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.

RESPONSE IN OPPOSITION TO ROCKWOOL'S MOTION TO DISMISS

Jefferson County Foundation ("JCF"), Karen Freer, Sharon Wilt, and Gavin Perry ("Appellants"), by and through undersigned counsel, submit this *Response in Opposition to ROCKWOOL's Motion to Dismiss*. In support of their Response in Opposition, Appellants argue as follows:

INTRODUCTION

ROCKWOOL asserts that each of the Appellants' claims must be dismissed under R. 12(b)(6) of the W. Va. R. Civ. P. In each instance, ROCKWOOL is incorrect and the claims should proceed to their merits.

Essentially, ROCKWOOL argues that Appellants' claims should be dismissed because ROCKWOOL submitted sufficient information to the WV Department of Air Quality ("WVDAQ") and that the WVDAQ appropriately reviewed that information and correctly issued

Modification Permit No. R14-0037A ("Modified Permit"). This argument misstates, and glazes over, the underlying issue behind Appellants' claims: that the stack testing and related emissions information that form the basis of Rockwool's Application, and the resulting Modified Permit, were not sufficient to establish to the required degree of certainty that the potential to emit of the RAN-5 facility was below 250 tons per year ("tpy"). Thus, the WVDAQ incorrectly issued the Modified Permit as a synthetic minor source permit, and inappropriately relieved RAN-5 from major source Prevention of Significant Deterioration ("PSD") permitting requirements.

In doing so, the WVDAQ's issuance of the Modified Permit was arbitrary and capricious and did not meet appropriate legal standards.

LEGAL STANDARD

Motions to dismiss should not be granted unless it appears beyond doubt that the non-moving party can prove no set of facts in support of their claim that would entitle them to relief. Sylllabus Point 2, *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.,* 244 W. Va. 508, 514-15, 854 S.E.2d 870, 876-77 (2020). Because the judicial system prefers to decide cases on their merits, all claims by the non-moving party (Appellants in this instance), should be construed in the light most favorable to the non-moving party and all allegations should be taken as true. *Sedlock v. Moyle*, 222 W. Va. 547, 550, 668 S.E.2d 176, 179 (2008) (citing *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978)). The moving party bears the burden of proof in showing that no legally cognizable claim for relief exists. *Mountaineer Fire & Rescue Equip.* at 520. If the moving party cannot prove that no legally cognizable claim for relief exists, the motion should be denied.

ARGUMENT

In this case, Rockwool argues that Appellants' Appeal must be dismissed because the WVDAQ correctly issued the Modified Permit as a synthetic minor permit because "the operational limits at the RAN-5 result in emissions below 250 tpy." Motion to Dismiss ("MTD") at 5. However, Rockwool misconstrues Appellants' arguments and fails to address the obligations on the WVDAQ in issuing this permit under West Virginia law. Before issuing the Modified Permit, West Virginia law required the WVDAQ to confirm that Rockwool's permit application contained "sufficient information" for the DEP "to determine" that continuing operations at RAN-5 would "be in conformance with" West Virginia air permitting rules, 45 CSR § 13 – 5.4, and to deny any permit request if the proposed changes would "violate applicable emission standards…or be inconsistent with the intent and purpose" of the DEP permitting rules and the West Virginia Air Pollution Control Act, 45 CSR § 13 – 5.7.

In this case, the WVDAQ could not show that Modified Permit complied with the state (and federal) requirements regarding permitting obligations for major stationary sources because Rockwool did not provide the information needed to show to support issuance of a minor source permit under West Virginia law.[1] As explained in more detail below, the WVDAQ could not reasonably determine that the PTE for the RAN- 5 facility was sufficient to issue a minor source permit under 45 CSR § 13 - 16.3. Such a determination was not possible because Rockwool's Application did not provide the type of reliable verification of emissions such as from representative stack testing or other emissions information as required to determine that the RAN- 5 facility's potential to emit ("PTE") was below the major source PSD permitting threshold, as defined by 45 CSR §§ 14 - 2.58. Rockwool's assertion that "operational

[1] As a general matter, we note that nowhere in the Motion to Dismiss does Rockwool provide cites to the Response to Comments or other record documents that purport to show that their arguments are derived from WVDAQ's decision making in this permitting action.

limits…result in emissions below 250 tpy," MTD at 5, presumes that the connection between operational limits and the annual emissions – i.e., how much of each pollutant is emitted per unit of production – has been properly evaluated, verified, and determined. That is simply untrue, as explained below. The Appellants raise sufficient claims regarding whether the WVDAQ appropriately issued the Modified Permit to Rockwool and relieved RAN-5 of its existing PSD permitting obligations, so the Motion to Dismiss must be denied.

