

WEST VIRGINIA AIR QUALITY BOARD

OHIO VALEY JOBS ALLIANCE,

Appellant,

v.

Case No. 15-01-AQB

**WILLIAM F. DURHAM, Director,
Division of Air Quality, West Virginia
Department of Environmental Protection,**

Appellee,

MOUNDSVILLE POWER, LLC,

Intervenor.

FINAL ORDER

Moundsville Power, LLC ("Moundsville Power"), has proposed constructing a natural gas combined cycle power plant near Moundsville, West Virginia. Moundsville Power was issued a *Permit to Construct* (No. R14-0030) by the West Virginia Department of Environmental Protection, Division of Air Quality ("DEP") on November 21, 2014. *Certified File, p. 39.* Construction has yet to begin on the plant.

Subsequent to issuance of the Permit, Moundsville Power re-evaluated the plant equipment and design, and decided to propose certain changes, including larger duct burners, higher turbine firing rate, increased power output, and cooling tower revisions. *Transcript, Vol 1, pg. 171.*

On April 22, 2015, Moundsville Power applied for a Class II Administrative Update of the Permit to facilitate the changes. *Certified File, p. 142.* The Administrative Update was approved and issued to Moundsville Power on August 14, 2015. *Certified File, p.1.*

Three (3) months after the Administrative Update (November 18, 2015), a group called the Ohio Valley Jobs Alliance ("OVJA") appealed the update. OVJA consists of a few individuals whose primary purpose is to save coal mining jobs. *Transcript Vol. 1, pg. 137, 141, 148-51.* OVJA did not officially incorporate until May 2015, six months prior to filing the appeal. *Id. at 142.* OVJA has held one meeting since its incorporation. *Id. at 156.* It should be noted that the Board was somewhat concerned by the OVJA's apparent lack of knowledge about the contents of its appeal, lack of a cognizable purpose related to the environment, and overall express intent to stop the construction of the plant solely to benefit another industry. Nevertheless, the Board permitted the OVJA to proceed as a party.

In regards to the Administrative Update, the OVJA argues that the DEP should have proceeded with a *modification* of the permit instead of an *Administrative Update* when it allowed Moundsville Power to increase its emissions limits for CO₂, Formaldehyde, and Particulate Matter (PM_{2.5}). Proceeding with a modification of the permit would mean that the DEP and Moundsville Power would have to repeat the public notice, comment period, etc. An Administrative Update does not require these steps to be repeated.

The following represents the issues the Board believes were properly noticed in the appeal and addressed in the hearing and the subsequent briefs:

1. Whether CO₂ was a regulated pollutant at the time of the Class II Administrative Update, and if so, whether the allowed increase in CO₂ emission limits was permitted by an Administrative Update;
2. Whether allowed increase of PM_{2.5} emission limits was permitted by an Administrative Update;
3. Whether the allowed increase of Formaldehyde emission limits was permitted by an Administrative Update; and

4. If a modification is required, whether the DEP and Moundsville Power adequately reevaluated air quality monitoring and Best Available Control Technology (BACT).

CO₂

OVJA argues that CO₂ was a regulated pollutant at the time the Administrative Update was used to change the permit. *Appellant's Findings of Fact / Conclusions of Law, Pg. 2*. On the other hand, the DEP and Moundsville Power argue that CO₂ was not a regulated pollutant at the time. *Appellee's Findings of Fact / Conclusions of Law, Pg. 12*. Determining whether CO₂ was a regulated pollutant at the time of the Administrative Update is important. If CO₂ was a regulated pollutant at the time, then the DEPs change in allowable CO₂ levels would have triggered a modification rather than an Administrative Update.

