

EHB Denies Protective Order for Shell's Pa. Chemicals Project

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In the case of *Clean Air Council and Environmental Integrity Project v. Commonwealth of Pennsylvania*, EHB Docket No. 2015-111-R, the Environmental Hearing Board (EHB) denied a motion for a protective order without prejudice with respect to documents Shell Chemical Appalachia sought to protect. The EHB's approach may be instructive for other companies seeking to protect information it considers confidential.

By way of background, on Jan. 18, the supervisors of Potter Township in Beaver County approved a conditional use permit for Shell's proposed petrochemical complex. The facility, comprised of an ethane cracker and three polyethylene units, is designed to employ a natural gas liquid from the Marcellus and Utica shale formations to produce plastic pellets used in plastics manufacturing. The site of a former zinc smelter will also host a natural gas power plant and three pipelines, and with a tax credit valued at \$1.65 billion over 25 years, the facility is slated for the largest tax break in Pennsylvania's history.

The Department of Environmental Protection issued its Air Quality Plant Approval (permit) to Shell on June 18, 2015, and on Aug. 3, 2015, Clean Air Council and Environmental Integrity Project (appellants) appealed the issuance of the permit to the EHB. The appellants' notice of appeal contends that because Beaver County is a nonattainment zone for the National Ambient Air Quality Standards (NAAQS) for ozone, and the complex will emit more than 50 tons per year of volatile organic compounds (VOCs), it is considered a major source and is subject to the federal nonattainment new source review (NA/NSR) program.

The NA/NSR program requires new facilities to achieve the Lowest Achievable Emissions Rate (LAER), defined as "the most stringent emissions limitation which is contained in the implementation plan of any state for such class or category of stationary source, unless the owner demonstrates that such limitations are not achievable" or "the most stringent emissions limitations which is achieved in practice by such class or category of stationary sources," 40 CFR 51.165(a)(1)(xiii). The appellants allege the permit is legally deficient because it does not comply with LAER and does not include federally enforceable limits for VOC emissions.

On May 20, 2016, the EHB adopted the Joint Proposed Plan for Conducting Electronic Discovery prepared by the appellants, Shell and the Pennsylvania Department of Environmental Protection. Acknowledging discovery of electronically stored information was reasonably likely to be sought, the plan provided a framework for such discovery, including the scope of ESI discovery and the manner of ESI preservation, collection, production and use.

Subsequently, on Aug. 15, 2016, Shell filed a motion for protective order regarding trade secrets, confidential business information, and other confidential materials (PO motion). In its PO motion, Shell pronounces that it "considers virtually all of the ESI identified as responsive to the [appellants'] discovery requests to be trade secrets and [confidential business information] which, if publicly disclosed, could substantially harm its business interests." On those grounds, Shell petitioned the EHB to enter a protective order in respect of such CBI.

[In *MarkWest Liberty Midstream & Resources v. Clean Air Council*, 71 A.3d 337](#) (Pa. Cmwlth. 2013), the Commonwealth Court followed the Superior Court's adoption of the following six-factor test to determine whether certain information constitutes a trade secret: the extent to which the information is known outside of the business; the extent to which it is known by employees and others involved in the business; the extent of measures taken by the party to guard the secrecy of the information; the value of the information to the party and to its competitors; the amount of effort or money expended by the party in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others. If a party is able to demonstrate that the specific information it seeks to protect is a trade secret, "the burden shifts to the requesting party to demonstrate, by competent evidence, that there is a compelling need for that information and that the necessity outweighs the harm of the disclosure," see [Crum v. Bridgestone/Firestone North American Tire](#), 907 A.2d 578 (Pa. Super. 2006).

Shell, in its PO motion, requested the Board to review all of the allegedly confidential documents and determine for itself if they are protected from disclosure under the MarkWest factors. In support for its PO motion, Shell highlighted the "nature of the appellant organizations and the roles that their counsel play," as environmental advocacy organizations regularly engaged in litigation with energy companies. Alternatively, appellants' memorandum of law in support of appellants' motion to compel full and complete discovery responses cited [Barkman v. DER](#), 1991 EHB 649, to argue "sweeping objections to discovery requests are not permissible," a general assertion of confidentiality, without further explanation, does not qualify as a proper objection, and it is Shell's responsibility to "initially establish that the information it seeks to protect is a trade secret or confidential business information, not the board's."

On Dec. 2, 2016, the EHB granted the appellants' motion to compel and denied Shell's PO motion without prejudice, permitting the parties an opportunity to prepare a more narrowly tailored protective order. The EHB explains, "Shell Chemical has not demonstrated that any of the information for which it seeks a protective order is confidential according to the six-part test set forth in MarkWest. In fact, it does not identify a single document, much less explain how it meets the six-part test. We, therefore, can stop our analysis at this point since the Permittee has not established that it is entitled to a protective order."

As the EHB order suggests, Pennsylvania courts analyze the MarkWest factors on a document-by-document basis. Even if the MarkWest factors are demonstrated, parties seeking the information who claim they are pursuing the public interest may be asked to convince to the court that the public's right to know can satisfy the requesting party's burden. In one analogous case decided under Public Utility Commission (PUC) [Regulations, Lyft v. Pennsylvania Public Utility Commission](#), 145 A.3d 1235 (Pa. Cmwlth. 2016), the Commonwealth Court decided whether the operator of a mobile ride-sharing application could obtain a protective order over its aggregated trip data during certain periods when it was not licensed to operate. Under the PUC regulation, Lyft had the burden to demonstrate the harm would be substantial and "outweigh the public's interest in free and open access to the administrative hearing process."

As the Lyft data sought was limited to the number of trips without revealing any additional details about the trips, the court held disclosure would not cause competitive harm. Although

Lyft argued the data would reveal otherwise unavailable "operational information" and "could be used by competitors to extrapolate the data and model Lyft's existing and potential activities in other markets," the court upheld the PUC's conclusion that "the public had a right to know about the extent of Lyft's noncompliance over various periods."

While the Lyft court explicitly contemplated the public's interest in free and open access to the administrative process in the PUC context, the standard set forth in MarkWest when the burden shifts to the party requesting confidential information to show there is a compelling need for the information, and that the necessity outweighs the harm of disclosure, can be more broadly construed. If Shell is able to demonstrate the information it seeks to protect is a trade secret, the EHB's ultimate decision on whether the harm from disclosure is outweighed by necessity—an analysis which could consider the public's interest—will be instructive for determining the type of information entitled to a protective order, especially in the petrochemical context. •

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