West Virginia Air Quality Board
Charleston, West Virginia

Jefferson County Foundation, et al.,

Appellants,

v.

Appeal No. 23-02-AQB

Laura M. Crowder, Director,
West Virginia Department of Environmental Protection,
Division of Air Quality,

Appellee,

and

Roxul USA, Inc., d/b/a ROCKWOOL,

Intervenor--Appellee.

MEMORANDUM OF LAW IN SUPPORT OF ROCKWOOL'S MOTION TO DISMISS

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

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INTRODUCTION

On November 16, 2023, Roxul USA, Inc., dba ROCKWOOL, was issued Modification Permit No. R14-0037A (the "Modified Permit") for the operation of a rock wool insulation manufacturing facility in Ranson, Jefferson County, West Virginia. In this appeal, Appellants Jefferson County Foundation, Inc. and three of its board members (collectively, "JCF") contend that the West Virginia Department of Environmental Protection's Division of Air Quality ("DAQ") wrongfully issued the Modified Permit to ROCKWOOL in violation of applicable state and federal regulations. Notice of Appeal, p. 1. The undisputed material facts, however, demonstrate that ROCKWOOL's RAN-5 facility was properly permitted as a synthetic minor source.

SUMMARY OF ARGUMENT

JCF's appeal is based upon the premise that DAQ erred in allowing RAN-5 to be designated as a synthetic minor source because DAQ failed to ensure that RAN-5 does not have the physical and operational capacity to emit major source amounts. That is a faulty premise, and JCF's appeal must be dismissed as a matter of law. By its very definition, a synthetic minor source is one that has "the physical and operational capability to emit major amounts, but [is] not considered [a] major source[] because the owner or operator has accepted an enforceable [emission] limitation." Memorandum from the Office of Air Quality Planning and Standards, OAR (MD-10), Office of Regulatory Enforcement, OECA (2241A), (Apr 14, 1998), p. 2, attached hereto as **Attachment A**; *see also* 40 C.F.R. § 49.152. ROCKWOOL has implemented operational restrictions, such as a limit on production hours, and accepted enforceable emissions limitations at RAN-5 below major source levels. As a result, while RAN-5 has the physical and operational capacity to emit major amounts like every other synthetic minor source, ROCKWOOL is legally prohibited from doing so and must comply with the emissions limitations it voluntarily agreed to comply with

in its application. Those limitations are expressed as enforceable conditions in the Modified Permit, and as such are sufficient as a matter of law to make the RAN-5 facility a minor source of air emissions.

LEGAL STANDARD

Under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, as generally followed by this Board in resolving appeals,[1] the Board may dismiss any claim for "failure to state a claim upon which relief can be granted." W. Va. R. Civ. P. 12(b)(6). This includes dismissal of a claim due to a dispositive issue of law. *Neitzeke v. Williams*, 490 U.S. 319, 326 (1989). The dismissal process allows the Board to streamline litigation by dispensing with needless discovery and fact-finding. *Id.* at 326. For purposes of a Rule 12(b)(6) motion, the appeal "is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." *Cantley v. Lincoln Co. Commn.*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007) (internal quotations omitted). However, the Board is "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." Franklin D. Cleckley, et al., Litigation Handbook on West Virginia Rules of Civil Procedure 386 (4th ed. 2012); *see also Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002).

BACKGROUND, RELEVANT PROCEDURAL HISTORY, AND THIS APPEAL

1. ROCKWOOL owns and operates a stone wool insulation manufacturing facility in Ranson, Jefferson County, West Virginia, which is referred to herein as "RAN-5". CR at 1-2.

2. On November 21, 2017, ROCKWOOL submitted an application to DAQ for a pre-construction new major stationary source permit. CR at 126. At that time, RAN-5 was classified as a major stationary source because its potential to emit ("PTE") exceeded 250 tpy of VOC, and

[1] W. Va. C.S.R. § 52-1-6.13.

other emissions were also subject to PSD review due to potential emissions greater than the PSD significant emission rate for each pollutant. *Id.*

3. On April 30, 2018, DAQ issued a major source pre-construction air pollution control permit to ROCKWOOL for the construction of RAN-5 (the "Original Permit"). CR at 218. Under the Original Permit, ROCKWOOL could burn either coal or natural gas to melt the rock and other materials to make stone wool insulation. CR at 2, 59.

