CENTER FOR COALFIELD JUSTICE AND
SIERRA CLUB

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION AND CONSOL
PENNSYLVANIA COAL COMPANY, LLC,

Permittee

EHB Docket No. 2016-155-B

Issued: February 1, 2017

OPINION IN SUPPORT OF ORDER
GRANTING PETITION FOR SUPERSEDEAS IN PART

By Steven C. Beckman, Judge

Synopsis

The Board granted in part a Petition for Supersedeas of the issuance of a permit revision by the Department that allows longwall mining by Consol under Kent Run over the 3L panel. The Board now issues an Opinion in support of its earlier Order. The Board finds that the Petitioners, the Center for Coalfield Justice and Sierra Club, have shown that they are likely to succeed in their claim on the merits because the Department’s permit application review process was arbitrary, capricious, inappropriate and unreasonable. As such, the Board finds that there was irreparable harm per se along with the potential for actual irreparable harm. Finally, the Board concluded that the harm claimed by Consol was speculative because the permit that granted Consol the right to longwall mine beneath Kent Run was conditional and the condition had not been satisfied at the time of the Board’s Order granting the Petition for Supersedeas in part.
OPINION

Background

The Bailey Mine complex is a large underground coal mine complex located in Greene and Washington Counties, Pennsylvania. Consol Pennsylvania Coal Company, LLC (“Consol”), has conducted development and longwall mining activities at the Bailey Mine since 1985 under CMAP No. 30841316. In 2007, Consol sought a permit revision to CMAP No. 30841316 to conduct development and longwall mining in the area known as the Bailey Mine Eastern Expansion Area (“BMEEA”). BMEEA is located adjacent to and partially underlies Ryerson Station State Park. In general, as proposed by Consol, BMEEA consists of five longwall panels approximately 1,500 feet wide by 12,000 feet long with the longer dimension running largely in an east-west direction. The five panels start with the 1L panel on the northern boundary of BMEEA through the 5L panel on the southern edge of BMEEA.

On March 29, 2012, the Pennsylvania Department of Environmental Protection (“the Department” or “DEP”), issued Permit Revision No. 158 allowing development mining for BMEEA. On May 1, 2014, the Department issued Permit Revision No. 180 which authorized longwall mining in panels 1L through 5L of BMEEA, but did not authorize longwall mining beneath two streams, Polen Run and Kent Run. These streams are generally located in the western half of BMEEA and flow north–south perpendicular to the panels. On February 26, 2015, the Department issued Permit Revision No. 189 authorizing longwall mining under Polen Run in the 1L and 2L panels. Consol’s application that led to Permit Revision No. 189 did not seek permission to mine under Kent Run. The Center for Coalfield Justice and the Sierra Club (“CCJ/SC”), appealed the issuance of Permit Revision Nos. 180 and 189 and those appeals are consolidated at EHB Docket No. 2014-072-B (“Consolidated Appeal”). A multi-day hearing
was held on the Consolidated Appeal in August 2016 and the filing of post hearing briefs was concluded on December 6, 2016. The Consolidated Appeal is awaiting adjudication by this Board.

On February 22, 2016, Consol submitted an application seeking authorization to conduct longwall mining beneath Polen Run and Kent Run in the 3L panel. On July 29, 2016, the Department determined that the application was administratively complete. On December 13, 2016, the Department issued Permit Revision No. 204 authorizing longwall mining beneath both Polen Run and Kent Run in the 3L panel. Permit Revision No. 204 requires Consol to implement an approved stream restoration plan to address any impacts to the streams from Consol’s longwall mining. Permit Revision No. 204 also includes Special Condition 97 that states that Consol may not conduct longwall mining beneath or adjacent to Kent Run until the Pennsylvania Department of Conservation and Natural Resources (“DCNR”) grants written access to Consol to allow them to perform stream mitigation work authorized by the Department.1 CCJ/SC appealed the issuance of Permit Revision No. 204 on December 19, 2016.

On the afternoon of December 21, 2016, CCJ/SC filed a Petition for Supersedeas (“Petition”) with this Board, seeking to halt longwall mining under Polen Run and Kent Run. On December 22, 2016, the Board held a conference call with all parties to discuss how to proceed on the Petition and requested a status update from counsel for Consol about mining in the 3L panel. The Board was informed that, as of that morning, the longwall face in the 3L panel had advanced beyond Polen Run. Following the conference call, the Board issued an Order on December 23, 2016, scheduling a hearing on CCJ/SC’s Petition to begin on January 10, 2017. The Order required Consol to file notification if it received the grant of written access from

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1 Consol has appealed the inclusion of Special Condition 97 in Permit Revision No. 204 to the Board. It is docketed at 2017-002-R.
DCNR pursuant to Special Condition 97 or otherwise resolved the Special Condition\(^2\) and also prohibited longwall mining within 500 feet of any portion of Kent Run that overlies the 3L panel pending a ruling on the Petition.

Consol filed its response to the Petition on January 3, 2017, and included with it a Motion to Dismiss Petition for Supersedeas (“Motion”). On January 9, 2017, an Opinion and Order on the Motion was issued granting in part and denying in part Consol’s Motion. The Board found that the Petition was moot as to Polen Run because the action the Petition sought to prevent, the undermining of Polen Run, had already occurred. The Board dismissed any claims under the Petition that addressed Polen Run but ruled that the Petition was ripe as to Kent Run. A hearing on CCJ/SC’s Petition was held in Pittsburgh from January 10 – 12, 2017. On January 18, 2017, the parties submitted briefs and memorandums of law addressing the issues raised in the hearing. On January 24, 2017, the Board issued an Order granting the Petition in part, preventing Consol from conducting longwall mining within 100 feet of any portion of Kent Run and stated that an opinion in support of the Order would follow. This opinion is issued in support of the Board’s January 24, 2017 Order.\(^3\)

**Supersedeas Standard**

As the Board has recently stated in *Delaware Riverkeeper Network v. DEP*, EHB Docket No. 2014-142, Opinion in Support of Order Denying Supersedeas, slip op. at p. 3 (Feb. 4, 2016), a supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need. *See Weaver v. DEP*, 2013 EHB 486; *Global Eco-Logical Servs., Inc. v. DEP*, 2000 EHB

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\(^2\) As of the date of the Board’s Order granting in part CCJ/SC’s Petition, the Board had not received notice from Consol that it had satisfied Special Condition 97.

