

APPENDIX C
BLACK ROCK ROAD CORRESPONDENCE

This appendix contains copies of correspondence related to OEA's analysis of the Black Rock Road alternative. Included in this appendix are copies of agency letters assessing the potential impacts on threatened and endangered species associated with the construction of Black Rock Road. This appendix also contains a copy of PHMC's letter detailing its findings about this alternative pursuant to Section 106 of the National Historic Preservation Act. Finally, OEA has included a copy of Judge Bradley P. Lunsford's Centre County Court of Common Pleas Order approving RRLLC's Preliminary Subdivision Plan (which included the construction of Black Rock Road) provided by RRLLC.

SIR #29810
KASITZ
Page 2

3. Workers responsible for implementing this project should be advised that timber rattlesnakes may be encountered and that avoidance is the best means of minimizing risks to personal safety. These workers should also be advised that the timber rattlesnake is a state protected species and is not to be harmed.

Timber rattlesnake monitoring is to be conducted by a qualified/recognized timber rattlesnake biologist who has the proper skills and permits (scientific collecting permit) to handle this venomous species. I have enclosed a list of qualified timber rattlesnake surveyors recognized by the PFBC for your convenience. If timber rattlesnakes and/or denning sites are observed, they should be documented by photographs, habitat descriptions, in addition to being mapped and labeled accordingly. The biologist is to submit a report to this office (Natural Diversity Section) following the completion of the project documenting all of the activity and herpetofauna encountered at each crossing and staging area.

Although the nature of the timber rattlesnake is rather docile, it can be dangerous if threatened, cornered, or handled improperly. The project development is close enough to an extant population of timber rattlesnakes to warrant some concern about rattlesnake-human conflicts. Therefore, people visiting in the project area should be mindful of the presence of the snakes in the area. Rattlesnakes are attracted to open areas for basking and forested areas with thick deciduous leaf litter that tend to support high populations of rodents. To avoid any conflicts, people can discourage rattlesnakes from entering the area by installing silt fencing along heavily traveled areas and removing rock, brush and/or debris piles. We also reiterate that the workers responsible for implementing this project be advised that timber rattlesnakes may be encountered and that avoidance is the best means of minimizing risks to personal safety.

If you have any questions regarding this response, please contact Tina Walther of my staff (814-359-5186) and refer to the SIR number at the top of this letter. Thank you for your cooperation and attention to this matter of endangered species conservation and habitat protection.

Sincerely,

Christopher A. Urban
Christopher A. Urban, Chief
Natural Diversity Section

CAU/TW/mr

Enclosure (1)



Pennsylvania Fish & Boat Commission

Division of Environmental Services
Natural Diversity Section
450 Robinson Lane
Belleville, PA 16823-9620
(814) 359-5237 Fax: (814) 359-5175

January 14, 2009

IN REPLY REFER TO
SIR# 29810

RETTEW ASSOCIATES
JONATHAN KASITZ
223 WINDGATE DRIVE
CHESTER SPRINGS, PA 19425

RE: Species Impact Review (SIR) – Rare, Candidate, Threatened and Endangered Species
RT 53 ACCESS ROAD/TWAW SITE
RUSH, SNOW SHOE Townships, CENTRE County, Pennsylvania

Dear MR. KASITZ:

I have reviewed the map accompanying your recent correspondence, which concerns the above-referenced project. Based on records maintained in the Pennsylvania Natural Diversity Inventory (PNDI) database and Pennsylvania Fish & Boat Commission (PFBC) files, a den of the timber rattlesnake (*Crotalus horridus*, P.A. candidate) is known from within the proposed project site.

Timber rattlesnakes occur in the forested, mountainous regions of the Commonwealth. They prefer forested areas to forage for small mammals (e.g., mice and chipmunks) and talus, south to southeastern facing rocky slopes for hibernating and other thermoregulatory activities. The timber rattlesnake is threatened by overhunting, poaching and habitat alteration.

We are concerned about direct and indirect effects that the proposed project could have on the local population of the timber rattlesnake. If the work is to be conducted out of the active season of the timber rattlesnake, then I do not anticipate any adverse impacts to this species of special concern. However, if work is to be conducted from April 15-November 15, then I will ask you to take the following precautions to safeguard workers and rattlesnakes:

1. A qualified timber rattlesnake biologist should visit the site and define the den site and basking areas. A 300-foot buffer should be implemented around these sites, within which timber harvest will be limited to the period between November 15 and April 15. Also, within this buffer, no large rocks (> 2' diameter) should be disturbed by skidding activities.
2. The qualified timber rattlesnake biologist should be on-site during construction activities to inspect the area (including staging areas) for timber rattlesnakes and to capture and remove any rattlesnakes that may be encountered. Timber rattlesnakes observed on-site are to be measured, sexed, and the habitat characterized where the snake was found. All captured snakes should be released within close proximity of the site (within 0.25 mile, within same watershed in appropriate habitat), and moved no further than is necessary to safely continue work activities.

