



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD



**CENTER FOR COALFIELD JUSTICE
and SIERRA CLUB** :

v. :

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and CONSOL
PENNSYLVANIA COAL COMPANY, LLC
Permittee** :

EHB Docket No. 2018-028-R

Issued: April 24, 2018

**OPINION AND ORDER ON
PETITION FOR SUPERSEDEAS**

By Thomas W. Renwand, Chief Judge

Synopsis

The Board denies the Appellants’ Petition for Supersedeas in their appeal of Permit Revision 210 authorizing longwall mining under Polen Run in the 5L Panel of the Bailey Mine East Expansion Area. The Board finds that the updated hydrogeologic data, monitoring data and other evidence presented at the supersedeas hearing supports the Department’s issuance of the permit revision. The Appellants have raised important concerns regarding the health of Polen Run, but Consol and the Department have presented strong evidence that Polen Run is not likely to be impaired and, should any flow loss occur, it can be successfully restored.

OPINION

Background

The history of this matter is fully set forth in the Pennsylvania Environmental Hearing Board (Board) Opinion issued on February 1, 2017 in *Center for Coalfield Justice v. DEP and*

Consol Pennsylvania Coal Co., 2017 EHB 38 (*Coalfield Justice I*), and Adjudication issued on August 15, 2017 in *Center for Coalfield Justice v. DEP and Consol Pennsylvania Coal Co.*, 2017 EHB 799 (*Coalfield Justice II*). We borrow from those decisions in presenting the history here: The Bailey Mine complex is a large underground coal mine complex located in Greene and Washington Counties, Pennsylvania. Consol Pennsylvania Coal Company, LLC (Consol), has conducted development and longwall mining activities at the Bailey Mine since 1985 under CMAP No. 30841316. In 2007, Consol sought a permit revision to CMAP No. 30841316 to conduct development and longwall mining in the area known as the Bailey Mine Eastern Expansion Area (“BMEEA”). BMEEA is located adjacent to and partially underlies Ryerson Station State Park, the only state park in Greene County. BMEEA consists of several longwall panels running largely in an east-west direction, referred to as Panels 1L, 2L, etc. The panel at issue in this appeal is the 5L.

On March 29, 2012, the Pennsylvania Department of Environmental Protection (Department or DEP), issued Permit Revision No. 158 allowing development mining for BMEEA. On May 1, 2014, the Department issued Permit Revision No. 180 which authorized longwall mining in panels 1L through 5L of BMEEA, but did not authorize longwall mining beneath two streams, Polen Run and Kent Run. Those streams are generally located in the western half of BMEEA and flow north–south perpendicular to the panels. On February 26, 2015, the Department issued Permit Revision No. 189 authorizing longwall mining under Polen Run in the 1L and 2L panels. Consol’s application that led to Permit Revision No. 189 did not seek permission to mine under Kent Run.

On February 22, 2016, Consol submitted an application seeking authorization to conduct longwall mining beneath Polen Run and Kent Run in the 3L panel. On December 13, 2016, the

Department issued Permit Revision No. 204 authorizing longwall mining beneath both Polen Run and Kent Run in the 3L panel. Permit Revision No. 204 required Consol to implement an approved stream restoration plan to address any impacts to the streams from Consol's longwall mining. It also included Special Condition 97 stating that Consol could not conduct longwall mining beneath or adjacent to Kent Run until the Pennsylvania Department of Conservation and Natural Resources granted written access to Consol to allow it to perform stream mitigation work authorized by the Department.

The Center for Coalfield Justice and Sierra Club (Appellants) appealed the issuance of Permit Revisions 180, 189 and 204, and petitioned for supersedeas in the case of Permit Revision 204. On February 1, 2017, the Board granted, in part, the Appellants' Petition for Supersedeas as to Permit Revision 204, finding that the Appellants had met their burden of demonstrating that they were likely to succeed on the merits of their appeal (*Coalfield Justice I*). With regard to Polen Run, the Board found that the matter was moot because Polen Run had already been undermined in the 3L panel by the time the supersedeas was filed.