\(^3\) The Board issued the Order without waiting for this Opinion to be completed to provide Consol with as much time as possible to adjust its longwall mining plans in the 3L panel prior to reaching the 100 foot restriction at Kent Run provided in the Order.
The petitioner bears the burden to prove that a supersedeas should be issued. *Tinicum Twp. v. DEP*, 2008 EHB 123, 126. The standard for granting or denying a petition for supersedeas is set forth in the Environmental Hearing Board Act, and by the regulations promulgated thereunder. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63. In ruling on a supersedeas request, the Board is guided by relevant judicial precedent and its own precedent, and among the factors to be considered are: 1) irreparable harm to the petitioner; 2) likelihood of the petitioner’s success on the merits; and 3) likelihood of injury to the public or other parties, such as the permittee in third party appeals. *Id.* A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b).

In order for the Board to grant a supersedeas, a successful petitioner generally must make a credible showing on each of the three regulatory factors, with a strong showing of a likelihood of success on the merits. *Hudson v DEP*, 2015 EHB 719, 726, (citing *Mountain Watershed Ass’n v. DEP*, 2011 EHB 689, 690-91; *Neubert v. DEP*, 2005 EHB 598, 601; *Lower Providence Twp. v. DER*, 1986 EHB 395, 397). If the petitioner fails to carry its burden on any one of the regulatory factors, the Board need not consider the remaining requirements for supersedeas relief. *M.C. Resource Development v. DEP*, 2015 EHB 261, 265, (citing *Dickinson Twp. v. DEP*, 2002 EHB 267, 268; *Oley Twp. v. DEP*, 1996 EHB 1359, 1369). In order to be successful, the petitioner’s chance of success on the merits must be more than speculative; however, it need not establish the claim absolutely. *Global*, 2000 EHB 829, 831-32. It is important to remember that a ruling on a supersedeas is merely a prediction, based on the limited record before the Board and the shortened timeframe for consideration, of who is likely to prevail following a final disposition of the appeal. *Weaver*, 2013 EHB 486, 489; *Tinicum*, 2008 EHB 123, 127. In the
final analysis, the issuance of a supersedeas is committed to the Board’s sound discretion based upon a balancing of all the above criteria. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797.

**Likelihood of Success on the Merits**

CCJ/SC must make a strong showing that they are likely to be successful on the merits of their claim. This matter involves a third party appeal of a permit revision issued by the Department. In a third party permit appeal, in order to be successful, the party challenging the Department’s permit decision must show, by a preponderance of the evidence, that in issuing the permit, the Department decision was not appropriate, did not conform with the applicable law or was unreasonable. *United Refining Company v. DEP*, EHB Docket No. 2014-174-R (Adjudication issued July 7, 2016). Stated in another way, an appellant must show that the decision to issue the permit was arbitrary, capricious or contrary to law. *Teska and Mannarino v. DEP*, EHB Docket No. 2016-096-B (Opinion On Appellants’ Petition For Supersedeas issued August 3, 2016). See also *Shuey v. DEP*, 2005 EHB 657, 691 (citing *Zlomsowitch v. DEP*, 2004 EHB 756, 780); *Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot.*, 131 A.3d 578, 587 (Pa. Commw. Ct. 2016) (In order to prevail, appellants must show that the Department acted unreasonably and in violation of the laws of the Commonwealth in issuing the permit). We find that based on the evidence and testimony presented at the Petition hearing,⁴ CCJ/SC is likely to be successful on their claim that the Department’s decision to issue Permit Revision No. 204 was arbitrary, capricious, unreasonable and not appropriate.

The Department called two witnesses on direct at the Petition hearing to testify about the Department’s application review process and the decision to issue Permit Revision No. 204. Jeffrey Thomas, a licensed professional geologist employed by the Department, was admitted as

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⁴ All parties agreed that the record of the Petition hearing includes by reference the testimony and evidence from the August hearing in the Consolidated Appeal.
an expert on geology and hydrogeology and testified regarding his role in the review of the permit application and the decision to issue the permit revision. The Department’s other witness was Michael Bodnar, a licensed engineer also employed by the Department. Mr. Bodnar testified extensively in the Consolidated Appeal hearing in August and was admitted as an expert in civil engineering in that hearing and in the Petition hearing. CCJ/SC also called Mr. Bodnar on direct during the Petition hearing. Mr. Bodnar’s testimony was focused on his role in the permit application review process and the decision to issue Permit Revision No. 204. We did not hear any testimony in the Petition hearing from Joel Koricich, the Department’s District Mining Manager, who signed this latest permit revision on behalf of the Department (Stipulated Ex. D). Mr. Koricich supplied extensive testimony during the Consolidated Appeal hearing.

