

BEFORE THE RECLAMATION COMMISSION

SIDWELL MATERIALS, INC.,	:	Case No. RC-13-012
	:	
Appellant,	:	
	:	Review of Chief's Order 7355 - Modified;
-vs-	:	Permit D-2261 (McGary Property)
	:	
DIVISION OF MINERAL RESOURCES	:	
MANAGEMENT,	:	
	:	<u>FINDINGS, CONCLUSIONS &</u>
	:	<u>ORDER OF THE COMMISSION</u>
Appellee.	:	

Appearances: Scott Eickelberger, Ryan Linn, Counsel for Appellant Sidwell Materials, Inc.; Brian Ball, Assistant Attorney General, Counsel for Appellee Division of Mineral Resources Management.

Date Issued: June 25, 2014

BACKGROUND

On December 16, 2013, Appellant Sidwell Materials, Inc. ["Sidwell"] filed with the Reclamation Commission a Notice of Appeal from the Division of Mineral Resources Management's [the "Division's"] issuance of modified Chief's Order 7355. This Chief's Order alleges that Sidwell's mining operations, conducted pursuant to coal mining and reclamation permit D-2261, have proximately caused the diminution of agricultural / recreational water supplies located on the Brian McGary property. The McGary property is situated immediately adjacent to the permit D-2261 area.

Modified Chief's Order 7355 required Sidwell to take various actions, including: (1) developing a replacement plan for the McGary water supplies, and (2) providing a temporary agricultural water supply to certain livestock housed on the McGary property.

Accompanying Sidwell's Notice of Appeal was a Request for Temporary Relief. A site view and hearing on Temporary Relief were conducted on January 8, 2014.

On January 14, 2014, the Commission Chair **granted** Temporary Relief from the requirement that Sidwell develop a written replacement plan for the McGary water supplies by an identified date. Temporary Relief was granted for a limited period, set to expire on **June 4, 2014**. Temporary Relief was **conditioned** upon Sidwell's provision of a temporary agricultural water supply to the McGary livestock.

On May 7 & 8, 2014, this matter came on for hearing upon its merits. At hearing, the parties presented documentary evidence and examined witnesses appearing for and against them.

In order to allow the Commission adequate time to deliberate and render its decision upon the merits, on May 22, 2014, the Commission Chair, *sua sponte*, **extended** his grant of Temporary Relief until **June 20, 2014 or until a decision on the merits is rendered**. As under the original grant of Temporary Relief, Sidwell remained obligated to provide a temporary agricultural water supply to the McGary livestock.

At the January 8, 2014 Temporary Relief hearing, the Division raised a jurisdictional issue relative to the initial filing of Sidwell's Notice of Appeal. Requests for Temporary Relief are heard, and decided, solely by the Commission Chair. Motions addressing jurisdiction require consideration by the full Commission. Therefore, on January 8, 2014, the Commission Chair instructed the Division to file a written jurisdictional motion with the full Commission. On January 19, 2014, the Commission **established** a filing schedule for dispositive motions, requiring filings by March 3, 2014. No filing relative to the jurisdictional issue identified by the Division at the Temporary Relief hearing was made prior to the merit hearing.

During opening statements at the Commission's May 7, 2014 merit hearing, the Division again orally **moved** to dismiss this appeal on jurisdictional grounds. The Division was again instructed to make this motion in writing, and the Commission proceeded to hear the merits of this cause. Post-hearing briefs were filed on May 16, 2014, with responses filed on May 21, 2014. The Division's jurisdictional motion was addressed by the parties through these post-hearing filings. A ruling upon the pending Motion to Dismiss is included in this final order.

RULING UPON MOTION TO DISMISS

The Division has moved for the dismissal of this appeal, citing flaws in Sidwell's filing of its Notice of Appeal. The Division argues that these flaws cause the Commission to lack jurisdiction in this matter. Sidwell has made counter arguments to the Division's motion.

Sidwell's Notice of Appeal was filed on December 16, 2013. The Notice of Appeal was submitted in the form of a letter, under the signature of Professional Engineer Timothy Linn. Mr. Linn's letter sets forth Sidwell's complaints relative to modified Chief's Order 7355, questioning the Division's determination that Sidwell's operations had proximately caused the diminution of water supplies on the McGary property.

Mr. Linn is not an attorney. Nor is he an officer of Sidwell Materials, Inc. Rather, Mr. Linn is a third-party consultant, who performs engineering work on behalf of Sidwell.

The Division moved to dismiss this appeal based upon the facts: (1) that Mr. Linn is not an attorney, and therefore, may not "represent" Sidwell in this action, (2) that the Notice of Appeal did not provide the appearance and contact information for Attorney Scott Eickelberger (who now represents Sidwell), and (3) that the Notice of Appeal did not specifically articulate the grounds for Sidwell's appeal or specifically state the relief sought.

To consider the Division's motion, the following time-line is relevant:

December 2, 2013 – Modified Chief's Order 7355 issued by Division (order issued to Sidwell Materials via Certified Mail)

December 16, 2013 – Notice of Appeal and Request for Temporary Relief filed with the Commission by Mr. Linn

December 18, 2013 – Commission sent letter to Mr. Linn (copied to Division's counsel), informing Mr. Linn that Sidwell Materials, as an Ohio corporation, must be represented by counsel before the Commission, and also attempting to schedule a Temporary Relief hearing

December 23, 2013 – Attorney Scott Eickelberger contacted the Commission and verbally entered his appearance on behalf of Sidwell; Commission conducted a telephone pre-hearing conference for the purpose of scheduling a site view and Temporary Relief hearing; Attorney Eickelberger participated in the conference on Sidwell's behalf

December 26, 2013 – Attorney Scott Eickelberger entered a written Notice of Appearance on behalf of Sidwell, providing all contact information

January 2, 2014 – end of the thirty-day appeal period for modified Chief's Order 7355¹

January 8, 2014 – site view and Temporary Relief hearing conducted; Attorney Eickelberger was in attendance and presented arguments on behalf of Sidwell.

Commission Rule O.A.C. §1513-3-03 addresses appearance and practice before the Reclamation Commission, and provides in part:

(A) Except as prohibited by section 4705.01 of the Revised Code,² any party may appear on his own behalf or may be represented by an attorney at law admitted to practice before the supreme court of Ohio, or by an attorney admitted to practice by the commission pursuant to a motion to appear *pro hac vice*.³

¹ Modified Chief's Order 7355 was received by Sidwell on December 3, 2013.

² O.R.C. §4705.01 addresses the practice of law, and sets forth certain prohibited actions including the unauthorized practice of law. The representation of a corporation by a non-attorney is considered the unauthorized practice of law.

³ Prior to January 26, 2009, Commission Rule O.A.C. §1513-3-03 allowed the following:

(C) In the absence of an attorney, a party may represent itself, a partnership may be represented by any of its members, a corporation or association may be represented by any of its officers, and any governmental unit may be represented by an employee offering proof of authority.

(O.A.C. §1513-3-03(C), as in effect from March 7, 1986 through January 26, 2009.)

Note that even under this prior version of the Commission's rule on appearance and practice, Mr. Linn's appearance would be problematic, as Mr. Linn is not an officer of Sidwell Materials, Inc.

The Commission's rule prohibits the unauthorized practice of law by non-attorneys. This rule is consistent with accepted practices as articulated in O.R.C. §4705.01, which practices have been developed to protect the public:

The premise behind the rule prohibiting the unauthorized practice of law is that "limiting the practice of law to licensed attorneys is generally necessary to protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation.

Cleveland Bar Assn. v. Comp Management, Inc., (2004) 104 Ohio St. 3d 168, 2004-Ohio-6506, ¶40.