A. The WVDAQ could not issue a synthetic minor source permit and relieve the RAN-5 facility of major source PSD permitting requirements without complete and accurate information regarding the emission estimates provided in Rockwool's application and the resulting emission limits in the Modified Permit.

Rockwool argues that neither it, nor the WVDAQ, are required to explain how reductions from the Original Permit resulted in RAN-5 becoming a synthetic minor source in the Modified Permit. Rockwool asserts that it has done this because the emission estimates contained in the Modification Application "were properly estimated to be less than 250 tpy." MTD at 6. This is wrong for two reasons.

First, Appellants raised multiple issues with the emissions estimates and underlying calculations upon which the Modified Permit is based during the WVDAQ's issuance of the Modified Permit.[2] As explained below, not all of these issues were addressed by the WVDAQ in issuing the final permit, and Appellants can present information showing the strong probability that Rockwool's potential emissions can be estimated to be greater than 250 tpy. Thus, the Appeal properly asserts that the information provided in Rockwool's May 2023 Application and the resulting terms of the Modified Permit are not sufficient to confirm that emissions of volatile

[2] *See, generally,* JCF Public Comments at 15-24 (comments 4-22).

organic compound ("VOC") and total particulate matter ("PM") pollution from RAN-5 are sufficiently low to avoid PSD permitting requirements.

Second, because RAN-5 has been operating as a major stationary source under the PSD permit issued by the WVDAQ in 2018 (Permit No. R14-0037), Rockwool is asking for a synthetic minor permit that will replace that PSD permit and relieve RAN-5 of its existing major source PSD permitting requirements.[3] Thus, the WVDAQ decision to issue the Modified Permit is also a decision to remove existing PSD regulatory requirements at RAN-5. The WVDAQ can only make this decision after determining that a permit modification application contains "sufficient information" that Rockwool's continued operation under the Modified Permit "will be in conformance with" West Virginia air permitting rules. 45 CSR § 13 – 5.4. Appellants assert that the WVDAQ failed to (and, in fact, could not) make such a determination in this case, based on the information provided in Rockwool's Application.

While Rockwool argues that information about the specific emission reductions relating to specific changes at the facility is only "useful commentary," Appellants asserts that this information is necessary for the WVDAQ to confirm that RAN-5 is no longer a major source and that removal of its existing PSD permit conforms with state and federal law. Accordingly, questions remain regarding the issuance of the Modified Permit given continued, unaddressed

[3] Those requirements include application of the best available control technology for emissions from exclusive use of natural gas at the facility, area-specific monitoring showing that emissions from the source will not cause problems with NAAQS attainment in nearby areas, and from the requirement to undergo additional major source permitting when undertaking major modifications at a facility. 45 CSR §§ 14 –2.12 and 8.2 (BACT), 4, 10, and 11 (air modeling), and 3.2 (permitting of major modifications)*s; see also* 42 U.S.C §§ 7475(a)(4) and 7479(3) (BACT), 42 U.S.C § 7475(a)(3) and (7) (air modeling), and 40 C.F.R. § 52.21(a)(2)(ii)3.2 (permitting of major modifications). While WVDAQ and/or Rockwool may try to assert that such concerns are unnecessary because the BACT limits from the existing PSD permit continue in the Modified Permit, JCF has long contended that those limits do not represent BACT for a source operating with natural gas and that the air modeling conducted during PSD permitting was insufficient. *See* JCF Public Comments at 2 and various EPA and WVDAQ letters cited therein. Moreover, such arguments do not address the PSD requirements for air modeling or permitting of major modifications at the RAN-5 facility.

concerns regarding the accuracy of Rockwool's emission estimates and the resulting permit terms.

Accordingly, since there are still questions remaining about the accuracy of Rockwool's emission estimates provided in its application (and the resulting emission limits in the modified permit) and the reasonableness of the WVDAQ determination that RAN-5 is no longer a major source subject to its existing PSD permit, there are relevant questions of law and fact that remain. The Motion to Dismiss must be denied.

B. The WVDAQ could not issue a synthetic minor source permit to Rockwool and relieve the RAN-5 facility of major source PSD permitting requirements without confirming that emission estimates were based on stack testing conducted at periods of maximum emission production for each pollutant.

