Before the

MARICOPA COUNTY AIR POLLUTION HEARING BOARD

In the matter of the appeal of	)	
	)	DRAFT
Hickman's Egg Ranch, Permit No. 140062	)	**FINAL DECISION AND ORDER**
	)	
Daniel E. Blackson, Appellant.	)	Cause No. MCAPHB2016-01-PA
	)	
	)	

BEFORE:

Shane Leonard, Chair, Brian Davidson, Sine Kerr, Kim MacEachern, and Lucas Narducci, members, Maricopa County Air Pollution Hearing Board.

APPEARANCES:

Daniel E. Blackson appears pro se in an appeal of a minor permit revision issued to Hickman's Egg Ranch, Permit No. 140062. Robert C. Swan, Maricopa County Attorneys Office, represented the Maricopa County Air Quality Department, respondent.

PROCEDURAL HISTORY:

This matter comes before the Maricopa County Air Pollution Hearing Board (Board) as an appeal by Daniel E. Blackson (Blackson) from the grant by the Maricopa County Air Quality Department (Department) of a requested minor permit revision to revise Non-Title V Air Quality Permit No. 140062 for Hickman's Egg Ranch (Hickman) located near Tonopah. On November 16, 2015, Hickman filed a minor permit revision application seeking to add eight diesel-fueled emergency generators and two propane-fueled boilers to provide hot water for egg washing operations. *See* Non-Title V Technical Support Document (TSD), at 1. On April 19, 2016, Blackson filed comments raising concerns about the proposed permit. On June 10, 2016, the Department issued the minor permit revision without any changes requested by Blackson. On July 12, 2016, Blackson filed this appeal with the Board.

On August 1, 2016, the Department filed a motion to dismiss the permit appeal as beyond the scope of the minor permit revision or, in the alternative, to restrict the appeal to only the issues related to the minor permit revision.

On August 16, 2016, the Board reviewed the answer filed by MCAQD and heard argument from Mr. Blackson and Mr. Swan representing MCAQD. The Board deferred

action on the jurisdictional arguments to give Mr. Blackson time to prepare a response. Both MCAQD and Mr. Blackson filed briefs on jurisdictional issues on August 29, 2016.

On August 31, 2016, the Board heard argument on the jurisdictional issues. The Board ruled on jurisdiction as follows:

1. That the appeal as it relates to comments #1-#3, #5-#7, #10 and #18 is dismissed.
2. That the appeal as it relates to comments #8, #9, #11, #13, #14 and #17 is allowed, but evidence is limited to whether the Department properly calculated the emissions, characterized them as fugitive or point source, and, based upon the revised calculation, applied the proper permitting standards and procedures (e.g., did the source trigger a procedure other than the one that the Department used to process the permit application and revision).

Order on Jurisdiction at 5. An additional order by the chair was issued on November 4, 2016 clarifying the calling and scope of witnesses.

On November 7, 2016, the Board heard argument on the merits. Mr. Blackson presented argument and elicited testimony from himself and from Ms. Martin, a professional engineer and expert in air pollution control and concentrated animal feeding operations. Mr. Swan argued and elicited testimony from Mr. Richard Sumner, Air Permit Manager for the Department. The Board continued the hearing until December 2, 2016, when it met to deliberate.

JURISDICTIONAL ANALYSIS:

The County argues two major points in support of its contention that the Board does not have jurisdiction over Mr. Blackson's appeal: (1) Blackson is not properly before the Board; and (2) the Board's review is limited to the Control Officer's *action* approving the minor permit revision adding 8 emergency generators and 2 boilers. In response, Mr. Blackson argues that this is an *appealable agency action* and that any topic touched upon by his comments is within the Board's purview.

A.R.S. § 49-482 states as follows:

> Within thirty days after notice is given by the control officer of approval or denial of a permit, permit revision, or conditional order, the applicant and any person who filed a comment on the permit or permit revision pursuant to section 49-480, subsection B and section 49-426, subsection D, or on the conditional order pursuant to section 49-492, subsection C, may petition the hearing board, in writing, for a public hearing, which shall be held within thirty days after receipt of the petition. The hearing board, after notice and a public hearing, may sustain, modify, or reverse the action of the control officer.

