June 11, 2021

Via E-mail: mcallaghan@neelycallaghan.com
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Re: FCCEA FINAL & BINDING TIME-SENSITIVE ABATEMENT ACTION ORDER NO. 2021-002-9.5(b)-001

Mr. Callaghan:

On May 4, 2021, the Fayette County Code Enforcement Agency ("FCCEA") issued a Final and Binding Time-Sensitive Abatement Action Order ("Order") against many entities including The Continental Insurance Company ("Continental"). In accordance with Paragraph 6 and Section IX(b) of that Order, Continental requested an informal conference to discuss the scope of the Order and its application upon Continental. That conference occurred on June 4, 2021 and lasted about thirty minutes. In light of that conference, and in accordance with Section IX(b) of the Order, Continental provides the following written comments and statements of positions:

As a preliminary matter, while Continental appreciated the opportunity to speak with you, the conferral was inadequate to discuss its concerns with the Order in several respects. First, during the conferral, Continental asked for an explanation concerning why the FCCEA named Continental a remedial respondent and was informed that this issue could be later argued and litigated, specifically in the federal lawsuit. In addition, much of the discussion involved your Office outlining settlement considerations, despite the Office's inability to explain the specific basis for liability asserted against Continental in the first instance. Finally, when Continental attempted to ask questions aimed at narrowing the areas of dispute, you indicated such issues could be discussed at a later time and in a "different forum." Simply put, this conferral process was inadequate to engage in any meaningful discussion regarding the Order.

In addition, Continental takes exception to the Order on the following grounds:

1. The county level administrative process is not the proper forum to attempt to enforce the Order against Continental because the Commission elected to file a federal action. Under Section IX.V(d) of the Comprehensive Public Nuisance Abatement Ordinance, No. 2018-001 ("Ordinance"), the FCCEA and Commission commenced a civil action in the United States District Court for the Southern District of West Virginia to pursue enforcement of the Order, Case No. 2:21-cv-00307. Because the Commission elected to pursue that course of action, Section IX.V(g) of the Ordinance requires Continental to raise challenges to the Order in that federal action. *Id.* By filing suit, the federal action presents the sole forum for Continental to challenge the Order. Order at 16 ¶ 4; *see also* Ordinance at § XXIX(c). Accordingly, Continental requests the County immediately stay all administrative proceedings at the county level. Continental

objects to any continued county level administrative process during the pendency of the federal action and insists that all further deadlines, discovery, discussions, or other litigation proceed in the federal action subject to the Federal Rules of Civil Procedure and the Court's Scheduling Order.

2. The Ordinance is impermissibly overbroad. In enacting the Comprehensive Public Nuisance Abatement Ordinance, No. 2018-001, the Commission exceeded its legislative grant of authority to enact a public nuisance abatement ordinance and unlawfully conferred power it does not have upon the prosecuting attorney and the FCCEA. As a statutorily-created political subdivision of limited authority, W. Va. Code § 7-1-1 *et seq.*, the Commission possesses only "such powers as are expressly conferred by the Constitution and legislature, together with such as are reasonably and necessarily implied in the full and proper exercise of the powers so expressly given." Syl. Pt. 4, *State ex rel. W. Virginia Parkways Auth. v. Barr*, 228 W. Va. 27 (2011). The Commission does not have the authority to define what constitutes a "nuisance." *See EQT Prod. Corp. v. Wender*, 870 F.3d 322, 335 (4th Cir. 2017) (observing that local West Virginia government lack authority to "enact that any particular thing is a nuisance"). The Commission's definition is broader than that provided under West Virginia statutory and common law. Further, as written, the Ordinance unlawfully allows the Commission to function as an environmental regulator, when it is the State, through the WVDEP, that has the authority to regulate. Accordingly, Continental requests the FCCEA and Commission withdraw the Order.

3. The Ordinance violates West Virginia Code § 7-1-3ff(e) because it lacks appropriate procedural rules. At the administrative level, the Ordinance and the Order deprive Continental of any reasonable procedure to raise challenges to or issues with the Order. As outlined above, the conferral process was inadequate, and the lack of administrative remedies violates basic due process principles under both the State and federal constitutions. As a political subdivision of limited authority, the Commission "can do only such things as are authorized by law, and in the mode prescribed." Syl. Pt. 4, in part, *State ex rel. W. Virginia Parkways Auth. v. Barr*, 228 W. Va. 27 (2011). The Legislature prescribed such mode when it mandated that any commission enacting an abatement statute "provide for fair and equitable rules of procedure" for pursuing abatement actions, including a hearing before the Commission and appeal rights of any final order from the Commission to circuit court. *See* W. Va. Code § 7-1-3ff. There are no such rules or rights under Section IX.V of the Ordinance; consequently, Section IX.V and the "Final and Binding Time-Sensitive Abatement Order" are invalid. In addition, the Order provides that the purported failure "without good cause" of any respondent to comply with the Order shall result in the imposition of substantial fees and penalties, including punitive damages. Yet neither the Order nor Ordinance identify how such a determination is made, and the Order unlawfully constrains a respondent's ability to challenge any such findings. *See* Order at § IX.V(g). The lack of such standards violates West Virginia law. W. Va. Code § 7-1-3ff(e). For these reasons, Continental requests the Commission withdraw the Order. Alternatively, Continental is willing to litigate the Commission's position on enforcement of the Order in the federal action in accordance with the District Court's scheduling order and requests the Commission stay the administrative proceeding while the federal action progresses.

