BEFORE THE ENVIRONMENTAL HEARING BOARD

ERIE COKE CORPORATION	:	
	:	
v.	:	EHB Docket No. 2019-069-B
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION.	:	

DEPARTMENT'S POST-HEARING BRIEF IN OPPOSITION TO ERIE COKE'S PETITION FOR SUPERSEDEAS

Carl D. Ballard
Assistant Counsel
PA I.D. No. 320830
Kayla A. Despenes
Assistant Counsel
PA I.D. No. 320726
Douglas G. Moorhead
Regional Counsel
PA I.D. No. 74560
Northwest Regional Counsel
Office of Chief Counsel
230 Chestnut Street
Meadville, PA 16335
(814) 332-6070

DATE: August 7, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

RULES

REGULATIONS

STATUTES

BEFORE THE ENVIRONMENTAL HEARING BOARD

ERIE COKE CORPORATION	:	
	:	
v.	:	EHB Docket No. 2019-069-B
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

DEPARTMENT'S POST-HEARING BRIEF IN OPPOSITION TO ERIE COKE'S PETITION FOR SUPERSEDEAS

The Commonwealth of Pennsylvania, Department of Environmental Protection ("Department") hereby submits its Post-Hearing Brief in Opposition to Erie Coke's Petition for Supersedeas in the above-captioned matter. For the reasons that follow, the Department requests that the Pennsylvania Environmental Hearing Board ("Board") deny Erie Coke Corporation's ("Erie Coke") Petition for Supersedeas.

I. INTRODUCTION

Presently before the Board is Erie Coke's Petition for Supersedeas requesting that the Board supersede the Department's July 1, 2019 denial of Erie Coke's application to renew its Title V Permit and authorize Erie Coke to continue operating ("Department's Denial"). Before its expiration on February 28, 2018, Erie Coke's Title V Permit authorized the operation of the air contamination sources and air cleaning devices at its coke manufacturing facility located at the foot of East Avenue between Lake Erie and the Bayfront Highway in the City of Erie, Erie County, Pennsylvania ("Facility"). Erie Coke applied to renew the Title V Permit on August 28, 2017 ("Renewal Application").

On the day after the Renewal Application was submitted, the Department advised Erie Coke it could not renew the Title V Permit because the Facility lacked a backup hydrogen sulfide

("H_2S") control device. Nevertheless, the Department did not deny the Renewal Application at that time and did not order Erie Coke to stop operation of its air contamination sources. Instead the Department made repeated attempts to gain compliance with the H_2S backup requirement, among other regulatory requirements.

On February 4, 2019, the Department issued an administrative order to Erie Coke requiring Erie Coke to, among other things, submit a compliance schedule ("Department's Order"). On May 9, 2019, the Department notified Erie Coke that pursuant to 25 Pa. Code §§ 127.412(f)-(g), the Department placed Erie Coke's continuing violations and its lack of intention or ability to comply with the Air Act, Act of January 8, l960, P.L. 2119, *as amended*, 35 P.S. §§ 4001-4015 ("Air Act") and the rules and regulations promulgated thereunder ("Regulations") on the Department's compliance docket ("Compliance Docket Notification"). The Department's Compliance Docket Notification advised Erie Coke that the Department could not renew its Title V Permit. DEP Ex. UU.

On July 1, 2019, with no end in sight to Erie Coke's violations, the Department denied the Renewal Application based upon, among other things, Erie Coke's demonstrated lack of intention or ability to comply with the Air Act and Regulations. Erie Coke appealed the Department's Denial on July 2, 2019. On July 3, 2019, Erie Coke filed an Application for Temporary Supersedeas and a Petition for Supersedeas requesting that the Board supersede the Department's Denial. Specifically, Erie Coke's Petition for Supersedeas requests that the Board: "suspend the operation of the [Department's] Denial such that Erie Coke can operate under its existing permit until such time as the Board reaches a final decision on Erie Coke's appeal of the Department's Denial." Petition for Supersedeas, p. 13. Erie Coke's Petition for Supersedeas does not request a supersedeas of the Compliance Docket Notification.

Following a conference call with the parties, the Board granted Erie Coke's Application for Temporary Supersedeas on July 5, 2019. On July 6, 2019, the Department filed a Motion to Deny Petition for Supersedeas Without a Hearing ("Motion") based on Erie Coke's failure to state grounds sufficient for the granting of a supersedeas. The Department also filed a Response in Opposition to Erie Coke's Petition for Supersedeas on July 8, 2019. On July 9, 2019, Erie Coke filed a Response to the Department's Motion, and on July 10, 2019, the Board issued an Order denying the Motion. Following six days of hearing on the Petition for Supersedeas, the Board on July 19, 2019 issued an order for the parties to file simultaneous post-hearing briefs on or before August 7, 2019.[1]

II. STANDARD FOR OBTAINING A SUPERSEDEAS

Erie Coke's Petition for Supersedeas seeks an extraordinary remedy that will not be granted absent a clear demonstration of appropriate need. *See Delaware Riverkeeper Network, et al. v. DEP*, 2016 EHB 41, 43. As the petitioner, Erie Coke bears the burden to prove that a supersedeas should be issued. *Id.* When considering a petition for supersedeas, the Board is governed by Section 7514(d) of the Environmental Hearing Board Act ("Hearing Board Act"), 35 P.S. § 7514(d), and Rule 1021.63 of the Board's Rules of Practice and Procedure ("Board's Rules"), 25 Pa. Code § 1021.63. The Hearing Board Act and the Board's Rules provide that the grant or

[1] The parties have determined there are five exhibits that have been admitted which are marked both as a DEP exhibit and an Erie Coke (ECC) exhibit. For ease of reference, the parties agree to use the DEP Exhibit reference for these duplicates as follows:

ECC Ex. 1 is DEP Ex. DD
ECC Ex. 2 is DEP Ex. RR
ECC Ex. 4 is DEP Ex. SS
ECC Ex. 7 is DEP Ex. UU
ECC Ex. 12 is DEP Ex. BB

denial of a supersedeas will be guided by relevant judicial precedent and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a).

The Hearing Board Act and the Board's Rules also provide a distinct limitation that a supersedeas shall not be issued in cases where pollution or injury to the public health, safety, or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b); *Simon v. DEP*, 2017 EHB 414, 417. If pollution or injury to the public health, safety, or welfare exists or is threatened, no supersedeas may be granted. *Ramagosa v. DEP*, 1990 EHB 1461, 1466. Thus, the petitioner has the burden to demonstrate by a preponderance of the evidence that no pollution or injury to the public health, safety, or welfare will result from the grant of a supersedeas. *Svonavec, Inc. v. DEP*, 1998 EHB 417, 422-23 ("[I]t is the burden of [the petitioner] to demonstrate by a preponderance of the evidence that no pollution or injury to the public health, safety, or welfare will result from the grant of a supersedeas.").

In cases where the mandatory prohibition against issuance of a supersedeas does not apply, the Board considers the statutory and regulatory criteria. *Global Eco-Logical Services, Inc. v. DEP*, 2000 EHB 829, 831; *Simon*, 2017 EHB at 418. Among the factors to be considered are: 1) irreparable harm to the petitioner; 2) likelihood of the petitioner's success on the merits; and 3) likelihood of injury to the public or other parties. 35 P.S. § 7514(d)(1)(i)-(iii); 25 Pa. Code § 1021.63(a)(1)-(3). In order for the Board to grant a supersedeas, the petitioner must make a credible showing on each of the three enumerated factors, with a *strong showing* of a likelihood of success on the merits. *Delaware Riverkeeper Network*, 2016 EHB at 43 (emphasis added). If the petitioner fails to carry its burden on any one of the factors, the Board need not consider the remaining requirements for supersedeas relief. *Id.* Finally, "[i]n circumstances where there will not be pollution or injury to the public, the issuance of a supersedeas is ultimately committed to

the Board's discretion based upon a balancing of all of the statutory criteria." *Simon*, 2017 EHB at 418.

III. ARGUMENT

Erie Coke's Title V Permit has expired and any right of Erie Coke to continue operating air contamination sources at the Facility expired with it. From the day its Renewal Application was submitted, the Department was never able to renew the Title V Permit because Erie Coke could not comply with the Air Act, the Regulations, or the Title V Permit. Accordingly, Erie Coke could not claim a right to continue operating after the expiration of the Title V Permit. The Department waited nearly 22 months to act upon the Renewal Application in the hope that Erie Coke could identify some viable plan for achieving compliance that could be incorporated into a renewed Title V Permit. When it became apparent that Erie Coke would not do this, and environmental and public harm continued, the Department denied the Renewal Application.

Erie Coke's Petition for Supersedeas asks the Board to supersede the Department's Denial and authorize it to continue operating. Because the Title V Permit expired on February 28, 2018, and Erie Coke was not authorized to operate after that date, the Board cannot authorize Erie Coke's continued operation through a supersedeas. The purpose of granting a supersedeas is to maintain the *status quo* pending the outcome of a decision on the merits of an appeal, and the *status quo* at the time of the Department's Denial is that Erie Coke had no authorization to operate. Moreover, the Board cannot grant the supersedeas because pollution and injury to the public are occurring and will continue to occur if a supersedeas is granted. Finally, Erie Coke failed to carry its burden to make a strong showing of its likelihood of success. Accordingly, the Board must deny Erie Coke's Petition for Supersedeas.

A. The Board Cannot Grant Erie Coke's Requested Relief.

Erie Coke's Petition asks the Board to stay the Department's Denial and establish its right to operate, but the Board will not supersede the denial of a permit. *Solomon v. DEP*, 1996 EHB 989, 994-995; *Neville Chemical Co. v. DER*, 1992 EHB 926. *See also EHB Practice and Procedure Manual*, March 2019, p. 38, ¶ 5. Nor will the Board issue a supersedeas where it would alter the last lawful *status quo ante*. *Solomon v. DEP*, 1996 EHB at 992; *Amity v. DER*, 1988 EHB 766, 766-67. Further, the Board has consistently held that it will not grant a supersedeas where the *status quo* sought to be maintained by the supersedeas involves an unlawful activity. *Neville Chemical Co. v. DER*, 1992 EHB 926, 929; *Ramagosa*, 1990 EHB at 1466.

In its Petition, Erie Coke requests the following specific relief:

> Erie Coke respectfully requests that the Environmental Hearing Board supersede the Department's July 1, 2019 Denial, and thereby suspend the operation of the [Department's] Denial, such that Erie Coke can operate under its existing permit until such time as the Board reaches a final decision on Erie Coke's appeal of the Departments' Denial.

Petition for Supersedeas, p. 13. Erie Coke's requested relief is based upon the incorrect assertion that the *status quo* in this case is that Erie Coke could operate under its Title V Permit until the Department's Denial. Petition, ¶ 6. Contrary to Erie Coke's assertions, prior to the Department's Denial, its Title V Permit had expired by operation of law on February 28, 2018. 25 Pa. Code § 127.446(a); Petition ¶ 6. Thus, Erie Coke has no "existing permit" and the Board cannot grant Erie Coke authority to operate through a supersedeas order.

1. Erie Coke's Authority to Operate is Not Administratively Extended.

Pursuant to 25 Pa. Code § 127.446(c), the terms and conditions of an expired operating permit can be continued pending the issuance of a new permit only when the permittee has submitted a timely and complete application and paid the required fees, *and* the Department is

unable, *through no fault of the permittee*, to issue or deny a new permit before the expiration of the previous permit. 25 Pa. Code § 127.446(c) (emphasis added). Additionally, pursuant to Section 503(d) of the Clean Air Act, 42 U.S.C. § 7661b(d), if an applicant has submitted a timely and complete application for a permit required by this subchapter (including renewals), but final action has not been taken on such application, the source's failure to have a permit shall not be a violation of this chapter, *unless the delay in final action was due to the failure of the applicant timely to submit information required or requested to process the application.* 42 U.S.C. § 7661b(d) (emphasis added). Thus, a permittee can continue operating under the terms of an expired operating permit only if the Department's failure to renew the permit is not the fault of the permittee.

The Department has established that it could not approve Erie Coke's application to renew the Title V Permit because of Erie Coke's chronic, repetitive failures to comply with the terms and conditions of the Air Act, Regulations, and the Title V Permit. Since the day after the submission of the Renewal Application in August 2017, Erie Coke has been on notice that the Department could not renew the Title V Permit without a backup H_2S control device. Tr. 889-90, 897. Erie Coke was notified again and again that its noncompliance was preventing the Department from moving forward with its Renewal Application. *See* DEP Ex. II., JJ., LL., OO., and QQ. The Department's May 9, 2019 Compliance Docket Notification informed Erie Coke that the Department could not renew the Title V Permit because Erie Coke's lack of intent or ability to comply was placed on the Department's compliance docket. DEP's Ex. UU.; *See* 25 Pa. Code § 127.422.[2] Thus, Erie Coke's authorization to operate was not administratively extended after its

[2] Erie Coke has not filed a Petition for Supersedeas for the Department's Compliance Docket Notification. Despite its statements otherwise in its Response to the Department's Motion to Dismiss Without a Hearing, Erie Coke's present Petition for Supersedeas does not ask the Board to supersede that Department action.

