WEST VIRGINIA AIR QUALITY BOARD
CHARLESTON, WEST VIRGINIA

WILLIAM J. HUGHES,

Appellant,

v. **Appeal No. 10-03-AQB**

JOHN BENEDICT, DIRECTOR, DIVISION OF AIR QUALITY, WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

Appellee,

and

APPALACHIA MIDSTREAM SERVICES LLC,

Intervenor.

FINAL ORDER

This appeal was filed with the Air Quality Board (the "Board") on October 13, 2010, by Appellant William J. Hughes ("Appellant"). The subject of Appeal No. 10-03-AQB (the "Appeal") is two separate permits issued to Appalachia Midstream Services LLC ("AMS" or "Intervenor")[1] by the Division of Air Quality ("DAQ" or "Appellee") on September 9, 2010. These two permits authorize the construction and operation of the Pleasants and Miller compressor stations in northern West Virginia. DAQ concluded that each of the two compressor stations constituted an individual stationary source and further determined that each is a non-major source subject to 45 CSR 13 ("Regulation 13"). (R. at 1, 810.) AMS was allowed to intervene as a party in the proceedings. As the holder of the permits at issue, AMS had the legal right to intervene in this Appeal in accordance with W. Va. Code § 22B-1-7(e).

[1] According to a stipulation entered between the parties, AMS is a unique indirect subsidiary of Chesapeake Energy Corp. ("Chesapeake Energy").

An evidentiary hearing was held on the Appeal on May 19, 2011. A quorum of the members of the Board was present. Joe Osborne and Mary Anne Maul represented Appellant. Anne C. Blankenship, Donald Shandy, Richard Alonso and Shyla Blackketter Dwyer represented Intervenor AMS. Roland Huson and Jody Jones, Office of Legal Services, Department of Environmental Protection, represented DAQ. Mr. Osborne, Mr. Shandy, Mr. Alonso and Ms. Dwyer were admitted *pro hac vice*.

This Appeal originally presented two separate issues: (1) "Has DAQ provided an adequate factual and legal basis for its decision not to aggregate Chesapeake Energy's compressor stations, well sites, and other associated pollutant-emitting activities for the purpose of making PSD and Title V major source determinations?" and (2) "Does DAQ have legal authority to regulate air emissions from natural gas exploration, development, production, storage and recovery operation occurring at well sites and other associated process equipment sites?" (Notice, ¶¶ 67, 68.) The second issue was decided upon Appellant's Motion for Partial Summary Judgment. (Order, April 30, 2011).[2] The only issue at the evidentiary hearing involved the fact-specific application of the three-prong aggregation test.

Appellant argued that the two compressor stations, as well as certain other oil and natural gas operations in the area, constituted a single stationary source for air permitting purposes and, therefore, DAQ had improperly issued separate air emissions permits for each of the two compressor stations. Upon hearing all of Appellant's evidence, counsel for Intervenor moved for a directed verdict at the close of Appellant's case at the evidentiary hearing. Counsel for DAQ joined in the motion. At that time, the Board decided that, considering all the evidence in the light

[2] Appellant filed a Motion for Partial Summary Judgment as to the second issue. Neither DAQ nor Intervenor disputed that DAQ has the authority to regulate air emissions from oil and natural gas operations. Accordingly, the Board granted summary judgment on the issue of DAQ's authority to regulate air emissions for the oil and natural gas industry. However, the Board declined to grant summary judgment on the issue of whether or not any and all air emissions from well pad sites must be aggregated for potential to emit calculations. That inquiry was the subject of the evidentiary hearing.

most favorable to Appellant, Appellant had failed to meet his burden to provide sufficient evidence showing that DAQ had erred in the permitting actions which are the subject of this Appeal. Thus, the Board granted Intervenor's motion for directed verdict and accepted the Intervenor's counsel's offer to prepare a Proposed Final Order. This Final Order follows.

DISCUSSION

This Appeal involved two separate permits issued to AMS. Permits Nos. R13-2828 and R13-2831 allow AMS to construct and operate the Pleasants and Miller compressor stations, respectively, in an area of northern West Virginia referred to as the Victory Field. The Appeal raised issues regarding whether DAQ correctly issued separate permits for the two compressor stations. Specifically, Appellant raised the issue of whether DAQ should have aggregated the emissions from "Chesapeake Energy's compressor stations, well sites, and other associated pollutant-emitting activities for the purpose of making PSD and Title V major source determinations." (Notice, ¶ 67.)