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A.R.S. § 49-482.A. Section 49-482 ties the scope of the Board's review to the Control Officer's action, in this case issuance of the minor permit revision. The "the" before "action of the control officer" relates back to the control officer's action stated in the prior sentence. Hence, we agree that A.R.S. § 49-482 limits our jurisdiction to review of the control officer's action, the approval of the minor permit revision adding 8 engines and 2 boilers, and not the underlying permit. A.R.S. § 49-480.02, which refers to A.R.S. § 49-482, does not expand the scope of the Board's jurisdiction. *See, e.g.,* A.R.S. § 49-480.02.A.

Mr. Blackson's claim to broader review thus must rise or fall on whether this is an "appealable agency action" within the meaning of the Regulatory Bill of Rights, codified at A.R.S. § 49-471 *et seq.* The Regulatory Bill of Rights defines an "appealable agency action" as follows:

> (a) Means an action that determines the legal rights, duties or privileges of a party.
>
> ...
>
> (d) Does not include a decision or action that must be appealed to the hearing board pursuant to section 49-476.01, 49-480.02, 49-482, 49-490 or 49-511 or to a final administrative decision obtained by an administrative appeal under section 49-471.15.

A.R.S. § 49-471.4(a) & (d). Permit actions are appealed pursuant to sections 49-480.02 and 49-482 and therefore this action is not an "appealable agency action" within the meaning of the Regulatory Bill of Rights. This point is made emphatically in A.R.S. § 49-471.15, which states:

> A person whose legal rights, duties or privileges were determined by an appealable agency action or who will be adversely affected by an appealable agency action and who exercised any right to comment on the action provided by law, rule or ordinance may appeal the action to the air pollution hearing board ... ***except that administrative appeals of decisions to approve, deny or revoke a permit, permit revision or conditional order are governed by sections 49-480.02 and 49-482*** and hearings on orders of abatement are governed by section 49-490.

A.R.S. § 49-471.15.A (emphasis added). Based upon this language, we conclude that while Mr. Blackson may raise any issue in comments, the Board may only act on the control officer's action, in this case the minor permit revision, not the underlying permit.

MCAQD further urges the Board to adopt a narrow reading of what comments justify an appeal, limiting them to only those issues that go to the approvability of the minor permit revision, in this case the addition of 8 emergency generators and 2 boilers.

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Mr. Blackson urges that the Board can act based on any reason set forth in comments. As set forth above, the Board cannot reach the underlying permit. The question is whether the Board can rely upon any reason—including issues with the underlying permit—to reject the minor permit revision. We believe that Arizona law does not support this broad contention. First, applications for permit revisions "need supply [application information] only if it is related to the proposed change." Maricopa County Air Pollution Control Regulation (MCAPCR), Rule 220, § 301.4(a); *see also* 40 C.F.R. § 70.5(a)(2). It seems incongruous to review a permit based on information unrelated to the application and not included in the record. Second, the Regulatory Bill of Rights states that a person is "entitled to have the control officer not base a permitting decision under this article in whole or in part on conditions or requirements that are not specifically authorized by a provision of this state's law as provided in section 49-471.10, subsection C." A.R.S. § 49-471.01.A.7; *see also* A.R.S. § 49-471.10.C. In light of this policy, the Board holds that the basis for rejecting the control officer's *action* must be related to the statutory and regulatory requirements for the *action before the Board* and not the underlying permit.

Further support for this position is found in A.R.S. § 49-480, which provides that "procedures for the review, issuance, revision and administration of permit issued pursuant to this section ... shall impose no greater procedural burden on the permit applicant" than procedures applicable to state permits. A.R.S. § 49-480.B. State law for state permits clearly states that "[g]rounds for comment are limited to whether the proposed permit meets the criteria for issuance prescribed in this section or in section 49-427." A.R.S. § 49-426.D. While technically limited to title V permits (for major sources), it would be unusual if a broader test were used for a non-Title V source. Accordingly, we conclude that comments which can be urged as a basis for rejecting or modifying the control officer's action are limited to those which go to the statutory and regulatory criteria for issuance of the specific permit revision at issue.

In the present case, the Board holds that Mr. Blackson's allegation that the Department's use of the non-Title V minor permit revisions process was improper, is properly before the Board if Mr. Blackson can, in fact, demonstrate that this procedure was not appropriate for the change at the Hickman's Egg Ranch.

