WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA, INC., C.I. MCKOWN & SON, INC., POCONO ENERGY CORP. AND TEMPTEST ENERGY CORP.,

Appellant,

v. **Appeal No. 15-16-EQB**

SCOTT G. MANDIROLA, DIRECTOR, DIVISION OF WATER AND WASTE MANAGEMENT, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellee,

and

WEST VIRGINIA RIVERS COALITION, AND WEST VIRIGNIA CITIZEN ACTION GROUP,

Intervenors.

FINAL ORDER

This appeal was filed with the West Virginia Environmental Quality Board ("Board") on October 1, 2015. A two-day evidentiary hearing was held before a court reporter and full complement of the Board on January 14-15, 2016. The following members of the Board were present for the hearing:

Dr. Edward M. Snyder
Dr. Charles C. Somerville
Dr. B. Mitchel Blake, Jr.
Dr. D. Scott Simonton
Mr. William H. Gillespie

This appeal stems from the implementation of the *Aboveground Storage Tank Act* passed by the state legislature in 2015. The law required the West Virginia Department of Environmental Protection ("WVDEP") to create a model to regulate aboveground storage tanks near tributaries that were upstream from public water intakes. The model created zones around tributaries based on their stream flow, gradient, and topography. Tanks in these zones would be regulated according to the new law. After the model was completed, the appellants filed an appeal alleging that the model contained several deficiencies and misapplications.

After hearing the evidence presented in the pleadings and hearing, the Board unanimously decided to **DENY** in part and **GRANT** in part the relief sought by the Appellant.

Standard of Review

When hearing an appeal, pursuant to W. Va. Code §22B-1-7(e), the Board "shall hear the appeal *de novo*, and evidence may be offered on behalf of the appellant, appellee and by any intervenors." In accordance with *Syl. Pt. 2, W. Va. Div. of Envt'l Protection v. Kingwood Coal Co.*, 200 W. Va. 734, 745, 490 S.E.2d 823, 834 (1997), the Board "is not required to afford any deference to the DEP decision but shall act independently on the evidence before it."

After hearing the evidence, pursuant to W. Va. Code § 22B-1-7(g), the Board "shall make and enter a written order affirming, modifying or vacating the order, permit or official action of the chief or secretary, or shall make and enter such order as the chief or secretary should have entered."

Standing

The *West Virginia Citizen Action Group* and the *West Virginia Rivers Coalition* asked the Board to allow them to intervene as a party in the appeal. Instead of making an immediate decision,

the Board allowed the groups to participate in the hearing but reserved the right to disqualify them if their intervenor status was not justified.

The guiding law comes from W. Va. Code §22B-1-7. It states that "any person affected by the matter pending before the Board may by petition intervene as a party appellant or appellee."

In regards to the facts, a witness (and member) for the potential Intervenor, the *West Virginia Citizen Action Group*, testified about water use. The witness, Karen Ireland, testified that she relies on water from the Elk River. (Hearing Transcript, pg. 15) She testified that there are aboveground storage tanks upstream from her location in zones of critical concern and zones of peripheral concern along the Elk River. (Hearing Transcript, pg. 15–16) The intent of her testimony was to show that she had an interest in the outcome of the appeal.

Similarly, a witness (and member) for the potential Intervenors, the *West Virginia Rivers Coalition*, also testified about water use. The witness, Angie Rosser, testified that she relies on water from the Elk River. (Hearing Transcript, pg. 22) She testified that there are aboveground storage tanks upstream from her location in zones of critical concern and zones of peripheral concern along the Elk River. (Hearing Transcript, Pg. 22-24) The intent of her testimony was to show that she had an interest in the outcome of the appeal.

Based on the above law and facts, the Board finds that the potential Intervenors have an interest in the issues on appeal, i.e., the regulation of aboveground storage tanks. Therefore, it is **ORDERED** that the *West Virginia Citizen Action Group* and the *West Virginia Rivers Coalition* were permissible Intervenors. The evidence properly submitted and/or elicited by the intervenors will be considered by the Board for the remainder of its decisions.

Legislative Rule

Appellants argue that the process of creating the zones of critical concern and zones of peripheral concern constitute rule-making, which invokes requirements such as public notice, a comment period, etc. (Appellant's Brief, pg. 15) On the other hand, the WVDEP did not view the process as rule-making – it believes it was simply implementing the parameters detailed in the new law and, therefore, did not need to conduct a public notice, a comment period, etc.