While Ohio corporations generally must be represented by counsel in legal proceedings, the Ohio Supreme Court has carved out certain narrow exceptions to this general rule. In these cases, the Court has specifically identified circumstances in which lay representation does not pose a significant hazard to the public, or where public policy supports lay representation for certain activities. *Henize v. Gile*, (1986) 22 Ohio St. 3d 213, 22 OBR 364. The Ohio Supreme Court has allowed lay representation of corporations at the administrative level, where the lay person "does not make legal arguments, examine witnesses, or undertake any other tasks that can be performed only by an attorney." *Dayton Supply & Tool Company, Inc. v. Montgomery County Board of Revision, et al.*, (2006) 111 Ohio St.3d 367, 2006-Ohio-5852, ¶2. The Court has also acknowledged that a need to expedite proceedings may be a consideration where lay representation has occurred. *Dayton Supply & Tool Company, Inc. v. Montgomery County Board of Revision, et al.*, *supra* at ¶14.

In this matter, Sidwell filed a Motion for Temporary Relief. O.R.C. §1513.13(C) requires the Commission Chair to address such motions in an expeditious manner. Thus, there was an interest in advancing this matter to a Temporary Relief hearing as expeditiously as possible. While Mr. Linn filed the Notice of Appeal on behalf of Sidwell (an action which the Commission acknowledges to be at the "outer boundaries" of permissible lay conduct), Attorney Eickelberger entered his appearance informally on December 23, 2013 and formally on December 26, 2013. Therefore, Mr. Eickelberger's appearance was entered prior to the expiration of the thirty-day appeal period for modified Chief's Order 7355. Thus, within the initial thirty-day appeal period, any jurisdictional defect attributable to Mr. Linn's filing of the Notice of Appeal was, effectively, cured.

Regarding the Division's claim that the Notice of Appeal filed by Mr. Linn on December 16, 2013 did not adequately set forth the grounds for appeal or the relief requested, O.R.C. §1513.13(A)(1) requires simply:

The notice of appeal shall contain a copy of the notice of violation, order, or decision complained of and the grounds upon which the appeal is based.

In this case, modified Chief's Order 7355 was attached to Sidwell's Notice of Appeal, as were several other documents relating to Sidwell's position regarding the order under review.

Moreover, Attorney Eickelberger, upon entering his appearance as counsel, still had sufficient time to file an amended Notice of Appeal, in order to cure any jurisdictional defects or further define Sidwell's grounds for appeal. *See O.A.C. §1513-3-04(F)*. Mr. Eickelberger did not make such a filing; nor was such filing necessary in the opinion of the Commission.

The filing of a notice of appeal in the Commission's *de novo* proceedings serves as general notice that an appellant believes itself to be adversely affected by a Chief's decision that is arbitrary, capricious or inconsistent with law.

The Commission has held in the past that a failure to set forth specific "errors" in a notice of appeal is not fatal to the Commission's jurisdiction. *Jeffco Sales & Mining v. Division, RBR-3-87-218 (August 28, 1987)*; *Murray Energy Corporation, et al. v. Division & Oxford Oil Company, RC-11-006 (September 21, 2011) [Order Denying Motion to Dismiss]*. Notably, the Commission's rules provide for pre-hearing discovery, in the event that the appellee requires more specific information relative to an appellant's notice of appeal. *See O.A.C. §1513-3-10*.

The Commission **FINDS** that Sidwell has properly invoked the Commission's jurisdiction in this matter. The Commission hereby **DENIES** the Division's Motion to Dismiss, and will proceed to consider the merits of this appeal.

FINDINGS OF FACT

1. In 1995, Mr. Brian McGary purchased an undeveloped piece of property in Wheeling Township, Belmont County, Ohio [the "McGary Property" or the "Property"]. The McGary Property is approximately 52 acres in size. This triangular piece of land is bounded on the west by County Road 66 and on the east by County Road 64 (Unity Church Road). Mr. McGary purchased the Property as a retreat, and utilizes the Property for recreational / agricultural purposes.

2. This area of Belmont County has been extensively mined for coal, pursuant to many mining permits, and over a long period of time. In this geologic setting, the #9 Meigs Creek Coal Seam is found closest to the ground surface and occurs at an approximate elevation of 1115 feet msl [mean sea level]. The #8 Pittsburgh Coal Seam is situated at a lower geologic level, occurring at an approximate elevation of 1030 feet msl. Thus, about 85 feet of material separate these two coal seams. The lithology between the coal seams contains various geologic units, including the Redstone and Fishpot Limestones. The #9 coal, the #8 coal, and the Redstone and Fishpot Limestones are all minable deposits. These units have been, and continue to be, extensively surfaced mined. Some abandoned underground mines, from which the #8 coal was produced, also exist in the area.

3. Much of the mining in this area occurred prior to Ohio's enactment of a comprehensive reclamation law, and at a time when open pits were frequently left on properties following surface mining.⁴ The #9 coal was mined on the McGary Property prior to 1982, and a series of "remnant pits" were created in the unconsolidated mine spoil on this property.⁵ Over time, these open pits filled with water, and created a series of "ponds." These ponds existed on the Property when Brian McGary purchased the land in 1995.

⁴ In 1977, Congress passed the Federal Surface Mining Control and Reclamation Act ["SMCRA"], 91 Stat. 445, 30 U.S.C. §1201, *et seq.* SMCRA sets forth national environmental performance standards for coal mining and reclamation, and allows individual states to regulate coal mining within their borders, provided that the states' mining and reclamation laws are "at least as stringent as" SMCRA (*see 30 CFR 732.15 and 30 CFR 801.4.*) In August 1982, Ohio's regulatory program was approved by the federal government, and Ohio obtained "primacy" to administer its own coal mining program. At that time, the requirements of Ohio's mining and reclamation laws changed dramatically. Mining and reclamation activities that occurred prior to 1982 are commonly referred to as "pre-law" activities.

⁵ During surface mining, the intact stratified geologic units situated above the deposit being mined (*i.e.*, the overburden) is broken-up and mixed. "Mine spoil" is the mixture of these excavated materials. Spoil is "unconsolidated," as it has been removed from its original stratified location within the geologic bedding planes, and has been modified into a "loose" material.

4. The ponds on the McGary Property are remnant "pre-law" mining pits created during surface mining of the #9 coal. The Division's exhibits show the ponds' bottoms as having maximum depths to an elevation of 1115 feet msl (the approximate elevation of the bottom of the #9 coal seam in the area). (*See Division's Exhibit 9.*) However, no soundings have been taken to determine the actual depths of the ponds. The ponds are influenced by rainfall; and Mr. McGary testified that - historically - the ponds would be at their highest water levels in the Spring of the year, and would lose a certain amount of water over the Summer months. Thus, water depths in the ponds would vary over the course of a year. Indeed, the number of ponds on the McGary Property could also vary. When water levels were high, there might be one large – possibly five-acre – pond on the McGary Property. However, when water levels were lower, there would instead be a series of ponds, separated by small "land bridges." Aerial photographs of the McGary Property taken over the years sometimes show one large pond on the Property, and sometimes show one larger pond (identified at hearing as Pond A) and two smaller ponds (identified at hearing as Ponds B and C).⁶ At the time of the Commission's site view, in January 2014, three ponds existed on the McGary Property. By the time of the Commission's hearing, in May 2014, water levels were higher, and a fourth small pond (identified at hearing as Pond D) had developed at the southernmost end of the McGary Property. While Mr. McGary testified that prior to about 2009, one large pond existed on his property, it is notable that written assessments of the water resources on the McGary Property (developed in 2005 – 2006, as part of Sidwell's permitting process) show three ponds on the McGary Property. (*See Division's Exhibit 6, pp. 81-83; Division's Exhibit 7, p. 86.*) Mr. McGary produced at hearing an undated photograph, which appears to show one large pond on his property.⁷ Mr. McGary testified that, historically, water depth in the Pond A would range from 15 – 17 feet in the Spring, but would be reduced to 12 – 15 feet during drier times of the year. The evidence, taken as a whole, establishes that even prior to Sidwell's coal mining in the area, the water levels and number of ponds on the McGary Property would vary.

⁶ The value of the aerial photographs submitted by the Division is limited by the fact that accurate dating of these aerials cannot be confirmed. For example, the vegetation shown in aerials marked with dates of 11/11 and 12/10, does not seem appropriate to the suggested time of year. (*See Division's Exhibit 8, pp. 90 & 91.*) The aerials do, however, establish changes on the site over time.