4. The Ordinance and Order are preempted by the West Virginia Groundwater Protection Act, W. Va. Code §§ 22-12-1 through 22-12-14. The WVDEP "has the sole and exclusive authority to promulgate standard of purity and quality for groundwater of the State." W.

Va. Code § 22-12-4(a). Absent an express provision to the contrary, the Secretary of the WVDEP has exclusive authority to adopt standards of purity and quality for groundwater. W. Va. Code § 22-12-4(e). Those standards are set forth in 47 C.S.R. 2 and its related regulations. The Ordinance and Order are preempted as they set forth standards that differ from those set forth in the State Code and the WVDEP's regulations (for instance, standards relating to iron). In fact, all such conflicting standards "are void." W. Va. Code § 22-12-14(a). In addition, while the Ground Water Protection Act reserves authority to entities like the Commission to abate nuisances under West Virginia Code § 22-12-13(b), the statute explicitly empowers the WVDEP with all regulatory authority. The Commission lacks the ability to regulate any groundwater standards within Fayette County, and thus, its standards are void.

5. The Ordinance and Order are preempted under the West Virginia Water Pollution Control Act. W. Va. Code § 22-11-1. All authority to promulgate rules and standards for surface water quality is vested in the Secretary of the DEP. W. Va. Code § 22-11-7b(a). The Water Pollution Control Act "expressly reserve[s] and reaffirm[s]" the "right and control of the state in and over the quality of all waters of the state," W. Va. Code § 22-11-20, and the WVDEP Secretary has adopted a comprehensive set of water quality standards. W. Va. ADC 47-2-1. Accordingly, local governments do not have regulatory authority over water quality standards and water pollution control for any waters in the State. The Ordinance unlawfully appoints the Commission as the regulator of surface and ground waters in Fayette County. It is therefore preempted by the Water Pollution Control Act. Moreover, the Act prohibits enforcement of any water quality standards except in an action to enforce an NPDES permit. For these reasons, the Commission lacks authority to enforce any county-level water quality standards against Continental through a local ordinance. Continental thus requests the County acknowledge that any and all standards different than those provided by the West Virginia Water Pollution Control Act are preempted and void.

6. The Ordinance and Order set forth regulations and standards different than those provided in the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1202(a), and West Virginia's Surface Mining and Control Reclamation Act, W. Va. Code § 22-3-1. All such standards are preempted. The SCMCRA and the WVSMCRA establish a comprehensive regulatory scheme covering coal mining's impact on groundwater. Moreover, the Ordinance creates an additional regulatory regime over groundwater that is in conflict with the SCMRA's and WVSCMRA's comprehensive framework as it imposes additional and unnecessary requirements that conflict with and frustrate key purposes of the SMCRA and WVSCMRA. Continental requests the County acknowledge that any and all standards different than those provided by the SCMRA and the WVSMCRA are void.

7. The Ordinance and Order conflict with, and are thereby preempted by, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). 42 U.S.C. § 9607(a) and the National Contingency Plan ("NCP"). A county abatement order that requires more stringent clean-up standards than those provided for under federal law are preempted under the doctrine of conflict or field preemption. Continental requests the County acknowledge that any and all standards different than those provided by CERCLA and the NCP are preempted and void.

8. Any imposition of the harsh, unwarranted, and arbitrarily-set penalties prescribed by the Ordinance, particularly before the FFCEA has even established the existence of a nuisance, violates the Excessive Fines Clause of the Eighth Amendment and Equal Protection Clause of the Fourteenth Amendment and constitutes an unlawful taking under both the State and federal constitutions. Similarly, the lack of judicial review specified in Section IX.V of the Ordinance violates due process. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 421 (1994). Further, the civil penalties do not serve any non-punitive purpose and are not directed at nuisance abatements, therefore rendering the provisions regulatory in nature, which exceeds the Commission's limited authority. The penalties for non-compliance with the Order, including the threat of punitive damages, are unlawful as they may be imposed without a hearing or appropriate judicial review, the process lacks a constitutionally sufficient evidentiary standard, and the fines and penalties have been arbitrarily set without sufficient justification or due process. The same is true for the requirement that the Commission's and FFCCEA's attorneys' fees and costs of litigation be imposed upon a respondent. The Ordinance and Order punish a respondent for exercising basic due process rights by attempting to challenge the Order at every level from the administrative proceedings through appeal. The FCCEA's issuance of a compliance order threatening imminent imposition of civil and punitive penalties, in addition to liability for costs and fees, without providing Continental an opportunity to appeal and be heard violates its procedural due process rights. *See* U.S. Const. amends. IV & XIV; W. Va. Const. Art. III § 10. Continental requests the Commission withdraw from its Order all references to Section IX.V(e) and attendant provisions.

