COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ERIE COKE CORPORATION'S POST-HEARING BRIEF IN SUPPORT OF SUPERSEDEAS

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I. Introduction and Summary: The Board Should Grant Supersedeas and Allow Erie Coke to Continue to Operate Pending Resolution of Its Appeal.

Absent a supersedeas, Erie Coke will be forced to shut its coke ovens down, and (as the Department concedes) this will irreparably damage those ovens, such that they can never again be restarted. As a consequence, before Erie Coke's appeal ever really begins, the Department will have succeeded in its admittedly-unprecedented attempt to put Erie Coke out of business permanently, depriving Erie Coke of any realistic opportunity to avail itself of the procedural rights it has under law, and depriving the Board of the effective ability to consider on the merits the Department's inappropriate and unlawful decision to deny Erie Coke's Title V permit renewal application (the "Denial") (Ex. BB).[1]

If the Denial were allowed to take immediate effect, the collateral damage would be even more widespread. The Denial will permanently destroy 137 jobs, putting those employees out of work, threatening their families' livelihoods, eliminating one of the few significant industrial employers remaining in Erie, and impacting all of those suppliers and other businesses who depend on the plant's operation and the patronage of its employees. Moreover, because Erie Coke is also one of only three remaining merchant foundry coke producers in the United States, its closure will severely impact entire industries who rely on Erie Coke for key raw materials.

Just as importantly, the evidence before the Board shows that Erie Coke's continued operation during the pendency of this appeal will not cause harm to public health or the environment. Even if Erie Coke would not be in perfect compliance with its prior permit terms, Dr. Dittenhoefer's unchallenged testimony demonstrates that Erie Coke's continued operation

[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 (Title V Permit)	= DEP Ex. DD
ECC Ex. 2 (February 4, 2019 Order)	= DEP Ex. RR
ECC Ex. 4 (April 5, 2019 Compliance Plan)	= DEP Ex. SS
ECC Ex. 7 (May 9, 2019 Compliance Docket Notification)	= DEP Ex. UU
ECC Ex. 12 (July 1, 2019 Denial letter)	= DEP Ex. BB

presents no acute or chronic health or ecological risks. The Department's evidence, by contrast, is inconsistent or impressionistic.

As a result, there is simply no justification on the record before the Board that would permit the Department to summarily inflict such a drastic injury on Erie Coke, the Erie community, and American industry more broadly. Initially, the Denial is contrary to law because the Department failed to provide the required advance notice and an opportunity to comment on the Department's intent to deny the permit renewal application. Further, contrary to the Department's finding, Erie Coke has the ability and intent to comply with its permits, and is currently a profitable enterprise willing and able to dedicate the necessary resources required to achieve that goal. Erie Coke's compliance performance has been rapidly improving in the past six months with the advent of a new management team and a new dedication to building a compliance culture. Erie Coke simply needs more time to finish its work, as laid out in its April 5, 2019 compliance plan and subsequent submissions.

In fact, notwithstanding the existential threat that the Denial presents, Erie Coke continues to dedicate resources and effort toward compliance by implementing stack tests, proposing additional improvements to the Department, and conducting other work focused on performance improvement. With the revenue available from continued operations during the appeal, Erie Coke will continue carrying out the plans it has prepared and submitted to the Department. Erie Coke will continue collaborating with the Department until all issues are resolved, the underlying problems are corrected, and compliance is restored. Indeed, Erie Coke has already remedied most of the problems the Department has identified. If necessary, the Board may even condition the supersedeas on Erie Coke's continued implementation of its emission reduction plans and associated operational changes and improvements.

In brief, a denial of supersedeas would effectively inflict a corporate death sentence on Erie Coke. Such an outcome, when Erie Coke is so close to the finish line in responding to the Department's demands, would be tragic, and would have severe and far-reaching ripple effects. A better, non-destructive alternative is available here: this Board should supersede the

Department's Denial, allowing Erie Coke to remain open while it pursues its legitimate appeal and restores itself to compliance. While supersedeas may be an "extraordinary" remedy, it fits these extraordinary circumstances, and should be granted by the Board.

II. Relevant Standards: The Board Must Consider *All* Relevant Statutory Criteria, and Should Not Deny Supersedeas Simply Because Emissions Will Continue Pending Appeal.

The standards governing the Board's consideration of a supersedeas petition are well-known. The issuance of supersedeas is committed to the Board's discretion, "based upon a balancing of ***all*** of the statutory criteria." *Global Eco-Logical Services*, 1999 EHB 649, 1999 WL 612910, at *2 (Aug. 4, 1999) (emphasis added). These include (i) irreparable harm to the petitioner; (ii) the likelihood others will be injured; and (iii) the likelihood that the petitioner will prevail on the merits. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a)(1)-(3). Erie Coke satisfies all three of these criteria: as discussed below, there is no dispute that the Denial, if allowed to take effect, would cause irreparable harm to Erie Coke and many others, and that there is little risk to the public health or welfare if Erie Coke is allowed to continue operating. Further, the evidence – even at this early stage of the proceedings – shows that the Department's Denial was premature, ill-grounded in fact, and violated applicable law.

Tacitly accepting that Erie Coke satisfies this trinity of requirements, the Department has argued (and presumably will continue to argue) that supersedeas is nonetheless impermissible because "pollution" will occur. Simply put, it is not a *per se* bar to supersedeas if emissions – even emissions that exceed permit limits – will occur during the ensuing appeal. While 35 P.S. § 7514(d)(2) provides 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," emissions are not necessarily equivalent to "pollution." This argument (as previously advanced by the Department) tries to prove too much, and would effectively render the supersedeas process an empty promise for any operating facility with an air emission permit; after all, allowed emissions to the atmosphere are an inherent part of any air

permit (and indeed, any manufacturing operation), and will occur every time, whenever supersedeas is granted allowing an air permit to continue in effect. Effectively, an air emission permit necessarily allows some level of "pollution," as that term is defined in the Air Pollution Control Act. But applying the well-known principle of *noscitur a sociis* (a word is known by the company it keeps), "pollution" – as that term appears in the Environmental Hearing Board Act – should be interpreted in relation to the other words in 35 P.S. § 7514(d)(2) ("injury to the public health, safety or welfare"). In other words, 35 P.S. § 7514(d)(2) is designed to ensure that the public is not harmed during the pendency of an appeal, and was not designed as a back-door method of terminating all ongoing emissions. *See Simon v. DEP*, 2017 EHB 414, 2017 WL 2399755, *12 (May 25, 2017) (granting conditional supersedeas against issuance of two water discharge permits where conditions would minimize but not necessarily eliminate impact from stormwater and sediment to the petitioner's property); *Power Operating Company, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Protection*, 1997 EHB 1186, 1997 WL 797212, at *8 (Dec. 22, 1997) (granting supersedeas allowing petitioner to ameliorate or eliminate pollution, rather than simply eliminate it, despite finding that "granting the petition would allow Appellant to continue driving trucks through the stream generating sediment pollution in violation of the Clean Streams Law").

Here, as Erie Coke has shown, its continued operation does not present a risk to public health, safety or welfare. (The scientific content and technical detail of Erie Coke's showing sets this case apart from other cases involving supersedeas petitioners.) As a result – and in light of the measures described in Erie Coke's Title V permit and compliance plans – continued emissions will not result in "pollution," as that term is used in 35 P.S. § 7514(d)(2).

III. A Shutdown of Erie Coke's Ovens Would Be Irreparably Catastrophic to the Company.

The unquestionably irreparable harm to Erie Coke from the Department's Denial, if it is permitted to go into effect pending appeal, could not be clearer or more severe. Because the

Denial revokes Erie Coke's permit to operate, it would be required to shut down combustion to its ovens and close its plant. Without the heat from production, the ovens will crack beyond repair and be forever inoperable. *See* Tr. 57:7-13 (Dr. Dittenhoefer: "[Y]ou can't shut a… coke battery down without irreparable damage being done. These ovens operate at 2,000 degrees. If you would stop heating them, …the bricks and the structure would contract and crumble and there would be no… recovery, …it would require a complete rebuild."); Tr. 329:23-330:12 ("If [the battery] is turned off and it's left off, the battery starts to cool down, and as it's cooling, it shrinks…. It could shrink as much as four to six inches on one wall. So it will open up cracks and gaps on the walls several inches… Q. And in that event, could that coke oven ever be restarted? A. No. If you restart that, the cracks will not come back together again the same way that they came apart."); 143:19-144:1. As a result, Erie Coke would go out of business permanently. The Department admits as much. *See* Tr. 1063:12-25 (Gustafson).[2]

Put simply, the harm to Erie Coke would thus be complete, catastrophic, and indisputably irreparable:

> The Department's order shuts [Erie Coke] down, puts it out of business at its only site permanently, [and] requires it to . . . regulatorily close the facility . . . If allowing that order to stand during the pendency of the appeal would not cause irreparable harm, it is difficult to imagine what would. [Erie Coke's] severe economic loss for which it has no recourse is unquestionably adequate to constitute irreparable harm.

See Global Eco-Logical Services, 1999 EHB 649, 1999 WL 612910, at *3 (Aug. 4, 1999); *see also Keystone Cement Company v. DEP*, 1992 EHB 590, 1992 WL 123375, at *5 (May 7, 1992) (finding that "significant financial or economic injury constitutes irreparable harm" where petitioner faced a loss of $4 million, requiring either a 15% pay cut from all employees or plant

[2] A "hot idle" (*i.e.,* the combustion of natural gas to keep the ovens sufficiently heated without coke production) is simply not feasible. Without the revenue stream from coke production, there would be no money even to pay for the natural gas required to operate the ovens, much less the payroll and other operational expenses of the facility. Erie Coke simply could not afford to operate its ovens without producing coke and would be forced to shut them off and shutter its doors permanently. *See* Tr. 57:23-58:24,166:20-167:14.

closure); *M.C. Resource Development Co. v. DEP*, EHB Docket No. 2015-023-C, 2015 WL 2381840, at *3-4 (May 7, 2015) (granting supersedeas based on a finding the petitioner would lose more than half of its yearly revenue – "a severe financial loss" – which was the kind of "economic injury" that clearly constitutes irreparable harm, and that one of its customers will also suffer significant economic injury); *Power Operating Company, Inc. v. DEP*, 1997 EHB 1186, 1997 WL 797212, at *7 (Dec. 22, 1997) (finding that a cost to comply with the Department's order of over $1 million "would be substantial and cause irreparable harm").