Title V Permit expired on February 28, 2018 and it had no authority to operate before the Department's Denial under 25 Pa. Code § 127.446(c) or Section 503(d) of the Clean Air Act, 42 U.S.C. § 7661b(d).

Between February 28, 2018 and the Department's Denial on July 1, 2019, the Department made repeated efforts to bring Erie Coke into compliance, including meeting with Erie Coke on multiple occasions, issuing the February 2019 administrative order, and issuing the Compliance Docket Notification. While Erie Coke's authorization to operate was not extended, the Department exercised its enforcement discretion to try to bring the Facility into compliance. When it became apparent that Erie Coke's violations would not end in the foreseeable future, the Department denied the Renewal Application and filed a Complaint in Equity seeking a permanent end to Erie Coke's violations. Once the Department acts on a permit application, an expired permit cannot be automatically continued regardless of what transpires after the Department's action. *Tinicum Township v. DEP*, 2002 EHB 822, 825-826 (addressing an analogous provision of 25 Pa. Code § 92.9 that automatically extends the terms and conditions of an NPDES permit).

Accordingly, Erie Coke was not authorized to continue operating before the Department's Denial and cannot be authorized to continue now. Therefore, the Board should not change the *status quo* by authorizing Erie Coke to operate as requested in its Petition for Supersedeas. *Solomon v. DEP*, 1996 EHB at 992; *Amity v. DER*, 1988 EHB 766, 766-67.

2. A Supersedeas Would Condone Erie Coke's Further Unlawful Conduct.

As was the case in *Solomon*, Erie Coke has committed numerous and repetitive statutory and regulatory violations and has been assessed civil penalties for those violations. DEP's Ex. BB, HH, UU. This compliance history justifies the Department's Denial. *Solomon*, 1996 EHB at 994; *See also*, *Prevano v. DEP*, 2011 EHB 453, 494. Granting a supersedeas would only condone

further unlawful conduct by Erie Coke, including, but not limited to, continuing battery stack opacity violations, S*ee* Tr. 199, 200, 201, 261, 319-20, and 591, exceeding the regulatory limit for H_2S combustion, *See* Tr. 602-603, and perhaps most significantly, operating air contamination sources without any authorization.

The present appeal is distinguished from *Parker Sand and Gravel v. DER*, 1983 EHB 557, where the Board granted a petition for supersedeas that allowed unauthorized operation to continue while it reviewed the Department's denial of permit application renewal. In *Parker Sand and Gravel*, no violations or unlawful conduct were noted other than the lack of a permit. Here, the Department has taken concentrated enforcement efforts to end the numerous violations it has noted at the Erie Coke Facility, including implementing the Department's *Compliance Docket Procedure*, Document No. 273-4130-004 ("Compliance Docket Procedure") and issuing an administrative order.

Similarly, this case is distinguished from *Baumgardner, et al v. DER*, 1988 EHB 786, in which the Board granted a supersedeas when the Department issued an order abruptly shutting down an oil recycling facility based on a new regulatory definition of "solid waste." *Baumgardner*, 1988 EHB at 792. The Board granted the petition for supersedeas that incidentally allowed operation in *Baumgardner* because it found the Department's sudden action, announcing the application of the new definition in a shutdown order, constituted an abuse of discretion. *Id*. In the present case, as in *Solomon*, the Department took no abrupt action and the Department's Denial is based on a well-documented history of significant and repetitive history of violations that harmed the environment and public health. The Board cannot characterize the Department's action as an abuse of discretion. *Solomon*, 1996 EHB at 994.

As a matter of law, the Board cannot grant the relief requested by Erie Coke because it would alter the *status quo* by permitting Erie Coke to operate and continue its unlawful activity. *Solomon*, 1996 EHB at 991; *Neville Chemical Co.,* 1992 EHB at 929; *Ramagosa,* 1990 EHB at 1466; *Amity*, 1988 EHB at 766-67. Therefore, the Petition for Supersedeas must be denied.

B. The Board is Statutorily Prohibited from Issuing a Supersedeas Because Pollution or Injury to the Public Health, Safety or Welfare Would Occur During the Period When the Supersedeas Would Be in Effect.

The Board is statutorily prohibited from issuing a supersedeas if pollution or injury to the public health, safety or welfare exists or is threatened. 35 P.S. § 7514(d)(2); *See also* 25 Pa. Code § 1021.63(b); *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 649, 651-52 ("Although the decision to issue a supersedeas is ordinarily within the Board's discretion, a supersedeas may ***never*** issue where pollution or injury to the public health, safety, or welfare exists or is threatened during the period when the supersedeas would be in effect. . . . [It] is worth repeating that all bets are off if there is ongoing harm to the environment.") (emphasis added). Erie Coke has the burden to demonstrate by a preponderance of the evidence that no pollution or injury to the public health, safety, or welfare will result from the grant of a supersedeas. *Svonavec, Inc. v. DEP*, 1998 EHB 417, 422-23; *See also Delaware Riverkeeper Network*, 2016 EHB at 43.

Erie Coke's lengthy history of noncompliance with the Air Act, the Regulations, and its expired Title V Permit is undisputed. The facts when viewed in their totality demonstrate that Erie Coke chronically and systemically fails to comply with the law. For years, these violations have subjected the environment and the residents of the City of Erie to ongoing emissions of particulate matter and coke oven gas—a hazardous air pollutant—and Erie Coke's own witnesses testified there is no end in sight. Erie Coke's violations and the ongoing pollution episodes, and the threat

these episodes pose to the public's health, safety, or welfare, prevent Erie Coke from obtaining the supersedeas it seeks.

Despite the clarity of the facts and the law, Erie Coke attempts to circumvent this statutory prohibition by claiming that "pollution," as that term is used in 35 P.S. § 7514(d)(2) and 25 Pa. Code § 1021.63(b), cannot possibly include all "air pollution," as defined by the Air Act, and that its Title V Permit exceedances are *de minimis* and pose no real threat of injury to the public health, safety, or welfare. This argument misinterprets the law and misstates the facts presented at the supersedeas hearing.

1. Pollution as Used in the Hearing Board Act Includes Air Pollution as That Term Is Defined in the Air Act.

As stated above, both the Hearing Board Act and the Board's Rules plainly proscribe the issuance of a supersedeas "in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect." 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b).[3] In its Response to the Department's Motion, and throughout these supersedeas proceedings, Erie Coke has argued that the term "pollution" in the Hearing Board Act cannot be construed to include all forms of "air pollution" as that term is defined in the Air Act. The Air Act defines "air pollution" as follows:

> The presence in the outdoor atmosphere of any form of contaminant, including, but not limited to, the discharging from stacks, chimneys, openings, buildings, structures, open fires, vehicles, processes or any other source of any smoke, soot, fly ash, dust, cinders, dirt, noxious or obnoxious acids, fumes, oxides, gases, vapors, odors, toxic, hazardous or radioactive substances, waste or any other matter *in such*

[3] It is worth noting that prior to the promulgation of the Board's Rules at Chapter 1021, 25 Pa. Code § 1021.1, *et seq*., the prohibition on supersedeas was framed differently from its current version. Specifically, former Chapter 21.78(b) read as follows: "A supersedeas shall not issue in cases where ***nuisance or significant (more than* de minimis*) pollution or hazard to health or safety*** exists or is threatened during the period when the supersedeas would be in effect." *See* 25 Pa. Code § 21.78(b) (emphasis added); *See also North Cambria Fuel Co. v. DER*, 1985 EHB 755, 756 (quoting 25 Pa. Code § 21.78 and denying supersedeas "under the strict precept" of that rule). Arguably, the removal of the qualifiers "significant (more than *de minimis*)" from the text of the current Board Rule suggests an intent that "pollution" be read ***more broadly*** than under the former rule.

> *place, manner or concentration inimical or which may be inimical to the public health, safety or welfare or which is or may be injurious to human, plant or animal life or to property or which unreasonably interferes with the comfortable enjoyment of life or property.*

35 P.S. § 4003 (emphasis added). Nothing in the Hearing Board Act or the Board's Rules suggest that the statutory definitions of "pollution" in the various Pennsylvania statutes that the Department administers, including the Air Act, should not be considered "pollution" for the purposes of a petition for supersedeas.

As the Commonwealth Court recently explained, "[w]e are instructed to give the statute its obvious meaning whenever the language is clear and unambiguous. . . . To that end, we will construe words and phrases according to their common and approved usage." *Marcellus Shale Coal. v. Dep't of Envtl. Prot.*, 193 A.3d 447, 471 (Pa. Cmwlth. 2018) (internal quotation marks and citations omitted). This Board has correctly observed that it cannot ignore the plain language of a statute, "for the plain language of a statute is the best indication of legislative intent." *Angela Cres Trust v. DEP*, 2013 EHB 130, 135 (citing *Colville v. Allegheny County Retirement Board*, 926 A.2d 424, 431 (Pa. 2007)).

The Board should not depart from the plain language of the Hearing Board Act in 35 P.S. § 7514(d)(2) and the Board's Rule at 25 Pa. Code § 1021.63(b). "Pollution," according to its common usage, broadly encompasses all forms of environmental pollution, including air pollution.[4] This is consistent with the Board's rulings throughout its supersedeas jurisprudence. For instance, the Board has specifically found that "a potential for air pollution through increased particulate emissions" is the type of pollution that necessitates denial of a supersedeas. *Chambers*

[4] "In determining the common and approved usage or meaning of undefined statutory terms, courts may turn to standard dictionary definitions." *Marcellus Shale Coal.*, 193 A.3d at 472 (citations omitted). The Merriam-Webster dictionary broadly defines "pollution" as "the action of polluting especially by environmental contamination with man-made waste" and defines "pollute" as "to contaminate (an environment) especially with man-made waste." https://www.merriam-webster.com/dictionary/pollution; https://www.merriam-webster.com/dictionary/pollute.

Dev. Co. v. DER, 1988 EHB 68, 88, *aff'd*, *Chambers Dev. Co. v. Dep't of Envtl. Res.*, 545 A.2d 404 (Pa. Cmwlth. 1988) (denying petition for supersedeas where Board found evidence of potential air pollution and danger to public health, safety, or welfare as a result of increased noise and dust at a landfill). Further, this Board has determined that "the emissions from coke oven pushing operations are harmful and must be captured and contained." *U.S. Steel Corp., v. DER*, 1980 EHB 1, 7. The Pennsylvania Supreme Court has also acknowledged that "[w]hen the Environmental Quality Board promulgated the regulation prohibiting certain fugitive emissions, it had already made a determination that such emissions cause or contribute to a condition of air pollution." *DER v. Locust Point Quarries, Inc.*, 396 A.2d 1205, 1210 (Pa. 1979). Accordingly, there can be no question that "pollution," as used in the Hearing Board Act and the Board's Rule, contemplates "air pollution" as that term is defined in the Air Act.

Ultimately, a plain reading of the text of the Hearing Board Act and the Board's Rule combined with the Board's historic application of those provisions leads to the conclusion that the ongoing air pollution at Erie Coke's Facility is the type of pollution that falls within the mandate of 35 P.S. § 7514(d)(2) and 25 Pa. Code § 1021.63(b). Therefore, the Petition for Supersedeas must be denied.

2. Pollution Exists for the Purpose of Supersedeas When Permit Limits Will Be Violated.

The Board has, in some instances, found that pollution that occurs within the strict confines of permit limits does not prevent the issuance of a supersedeas. *See Global Eco-Logical Servs. v. DEP*, 1999 EHB 649; *but cf. UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 822 (denying supersedeas where a critical issue in the case was whether operating in accordance with the permit would threaten the environment; imposing conditions on a supersedeas to ensure compliance with the permit would not address the basic dispute about whether full compliance with the permit

would result in harm). This interpretation of pollution is consistent with the definition of air pollution, which includes qualifications regarding the inimical effect: " . . . *in such place, manner or concentration inimical or which may be inimical to the public health, safety or welfare or which is or may be injurious to human, plant or animal life or to property or which unreasonably interferes with the comfortable enjoyment of life or property*." 35 P.S. § 4003.

In its Response to the Department's Motion, Erie Coke misreads the Board's decision in *Global Eco-Logical* as standing for the proposition that "the risk of continuing permit exceedances does not *ipso facto* constitute 'pollution' or 'injury in the public health, safety or welfare[.]'" Erie Coke's Response to Department's Motion, ¶ 47. However, Erie Coke's assertion that continuing permit exceedances do not constitute pollution or pose a threat of injury to the public health, safety, or welfare finds no support in *Global Eco-Logical*.

