

APPALACHIAN CITIZENS' LAW CENTER, INC.

317 MAIN STREET
WHITESBURG, KENTUCKY 41858
606-633-3929 1-877-637-3929
FAX 606-633-3925
www.appalachianlawcenter.org

STEPHEN A. SANDERS
Director
steve@appalachianlawcenter.org

MARY CROMER*
Staff Attorney
mary@appalachianlawcenter.org
*Also Admitted in VA

WES ADDINGTON
Deputy Director
wes@appalachianlawcenter.org

EVAN B. SMITH
Staff Attorney
evan@appalachianlawcenter.org

November 21, 2016

Kentucky Department for Environmental Protection
Division of Enforcement
Jeff Cummins, Director
300 Sower BLVD
Frankfort, KY 40601

**RE: Comments on the proposed agreed order between the Energy and Environment Cabinet and Advanced Disposal Services Blue Ridge Landfill, Inc.
Case No. DWM 160048
VIA EMAIL: jeff.cummins@ky.gov**

Dear Mr. Cummins,

Please accept these comments on behalf of the Concerned Citizens of Estill County, Inc. ("CCEC") on the proposed Agreed Order between the Energy and Environment Cabinet ("EEC") and Advanced Disposal Services Blue Ridge Landfill, Inc. ("BRL").

First, we want to thank EEC for giving citizens an opportunity to comment on this very important enforcement action. CCEC is particularly appreciative of the meetings and discussions that we have had with EEC leading up to this proposed agreement.

However, while we are appreciative of the degree to which we have been kept apprised of the discussions leading to this settlement, our ability to meaningfully participate in this enforcement action would have been much greater had EEC provided all public records requested by CCEC and included CCEC as a full party in its enforcement as CCEC requested. Because we were not given all records or included as a full party in this enforcement action, we lack certain key information regarding BRL and its defenses that prevent us from being able to fully comment on key aspects of the proposed settlement. Notwithstanding the deficiency in process to date, CCEC submits these comments on the proposed agreement based on information that it has gathered regarding this enforcement action.

I. Process Going Forward

As CCEC has stated throughout its discussions with EEC, the Corrective Action Plan (CAP), and most significantly the remediation plan component of the CAP, are of central importance to CCEC's members. We applaud EEC for including, in the proposed settlement, the condition of "community acceptance." Full inclusion of CCEC in the process of developing the CAP and its remediation plan is critical to achieving community acceptance.

The proposed agreed order contemplates a process during which BRL and EEC will agree upon a CAP. CCEC needs to be included in this process. In particular, CCEC needs to be included in or copied on each communication between BRL or its agents and EEC related to the CAP. In addition, CCEC needs to be given the opportunity to comment substantively on each submission made by BRL or its agents during the development of the CAP or any resubmitted or amended CAP developed pursuant to paragraph 20 or 21.

In addition to the inclusion of CCEC in the iterative process of developing the CAP, the public needs to be given notice and an opportunity to comment on EEC's final determination to accept the CAP or any resubmittal or amendment contemplated in paragraphs 20 or 21. Finally, CCEC asks that paragraph 24 be revised to explicitly include the ability of EEC to seek public comments when reviewing the CAP or Amended CAP.

II. Clarity Regarding the Scope of Violations

The recitations in the proposed agreed order reference 47 loads of oil and gas production waste being disposed of at the Blue Ridge Landfill. The public notice of the proposed agreed order, on the other hand, references the original 47 loads cited in the Notice of Violation and the identification of an additional 45 loads of waste received at the landfill. The proposed agreed order also asserts that it "addresses only the allegations specifically described above." (§34). Since only the 47 loads are specifically mentioned in the proposed agreed order, there is ambiguity as to what violations are being settled. The agreed order needs to be modified to clearly state what violations are being settled.

III. Inclusion of the CAP in the Permit

The proposed agreed order needs to be revised to require that all provisions of any CAP accepted by EEC are incorporated into BRL's permit. Likewise, any provisions of the proposed Supplemental Environmental Projects ("SEP") that are not otherwise included in the CAP should also be included in the relevant permits. In particular, with regard to the installation and use of radiation detecting equipment at the two landfills, each of those permits should be revised to incorporate the quality assurance and monitoring requirements related to the use of those detection devices. All requirements of the CAP and all requirements related to radiation detection should be included in the Division of Waste Management's regular inspections of the landfills.