MERITS ANALYSIS:

In reviewing a challenge to the Department's issuance of a minor permit revision based on alleged inconsistency with a regulation, the Board will interpret the plain language of the regulation, giving considering to the intent underlying the regulation. *Milner v. Colonial Trust Co.*, 198 Ariz. 24, 26 (Ct. App. 2000). The Board will also defer to the Department's interpretation of the regulation where the interpretation is reasonable. *Ponte v. Real,* 471 U.S. 491, 508 (1985); *Pima County v. Pima County Law Enf't Merit Sys. Council*, 211 Ariz. 224, 228 (2005). Where, as here, the regulation is part of a joint federal/state/local scheme, we will also consider the interpretations advanced by other regulatory partners in the scheme, such as the U.S. EPA.

On the merits, this case comes down to a simple question: is the Hickman's Egg Ranch a "major source," in which case the Department's use of the non-Title V permit revision procedures is inappropriate. The answer to this question depends primarily on whether emissions from the ranch are considered "fugitive" or "non-fugitive," and if non-fugitive, whether the emissions exceed either 100 tons/year, the trigger for Title V operating permit status, or a major preconstruction review threshold under Rule 240.

Agricultural exemption. Initially, the parties argue about the relevance of Maricopa County's agricultural exemption, which provides as follows:

> Notwithstanding Sections 301, 302 and 303 of this rule, the following sources shall not require a permit, unless the source is a major source or unless operation without a permit would result in a violation of the Act:
>
> 308.3. Agricultural equipment used in normal farm operations. Agricultural equipment used in normal farm operations, for the purposes of this rule, does not include equipment that would be classified as a source that would require a permit under Title V of the Act, or would be subject to a standard under 40 CFR parts 60 or 61.

MCAPCR Rule 200, §§ 308 & 308.3[1]. Blackson argues that the exemption does not apply because the structures, including the barns, ponds, manure, feces, etc., at the ranch are not "equipment." The County argues that the operation falls within "normal farm operations" and is therefore excluded. The Board finds, in light of the express language of both Section 305.1(c) and A.R.S. § 49-457, which while not strictly applicable to the Hickman's Egg Ranch because located outside the "regulated area" does demonstrate the policy of the State not to regulate agricultural activities, including poultry production, beyond that required under the applicable implementation plan and applicable requirements of the Clean Air Act. *See* A.R.S. § 49-457(N) ("A best management practice adopted pursuant to this section does not affect any applicable requirement in an applicable implementation plan or any other applicable requirements of the clean air act, including section 110(l) of the act.") *and* (O) ("The regulation of PM-10 particulate emissions produced by regulated agricultural activities is a matter of state-wide concern. Accordingly, this section preempts further regulation of regulated agricultural activities by a county … or other political subdivision of the state."). The fairest reading is that unless the Hickman's Egg Ranch is subject to an implementation plan requirement, an NSPS or NESHAP, or is a major source, the agricultural activities remain exempt. MCAPCR Rule 200, § 308.3. The Board agrees with Blackson, however, that if the Hickman's Egg Ranch is a "major source," then it is subject to permitting and potentially preconstruction review requirements and the use of non-Title V procedures was an error.

[1] MCAPCR Rule 200, Revised 3/26/2008, by agreement of the parties.

Is Hickman's Egg Ranch a stationary source. Mr. Blackson testified that Hickman's Egg Ranch is a "stationary source" by reference to the regulatory definitions in the Maricopa County Rules. Tr. 16:16-19:9. He noted that there is no exemption from the definition of source for animal feeding operations. Tr. 19:10-17. He then testified that the henhouses emit PM_{10}, $PM_{2.5}$ and VOCs and that the process waste water surface impoundment ponds were structures emitting VOC. Tr. 21:23-23:6. Ms. Martin affirmed this understanding. Tr. 39:16-24; Tr. 40:3-41:4. Mr. Sumner conceded that the animal feeding operations, manure piles, hen houses and lagoons would emit, Tr. 67:19-23, and that they are stationary sources. Tr. 102:3-5.