We found Mr. Thomas’ testimony regarding his application review efforts concerning, particularly in light of the testimony of Mr. Koricich in the Consolidated Appeal hearing. In his August testimony, Mr. Koricich stated that when the Department issued Permit Revision No. 180, it denied Consol’s request to mine under both Polen Run and Kent Run (CAT. 1589).\(^5\) We note that this decision followed a review period that covered approximately seven years from the time of the submittal of the initial permit application by Consol. When the Department subsequently issued Permit Revision No. 189, it permitted longwall mining under Polen Run in the 1L and 2L panels but Consol did not seek permission to longwall mine under Kent Run. The Board questioned Mr. Koricich about the basis for the Department’s initial decision to put Kent Run and Polen Run off limits to longwall mining and its eventual decision to allow longwall mining under Polen Run in the 1L and 2L panels. He testified that the initial decision was based on the Department’s review of the hydrologic variables for Kent Run and Polen Run found in

\(^5\) We will cite to testimony from the August 2016 Consolidated Appeal hearing with the designation “CA”. We will cite to testimony from the January 2017 Petition hearing with the designation “P”.
Module 8, including the hydrogeologic variables found in Table 8.5 of Module 8. The Department compared the variables for Kent Run and Polen Run with the variables from various nearby streams, including a group of streams immediately west of Kent Run that had not satisfactorily recovered from the impacts resulting from prior longwall mining conducted beneath those streams by Consol. Mr. Koricich identified the specific streams to the west of Kent Run that were of concern as Polly Hollow, Kim Jones, Crow’s Nest and an unnamed tributary of the North Fork. (CAT. 1593). Mr. Koricich testified that when the Department was considering the risk to Kent Run, it specifically considered the fact that Polly Hollow had not recovered post-mining. (CAT. 1620). Speaking about Kent Run over the 1L and 2L panels, Mr. Koricich stated that the Department did not believe that Kent Run could be mined and restored because “we think that the hydrologic variables are enough of an indicator to us that they can’t do it successfully.” (CAT. 1591).

Mr. Koricich provided further testimony explaining the Department’s later decision to permit the undermining of Polen Run. In that testimony, he identified Kent Run as being at greater risk than Polen Run for “permanent adverse effects” from longwall mining. (CAT. 1607-8). He identified two specific hydrogeologic variables that supported this conclusion, depth of cover and previous longwall mining in the headwaters of Kent Run. (CAT. 1608-12). He stated that the depth of cover at Kent Run was less on average by 200 feet than it is in Polen Run and that this was significant. (CAT. 1611). He noted that the headwaters of Polen Run had not been previously undermined in contrast to the fact that upper portions of the Kent Run watershed, including the headwaters, had been previously undermined and in fact had experienced some flow loss. (CAT. 1609-11, 1618). Mr. Koricich’s testimony on these issues

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6 Module 8 is one of the modules that make up a longwall mining permit application. Module 8 is labeled “Hydrology” and includes a chart listing numerous streams and their associated hydrogeologic variables at Table 8.5.
and the Department’s overall approach was consistent with similar testimony offered by other witnesses at the Consolidated Appeal hearing.

Mr. Koricich’s testimony regarding the Department’s concerns about the potential impacts of longwall mining on Kent Run and how the Department viewed the hydrologic variables as of the Consolidated Appeal hearing are in marked contrast to Mr. Thomas’ testimony five months later at the Petition hearing. We first note that it appears that no new hydrogeologic data relevant to the issues that concern the Board was submitted by Consol as part of the application for Permit Revision No. 204. In fact, Table 8.5 of Module 8 that summarizes the hydrogeologic variables, and that Mr. Thomas testified he used in reaching his conclusions, bears a stamped received date by the Department of April 28, 2011. (Department’s Ex. C-6). Mr. Thomas opined that Kent Run may experience temporary flow loss following mining and subsidence in the 3L panel and that Kent Run will not experience a permanent flow loss over the 3L panel. (PT. 526, 531). When asked for the basis of his opinion, referencing Table 8.5, he testified that he had identified four significant factors including depth of cover, percentage of soft rock in the upper 50 feet of the permit area, the stream gradient in Kent Run and the amount of Kent Run’s watershed that will not be undermined. (PT. 526-528).

The Board understands that the prediction of subsidence impacts on streams is not an exact science and that different professionals reviewing the same information can arrive at different conclusions. Our concern with Mr. Thomas’ conclusion is that, based on his testimony, he failed to consider the issues that had apparently troubled the Department and Mr. Koricich in the prior decisions regarding Kent Run. He was asked whether he was aware of the Department’s prior concerns about Kent Run and stated “I was not.” (PT. 536-37). Mr. Thomas testified that he was not familiar with Mr. Koricich’s testimony in the Consolidated Appeal
hearing or Mr. Koricich’s assessment of Kent Run. (PT. 549-550). He further testified that he had only passing conversations with Mr. Koricich regarding the earlier permit revisions and had not spoken with Mr. Koricich about Mr. Koricich’s assessment that Kent Run was at risk for permanent adverse impacts. (PT. 537). Mr. Thomas was asked whether he had reviewed any of the deficiency letters or correspondence between the Department and Consol regarding Polen Run and Kent Run and his answer was no. (PT. 556). In addition, he stated that he did not have any discussions with anyone about the two streams, Polly Hollow and Kim Jones, that Mr. Koricich testified played a significant role in the Department’s concerns about the potential impacts to Kent Run and he testified that he had not considered Polly Hollow in any way in reaching his decision. (PT. 537-38, 549). Mr. Thomas testified that he alone was responsible for the hydrogeologic conclusions that supported the issuance of Permit Revision No. 204 and that his supervisor, Jeff Cost, did not contribute any factual or scientific interpretation to the decision. (PT. 571).

Our overall impression is that Mr. Thomas made his determination that Kent Run was not at risk of a permanent impact in something of a vacuum and completely devoid of any review or consideration of the significant concerns that the Department had expressed about Kent Run previously. No new hydrogeologic variable information was submitted that could account for the new conclusions. It does not appear from his testimony that Mr. Thomas looked at the table of hydrogeologic variables in the permit application and made any comparison of the variables for Kent Run with those of the two streams, Polly Hollow and Kim Jones, that had played a significant role in the Department’s previous determinations not to allow undermining of Kent Run. While a fresh set of eyes to review an application may be appropriate at times, the failure to conduct that review with full knowledge of the underlying issues or to discuss your conclusion
with staff who had previously reviewed the information and reached a different conclusion strikes us as arbitrary, capricious, inappropriate and unreasonable.

