



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

|  |   |                                  |
|--|---|----------------------------------|
| <b>CITIZENS FOR PENNSYLVANIA’S</b>           | : |                                  |
| <b>FUTURE, MAYA K. VAN ROSSUM, THE</b>       | : |                                  |
| <b>DELAWARE RIVERKEEPER AND</b>              | : |                                  |
| <b>DELAWARE RIVERKEEPER NETWORK</b>          | : |                                  |
|  | : |                                  |
| <b>v.</b>                                    | : | <b>EHB Docket No. 2023-026-L</b> |
|  | : |                                  |
| <b>COMMONWEALTH OF PENNSYLVANIA,</b>         | : |                                  |
| <b>DEPARTMENT OF ENVIRONMENTAL</b>           | : |                                  |
| <b>PROTECTION and TRANSCONTINENTAL</b>       | : | <b>Issued: February 21, 2024</b> |
| <b>GAS PIPE LINE COMPANY, LLC, Permittee</b> | : |                                  |

**OPINION AND ORDER ON  
MOTION IN LIMINE**

**By Bernard A. Labuskes, Jr., Board Member and Judge**

**Synopsis**

The Board grants in part a permittee’s motion in limine where one of the appellants’ expert reports addresses an issue that has no relation to the objections raised in the notice of appeal. The remainder of the motion is denied.

**OPINION**

Citizens for Pennsylvania’s Future, Maya van Rossum, the Delaware Riverkeeper, and Delaware Riverkeeper Network (the “Appellants”) have filed an appeal of the Department of Environmental Protection’s (the “Department’s”) issuance of Erosion and Sediment Control Permit No. ESG830021002-00 and Water Obstruction and Encroachment Permit Nos. E4083221-006 and E4583221-002 to Transcontinental Gas Pipe Line Company, LLC (“Transco”) for work associated with Transco’s Regional Energy Access Expansion Project in Luzerne, Monroe, Northampton, Bucks, and Chester counties. Discovery is completed in this matter and the parties

are currently in the midst of exchanging expert reports. Any dispositive motions are to be filed by March 28, 2024.

Transco has filed a motion in limine seeking to preclude the Appellants from offering any evidence with respect to three issues that have been addressed to some degree by two expert reports from the Appellants. Transco argues that the issues are beyond the scope of the Appellants' notice of appeal. Transco asserts that an expert report authored by Paul Cooper discusses potential impacts related to horizontal directional drilling as well as what Transco calls "third-party compliance history," both of which Transco argues are not included in the notice of appeal. Transco also argues that a report authored by Schmid & Company, Inc. discusses protections for bats and seasonal use restrictions, which are also not contained in or related to any objections in the Appellants' notice of appeal.

The Appellants argue in response that a motion in limine, at this juncture in the appeal, is entirely premature. The Appellants say the proper time for a motion in limine is after the parties have begun to file their pre-hearing memoranda, which has not happened in this appeal because as of now no hearing has been scheduled. The Appellants say this alone is reason enough to deny the motion. Alternatively, the Appellants assert that all of the topics that Transco seeks to preclude are properly within the genre of the water quality issues raised in their notice of appeal. The Department has filed a letter indicating that it does not oppose Transco's motion or the relief requested in the motion.

Initially, we do not agree that Transco's motion is necessarily premature, as argued by the Appellants. The pre-hearing schedule proposed by the parties and accepted by the Board provides for the exchange of expert reports and rebuttal expert reports over the course of two and a half months, so it is not particularly surprising that some potential evidentiary issues have been

identified in the reports in advance of any scheduled merits hearing or pre-hearing memoranda. It is true that a more typical motion in limine is filed close to the eve of a merits hearing. *Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235, 237. Indeed, the purpose of a motion in limine is to provide the Board with an opportunity to consider potentially prejudicial evidence and rule on the admissibility of such evidence before it is referenced or offered at trial. *Penn Twp. Mun. Auth. v. DEP*, 2021 EHB 72, 73; *Kiskadden v. DEP*, 2014 EHB 634, 635. However, while having the parties' pre-hearing memoranda in hand can be helpful to the Board for purposes of evaluating a motion in limine, to the extent deferring ruling on Transco's motion could require Transco to expend time and resources retaining an expert on an issue that has no relation to the notice of appeal filed by the Appellants, the motion is not necessarily premature.

Turning to the scope of the Appellants' notice of appeal, we have held that allegations and issues that are not raised in a notice of appeal are generally waived. *Benner Twp. Water Auth. v. DEP*, 2019 EHB 594, 637; *Clean Air Council v. DEP*, 2019 EHB 417, 420. However, objections raised in general terms are typically sufficient to avoid waiver. *Clean Air Council v. DEP*, 2022 EHB 291, 294 (citing *Croner, Inc. v. Dep't of Env'tl. Prot.*, 589 A.2d 1183, 1187 (Pa. Cmwlth. 1991)). Notices of appeal are to be read broadly. "So long as an issue falls within the scope of a broadly worded objection found in the notice of appeal, or the 'genre of the issue' in question was contained in the notice of appeal, we will not readily conclude that there has been a waiver." *GSP Mgmt. Co. v. DEP*, 2011 EHB 203, 207 (quoting *Rhodes v. DEP*, 2009 EHB 325, 327). Nevertheless, "there are limits and an appellant runs a risk that it might suffer waiver of issues if it fails to specify its objections in its notice of appeal." *Penn Coal Land, Inc. v. DEP*, 2017 EHB 337, 367.