4. ROCKWOOL began commercial operations at RAN-5 on or about July 2021.

5. ROCKWOOL, during construction, and prior to the commencement of commercial operations, decided to burn natural gas, not coal, to melt the rock and other materials, and on October 3, 2022, it submitted an application to modify the Original Permit to eliminate the permit conditions relating to the use of coal. CR at 488.

6. ROCKWOOL resubmitted its application on May 22, 2023. *See* CR at 746.

7. In its May 2023 application, ROCKWOOL explained that

> [w]ith the proposed changes outlined in this application, the RAN Facility will experience a net decrease in emissions of all pollutants. Additionally, this decrease will result in the facility no longer being defined as a 'major stationary source'. This means the facility no longer has the potential to emit two hundred fifty (250) tons per year or more of any regulated NSR pollutant.

CR at 759.

8. After a lengthy and extensive review and public comment period, DAQ issued the Modified Permit on November 16, 2023, and RAN-5 was characterized as a synthetic minor source.

9. On December 18, 2023, JCF filed their Notice of Appeal with the Board in Appeal No. 23-01-AQB.

10. In their appeal, JCF contends the DAQ erred in allowing ROCKWOOL to modify its pre-construction permit to be regulated as a synthetic minor source rather than a major stationary source.

11. On January 12, 2024, ROCKWOOL filed its Notice of Intervention. As the permittee, ROCKWOOL is a real party in interest and shall participate in this appeal as an Intervenor—Appellee pursuant to West Virginia Code § 22B-1-7(e) and W. Va. C.S.R. § 52-1-2.2.e.

ARGUMENT

ROCKWOOL's RAN-5 is permitted as a synthetic minor source and is only required to demonstrate that its operational restrictions prevent it from emitting at or above the thresholds for major sources in 40 CFR 52.21. Synthetic minor sources are not required to demonstrate reductions in emissions or where every emission reduction comes from.

A "synthetic minor source" means a source that otherwise has the potential to emit regulated NSR pollutants in amounts that are at or above the thresholds for major sources in 40 CFR 52.21, but has taken a restriction so that its PTE is less than such amounts for major sources and the source has elected to take a restriction so that its PTE is less than such amounts for major sources. Memorandum from the Office of Air Quality Planning and Standards, OAR (MD-10), Office of Regulatory Enforcement, OECA (2241A), (Apr 14, 1998), p. 2; *see also* 40 C.F.R. § 49.152. The restrictions are enforceable as a practical matter (as defined in 40 CFR 49.152). Because the restrictions are enforceable, the source is legally prohibited from emitting as a major source. *Id.* In other words, operators have the discretion to choose emissions limitations to obtain the designation as a synthetic minor source and operators must comply with those limitations.

JCF claims that ROCKWOOL's Modification Application does not contain sufficient information to allow RAN-5 to be classified as a minor source and that DAQ did not properly confirm that the PTE calculations supplied by ROCKWOOL were correct. Notice of Appeal, Section 5, A and B. Specifically, JCF asserts that: (1) ROCKWOOL failed to explain how each operational change will lead to specific emissions reductions; and (2) ROCKWOOL's stack testing data was based on maximum production and not maximum emissions capacity. JCF insists that ROCKWOOL is required to demonstrate reductions in emissions and show precisely where every emissions reduction comes from. As explained below, ROCKWOOL is only required to demonstrate that the operational limitations at the RAN-5 result in emissions below 250 tpy.

A. ROCKWOOL is not required to explain how reductions from the Original Permit resulted in it becoming a synthetic minor under the Amended Permit.