With respect to the law, in the definitions section of the *Underground Storage Tank Act*, the zones of critical concern and zones of peripheral concern are determined "using a mathematical model that accounts for stream flows, gradient and area topography. The width of the zone of critical concern is one thousand feet measured horizontally from each bank of the principal stream and five hundred feet measured horizontally from each bank of the tributaries draining into the principal stream." W. Va. Code §22-30-3(20) and (21). There is no specific requirement that the WVDEP write a rule to create the model. The appellants believe that a rule would be required anyway, under W. Va. Code §29A-1-2, which defines a "rule".[1]

A deeper look into the law provides insight. There are several other sections in the law that expressly requires the WVDEP to make rules. For example, §22-30-4(d)(1) states that "the secretary *shall propose emergency or legislative rules* for legislative approval in accordance with provisions of article three, chapter twenty-nine-a of this code to set out the process and procedure for registration fee assessment and collection". (Emphasis added.) Also, §22-30-25 states that "the secretary may designate, *by rules proposed for legislative approval* in accordance with article

[1] "Rule" includes every rule, standard or statement of policy or interpretation of general application and future effect, including the amendment or repeal of the rule, affecting constitutional, statutory or common law rights, privileges or interests, or the procedures available to the public, adopted by an agency to implement, extend, apply, interpret or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include rules relating solely to the internal management of the agency, nor rules of which notice is customarily given to the public by markers or signs, nor mere instructions. Every rule shall be classified as "legislative rule", "interpretive rule" or "procedural rule", all as defined in this section, and is effective only as provided in this chapter.

three, chapter twenty-nine-a of this code, additional categories of aboveground storage tanks..." (Emphasis added.) There are several other examples. Clearly, the legislature expressly required rules in some instances, and recommended rules in others.

There is also a catchall provision for rulemaking: §22-30-23 states that "the secretary *shall promulgate emergency and legislative rules as necessary* to implement the provisions of this article in accordance with provisions of article three, chapter twenty-nine-a of this code. (Emphasis added.) This provision appears to give the WVDEP the discretion to make other rules "as necessary".

The Board is faced with determining if the legislature intended for a rule to be made for developing the mathematical model despite there being no express requirement in the law. ("In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.) Syl. Pt. 2, *Smith v. State Workmen's Comp. Com'r*, 159 W. Va. 108, 109, 219 S.E.2d 361, 362 (1975) The Board finds that the legislature expressly required that rules be made in particular sections of the law. Rules are required for establishing fees, tank registration, tank inspections, etc. The legislature also gave the WVDEP discretion to make additional rules when necessary. Despite all these sections where rulemaking was required, the legislature did not state that a rule was required for making the mathematical model. The Board believes the decision to expand rulemaking authority to the mathematical model is within the purview of the legislature. The Board refrains from reading more into the statute than is expressly provided. Thus, it is **ORDERED** that the WVDEPs actions were reasonable and lawful.

Definition of "tributaries"

Appellant argues that the WVDEP expanded the definition of "tributaries" which in turn enlarged the number of zones of critical concern and zones of peripheral concern. (Appellant's Brief, pg. 16) Specifically, Appellant argues that the WVDEP should not have labeled ephemeral and intermittent streams as tributaries because "such streams contain water only in response to precipitation events or only during limited portions of the year". (*Id.*) On the other hand, the WVDEP argues that a tributary is any and all waterways, regardless of intermittent flow, based on the basic tenets of environmental science.

With regard to the law, W. Va. Code §22-3-3(20) and (21), states that the width of the zone of critical concern and peripheral concern "is one thousand feet measured horizontally from each bank of the principal stream and five hundred feet measured horizontally from each bank of the tributaries draining the principal stream." There is no specific definition for "tributaries" elsewhere in the law.

With respect to the facts, during the hearing there was no evidence that the legislature intended to limit "tributaries" to exclude ephemeral and intermittent streams. Also, given that the intent of the law is to prevent contents of aboveground tanks from leaking into drinking water intakes, it is logical to include streams that *can* carry water, even if only during certain times of the year. As one intervenor witness put it, "the whole point of delineating these zones of critical concern is to identify an area that deserves a higher level of protection due to the hydrologic connectivity, the fact that if something spills into a stream anywhere in that area, it will arrive at the intake with 5 hours, and if you only included direct tributaries in that definition and excluded tributaries of tributaries, you would undermine the intent of that zone." (Hearing Transcript, pg. 431, Evan Hanson)

Thus, it is **ORDERED** that the definition of "tributaries" as used by the WVDEP was lawful.