Appellant challenged the issuance of both permits, arguing that various units operated by Intervenor in the Victory Field are adjacent, interconnected, and interdependent. (Notice, ¶ 55.) Thus, Appellant argued that the two compressor stations constitute a single "plant" for Clean Air Act permitting purposes. Appellant also argued that emissions from a natural gas delivery point and separately owned natural gas well pad sites in the Victory Field, which he did not specifically name or identify in the Notice of Appeal, should be aggregated for air permitting purposes. (*Id.*, ¶¶ 56, 66.) Discovery was taken from all parties to the Appeal. The Board granted Appellant's request to continue the hearing and take additional discovery. (Order, December 17, 2010.)

The West Virginia air quality regulations are sourced from and implement federal requirements. The State of West Virginia implements the Clean Air Act permitting programs at

issue in this Appeal through a federally-approved State Implementation Plan (or "SIP"). Under these regulations, DAQ cannot aggregate emissions from separate activities or operations for permitting purposes, unless they meet the three-factor stationary source definition, *i.e.*, they must (1) belong to the same industrial grouping; (2) sit on one or more contiguous or adjacent properties; and (3) be under common control. 45 CSR 14-2.13; *see also* 40 C.F.R. § 51.166(b)(6). The application of these three factors is sometimes called the "aggregation test." In response to limits placed upon its discretion by a federal court, the U.S. Environmental Protection Agency ("EPA") has stated that regulatory agencies should consider the aggregation test in light of the requirement that separate units can be treated as one only if they collectively comport with the "common sense notion of a plant." *See* 45 Fed. Reg. 52,676, 52,695 (Aug. 7, 1980); *Alabama Power Co. v. Costle*, 636 F.2d 323, 397 (D.C. Cir. 1979). While federal guidance and recommendations may be instructive, DAQ must apply the aggregation test on a case-by-case basis to the specific facts of the instant matter.

The most important part of the aggregation test for this Appeal is the "contiguous or adjacent properties" factor. Neither West Virginia nor federal regulations define adjacent or place any definitive restrictions on how far apart two units can be and still be considered to sit on adjacent properties. Appellant argued that "interdependent" units can be considered to be located on contiguous or adjacent properties, regardless of physical proximity, based upon his reading of certain EPA policy statements and recommendation letters. DAQ argued that it was appropriate to consider the common sense and plain meaning of the terms contiguous and adjacent, and that DAQ properly did so, and that even if the Board did consider "interdependency" as a factor, dependent is not the same as interdependent.

The issue raised by Appellant goes to the application of the aggregation test. Before the parties were allowed to put on testimony, the Board heard several motions *in limine*, including Intervenor's motion to exclude testimony not related to the aggregation test factors. The Board granted the motion. (Tr. at 48.) The Board's ruling specifically limited the testimony of the witnesses to the factual issues related to the application of the aggregation test factors. (*Id.*) Specifically, the Board recognized that issues such as health effects and impacts from air pollution and the nature and quantity of emissions were not relevant, as they were not related to the fundamental issue of whether the separate emissions units covered by the permits in question constituted a single "stationary source." (*Id.* at 48-50.) Appellant did not question DAQ's issuance of the permits as it related to what the compressor stations were actually emitting, and the Board refused to hear testimony on those issues. (*Id.* at 51-52.)

Appellant offered the testimony of five witnesses at the evidentiary hearing. Appellant William (Bill) Hughes resides in Wetzel County and regularly travels in and through the area referred to as the Victory Field. (Tr. at 67, 71-72.) During the hearing, Appellant testified that the compressor stations are located approximately 3.1 miles apart in a very steep, hilly area. (*Id.* at 83, 97-98.) He also testified that he believed there were approximately 28 currently developed well pads in the Victory Field. (*Id.* at 81-82.) Appellant testified that some of the well pads are within one mile of each other, or slightly closer, but he did not testify as to the location of the closest well pad to either compressor station. (*Id.* at 82-83.) Appellant estimated that these well pads are spread throughout an approximately 28-square-mile area. (*Id.* at 83-84.) He also testified that he observed the "Chesapeake Energy" name and/or logo on signs located at many of the individual well pad sites within the field. (*Id.* at 78.) He acknowledged he had seen the name and/or logo of another energy company on trucks within Wetzel County. (*Id.* at 93.)