Our concerns are further compounded by the source of the scientific data that formed the basis of Mr. Thomas’ conclusion. Prior to joining the Department in July 2015, Mr. Thomas worked for a consulting firm for approximately 11 years. (Department Ex. C-5). He testified that a portion of his consulting work was on behalf of Consol and specifically involved the Bailey Mine. During his direct testimony, Mr. Thomas said that information he collected on behalf of Consol was incorporated into Consol’s permit application for BMEEA. (PT. 519-521). He stated “I did a lot of stream characterization work for that permit in developing data for the hydrogeologic variables that are used to assess or predict potential impacts from mining to streambeds.” (PT. 519). More specifically, Mr. Thomas testified that work he had done in the field was included in Table 8.5 of Module 8 of Consol’s application for Permit Revision No. 204. (PT. 520-521). Mr. Thomas later testified that Table 8.5 and the hydrogeologic variables listed there formed the basis for his conclusions regarding the impact to Kent Run. (PT. 526). In essence, Mr. Thomas’ conclusions regarding Kent Run on which the Department relied in issuing Permit Revision No. 204 were based, at least in part, on a review of data and information he had collected while working for the permit applicant, Consol. It is inherently difficult to be fully objective in reviewing data that you collected on behalf of a permit applicant and we question the wisdom of assigning a Department employee to review his own data collected on behalf of a permit applicant as part of the process of determining whether to issue a permit.7

7 We do not intend this discussion to in anyway impugn Mr. Thomas’ integrity or professionalism. We simply find it extremely surprising that he was put in this position by his management particularly in light of the fact that the Department must have been aware that regardless of what decision it reached on the permit application, its decision would be controversial and likely to be challenged in front of the Board.
The fact that this is exactly what occurred here further raises our concerns that the decision here was inappropriate and unreasonable.

We also have some concerns of a more technical nature with the decision reached by the Department that Consol can adequately restore Kent Run following any impact from its undermining by Consol. The Department’s other witness at the Petition hearing, Mr. Bodnar, testified extensively during the Consolidated Appeal hearing. During the August hearing, he provided testimony consistent with Mr. Koricich’s testimony discussed above about the Department’s concerns with the difficulty of restoring Kent Run. At the Petition hearing, the Board questioned Mr. Bodnar about the basis for the Department’s revised conclusion that Kent Run could be adequately restored by Consol. He testified that the Department’s conclusion that Consol’s mitigation plans for restoring Kent Run over the 3L panel were adequate for approval of the permit application was based on two interrelated principal points: Consol’s proposal to conduct progressive mitigation and the apparent success of channel lining in restoring Polen Run over the 1L and 2L panels. (PT. 595).

Our understanding of the first point is that it has to do with the difference between what Consol submitted as part of its application for Permit Revision No. 180 and what it submitted in the Permit Revision No. 204 application. In the earlier Permit Revision No. 180 application, Consol never proposed to go beyond grouting as a repair technique for Kent Run. (PT. 595-596). Because of the Department’s concerns regarding the impact on Kent Run and whether grouting would be effective, when reviewing the Permit Revision No. 180 application, the Department concluded that it could not be assured that Kent Run would be adequately restored. As part of the Permit Revision No. 204 application, Consol proposed that it would first attempt to restore Kent Run through grouting if necessary and, if that was unsuccessful, Consol proposed
to rely on channel lining similar to what it had conducted in Polen Run over the 1L and 2L panels. This stepwise approach to addressing any impacts to Kent Run starting with augmentation, progressing to grouting and finally to channel lining if necessary apparently satisfied the Department’s earlier concerns regarding Consol’s approach to restoring Kent Run.

Mr. Bodnar also testified that the impacts to Polen Run over the 1L and 2L panels from Consol’s longwall mining were less than the Department had anticipated, and that this provided a basis for concluding that the impacts to Kent Run would be less than previously anticipated and therefore increased the likelihood that the restoration efforts would be successful. (PT. 12). On further questioning, Mr. Bodnar testified that the Department was not entirely convinced that grouting alone would be successful and that is the reason the Department required channel lining as a further restoration technique in Kent Run above the 3L panel. (PT. 13). Taking all of Mr. Bodnar’s testimony into consideration, it is clear to the Board that the Department’s decision to issue Permit Revision No. 204 to allow Kent Run to be undermined in the 3L panel relies in a significant way on Mr. Bodnar’s second principal point, the apparent success of the channel lining system in restoring Polen Run over the 1L and 2L panels.

The Board heard extensive testimony about the channel lining in Polen Run above the 1L and 2L panels in the Consolidated Appeal hearing and in the Petition hearing. The installation of the channel lining on Polen Run was completed over the 1L panel in December 2015 and over the 2L panel in August 2016. Permit Revision No. 189 contained a six-month post liner installation monitoring period to determine whether Polen Run had been successfully restored. According to Mr. Bodnar, the six-month monitoring period was proposed by Consol to expedite the monitoring so that the Department could use that information to consider Consol’s request to mine beneath Polen Run and Kent Run in the 3L and 4L panels. (PT. 40). Under the terms of
the permit, success of the liner is determined by considering the conveyance of flow over the lined section of the stream consistent with an amount established in the permit and the status of the biological community as measured at designated monitoring stations. We have some reservations about the Department’s conclusion that the success of the liner system in Polen Run provides sufficient evidence to conclude that Consol can restore Kent Run over the 3L panel based on the adequacy of the data that was used to demonstrate that the success criteria were satisfied, along with the nature of Polen Run over the 1L panel as compared to the nature of Kent Run over the 3L panel.8