Quantification of emissions. Mr. Blackson submitted materials admitted by the Board at the hearing, that total emissions from the Hickman's Egg Ranch are as follows: Buckeye Egg Farm data, PM_{10}: >100 barns/12,000,000 chickens * (550 tpy+700 tpy+600 tpy)/>100 barns = 0.000154 tpy PM_{10} /chicken; Iowa Study, PM_{10}: 105 mg/day-bird, $PM_{2.5}$: 8 mg/day-bird (Blackson PHD 27-28); Indiana Study PM_{10}: 16 g/d-AU, $PM_{2.5}$: 1.1 g/d-AU (Blackson PHD 28); Indiana Study VOC 0.0000596 kg/day/chicken (Blackson PHD 39); San Luis Obispo Air Pollution Control District – Agricultural Operation calculator VOC: 0.192 lb/chicken-yr (Blackson PHD 39-40). Mr. Blackson then applied these factors to calculate total PM_{10} and VOC emissions from the Hickman's Egg Ranch (potential to emit basis) (some math corrected by Board):

PM_{10}: 14 houses * 307,200 chickens/house * 0.000154 tpy/chicken = 662.3 tpy PM_{10} (Buckeye data)
PM_{10}: 14 houses * 307,200 chickens/house * 105 mg/day-bird * 365 day/yr * 0.001 g/mg * 0.0000011 ton/g = 181.3 ton/yr (Iowa data)
PM_{10}: 14 houses * 307,200 chickens/house * 16 /d-AU * 500 AU/50,000 hens * 365 day/yr * 0.0000011 ton/g = 276.3 ton/yr (Indiana data)

$PM_{2.5}$: 14 houses * 307,200 chickens/house * 8 mg/day-bird * 365 day/yr * 0.001 g/mg * 0.0000011 ton/g = 13.8 ton/yr (Iowa data)
$PM_{2.5}$: 14 houses * 307,200 chickens/house * 1.1 g/d-AU * 500 AU/50,000 hens * 365 day/yr * 0.0000011 ton/g = 19.0 ton/yr (Iowa data)

VOC: 14 houses * 307,200 chickens/house * 0.0000566 kg/day * 365 day/yr * 0.0011 ton/kg = 102.9 tpy VOC (Indiana data)
VOC: 14 houses * 307,200 chickens/house * 0.192 lb/chicken-yr * 1 ton/2000 lb = 412.9 tons/yr (California data)

Mr. Sumner, on behalf of the Department, testified that emissions from animal feeding operations are highly variable, EPA has not yet published definitive factors, and the General Accountability Office had challenged the credibility of EPA's study. Tr. 80:11-83.14. The Department determined that the emissions factors were not of sufficient quality to be relied upon. Tr. 83:6-14. On cross, he testified to his understanding that there was a "large variation" in emission estimates. Tr. 91:3-16. This

testimony tends to establish that emissions may be lower or higher than that provided by the studies cited by Mr. Blackson.

Fugitive emissions. In determining whether the Hickman's Egg Ranch is a major source, "fugitive emissions" are excluded because the ranch is not a listed categorical source. *See* MCAPCR Rule 100, § 200.60(c).[2] Fugitive emissions are defined as "[a]ny emission which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening." *Id* § 200.54.

Mr. Blackson testified that because the henhouses have a roof, three sides and an open side, the open side should be treated as a "vent" because it is the functional equivalent of a vent. Tr. 32:13-33:5. He also testified that it would be arbitrary to require the opening to be smaller to qualify as a vent – any such requirement arbitrary because the opening is the functional equivalent of a vent. *Id.* Since the VOCs and particulate matter are passing through that opening to the outdoors, they are non-fugitive emissions. *Id.* Mr. Blackson also testified that EPA's settlement with Buckeye Egg Farm shows that emissions from these facilities are non-fugitive. *Id.* at 33:6-9.

Ms. Martin testified similarly, but with the nuance that it is the fans blowing particulate that are the point sources and that other emissions from the henhouses are likely fugitive. Tr. 56:14-20; 59:10-16. She agreed that road emissions were fugitive. *Id.* 59:14-16.

