

February 10, 2021

Via Electronic Filing

Ms. Rosemary Chiavetta, Esquire
Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: Docket No. C-2021-3023766
G.A. Homes, Inc. v. Aqua Pennsylvania Wastewater, Inc.
Preliminary Objections of Aqua**

Dear Secretary Chiavetta:

Attached for filing is the Preliminary Objections of Aqua Pennsylvania Wastewater, Inc. to the Complaint filed by G.A. Homes, Inc. in the above captioned proceedings.

A copy of the Preliminary Objections has been provided to the Complainant in the manner indicated on the attached Certificate of Service.

If there are any questions, please do not hesitate to contact me.

Very truly yours,

Reger Rizzo & Darnall LLP



Margaret A. Morris

MAM/co
Enclosures

cc: Mary McFall Hopper, Esquire, Aqua Pennsylvania, Inc. [w/encl.]
Ronnie J. Fischer, Esquire [w/encl.]

**Re: Docket No. C-2021-3023766
G.A. Homes, Inc. v. Aqua Pennsylvania Wastewater, Inc.
Preliminary Objections of Aqua**

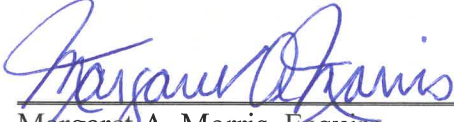
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the following person(s), in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Via Electronic Mail

Ronnie J. Fischer, Esquire
ronnie_fischer@hotmail.com

Dated: February 10, 2021


Margaret A. Morris, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

G.A. HOMES, INC.

v.

**AQUA PENNSYLVANIA
WASTEWATER, INC.**

:
:
:
:
:
:

Docket No. C-2021-3023766

NOTICE TO PLEAD

Pursuant to 52 Pa. Code § 5.63, you are hereby notified that if you do not file a written response answering the enclosed Preliminary Objections of Aqua Pennsylvania Wastewater, Inc. in the Preliminary Objections may be deemed to be true, whereby requiring no other proof. All pleadings, such as a Reply to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for Aqua Pennsylvania Wastewater, Inc., Margaret A. Morris, Esq., and where applicable, the Administrative Law Judge presiding over the issue.

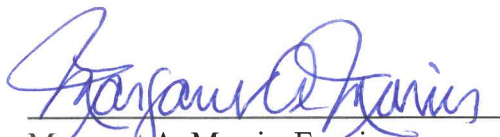
File with:

Rosemary Chiavetta, Esquire
Secretary
Pennsylvania Public Utility Commission
rchiavetta@pa.gov

With a copy to:

Margaret A. Morris, Esquire
Reger Rizzo & Darnall LLP
mmorris@regerlaw.com

Date: February 10, 2021



Margaret A. Morris, Esquire
Attorney ID No. 75048
Reger Rizzo & Darnall LLP
Cira Centre, 13th Floor
2929 Arch Street
Philadelphia, PA 19104
(215) 495-6524 (tel.)
mmorris@regerlaw.com

Counsel for Aqua Pennsylvania Wastewater, Inc.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

G.A. HOMES, INC.	:	
	:	
v.	:	Docket No: C-2021-3023766
	:	
AQUA PENNSYLVANIA	:	
WASTEWATER, INC.	:	

**PRELIMINARY OBJECTIONS OF
AQUA PENNSYLVANIA WASTEWATER, INC.
TO THE FORMAL COMPLAINT OF G.A. HOMES, INC.**

NOW COMES Aqua Pennsylvania Wastewater, Inc. (Aqua or Company), by and through its attorneys, Reger Rizzo & Darnall LLP, pursuant to 52 Pa. Code § 5.101, hereby files its Preliminary Objection to the Formal Complaint of G. A. Homes, Inc. (Complainant) filed in the above-captioned proceeding. Aqua avers the subject of the Formal Complaint is beyond the jurisdiction of the Pennsylvania Public Utility Commission (Commission) who is without authorization to grant the Complainant’s request, i.e. order Aqua to approve the outstanding applications for water and sewer connections arguing the connections are permitted under the regulations promulgated by the Pennsylvania Department of Environmental Protection (DEP). Aqua avers that any determination that a requested connection is an exception to the DEP ban must be determined by DEP, not the Commission. The Formal Complaint includes impertinent matter in its requested relief. Therefore, Aqua moves to have the Formal Complaint dismissed in its entirety.