Our Mission:

To protect, conserve and enhance the Commonwealth's aquatic resources and provide fishing and boating opportunities.

www.fish.state.pa.us



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Pennsylvania Field Office
315 South Allen Street, Suite 322
State College, Pennsylvania 16801-4850

April 14, 2009



Jonathan Kasitz

Retiree
223 Windgate Drive
Chester Springs, PA 19425

RE: USFWS Project #2009-0013

Dear Mr. Kasitz:

This is in response to your letter of March 16, 2009, regarding our email of February 26, 2009, which requested additional information about the Route 53 Access Road/Black Rock Road project located in Centre County, Pennsylvania. The project is within the range of the Indiana bat (*Myotis sodalis*) and northeastern bulrush (*Scirpus americanus*), species that are federally listed as endangered. The following comments are provided pursuant to the Endangered Species Act of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*) to ensure the protection of endangered and threatened species.

According to your March 16 letter, the purpose of this road is to provide an alternate route around the Village of Moshannon to minimize hunting and quarry traffic through town, and there is no connection between this project and the landfill previously proposed nearby.

Indiana Bat

Indiana bats hibernate in caves and abandoned mines during the winter months (November through March), and use a variety of upland, wetland and riparian habitats during the spring, summer and fall. Indiana bats usually roost in dead or living trees with exfoliating bark, crevices or cavities. Female Indiana bats form nursery colonies under the exfoliating bark of dead or living trees, such as shagbark hickory, black birch, red oak, white oak, and sugar maple, in upland or riparian areas.

Land-clearing, especially of forested areas, may adversely affect Indiana bats by killing, injuring or harassing roosting bats, and by removing or reducing the quality of foraging and roosting habitat. Due to the anticipated impacts of the project on forest habitat, a bat survey of the project area should be conducted between May 15 and August 15 by a qualified, Fish and Wildlife Service-approved biologist (see enclosed list) using the enclosed *Indiana Bat Mist Netting Guidelines*.

Commonwealth of Pennsylvania
Pennsylvania Historical and Museum Commission
Bureau for Historic Preservation
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120-0093
www.phmc.state.pa.us



April 2, 2009

Suzanne Stasiulatis
RETTEW Associates, Inc.
3020 Columbia Avenue
Lancaster, PA 17603

DISPATCHED BY FAX
1717-798-1400

Re: File No. ER 2004-2464-027-C
COE Joint Permit: Route 53/
TEWAR Site Subdivision, Rush &
Snow Shoe Twp., Centre Co.

Dear Ms. Stasiulatis:

The Bureau for Historic Preservation (the State Historic Preservation Office) has reviewed the above named project in accordance with Section 106 of the National Historic Preservation Act of 1966, as amended in 1980 and 1992, and the regulations (36 CFR, Part 800) of the Advisory Council on Historic Preservation. These requirements include consideration of the project's potential effect upon both historic and archaeological resources.

Based on our survey files, which include both archaeological sites and standing structures, there are no National Register eligible or listed historic or archaeological properties in the area of this proposed project. Therefore, your responsibility for consultation with the State Historic Preservation Office for this project is complete. Should you become aware, from any source, that historic or archaeological properties are located at or near the project site, please notify the Bureau for Historic Preservation at (717) 783-8946.

Sincerely,

Douglas C. McLearn, Chief
Division of Archaeology &
Protection

Cc: COE, Baltimore District
DEP, Northeastern Regional Office

DCM/hmw

U.S. FISH AND WILDLIFE SERVICE
Pennsylvania Field Office

QUALIFIED NORTHEASTERN BULRUSH SURVEYORS

The following list includes persons known by the U.S. Fish and Wildlife Service to have the skills and experience to conduct surveys for the northeastern bulrush (*Scirpus americanus*). Observations of the northeastern bulrush at previously undocumented sites must be reported in writing to the Service within 48 hours. Northeastern bulrush surveys should be overseen by a qualified surveyor, who should be present in the field at all times during the investigation.

This information is not to be construed as an endorsement of individuals or firms by the Service or any of its employees. Persons not on this list, but who have documented experience in conducting scientific studies of, or successful searches for, the northeastern bulrush may submit their qualifications to the Service for review. The submission must include documentation that the requestor has experience successfully locating and identifying the northeastern bulrush and its habitat. Additions to and deletions from this list are at the sole discretion of the Service. This list is subject to revision at any time without prior notice.