Rockwool also asserts that this appeal must be dismissed because Appellants have not alleged that its stack testing – and the resulting emission estimates – are deficient. This is also wrong. Appellants (and other citizens) raised multiple comments regarding problems with emissions estimates and underlying calculations upon which the Modified Permit is based. The most serious of these issues is that estimates were based emission data from stack testing at times of maximum *production*, instead of during times of maximum *emissions for each pollutant in question*. Specifically, Appellants commented that synthetic minor permits must be based on emissions limits that restrict a source's "potential to emit," or PTE, below 250 tpy, because West Virginia law defines PTE as "the *maximum capacity* of a stationary source *to emit a pollutant* under its physical and operational design." JCF Public Comments at 4-5, citing 45 CSR § 14 - 2.58 (emphasis added) and similar language in 45 CSR § 13 - 2.19. Appellants then stated that Rockwool and WVDAQ "must be able to show that the stack testing emission information they used was collected using a period that was representative of maximum (or 'worst case') emissions for each pollutant," explaining that such maximum emissions would likely occur at or

near maximum production load for some pollutants and at lower loads for others. JCF Public Comments at 18 (Comment #9).

The WVDAQ recharacterized this comment as stating that emission estimates must be based on stack testing during operating scenarios "that would result in worst case emissions," and then responded that Rockwool's stack tests were performed using protocols approved by the WVDAQ and consistent with MACT standards. RTC at 15-16 (Comment #44 and Response). That response does not recognize, much less address Appellants' comment that the conditions to produce *maximum emissions* can and will occur at different production levels, depending on the pollutants. Nor does the response explain how stack testing at maximum production periods complies with state law requirement to calculate PTE based on the maximum emissions for all pollutants. The response answers the WVDAQ's own recharacterization of the issues – Appellants are not arguing that the stack testing performed by Rockwool failed to comply with its protocols. Rather, Appellants assert that the stack testing did not provide the emissions information necessary to determine RAN-5's PTE for synthetic minor permitting purposes.

Consistency with MACT standards is irrelevant because, at best, those standards address emissions of hazardous air pollutants and have no bearing on the emissions of criteria pollutants that are the focus of the PSD permitting requirements at issue here (i.e., the pollutants associated with the National Ambient Air Quality Standards, or NAAQS).[4] Rockwool and the WVDAQ simply fail to recognize, or acknowledge, that while Rockwool's stack testing may comply with testing protocols for determining compliance with its existing PSD permit or federal MACT

[4] *Compare* Risk and Technology review of the National Emissions Standards for Hazardous Air Pollutants, https://www.epa.gov/stationary-sources-air-pollution/risk-and-technology-review-national-emissions-standards-hazardous, *with* Prevention of Significant Deterioration Basic Information, https://www.epa.gov/nsr/prevention-significant-deterioration-basic-information.

rules, that does not mean such testing also provides adequate information to determine PTE values for each criteria pollutant under West Virginia law for the purpose of establishing synthetic minor limits for each pollutant and removing PSD permitting obligations.[5]

In addition, contrary to Rockwool's assertions that Appellants have not explained "why maximum emissions wouldn't be generated during maximum operations," MTD at 7, JCF's public comments clearly noted that maximum emissions of certain pollutants would occur at lower loads than pollution emitted at maximum operations, JCF Public Comments at 18. That fact is simply due to the manner in which criteria pollutants are generated or created in industrial processes, which is common engineering knowledge, which Appellants' Expert Witness can provide during the Board's consideration of the merits of the Appeal. For example, the pollutants NOx, carbon monoxide, and VOCs – all of which are created in fuel combustion processes. NOx emissions depend significantly on the combustion temperatures and, as a result, track closely with production rates since higher production rates typically generate more intense combustion conditions and therefore more NOx emissions. Thus, if the goal is to determine the PTE for NOx, it would be based on the maximum emissions of NOx pollution, which is likely to occur at maximum production conditions. However, this is not true for carbon monoxide and VOCs. Carbon monoxide and VOC emissions, which are created due to partial combustion of fuels, tend to be *lower* as combustion conditions and temperatures become elevated – i.e., under conditions when the NOx emissions tend to be high, carbon monoxide and VOC emissions tend to be lower. Thus, production levels for maximum carbon monoxide and VOC emissions are not the higher production levels but rather lower production levels.

[5] We note that Rockwool's Motion to Dismiss does not cite the PTE definition contained in the West Virginia major source permitting rules or otherwise attempt to explain how the Modified Permit complies with that definition.