Mr. Sumner, for the Department, testified that the Department considers the animal feeding operation, manure piles, hen houses and lagoons to be fugitive emissions. He explained that the Department does not believe emissions can "reasonably be captured" and that the openings are so large, over 84 feet wide and nearly 40 feet high, so as to render them infeasible for capture. Tr. 67:12-68:18. He also stated that the Department was following official EPA position that the fugitive/non-fugitive status of animal feeding operation buildings was "open" and that EPA would provide more definitive guidance in the future. Tr. 68:19-:69:3. He testified that stack emissions from the boilers and generators was included. Tr. 74:4-75:17.

On cross-examination, Mr. Blackson pressed Mr. Sumner to define when the opening at Hickman's would become a vent in the Department's view. Mr. Sumner declined to give a definitive answer, stating that "we would use judgment and that it is a spectrum." He noted that ultimately, the question of whether an opening is the "functional equivalent" of a vent is a question of reasonableness. Tr. 97:10-98:21. Mr. Sumner admitted that EPA had brought an action against a hen house in Ohio. Tr. 98:22-99:2.

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[2] MCAPCR Rule 100, Revised 9/25/2013, by agreement of the parties.

Rule 241. Mr. Blackson testified that it was arbitrary for the county not to have addressed Rule 241. Tr., 28:25-29:13. Mr. Sumner testified that the Department did look at the Rule 241 issues, but that because the total non-fugitive emissions were well under the thresholds, it was not triggered. Tr. 79:9-80:5. He also testified that it is normal practice not to separately document Rule 241 where the emissions are below the trigger thresholds. The Board concludes that Rule 241 was adequately addressed unless Mr. Blackson sustains the contention that the Hickman's Egg Ranch is actually a major source.

Analysis of merits. The Board finds that the Hickman's Egg Ranch is a "stationary source" potentially subject to air quality permit regulation because it emits pollutants and falls within the definition of a building, structure, facility or installation. MCAPCR Rule 100, §§ 200.26, 200.105. Even if a stationary source, it is not subject to permitting if it is an agricultural activity unless it would require a permit under Title V of the Clean Air Act or otherwise result in a violation of the Clean Air Act. MCAPCR Rule 200, § 308 & 308.3. Mr. Blackson argued that Hickman's Egg Farm is either a "major source" under Title V or under federal major preconstruction review requirements. The Board holds that the agricultural exemption applies to non-major sources and precludes permit regulation of the hen houses and agricultural activities, but does not preclude regulation of non-agricultural activities, such as generators, boilers, and similar non-agricultural sources. MCAPCR Rule 200, § 308.3.

The definition of "major source" for Title V requires that a source emit 100 tons/year or more of a pollutant, but excludes fugitive emissions from all but categorical sources listed in Rule 200, section 200.60(c). MCAPCR Rule 200, § 200.60(c). It is undisputable that the Hickman's Egg Ranch is not a categorical source. Tr. 66:19-22. Therefore, only the non-fugitive emissions are counted in determining its source classification. MCAPCR Rule 200, § 200.60(c). This is also true under the preconstruction review rules. MCAPCR Rule 240, § 304.13 (nonattainment area); § 305.1(d)(1) (attainment/unclassifiable area) (both exclude fugitive emissions). None of the witnesses, Mr. Blackson, Ms. Martin, or Mr. Sumner, offered any apportionment of emissions from the Hickman's Egg Ranch between fugitive and non-fugitive emissions.

The Board agrees with the Department that EPA has not established definitive policy on this area. *See, e.g.,* 67 Fed. Reg. 63551, 63557 (Oct. 15, 2002) (California Title V program withdrawal) ("While EPA believes that these concepts are important guideposts for determining the presumptive fugitive and non-fugitive emissions sources at CAFOs, EPA is not making such policy decisions in this rulemaking...."); 70 Fed. Reg. 4958, 4959 (Jan. 31, 2005) ("this notice does not address fugitive emissions. Guidance on fugitive emissions will be issued ... after the conclusion of the monitoring study"). The Board also holds that EPA's failure to provide guidance does not excuse the Department from applying its rules.

