

**AIR QUALITY BOARD
CHARLESTON, WEST VIRGINIA**

**SIERRA CLUB, OHIO VALLEY
ENVIRONMENTAL COALITION, COAL
RIVER MOUNTAIN WATCH, WEST
VIRGINIA HIGHLANDS CONSERVANCY,**

Appellants,

v.

Appeal No. 10-01-AQB

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

Appellee,

and

TRANSGAS DEVELOPMENT LLC,

Intervenor.

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

In connection with an agreed scheduling order filed by the parties in this appeal, Appellants, Appellee and Intervenor filed Cross Motions for Summary Judgment. All parties filed responses and presented oral argument on the Motions before the Board and a certified court reporter on August 4, 2010. The Board met, reviewed the briefs, including the affidavits, exhibits, and associated case law, and voted unanimously to **DENY** all Motions for Summary Judgment.

STANDARD OF REVIEW

Summary judgment is to be granted whenever the relevant portions of the record “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as

a matter of law.” W.Va. R. Civ. P. 56(c). A “material” fact is “one that has the capacity to sway the outcome of the litigation under the applicable law.” Syl. Pt. 5, *Jividen v. Law*, 194 W.Va. 705, 708, 461 S.E.2d 451, 454 (1995).

DISCUSSION

Appellants’ Notice of Appeal raised numerous arguments and areas of concern contained within the Permit. Appellants have decided that due to limited resources and constraints on discovery, Appellants will not pursue many of its original arguments made in its Notice of Appeal. On summary judgment, Appellants seek judgment on only two areas: (1) the Potential to Emit calculations based on an efficiency rate of 99.5% for Carbon Monoxide (“CO”); and (2) the failure of WVDEP to accurately calculate or even include the emissions released during upsets and malfunctions.

Appellants filed a voluminous Motion for Summary Judgment and response that included citations to various facilities and Environmental Protection Agency (“EPA”) documents and the affidavit of its technical expert in its’ pursuit of summary judgment on these two questions. The Board considered the arguments and evidence and determined that there is enough of a question regarding whether or not the emissions will occur to deny summary judgment on both of these questions.

Intervenor argued summary judgment in its favor on the same two matters as the Appellants and also requested the Board summarily decide the following: (1) whether or not WVDEP should have included waste water emissions in the facility’s potential to emit; (2) whether WVDEP underestimated all sulfur compounds in the calculations in the potential to emit Sulfur Dioxide (SO²) emissions; (3) whether WVDEP properly used the TANKS Model in determining the storage tanks

emissions for the facility; (4) whether WVDEP properly calculated or considered the emissions from the plant's cooling tower; and (5) whether or not WVDEP properly calculated the potential to emit for Nitrogen Oxide (NO_x).

The Board considered Intervenor's exhibits and argument and the response filed by Appellants, and determined that there is enough question of fact to deny summary judgment on all of these issues. The Board is particularly interested in the details of the wastewater treatment facility and the question of the calculations of the emissions or decision by WVDEP not to calculate the emissions from the wastewater treatment plant. The Board recognizes that Intervenor and WVDEP argue that a decision on how to control the wastewater had not been made at the time the permit was issued. However, the Board considers Appellants' arguments on segmentation to be valid and considers this an area where more evidence is needed prior to making a summary decision.

The Board considered Appellee's arguments and finds that an order on summary judgment is not necessary on two of the questions because in its Response, Appellant argued that it would not pursue the questions of greenhouse gas emission inventory or the attainment questions presented for summary judgment by Appellee. Appellee's final argument was Appellants' failure to raise a valid question of fact related to the method and process used by Appellee in calculating the potential to emit. The Board disagrees with Appellee and finds there is enough question of fact to survive summary judgment and the matter should be decided after an evidentiary hearing on the matter.

In summary, the issues remaining for hearing are the following: (1) the Potential to Emit calculations based on an efficiency rate of 99.5% for Carbon Monoxide ("CO"); (2) the failure of WVDEP to accurately calculate or even include the emissions released during upsets and malfunctions; (3) whether or not WVDEP should have included waste water emissions in the facility's potential to emit; (4) whether WVDEP underestimated all sulfur compounds in the calculations in the potential to emit Sulfur Dioxide (SO₂) emissions; (5) whether WVDEP properly


used the TANKS Model in determining the storage tanks emissions for the facility; (6) whether WVDEP properly calculated or considered the emissions from the plant's cooling tower; and (7) whether or not WVDEP properly calculated the potential to emit for Nitrogen Oxide (NOx).

CONCLUSION

Having reviewed all briefs, motions, responses, arguments, and exhibits in this matter, the Board unanimously **DENIES** Appellants' Motion for Summary Judgment, Appellee's and Intervenor's Motions for Summary Judgment. This matter is set for hearing on October 27 - 28, 2010, beginning at 8:30 a.m. All Motions in Limine are to be submitted to the Board by the close of business on October 13, 2010, with responses due by close of business on October 20, 2010. A prehearing conference is scheduled for 10:00 a.m on October 13, 2010. Parties are welcome to appear or call in to participate in the prehearing conference before the Board's counsel. If appearing in person, said prehearing will be conducted at the Board's offices located at 601 57th Street, Charleston, Kanawha County, West Virginia 25304. If appearing by telephone, dial 1-877-302-0757. After the welcome message, dial the conference I.D. (8855847) followed by the pound (#) key.

It is so **ORDERED** and **ENTERED** this 21 day of September, 2010.

Air Quality Board



J. Michael Koon, Chairperson