

West Virginia Dismisses Challenge to Marcellus Oil and Gas Development Clean Air Act Permits

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On Thursday, May 19, 2011, the West Virginia Air Quality Board granted a directed verdict to Appalachia Midstream Services, LLC, a subsidiary of Chesapeake Energy, dismissing an appeal challenging its Clean Air Act permits for its development in northern West Virginia. The verdict sends a positive signal to the oil and gas industry in the United States.

The Group Against Smog and Pollution (GASP), a Pittsburgh-based environmental organization, attempted to argue that Chesapeake Energy should have obtained a major source New Source Review (NSR) permit before it started development in the Marcellus region of West Virginia, arguing that Chesapeake should have treated its two compressor stations and the wells that feed gas to the compressor stations as one industrial source. If GASP had been successful, aggregating all of the individual sources may have triggered the permitting thresholds for NSR permits that commonly thwart or delay industrial development in the United States. The West Virginia Air Quality Board found that the oil and gas field at issue did not fit the common sense notion of the plant and upheld the permitting decision made by the West Virginia Department of Environmental Protection (DEP) to not aggregate the different emission sources.

Aggregation of emitting activities for permitting purposes is only appropriate for activities that:

1. have the same SIC code;
2. are under the common control of the same person; and
3. are on contiguous or adjacent properties.

Over the years, EPA has twisted these elements to require a fact-intensive analysis to determine whether activities should be aggregated, including examining the interdependence of the various sources. As an example of how EPA has stretched these terms, EPA has found sources more than 20 miles apart to be contiguous and adjacent, defying the Webster's dictionary definition of "contiguous" and "adjacent." Such EPA actions have allowed various interest groups to use the Clean Air Act appeals and permitting process to try to halt oil and gas development in the United States. West Virginia was the latest venue for this clash.

Before the Air Quality Board heard the evidence, GASP filed several motions attempting to exclude certain evidence, testimony and source determinations made by other States that were favorable to

Chesapeake's position and solely limit the appeal to how EPA implements air permitting issues. The Air Quality Board found that it was not limited to only EPA guidance, but that it could consider how other States such as Texas, Oklahoma and Colorado permit the oil and gas industry.

The evidentiary hearing had been scheduled for two days, but after GASP concluded its case at the end of day one of the hearing, the Air Quality Board approved how DEP permitted the activities and dismissed the appeal. This decisive outcome sends a strong message to potential interest groups that they will face an uphill battle when attempting to argue that emissions from wells and compressor stations should be aggregated together.

Chesapeake Energy was represented by Bracewell & Giuliani's Environmental Strategies Group, Ryan Whaley Coldiron Shandy PLLC from Oklahoma City, and Robinson & McElwee PLLC from Charleston. For more information on this matter and how it may impact prospects for oil and gas exploration and production, please contact one of the Bracewell & Giuliani attorneys listed on this update.