IV. Penalties

The \$95,000 penalty assessed against BRL is insufficient given the magnitude of violations at issue here. The \$95,000 penalty amounts to just over \$1000 per load received, assuming that the settlement encompasses 92 loads. EEC is authorized to assess at least \$25,000 per load,¹ or \$2,300,000. The consideration of the Maggard factors² argues for a penalty assessment of at least \$2,300,000.

A. CCEC Lacks Information Necessary to Justify EEC's Low Penalty Assessment

EEC's assessment of penalties is based on what are known as the Maggard factors. Through an analysis of these factors, EEC determines whether the assessed penalty falls at the high or low end of the range of penalties allowed by statute. CCEC's consideration of the Maggard factors argues for penalties at the high end for each load received, or \$2,300,000. EEC assessed its penalties at the very low end of the range, at just over \$1000 per illegal load received.

As part of its open records requests to EEC, CCEC asked for all communications between EEC and the responsible parties. That request was denied. That denial forms part of the basis of CCEC's Open Records Act lawsuit against EEC. Without critical information regarding, e.g., the economic benefits BRL garnered from taking illegal radioactive waste, CCEC cannot fully assess each of the Maggard factors. Had EEC complied with the Open Records Act and disclosed all agency records requested and/or had EEC consented to CCEC's request to formalize its negotiations with BRL through an adjudicated enforcement action in which CCEC could become a full party, CCEC would have much better information with which to perform a full Maggard factors analysis. In the absence of such information, CCEC confines its analysis to the following Maggard factors, each of which lead to a determination of the proper penalty assessment of \$2,300,000: (1) the seriousness of the violation; (2) BRL's culpability; (3) the economic impact of the penalty on BRL; and (4) the potential for other similar violations at the landfill.

B. Maggard Factors Analysis

1. Seriousness of the Violation

¹ KRS 224.99-010 authorizes EEC to assess a "civil penalty not to exceed the sum of twenty-five thousand dollars (\$25,000) for each day during which such violation continues..." for each violation of KRS 224.1-400. KRS 224.1-400 was violated each time a load was received at the landfill. The per-day multiplier would result in a significantly higher overall penalty. For example, 262 days passed between BRL's first receipt of illegal radioactive waste and EEC's notice of violation. Therefore, EEC has the authority to assess the total penalty for that first load alone at at least \$6,550,000. Per day multipliers could be used for each load received, making the total allowable penalty assessment far higher than the \$2.3 million CCEC advocates for here. CCEC does not advocate for the maximum penalty allowable under the law, simply because we believe that the focus of EEC's enforcement needs to be on ensuring that the landfill designs and completes the most protective remedial measures possible.

² See *NREPC v. Wendall Maggard*. Energy and Environment Cabinet, Office of Administrative Hearings. File No. DWM-19198-038, Final Order entered June 2, 1994.

The illegal receipt of radioactive waste for which the landfill is not designed is a very serious violation. The low-level radioactive waste received by BRL can only properly be disposed of in one of four facilities in the United States.³ One of the primary reasons for this is that such facilities are designed to contain the waste for long periods of time. BRL's municipal contained landfill has a liner that is warranted for only 30 years, a mere fraction of the time that this waste will continue to pose a public health hazard. The seriousness of this violation cannot be overstated. The landfill sits across the road from two schools and just upstream from the Kentucky River. The potential migration of radioactive isotopes off-site for generations to come presents a serious hazard to the people of this region.

The coming debate regarding the remediation likewise underscores the seriousness of the violation at issue. Much of the debate is likely to center on the additional risks created if BRL removes the waste and ships it to one of the four licensed low-level radioactive waste facilities. If the removal of the waste is not done in such a way as to ensure the protection of the citizens and workers, the additional harm to public health may be very serious.

