

MINUTES
WATER QUALITY APPEALS BOARD MEETING
100 N. 15th Avenue, Suite 103
Wednesday, December 14, 2016

IN ATTENDANCE: Scott S. Wakefield, Chairman; Gail M. Clement, Vice Chair; Fred E. Brinker, P.E., Member

STAFF IN ATTENDANCE: Lisa Kautz & Connie Castillo, Clerk of the Board; Joseph Sciarrotta, Solicitor Attorney General's Office, Counsel for the Board

MINUTES:

1. The regular meeting of the Water Quality Appeals Board (WQAB) was called to order by Scott Wakefield at 9:59 A.M., Wednesday, December 14, 2016.
2. **Attendance for Meeting** – Russell Yurk & Dave Henry, Attorneys for Appellant SWVP-GTIS MR, LLC; Barbara Pashkowski, Attorney for Appellant Town of Florence; Tom Rankin, Mayor for Town of Florence; Christopher Ward, Attorney for Appellant Pulte Home Corp.; Brad Glass and Rita Maguire, Legal Counsel for Florence Copper, Inc.; Dan Johnson, Vice President and General Manager of Florence Copper Inc. Jeff Cantrell and Rick Zeise, Attorneys for the Attorney General representing ADEQ; Brad Pollock, Attorney General's Office; Jerry Scott and Ana Karen Lewis, ADEQ; Cliff Mattice, Town of Florence; Mark Nicholls of Florence Copper.

3. **Approval of the Minutes from the meeting of October 13, 2016.**

The Board reviewed and approved the minutes with no changes. Mr. Brinker moved to approve the minutes from October 13, 2016. Ms. Clement seconded the motion. Motion passed unanimously.

4. **16-002 Town of Florence, SWVP-GTIS MR LLC, and Pulte Homes Corporation.**

The Board will discuss the briefings that were submitted at our request and to discuss and decide on whether we will hear this appeal ourselves or submit it to the Office of Administrative Hearings.

Chairman Wakefield asks the parties if they have any brief comment to supplement or clarify or we'll permit brief comments and then the Board can discuss what we would like to do. Starting with the appellants.

Jorge Franco states that they did not file a response to some of the briefings because they are in general agreement with the process that is being proposed by FCI and that would be for the Board to hear the matter and to have an abbreviated hearing to do that on the issues that are to be identified in the scope of that hearing. So with that, they're in general agreement and can answer any questions that may be asked. Barbara Pashkowski is also in agreement with the general proposal for hearing this matter and moving it forward.

Brad Glass states that for over four years, Florence Copper has been seeking a temporary aquifer protection permits from the Department to offer a short-term pilot test in-situ copper recovery facility in order to prove the safety and the technology to the community and to the agency. Florence Copper has gone above and beyond (re) this extraordinary conditions in that permit

including agreeing to conduct close (operate) rinsing of the mine block to (the aquifer) water quality standards or background.

The parties agree that what was remanded to ADEQ in the prior year and was limited to five general areas or issues. Consideration of the BHP draft reports, additional monitoring to detect additional vertical migration solution, additional monitoring to detect horizontal migration solution and Florence Copper's of our initial briefing we grouped the horizontal monitoring issue as one -- it's been broken out into two, by some of the parties. The location of the PMAs and POCs and the submittal of an updated closure plan.

ADEQ and Florence Copper fully and comprehensively responded to each of the five issues. We believe that this information as well as the extensive briefing done provides specific – sufficient grounds for the Board to find that the remanded issues have been fully address by ADEQ.

If the Board does not make such a finding, it's ignoring its own narrow remand and subjecting the emitted permits additional and unnecessary delay. Also causing the State of Arizona and Florence Copper to spend more money and staff time beyond millions of dollars already being spent on what we submit respectfully are unwarranted and unsubstantiated charges by the appellants designed simply to stop this project.

Furthermore, a review of (constants) of appeal in each of the subsequent filings by appellants shows the appellants have failed to site specific provisions of the significant amendment that are arbitrary, unreasonable, unlawful or based upon a technical judgment that is clearly invalid and they fail to provide the legal and technical basis for doing so. And that's the standard for review of this Board.

Florence Copper now requests that the Board review the briefing currently before it, analyze whether the changes the ADEQ made to this significant amendment addressed the remand issues. If the Board finds it does, we contend that the Board should dismiss the appellants' notice of appeal and affirm the Director's decision to issue the significant amendment.

Alternatively, if the Board does not decide to dismiss appellants' notice of appeal, Florence Copper requests that the Board retain jurisdiction to hear what it ultimately decides on the remaining issues.

We believe retention is critical to the Board repeating the prolonged administrative hearing that happened previously. We have proposed to you (in a writing) as referenced earlier was a very focused, concise hearing where each of the parties would have two technical witnesses.

We would submit a direct testimony in writing to you and then conduct the cross examination in front of you to allow you also to ask questions of the witnesses. And we believe that would take approximately three days.

In the proposed schedule on that front would be to submit the direct written testimony and any exhibits that would be used within 30 days of today and that the hearing be scheduled 60 days after that.