The above examples highlight that a basic understanding of the criteria pollutant emissions generation in the types of industrial processes at the RAN-5 facility would indicate the necessity of stack testing at the different production levels that maximize emissions of particular pollutants in order to make the appropriate PTE determinations. A one-size-fits-all stack testing at one production level (i.e., the maximum production level) conducted by Rockwool cannot assure the correct PTE estimation for *all* pollutants. JCF's Public Comments clearly stated that the WVDAQ could issue a synthetic minor permit and associated emissions limits "that rely on stack testing data unless Rockwool can show that such tests were performed during periods that represent the maximum emission capacity for each pollutant, or WVDEP must explain why use of stack test data to calculate PTE and set emission limits without such a showing is allowed under state and federal law." *Id* at 18. The WVDAQ issued the final Modified Permit without making either of showing.

Rockwool's Motion to Dismiss does not assert that the stack testing occurred at periods of maximum capacity for emissions production for each pollutant,[6] and the WVDAQ's permit record does not explain why use of the existing stack testing data would lead to permit limits that comply with the West Virginia definition of PTE. This information is determinative in deciding whether RAN-5 should be subject to major or minor source permitting requirements. Thus, there are relevant questions of law and fact that remain regarding the emission estimates underlying

[6] Rockwool appears to rely on 45 CSR § 2-5 to support its claim that the Modified Permit properly relied on stack testing conducted during maximum operations, see MTD at 7 n.2. However, 45 CSR § 2-5 addresses "Control of Fugitive Particulate Matter" at Indirect Heat Exchangers. To the extent that Rockwool meant to cite Section 5 of the Appendix to 45 CSR § 2, that provision addresses stack testing performed to show compliance with the emission standards as set forth in 45CSR2 to address pollution from Indirect Heat Exchangers, and does not apply to establishing PTE for permitting purposes of a insulation production facility such as RAN-5. We also note that there is a typographic error in ¶ 41.b. of the JCF Appeal, which cites to "45 CSR §§ 2 - 19 and 14 - 2.58" for the WV definition of PTE. That citation should be to 45 CSR § 13 – 2.19 and 14 - 2.58, which is consistent with ¶¶ 16-17 of the JCF Appeal that clearly cited § 13 – 2.19 as setting forth the PTE definition under WV law.

and the emission limits contained in the Modified Permit and the associated determination that RAN-5 is no longer a major source subject to its existing PSD permit. The Motion to Dismiss must be denied.

C. The WVDAQ could not issue a synthetic minor source permit to Rockwool and relieve the RAN-5 facility of major source PSD permitting requirements without information regarding the calculation made to and assumptions inherent in Rockwool's emission estimates and resulting permit limits.

Rockwool next argues that the Appeal should be denied because the WVDAQ did confirm that Rockwool's emission calculations were correct and properly issued the synthetic minor permit. Rockwool explains how the emission estimates (and resulting permit limits) were based on use of AP-42 emission factors for smaller emission sources at RAN-5 and, for larger sources, use of either stack testing or continuous emission monitoring data at RAN-5 plus "what they believed to be a reasonable compliance margin" derived from application of "certain engineering judgments." MTD at 7. Rockwool asserts that "DAQ simply compared the proposed limits to existing stack testing results" to confirm that the proposed emissions limits were reasonable. *Id.* However, as shown above, neither Rockwool nor the WVDAQ have shown that the stack testing occurred at periods of maximum capacity for emissions generation for each pollutant, as required by West Virginia law. Nor have they asserted that such a showing is not required.

Moreover, since Rockwool did not submit the engineering judgments it applied or information on the compliance margins it used in creating the emission estimates to the WVDAQ, RTC at 4 (Response to Comment #1), it is not clear how the WVDAQ could reasonably determine that those estimates or the resulting emission limits were appropriate, much less consistent with state and federal law and consistent with the "intent and purpose" of the WVDAQ permitting rules and the West Virginia Air Pollution Control Act, as required under

45 CSR § 13 – 5.7. The WVDAQ claims that it determined the limits were reasonable and accepted the limits "after exhaustive conversations with Roxul and internal deliberations." RTC at 4 (Response to Comment #1). However, neither the content of the WVDAQ's conversations and deliberations nor Rockwool's underlying calculations and analyses were provided to Appellants and the public. Thus, there is no way for Appellants or the public to confirm that the final Modified Permit is reasonable and in compliance with state and federal law. Rockwool's repeated assertion that Appellants have not shown the emissions calculations are incorrect misses the point. It is the responsibility of WVDAQ, under the law, to confirm that the Modified Permit and the emission limits in it meet the legal requirements. Under the circumstances here, it is not clear the WVDAQ, the Appellants, or the Board) can confirm that they *are* correct without complete information about how they were derived.