Richard Mellon Mellon Biological Services 200 Flint Court South Yardley, PA 19067 (215) 493-0697	Staff Botanist Western Pennsylvania Conservancy 316 Fourth Ave. Pittsburgh, PA 15222 (412) 288-2777
Bob Bevan Bevan Environmental Services 2322 W. Sunbury Road Boyars, PA 16020 (724) 735-2766 (724) 679-0272 (cell)	Dr. Larry Kloiz Biology Department—Shippensburg University 1871 Old Main Drive Shippensburg, PA 17257 (717) 477-1402 lkloiz@ship.edu
Dr. Alfred Schuyler Department of Biology Academy of Natural Sciences 1900 Benjamin Franklin Parkway Philadelphia, PA 19103-1195 (215) 299-1193	Larry G. Brewer Environmental Solutions & Innovations, Inc. 781 Neeb Road Cincinnati, Ohio 45233 (513) 451-1777 lbrewer@environmentalsi.com
Dr. Ann Rhoads Morris Arboretum 9414 Meadowbrook Avenue Philadelphia, PA 19118 (215) 247-5777, ext. 134	Joe Isaac RD 1 Box 117F Pulaski, PA 16143 (412) 964-8770

Revised 01/14/2009

Mist-net sites should be established in the best habitat available that can be netted within each 1-km interval of the proposed roadway disturbance area. If any Indiana bats are captured, they should be tracked using radio-telemetry to identify roosting and foraging areas. Prior to undertaking this survey, a study plan should be provided to the Service for review. Following completion of this survey, results should be submitted to the Service for review and concurrence. Due to the potential for spreading "white-nose" syndrome and the importance of maintaining clean equipment, please adhere to the enclosed Pennsylvania Game Commission's *Bat Handling/Disinfection Protocol for Summer Bat Field Studies*.

Should Indiana bats be found during this survey, further consultation with the Service will be necessary, including the submission of detailed project plans, and an analysis of alternatives to avoid and minimize adverse effects.

Northeastern Bulrush

Potential habitat for this species could be affected if the project will directly or indirectly affect wetlands. The northeastern bulrush is typically found in ponds, wet depressions, shallow sinkholes, vernal pools, small emergent wetlands, or beaver-influenced wetlands. These wetlands are often located in forested areas and characterized by seasonally variable water levels.

During our phone conversation of April 8, 2009, you reported that wetlands on the project site have been delineated and you are planning to submit photos and delineation reports to this office for review. Should these wetlands be found suitable to support northeastern bulrush, we recommend that a qualified botanist with field experience in the identification of this species conduct a thorough survey of all potentially suitable wetland habitat within the proposed project area to determine the presence of the northeastern bulrush, before any permits are approved or earth-moving activities begin. Surveys for this species should be conducted between June 1 and September 30, when the flowering/fruiting culm is present. A survey report should be submitted to the Service for review and comment. A list of botanists skilled in the location and identification of the northeastern bulrush is enclosed.

This response relates only to endangered or threatened species under our jurisdiction, based on an office review of the proposed project's location. No field inspection of the project area has been conducted by this office. Consequently, this letter is not to be construed as addressing potential Service concerns under the Fish and Wildlife Coordination Act or other authorities.

To avoid potential delays in reviewing your project, please use the above-referenced USFWS project tracking number in any future correspondence regarding this project.

If you have any questions regarding this matter, please contact Pamela Stollenberger of my staff at 814-234-4090.

Sincerely,



David Denmore
Supervisor

**U.S. FISH AND WILDLIFE SERVICE
Pennsylvania Field Office**

QUALIFIED INDIANA BAT SURVEYORS

The following list includes persons known by the U.S. Fish and Wildlife Service to have the skills and experience to conduct surveys for Indiana bats. Any individuals handling or conducting surveys for Indiana bats must first obtain a permit from the Pennsylvania Game Commission. All Indiana bat captures must be reported in writing to the Service and Commission within 72 hours. Indiana bat surveys should be overseen by a qualified surveyor, who should be present in the field at all times during the investigation. Mist-net surveys should be carried out in accordance with the Service's *Indiana Bat Mist Netting Guidelines*. If any Indiana bats are captured during mist-netting, a surveyor with bat telemetry experience should be prepared to place a transmitter on the bat(s) to identify roost trees and foraging habitat. Various sampling techniques, including mist-netting, Aunbat detection, radio-telemetry, harp-trapping and hibernacula surveys, are used to detect and monitor bats. Some individuals on this list may not be qualified to conduct all types of sampling.

