IN THE COMMON PLEAS COURT OF CLARK COUNTY, OHIO

CAM MAD RIVER TOWNSHIP,et al.,	:	CASE NO. **18CV0425**
Appellants,	:	JUDGE DALE A CRAWFORD by assignment
v.	:	
DIVISION OF MINERAL RESOURCES MANAGEMENT OHIO DEPARTMENT OF NATURAL RESOURCES, et al.,	:	DECISION AFFIRMING THE RECLAMATION COMMISSION'S DECISION OF JULY 25, 2018
Appellees.	:	

This matter is before the Court on Appellants, CAM-MAD RIVER TOWNSHIP (CAM), Charles D Swaney and Michael Verbillion R C 1513.14 appeal from the July 25, 2018 "Findings, Conclusions & Order of the Reclamation Commission" ("Commission") in Commission case # RC-17-004-006. The Commission decision dealt with a Notice of Appeal filed by Appellants regarding these decisions rendered by the Chief of the Division of Mineral Resources Management. As stated by the Commission, "These decisions: (1) approved an amendment to surface mining permit IM-340, adding acreage to the permitted area, (2) approved a modification to permit IM-340, increasing the proposed depth of mining and authorizing dewatering operations to facilitate mining, and (3) approved a modification to permit IM-340, revising the blasting plan for the permitted area." (Findings, p.1) A hearing was held before the Commission on April 4, 5, 25, 26, and May 9, 2018. Witnesses were called and a transcript made.

BACKGROUND:

The background is set forth in the Findings and is not in dispute.
CAM is a non-profit organization known as Citizens Against Mining. Appellants, Swaney and Verbillion, are property owners who live adjacent to the subject property proposed to be mined. Enon Sand and Gravel LLC ("Enon") is a mining company whose mining permit applications are the subject of this appeal. Prior to 1975 mining of industrial materials was not regulated. After 1975, mining quarries were required by RC chapter 1514 to obtain permits from the Division of Mineral Resources ("Division"). Since the enactment of Chapter 1514 the subject mining areas were covered by permits IM-340 and IM-375. Between 1977 and 2015, the permits were amended and modified several times. In 2015 permits IM-340 and IM-375 were transferred to Enon. After acquiring the two permits Enon sought to combine the permits and engage in additional mining activities on the combined sites. (Findings, p 6). In late 2016 and early 2017, Enon submitted the following applications which are the subject of this appeal:

"1. Application to amend permit IM-340, #A-340-1, seeking to add acreage to permit IM-340. Through this application Enon sought to "combine" permits IM-340 and IM-375 into a single permit. At

this time, IM-340 covered 21.8 acres and permit IM-375 covered 398.8 acres. When combined under IM-340, the permit would cover 420.6 acres.

2. Application to modify permit IM-340, #IMM-340-4, seeking permission to increase the allowable depth of mining and to allow dewatering operations on the site. This application included a ground water model prepared on behalf of Enon by Eagon& Associates Inc. [the "EAI model"].

3. Application to modify permit IM-340, #IMM-340-5, seeking to revise and update the permit's existing blast plan. Blasting had been allowed on the permit IM-340 area since 2005. This application proposed revisions to the existing blasting plan." [Findings p 6]

On July 13, 2017 the Division approved the three applications.

APPELLANTS' ASSIGNMENTS OF ERROR

1. The Commission erred in holding that Enon's groundwater model complies with OAC 1501:14-5-01(C), because the model report does not accurately reflect the hydrologic conditions of the study area and fails to be consistent with numerous ASTM international standard. (Decision at pp. 16-17).

2. The Commission erred in holding that the Chief is not required to establish the projected cone of depression. (Decision at pp.16-17).

3. The Commission erred in holding that the dewatering Application complies with R.C. 1514.13 and OAC 1501:14-5-02, when it failed to contain an adequate analysis on suitable replacement water supply sources. (Decision at pp. 21-24).