The Board finds the testimony of Mr. Sumner persuasive that judging whether emissions are fugitive or non-fugitive requires considering a spectrum of what is "reasonable" or not and depends upon the nature of the buildings and emissions involved. Tr. 98:15-98:21, *see also* MCAPCR Rule 100, § 200.54 ("emissions would could not *reasonably* pass through a stack … or other functionally equivalent opening" (emphasis added)). The Board finds, based on the evidence before it and granting deference to the Department's interpretation of the program it is entrusted to administer, that emissions from the end of the hen house are fugitive because it is not reasonable to capture them and duct them. *See* Tr. 67:12-68:18. The Board also finds, however, that Ms. Martin has provided a reasonable basis to conclude that at least some portion of the particulate from the hen house that exits through a fan may be non-fugitive. Tr. 54:10-55:20 ("those are not fugitive emissions coming out of the fans; those a non-fugitive emissions and should be treated as such").

The Board finds that some portion of the emissions from the hen house that comes through the fans is non-fugitive, but this portion is clearly less than the full PM_{10}, $PM_{2.5}$ or VOC emissions calculated by Mr. Blackson because there is testimony that these pollutants come from feces and urine as well as the birds. The feces and urine are managed in the manure pile and in the process water impoundments, which are in areas where the emissions are fugitive in nature because they are outside or encompassed only within the very large opening that Mr. Sumner testified is not the "functional equivalent" of a vent. Tr. 67:12-68:18. The Board defers to Mr. Sumner's conclusions on this opening and therefore finds that emissions generated from the manure pile area are also fugitive.

Although the Board must defer to the Department's interpretation of its regulations where reasonable or permissible, it cannot defer to an interpretation that contradicts the regulations. Mr. Blackson and Ms. Martin have demonstrated that some portion of hen house emissions pass through a fan. In this case, the Board holds that the Department's practice of treating all emissions from a hen house as fugitive cannot be reconciled with the regulatory definition in MCAPCR Rule 100, which states that emissions that "reasonably" could pass through a vent are non-fugitive. Some or all of the emissions passing through the fans are non-fugitive. MCAPCR Rule 100, § 200.54. Because the Department believed that all emissions were fugitive, it failed to consider an important aspect of the permitting record—what portion of hen houses emissions are non-fugitive, and hence did not evaluate whether the non-fugitive portion, when combined with the admittedly non-fugitive emissions from boilers and emergency engines, exceeded major source thresholds. Mr. Blackson and Ms. Martin did not quantify what portion of the emissions passing through the fans were non-fugitive, so an inadequate record exists to hold that the Department's issuance of a non-Title V minor permit revision was in error. Because Mr. Blackson has the burden of persuasion on this issue, MCAPHB Manual §3.22(B)(1), the Board affirms the issuance of the permit. In the future, however, the Department must, in the exercise of its professional judgment,

apportion emissions from these facilities between their fugitive and non-fugitive components and process the permit accordingly.

Based upon the foregoing analysis, the Board enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT:

1. On November 16, 2015, Hickman's Egg Farm applied for a minor permit revision seeking to add 8 diesel-fueled emergency generators and 2 propane-fueled boilers. *See* Non-Title V Technical Support Document (TSD), at 1.
2. On April 19, 2016, Blackson filed comments on the permit application and proposed permit, raising substantially the issues presented in this appeal.
3. On June 10, 2016, MCAQD issued a minor permit revision to Hickman's Egg Farm.
4. On July 12, 2016, Blackson filed an appeal with this Board.
5. EPA has not yet released definitive methods for calculating PM_{10}, $PM_{2.5}$ and VOC emissions from poultry operations such as Hickman's Egg Ranch. Tr. 81:9-83:5.
6. Based on reasonable information in the record, the PM_{10} potential to emit (PTE) from the Hickman's Egg Ranch may be as much as 662 tons/year, but that there is considerable variation between the different methods of calculation. Blackson PHD 27-40.
7. Based on reasonable information in the record, the $PM_{2.5}$ PTE from Hickman's Egg Ranch may be as much as 19 tons/year, but is clearly less than 100 tons/year. *Id.*
8. Based on reasonable information in the record, the VOC PTE from Hickman's Egg Ranch may be as much as 400 tons/year. *Id.*
9. Based on reasonable information in the record, some of the PM_{10}, $PM_{2.5}$, and VOC emissions passing through the fans are non-fugitive in nature. Tr. 54:10-55:20.
10. Based on information in the record, the Board finds that emissions from the roads, parking lots, and lagoons are fugitive. Tr. 59:10-13; Tr. 67:12-17; Tr. 95:10-13.
11. Based on information in the record, the Board defers to the Department's conclusions that emissions from the large opening at the end of the hen house are fugitive in nature. Tr. 67:12-68:18.
12. None of the parties have provided a credible apportionment of emissions between fugitive and non-fugitive portions. The Board also finds that Mr. Blackson has not delineated what portion of emissions from the studies that he cited are fugitive or non-fugitive.
13. Based on information in the record, the Board defers to the Department's calculation of the non-fugitive emissions from the emergency engines and boilers and are less than the Rule 241 thresholds. Tr. 78:16-79:6.
14. Based on the record, there is insufficient evidence to conclude that the Hickman's Egg Ranch is or is not a major source.

