March 24, 2021

VIA HAND DELIVERY
Jackie D. Shultz, Board Clerk
Environmental Quality Board
601 57th Street, S.E.
Charleston, WV 25304

RE: Murray American Energy, Inc. v. AMBIT – Appeal No. 20-07-EQB

Dear Ms. Shultz:

Enclosed for filing in the above referenced matter please find the original and two (2) copies of “AMBIT’S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.” A copy has been provided to appropriate counsel.

Thank you for your consideration in this matter.

Sincerely,

Roberta F. Green
Christopher D. Negley

Enclosures
cc (w/encl):
Jason E. Wandling, Esq. / Jeffrey O. Dye, Esquire
Christopher B. Power, Esq. / Robert M. Stonestreet, Esq.
Mark S. Weiler, Esq.
BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

MURRAY AMERICAN ENERGY, INC.,
MARION COUNTY COAL RESOURCES, INC., and
WEST VIRGINIA LAND RESOURCES, INC.,

Appellant,

v. 

Appeal No. 20-07-EQB

HAROLD D. WARD, DIRECTOR,
DIVISION OF MINING AND RECLAMATION,
DEPUTY SECRETARY FOR OPERATIONS,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Appellee,

v.

AMERICAN BITUMINOUS POWER
PARTNERS, L.P.,

Intervenor.

AMBIT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW

Now comes Intervenor American Bituminous Power Partners, L.P. (AMBIT), by
counsel, and submits the appended proposed Findings of Fact and Conclusions of Law for the
Board’s review,

AMERICAN BITUMINOUS POWER PARTNERS, LP,
By Counsel.

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FININDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Environmental Quality Board (Board) for hearings held January 14, 2021, January 27, 2021, and February 4, 2021. Wherefore, upon the Board's mature consideration of the facts adduced at evidentiary hearing, the pleadings of the parties before the Board and the argument of counsel; for all of the reasons set forth herein; and for good cause shown, Appellant's challenge to the subject permitting process is DENIED.

I. No remedy at law for monetary relief; failure to join indispensable parties.

The Board understands and acknowledges the complexities of the water systems in place and the potential disputes between these two sophisticated commercial entities and involving the many other individuals and entities involved in and/or affected by this process and not participatory nor represented here. The Board understands and acknowledges the relative financial and other responsibilities undertaken voluntarily by each of the participants here, and potentially,
the individuals and entities affected/involved, who are not included in this process before the Board. As a matter of law and fact, the Board finds that no existing law provides monetary damages or relief, nor has Appellant American Consolidated Natural Resources or ACNR\(^1\) (cited collectively for Murray American Energy, Inc. Marion County Coal Resources, Inc., and West Virginia Land Resources, Inc.) provided evidence of any such law nor any such agreement to be bound by Intervenor or other mine pool participants. As a matter of law and fact, the Board finds that no existing law or regulation limits the amount of Injectate Intervenor American Bituminous Power Partners, LP (AMBIT) or any other permit holder may inject, nor has Appellant provided evidence of any law or agreement so providing. The Board also finds that no remedy is available here because the evidence on the direction of flow and the final destination of injectate in the mine pool system generally is equivocal, with all parties introducing compelling but disputed evidence that evades final conclusion without additional technical review and study unavailable here or through this process. Further, the Board understands and acknowledges that the mine pool system and the monitoring and control of the mine pool system was initiated by federal and state government mandates that predate these parties, permits and appeal, and that the program itself does not provide rights or remedies between these participants.

**II. No material violation within WVDEP's regulatory authority.**

Within the regulatory authority granted to WVDEP (the measure the Board must adopt for

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\(^1\) [http://www.acnrinc.com/operations/](http://www.acnrinc.com/operations/), attesting as follows:

American Consolidated Natural Resources produces approximately 49 million tons of coal each year, produced through the efforts of nearly 5,000 people in 5 regions. We operate 9 active mines in 5 regions in the United States. American Consolidated Natural Resources operates 9 underground longwall mining systems and 25 continuous mining units. We operate 10 coal transloading facilities and 5 mining and equipment factory and fabrication facilities. Our coal reserves total more than 6 billion tons of high heat, high quality coal in close proximity to our customers.
this permitting process), the Board does not find that the permit application or the process was materially incomplete, inaccurate or illegal on any of the factors that WVDEP has authority to regulate for this permit. Therefore, while Appellant has sought financial compensation to help defray its responsibilities and has questioned or challenged the process, the science and various perceived shortcomings of the permitting process and the permit at issue, the Board finds that, on the issues for which State law provides WVDEP the regulatory authority for oversight of permitting, the permit at issue is ‘complete’ (as that term is understood by WVDEP’s regulatory authority), accurate (as adjudged by WVDEP in its regulatory authority) and lawful, all as set forth below. Where Appellant challenges AMD sludge versus AMD in the public notice, the Board finds that ACNR had actual notice of the permitting process and input directly into the process through its assertions relative to direction of flow by and through its representatives Justin Smith and its Director of Environmental Compliance Jon Nagel, such that any allegation relative thereto is moot and, once again, Appellant is without injury in fact. Further, ACNR’s allegations in its Appeal are that the “DEP Director act arbitrarily, capriciously, contrary to law or abuse his discretion” in granting the permit. The Board acknowledges that West Virginia’s Supreme Court has held that the ‘arbitrary and capricious’ standard is a deferential one, which presumes actions are valid “as long as the decision is supported by substantial evidence or a rational basis.” Syl. pt. 3, In re Queen, 196 W. Va. 442, 473 S.E.2dd 483 (1996). The Board so finds in this instance on all matters properly before it on this Appeal.

III. Standing, Injury in fact.

Further, the Board addresses now fully the issue of standing. While the undisputed evidence before the Board demonstrates that Appellant voluntarily, knowingly accepted a responsibility through its purchase of CONSOL’s properties, the Board FINDS that the evidence
on the direction of flow and the final destination of injectate in the mine pool system generally is equivocal, with all parties introducing compelling but disputed evidence that evades final conclusion without additional technical review and study unavailable here or through this process. Therefore, whereas Appellant relies upon West Virginia Code Section 22-11-21 for its standing ('aggrieved'), the Board notes that the Supreme Court of Appeals of West Virginia has found that 'aggrieved' requires an invasion of legal rights in order to constitute an injury in fact: "injury separate and apart from that which the general citizenry might experience as a result of the same ruling." Syl. pt. 6, Corliss v. Jefferson County Board of Zoning Appeals, 214 W. Va. 535, 591 S.E.2d 93 (2003). Therefore, based upon the evidence adduced and for all of the reasons set forth below, the Board finds that, while Appellant demonstrates the responsibility it has assumed, it has not proven that Intervenor’s Injectate actually reaches any of its (ACNR’s) sites. While the injectate is permitted to reach Dogwood Lakes, no direct evidence has been adduced (e.g. die testing) that confirms that the injectate at issue travels from its home mine void. Unless or until evidence exists that ACNR has suffered an injury in fact by treating in particular Intervenor’s Injectate, ACNR does not have standing to challenge the process before this Board. ACNR challenges notice provisions but received actual notice, such that it has no injury in fact on that issue. In sum, whereas the Board’s initial determination was that ACNR did have standing to proceed, upon final review of the evidence and transcript of testimonial evidence, and in clear reflection of the months of adjudication and argument, the Board finds that no direct, express evidence of injury in fact (actual arrival and treatment of AMBIT’s Injectate at either Dogwood Lakes or at the reverse osmosis (RO) facility, nor any failure of effective notice) has been proven. Therefore, the Board finds that Appellant has not proven the particularized injury that is requisite

\[2^2\] Syl. pt. 2, SER Healthport Techs, 239 W. Va. 239, 800 S.E.2d 506 (2017), defining ‘injury in fact’ as including an invasion of legal rights.
for relief before this Board and, therefore, has no standing.

Additionally, West Virginia law, in particular, WVDEP’s regulatory authority (which by law shapes this Board’s scope of inquiry) precludes persons who fail to participate in the comment period to proceed further,\(^3\) such that ACNR’s Appeal is moot on that basis as well, as it failed to comment despite receiving actual notice.

IV. Need for additional study, review and potential remedy.

In overview, the Board does question whether the mine pool structures and programs have sufficient oversight and guidance, and whether any solution by necessity would need to be systemic, regulatory and/or legislative in scope and nature. While that process is beyond the scope of this Board’s purview, nonetheless, the Board includes here a strong recommendation if not a mandate that relevant authorities review, consider and address the complexities, costs and dangers of the pool system, and what its implications are for the State of West Virginia and its aquifer.\(^4\)

In support whereof, the Board hereby adopts the following Findings of Fact and Conclusions of Law.

V. Background.

Appellant ACNR has alleged that Appellee West Virginia Department of Environmental

\(^3\) 47 CSR 13.13.28:
13.28. Obligation to Raise Issues and Provide Information During the Public Comment Period. All persons, including applicants, who believe any condition of a draft permit is inappropriate or that the Director tentative decision to prepare a draft permit is inappropriate, shall raise all reasonably ascertainable issues and submit all reasonably available arguments and factual grounds supporting their position, including all supporting material, by the close of the public comment period. All supporting materials shall be included in full and not be incorporated by reference, unless they are already part of the administrative record in the same proceeding, or consist of State or Federal statutes and rules, documents of general applicability, or other generally available reference materials. Submitters of comments shall make supporting material not already included in the administrative record available to the State as directed by the Director.