4. The Commission erred in holding that the approvals did not violate R.C. 1514.02, because Permit IM-340, as amended, fails to include adequate performance measures pursuant to R.C. 1514.02(A)(10). (Decision at pp. 10-11).

5. The Commission erred in holding that the mining plan, as amended, ensures that contamination, resulting from mining, is prevented pursuant to R.C. 1514.02(A)(10)(h). (Decision at pp. 25-26).

6. The Commission erred by failing to find that the mining and reclamation plan, as amended, fails to ensure that all watercourses and lakes will be in compliance with R.C. 1514.02(A)(10)(h) upon completion of reclamation. (Decision at pp. 10-11).

7. The Commission erred in holding that the Applications and mining and reclamation plan were not required to include measures to ensure that damage to adjoining property is prevented pursuant to R.C. 1514.02(A)(10) and (B), and R.C. 1514.12. (Decision at pp 27-29).

8. The Commission erred by failing to conclude that the mining and reclamation plan, as amended, fails to contain the performance measures required by R.C. 1514.02(A)(10) and R.C. 1514.02(A)(10)(c), (d), (e), (i), (j), and (k) and (l). (Decision at pp. 10-11).

9. The Commission erred in holding that the Applications complied with the zoning-related requirements of R.C. 1514.02(A)(3) and R.C. 1514.02(A)(10)(b). (Decision at pp. 30-32).

STANDARD OF REVIEW

"Pursuant to R.C. 1514.09 and 1513.14(A)(3) the standard of review of the Court of Common Pleas in this case is that 'the court shall affirm the decision of the commission unless the court determines that it is arbitrary, capricious, or otherwise inconsistent with law R.C. 1513.14(A)(3)" Division of Mines vBd of Comm. 98AP1569 (CA 10th 1999). The court further "postulated" that the general principles applicable to Chapter 119 appeals should apply. In Univ. of Cinn. v Conrad (1980), 63 Ohio St 2d 108, the court held at pp 111-112:

"In undertaking this hybrid form of review, the Court of Common Pleas must give due deference to the administrative resolution of evidentiary conflicts. For example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility. However, the findings of the agency are by no means conclusive.

Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse, vacate, or modify the administrative order. Thus, where a witness' testimony is internally inconsistent, or is impeached by evidence of a prior inconsistent statement, the court may properly decide that such testimony should be given no weight. Likewise, where it appears that the administrative determination rests upon inferences improperly drawn from evidence adduced, the court may reverse the administrative order."

The burden of "arbitrary" and/or "capricious" is significant and well above the Chapter 119 burden of "reliable" and "probative", Webster's defines arbitrary as "seeming at random" and capricious as "sudden, impulsive or unpredictable". At no time have Appellants suggested that the Commission's decision was either arbitrary or capricious(as they are defined). With respect to all nine claims of error, Appellants assert that the Commission's decisions were not consistent with law.

DISCUSSION

1. (The Commission erred in holding that Enon's groundwater model complies with OAC 1501:14-5-01(C), because the model report does not accurately reflect the hydrologic conditions of the study area and fails to be consistent with numerous ASTM international standard. (Decision at pp. 16-17).

The Commission heard significant and detailed testimony regarding the groundwater model report submitted via the Eagon& Associates Inc. Report ("Eagon Report"). (See Findings pp.16-21). The Commission found "the EAI [Eagon Report Ex 13] model utilized a reasonable process based upon available public data, which met generally- accepted scientific principles... The Commission finds that the EAI model met all statutory and regulatory requirements, as well as all generally-accepted scientific principles. As such, CAM has not established that the Chief's approval of the cones of depression developed from the EAI groundwater model was unreasonable or contrary to law."

The Court finds that there was substantial evidence in the record to support the Commission's findings. While Appellants believe there may have been some evidentiary conflicts with regard the Eagon Report findings, the Court has deferred to the factual determination of the Commission. The findings are supported by reliable evidence and are not contrary to law.