On August 15, 2017, the Board issued an Adjudication on the appeals of Permit Revisions 180 and 189, finding that the Department's issuance of Permit Revision 180 was reasonable and in compliance with the applicable statutes and regulations and that the anticipated and actual impacts to the streams from longwall mining did not rise to the level of impairing the streams. As to Permit Revision 189, the Board found that the evidence presented at hearing demonstrated that the permit revision was issued in violation of the applicable statutes and regulations and Article I, Section 27 of the Pennsylvania Constitution because the anticipated and actual impacts to Polen Run had impaired and were likely to further impair Polen Run and cause pollution as that term is defined under 25 Pa. Code § 86.37(a)(3) of the Department's

regulations (*Coalfield Justice II*). In *Coalfield Justice II*, we recognized that neither the Clean Streams Law nor the Mine Subsidence Act require that there be no impact to waters of the Commonwealth from activities permitted by the Department, including longwall mining. 2017 EHB at 834, 835. By the same token, the law prohibits longwall mining from permanently eliminating natural flow in a stream. *Id.* at 842-43.

The matter currently before the Board is the Department's issuance of Permit Revision 210 on March 7, 2018, authorizing Consol to conduct full extraction longwall mining beneath Polen Run in the 5L panel. The Appellants appealed the issuance of the permit revision on March 21, 2018 and on the same date filed Petitions for Supersedeas and Temporary Supersedeas. On April 3, 2018, the Board held a conference call with the parties to address the Petitions for Supersedeas and Temporary Supersedeas and requested a status update from counsel for Consol as to the advancement of mining as of that date. By Order dated March 28, 2018, the Board restricted mining within 500 feet of Polen Run until such time as the Board could hold a supersedeas hearing on the Appellants' petition. The Board directed Consol to keep the Board apprised as to the progression of mining and the anticipated date on which mining was expected to reach the 500-foot buffer. On April 3, 2018, the parties conferred and consented to an amendment of the Board's Order and agreed to a 100-foot buffer. The Board adopted the parties' amendment and revised its Order on April 4, 2018.

A supersedeas hearing was held on April 5-6, 2018 and April 16-17, 2018 and the parties submitted briefs on April 20, 2018.

Standing

There is no question that the Appellants have standing in this matter. Both Center for Coalfield Justice and Sierra Club have standing through at least one of their members, Veronica

Fike. *Funk v. Wolf*, 144 A.3d 228, 245-46 (Pa. Cmwlth. 2016) (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000); *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (An organization has standing if at least one individual associated with the group has standing). Ms. Fike grew up in the area of Ryerson Station State Park and used the park frequently during her childhood. She continues to live in the area and hike in the park, including in the area of Polen Run. Ms. Fike testified that she used to spend much of her time on Duke Lake until it had to be drained due to mine damage caused by Consol’s mining and now her use of the park involves other aquatic resources, including Polen Run.

Supersedeas Standard

As we stated in *Coalfield Justice I*, “a supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need.” 2017 EHB at 41-42 (citing *Delaware Riverkeeper Network v. DEP*, 2016 EHB 41, 43). The burden is on the petitioner to prove that a supersedeas should be granted. *Id.* at 42 (citing *Tinicum Twp. v. DEP*, 2008 EHB 123, 126). The Environmental Hearing Board Act sets forth factors to be considered in ruling on a request for supersedeas:

- 1) Irreparable harm to the petitioner;
- 2) Likelihood of the petitioner’s success on the merits;
- 3) Likelihood of injury to the public or other parties, such as the permittee in third party appeals.¹

¹ Even though the Environmental Hearing Board Act requires the Board to consider “likelihood of injury to . . . other parties such as the permittee in third party appeals” in determining whether to grant or deny a supersedeas, we can think of few, if any, circumstances in which harm to a permittee in a third-party appeal would prevent the granting of a supersedeas where the petitioner has demonstrated both a likelihood of success on the merits and irreparable harm.

Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7514, at § 7514(d). These factors are also codified in the Board's Rules of Practice and Procedure at 25 Pa. Code § 1021.63(a). A supersedeas will 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. *Id.* at § 1021.63(b). In order for a supersedeas to be granted, a successful petitioner must make a credible showing on each of the three factors enumerated above, with a strong showing of a likelihood of success on the merits. *Coalfield Justice I, supra* at 42 (citing *Hudson v. DEP*, 2015 EHB 719, 726). In order to be successful, the petitioner's likelihood of success on the merits must be more than speculative; however, it need not establish the claim absolutely. *Id.* (citing *Global Eco-Logical Servs., Inc. v. DEP*, 2000 EHB 829). A ruling on a supersedeas is merely a prediction, based on the limited record before us and the shortened timeframe for consideration, of who is likely to prevail following a final disposition of the appeal. *Weaver v. DEP*, 2013 EHB 486, 489.

