

Commonwealth of Pennsylvania
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Maryanne Wedock
Acting Secretary of the Board

1. **Name, address and telephone numbers of appellants:**

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2. **Subject of the appeal:**

(a) Actions of the Department for which review is sought:

Determination by the Department (“DEP”) in its October 18, 2011 letter to Cabot Oil and Gas Corporation (“Cabot”) effectively absolving Cabot of its legal obligation under the Pennsylvania Oil and Gas Act (“OGA”) to replace or restore the water supplies which Cabot had contaminated, and allowing Cabot to discontinue provision of temporary fresh water to appellants affected by the contamination. (Copy of the Department’s October 18, 2011 Letter to Cabot attached hereto as Exhibit “A”).

(b) The Department’s official who took the action:

Scott Perry
Acting Deputy Secretary
Oil & Gas Management Program

(c) The location of the operation or activity which is the subject of the Department’s action:

Dimock and Montrose, Susquehanna County, PA.

(d) On what date have you received notice of the Department’s action:

October 19, 2010.

3. **Objections to the Department's action:**

The appellants object to and appeal DEP's action, memorialized in its October 18, 2011 letter to Cabot, relieving Cabot of its obligation under the OGA to replace or restore the water supplies which it contaminated, and allowing Cabot to discontinue deliveries of temporary fresh water to appellants. Appellants assert and object to the following:

1. After the explosion of a private water well in Dimock, PA in January of 2009, DEP began investigating Cabot's wells and drilling practices in the Dimock and Montrose areas.
2. As a result of its preliminary investigations, on February 27, 2009, DEP issued Cabot a notice of violation for, *inter alia*, discharging natural gas, a polluting substance, to the waters of the Commonwealth without authorization, and for failing to prevent gas from entering fresh groundwater – specifically the same water used by appellants for drinking, bathing, and other household needs.
3. Additionally, on May 13, 2009, DEP issued Cabot a notice of violation for failing to properly cement casing at certain Cabot wells, and for failing to prevent gas from entering the same groundwater from its Gesford 3 well.
4. As a result of these and other violations discovered through DEP investigation, including the unpermitted discharge of diesel fuel and drilling mud, Cabot entered into a consent order with DEP on November 4, 2009.
5. The consent order provided, *inter alia*, that, “Cabot's pollution of the Affected Water Supplies and failure to restore or replace the Affected Water Supplies to the quality at least equal of the water supply prior to becoming affected is a violation of Section 208(a) of the Oil and Gas Act, 58 P.S. §:601.208(a), and 25 Pa. Code §7851(d).”
6. The order also provided that “Cabot shall assure that the users of the Affected Water Supplies will receive water in amounts sufficient to continually satisfy water usage needs until the Department notifies Cabot, in writing, that the Department has determined that the Affected Water Supply has been restored such that Cabot is no longer required to provide such purchased water.”
7. 58 P.S. §:601.208(a) of the OGA provides that “Any well operator who affects a public or private water supply by pollution or diminution shall restore or replace the

affected supply with an alternate source of water adequate in quantity or quality for the purposes served by the supply”

8. 58 P.S. § 601.208 also provides that where the DEP finds that a well operator has polluted a water supply, or in cases where a pollution is presumed under law, “then [DEP] shall issue such orders to the well operator as are necessary to assure compliance with subsection (a),” i.e. the restoration or replacement of the affected supply.
9. 25 Pa. Code § 78.51 sets forth the appropriate regulatory standard for a replaced or restored water supply, mandating, *inter alia*, that the supply “be as reliable as the previous water supply;” “be as permanent as the previous water supply,” “provide the water user with as much control and accessibility as exercised over the previous water supply,” and meet “the standards established under the Pennsylvania Safe Drinking Water Act.”
10. On December 15, 2010, Cabot and DEP again modified the original consent order, which had previously been modified twice.
11. In the modified order, paragraph H states that Cabot had not “permanently restored and/or replaced all of the Water Supplies by September 17, 2010.”
12. Instead of ordering Cabot to restore the contaminated underground water supplies in accordance with the standards of 25 Pa. Code § 78.51 in the affected aquifer, the order proposes to relieve Cabot of “any obligation of Cabot to pay for or restore and/or replace the Water Supplies, or to provide for ongoing operating or maintenance expense,” provided Cabot comply with the terms of paragraph 6 of that order.
13. Paragraph 6(a) requires Cabot to establish nineteen escrow funds free and clear of any encumbrances, funded with twice the then tax assessed value of the property owned by the affected households – one for each household still affected by the contamination, with “Cabot to pay *all* fees and costs associated with each account.” Paragraph 9 of the Model Escrow Agreement, incorporated into the Consent Order of December 15, 2010 at paragraph 6(a), requires that Cabot be responsible for all taxes on *any* interest or earnings received on the Escrow Funds.