JCF contends that ROCKWOOL isn't entitled to be treated as a synthetic minor because it hasn't shown how it accomplished its PTE reductions from the Original Permit to the Modified Permit. JCF states that "they do not explain exactly how the eleven (11) categories of changes to the facility and operations noted in their May 2023 Application will lead to that 275 tpy reduction in VOC emissions." Notice of Appeal p. 14. ROCKWOOL has in fact made that demonstration, just not in the way that the JCF would like. And as ROCKWOOL had no obligation to draft its modification application in the form JCF desires, JCF's appeal should be dismissed

To be considered a synthetic minor source, ROCKWOOL is only required to impose operational restrictions and accept enforceable emissions limitations so that its PTE is less than 250 tpy. Memorandum from the Office of Air Quality Planning and Standards, OAR (MD-10), Office of Regulatory Enforcement, OECA (2241A), (Apr 14, 1998); *See also* 40 C.F.R. § 49.152. ROCKWOOL's listed operational restrictions, include, but are not limited to, the reduction of annual hours of operation and the removal of coal-fired related equipment. In addition, ROCKWOOL's

application included Attachment G and provides a detailed explanation of the changes to ROCK-WOOL's manufacturing process and associated emissions points, which JCF fails to mention in the Notice of Appeal. Ultimately, the Modification Application contained emissions estimates for all internal sources at the RAN-5 and those emissions were properly estimated to be less than 250 tpy. Based on those estimates, DAQ was able to properly set emissions limits on the RAN-5 in accordance with synthetic minor source requirements.

JCF apparently misunderstands the passage in the permit modification application which refers to the changes from the Original Permit that would result in RAN-5 being a minor source. That was merely helpful commentary from ROCKWOOL explaining where the changes had occurred, and was never intended to be the basis for proving that RAN-5 was a minor source. ROCK-WOOL had no reason to lay out the exact emissions reductions occasioned by those 11 changes; all that information can be calculated from the application for modification. The restrictions on operations and the emissions limitations proposed by ROCKWOOL were then incorporated in the Amended Permit, making them enforceable restrictions and converting RAN-5 to a minor source.

If the JCF had reason to believe the operational restrictions and emissions limits imposed on ROCKWOOL in the Amended Permit are insufficient for it to qualify as a minor source, it has the information to do the calculations to demonstrate that. The fact that it has not done so suggests that it cannot do so, and therefore its appeal should be dismissed.

B. Even if the JCF allegations were true, JCF has not properly alleged that ROCK-WOOL's stack testing was deficient.

JCF takes the position that the stack testing was deficient because PTE must be based on maximum emissions, whereas ROCKWOOL performed testing at maximum capacity. Even assuming that ROCKWOOL tested at maximum capacity, there is no allegation that the stack testing didn't comply with the relevant federal and state regulations that specify how it is to be done. Nor

is there any explanation by JCF why maximum emissions wouldn't be generated during maximum operations.[2] In short, without being able to distinguish maximum capacity from maximum emissions, JCF has not appealed an error that this Board can resolve, and the appeal should be dismissed.

C. ROCKWOOL submitted sufficient information to establish that it is a synthetic minor source.

JCF alleges that the DEP failed to confirm that ROCKWOOL's emissions calculations were correct. That is incorrect. The permit application, and the Amended Permit, contain the information needed to calculate what emissions are allowed, and therefore whether RAN-5 is a minor source. For smaller sources at RAN-5 (e.g. boilers, haul roads, storage tanks, fire water pump and material handling) the emissions calculations were based almost entirely on AP-42. AP-42 has been published as the primary compilation of EPA's emissions factor information since 1972 and is used by both industry and regulatory agencies across the country. CR at 56.

For larger sources (e.g. Furnace IMF01 and the WESP), ROCKWOOL based its estimates (with the exception of certain individual HAPs which were not tested for or monitored) on either stack testing performed at RAN-5 or data from the Continuous Emissions Monitoring system installed at the RAN-5. ROCKWOOL then applied certain engineering judgments to that data in order to develop proposed limits that included what they believed to be a reasonable compliance margin. In order to determine whether or not ROCKWOOL proposed emission limits were reasonable, DAQ simply compared the proposed limits to existing stack testing results.

[2] JCF refers to 45 CSR 2-19, which ROCKWOOL could not identify. However, in looking at 45 CSR 2-5, ROCKWOOL would note that "All compliance test runs which are to be included in the test result for a unit or a specified number of units, shall be conducted while the unit or group of units is operated at or above the normal maximum operating load for the specified unit or group of units . . . ." (Emphasis added.)