\(^4\) See West Virginia Mine Pool Atlas at Abstract, finding the mine pool system a means of replenishing the aquifer.
Protection (WVDEP or DEP) improvidently reissued Underground Injection Control (UIC) Permit No. 0394-01-049, Modification #1, to Intervenor AMBIT based on four areas where ACNR claims the reissued permit was incomplete or inaccurate, to-wit, (a) the UIC permit did not identify the Intervenor’s “legal right to inject” into downdip mine workings; (b) the UIC permit failed to adequately describe an alternative treatment system should the “Paw Paw Syphon (or pump) cease[] to pump water out of the Dakota Deep Mine”; (c) the UIC permit failed to provide a satisfactory explanation that the flow of allowed injectate would be "insignificant" to pool water elevations in the mine voids to which it flows; and (d) the UIC permit failed to provide a satisfactory explanation that the Injectate authorized to be injected by the UIC Permit would have no significant effect on the volume or quality of water treated at the Dogwood Lakes AMD Treatment. See Notice of Appeal, June 30, 2020, at 4.

Specifically, ACNR raised four questions of fact and four questions of law that structure its appeal and, therefore, this Board’s considerations:

**Questions of Fact:**

1. Has ABPP entered into any agreement with MAEI to allow for the handling and treatment of the Injectate (at the Dogwood Lakes AMD Treatment Plan) that is authorized to be injected by the UIC Permit?
2. Did the UIC Permit application fail to adequately and accurately address the issues identified in Part B.2 above? In its review of the UIC Permit application, did the DEP adequately assess those same issues?
3. Did the public notice for the UIC Permit application identify the Injectate as only consisting of "AMD sludge"? Did the public notice for the UIC Permit application lead a reasonable reader to conclude that the Injectate would be placed into the abandoned Joanne Mine and remain there?
4. Such other and further questions of fact as may be raised by the administrative

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5 The permit was reissued on May 22, 2020 and modified on June 12, 2020.
6 Part B.2. reads as follows:
   it failed to adequately describe the alternative treatment system that would be employed in the event that the Paw Paw Syphon (or pump) ceases to pump water out of the Dakota Deep Mine (including the proposed method of treatment, timeline for design, permitting and construction of such a treatment system, possible locations and estimated costs);
Questions of Law:

1. Assuming ABPP has not entered into any agreement with MAEI to allow for the handling and treatment of the Injectate that is authorized to be injected by the UIC Permit, did the Director act arbitrarily, capriciously, contrary to law or abuse his discretion in issuing the UIC Permit to ABPP?

2. Assuming the UIC Permit application failed to adequately and accurately address the issues identified in Part B.2 above, did the DEP Director act arbitrarily, capriciously, contrary to law or abuse his discretion in issuing the UIC Permit to ABPP?

3. Assuming the DEP failed to adequately assess the issues identified in Part B.2 above, did the DEP Director act arbitrarily, capriciously, contrary to law or abuse his discretion in issuing the UIC Permit to ABPP?

4. Assuming the public notice of the UIC Permit application was deficient in the ways described above, did that violate applicable law and/or regulations?7

To reiterate, the Board finds that no legal authority was referenced, introduced or cited in any way to support Appellant's challenge to the permit relative to its responsibilities in treating mine pool and other injectates. No agreement exists between Appellant and Intervenor to allow for the handling and treatment of the Injectate (at the Dogwood Lakes AMD Treatment Plan) that is authorized to be injected by the UIC Permit. Without a basis in statutory or regulatory law, this issue is outside the Board's purview, such that the Board cannot and may not address whether on this basis the Director acted arbitrarily, capriciously, contrary to law or abused his discretion in issuing the UIC Permit. Further, once again, the Board acknowledges that West Virginia's Supreme Court has held that the 'arbitrary and capricious' standard is a deferential one, which presumes actions are valid "as long as the decision is supported by substantial evidence or a rational basis." Syl. pt. 3, In re Queen, 196 W. Va. 442, 473 S.E.2dd 483 (1996). The Board so finds in this instance on all matters properly before it on this Appeal.

7 Notice of Appeal at 5.
At the close of the hearings, the Court ordered the parties to submit proposed findings of fact and conclusions of law. In accordance with Article 5, Chapter 29A of the West Virginia Code and 46 CSR 4, § 6.10, the Board now makes the following findings of fact and conclusions of law.

VI. FINDINGS OF FACT

1. Kevin Rakes serves as the Manager of Engineering for ACNR Resources, Inc. In that role he manages the engineering and environmental compliance within West Virginia, including the 150,000 acres of flooded mine pools comprised of the Fairmont Mine Pool (FMP) and the Morgantown Mine Pool (MMP). Proceedings of Hearing (Tr.) at 32.

2. The FMP is the informal name for a flooded complex of underground mines in Marion County, West Virginia. Water levels in the FMP are controlled by ground water outflow and withdrawal which offsets subsurface inflow and infiltration. Appellee Exhibit #4, Final Report, Fairmont, West Virginia Mine-pool at Abstract.

3. Some of the water in the north-end of the FMP is removed by a siphon and pump system (the “Paw Paw Siphon”) and transferred to the MMP for treatment at a facility located farther north. Id.

4. ACNR voluntarily assumed responsibility for the management of the FMP, the Paw Paw Siphon and other active and abandoned mines in the areas by purchasing the assets of the CONSOL group of companies in 2013. Tr. at 68, 86. In purchasing the CONSOL properties, ACNR’s predecessors Murray American Energy Inc. (MAEI) purchased as well the reverse osmosis treatment facility that CONSOL had been mandated to build and operate pursuant to federal Consent Decree. Tr. at 115.

5. The appeal before the Board involves the third reissuance of AMBIT UIC Permit 0394-01-049 (the “Permit”). Tr. at 186. MAEI was in control of the same portions of the mine
pool system when Intervenor’s permit last underwent renewal but did not challenge that process. Tr. at 69.

6. ACNR does not have agreements with any companies or agencies to treat waters in the Dogwood Lakes AMD plant or its subparts, nor has it attempted to locate any responsible parties for any of the intervening mind voids that contribute to Dogwood Lakes or the mine pools. Tr. at 66, 109. ACNR has two or three agreements in place with companies or agencies to treat waters in its reverse osmosis plant. ACNR has never had an agreement in place with Intervenor to treat any waters. Tr. at 68.

At this time, ACNR charges the treatment costs against their active operations as a “rough ratio of how much coal is produced [which] corresponds to how much money is charged against that mine to treat water at the plant.” Tr. at 58.

7. On direct questioning by the Board, Rakes testified that the direction of flow matters to ACNR for three reasons. First, ACNR believes it should not “have to pay to treat other people’s things without compensation.” Tr. at 127. ACNR provided no legal basis nor agreement to support that position.

Additionally, Rakes testified on the Board’s questioning that direction of flow matters because the reverse osmosis plant costs ACNR “a half a million dollars a year” to operate, which it alleges it has been doing for over a decade (although the Board notes that the CONSOL purchase was in 2013). Tr. at 127.

Finally, Rakes testified that ACNR “undergo[es] a much higher degree of scrutiny on some of the permits that [ACNR has] turned in, at least, you know, by information [Rakes has] received from other people in Murray [although Rakes has no] direct experience. And those standards should be, you know, applied equally to everybody.” Tr. at 127.
8. The Paw Paw Siphon removes mine water from FMP and routes it over a barrier pillar for discharge into the MMP for treatment. The Siphon removes water at a faster rate than naturally occurring exfiltration to keep the mine pool at a level that will prevent a breach to the surface and into the waters of the State.

9. The five-year median Siphon withdrawal for 2008 to 2012 was 850 gallons per minute (gpm). Subsurface outflow and leakage are estimated to remove another 1,400 gpm from the FMP. Appellee Exhibit #4, Final Report, Fairmont, West Virginia Mine-pool.

10. The line of demarcation for the MMP and FMP is the Dakota Mine (also called CONSOL #96) where the Paw Paw Siphon is sited. Areas south of Dakota mine are in the FMP and areas north of the Dakota mine are in the MMP.

11. ACNR has two active operations (Marion County Coal Mine and the Harrison County Coal Mine) in the vicinity of the FMP. See Appellant Exhibit #2. These mines have parts where active mining occurs and parts that are “sealed” off and inactive. Tr. at 37-42.

12. To operate the active parts of the mines and keep their employees safe, ACNR must maintain continuous pumping so the mines do not become flooded. Tr. at 42.

13. In addition to its active mines, ACNR (through West Virginia Land Resources) controls abandoned mines in the area including, inter alia, the CONSOL #9 and the CONSOL #20 (also known as the “Four States” mine). Tr. at 42.

14. ACNR pumps water out of the CONSOL #9 for pretreatment at the Lewellyn AMD facility (the Lewellyn AMD facility is adjacent to the Marion County Mine). Tr. at 42ff.

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8 Appellee Exhibit #4, Final Report, Fairmont, West Virginia Mine-pool at 4, 17.
9 Appellee Exhibit #4, Final Report, Fairmont, West Virginia Mine-pool at 1, 4.
15. The pretreated water is then pumped to its Northern West Virginia reverse osmosis (RO) facility for final treatment at northern West Virginia Dent’s Run RO facility. Reverse osmosis removes salts and minerals through a mechanical process, to-wit, pumping the water at high pressure through microfilters. Tr.at 159.

16. In addition to the Lewellyn facility, ACNR also operates the Thorne AMD facility which treats water from the CONSOL #20 for pretreatment and which is then pumped for final treatment at the Dent’s Run RO facility. Tr. at 44.

17. Treatment for any water that needs to be pumped so that the Harrison County Mine can operate is directed to another AMD facility, to-wit, the Dogwood Lakes AMD treatment facility. Here, water is treated conventionally with hydrated lime or peroxide and then released to the surface. Tr. at 48. ACNR operates a second conventional AMD facility called Flaggy Meadows that operates the same as Dogwood Lakes. Tr. at 48. In both instances, the facilities take water from the FMP and treat it before releasing it at the surface. Tr. at 48.