This information is not to be construed as an endorsement of individuals or firms by the Service or any of its employees. Persons not on this list, but who have documented experience in conducting scientific studies of, or successful searches for, Indiana bats may submit their qualifications to the Service for review. The submission must include documentation that the requestor has experience successfully locating and identifying Indiana bats in their hibernacula and their summer habitat. Additions to and deletions from this list are at the sole discretion of the Service. This list is subject to revision at any time without prior notice.

Chris Sanders, Jessica Kapp, Michael O'Mahony Sanders Environmental, Inc. 322 Borealis Way Bellefonte, PA 16823 814-364-8766; 814-659-8257 (cell) sanders@bunigate.com	John Chenger, Matt Hopkins & Kevin Rhome Bat Conservation & Management 220 Old Stone House Road Carlisle, PA 17015 717-241-2228 814-442-4246 (cell)	Dr. Virgil Brack, Jr. Environmental Solutions & Innovations 781 Nebb Road Cincinnati, OH 45233 513-451-1777 513-451-3321 (fax)
Jeffrey Brown, Amy Henry & Russell Romné BHE Environmental, Inc. 11733 Chesterdale Road Cincinnati, OH 45246 513-326-1500 513-326-1550 (fax)	James A. Hart Western Pennsylvania Conservancy PA Natural Heritage Program 19 Wyrick Avenue Shippensburg, PA 17257 717-350-1931 jahart@pa.net	Hal Bryant Eco-Tech, Inc. P.O. Box 8 Frankfort, KY 40602-0008 502-695-8060 502-695-8061 (fax) myotis2000@aol.com
Stacy Wolbert 145 Lamb Drive Morrisdale, PA 16858 814-360-1290 stacy_wolbert@yahoo.com	Robert F. Madej R.D. Zande & Associates 1237 Dublin Road Columbus, OH 43215 800-340-2743 614-486-4387 (fax)	Dr. Karen Campbell Biology Department Albright College Reading, PA 19614 610-921-2381

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Indiana Bat Surveyors / Nov 14-18-08

Neil Bossart
Civil & Env. Consultants, Inc.
333 Baldwin Road
Pittsburgh, PA 15205
412-429-2324
nbossart@eccline.com

John Macgregor
Berea Ranger District
Daniel Boone National Forest
1835 Big Hill Road
Berea, KY 40403
606-745-3100

Dr. Lynn Robbins
Southwest Missouri State Univ.
Biology Department
901 South National
Springfield, MO 65804
417-836-3366

Dr. Michael Gannon
Department of Biology
Penn State University
Altoona College
3000 Iyaside Park
Altoona, PA 16601-3760
814-949-5210

Steve Pernick
L.R. Kimball and Associates
615 West Highland Avenue
Ebensburg, PA 15931
814-472-7700
pernis01@rkimball.com

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2601 N. Front St.
Harrisburg, PA 17110
717-232-0593
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Charleston, WV 25304
304-357-4793

Michael R. Schirmacher
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Hidden Valley, PA 15502
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mschirmacher@batcon.org

James Kiser
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1901 Nelson Miller Parkway
Louisville, KY 40223
812-206-0100; 606-434-9018 (cell)
james.kiser@stantec.com

Kristen Watrous
Stantec
55 Green Mountain Drive
South Burlington, VT 05403
802-383-0425; 802-578-7161 (cell)
kristen.watrous@stantec.com

Tim Blackburn
825 19th Street, 2nd Floor
Altoona, PA 16601

Page 2 of 2

Indiana Bat Surveyors / Nov 14-18-08



BUREAU OF FORESTRY

September 30, 2009

PNDI Number: 019799

Jonathan P. Kasitz
RETTEW
610-438-3273

Re: No. 04-05830-003 Phase 454 Black Rock Road Project
Snow Shoe Township, Centre County

Dear Mr. Kasitz,

Thank you for the submission of your field survey for Pennsylvania Natural Diversity Inventory (PNDI) Environmental Review Receipt Number 019799 for review. PA Department of Conservation and Natural Resources screened this project for potential impacts to species and resources of concern under DCNR's responsibility, which includes plants, terrestrial invertebrates, natural communities, and geologic features only.

No Impact Anticipated As Per Survey

PNDI records indicated species or resources of concern are located in the vicinity of the project. However, based on the information you submitted concerning the nature of the project, the immediate location, and the survey report received by this office 9/22/09, DCNR has determined that no impact is likely. No further coordination with our agency is needed for this project.

This response represents the most up-to-date summary of the PNDI data files and is valid for one (1) year from the date of this letter. An absence of recorded information does not necessarily imply actual conditions on-site. Should project plans change or additional information on listed or proposed species become available, this determination may be reconsidered.