Appellant tendered Duane Nichols as an expert in the area of chemical and process engineering. Upon the objection of Intervenor, the Board found that Mr. Nichols lacked relevant experience in natural gas gathering systems and operations, and in the Marcellus area specifically, to be qualified as an expert regarding the issues involved in this Appeal. (Tr. at 123). Accordingly, the Board restricted Mr. Nichols from offering opinions and limited his testimony to facts within his knowledge and instructed the parties it would give Mr. Nichols' testimony the weight it deserved. (*Id.*) Based upon his review of the permit record, Mr. Nichols testified that a 4-inch pipeline connected the two compressor stations, and condensate could flow only one-way in the pipeline, from the Pleasants station to the Miller station. (*Id.* at 140-41, 143.) He also testified that certain condensate stabilization equipment and additional condensate storage tanks were located only at Miller, not at Pleasants. (*Id.* at 141-144.) Mr. Nichols acknowledged that the permit for the Pleasants station contains loadout provisions whereby trucks can transport liquids from the Pleasants station if necessary. (*Id.* at 157-58.)

Edward Wade resides in Wetzel County and regularly travels in and through the area referred to as the Victory Field. (Tr. at 163-64.) He testified that there are both paved and unpaved public roads in the Victory Field area, and the roads are small, narrow, windy, and steep. (*Id.* at 166.) Mr. Wade further testified that the Miller station sits roughly two miles from the nearest paved road, while the Pleasants station is closer to seven miles from the nearest paved road. (*Id.* at 166-67.) He acknowledged the safety benefits of piping condensate from Pleasants to Miller as opposed to transporting condensate by truck. (*Id.* at 179-80.)

Jerry Williams was DAQ's permit engineer who reviewed the two permits and made a recommendation to his supervisor and the DAQ Director to approve the AMS permit applications. (Tr. at 184-85.) Mr. Williams testified that he performed the required stationary source

determination for the two compressor stations. (*Id.* at 185.) This involved an analysis of the three-factor aggregation test. (*Id.* at 199.) All three factors must be satisfied in order for aggregation to be appropriate. (*Id.* at 208.) He indicated that the key issue was whether the facilities were located on contiguous or adjacent properties. (*Id.* at 199-200.) As the record reflects, the compressor stations are separated by nearly four miles of pipeline and located in an area of mountainous and rugged terrain. ®. at 97, 130-31.) With regard to these stations, Mr. Williams considered the treatment of condensate at the facilities as one part of his analysis, but that fact alone was not determinative. (Tr. at 185-86.) He testified that condensate is produced at both Pleasants and Miller, and the condensate is transported via pipeline from Pleasants to Miller, but condensate could also be shipped from Pleasants by truck if necessary. (*Id.* at 186-95.) Mr. Williams specifically referred the Board to pages 4 and 130 of the Certified Record, which supported his understanding.

With regard to the well pad sites in the field, Mr. Williams testified that the boundaries of the well pad sites did not touch the boundaries of either compressor station, so none were contiguous. (Tr. at 200.) His understanding of the word "adjacent" was that it means close or nearby, but there is no specific distance requirement. (*Id.* at 200-01.) Mr. Williams testified that DAQ had to look at the common sense notion of a plant, including proximity, in determining whether units are "adjacent." (*Id.* at 201.) In its Response to Comments on the two permit applications, DAQ also noted that it must take a "common sense approach" to aggregation issues and "not aggregate pollutant emitting activities that as a group would not fit within the ordinary meaning of 'building', 'structure', 'facility', or 'installation'." ®. at 72.) In applying the aggregation test, Mr. Williams determined there were no well pads located contiguous or adjacent

to either compressor station, and therefore, he determined that no well pads could be considered part of the same stationary source as either compressor station. (Tr. at 208.)