18. ACNR operates the reverse osmosis facility due to its purchase of CONSOL’s interests, which included a Consent Decree that CONSOL had reached with the federal government. Tr. at 59. This Consent Decree set up different treatment scenarios for different active and abandoned mines now controlled by ACNR.

19. ACNR must treat any water in the FMP and MMP before it is discharged into the potable water supply of the area. As stated above, this treatment would occur at the Lewellyn or Thorne RO AMD facilities or the Dogwood Lakes or Flaggy Run conventional AMD treatment facility. Tr. at 58-59.

20. As a part of its treatment plan, ACNR has employees who monitor the levels in the FMP and adjust ACNR’s treatment to ensure that the FMP level does not rise to where untreated
water would be allowed to discharge into the potable water supply. The Office of Surface Mining has set the level at 857 feet. Tr. at 75.

The Paw Paw Siphon withdraws or loses by leakage 3,240,000 gallons per day. Tr. at 72ff. Intervenor’s new permitted levels, regardless of whether they reach the Syphon, allow for a maximum of 280,000 gallons per day, or approximately 12 percent of the total egress from the Syphon, even assuming that the Joanna injectate reached the Syphon (and there is no evidence of its doing so). Tr. at 72ff. Neither ACNR’s representative nor ACNR’s expert knows how much volume was necessary to raise the mine pool one foot, but both agree with the OSM report that mine pool levels have remained ‘relatively stable’ since 2005. Tr. at 75-76, 183.

ACNR has made no changes to its pumping, treatment or other practices as a result of this permit renewal, the alleged increases in injection or otherwise. Tr. at 79-80. As a result, ACNR can point to no exact damage or increased burden as a result of this permitting process. Id.

21. Whereas ACNR’s representative identified no regulatory or statutory support for any monetary payments or reimbursement, Rakes testified that ACNR spends $9,000,000 per year to operate its treatment facilities and that these costs are allocated to ACNR affiliates based on tonnage. Tr. at 59.

22. The appeal before the Board involves the third reissuance of AMBIT UIC Permit 0394-01-049 (the “Permit”). Tr. at 186.

23. The UIC permit is associated with the Joanne Mine and allows AMBIT to legally inject an average of 266,400 gallons of water per day into the Joanne mine with a maximum daily allowance of 280,000 gallons per day. This is an increase from an average daily injectate of 52,000 gallons per day in the previously approved Permit. Tr. at 72ff.
24. The Permit, as modified and approved, finds that any water that leaves the Joanne Mine void is permitted to travel toward the Paw Paw Siphon and then to Dogwood Lakes treatment facility for conventional treatment. Certified Record (CR) at 89. Neither Rakes nor ACNR’s retained expert James A. Kilburg had performed any testing whatsoever as to direction of flow or extent of flow, although the retained expert testified that it would be possible to do so. Tr. at 103, 181, 187.

25. James Kilburg, Ph.D., Geology, serves as a senior consultant for Civil Environmental Consultants. Dr. Kilburg was qualified to provide expert opinions in the case in the area of geology and hydrogeology including groundwater systems. Tr.at 133.

26. Rakes testified that, after learning of the Permit reissuance, he reviewed the 2004 OSM report, which he testified states that water injected into the Joanne mine void then travels north and south into the CONSOL #9 and CONSOL #20 mines where it would be treated at one of ACNR’s RO facilities. Tr. at 62; Appellant Exhibit #4.

27. Rakes and Kilburg testified that ACNR’s active operations are “downdip” to the Joanne mine void and that, as a result, any water that leaves the Joanne mine void would travel through gravity to ACNR’s operations. Tr. 158, 101. Whereas Kilburg discounted ‘head’ or levels at the Joanna Mine (Tr. at 159, 206), WVDEP’s expert geologist discussed ‘head pressures’ that change direction of flow from the Joanna and are not reflected in the OSM study (e.g., Figure 4) upon which Appellant relies. Tr. at 455.

28. Rakes and Kilburg both conceded that one of the allegedly downdip mines from the Joanna, the Harrison County Coal Mine, will flow east toward Dogwood Lakes (and, allegedly, uphill) once pumping ceases. Tr. 97.
29. Kilburg testified that Intervenor’s permit application is accurate that there is no active pumping in the vicinity of the Joanna Mine void if the injectate travels toward the Paw Paw Siphon. Tr. at 219-20.

30. ACNR determined its infrastructure was sufficient to handle any levels referenced in the application. Tr. at 66.

31. ACNR previously had agreements with three other companies who had discharged water that was treated by ACNR. However, all three agreements are no longer in existence. Further, ACNR has not reviewed other mines for which it is treating water for other potentially responsible parties. Tr. at 66, 68, 109.

32. ACNR has not performed any scientific testing to establish that water potentially leaving the Joanne mine void is “commingling” with waters from ACNR’s operations for treatment at its RO or conventional treatment facilities. Tr. at 103, 181, 187.

33. Kilburg has a limited history in permitting and the subject permit is the first West Virginia DEP issued UIC permit that he has ever reviewed. Tr. at 136.

34. Kilburg testified that AMBIT was seeking in its Permit approval to inject seepage from its coal refuse pile and stormwater and/or surface runoff into the borehole. Approximately 80% was seepage with the remaining 20% being the stormwater and surface runoff. Dr. Kilburg testified that it was his opinion that the injectate was not AMD sludge as set forth in the permit. Tr. at 145.

35. Kilburg testified that the injectate from the Joanne mine void was injected into the Joanne “sub-pool” which is part of the FMP. Tr. at 147-48.

36. Kilburg prepared Appellant Exhibit #5 titled “Groundwater Basin Portion of the Fairmont Mine Pool.” Tr. at 149. He testified that he plotted the AMBIT borehole to determine
the direction of groundwater in the area. The map utilized, in part, topographic and soil maps dating back to the early 1900s. He also incorporated ACNR’s mapping of active mining operations and anticlines and synclines in the area. Tr. at 149ff.

37. The purpose of Exhibit #5 was to prepare a “conceptual” model of the hydrological site conditions in the vicinity of the AMBIT borehole. Kilburg also prepared Appellant Exhibit #6 which shows mine flow direction in the area of AMBIT’s permit. Tr. at 152.

38. Kilburg offered the opinion that the injectate from the Joanne borehole does not flow as set forth in the Permit application, where AMBIT states that the injectate travels from the borehole east to Bethlehem #44 aka “Idamay,” then to Bethlehem #44, then to Dakota and to Jordan where it is pumped through the Paw Paw Siphon to the MMP for treatment at Dogwood Lakes. Tr. at 158.

39. Rather, Kilburg opined that the injectate from Joanne borehole would exit into the CONSOL #9 and the CONSOL #20 for treatment at the Llewellyn treatment facility. Kilburg testified that water would have to travel “uphill” over the Wolf Summit Anticline and other anticlines and synclines for treatment to be performed at Dogwood Lakes. Tr. at 158-61.

40. Upon examination by the Board, Kilburg described that underground structures (which are similar to above-ground structures) include anticlines, which are folds in which each half of the fold dips away from the crest, and syncline, which are folds in which each half of the fold dips toward the trough of the folds; thus Kilburg has the opinion that the water from the injectate would not be able to traverse the anticlines and synclines in the area as described in AMBIT’s application. Tr. at 226.

41. Kilburg offered the opinion that the 2014 OSM Report was incorrect in its assertion that the Paw Paw Siphon controls the water level in the Joanne mine void. Tr. at 165-68.
42. Upon cross-examination, Kilburg testified that he does not have knowledge of the total gallons of water in the FMP, how many gallons are added annually, how many gallons are exfiltrated annually, or how many gallons would be needed to raise the level of the FMP by one foot. Tr. at 183.

43. Upon cross-examination, Kilburg testified that a study would need to be done to "find out all of the amount of water" that is being added to the FMP "from sources other than natural sources, like infiltration" before determining how much water is added annually to the FMP. Tr. at 183.

44. Upon cross-examination, Kilburg testified that he had not done any scientific testing on AMBIT’s injectate to determine the character of the water to be injected. Rather, he relied on the OSM report for his understanding of the water’s chemical properties. Tr. at 103-04.

45. Upon cross-examination, Kilburg testified that he had not performed any dye tracing of AMBIT’s injectate. Tr. at 180-81.

46. Upon cross-examination, Kilburg testified that pumping of active mines may influence flow toward the wells in the area but that underground structures control the direction of flow. Tr. at 204-05.

47. Robert “Bob” Hudnall is an Environmental Program Manager who oversees the UIC program for the DEP’s Office of Mining and Reclamation. Hudnall has Bachelor’s of Science. in Mining Engineering and a Bachelor’s of Science in Industrial Management from West Virginia Tech University. Tr. at 229.

48. Hudnall has seven years with DEP including five years with UIC. Prior to coming to DEP, Hudnall spent twenty-five years working in the coal industry. Tr. at 231, 266, 377.

49. In his role as a Program Manager, Hudnall reviews applications to permit the
injection of underground mining waste into mine voids. He has one member of his staff whose role is primarily clerical. Tr. at 229-31.

50. DEP’s review of a permit application is limited by its enabling law (regulatory and/or statutory), in particular, 47 CSR 13-13.10(d), which expressly limits the information DEP requires and can enforce in its permitting process. Tr. at 243, 269-70.10

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10 47 CSR 13-13.10(d):

13.10.d. Information requirements. All applicants for UIC permits shall provide the following information to the Director, using the application form provided by the Director:

13.10.d.1. The activities conducted by the applicant which require it to obtain permits under UIC.