CONCLUSIONS OF LAW:

1. Blackson's appeal was timely filed. A.R.S. § 49-482; APHB Manual § 3.6(B); *see also Thielking v. Kirschner*, 176 Ariz. 154, 859 P.2d 777 (Ct.App.Div.1 1993).
2. Based on the analysis set forth above, the Board's jurisdiction extends only to the minor permit revision and not the underlying permit. *See* A.R.S. § 49-482 (review limited to the action of the control officer).
3. The Regulatory Bill of Rights' "appealable agency action" provisions do not apply to a permit appeal required to be processed pursuant to A.R.S. § 49-482. *See* A.R.S. § 49-401.4(d); § 49-471.15.C.
4. Under A.R.S. §§ 49-480 and 49-426, the grounds of comment upon which the Board can act are "limited to whether the proposed permit meets the criteria for issuance prescribed in this section [A.R.S. § 49-426] or in section 49-427." *See* A.R.S. § 49-480.B (county procedures are limited to what state allows) & A.R.S. § 49-426.D (limiting state grounds of comment to whether criteria for issuance met).
    a. Comment #1 goes to whether the operation is subject to the agricultural best management practices (BMPs) and dust generation. Whether the operation is or is not subject to the agricultural BMPs does not impact issuance of a permit for regulated engines or boilers. Similarly, the complaint about dust is not related to the engines or boilers. Comment #1 is beyond the jurisdiction of the Board on appeal.
    b. Comment #2 complains that the Department has not considered "the ability to measure noxious chemicals and odorous components of chicken manure." This contention does not related to the engines or boilers and is beyond the jurisdiction of the Board on appeal.
    c. Comment #3 states that there is an inadequate demonstration for hydrogen sulfide emissions from egg operations, but does not address the engines or boilers. Comment #3 is beyond the jurisdiction of the Board on appeal.
    d. Comment #4 is omitted from the appeal.
    e. Comment #5 is directed at odor complaints from general farm operations and not from the engines or boilers. Comment #5 is beyond the jurisdiction of the Board on appeal.
    f. Comment #6 is directed at manure hauling, which is beyond the jurisdiction of the Board on appeal.
    g. Comment #7 contends that the farm is a process industry, but this argument facially does not apply to the fuel burning equipment in the revision. Accordingly, this comment is beyond the jurisdiction of the Board on appeal.
    h. Comment #8 alleges that the Department failed to consider new source review issues and whether the units should have been included with an earlier permit. This issue is properly before the Board.

i. Comment #9 alleges that VOC emissions from henhouses are non-fugitive. This issue is within the jurisdiction of the Board to the extent it implicates a failure of the Department to apply the proper new source review or permitting standards.
j. Comment #10 goes to odor complaints unrelated to the engines and boilers covered by the permit revision and hence is beyond the jurisdiction of the Board on appeal.
k. Comments #11, #13, #14, #17 allege errors and omissions in the application. To the extent that these errors or omissions may have resulted in the Department applying the incorrect permitting standard (e.g., major new source review, minor new source review, or Title V procedures) they are within the Board's jurisdiction.
l. Comments #12, #15, #16 were omitted from the appeal.
m. Comment #18 goes to odor, is not related to the engines or boilers, and is beyond the jurisdiction of the Board on appeal.

