

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
PETITION TO REOPEN THE
RECORD**

Erie Coke Corporation (Erie Coke) petitions the Board to reopen the record for the Board's consideration on the Petition for Supersedeas (the "Record") to include the following exhibits:

- **Proposed Exhibit 25C** is Erie Coke's July 2019 Continuous Source Monitoring Reports ("July 2019 COM Reports," Exhibit A hereto). Proposed Exhibit 25C contains opacity measurements for July 2019 from the Erie Coke facility's continuous opacity monitor, and shows that Erie Coke battery stack emissions exceeded the 20% opacity standard for only 379 minutes, and thus that Erie Coke complied with this standard 99.15% of the time. Proposed Exhibit 25 C further shows that Erie Coke did not violate the 60% opacity standard (and thus was in compliance with this standard 100% of the time).
- **Proposed Exhibit 27** is the July 31, 2019 Coke-Side Shed Engineering Evaluation for Capture Improvement ("Coke Side Shed Evaluation," Exhibit B hereto). Erie Coke committed to providing this document in its April 2019 compliance plan.

This evidence qualifies for entry into the record under the standard set forth at 25 Pa. Code § 1021.133(b). It did not exist at the time of the July 10-18, 2019 hearing, because it was only generated after the hearing concluded. And it is highly material to Erie Coke's petition for supersedeas, because it demonstrates Erie Coke's positive compliance trajectory, its continued responsiveness to the Department's demands, the lack of any harm from continued operations, and the efficacy of Erie Coke's plans and process changes in achieving compliance. When Erie Coke's entire future hangs in the balance, this Board should have before it all available relevant

evidence. Therefore, Erie Coke respectfully requests this Board reopen the record and include its July 2019 COM Report and its Coke Side Shed Evaluation. In support of its Petition, Erie Coke further states the following:

1. The standards governing a petition to reopen the record are set forth in 25 Pa. Code § 1021.133(b) which provides that:

- (b) The record may be reopened upon the basis of recently discovered evidence when all of the following circumstances are present:
 - (1) Evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true.
 - (2) The evidence is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.
 - (3) The evidence is not cumulative.

2. All these criteria apply here. As in *Blue Mountain Preservation Association, Inc. v. DEP*, EHB Docket No. 2005-077-K, 2006 WL 2195412 (July 26, 2006), the evidence conclusively establishes facts that are material to Erie Coke’s petition, as shown by Erie Coke’s citation to the evidence in its Post-Hearing Brief; further, the evidence could not have been discovered before the hearing because it did not yet exist, and it is not cumulative of other evidence.

3. Although not controlling, Pennsylvania case law on trial practice provides guidance to consider in reopening the record:

“[A] case may be reopened where it is desirable that further testimony be taken in the interest of a more accurate adjudication and where an honest purpose would be justly served without unfair disadvantage.” *In re J.E.F.*, 487 Pa. 455, 459, 409 A.2d 1165, 1166 (1979). Here, the trial court reopened the case... to secure an accurate depiction of the case’s current state of facts and to assist it in obtaining a fair disposition without prejudicing the substantive or procedural rights of Landowner.

Bretz v. Cent. Bucks Sch. Dist., 86 A.3d 306, 314–15 (Pa. Commw. Ct. 2014).

4. Similarly, here, particularly because of the equitable nature of a petition for supersedeas, reopening the record would assist the Board to understand the current state of facts and obtain a fair disposition. Erie Coke continues to show tremendous improvements in its compliance and cooperative efforts, and these are reflected in these most recent opacity readings and in the coke side shed engineering evaluation and recommendations. Because the current reality is essential to an assessment of whether to maintain the status quo, admitting this evidence is the fairest approach, especially with Erie Coke's future hinging on the outcome.

July 2019 COM Report:

5. Erie Coke's July 2019 Continuous Source Monitoring Reports did not become available until the month of July concluded and, therefore, could not have been offered into evidence at the July 10-18, 2019 hearing.

6. These reports are material to Erie Coke's petition, because the improvement they show is further support for the lack of harm in granting Erie Coke's petition and for the unreasonable and unlawful nature of the Department's denial of the Title V permit renewal.

7. Erie Coke has continually reduced the opacity of its emissions, such that by April of this year, it was operating within Pennsylvania's three-minute 20% opacity requirement 94% of the time, by May 97%, and by June 98% of the time. This downward trend was presented at the hearing. *See* Tr. 537:9-18. The July reports show an even higher compliance percentage (99.15%), thus continuing the positive trend.

8. The July 2019 COM Report is relevant to whether supersedeas will result in "injury to the public." 35 Pa. Stat. Ann. § 7514(d)(1)(iii). Erie Coke's positive trajectory, further bolstered by its July 2019 reports, shows the particulate matter (PM) in its battery stack emissions is in nearly full compliance with regulatory standards and is now an even smaller contributor to the particulate concentrations in Erie's atmosphere (which already meets ambient air quality standards). Therefore, the July reports show no harm will result from granting the petition.