The relevant law is located at 45 CSR §13-2.20, which states as follows:

2.20. "Regulated Air Pollutant" for the purpose of this rule means the following:

2.20.e. Any air pollutant subject to a new source performance standard (NSPS) promulgated under section 111 of the Clean Air Act including section 111(d)⁹, which requires new and modified sources to satisfy emissions standards, work practice standards and other requirements

The applicable facts are as follows: The law cited above defines a regulated pollutant as a pollutant subject to a New Source Performance Standard (NSPS). CO₂ was not subject to NSPS until the effective date of the new federal regulation 40 CFR 60, subpart TTTT. This law was effective October 23, 2015:

DATES: This final rule is effective on October 23, 2015. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of October 23, 2015.

80 Fed. Reg. 6410 (Oct. 23, 2015).

An Administrative Update was used by the DEP in August 2015, about two months before the NSPS (i.e. 40 CFR 60, subpart TTTT) became effective. Consequently, at the time the DEP used the Administrative Update, CO₂ was not a regulated pollutant.

Again, determining if CO₂ was a regulated pollutant at the time when the DEP used an Administrative Update is important. If CO₂ was a regulated pollutant at the time, then the DEP could not use an Administrative Update to modify the permit. The DEP would have to undertake a modification of the permit, which would require public notice and a comment period, at the least. Because the Board finds that CO₂ was not a regulated pollutant at the time, the change in CO₂ limits did not trigger a modification.

For the above reasons, the Board finds that the action by the DEP to use an Administrative Update to modify the CO₂ limits was lawful. Thus, the revisions to the permit by the DEP are **AFFIRMED**. *See: W. Va. Code 22B-1-7(g)(1)*

PM_{2.5}

OVJA argues that the DEP increased PM_{2.5} emissions limits beyond what is allowed in an Administrative Update. On the other hand, the DEP concedes to lower emission limits and asks that the Board simply order the PM_{2.5} limits to be reduced.

The relevant law is located at 45 CSR 14-2 which states as follows:

2.40. "Major modification" means any physical change in or change in the method of operation of a major stationary source which results in: a significant emissions increase (as defined in subsection 2.75) of any regulated NSR pollutant (as defined in subsection 2.66); and a significant net emissions increase of that pollutant from the major stationary source...
(irrelevant portions omitted)

2.75. "Significant emissions increase" means, for a regulated NSR pollutant, an increase in emissions that is significant (as defined in subsection 2.74) for that pollutant.

2.74. "Significant" means:

2.74.a. In reference to a net emission increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

PM2.510 tons per year

The applicable facts are as follows: The DEP increased the PM_{2.5} emissions limits to 11.76 tons per year in the Administrative Update. That amount exceeds the 10 tons per year limit and therefore triggers a major modification. In other words, the increase in PM_{2.5} is not appropriate for an Administrative Update. However, the DEP and Moundsville Power conceded that it would accept lower limits. The Board will not waste the opportunity to require less polluting when the parties do not object and the issue can be resolved.

Thus, the Board modifies the terms and conditions of the permit. The DEP and Moundsville Power are **ORDERED** to reduce the emissions limits by a value less than the 10 tons per year threshold or proceed with the requirements of a modification.

Formaldehyde

OVJA argues that a change in the formaldehyde emissions limits triggered a modification of the permit. As a result, appellants argue that the administrative update was not allowed.

The relevant law is located at 45 CSR 13-2 which states as follows:

2.17 "Modification" for the purpose of this rule means any physical change in or change in the method of operation of any existing stationary source, excluding any emissions unit which meets or falls below the criteria delineated in Table 45-13B, which:

2.17.c. Results in an increase in emissions of an air pollutant listed in Table 45-13A of 10 percent or more of the amount set forth in Table 45-13A at a facility which, prior to the physical change or change in method of operation, has the potential to emit the air pollutant at or above the amount set forth in Table 45-13A; provided that nothing in this subdivision shall affect the facility's obligation to comply with 45CSR27

Table 45-13A lists the potential emission rate of formaldehyde as 1,000 pounds for year. See: 45 CSR 13-16.