To the contrary, the Board in *Global Eco-Logical* was clear that the permit defines the acceptable level of risk and that the likelihood of pollution or harm occurring is low so long as the permittee "is required to operate in ***full compliance*** with its permit." *Global Eco-Logical*, 1999 EHB at 653 (emphasis added). In that case, the Board found that any potential harm to the environment presented by the continued operation of the site could be reduced to a tolerable risk level if the supersedeas was conditioned upon full compliance with the permit and an additional margin of safety added by the Board. *Id.* at 652-53. Specifically, because the permittee in *Global Eco-Logical* had demonstrated a "propensity to exceed its permit limits," the Board added "an extra margin of safety" in the form of a supersedeas condition that was more stringent than the permit limit. *Id.* at 653. Far from sanctioning continuing permit exceedances during the pendency of a supersedeas, the Board in *Global Eco-Logical* recognized that the mandatory prohibition on supersedeas would apply if those limits were exceeded. Accordingly, the order fashioned by the

Board provided, among other things, that: 1) the supersedeas would automatically terminate if the permittee exceeded the more stringent limit set by the Board; and 2) the supersedeas could be terminated at any time upon petition by the Department if the permittee violated any term or condition of its permit or any applicable environmental statute, rule, or regulation. *Id.* at 660.[5]

No aspect of the Board's analysis in *Global Eco-Logical* supports granting a supersedeas where there is a likelihood that chronic permit exceedances will continue during the pendency of the supersedeas. Erie Coke argues that "with appropriate protective measures in place, emissions can be reduced to a level that is sufficiently protective of the public health and welfare." Erie Coke's Response to Department's Motion, ¶ 22. However, as the Board's opinion in *Global Eco-Logical* demonstrates, "appropriate protective measures" cannot be anything short of those already delineated by Erie Coke's expired Title V Permit.

Accordingly, the Board is prohibited from granting Erie Coke's Petition for Supersedeas unless Erie Coke's continued operation of the Facility can be reduced to a tolerable risk level by ***full compliance*** with the expired Title V Permit. As explained further below, because the record in this matter shows Erie Coke will not comply with the terms and conditions of its expired Title V Permit, pollution will result and the Petition for Supersedeas must be denied.

3. Erie Coke Failed to Demonstrate That Its Continued Operation During a Supersedeas Will Not Result in Pollution or Threaten the Health, Safety, or Welfare of the Public During the Period in which a Supersedeas Would Be in Place.

Erie Coke has the burden to demonstrate by a preponderance of the evidence that no pollution or injury to the public health, safety, or welfare will result from the Board's grant of a supersedeas. *Svonavec, Inc. v. DEP*, 1998 EHB at 422-23. In this regard, Erie Coke places all of

[5] Nor does Erie Coke's reference to *Simon v. DEP*, 2017 EHB 415, lead to a different result. *Simon* involved a third party's petition to supersede the issuance of a permit. The Board granted the supersedeas in part and denied it in part with conditions to insure pollution would not occur.

its eggs in the basket of Dr. Dittenhoefer's testimony. Its strategy fails for a number of reasons. First, Dr. Dittenhoefer's testimony goes only to the second prong of the prohibition found in 35 P.S. § 7514(d)(2) and 25 Pa. Code § 1021.63(b), *i.e.*, whether "injury to the public health, safety or welfare exists or is threatened." Dr. Dittenhoefer simply does not speak to whether pollution will exist or be threatened during the pendency of a supersedeas. As set forth below, the Department presented ample evidence of ongoing pollution, and Erie Coke's own witnesses admitted that this pollution will continue.

Moreover, Dr. Dittenhoefer's opinion testimony only speaks to one particular type of health risk—chronic excess cancer risk. Tr. 71. The risk assessment performed by Dr. Dittenhoefer does not evaluate, for instance, the effect of excess sulfur emissions from Erie Coke or acute exposure to high concentrations of coke oven gas from Erie Coke. Tr. 113. Neither does his report present an opinion on the acute risk to humans inhaling particulate matter from Erie Coke. Tr. 113. Dr. Dittenhoefer's evaluation did not consider the non-cancer effects of the hazardous air pollutants such as toluene, xylenes, and phenols in Erie Coke's emissions. Tr. 101.

Further, the data used by Dr. Dittenhoefer to reach his conclusions on chronic excess cancer risk do not reflect Erie Coke's potential to emit under the expired Title V Permit or what Erie Coke proposes to emit in the Renewal Application. Tr. 96-97. In fact, Dr. Dittenhoefer's analysis used benzene concentrations from a 2016 ICR stack test that were ten times lower than Erie Coke's potential to emit and much less than what Erie Coke reported to the Department for 2016. Tr. 100-102, 106-107, DEP Ex. C. Over the Department's objection, Erie Coke tried to have Dr. Dittenhoefer reform his opinion in rebuttal, but Dr. Dittenhoefer would not clearly say he used

Erie Coke's potential to emit. Tr. 1103. Thus, his testimony in this regard is muddled at best and should be given no weight.[6]

Because Erie Coke's only evidence that addresses pollution or harm that would result during any period of supersedeas is limited to chronic excess cancer risk and these conclusions are not based on the most conservative data or even actual recent data regarding emissions of carcinogens from the Facility, Erie Coke did not meet its burden to demonstrate by a preponderance of the evidence that no pollution or injury to the public health, safety, or welfare will result from the Board's grant of a supersedeas. *Id.*

4. The Evidence and Testimony Presented at Hearing Show Pollution Will Continue During the Period Any Supersedeas Is in Place.

The evidence presented during the supersedeas hearing established that Erie Coke will continue to emit air pollution in excess of the applicable limits set by the Air Act, the Regulations, and its expired Title V Permit if a supersedeas is granted. As demonstrated by the testimony of several citizen witnesses, this pollution has real, concrete effects on the people who live and work in the vicinity of the Facility.

a. Erie Coke's Battery Stack Opacity Violations Prohibit the Grant of Supersedeas.

Erie Coke is regulatorily required to prevent visible emissions from the battery stack exceeding 20% opacity for periods aggregating more than three minutes in any one hour (i.e., the 20% opacity standard). 25 Pa. Code § 123.41(1). Erie Coke is also required to prevent visible emissions from the battery stack exceeding 60% opacity at all times (i.e., the 60% opacity

[6] On cross examination during Dr. Dittenhoefer's return to the stand, he clearly stated that his recalculation was not done in rebuttal to any testimony of Mr. Gustafson or Mr. Brophy. Tr. 1102-03. In fact, it was done before Mr. Gustafson testified on the last day of the hearing. Tr. 1102. Thus, Dr. Dittenhoefer's testimony was not rebuttal and should not be accepted. *See* Pa. R.E. 611(a); *see e.g.*, *Commonwealth v. Miles,* 846 A.2d. 132 (Pa. Super 2004); *Raitti v. Wheeling Pittsburgh Steel Corp*., 758 A.2d. 695 (Pa. Super. 2000).

standard). 25 Pa. Code § 123.41(2). Violations of the 20% and 60% opacity standards are automatically recorded by the continuous opacity monitor on Erie Coke's battery stack, and Erie Coke submits so those records to the Department on a quarterly basis. Tr. 200; 260-61; 518-20; ECC Ex. 25A (20% standard – raw data) and ECC 25B (60% standard – raw data); DEP Ex. FF (continuous opacity monitoring system ("COMS") quarterly reports).

Substantial evidence was presented throughout the supersedeas hearing regarding Erie Coke's history of noncompliance with the 20% and 60% opacity standards. The COMS reports demonstrate Erie Coke has had battery stack opacity violations every quarter from the Second Quarter of 2015 through the Second Quarter of 2019 (the most recently reported quarter). Tr. 911; DEP Ex. FF. Further, Erie Coke has experienced an increasing trend of battery stack opacity since the Third Quarter of 2017, with the highest number of opacity violations occurring in the First Quarter of 2019. Tr. 911, 914, 930; DEP Ex. FF; *See also* DEP Ex. GG.

Erie Coke's own witnesses testified that increased opacity correlates with increased emissions of particulate. For instance, Dr. Dittenhoefer testified that a higher opacity reading means more emissions are present in the emitted plume. Tr. 116. Dr. Dittenhoefer also testified on rebuttal that "[i]t's well known . . . that there is a relationship between opacity and concentrations of emissions, particularly for particulate matter like hazardous metals, semi-volatile organic compounds." Tr. 1093-94.[7] Dr. Dittenhoefer also conceded that his risk assessment did not address the acute risk to humans inhaling particulate matter from the Facility. Tr. 113. Erie Coke's Environmental Director, Edward Nesselbeck ("Mr. Nesselbeck"), testified that "increased

[7] Although Dr. Dittenhoefer attempted to dial back his testimony by questioning whether increases in opacity from tall stacks necessarily result in detectable increases in ground-level concentrations of hazardous pollutants, Erie Coke's visible emissions to the outdoor atmosphere from its battery stack in excess of the 20% opacity standard is prohibited conduct that the Environmental Hearing Board has determined to be pollution. Moreover, "a potential for air pollution through increased particulate emissions" is the type of pollution that necessitates denial of a supersedeas. *Chambers Dev. Co. v. DER*, 1988 EHB at 88.

opacity generally relates to increased particulate," and agreed that a 60% opacity reading from Erie Coke's continuous opacity monitor would indicate significant particular matter coming from the battery stack. Tr. 596. There was also testimony from Erie Coke's Plant Superintendent, Anthony Nearhoof ("Mr. Nearhoof"), that Erie Coke's battery stack frequently emits untreated coke oven gas, which escapes through cracks and holes in the oven walls and penetrates the flues. Tr. 274-75; 295; S*ee also* Tr. 717-18. When coke oven gas penetrates the flues, "[i]t becomes opacity." Tr. 295.

Several of Erie Coke's witnesses testified that Erie Coke will never be able to eliminate its battery stack opacity violations. Paul Saffrin ("Mr. Saffrin"), Erie Coke's Chief Executive Officer, admitted that Erie Coke has exceeded the allowable minutes of opacity from its battery stack every quarter since 2016. Tr. 199. When asked on cross-examination when Erie Coke will end those opacity violations, Mr. Saffrin testified that "there is never going to be a situation where there's zero opacity violations." Tr. 200. Mr. Saffrin stated that Erie Coke cannot operate within the regulatory standard for opacity. Tr. 201. Mr. Nearhoof, also admitted to Erie Coke's exceedances of its battery stack opacity limits. Tr. 261. Mr. Nearhoof testified that these opacity exceedances from the battery stack continued into the Second Quarter of 2019, after Erie Coke began implementing the plan it submitted to the Department on April 5, 2019, DEP Ex. SS ("Compliance Plan"), and also admitted that the new work practices identified in the "Compliance Plan" did not end the opacity violations. Tr. 261. Mr. Nearhoof stated his belief that the new work practices identified in the Compliance Plan would show improvement of battery stack opacity, but "not 100 percent." Tr. 261. In addition, John Nelson ("Mr. Nelson"), Erie Coke's Battery Supervisor, testified that while it is his goal to limit opacity violations, he does not believe that Erie Coke can ever eliminate them. Tr. 319-20. The most optimistic view was expressed by Mr. Nesselbeck,

who stated his hope that the end of the year is a "reasonable target" for Erie Coke to come into compliance with the opacity requirements of its permit. Tr. 591.

The reality of this ongoing pollution was described in detail by several citizen witnesses who testified about their personal experiences living and working near the Erie Coke Facility. Steve Narusewicz ("Mr. Narusewicz"), who lives just 200-300 yards from the Facility, testified that whenever a strong wind comes from the direction of the Facility toward his home, the wind brings with it a cloud of coal dust. Tr. 380, 382. When this occurs, he and his family are forced inside the house and shut all of their windows to keep the cloud of dust, and the odors associated with it, from coming into their home. Tr. 382-83. Mr. Narusewicz testified to a photograph depicting black dust that had accumulated in the screen track of the back window of his house. Tr. 384-86; DEP Ex. EEE. He explained that this type of dusty material frequently accumulates on his home and that he has to power wash the house and windows twice a year to remove the accumulation. Tr. 384-86. A sample was taken of the particulate present on Mr. Narusewicz's window and depicted in DEP Ex. EEE, and the laboratory analysis of that sample confirmed that it was comprised of 85% coke. Tr. 646-47; DEP Ex. FFF.

In addition, Scott Mellon ("Mr. Mellon"), an employee at the Pennsylvania Soldiers and Sailors Home located about three-tenths of a mile south/southwest of the Facility, testified that he routinely witnesses clouds of "thick, grayish-white fog" traveling from the direction of the Facility toward the Soldiers and Sailors Home. Tr. 397-99. The cloud causes Mr. Mellon and his fellow employees to close their windows. Mr. Mellon explained that the cloud has a strong chemical odor and causes his eyes and throat to sting. Tr. 399-402. After days when he has had his office window open and the cloud has been bad, Mr. Mellon notices black matter comes out of his nose when he blows it. Tr. 403. Mr. Mellon also testified that he has asthma and that he now uses a rescue

inhaler that he did not use before he started working at the Soldiers and Sailors Home. Tr. 404, 409.