Likelihood of Success on the Merits and Irreparable Harm

The Appellants must make a strong showing that they are likely to be successful on the merits of their claim. They must show by a preponderance of the evidence that the Department's decision to issue Permit Revision 210 was unreasonable or did not comply with the applicable statutes or regulations or Article I, Section 27 of the Pennsylvania Constitution. 25 Pa. Code § 1021.122(a). To meet this burden they must demonstrate that the Department's issuance of Permit Revision 210 is likely to cause impairment to Polen Run.

The Appellants assert that the evidence presented at the supersedeas hearing shows that severe impacts to Polen Run in the 5L panel are likely and that streambed grouting is unlikely to be successful in restoring Polen Run. The Appellants contend that this conclusion is well-

documented in prior permit revisions approved for the BMEEA and that the conditions that previously caused the Department to deny longwall mining beneath Polen Run have not changed. The Board has recognized that the Department has previously expressed concerns with the potential for flow loss in Polen Run. In *Coalfield Justice II*, we noted that the Department did not permit longwall mining under Polen Run in a prior permit revision - Permit Revision 180 - because the Department had concluded that the proposed mitigation/restoration technique – grouting – would not be successful in restoring Polen Run. 2017 EHB at 813, Finding of Fact 87.² When the Department permitted mining under Polen Run in Permit Revision 189 and authorized streambed lining as a method of mitigation, we found that actual impairment had occurred to Polen Run due to the permanent destruction of the existing stream channel. *Id.* at 852. When the Department permitted mining under both Polen Run and Kent Run in the 3L panel under Permit Revision 210, the Board granted the Appellants’ petition for supersedeas after finding that the Department had made its decision without considering the issues that had led it to deny prior requests to mine under Kent Run. *Coalfield Justice I, supra.*³ The Appellants assert that the same problems that led either the Department or the Board to reject the undermining of Polen Run and/or Kent Run under previous permit revisions continue to exist under Permit Revision 210, the subject of this supersedeas action.

The Appellants argue that flow loss is already occurring in Polen Run and that it will be exacerbated by further mining in the 5L panel. They point to testimony by both Department hydrogeologist, Paul Cestoni, and Consol’s Manager of Hydrogeology, Joshua Silvis, confirming that flow loss had occurred in the 1L and 3L panels of the stream and that the 2L panel was lined

² The reference to Permit Revision No. “187” in Finding of Fact 87 in the Board’s Adjudication in *Coalfield Justice II* is a typographical error. The correct permit number is “180.”

³ The Board’s supersedeas decision in *Coalfield Justice I* covered only mining under Kent Run since mining had already taken place under Polen Run.

due to concern about flow loss. They argue that Consol and the Department wear blinders as to those impacts when making their prediction of “no impact” from the undermining of Polen Run in the 5L panel. It is the Appellants’ contention that none of the factors that troubled either the Department or the Board in previous permit revisions have changed with regard to Permit Revision 210; they assert that the only thing that has changed is Consol’s characterization of the impact on Polen Run.

In support of their supersedeas petition, the Appellants presented the testimony of Dr. Keith Eshleman, who was recognized as an expert in hydrology, and Dr. Benjamin Stout, recognized as an expert in stream ecology. Dr. Eshleman is a professor at the University of Maryland Center for Environmental Science. He has spent the last 15 years conducting monitoring on the effects of longwall mining on small streams in West Virginia. It is his opinion that dewatering is occurring in Polen Run as a result of longwall mining. In reaching his conclusion, Dr. Eshleman relied on a number of materials, including Act 54 Reports prepared by the University of Pittsburgh; hydrogeologic factors and flow data; and comment letters from the Pennsylvania Department of Conservation and Natural Resources (DCNR). It is Dr. Eshleman’s contention that the flow data submitted by Consol does not accurately reflect the condition of Polen Run because the frequency of data collection was inadequate. He advocated for continuous monitoring in which data is collected every 15 minutes, as opposed to the less frequent data collection conducted by Consol and submitted to the Department. He testified that complete stream dewatering episodes can occur for very short durations and such episodes are missed without continuous monitoring. Department hydrogeologist Paul Cestoni admitted that he did not do any analysis to assess the frequency or duration of low-flow or no-flow periods. As further support for his conclusion that Polen Run is susceptible to dewatering, Dr. Eshleman

referred to the University of Pittsburgh's 2008-2013 Act 54 Report regarding the effect of longwall mining on streams. The Act 54 Report presents information on streams that have not recovered following longwall mining. Dr. Eshleman also referred to the Department's own analysis in previous permit applications in which it had expressed concerns about Polen Run. In previous permit reviews, the Department had concluded that the hydrogeologic setting of Polen Run was similar to that of other streams overlying the Bailey Mine that had experienced substantial flow loss and had not been restored.