2. (The Commission erred in holding that the Chief is not required to establish the projected cone of depression. (Decision at pp.16-17).

R.C. 1514.15(A) states in part, that the "Chief of the Division of Mineral Resources management shall...establish a projected cone of depression for any surface mining operation that may result in dewatering". Appellants assert that the Chief alone can establish the projected cone. The approval of IMM-340-4 was signed by the Division's Deputy Chief, David Crow. (Findings p.16) The Commission found that since R.C. 1501.05 authorizes Division Chiefs to employ technical staff as necessary, it was not arbitrary, capricious, or inconsistent with law for the Chief to permit his Deputy to sign IMM-340-4. The evidence shows that the Chief was involved in the review process but did not specifically "approve" the model. Crow took the lead on this project.

It was not arbitrary or capricious for the Commission to find that the "Deputy" Chief had the legal authority to approve the model on behalf of the Chief. A "deputy", as opposed to an "assistant", generally is appointed as a substitute with the power to act on behalf of his/her chief. (See Webster's dictionary def "deputy"). The Supreme Court in Bell v Bd. of Trustees (1973) 334 Ohio St 70 at 74 held:" In the operation of any public administrative body, sub delegation of authority , impliedly or expressly exists - and must exist to some degree. The real issue for decision is at what point delegation must stop and the Board itself must act".

Ohio Admin Code 123:1-47-01 (A)(27) defines "deputy" as "an employee authorized by law to act generally for or in place of his or her principal and holding a fiduciary duty to such principal, or an employee holding a fiduciary or administrative relationship to the agency." In Donner v BWC, 1999 Ohio App Lexis 5811, 27 (CA 10th 1999) the Court held that "in order for an employee to be authorized to act for and on behalf of an agency, he or she must be a deputy or assistant." See also Charlton v Corrigon, (1988), 36 Ohio St. 3d 68.

The Court finds that Deputy Crow had the authority to act for the Chief pursuant to the duties set forth under R.C. 1514.13.

(See Crow testimony vol. 4 p. 869-
Q. "Do you have the authority to approve permits?"
Ans. "Yes" "and in the end when it comes to me for final review, I'll consult or talk to our Chief before I eventually would issue the permit or modification" Tr. vol. 4 p. 870)

3. The Commission erred in holding that the dewatering Application complies with R.C. 1514.13 and OAC 1501:14-5-02, when it failed to contain an adequate analysis on suitable replacement water supply sources. (Decision at pp. 21-24).

Appellants' assert that "[n]either the EAI report nor the application materials for Application IMM-340-4 contain an analysis of alternative water supply sources adequate to fulfill the water supply replacement provisions of R.C. 1514.13." R.C. 1514.13(B) requires a mine operator to be responsible to replace any water supply affected by the mining operation. In the absence of a suitable replacement water supply plan, an application can be denied. (OAC 1501: 14-5-02(B). The Commission reviewed the EAI model as it addressed the availability and suitability of alternative water supply sources (Findings 23-25) and found:

"(1) Enon's monitoring network will allow the operator to continually assess the vulnerability of individual wells. (Findings p. 24)

(2) CAM has not established that it would be impossible to supply replacement by the method put forth by Enon. (Findings p. 24)

(3) The monitoring and replacement plans provide significant protections from water losses to landowners located both within and outside the projected cones of depression. (Findings p. 25)

(4) The plan ensures that if water loss is experienced, it will be addressed expeditiously and consistent with the requirements of R.C. 1514.13. (Findings p. 25)"

Appellants dispute the EAI report findings and the Commission's reliance on the report. They assert that the Culbertson well is an example of the fallacy of the EAI findings. Appellants further assert that "applying the drawdown contour to the well tells us that the aquifer is projected to be completely dewatered." (App brief p. 20). Enon's expert Steve Champa found the Culbertson well would not be subject to dewatering. The Commission further found, through the testimony of Mr. Garrison of Enon, that Enon's plan exhibited a willingness to remediate any groundwater issue that is created in the future.