13.10.d.2. Name, mailing address, and location of the facility for which the application is submitted.

13.10.d.3. Up to four (4) SIC codes which best reflect the principal products or services provided by the facility.

13.10.d.4. The operator’s name, address, telephone number, ownership status, and status as Federal, State, private, public, or other entity.

13.10.d.5. A listing of all permits or construction approvals received or applied for under any of the following programs:


13.10.d.5.B. NPDES program under CWA and State Act.

13.10.d.5.C. Prevention of Significant Deterioration (PSD) program under the Clean Air Act.

13.10.d.5.D. Nonattainment program under the Clean Air Act.

13.10.d.5.E. National Emission Standards for Hazardous Pollutants (NESHAPS) pre-construction approval under the Clean Air Act.

13.10.d.5.F. Dredge or fill permits under section 404 of CWA.

13.10.d.5.G. Other relevant environmental permits, including State permits.

13.10.d.6. A topographic map (or other map if topographic map is unavailable) extending one (1) mile beyond the property boundaries of the source, depicting the facility and each well where fluids from the facility are injected underground and those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area.


13.10.e. Record keeping. Applicants shall keep records of all data used to complete permit applications and any supplemental information submitted under subsection 13.3 for a period of at least three (3) years from the date the application is signed.
51. The requisite level of specificity used in the application, the nature and determination of what constitutes a 'complete' application as required by law, is left within the sole discretion of the reviewer as a matter of law. Tr. at 247.

52. No statutory nor regulatory authority exists under West Virginia law to require or allow WVDEP to inquire into legal right to inject. Tr. at 250-51. Often applicants produce documentation in response to the 'legal right to inject' inquiry, including leases (as here), but WVDEP does not investigate this issue nor require documentation. Tr. at 251. AMBIT only needed to demonstrate legal right to inject into the Joanna Mine void, and it provided that documentation. Tr. at 366-67.

53. Here, proper notice was issued, but no comments were received. Tr. at 255. WVDEP provides for public notice and comment so that “[i]f the public have any issues or concerns about the activity, about any health or environmental concerns, they can submit comments and request a hearing, if necessary, and we will -- we would address their comments.” Tr. at 254. MSHA is provided a copy of the application so that its representatives can comment or identify complications. Tr. at 256-57.55.

Whereas West Virginia law\textsuperscript{11} requires that persons who believe an application or WVDEP’s decision-making is inappropriate “shall raise all reasonably ascertainable issues and

\textsuperscript{11}47 CSR 13.13.28:

13.28. Obligation to Raise Issues and Provide Information During the Public Comment Period. All persons, including applicants, who believe any condition of a draft permit is inappropriate or that the Director tentative decision to prepare a draft permit is inappropriate, shall raise all reasonably ascertainable issues and submit all reasonably available arguments and factual grounds supporting their position, including all supporting material, by the close of the public comment period. All supporting materials shall be included in full and not be incorporated by reference, unless they are already part of the administrative record in the same proceeding, or consist of State or Federal statutes and rules, documents of general applicability, or other generally available reference materials. Submitters of comments shall make supporting material not already included in the administrative record available to the State as directed by the Director.
submit all reasonably available arguments and factual grounds supporting their position, including all supporting material, by the close of the public comment period’ (Tr. at 258-59), ACNR failed to respond or object during the comment period. Two of its representatives, Director of Environmental Compliance John Nagel, along with Justin Smith, were contacted by Bob Hudnall, head of UIC permitting for WVDEP, on February 3, 2020, prior to the issuance of the permit, and were advised of the application and key features of same, including direction of flow. Tr. at 89, 260-62. No evidence was adduced that either Smith or Nagel objected in any way in February 2020 nor initiated the comment process officially at any point, although they had actual notice of the ongoing permitting process and the representations regarding direction of flow

54. In reviewing Intervenor’s permit application, WVDEP believed direction of flow was toward the Paw Paw Siphon and believes, even after Appellant’s evidence was introduced, that the direction of flow set out in the application is possible given all that can be known at this time. Tr. at 263.

55. The UIC program, in general, reviews permit applications by companies whose water cannot be discharged to the surface because it does not meet West Virginia water quality laws and regulations involving drinking water at the injection site. Tr. at 239.

56. A UIC permit allows the water to be injected directly into a mine void, as drinking water standards are less strict than aquatic standards. Then, when underground, the injectate is mixed with other underground water, thereby being diluted. Tr. at 239.

57. A UIC application is received on a standard form prepared by the DEP. Hudnall testified that the UIC application that AMBIT submitted was prepared on a form that was adopted in 2018. Tr. at 280.
58. The UIC application in question was received in March 2019. WVDEP sent two sets of technical corrections to the applicant in February 2020 with the application being ready for a draft permit issuance in the spring of 2020 before final issuance in June 2020. Tr. at 378-79.

59. AMBIT’s application was for reissuance of the Permit #3. As an initial review procedure, Hudnall reviewed previous AMBIT UIC permits to determine changes in this application from the previously approved permits. Tr. at 382-83.

60. Hudnall testified that the primary change that stood out was the increase in the average daily gpd and maximum daily gpd of injectate from previous Permits, which he discussed with the applicant’s representative. Tr. at 383.

61. In reviewing this change, Hudnall testified that the previously issued Permits required estimated average daily and maximum daily gpd by AMBIT (‘Report Only’ values). However, due to a change in reporting requirements, AMBIT was now being required to report actual measured flow. Hudnall learned of the actual measured flow numbers from John Spencer, AMBIT’s consultant for the Permit. Tr. at 236-37.

62. Hudnall testified that the increase in flow submitted by AMBIT was acceptable to the DEP since the “dewatering capability of the mine void [was] greater than what the injection rate is.” Tr. at 237. He further testified that this increase was acceptable since the injectate flowed toward the Paw Paw Siphon which was capable of receiving the injectate. Tr. at 237.

63. West Virginia laws and regulations do not contain a legal limit as to the gallons of water that can be injected under a UIC permit. Tr. at 240. See also 47 CSR 13, generally.

64. Hudnall testified that AMBIT properly cited AMD sludge on its permit application as the term “AMD sludge” is the sediment from treating acid mine drainage from a treatment facility. Tr. at 238. The other choice on the application “other” would pertain to any other liquid
that did not meet water quality standards. During cross-examination, Hudnall conversely testified that DEP should have had AMBIT cite "other" for its application. He testified this was an "oversight" on his part. Tr. at 327.

65. The DEP utilizes 47 CSR § 13-1 et seq., in reviewing UIC permit applications. Subsections within the regulations require various categories of information to be supplied by the applicant in order to allow DEP to scrutinize the application. The categories include, *inter alia*, company information, maps, details of injection activity, geologic and receiving void information and company certification of information. Tr. at 245ff.

66. While the application contains language regarding a "legal right to inject" into the receiving mine void by the applicant, the governing regulations, 47 CSR § 13-1 et seq., do not contain any legal requirement or authority for DEP to review on this subject. Hudnall testified that the language in the application is just "additional information" that the DEP collects for clarification and to protect the DEP. Tr. at 251.

67. In this case AMBIT's application stated that it had the legal right to inject and provided the DEP with lease documents for its leasehold on the Joanne mine facility. Tr. at 251-52.

68. Hudnall testified that a UIC applicant must publicly advertise a draft of the proposed permit when DEP determines that the draft meets legal requirements. The purpose is to provide the public, including any mineral owner, with the draft permit so that the public may submit comments or request a public hearing before final issuance of the permit. Tr. at 253-55.

69. DEP prepares the advertisement that the applicant must advertise in the paper with the highest reader rate in the county where the activity is located. Tr. at 253-54.
70. Here, AMBIT advertised the draft Permit in the Fairmont Times West Virginia. CR at 48. The advertisement advertises a 30-day comment period for the draft permit. Tr. at 254. No comments were received. Tr. at 254-55, 257.

71. Hudnall testified that the advertisement met all legal requirements found in 47 CSR § 13-1 et seq. Tr. at 255.

72. Once again, Hudnall testified that he communicated with Justin Smith and Jon Nagel of ACNR in February 2020 while the application was still being reviewed and accomplishing notice in fact. See Appellee Exhibits #3 and 11; Tr. at 259ff. Further, Hudnall testified that Jon Nagel telephoned him specifically regarding the proposed injection by AMBIT into the Joanne mine void. Tr. at 261.

73. Hudnall confirmed, however, that actual notice was achieved through Messrs. Smith and Nagel. Tr. at 259.

74. The applicant is also required to notify MSHA of its application. Tr. at 256-57. Hudnall testified that AMBIT’s application provided that MSHA had been notified. See Appellant’s Exhibit #8.

75. While MSHA does not “approve” the application, Hudnall testified that he spoke with Jim Toothman of MSHA who relayed that MSHA did not believe that the issuance of the permit would not have any health and safety impact on ACNR’s mines. Tr. at 255.

76. Upon cross-examination, Hudnall testified that DEP employee Jeff Parsons actually stamps the permit for Harold Ward, acting Director of Mining and Reclamation. Tr. at 267. Parsons and Hudnall spoke about the Paw Paw Siphon, as Parsons has historical knowledge about how it operates. Tr. at 268.
77. Upon cross-examination, Hudnall agreed that WVDEP must find that an application is complete and accurate before a permit can be issued. Tr. at 269.

78. Upon cross-examination, Hudnall testified that the UIC permitting process does not require him to determine whether an applicant has any outstanding environmental compliance issues under an “Article 3” or surface-mining permit. Tr. at 271.