Our principal concern is with the length of the monitoring period, six months, and whether success over that time frame is adequate to draw the conclusion that the liner installation in Polen Run over the 1L panel was successful. Biological success is determined using total biological scores ("TBS") calculated in accordance with the Department’s technical guidance document titled “Surface Water Protection – Underground Bituminous Coal Mining Operations.” (Stipulated Ex. G). Consol submitted a biological performance assessment for the Polen Run 1L liner restoration project dated February 3, 2016. (CA hearing Joint Stipulated Ex. Q). The mean pre-mining TBS score was 47.1 and the mean post-restoration TBS score was 67.6. Consol stated, and the Department agreed, that these scores satisfied the biological performance requirement in Permit Revision No. 189 since the post-restoration TBS score is more than 88% of the pre-mining TBS score. However, the biological data for the assessment was not collected over the restored portion of Polen Run in the 1L panel but instead was collected in a biological monitoring site (BSW06) over the 2L panel prior to BSW06 being undermined. BSW06 is

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8 Mr. Bodnar testified that the six-month monitoring period was not completed for the liner system installed in Polen Run over the 2L panel at the time the Department issued Permit Revision No. 204 so it does not appear that the Department considered the success status of the liner over the 2L panel in reaching its permit decision regarding undermining Kent Run in the 3L panel. (PT. 40).
located downstream of the channel lining installed in Polen Run in the 1L panel. This was done to allow calculation of a TBS score since a TBS score could not be calculated for Polen Run above the 1L panel because TBS scores only apply to biologically diverse streams and Polen Run above the 1L panel does not qualify as a biologically diverse stream. (PT. 495-96).

The six month monitoring period and the acceptance of biological performance data from a location other than Polen Run over the 1L panel was done principally to accommodate Consol’s mining schedule. We question whether this approach can be relied on as a good indication of success in restoring the biological community in the 1L panel. Dr. Nuttle, an expert witness for Consol on ecology, who oversaw the biological monitoring effort, testified about the biological monitoring in both the Consolidated Appeal hearing and the Petition hearing. At the Petition hearing, he presented testimony about the length of time it takes for streams with watersheds similar in size to Kent Run and Polen Run to recover biologically following restoration by grouting, a less intrusive method than installation of a channel liner. He testified that on average the length of time from completion of grouting to biological recovery is 1.6 years based on the recovery criteria being met when the second biological sample was collected and confirmed the initial sample data. (PT. 491-92). He further testified that if you assumed recovery had actually occurred when the initial sample data was collected, restoration occurred on average within one year. (PT. 492). Dr. Nuttle was specifically asked about what the biological performance data collected at BSW06 over the 2L panel tells him about the success of the liner in Polen Run over the 1L panel. In response, he testified “[S]o the data shows that the lining of the 1L panel upstream contributes to, and at the very minimum, does not negatively affect biology and, in fact, it actually suggests it enhances the performance of the biological community on the 2L panel.” (PT. 493) (emphasis added). This statement confirms our understanding from
the testimony in August, that an increased post-restoration TBS score at BSW06 tells us something about the re-establishment and maintenance of flow in Polen Run across the 1L panel but does not necessarily tell us much about the recovery of the biological community in Polen Run over the 1L panel. Dr. Nuttle did testify that he observed fish and quite a few different macroinvertebrate taxa on a June 2016 visit to Polen Run over the 1L panel (PT. 498). Our overall impression of the biological data presented for Polen Run over the 1L panel is that it points to the likelihood that Polen Run will recover biologically; however, we think it was premature to reach that conclusion based on six months of data collected in a location other than within the 1L panel itself. We certainly have reservations about relying on that data as a demonstration of sufficient success to support the issuance of a permit to undermine Kent Run in the 3L panel.

Our reservations are further raised by the obvious differences in the nature and settings of Polen Run over the 1L panel and Kent Run over the 3L panel. [See for instance CA Ex. A-3, A-5 and CP-19 (Polen Run) and P Ex. CP-8 (Kent Run)]. Kent Run over the 3L panel appears to be generally a wider stream and located in a wooded setting within Ryerson Station State Park. In contrast, Polen Run over the 1L panel is generally a narrower stream and located in an agricultural setting with cleared fields. When questioned about those differences, Mr. Bodnar testified that while he did not think the stream profiles were that different, Polen Run is a narrower stream with a steeper gradient than Kent Run. (PT. 597). It is clear from testimony from both Mr. Bodnar and Dr. Nuttle that the Kent Run watershed is larger than the Polen Run watershed particularly when looking at the size of the watershed above Polen Run at the 1L panel as compared to Kent Run at the 3L panel. The bankfull width of Polen Run over the 1L panel ranges from 10 feet to 14 feet according to information in Module 15 of the permit.
application (Stipulated Ex. C), although at some points it appears to be significantly less than that. Mr. Benson, a witness for Consol in both the August hearing and the Petition hearing, testified that the width of Kent Run bank to bank is 32 feet. (TP. 463). This is consistent with the bankfull width of Kent Run over the 3L panel identified in Module 15 as ranging from 22 feet to 37 feet. (Stipulated Ex. C). Mr. Bodnar was asked by the Board whether there are any segments where the liner in Polen Run has been used successfully in a stream that looks like the pictures of Kent Run shown at the Petition hearing. Mr. Bodnar answered “Not Polen Run, but Consol did have a project over a stream known as Crafts Creek where a … a coated geosynthetic clay liner was installed. Now, the protective cover material in that situation was different, but that project was successful. Crafts Creek is a larger watershed, probably more similar to Kent Run.” (PT. 596-97). We were not provided any information specifically concerning the project at Crafts Creek or any indication that the Department had considered that site in reaching its permit decision on Permit Revision No. 204. Ultimately, the different physical nature and setting of Kent Run and Polen Run gives us some concerns about whether success at Polen Run is necessarily a good indicator that installation of a channel liner at Kent Run will be successful.