5. In reviewing a challenge to the Department's issuance of a minor permit revision based on alleged inconsistency with a regulation, the Board will interpret the plain language of the regulation, giving considering to the intent underlying the regulation. *Milner v. Colonial Trust Co.*, 198 Ariz. 24, 26 (Ct. App. 2000).
6. The Board will also defer to the Department's interpretation of the regulation where the interpretation is reasonable. *Ponte v. Real,* 471 U.S. 491, 508 (1985); *Pima County v. Pima County Law Enf't Merit Sys. Council*, 211 Ariz. 224, 228 (2005). Where, as here, the regulation is part of a joint federal/state/local scheme, we will also consider the interpretations advanced by other regulatory partners in the scheme, such as the U.S. EPA.
7. The Hickman's Egg Ranch is a "building, structure, facility or installation" and a stationary source. MCAPCR Rule 100, §§ 200.24, 200.105.
8. The definition of "major source" for Title V requires that a source emit 100 tons/year or more of a pollutant, but excludes fugitive emissions from all but categorical sources listed in Rule 200, section 200.60(c). MCAPCR Rule 200, § 200.60(c).
9. Hickman's Egg Ranch is not a categorical source. Tr. 66:19-22.
10. Only non-fugitive emissions are counted in determining its source classification. MCAPCR Rule 200, § 200.60(c). This is also true under the preconstruction review rules. MCAPCR Rule 240, § 304.13 (nonattainment area); § 305.1(d)(1) (attainment/unclassifiable area) (both exclude fugitive emissions).
11. The Board finds the testimony of Mr. Sumner persuasive that judging whether emissions are fugitive or non-fugitive requires considering a spectrum of what is "reasonable" or not and depends upon the nature of the buildings and emissions involved. Tr. 98:15-98:21, *see also* MCAPCR Rule 100, § 200.54 ("emissions would could not *reasonably* pass through a stack … or other functionally equivalent opening" (emphasis added)).
12. The Board holds, based on the evidence before it and granting deference to the Department's interpretation of the program it is entrusted to administer, *see*

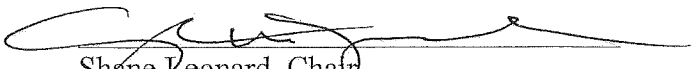
Conclusion of Law ¶¶ 5-6, that emissions from the end of the hen house are fugitive because it is not reasonable to capture them and duct them. *See* Tr. 67:12-68:18.

13. The Board holds that Ms. Martin has provided a reasonable basis to conclude that at least some portion of the particulate from the hen house that exits through a fan may be non-fugitive. Tr. 54:10-55:20 ("those are not fugitive emissions coming out of the fans; those are non-fugitive emissions and should be treated as such").
14. The Board holds that sufficient doubt exists as to whether the Hickman's Egg Ranch is a major source that the Board remands this matter back to the Department to determine, either quantitatively or qualitatively, that the Hickman's Egg Ranch is or is not a major source of non-fugitive emissions.

It is **ORDERED** as follows:

1. That the appeal as it relates to comments #1-#3, #5-#7, #10 and #18 is dismissed.
2. That the appeal as it relates to comments #8, #9, #11, #13, #14 and #17 is allowed, but evidence is limited to whether the Department properly calculated the emissions, characterized them as fugitive or point source, and, based upon the revised calculation, applied the proper permitting standards and procedures (e.g., did the source trigger a procedure other than the one that the Department used to process the permit application and revision).
3. Based upon full consideration of the evidence, the Board finds that there is insufficient evidence [or that the Department erred in treating all hen house emissions as fugitive, but that there is insufficient evidence] that the non-Title V minor permit revision procedure was proper and the Board remands, but does not vacate, the minor permit revision to the Department to clarify the basis for its position. The Department shall consider the information in this record and such additional information as it chooses to gather and shall apportion emissions as fugitive or non-fugitive and render a decision on whether Hickman's Egg Ranch is or is not a major source. If the Department determines it is not a major source, the Department shall serve that decision on the Board and Mr. Blackson, who shall have 30 days to file objections with the Board and request a hearing on the new determination. If the Department determines that Hickman's Egg Ranch is a major source, it shall revoke and reissue the minor permit revision under the Title V or other appropriate rules and Mr. Blackson or Hickman's Egg Ranch may appeal as provided by law.

So ordered this 2nd day of December, 2016.



Shane Leonard, Chair
Air Pollution Hearing Board