

BEFORE THE VIRGINIA
STATE AIR POLLUTION CONTROL BOARD

IN THE MATTER OF)
VIRGINIA DEPARTMENT OF)
ENVIRONMENTAL QUALITY)
PERMIT NO. 11119)
FOR W-L CONSTRUCTION AND PAVING, INC))

September 2, 2003

THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE AND WYTHE
ENVIRONMENTAL ACTION GROUP APPEAL OF THE VIRGINIA DEPARTMENT
OF ENVIRONMENTAL QUALITY'S EXEMPTION OF PERMIT NO. 11119

The Blue Ridge Environmental Defense League (BREDL) and Wythe Environmental Action Group (WEAG) hereby petition to appeal the Virginia State Air Pollution Control Board, per 9 VAC 5-170-200, the Virginia Department of Environmental Quality's determination to exempt the relocation of a W-L Construction and Paving, Inc. asphalt plant, permit no. 11119, from adhering to the provisions of Article 6, 9 VAC 5-80-1100 et seq.

Respectfully submitted,

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Background

BREDL is a regional, community-based, non-profit environmental organization. Our founding principles are earth stewardship, environmental democracy, social justice, and community empowerment. BREDL has chapters throughout the Southeast, including Virginia. WEAG is a BREDL chapter based in Wythe County.

On October 18, 1991 DEQ approved a permit for a 320 ton/hour, 200 thousand ton/year drum mix asphalt plant in Scott County under Registration No. 11119 and County-Plant No. 2840-0050. In the mid-nineties, this facility was moved to Smyth County. During a period of non-operation in Smyth County, Smyth County enacted county-wide zoning. When W-L Construction and Paving, Inc. tried to commence operation in Smyth County, after zoning, concerned citizens contacted the Smyth County Zoning Board. On December 3, 2002 the Smyth County Zoning Board ruled that the asphalt plant violated Smyth County zoning. The company appealed the decision to the Smyth County Circuit Court, which held a hearing on March 11, 2003. In an April 11, 2003 letter to involved parties, Judge Charles B. Flannagan, II. declared that "W-L Construction must comply with the provisions of the Smyth County Zoning Ordinance before operating a portable asphalt mixing plant at the site in question." On April 17, 2003, W-L Construction and Paving, Inc. notified Virginia Department of Environmental Quality Southwest Regional Office in Abingdon that it intended on relocating the asphalt plant to Wythe County, near Rural Retreat. On April 18, 2003, the DEQ Southwest Regional Office approved the relocation.

Timeline

This appeal is filed in a timely manner because of the following circumstances. When local citizens in Wythe County, now WEAG, learned that an asphalt plant was possibly being planned to operate in their residential community they contacted the DEQ Southwest Regional Office. As early as May 2003, Virginia DEQ Air Permit Manager Rob Feagins told the citizens that he was unaware of any attempt or notification to locate a W-L Construction and Paving, Inc. asphalt plant in the Black Lick community just outside of Rural Retreat in Wythe County. The local citizens contacted BREDL. On June 5, 2003 we contacted the DEQ Southwest Regional Office and were told the same thing by Mr. Feagins. BREDL soon began written correspondence with the DEQ Southwest Regional Office regarding this issue. Throughout June and the first week of July, Both BREDL and WEAG members were constantly told that the DEQ Southwest Regional Office had not received any notification to locate an asphalt plant in the Black Lick area. On July 7, 2003, BREDL submitted a Freedom of Information Act request to the DEQ Southwest Regional Office. While gathering the information for this FOIA request, the DEQ Southwest Regional Office "discovered" the notification fax and DEQ's approval letter for the plant relocation to the Black Lick area. (See Attachment 1) W-L Construction and Paving, Inc. had faxed the notification on the afternoon of April 17, 2003. Then, in the morning of April 18, 2003, Mr. Feagins of the DEQ Southwest Regional Office granted approval to the company. On July 25, 2003, BREDL and

WEAG mailed a letter to Virginia Department of Environmental Quality Director Robert G. Burnley requesting that DEQ fully explain how the determinations were made for each of the permit exemption provisions listed in 9 VAC 5-80-1320 A.1.c. (See Attachment 2) We further requested that DEQ re-open and amend the permit. We also requested that DEQ initiate a new public participation process for this permit. Apparently, DEQ Director Burnley asked the DEQ Southwest Regional Office to respond to our letter. In a letter dated August 4, 2003, DEQ Southwest Regional Office Regional Director Michael D. Overstreet responded to our July 25, 2003 letter to Director Burnley. (See Attachment 3) In his response, Mr. Overstreet failed to address our concerns as outlined in our July 25, 2003 letter. Thus, per 9 VAC 5-170-200 G., we are submitting this appeal within 30 days of the Director's rendered decision as presented in the August 4, 2003 letter.