To be considered a synthetic minor source, ROCKWOOL is required to estimate emissions based on operational restrictions, and determine whether emissions from the RAN-5 will exceed 250 tpy. Consequently, all of ROCKWOOL's proposed limits for the main emission sources at the RAN-5 are larger than the results of actual emissions testing performed. CR at 65-66. Those results were increased above stack testing results to include an appropriate margin for compliance. These higher emissions were what went into the PTE calculation that determined whether RAN-5 is a minor source. As explained above, ROCKWOOL performed the proper testing, identified appropriate limits, and RAN-5 is a minor source.

D. If ROCKWOOL fails to adhere to the emissions limits in the Modified Permit, it will be subject to enforcement, penalties, and regulation as a major source.

The purpose of the synthetic minor source permitting program is to allow operators to self-impose operational restrictions to bring sources under the major source emissions threshold. Memorandum from the Office of Air Quality Planning and Standards, OAR (MD-10), Office of Regulatory Enforcement, OECA (2241A), (Apr 14, 1998) p. 1-2; *See also* 40 C.F.R. § 49.152. Sources permitted as synthetic minor sources are legally required to operate under the operational restrictions and are prohibited from operating as major sources. *Id.* The crux of JCF's appeal is that ROCKWOOL could somehow emit as a major source while operating under a minor source permit, which is specifically prohibited under the Modified Permit.

ROCKWOOL developed emissions estimates based on its chosen operational limits and determined that the RAN-5 will be able to function with emissions below 250 tpy. It showed its work in the permit application. If those circumstances change or the emissions estimates are incorrect, and monitoring shows that the RAN-5 emits above 250 tpy, then ROCKWOOL will be subject to penalties and enforcement for improperly operating under a major source permit. At that point, ROCKWOOL will be required to apply for a major source permit. JCF seems to imply that,

by partaking in the permitting process as a synthetic minor source, ROCKWOOL will be able to provide false emissions data and operate surreptitiously as a major source with minor source limits. JCF has failed to show how that is a reasonable possibility, given the obligations imposed by the Modified Permit, and accordingly JCF's appeal must be dismissed as a matter of law.

CONCLUSION AND RELIEF REQUESTED

For the reasons explained above, ROCKWOOL respectfully requests that the Board enter an Order dismissing JCF's Appeal and granting such other relief as the Board deems just and proper.

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ATTACHMENT A

April 14, 1998

MEMORANDUM

SUBJECT: Potential to Emit (PTE) Guidance for Specific Source Categories

FROM: John S. Seitz, Director /s/
Office of Air Quality Planning and Standards, OAR (MD-10)

Eric Schaeffer, Director /s/
Office of Regulatory Enforcement, OECA (2241A)

TO: See Addressees

This memorandum provides guidance for addressing the minor source status under the Clean Air Act (Act) for lower-emitting sources in eight source categories.

Background Information

Many Act requirements apply only to major sources with a potential to emit air pollutants at levels greater than a given amount. The Environmental Protection Agency (EPA), in its current regulations, defines a source's potential to emit air pollutants as follows:

> "Potential to emit" is the maximum capacity of a stationary source to emit under its physical and operational design. Any physical or operational limitation on the source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation, or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the (EPA) Administrator."[1]

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[1]The EPA is currently reviewing the requirement in EPA's regulations that limitations must be federally enforceable in order for sources to take credit for those limits. Because this review is not yet complete, and is the subject of an upcoming rulemaking, the EPA has developed interim policies on this issue. The following policy memorandums describe EPA's interim policies: "Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit" (January 22, 1996) and "Extension of January 25, 1995 Potential to Emit Transition Policy" (August 27, 1996). The EPA describes the ways a State or local limit achieves "federally enforceable" status in a 1995 policy memorandum, "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act" (January 25, 1995).

Often, in describing the overall stationary source population regarding potential-to-emit issues, EPA groups sources into three general types:

(1) Major sources - those that actually emit major amounts of air pollutants, or have the potential to do so;

(2) "True minor"[2] (also called "natural minor") sources - those that do not have the physical or operational capacity to emit major amounts (even if the source owner and regulatory agency disregard any enforceable limitations); and

(3) "Synthetic minor" sources - those that have the physical and operational capability to emit major amounts, but are not considered major sources because the owner or operator has accepted an enforceable limitation.