79. Upon cross-examination Hudnall testified that AMBIT’s application meets the standard for controlled flow as, should circumstances warrant, the injectate flow could be effectively diverted from the borehole. Tr. at 278.

80. During cross-examination, Hudnall was provided with West Virginia Code § 22-3-9 which provides, in pertinent part, that an applicant for an Article 3 permit must provide DEP with legal documents demonstrating a legal right to “enter and conduct” surface mining. Tr. at 275-76.

81. Hudnall testified that the UIC program does not require applicants to provide a current right to the property. Tr. at 276. Rather, if the applicant has a current Article 3 permit and an NPDES permit, then the UIC program can issue the permit as the applicant has the right to inject. Tr. at 276.

82. During cross-examination, Hudnall was asked about the difference between the previous amounts of injectate as provided in annual reports and the increased rates of injection in the application at issue. Tr. at 288-89. Hudnall testified that numbers in the application had to be increased to reflect reported flow as the number in the application originally were ‘report only” values. Tr. at 292.

83. In short, the prior application was based on “report only” values, but AMBIT’s current application as set forth in DEP’s 2018 revised form requires actual (measured) flow.
numbers. Tr. at 288. In practical terms, the approved amount of gpy increased from 31,000,000 to more than 100,000,000. Tr. at 289ff.

84. Hudnall testified that now that the UIC permit has a defined flow number such that flow in excess of that number would violate a permit condition. Tr. at 384-85.

85. During cross-examination, Hudnall was asked whether he agrees that the application incorrectly states that the AMBIT permit was not “updip” of other adjacent mine workings. Hudnall testified that that question was correctly answered by AMBIT since a large coal barrier separates the Joanne mine void from other “adjacent” mine workings. Tr. at 384. Hudnall testified that this was the way DEP reviewers interpreted the question. Tr. at 384. Hudnall testified that his understanding of ‘adjacent’ is directly next to, ‘right beside it.’ Tr. at 410.

86. During cross-examination, Hudnall was asked about the direction of injectate flow from the Joanne borehole. Specifically, he was asked to address the 2014 OSM report on where water from the Joanne borehole would migrate and that the borehole was updip from the Loveridge mine. Hudnall testified that was one variable to consider but that there were many other variables that supported AMBIT’s position that the injectate flowed toward the Paw Paw Siphon including that mining conditions can change drastically and that mapping contours are determined when a mine is being developed. Tr. at 325-26.

87. During cross-examination, Hudnall agreed that surface runoff generally cannot be a part of injectate unless it receives treatment. Hudnall clarified that the DEP allows the practice where it is impractical for the surface runoff to be separated. Tr. at 327.

88. Here, DEP was satisfied that separation was impractical. As noted above, the application states that as much as 20% of the total injectate may be surface runoff, but DEP did not place a limit on surface runoff in the Permit. Hudnall acknowledged that the addition of surface
runoff was a modification to the Permit. The runoff comes from the slope above the seep collection area. Tr. at 327-31.

89. Upon cross-examination, Hudnall testified that DEP did not approach ACNR about capacity for AMBIT’s injectate or any financial impact the injectate have for AMBIT. Tr. at 331. No legal support or other evidence was introduced relative to any basis for that inquiry nor for payments between/among commercial entities relative to the mine pool and injection well processes.

90. Upon cross-examination Hudnall was asked about AMBIT’s injecting stormwater under its 2014 Permit. While that may be a violation of that permit, Hudnall testified that was cured by the 2020 permit at issuing in this case that addresses stormwater runoff. Tr. at 335-36.

91. Upon cross-examination Hudnall was asked to address the injectate flow direction as set forth in AMBIT’s UIC application. Hudnall testified that he sent DEP Geologist Joshua Bonner a copy of the flow diagram that he had drafted (after speaking with ACNR’s Smith and Nagel), and the flow defined by the diagram became a part of AMBIT’s application as submitted by consultant Spencer. Tr. at 337.

92. Hudnall testified that Bonner agreed that the flow direction, i.e., toward the Paw Paw Siphon, was correct. Hudnall testified that in addition to speaking with Bonner, he reviewed the maps in the application to confirm the flow direction of the injectate. He also testified that water flow underground is very “unique” and in his experience that there was enough information for DEP to agree that the treatment scenario in the application was correct. Tr. at 340-41.

93. Hudnall testified that AMBIT’s statement in the application that alternative treatment was available, to-wit, the erection of temporary and long-term treatment at the Joanne site should it be necessary, meets DEP’s requirements of the UIC regulations. As an NPDES
permit was already in place, DEP did not require more detailed plans for the temporary and long-term treatment. Tr. at 350-51.

94. Hudnall confirmed that the historical flow numbers in AMBIT’s previous permit were “report-only” numbers meaning that the previous Permit had no flow rate limit contained within it. Tr. at 384. Thus, Hudnall testified that under DEP’s regulations, the flow rate as set forth in the previous permit, whatever it was, was not subject to a DEP enforcement action. Tr. at 384-85.

95. Upon cross-examination, Hudnall testified that he had not been provided any information that the injectate actually leaves the Joanne mine void. Tr. at 387. Moreover, based on his knowledge, it would be difficult for anyone to positively tell where the injectate would ultimately flow, but AMBIT’s application that it would go to Dogwood Lakes is feasible. Tr. at 387.

96. Upon cross-examination, Hudnall confirmed that when he contacted ACNR’s Justin Smith and Jon Nagel to discuss AMBIT’s application, he specifically told them that the injectate would migrate through the Joanne mine void and into the system that ultimately leads to the Paw Paw Siphon. Tr. at 389.

97. Upon cross-examination, Hudnall testified that no regulation exists relative to the cost of any treatment or where treatment was to be done, if necessary or who would pay for the treatment, if necessary. Tr. at 410-11.

98. Upon cross-examination, Hudnall testified that there were no active mines near the Joanne mine void; thus, the application was complete with regard to the question of adjacent mines being impacted by the granting of the Permit. Tr. at 413-14.
99. Lastly, Hudnall testified that the approved application meets all DEP permitting requirements. Tr. at 412.

100. Josh Bonner is employed as Geologist IV for the DEP. Bonner’s position is in Permitting, and he, inter alia, conducts review of active permit applications including UIC applications. Tr. at 415. Bonner also does “post-mining” underground assessments that include assessment of mine pool elevations. Tr. at 521.

101. Bonner holds a bachelor’s in science in Geology from West Virginia University. Tr. at 417.

102. Bonner was qualified as an expert and permitted to offer opinions in geology, hydrology and underground mines. Tr. at 420.

103. Bonner completed the Geologist’s portion of AMBIT’s UIC application titled DMR/UIC INSPECTOR-GEOLOGIST SIGNOFF FORM. See CR at 128; Tr. at 420.

104. Prior to completing the signoff form, Bonner was familiar with the 2014 OSM Report as well as having authored reports on the transference of water across internal barriers, which used pumping rates from the CONSOL mines to calculate estimates of horizontal hydraulic conductivity for the coal barriers between those mines and adjacent mines. Finally, he had ACNR’s pumping data in his possession. Tr. at 421ff.

105. The Signoff form requires Bonner to offer his professional opinion of five topics, to-wit, was AMBIT’s proposed injection site in the Joanne mine void likely to result: (1) in the migration of the mine pool water into underground water source(s), (2) in the migration of the mine pool water into active or abandoned mines above, below, or adjacent to the mine void, (3) in the breaching of the underground barriers, (4) migration of the mine pool water to the surface, and (5) in any other undesirable impact upon the environment or on human health. Tr. at 423.
106. Bonner answered each question in the negative and signed the form on March 6, 2020, as part of the UIC review process for AMBIT’s application. Tr. at 426.

107. Specifically, Bonner, in support of his professional opinions regarding question number one on the signoff form, testified that his review of the application, combined with his knowledge of the surrounding surface areas and underground mine workings, found no public water intakes that would be affected by the UIC application. Tr. at 423.

108. Bonner testified that he could have answered question number two regarding whether AMBIT’s injection resulted in the “migration of the mine pool water into active or abandoned mines above, below, or adjacent to the mine void” in the affirmative but that, had he done so, he would have written in the “Explanation” part of the signoff form that any migration would not be significant since any water migrating through the mine would have to pass through a “very significant coal barrier in the downdip direction between Joanne and any adjacent mining in the Marion County Mine.” Tr. at 423-24.

109. Bonner further clarified that it was his professional opinion that the existing coal barrier between the Joanne mine and the Marion County mine disqualified the latter as being truly “downdip” from Joanne as that termed is used in geology. The length of the coal barrier is an estimated 3400 feet. Tr. at 424-27.

110. Finally as to question number two on the Sign-off Form, he testified that he agreed with AMBIT’s characterization of the flow from the Joanne mine void as directing toward the Paw Paw Siphon. Tr. at 424.

111. Thus, Bonner would have signed off on the permit application as proper and lawful regardless of whether he had checked “yes” to question number two for the reasons stated above. Tr. at 425.
112. Regarding his negative findings for questions three, four and five, Bonner offered his professional opinion that he did not believe that the injection at Joanna would lead to breaching in any “catastrophic” nature, which he believes the question is referring to (as opposed to naturally occurring seepage) because the pool elevation has been stable. He does not believe that injection would cause the migration of the mine pool to the surface nor that the magnitude of the stated injection flow would have any “overall” impact on the mine pool. Tr. at 427.

113. Bonner further testified in support of his professional opinions that his review of the data including the 2014 OSM study found that the Joanne mine pool has been stable since 2014 at between 825 and 835 feet. During cross-examination, Bonner testified that the OSM report has been used for permitting actions by the DEP since its creation and that he was very familiar with its contents. Tr. at 429.