Low penalties for this type of violation send the wrong message. They signal to the industry that carelessness is accepted. Disregard for the health of the workers and generations of community members cannot be accepted. EEC must send a strong message to all landfills that carelessness and disregard in the receipt of illegal waste will be punished. For these reasons, the first Maggard factor, the seriousness of the violation, militates in favor of a penalty of \$25,000 per violation.

2. Blue Ridge Landfill's Culpability

At the very least, BRL should have known that the waste shipments it was receiving from West Virginia and Ohio contained radioactive materials in violation of Kentucky law. The recitations contained in the proposed agreed order present BRL's arguments against its culpability here. Paragraph six of the agreement states that it is Blue Ridge's position that it acted consistent with industry practice in relying on the certified statements of the generator, Cory Hoskins, and in relying on review of a third-party technical consultant. Neither of those defenses is sufficient. CCEC lacks any information on whether any officials at BRL knew that they were receiving radioactive waste. The records of the investigations conducted lead to the unassailable conclusion that many, if not most, of the others in the chain knew that the waste was radioactive. Yet, BRL maintains that it was ignorant of the character of the waste it accepted.

BRL's defense is insufficient simply because any landfill should have known that oil and gas production waste being received from West Virginia and Ohio in 2015 and 2016 would have been radioactive. BRL is held to the standard of its industry. That industry is aware of the issues surrounding the radioactivity found in oil and gas production waste from hydraulic fracturing of the Marcellus Shale formation.⁴ That industry is aware that other states, Pennsylvania, Ohio, and

³ See <http://www.nrc.gov/waste/llw-disposal/licensing/locations.html> (last visited Nov. 21, 2016).

⁴ Issues surrounding the disposal of radioactive fracking waste from the Marcellus Shale formation have been widely reported in the media. See, e.g., Ian Urbina, *Wastewater Recycling No Cure-All in Gas Process*, N.Y. Times, Mar. 1, 2011, available at www.nytimes.com/2011/03/02/us/02gas.html; Adam Wernick, *Here's Another Complication for Fracking –Radioactive Waste*, PRI, Jul. 9, 2014, available at www.pri.org/stories/2014-07-

West Virginia included, have been ratcheting down on the legal landfilling of radioactive fracking waste, leading to a situation where the waste is being shipped around to different states for disposal. Anyone in the industry should have known that Cory Hoskins' certifications that (1) the waste being received was exempt oil and gas production waste pursuant to 40 C.F.R. 261.4(b)(5) and (2) did not contain radioactive waste were facially inconsistent. BRL either knew or should have known that the waste was radioactive.

BRL's reliance on a third-party consultant is disingenuous at best. Veolia, the third-party consultant, is a sister company of BRL. Both are owned by Advanced Disposal Services, Inc.⁵ To be credible, third-party review must be conducted by an independent third party. It was not. BRL's reliance on Veolia's review, therefore, does not provide any defense regarding BRL's culpability.

The culpability analysis under the Maggard factors militates in favor of a \$25,000 per violation penalty.

3. Economic Impact of the Penalty on the Violator

BRL is a subsidiary of a multi-billion dollar corporation, Advanced Disposal, Inc.⁶ To the extent that BRL is a well-capitalized subsidiary; it will be able to absorb even the maximally assessed penalty as the cost of doing business. In no case should BRL be allowed to escape payment of penalty because of any undercapitalization. Because of the potential risk of undercapitalization, EEC should assess penalties against BRL and its parent Advanced Disposal, Inc. Regardless, any penalty below \$2.3 million would signal to BRL and to any other similarly positioned landfills in the Commonwealth that serious violations of Kentucky's environmental laws can be dealt with in a way that does not significantly impact the company's bottom line.

The economic impact analysis under the Maggard factors militates in favor of a \$25,000 per violation penalty.