Contentions

BREDL and WEAG contend that the DEQ Southwest Regional Office, and subsequently the Virginia DEQ Director did not fully address the permit exemption levels of 9 VAC 5-80-1320 thereby granting W-L Construction and Paving, Inc. authorization to relocate its facility without following the provisions of Article 6, 9 VAC 5-80-1100 et seq. We ask for a public hearing because previous requests for a public hearing by the Wythe County Board of Supervisors (See Attachment 4) and residents of Wythe County were improperly dismissed by DEQ.

We request the Board to fully explain how these determinations were made for each of the permit exemption provisions listed in 9 VAC 5-80-1320 A.1.c. 9 VAC 5 Chapter 80. Further we request that the Board explain why DEQ determined that neither a public notification nor a public hearing was needed.

Facility Does Not Meet Requirements for Relocation

DEQ has failed to determine that this plant has met permit exemption requirements for relocation. Part II, Article 6 of Virginia Regulations for the Control and Abatement of Air Pollution states:

9 VAC 5-80-1320 Permit exemption levels.

A. The general requirements for permit exemption levels are as follows:

1. The provisions of this article do not apply to the following stationary sources or emissions units:

c. The relocation of a portable emissions unit provided that:

(1) The new emissions from the portable emissions unit are secondary emissions;

(2) The portable emissions unit has previously been permitted or is subject to a general permit;

(3) The unit would not undergo modification or reconstruction;

(4) The unit is suitable to the area in which it is to be located;

and

(5) Reasonable notice is given to the board prior to the relocation identifying the proposed new location and the probable duration of operation at the new location. Such notice shall be given to the board not less than 15 days in advance of the proposed relocation unless a different time duration is previously approved by the board.

The proposed asphalt plant at Black Lick Road near Rural Retreat in Wythe County should not be exempted from permitting because the unit is not suitable to the area in which it is to be located. DEQ granted authorization without properly considering state regulations for a permit exemption.

In his August 4, 2003 letter, Mr. Overstreet states that “no additional site suitability study is required” because the source was previously permitted. The W-L plant was permitted for a site in Scott County in 1991. DEQ has not done a site suitability study for the proposed site in Wythe County. According to state regulation 9 VAC 5-8-1320 A.1.c.(4), the facility must be suitable to the area in which it is to be located. The result of DEQ's failure to follow Virginia regulations and state law is the improper authorization to move the W-L plant without properly considering state regulations for a permit exemption. In the following paragraphs we will detail DEQ's permit failures, omissions, and errors in this matter.

Virginia DEQ did not adhere to the State Code of Virginia § 10.1-1307 E.3 statute which states:

§ 10.1-1307. Further powers and duties of Board.

E. The Board in making regulations and in approving variances, control programs, or permits, and the courts in granting injunctive relief under the provisions of this chapter, shall consider facts and circumstances relevant to

the reasonableness of the activity involved and the regulations proposed to control it, including:

3. The suitability of the activity to the area in which it is located;

Further, DEQ failed to demonstrate adherence to the State Air Pollution Control Board's Suitability Policy which lists three criteria which must be considered before a permit exemption is granted:

1. Air quality characteristics and performance requirements defined by SAPCB regulations;
2. The health impact of air quality deterioration which might reasonably be expected to occur during the grace period allowed by SAPCB regulations or the permit conditions to fix malfunctioning air pollution control equipment;
3. Anticipated impact of odor on surrounding communities or violation of the SAPCB Odor Rule.

Per Suitability Policy requirement number 1, Virginia DEQ did not follow its own regulations when it granted approval to W-L Construction & Paving, Inc. to relocate an asphalt plant. For the relocation of a portable asphalt plant both a site map and documentation of site suitability must supplement the company's notification to DEQ. Although a site map was provided, DEQ files do not contain any "documentation of site suitability" from the applicant nor did DEQ make a "determination of site suitability."