⁷ Mr. McGary testified that he believes this photograph (Commission's Exhibit 4) dates from sometime before 2011. This photo was taken in the Winter, with heavy snow coverage. It simply cannot be determined from the photo whether snow is covering only the surface of water, or is also covering "land bridges." Photographs from Mr. McGary, marked as Commission's Exhibits 2 (April 24, 2014) and 3 (possible date prior to 2011), do show a change in the water level of Pond A.

5. Since his purchase of the property in 1995, Mr. McGary has utilized his ponds for recreation, and he has constructed a deck and boat docking facilities at Pond A.

6. On April 5, 1996, Sidwell obtained an industrial minerals permit from the Division, authorizing Sidwell to develop a limestone quarry on approximately 205 acres of ground on the east side of County Road 64. This operation is known as the Uniontown Stone facility. The operation is directly across the county road, and adjacent to, the McGary Property. Permit IM-1283 allowed Sidwell to quarry the Redstone and Fishpot Limestones.

7. The #8 coal is situated beneath the Redstone and Fishpot Limestones. In 2005 – 2006, Sidwell applied for a coal mining permit to allow incidental mining of the #8 coal. As part of the application process, Sidwell was required to evaluate the probable hydrologic consequences of coal mining on the permit application site. Also as part of this application process, the Division was required to assess the cumulative hydrologic consequences of coal mining at the facility. These evaluations were intended to predict the impacts of coal mining on area hydrology, as well as mining's impacts upon specific water resources and water availabilities within a designated distance from the proposed mine. The McGary ponds fall within the area evaluated during the permitting process. Sidwell's 2005 – 2006 application for a coal mining permit identified three "wildlife" ponds on the McGary Property (the "wildlife" designation was provided by Sidwell in its application documents).

8. On March 28, 2006, Sidwell obtained coal mining permit D-2261. This permit authorized Sidwell to mine the #8 coal on approximately 47.8 acres of land. Sidwell's permit D-2261 overlapped Sidwell's previously-issued industrial minerals permit IM-1283.

9. In 2008, Sidwell submitted an adjacent area application, D-2261-1, adding 95.1 acres to its coal mining operation. This adjacent area application moved the boundaries of Sidwell's coal mining operation closer to the McGary ponds. (However, the McGary Property is not part of the permitted area, and the McGary ponds are located outside all permit boundaries.)

10. In or around 2008, Mr. McGary acquired a small number of goats, which he keeps in the vicinity of Pond C. These goats obtained water from Pond C.

11. Until about 2009, Sidwell was primarily mining the Redstone and Fishpot Limestones at the Uniontown facility. Sometime in 2009, Sidwell began limited mining of the #8 coal, although the operation still focused on limestone production. Mining progressed from the southwest to the northeast. By the Spring of 2009, Sidwell's mining operations had advanced to a location along County Road 64, directly across the road from the McGary Property. By December 2010, Sidwell's active pit was approximately 520 feet from the closest McGary pond.⁸

12. Mr. McGary testified that beginning in about the Spring of 2009, he began to notice an atypical reduction in the water levels of his ponds. During the Winter of 2010, Mr. McGary testified that the depth of Pond A had been reduced to approximately 48 inches. At this time, Mr. McGary also testified that his goats were unable to safely obtain water from Pond C. On December 21, 2010, Mr. McGary filed a water loss complaint with the Division.

13. The McGary water loss complaint was initially investigated by Division Hydrologist Kyle Baldwin, who was responsible for this investigation from late 2010 until late 2012. Mr. Baldwin was the only Division hydrologist to actually conduct field tests relative to this investigation. Mr. Baldwin conducted two dye tests, took samples of water from a McGary pond and the Sidwell pit, created geologic cross sections, and took photographs and video of field conditions. Mr. Baldwin testified that his dye tests were inconclusive. Mr. Baldwin also testified that the chemical testing of the waters in a pond and in the pit showed the waters in these structures to be of a similar chemical composition. However, Mr. Baldwin did not find the results of the water testing particularly persuasive. According to Mr. Baldwin, cross sections showing relative geologic elevations, and video of water entering the Sidwell pit through joints, cracks and fissures in the intact, consolidated portions of the Sidwell pit's highwall, establish a hydrologic connection between these structures. Yet, Mr. Baldwin never produced a written report setting forth conclusions from his investigation. Ultimately, Mr. Baldwin was transferred to another position, and the McGary investigation was transferred to another Division hydrologist. Mr. Baldwin was qualified as an expert at hearing, and testified that he believes there to be a hydrologic connection between activities on permit D-2261 and the loss of water in the McGary ponds.

⁸ There was inconsistent evidence at hearing as to the distance between the McGary ponds and the Sidwell pit. The estimate of 520 feet is taken from the water loss complaint filed by Mr. McGary on December 21, 2010. (*See Division's Exhibit 4.*) Mr. Linn testified that 590 feet separate Sidwell's currently active pit from Pond A. Pond A, however, is not the closest pond to Sidwell's pit. For purposes of this decision, the Commission will utilize the 520 feet figure as the distance between the Sidwell pit and the closest McGary pond.

14. In late 2012, Division Hydrologist Laura Bibey assumed responsibility for the McGary water loss investigation. Ms. Bibey visited the permit D-2261 site, observed the McGary ponds, compiled aerial photographs of the site,⁹ and met with the involved parties. Ms. Bibey did not conduct any independent field tests relative to this complaint. On January 15, 2013, Ms. Bibey produced a written report, concluding that Mr. McGary's "water quantity issue was a result of mining activities at the Sidwell Materials Inc. Uniontown Stone facility." (*See Division's Exhibit 15, p. 27.*) In forming this conclusion, Ms. Bibey relied upon her understanding of Mr. Baldwin's field investigation. Ms. Bibey was qualified as an expert at hearing, and testified to a hydrologic connection between activities on permit D-2261 and the loss of water in the McGary ponds.

15. After the issuance of the January 15, 2013 Bibey Report, Sidwell was instructed to develop a plan to address Mr. McGary's water loss. Division inspection reports began noting the need for a water replacement plan in February of 2013. Comments regarding the McGary water loss complaint, and the need for a replacement plan, were contained in monthly inspection reports during most of 2013. By September of 2013, the Division began to set deadlines for Sidwell's submission of a water replacement plan, although no formal enforcement action mandating replacement was issued. Over this period, Sidwell continued to express concerns and questions regarding whether its mining operation had proximately caused water loss in the McGary ponds. Thus, even though several deadlines were set for Sidwell's submission of a water replacement plan during the Fall of 2013, no replacement plan was submitted.

16. In the Fall of 2013, Supervising Hydrologist Cheryl Socotch was asked to review the findings relative to the McGary water loss complaint. Ms. Socotch performed no independent testing, and did not visit the site until after Sidwell's appeal to the Commission was filed. In her review of the McGary water loss complaint, Ms. Socotch relied upon the Bibey Report, upon information in Mr. Baldwin's field notes, and upon her understanding of the results of Mr. Baldwin's field investigation. On September 13, 2013, Ms. Socotch produced a report, finding that "it [was] not unlikely that the active mining on the adjacent Sidwell mine site [had] impacted the ponds on the McGary property." (*See Division's Exhibit 18, p. 66.*) Ms. Socotch was qualified as an expert at hearing, and testified to a hydrologic connection between activities on permit D-2261 and the loss of water in the McGary ponds.

⁹ See footnote 6, *supra*.

17. On December 2, 2013, modified Chief's Order 7355 was issued to Sidwell Materials.¹⁰ The Chief's Order contained the following findings:

4. A dye test conducted in February of 2012 revealed that dye placed in the McGary ponds emerged from the open face/highwall on the Sidwell Material, Inc. D-2261 active pit, indicating a direct hydrologic connection from the McGary ponds to Permit D-2261.

5. A Site Investigation Report dated January 15, 2013 [the Bibey Report], a copy of which is attached hereto as if fully rewritten herein, concluded that the diminution of Mr. McGary's agricultural/recreational water resources (ponds) proximately resulted from the coal mining operation conducted by Sidwell Materials, Inc. on Permit D-2261. The reasons for this conclusion contained in [the Bibey] Report are fully incorporated herein by reference.