The applicable facts are as follows: Formaldehyde is one of several Hazardous Air Pollutants (HAPs) that is regulated in the permit. Emissions of HAPs are calculated using an emission factor. In the original permit and the subsequent Administrative Update, the DEP and Moundsville Power used an emission factor of 3.0×10^{-4} lbs/MMBTU. The number was taken from a 2001 EPA guidance memo and incorporates emission control factors which serve to lower the potential for emission. In this case, the emission control is an oxidation catalyst installed at the plant. However, in the Administrative Update, the DEP applied an additional 10% control that was not based on any new emission control technology. *Transcript, Vol. 2, pg. 73*. In other words, the potential to emit HAPs in the original permit was discounted due to the use of the control technology at the plant (i.e. the oxidation catalyst). Then, in the subsequent Administrative Update to the permit, the potential to emit HAPs was discounted another 10% but without the addition of any new control technology. The additional 10% was just enough to reduce the potential to emit HAPs down to a value that would not invoke a modification and allow the permit change approving the Administrative Update.

Nevertheless, as pointed out by the DEP and Moundsville power, OVJA did not identify a state or federal regulation that prohibits the DEP from using the emissions factor from the 2001 EPA memo. Similarly, OVJA did not identify a state or federal regulation that prohibits the DEP from applying another 10% control to the potential to emit. Testimony from the DEP stated that the applying the additional 10% control was reasonable and was not for the purpose of circumventing a modification. *Transcript, Vol. 2, pg. 73*

For the above reasons, the Board finds that the action by the DEP to use an Administrative Update to modify the formaldehyde limits was lawful. Thus, the revisions to the permit by the DEP are **AFFIRMED**. *See: W. Va. Code 22B-1-7(g)(1)*.

Air Quality Monitoring and Best Available Control Technology

OVJA argues that the air quality monitoring performed by the DEP and Moundsville Power was not properly performed. *Appellants Findings of Fact / Conclusions of Law, Pg. 13*. The DEP and Moundsville Power argue that additional air quality monitoring was not required for the Administrative Update, despite doing it anyway. *Appellee and Intervenor's Joint Findings of Fact / Conclusions of Law, Pg. 18*. They also argue that the air quality monitoring was properly performed regardless of whether it had to be done. *Id.*

The relevant law is located at 45 CSR 14-11 which states as follows:

11.2. Any person proposing to make a major modification to a stationary source shall provide an analysis of the ambient air quality in the area that the major modification would affect for each pollutant for which it would result in a significant net emissions increase.

The applicable facts are as follows: The Board has ruled previously in this Order that a modification / major modification was not required by the DEP and Moundsville Power. The Board concluded that the Administrative Update was permissible. Additional air quality monitoring is not required under an Administrative Update, despite the DEP and Moundsville Power revisiting air quality monitoring anyway.

In addition, the OVJA argues that an analysis of the Best Available Control Technology (BACT) should have been revisited. *Appellants Findings of Fact / Conclusions of Law, Pg. 3*.

The relevant law is located at 45 CSR 14-8 which states as follows:

8.3. Any person proposing a major modification of a stationary source shall apply best available control technology for each regulated NSR pollutant for which such proposed major modification would cause a

significant net emissions increase from such source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

The applicable facts are as follows: Again, the Board has ruled previously in this Order that a modification / major modification was not required by the DEP and Moundsville Power. Therefore, the Administrative Update is permissible. Additional BACT review is not required under an Administrative Update, despite the DEP and Moundsville Power revisiting the analysis anyway.

Thus, it is **ORDERED** that the issues of air quality monitoring and BACT were not applicable to the Administrative Update. *See: W. Va. Code 22B-1-7(g)(1) for Board Authority.*

ENTERED: July 18, 2016
(Date)

J. Michael Koon, Chairman
J. Michael Koon, Chairman

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CERTIFICATE OF SERVICE

This is to certify that I, Jackie D. Shultz, Clerk for the Air Quality Board, have this day, the 19th day of July, 2016, served a true copy of the foregoing Final Order to all parties in Appeal No. 15-01-AQB, by mailing the same via United States Mail, with sufficient postage, to the following address:

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