Per Suitability Policy requirement number 2, we can find no record of how DEQ assessed the EPA-454/R-00-019 December 2000 report on Hot Mix Asphalt Plants and EPA's findings on criteria and hazardous air pollutant emissions from asphalt plants. The EPA's investigation reveals higher levels of toxic fugitive emissions at ground level from all types of asphalt plants. In addition, the SAPCB may propose new regulations to account for these emissions. Under the DEQ's 1991 permit, air quality deterioration could result in the exceedence of NAAQS in Wythe County. The permit written in 1991 must be re-opened and altered to reflect this new data and to protect public health.

Per Suitability Policy requirement number 3, this same unit has had numerous odor complaints at a previous site in Smyth County. According to a Smyth County News and Messenger April 25, 2003 article based on Smyth County Circuit Court testimony,

"...citizens who live nearby began to complain about the asphalt plant's pollution and odor...Quarry neighbors exhibited photographs of a large column of smoke coming from W-L's operation. The citizens said that they spent the entire summer with windows closed at their houses due to odor resembling the scent of burning tires. One family said their child

experienced medical problems with breathing as a result of W-L's actions.”

Asphalt plants cause huge air pollution and odors problems. DEQ must follow Virginia's Odor Rule. The site is unsuitable based on the impact of odor on the surrounding community.

DEQ failed to Follow Notification and Duration of Operation Requirements

9 VAC 5-8-1320 A.1.c.(5) requires that “Reasonable notice is given to the board prior to the relocation identifying the proposed new location and the probable duration of operation at the new location...” However, DEQ granted authorization to relocate the plant without obtaining the “probable duration of operation at the new location”. In the April 17, 2003 W-L Construction and Paving, Inc. letter to DEQ, there is no mention from the permit holder of the probable duration of operation.

DEQ Failed to Ascertain the Black Lick Location is a Greenfield Site

On April 18, 2003 DEQ approved the relocation of the asphalt plant to the Black Lick site. A preliminary site inspection by DEQ staff would have determined the location to be a “greenfield source” as defined by state regulations. A greenfield source is an air pollution emission unit constructed on or moved to a site which previously had no emission units. In his August 4, 2003 letter, Mr. Overstreet dismissed the greenfield issue by alluding to the site as “an already-established site”. Mr. Overstreet's assessment is far from the true definition of a Greenfield source as defined by state regulations. The asphalt plant would be relocated to a greenfield where no emission unit facility currently exists. Virginia DEQ's New Source Review Permits Program Manual, Sept. 7, 2000 states:

“The term “greenfield source” is any new site (not previously designated as a stationary source) on which equipment undergoes initial construction, installation or relocation. ... For Greenfield sources which have no existing emission units at a location this law (Virginia Code § 10.1-1307 E.3.) requires that DEQ perform some preliminary inspection of the proposed location to ensure that there are no obvious threats to public health and safety, that the source can be built consistently with the legal and regulatory requirements for a new source, ...

...In addition to performing this inspection for greenfield sources, DEQ (must) determine, for a portable facility, that the portable unit to be relocated is suitable to the area in which it is to be located.” pp.21-22

Because DEQ failed to perform an on site inspection, as outlined in NSR Permit Program Manual Sept 2000, this asphalt plant:

- 1) Would be located on a site where no existing facility is located;

- 2) Would be located within 400 feet of at least 3 residences and within 1000 feet of several residences;
- 3) Would be located within approximately 1 mile of the recently opened elementary school and a popular day care center serving the community.
- 4) Would be located within approximately 2 miles of the Jefferson National Forest Crawfish Valley Roadless Area. A scenic area that is heavily used for its recreational benefits;
- 5) Would have runoff into Mill Creek which feeds into Reed Creek, which provides public drinking water for the town of Wytheville;
- 6) Would be located within 1/4 – 1/2 miles of several houses and structures that are eligible for inclusion in the National Historic Registry; and
- 7) Would be located within a mountainous community that is susceptible to meteorological temperature inversions, which will trap pollution. It will be located in an area where the topography has the plant sited in a lower elevation valley surrounded by rising hilltops in a 1/4 mile radial distance around the plant.