The Chief's Order required Sidwell to:

Within 2 days, "supply a temporary agricultural source of water to the livestock on the McGary property."

Within 45 days, "submit to the Division a written plan detailing the measures that will be taken to replace the agricultural/recreational water supplies located on the McGary property ... [to] include a detailed time schedule for the implementation of each phase of the water supply replacement plan."

"Within 180 days of receipt of the Division's written approval of Sidwell Materials, Inc.'s water replacement plan, . . . implement the approved plan and establish a permanent water replacement in a manner consistent with Policy Directive: Regulatory 2013-01."

18. On December 12, 2013, Sidwell Materials appealed modified Chief's Order 7355 to the Reclamation Commission. On January 14, 2014, Temporary Relief was granted from the requirement that Sidwell develop a water replacement plan with 45 days of the issuance of modified Chief's Order 7355.

¹⁰ Chief's Order 7355 was originally issued on November 27, 2013 – the day before Thanksgiving. Aspects of the compliance deadlines set forth in the original order could not be accomplished because of the holidays. Therefore, Chief's Order 7355 was modified with revised compliance deadlines, and the modified order was issued on December 2, 2013.

19. On April 24, 2014, Timothy Linn, on behalf of Sidwell, emplaced dyes in each of the McGary ponds, specifically placing black dye in Ponds C and D. At hearing, Sidwell's employee Drake Prouty testified that he had not observed dye in Sidwell's mining pit after April 24, 2014. But, Mr. Prouty also testified that he observed a variety of water colors in Sidwell's pits on May 6, 2014. Division Inspector Dylan Pendleton visited Sidwell's D-2261 site on April 28, 2014 and again on May 2, 2014. Inspector Pendleton photographed the Sidwell pit, and testified that he observed black dye in the Sidwell pit during these visits.

DISCUSSION

Coal mining operations in Ohio are conducted pursuant to permits issued by the Ohio Division of Mineral Resources Management. Such operations are regulated in accordance with Ohio's mining laws.

A. THE BURDEN OF PERSUASION :

O.R.C. §1513.13(B) sets forth the standard of review applied in appeals taken to the Reclamation Commission, and provides:

The commission shall affirm the notice of violation, order, or decision of the chief unless the commission determines that it is arbitrary, capricious, or otherwise inconsistent with law; in that case the commission may modify the notice of violation, order, or decision or vacate it and remand it to the chief for further proceedings that the commission may direct.

In accordance with Commission Rule O.A.C. §1513-3-16(B), Sidwell shoulders the burden of persuasion in this matter. Therefore, Sidwell must establish, through evidence, that modified Chief's Order 7355 is arbitrary, capricious or otherwise inconsistent with law. Sidwell presented no expert witnesses or reports at hearing.¹¹

¹¹ Sidwell attempted to qualify Professional Engineer Timothy Linn as an expert in mine site hydrology. Mr. Linn has many years of experience as a mining consultant. He is not, however, an expert in hydrology, and was not so qualified by the Commission. The Commission did, however, receive Mr. Linn's testimony, as a lay witness regarding events in which he participated.

Sidwell's presentation at hearing challenged the Division's water loss investigation, pointing out inconsistencies in testimonies and opinions of various Division staff, as well as highlighting flaws and shortcomings in the Division's investigation. While Sidwell may have been effective in this regard, Sidwell did not set forth any independent evidence, or rationale, to refute the Division's conclusion that water loss in the McGary ponds was proximately caused by Sidwell's mining.

B. THE REQUIREMENT TO REPLACE AN AFFECTED WATER SUPPLY:

O.R.C. §1513.162(A) provides:

The operator of a coal mining operation shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where the supply has been affected by contamination, diminution, or interruption proximately resulting from the coal mining operation and shall reimburse the owner for the reasonable cost of obtaining a water supply from the time of the contamination, diminution, or interruption by the operation until the water supply is replaced.

(See also: O.A.C. §1501:13-9-04(P).)

Ohio's statute places an absolute obligation upon "[t]he operator of a coal mining operation [to] replace [a] water supply . . . where the supply has been affected by contamination, diminution, or interruption proximately resulting from [a] coal mining operation . . . ". The obligation is to return the water supply to the condition that existed prior to mining. *Tina Patterson v. Division & Anthony Mining Company, RC-13-010 (March 10, 2014).*

The McGary ponds are not "natural structures." They were created by previous mining activities, and exist in unconsolidated mine spoil. Had a previous miner not left behind open mining pits, these ponds would not exist. The ponds are not features of the "natural" hydrogeology of this area. Thus, these ponds do not necessarily "perform" as natural structures.

Mr. McGary testified that water levels in these ponds respond strongly to seasonal variations. In other words, the ponds would be at their fullest levels in the Spring – at which time they may have existed as one, large pond. But, the ponds would lose water over the drier months of the year, breaking into a series of smaller ponds separated by land bridges.

Mr. McGary testified that beginning in about 2009, the yearly water loss in the ponds became more pronounced, and the water levels in the ponds did not "recover" in response to seasonal changes, as they had in the past.

Permitting information submitted by Sidwell in 2005 - 2006 (before any coal mining activity occurred), identified a series of three ponds on the McGary property, as opposed to one, five-acre impoundment. But, clearly, at some point in time, the McGary ponds, and particularly the largest, northernmost pond (identified at hearing as Pond A), had sufficient depth so as to encourage Mr. McGary to construct a deck and docking structures based upon a higher water level than is now present at the site.

In this appeal, the Commission must determine: (1) whether the McGary ponds are water supplies protected under O.R.C. §1513.162(A), and, if so, (2) whether loss of water in the McGary ponds was proximately caused by Sidwell's mining activities under permit D-2261. The following areas of information were brought forth by the parties at hearing, and relate to possible causes of water loss in the McGary ponds:

1. Predictions of the possible hydrologic impacts of mining, as contained in the application and permitting materials associated with permit D-2261.
2. The geology of the area, and particularly the geology that exists between the Sidwell mine and the McGary ponds, which would include consideration of:
 - the "strike and dip" of the geologic units situated around and between these structures,
 - the nature of the materials separating the Sidwell mine from the McGary ponds, and
 - the ability of water to be transmitted from one structure to another based upon relative elevations, geologic transmissivity, and the anticipated direction of underground flows allowed by fractures, aquitards and bedding planes.

3. The results of investigations and testing, such as:

- dye testing,
- geochemical testing,
- geological evaluations in the form of cross-sections, or other technical documents, showing the relative geologic elevations and/or the interruption of geologic units by mining, which items may impact hydrologic pressures and conductivity.

C. SIGNIFICANCE OF THE HYDROLOGIC PREDICTIONS:

Pursuant to O.R.C. §1513.16(A)(10), a coal mining operation must be conducted in a manner that will:

Minimize the disturbances to the prevailing hydrologic balance¹² at the mine site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after coal mining operations and during reclamation
....

As part of the permitting process, an applicant for a mining permit is required by O.R.C. §1513.07(B)(1)(k) to submit a determination of the probable hydrologic consequences of its proposed operations. This submission is commonly referred to as a "PHC" [Probable Hydrologic Consequences]. Through the PHC, the permit applicant attempts to predict the hydrologic impacts of its proposed operations. (Sidwell's PHC for permit D-2261 is included in Division's Exhibit 7, at pages 85-89.) The Division reviews an applicant's PHC during the permitting process. However, the Division does not conduct any independent testing, or field evaluations, of the hydrology or water resources at the application site.

¹² O.A.C. §1501:13-1-02 defines the following terms:

(JJJ) "Hydrologic balance" means the relationship between the quality and quantity of inflow to, outflow from, and storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the quantity and quality relationships between precipitation, runoff, evaporation, and the change in ground and surface water storage.

During the permitting process, the Division is, however, tasked by O.R.C. §1513.07(E)(2)(c)(i) with generating its own predictions regarding the potential impacts of a proposed mine on area hydrology. The Division's determination is commonly referred to as a "CHIA" [Cumulative Hydrologic Impact Assessment]. The Division, as the permitting and regulatory authority for all mining within the State, possesses a broader knowledge and understanding of what other mining has occurred, or is occurring, within the vicinity of an application site. Thus, the Division is in a unique position to evaluate the potential cumulative effect that a single proposed mine may have, when viewed against existing impacts of all previous or current mining within the application area. (The CHIA for permit D-2261 is Division's Exhibit 5.)