IV. Granting Supersedeas Will Prevent Harm to Third Parties and the Public During the Pendency of the Appeal.

The evidence shows that Erie Coke is not the only person or entity that would suffer irreparable harm if the Board denies supersedeas; rather, the effects of Erie Coke's permanent closure would be widespread and severe. It would devastate Erie Coke's employees and their families, deliver yet another blow to the Erie economy, and jeopardize entire industries. By contrast, Erie Coke's continued operations during the appeal will not cause harm to the public health or the environment.

A. The Economic Harm to Employees, Their Families, the Erie Economy, and National Industries, Without a Supersedeas, Would Be Severe.

Erie Coke employs 137 workers at wages that average more than $17/hour, well above Erie's average. *See* Tr. 160:8-15, 249:12-14. If supersedeas is denied, and the plant closes, these 137 workers will all permanently lose their jobs. *See* Tr. 160:25-161:5.

The effect that this would have is obvious: these 137 workers would suddenly be unable to support their families, and would face the fear of long-term, potentially permanent, unemployment or underemployment. These workers would now struggle to feed and provide for children and elderly parents, would lose valuable health insurance, and would likely lose homes and apartments. *See, e.g.,* Tr. 248:6-17 (Nearhoof: "[M]y son starts at Mercyhurst in the fall" and "I'm not sure how I would be able to keep his college moving in a forward direction." Also, "my wife and I bought our first house about almost 5 years ago after 15 years of marriage," and

"I don't see anything other than selling my house having to happen, and then working whatever jobs I could find at this point to provide some type of living for my family."); Tr. 313:1-14 ("I have a wife and kids. . . . I just bought a new house in Erie. And I don't know what I would do without my job. I don't know what my family would do without my job.").

Many of these workers have criminal records and other employment challenges, but have been able to enjoy a fresh start for themselves and for their families through employment at Erie Coke. In the struggling Erie economy, these workers may be unable to find any job, much less one on which they could support a family. *See* Tr. 248:20-249:17.

These effects would ripple throughout the Erie economy. Erie Coke purchases supplies from local businesses, and utilizes local contractors; for example, most of its maintenance is performed by a local establishment. And its employees frequent Erie's stores, restaurants, schools, entertainment venues, and other economic vehicles. *See* Tr. 160:16-24. As a result, all of Erie's various businesses would feel the effects of the loss of revenue flowing through the economy following Erie Coke's closure.[3] And all of these injuries would be inflicted after Erie Coke has largely addressed all of the Department's demands, and when Erie Coke is on a clear trajectory to fully satisfying the remaining few.

Erie Coke's permanent shutdown would also impact entire sectors of the North American economy. Erie Coke produces a high-quality foundry coke primarily used in the manufacturing of cast materials for such end products as automotive engines and other car parts, pipe fittings, military equipment, construction and mining equipment, valves, farm machinery, manhole

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[3] Most of this revenue is imported into the Erie economy, because almost all of Erie Coke's sales are to companies located outside the Erie region.

The Board may take judicial notice of the fact that Erie has lost thousands of manufacturing jobs, and that the local economy is struggling. *See, e.g.,* CBS News, "Erie is definitely a sinking ship, and you'd be crazy not to get off" (Feb. 27, 2017), *available at* https://www.cbsnews.com/news/america-manufacturing-erie-pennsylvania/ ("rows of red-brick factories [that] once proudly turned out American-made goods and employed tens of thousands of local workers [are n]ow almost entirely derelict," the "depressing route" through the area "look[s] like a graveyard," and "the emotional toll that hits a community which has lost the means to provide for its people" is palpable throughout the town).

covers and grates, and other manufactured goods and capital equipment. *See* Tr. 159:15-24. In addition to cast materials, foundry coke is used to make rockwool insulation and sugar. *See* Tr. 159:25-160:7. It is one of only three merchant foundry coke suppliers in the United States, and is the only foundry coke company still in the northeast (the others are in Birmingham, Alabama). *See* Tr. 161:8-14, 233:19-23, 237:17-21. Because of its location, it supplies ***all*** of Canada's foundry coke's needs and, for most of its customers, supplying out of Birmingham would be a logistical challenge, particularly when attempting to truck such long distances in the winter. *See* Tr. 161:11-12; 237:13-238:1.

For example, one of Erie Coke's customers is McWane, Inc., which, as one of the country's largest iron foundry companies, produces about 30 percent of all the pipes and valves and fittings in the entire country. Its specialties are ductile cast iron pipe for water delivery systems, sewer pipe for sewer systems, the fittings and valves that are required for a water system, and also fire hydrants. It supplies to cities, counties and other water supply systems throughout the country. *See* Tr. 230:14-231:17, 232:25-233:1. McWane uses foundry coke in its cupola furnaces to produce cast iron from scrap. *See* Tr. 231:18-232:4. The unique 6x9 coke that McWane requires for the operation of its foundries is ***only*** produced by Erie Coke. *See* Tr. 232:14-23. Procuring replacement coke would be difficult, if not impossible, and would certainly be more costly. *See* Tr. 233:11-16, 233:24-234:17.

All these industries would be hamstrung at a time when manufacturing is already challenged in this country, when cities and towns cannot afford to pay more for cast iron water and sewer system components if replacements can even be procured, and when the economy in general is hanging in delicate balance. The ripple effects from a shutdown of Erie Coke would be extensive, and all while Erie Coke has largely acquiesced to all the Department's demands and is on a clear trajectory toward full satisfaction and consistent compliance.

Seldom in the law does a court consider the human effects of its decisions, but that is exactly what the standard for supersedeas not only allows but requires here. When Erie Coke has shown tremendous progress over the past few months, and is on a clear path toward full

compliance, there simply is no reason for the Board to inflict such personal and economic suffering on third parties. This situation cries for finding a better path forward, and that is exactly what Erie Coke will accomplish if it can continue to make improvements and demonstrate, on the merits, that the Department's Denial was ill-advised and infirm.

B. A Supersedeas Will Not Harm Public Health or the Environment.

Erie Coke has been operating pursuant to its current permit for over six years and pursuant to similar previous permits for decades. The Department considered each permit it issued over that history to contain appropriate measures to protect public health and the environment. Erie Coke now simply asks to be able to continue operating under its current permit while this matter is resolved. During this time, analytically-sound studies demonstrate Erie Coke's operations will pose no increased health risk to the surrounding community, even at higher emissions levels. Now that Erie Coke has made improvements in its operations, its operations will have an even more inconsequential impact on the Erie community. The Department has presented no evidence to counter Erie Coke's evidence, and no evidence whatsoever that Erie Coke's operations pose any risk to human health or the environment. Therefore, allowing Erie Coke to remain open during the pendency of its appeal is the fairest and most widely beneficial approach.

1. Erie Coke's Evidence Demonstrated That Facility Emissions Will Not Cause Acute or Chronic Illness or Risk to Ecological Receptors.

Most importantly, the evidence shows that the surrounding community would experience no adverse health effects from Erie Coke's operations during the supersedeas period. EPA conducted a thorough study to develop its MACT ("maximum achievable control technology") standards in 1993 and 2003 (MACT I and II), analyzing Erie Coke's emissions data specifically. EPA concluded that the facility presented a negligible acute toxicity risk, chronic non-cancer risk, or ecological risk; EPA also concluded (based on highly-conservative data), that chronic cancer risk was at an acceptable level. *See* Tr. 24:24-26:3; 43:3-24, 113:9-12, 141:5-23.

Dr. Dittenhoefer refined this analysis in an assessment of chronic cancer risk, using actual Erie Coke emissions data collected in 2016, population data for the vicinity of Erie Coke's facility, and actual Erie Coke emission rates. Based upon conservative assumptions that would tend to overstate risk dramatically – that a person remained at the point of maximum exposure for 70 years without interruption, 24 hours a day and 365 days a year – Dr. Dittenhoefer's modeling determined that (as compared to the approximately 30% chance that every American otherwise faces of contracting cancer in their lifetimes) Erie Coke's operations would not cause a single excess case of cancer in more than 500 years. *See* Ex. 3, at 1 & Table 2 ("MACT II – Estimated Actual Scenario"); Tr. 25:19-26:3 (discussing "MACT II – Allowable Scenario"), 137:14-23, 1093:16-19.

Dr. Dittenhoefer also assessed chronic cancer risk assuming that Erie Coke operates at full capacity and emits all allowable emissions – *i.e.*, all emissions allowed under law. Tr. 24:10-25:8. Dr. Dittenhoefer referred to this "MACT II Allowable" scenario as the "worst-case scenario" because Erie Coke's actual emissions – even with the type of noncompliance alleged by the Department as attempted justification for the Denial – are less than its allowable emissions, because it has typically operated significantly below full capacity. *See* Tr. 36:24-37:8; 38:18-24; 48:22-51:4; 61:11-18. Dr. Dittenhoefer also concluded that the health risk from Erie Coke is not materially influenced by the types of noncompliance alleged by the Department. Tr. 49:1-7; 56:19-57:3. Moreover, Erie Coke's actual emissions have continued falling even further below "allowable" totals as it has complied with the Department's various demands. *See* Tr. 51:17-25; *infra* §§ V.B.3-8. Even this "allowable," "worst-case scenario" modeling showed results that were far below risks that EPA deems appropriately protective of health, with at most "much fewer than one case of cancer if the plant would operate for 100 years or more." Tr. 25:19-26.

The Department cannot refute these conclusions. Mr. Gustafson admitted that he has no critiques of Dr. Dittenhoefer's methodology or conclusions, *see* Tr. 970:5-7, and none of the Department's witnesses had the necessary professional qualifications to attack Dr. Dittenhoefer's

work, *see, e.g.,* Tr. 771:13-19, 966:1-6. As a result, the Department was left only with counsel's efforts to cast doubt on cross-examination, but those attacks also fell flat. While the Department attempted mightily to take issue with certain of the emissions data Dr. Dittenhoefer used, he was able to explain all of his methodological choices. *See generally* Tr. 72:18-82:9, 85:3-103:2, 105:3-111:22, 139:15-140:15. And in any event, the sensitivity analyses Dr. Dittenhoefer performed in response to these criticisms showed that the use of different emission levels (to account for the Department's attempted data criticisms) did not materially alter the outcome of his analyses. *See* Tr. 1091:1-7, 1092:7-1093:19. Further, although counsel for the Department questioned Dr. Dittenhoefer's use of meteorological data collected at the Erie Airport, *see* Tr. 62:13-66:7, it was in fact the Department who advised Dr. Dittenhoefer to use that data to model conditions at Erie Coke, and who supplied Dr. Dittenhoefer with that data knowing that his work involved emissions from Erie Coke, *see* Tr. 1097:5-1098:2.