[09/heres-another-complication-fracking-radioactive-waste.html](http://www.post-gazette.com/local/marcellusshale/2013/08/22/Marcellus-Shale-waste-trips-more-radioactivity-alarms-than-other-products-left-at-landfills/stories/201308220367); Anya Litvak, *Marcellus Shale Waste Trips More Radioactivity Alarms Than Other Products Left at Landfills*, Pittsburg Post-Gazette, Aug. 22, 2013, available at <http://www.post-gazette.com/local/marcellusshale/2013/08/22/Marcellus-Shale-waste-trips-more-radioactivity-alarms-than-other-products-left-at-landfills/stories/201308220367>; Don Hopey, *Two More Drilling Sites Found with Marcellus Shale Sludge Radioactivity in Washington County; DEP Sees No Threat*, Pittsburg Post-Gazette, May 27, 2014, available at <http://www.post-gazette.com/business/2014/05/27/Two-more-containers-found-with-Marcellus-Shale-sludge-radioactivity-in-Washington-County/stories/201405270162>; Don Hopey, *West Virginia Won't Accept Additional Drilling Waste Tainted with Radioactivity*, Pittsburg Post-Gazette, May 29, 2014, available at <http://www.post-gazette.com/local/region/2014/05/29/West-Virginia-rejects-drilling-waste-tainted-with-radioactivity/stories/201405290267>.

⁵ See Advanced Disposal, Inc.'s press release on the acquisition of Veolia ES Solid Waste, Inc. here: <http://www.advanceddisposal.com/news/2012/advanced-disposal-closes-acquisition-of-veolia-es-solid-waste.aspx>.

⁶ See Advanced Disposal Inc.'s most recent quarterly report here: <http://ir.advanceddisposal.com/investors/financial-information/sec-filings/sec-filings-details/default.aspx?FilingId=11665828>.

4. The Potential for Other Similar Violations at the Landfill

During the investigations of these violations, a filter sock was discovered at the surface of the landfill. The filter sock was radioactive debris from oil and gas production operations. The filter sock was not in the locations where the 92 loads of radioactive waste at issue here were dumped. Instead, the filter sock happened to be discovered in a different location. It was determined to not be part of the violations at issue here.

The accidental discovery of yet more radioactive waste from oil and gas production at this landfill is disturbing to say the least. It indicates a strong likelihood of other similar violations by this landfill. For that reason, the analysis of this Maggard factor also militates in favor of a \$25,000 per penalty violation.

V. Supplemental Environmental Project Proposed

CCEC supports the concepts behind the two Supplemental Environment Projects (“SEPs”) set forth in the proposed agreement. Minor changes are needed to the radiation detection plan to make it more effective and responsive to community concerns. First, the monitoring plans need to be changed such that EEC and the community receive the results of all monitoring for the first six months of operation. After six months, BRL should be required to submit a quarterly report to EEC and the community that details each instance in which a waste load measuring greater than 5 pCi/g Radium 226 arrived at the gate and the disposition of that waste load. These reporting requirements must be made part of BRL’s permit. Likewise, BRL’s permit must be amended to include reporting of the maintenance, calibration, and quality control records of the installed detection equipment. Such reporting would then be made available to the public via Kentucky’s Open Records Act.

VI. Penalties in Excess of the Proposed SEPs

The costs of the two SEPs are far lower than any justifiable penalty. The currently proposed SEPs are expected to cost around \$120,000. As outlined above, penalties must be far greater than that. CCEC supports putting additional penalty moneys into an escrow account and allowing that money to be used to fund the remaining work required by the Corrective Action Plan, with the exception of any costs incurred as a result of additional bonding and closure activities. In other words, CCEC believes that the additional \$2.18 million that EEC must assess as a penalty should be put aside to be used for the remediation of the landfill with all such moneys required to be spent within two years of the execution of the Agreed Order. After two years or after the termination of the Agreed Order, whichever comes first, the money remaining in escrow should be distributed to a Supplemental Environmental Project agreed upon by BRL, EEC, and CCEC.

VII. Conclusion

CCEC appreciates this opportunity to comment on the proposed agreed order. While we

are generally supportive of the terms contained in the order, the penalty assessment must be increased so that the state's enforcement for the illegal receipt of harmful radioactive waste is not seen as a cost of doing business. CCEC will gladly support a final agreed order that incorporates the improvements outlined in herein. We look forward to working with EEC and BRL in the development of the CAP.

Sincerely,

A handwritten signature in cursive script that reads "Mary Varson Cromer".

Mary Varson Cromer