Dr. Eshleman presented a very compelling case, but for one fact: The updated data submitted with the application for Permit Revision 210 presents a very different picture than data submitted with previous permit applications. The data submitted with the application for Permit Revision 210 reflects more recent conditions in the BMEEA. In his affidavit in support of the Petition for Supersedeas, Dr. Eshleman states, "I am confident that the geology of Polen Run in the 5L panel has not changed since the initial determination [when the Department did not authorize the undermining of Polen Run]." However, what appears to have changed is that more recent data indicates that undermined streams over the BMEEA are being restored. Table 8.5 (admitted at the supersedeas hearing as Appellants' Exhibit 2) reflects hydrogeologic data as of April 2011. Three of the streams listed in the table – Polly Hollow, Crows Nest, and Unnamed Tributary 32596 (also known as the Kim Jones Stream) – are located west of Polen Run. All three streams experienced flow loss due to undermining and have not recovered.⁴ According to testimony by the Department's Michael Bodnar and Consol's Joshua Silvis, those streams were not subject to the Department's 2005 Technical Guidance Document on Surface Water

⁴ Consol's Manager of Hydrogeology, Joshua Silvis, testified that it is Consol's belief that Polly Hollow, Crows Nest and Unnamed Tributary 32596 have, in fact, recovered and they are simply waiting on the Department's determination.

Protection for Underground Bituminous Coal Mining Operations, which, according to Mr. Silvis, “establishes more robust hydrologic and biological monitoring protocols” (T. 311) and contains additional requirements that were not in effect during the undermining of the aforesaid three affected streams. Consol submitted a revised table of hydrogeologic variables with its application for Permit Revision 210. This document – Table 8.9a (admitted as Appellants’ Exhibit 1) – contains hydrogeologic information for an updated set of reference streams as of November 2017 and February 2018. Table 8.9a lists a number of streams overlying the Bailey Mine that have recovered following mining-induced flow loss. All of the streams listed in Table 8.9a were subject to the Department’s 2005 Technical Guidance Document, unlike the three aforementioned streams that are alleged to have not recovered (Polly Hollow, Crows Nest and Unnamed Tributary 32596). Polen Run has comparable or, in some cases, more favorable hydrogeologic variable conditions than many of the streams listed in Table 8.9a. Three variables, in particular, are note-worthy: 1) Polen Run’s drainage area is larger than 13 of the 16 streams listed in Table 8.9a. The larger the drainage area, the less likely it is that a stream will experience subsidence-induced flow loss. 2) The percentage of exposed bedrock in Polen Run over the 5L panel is the same or less than the streams listed in Table 8.9a.⁵ The lower the percentage of exposed bedrock, the less likely it is that a stream will experience subsidence-induced flow loss. 3) Polen Run over the 5L panel has comparable depth of cover, and in some cases more depth of cover, than a number of the streams listed in Table 8.9a. The greater the depth of cover, the less likely it is that a stream will experience subsidence-induced flow loss.

⁵ Table 8.5 from 2011 lists the percentage of exposed bedrock in Polen Run as 37%, whereas the more recent Table 8.9a lists it as less than 5% in the streambed above the 5L panel. Witnesses for Consol and the Department testified that the figure of “less than 5%” was supported by field observations conducted by both Consol and the Department, and the Appellants presented no evidence that leads us to conclude that this figure is not correct.

Thus, Table 8.9a supports the prediction that Polen Run is likely to recover should it experience flow loss from mining.

Dr. Eshleman expressed concern with relying on the streams listed in Table 8.9a due to their location in a different section of the BMEEA (over the I panels) but acknowledged that proximity is not necessarily one of the hydrogeologic variables that is required for stream comparison. We find that a better indicator of predicted impact from mining on streams in the BMEEA is whether the mining and restoration were done under the same set of requirements. Although the parties' experts disputed whether Polen Run aligned more closely with the hydrogeologic variables of the streams in Table 8.5 versus the streams in Table 8.9a, there was enough similarity between Polen Run and the streams in Table 8.9a that we find it to be a sufficient indicator of mining impact for the purpose of deciding the Petition for Supersedeas.