The Court finds that the Commission 's findings that Enon's plan fulfills the water supply replacement provisions of R.C. 1514.13 is supported by reliable evidence and are not contrary to law.

4. The Commission erred in holding that the approvals did not violate R.C. 1514.02, because Permit IM-340, as amended, fails to include adequate performance measures pursuant to R.C. 1514.02(A)(10). (Decision at pp. 10-11).

"Appellants argued that they [Enon] were required to update its mining and reclamation plan pursuant to the Amendments themselves in compliance with R.C. 1514.02(B) and (E)." (Appellants' brief, p.21)

The Commission found that the "Division conducted a thorough review of the Permit IM 340 Amended and Modification Application." (Findings p. 11) The testimony was consistent with a finding that the plan covered under the original permit and renewal application constituted an updated plan. (Findings p. 10, testimony of Crow Vol. 4 pp.878-879)

The Commission's findings are supported by reliable evidence and are not contrary to law.

5. The Commission erred in holding that the mining plan, as amended, ensures that contamination, resulting from mining, is prevented pursuant to R.C. 1514.02(A)(10)(h). (Decision at pp. 25-26).

The Commission found that "the requirements of R.C. 1514.02(A)(10)(h) to not extend to contamination from other, non-mining sources, such as fecal coliform or nitrates that may already exist in the soils or waters within the vicinity of a mine site." (Findings p. 26) The Commission further found that jurisdiction of this type of contamination is subject to the jurisdiction of the EPA. However, the Commission further found that there is no evidence of this type of contamination nor has CAM provided sufficient evidence to show non-compliance. (See also testimony of Crow whereas he testified the Division does not exercise jurisdiction on these off-site matters. (Tr. Vol. IV p. 887)

The Court finds that the Commission properly determined that if contamination takes place on the site Enon's reclamation plan adequately addresses water contamination issues, however generated. (Findings p. 21-26). These findings are supported by reliable evidence and are not contrary to law.

6. The Commission erred by failing to find that the mining and reclamation plan, as amended, fails to ensure that all watercourses and lakes will be in compliance with R.C. 1514.02(A)(10)(h) upon completion of reclamation. (Decision at pp. 10-11).

The Commission found "[a]s to impoundments, the 2008 renewal contains a description of how Enon will prevent contamination of water in any impoundment remaining on the site" [Findings p. 26]. The Commission specifically supports it's finding with Ex. 4 p.002733. Appellee correctly states that the entire record, including the testimony of Crow and the reclamation plan reflected in the 2017 amendment and modification along with Permit 340 plan, reflect that the "watercourses and lakes" will be in compliance with R.C. 1514.02(A)(10)(h).

The findings are supported by reliable evidence and are not contrary to law.

7. The Commission erred in holding that the Applications and mining and reclamation plan were not required to include measures to ensure that damage to adjoining property is prevented pursuant to R.C. 1514.02(A)(10) and (B), and R.C. 1514.12. (Decision at pp 27-29).

The Commission found "no evidence was presented to establish that offsite damage to the Vonderglas Fen [marshy area] was likely to occur due to mining, and no actionable claim currently exists relating to the dewatering of the Vonderglas Fen". (Findings p. 28) The Commission further found that if a future problem with the fen comes about Mr. Vonderglas has a future remedy under R.C. 1514.13. Appellant asserts that the Commission's findings regarding the fen are not supported by the evidence. Appellant's argument speculates regarding issues based upon Mr. Huntsman testimony. Mr. Champa testified that the elevation of the fen is above the elevation of the quarry. (Tr. Vol. V pp. 1206-1207) Mr. Champa further testified that if dewatering took place the fen would not be affected. (Tr. Vol. 5 p. 1203)

The Commission's findings that there was not sufficient evidence to support Appellants' claim that the mining activity would dewater the fen is supported by the evidence. The Court will not substitute it's judgment on this issue. The findings are not contrary to law.