14. Paragraph 6(e) requires Cabot to offer and install a whole house gas mitigation devices for residential water supplies to treat water for personal and household use. No lesser standard than the applicable 25 Pa. Code § 78.51 for all replaced water is stated, expressly or even impliedly, anywhere in paragraph 6 nor anywhere in the December 15, 2010 Consent Order for those households which so elect to receive them, which Cabot is then obligated to install within 90 days of the election.
15. On October 11, 2011, Cabot and DEP held a private meeting, without notice to the affected homeowners, plaintiffs in related litigation and their counsel, nor the public, presumably to discuss the terms of, and compliance with, the modified consent order.
16. On October 17, 2011, Cabot sent a letter to DEP, without notice to the affected homeowners, plaintiffs in related litigation and their counsel, nor the public, claiming that it had complied with paragraph 6 of the modified consent order and requesting permission to discontinue deliveries of temporary bottled and bulk fresh water to the affected Property Owners effective November 30, 2011.
17. The next morning, again without notice to the affected homeowners, plaintiffs in related litigation and their counsel, nor the public on October 18, 2011, DEP sent a letter (“termination letter”) to Cabot essentially copying and pasting paragraph 6 of the modified order, and stating “the Department has determined that Cabot has satisfied the terms and conditions of Paragraph 6 of the [modified consent order] and therefore grants Cabot’s request to discontinue providing temporary potable water to the remaining property owners.”
18. Notably, on September 13, 2011, Cabot similarly attempted to obtain permission from the DEP to cease deliveries of temporary water supplies to the appellants. A day later, Cabot withdrew its request and continued deliveries of fresh bulk and bottled water deliveries to the appellants.
19. In granting Cabot’s most recent request and determining that Cabot has complied with the requirements of Section 208 of the OGA and 25 Pa. Code § 78.51, the DEP did not conduct an independent and unbiased review of the record. Instead, it relied entirely on abridged sampling results, mischaracterization of facts, and false conclusions presented solely by Cabot.

20. The termination letter, sent just one week after the private meeting and one day after Cabot's October 17, 2011 letter, makes no reference to the specific requirements of the OGA or its implementing regulations outside of the copied text from paragraph 6 proposing to relieve Cabot of its responsibilities under law after compliance with that paragraph.
21. The termination letter makes no findings as to the quality of the contaminated water supplies or the reliability of the whole house treatment system.
22. The termination letter fails to assert a reason why it found that Cabot had "satisfied the terms and conditions of Paragraph 6," or even state that it had reviewed Cabot's October 17 letter or any relevant testing results in support of the claims in that letter.
23. As such, DEP's October 18 action, expressed in the termination letter, essentially absolving Cabot of all its responsibilities under the OGA without reference to the appropriate statutory or regulatory standard, was *ultra vires* and otherwise not in accordance with law.
24. Additionally, because an inappropriate standard was used, DEP made no relevant findings of fact in determining whether Cabot had satisfied its obligations under the OGA nor even the December 15, Consent Order; the DEP did not support its decision with substantial evidence, let alone any evidence.
25. Indeed, testing data available to DEP demonstrates that the water supplies of the Dimock residents continue to contain levels of aluminum, barium, beryllium, iron, manganese, toluene, tributyl phosphate, and non-naturally occurring chemicals associated with fracking such as bis (2-Ethylhexyl) adipate and bis (2-Ethylhexyl) phthalate in excess of primary and secondary drinking water standards under both the federal and state Safe Drinking Water Acts.
26. Further testing done by Cabot has also revealed the presence of ethylene glycol in water *after* treatment by the whole house treatment system.
27. Nor has the whole house treatment system been installed in all properties whose homeowners have elected to receive it nor can it be installed in all of the remaining properties should their owners elect to receive them: the system selected solely by Cabot cannot be installed in properties whose water has high iron content,

preventing installation in at least one property whose owner has elected to receive and precluding installation in many, if not most, of the remaining affected properties identified in paragraph 6 of the December 15, 2010 Consent Order.

28. As such, even using the appropriate standard, any decision by DEP that the contaminated water supplies had been restored or replaced in accordance with law would be arbitrary, capricious and contrary to the manifest weight of the evidence.
29. Cabot also failed to provide escrow funds free and clear of any encumbrances, including taxes. To the contrary, Cabot issued or caused to issue federal W-9 forms to all those who have already elected to receive the escrow funds, causing them to forfeit a substantial portion of the funds to the federal government, in violation of both the intent and express provisions of the December 15, 2010 Consent Order.
30. In addition to the foregoing objections, appellants also object to the fact that DEP:
 - a. deprived appellants their constitutional right to pure water under Penn. Const. Art. I, §27 without due process of law;
 - b. placed appellants in the untenable position of drinking water that is contaminated or personally paying for deliveries of potable water
 - c. negotiated in bad faith to the prejudice of the appellants;
 - d. acted *ultra vires* by disregarding Departmental regulations, creating a new standard for compliance with Section 208 of Oil and Gas Act, and, in effect, rewriting the laws of the Commonwealth of Pennsylvania; and
 - e. such other and additional issues as may become apparent during the preparation of the Record on Appeal and appellants' brief(s).
31. Appellants reserve the right to amend and/or supplement this response as more information becomes available.