It is notable that at least 13 of the 16 streams in Table 8.9a experienced flow loss. However, all of the 13 streams have evidently recovered, and both Consol and the Department rely on the recovery of those streams as support for their prediction that Polen Run will recover in the event flow loss is experienced. When asked what alleviated his prior concerns regarding the undermining of Polen Run, the Department's Michael Bodnar stated that the updated hydrogeologic analysis leads him to believe that should any flow loss occur, the restoration techniques will successfully restore the stream. He stated that he has seen grouting successfully restore streams, including Polen Run over the 3L Panel.

In addition to the updated hydrogeologic data, Consol also submitted 12 months of flow data for Polen Run above the 3L panel which was completed in February 2018. The data shows that the post-mitigation streamflow met or exceeded the performance requirements. In 2017

Consol submitted flow data for the entire length of Polen Run which showed that post-mining streamflow is within the range of pre-mining flow.

We agree with Dr. Eshleman that continuous monitoring would have provided a more complete picture as to flow data. However, there is no indication that continuous monitoring would have provided a *different* picture. Dr. Eshleman did not conduct any of his own monitoring for Polen Run, and it is only speculative that more frequent monitoring would have provided different results. Alleging that the Department's investigation or review was deficient is generally not enough to meet an appellant's burden of proof; the appellant must demonstrate that following a different course of action would have resulted in a different outcome. *See, O'Reilly v. DEP*, 2001 EHB 19, 51 (A party who would challenge a permit must show us that errors committed during the application process have some continuing relevance).

Finally, we find that reliance on the Act 54 Report is limited. The Act 54 Report is a broad study of the general effects of longwall mining on structures and water resources, but is not necessarily a comprehensive or current study. Consol's expert on stream ecology, Mark Haibach, testified that the data contained in the report, covering the period from 2008-2013, is now dated and reflects pre-restoration conditions. It is his opinion that more recent data leads to different conclusions. For these reasons, we assign limited weight to the Act 54 Report.

We note that in at least one prior permit revision, the Department did not believe that grouting would successfully restore Polen Run should it suffer flow loss. This raises the question: what has changed? One thing that has changed, according to the testimony of Consol's Supervisor of Stream Mitigation, Brian Benson, is the method of grouting. In Mr. Benson's words, "We have gotten better at what we do now" as compared to grouting performed seven to nine years ago. (T. 482)

The Appellants also presented the testimony of stream ecologist Dr. Benjamin Stout, a professor of biology at Wheeling Jesuit University. Dr. Stout reviewed the macroinvertebrate data and total biological scores at various sampling points along Polen Run. He testified that at sampling location BSW06 there has been a decline in the diversity of the macroinvertebrate community. Consol's expert Mr. Haibach disagreed and testified that it is his opinion that the biological data shows a healthy community at Polen Run. The cumulative evidence shows that, while there seems to be a shift in the type of taxa present post-mining as compared to pre-mining, the overall number and diversity of taxa meet the standards set forth in the Department's Technical Guidance Document. Based on the overall evidence, we find that the biological data does not support the granting of a supersedeas for Polen Run in the 5L panel.

Dr. Stout also testified as to the problems associated with grouting, should it be necessary. Experts for both Consol and the Department testified that they believe flow loss in Polen Run is unlikely, but in the event of flow loss, flow can be successfully restored through grouting and other so-called minor forms of stream restoration activities including augmentation, heave removal and surface fracture sealing. Grouting consists of drilling small diameter boreholes and injecting a grouting material into the holes with a pump machine. (T. 465-66) Although it is considered by the Department to be a "minor" form of stream restoration, the evidence suggests that grouting causes a significant disruption to the stream both while the grouting is being conducted and after it is completed. According to Consol's Supervisor of Stream Mitigation, Brian Benson, grouting is either unlikely to be needed in Polen Run over the 5 L panel or, if needed, will take place only in certain sections where the work is likely to be completed in two weeks. In the unlikely event that the entire length of Polen Run above the 5L panel needs to be grouted, the process can take six to eight weeks. Mr. Bodnar predicted a

potentially longer period of time of two to four months. According to Dr. Stout, once a stream has been grouted, the grouting creates a barrier between underground water flow and the surface stream and isolates the stream's surface flow from the hyporheic zone which is the moistened zone beneath the surface. This zone provides a refuge for certain macroinvertebrates during times of low flow.