Many sources have the "capacity" to emit major amounts of air pollutants, but actually emit amounts that are much lower than the major source threshold. For such sources, States and local permitting agencies provide opportunities to obtain limits on their potential to emit through construction permit programs, operating permits, general permits applicable to multiple sources, State implementation plans (SIP), and other mechanisms.

There are two overall approaches that States and local agencies can use to establish enforceable emission limits which ensure that a source's potential emissions are below the major source threshold. Using the first approach, case-by-case permitting, agencies create terms and conditions tailored to a given plant site. This approach is essential for complex sources warranting close scrutiny, such as sources that comprise many different sources and source types, and sources that limit their emissions to near-major amounts. Under the second approach, generally appropriate for less complex sources, States and local agencies create a standard set of terms and conditions for many similar sources at the same time. The terms air quality agencies use to describe this approach include "general permits," "prohibitory rules," "exclusionary rules," and "permits-by-rule." (From this point on, rather than to repeat each of these terms, this guidance will use the term "prohibitory rule" for the latter three terms.) For a general permit, the permitting agency establishes a standard set of terms and conditions, and then incorporates those terms and conditions into the general permit. Sources wishing to be subject to the general permit must provide a notification to the permitting agency, and must comply with the standard terms and conditions. From the source's perspective, the administrative procedure for receiving a general permit is typically much more streamlined than receiving a case-by-case permit. State "prohibitory rules" are similar to general permits, but States or local agencies put them in place with a regulation development process rather than a permitting process.

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[2]The Act requirements for criteria pollutant programs refer to nonmajor sources as "minor sources," while the air toxics program in section 112 refers to nonmajor sources as "area sources." For purposes of this discussion, the term "minor" means all nonmajor sources.

What Is The Purpose Of This Guidance Memorandum?

The EPA issues this guidance to assist States and local agencies in efficiently creating potential-to-emit limits for small sources, and to assist States and source owners in identifying sources that are minor sources without additional limits. Where States and local agencies need and use this guidance, small business owners will achieve greater certainty that EPA, States and local control agencies, and the public do not consider them major sources under the Act.

Trade groups for a number of industries, typically those representing small business owners, have informed the EPA that these owners have significant uncertainties and confusion over their major or minor source status. These groups have also indicated to EPA that they would prefer that EPA give explicit guidance showing with certainty how a source can be considered a natural minor or synthetic minor, rather than for source owners to be left with continuing uncertainty.

Today's guidance addresses eight specific industry categories. The guidance provides technical information useful in devising potential-to-emit limits for small sources in the included industries. A State may find this information particularly useful for creating generic potential-to-emit limits in prohibitory rules and general permits for numerous similar, small sources in an industry.

The EPA has developed this guidance as a pooled technical effort with the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO). The EPA hopes that this information-sharing exercise will help to reduce uncertainty and help to foster technical consistency among permitting agencies.

While this guidance summarizes the results of a significant amount of technical work, and should provide information readily usable by permitting agencies, EPA also recognizes that many States and local agencies have already addressed issues related to many categories discussed in this memorandum. Additionally, States and local agencies may possess State-specific emissions information for given source types. It is not EPA's intent to imply that the screening cutoff levels described in this guidance are the only limitations that would be appropriate for a given type of sources in a given State or local area. The EPA does not intend that these calculations should result in the only values that EPA would find acceptable. Also, EPA does not intend to imply that calculations previously approved by the EPA in prohibitory rules or general permits must be revisited to conform to this guidance.

In providing guidance that should help provide easy ways for sources to clarify that they are minor sources, the EPA is not intending to imply that minor sources are not important air quality sources. Readers should not interpret this guidance as making any judgment about the wisdom of emission control measures targeted at minor source categories.

What Types Of Source Categories Are Included In This Guidance?

In identifying source categories to be covered within this guidance, the EPA included those categories for which a single type of activity tends to dominate emissions, and for which most sources in the category actually emit at levels well below their potential, and well under the major source thresholds. For sources with numerous categories at the plant site and/or that emit amounts that are just below the major source threshold, EPA believes that there is generally no feasible way to ensure their minor source status without a case-by-case permitting process. In addition, categories covered by this guidance tend to be those for which the parameters that affect emissions are relatively easy for EPA to describe and characterize. With some exceptions, this guidance does not cover categories involving control equipment.