4. Related appeals:

Ronald R. Carter, Sr., et al v. Commonwealth of PA DEP and Cabot Oil & Gas Corporation, EHB Docket No. 2011-003-L.

The information submitted is true and correct to the best of my information and belief.



Tate J. Kunkle, Esq.

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EXHIBIT “A”



pennsylvania

DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF OIL AND GAS MANAGEMENT

October 18, 2011

Mr. Phillip Stalnaker
Vice President, Regional Manager
Cabot Oil & Gas Corporation
Five Penn Center West, Suite 401
Pittsburgh, PA 15276-0120

Re: December 15, 2010 Consent Order and Settlement Agreement
Provision of Temporary Water

Dear Mr. Stalnaker:

On October 17, 2011, Cabot Oil & Gas Corporation ("Cabot") renewed its request that it be permitted to discontinue providing temporary potable water to the remaining property owners subject to the December 15, 2010 Consent Order and Settlement Agreement ("December COSA") that are still receiving temporary water deliveries. As part of that request, Cabot has committed to providing written notice, on or before November 1, 2011, to the property owners of the conditions under which the discontinuation of temporary water supplies will occur. The Department's analysis of and determination concerning that request are set forth below.

Pursuant to Paragraph 6.d of the December COSA, Cabot's obligations to provide temporary potable water are as follows:

For each Property Owner, Cabot shall continue to provide and maintain temporary potable water and, as applicable, shall continue to maintain gas mitigation devices that it had previously installed until Cabot receives written notice from the Department that it has complied with all of the requirements of Paragraph 6.a-6.b., above, for that Property Owner.

Paragraphs 6.a – 6.b of the December COSA require, in relevant part, the following:

6. ***Settlement of Restoration/Replacement Obligation.*** The claims by the Department regarding Cabot's obligations under Section 208 of the Oil and Gas Act, 58 P.S. § 601.208, and 25 Pa. Code § 78.51, including any obligation of Cabot to pay for or restore and/or replace the Water Supplies, or to provide for ongoing operating or maintenance expense shall be satisfied, as follows:

a. Escrow Fund.

- i. Within thirty (30) days after the date of this Consent Order and Settlement Agreement, Cabot shall establish nineteen (19) Escrow Funds and each Escrow Fund shall hold an amount equal to, whichever is greater: \$50,000; or two times the assessed value by the Susquehanna County Tax Assessor of the property(ies) owned by the Property Owners within the Dimock/Carter Road Area. Such assessed values for each property owned by the Property Owners are listed in chart attached as Exhibit D;
- ii. Within ten (10) days after Cabot has established and funded the nineteen (19) Escrow Funds in accordance within Paragraph 6.a.i., above, Cabot shall notify each Property Owner, in writing, of the existence of the funds in the Escrow Fund for that Property Owner, the procedure by which the Property Owner can obtain his/her/their payment from the Escrow Fund;
- iii. Cabot shall pay all fees and costs associated with each of the Escrow Funds.

* * *

- b. Effect of Notification to Department. After the time has passed for the Escrow Fund to be funded in accordance with Paragraph 6.a.i., above, and upon completion of the restoration activities described below, the Department's claims regarding Cabot's obligations under Section 208 of the Oil and Gas Act, 58 P.S. §601.208, and 25 Pa. Code §78.51, to restore and/or replace a Water Supply that serves the property owned by a Property Owner shall be satisfied upon the Department's receipt of information from Cabot that verifies that: the nineteen (19) Escrow Funds have been established and fully funded in accordance with Paragraph 6.a.i., above; each of the Property Owners have received written notice from Cabot of the Escrow Fund and of the procedure by which the Property Owner can obtain his/her/their payment from such Escrow

Mr. Phillip Stalnaker

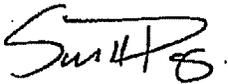
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October 18, 2011

Fund; *and* each of the Property Owners have received written notice from Cabot that it will install a whole house gas mitigation device at the property as provided for below.

The Department has determined that Cabot has satisfied the terms and conditions of Paragraph 6 of the December COSA and therefore grants Cabot's request to discontinue providing temporary potable water to the remaining property owners subject to the December COSA. Cabot shall do so under the conditions proposed in its October 17, 2011 letter.

Sincerely,



Scott Perry
Acting Deputy Secretary
Office of Oil and Gas Management

cc: S. Craig Lobins
Donna Duffy
Jennifer Means
Geoff Ayers

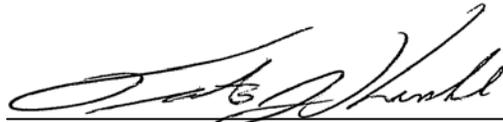

PROOF OF SERVICE

I, Tate J. Kunkle, Esq. hereby certify that a copy of the notice of appeal, was on November 18, 2011, served upon:

Donna L. Duffy
Regional Counsel
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Via First Class Mail, postage pre-paid

Scott Perry
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