Looking at all of the issues and questions regarding the Department’s decision to issue Permit Revision No. 204 raised by Mr. Thomas’ testimony and Mr. Bodnar’s testimony, we conclude that CCJ/SC are likely to be successful on the merits of their claim that the Department should not have issued this permit revision. It is not often that the Board concludes that the Department’s review procedures were of sufficient concern to support a finding that they were inappropriate, unreasonable, arbitrary or capricious in the absence of a clear failure to follow a specific statutory or regulatory requirement. We would first note that our conclusion here is in the context of a supersedeas petition and, therefore, the evidence presented may not fully reflect
all of the actions taken by the Department but we can only rule based on the evidence presented. Further, the facts of this matter are unusual in that the permitting decision in question is part of an ongoing piecemeal permitting process for Consol’s longwall mining of BMEEA. Piecemeal permitting is often fraught with factual and process issues in our experience. Finally, it is unusual to have held a full hearing on aspects of the issues that are subsequently presented for consideration in a petition for supersedeas and certainly the information garnered in that multi-day hearing has played a role in our decision.

Irreparable Harm To Petitioners

The central purpose of a supersedeas is to prevent an appellant from suffering irreparable harm while the Board considers the appeal. This Petition requires the Board to consider whether CCJ/SC will suffer irreparable harm as a result of Consol’s longwall mining of Kent Run in the 3L panel within Ryerson Station State Park. CCJ/SC argue that they will incur both irreparable harm per se as well as actual harm as a result of the Department’s decision to issue Permit Revision No. 204. The issue of whether there is irreparable harm per se is directly related to the first factor, the likelihood of Petitioners’ success on the merits. In Hudson v. DEP (2015 EHB 719) the Board stated that where the petitioner has made a strong showing that the Department acted unlawfully in approving a permit, such action constitutes irreparable harm per se. The reason for this is because it is presumed that such an action by the Department is injurious to the public and the interests that the regulations are in place to protect. While Hudson relied on a clear violation of the regulations governing permit issuance in reaching that conclusion, we see no reason that its reasoning would not apply in a case like this where the determination was not based on the violation of a specific regulation but involved the permit review process as conducted by DEP. Clearly a permit review process that is arbitrary, capricious, unreasonable or
inappropriate is injurious to the public, including CCJ/SC and their members, and inconsistent with the interests that the permitting process is designed to protect. We find that given the likelihood that CCJ/SC will be successful on the merits of their claim, they have suffered irreparable harm per se.

We also think there is a strong, although not conclusive, argument that Kent Run in the 3L panel may suffer actual irreparable harm as a result of longwall mining and that CCJ/SC, their members and the general public will suffer irreparable harm as a result. In many of the matters that come in front of the Board, the central issue in considering this question is whether the nature and probability of the harm that is of concern to the Petitioners is adequately supported in the record or appears to be remote and/or speculative. This situation is fundamentally different in that there appears to be only limited debate among the parties about whether Consol’s undermining of Kent Run will have an impact on the stream. The testimony at both the Consolidated Appeal hearing and the Petition hearing support the conclusion that Kent Run is likely to suffer subsidence and at least some flow loss as a result of being undermined by Consol. Instead of focusing on the issue of whether there will be any harm, Consol and the Department’s principal argument is that any negative impacts will be temporary and, if necessary, the impacts will be satisfactorily addressed by Consol through progressive mitigation. Therefore, they argue that any harms to Kent Run will be repaired and as a result there cannot be a finding of irreparable harm.

This argument of course depends on whether we are convinced that Kent Run can and will be satisfactorily repaired by the progressive mitigation required by the permit. As should be evident from our prior discussions, we are not convinced of that fact. Even Consol acknowledges a success rate of less than 100% in restoring streams within the Bailey Mine
complex, and it is not clear that Consol’s calculation takes into account some of the unrecovered streams such as Polly Hollow and Kim Jones that are in close proximity to Kent Run. We cannot say at this point that Consol and the Department are correct that any harms to Kent Run will definitely be repaired.

Further, there is no question that any necessary repair work will irrevocably alter Kent Run from its current natural state. Cutting out heaves from the streambed and grouting of fractures will alter Kent Run. If channel lining is required, the alteration of Kent Run will be even more significant. Full implementation of the approved channel lining plan would result in the length of Kent Run over the 3L panel being reduced by 13% because several meanders would be removed to improve stream stability. (PT. 432). The approved channel lining plan also acknowledges that groundwater recharge to Kent Run would be impacted and provides for a piping system to collect and re-introduce that groundwater back into the stream.

Finally, we note that Kent Run over the 3L panel is located entirely within Ryerson Station State Park and therefore, it can be accessed by the public for public recreation. We received testimony about public use from Ms. Veronica Fike, a member of both CCJ and the Sierra Club, at both the Consolidated Appeal hearing and the Petition hearing. There is no question that the public use of Kent Run will, at a minimum, be impacted during any repair work on Kent Run. Longer term, if the repairs are not successful, the public use of Kent Run, along with its environmental value, will be harmed. In the context of a petition for supersedeas, such as this, we think that there is a strong argument that Kent Run may suffer actual irreparable harm and that such harm would affect CCJ/SC, their members and the general public.

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9 Grouting is 90% effective for restoring streams. (PT. 411-12); somewhere between 90 and 95 percent of the watershed’s area is showing return to the baseline conditions for both hydrologic and biologic data (CAT. 1080).
Likelihood of Injury to the Public or Other Parties, Including the Permittee, Consol

This factor is really the flip side of the prior factor about harm to the Petitioners if the supersedeas is denied and asks the Board to consider the nature of the harm that will occur if the Board grants the supersedeas petition. There is no real question that granting the supersedeas prevents the likelihood of injury to the general public by minimizing the potential for longwall mining to impact Kent Run within Ryerson Station State Park. The main issue for the Board concerning this factor is the likelihood of injury to Consol. Consol provided testimony during the Petition hearing about the impact a supersedeas would have on its operations and financial situation and set out in detail in its posthearing brief the harm it contends it would suffer if the supersedeas request was granted.