Brandon Sutter ("Mr. Sutter"), a fisherman who docks his boat at Lampe Marina, just 600-1,000 yards northwest of the Facility, also testified about his experience with pollution coming from the Erie Coke Facility. Tr. 484-486. Mr. Sutter explained that there is a black residue on his boat every time the wind has blown from a south or southeasterly direction. Tr. 486-87. He testified to photographs taken of his boat in June 2019, which depict the black material that accumulates on his boat. Tr. 489-493; DEP Ex. XX. Mr. Sutter uses his boat at least three to four times per week, and he has to clean the black residue off of his boat with strong detergents nearly every time that he uses it. Tr. 489-90. When he takes guests out on his boat, he has to clean off the bench seat because it is covered with the black residue. Tr. 491. He does not want the residue to get on his guests because it stains clothing. Tr. 492. Mr. Sutter explained that because he is a fisherman, he pays particular attention to the direction of the wind when taking his boat out on the lake. Tr. 485-86. He believes the black residue comes from the Facility because "[his] boat is covered with the stuff" on days when the wind blows from the south/southeast—the direction of the Facility. Tr. 494. The pollution described by Mr. Sutter and his fellow citizens cannot be ignored.

As a matter of law, Erie Coke's continuing violations of 25 Pa. Code § 123.41(1) and (2) are injurious to the public. *Com. v. Coward*, 414 A.2d 91, 98 (Pa. 1980) ("When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury.") (quoting *Pennsylvania Pub. Util. Comm'n v. Israel*, 52 A.2d 317, 321 (Pa. 1947)). Moreover, Erie Coke did not rebut in any material way the actual impact its battery stack

emissions are having on the environment or the citizens that testified. Unequivocally, the record in this matter reflects that Erie Coke is causing air pollution, *i.e.,* discharging from its stack smoke, soot, noxious odors, or hazardous substances in a manner or concentration inimical or which may be inimical to the public health, safety, or welfare or which unreasonably interferes with the comfortable enjoyment of life or property. 35 P.S. § 4003. Therefore, based on Erie Coke's battery stack opacity violations alone, pollution will occur and the Board is statutorily required to deny the Petition for Supersedeas. *Chambers Dev. Co. v. DER*, 1988 EHB at 88.

b. Pollution Will Occur in the Form of Fugitive Emissions.

Daniel Brophy ("Mr. Brophy"), the Department's Air Quality Specialist and expert witness, testified to a series of violations that he observed at the Facility while performing inspections. Mr. Brophy testified to a number of inspection reports documenting his observations of fugitive pushing emissions above 20% opacity from the coke shed. Tr. 672-684; DEP Ex. L, O, P, Q, R, S, T; *See also* 25 Pa. Code § 123.15 (fugitive emissions from coke pushing operations shall not exceed 20% at any time). Mr. Brophy also testified to videos he took of Erie Coke's pushing operations in September 2018, which recorded his observations of fugitive pushing emissions exceeding 20% opacity. Tr. 673-76; DEP Ex. M, N. Mr. Brophy explained that these videos showed pushing emissions escaping the coke shed and entering the outdoor atmosphere. Tr. 675. With only one exception, since Mr. Brophy's observations in September 2018, he has observed at least one push with fugitive emissions greater than 20% opacity each time he has inspected the Facility to observe pushes. Tr. 672-684, 843-44. Mr. Brophy also testified to his frequent observations of fugitive emissions of raw untreated coke oven gas leaking from Erie

Coke's battery doors, lids, offtakes, collector main, and liquor pot and escaping into the open atmosphere while conducting his Method 303 inspections. Tr. 688; 694-711; DEP Ex. O, P, Q, X.

While Erie Coke's witnesses quibbled with Pennsylvania's regulatory standards, they could not seriously dispute the existence of the violations, nor could they rebut Mr. Brophy's testimony that it is more likely than not that he will find a violation every time he inspects the Facility. Tr. 746. Erie Coke only questioned the methods used by Mr. Brophy to observe these emissions or the accuracy of his percentages. Erie Coke did not refute that its coke-side shed is failing to capture these emissions. Mr. Saffrin, Mr. Nearhoof, and Mr. Lauricella all testified that the coke-side shed was not capturing these emissions as it should. Tr. 184-87, 280-84, 453-54. Nor will the coke-side shed be fixed anytime soon. Erie Coke is evaluating what it could do. Tr. 367-68, Tr. 475-76. Some months will expire before Erie Coke begins to address this problem. Tr. 476. As a result, these emissions that are supposed to be captured will continue to enter the environment as air pollution.

Particularly concerning was Mr. Brophy's testimony that he has observed and documented fugitive emissions from Erie Coke crossing property lines on more than one occasion. Tr. 725-28; DEP Ex. U, V, W. One of the most severe of these instances occurred less than a month before the start of these supersedeas proceedings. On June 13, 2019. Tr. 733-35; DEP Ex. Y, Z. Mr. Brophy explained that he observed a large plume of untreated, uncombusted coke oven gas escape from the push side of Erie Coke's A Battery, travel east over the boat launch, and dissipate off Erie Coke's property around the three sister stacks of the old Hammermill plant. Tr. 733-34. The cloud was large, extending from the battery to the stack, and was visible for approximately ten minutes. Tr. 733-35, 741. Mr. Brophy explained that this was "the most concerning thing that I've witnessed in inspecting Erie Coke, being the large size of the emission cloud. . . . In my opinion,

it was the worst – the most alarming that I've ever seen based on what is in raw, [un]treated coke oven gas." Tr. 741.

On cross-examination, Dr. Dittenhoefer conceded that there is a potential acute health risk posed by breathing in the emissions present in the plume Mr. Brophy observed on June 13, 2019. Tr. 71. Significantly, the home of Department's witness George Harmon is located right in the path of this cloud ("Mr. Harmon). Tr. 411. Mr. Harmon testified he has had to close his windows to avoid emissions from Erie Coke. Tr. 413-14.

Thus, at a minimum, Erie Coke's burden was to prove it would not cause pollution during the time that any supersedeas would be in effect. Clearly, it cannot prevent fugitive emissions from escaping the coke-side shed in the near term. Moreover, Erie Coke's track record indicates it is more likely than not that another cloud of emissions containing coke oven gas is likely to cross property lines during the period any supersedeas would be in effect. Therefore, the Board is statutorily required to deny the Petition for Supersedeas.

c. Pollution Will Occur When Erie Coke Takes the H_2S Absorber Offline.

In addition to Erie Coke's admitted inability to comply with the battery stack opacity limits, Erie Coke's witnesses testified that they cannot meet the restrictions on hydrogen sulfide concentrations during the pendency of a supersedeas. The H_2S Absorber reduces concentrations of hydrogen sulfide emitted from the combustion of coke oven gas at the Facility. The expired Title V Permit requires Erie Coke to operate the H_2S Absorber at all times that the coke ovens are in operation. *See* DEP Ex. DD. Erie Coke is regulatorily prohibited from flaring or combusting coke oven gas that contains sulfur compounds, expressed as equivalent hydrogen sulfide, in concentrations greater than 50 grains per 100 dry standard cubic feet. 25 Pa. Code § 123.23(b).

Mr. Nesselbeck testified that the H_2S Absorber is taken offline every other month for cleaning and routine maintenance. Tr. 602. Given this schedule, the H_2S Absorber will be taken offline three or four more times before the end of this year. Tr. 603. Mr. Nesselbeck further admitted that when the H_2S Absorber is taken offline, Erie Coke violates the 50 grains per 100 dry standard cubic feet standard set forth in 25 Pa. Code § 123.23(b). Tr. 603. Despite being told as early as August 29, 2017 that the Department would not be able to renew the Title V Permit without a backup hydrogen sulfide control device, *See* Tr. 889-99, Erie Coke did not submit a plan approval for a backup control device until late June 2019. Tr. 375. The plan approval states that Erie Coke intends to install the backup hydrogen sulfide control system within eight months after the Department's approval of the plan approval. ECC Ex. 9. Thus, by Erie Coke's own admission, at a minimum, it will continue combusting coke oven gas with hydrogen sulfide concentrations in excess of the regulatory requirement set forth in 25 Pa. Code § 123.23(b) from now until at least eight months after Erie Coke obtains the Department's approval of a backup H_2S control system.

Further, the Board heard ample testimony of the odors impacting residents living, working, and recreating in and around the Facility. Mr. Narusewicz, Mr. Mellon, Mr. Harmon, and Cathy Cardoso ("Ms. Cardoso") all testified how they have to close the windows of their homes and offices due to the odors. Tr. 382-83, 402-03, 413, 421-22. Ms. Cardoso testified how she could not take her usual walks when the odors from Erie Coke were present. Tr. 422-23. These effects meet the definition of air pollution in that they unreasonably interfere with the comfortable enjoyment of the life or property of each of these individuals.

Erie Coke's continuing violations of 25 Pa. Code § 123.23(b) are injurious to the public as a matter of law. *Delaware Riverkeeper Network, et al. v. DEP*, 2013 EHB 60, 63; *Pleasant Hills Const. Co. v. Pub. Auditorium Auth. of Pittsburgh*, 782 A.2d 68, 79 (Pa. Cmwlth. 2001); *Com. v.*

Coward, 414 A.2d 91, 98 (Pa. 1980). Thus, it would be an error of law to grant a supersedeas while acknowledging that Erie Coke's violation of this regulatory standard and the record evidence of pollution will continue during the period of any supersedeas.

C. Erie Coke Failed to Meet the Standard for Obtaining a Supersedeas.

If a petitioner for supersedeas is able to carry its burden of establishing that pollution is not likely to occur, the Board will then consider: 1) irreparable harm to the petitioner; 2) likelihood of the petitioner's success on the merits; and 3) likelihood of injury to the public or other parties. 35 P.S. § 7514(d)(1)(i)-(iii); 25 Pa. Code § 1021.63(a)(1)-(3). In order for the Board to grant a petition for supersedeas, the petitioner must make a credible showing on each of the three enumerated factors, with a *strong showing* of a likelihood of success on the merits. *Delaware Riverkeeper Network*, 2016 EHB at 43 (emphasis added). If the petitioner fails to carry its burden on any one of the factors, the Board need not consider the remaining requirements for supersedeas relief. *Id.* For the reasons that follow, Erie Coke did not carry its burden on any of these factors in these proceedings and its Petition for Supersedeas must be denied.

1. Erie Coke Did Not Meet Its Burden to Establish a Likelihood for Success on the Merits.

Erie Coke has the burden to make a strong showing of its likelihood of success on the merits in this appeal. *Simon v. DEP*, 2017 EHB 414, 417; *Delaware Riverkeeper Network*, 2016 EHB at 43. Erie Coke's chance of success on the merits must be more than speculative; however, it need not establish the claim absolutely. *Global Eco-Logical Serv. v. DEP*, 2000 EHB 829, 831-32.

Erie Coke bears the burden of proof in its underlying appeal of the Department's Denial. 25 Pa. Code § 1021.122(c)(1). In order to carry its burden of proof, Erie Coke must show by a preponderance of evidence that the Department's Denial "was arbitrary, capricious, contrary to

law, or a manifest abuse of discretion." *Pagnotti Enterprises, Inc. v. DER*, 1993 EHB 884, 901 (citing *Warren Sand and Gravel Co., Inc. v. DER*, 341 A.2d 556 (Pa. Cmwlth. 1975); *Franklin Twp. Bd. of Supervisors v. DER*, 1992 EHB 266).

As the Commonwealth Court has explicitly recognized, "[a] permit ***will be denied*** if '[t]he applicant or related party has a violation or lack of intention or ability to comply that is listed on the compliance docket.'" *Eureka Stone Quarry, Inc. v. Dep't of Envtl. Prot.*, 957 A.2d 337, 347 (Pa. Cmwlth. 2008) (citing 25 Pa. Code § 127.422(5)) (emphasis added); *See also* 35 P.S. § 4007.1(a) (prohibiting the Department from reissuing a permit to an applicant that is in violation of the Air Act, the Regulations, a plan approval, a permit, or an order of the Department, as indicated by the Department's compliance docket, unless the violation is being corrected to the satisfaction of the Department); 35 P.S. § 4007.1(b)(authorizing the Department to refuse to issue any permit to an applicant that lacks the intention or ability to comply with the Air Act, the Regulations, a plan approval, a permit, or an order of the Department as indicated by past or present violations, unless the lack of intention or ability to comply is being or has been corrected to the satisfaction of the Department). Consequently, Erie Coke's placement on the compliance docket was enough on its own to justify the Department's Denial.

The reasons for which the Department may deny or refuse to renew a permit are further set forth at 25 Pa. Code § 127.422:

> The Department will deny or refuse to revise or renew an operating permit to a source to which one or more of the following applies:
>
> > 1) The Department has determined it is likely to cause air pollution or to violate the act, the Clean Air Act or the regulations thereunder applicable to the source.
> >
> > 2) In the design of the source, provision is not made for adequate verification of compliance, including source testing or alternative means to verify compliance.

> 3) The EPA has notified the Department in writing that the permit is not in compliance with the requirements of the Clean Air Act or the regulations thereunder.
>
> 4) The applicant has constructed, installed, modified or operated an air contamination source or installed air pollution control equipment or devices on the source contrary to the plans and specifications approved by the Department.
>
> 5) The applicant or a related party has a violation or lack of intention or ability to comply that is listed on the compliance docket.

