ZIP 25301)
Post Office Box 273
Charleston, WV 25321-0273
O 304.340.1694
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RMorrison@spilmanlaw.com

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James A. Walls

From: Andrew Earley <aearley@fairshake-els.org>
Sent: Thursday, January 25, 2024 3:26 PM
To: DeRaimo, Kenna M
Cc: David L. Yaussy; Joseph C. Unger; James A. Walls; Wandling, Jason E (Jason.E.Wandling@wv.gov); Driver, Charles S
Subject: Re: 23-01-AQB and 23-02-AQB re: ROCKWOOL Notices of Intervention

EXTERNAL SENDER

Hi Kenna,

My clients will not be filing a response to Rockwool's Notice of Intervention.

Thank you,

Andrew Earley, Esq.

Get [Outlook for iOS](#)

From: Driver, Charles S <charles.s.driver@wv.gov>
Sent: Thursday, January 18, 2024 7:53:52 AM
To: DeRaimo, Kenna M <kenna.m.deraimo@wv.gov>
Cc: David L. Yaussy <DYaussy@spilmanlaw.com>; Andrew Earley <aearley@fairshake-els.org>; Joseph C. Unger <junger@spilmanlaw.com>; James A. Walls <jwalls@spilmanlaw.com>; Wandling, Jason E (Jason.E.Wandling@wv.gov) <jason.e.wandling@wv.gov>
Subject: Re: 23-01-AQB and 23-02-AQB re: ROCKWOOL Notices of Intervention

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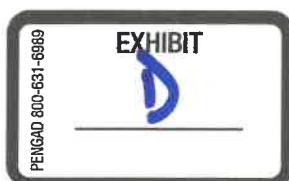
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Sincerely,

Kenna



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Thank you for your attention to this matter. Please let me know if you have any questions regarding the filing.

Dave

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