The PHC and the CHIA are predictive tools, and will not necessarily reflect the actual impacts of mining upon hydrology. Both Sidwell (in its PHC) and the Division (in its CHIA) predicted that mining operations under permit D-2261 would not result in material damage to the hydrologic balance beyond the permit area. These documents also specifically predicted that mining would not compromise the long-term availability of surface or ground water to owners of nearby water supplies.¹³

Cheryl Socotch, a Supervising Hydrologist for the Division and a qualified expert at hearing, testified that the ultimate predictions by Sidwell and the Division as to water availability proved to be incorrect.

Yet, both of these hydrologic predictions, actually did predict that the two shallowest aquifers in the area of proposed permit D-2261 (aquifers A and B) would likely be permanently lowered by Sidwell's operations. In fact, Sidwell stated that a spring, Spring S-6, (which is developed in these shallow aquifers, and which is located even further from the mine site than the McGary ponds) could "undergo diminution, as [its] supplying aquifer is hydrologically connected to the proposed permit area." (*Emphasis added. See Division's Exhibit 7, at p. 87.*) The McGary ponds are developed in these same shallow aquifers.

¹³ It has been noted by the courts, that CHIAs - and perhaps particularly PHCs (which are submitted by applicants seeking permission to mine) - may be overly optimistic regarding the potential negative hydrologic impacts of mining. *Citizens Organized Against Longwalling v. Division and Southern Ohio Coal Company*, (1987) 41 Ohio App.3d 290, at p. 297.

The question then becomes why, given the fact that both the Division and Sidwell anticipated impacts to the shallow aquifers in the area, did both Sidwell and the Division conclude that mining under permit D-2261 would **not** negatively impact hydrologic resources in the area?

First, predictions of the PHC and the CHIA look at impacts to the "hydrologic balance," which is a broad, "area-wide" assessment, evaluating whether mining will cause a "net gain or net loss" of water resources within a particular "hydrologic district," such as a watershed or drainage basin.¹⁴ In considering the impacts of Sidwell's mining upon the "hydrologic balance" in this general area, the conclusion that area hydrology would not be negatively affected by mining under permit D-2261 was likely correct, as neither ground nor surface water was proposed to be diverted, or removed, from the watershed.

However, the PHC and the CHIA must also assess the availability of water in ground and surface water systems. An assessment of water availability looks more towards water usage in the area of proposed mining.

Both the PHC and the CHIA specifically mention the McGary ponds.¹⁵ However, both predictions also operated under the assumption that the McGary ponds were not **utilized** water supplies. Thus, both evaluations failed to appreciate that the lowering of water levels in these ponds might be considered a significant water loss, if the ponds were utilized by a landowner.

The McGary ponds were identified in the permit application as "wildlife structures." By virtue of this designation (assigned by Sidwell), it is possible that neither Sidwell nor the Division viewed a diminution in these "wildlife" ponds as problematic. However, Mr. McGary testified that since 1995 he has utilized his ponds for recreation. Therefore, Sidwell's designation of these ponds as "wildlife structures," may not have been totally accurate.

¹⁴ For example, in this matter, predictions were made that shallow aquifers A and B would be impacted by mining. But, it was also predicted that any water from these shallow aquifers would "relocate" to lower aquifer C. Thus, there would be no "net loss" of water within the watershed. Water would not be removed from the watershed, but rather would be found at different "locations" (*i.e.* elevations) within the watershed. Such relocation of water is not indicative of damage to the hydrologic balance, but would be of great concern to a water user, who relies upon the existence of a water resource in a particular "spot," so as to have access to that water.

¹⁵ In the PHC and the CHIA, the McGary ponds are identified as EWIs [existing water impoundments], and are designated as EWI-4, EWI-6 and EWI-7. These same impoundments were identified at hearing as Pond A, Pond B and Ponds C/D, respectively.

The addition of Mr. McGary's small goat herd in about 2008 could not have been anticipated during the permitting process in 2005 - 2006. But, there is no legal restriction, prohibiting Mr. McGary from expanding the use of ponds located upon his property. Thus, since at least 2008, Pond C became an agricultural water supply.

Sidwell cites the conclusions of the PHC and the CHIA (which both concluded that mining would not negatively impact the hydrologic balance) as specifically supporting Sidwell's contention that a hydrologic connection between the D-2261 mine and the McGary ponds can **not** be established. But, in fact, the narratives of these permitting documents state the opposite. Both the PHC and the CHIA specifically predicted the disturbance of shallow aquifers, and predicted the dewatering of water resources developed in these shallow aquifers (such as Spring S-6 and the McGary ponds). Indeed, as regards the McGary ponds, the anticipated impacts occurred precisely as predicted.

The Commission **FINDS** that the language regarding impacts upon area aquifers, contained in both the PHC and the CHIA, supports a hydrologic connection between Sidwell's mine and the McGary ponds, despite these documents' ultimate conclusion that no impact to the "hydrologic balance" would occur.

D. ARE THE MCGARY PONDS PROTECTED WATER SUPPLIES UNDER O.R.C. §1513.162:

O.R.C. §1513.162(A) requires a mine operator to replace (or, if possible, repair) water supplies proximately impacted by mining. The statute lists examples of protected water supplies, which include supplies used for domestic, agricultural or industrial purposes. But, the statute also extends protection to other water resources with "legitimate" uses.

In the Commission's experience, most water loss complaints involve the impacts of mining upon domestic water supplies. Such complaints generally address alleged impacts on domestic wells or springs. On a more limited basis, the Commission has seen water loss complaints involving springs or ponds with agricultural usages.

The Division has developed Procedure Directives addressing the replacement of affected water supplies under O.R.C. §1513.162. The Division's current directive on this subject deals almost exclusively with the replacement of domestic water supplies. (*See P.D., Regulatory 2013-01.*)

Repair or replacement of "recreational" water resources is not specifically addressed in statute, rule or agency directive. Review of the PHC and CHIA associated with Sidwell's mining application confirms that water resources not specifically identified as domestic, agricultural or industrial, were not given significant consideration by either Sidwell or the Division during the permitting process.

The McGary ponds were identified in Sidwell's 2005 – 2006 permitting materials as "wildlife structures." Yet, testimony established that these ponds have served a recreational purpose since approximately 1995, and that Pond C has served an agricultural purpose since about 2008.

While the McGary recreational ponds are not the "type" of water resources typically reviewed by the Commission, these ponds clearly have a "legitimate use" in the eyes of Mr. McGary. Mr. McGary's property on County Road 64 is a "retreat" for the McGary family. Mr. McGary testified that he was motivated to purchase this land specifically because of the existence of the ponds. In testimony, Mr. McGary described fishing with friends and family from the ponds. The evidence also established that Mr. McGary constructed a deck and some rudimentary docking facilities in order to enhance his enjoyment of these ponds. Clearly, the ponds provide great recreational value to Brian McGary.

The Commission must determine if the McGary ponds are the **type** of water supplies entitled to protection or replacement under O.R.C. §1513.162. The statute enumerates protected water usages, but does not specifically identify "recreation" as a protected usage. Significantly, this Commission has previously identified recreationally-utilized water resources as protected under O.R.C. §1513.162. And the protection of such recreational water resources has been confirmed by the Ohio courts. *See Karl & Brenda Spires v. Division, 2007 Ohio 5035 [Belmont County Court of Appeals]*.

In this case, there is an established and long-standing recreational usage of the McGary ponds, in addition to a more-recent agricultural usage of Pond C. The Commission **FINDS** that the McGary ponds are subject to the provisions and protections of O.R.C. §1513.162.

E. HYDROLOGIC CONNECTION:

Having determined that the McGary ponds are protected supplies under O.R.C. §1513.162(A), the Commission must determine if a hydrologic connection exists between the ponds and Sidwell's mining. If such a connection exists, mining activities under permit D-2261 have the potential to proximately cause a diminution in the McGary ponds.