2. The Mere Fact of an Emissions Exceedance Does Not Equate to Harm to Human Health or the Environment.

Against Erie Coke's overwhelming evidence that no harm would ensue, the Department has simply failed to present ***any*** evidence of ***actual*** harm that would result from Erie Coke's continued operations. The mere fact that there have been and likely will continue to be emissions exceedances does not undermine Erie Coke's showing, or in any way demonstrate that there is a realistic threat to human health or the environment.

As an initial matter, the Pennsylvania emission standards at issue (as compared to the federal NESHAP standards) are all technology-based; that is, the permissible emission levels are a function of what available technology was believed to be able to achieve, and are not set based upon any calculations of potential risk to human health or ecological receptors.[4] As a result,

[4] For example, the 20% opacity requirement is a technology-based standard, not a risk-based one, meaning Pennsylvania set it based on what was believed to be technologically possible, not what is necessary to protect health. *See, e.g.,* Tr. 975:25-976:4.

Similarly, 25 Pa. Code 123.44, addressing fugitive emissions from doors, charging port seals, offtake piping, and other topside emissions, is technology-based, set considering what a coke plant was believed to be able to accomplish, not what is necessary for the protection of

exceedances mean at most that a facility at the time was not operating within technological constraints, ***not*** that exceedances will necessarily threaten human health or the environment.

In fact, the record shows that Erie's ambient air satisfies all air quality standards even taking into account Erie Coke's alleged exceedances. Opacity restrictions are designed to address particulate emissions, *see* Tr. 974:18-975:19, but the Erie area easily satisfies federal air quality standards for particulate matter, *see* Tr. 972:11-24, 973:7-8, based upon measurements at a monitoring station that is in close proximity to Erie Coke's facility, *see* Tr. 973:9-14. Similarly, the limitation on the combustion of hydrogen sulfide is designed to address the presence of sulfur dioxide in the ambient air, Tr. 980:20-23, but Erie is in attainment for sulfur dioxide "by a wide margin," Tr. 863:13-16, 973:4-6, which is not even deemed to be a hazardous air pollutant, *see* Tr. 863:8-9.

3. Citizen Complaints and Photographs Do Not Demonstrate a Threat of Harm Sufficient to Justify a Summary Facility Shutdown at the Outset of an Appeal.

The Department, recognizing that it cannot show risk to human health or the environment through scientific analyses, rests instead upon a series of impressionistic accounts from

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public health. *See* Tr. 982:4-983:4. In the same fashion, 25 Pa. Code § 129.15, setting 20% opacity standard for fugitive emissions from air cleaning devices used in connection with pushing operations, contains an exception for when "emissions are of minor significance with respect to causing air pollution" or "emissions will not prevent or interfere with the attainment or maintenance of any ambient air quality standard." *See also* 7 Pa.B. 909, 909 (Apr. 2, 1977) ("The regulations establishing standards governing the emission of air contaminants from coke oven batteries, including §§ 123.44 and 129.15, are intended to require the maximum reduction of such emissions achievable by the installation and operation of the best available control technology on existing batteries."); 7 Pa.B. 1931, 1931 (Jul. 9, 1977) (same); 7 Pa.B. 2251, 2251 (Aug. 13, 1977) (same).

Finally, the text of 25 Pa. Code § 123.23 (prohibiting the combustion of coke oven gas containing more than 50 grains of hydrogen sulfide per 100 dry standard cubic feet) also show it was designed to accommodate what a source could technologically accomplish, rather than what it must accomplish to protect health, because it contains exceptions during pushing operations and malfunctions and whenever an exceedance is otherwise unavoidable. *See* 25 Pa. Code § 123.23(c); *see also* 4 Pa.B. 2281, 2283 (Oct. 26, 2974) (explaining that § 123.23 was amended to allow for "unavoidable oven leakage" and emissions of "small quantities of undesulfurized gas" where "there is currently no reasonable means to prevent such emissions").

concerned citizens, a photograph showing a production upset, and laboratory analyses of samples taken in and around the Erie Coke facility purporting to identify the presence of particulate coke. None of this evidence is sufficient to justify the drastic outcome the Department seeks here.

Initially, the citizen accounts, while undoubtedly sincere, do not establish that Erie Coke emissions threaten public health or welfare. Initially, there is nothing in these accounts that makes clear that Erie Coke is the source of the complained-of odors (as opposed to the City of Erie Wastewater Treatment Plant or some other source). Further, the various accounts are inconsistent with each other, and with the affidavits that these witnesses signed in advance of testifying,[5] reducing their persuasive force both individually and collectively:

- They describe different frequencies of odor or particulate impact. *See, e.g.,* Tr. 381:14-383:8 (Narusewicz: odor and dust one to three times per year); 400:22-23 (Mellon: odor every couple of weeks); 402:23-403:1 (Mellon: odor every week or so); 412:15-16, 23-25 (Harmon: walks two to three times a week and smells odor one out of every four walks); 421:22-422:3 (Cardoso: three to four times a week); 486:19-487:10 (Sutter: dust "on almost a daily basis"); Ex. A to Department's Opposition to Petition for Supersedeas ("Opposition") (Mellon Affidavit: once or twice a week); Ex. D to Opposition (Harmon Affidavit: dust on days when it does not rain).
- They describe different types of smells, ranging from "tarry" to "sulfur-like" to a "metallic" or "burning." *See, e.g.,* Tr. 400:18-21 (Mellon: "chemically" or "tarry" smell), 412:20-22 (Harmon: "like freshly laid pavement, like tar"); 421:11-12 (Cardoso: "sulfur-like smell"); 496:21-25 ("chemical-like odor, sort of like coal" or "coal furnaces"). Ex. A to Department's Opposition ("Opposition") (Mellon Affidavit: "strong metallic burning odor"); Ex. B to Opposition (Cardoso

[5] These affidavits were prepared by a Department investigator, and were signed without alteration by the witnesses. *See, e.g.,* Tr. 406:5-19, 415:22-416:5, 427:24-428:22)

Affidavit: same); Ex. D to Opposition (Harmon Affidavit: "metallic/burning odor"); Ex. F to Opposition (Sutter Affidavit: "strong burnt odor").

The Department's own approach to investigating these complaints is just as *ad hoc:* its determination is based simply on the contention that an odor can be pinpointed to Erie Coke simply because "you know it when you smell it," Tr. 1014:6-17. Even then, the Department could not substantiate most of the complaints that it received, and identified a number of other potential sources of odors in the vicinity. *See, e.g.,* Tr. 779:16-784:4 (discussing an odor of dead fish, an odor from the City wastewater treatment plant, and various occasions on which no odor was detected); Tr. 784:19-785:12 (noting a "slight" odor that Brophy associated with Erie Coke, but admitting that it was not "strong, continuous, and objectionable"); Ex. S ("I moved to Erie Land Lighthouse for odors crossing property and did not find any Erie Coke odors at this time."); Ex. U.

The Department's analyses of wipe samples taken in the vicinity of Erie Coke's facility are equally insufficient to show that Erie Coke's operations threaten harm to the public. Even if they were reliable, they say nothing about when (over the decades Erie Coke has been in operation) those particulates were released into the environment. *See* Tr. 653:9-18; 766:21-24, 768:23-769:2. But more importantly, those analyses (microscopic examinations of the samples) lack any scientific rigor. The Department could not identify the provenance of the purported Erie Coke "reference sample" that the Department laboratory used. *See* Tr. 647:12-21, 650:14-17. The Department analyst admitted that his standard for comparing samples is "[y]ou make up a slide and you look at it," without the benefit of any governing standard for conducting the analysis, and that it has subjectivity. Tr. 649:25-650:7, 652:1-3. The analyst has never compared coke to any number of other similar carbonaceous materials to confirm he can differentiate what he is seeing, and cannot say what the difference would be between coke, charcoal, carbon black, or even laser printer toner. *See* Tr. 651:5-25.

Finally, purported observations of visible emissions leaving Erie Coke's property – no matter how "alarming" the Department's inspector may find them, Tr. 741:13-15 – do not

demonstrate any material risk, because the Department cannot establish what the concentrations of various constituents in an emission plume actually were. *See* Tr. 786:10-20, 799:13-18, 837:15-25, 840:18-21, 841:4-9; 863:17-25. As Dr. Dittenhoefer testified, without contradiction from the Department, health effects from airborne exposure depends upon the concentration and duration of exposure, and those concentrations diminish as an emission disperses into the atmosphere; as a result, one can draw no conclusions about potential health impacts simply from a photograph. *See* Tr. 129:24-133:25. And Dr. Dittenhoefer has further testified that there is no correlation between the opacity of an emission and increases in ground-level concentrations of hazardous pollutants. *See* Tr. 1093:20-1094:12.

In short, all of the record evidence, considered as a whole, shows that no harm to the environment or to the health of the Erie community will result from a brief supersedeas, simply to allow Erie Coke the ability to be heard on the merits of its appeal. The Department has not presented any persuasive evidence showing that emissions from Erie Coke are present in the Erie environment at levels that would be harmful to health or the environment, or that would otherwise negatively impact the public welfare.

V. Erie Coke is Likely to Succeed on the Merits.

Erie Coke has also shown it has a reasonable probability of success on the merits. In this regard:

> It is helpful to remember that the Board is not called upon to decide the case on the merits in the context of a supersedeas application. The Board is, at most, required to make a prediction based upon a limited record prepared under rushed circumstances of how an appeal might be decided at some indeterminate point in the future. Based upon that prediction, as well as an assessment of who will be hurt the most if the status quo is maintained during the litigation process, the administrative law judge is simply called upon to decide whether that status quo should be maintained until the case can be decided based upon a proper record by the full Board.

Global Eco-Logical Services, 1999 EHB 649, 651-52, 1999 WL 612910, at *2; *see also M.C. Resource Development*, 2015 EHB 261, 272, 2015 WL 2381840, at *7.

Moreover, where the magnitude of irreparable harm is great, the Board will relax the showing on the merits that a supersedeas petitioner must make. *See Global Eco-Logical Services*, 1999 EHB 649, 652, 1999 WL 612910, at *2 (granting supersedeas where there is a strong case of irreparable harm given that the facility will be shut down completely and permanently); *Gary L. Reinhart, Sr. 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."); *Keystone Cement Company*, 1992 EHB 590, 599, 1992 WL 123375, at *5. Ultimately, the issuance of supersedeas is committed to the Board's discretion, "based upon a balancing of ***all*** of the statutory criteria." *Global Eco-Logical Services*, 1999 EHB 649, 651, 1999 WL 612910, at *2 (emphasis added).