The question, then, is whether grouting causes impairment to a stream such that its approval by the Department constitutes a violation of Article I, § 27. We examined this issue in *Coalfield Justice II*:

Consolidation grouting is more involved [than other minor forms of stream restoration] and involves de-watering a section of the stream and drilling into the streambed. In general these grouting activities take place in limited sections of the streams and take a limited amount of time to complete according to the testimony. In the end, with consolidation grouting, the pre-mining streambed and channel are largely intact following restoration.

2017 EHB at 850.

Overall, it is necessary to strike a balance, as we did in *Coalfield Justice II*, recognizing that some impact from mining is likely to occur, while ensuring that the requirements of Article I, § 27 are met. Depending on the extent of grouting, it is possible that it could result in the impairment of a stream. Here, however, the evidence shows that grouting will only be necessary in small sections of the stream, if at all, and will not interfere with the overall function of the stream or the public's enjoyment of it. Grouting was necessary along only a 300-foot stretch of the 1,700 foot length of Polen Run above the 3L panel. We feel confident, based on the evidence, that the extent of grouting that may be necessary in Polen Run above the 5L panel will be comparable.

We agree with the sentiment expressed in the Department’s brief that “one of the most important tasks performed by the Board is to evaluate and decide the credibility of expert witnesses.” (Department Brief, p. 19). Not only is this one of the Board’s most important tasks, it is also one of the most difficult, especially where, as here, the quality of expert testimony was outstanding on all sides. Each party’s expert witnesses were well-prepared, knowledgeable about the facts of the case, and articulate in their explanations; they provided helpful and persuasive testimony. However, although the testimony presented by the Appellants’ expert witnesses was compelling, we find that the testimony and evidence presented by Consol and the Department were equally persuasive and successfully rebutted the contentions raised by the Appellants. Given the high burden that must be met in order to grant a supersedeas, where the evidence comes down to a close call we cannot find that the burden has been met.

The Appellants argue that, in granting Permit Revision 210, the Department ignored the concerns of its sister agency, the Department of Conservation and Natural Resources (DCNR). DCNR submitted comments to the Department in the form of letters dated September 1, 2017 and January 4, 2018. DCNR’s comments were admitted at the supersedeas hearing as Stipulated Exhibits 9 and 10. Since the 5L Panel (as well as other panels at the BMEEA) undermines Ryerson Station State Park, DCNR has an interest in the matter as trustee of the state park. In its letter dated January 4, 2018, DCNR expresses concern with the hydrogeologic data submitted by Consol in Table 8.9a, and states as follows:

The DCNR does not believe CPCC [Consol] has provided definitive data supporting their conclusion that hydrogeologic impacts are not predicted in Polen Run 5L and, if flow loss were to occur, it would be temporary and constrained to the transition phase of subsidence (See Addendum to Module 8; Polen Run, 5L). Rather, existing streambed lithology, percentage of the Polen Run watershed undermined, and observed and documented post-mining impacts within Polen Run corroborate CPCC’s [Consol’s] original

conclusion from April 2011 that hydrologic impacts to Polen Run 5L are likely.

(Stipulated Ex. 10, p. 1) The letter concludes with the following:

The July 2017 Environmental Hearing Board Decision (2014-072-B) confirms [that] data which does not accurately represent what it is purported to support cannot be relied on as an indication of successful restoration. Polen 3L is the only panel in Polen Run where grouting is the sole restoration technique employed and is the only restoration commensurate to what is proposed for Polen Run 5L. The DCNR believes the DEP should require the CPCC [Consol] to provide appropriate monitoring data for flow and biological scores within Polen Run 3L, over a minimum of a 12 months duration, prior to considering a permit revision to mine under Polen Run in the 5L Panel. The DCNR is [sic] also does not see any scientific or other support for relying on the restoration of a stream in one panel when the stream crosses multiple panels. In the DCNR's view, the entirety of the stream that was undermined needs to be used to determine if continued longwall mining in additional panels will cause subsidence in the additional panels. Using one small portion does not meet any scientifically accepted standard for concluding that there will be no impacts from mining. The DCNR believes the CPCC [Consol] must, at minimum, show successful restoration in Polen Run 3L to demonstrate their possible ability to restore flow and biological conditions in 5L.