Which Specific Source Categories Are Included?

Eight source categories are included:

(1) gasoline service stations;

(2) gasoline bulk plants (bulk plants are small bulk gasoline distribution facilities that distribute less than 20,000 gallons per day, and that receive gasoline by truck rather than by rail or barge);

(3) boilers (specifically, the guidance addresses natural gas and oil combustion in industrial boilers having a capacity of 100 million BTU/hour or less);

(4) cotton gins;

(5) coating sources;

(6) printing, publishing and packaging operations;

(7) degreasers using volatile organic solvents;

(8) hot mix asphalt plants.

What Guidance Does EPA Provide For Those Categories?

In the attached tables, EPA provides guidance in the form of operational cutoffs. The tables contain cutoffs that States and local agencies can use as limits in general permits and prohibitory rules.[3]

How Did EPA Calculate The Cutoffs?

The EPA's calculations are discussed in a separate document attached to this guidance memorandum entitled "Technical Support Document for Lower-Emitting Source Guidance Memorandum Documentation of Emission Calculations." For some categories, calculations were easy to make because the amount of pollutant used equates to the amount of pollutant emitted. For others, EPA needed to make more difficult technical judgments to make the calculations. In about half the cases, EPA relied on AP-42 emission factors as part of the technical basis for calculating the cutoffs. It is important to note that the AP-42 factor was not the entire basis for the calculation, and that the calculations leave a margin, generally about 50 percent to account for uncertainty in the emissions estimate.[4]

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[3]For categories with annual limits, the cutoffs are listed as values not to be exceeded during any rolling 12-month period. The EPA is accepting, on an interim basis, the use of a 12-month period, rather than the shorter time periods recommended by EPA's June 1989 policy memorandum "Guidance on Limiting Potential to Emit in New Source Permitting," given that the guidelines provide for cutoffs at levels nominally 50 percent of the major source threshold. Please note that EPA will be revisiting issues in an upcoming rulemaking related to the averaging times of potential-to-emit limits, including those for prohibitory rules and general permits.

[4]The EPA reiterates its position that emission factors, such as those in EPA's AP-42 compilation, are based upon the average of the values from available testing, and are not generally recommended as the approach to characterizing emissions from any given source for purposes of applicability determinations. The EPA believes, however, for the purposes of this guidance, that in a number of cases emission factors provide the only available means from which a cutoff could be determined. Rather than eliminate any such source category from consideration under this memorandum, the EPA feels that a reasonable approach is to make use of the AP-42 emission factors, building in a margin of error to account for the uncertainty in the data. The EPA believes that this approach should ensure that there is a low probability that any potentially major-emitting source would escape review. For source categories addressed by the guidance, which tend to be dominated by low-emitting sources for which source-specific emission factor data are not likely to be generated, the EPA believes this to be a reasonable approach. However, to the extent that source-test data, or other information indicate that the emission factors, or other assumptions made in calculating the limits are not appropriate for a specific source within a category, the source and permitting authority should not apply to this guidance. The EPA has not changed its position that such emission factors are not an acceptable approach for large industrial facilities. Finally, the EPA recognizes that as the emission factors used as the basis for the guidance are updated, it will be necessary to review the calculations in light of the revised factors to determine whether the guidance should be amended.

Similarly, the EPA believes that for nearly all source categories, even those that are simple enough to be good candidates for this guidance, there will usually be emitting activities that will be co-located with the activity described in the cutoff. Generally, these sources are a very low percentage of the emissions from the entire facility. Some examples of co-located sources are cold cleaners at gas stations, consumer product usage such as cleaners and white-out, lawn mowers, and small portable generators. To account for any such sources, EPA calculated the cutoffs leaving a small margin for any such sources that may be present. (Note that EPA does not mean to imply that overall these types of co-located sources are not environmentally significant--just that they probably have little bearing on whether a source is major or minor.)

Will This Guidance Replace The EPA's January 25, 1995 Transition Policy? If So, When Does That Transition Policy Expire?