Should the proposed work continue beyond the period covered by this letter, please resubmit the project to this agency as an "Update" (including an updated PNDI receipt, project narrative and accurate map). If the proposed work has not changed and no additional information concerning listed species is found, the project will be cleared for PNDI requirements under this agency for an additional year.

This finding applies to impacts to DCNR only. To complete your review of state and federally-listed threatened and endangered species and species of special concern, please be sure the U.S. Fish and Wildlife Service, PA Game Commission, and the Pennsylvania Fish and Boat Commission have been contacted regarding this project as directed by the online PNDI ER Tool found at www.naturalheritage.state.pa.us.

Sincerely,

Andrew Rohrbau, Environmental Review Manager FOR Chris Firestone, Wild Plant Program Mgr.
Ph: 717-705-2823 - scirobba@dnr.state.pa.us

conservé sustain enjoy

P.O. Box 8552, Harrisburg, PA 17015-8552 717-787-3444 (fax) 717-772-0271

TO: P. 12



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA GAME COMMISSION
2001 ELMERTON AVENUE, HARRISBURG, PA 17110
"TO MANAGE ALL WILD BIRDS, MAMMALS AND THEIR HABITATS
FOR CURRENT AND FUTURE GENERATIONS."

December 2, 2009

PNDI Large Project Review

Mr. Jonathan Kasitz
Rettew Environmental
3020 Columbia Avenue
Lancaster, PA 17603

PNDI Large Project Review- revised
Re: Black Rock Road/Rt. 53 Access Road
Rush and Snow Shoe Township, Centre County, PA

Dear Mr. Kasitz,

Thank you for submitting additional information regarding the Black Rock Road/Rt. 53 Access Road Project to the PA Game Commission (PGC) on November 19, 2009 for review. The PGC screened this project for potential impacts to species and resources of concern under PGC responsibility, which includes birds and mammals only.

A PGC letter, dated April 9, 2009, stated that a field view had been conducted with PGC staff and that "there was no suitable habitat for Allegheny woodrats (*Neotoma magister*), a state-listed threatened species, on or in close proximity to the proposed bridge and access road construction areas." Therefore, the proposed project should not cause any adverse impacts to Allegheny woodrats.

Potential Impact Anticipated

The PGC has received and thoroughly reviewed the information that you provided to this office as well as PNDI data, and has determined that potential impacts to threatened, endangered, and/or species of special concern birds and mammals may be associated with your project. Therefore, additional measures are necessary to avoid potential impacts to the species listed below.

Scientific Name	Common Name	PA Status
<i>Myotis leibii</i>	Eastern Small-footed Bat	THREATENED

Next Steps

The following Conservation Measures should be performed for above listed species:

ADMINISTRATIVE BUREAU:
PERSONNEL: 717-787-7956 ADMINISTRATIVE: 717-787-7957 AND PROSODY DIVISION: 717-787-6884
LICENSE DIVISION: 717-787-7958 WILDLIFE DIVISION: 717-787-6885 WILDLIFE PROTECTION: 717-787-6740
WILDLIFE HABITAT MANAGEMENT: 717-787-6818 REAL ESTATE DIVISION: 717-787-6568 AUTOMATED TECHNOLOGY SYSTEMS: 717-787-4076
FAX: 717-777-2241
WWW.PGC.STATE.PA.US
AN EQUAL OPPORTUNITY EMPLOYER

Mr. Kasitz

-2-

December 2, 2009

▪ All trees or dead snags greater than 5 inches in diameter at breast height that need to be harvested to facilitate the project shall be cut between November 15 and March 31.

▪ No disturbance buffer of at least 300 meter around all known roost locations, maternity colonies, and hibernation sites to help protect them from degradation, deforestation, water contamination, erosion and flooding. If small-footed roosting habitat is impacted by the project, alternate roosting habitat must be created. These alternate roosts will need to be created in suitable locations outside of the disturbance area of the project, but close enough to try to move the bats to a safer area by providing a better structure in a more suitable location. Further coordinate with the PGC is necessary if any known roost locations are to be impacted.

▪ Creation of a riparian buffer zone. Small-footed and other bats often forage along streams and wetlands, where they drink water or catch flying insects. The removal of a stream, wetland, and/or associated edges/banks may harm bats by removing their foraging area, causing them to expend energy locating a new foraging area, and potentially engaging in intra-specific (bat to bat) competition. The project should avoid impacting streams and wetlands, and leave a minimum 50-foot buffer along the stream edge (total of 100 ft from both stream banks) or wetland, to reduce impacts to foraging bats.

This response represents the most up-to-date summary of the PNDI data files and is valid for one (1) year from the date of this letter. An absence of recorded information does not necessarily imply actual conditions on site. Should project plans change or additional information on listed or proposed species become available, this determination may be reconsidered.