9. The July 2019 COM Report is also material to showing that Erie Coke has the ability and intention to comply with its permit. The Department will renew a Title V permit when it observes “actions ... that will lead to compliance,” Tr. 961:3-8, and the July 2019 reports demonstrate Erie Coke’s plans can lead and are leading to compliance sufficient to support permit reissuance. Because battery stack emission opacity is, therefore, not a legitimate basis for the permit denial, Erie Coke is likely to succeed on the merits of its appeal.

10. Therefore, the July 2019 Continuous Source Monitoring Reports qualify for inclusion in the record under 25 Pa. Code § 1021.133(b), and Erie Coke requests this Board include them in the record here.

Coke Side Shed Evaluation:

11. Erie Coke also asks the Board to include the July 31, 2019 Coke Side Shed Evaluation, which was still under preparation at the time of the hearing. Because the July 2019 Engineering Evaluation was not yet complete, it could not have been offered into evidence at the July 10-18, 2019 hearing.

12. The July 2019 Engineering Evaluation is material to Erie Coke’s petition, because it demonstrates Erie Coke’s continued compliance with the February 4, 2019 Administrative Order, and thereby its overall intention and ability to comply with the Department’s demands. It is also part of Erie Coke’s “acceptable and complete compliance plan[s]” that authorizes the Department to renew Erie Coke’s Title V permit. *See* Tr. 961:3-8.

13. The Department based its Denial in part on “Erie Coke’s lack of intention or ability to comply as shown by the compliance history of the facility.” Ex. AA. The Department detailed many of its issues with Erie Coke’s compliance in its June 21, 2019 letter. *See* Tr. 943:11-944:16; Ex. RR. Some of the Department’s criticisms related to Erie Coke’s submittal of an “Engineering Evaluation and Compliance Plan for the Coke Side Shed Capture System, as required Paragraph 3.b of the [February 2019 Administrative] Order.” *See* Ex. RR, at 2. Specifically, the Department was critical that the plan still contained some items under investigation.

14. At the time, Erie Coke had not yet completed its full assessment of which improvements would be effective to bring Erie Coke's emissions into compliance, but (as Erie Coke testified) it was in the process of completing the more detailed "engineering evaluation of the [emissions capture] system from one end to the other, and that includes the evaluation of the current condition of the shed, potential modifications to it to help capture pushing emissions, evaluation of the fan operation within the baghouse system, which puts the negative pressure on the entire capture system collecting the fugitives." Tr. 544:1-19. The July 2019 Engineering Evaluation is the culmination of that process and contains six concrete measures that will be effective to "increase dust capture and collection from the coke pushing process occurring under the sheds and, by doing so, to decrease the amount of visible opacity observed from the sheds during oven pushing." *See* Coke Side Shed Evaluation, at 1.

15. Therefore, Erie Coke has the intention or ability to comply, and indeed has been responsive to the Department's demands. Whenever the Department has alleged a submission is inadequate, Erie Coke has submitted a revised version to address the Department's comments. Erie Coke's completion and submission of the Coke Side Shed Evaluation further demonstrates Erie Coke's willingness to comply, as well as its ability to comply with any applicable limitations on the opacity of pushing emissions that may escape the coke side shed.

16. Therefore, the Coke Side Shed Evaluation qualifies for inclusion under 25 Pa. Code § 1021.133(b), and Erie Coke requests this Board include it in the record here.

WHEREFORE, for the reasons stated above, Erie Coke requests the Board reopen the record and admit Erie Coke's July 2019 COM Report and its July 31, 2019 Coke Side Shed Evaluation for its consideration in connection with Erie Coke's Petition for Supersedeas. These exhibits are conclusive evidence on matters that are material to Erie Coke's Petition for Supersedeas, could not have been discovered earlier because they were only created after the hearing concluded, and are not cumulative of other evidence already in the record.



August 7, 2019

Respectfully submitted,

/s/ Paul K. Stockman

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CERTIFICATE OF COUNSEL

Pursuant to 25 Pa. Code § 1021.133(d)(3), I certify that this Petition is being filed in good faith and not for the purpose of delay.

Date: August 7, 2019

/s/ Paul K. Stockman

Paul K. Stockman

VERIFICATION PURSUANT TO RULE 1024(C) OF THE PENNSYLVANIA RULES OF CIVIL PROCEDURE

This attorney verification is made pursuant to Rule 1024(c) of the Pennsylvania Rules of Civil Procedure because the officers and other knowledgeable personnel of Defendant Erie Coke Corporation are outside the jurisdiction of this Court and their verification cannot be obtained within the time allowed for filing the foregoing Petition. The foregoing Petition is true and correct to the best of the undersigned's information and belief. This verification is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: August 7, 2019

/s/ Paul K. Stockman

Paul K. Stockman



CERTIFICATE OF SERVICE

I certify that today I served a true and correct copy of the foregoing Petition to Reopen the Record, with accompanying materials, upon all counsel of record by electronic filing on the Board's e-filing system.

Date: August 7, 2019

/s/ Paul K. Stockman

Paul K. Stockman