To prevail in this appeal, Erie Coke must show by a preponderance of the evidence that the reasons for denial outlined in 25 Pa. Code § 127.422 are not present and that the Department's Denial was arbitrary, capricious and an abuse of discretion. Because several of the reasons for denial have been established by substantial evidence and the record shows that the Department's Denial was based on years of noncompliance with no end in sight, Erie Coke has failed to make any showing of its likelihood of success, much less a strong one.

a. Erie Coke's Placement on the Compliance Docket Supports the Department's Denial.

As noted above, the Air Act authorizes the Department to place a permittee on the air quality compliance docket, which serves, among other things, as a permit bar. 35 P.S. § 4007.1; *Eureka Stone Quarry,* 957 A.2d at 347. In order for Erie Coke to show it is likely to succeed, Erie Coke must show that the Department's placement on the compliance docket of Erie Coke's continuing violations and its lack of intent or ability to comply with the Air Act, the Regulations, and the expired Title V Permit, was unlawful or an abuse of discretion. 25 Pa. Code § 127.422(5). Placement on the compliance docket is governed by 25 Pa. Code § 127.412(f)-(g):

> (f) If the Department finds that the applicant or related party has an existing or continuing violation or lacks the intention or ability to comply with the act, or the

> rules or regulations promulgated under the act, or a plan approval operating permit or order of the Department, as indicated by past or present violations, the Department will attempt to resolve the violations or lack of intention or ability to comply informally.
>
> (g) If the Department is unable to resolve the violation or lack of intention or ability to comply on an informal basis, the Department will place the violation and may place the lack of intention or ability to comply on the compliance docket. The violation or lack of intention or ability to comply shall remain on the compliance docket until it is resolved to the satisfaction of the Department.

On May 9, 2019, the Department placed Erie Coke's continuing violations at the Facility and Erie Coke's lack of intention or ability to comply on the compliance docket. DEP Ex. UU. Erie Coke appealed that action on June 10, 2019 at EHB Dkt. No. 2019-050-B. Erie Coke did not file a petition to supersede that action.[8] Therefore, Erie Coke's continuing violations and its lack of intent or ability to comply remain on the Department's compliance docket and the Department's Denial was properly based on 25 Pa. Code § 127.422(5); *Id*.

Erie Coke lacks any basis in law or fact to contest the Department's placement of its continuing violations and its lack of intent or ability to comply on the compliance docket or its conclusion that violations will continue. The Commonwealth Court's decision in *Eureka Stone Quarry,* 957 A.2d 337, is directly on point. In *Eureka*, the Commonwealth Court affirmed the Board's adjudication upholding the Department's placement of a quarry operator, Eureka, on the

[8] On July 3, 2019, Erie Coke filed its Application for Temporary Supersedeas ("Application") and Petition for Supersedeas ("Petition") at EHB Dkt. No. 2019-069-B. Erie Coke put EHB Dkt. Nos. 2019-050-B and 2019-019-B on the heading of both the Application and Petition; however, during a July 5, 2019 conference call on the Application, the Board clarified that it would consider the Application and the Petition to be filed with respect to only EHB Dkt. No. 2019-069-B. Later on July 5, 2019, the Board issued an Order at EHB Dkt. No. 2019-069-B granting the Application and scheduling a hearing on the Petition. The Board's July 5, 2019 Order did not list EHB Dkt. No. 2019-050-B or 2019-019-B in the heading.

In fact, the only further mention of the Petition on any of the above-referenced dockets was in Erie Coke's response to the Department's Motion to Deny Supersedeas Without Hearing. In its Response, Erie Coke incorrectly stated that "the parties and Board agreed, in their July 5, 2019 conference, that a supersedeas in No. 2019-069-B would be sufficient to provide the necessary relief." Response, p.3, ¶16. Erie Coke went on to state that "[t]o the extent a supersedeas in No. 2019-050-B is necessary to provide complete relief, Erie Coke asks the Board to deem the filings in this matter as applying, in equal measure, to No. 2019-050-B;" however, nothing was ever filed at EHB Dkt. No. 2019-050-B.

compliance docket. *Id.* at 346-47. The Commonwealth Court found that the Board's decision was supported by substantial evidence where the record showed that Eureka had a history of ongoing violations (consisting of 70 air quality violations over a five-year period) and that Eureka "had been operating in a near constant state of noncompliance" despite taking a few steps to address its problems. *Id.* at 346. In addition, the record showed that Eureka had failed to take adequate steps to prevent violations. *Id.* For instance, the Department requested abatement plans on three separate occasions prior to placing the company on the compliance docket; however, Eureka failed to respond to these requests. *Id.* at 346-47. The Commonwealth Court noted that "[t]he Department worked with Eureka for a number of years attempting to get Eureka in compliance and only placed Eureka on the compliance docket after Eureka continued to violate the regulations and failed to respond to the Department's requests for abatement plans." *Id.* at 347. The Commonwealth Court concluded that the Board correctly determined that the Department's placement of Eureka on the compliance docket was reasonable and appropriate because Eureka lacked the ability and/or intent to comply with the air quality laws. *Id.*

The evidence presented at the supersedeas hearing in this case closely parallels the facts in *Eureka*, and in many ways, is even more egregious. Throughout the supersedeas hearing, the evidence continually demonstrated that Erie Coke has a significant history of noncompliance with the air quality laws, and that despite the Department's repeated efforts to coerce compliance, Erie Coke simply cannot comply with the law. Compared to the 70 violations over a five-year period which supported placement on the compliance docket in *Eureka*, here, the Department's Compliance Docket Notification identifies 78 unresolved violations between June 2017 and April 2019. DEP Ex. UU, Exhibit A. Erie Coke has been on notice that some of the continuing violations at the Facility would prevent the Department's approval of Erie Coke's Renewal

Application since at least August 2017. Tr. 889-90, 897. Erie Coke has been on notice of all of the continuing violations at the Facility that will prevent renewal since at least November 2018. Tr. 925-26; DEP Ex. OO. Despite the Department's repeated efforts to work with Erie Coke to get an adequate plan to abate the ongoing violations at the Facility, Erie Coke has repeatedly demonstrated its inability to submit and execute such a plan. Additionally, in several instances, Erie Coke's own witnesses testified that Erie Coke was unable to meet specific regulatory standards.

In the underlying case in *Eureka*, the Board made the following observations when concluding that the Department did not abuse its discretion by placing Eureka on the compliance docket:

> It is abundantly clear that the negotiation and settlement of the civil penalties from 2000 to 2004, culminating in the June 2004 Consent Agreement for Civil Penalties (CACP), did little to impress upon Eureka the need to change its operations to become proactive about reducing fugitive emissions of dust at its facilities. Eureka has been in business for a very long time and should have enough sophistication at this point to understand that in the Department's view civil penalties are not to be considered merely a cost of doing business. Rather, operators are expected to be proactive about compliance and willing to do what is necessary to achieve compliance, not just react when they are cited with a violation. Eureka waited for the Department to catch a violation and only then did it seem willing to rectify the problem. Although Eureka did abate many of the violations observed by the Department, it never did more than the minimum which was necessary. There is very little evidence in this record that Eureka had any intention of developing a long-term solution to the succession of fugitive emission problems prior to its placement on the docket. We conclude that there is ample evidence upon which to base a conclusion that Eureka lacked the intent to comply with the law and was properly placed on the compliance docket.

Eureka Stone Quarry, Inc. v. DEP, 2007 EHB 419, 463. These exact observations could be made of Erie Coke's environmental compliance history, and the conclusions reached by the Board in *Eureka* and upheld by the Commonwealth Court apply with equal force here. While Erie Coke

would have this Board focus on recent, isolated efforts at compliance, the reality is that Erie Coke never did more than the minimum necessary to placate the Department and continue operating. Thus, Erie Coke is properly on the compliance docket and the Department's Denial was lawful and not an abuse of discretion. *Eureka Stone Quarry,* 957 A.2d at 346-47; *see also Rochez Bros.*, 334 A.2d at 794.

b. Erie Coke Cannot Comply with the Law and Regulations

The Commonwealth Court also has made clear that the Department must deny an application to renew an operating permit where it is demonstrated that the applicant cannot comply with the law. *Rochez Bros., Inc. v. DER*, 334 A.2d. 790, 794 (Pa. Cmwlth. 1975) (holding the Department's denial of an application to renew an operating permit was proper because appellant could not comply with the opacity requirements of 25 Pa. Code § 123.41). The record in this matter shows Erie Coke cannot comply and the Department's Denial was proper under 25 Pa. Code § 127.422.

i. Erie Coke Cannot Comply With 25 Pa. Code § 123.41.

Like the appellant whose renewal application was denied in *Rochez*, Erie Coke cannot comply with the opacity requirements at 25 Pa. Code § 123.41. Erie Coke's compliance is monitored by a continuous opacity monitoring system in its battery stack that provides minute-by-minute compliance data and allows Erie Coke to compile a quarterly COMS report, which summarizes the number of minutes Erie Coke was in violation for the previous quarter. Tr. 200, 909-10; DEP Ex. FF.

While Erie Coke had opacity violations every quarter in 2016 and 2017, the Department noticed a more than tenfold spike in the minutes of opacity violations in the Third Quarter of 2017. Tr. 911, 914. At the time, Erie Coke told the Department that the primary cause of the increased

minutes of violation were issues with training and maintenance. Tr. 916-17; DEP Ex. II, JJ. When the opacity violations continued in 2018, the Department eventually stopped entering into consent assessments of civil penalty for the violations with Erie Coke. Tr. 911. By the Third Quarter of 2018, the minutes of opacity violations remained elevated. DEP Ex. FF, GG. Erie Coke again explained that better operation and maintenance of the battery would abate the opacity violations. Tr. 924, 928-30; DEP Ex. QQ. However, during the First Quarter of 2019, Erie Coke recorded the most minutes of opacity violations ever recorded by the Facility's COMS. Tr. 930; DEP Ex. FF, GG. Most recently, Erie Coke had more than 3,000 minutes of opacity violations in Second Quarter 2019. DEP Ex. FF.

Due to Erie Coke's repeated failure to address the continuing opacity violations, the Department's Order required Erie Coke to, among other things, submit a report describing and determining the cause of the continuing opacity emissions exceedances from the Battery stack, and a list of corrective actions to prevent further such exceedances. DEP Ex. RR, pp. 13-14. Erie Coke submitted the "Compliance Plan" proposing eight items to address the opacity issues at the Facility. Tr. 451-53; DEP Ex. SS, p. 25. Of the eight items Erie Coke proposed, only one of the items – reducing the number of stuck ovens – was not the type of routine and maintenance activities that had been discussed between the Department and Erie Coke over the previous years. Tr. 452-53.

Reducing the number of stuck ovens is not routine operation and maintenance because stuck ovens are not a routine occurrence in a well-functioning coke facility. Tr. 453. Moreover, Erie Coke has not been able to reduce the number of stuck ovens since submitting the April response. Tr. 447. To the contrary, as of July 10, 2019, all of the ovens that were stuck in May are still stuck, and three additional ovens are stuck. Tr. 958-59. These stuck ovens are all ovens that were not rebuilt under the 2010 Consent Decree. Tr. 959.

Erie Coke's own witnesses repeatedly testified that compliance with the battery stack opacity requirements was not possible. Tr. 201-02, 261, 318-20, 540-41. They say that there could always be upset conditions where the 20% opacity requirement is exceeded. Tr. 201-02, 540-41. However, the evidence in this matter demonstrates that upset conditions are simply the normal operating conditions at the Facility. Since the Third Quarter of 2017, the number of days per quarter where there was at least one exceedance of the battery stack opacity requirements ranged from 54 to 86, with six of the eight quarters seeing more than 80 days with violations. DEP Ex. FF, GG.

Accordingly, the evidence is clear that despite nearly two years of attempting to resolve the opacity violations, Erie Coke cannot comply with the applicable opacity requirements for the battery stack. Thus, the Department's Denial is lawful and not an abuse of discretion. *Rochez Bros.*, 334 A.2d. at 794.

ii. Erie Coke Cannot Meet Visible Pushing Emission Requirements of 25 Pa. Code § 123.15.

Erie Coke also cannot comply with the applicable requirements for visible pushing emissions at 25 Pa. Code § 123.15. Over the past year, instances of unlawful fugitive emissions from Erie Coke's pushing operations increased. Since September 2018, with one exception, each time Mr. Brophy inspected the Facility to observe pushes, he observed at least one push with fugitive emissions of greater than 20%. Tr. 672-84, 843-44. On December 21, 2018, Erie Coke's counsel proposed to address pushing violations, like the opacity violations, by improving operation and maintenance. Tr. 929; DEP Ex. QQ.