John T. (Toby) Lattea testified as Intervenor's manager of operations over the Marcellus south district, which includes a four-state region, including the Victory Field. (Tr. at 212.) Mr. Lattea's employer is Chesapeake Midstream Management, which operates the AMS assets, such as the compressor stations in the Victory Field. (*Id.* at 214.) He has knowledge of the complex parameters that go into designing a gas field, and he testified that there were a number of economic, safety, and logistic issues, including accounting for future growth, that went into the design of the field. (*Id.* at 212, 216-18.) Mr. Lattea testified that Chesapeake Appalachia LLC owns some well pad sites in the area, but that AMS does not have any control over that aspect of the operations; thus, he could not speak to the emissions units at the well pads. (*Id.* at 213, 218). At the close of Appellant's evidence, Intervenor moved for a directed verdict and DAQ supported the motion. The Board granted the motion on the basis that Appellant had not set forth a case upon which relief could be granted. (Tr. at 230.) Appellant did not present evidence to support a finding that DAQ's decision was incorrect. Appellant did not offer any evidence proving that the "contiguous or adjacent" prong of the aggregation test had been met. (*Id.* at 229-30.) Indeed, the only evidence offered by Appellant was that the compressor stations were located more than three miles from one another. The testimony also clearly demonstrated that the two compressor stations are capable of operating independently of one another. The stations are connected by a one-way, four-mile pipeline that transports condensate from the Pleasants station to the Miller station; however, condensate can also be loaded at the Pleasants station for transportation by truck to the Miller station or elsewhere. As to the well pads in the area, the only evidence offered by Appellant was that there are roughly 28 developed well pads within a 28-square-mile area

surrounding the two compressor stations. Appellant offered no evidence that any specific well pad sat on a property bordering either of the compressor stations; indeed, the testimony showed that no well pads sat on bordering properties. The limited testimony on distance showed that most of the well pads were separated by roughly one mile or more. Nor did Appellant show that the oil and natural gas operations in the area collectively meet the common sense notion of a plant. Finally, Appellant did not offer any evidence on common control over the well pad operations. Appellant only offered testimony that Chesapeake Energy has a significant business presence in the area based upon its logos on signs and trucks in the Victory Field.

In pursuing an appeal before the Board, Appellant must raise an issue with sufficient evidence to support a finding that Appellee's decision was incorrect. Then, Appellee must produce evidence demonstrating its reasoning in making its decision. Appellant then has the opportunity to show that the evidence produced by Appellee is pre-textual or otherwise deficient. This shifting burden of proof standard was set out in a case before the Circuit Court of Kanawha County, *Wetzel County Solid Waste Authority v. Chief, Office of Waste Management, Division of Environmental Protection*, Civil Action Number: 95-AA-3 (Circuit Court of Kanawha County, 1999). While *Wetzel County* is merely persuasive authority, the Board agrees with the analysis and has used that test here.

In this case, the Board found that Appellant did not raise the issue regarding the application of the aggregation test with sufficient evidence to support a finding by the Board that the units in question were located on contiguous or adjacent properties; therefore, there was no basis for the Board to conclude the permits issued by the DAQ to AMS were not correct. Thus, the Board dismissed this issue upon Intervenor's motion. The Board accepted the Intervenor's request to submit a proposed written order summarizing the Board's decision.

FINDINGS OF FACT

The Board considered the Proposed Order and written Findings of Fact submitted by the prevailing party Intervenor. After due consideration of each and every Finding of Fact proposed by the parties, the Board hereby rejects, accepts, incorporates, or modifies each such proposed Finding of Fact by adoption of the Board's own Findings of Fact as they are set forth below:

1. The Appellee, Division of Air Quality ("DAQ"), issued Permit Nos. R13-2829 and R13-2831 to Appalachian Midstream Services LLC ("AMS") on September 9, 2010.
2. The permits authorize AMS to construct and operate two compressor stations, the Pleasants and Miller compressor stations, in an area of northern West Virginia referred to as the Victory Field.
3. DAQ concluded that each of the two compressor stations constituted an individual stationary source because they are not located on contiguous or adjacent properties, and further determined that each is a non-major source subject to 45 CSR 13 ("Regulation 13").
4. Appellant William J. Hughes resides in Wetzel County and regularly travels in and through the area referred to as the Victory Field.
5. The Pleasants and Miller compressor stations are located more than three miles from one another in an area of rugged, mountainous terrain.
6. The Miler compressor station is located approximately two miles from the nearest paved road, and the Pleasants compressor station is located approximately seven miles from the nearest paved road.
7. All natural gas from the Pleasants and Miller compression stations is sent to the Central Delivery Point ("CDP") for transmission to a third-party gathering line.