In support of its preliminary objections, Aqua states as follows:

1. The Complainant filed a Formal Complaint averring that the Company improperly denied water and sewer connections for properties located in its Honesdale Division.

2. In an Answer and New Matter being served contemporaneously with this Preliminary Objection, Aqua has denied the material allegations in the Formal Complaint.

3. Aqua avers that it maintains the Masthope Wastewater Treatment Facility (Treatment Facility) that serves its Honesdale Division. On December 3, 2020, Aqua met with representatives of the Pennsylvania Department of Environmental Protection (DEP) to discuss the hydraulic or organic overload at the Treatment Facility and was verbally notified by DEP that a moratorium of sewer service connections was to be issued. The DEP moratorium was memorialized in a letter, dated December 11, 2020, which also advised the Company that it was required to comply with DEP regulations, 25 Pa. Code § 94.21 and noted the standards for granting exception contained in Sections 94.55-94.57. DEP regulations¹ specifically state that no exception shall be considered granted until advised in writing by DEP. A copy of the DEP letter, dated December 11, 2020, is provided as Attachment 1.

4. DEP regulations² specifically state that an objective of DEP is to limit additional connections on an overloaded system. The Complainant specifically alleges that certain applications for connection meet DEP's requirement, under 25 Pa. Code § 94.56, for an exception of the connection ban. The Company avers that DEP regulations specifically prohibit any new connection while the ban is in effect.³ DEP regulations⁴ provide for certain exceptions to a connection ban. The Company specifically avers that nine of the applications do not qualify

¹ 25 Pa. Code § 94.51.

² 25 Pa. Code 94.2(2).

³ 25 Pa. Code § 94.21(a).

⁴ 25 Pa. Code § § 94.51-94.57.

as an exception under DEP regulations. To the extent, the Complainant disagrees with the Company's position regarding the applicability of the DEP exception, a complaint should be filed with DEP, not the Commission. The Company avers that it lacks the authority to approve an application for a new sewer connection without DEP written approval.

5. The Company avers that the Commission lacks subject matter jurisdiction to entertain and resolve a dispute regarding the interpretation and enforcement of DEP regulations related to the connection ban. As a creature of legislation, the Commission possesses only the authority the State Legislature has specifically granted to it in the Code, 66 Pa.C.S. §§ 101, *et seq.* The Commission's jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 477 Pa. 1, 383 A.2d 791 (1977); *Allegheny County Port Authority v. Pa. P.U.C.*, 427 Pa. 562, 237 A.2d 602 (1967); *Behrend v. Bell of Pa.*, 257 Pa. Superior Ct. 35, 390 A.2d 233 (1978); *Harrisburg Taxicab & Baggage Co. v. Pa. P.U.C.*, 786 A.2d 288 (Pa. Cmwlth. 2001); and *City of Erie v. Pa. Electric Co.*, 383 A.2d 575 (Pa. Cmwlth. 1978).

6. It is well settled that the Commission has only the powers, and can only consider such matters, as are expressly, or by necessary implication given to it by the legislature. *Behrend v. Bell Telephone Co.*, 363 A.2d 1152 (Pa, Super 1976); *Brockway Glass Company, Inc. v. Aqua Power Co.*, 54 Pa P.U.C. 509 (1980); *Bones v. Bates Taxi, Inc.*, 51 Pa, P.U.C. 346 (1977). The Pennsylvania Public Utility Code, 66 Pa.C.S. § 101, *et seq.* (the Code), gives the Commission supervisory and regulatory power over the rates, service and facilities of public utilities. *Brockway Glass* at 514.

7. Section 501 of the Code, 66 Pa.C.S. § 501, the Commission must “enforce, execute and carry out, by **its** regulations, orders or otherwise” all the provisions of the Code. Section 701 of the Code,⁵ allows any person, having an interest in the subject matter, to file a formal complaint in writing with the Commission setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law **which the Commission has jurisdiction to administer**. *See also*, 52 Pa. Code § 5.21(a). The Company avers that the Commission lacks subject matter jurisdiction to entertain and resolve a dispute involving DEP regulations.

8. The Commission and DEP have concurrent jurisdiction over the service and facilities of the Company. *Pickford et al v PAWC*, Docket Nos. C-20078029 *et al*, (Opinion and Order entered March 20, 2018). The Commission has regulatory authority under 66 Pa.C.S. § 1501 over the quality of public utilities’ facilities and services, whereas the DEP has primary jurisdiction over the permitting and compliance monitoring activities under 25 Pa. Code 91.1 *et seq.* and Pennsylvania's Clean Streams Law for waste treatment facilities.