Appellants have already explained how the underlying stack test emissions data fail to conform with state law requirements for calculating PTE, and now explain why the WVDAQ (and the public) require information about Rockwool's emissions calculation to determine whether Modified Permit complies with the law, thereby providing an adequate basis for its Appeal to continue. The Motion to Dismiss must be denied.

D. The WVDAQ must confirm that issuance of the synthetic minor source permit, and its included emission limits, are appropriate now in order to issue a permit in compliance with state late.

Rockwool finally argues that to the extent "circumstances change or the emissions estimates are incorrect, and monitoring shows that the RAN-5 emits above 250 tpy," Rockwool will be subject to enforcement action and required to apply for a major source permit. MTD, at 8. The potential for future enforcement action and major source permitting is not the legal standard upon which the WVDAQ's issuance of the Modified Permit should be judged. Instead, the Modified Permit can only be issued if it complies with the permitting requirements of the

Clean Air Act, which requires the WVDAQ to confirm that that RAN-5 is not a major stationary source and that issuance of the Modified Permit confirms with relevant state and federal regulations. 45 CSR § 13 – 5.7.

Rockwool seems to think that Appellants' Appeal is actually intended to address some future noncompliance in which RAN-5 will emit pollution above 250 tpy and violate the Modified Permit. MTD at 8. This is incorrect. Appellants' Appeal is asserting that the WVDAQ cannot confirm, under the *current* permit record, that RAN-5's PTE is below 250 tpy and cannot show that it was appropriate to replace the existing major source PSD permit with the synthetic minor Modified Permit.

In this argument and throughout its motion, Rockwool completely ignores the fact that until May 2023, when it filed its amended application to modify its permit, Rockwool – and the WVDAQ – asserted that RAN-5 was a major source and was subject to PSD permitting requirements.[7] Thus, under the legal permitting requirements, it is the obligation of Rockwool and the WVDAQ to show that changing the status of the RAN-5 facility and issuing the Modified Permit is appropriate. While Rockwool argues that it "showed its work in the permit application," MTD at 8, that assertion is not accurate. The information provided above and in Appellants' Appeal clearly show that many aspects of that "work" were not provided. Thus, it is not possible to confirm that the PTE estimates – and the undisclosed analyses and assumptions upon which they are based – are correct and that issuance of the Modified Permit was appropriate. Requiring such a showing now is not only required by relevant West Virginia law, it is also a more efficient use of state and public resources than allowing the Modified Permit to go

[7] See Rockwool's October 2022 Application for a Modified Permit and WVDAQ's March 11, 2020 letter stating that the PSD Permit remained in effect following Rockwool's decision to use only natural gas at RAN-5.

forward, waiting to see if it actually controls RAN-5 emissions as required by law, and then undertaking another permitting action if it does not.

Accordingly, Appellants' Appeal should be allowed to proceed and the Motion to Dismiss denied because Appellants have stated a claim upon which relief can be granted, and Rockwool has not met its burden in showing that no claim for relief exists.

Respectfully Submitted,

Jefferson Co. Foundation, Karen Freer,
Gavin Perry, and Sharon Wilt,

By Counsel,

Andrew C. Earley (WVSB No. 14055)
Fair Shake Environmental Legal Services
232 Capitol St., Ste. 14
Charleston, WV 25301
aearley@fairshake-els.org
(234) 255-5397

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Certificate of Service

I, Andrew Earley, do hereby certify that I served the foregoing *Response in Opposition to Rockwool's Motion to Dismiss* on the parties below by First Class U.S. Mail, postage prepaid, at the following addresses on February 2, 2024:

Kenna M. DeRaimo
Clerk of the Board
West Virginia Air Quality Board
601 57th Street, SE
Charleston, WV 25304

David Yaussy, Esq.
Joseph Unger, Esq.
Spillman Thomas & Battle, PLLC
300 Kanawha Blvd.
Charleston, WV 25301
Counsel for Intervenor

James Walls, Esq.
Spilman Thomas & Batlle, PLLC
48 Donley St., Ste. 800
Morgantown, WV 26501
Counsel for Intervenor

Charles S. Driver, Esq.
WV Dept. of Environmental Protection
Office of Legal Services
601 57th St., S.E.
Charleston, WV 25304
Counsel for Appellee

Andrew C. Earley
Counsel for JCF et al