

**WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD  
CHARLESTON, WEST VIRGINIA**

**INDEPENDENT OIL AND GAS )  
ASSOCIATION OF WEST VIRGINIA, INC., )  
C. I. MCKOWN & SON, INC., )  
POCONO ENERGY CORP. and )  
TEMPEST ENERGY CORP. )  
Appellants, )**

**v. )**

**Appeal No. \_\_\_\_\_**

**SCOTT G. MANDIROLA, Director, Division )  
of Water and Waste Management, West )  
Virginia Department of Environmental )  
Protection, )**

**Appellee. )**

**NOTICE OF APPEAL**

Appellants C. I. McKown & Son, Inc. ("McKown"), Pocono Energy Corp. ("Pocono"), Tempest Energy Corp. ("Tempest") and Independent Oil and Gas Association of West Virginia, Inc. ("IOGA"), (sometimes collectively referred to as "Appellants") respectfully represent that each is aggrieved by certain decisions by Scott G. Mandirola, Director, Division of Water and Waste Management ("DWWM"), West Virginia Department of Environmental Protection ("WVDEP"), issued on September 4, 2015 and September 8, 2015 and other dates by e-mails directed to owners and operators of aboveground storage tanks ("ASTs") which designate which ASTs are Level 1 Regulated ASTs or Level 2 Regulated ASTs based in whole or in part on whether the ASTs are located in a "zone of critical concern" or "zone of peripheral concern" as defined in the Aboveground Storage Tank Act, W. Va. Code § 22-30-3 (20) and (21) ("AST Act"). More particularly attached as Exhibit A hereto is a list of the McKown, Pocono and Tempest ASTs that have been designated as Level 1 or Level 2 regulated ASTs by

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communication from WVDEP dated September 4, 2015 and September 8, 2015. Additional designations of Level 1 and Level 2 regulated ASTs were made to many members of IOGA. These designations contain common errors which are raised by McKown, Pocono, Tempest and IOGA on behalf of its members in the interest of administrative and judicial economy. McKown, Pocono, Tempest and IOGA are challenging the delineation and mapping of the zones of critical concern (“ZCCs”) and zones of peripheral concern (“ZPCs”) which WVDEP uses, in whole or in part, in determining and designating which ASTs are Level 1 or Level 2 regulated ASTs on the basis that the ZCC and ZPC delineations are unlawful and the criteria used for delineating the ZCCs and ZPCs are arbitrary and capricious and without basis in law or fact:

(1) The ZCC and ZPC delineations are unenforceable because the conclusions and mapping was not subject to notice and opportunity to comment by the regulated community and the public.

(2) The ZCC and ZPC delineations exceed the scope of the definitions set forth in the AST Act by continuing upstream beyond the “tributaries draining into the principal stream.”

(3) The ZCC and ZPC delineations exceed the scope of the definitions by failing to adequately account for stream flows, gradient and area topography and other existing conditions in streams, rivers, lakes, reservoirs, impoundments and other features in the delineation.

(4) Upon information and belief, one or more of the assumptions utilized in delineating the area of the ZCCs and ZPCs are arbitrary and capricious without a basis in fact.

In addition, Pocono has incurred costs and expenses in moving ASTs and rearranging its operating equipment to areas outside of ZCCs as designated by WVDEP in October 2014. Pocono relied upon information from WVDEP to rearrange its operating equipment outside the

designated ZCCs. WVDEP confirmed that the ASTs were located outside the ZCCs following the rearrangement of Pocono's ASTs and operating equipment.

McKown, Pocono, Tempest and IOGA therefore pray that the Environmental Quality Board (the "Board") review this matter pursuant to W. Va. Code § 22-30-18 and grant it the following relief:

- (1) Such relief as the Board may deem appropriate, including but not limited to the following:
  - a. Prohibit the WVDEP's utilization and enforcement of determinations that certain ASTs are Level 1 or Level 2 regulated ASTs based on the location of the AST being within a ZCC or ZPC until the delineation of the areas of the ZCCs and ZPCs are finalized following public notice and opportunity to comment.
  - b. Order WVDEP to disclose the methodology, assumptions and criteria used to delineate the ZCCs and ZPCs to afford AST owners and operators the opportunity to evaluate the validity and accuracy of the determinations made by WVDEP concerning the regulated status of ASTs.
  - c. Find and determine that the distance an AST is from a principal stream or tributary to the principal stream must be measured from the ordinary high water mark of the stream on a perpendicular line running horizontally along the surface of the ground for a distance of one thousand (1,000) or five hundred (500) feet, respectively, to an AST.
  - d. Order WVDEP to delineate the ZCCs and ZPCs using validated stream flow rates based upon the individual characteristics of the stream and

water flow within the specific watershed, including residence time in lakes, reservoirs and impoundments.

- e. Prohibit WVDEP from designating as Level 1 regulated ASTs those Pocono ASTs which were relocated and rearranged to be outside ZCC based information supplied by WVDEP and confirmed by WVDEP, or, in the alternative, award Pocono the cost of relocating and rearranging its ASTs to be outside the designated ZCCs.

- (2) Any other relief or revisions deemed appropriate by the Board following consideration of all of the information and evidence presented.

Specific Objections: Appellants' specific objections including questions of fact and law to be determined by the Board are set forth in detail and attached hereto as Exhibit B.

Amendment of this Notice of Appeal may be had only by leave of the Board, and for good cause shown.

**[Signatures on next page]**

Respectfully submitted this 1<sup>st</sup> day of October, 2015.

**INDEPENDENT OIL AND GAS ASSOCIATION  
OF WEST VIRGINIA, INC.**



David L. Yaussy (WV Bar #4156)

Mark D. Clark (WV Bar #731)

Spilman Thomas & Battle, PLLC

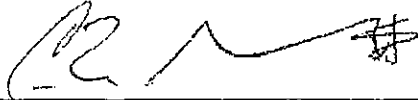
300 Kanawha Boulevard, East

Charleston, West Virginia 25301

Telephone: (304) 340-3800

Facsimile: (304) 340-3801

**C. I. MCKOWN & SON, INC.**



By: C. I. McKown, II

Its: President

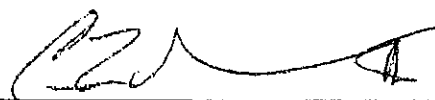
Address: P. O. Box 711

9958 Clay Road

Newton, WV 25266

Phone: (304) 565-7318

**POCONO ENERGY CORP.**



By: C. I. McKown, II

Its: President

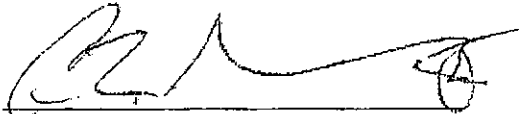
Address: P. O. Box 711

9958 Clay Road

Newton, WV 25266

Phone: (304) 565-7318

**TEMPEST ENERGY CORP.**



By: C. I. McKown, II

Its: President

Address: P. O. Box 711

9958 Clay Road

Newton, WV 25266

Phone: (304) 565-7318