In discussing the balancing of statutory criteria that the Board must undertake, the Board frequently relies on *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983), which discusses the application of similar factors in the nearly identical context of a motion for a preliminary injunction. *See, e.g., M.C. Resource Development*, 2015 EHB 251, 265, 2015 WL 2381840, at *3; *Global Eco-Logical Services*, 1999 EHB 649, 6511999 WL 612910, at *2; *Keystone Cement Company*, 1992 EHB 590, 597, 1992 WL 123375, at *5. *Process Gas* provides that "[t]he requirement that the applicant for a stay show that it is likely he will prevail on the merits should not be an inflexible rule. This criterion must be considered and weighed relative to the other three criteria." 467 A.2d at 809 n.8. As such, where the magnitude of irreparable harm is great, the balancing act of the remaining factors may warrant a lesser showing of likelihood to prevail on the merits. *See id.*; *Witmer v. Com., Dep't of Transp., Bureau of Driver Licensing*, 889 A.2d 638, 640 (Pa. Commw. 2005).

Although this is well-known to the Board, it is also important to emphasize that the Board considers the Department's Denial *de novo,* and is not bound to give deference to any of the Department's findings of fact. *See, e.g., Warren Sand & Gravel Co. v. Com., Dep't of Envtl. Res.*, 341 A.2d 556, 565 (Pa. Commw. 1975). The Board "is not an appellate body with a limited scope of review," but instead the Board "based upon the record made before it, may

substitute its discretion" for the Department's." *Id.* This *de novo* review of the record will make clear to the Board that the Department's Denial was ill-grounded in fact and based upon misunderstandings of applicable law.

A. The Department's Failure to Provide Any Notice of Its Intent to Deny Erie Coke's Renewal Application Renders the Denial Improper as a Matter of Law.

As an initial matter, the Board need not delve into the details of the Department's decision-making to determine that its Denial was legally improper, because the Department admittedly failed to provide any notice of its intent to deny Erie Coke's Title V permit renewal application prior to its July 1, 2019 Denial. This notice was mandatory, and conversely the lack of notice was contrary to governing statutes and regulations. The Department "does not have the authority to waive or disregard these important procedural requirements" and moreover, it "does not get to pick and choose which of the notice requirements it will honor in any given case." *Big Spring Watershed Association v. DEP*, 2015 EHB 100, 104-05, 2015 WL 1265992, at *3 (Mar. 3, 2015). As such, the Department's procedural defects render its Denial fatally infirm, and Erie Coke is thus likely to prevail on the merits of its challenge to the Department's action.

The relevant statute and rules repeat numerous times that the Department must provide public notice prior to issuing a denial of a permit application, eliminating any confusion on the issue. For instance, under the Air Pollution Control Act, the Department "shall provide public notice and the right to comment ***on all permits***" to operate a stationary air contamination source, and the Department must do so "***prior to*** issuance ***or denial***…." 35 P.S. § 4006.1(b)(1) (emphasis added).

The Department's rules repeat this requirement for advance notice of proposed denial of a permit to operate a stationary air contamination source, including a Title V permit: the Department must "provide public notice and the right to comment ***on each permit prior to*** issuance ***or denial***." 25 Pa. Code § 127.402(b) (emphasis added). Furthermore, for all operating permit applications, the Department must "prepare a notice of action to be taken" on such

applications, which includes the action of a denial. *Id.* § 127.424(a). Regarding proposed denials, the rule states that the "written notice of the denial will be given to requestors ***and to the applicant*** and will be published in the *Pennsylvania Bulletin.*" *Id.* § 127.424(c) (emphasis added).

If it were not already clear that the Department must give public notice in advance of all proposed actions taken on a permit, including a proposal to deny a permit, the rules continue to state how the public may review permit applications in advance of a decision and how to inform the public of how the Department will reach a final decision, how long written comments or protests will be accepted, procedures for requesting a hearing, and other procedures for public participation in the final decision. *Id.* at §§ 127.424(e)(1)-(3); 127.425(5); 127.521 (providing additional public participation provisions applicable to Title V permit applications and similarly reinforcing the requirement that the Department give notice in advance of a proposed action on a permit). All of these necessary elements of notice contemplate that notice must be given in advance in order to inform the public and any potentially impacted parties (including the existing permittee) of the Department's proposed action and to give those parties an opportunity to comment. Failure to do so "sends a signal that the Department does not really care what the public thinks about its proposed action." *Big Spring*, 2015 EHB at 105.

These notice requirements are strictly construed, and failure of the Department to conform to these prescriptions invalidates any ensuing Department action. For instance, in *Soil Remediation Sys., Inc. v. Dep't of Envtl. Prot.*, 703 A.2d 1081 (Pa. Commw. 1997), the Commonwealth Court reversed a Board decision upholding the Department's denial of a request for an extension of an air pollution control plan approval, because the Department failed to follow the proper notice procedures. In another recent Board decision, the Board itself rebuked the Department for its failure to provide adequate public notice of a draft NPDES permit, as required by Department rules. *See Big Spring*, 2015 EHB 100. There, the Department failed to publish notice that it had prepared a draft permit, a "key step in the permitting process" (and akin to the Department's intent to issue a denial of a permit to an existing source). *See id.* at 106.

Citing supporting precedents, the Board stated that "a duly promulgated regulation has the force and effect of law and it is improper for an agency to ignore or fail to apply its own regulations." *Id.* at 104. Because the Department wholly failed to provide the proper advance public notice and "committed a serious breach of an important regulatory requirement," the Board suspended and remanded its action. *Id.* at 102, 107.

Here, the Department's failure to provide any public notice of its intent to issue a denial of Erie Coke's permit application was a similar breach of its regulatory duties. At the hearing, the Department conceded that it gave no advance public notice of its intent to deny the permit held by an existing permittee. *See* Tr. 988:3-17. And the Board may take judicial notice of the fact that no notice appeared in the *Pennsylvania Bulletin*, as required by Department rules. In short, the Department completely failed to comply with its statutory and regulatory obligations to provide public notice of its proposed action. As in *Big Spring*, "this is not a case where there was public notice but it was deficient in some way." *See Big Spring*, 2015 EHB at 102 (finding that failure to strictly conform by publishing notice is "hardly a 'minor, procedural error'"). The Department's failure to publish its intent to deny Erie Coke's permit renders its action improper and directly contrary to the clear statutory and regulatory requirements.[6] For this reason alone, Erie Coke is likely to prevail on the merits.

While that is true regardless of whether Erie Coke were prejudiced by the Department's failure, Erie Coke has clearly been prejudiced. If the Department had provided notice of its intent to issue the Denial, Erie Coke would have had an opportunity to assert its prevailing arguments for why such a step would be unlawful and inappropriate. *See, e.g., Harvilchuck v. DEP*, 117 A.3d 368, 373 (Pa. Commw. 2015) (asserting that the intent of constitutionally

[6] Importantly, this is not a case where the Department issued inadequate or deficient public notice, as in *Zlomsowitch v. DEP*, 2004 EHB 756, 2004 WL 2751154 (Nov. 15, 2004) (where appellants received notice of the permit application at issue) or *Hanslovan v. DEP*, 1992 EHB 1011, 1992 WL 211988 (Aug. 12, 1992) (where appellants objected to the form of publication used). Here, the Department wholly failed to provide public notice of its impending denial.

adequate notice of administrative action is to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections). In turn, the Department would have had to consider and address those comments prior to issuing the Denial. *Cf. Big Spring*, 2015 EHB at 105-06 (identifying that the lack of opportunity to comment on "critical terms" deprived appellant of a basic right and "the possibility of revealing something the Department might have otherwise missed"). Instead, the Department deprived Erie Coke of that opportunity, impermissibly dodging the Department's obligation to accept and consider Erie Coke's comments and forcing Erie Coke to fight for its life in this supersedeas proceeding in order to even have an opportunity to present those arguments in this appeal.

Moreover, none of Erie Coke's dealings with the Department could even charitably be construed as providing constructive notice of the Department's intent to deny the permit renewal application. The Department had never before denied a Title V permit renewal, *see* Tr. 986:2-6, And even the Department "never thought we were going to get there, to that point," Tr. 961:11-12, not making a final decision until late June, Tr. 963:7-24, 986:22-987:10.

B. Erie Coke Has the Ability and Intention to Comply.

Beyond the Denial's procedural infirmity, it is also substantively unsupportable. The Department principally based its Denial on "Erie Coke's lack of intention or ability to comply as shown by the compliance history of the facility." *See* Ex. BB. That Department's determination here is so counter to the evidence as to be arbitrary and capricious, and the Board – when it exercises its *de novo* review – will conclude that the Department's conclusion is simply incorrect.

In fact, the unchallenged evidence shows that, in the last six months, Erie Coke has made a renewed commitment to compliance, and has both the corporate commitment and financial wherewithal to achieve consistent compliance. More importantly, the evidence also shows that Erie Coke has made tremendous strides in correcting the alleged violations at its facility, and has implemented extensive new procedures to ensure continued compliance. These efforts showcase

Erie Coke's commitment to compliance, and Erie Coke submitted evidence here to show its financial and organizational ability and commitment to fulfill all the plans and commitments it has made to the Department.

1. Erie Coke Is Committed to Compliance.

At bottom, the Department's judgment that Erie Coke lacked the ability or intent to comply is entirely backward-looking; it is based simply upon the fact that it had emissions exceedances and other operational problems in the past. It fails to recognize the substantial efforts and commitments Erie Coke has made, which demonstrate its ability and intent to comply with applicable requirements on a going-forward basis.

Concededly, Erie Coke has encountered environmental compliance difficulties, starting in 2017, when an unexpectedly large number of senior employees retired and the new or junior people who replaced them were inexperienced in implementing the necessary environmental control measures. *See* Tr. 161:21-163, Tr. 241:13-242:4. Persisting challenges in hiring, training, and retaining new, quality employees exacerbated these issues. But since December 2018, Erie Coke has successfully and systematically overhauled its environmental compliance team and process to the point that there has been a dramatic improvement in performance (described below, *see infra* § V.B.3).