Mr. McGary filed his water loss complaint with the Division on December 21, 2010. At that time, the active pit at Sidwell's Uniontown facility was about 520 feet from the closest McGary pond. Initially, Division Hydrologist Kyle Baldwin was assigned to investigate the McGary complaint. Mr. Baldwin was the only Division hydrologist to conduct any actual field tests as part of his investigation of this complaint. However, Mr. Baldwin never completed his water loss investigation. The investigation was transferred to Division Hydrologist Laura Bibey, who - in January 2013 - issued a written determination, finding a hydrologic connection between Sidwell's operations and the McGary ponds. Following the issuance of the Bibey Report, the McGary water loss complaint remained under some form of review by the Division, with Division Supervising Hydrologist Cheryl Socotch authoring a report in September 2013. Modified Chief's Order 7355, which mandated that Sidwell address water loss in the McGary ponds, was not issued until December 2, 2013. Thus, the Division's investigation of the McGary water loss complaint was on-going for almost three full years, and received input from three Division hydrologists.

Dye Testing:

As part of his investigation, Mr. Baldwin elected to conduct a dye test in order to test for a hydrologic connection between the McGary ponds and Sidwell's operations. The hypothesis was that if dye were placed in a McGary pond, and then emerged in Sidwell's mining pit, it could be deduced that water from the McGary ponds was being "drained" into the Sidwell pit. This would establish a hydrologic connection between these structures.

While the theory behind the dye tests seemed simple and straightforward, the actual application of the tests in the field created more questions than were answered. By his own admission, Mr. Baldwin was unfamiliar with any protocol for dye testing. In fact, these two tests were the only such tests ever conducted by this hydrologist.

Additionally, about two weeks prior to the Commission's May 7, 2014 hearing, Sidwell conducted its own dye test, with similarly unhelpful results.

The evidence regarding Mr. Baldwin's dye tests was unclear and confusing. Apparently, Mr. Baldwin conducted two tests, possibly in March 2011 and again in August 2011.¹⁶ Mr. Baldwin testified that he found the results of both of these dye tests to be **inconclusive**. Yet, the two Division hydrologists, who worked on the McGary water complaint after Mr. Baldwin left his position at the Division, assumed that the results of Mr. Baldwin's second dye test conclusively established a hydrologic connection between the McGary ponds and Sidwell's pit. In authoring **their** reports,¹⁷ both Hydrologist Laura Bibey and Supervising Hydrologist Cheryl Socotch relied upon the "success" of Mr. Baldwin's second dye test as evidence establishing a hydrologic connection in this matter. Indeed, modified Chief's Order 7355 specifically calls out the Baldwin dye test as a seminal factor in establishing a connection between Sidwell's operations and the McGary water loss:

¹⁶ The evidence was never clear on exactly **when** Mr. Baldwin conducted his dye tests. Also, it appears that at least one of the reviewing Division hydrologists believed that more than two dye tests were conducted by Mr. Baldwin.

¹⁷ Mr. Baldwin never authored a report. The other Division hydrologists attempted to "reconstruct" Mr. Baldwin's field investigation through their, independently-authored, reports.

4. A dye test conducted in February of 2012 revealed that dye placed in the McGary ponds emerged from the open face/highwall on the Sidwell Material, Inc. D-2261 active pit, indicating a direct hydrologic connection from the McGary ponds to Permit D-2261.¹⁸

(See Division's Exhibit 14, p. 15.)

The Chief's reliance upon the second Baldwin dye test is obviously misplaced. Hydrologist Baldwin, who conducted the test, was of the absolute opinion that neither of his dye tests established a hydrologic connection between the McGary ponds and the Sidwell pit. Therefore, there was no basis for the Chief, or his reviewing hydrologists, to rely upon Mr. Baldwin's dye tests as a means of establishing hydrologic connectivity.

In modified Chief's Order 7533, the Chief also references the Bibey Report as establishing Sidwell's responsibility for the McGary water loss. But again, the Bibey Report relied heavily upon the second, inconclusive, Baldwin dye test as evidence of a hydrologic connection. The Chief's reliance on the Bibey Report, to the extent that his reliance indicates the Chief's opinion that the second Baldwin dye test was successful, is also misplaced.

On April 24, 2014, Sidwell conducted its own dye test in an attempt to disprove the alleged hydrologic connection between the ponds and its mine. Mr. Linn developed a written methodology for Sidwell's testing, using different colored dyes for different ponds. Sidwell also dug observation pits to help track the movement of dye. *(See Appellant's Exhibit F.)* While Mr. Linn developed a written methodology, Mr. Linn admitted that he had no previous experience with dye testing, and there was no evidence that the methodology he developed was appropriate to the situation.

¹⁸ In fact, Mr. Baldwin did not testify to conducting a dye test in February 2012. Mr. Baldwin visited the Sidwell pit in February 2012 and took photographs in February 2012 of material emanating from Sidwell's pit highwall. But, Mr. Baldwin testified that he was not confident that the material observed and photographed on the Sidwell highwall in February 2012 was dye. Again, Mr. Baldwin testified that both of his dye tests were inconclusive.

Mr. Linn emplaced dye in the McGary ponds on April 24, 2014, but never personally returned to the mine site to determine if dye emerged in Sidwell's pit. Mr. Linn had, however, developed an observation log, which Sidwell employees were to complete as part of this testing. The only log received by the Commission at hearing was a blank log, with no entries whatsoever. (*See Appellant's Exhibit F, p. 2.*) Sidwell employee Drake Prouty testified at hearing, but was equivocal about whether the water in Sidwell's pit was discolored by black dye after April 24, 2014.

Division Inspector Dylan Pendleton visited the Sidwell mine on April 28, 2014 and again on May 2, 2014 - following Sidwell's April 24, 2014 placement of dye in the McGary ponds. Inspector Pendleton took photographs of the water in Sidwell's pit. (*See Division's Exhibit 19, photo on right; Division's Exhibit 24, p. 2.*) Inspector Pendleton testified that he believed that some amount of black dye had migrated from the McGary ponds into the Sidwell pit.¹⁹

A successful dye test is not the only means of establishing a hydrologic connection between the McGary ponds and Sidwell's mining operation. In light of the unclear nature of the evidence surrounding the dye tests performed by both the Division and Sidwell, the Commission has decided to disregard all evidence regarding this form of testing.

Chemical Testing of Water:

On May 31, 2011, as part of his investigation, Mr. Baldwin sampled the water in one of the McGary ponds and the water in the Sidwell pit. The results of these samples showed the waters to be similar in chemical composition, with both samples displaying the characteristics of water found in close proximity to a mining operation. The chemical tests did not rule out a hydrologic connection between the McGary ponds and the Sidwell pit, nor did they establish such a connection.

¹⁹ Sidwell had placed black dye into Pond C and Pond D.

Evaluation of Geological Setting and Relative Geologic Elevations:

In testimony, Mr. Baldwin's opined that the hydrologic connection between the McGary ponds and the Sidwell operation is established primarily by virtue of the geologic setting and elevations present at the site.

Proximity: The evidence established that Mr. McGary began to notice a diminution in his ponds' water levels as Sidwell's mining moved closer to County Road 64, and thus moved closer to the McGary ponds. The McGary Property and Sidwell's operations are immediately adjacent to each other, separated only by County Road 64. When Mr. McGary lodged his water loss complaint, Sidwell's open pit was estimated to be 520 feet from the closest McGary pond.

The close proximity of Sidwell's pit to the McGary ponds suggests that these structures could influence each other. The Socotch Report states that as mining moved closer to the McGary ponds, Division inspectors noted increased pumping of water from the Sidwell pit, suggesting an increasing accumulation of water within the mine pit. This increase in pumping is not, in itself, persuasive evidence of a hydrologic connection, as there could be other, reasonable explanations for this increase in pumping.

Notably, when questioned by the Commission, Division Hydrologist Laura Bibey estimated that, in order to avoid impact to the McGary ponds, Sidwell's operation would have been required to maintain **at least** a 1,000 foot barrier between the ponds and the mining pit, and likely a greater barrier, considering the unconsolidated nature of some materials between these structures.