This Board is uniquely qualified to determine the merit of appellants' claims. Florence Coppers asks that you either affirm the Director's decision today and reject the notice of appeal or accept jurisdiction and conduct the hearing that I just suggested on the narrow set of issues.

Jeff Cantrell indicates that the Board's role is not to draft the permit but to review the agency decision on whether the permit should have been issued using that standard. Mr. Cantrell states that

the agency has already submitted its issue matrix to the Board, which clearly identifies all the issues that were identified in the Board remand to it. On the issue of whether there was sufficient public notice and public process, we again submitted the notice of hearing; we submitted a video and a transcript of the public hearing as well as responses to the summary. So clearly that requirement was complied with.

We believe that no hearing is necessary. We believe that the Board already has sufficient information for it to make a ruling based on the standard that it shall affirm unless - and the Board really needs nothing further in order to make an obvious decision affirming ADEQ's position.

Jorge Franco argues that everything that was just stated for the most part was an argument. Arguments are reserved for the hearing - the hearing that this Board is here to determine whether they should have what should be referred to an ALJ for the Office of Administrative Hearings.

In this Board's last session, it did not ask for substantive briefs. What it did ask for was position statements by the parties as to what the framing of the issues for such a hearing might be. And that has been submitted. So to the extent that this platform, this session today is being used for substance and sufficiency of the significant amendments, this isn't the time for that and the Board doesn't have the record and the briefing it needs for that.

Mr. Fred Brinker take exception to that and argues that he specifically said that the brief should contain references to the portions of the permit that were modified, right? And with the case of the appellants to those specific portions of permit to which you had exception to, right? Mr. Brinker continues to states that he has read through the brief and didn't see any direct citation of any specific permit section that had an issue. Mr. Franco's comments were general. So what Mr. Franco was saying is not exactly true. In the case of the state, ADEQ, their brief went through and they gave me every section that was sent. They even provided me a red line copy of the original permit so I could see how it was changed. They provided a table to summarize what was changed. You guys didn't do any of that. You again made general arguments about we don't think this is sufficient. We don't agree with this. You didn't specifically say this specific provision we don't agree with; here's the reason why. Here's what we think it should be. So I just want to correct the record that what you're saying is not exactly true.

Jorge Franco clarifies his comments. Our position is the following; the place to present the substance and the testimony and the additional evidence to address the sufficiency of the significant amendment would be in the very hearing that we are seeking and the very hearing in which their motion said should be held before this Board as opposed to having a drawn out more expensive and less efficient process again the ALJ having gone through 34 days of testimony. We agree with the process and believe there is more to present. Believes that the Board should also hear from experts and revisits the significant amendments and provide additional analysis and thereby additional evidence. We agree with the process proposed, which would entail submitting those substantive written briefs on a schedule so that the Board would then see what those witnesses, particularly the technical witnesses have to say about the significant amendments and thereby the sufficiency of the significant amendments. Today is not the day to do that. He understood that the scope was going to be from the agenda that he does have, which is exactly what Mr. Brinker said just a moment ago to identify the scope of the issues and decide whether or not this Board should hear that matter or whether it should be referred to an ALJ. Our suggestion would be that we submit written briefs as have been proposed within, 30 to 60 days after the holidays have passed so on January 1. So we're talking about submittals by February; also an opportunity for each party to respond simultaneously to the other party's submittal within 30 days after that. Then the setting of the hearing, which we think would probably take three or four days' maximum in which limited live testimony would be heard. At that point it would be submitted to this Board for a decision or any post hearing briefings that might be necessary or required at that time.

Mr. Glass addresses a few points that have been raised. One, Florence Copper filed a motion to strike and the Attorney General filed a motion to dismiss. And that's pending before the Board as well. This is a unique case due to a prior hearing that was remanded for specific issues for agency and Florence Copper to address which they did. We believe there should be sufficient grounds for the Board to dismiss the notice and confirm the Director's decision. We do not think there is a need to have a hearing. If the Board does decide to have a hearing, we think it could be done in the timeframe suggested.

Barbara Pashkowski asks that everyone considers the importance of the protection of human health and the environment. This is not a process that should be rushed by any means. Also, I concur with counsel for Southwest Value that what we understood from the last hearing is that substantive issues would not be heard today. That's what it appears counsel for the permittee and for the state are trying to do. It was to bring before you what we believe the issues are and then for you to decide whether you are going to hear it or refer it to Owen. That's consistent with the agenda item. It is not a substantive hearing. So I would object to comments that have been proposed as substantive resolution to this matter. We have a very important issue here. That is the city's, the town's groundwater resources, its citizens and protection of those citizens and the environment. Please don't rush this through.

Jeff Cantrell argues that his presentation was not an argument on the substance. It's a justification for the fact that this is a much simpler matter than would appear on the surface, well within the capability of this Board to conduct in a rather quick and easy hearing. This isn't something that's going to drag on forever given the standard of review. We believe that no hearing is necessary. However, if the Board wants to conduct a hearing, we endorse the idea of written direct testimony to keep streamlined. Essentially all the issues that are important have already been written - have already been addressed in the briefing. That's what the briefing was - the original briefing that this Board ordered was - it was designed to achieve was to define the scope of the issues that the Board will hear. So we think it'll be actually really straightforward simple matter if the Board elects to hear and elects to conduct a hearing as opposed to making essentially a ruling on the pleading.