114. Bonner provided testimony regarding his interpretation of the data regarding where the injectate flows from the Joanne mine void, if it were to leave the mine void. See Appellee Exhibits #5 and #6; Tr. at 483-85

115. Appellee Exhibit #6 tracks three separate mine pool levels and was created with data provided by ACNR. The three mine pool levels were established at (1) the Carberry monitoring hole at the Idamay Mine, (2) the Penn overall monitoring point and (3) the Barrackville monitoring point in the Bethlehem #8 mine. The Penn overall monitoring point is the compliance point for the FMP. Tr. at 449ff.

116. Bonner’s review of the OSM data was that the introduction of the Paw Paw Siphon resulted in a drawdown at the Carberry monitoring point. Tr. at 444.

117. Bonner’s review also indicated that a series of interconnections (or “punch throughs") existed including one that connects CONSOL #38 and the Dakota mine, which are then
also affected by the drawdown at the Siphon (as shown in the Carberry monitoring point). Tr. at 447.

118. As the Carberry monitoring point is only approximately one mile from the AMBIT injection site, Bonner states that it remains “plausible” that the Joanne mine void is connected to the Paw Paw Siphon as set forth in AMBIT’s application. Upon cross-examination Bonner testified that since the flow path in the AMBIT application was plausible, he would have needed “significant evidence to the contrary” in order to alter his statements, and no such significant evidence was ever presented. Tr. at 451ff.

119. Bonner was asked to address Kilburg’s testimony that the injectate would have to flow “uphill” to ultimately reach the Paw Paw Siphon. He testified that it was not a case of water flowing directly uphill; rather, he believes that with the pool elevations in those areas significantly above the average coal seam height of 680 feet, that the areas are subject to pressered inflows from the interconnections of the mines and that this pressered head flow is the primary mover of water as opposed to underground structures. Tr. at 455.

120. The Paw Paw Siphon then is acting as an “artesian aquifer” discharging water up and over the mine barrier from the Dakota mine to the Jordan mine and then, ultimately, to the Paw Paw Siphon. Tr. at 456.

121. Bonner then testified that it was his opinion that the Joanne mine void has yet to reach its equilibrium pool elevation at this time but that he believes that it will at equilibrium be in concert with Bethlehem #44 and thus water migrating from the mine void will migrate to the Paw Paw Siphon. Tr. at 456.

122. Finally, Bonner testified that he is unaware of any study or report that definitively maps out the underground migration of the water in the area. Tr. at 459.
123. Upon cross-examination, Bonner testified that he believed that OSM’s explanation for mine flow water was “acceptable.” However, he clarified that predicting exact volumes of flow was “nearly impossible” and that even OSM stated in its report that their flow estimates were “upper” estimates. As a result, Bonner noted that OSM in its report noted reasonable estimates of output and flow direction (10 to 20 percent). Tr. at 478-80.

124. Upon cross-examination, Bonner stated that it was his professional opinion, based on his knowledge and experience, that the Carberry monitoring report “indicated the explanation of water management” as set forth in AMBIT’s application. He further testified that since this was “plausible” then that is sufficient for his review since no mapping exists of the area. Tr. at 483-84.

125. Upon cross-examination, Bonner testified that his primary role as a reviewer was to determine whether the receiving pools were managed so that no water would be released to surface or underground water sources. Here, Bonner determined that any water from the borehole was managed and would not escape whether that was from, ultimately the Paw Paw Siphon, or an intervening mine such as the CONSOL #9 or CONSOL #20 mines. Tr. at 513ff.

126. Bonner signed off on the application as compliant with West Virginia laws and regulations based on these findings. Tr. at 500.

127. Bonner testified that the Joanne mine void was rising about one foot a year while it seeks equilibrium but that he could not determine whether the pumping in the nearby CONSOL mines has any impact on the Joanne mine void since those mine voids are being dewatered without any apparent impact on the Joanne mine void. Tr. at 541.

128. Upon cross-examination, Bonner testified that the proposed 185 gallon (per minute) injectate flow would be “insignificant” as compared to the flow through the Paw Paw Siphon. Tr.
129. Upon cross-examination, Bonner testified that he drafted, in part, a Cumulative Hydrologic Impact Assessment (CHIA) for the Harrison County Coal Mine. The CHIA found that the water that left the Harrison County Coal Mine would ultimately lead to the Paw Paw Siphon after having passed through numerous mine voids including the Joanne mine void should ACNR discontinue pumping at CONSOL #9 and CONSOL #20. Tr. at 490-91.

130. Upon cross-examination, Bonner testified that he has provided training on geohydrology, mine pool assessment and post-underground mining assessment that included a discussion on the 3400’ coal barrier to the west of the Joanne mine void and the 3000-foot barrier between Joanne and Jameson (to the north), Four States (to the South) and Idamay (to the east) all of which influence underground flow due to possible interconnections and fractures. Tr. at 521.

131. Upon cross-examination, Bonner agreed that the flow of underground water is a complicated process shaped by numerous factors including the interplay of liquids, solids and gases and mechanical, thermal, chemical and hydrologic processes as well as dissimilar coal barriers that are in place. Tr. at 532.

132. Moreover, the direction of flow of underground water is based on assumptions and estimates that are not true for all underground systems. In this case, the OSM Report uses what Bonner terms a “big” assumption that vertical infiltration is not a significant input into the receiving mine voids. Thus, because of this assumption, OSM had to overestimate the flow across the barriers to match the flow rates of the pumping rates. Tr. at 533.

133. Upon cross-examination, Bonner agreed that it was unlikely but “not impossible” that AMBIT’s injectate never leaves the Joanne mine void. He did testify that at least some of the injectate never leaves the mine void since its level continues to rise. Tr. at 536.
134. Intervenor called to the stand its consultant who was primary on researching, writing and submitting the UIC permit application, John Robert Spencer, Jr. Tr. at 563.

135. Spencer has a bachelor’s and master’s degrees in mineral processing engineering from West Virginia University. Tr. at 563. He is familiar with West Virginia State Regulations and with state law on underground injection wells. Tr. at 566.

136. After an extensive career in the coal industry, Spencer transitioned to consulting with a company called Potesta and then started his own company, ARM Services, LLC. Tr. at 563. From 1995 to the present, the majority of Spencer’s professional time has been spent with permitting. Tr. at 565. He has prepared, all totaled, several hundred permits, including new operations, amendments, modifications, IBRs and so forth. Tr. at 566.

137. This is the first challenge to a permit Spencer has prepared. Tr. at 566.

138. In preparing a permit, Spencer starts by gathering all of the information including any past permits, discussing with the permitholder all of the information regarding the permit, gathering what he needs from the permitholder, consulting with outside sources as indicated and/or with DEP. Tr. at 568.

139. Spencer testified that the flow diagrams in the application reflect what he is confident is direction of flow; he received them from Bob Hudnall at DEP. Tr. at 569. Specifically, Spencer referenced an email he received on February 3, 2020, forwarding to him communications between two representatives of [then] Murray, with DEP’s geologist Josh Bonner, and the inspector for the Joanne parcel. Tr. at 571-72.

140. Spencer understood from the email that Hudnall discussed direction of flow with Bonner and with Murray representatives Justin Smith and Jon Nagel. Tr. at 572. On this basis, Spencer believed he was proceeding based upon ‘very solid information.’ Tr. at 573. Nonetheless,
Spencer inquired further, approaching Chief Inspector Noonan at Philippi, who had been an inspector on the Joanne Parcel for some period. Tr. at 573. Noonan confirmed direction of flow and sent Spencer the office ‘cheat sheet’ to help explain the interconnections of the voids, pools. Tr. at 576.

141. Spencer’s inquiries led him to understand and believe that direction of flow was to the east, given the maps of mine barriers, the two prior applications that found likewise, and the consensus from three different sections of DEP and two representatives of Murray. Tr. at 586-77.

142. Spencer researched legal right to inject into the Joanna borehole by tracing from the original permit holder Eastern Associated Coal in 1983-85, then to North Marion Development, and onto AMBIT/Intervenor by lease. Tr. at 591-92; 631.

143. Spencer worked with AMBIT/Intervenor to determine the plan relative to if the maximum water level should be exceeded, like with the failure of the Paw Paw Siphon. Tr. at 593. Spencer testified to areas nearby on Permit Number 002183, which is available for erection of a short- or long-term treatment system. Tr. at 593.

144. Spencer worked with AMBIT to understand the seep collection system that was intended to reduce the amount of surface water runoff that would be injected. Nonetheless, it does not eliminate all runoff. In conversation with the company, the 80/20 injectate to surface water was determined. Tr. at 595-96, 597. See also Tr. at 636.

145. Spencer had to select Other or AMD sludge on the application. He selected AMD sludge on the basis that AMBIT advised him that the company had always been instructed to mark ‘sludge.’ Tr. at 597, 639. Spencer considered it as well, understood that it had qualities of AMD, and knew that it had some level of solids as well. Tr. at 598.
146. In preparing the application, Spencer became aware that the flow rate parameters had been changed from ‘report only’ to ‘measured.’ See also Tr. at 619-20. Therefore, where the prior submissions had been estimates, it was now necessary to list a maximum limit. Tr. at 599. Working from the annual reports, he focused on 180,000 gpm. Tr. at 600. That said, he is aware that current readings are hovering around 20 to 25 gallons (per minute). Tr. at 600. On cross examination, Spencer testified that he relied on the earlier numbers prior to checking annual reports – and revised accordingly. Tr. at 617.

147. Upon receiving this challenge to his work, Spencer set about determining what impact the Joanna injectate has on the FMP. Tr. at 608. Relying on data from the Mine Pool Atlas, Spencer determined the effect was infinitesimally small. Tr. at 603. On cross examination, Spencer testified to suppositions he made based on the Atlas’s tabular data (averages). Tr. at 640ff.