The Department's Order required Erie Coke to submit a plan and schedule to correct the continuing pushing violations, including an "engineering evaluation of the Coke Side Shed Baghouse's ability to capture and control coke pushing emissions from the Battery in accordance

with the Air Act, the Regulations, the Permit, and all applicable Federal laws, and a list of corrective actions to prevent future opacity emission exceedances." DEP Ex. RR. The "Compliance Plan" again proposed operation and maintenance activities to resolve the pushing violations, such as inspecting and repairing the shed and baghouse. Tr. 459-60; 937-38; DEP Ex. SS, p.48. However, inspections and repairs of the shed and baghouse are already required by the Regulations and the expired Title V Permit. 40 CFR §§ 63.7300 and 63.7335; Tr. 937-38; DEP Ex. DD, pp. 124-25, 134-35. In fact, the "Compliance Plan" proposed inspections and repairs on a quarterly or yearly basis, while the Regulations and expired Title V Permit require monthly inspections and repairs. DEP Ex. SS.

The "Compliance Plan" did not include an engineering evaluation of the shed's overall ability to effectively capture pushing emissions, but proposed to, at a future date, evaluate the feasibility of a baffle system to mitigate wind and conduct an engineering evaluation of the design of the shed versus the way it was actually built. DEP Ex. SS, p. 48.

Accordingly, as of the date of the Department's Denial, Erie Coke had not come up with a way to consistently comply with 25 Pa. Code § 123.15. Therefore, the Department's Denial is lawful and not an abuse of discretion.[9]

iii. Erie Coke Lacks the Financial Ability to Come into Compliance.

To succeed on the merits, Erie Coke had the burden to establish by a preponderance of evidence that it has the financial ability to bring the Facility into compliance. Because Erie Coke

[9] Neither can Erie Coke meet the proper restrictions on hydrogen sulfide concentrations. When the H_2S Absorber is offline, by Erie Coke's own admission, Erie Coke cannot meet the regulatory hydrogen sulfide standard set forth in 25 Pa. Code § 123.23(b). Tr. 203-04, 603. After years of requests, Erie Coke finally submitted a plan approval in late June of 2019. Tr. 375. The plan approval states that Erie Coke intends to install the backup control device within eight months of the Department's approval. ECC Ex. 9. In the meantime, Erie Coke will continue to violate 25 Pa. Code § 123.23(b) on a regular basis.

cannot fund even the improvements it proposes to operate lawfully, it cannot show that the Department's conclusion that it lacks ability to comply is arbitrary or capricious.

[Following Redacted]

[redacted]

[redacted]

[redacted]

iv. Erie Coke Has Demonstrated It Lacks the Intent to Comply.

Erie Coke has the burden in this appeal to show by a preponderance of the evidence that it has the intent to comply. While this may seem a low bar, Erie Coke has failed to provide substantial evidence of its intent. Mr. Saffrin and Mr. Nesselbeck have claimed good intentions. Tr. 186, 591. But the testimony and evidence presented by Erie Coke at the hearing fall short of

meeting its burden. The evidence and testimony show that Erie Coke only intends to do whatever is necessary to continue operating.

[redacted]. Erie Coke has no budget for capital improvements. Tr. 217. [redacted]. What this means is Erie Coke will try to squeeze out some funds for environmental compliance from its operating budget if it can. [redacted] Clearly, Erie Coke lacks the intent to make environmental compliance its priority.

More specifically, Erie Coke knew well before its 2019 fiscal year began that it had to install a backup H_2S Absorber. Tr. 889-90, 897. Yet, it made no financial provision for it. Erie Coke did not even begin evaluating backup devices until December 2018, more than 16 months after the Department first brought it up. Tr. 437-38. This was done only after the Department threatened to put Erie Coke on the compliance docket. DEP Ex. OO. No evaluation or plan approval was submitted to the Department until after Erie Coke was ordered to do it. DEP Ex. RR; ECC Ex. 6, ECC Ex. 9: Tr. 556. Mr. Durkin testified that Erie Coke still has no firm source of capital to install the device. Conf. Tr. 34-38. Mr. Nesselbeck said no money has been set aside for the project. Tr. 585. One can only conclude that Erie Coke has delayed as long as it could before being forced to install this backup device.

The centerpiece of Erie Coke's intent argument is the "Compliance Plan" submitted in response to the Department's Order. DEP Ex. SS. However, even that was never intended to end

in compliance with the terms and conditions of the expired Title V Permit. Tr. 460. Mr. Lauricella described it as an engineering evaluation not tied to compliance with the terms of the expired Title V Permit. Tr. 460. He agreed the action items were things Erie Coke should have already been doing. Tr. 451-53. Mr. Nesselbeck confirmed that the operation and maintenance plans attached to the "Compliance Plan" were preliminary and evolving. Tr. 566-67. Erie Coke's main strategy remains the same as it was in late 2017: improve operations and personnel. DEP Ex. SS. Yet, Erie Coke has no training budget. Tr. 214.

Further, Erie Coke's claim of a "new team" to ensure environmental compliance is misleading and does not prove Erie Coke's intent to comply. Mr. Lauricella was the engineer that presided over the demise of Erie Coke's sister plant in Tonawanda, New York. Tr. 433-36. He incredibly showed little knowledge of the well-known environmental compliance issues that eventually closed that coke plant. Tr. 433-36. He previously did work for Erie Coke including managing the construction of the coke-side shed. Tr. 438-39. It is fair to conclude that his work resulted in the coke-side shed not being constructed in accordance with the plan approval. Tr. 438-43. Gene Loepp ("Mr. Loepp"), the Plant Environmental Manager, formerly worked for Erie Coke and is focused on the wastewater treatment plant. Tr. 531, 579-80. Mr. Nesselbeck has consulted with Erie Coke in the past. Tr. 522-23. He has no authority over operations or employees at the plant. Tr. 586-88. He has been on the job since the first week of March, but only recently has he become familiar with the requirements of the expired Title V Permit. Tr. 592-93. The person most familiar with the expired Title V Permit is former environmental manager, Randy Wiler, and he is only at the Facility one day a week. Tr. 593-94.

Finally, the Board must see that Erie Coke's efforts to comply amount only to fending off the Department as long as it can. Erie Coke did nothing before the Department increased its

informal enforcement efforts in November 2018. It did little until the Department's Order in February 2019. The Department's Compliance Docket Notification still did not elicit much response. Mr. Gustafson described the condition of the Facility in May 2019 as "deplorable." Tr. 962. If there ever was a time to manage the plant correctly this was it. *Perano v. DEP*, 2011 EHB 453, 498. The testimony of the CEO himself, Mr. Saffrin, confirms Erie Coke's only intent is to keep the Department at bay. Tr. 191-92.

Erie Coke has lacked the intent to comply with the Air Act, the Regulations, and its expired Title V Permit since at least 2017, and it still has not demonstrated by a preponderance of the evidence that it has the intent now. Therefore, it has no likelihood of success on the merits and its Petition for Supersedeas must be denied.

c. Erie Coke Installed Air Pollution Control Equipment at the Facility Contrary to the Plans and Specifications Approved by the Department.

Another reason for the Department's Denial is Erie Coke's installation of the coke-side shed and baghouse contrary to the plans and specifications approved by the Department. 25 Pa. Code § 127.422(4). The plan approval for the coke-side shed and baghouse required a peaked-roof on the shed; however, Erie Coke built a slightly slanted roof, thereby decreasing the designed capture area. Tr. 443; DEP Ex. BBB. Additionally, the design of the coke-side shed and baghouse required a variable frequency drive fan; however, Erie Coke did not use a variable frequency drive fan when constructing the baghouse, thereby removing any ability to control the amount of suction being used to capture the pushing emissions. Tr. 443; DEP Ex. BBB. Erie Coke admits it has installed air pollution control equipment at the Facility contrary to the plans and specifications approved by the Department as stated in the Department's Denial and 25 Pa. Code § 127.422 (4). Therefore, Erie Coke cannot succeed on the merits of this appeal.

d. The Department's Denial Was Neither Arbitrary, Capricious nor an Abuse of Discretion.

The Department's Denial was not a decision that was made carelessly or in haste as Erie Coke would suggest. Erie Coke submitted its Renewal Application on August 28, 2017. Pursuant to 25 Pa. Code § 127.421(b), the Department is required to either approve or disapprove a complete application within 18 months after the date of receipt. The Department's Denial came 22 months after Erie Coke submitted the Renewal Application. Erie Coke would now have the Board believe that the Department's Denial was abrupt and the Department should have waited to see if Erie Coke's recent operation and maintenance efforts would improve compliance. To the contrary, the Department carefully and deliberately exercised its discretion since August 2017. With no end in sight to Erie Coke's violations and another alarming incident of fugitive coke oven gas leaving the Facility on June 13, 2019, the Department acted on the Renewal Application in the only way it lawfully could: denial.

In the 22 months that the Department had the Renewal Application, the Department notified Erie Coke of its compliance concerns and gave Erie Coke every chance to take steps to end the repetitive and continuous violations at the Facility. Beginning on the day after it submitted the Renewal Application, the Department told Erie Coke it would need to install a backup hydrogen sulfide control device to meet the regulatory standards set forth in 25 Pa. Code § 123.23(b). Tr. 877-78.

In early 2018, the Department let Erie Coke know it would no longer be resolving civil penalty liability for violations through consent assessments of civil penalty due to the increase in frequency and volume of both types of violations with no tangible plan to abate them. Tr. 882-83, 916-17. Despite weekly dialogue between the Department and Erie Coke, as of November of 2018, more training and better operation and maintenance still had not abated the violations. Tr.

922. The Department met with Erie Coke on November 9, 2018 to ensure that Erie Coke was aware of the Department's concerns regarding the wide array of continuing violations at the Facility, and to ascertain any additional plans that Erie Coke might have to abate those violations. Tr. 923-27. Again, the Department was met with the same response: improved training, operation, and maintenance. Tr. 923-25.

The Compliance Docket Procedure instructs the Department to first attempt to resolve continuing violations informally, culminating in the issuance of a compliance review notification letter informing the regulated entity that the ongoing violations could result in placement on the compliance docket, thereby precluding issuance of a permit ("Compliance Review Notification"). DEP Ex. PP. The Department provided the Compliance Review Notification letter to Erie Coke after the November 9, 2018 meeting failed to yield any proposed corrective actions to abate the continuing violations at the Facility. Tr. 925-27; DEP Ex. OO. On December 21, 2018, Erie Coke's counsel sent a letter to the Department responding to the Compliance Review Notification letter. Tr. 928-29. Through the December 21, 2018 letter, Erie Coke again proposed to resolve the litany of continuing violations at the Facility with improved operation and maintenance. Tr. 929-31.

Following Erie Coke's submission of the December 21, 2018 letter, and despite hiring Mr. Nesselbeck in early 2019, Erie Coke recorded the most minutes exceeding the battery stack's 20% opacity limit that the COMS had ever recorded. Tr. 930; DEP Ex. FF, GG. Additionally, Erie Coke continued to experience a large volume of other violations at the Facility on a regular basis. DEP Ex. BB (attached chart). Having exhausted its informal enforcement options, the Department's Order required Erie Coke to, among other things, notify the Department each time the H_2S Absorber was taken offline, submit a plan approval for a backup hydrogen sulfide control

device, and submit a compliance schedule to abate the continuing violations at the Facility. DEP Ex. RR.

The Department met with Erie Coke on March 5, 2019 to discuss Erie Coke's progress in developing a compliance schedule, and again emphasized that any submission to the Department needed to include a schedule to abate the continuing violations at the Facility. Tr. 1070-71. On April 5, 2019, Erie Coke submitted the "Compliance Plan," which included almost exclusively operation and maintenance activities that should already have been implemented on an ongoing basis at the Facility. Tr. 451-53, 459-60, 936; DEP Ex. SS, pp. 25, 48. Moreover, the "Compliance Plan" was, in fact, not a plan to attain compliance at all—it was prepared with absolutely no regard for the Facility's compliance with its expired Title V Permit. Tr. 459-60. Further, some of the proposed operation and maintenance activities, such as regular inspections and repairs, were proposed with frequencies far less than required by the law. 40 CFR §§ 63.7300 and 63.7335; Tr. 937-38; DEP Ex. DD, 124-25; 134-35.

If an informal Compliance Review Notification does not result in abatement of the violations, and more formal efforts to coerce compliance are also unsuccessful, the Compliance Docket Procedure next instructs the Department to place the violator on the compliance docket. DEP Ex. PP. After the Department's formal effort of ordering Erie Coke to submit a compliance schedule failed, with Erie Coke again sticking to its "operation and maintenance" script to no avail, the Department placed Erie Coke on the compliance docket on May 9, 2019. Tr. 945; DEP Ex. UU.

On May 15, 2019, the Department conducted a comprehensive inspection of the Facility, only to find the Facility in "deplorable condition." Tr. 962; DEP Ex. O, P. The Department continued to inspect the Facility throughout May and June and observed violations at all but one

inspection. Tr. 678-67, 843-44; DEP Ex. BB (attached chart). In fact, on June 13, 2019, more than a month after the Department had placed Erie Coke on the compliance docket, Mr. Brophy, who has been the Department's inspector for the Facility for over seven years, witnessed a cloud of fugitive coke oven gas emissions traveling off of Erie Coke's property that constituted the "most alarming thing [he had] ever seen" in inspecting Erie Coke. Tr. 658, 733-41; DEP Ex. Y, Z. Unfortunately, Mr. Brophy witnessed the cloud cross over Lake Front Drive and over the residence of Mr. Harmon, who testified that he is forced to close his windows due to the malodors emanating from Erie Coke. Tr. 413, 860-61.