8. The emissions units at issue in this matter all belong to the same 2-digit Major SIC Code.
9. Chesapeake Appalachia, LLC and Chesapeake Energy Marketing, Inc. are each unique direct subsidiaries of Chesapeake Energy Corp. Appalachia Midstream Services, LLC is a unique indirect subsidiary of Chesapeake Energy Corp.
10. Chesapeake Energy affiliates own an interest in a number of natural gas wells in an area spanning at least a 28 square miles within the Victory Field that are connected to the Pleasants and/or Miller compressor station, although different entities have responsibility for the compressor stations and the well pads.
11. No well pads are located on properties whose boundaries are touching the boundaries of either of the compressor stations.
12. There was no evidence presented regarding the exact distance between any of the well pads and the nearest compressor station. However, no well pads are located on properties that are close or nearby to either of the compressor stations.
13. The individual well pads are separated from one another by some distance, with the closest well generally being located roughly one mile away or more.
14. There were a number of economic, safety, and logistic issues that went into the design of the natural gas gathering system, including the location of equipment and units.
15. Condensate is shipped from the Pleasants station to the Miller station by way of a four-inch pipeline that is approximately four miles in length; there is a one-way flow of condensate from Pleasants to Miller.

16. Condensate can also be shipped from the Pleasants station offsite by truck if necessary. However, there are safety benefits related to piping condensate from the Pleasants station to the Miller station, as opposed to transporting the condensate to the Miller station or elsewhere by truck.
17. The Pleasants and Miller compressor stations can operate independently of one another.

CONCLUSIONS OF LAW

The Board considered the proposed order submitted by counsel for Intervenor and hereby rejects, accepts, incorporates, or modifies each such proposed Conclusions of Law by adoption of the Board's own Conclusions of Law as they are set forth below:

1. The Air Quality Board has jurisdiction to decide this Appeal.
2. West Virginia is authorized to implement and enforce the Clean Air Act within the state under its EPA-approved State Implementation Plan.
3. Air emissions units may be treated as a single stationary source for air permitting purposes only if they meet the common sense notion of a plant and: (1) belong to the same industrial grouping; (2) sit on one or more contiguous or adjacent properties; and (3) be under common control. *See* 45 CSR 14-2.13.
4. Each of these three factors of the aggregation test must be satisfied in order to treat separate emissions units as a single stationary source under West Virginia regulations, which are sourced from and implement federal regulations.
5. The plain meaning of the terms "contiguous" and "adjacent," particularly in the context of the common sense notion of a plant, are appropriate considerations in the application of the aggregation test.

6. Issues related to health impacts or effects or the quantification or characterization of emissions are not relevant to the application of the aggregation test.
7. There was no evidence that showed the compressor stations sit on contiguous or adjacent properties.
8. There was no evidence that showed the two compressor stations operate interdependently.
9. There was no evidence that showed that any well pads in the Victory Field sit on properties contiguous or adjacent to either compressor station.
10. There was no evidence that showed that any individual well pads in the Victory Field sit on properties contiguous or adjacent to each other.
11. The Air Quality Board's standard of review is *de novo* (W.Va. Code §22B-1-7(e)), which requires the Board to hear the appeal and be the "ultimate finder of fact and to act independently on the evidence before it." Accordingly, the Board does not afford deference to the decision of the Division of Air Quality. *W. Va. Div. of Envtl. Prot. v. Kingwood Coal Co.*, 490 S.E.2d 823, 834 (W. Va. 1997).
12. The burden of proof is a shifting burden. Appellant must raise the issue with sufficient evidence to support a finding that Appellee's decision was incorrect. Appellee must produce evidence demonstrating its reasoning in making its decision. Appellant then has the opportunity to show that evidence produced by the Appellee is pre-textual or otherwise deficient. *See Wetzel County Solid Waste Authority v. Chief, Office of Waste Management, Division of Environmental Protection*, Civil Action Number: 95-AA-3 (Circuit Court of Kanawha County, 1999).

13. There was no evidence suggesting that the compressor stations were located on contiguous or adjacent properties, as required by the aggregation test, upon which to support a claim for relief. Appellant failed to raise this issue with sufficient evidence.

14. None of the evidence offered by Appellant was sufficient to establish that the compressor stations together, or the compressor stations and well pad sites, met the common sense notion of a plant.

15. As a matter of policy and to assure fairness, the Board has adopted the appropriate West Virginia Rules of Civil Procedure to guide the appeals process before the Board. *See* 52 CSR 1-6.13. Rule 50(a) of the West Virginia Rules of Civil Procedure allows for a directed verdict when a party has been fully heard on an issue and there is no legally sufficient evidentiary basis to find for that party on that issue.

The Board **DISMISSES** the Notice of Appeal and **AFFIRMS** Permit Nos. R13-2829 and R13-2831.

It is so **ORDERED** and **ENTERED** this 6th day of August, 2011.

AIR QUALITY BOARD

R. Thomas Hansen, Vice-Chairman