The initial problem with Consol’s position is that any harms it now claims are speculative since the permit issued by the Department to mine under Kent Run was conditioned on Consol satisfying Special Condition 97. The Board ordered Consol to inform us if the condition was satisfied. At the time of the Board’s Order granting in part the Petition, Consol had not filed the required notice that the condition had been satisfied and has not done so to date. The fact that the condition in the permit was not satisfied at the time of our Order makes any harms claimed by Consol speculative since it could not longwall mine under Kent Run without satisfying that condition under the specific terms of Permit Revision No. 204. Consol in fact argued that the Board should not hear the Petition because it was not ripe based on an argument that it was a conditional permit and the condition was not satisfied. We rejected that argument and further reject Consol’s argument that if we did not grant the motion to dismiss on the ripeness issue, we should ignore the fact that a claim for harm would be speculative if the condition was not satisfied. We do not think we are required to do so because the issue of ripeness requires a
different analysis than the one posed by our consideration of the issue of harm in balancing
concerns in a supersedeas decision.

In an effort to fully address the issue, however, we will go beyond the speculative nature
of Consol’s harm claim and look further at Consol’s concerns. In doing so, we conclude that the
harm asserted by Consol is less than it claims and is at least in part the result of operational
choices that Consol made on its own. When Consol undertook development mining for the 3L
panel, it designed the full length of the panel to be mined by longwall mining even though it
lacked permission from DEP to longwall mine underneath both Polen Run and Kent Run. The
permit status was still the same when Consol began longwall mining in the 3L panel. In fact,
Permit Revision No. 204 was not issued until just prior to Consol reaching Polen Run. Consol
claims that it will be harmed by the supersedeas because it will be required to revise its
ventilation and roof control plans and it will be more difficult for it to remove the longwall
mining machinery short of the end of the panel. These harms are directly the result of Consol
proceeding with the planning and development of the 3L panel as if it had Permit Revision No.
204 in hand even though it did not and even though the testimony at the Consolidated Appeal
hearing was that Consol had no guarantee from DEP that it would receive the required permit.

Experts for both Consol and CCJ/SC\textsuperscript{10} agreed that if Consol was prevented from longwall
mining under Kent Run, Consol would likely move the longwall mining machinery out of the 3L

\textsuperscript{10} CCJ/SC presented expert testimony on the operations and economics of longwall mining from Art
Sullivan, a mining consultant, whom the Board admitted as an expert on mine safety and underground
coal mining. Consol presented expert and factual testimony from Charles Shaynak, Senior Vice President
of Consol’s Pennsylvania operations, whom the Board admitted as an expert on longwall and
underground bituminous coal mining and operations. Mr. Shaynak was also admitted as an expert at the
Consolidated Appeal hearing.
panel and that the coal remaining in the 3L panel would not be mined in the future.\textsuperscript{11} The experts, however, appear to disagree on exactly how much coal will be left unmined. The Board’s Order granting the supersedeas modified its prior order and adjusted the buffer from no longwall mining within 500 feet of Kent Run to no longwall mining within 100 feet of Kent Run.\textsuperscript{12} Consol’s expert, Mr. Shaynak, testified that this would result in 1,000 feet of coal left in place but did not demonstrate to the Board directly how he determined that number. He testified that he had redone the math that morning. (PT. 353). CCJ/SC’s expert, Mr. Sullivan, presented testimony suggesting a smaller number. Using a map showing the 3L panel and a line 500 foot from Kent Run, (Stipulated Ex. L), the Board observed Mr. Sullivan measuring the distance from the 500 foot line to the end of the 3L panel as 3.9 inches. (PT. 262). The map scale was 1”=300 feet. Therefore, the distance from the 500 foot line to the end of the panel is 1,170 feet.\textsuperscript{13} At the 100 foot line, the amount of remaining coal in the 3L panel would be 770 feet. Both experts testified that Consol’s production rate is 360 tons per foot. Consol asserts in its post-hearing brief that being required to stop at the 100 foot barrier would result in 360,000 tons of coal being left unmined but, based on the calculations above, we find that this amount is a smaller number, 277,200 tons. Mr. Shaynak’s uncontradicted testimony was that Consol’s most recent average sales price for its coal is $42.60 per ton. (PT. 353). Using the 277,200 ton figure, the revenue

\textsuperscript{11} While we accept the experts’ testimony that the coal will be left unmined, we note that Consol retains a permit to mine the coal at the end of the 3L panel just not by longwall mining. Presumably, it is the economics of recovering it in some other fashion that makes it unlikely to be mined.

\textsuperscript{12} The Board made this adjustment because 1) it addressed some of the safety issues raised by Consol, 2) it was consistent with the barrier left in place to protect Kent Run in the 1L and 2L panels and there was no evidence that the 100 foot barrier was inadequate to protect Kent Run in the 1L and 2L panels, and 3) there was no substantive evidence that a similar 100 foot barrier would not be adequate in the case of the 3L panel.

\textsuperscript{13} In his testimony, Mr. Sullivan rounded this number to 1,100 feet. (PT. 262).
value of the coal left unmined is approximately $11.8 million. This number is less than the $15.3 million that Consol claims in its post-hearing brief but is still a loss of revenue.