Should the proposed work continue beyond the period covered by this letter, please resubmit the project to this agency as an "Update" (including an updated PNDI receipt, project narrative and accurate map). If the proposed work has not changed and no additional information concerning listed species is found, the project will be cleared for PNDI requirements under this agency for an additional year.

This finding applies to impacts to birds and mammals only. To complete your review of state and federally-listed threatened and endangered species and species of special concern, please be sure that the U.S. Fish and Wildlife Service, the PA Department of Conservation and Natural Resources, and/or the PA Fish and Boat Commission have been contacted regarding this project as directed by the online PNDI ER Tool found at www.naturalheritage.state.pa.us.

Sincerely,



Tracey Librandi Mumma
Division of Environmental Planning & Habitat Protection
Bureau of Wildlife Habitat Management
Phone: 717-787-4250, Extension 3614
Fax: 717-787-6957
E-mail: tlibrandi@state.pa.us

Mr. Kasitz

-3-

December 2, 2009

A PNHP Partner



cc: Dusza
Ross
DuBrook
Brauning
Turner
Buchkoski



October 26, 2010

Kevin Starnier, CEP
Skelly and Loy Inc.,
449 Eisenhower Boulevard
Suite 300
Harrisburg, PA 17111-2302

RE: Draft EIS

Dear Mr. Starnier:

Please see the enclosed letter from Centre County Judge Bradley P. Lunsford deeming the preliminary plan for the proposed road noted in Section 2.3.2 in the draft EIS.

"No - Build Alternative - Local Road System Upgrade"

A final plan for the proposed road has not been submitted to Centre County planning as of this date.

Also, please note that the name is Black Rock Road.

Sincerely,

RESOURCE RECOVERY, LLC

E.B. Abel Jr.

Enclosures

P.O. Box 525 • Mountville, PA 17554 • (717) 285-2020 • www.resource-recovery-llc.com

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

No. 2009-2089

RESOURCE RECOVERY, LLC

Plaintiff

v.

CENTRE COUNTY PLANNING COMMISSION
and
CENTRE COUNTY BOARD OF COMMISSIONERS

Defendants

IN EQUITY

Attorney for Plaintiffs:
Attorney for Defendants:
Ronald M. Lucas, Esq.
Louis T. Glantz, Esq.

Lunsford, J.

ORDER OF COURT

AND NOW, this 4th day of March, 2010, upon review of the Masters Report filed on March 1, 2010, this Court adopts the Statement of Facts, Legal Discussion and recommendation made by the Master. The Planning Commission failed to render or communicate a decision to Resource Recovery, LLC within ninety (90) days of the regular meeting of the Planning Commission next following the date of the submission; therefore, the Preliminary Subdivision is deemed approved and Resource Recovery, LLC's Motion for Peremptory Judgment is hereby GRANTED.

BY THE COURT:

Bradley P. Lunsford, Judge

cc. James Rayback, Esq., Master

FILED FOR RECORD

2010 MAR -4 P 4:05

DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY, PA

JAMES M. RAYBACK, INC.
ATTORNEY AT LAW
102 East College Avenue
State College, Pennsylvania 16801

phone 814 238-3053
fax 814 237-3227
jmr@verizon.net

February 26, 2010

Ronald M. Lucas, Esquire
Stevens & Lee
17 North Second Street
16th Floor
Harrisburg, PA 17101

Re: Resource Recovery, LLC vs. Centre County Planning Commission and Centre County Board of Commissioners

Dear Mr. Lucas:

Please find enclosed with this letter a copy of the Masters Report, Certificate of Filing of Masters Report, and Statement of Facts which is being filed in the Prothonotary's Office in regard to the above noted matter.

Very truly yours,

JAMES M. RAYBACK, INC.

By  James M. Rayback

JMR/slb
Enclosure

Not Handicapped Accessible - Telephone to Arrange Services

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

RESOURCE RECOVERY, LLC
Plaintiff
vs.
CENTRE COUNTY PLANNING COMMISSION
and
CENTRE COUNTY BOARD OF COMMISSIONERS
Defendants
No. 2009-2069
IN EQUITY

MASTERS REPORT

James M. Rayback, Esquire was appointed by Bradley P. Lunsford, Judge of the Court of Common Pleas of Centre County, Pennsylvania by Order dated the 7th day of December, 2009 to perform the duties of a Master in the above matter and to report his conclusions and recommendation to the Court. Specifically the Court charged the Master to determine whether a material issue of fact exists before ruling on the Motion for Peremptory Judgment filed by Plaintiff, and if no issue of material fact exists, to recommend or not whether a deemed decision should be approved or not granting Plaintiff's subdivision plan.