Many lower-emitting sources in categories addressed by today's guidance may be operating under EPA's transition policy, first announced in a policy memorandum of January 25, 1995. The purpose of this transition policy was to alleviate concerns that sources may face gaps in the ability to acquire federally enforceable PTE limits. For sources lacking federally-enforceable limitations with low actual emissions, the transition policy provided a 2-year period extending from January 1995 to January 1997 (for sources lacking federally-enforceable limitations). On August 27, 1996, the EPA extended the transition period until July 31, 1998. During this transition period, State and local air regulators have the option of treating lower-emitting sources as minor, if the source owner maintains adequate records to demonstrate that actual emissions are less than 50 percent of the major source threshold. Today's guidance, in addressing sources that are common and numerous, should cover most of the lower-emitting sources that States may address by creating general permits or prohibitory rules. The EPA believes, however, that States will need a reasonable amount of time to implement today's guidance.

The EPA will release a separate guidance memorandum in the future to address issues related to the expiration of the transition policy. The transition policy involves other issues, in addition to those for sources emitting less than 50 percent of the major source threshold, and the EPA prefers to address all of those issues at the same time.

How Does This Guidance Relate To State And Local Minor Source Construction Permit Programs?

This guidance is NOT intended to affect minor source new source review (NSR) programs. Those programs are necessary for attainment and maintenance of the national ambient air quality standards (NAAQS), and for generally managing and protecting air quality in a given location. These are considerations independent of whether a source is a "major" or "minor" source. In making any change to a minor NSR program, the State or local agency needs to address air quality impact considerations in addition to those discussed here. For example, an agency limit to ensure that a source is minor for sulfur dioxide (SO_2) may involve fuel sulfur

limits. Because those same fuel sulfur limits could possibly lead to short-term exceedances of the SO_2 standards, and the agency could not categorically exempt such a source from minor NSR without addressing those air quality impacts; it is important to note that the annual limits contained in the guidance, while ensuring that the source is not a "major source," may not ensure that the source meets all short-term NAAQS.

Does this Policy Create Any Rights or Obligations?

The policies set forth in this memorandum are intended solely as guidance, do not represent final Agency action, are not binding on any party, and cannot be relied upon to create any rights enforceable by any party.

How Is This Guidance Being Distributed?

The Regional Offices should send this memorandum to State and local agencies within their jurisdiction. This memorandum and the accompanying technical support document are accessible from the Internet. The Internet location is the "Office of Air and Radiation (OAR) Policy Guidance" portion of EPA's "technology transfer network (TTNWeb)," bulletin board, that is, http://www.epa.gov/ttn/oarpg.

If There Is Something I Do Not Understand, Who Will Answer My Questions?

Questions concerning specific issues and cases should be directed to the appropriate EPA Regional Office. If you are a source owner and have questions about this policy, you should direct questions concerning specific issues and source-specific cases to the appropriate State or local agency. The Regional Office staff with questions may contact Timothy Smith of the Integrated Implementation Group at (919) 541-4718, or Carol Holmes of the Office of Regulatory Enforcement at (202) 564-8709.

Attachments

cc: C. Holmes (2242A)
T. Kelly (2131)
J. Ketcham-Colwill (6103)
T. Smith (MD-12)
J. Walke (2344)

Addressees:
Director, Office of Ecosystem Protection, Region I
Director, Environmental Planning and Protection Division, Region II
Director, Air Protection Division, Region III
Director, Air, Pesticides, and Toxics Management Division, Region IV
Director, Air and Radiation Division, Region V
Director, Multimedia Planning and Permitting Division, Region VI
Director, Air, RCRA and Toxics Division, Region VII
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West Virginia Air Quality Board
Charleston, West Virginia

Jefferson County Foundation, et al.,

Appellants,

v. **Appeal No. 23-02-AQB**

Laura M. Crowder, Director,
West Virginia Department of Environmental Protection,
Division of Air Quality,

Appellee,

and

Roxul USA, Inc., d/b/a ROCKWOOL,

Intervenor--Appellee.

CERTIFICATE OF SERVICE

I hereby certify that on the January 19, 2024, I caused the foregoing **MEMORANDUM OF LAW IN SUPPORT OF ROCKWOOL'S MOTION DISMISS** to be served upon the following parties by United States mail, postage prepaid:

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