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Confidential Treatment of Data Request: Beaver County Ethylene Cracker Facility Appeals Pennsylvania DEP Classification of Information as Emission Data

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Shell Chemical Appalachia LLC ("Shell") filed a Notice of Appeal ("Notice") before the Pennsylvania Environmental Hearing Board on September 25th objecting to the Pennsylvania Department of Environmental Protection's ("PDEP") denying the company's request that certain supplied data be treated as confidential.

Shell's Notice states that PDEP concluded that the data produced by the Shell Polymers Monaca facility in Beaver County, Pennsylvania was "emission data" and therefore not entitled to confidential treatment.

The Notice addresses an ethylene cracker facility ("Facility") in Beaver County Pennsylvania.

A malfunction is stated to have occurred at one of the Facility's furnaces which required Shell to report certain information related to the incident. The supplied information related to the malfunction is stated to have included 14 photographs.

Shell states that a request for confidential treatment under Section 13.2 of the Air Pollution Control Act ("ACPA") was granted for the photographs as Confidential Business Information ("CBI").

An additional report is stated to have been provided to PDEP to satisfy malfunction reporting requirements. This report is stated to have identified certain gas flow and gas composition data contained in four separate sections of the report as CBI under the ACPA and the Clean Air Act regulations. Shell asserts that under those provisions, the data was not "emission data," and is therefore CBI.

PDEP is stated to have received a Right-to-Know-Law ("RTKL") Request filed by the Environmental Integrity Project concerning the records Shell produced. PDEP agreed that a portion of the gas and flow composition data was confidential but other portions were not.

PDEP's justification was that certain portions of the data:

...is necessary to determine the identity, amount, and concentration of emissions from the Ethane Cracking Furnaces during the ... malfunction event.

PDEP therefore denied Shell's request for reconsideration. The agency issued its final determination on the RTKL Request on September 5th.

Shell's objections to PDEP's decision include:

- Conflicts with State and Federal Law, arguing in part:
- Data is governed by the Clean Air Act and the APCA and thus supersedes the RTKL in defining what records are public vs. non-public.
- APCA provides that PDEP must implement the relevant section consistent with the Clean Air Act.
- Federal courts have narrowly construed the regulatory definition of "emission data" as requiring that the information be necessary to determine, i.e., the only information available to determine the characteristics of the emissions.
- Courts have excluded background or upstream process information from the scope of the term "emission data".
- PDEP relied on an insufficient and/or incorrect factual basis to issue the decision.
- Did not adequately explain why the data at issue constituted "emission data," including its conclusion that such data is "necessary" to calculate emissions.
- No state or federal case law to support PDEP's determination.
- Shell was not required to report this data as part of its routine emissions reporting and malfunction reporting.
- PDEP ignored the fact that Shell historically has sought—and PDEP has granted—confidential treatment of this type of data.
- PDEP did not consider Shell's supplemental September 3 submission in its reliance on the August 26 Decision as a "final" order.
- PDEP did not consider Shell's supplemental September 3 submission in issuing its September 5 Final Determination of the RTKL Request.
- PDEP's action in in issuing the Decision is otherwise arbitrary, unreasonable, an abuse of discretion, and/or unlawful for many of the same reasons.

A copy of the Notice can be downloaded [here](#).