The parties previously appeared before the Court and submitted motions and briefs supporting their respective positions. On January 18, 2010, attorneys for the respective parties argued their respective positions before the Master.

STATEMENT OF FACTS

The owner of the property in question, Resource Recovery, LLC, owns approximately five thousand seven hundred fifty (5,750) acres of land located partially in Rush Township and partially in Snow Shoe Township, Centre County, Pennsylvania. On or about January 10, 2009, Resource Recovery through its agent, RETTEW Associates, Inc., delivered a preliminary subdivision plan, with accompanying documents to the Centre County Planning Office. Included in the submission were (1) a fifty two (52) sheet plan titled Preliminary Subdivision Plan for Resource Recovery, LLC, (2) a completed application form, (3) Preliminary Storm Water Management Report (four copies), (4) Wetland Report (four copies), (5) Flood study (four copies), (6) traffic analysis (four copies), (7) Planning waiver and non-binding declaration for sewer planning (four copies), (8) copy of submission letter to Snow Shoe Township Zoning Officer, (9) copies of submission letters to Rush Township, Snow Shoe Township Board of Supervisors, the Postmaster, and Centre County 911, (10) check in the amount of \$140.00 made payable to Centre County for review fees.

Resource Recovery submitted an eight (8) lot non-residential subdivision plan. Four (4) lots are located entirely within Snow Shoe Township and four (4) lots were located entirely within Rush Township. The materials that were submitted did not propose development or improvement of any of the proposed lots or the approval of any use of the proposed lots.

The Centre County Planning staff reviewed the materials between January 8 and January 15, 2009 and issued a letter to Resource Recovery rejecting the submission of the plan and materials as an incomplete submission. The planning staff listed a number of technical deficiencies and a failure to list the ultimate intended use of the property by Resource Recovery

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

RESOURCE RECOVERY, LLC

Plaintiff

No. 2009-2069

vs.

IN EQUITY

CENTRE COUNTY PLANNING COMMISSION

and

CENTRE COUNTY BOARD OF COMMISSIONERS

Defendants

CERTIFICATE OF FILING OF MASTERS REPORT

On the 26 day of FEBRUARY, 2010 true and correct copies of this report were served upon all council of record, a copy of which is attached in accordance with the Order of the Court dated December 7, 2009.



James M. Rayback, Esquire, Master

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as the reasons for the issuance of the incomplete submission notice.

The staff's incomplete submission notice that was sent to Resource Recovery was issued on the 10th day of January, 2009, and the next meeting of the Centre County Planning Commission was on January 20, 2009. The minutes of the January 20, 2009 meeting of the Centre County Planning Commission do not reference any discussion on the plan as submitted or the staff notice of an incomplete submission, nor do they indicate the Planning Commission took any action as to the plan or staff notice of incomplete submission. The Planning Commission did not take any formal action in regard to Resource Recovery submission or the staff incomplete submission notice between January 20, 2009 and April 20, 2009, a period of ninety (90) days.

On May 26, 2009, at the meeting of the Centre County Planning Commission, an attachment was added to the minutes of the meeting which reports to be a verbatim copy of the tape made at the Centre County Planning Commission meeting of January 20, 2009, at which Mr. Anson Burwell, the County Subdivision Officer spoke, and updated the situation regarding Resource Recovery. The report was made by Mr. Burwell, but there is no indication that the report was accepted, nor is there any indication that the report and its contents were voted upon.

A communication from the Planning Commission was not sent to Resource Recovery to state the position of the Planning Commission or giving reasons for a decision. There is no record of a decision being made by the Planning Commission.

The record indicates the procedural history taken by the parties during and subsequent to the submission to the planning staff on or about January 8, 2009.

LEGAL DISCUSSION

The master will recommend to the Court that a deemed decision in favor of Resource

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Recovery be issued based upon the facts stated above and the legal discussion below. There is no material issue of fact which would deny a deemed decision. The subdivision plan as submitted should be approved.

The Municipalities Planning Code in Section 501, 53 P.S. §10501, et seq grants the County as a municipality the power to regulate subdivisions and land development within its borders. It is directed to do so as a governing body or by delegation to its planning agency, both of which are to act in accordance with the County Subdivision and Land Development Ordinance. The Centre County Board of Commissioners did make such a delegation of authority to its Planning Commission and did adopt a subdivision and planning ordinance. Subdivision and Land Development Ordinance No. 3 of 1983. Section 503(1) 53 P.S. §10503(1) of the Municipalities Planning Code provides that the County Subdivision and Land Development Ordinance may contain criteria for the submittal and processing of plans.