Structural Data Relative to Geology and Geologic Elevations: Mr. Baldwin developed cross-sections, displaying the relative elevations between the #8 coal seam, the #9 coal seam, the McGary ponds and the Sidwell pit. (*See Division's Exhibit 9.*) The McGary ponds were remnant pits from "pre-law" surface mining of the #9 coal. Thus, the "bottoms" of these ponds would be no deeper than 1115 feet msl (the approximate bottom of the #9 coal seam). On permit D-2261, Sidwell is mining the #8 coal seam. The elevation of the bottom of the #8 coal seam is approximately 1030 feet msl. Therefore, the bottom of Sidwell's pit is about 85 feet lower than the deepest logical extent of the McGary ponds.

The movement of ground water is complex, and is influenced by many factors. The "dip" of geologic units²⁰ may influence the flow of groundwater. The "dip" is important because, within the layering of geologic units, some units act as barriers, or "aquitards,"²¹ to the downward migration of water. Water will percolate through the ground, until it encounters an aquitard. At that point, water will move along the top of the aquitard in the direction of the regional, or localized, "dip" – or tilt – of the rock layer constituting the aquitard.

The Commission received inconsistent testimony as to "dip" in the immediate vicinity of the McGary ponds and the Sidwell operation. However, it appears most likely that the dip of the #9 coal seam in this area is towards the southeast, which supports the opinion put forth by Division hydrologists that water from the McGary ponds moves along the clay/shale unit located below the #9 coal seam (referred to as the #9 underclay, which acts as an aquitard), and flows in the direction of the Sidwell pit.

Moreover: (1) the close proximity of the McGary ponds to Sidwell's pit, (2) the fact that the McGary ponds are developed in unconsolidated mine spoil (which may enhance the flow of water), and (3) the relative hydraulic gradients (which may influence the movement of water from higher elevations to lower elevations),²² may all impact the direction of groundwater flow.

Hydrologists Baldwin and Socotch agreed that the change in hydraulic gradients caused by the opening of a mine pit in such close proximity to the McGary ponds could affect hydraulic head pressures and facilitate movement of groundwater towards the Sidwell pit.

²⁰ Underground rock units do not necessarily lay horizontally. The "strike and dip" of a geologic unit describes the rock's "orientation." Specifically, "dip" refers to the angle, or tilt, of a geologic unit. Generally, in this area of Ohio the "dip" of underground rock units is to the southeast, which would support the possible flow of groundwater from the McGary ponds towards the Sidwell pit. However, the evidence was contradictory as to the direction of the "dip" of the two coal beds in the immediate vicinity of the McGary ponds and Sidwell's operation. The testimony of Hydrologist Laura Bibey, as well as the narrative of the CHIA for permit D-2261, suggests that an anomaly exists in the immediate vicinity of permit D-2261, with the #9 coal seam dipping to the southeast (as is typical), but the #8 coal seam being regionally folded and dipping to the northwest.

²¹ An "aquitard" is a geologic zone that restricts the flow of groundwater. Consisting of relatively impermeable materials, such as clays or shales, an aquitard retards, but does not completely preclude, the flow of water downward through that unit.

²² "Hydraulic gradient" is the difference in elevations between the top of the groundwater table and the aquitard that retains the groundwater. Hydraulic gradient can be expressed in terms of feet, or in terms of hydraulic "pressure." Generally, groundwater will flow towards a lower hydraulic gradient.

Between the McGary ponds and Sidwell's operation some of the ground has been disturbed by previous mining. In these areas, mining has altered the original geologic bedding scheme, replacing intact rock units with unconsolidated mine spoil. The presence of unconsolidated mine spoil may enhance the flow rate of groundwater.

In other areas, intact rock still exists. In his investigation, Mr. Baldwin specifically noted that the intact limestone and shale units situated between the McGary ponds and the Sidwell pit displayed a particular pattern of joints and fractures. In this regard, Mr. Baldwin noted that the joint plane orientation of these rock units established a trend for groundwater movement (through a series of fractures, joints and fissures within the consolidated rock) towards the Sidwell pit. (*See Division's Exhibit 9, p. 3.*) Mr. Baldwin testified that an example of this movement was exhibited through the videos shot by Mr. Baldwin, which clearly show significant amounts of water emerging from Sidwell's pit highwall, through joints and cracks in consolidated materials, at an elevation above the bottom of the Sidwell pit. (*See Division's Exhibits 20 & 21, recorded in 2011.*)

A summary of Supervising Hydrologist Cheryl Socotch's geologic opinion presented at hearing is provided through the Socotch Affidavit:

10. The geologic regional dip is generally to the southeast where the mine is located.²³ The three impoundments on the McGary property are located at the base of the #9 coal seam, and the overburden and coal/limestone removal on the Sidwell property is located at a lower (#8 coal) seam. This supports a loss of upgradient groundwater to a point of lower gradient, especially considering that the area immediately surrounding the McGary ponds and the mine site is previously disturbed, unconsolidated mine spoil. Furthermore, the hydrological assessment included in permit D-2261²⁴ indicated that removal of higher overburden as part of this mining operation and removal of perched aquifers²⁵ would result in a permanent lowering of water levels, even beyond the permit limits.

(*See Division's Exhibit 18, p. 69, ¶10.*)

²³ The evidence appears to confirm that the #9 coal seam dips to the southeast, even though the #8 coal seam may be regionally folded and could dip to the northwest.

²⁴ This reference is to the PHC and the CHIA.

²⁵ The reference to perched aquifers is to aquifers A and B.

The Commission **FINDS** that a preponderance of the geologic evidence establishes a hydrologic connection between the McGary ponds and Sidwell's permit D-2261 operations. The Commission further **FINDS** that a preponderance of the evidence establishes that activities conducted by Sidwell under permit D-2261 proximately caused a diminution of water in the McGary ponds.

Elements of the Division's investigation were troubling. The reliance of two Division hydrologists, and ultimately the Division Chief, upon Mr. Baldwin's inconclusive second dye test is an example of miscommunication and misunderstandings within the agency. Inconsistent and contradictory testimonies from Division witnesses required the Commission to literally sift through the evidence in order to establish its credibility. The Commission was also surprised that some very basic facts could not be conclusively established, or agreed upon, by Division personnel. One example is the fact that the Commission received inconsistent testimonies regarding the distance between the Sidwell pit and the McGary ponds. It would appear that this distance should have been easily discerned, and not a subject of controversy.

As the Commission has noted in previous water loss appeals, the fact that the investigation of Mr. McGary's water loss complaint took nearly three years to complete is disappointing and violates the Division's own directives, which call for the investigation and resolution of such complaints in an expeditious manner. (*See P.D., Regulatory 2013-01.*)

However, from a timeliness standpoint, Sidwell is not without fault. The Bibey Report was issued in January 2013, with a copy of that report sent to Sidwell Materials. Inspection reports throughout 2013 instructed Sidwell to resolve the McGary water loss complaint and develop a replacement plan. Deadlines for such a plan were repeatedly set and ignored.

Additionally, although the burden of persuasion was placed upon Sidwell in this appeal, it is notable that Sidwell failed to provide **any** alternative explanation or rationale regarding water loss in the McGary ponds.

CONCLUSIONS OF LAW

1. The ultimate burden of persuasion in this matter is placed upon the Appellant Sidwell Materials, Inc. to prove by a preponderance of the evidence that the Division Chief acted arbitrarily, capriciously or in a manner inconsistent with law in issuing modified Chief's Order 7355, which order required Sidwell to replace affected agricultural / recreational water supplies located on the Brian McGary Property. (*See O.R.C. §1513.13(B).*) Sidwell did not meet this burden.

2. O.R.C. §1513.162 requires:

The operator of a coal mining operation shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where the supply has been affected by contamination, diminution, or interruption proximately resulting from the coal mining operation and shall reimburse the owner for the reasonable cost of obtaining a water supply from the time of the contamination, diminution, or interruption by the operation until the water supply is replaced.

(*See also: O.A.C §1501:13-9-04(P).*)

3. The McGary ponds, which are used for recreational purposes and, in part, for agricultural purposes, are legitimate water supplies, subject to the provisions and protections of O.R.C. §1513.162.