Critical to this effort is the revamped and staffed-up Erie Coke environmental team. Chuck Lauricella, Engineering Manager, has been in place since November 2018, Ed Nesselbeck began in the newly formed Environmental Director position in February 2019, and Gene Loepp was hired and installed as the facility's new Environmental Manager in April 2019. *See* Tr. 579:1-19. While it has taken this team time to become fully familiar and engaged with Erie Coke's issues, they and the company have been taking deliberate, systematic step to improve compliance. Many of these measures and their outcomes are described below, *see infra* § V.B.3, and in addition to those discrete measures, Erie Coke is building a compliance culture to ensure compliance performance in the long-term.

These efforts include the company's implementation of its plan to perform a daily, facility-wide environmental inspection program, which in turn is integrated with other functions at the facility to ensure any issues are promptly identified and addressed. *See* Tr. 529:8-530:21. Mr. Nesselbeck is also developing a comprehensive environmental management system – beginning with air emission compliance – to support systemization of environmental compliance. Tr. 525:18-24. In parallel, the facility has at this point successfully staffed up a new, dedicated oven maintenance crew to more thoroughly and consistently perform the dusting and patching maintenance work needed to comply with battery stack opacity requirements. *See* Tr. 242:7-23. And the progress being made there is apparent in the data automatically generated by the facility's continuous opacity monitoring system. *See* Ex. FF; Ex. 25A; Ex. 25C.[7]

In addition, Erie Coke recognizes that improved relationships with the public and with the Department are needed for its operation to succeed long-term. *See* Tr. 567:19-570:24 ("As soon as I started, I recognized that [relations between Erie Coke and the community are] one particular area that we need to focus on."). Environmental Director Ed Nesselbeck has reached out to the leader of Hold Erie Coke Accountable, to TV stations and print media, and to the Erie Chamber of Commerce, and hopes ultimately to set up a public forum. Both Mr. Lauricella and Mr. Nesselbeck have made similar, consistent efforts with Department leadership. *See* Tr. 375:21-377:20, 570:24-571:12, 1050:21-1060:12. And the Department's Mr. Brophy testified that Erie Coke personnel are always respectful, helpful, and immediately responsive to concerns he identifies. *See, e.g.,* Tr. 812:22-813:4.

Now, to those ends, Erie Coke is committing to substantial capital improvements at its facility, rather than continuing in asserting legitimate objections over what the regulations actually require. For example, the Department has always known that the facility does not have a back-up desulfurization system, but routinely interpreted Erie Coke's Title V permits to allow the absorber to be taken off-line for maintenance activities. *See* Tr. 896:8-9; 1022:12-1023:11.

[7] Erie Coke has moved to supplement the record to include Exhibit 25C, the July 2019 continuous opacity monitoring reports.

Such an approach was the only colorable manner in which to interpret Erie Coke's Title V permits, and was sensible in light of the Erie region's compliance with the SO_2 ambient air quality standards. At the apparent whim of the Mr. Gustafson, the Department changed its approach in late 2017, culminating in the Department's order in February 2019 requiring Erie Coke to submit a plan approval for a back-up system that would only operate a small fraction of the time. *See* Tr. 1024:2-8; Exhibit RR. Rather than contest the Department's arbitrary and capricious *volte-face,*[8] however, Erie Coke instead complied with the Department's direction, and submitted a back-up system plan approval application in June 2019. *See* Ex. 9.

Similarly, the Department mistakenly contends that pushing emissions escaping the coke side shed are noncompliant if they exceed 20% opacity at any point in time. *See infra* § V.B.3. That was the apparent basis of the February Order's requirement that Erie Coke develop and submit an engineering evaluation of the coke side sheds within 60 days. But again, Erie Coke timely submitted its Coke Side Shed Capture Engineering Evaluation and Compliance Plan, *see* Ex. SS, Ex. 9, has substantially improved the shed already (to address some items first noted by the Department, as well as items that Erie Coke independently identified, *see* Tr. 835:10-836:13), and has followed up with a July 31, 2019 Coke-Side Shed Engineering Evaluation for Capture Improvement. *See* Ex 27.[9] Now, Erie Coke awaits Departmental feedback on that submission and looks forward to implementing it.

All of these measures show Erie Coke is committed to compliance. Its new personnel, from its senior management team to lower-level employees, are dedicated to ensuring that everyone working at Erie Coke both knows and follows proper operational protocols. *See* Tr. 242:5-247:6, 524:9-18. And its comprehensive and daily inspections and its compliance plans have identified various issues and opportunities for improvement – from repairs and capital

[8] Erie Coke only contested the requirement that it prepare a plan approval application on the Department's unrealistic time frame.

[9] Erie Coke has moved to supplement the record to include Exhibit 27, the July 31, 2019 engineering evaluation report for coke side shed capture improvements.

upgrades to process changes – that Erie Coke is already implementing. These efforts have been neither cheap nor convenient, but Erie Coke has done them to show it is committed to compliance and to a positive working relationship with the Department.

2. Erie Coke Has the Financial Ability to Comply.

The cost of facility improvements has and will be significant, but Erie Coke has begun implementing the measures set forth in these plans, is continuing to do so despite the risk at any moment of immediate shut down, and is committed to continuing to execute the plans. For example, the cost of the backup desulfurization system is anticipated to be $750,000, the new pushing emission controls are anticipated to be $670,000, and improving battery stack opacity performance is expected to cost $1,000,000 – all exclusive of internal plant labor and routine operations and maintenance activities. *See* Ex. DDD. As estimated to date, the improvements will cost more than $3 million, and may climb higher. *See* Ex. DDD; Confi. Tr. 29:5-7.

Erie Coke admittedly has weathered difficult financial times – as has the iron and steel industry more broadly – [redacted] but the matter at issue now is whether Erie Coke ***currently*** has the ability to comply. [redacted] 8. Critically on that question, [redacted] and the company is now confident that it does and will have the resources needed to follow through on the improvements to which it has committed. *See* Tr. 164:12-14; [redacted]. The same conditions that led to improved performance are expected to continue in the next fiscal year, and the market for Erie Coke's products is strengthening. [redacted] the positive financial trajectory of the company is clear, and the company's leadership is confident that, when expenditures are required for the environmental improvement projects to which Erie

Coke has committed, the company will have the resources. *See* Tr. 165:12-17 [redacted] [redacted][10]

3. Erie Coke Has Complied with the February 4, 2019 Administrative Order.

Turning to the Department's specific allegations, Erie Coke has unquestionably complied with the February 4, 2019 order.

First, the Order required the submission of a pushing emission baghouse stack test protocol within 30 (thirty) days of the Order's issuance, and implementation following Departmental approval of the protocol. *See* Ex. RR, at 13. The Department acknowledged that Erie Coke timely submitted the protocol, the Department approved it, and it has now been implemented. *See* Tr. 562:6-563:3; 935:6-11.[11]

Second, the Order required Erie Coke to notify the Department if the facility's existing desulfurization system (the absorber/thionizer) is taken out of service and when it is returned to service. *See* Ex. RR, at 13. Erie Coke testified that it has complied with that requirement, and the Department has not alleged any failure to so comply. *See* Tr. 563:14-23. Indeed, the Department has relied on Erie Coke's notifications to identify alleged violations. *See* Ex. BB, at Ex. A (identifying alleged violations when the absorber/thionizer system was taken out of service for maintenance).[12]

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[10] [redacted]

[11] There was a modest delay in conducting the stack test, but it was not due to any default on Erie Coke's part – rather, it was due to the testing consultant's scheduling backlog. *See* Tr. 563:4-13.

[12] As an aside, the schedule attached to the Denial as "Exhibit A" significantly (presumably deliberately) overstates Erie Coke's alleged non-compliance, by listing the same event on multiple lines if the Department believed that it violated more than one specific regulatory provision.

Third, the Order required Erie Coke to submit a "corrective action plan" addressing the allegations in the Order within sixty days. In addition to that general requirement, the Order specifically required the plan to include a battery stack engineering evaluation, a coke side shed baghouse engineering evaluation, an administratively complete plan approval application for the construction and installation of a backup desulfurization system (for use when the existing absorber/thionizer system is offline), and updated work practice and operation and maintenance plans. *See* Ex. RR, at 13-14. Erie Coke timely submitted a compliance plan addressing all required elements other than the administratively complete plan approval for a backup desulfurization system. *See* Ex. SS. As Erie Coke explained, it was not feasible to evaluate potential treatment technologies, select a preferred treatment method, and perform the engineering work needed to draft a plan approval application within the Order's 60-day time frame. *See* Ex. SS at 2-3; Tr. 372:16-373:12. But of course, Erie Coke, in accordance with the timeline it informed the Department it would be able to meet, cured that issue when it submitted the plan approval on June 25, 2019. *See* Ex. 9; Tr. 557:19-559:6; *see also* Tr. 373:13-374:1, 376:11-20.[13]

The Department's critiques of Erie Coke's submissions in response to the Order are misplaced, and reflect the Department's incomplete understanding of the coke plant's complexity. For example, the Department complained in its June 21, 2019 letter that Erie Coke had "not fully evaluated the battery, ha[d] not developed a comprehensive list of needed repairs, and ha[d] not submitted a schedule for completion of the repairs." *See* Ex. RR, at 2. Mr. Gustafson further testified that he found the battery stack opacity evaluation inadequate because it did not identify ***one*** specific root cause for battery stack opacity exceedances. *See* Tr. 962:13-16. At the outset, the February 4, 2019 Order did not contain any instruction to that effect. *See* Tr. 1037:17-1038:14. More broadly, the assumption that Erie Coke was required to perform

[13] In advance of that submission, on May 6, 2019, Erie Coke submitted to the Department a comprehensive engineering evaluation, identifying and assessing the feasibility of various treatment technologies and selecting iron oxide boxes as the optimal backup desulfurization method. *See* Ex. 6; *see also* Tr. 371:1-15, 372:25-374:1.

these tasks, and identify one (and only one) root cause for opacity excursions, appears to stem from Mr. Gustafson's ill-informed assumption that battery stack opacity exceedances needed to be addressed through a complete rebuild of B battery, *see* Tr. 1079:22-1080:8, which in turn appears to have led him to believe, incorrectly, that "the" cause of battery stack opacity exceedances was refractory damage.[14] The Department merely presumed as such, without any specific engineering training or coke plant expertise.