148. Spencer submitted the application and believes it to be true and accurate. Tr. at 611. Spencer worked with Intervenor/AMBIT to ensure that the submission was complete and accurate. Tr at 637-38. On the Board’s questioning, Spencer testified that, given the support he has for every decision he made relative to the permit application, he believes he would do it the same way, even in retrospect. Tr. at 651.

149. On cross examination, Spencer testified that AMBIT never applied for approval of the injection permit through its mining permit, 0-2183. Tr. at 613.

150. On cross, Spencer testified that he did not retain a geologist nor a hydrologist during the permitting process. Tr. at 623. He did not check with Murray directly (although he had the input through Hudnall). Tr. at 623-24. Spencer testified that, in order to prepare a permit application, you “need to have a fundamental knowledge but consult others when necessary.” Tr. at 646.
151. Spencer did not check with Murray on capacity. Tr. at 624-25. No legal support or other evidence was introduced relative to any basis for that inquiry nor for payments between/among commercial entities relative to the mine pool and injection well processes.

152. Spencer testified that, ‘for these purposes,’ no active mining was in the surrounding area and no active mining downdip from the Joanna mine void based largely on the sizeable coal barrier that limits or precludes flow toward ACNR’s operations. Tr. at 623, 628-29, 645. See also Tr. at 411. Further, Spencer testified that ACNR’s data agrees, as its CHIA prepared by Bonner and verified by Rakes demonstrates flow to the east once pumping and active operations cease. Tr. at 647.

153. Spencer testified that because Intervenor/AMBIT is not injecting into Dakota Mineworks, CONSOL #9 or CONSOL #20, it did not seek approval from those mine or mineral owners. Tr. at 634-35.

154. On the Board’s questioning, Spencer testified that, in his opinion, the water never leaves the Joanna mine void. Tr. at 649.

155. Intervenor AMBIT was represented at the evidentiary hearing by Herbert Richard Thompson. Tr. at 653. Thompson has worked for AMBIT since 1992 (absent a six-year stint elsewhere) and has worked in positions from fuel supervisor to, now, owners’ representative. Tr. at 653-54.

Thompson came to represent AMBIT before the Board based on the fact that, over the past 28 years, he has been almost entirely involved with fuel on sites including the Joanna parcel. Tr. at 659. He knows “that site intimately from where it was when [AMBIT] first got there to the way it looks today.” Tr. at 659. Also, his background in mining engineering gives him additional insights here. Tr. at 659-60.
156. Thompson has a bachelor’s degree in mining engineering from Pennsylvania State University and has backgrounds in mining, remediation and permitting oversight. Tr. at 654-55.

157. AMBIT owns the Grant Town Power Plant, which is specifically designed to burn waste coal. The process relies on burning limestone, which produces ash that has been recognized as a beneficial use byproduct. Tr. at 657.

158. The Joanne Parcel was one of two parcels leased to secure fuel reserves sufficient to satisfy a long-term power sales agreement (35 years). Tr. at 658. Joanna contains 3.5 million tons of waste coal. Tr. at 658. Unfortunately, none of the waste coal on the Joanna site is usable fuel. Tr. at 662.

159. After an overflow from a sedimentation pond, AMBIT worked to make the Joanna more efficient in terms of directing/handling surface water and acid mine drainage (AMD). Tr. 663. Prior to 1998, water that landed on the disturbed area reported to the sedimentation pond, with the overflow reporting to the borehole. Tr. at 664. Additionally, surface water came off of an embankment and into an open ditch that reported to the borehole. Tr. at 664.

160. Starting in 1996, AMBIT did four things to make the AMD/runoff on the Joanna more manageable. First, AMBIT installed and/or upgraded diversion ditches to carry water from the undisturbed wooded area away from the site collection and treatment systems. That water is not AMD, did not need treatment and just needed to be diverted. The ditches accomplished that. Tr. at 665.

161. Second, AMBIT reclaimed the gob pile by creating an ash cap using the beneficial use ash (highly alkaline), which was placed in two-foot lifts and compacted followed by topsoil and vegetation. Tr. at 665. This reduced the amount of water that was flowing and being collected by the erosion and sedimentation control structures within the permit and disturbed areas. Tr. at
162. Third, AMBIT converted the sedimentation pond into a treatment pond, also adding an NPDES outlet thus diverting those collected and treated waters away from the injection borehole of the UIC permit. Tr. at 666.

163. Fourth, AMBIT inserted a French drain system into the embankment to isolate and collect acid mine drainage seeps. Tr. at 667. This process helped reduce or eliminate surface water entering the borehole. Tr. at 669. In the application, Spencer worked to convey some of these efficiencies in terms of injectate and surface water curtailment. Tr. at 670.

164. After the appeal was filed, Thompson went to check injectate flow levels historically. Tr. 670-71. AMBIT has tried a variety of methods over time to accomplish these readings, including visual estimate when the permit was ‘report only.’ Tr. at 671. Currently, AMBIT is using a five-gallon bucket and a timed collection, which has proven workable, efficient. Tr. at 672.

165. Thompson testified to the company’s experience with treating AMD on the property, should it become necessary (e.g., Paw Paw Siphon failure). Tr. at 672-73. The company is treating the AMD at the Rachel site, which is across the state road from the Joanna, through two collection and treatment ponds. Tr. at 673.

166. Thompson explained legal right to inject through the lease with Horizon which requires AMBIT to perform all actions incidental to the reclamation of the Joanne parcel.’ Tr. at 675, citing section 3 of the lease. Thompson also pointed to section 9 of the lease, which requires landlord to deliver the site in full compliance with law and requires AMBIT to maintain the permits. Tr. at 676.
167. Also as part of the appeal process, Thompson has read the OSM report, the Mine Pool Atlas, a related article located by John Spencer, and gathered the information he could relative to direction of flow. Tr. at 676-77. Thompson determined that, in his review and understanding of materials, the injectate flows toward Dogwood Lakes, based in large part on the sizeable coal barrier to the west. Tr. at 676-77. Thompson further cites testimony provided by Bonner relative to mine pool daylighting in the Mon River, which further supports flow to the east. Tr. at 681, 683.

168. Because AMBIT leases the Joanne parcel and because it has a borehole and permit in place, AMBIT has not constructed the type of process that it has in place on the Rachel site, which it owns. Tr. 684-85. AMBIT has invested more than $500,000 in improving the efficiency of the Joanna to date, and the conversion to treatment ponds would cost several hundred thousand more. Tr. at 686, 695, 700-01.

169. On cross, Thompson testified about injectate traveling through other mine voids, but no authority was provided to him by counsel relative to those inquiries. Tr. at 690-91.

170. AMBIT inherited the Joanne parcel and its AMD issues as part of a business relationship. While AMBIT is ‘saddled’ with this site, it’s all part of the deal. Tr. at 695. Thompson testified that he looks at ACNR and understands that they purchased the CONSOL assets, taking on the responsibility for the mine pool at the same time with eyes wide open. Tr. 695-96.

VII. Conclusions of Law

1. On June 12, 2020, DEP, by and through Harold Ward, Director, Division of Mining and Reclamation, issued Underground Injection Control (UIC) Permit No. 0394-01-049, Modification No. 1, to AMBIT.

2. The permit authorized AMBIT to operate a Class 5 Type 5X13 injection well.

3. Generally, a Class 5 injection well “inject[s] non-hazardous fluids into strata that contain underground sources of drinking water.” 47 CSR 13, § 12.1.
4. Permit Modification No. 1 further authorized AMBIT to modify page 11 of the reissuance #3, approved on May 29, 2020, and waived UIC Groundwater Monitoring requirements in conjunction with the previously approved Article 3 Groundwater Monitoring Waiver and the associated mine pool management practices.

5. Permit Modification No. 1 further found that the receiving mine pool’s elevation of 829.92 feet varied due to the hydrologic connection with adjacent mines operated by Murray American Energy and directed that the mine pool level would be monitored quarterly at the Rachael Monitoring Well (Joanne Mine) and the Carberry Monitoring Well (Idamay Mine) with reporting to DEP.

6. Permit Modification No. 1 was issued in compliance with the provisions of West Virginia Code, Chapter 22, Article 11 (Water Pollution Control Act), Section 8, Chapter 22, Article 12 (Groundwater Protection Act) and Legislative Rules, Title 47, Series 13 (Underground Injection Control) Sections 12 and 13.

7. Permit Modification No. 1 followed DEP’s issuance of Permit No. 1 on May 29, 2020. Permit No. 1 granted AMBIT an “area permit” to inject AMD Treatment Sludge through 2 Class 5, Type 5X13 injection wells into the subsurface located in Marion County. The “Construction Requirements” of the Permit noted the injection point was the Joanne mine and required grouting from the injection point to the receiving void (styled the “Joanne Mine Void” in the application).

8. Neither WVDEP nor the West Virginia Legislature has not enacted any statute or governing regulation that requires DEP to evaluate whether a UIC applicant has a legal right to inject its injectate into a mine void that may become hydraulically connected with an adjacent mine void or voids nor to enforce any applications on that issue.
9. West Virginia law, 47 CSR 13.13.28 requires that all persons, including applicants, who believe any condition of a draft permit is inappropriate or that the Director tentative decision to prepare a draft permit is inappropriate, shall raise all reasonably ascertainable issues and submit all reasonably available arguments and factual grounds supporting their position, including all supporting material, by the close of the public comment period. All supporting materials shall be included in full and not be incorporated by reference, unless they are already part of the administrative record in the same proceeding, or consist of State or Federal statutes and rules, documents of general applicability, or other generally available reference materials. Submitters of comments shall make supporting material not already included in the administrative record available to the State as directed by the Director.