9. The Ordinance and Order violate due process as it deprives Continental the right to seek review of the Order. As written, the Ordinance and Order require any challenge by a respondent be brought only in an action filed by the County Prosecutor against Continental. Ordinance at § IX.V(g). This is not a sufficient process, particularly considering no private party has the right to compel the filing of such an action under West Virginia law. A party seeking to challenge such an Order must have an available judicial remedy. *See Rohrbaugh v. Wal-Mart Stores*, 212 W. Va. 358, 364 (2002) ("For every wrong there is supposed to be a remedy somewhere.").

10. The abatement procedures following the issuance of a Final and Binding Time Sensitive Abatement Order also violate West Virginia law and basic due process principles given that compliance is immediately mandatory and there is no legitimate mechanism to raise challenges or seek appropriate judicial review. Under Section IX.V(c), following a conferral, a remedial respondent is required to "carry out at their sole cost and under the comprehensive oversight and monitoring by the Code Enforcement Agency such Abatements Actions as the Code Enforcement Agency deems necessary and proper[.]" The absence of procedural and substantive remedies to challenge this "mandatory" abatement process violates both statutory (e.g., W. Va. Code § 7-1-3ff) (requiring each County Commission to enact "fair and equitable rules for procedure") and Constitutional rights (e.g., due process). The FCCEA cannot be both the judge and jury. This "Time Sensitive" abatement process also unlawfully deprives a respondent's ability to challenge a "Final and Binding Time Sensitive Abatement Order" by limiting a respondent's right to seek review to one of four proceedings, all of which must first be commenced by the County Prosecutor. Ordinance at § IX.V(g). The Legislature plainly did not intend for such a result, considering it mandated all such ordinances "provide for fair and equitable rules of

procedure" when pursuing abatement actions. The statute itself contemplates that public nuisance remediation should be initiated by administrative complaint followed by a hearing conducted before the Commission. *See* W. Va. Code § 7-1-3ff(f)(1)-(4). The FCCEA is a party to that proceeding where it bears the burden of proving its allegations against each respondent by a preponderance of the evidence before the Commission. W. Va. Code § 7-1-3ff(f)(5). Section IX.V fails to satisfy any of these requirements. For the same reasons, the Ordinance violates both State and federal due process. As outlined above, this limitation also constitutes a violation of W. Va. § 7-1-3ff (requiring the process contain "fair and equitable" procedural rules and an appeal of all final orders entered by the Commission to circuit court).

11. The Ordinance unlawfully lowers the evidentiary burden of proving the validity of an alleged nuisance and an order, including the standards a party must demonstrate to obtain injunctive relief. Ordinance at § IX.V(d). The Commission lacks the authority to alter such standards under West Virginia statutory and common law, as well as the State and federal constitutions.

12. To be sure, Continental takes all environmental concerns seriously. Yet, from Continental's review of the record (which is on-going), it does not appear that the "gob piles" at issue have unlawfully impacted the groundwater. Continental understands that water samples were taken both upstream and downstream of these gob piles, but that testing for the presence of certain metals was only conducted on the downstream samples.[1] Without upstream testing, it is impossible to determine whether the gob piles are contributing to the alleged increase in metals in the water. In addition, Continental has been provided no evidence of a legitimate public health concern to groundwater particularly given that the testing for alleged pollutants or contaminants from these samples do not appear to exceed drinking water standards established under the Safe Drinking Water Act. It also does not appear that the gob piles have contaminated the water supply actually used by Fayette County residents, and so no reason exists for the FCCEA to believe that Fayette County residents are being exposed to the alleged contamination. The confluence of these factors seriously undermines the FCCEA's declaration that these gob piles—the apparent result of mining operations that concluded nearly 70 years ago—constitute an imminent and substantial threat to the public health, much less a public nuisance.

Continental requests that the FCCEA and Commission withdraw its Order. At a minimum, given the Commission's decision to pursue a federal action, and because the Order requires Continental to challenge it in that forum, Continental requests the Commission immediately stay and abey all administrative level proceedings.

[1] These are among the items we wished to discuss during the informal conference before it was abruptly ended.

Should you have any questions or comments, Continental is willing to meet to discuss these issues further at a mutually convenient date, time, and location.

Sincerely,

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