Revenue is not, however, the only way to look at the issue of economic harm. Looking at only revenue does not account for the costs that Consol would incur to produce that 277,220 tons of coal. Mr. Shaynak acknowledged that revenue is different than profits. (PT. 387). Mr. Sullivan testified that the real value of the coal is the profit and stated that “nobody is making more than a couple of bucks after taxes.” (PT. 313). CCJ/SC’s counsel asked Mr. Shaynak about Consol’s costs but Consol’s counsel objected to the question. (PT. 387). The Board returned to this issue and asked Mr. Shaynak about Mr. Sullivan’s testimony that the profit is in the range of $2 per ton and gave him the opportunity to provide a different number. (PT. 391-92). Mr. Shaynak testified that $2 per ton was “very inaccurate” but was unwilling to provide the Board with a more accurate number. (PT. 392). As a result, the only number the Board has to work from is the $2 per ton. The profit on the unmined coal is therefore in the range of $544,400. Even if Mr. Sullivan’s number is off on both the amount of coal that is left in place and the amount of profit per ton, we conclude that the actual economic harm is still significantly less than the $15.3 million revenue loss claimed by Consol.\(^{14}\)

Consol also raised the issue that entry of the supersedeas would potentially be disruptive to its ongoing mining operations and could create layoffs. The major source of a potential disruption was identified as the fact that Consol had not yet completed development mining at the receiving end of the 4L panel and, therefore, would have no place to move the longwall equipment that would be idled in the 3L panel. (PT. 356). However, based on Mr. Shaynak’s testimony, we are not sure this would have been an issue with the 500 foot barrier at Kent Run.

\(^{14}\) We would also note that under the Board’s Order preventing the undermining of Kent Run, it is likely that Consol will avoid certain costs to monitor and restore Kent Run.
and, these concerns are further addressed by the Board’s decision to reduce the no longwall mining zone to 100 feet from Kent Run. On January 11, 2017, Mr. Shaynak testified at the Petition hearing that Consol was about three weeks out on having the 4L panel ready to mine and that it would be ready “by the end of January, beginning of February.” (PT. 374.). On January 18, 2017, Consol stated in a filing with the Board that it anticipated that the longwall face would reach the 500 foot barrier on January 30 or January 31. Given the additional 400 feet of coal that Consol is allowed to mine under the Board’s Order, along with a rate of mining that was identified as 70 feet per day, our understanding of the evidence is that Consol will likely have to stop longwall mining in the 3L panel on or around the end of the first week of February 2017. Development in the 4L panel will be complete by that point according to Mr. Shaynak and Consol will be able to move its longwall mining equipment to the start of the 4L development without any disruption resulting from the status of the 4L development mining. Concerns about timing and safety are further mitigated by the fact that Consol earlier developed cross-cuts at the 100 foot barrier distance in case it was required to stop at that point. Admittedly, it will be more difficult to remove the longwall machinery at the 100 foot barrier location than at the end of the 3L panel, but as discussed above, that difficulty is in large part a result of Consol’s decision to proceed in a certain fashion even though it lacked the permits to do so at the time. Based on all of the testimony, the Board’s decision to set a 100 foot barrier was an attempt to balance Consol’s safety and timing concerns with adequately protecting Kent Run.

Overall, we acknowledge that if we put aside the issue of the conditional nature of Permit Revision No. 204, the testimony supports the likelihood that Consol will suffer some economic harm as a result of our supersedeas decision. However, we see no need to put aside the speculative nature of Consol’s harm. Additionally, we determined the harm to be less than the
harm claimed by Consol and find that any remaining harm to Consol must be balanced against the likely harm to Kent Run. The Board has done what it can to mitigate any potential harm to Consol by striking a balance between allowing the mining to proceed towards Kent Run to within 100 feet and minimizing the likelihood of harm to CCJ/SC, their members and the general public’s interest in maintaining Kent Run in its natural state within Ryerson Station State Park.

Conclusion

In the end, the determination of whether or not to grant a petition for supersedeas is at the discretion of the Board based on a balancing of the factors it considers in reaching that decision. In this case, the Board was faced with a difficult decision involving the need to balance impacts to a stream located entirely within a state park, concerns regarding mine safety and access by Consol to a valuable natural resource, a complicated permit review process and the right to a meaningful review of the permit decision made by the Commonwealth. All of this was underpinned by a pending full Board adjudication addressing similar issues in a challenge to earlier permit revisions involving all of the same parties. We find that the proper balancing of the factors presented leads us to the conclusion that the Petition for Supersedeas should be granted in part and Consol should be prevented from longwall mining under Kent Run in the 3L panel in accordance with the terms of our Order until such time as the Board can hold a full hearing on CCJ/SC’s appeal of Permit Revision No. 204. A copy of our previously issued Order is attached.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: February 1, 2017
c: DEP, General Law Division:  
Attention: Maria Tolentino  
(via electronic mail)

For the Commonwealth of PA, DEP:  
Barbara J. Grabowski, Esquire  
Michael J. Heilman, Esquire  
Forrest M. Smith, Esquire  
(via electronic filing system)

For Appellants:  
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John M. Becher, Esquire  
(via electronic filing system)

Permittee:  
Robert L. Burns, Esquire  
Megan S. Haines, Esquire  
(via electronic filing system)
ORDER GRANTING APPELLANTS’ PETITION FOR SUPERSEDEAS IN PART

AND NOW, this 24th day of January, 2017, following a hearing on Appellants’ Petition for Supersedeas, and review of the parties’ Post Hearing Filings, the Board Orders as follows:

1. The Petition for Supersedeas as requested is granted in part.

2. The Permittee may continue to longwall mine under the terms of its current permit, including Permit Revision No. 204, but may not conduct longwall mining within 100 feet of any portion of Kent Run in the 3L Panel.

3. The Appellants shall not be required to file a bond or other security.

4. An opinion in support of this Order Granting Appellants’ Petition for Supersedeas In Part shall follow.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: January 24, 2017

c: For the Commonwealth of PA, DEP:
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Michael J. Heilman, Esquire
Forrest M. Smith, Esquire
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Sarah E. Winner, Esquire
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