ACNR failed to participate in the notice and comment process, although it had actual knowledge of the ongoing process.

10. West Virginia Code § 22B-1-7(c) provides that an appeal by any “person subject to an order, permit or official action” by the DEP must be perfected within (30) thirty days.

11. Whereas Appellant ACNR did not participate in the comment process despite actual notice, it did timely filed an appeal with the Environmental Quality Board (EQB) regarding DEP’s issuance of UIC Permit No. 0394-01-049.

12. Thereafter, AMBIT, the permit holder, was granted Intervenor status in the matter.


14. “After such hearing” the EQB “shall make and enter a written order affirming, modifying or vacating the order, permit or official action of the chief or secretary, or shall make and enter such order as the chief or secretary should have entered, or shall make and enter an order approving or modifying the terms and conditions of any permit issued.” West Virginia Code § 22B-1-7(g)(1).
15. "Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law power but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 2, Mountaineer Disposal Serv., Inc. v. Dyer, 156 W.Va. 766, 197 S.E.2d 111 (1973) (emphasis added). See also State ex rel. Hoover v. Berger, 199 W.Va. 12, 19, 483 S.E.2d 12, 19 (1996) ("An administrative agency . . . has no greater authority than conferred under the governing statutes").

16. "[S]tanding . . . is comprised of three elements. First, the party . . . [attempting to establish standing] must have suffered an "injury-in-fact" - - an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection [between] the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision. Coleman v. Sopher, 194 W. Va. 90, 95 n.6 459 S.E.2d 367, 372 n.6 (1995) (emphasis added). Accord Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351, 364 (1992): Valley Forge College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472, 102 S. Ct. 752, 758, 70 L. Ed. 2d 700, 709 (1982)."

17. 47 CSR 13, § 13.1 through – 32 “Injection Well Permitting Program” provides the legislative framework for the DEP’s review of AMBIT’s UIC permit application.

18. 47 CSR 13, § 13.1 and 13.1.a. provides a general prohibition against the movement of fluid into underground sources of drinking water unless authorized by DEP permit or rule.

19. The Fairmont Mine Pool (FMP) is the informal name for a flooded complex of underground mines in Marion County, West Virginia. Water levels in the FMP are controlled by
ground water outflow and withdrawal which offsets subsurface inflow and infiltration. Appellee Exhibit #4, Final Report, Fairmont, West Virginia Mine-pool at Abstract.

20. Some of the water in the north-end of the FMP is removed by a siphon and pump system (the “Paw Paw Siphon”) and transferred to the Morgantown Mine Pool (MMP) for treatment facility located farther north. Id.

21. The AMBIT UIC permit application proposed to inject acid mine drainage sludge into a borehole associated with the Joanne Mine Void.

22. AMBIT is the holder of a surface mining permit associated with the Joanne Mine and the monitoring point associated with the Joanne mine is the Rachel monitoring point.

23. The AMBIT UIC permit application stated that the injectate would be comprised of surface runoff (20%) and course runoff from the Joanne Course Runoff Site (80%). The Joanne Course Runoff Site is permitted by AMBIT under Permit No. O-0021-83.

24. The AMBIT UIC permit application stated that injectate into the Joanne Mine Void will flow, should it leave the mine void, ultimately to the Paw Paw Siphon.

25. The AMBIT UIC application provided a map showing that the injectate would flow, if it left the Joanne Mine Void, from the Joanne borehole to Bethlehem #44 (also called “Idamay #44”) then to Bethlehem #41 (also called “Barrackville”), then to the Dakota deep mine and then to the Paw Paw Siphon, as each mine is hydraulically connected.

26. WVDEP, through its Office of Mining and Reclamation, is the agency charged with determining whether AMBIT’s application was compliant with West Virginia laws and regulations regarding the issuance of a UIC permit.

27. WVDEP reviewed AMBIT’s area permit application pursuant to 47 CFR 13, et seq.
28. Specifically, 47 CFR § 13.4 governs the UIC application process for Area Permits. Here, 47 CFR § 13.413.4.b. provides as follows:

Area permits shall specify:

13.4.b.1. The area within which underground injections are authorized; and

13.4.b.2. The requirements for construction, monitoring, reporting, operation, and abandonment, for all wells authorized by the permit.

29. Thus, WVDEP’s review of the UIC permit extends only to those parameters. See, e.g., syl. pt. 2, Mountaineer Disposal Serv., Inc. v. Dyer, 156 W.Va. 766, 197 S.E.2d 111 (1973) (emphasis added). See also State ex rel. Hoover v. Berger, 199 W.Va. 12, 19, 483 S.E.2d 12, 19 (1996) ("An administrative agency . . . has no greater authority than conferred under the governing statutes"). That is, WVDEP’s review of AMBIT’s UIC permit application does not extend to the factors consistent with review of an Article 3 or surface-mining permit.

30. ACNR offered factual and expert testimony regarding the flow of injectate from the Joanne borehole. ACNR posits that the injectate flow does not flow toward the Paw Paw Siphon, rather, the injectate flows toward in another direction, to-wit, toward ACNR’s Reverse Osmosis treatment plant at Dent’s Run. In any event, since ACNR also treats water associated with the Paw Paw Siphon, ACNR asserted that the DEP should have determined whether a legal right existed for AMBIT to injectate that ultimately was treated by ACNR.

31. ACNR seeks reimbursement for its treatment of fluids at either or both its reverse osmosis plant or at Dogwood Lakes, although ACNR provides no legal authority for that compensation.

32. WVDEP offered expert testimony that, while unlikely, the injectate may stay in the Joanne Mine Void and never reach either ACNR treatment facility, and no evidence was adduced
by any party that it actually leaves the Mine Void. DEP Geologist Joshua Bonner testified that it was more likely that the injectate would flow in the direction in the Paw Paw Siphon, as set forth in AMBIT’s UIC application.

33. Lastly, AMBIT provided testimony in support of its position as to the ultimate question of where the flow may be treated and other features of its application, including the planned workaround, should the Siphon fail.

34. However, while the Board understands that the question of the underground geology and flow of injectate is a complicated question that scientific minds may differ, the Board finds that the answer to that question is not before the Board and is not capable of resolution, given the need for extensive technical analysis of the mine pool system generally, which is not before this Court and by logical necessity would involve parties not before this Board. See Wachter v. Dostert, 172 W. Va. 93, 303 S.E.2d 731 (1983), regarding the effect of failure to join indispensable parties as undercutting efforts to reach global, lasting resolution. The Board FINDS that the evidence on the direction of flow and the final destination of injectate in the mine pool system generally is equivocal, with all parties introducing compelling but disputed evidence that evades final conclusion without additional technical review and study unavailable here or through this process.

35. The governing statute provides that the Board can only make decisions that the Director “should have made.” West Virginia Code § 22B-1-7(g)(1).

36. West Virginia has not enacted any statute or governing regulation that requires the Director to evaluate the post-injectate flow to determine whether a third-party may be disadvantaged by the injectate. Rather, the governing regulations clearly demonstrate that the WVDEP’s evaluation (and subsequent approval or disapproval) is based on the merits of the
individualized applicant and borehole. Should the Legislature have determined that such interest should have been protected it could have enacted a provision to do so. This Board simply does not have the authority to examine issues that the DEP cannot. *Id.*, syl. pt. 2, *Mountaineer Disposal Serv., Inc. v. Dyer*, 156 W.Va. 766, 197 S.E.2d 111 (1973).

37. “[S]tanding . . . is comprised of three elements. First, the party . . . [attempting to establish standing] must have suffered an “injury-in-fact” - - an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. . . .” *Coleman v. Sopher*, 194 W. Va. 90, 95 n.6 459 S.E.2d 367, 372 n.6 (1995) (emphasis added).

38. In this case, ACNR is stating that it is suffered an “injury-in-fact” since, allegedly, it bears the cost of treating AMBIT’s injectate. Even assuming *arguendo* that such claim is valid, WVDEP (and, by extension, this Board) have no authority to evaluate the claim and render a decision.

39. Accordingly, ACNR has no standing to pursue this appeal.

40. Given the failure to join indispensable parties to any reconsideration of the mine pool process (as recommended by this Board), any resolution – even if it were appropriate here – would be short lived and subject to challenge, until such time as the process itself if reconsidered and addressed globally, as set forth herein.

WHEREFORE, the Appeal by ACNR of the decision by WVDEP to grant Underground Injection Control (UIC) Permit No. 0394-01-049, Modification No. 1, is DISMISSED with PREJUDICE for lack of standing.
The objections and exceptions of any aggrieved party are noted and preserved.

It is so ORDERED and ENTERED this ____ day of ________, 2021.

Environmental Quality Board

Prepared and submitted by:

D. Edward Snyder, Chairman

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BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

MURRAY AMERICAN ENERGY, INC.,
   Appellant,

v.                                            Appeal No. 20-07-EQB

HAROLD D. WARD, DIRECTOR,
DIVISION OF MINING AND RECLAMATION,
DEPUTY SECRETARY FOR OPERATIONS,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
   Appellee,

v.

AMERICAN BITUMINOUS POWER
PARTNERS, L.P.,
   Intervenor.

CERTIFICATE OF SERVICE

I hereby certify that I, Roberta F. Green/Christopher D. Negley, have this day, the 24th day
of March, 2021, served a true copy of the foregoing AMBIT'S PROPOSED FINDINGS OF
FACT, CONCLUSIONS OF LAW via U.S. first class mail (courtesy copy via email) to the
following:

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