4. It has been established through the Commission's *de novo* review, and upon a preponderance of the evidence, that operations conducted by Sidwell Materials, pursuant to coal mining and reclamation permit D-2261, proximately caused a diminution in the water levels of ponds located on an adjacent property owned by Mr. Brian McGary.

5. The issuance of modified Chief's Order 7355 was not arbitrary, capricious or otherwise inconsistent with law.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Commission hereby **AFFIRMS** the Division Chief's issuance of modified Chief's Order 7355.

6/25/2014
DATE ISSUED


SEAN A. McCARTER
Chairman, Reclamation Commission 

INSTRUCTIONS FOR APPEAL

This decision may be appealed to the Court of Appeals, within thirty days of its issuance, in accordance with Ohio Revised Code §1513.14 and Ohio Administrative Code §1513-3-22. If requested, copies of these sections of the law will be provided to you from the Reclamation Commission at no cost.

DISTRIBUTION:

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Brian McGary, Via Regular Mail

BEFORE THE RECLAMATION COMMISSION

SIDWELL MATERIALS, INC., : Case No. RC-13-012
: :
Appellant, : Review of Chief's Order 7355 -
: : Modified; Permit D-2261
-vs- : :
: :
DIVISION OF MINERAL RESOURCES :
MANAGEMENT, : **INDEX OF EVIDENCE**
: **PRESENTED AT HEARING**
Appellee. :

Before: Sean A. McCarter.

In Attendance: A. Thomas Althaus, Richard Cappell, Fred Dailey, James McWilliams,
Craig Porter and Hearing Officer Linda Wilhelm Osterman.

Appearances: Scott Eickelberger, Ryan Linn, Counsel for Appellant Sidwell Materials, Inc.;
Brian Ball, Assistant Attorney General, Counsel for Appellee Division of
Mineral Resources Management.

WITNESS INDEX

Appellant's Witnesses:

Drake Prouty	Direct Examination; Cross Examination
Timothy Linn	Direct Examination; Cross Examination

Appellee's Witnesses:

Kyle Baldwin	Direct Examination; Cross Examination
Laura Bibey	Direct Examination; Cross Examination
Cheryl Socotch	Direct Examination; Cross Examination
Dylan Pendleton	Direct Examination; Cross Examination
Brian McGary	Direct Examination; Cross Examination

EXHIBIT INDEX

Commission's Exhibits:

Commission's Exhibit 1	Demonstrative Drawing (by McCarter) of "Cross Section" between McGary Pond and Sidwell Pit (1 oversized sheet)
Commission's Exhibit 2	Photograph of McGary Pond A; taken by Brian McGary on April 24, 2014
Commission's Exhibit 3	Undated Photograph of McGary Pond A; taken by Brian McGary
Commission's Exhibit 4	Undated Photograph of McGary Pond A; taken by Brian McGary

Appellant's Exhibits:

Appellant's Exhibit A	Letter from Laura Bibey to Brian McGary; dated January 15, 2013 (the Bibey Report), with several attachments (16 pages; all black and white)
Appellant's Exhibit B	Memo from Cheryl Socotch to Dave Crow and Heidi Scott; dated September 13, 2013; re: Sidwell IM-1283/D-2261 vs. Brian McGary (the Socotch Report) (4 pages)
Appellant's Exhibit C	OPEN
Appellant's Exhibit D	"Questions/Concerns," dated November 19, 2013; re: ODNR Complaint #10-CA-36 vs. Sidwell Materials, Inc. Permit D-2261; by Timothy Linn, with attached E-Mail Chain, dating from October 15, 2013 to November 22, 2013 (3 pages)
Appellant's Exhibit E	OPEN
Appellant's Exhibit F	Status Report #1; dated April 18, 2014; re: ODNR Complaint #10-CA-36 vs. Sidwell Materials, Inc. Permit D-2261, with Blank Observation Log and Aerial Photograph Depicting Observation Pit Locations (3 pages)

Appellant's Exhibit G Chief's Order 7355-Modified; dated December 2, 2013 (4 pages)

Appellant's Exhibit H Demonstrative Drawing (by Linn), Showing Ponds and Pit Locations, Indicating Strike and Dip, and Indicating Direction of Mining (1 oversized sheet)

Appellee's Exhibits:

Appellee's Exhibit 1 Letter of Transmittal from Linn Engineering to Division; Sidwell Materials, Inc. Uniontown Application D-2261-1; received April 28, 2008, with undated Topographic Map (2 pages)

Appellee's Exhibit 2 Re-Mining Map, Sidwell Materials, Inc., Application D-2261-1, Addendum to Part 3, D(20); dated February 2, 2009 (1 oversized page)

Appellee's Exhibit 3 Blasting Plan Map, Sidwell Materials, Inc., Application to Revise a Coal Mining Permit; ARP R-2261-1; notarized May 19, 2011 (1 oversized page)

Appellee's Exhibit 4 Water Supply Complaint Form for Brian McGary Property; dated December 21, 2010 (2 pages)

Appellee's Exhibit 5 Final Draft Cumulative Hydrologic Impact Assessment (CHIA); Sidwell Application 10310; by Geologist George Mychkovsky; dated October 3, 2005 (4 pages)

Appellee's Exhibit 6 Portion of Application 10310; dated September 21, 2005, including Attachments 14A and 14D (4 pages)

Appellee's Exhibit 7 Portion of Application 10310; including Addendum to Page 14, E; Probable Hydrologic Consequences (PHC) (6 pages)

Appellee's Exhibit 8 Seven Aerial Photographs from Google Earth; hand-marked with dates 11/11, 12/10, 8/09, 7/06, 8/05, 9/21/04 and 1994 (7 pages)

Appellee's Exhibit 9 Cross Section created by Kyle Baldwin, with Aerials Showing Cross Section Location, Topography and Joint Orientation; dated January 20, 2011 (3 pages)

Appellee's Exhibit 10	Aerial Photograph Showing Location of Dye Test 1, Dye Test 2 and Dye Discharge; imagery date October 27, 2011 (1 page)
Appellee's Exhibit 11	Aerial Photograph of McGary Ponds and Sidwell Operation; undated (1 page)
Appellee's Exhibit 12	Photograph of Dye in McGary Pond; taken by Kyle Baldwin; undated (1 page)
Appellee's Exhibit 13	Water Sample Results; collected on May 31, 2011 (6 pages)
Appellee's Exhibit 14	Sidwell Materials' Notice of Appeal to the Reclamation Commission, with several attachments including Chief's Order 7355-Modified (13 pages)
Appellee's Exhibit 15	Letter from Laura Bibey to Brian McGary; dated January 15, 2013 (the Bibey Report), with several attachments including oversized pages and colored photographs (11 pages)
Appellee's Exhibit 16	Midterm Permit Review for Permit D-2261; dated July 11, 2013 (9 pages)
Appellee's Exhibit 17	Series of Division Inspection Reports (ranging in dates from January 28, 2013 to January 23, 2014) and Letter from Kyle Baldwin to Brian McGary, dated January 5, 2011, re: Complaint # 10-CA-036 (19 pages)
Appellee's Exhibit 18	Memo from Cheryl Socotch to Dave Crow and Heidi Scott; dated September 13, 2013; re: Sidwell IM-1283/D-2261 vs. Brian McGary (the Socotch Report), with attached Affidavit of Cheryl Socotch, dated March 17, 2014 (7 pages)
Appellee's Exhibit 19	Two Photographs dated May 29, 2013 and April 28, 2014; taken by Dylan Pendleton (1 page)
Appellee's Exhibit 20	Video of Sidwell Pit; taken by Kyle Baldwin, undated (testified as shot in 2011) (video)
Appellee's Exhibit 21	Video of Sidwell Pit; taken by Kyle Baldwin, undated (testified as shot in 2011) (video)

Appellee's Exhibit 22

OPEN

Appellee's Exhibit 23

OPEN

Appellee's Exhibit 24

Two Photographs of Sidwell Pit; page 1 –
undated; page 2 – taken by Dylan Pendleton on
May 2, 2014 (2 pages)