In fact, Mr. Lauricella credibly and amply demonstrated that there are a number of potential causes that can lead to battery stack opacity exceedances, individually or in combination; that Erie Coke narrowed those potential causes to a subset of possibilities; and that Erie Coke developed a detailed battery stack opacity compliance plan to address those possibilities through a combination of facility improvements, operational changes, and an enhanced and systematized maintenance program. *See* Tr. 336:23-353:21; *see generally* Ex. SS at Ex. A (Battery Stack Opacity Compliance Plan).

A similar analysis applies to the coke side shed engineering report. *See* Tr. 354:20-368:21; *see generally* Ex. SS at Ex. B (Coke Side Shed Capture Engineering Evaluation and Compliance Plan). In fact, Erie Coke has now (as Mr. Lauricella forecasted, *see id.*, 367:4-368:15) completed and submitted to the Department an engineering evaluation of the volume and suction of the existing coke side sheds, containing six specific recommendations to increase the sheds' total volume by 68%, to enhance controls on fugitive emissions at the ends of both sheds, and to focus automatically the baghouse fans' suction to the shed associated with the oven being pushed at any given time. *See* Ex. 27. Erie Coke awaits Departmental direction about whether any plan approval application or request for determination is needed before Erie Coke can implement the bulk of these recommendations.

[14] In any event, as Messsrs. Nelson and Lauricella testified – based upon their direct, personal observations of the battery – the current condition of B battery's oven walls is such that B battery need not be rebuilt to address battery stack opacity. *See* Tr. 304:6-305:11, 310:10-11, 312:9-24, 354:4-26, 448:10-22.

Finally, the Department's contention that the work practices plan and operations and maintenance plan are insufficient are equally misplaced. The Order required updated plans, and that is what Erie Coke submitted. *See generally* Ex. SS at Ex. C-D (Work Practice Control Plan and Operations & Maintenance Plan / Startup, Shutdown & Malfunction Plan). Erie Coke never intended for the submitted documents to be final versions. Rather, as specifically called for the in Erie Coke's compliance plan, Erie Coke intended to further update the work practice and operation and maintenance plans based on the lessons learned through the implementation of both the battery stack opacity report and the coke side shed report. *See* Ex. SS at 3. The compliance plan calls for further updated work practice and operation and maintenance plans to be submitted by August 15, 2019. *See id.*

More basically, the Department's personnel simply lack the background or experience to second-guess Erie Coke's engineering evaluations. Mr. Gustafson (who made the decision to issue the Denial, *see* Tr. 986:19-21), is not an engineer, has never worked in a manufacturing facility, has never performed an engineering root-cause analysis, has never regulated another coke plant, and has never even been to another coke plant besides Erie Coke. *See* Tr. 965:24-967:8. As a result, he is not familiar with the basic control technology and how it operates to reduce emissions at Erie Coke's facility; for example, he admits he does not know what several control valves do "specifically" or how they are "relevant to the batteries' emission performance." *See* Tr. 967:22-968:9. Similarly, the coke plant experience of Mr. Brophy – the Department's proffered expert on "coke plant operations," *see* Tr. 659:11-18 – was limited to two Method 303 recertification visits, two weeks assisting with inspection of ArcelorMittal's Monessen facility (as it was having compliance problems during resumption of normal operations after a hot idle), and his inspections of Erie Coke. *See* Tr. 659:25-662:18. Neither had ever been involved in the operation of a coke plant. *See* Tr 661:14-15, 966:10-21.

Importantly, what ultimately matters is Erie Coke's compliance performance. And notwithstanding the Department's critiques, that performance has, as described below, improved

significantly, demonstrating powerfully that Erie Coke has the intent and ability to comply with applicable requirements.

4. Erie Coke Is on Track to Achieve Compliance with Battery Stack Opacity Limits.

Erie Coke's monthly 20% opacity exceedance reports show a high-water mark in February 2019 of more than 5,000 minutes in excess of 20% opacity, with prior highs in the mid-2,000s to mid-3,000s. *See, e.g.,* Ex. 25A. But since February, Erie Coke has shown dramatic, replicable improvement in its performance, with 1,460 minutes in March, 2282 minutes in April, 1,300 minutes in May, 850 minutes in June, and 379 minutes in July – a July compliance percentage of 99.15%. *See* Ex. 25A, 25C. In addition, Erie Coke's monthly compliance with the 60% opacity limitation has been consistently above 99, with several months at 100% compliance. *See* Ex. 25B, 25C. *See generally* Tr. 536:20-540:5.[15]

These improvements coincide with and are attributable to increased staffing, new and more consistent training and management practices, and enhanced oven wall maintenance practices (consistent with the corrective action plan that Erie Coke provided to the Department). *See* Tr. 242:5-243:18, 247:17-248:2, 304:6-20, 305:12-310:9, 524:4-525:4. As the Department concedes, this enhanced maintenance is an appropriate method for addressing battery stack opacity. *See* Tr. 719:11-25.

Admittedly, Erie Coke is unlikely to completely eliminate opacity excursions – there will always be upsets, or inadvertent worker errors, or malfunctions. *See, e.g.,* Tr. 540:6-541:7. But "compliance" does not require perfection, as the Department admits. *See* Tr. 999:12-15 ("Q. Now, does compliance mean that there will never ever be an exceedance of a permit limit? A. Occasionally, there are upsets and malfunctions at plants that may cause exceedances."). Nor is perfection required for permit issuance. Tr. 852:12-853:2. Instead, "compliance" "is the action that a company takes to show that they are meeting the expected standards that have been

[15] Erie Coke has operated within the federal NESHAP's daily average opacity limit of 15%, with the sole exception of a single seven-day period). *See* Tr. 1:8-13, 1033:6-1034:1.

promulgated and laid out through regulations and rules." Tr. 999:8-11. As a result, the mere fact that there are exceedances does not mean that a permittee lacks the ability or intent to comply with applicable requirements. *See* Tr. 999:25-1000:6.

5. Fugitive Pushing Emissions Are Already Compliant, Are Set to Improve Further, and Are an Inappropriate Ground for Denying Permit Renewal.

Erie Coke has installed a coke side shed to capture pushing emissions. Suction draws the emissions from the shed to the baghouse, where particulate matter is cleaned out of the emissions before the emissions are ultimately released to the atmosphere through the baghouse. *See* Tr. 833:9-19. The Department does not contend that the baghouse system is not operating properly. Rather, the Department alleges that, on occasion, pushing emissions that escape capture by the coke side sheds (*i.e.,* fugitive pushing emissions) violate 25 Pa. Code § 129.15, which provides that "visible fugitive air contaminants in excess of 20% opacity from an air cleaning device installed for the control of pushing emissions under a plan approval from the Department shall be prohibited.…" *See, e.g.,* 791:1-792:7, 830:2-19, 831:1-20; *see generally* Ex. BB, at Ex. A (identifying alleged violations of 25 Pa. Code § 129.15).

But 25 Pa. Code § 129.15 is actually inapplicable to the violations the Department has alleged, because it only applies, by its terms, to a "cleaning device" – that is, the baghouse itself – and not to the coke side shed, a "capture device." The Department itself made that distinction repeatedly, referring to the coke side shed as the "capture system," 947:15-21, 948:6-9, 962:23, and agreeing that the shed "capture[s] pushing emissions" while "it's the function of the baghouse to actually clean that air before it's emitted by removing particulate matter," Tr. 833:9-19. Thus, this provision applies only to the possibility of fugitive emissions from the baghouse itself, and does not apply to emissions that are simply never captured by the shed. Rather, those emissions instead remain subject to, and only to, the federal NESHAP limit, which limits ***average*** opacity through the course of a push based upon a number of sequential observations.

Erie Coke complies with that standard, and the Department has not alleged otherwise. *See, e.g.,* Tr. 829:1-14, 830:10-19, 831:4-8.

Even if 25 Pa. Code § 129.15 were to apply to fugitive pushing emissions, the violations of that provision are not a suitable basis for ordering the permanent closure of Erie Coke's operation, given the inherent inaccuracy of opacity observations for emissions escaping from the coke side shed. According to the Department, whether such emissions exceed 20% opacity is determined on an instantaneous basis, based solely on human observation. *See* Tr. 791:23-792:6. As the Department admits, EPA's "Method 9" is the only accepted approach for human observation of emission opacity. *See* Tr. 793:2-5. But the Department only recently began to consistently use Method 9 to observe the opacity of pushing emissions not captured by the coke side shed. *See* Tr. 791:12-15; 809:25-810:8; 821:5-20. Prior visual observations of opacity lack any reliability whatsoever because Method 9 was not used consistently or at all.

More broadly, given the inherent inaccuracy of Method 9, it is even inappropriate for the Department to rely on its more recent, method-compliant observations to allege that any pushing emissions not captured by the coke side shed were in excess of 20% on an instantaneous basis, based on only a single observation. Method 9 attempts to account for many sources of inaccuracy, but correctly notes that some variables entirely outside the control of the observer affect the accuracy of the reading. These include, for example, "luminescence and color contrast between the plume and the background against which the plume is viewed." 40 C.F.R. Pt. 60, App. A-4. It is perhaps intuitive that "the potential for a positive error is … greatest when a plume is viewed under such contrasting conditions." *Id*. To account for this, Method 9 allows a significant margin of error in the certification process. An observer can pass the Method 9 certification test provided the observer is within 7.5% of actual opacity on average, and provided that no single observation error exceeds 15%. *See id.*, § 3.1. As described by EPA within Method 9 itself, the Method's inherent inaccuracy (especially when considering single observations) "must be taken into account when determining possible violations of applicable opacity standards." *See id*. For example, at the June 7, 2019, inspection, the average of all

opacity readings was in the range of 7-10% for the various ovens, with only one instantaneous outlier reading of 25%. *See* Tr. 828:17-831:20; Ex. Q. Indeed, all the alleged opacity exceedances that the Department testified about were at the 25% and 30% level – well within the Method 9 margin for error for actually compliant emissions – and are highly suggestive of outlier readings. *See* Tr. 828:17-19; 846:1-25; Ex. Q; Ex. T; Ex. 22. Thus, particularly for an action as draconian as permit denial, it is arbitrary and capricious for the Department to rely on the purported single-reading instantaneous opacity of emissions not captured by the coke side shed to deny Erie Coke's permit renewal.