DEQ Did Not Provide Accurate or Timely Information to the Public

DEQ Southwest Regional office communications with BREDL members and local citizens in May, June, & July indicated that the company had not sent a notification to relocate an asphalt plant. We were told on numerous occasions via telephone conversations and email correspondence that W-L had not sent a notification to relocate any of its portable asphalt plants. Only when BREDL sent a Freedom Of Information Act request for a copy of one of W-L's air permits did DEQ discover that the company had indeed faxed DEQ a notification and that DEQ had indeed granted permission. BREDL's FOIA request was sent on July 7, 2003.

DEQ Did Not Take Sufficient Time to Properly Assess the Permit Relocation Request

On April 17, 2003 at 2:00 PM, W-L Construction and Paving, Inc. faxed the DEQ Southwest Regional Office a notification to relocate an asphalt plant from Saltville to Rural Retreat. The next morning, on April 18, 2003 at 9:47 am (just a little over 3 1/2 business hours), the DEQ Southwest Regional Office faxed to W-L Construction and Paving, Inc. an authorization to relocate and operate at the site in Rural Retreat.

Facility Aging Equipment Modification and Reconstruction not considered

In his August 4, 2003 letter, Mr. Overstreet referenced the fact that the company did not state in its April 17, 2003 notification to DEQ that any plant modification or reconstruction would occur. The impact of aging, malfunctioning equipment on air

quality deterioration was not properly considered by DEQ. Specifically, with regard to 9 VAC 5-8-1320 A.1.c.(3), we contend that this unit has most likely undergone modification or reconstruction over the 12 years since it was first permitted in Scott County. We request the Board to demonstrate how it was determined, via purchasing records and other appropriate documentation, that this unit met the permit exemption based on the Virginia DEQ definitions of modification and reconstruction per 9 VAC 5-80-1110.

Facility Does Not Qualify for Permit Exemption

Under state and federal regulations, emissions of air pollutants must fall below certain benchmarks to escape more stringent regulatory oversight. The DEQ's permit fails to meet the emission rates for several criteria and hazardous air pollutants. Permit exemption limits stipulated in 9 VAC 5-80-1320 are 25 tons/year for particulate matter, 15 tons/year for PM-10, and 25 tons/year for volatile organic compounds. Based on the annual production limit of 200 thousand tons of asphalt, we estimate that the DEQ permit would allow 31 tons of VOC and 76 tons of particulates to be emitted into the air.

Asphalt cement comprises 5% (0.05) of the total hot mix plant production. Fugitive air emissions equal 1.07% (0.0107) of the consumed asphalt cement (data from Dr. R.M. Nadkarni). For an asphalt plant producing 200,000 tons of hot mix asphalt per year:

$$200,000 \text{ tons hot mix} \times 0.05 = 10,000 \text{ tons/year of asphalt cement consumed.}$$

Fugitive air emissions equal 1.07% (0.0107) of the consumed asphalt.

$$10,000 \times 0.0107 = 107 \text{ tons per year of asphalt vapor fugitive emissions}$$

The bulk of these fugitive emissions are condensed particulates. Volatile organic compounds (VOC) emissions are about 29% of the this total. Therefore, about 15 tons of VOC and 38 tons of particulates would be emitted by a 200,000 ton/year asphalt plant as fugitive emissions. To this must be added the total emitted from the smokestack itself.

The US Department of Health and Human Services has determined that PAHs (Polycyclic aromatic hydrocarbons) may be carcinogenic to humans. Animal studies show that PAHs affect reproduction, cause birth defects, and cause harmful effects on skin, body fluids, and the immune system. Similar effects could occur in humans.

Relief Requested

Blue Ridge Environmental Defense League and Wythe Environmental Action Group hereby request:

- 1) The State Air Pollution Control Board to fully examine how DEQ determinations were made for each of the permit exemption provisions listed in 9 VAC 5-80-1320 A.1.c for permit 11119 and if DEQ followed state regulations, standards and guidance in the April 18, 2003 granting of the facility relocation;
- 2) The State Air Pollution Control Board to re-open and amend the permit;
- 3) Further, we request a new public participation process to include a comment period, informational briefing and a public hearing.

Dated September 2, 2003

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Southwest Virginia Vice-President
Blue Ridge Environmental Defense League

Cc:

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Michael Overstreet, DEQ Southwest Regional Director
Ron Feagins, DEQ Southwest Regional Permit Manager
Gary Tibbs, WEAG President
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