Mr. Fred Brinker indicates that the purpose of this whole process is to determine what the substantive issues are. It's hard to do that if you can't talk about it, isn't it?

Gail Clement asks where we are with the UIC and is the permit final and received? There has been suggestion that this process is slowing you down. We don't not want to hurry anything that requires a very deliberate review.

Rita Maguire states that UIC has been issued in draft form. It is completed all of the public and comment requirements. EPA is now in the process of finalizing that permit. Everything is done. The only thing that we're waiting for is the signature from Region 9 and the final permit.

Mr. Fred Brinker inquires about the consultation between EPA and the state in regards to the whole process.

Brad Glass consults with his clients and states ADEQ periodically will consult with EPA and back. There's an exchange of information. ADEQ does not require any approval or consent from the EPA and vice versa. They're totally separate processes. However, both agencies are aware what the other agency is doing and they will review that. But they don't - it's not a coordinated effort.

Rita Maguire states that the EPA appeal is now an abbreviated process. There is no trial and it is strictly an appellate review briefing only.

Ms. Gail Clement stated that she had some lack of clarity regarding the selection of the PMA and it did not contain enough substance to provide us with the 500-foot distance off of the operation unit as the definition for the PMA.

Mr. Fred Brinker stated that it meets the requirement.

Ms. Gail Clement stated that she agrees the requirement is met; however technically she doesn't understand the justification. This shouldn't be looked at from the perspective of the final permit as the purpose of the pilot study is to gain information so that the model can be developed and improved.

Chairman Wakefield recommends the Board discuss legal issues where this meeting has been agendaized before proceeding further. Would anyone like to motion for executive session?

There is a motion to go into Executive Session at 10:37am, motion carries.

Return to Public Session 11:10am

Ms. Gail Clement states there appears to be unanimous agreement by all parties that basically there are five issues that could be also interpreted as four issues. I don't think there was any disagreement on that. Those issues were the PMA, the POC and then if anybody needs the abbreviations; I think we all know them by now; the monitoring and the submittal and use of the BHP report and then the revisions to the closure plan.

Chairman Wakefield asks if the Board should talk about the issues - essentially those five issues then whether we need anything further before we feel like we would be prepared to decide our cases? We obviously are not deciding anything today.

Ms. Gail Clement states that regarding the closure plan her opinion would be that they do not need additional information.

Mr. Fred Brinker agrees and states that the issue about the BHP 20-year-old report that's been provided - had a chance to read it. I think that's been dealt with. So, I don't think that's an issue anymore.

Ms. Gail Clement agrees and states they do not need additional information regarding those two issues.

Mr. Fred Brinker states that leaves us with essentially the additional monitoring, the PMA and the POC issues, which I think are still under consideration, right. We might need a little bit more information on. Because again, the appellants didn't provide any like details and stuff. They made general comments, right?

Ms. Gail Clement moves that they do not need any additional information regarding the former or the - we'll call it the BHP study report, the draft report. We do not need any additional information regarding the closure plan revisions.

Mr. Fred Brinker seconds. Motion Carries.

Chairman Wakefield states that we have to decide how do we want to proceed on the three remaining issues. Do we need testimony for further factual development? Is there analysis of what already exists in the record that we just need some briefing on? What more do we feel like we need to decide those issues?

Mr. Fred Brinker moves to request factual expert testimony on completions of Law 3.7.3.2.1, 3.7.3.3 and 3.8.

Ms. Gail Clement seconds the motion and now they are open for discussion.

The Board and all parties discuss potential procedures.

Mr. Fred Brinker requests a withdraw to his motion.

Mr. Fred Brinker requests to make an amendment to the motion for clarification.

Chairman Wakefield states that an amendment to the motion that the parties would not have an opportunity to cross examine each other's witnesses based on their waivers of that right that they gave in this meeting (orally). Still good with your second?

Mr. Fred Brinker agrees and states, one concern however is that, I'd hate for anybody to show up that day and there's an objection to the Board order. I would think that probably should be agreed to in writing well in advance of the hearing so if not that can be dealt with prior to witnesses, parties, lawyers; people paying lawyers to show up that day would be my thought.

Chairman Wakefield states that an order will be issued and the parties will have 10 days to file.

Chairman Wakefield states the motion was seconded and asks for further discussion from the Board members or comments from the parties.

Chairman Wakefield states that the motion carries, the Board will issue a written order setting for the substance of what was proposed here or what was adopted as procedure going forward.

Ms. Gail Clement moves to adjourn, and Mr. Fred Brinker seconds the motion.

Future Agenda Items. There were no future items for discussion.

5. Mr. Wakefield adjourned the meeting at 12:12 P.M.

ALL WQAB MEETINGS ARE AVAILABLE ON AUDIO TAPE



Submitted by Lisa Kautz, Clerk
Water Quality Appeals Board

12-19-16

Date

Approval Signature by Chairperson
Water Quality Appeal Board

Date