Further demonstrating the arbitrary nature of the Department's finding is the fact that 25 Pa. Code § 129.15 itself excuses fugitive pushing emissions in excess of the 20% instantaneous opacity standard when "emissions are of minor significance with respect to causing air pollution" or "emissions will not prevent or interfere with the attainment or maintenance of any ambient air quality standard." As discussed above, Erie has been at all times in compliance with ambient air quality standards, despite any alleged exceedances by Erie Coke, and there is no evidence that fugitive pushing emissions (most barely exceeding the 20% instantaneous limit, and falling within Method 9's margin for error) have had any significant deleterious effect on the surrounding environment. As a result, any such alleged "violations" in fact properly fall within the regulatory "safe harbor." Rather than applying this provision, however, the Department uncompromisingly, arbitrary and capriciously relied on exceedances of the 20% instantaneous standard to justify the Denial.

As a final observation, as discussed above, even though emissions not captured by the coke side shed are not subject to the 20% instantaneous limitation, Erie Coke has now completed and submitted its coke side shed engineering evaluation, proposing a number of measures to improve the coke side sheds' capture efficiency. *See* Ex 27. As a result, even if past fugitive emissions at the coke side sheds violated 25 Pa. Code § 129.15, that does not mean that Erie Coke currently lacks the ability or intent to comply with relevant requirements.

6. Alleged Violations of the Hydrogen Sulfide Combustion Restriction During Absorber/Thionizer Maintenance Do Not Justify a Permit Denial.

Nor does the Department's concern about alleged exceedances of the 50 grains per 100 dry standard cubic foot limit on combustion of hydrogen sulfide justify the Denial. Initially, routine maintenance on the desulfurization system is routine industry practice and proper engineering practice, and has been authorized historically by the Department; even the February 4, 2019 Administrative Order contains no requirement that Erie Coke ***not*** take the absorber/thionizer offline for maintenance. *See* Tr. 896:8-9 ("[I]t had been past practice that that was accepted by the agency… Erie Coke would notify us, you know and that was normal practice."), 899:13-17 ("[T]he order didn't order them not to take it offline," but rather "alluded to" noncompliance "by requiring Erie Coke to provide us notice when they took it offline."). But an "allusion to" noncompliance hardly puts Erie Coke on notice that the Department intends to deny it a Title V permit for servicing its absorber/thionizer, especially given that the Department had previously permitted such activities without complaint. Extending back to Erie Coke's first Title V permit in 1995, when the 50 grains per 100 standard cubic feet limitation had long been the rule, the Department issued the permit knowing ("it was obvious") Erie Coke would need to maintain its absorber/thionizer. *See* Tr. 1022:12-1023:11. And yet, Erie Coke's very compliance with the Order here (notifying the Department when it serviced the H_2S absorber) sowed the seeds for the Department's denial of Erie Coke's permit renewal, in light of the Department's abrupt and unjustified change from its long-standing historic interpretation of the regulatory scheme.

In any event, as discussed above, Erie Coke has committed to installing a backup desulfurization system, and has submitted a plan approval application seeking authorization for its construction and operation.

7. Alleged "Method 303" Violations Cannot Support the Denial.

Another set of alleged violations with respect to which Erie Coke has shown marked improvement involves visible emissions due to leaks from various battery sources. *See generally*

Ex. RR, ¶¶ LL, MM, and NN. Importantly, because the regulations do allow a certain percentage of these sources to experience leaks, the presence of leaks is not by itself a *per se* violation. Rather, a violation occurs when the number of sources with leaks exceeds the regulatory threshold. *See* 35 P.S. § 4006.1; 25 Pa. Code § 123.44(a); Tr. 699:7-9, 700:4-7, 700:25-701:7. The particular inspection performed to determine compliance is called Method 303 – Determination of Visible Emissions From By-Product Coke Oven Batteries. *See* https://www.epa.gov/sites/production/files/2019-06/documents/method_303_1.pdf. As EPA describes, "This method is applicable for the determination of visible emissions (VE) from the following by-product coke oven battery sources: charging systems during charging; doors, topside port lids, and offtake systems on operating coke ovens; and collecting mains." *See id.*; *see also, e.g.,* Ex. P. The Department identified several alleged Method 303 violations in its February 2019 Administrative Order and, later, in the Denial. *See* Exhibit PP, ¶ LL-NN; *see also* Ex. BB, at Ex. A.

Erie Coke's process and capital improvements have resulted in a substantial reduction in leaks from the referenced sources. *See* Tr. 51:17-25 ("[I]f you compare the first six months for 2019 to the full year of 2018, we're actually at a slightly less percent leaking doors, we are a factor of five less on the lids, and about a factor of two less on offtakes. And we're also seeing a downward trend in battery stack plume opacity compared to 2018."). *See also* Ex BB at Ex. A (showing 22 offtake, door, charging and lid leak allegations in 2017, 17 in 2018, and 5 to date in 2019). The Department does not dispute that downward trajectory. *See* Tr. 1016-18.

This is all the result of the efforts that Erie Coke has exerted over the past six months. For example, it now conducts a daily walk-around inspection of its entire plant, looking for issues such as leaks specifically. *See* Tr. 529:8-532:6. As a result, in the Department contracted inspector's "words exactly," he had "seen a phenomenal improvement over the last three or four months." *See* Tr. 555:3-10. In June 2019, "there were no violations for door leaks, no violations for lid leaks, no violations for charging opacity, and … two or three violations for an offtake leak." Tr. 555:20-23.

Even before Erie Coke implemented its new (and highly effective) proactive measures to prevent Method 303 violations, it was always immediately responsive when the Department observed a violation. Erie Coke has always had the intent to comply with all applicable regulations; however, for a period of time, due to unexpected turnover, it simply lacked the personnel to be as proactive as it wanted to be. For example, when leaks were identified during a May 13, 2019, inspection, the Department's inspectors noted Erie Coke immediately responded with a temporary patch to be followed by a permanent one, by sweeping up loose coal, and with other measures such that "they were mostly repaired." *See* Ex. O; Tr. 807:9-809:11.

Thus, Erie Coke's operations are now appropriate to prevent and respond to leaks from its various oven battery sources, and the Department has not presented any evidence to the contrary. In particular, the photographs the Department introduced to demonstrate the alleged Method 303 violations, *see, e.g.*, Ex. YY, Ex. ZZ, Tr. 711:21-714:24, provide no such support. Because the regulations and Erie Coke's permit allow a certain number of leaks, an image of a single leak cannot show that the total number of leaks exceeds the regulatory threshold. The Department's investigator Mr. Brophy concedes as much. *See* Tr. 801:6-9 ("Q. So you … can't form a judgment then, can you, whether the number of leaking offtakes at the facility that day was or was not compliant with its permit, can you? A. No, no."). And the evidence shows that now, through Erie Coke's proactive measures, the incidence of Method 303 violations has dropped dramatically, positively demonstrating Erie Coke's intention and ability to comply with the regulations.

8. Other Alleged Issues Do Not Support the Finding That Erie Coke Lacks the Intent or Ability to Comply.

Nor can the other categories of alleged violations set out in the exhibit appended to the Denial support the unprecedented decision to deny a Title V permit renewal:

- As discussed above, alleged "malodors" or fugitive dust complaints are impressionistic, inconsistent, and inherently subjective, such that it would be a

profound abuse of discretion for the Department to permanently shut down a significant manufacturing facility based upon such complaints.

- Finally, although the Department has identified a number of alleged recordkeeping violations, there is no evidence that these violations have caused or contributed to any adverse environmental conditions. Put otherwise, while Erie Coke does not minimize the importance of proper recordkeeping, the mere fact that (for example) the quench tower rinse cycle records incorrectly recorded ambient temperature, *see* Ex. BB, at Ex. A p.5, does not materially increase the risk of environmental harm, and certainly does not justify the permanent destruction of Erie Coke's business.

9. With These Process Improvements, the Department Should Have Renewed the Title V permit.

In short, Erie Coke has put forward detailed plans to achieve compliance, and is well on track to meet its compliance obligations. Under these circumstances, the Denial was patently inappropriate. As the Department itself agrees, a Title V permit can be renewed so long as the permittee presents appropriate plans for compliance. *See* Tr. 961:3-8 (Q: "[C]an the Department issue a Title V Permit to a facility that's not in compliance?" A. "We can, as long as they have an acceptable and complete compliance plan, you know, a set of specific actions over a set time schedule that will lead to compliance."). What the Department for the most part found lacking was not the specific actions that Erie Coke proposed, but rather was a critique of the root cause analysis to assess past failures. *See* Tr. 962:13-16. The Department simply has no basis to conclude that Erie Coke's plans are inadequate or will not lead to compliance here, particularly when the plans are already improving Erie Coke's environmental compliance. Thus, the Department's protestations run counter to the plain evidence and betray the Department's lack of expertise in assessing such plans.

C. Any Alleged Missing Information Does Not Justify a Permit Denial.

Also subjective (and appearing to be driven by punitive intent, rather than a real dispute) was the Department's decision to deny the Title V permit renewal based on the purported submittal of an incomplete application. *See* Ex. BB (identifying four categories of missing documents). In fact, Erie Coke submitted all the allegedly missing information in December 2018 and had a postal receipt confirming delivery. In June 2019, Mr. Nesselbeck provided both the postal receipt and a pdf of the submitted information to the Department. *See* Tr. 574:18-576:12. Despite that exchange, which should have made it clear the Department lost Erie Coke's submission (and possibly would have discovered this earlier if it had been more open to dialogue with Erie Coke), the Department nevertheless went forward with the Denial on that now patently faulty basis. The Department was also aware Erie Coke intended to amend its application based on the Department's comments (which is typical in the Title V application process), but, again, issued the Denial without awaiting Erie Coke's revised submission. *See* Tr. 1007:22-1008:25.

D. Erie Coke Did Not Operate Contrary to Department-Approved Plans and Specifications.

Although the Department alleged that Erie Coke operated contrary to Department-approved plans and specifications, *see* Ex. BB, that criticism lacks substance. Initially, Mr. Gustafson made clear that this simply reincorporated the alleged violations set out in Exhibit A to the Denial letter, *see* Tr. 1011:13-1012:11, which Erie Coke has addressed above. To the extent (contrary to Mr. Gustafson's testimony, as the author of the Denial) that the Department is pointing to the coke side shed and baghouse system design, its criticisms are equally unfounded. The proposed "peaked roof" design that the Department has pointed to elsewhere exists solely on a schematic showing the "projected" layout of the facility, *see* Ex. BBB, and is hardly a hard and fast commitment – and is particularly not grounds for forcing Erie Coke's permanent shutdown. Moreover, Mr. Lauricella explained (and International Chimney's engineering evaluation confirmed) that the peaked roof design would be ineffective, would create safety hazards, and would cause battery damage. *See* Tr. 362:7-364:3; Ex. 27, at 3-4. The use of a fan without

variable speed controls (a subject of Department cross-examination) also did not have any effect on emissions. As Mr. Lauricella explained, a fan with variable speed control is not superior. A fan without such a control is always operating at full speed – the variable speed control simply permits the fan to be operated more slowly. *See* Tr. 466:18-467:4. Considered in context, these critiques are merely *post hoc* criticisms asserted in a misguided effort to bolster an insupportable Department decision.