Both the DCNR and the DEP are trustees of public natural resources. Polen Run is an important natural resource in Ryerson Station State Park and Greene County. The DCNR recommends that the DEP work with the DCNR to develop requirements and recommendations prior to allowing the CPCC [Consol] to undermine Polen Run. In this way both agencies can effectively manage these natural resources for the benefit of the citizens of Pennsylvania.

(Stipulated Ex. 10, 4-5) No one from DCNR testified at the hearing, so we have no way of knowing whether DCNR's concerns were alleviated. According to Mr. Bodnar, the Department had several discussions with representatives of DCNR and took them into the field to show them a stream restoration. Additionally, the Department required a full 12 months of flow data for Polen Run above the 3L Panel, as requested by DCNR in its letter. However, testimony from a

representative of DCNR would have been helpful and would have provided a more complete picture as to its position on the approval of Permit Revision 210. In a case involving the threat of mine subsidence, it is rare that the owner or trustee of the property to be undermined does not testify. Nonetheless, we do have the testimony of Mr. Bodnar that DCNR's comments and concerns were taken into consideration and that the Department worked with DCNR to ensure that its requirements were met, and there was no evidence presented rebutting that testimony.

Article I, Section 27

Our recent decisions in *Coalfield Justice II*, *supra*, and *Friends of Lackawanna v. DEP*, 2017 EHB 1123, discussed the Department's duties under Article I, § 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment, following the Pennsylvania Supreme Court's holding in *Pa. Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF*):

We held in [*Coalfield Justice II*] that the proper approach in evaluating the Department's decision under the first part of Article I, Section 27 is, first, for the Board to ensure that the Department considered the environmental effects of its actions. The Department cannot make an informed decision regarding the environmental effects of its action if it does not have an adequate understanding of what those effects are or will be. *Id. Cf. Blue Mtn. Preservation Ass'n. v. DEP*, 2006 EHB 589 (failure to conduct proper analysis alone justifies a remand); *Hudson v. DEP*, 2015 EHB 719 (same). We must then decide whether the Department correctly determined that any degradation, diminution, depletion, or deterioration of the environment that is likely to result from the approved activity is reasonable or unreasonable. [*Coalfield Justice II*, 2017 EHB 855-63].

Friends of Lackawanna, 2017 EHB at 1160-61.

We acknowledge the actions undertaken by Consol and the Department in response to the Board's earlier rulings in *Coalfield Justice I* and *II*. It is apparent that both Consol and the Department have made a substantial effort to comply with those rulings. Two factors that led to

the granting of a supersedeas in the appeal of Permit Revision 204 have been corrected here: First, in the case of Permit Revision 204 the Board expressed concern over Consol's proposal to install a channel liner in Kent Run, particularly given the lack of sufficient data showing the success of a liner in Polen Run, as well as the different physical nature and setting of the two streams. Second, the Board was unable to assign a high degree of credibility to the Department's lead hydrogeology reviewer since he failed to discuss the data with prior permit reviewers. Additionally, he had worked as a consultant for Consol and during his review of the permit revision application was tasked with reviewing some of the very data that he himself had collected while working for Consol. These errors have been corrected with the submission of the application for Permit Revision 210: Paul Cestoni, the lead hydrogeologist for the Department in the review of Permit Revision 210, provided credible testimony; Consol submitted updated and more comprehensive hydrogeologic data to the Department; and less invasive restoration techniques have been approved for Polen Run. Additionally, there was extensive testimony in this case about the Department's denial of a permit to undermine Polen Run in the 4L panel because Consol had not submitted the requisite 12 months of data required by the Technical Guidance Document. Instead of accepting data collected over a shorter time period, as occurred with the approval of Permit Revision 204, the Department denied the approval to mine. The Department credibly demonstrated to us that in cases where insufficient data was provided by Consol, the Department did not allow mining to go forward. When it came time to seek authorization to undermine Polen Run in the 5L Panel, the evidence indicates that Consol submitted the requisite amount of data and that the data supports the Department's decision to allow mining. Consol has demonstrated that it has clearly committed substantial resources to

develop effective preventive and mitigation techniques to ensure that the environment is protected.