Applying the Jobson Equation to Regulated Streams

Appellants argue that the WVDEP improperly applied the Jobson Equation to streams obstructed by dams, impoundments, lakes, and reservoirs. (Appellant's Brief, pg. 16) The WVDEP agrees that the equation is only for unregulated streams, but argues that there is no equation for obstructed (or regulated) streams, so modifying the Jobson Equation was the most effective scientific method for modeling these type of streams.

As stated earlier, the law requires that zones of critical concern and zones of peripheral concern be established "using a mathematical model that accounts for stream flows, gradient, and area topography." W. Va. Code §22-30-3(20) and (21).

The facts show that the Jobson equation is essentially the underlying basis of the mathematical model. The equation characterizes steams using flow, gradient, and topography. But, the equation was only designed for unregulated streams, i.e. streams without interrupting dams, impoundments, lakes, etc. Nevertheless, the equation was reworked by the WVDEP to apply to regulated streams. So, Appellants are correct that the equation was used in a way that was not originally intended. However, the WVDEP determined that reworking the equation for use on regulated streams was the best option. Dr. Strager testified that "there's a lot of limitations to it, and it was the best available [model] to use at the time, under the time constraints..." (Hearing Transcript, pg. 184) An Appellant expert witness agreed that there was no better alternative method that could be used for regulated streams: "the problem is that there are a variety of site-specific conditions that would need to be considered, so something that's transferable – no, I've

not identified something that is transferable." (Hearing Transcript, pg. 228, Samuel Wilkes) The WVDEP's decision to rework the Jobson Equation was reasonable, especially when facing no alternative to complete a job it was mandated by law to perform.

Thus, it is **ORDERED** that the use of the Jobson equation on regulated streams was justified under the circumstances.

Accuracy of Modeling Technique

Similar to the previous argument, Appellants argue that the new mathematical model developed by the WVDEP (using the Jobson Equation) is unenforceable because it has "never been used before, is untested and lacks any meaningful validation, sensitivity analysis or evaluation of its applicability to regulated stream reaches..." (Appellant's Brief, pg. 17)

Similar to the Boards previous findings, the evidence shows that development of this mathematical model for thousands of streams and aboveground storage tanks in six (6) months with limited funds required innovation, assumptions, and acceptance of limitations. This is especially understandable given no alternative has ever been presented. This was essentially an invention required by law. Moreover, even moderate validation, sensitivity analysis, or other evaluations would not likely have been possible given the time and money constraints.

Thus, it is **ORDERED** that the development of the model by the WVDEP is not invalidated because it was not tested, analyzed, etc. before implementation.

Buffer Zones

Appellants argue that the buffer zones extending out from protected streams should be measured three-dimensionally instead of two-dimensionally. (Petitioner's Brief, pg. 17) Specifically, Appellants argue that a two-dimensional measurement increases the size of the zones

because it does not account for curvatures in the landscape. On the other hand, the WVDEP argues that the legislature plainly states uses the term "horizontal" which means a straight line left and right.

With respect to the law, W. Va. Code §22-30-3(20) and (21) states that the width of the zone of critical concern and zone of peripheral concern is "one thousand feet measured *horizontally* from each bank of the principal stream and five hundred feet measured *horizontally* from each bank of the tributaries draining into the principal stream." The plain meaning of the term "horizontal" is a straight line left and right of the zones. See: Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 571, 165 S.E.2d 108, 109 (1968) ("Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.") Accounting for the three-dimensional curvature of the landscape would require vertical measurements, such as a steep hillside or a cliff. If the legislature intended for vertical measurements, it would have been stated in the law. Thus, it is **ORDERED** that the WVDEP properly measured the buffer zones using a two-dimensional analysis.

Appellants also argue that the 1,320 foot buffer zone applied to the Ohio River exceeds the distance established by the law. (Petitioner's Brief, pg. 17) As previously stated, the law requires a buffer zone of *one thousand feet* measured horizontally from each bank of the principal stream. The WVDEP used a buffer zone of 1,320 feet. That distance was adopted from the Ohio River Valley Water Sanitation Commission (ORSANCO) which previously established the buffer zone for its purposes. The legislature plainly stated that the buffer zones are to be 1,000 feet. Thus, it is **ORDERED** that the buffer zone for the Ohio River be reduced from 1,320 feet to 1,000 feet as proscribed by the legislature.

Parties have a right to judicial review of this order pursuant to W. Va. Code §22B-3-3 and W. Va. Code §29A-5-4. The Party seeking judicial review must file its appeal within 30 days after the date the party received notice of this final order. A certified copy of this order will be provided to the Parties and/or counsel of record by the clerk of the Environmental Quality Board.

ORDERED and ENTERED this 26th day of April, 2016.

Environmental Quality Board

Dr. Edward Snyder, Chairman