E. Allegedly-"Unresolved" Violations Cannot Justify a Permit Denial, When the Department Views "Resolution" as Something to Be Determined in Its Sole Discretion.

Another basis set forth in the Denial letter for denying the permit renewal and permanently closing Erie Coke was the number of allegedly-"unresolved" violations. *See* Tr. 1026:3-13. But this again turns, wrongly, on the Department's subjective impressions; according to the Department, it has sole discretion over whether to "resolve" a violation. *See* Tr. 1000:24-1001:9. The Department then uses that discretion as it chooses, as a way to "get a company to the bargaining table," where, again, the Department has sole discretion in whether it accepts – in an exercise of "administrative grace" – the permittee's proposal for resolution. *See* Tr. 1001:4-1002:25. Here, the Department, solely in its own discretion, decided it would no longer "resolve" any of Erie Coke's violations, despite Erie Coke's repeated overtures, thus leaving all Erie Coke's violations "unresolved" and appearing on the "compliance docket." *See* Tr. 911:7-16, 917:8-12, 1000:24-1001:3, 1001:15-1002:7. Thus, the fact that Erie Coke's violations here are (in the Department's view) "unresolved" is not because Erie Coke made no attempt to resolve them, but because the Department decided to rebuff Erie Coke's overtures.

Indeed, the record reflects the Department's repeated unwillingness to engage with Erie Coke. Erie Coke even submitted a compliance plan outline in November and December 2018, specifically asking for Department feedback, but the Department provided no response until it issued the February 2019 order. *See* Tr. 375:21-378:9, 966:10-998:22; Ex. QQ. Mr. Lauricella called Mr. Gustafson in January 2019 to set up a meeting, and Mr. Gustafson never called him

back. *See* Tr. 377:8-378:1, 1059:21-1060:5. Following the February 2019 order, Mr. Gustafson then outright refused to meet with Mr. Lauricella. *See* Tr. 1060:6-12. When the Department finally met with Erie Coke personnel in March 2019, they opened the meeting with the unhelpful statement that nothing Erie Coke presented at the meeting would be believed ("You'll have to forgive us if we don't believe what you tell us at this meeting today. We've heard it all before, same stories, different faces."), thus further blockading collaboration toward achieving compliance. *See* Tr. 1060:22-1062:3; 1080:21-24 ("New faces but probably the same lies"), 1085:2-16.

Nevertheless, and even though unaccepted by the Department for reasons unclear, Erie Coke is continuing to "resolve" the alleged violations through new operational practices and extensive capital improvements. Through these changes, Erie Coke is experiencing dramatic reductions in its emissions and improvements in its overall compliance at the facility. This progress qualifies Erie Coke for a permit renewal pursuant to the Department's testimony here and its longstanding practice with other companies.[16]

VI. Granting Supersedeas Would Restore the Application Shield and Allow Continued Operations.

Because granting supersedeas here would operate to suspend the Denial, Erie Coke's most recent Title V permit would remain in effect pursuant to the statutory application shield. *See* 25 Pa. Code § 127.446. The Department appears to suggest the Board could not grant this relief, because the permit application was allegedly incomplete and because the Denial was purportedly mandated by Erie Coke's placement on the compliance docket. *See* Motion to Deny Petition for Supersedeas Without a Hearing, at 11-13. However, this is contrary to the evidence,

[16] The Department's final ground for denying Erie Coke's permit renewal is an insubstantial makeweight. While the Department alleged that Erie Coke did not provide adequate verification of compliance, Mr. Gustafson admitted that this referred to the lack of a baghouse stack test (which has now been completed) and a backup desulfurization system (which is now in progress). *See* Tr. 1009:15-1011:12. More broadly, the permit itself has elaborate testing and reporting mechanisms to ensure that Erie Coke is in compliance, as Mr. Gustafson admitted. *See* Tr. 1011:3-10.

to the Department's long-standing practice, and to the testimony presented at the hearing. First, as detailed above, Erie Coke had submitted the required information to form a complete Title V application, but apparently the Department misplaced it. Erie Coke provided it again in June of this year. *See* Tr. 574:18-576:12. Further, the Department has administrative discretion in its review of Title V applications and the timing of issuing permit renewals. As Mr. Gustafson testified, although the regulations prescribe an 18-month period for review and action on a permit application, the Department did not so act by the conclusion of that period in February of this year. *See* Tr. 960:5-14. Instead, the Department decided to issue the February 2019 AO and observe Erie Coke's response. *See* Tr. 960:18-961:2.

Mr. Gustafson also confirmed the Department can and will issue Title V permits to companies out of compliance with the regulations provided a compliance plan is in place. *See id.*, 961:3-8 ("We can [issue a Title V Permit to a facility that's not in compliance] as long as they have an acceptable and complete compliance plan, you know, a set of specific actions over a set time schedule that will lead to compliance."). Moreover, the Department has discretion over whether even to place a company on the compliance docket. *See id.*, 1001:6-7 (explaining the Department has sole discretion over whether to "resolve" a violation or leave it "unresolved" and place it on the compliance docket).[17]

Finally, the Department continued to indicate to Erie Coke that the facility was operating under the application shield even after placing the facility on the compliance docket on May 9, 2019, and even as the Department was declaring the renewal application incomplete: in every inspection report the Department issued, including three from June 2019, the Department noted the expiration date of Erie Coke's permit as "permit shield." *See, e.g.*, Ex. S, Ex. T, Ex. X. As a

[17] To the extent Erie Coke's mere placement on the compliance docket could be construed to terminate the "application shield" – a position the Department did not advance at the time – Erie Coke would request that the Board also supersede that Department action (as at issue in the appeal docketed at No. 2019-050-B). That decision – as with the Denial – was based upon the Department's inappropriate determination that Erie Coke lacked the ability or intent to comply; as shown above, that determination is simply not grounded in fact.

result, its current position is nothing more than an expedient effort to achieve through the back door what it cannot through the front.

In short, once the Board grants a supersedeas, Erie Coke would remain subject to the terms of the most recent Title V permit, and can continue to operate under those constraints.

VII. Erie Coke Is Open to Potential Conditions on a Supersedeas.

Although Erie Coke believes the Department has overstepped, and is unfairly targeting Erie Coke's operations in arbitrary and capricious ways, Erie Coke is attempting to comply with all the Department's demands and restore a positive working relationship going forward. Thus, while Erie Coke requests an outright supersedeas of the Denial, it is open to the Board imposing conditions as a showing of Erie Coke's good faith in reducing its emissions and achieving environmental compliance.

First, Erie Coke would accept a condition ordering it to comply with the Battery Stack Opacity Compliance Plan and Coke Side Shed Capture Engineering Evaluation and Compliance Plan submitted in April. *See* Ex. 4, App. A and B. Compliance with these plans, which Erie Coke intends in any event, should address issues that the Department has identified. It should also satisfy the Department's internal procedural requirement that a clear compliance plan be in place before renewing a Title V permit for a plant with violations. *See* Tr. 961:3-8 (the Department can issue a Title V permit "as long as [Erie Coke] ha[s] an acceptable and complete compliance plan, you know, a set of specific actions over a set time schedule that will lead to compliance.").

Second, Erie Coke would agree to undertake (or where appropriate, to submit a plan approval application to permit Erie Coke to undertake) the steps identified in the Coke Side Shed Engineering Evaluation. These efforts should further reduce fugitive emissions from pushing operations at the facility.

Third, Erie Coke would agree to submit a revised Title V permit application that satisfies all the Department's demands here. It already committed to submitting such a revised

application to the Department, *see* Tr. 577:3-7, and Erie Coke intends the revision also to address the additional concerns the Department has raised in these proceedings.

Finally, Erie Coke could agree to conduct an engineering evaluation of the B battery using an expert on which Erie Coke and the Department would mutually agree. Erie Coke understands the Department believes a rebuild of the B battery is necessary and the only solution to the emissions exceedances. *See* Tr. 1049:5-18, 1079:16-1080:8. This appears to be the underpinning of Mr. Gustafson's conclusion in his June 21, 2019, letter to Erie Coke that "[t]he Order required Erie Coke to complete the necessary evaluation and provide a report on the current operational condition of the battery along with a schedule to correct any required repairs by April 4, 2019. Erie Coke has not fully evaluated the battery, has not developed a comprehensive list of needed repairs, and has not submitted a schedule for completion of the repairs." *See* Ex. RR, at 2. Although Erie Coke fundamentally disagrees with the Department's assessment of its Battery Stack Opacity Compliance Plan and, more importantly, its insinuation that a rebuild is necessary, Erie Coke is open to hearing from a third party mutually agreeable expert on the subject.

Erie Coke hopes its suggestion of these conditions further reflects its good faith in achieving full compliance and in working collaboratively with the Department. These conditions should also alleviate any Department concern that a supersedeas would stall the tremendous progress already achieved. Erie Coke is committed to addressing all the Department's concerns and merely seeks the opportunity and time to comply.

VIII. Conclusion

Erie Coke's presentation of irreparable harm here is irrefutable. The devastation from a facility shutdown would be both severe and widespread. The magnitude of that factor nearly overshadows the remaining factors, and itself effectively compels the grant of a supersedeas. Coupled with the clear lack of harm from continued operations and the addition of new management, process improvements, significant decreases in emissions and other environmental

impacts, and comprehensive plans that will achieve compliance, it is more than sufficient for this Board to grant supersedeas, just as it did in *Global Eco-Logical Services*, 1999 EHB 649, 1999 WL 612910 (Aug. 4, 1999), and *Keystone Cement Company v. DEP*, 1992 EHB 590, 1992 WL 123375, at *5 (May 7, 1992). By contrast, the Department's decision to shutter Erie Coke permanently is arbitrary and capricious, an abuse of its discretion, unjustifiably punitive in comparison to the Department's handling of other companies, and should be superseded during the pendency of Erie Coke's appeal.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that today I served a true and correct copy of the foregoing Post-Hearing Brief in Support of Supersedeas upon all counsel of record by electronic filing on the Board's e-filing system.

Date: August 7, 2019

/s/ Paul K. Stockman
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