Following the Department's informal and formal efforts to compel Erie Coke to abate the violations at the Facility, Erie Coke's ongoing violations, including the egregious violation on June 13, 2019, left the Department with no further options. With no end in sight to the repeated violations at the Facility, Erie Coke forced the Department to fulfill its duties by denying Erie Coke's application to renew the expired Title V Permit. Tr. 961-63.

Like the Department's denial of the permit in *Perano*, the Department's Denial is not meant to punish, the objective it is to protect air quality. *Perano*, 2011 EHB at 502. Further any improvement by Erie Coke is not likely to continue without intense scrutiny by the Department, which it cannot afford to sustain. *Perano*, 2011 EHB at 498.

For these reasons, Erie Coke did not carry its burden to show any likelihood that the Department's Denial is arbitrary or capricious or an abuse of discretion, and its Petition for Supersedeas must be denied.

e. The Department Was Not Required to Publish Public Notice of Its Intent to Deny the Renewal Application.

At the hearing, Erie Coke asked Mr. Gustafson whether the Department published notice of its intent to deny Erie Coke's renewal application. Tr. 988. The Department did not. Pursuant

to 25 Pa. Code § 127.424(c), if the Department denies an operating permit, written notice of the denial will be given to requestors and to the applicant and will be published in the *Pennsylvania Bulletin*. The Department's Denial was hand-delivered to Erie Coke on July 1, 2019. Notice of the Department's Denial was published in the *Pennsylvania Bulletin* on July 13, 2019. 49 Pa.B. 3635, *Saturday, July 13, 2019*.

In contrast to subsection (c), subsection (b) of 25 Pa. Code § 127.424 provides for public notice to solicit comment when the Department is issuing an operating permit. Section 127.424 (b) requires the Department to draft a notice and send it to the applicant, the EPA, any state within 50 miles of the facility and any state whose air quality may be affected and that is contiguous to the Commonwealth. Further, the applicant shall, within ten days of receipt of notice, publish the notice on at least three separate days in a prominent place and size in a newspaper of general circulation in the county in which the source is to be located. Proof of the publication shall be filed with the Department within one week thereafter. An operating permit will not be issued by the Department if the applicant fails to submit the proof of publication

The purpose of the advanced public notice in subsection (b) is to solicit comments from people and states whose air quality may be affected by the Department's action, and the notice must provide for a 30-day comment period. 25 Pa. Code § 127.424(e).

Providing advanced public notice of a denial is not required because the air quality of the public and nearby states is not affected in any way that is detrimental to the interest of those parties. Thus, public comment on the Department's action is not solicited. The affected party, the applicant, is given written notice and an opportunity to appeal the action within 30 days. Accordingly, the Department was not required to provide advance public notice of the Department's Denial.

Even if the Board determines that 25 Pa. Code § 127.424 required the Department to publish advance notice of the Department's Denial, Erie Coke is still not likely to prevail on the merits of the appeal. Any failure to publish advanced notice of the Department's Denial is a curable error that has no substantive effect on its decision to refuse to renew Erie Coke's expired Title V Permit. *See*, e.g. *Harvilchuck v. DEP*, 2014 EHB 673, 690-92. Thus, Erie Coke has not met its burden to make a strong showing of its likelihood of success on the merits. Its Petition for Supersedeas should be denied.

2. Erie Coke's Claimed Irreparable Economic Harm Is Speculative and Self Inflicted.

Because Erie Coke is unable to make any showing of likelihood of success on the merits, the Board is not obligated to address the other two factors to consider when deciding whether or not to grant a petition for supersedeas. *Teska and Mannarino v. DEP*, 2016 EHB 541, 547; *Dickinson Twp. v. DEP*, 2002 EHB 267, 268; *Oley Twp. v. DEP*, 1996 EHB 1359, 1369. However, at least one of the Board's prior supersedeas opinions indicates that great irreparable harm may support supersedeas even in the absence of any likelihood of success on the merits. *See, e.g.*, *Reinhart v. DEP*, 1997 EHB 401, 419 ("On occasion, we have been persuaded to grant a supersedeas even though we believed that the petitioner would not prevail on the merits.") (citing *Keystone Cement Co. v. DER,* 1992 EHB 590).

The Board should not allow Erie Coke's claims of great irreparable economic harm to outweigh its utter lack of likelihood of success in this matter. Nothing in the Department's Denial requires Erie Coke to close immediately. Moreover, any economic harm to Erie Coke arises from its inability to operate in accordance with the Air Act and the Regulations, not the Department's Denial.

a. The Department's Denial Does Not Require Erie Coke to Immediately Shut Down.

To obtain a supersedeas of a Department action, a petitioner must show by a preponderance of the evidence that it *will* suffer irreparable harm prior to an adjudication on the merits. *See* 35 P.S. § 7514(d)(1)(i); *Borough of Roaring Spring v. DEP*, 2003 EHB 825, 835; *Citizens Alert Regarding the Environment v. DEP*, 2003 EHB 191, 195; *See also Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 502 Pa. 545, 552-54 (1983) (establishing criteria for stay of a government order). A petitioner need not demonstrate that the harm it will suffer is "immediate irreparable harm" but that the petitioner will suffer irreparable harm at some defined point in time pending final disposition of the appeal. *Borough of Roaring Spring v. DEP*, 2003 EHB at 835, *fn*. 20. The relevant inquiry is definiteness, *i.e.*, has the petitioner shown that it will definitely suffer irreparable harm pending final disposition of the appeal. *Id.*

Nothing in the Department's Denial requires Erie Coke to immediately stop operating its coke ovens. Tr. 1063. The Department has filed a Complaint in Equity. *See* ECC Ex. 13 ("Department's Complaint"). But only one count of the Department's Complaint seeks equitable relief based on the lack of authority to operate. Count I of the Department's Complaint is based on the expiration of the Title V Permit in February 2018 and the lapse of the administrative extension of the Title V Permit, or "Application Shield," ***before*** the Department's Denial. ECC Ex. 13, ¶ 135. The remaining nine counts of the Department's Complaint are not based on the Department's Denial, but on the continued operation of the facility as a statutory and common law nuisance.

While the Department's Complaint seeks a permanent injunction requiring Erie Coke to end the statutory and common law nuisances caused by its operation of the Facility, shutdown of the Erie Coke facility will not occur without due process before the Court of Common Pleas. The

Department has not filed for an emergency injunction or a preliminary injunction seeking immediate shut down of the Facility and triggering an immediate hearing. Tr. 1063. Erie Coke has answered the Department's Complaint and raised affirmative defenses. Thus, the Department's likelihood of success and the timing of any decision by the Court of Common Pleas is uncertain.

This case is distinguished from the clear irreparable economic harm found in *Global Eco-Logical Services or Baumgardner*, in that there is no Department order requiring Erie Coke to immediately shut down. *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 649, 652; *Baumgardner, et al v. DER*, 1988 EHB 786. Admittedly, the lack of a permit may eventually result in closing of the Facility, but that action is not certain and has not yet occurred. Moreover, it will not occur without further proceedings of the Court.

Specifically, Erie Coke has not presented any credible evidence or testimony that a shutdown will occur before the disposition of this appeal. Instead, Erie Coke asks the Board to leap to the conclusion that it must close its doors immediately if a supersedeas is not granted. Several other possibilities exist. For example, Erie Coke may reapply for a Title V Permit or state-only permit premised on operating at reduced production or alternative methods to ensure compliance. Operation could continue under a consent order or decree pending disposition of the appeal. Nothing was presented at the hearing to rule these possibilities out. In fact, the evidence and testimony at the hearing indicates the parties are still discussing potential resolutions. Erie Coke's written offer of a resolution was admitted and discussed in depth. *See* DEP Ex. DDD. Mr. Gustafson confirmed shut down was not the only option during his testimony on redirect:

> Q: So as we sit here today, do you hope that Erie Coke could do something that would prevent the facility from shutting down?

> A: You know, that's always the intent. . . . You know, our goal is always to get into compliance, you know, get facilities – assist facilities into compliance.
>
> Q: So Erie Coke still could change your mind, potentially?
>
> A: I mean, I've issued a denial letter; but if we had an actionable plan that corrected all of the violations to a reasonable amount of certainty that came to some sort of conclusion to the violations, that's something we would be willing to look at. We just have not been provided that.

Tr. 1074.

Erie Coke has failed to show by a preponderance of the evidence that the shutdown of the Facility is a definite result of the Department's Denial. Therefore the harm that Erie Coke claims will occur before this appeal is adjudicated is speculative and does not support the grant of supersedeas. *Guerin v. DEP*. 2014 EHB 18, 24.

b. Any Threatened Economic Harm to Erie Coke Is Self-Inflicted.

Irreparable harm to a petitioner is much less compelling when it is caused in substantial part by the petitioner itself, especially if it is the result of activity that was probably illegal. *Greif Packaging v. DEP*, 2012 EHB 85, 90; *Kennedy v. DEP*, 2008 EHB 423, 425; *UMCO Energy Inc. v. DEP*, 2004 EHB 797, 819. Because Erie Coke's unlawful activity has caused its claimed irreparable harm, the Board should not ignore Erie Coke's lack of any chance of succeeding on the merits.

Beginning in August 2017, Erie Coke was on notice that its noncompliance was preventing the Department from renewing its Title V Permit. Tr. 889-90, 897. Later that same year, after being advised of a concerning spike in battery stack opacity, Erie Coke informed the Department that personnel and training problems were causing its noncompliance. Tr. 914-17; DEP Ex. JJ. In January 2018, the Department again raised concerns. Tr. 917; DEP Ex. KK. In February 2018, the Department met with Erie Coke, and Erie Coke reiterated that it needed to do more training of

its crews and increased maintenance. Tr. 917-18. In November 2018, the Department met with Erie Coke and laid out all its compliance concerns. Tr. 923-26. Erie Coke continued to blame personnel and training. Tr. 924. At the end of that meeting having not heard any definite plans to improve its compliance, the Department advised Erie Coke in writing the ongoing violations at the Facility could result in placement on the compliance docket, thereby preventing the Department from renewing the expired Title V Permit. Tr. 925-26; DEP Ex. OO. Erie Coke's written response lacked any definite path forward or a schedule for coming into compliance. Tr. 928-31; DEP Ex. QQ.

After the Department's informal efforts to compel compliance did not yield a satisfactory result, the Department issued an administrative order that required Erie Coke to submit, among other things, a compliance plan and schedule that could form the basis for a compliance schedule in any renewed Title V Permit. Tr. 923-24; DEP Ex. RR ¶3. The Department's Order also required, almost 18 months after Erie Coke was first notified of the requirement, that Erie Coke submit a plan approval for a backup H2S control device within 60 days. Tr. 933-34; DEP Ex. RR ¶ 2, 3.c.

Erie Coke appealed the Department's Order. Instead of submitting a plan approval as required by the Department's Order, Erie Coke submitted a report on available alternatives in May 2019. Tr. 941; ECC Ex. 6. Based on the testimony of Mr. Lauricella and Mr. Nesselbeck, Erie Coke waited nearly 18 months after the issue was first raised to even evaluate a backup H_2S control device. Tr. 437-438; Tr. 556. The report submitted by Erie Coke in May 2019 lacked the details necessary for the Department to evaluate the efficacy of the alternatives. Tr. 941; DEP Ex. NNN. Most notably, the report lacked any statement or certification that any of the proposed alternative control technologies could meet the regulatory limit for combustion of hydrogen sulfide. Tr. 1071-

73. Erie Coke then waited until the last week of June 2019 to submit a plan approval for a backup control device. Tr. 944, 556; ECC Ex. 9.

Instead of submitting a compliance plan and schedule to meet its Title V Operating Permit requirements as required by the Department's Order, Erie Coke submitted an engineering evaluation of potential causes of increased opacity and causes of reduced capture efficiency. Tr. 460, 936-37; DEP Ex. SS. The engineer who authored the "Compliance Plan," Mr. Lauricella, testified at the hearing that it was an independent engineering evaluation and recommendations. Tr. 460. It was drafted without concern for regulatory requirements and was not related to the Title V Permit. Tr. 460. Erie Coke admits the "Compliance Plan" primarily consists of normal operating tasks and procedures that Erie Coke should have been doing all along. Tr. 451-453. Thus, the "Compliance Plan" is little more than a plan to address personnel and training issues identified almost two years ago.