8. The Commission erred by failing to conclude that the mining and reclamation plan, as amended, fails to contain the performance measures required by R.C. 1514.02(A)(10) and R.C. 1514.02(A)(10)(c), (d), (e), (i), (j), and (k) and (l). (Decision at pp. 10-11).

Appellant claims that the reclamation plan is not adequately updated to include measures that meet the R.C. 1514.02(E) standards (Appellants Brief p. 31). It appears to the Court that Appellants believe the plan is not specific enough in the sequence methodology to comply with R.C. 1514.02 (A)(10). The Commission in its "Background" noted that "on July 13, 2017, the Division approved the three applications submitted by Enon." The Commission then set for the sequence proposed in the plan. Deputy Crow testified that the sequence of a mining plan is found in all documents submitted to the Division with respect to Enon's applications. (Tr. Vol. IV p. 878). Appellants seek specificity to an extent not required by statute. Deputy Crow reviewed the sequence and its methodology. The Commission determined that the plan met the criteria set forth in R.C. 1514.02(A)(10).

The Court finds that the Commission's findings are supported by reliable evidence and are not contrary to law.

9. The Commission erred in holding that the Applications complied with the zoning-related requirements of R.C. 1514.02(A)(3) and R.C. 1514.02(A)(10)(b). (Decision at pp. 30-32).

Appellant's state "the Commission held that the Applications met all three subsections, despite the Applications only addressing a single one of them. Importantly, the Applications only contain a compliance certification pursuant to R.C. 1514.02(A)(14), and do nothing to update the mining and reclamation plan to include compliance with R.C. 1514.02(A)(3) and R.C. 1514.02(A)(10)(b). (Appellants' brief p. 31)"

The Commission found that R.C. 1514.02(A)(10)(b), requiring a plan that doesn't conflict with zoning," and does not apply to permitting decisions issued after March 15, 2002". In addition, the Commission found that the " 2008 renewal of IM-340 at question 14, identifies the local zoning authority in response to R.C. 1514.02(A)(3)" (Findings, p. 3)

The Court finds that the Commission's interpretation of the clear language, "On or after March 15, 2002, division (A)(10)(b) of this section does not apply to ...." is correct and is in accordance with the law. (R.C. 1514.02(A)(10)(b). (See Div of Mines & Reclamation v Bd. of Cty. Comm., 98AP-1569, 1999 WL. 1 063561. (10 Dist. 1999). The Commission agreed with Mr. Crow's testimony that once IM-340 was renewed the prior requirements were no longer applicable. (Tr. Vol. V 1239). The Commission further

found it "is satisfied with the testimony of Deputy Chief David Crow, given on the last day of hearing, which established - for the first time - that the permit renewal in 2008 removed the requirements of R.C. 1514.02(A)(10)(b) from permit IM-340."

The Court finds Mr. Crow's and the Commission's findings are in accordance with law.

CONCLUSION

The Court is very familiar with Appellants' plight with Enon's mining in their back yards. "Not in my back yard" is a cry heard by many property owners who oppose any form of commercial development near their homesteads. Chapter 1514 was enacted to protect affected property owners, not to prevent mining. It is clear to the Court that the Division, through its Director and Deputy Crow, conducted a thorough investigation of the Enon planned mining operations and potential issues if the mining is not conducted according to the permitted plan and statutory requirements.

The Court finds that all actions and findings were done according to law and were not arbitrary or capricious.

The Findings of the Reclamation Commission set forth in R.C. 17-004-006 are hereby affirmed.

Appellee shall prepare an entry reflecting this decision within 10 days of the decision.

JOURNALIZED
APR 07 2022
MELISSA M. TUTTLE
CLERK OF COURTS

JUDGE DALE A CRAWFORD by assignment

Copies to:
All Counsel of Record

FINAL APPEALABLE ORDER

CLERK TO SERVE ALL PARTIES BY ORDINARY MAIL CIV. R. 58