9. The Company avers the Commission lacks jurisdiction to entertain a complaint that alleges the Company improperly denied a connection application inconsistent with DEP regulations. Such authority to interpret and enforce its regulations lies exclusively with DEP. *McGrath Constr., Inc. v Upper Saucon Twp. Bd. Of Supervisors*, 952 A.2d 718 (Commw. Court 2008) (DEP has exclusive jurisdiction over issues involving the moratorium on sewer connections due to overloading).

10. The Formal Complaint seeks an order from the Commission requesting that it make a determination that the pending applications qualify as an exception under DEP regulations to the connection ban. Clearly, DEP, not the Commission, is the administrative

⁵ 66 Pa.C.S. § 701.

agency that has the authority to interpret its own lawfully promulgated regulations. *McGrath Constr., Inc., supra.* Furthermore, only DEP can provide the written confirmation of the exception that would permit the Company to connect the service. 25 Pa. Code § 94.51. Absent such a written confirmation, the Commission does not have the jurisdiction and cannot order the Company to make any connection in violation of DEP's connection ban.

11. DEP, not the Commission, is the administrative agency that has authority to interpret its own lawfully promulgated regulations and determine if the applications meet the requirement for an exception to the DEP connection ban. *McGrath Constr., supra.*

12. The sole requested relief by the Complainant, order the Company to approve the outstanding applications for connections, without DEP written approval, is not recoverable in the cause of action before this Commission, as the Commission is without authorization to enforce or interpret DEP regulations. *McGrath Constr., supra.* The request for relief is irrelevant to the instant cause of action and therefore an "impertinent matter" within the use and meaning of 52 Pa. Code § 5.101 (a)(2).

13. Since the sole issue in the Formal Complaint is the request for an enforcement and interpretation of DEP regulations, the Formal Complaint should be stricken in its entirety pursuant to Pa. Code §5.101(a)(2).

WHEREFORE, Respondent, Aqua Pennsylvania Wastewater, Inc., requests that the Formal Complaint filed by G.A. Homes, Inc. be dismissed with prejudice or denied in its entirety for lack of subject matter jurisdiction.

Respectfully submitted,

Date: February 10, 2021


Margaret A. Morris, Esq.
Attorney ID No. 75048
Reger Rizzo & Darnall LLP
Cira Centre, 13th Floor
2929 Arch Street
Philadelphia, PA 19104
(215) 495-6524 tel.
mmorris@regerlaw.com

Counsel for Aqua Pennsylvania Wastewater, Inc.

Docket No. C-2021-3023766
G.A. Homes, Inc. v. Aqua Pennsylvania Wastewater, Inc.

Attachment 1

Pennsylvania Department of Environmental Protection Letter
Dated: December 11, 2020



December 11, 2020

CERTIFIED MAIL NO. 7017 2400 0000 0920 0561

Mr. Todd Duerr, Vice-President of Production
Aqua Pennsylvania Wastewater Inc.
762 Lancaster Pike
Bryn Mawr, PA 19010

CERTIFIED MAIL NO. 7017 2400 0000 0920 0578

Ms. Denise Steuhl, Secretary
Lackawaxen Township
169 Urban Road
Hawley, PA 18428

Re: 2019 Municipal Wasteload Management Report
Masthope Community Development
Lackawaxen Township, Pike County

Dear Messrs. Soltis and Steuhl:

The Department has completed its review of the Aqua Pennsylvania Wastewater Inc. - Masthope Community Development 2019 Municipal Wasteload Management Annual Report (Report), dated March 30, 2020 and submitted pursuant to Chapter 94 of the Department of Environmental Protection's (DEP) Rules and Regulations. The report indicates your wastewater treatment facility is hydraulically overloaded. It will be necessary for Aqua Pennsylvania Wastewater Inc., as permittee, to comply with Section 94.21 of Chapter 94. Specifically, Section 94.21(a), 25 Pa. Code § 94.21(a), provides, in relevant part, that the permittee of a hydraulically overloaded system shall:

1. Prohibit new connections to the overloaded sewerage facilities except as approved by the permittee under the standards for granting exceptions contained in Sections 94.55--94.57 (relating to building permit issued prior to ban, replacement of a discharge, and other exceptions). No building permit may be issued by a governmental entity (Lackawaxen Township) which may result in a connection to overloaded sewerage facilities or increase the load to those sewerage facilities from an existing connection. The permittee shall retain records of exceptions granted and make the records available to the Department upon request. Requests for exceptions shall be made by a property owner to Aqua Pennsylvania Wastewater Inc. The request shall be reviewed by Aqua Pennsylvania Wastewater Inc. to determine if the proposed connection qualifies as an exception to the connection prohibition. If Aqua Pennsylvania Wastewater Inc. determines that the proposed connection qualifies as an

exception to the connection prohibition, Aqua Pennsylvania Wastewater Inc. shall forward the request to the Department for review and concurrence. No connection or building permit shall be issued for the proposed connection or the structure that the connection will serve until such time as Aqua Pennsylvania Wastewater Inc. receives the Department's written concurrence on the exception request.

2. Immediately begin work for the planning, design, financing, construction and operation of the sewerage facilities that may be necessary to provide required capacities to meet anticipated demands for a reasonable time in the future and resulting in a project that is consistent with the applicable official plans approved under the Pennsylvania Sewage Facilities Act (35 P.S. Sections 750.1--750.20) and the regulations thereunder in Chapter 71 (relating to administration of the sewage facilities planning program) and consistent with the requirements of the Department and the federal government regarding areawide planning and sewerage facilities.
3. Submit to the Regional Office, for the review and approval of the Department, a written Corrective Action Plan (CAP) within 90 days of receipt of notification of the Department's determination of overload, setting forth the actions to be taken to reduce the overload and to provide the needed additional capacity. The written CAP shall include, but not be limited to, limitations on and a program for control of new connections to the overloaded sewerage facilities and a schedule showing the dates each step toward compliance with paragraph 2 shall be completed.

The CAP needs to be submitted to the Department as a Plan Update Revision to the Official Sewage Facilities Plans of Lackawaxen Township. Submission of the CAP must be in accordance with Section 71.31(a)-(f) of the Department's regulations (25 Pa. Code § 71.31(a)-(f)). Please review the requirements of these regulations and corresponding guidance found in Items 1 through 8 of the Administrative Completeness Checklist which is part of the Act 537 Plan Content and Environmental Assessment Checklist found in Appendix I of the Department's publication, A Guide for Preparing Act 537 Update Revisions. A copy of the regulations and guidance materials are included for your use.

Upon receipt and approval of an acceptable CAP, submitted in accordance with Item No. 3 above, the Department may modify or lift the requirement of this regulation directing the permittee to prohibit new connections and the issuance of building permits. In determining whether the requirement to prohibit new connections shall be modified or lifted, the Department will consider the extent to which the permittee plans to limit new connections; timing for provisions of additional capacity and reduction of the existing overload; and the impact of the overload on treatment plant effluent quality, water quality degradation and public health.

December 11, 2020

Should you have any questions concerning this correspondence or the CAP, please contact Mr. Scott Novatnak, of my staff, at (570) 826-2337.

Sincerely,



Bharat Patel P.E.
Environmental Program Manager
Clean Water Program

Enclosures: - Section 71.31(a)-(f) of the Department's regulations (25 Pa. Code § 71.31(a)-(f))
- Act 537 Plan Content and Environmental Assessment Checklist
- Minimum Requirements of a Wasteload Management Corrective Action Plan and Schedule

cc: Mr. Bryon Killian/Entech Engineering Inc. (w/Enclosures)
Mr. Karl Stephens, Northeast Area Manager/Aqua Pennsylvania Wastewater Inc. (w/Enclosures)
Mr. Steve Clark, Greater PA Director of Operations/Aqua Pennsylvania Wastewater Inc. (w/Enclosures)
Mr. Paul Brindle, Honesdale Field Supervisor/Aqua Pennsylvania Wastewater Inc. (w/Enclosures)
Mr. Richard Tussel, Building Inspector/Lackawaxen Township (w/Enclosures)
Mr. Ralf Graf, Secretary/Lackawaxen Township Planning Commission (w/Enclosures)
Mr. Dennis Brink, Chairman/Pike County Planning Commission (w/o Enclosures)
Mr. Michael Mrozinski, Planning Director/Pike County Office of Community Planning (w/o Enclosures)
Thomas Farley, Esquire (w/Enclosures)