We do agree with the Appellants, however, that Consol's prediction of "no impact" is unlikely. In our opinion, the totality of evidence suggests that there is at least some likelihood that Polen Run will experience some degree of temporary flow loss. As the Appellants point out, every section of Polen Run that has been undermined has required some degree of mitigation for flow loss. However, the evidence also convinces us that any such flow loss will be minimal and short-lived and restored with the restoration techniques authorized by the permit revision. Indeed, we believe based on evidence presented before us, that the actual effects on the stream and Ryerson Station State Park will not be noticeable and will not interfere with the use of the park by the public. Although the Department had previously concluded that grouting in Polen Run would not work to restore the stream, the updated and comprehensive data submitted with Consol's permit application and presented at the supersedeas hearing leads us to conclude that grouting will be successful to restore Polen Run over the 5L panel should flow loss occur. This conclusion is based on post-restoration performance in other streams and in Polen Run over the 3L panel. As noted earlier, although there may be circumstances in which grouting could constitute a violation of Article I, § 27, we find that the extent of grouting that is likely to be required here does not rise to that level. The evidence indicates that if grouting is needed, it will only be required in some sections of Polen Run and not the entire length of the stream in the 5L panel.

As we explained in *Coalfield Justice II*, we must view the impacts of mine subsidence and the resulting restoration along a spectrum. Judge Beckman, writing for the Board, stated:

There is no question that the longwall mining authorized by the Department degrades and causes deterioration of the streams in

BMEEA on at least a limited and temporary basis. Ultimately then it becomes an issue of whether the degradation and deterioration is unreasonable. We hold that they are not in this case. In order to be unreasonable, we conclude that the destruction and degradation of the streams would need be more significant than the limited and temporary impacts that result from Consol's longwall mining under Permit Revision No. 180 issued by the Department. Longwall mining has social utility and is a type of development leading to an increase in the general welfare, convenience, and prosperity of the people. If it lacked that characteristic, it would be more likely to be judged unreasonable. The impacts to streams are generally limited in time and scope in a large part because of the requirements for mitigation and restoration that the Department placed in Permit Revision No. 180.

2017 EHB at 860. We find the same to be true here in our review of the evidence presented at the supersedeas hearing challenging Permit Revision 210.

In sum, the evidence presented by the Appellants at the supersedeas hearing is not sufficient to demonstrate a likelihood of success on the merits. However, as we stated in *Weaver*, "it is important to remember that the Board is not called upon to decide the case on the merits in the context of a petition for supersedeas." 2013 EHB 489. Our decision is based solely on the evidence presented to us at the supersedeas hearing which by its very nature is not fully developed. We are aware of the practical burdens imposed on the Appellants in a supersedeas hearing where they have not had the benefit of discovery and where they are required to prepare their case under significant time constraints. We note, of course, that if this case proceeds to a hearing on the merits additional evidence may be available regarding the impact of mining on Polen Run. At this time, however, based on the evidence before us, we see no basis for concluding that the Department acted unreasonably or in violation of the relevant statutes and regulations or Article I, § 27 of the Pennsylvania Constitution when it issued Permit Revision 210.

We acknowledge the important public service undertaken by the Appellants in appealing the issuance of Permit Revision 210 and the previous permit revisions that involve mining under Ryerson Station State Park. Ryerson Station State Park is the only state park in Greene County, and, pursuant to Article I, § 27, the public has a right to the preservation of its natural, scenic, historic and esthetic values. As has been clearly stated many times, Article I, § 27 creates a trust with natural resources as the corpus of the trust, the Commonwealth as trustee, and the people as the named beneficiaries. Appellants' appeal raises important public issues and ensures that the Department fulfills its duties and obligations under Article I, § 27. Those duties and obligations also extend to this Board and to the appellate courts.

Conclusion

Because we find that the Appellants have not prevailed in demonstrating a likelihood of success on the merits or irreparable harm, we need not address the remaining factor of harm to others.⁶

⁶ The Appellants presented testimony by Mr. Art Sullivan and Consol presented the testimony of Mr. Eric Schubel regarding the effect of a supersedeas on Consol's mining operations. We found both witnesses very knowledgeable and articulate. However, because we find that the Appellants have not demonstrated a likelihood of success on the merits, we need not address the specific testimony of Mr. Sullivan and Mr. Schubel.



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD



**CENTER FOR COALFIELD JUSTICE
and SIERRA CLUB** :

v. :

EHB Docket No. 2018-028-R

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and CONSOL
PENNSYLVANIA COAL COMPANY, LLC,
Permittee** :

ORDER

AND NOW, this 24th day of April, 2018, the Appellants' Petition for Supersedeas and Application for Temporary Supersedeas are denied for the reasons set forth in this Opinion.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: April 24, 2018

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