Over a month after it submitted the "Compliance Plan," Erie Coke continued its careless operation of the Facility. It took the Department's discovery of significant holes in the coke-side shed during its May 15, 2019 inspection to prompt Erie Coke to begin to correct those issues. Tr. 282-85, 456, DEP Ex. P (fifth, sixth, and seventh photos). These holes allowed coke oven gas to be emitted to the environment. Tr. 283, 680-81; DEP Ex. P (seventh photo). Even more telling is the large cloud of coke oven gas emitted by Erie Coke on June 13, 2019, that traveled the lakeshore right over Mr. Harmon's home. Tr. 733-34, 411. Mr. Nearhoof testified this cloud containing hazardous air pollutants was a result of an operational issue. Tr. 250-51. This operational issue was identified and anticipated in the "Compliance Plan." DEP Ex. SS, *Work Practice Control Plan*, p. 63 of 127, ¶8.

Erie Coke's inflated claims of "a new team" and an "upward trajectory" of compliance ring hollow when considered in the context of the timeline presented above. As explained further below, the management of Erie Coke has failed for nearly two years to take the necessary steps to come into compliance. This failure occurred at a critical time for Erie Coke when the Department was considering the Renewal Application and continued despite the Department's repeated warnings that it could result in denial of the Renewal Application. Perano, 2011 EHB at 498.

Erie Coke's claimed irreparable economic harm, that the Department's Denial may eventually cause it to shut down, is a direct result of its violations of the terms and conditions of its expired Title V Permit and Erie Coke's lack of intent and ability to correct the violations for years. While the Department cannot deny the eventual closure of the Facility and loss of Erie Coke's only remaining asset, the coke ovens, would be a significant economic loss, Erie Coke has no one but its officers and management to blame for the situation it now finds itself in.[10] Anyone who does not have the ability to comply should not be in business. *Risingson Farm v. DEP*, 2008 EHB 196, 207; *Starr v. DEP*, 2003 EHB 360, 373. Therefore, the Board should not give Erie Coke's claim of irreparable harm much weight, if any. *Greif Packaging v. DEP*, 2012 EHB at 90. At a minimum, the Board should not discount Erie Coke's utter lack of likelihood of success on the merits, because Erie Coke is responsible for its claimed irreparable economic harm. Absent any chance of success on the merits, Erie Coke's Petition for Supersedeas must be denied.

3. The Likelihood of Injury to the Public Is Greater if Supersedeas Is Granted.

Because Erie Coke lacks any likelihood of success on the merits, the Board need not address the likelihood of injury to the public. *Teska*, 2016 EHB at 547. However, as the petitioner,

[10] The Board should not consider the potential loss of jobs as an irreparable harm to Erie Coke. Erie Coke's irreparable harm is purely economic in that it may, at some point in the future, no longer be allowed to operate its only remaining significant asset, the coke ovens. The loss of jobs, as explained below, is a potential public harm mitigated by the public harms resulting from the continued unlawful operation of the Eri Coke Facility.

Erie Coke had the burden of demonstrating that the grant of supersedeas will not result in injury to the public or third parties. *Delaware Riverkeeper Network*, 2016 EHB at 43; *Globe Disposal v. DER*, 1986 EHB 891, 899. Where the Board is presented with facts that continuing violations of statue or regulations will occur during any period of supersedeas, the petitioner must demonstrate that the potential environmental harm from those violations will be minimal or none. *Globe Disposal v. DER*, 1986 EHB at 899-900; *See Fiore v. DER*, 1983 EHB 528, 531. Because Erie Coke's continuing violations result in injury to the public, it has failed to meet its burden on this factor.[11] Moreover, the two injuries claimed by Erie Coke if a supersedeas is not granted, the loss of product to its customers and the loss of 137 jobs at the Facility, are less compelling in the context of this matter than the continuing injuries sustained by the public from its violations.

a. Granting the Supersedeas Will Result in Continued Injury to the Public.

The Pennsylvania Supreme Court has stated that "[w]hen the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury." *Coward*, 414 A.2d at 98 (quoting *Pennsylvania Pub. Util. Comm'n v. Israel*, 52 A.2d 317, 321 (Pa. 1947)). The Pennsylvania Supreme Court has further instructed that "[t]he finding of irreparable harm usually is made by the court. Where a statute proscribes certain activity, all that need be done is for the court to make a finding that the illegal activity occurred." *Coward*, 414 A.2d at 98. In following Supreme Court judicial precedent, the Board has stated that where unlawful activity is occurring or threatened, or there is a violation of express statutory or regulatory provisions, there is irreparable harm *per se*, *Delaware Riverkeeper Network, et al. v. DEP*, 2013 EHB 60, 63, and that "[it] will not condone

[11] As explained in Section III.B., above, these injuries are pollution prohibiting the grant of supersedeas. If for some reason, the Board does not find this pollution prohibits supersedeas by law, it should give great weight to these injuries.

unlawful conduct by granting a supersedeas which will allow Appellants to continue that unlawful conduct." *Solomon v. DEP*, 1996 EHB 989, 994.

The Board should be even more vigilant when the unlawful conduct resulting from a grant of supersedeas implicates constitutional guarantees of Pennsylvania's Environmental Rights Amendment as it does in this case. Article 1, Section 27 of the Pennsylvania Constitution guarantees:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. Art. 1, Sec. 27. There can be no question that citizen's rights to "clean air" and "to the preservation of the natural scenic, historic and esthetic values of the environment" are implicated by the continuing emissions of particulate matter and coke oven gas from the Erie Coke Facility. Pa. Const. Art. 1, Section 27. Its location on the shore of Lake Erie and adjacent Presque Isle State Park makes these infringements even more egregious.

While unlawful conduct with constitutional implications should be enough public injury to prevent a supersedeas, the Board has required that actual injuries to the public must result from these infractions to constitute "injury to the public" for the purposes of supersedeas. *Fiore v. DER*, 1983 EHB 528, 531. The pollution described in detail by citizens at the hearing is substantial evidence of injury to the public and requires denial of Erie Coke's Petition for Supersedeas.

As described in detail in Section III.B., above, the citizens who live, work, and recreate in the vicinity of Facility are routinely subjected to malodors and emissions of black particulate and dust that accumulates on their homes, vehicles, and boats. One should only need to look at the cloud of coke oven gas in the Department's Exhibit Z.1. The testimony of Mr. Narusewicz, Mr.

Mellon, Mr. Harmon, Ms. Cardoso, and Mr. Sutter further provide substantial evidence that sanctioning Erie Coke's continued unlawful conduct violates Pennsylvania's Environmental Rights Amendment. *See, e.g.*, Tr. 382-87 (evidence of strong odors, clouds of dust, and deposition of black particulate matter); Tr. 398-404 (evidence of odorous clouds that cause stinging and burning of eyes and throat); Tr. 412-14 (evidence of odors and deposition of black particulate); Tr. 421-24 (evidence of strong odors that inhibit enjoyment of the outdoor environment); Tr. 486-96 (evidence of strong odors and accumulation of black residue that inhibits enjoyment of Lake Erie).

Given the nature of a supersedeas proceeding, the number of witnesses and the depth of their testimony was limited. However, these are compelling examples of living, working, and recreating in the shadow of Erie Coke's continued unlawful behavior. Even more compelling is the fact that these injuries are occurring in an area of the City of Erie identified as an Environmental Justice Area by the Department.[12] Tr. 878-79. Because the likelihood of actual harm from Erie Coke's continued unlawful conduct is certain, the Board should deny Erie Coke's Petition for Supersedeas.

b. Any Injury to Erie Coke's Customers Is Unlikely and Negligible.

Initially, with regard to any potential injury to Erie Coke's customers, it must be noted that [redacted] In addition, the only evidence that Erie Coke presented from a "third-party customer," McWane, Incorporated ("McWane"), demonstrated that McWane has already

[12] The Department defines an Environmental Justice Area as any census tract with a 30% or greater minority population or where 20% or more of individuals live at or below the poverty level, as defined by the U.S. Census Bureau. *See* Department's Environmental Justice Public Participation Policy (TGD No. 012-0501-002), *available at* http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=7918&DocName=ENVIRONMENTAL%20JUSTICE%20PUBLIC%20PARTICIPATION%20POLICY.PDF%20%20%20%3Cspan%20style%3D%22color%3Ablue%3B%22%3E%3C%2Fspan%3E.

identified a backup supply of foundry coke in the event the Facility closes. Tr. 233. No evidence was presented that Powers Coal and Coke could not continue to supply McWane. Thus, a shutdown may have some impact on McWane, but it is prepared and would come out the other side well-situated due to its size and number of foundries. Tr. 238-39. Accordingly, Erie Coke has not carried its burden to prove injury to this third party.

c. The Loss of Jobs Is Neither Immediate nor Certain, Results from Erie Coke's Own Mismanagement, and Is Mitigated by Public Policy Considerations.

Erie Coke claims the public will be harmed by the loss of 137 good paying jobs. Tr. 160-61. The Department cannot argue that this would have an insignificant impact on the employees. Neither the Department nor the citizens who testified during the supersedeas hearing wish to see Erie Coke's employees lose their jobs. Tr. 395, 409, 418-19, 430, 501-02, 853. However, as Mr. Narusewicz, Mr. Mellon, Mr. Harmon, and Mr. Sutter all testified, the welfare of the environment and the community should not be sacrificed so that Erie Coke can continue to pollute. Tr. 395, 409, 418-19, 501-02.

As explained in Section III.C.2., above, the Department's Denial does not, in itself, require that Erie Coke close. Nothing in the Department's Denial requires Erie Coke to immediately stop operating its coke ovens. Shutdown of the coke ovens requires further Department action, and any shut down will not occur without due process before the Court of Common Pleas. While Erie Coke's failure to obtain a permit may eventually result in action closing the Facility, that action is not certain, and Erie Coke has not presented evidence or testimony that shut down will occur before the final disposition of this appeal. Consequently, the potential public injury of job loss is neither immediate nor certain and does not support granting a supersedeas.

Second, any loss of jobs is the direct consequence of Erie Coke's own actions. As unfortunate as the loss of these jobs would be, Erie Coke's own officers and management have created the predicament in which its employees find themselves. There is no recognized right to continue operating a business that cannot comply with the law. *Risingson Farm*, 2008 EHB at 207. A fair summary of the testimony is that Mr. Saffrin and Mr. Durkin have failed to manage company finances, failed to provide for training, and failed to procure the personnel necessary to ensure compliance at the Facility. *See* Sections III.C.2.iii. and iv., above.

Finally, this type of public injury was contemplated by the General Assembly and the Environmental Quality Board when they provided for the denial or refusal to renew a permit in the Air Act and the Regulations. 35 P.S. § 4006.1(d), 4007.1(a) and 4007.1(b); and 25 Pa. Code § 127.422. The potential loss of jobs is the likely result when the renewal of a permit is denied. By contrast, neither the General Assembly nor the Environmental Quality Board contemplated that any entity could continue operating indefinitely in violation of the Air Act and its Regulations. *Rochez Bros.*, 334 A.2d at 794. Instead, the Air Act and the Regulations were designed to eliminate the type of injury that will occur to the public if a supersedeas is granted in this case. *Id.* at 796 ("[W]e have no doubt that the Legislature intended the Air Act to eliminate or reduce such air contamination because it is a public nuisance."). The people of this Commonwealth, through their elected representatives in the Legislature, have already determined which public injury is to be given greater weight when these two potential injuries compete against one another.

Because Erie Coke has not met its burden regarding the likelihood of injuries to the public, its Petition for Supersedeas should be denied.

IV. CONCLUSION

For the foregoing reasons, Erie Coke's Petition for Supersedeas of the Department's Denial should be denied.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

s/ Kayla A. Despenes
Kayla A. Despenes, PA I.D. No. 320726
Assistant Counsel
kdespenes@pa.gov

s/ Carl D. Ballard
Carl D. Ballard, PA I.D. No. 320830
Assistant Counsel
caballard@pa.gov

s/ Douglas G. Moorhead
Douglas G. Moorhead, PA I.D. No. 74560
Regional Counsel
dmoorhead@pa.gov
Northwest Regional Counsel
230 Chestnut Street
Meadville, PA 16335-3481
Telephone: 814-332-6070
Fax: 814-332-6996

Date: August 7, 2019

\\epccnws01\docpool\caballard\erie coke corp\ehb dkt no 2019-069-b\supersedeas\supersedeas post-hearing brief.docx

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE ENVIRONMENTAL HEARING BOARD

ERIE COKE CORPORATION	:	
	:	
v.	:	EHB Docket No. 2019-069-B
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Department's Post-Hearing Brief In Opposition to Erie Coke's Petition for Supersedeas in the above-captioned matter was this day served upon the Appellant's counsel by electronic filing of this document with the Environmental Hearing Board.

Paul K. Stockman
Christopher Max Zygmont
Kazmarek Mowrey Cloud Laseter LLP
Counsel for Erie Coke Corporation

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

s/ Carl D. Ballard

Carl D. Ballard, PA I.D. No. 320830
Assistant Counsel
caballard@pa.gov
Northwest Regional Counsel
230 Chestnut Street
Meadville, PA 16335-3481
Telephone: 814-332-6070
Fax: 814-332-6996

Date: August 7, 2019