The Subdivision and Land Development Ordinance of Centre County in Sections 504, Preliminary Plan Submission for Major Residential Subdivisions and Section 705, Land Development, each requires that when preliminary subdivision plans are submitted to the Centre County Planning Office that the following must be provided by the applicant:

1. Seven copies of the Preliminary Plan;
2. A completed application form;
3. Four copies of a sewage disposal report;
4. Payment of the payment processing fee.

Once the subdivision plan is submitted as provided above in Sections 504 and Section 705, then under Sections 507 and 708 the Planning Commission is required to "The Preliminary

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Plan shall be accepted for processing upon receipt of the following." After the plan is accepted "The Commission shall review the Preliminary Plan, render its decision and communicate said decision to the applicant not later than ninety (90) days after such application for preliminary approval is accepted or such additional period of time as may be agreed upon by the Commission and the applicant in writing." The applicant is to be notified within fifteen (15) days following the Planning Commission's decision. The Plan "if conditionally approved, shall specify any changes which shall be required before the submission of the final plan. If disapproved, the commission shall specify the defects found and describe the requirements which have not been met and shall, in each case, cite the provisions of the statute or when it relied upon." §507 Subdivision and Land Development Ordinance. Under Sections 504, 705 and 507 of the Subdivision and Land Development Ordinance, once the applicant provides the four enumerated items that are required, the plan is to be accepted upon presentation. The fact that the Planning Commission staff may complete a review of the plan prior to the Planning Commission making a decision, while efficient and logical, does not affect acceptance of the plan by the Planning Commission. The staff has no authority to reject a plan unless it fails to meet one of the four conditions noted above (§504 and 705), but the staff has the authority under the Subdivision and Land Development Ordinance to review the plan, and present their comments to the Planning Commission to allow the Planning Commission to make a decision on whether to approve a plan.

The facts as submitted indicate that D. Eric Brinsler delivered the required items to the Centre County Planning Office on January 8, 2009 and the Planning Commission admitted that such is the case as stated in their answer to Complaint in Mandamus in paragraph 9.

Only the portion of the subdivision located in Snow Shoe Township is covered by this

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appeal inasmuch as Rush Township has its own subdivision ordinance governing its lands. 53 P.S. §10502(d); Atlantic Richfield Co. v. Della Vecchia, 450 A.2d 792, 795 (Pa. Commonwealth 1982).

Section 508 of the Municipal Planning Code, 53 P.S. §10508 requires the following:

All applications for approval of a plat . . . whether preliminary or final, shall be acted upon by the governmental body or by the planning agency within such time limits as may be fixed in the Subdivision and Land Development Ordinance but the governing body or the planning agency shall render its decision and communicate it to the applicant not later than ninety (90) days following the date of the regular meeting of the governing body or the planning agency (which ever first reviews the application) next following the date of application as filed . . .

Section 307 of the Subdivision and Land Development Ordinance states "The date of submission shall be the date upon which the application form, the fees, if any, and the requisite number of plans and other documentation is submitted." A second paragraph of Section 307 states "The staff review shall take place as soon as practicable. Commission review and actions shall not be less than twelve (12) calendar days nor more than ninety (90) calendar days after the submission date."

The required documents were submitted on January 8, 2009. The date of the next Planning Commission was January 20, 2009. Therefore, the Planning Commission was obligated to render its decision and communicate said decision to the applicant not later than ninety (90) days following the January 20, 2009 Planning Commission meeting date. The ninety (90) day date would be April 20, 2009.

The Planning Commission did not render a decision by April 20, 2009 and it did not

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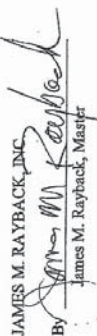
communicate a decision from the Planning Commission to the applicant by April 20, 2009.
(Answer to Complainant paragraphs 13, 28, 33, and 34.)

It is argued that staff of the Planning Commission rejected the submitted application and plan, but there is no provision in the Municipal Planning Code permitting or authorizing the staff of a Planning Commission to reject a plan. Under the Municipal Planning Code in Sections 508, 53 P.S. §10508 only the Planning Commission or governing body, whichever one is tasked with the duty of reviewing the plans may actually make a decision to accept or reject submitted plans.

When the Planning Commission failed to reply to the applicant as required by Section 508 of the Municipal Planning Code, such "failure of the governing body or agency to render a decision and communicate it to the applicant within the time and in the manner required herein shall be deemed an approval of the application in terms as presented"

Inasmuch as it appears from the facts that the Centre County Planning Commission did not take any action on the submitted plan within the time constraints, and did not inform the applicant of an acceptance or rejection, the plan is deemed accepted as presented.

Respectfully submitted,

JAMES M. RAYBACK, INC.
By 
James M. Rayback, Master

Date Feb 26, 2010

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