The six substantive paragraphs of the Appellants’ notice of appeal all relate in some way to water quality and the potential impacts to waters of the Commonwealth from Transco’s project. For instance, the Appellants contend that the permit terms and conditions allow for the degradation of certain high quality and exceptional value streams and wetlands. (Appeal at ¶¶ 1-3.) They say that Transco failed to demonstrate that its erosion and sedimentation controls and post-construction stormwater management best management practices will prevent thermal, sedimentation, and runoff impacts to streams and wetlands. (Appeal at ¶ 4.) They also say the permits do not contain sufficient monitoring and documentation requirements to ensure that water quality will be maintained and protected consistent with the regulatory antidegradation requirements. (Appeal at ¶ 5.)

Transco challenges the Cooper Report’s references to horizontal directional drilling as outside the scope of these objections. However, the statements in the Cooper Report appear to be tied to concerns over impacts from the potential inadvertent return of drilling fluids in streams and wetlands during the horizontal directional drilling process. (*See* Motion, Ex. A at 2.) At least at this point in the proceedings, it appears that this issue has a tangible relationship to the water quality concerns expressed by the Appellants in their notice of appeal.

Transco next characterizes the Cooper Report’s references to other pipeline projects and alleged problems with those projects as “third-party compliance history.” Transco argues that, under Section 609 of the Clean Streams Law, 35 P.S. § 691.609, it is exclusively “the applicant’s” compliance history that is relevant, and any discussion of whatever has happened with other operators or other non-Transco pipeline projects is unfairly prejudicial to Transco under Pennsylvania Rule of Evidence 403, Pa.R.E. 403. Putting aside the fact that Section 609 is also concerned with any “partner, associate, officer, parent corporation, subsidiary corporation,

contractor or subcontractor” of an applicant that has engaged in unlawful conduct, we do not read the Cooper Report as raising issues with “third-party compliance history.” It looks to be more of a discussion by way of context of environmental impacts that could potentially be associated with pipeline projects, including impacts to streams and wetlands. We are, of course, focused in this proceeding on the permits under appeal and the Transco project authorized by those permits. The relevance of any other pipeline project to this appeal may be limited. However, we think it is premature to issue a blanket preclusion on any such discussion. We cannot say at this point that the issue is outside of the genre of the issues contained in the Appellants’ notice of appeal.

Transco also directs our attention to the Schmid Report. (Motion, Ex. B.) The report generally assesses the effects from the Transco project on aquatic resources. However, Transco highlights portions of the report that discuss the protection of bats. For instance:

Both Chapter 102 (XII.E. and F.) and Chapter 105 (RR.1. and 2., UU., and VV. in Monroe County; SS.1. and 2., WW., and XX. in Luzerne County) permit approval conditions address the protection of endangered bats. But the requirements of the application table cited in the permits are contradictory and leave bats along the pipelines unprotected. Areas where bat seasonal restrictions apply are nowhere shown on site plans....

Most surface construction activities---trenching, blasting, pipe installation---are to be done in “summer” defined as 1 April through 15 November. But tree clearing can seriously disrupt roosting during the breeding season, so clearing must be done in “winter,” 16 November through 31 March, when bats are hibernating underground. Work close to known hibernacula or acoustic record locations is restricted, but no such areas are identified on project drawings. (In contrast, the drawings do list out the various seasonal restrictions on disturbance allowed in each stream across the proposed pipeline corridors intended to protect fish.)

....

If trees are cut at the wrong season, protected rare species of bats may be impacted. This should be rectified by drawings that show segments of ROW where construction is seasonally restricted because of bats, with clear directives as to what should and should not be done, where, and when.

(Ex. B at 27-28.)

We struggle to see how bat roosting and potential impacts to rare species of bats relate to the water quality objections expressed in the notice of appeal. The Appellants never explain how bat protections relate to their concerns over water quality. In response to the motion in limine, the Appellants offer nothing more than the blanket statement that all of the evidence Transco objects to, including bats, “fall[s] within the genre of risks to water quality.” (Resp. Memo. at 4.) There is nothing specific in the response on how protections of bats and their roosting habitats relate to water quality. Even under the most permissive of standards there is nothing we can find in the Appellants’ notice of appeal about bats. Therefore, Transco’s motion is granted with respect to bat protections and seasonal use restrictions.

Accordingly, we issue the Order that follows.



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

**CITIZENS FOR PENNSYLVANIA’S  
FUTURE, MAYA K. VAN ROSSUM, THE  
DELAWARE RIVERKEEPER AND  
DELAWARE RIVERKEEPER NETWORK** :

**v.** :

**EHB Docket No. 2023-026-L**

**COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and TRANSCONTINENTAL  
GAS PIPE LINE COMPANY, LLC, Permittee** :

**ORDER**

AND NOW, this 21<sup>st</sup> day of February, 2024, it is hereby ordered that the Permittee’s motion in limine is **granted in part and denied in part**. The Appellants are precluded from offering evidence on bat protections and seasonal use restrictions.

**ENVIRONMENTAL HEARING BOARD**

s/ Bernard A. Labuskes, Jr. \_\_\_\_\_  
**BERNARD A. LABUSKES, JR.**  
**Board Member and Judge**

**DATED: February 21, 2024**

**c: DEP, General Law Division:**  
Attention: Maria Tolentino  
(via *electronic mail*)

**For the Commonwealth of PA, DEP:**  
Lance H. Zeyher, Esquire  
Sean L. Robbins, Esquire  
Curtis C. Sullivan, Esquire  
Margaret O. Murphy, Esquire  
Robert A. Reiley, Esquire  
(via *electronic filing system*)



**For Appellant, Citizens for Pennsylvania's Future:**

Emma H. Bast, Esquire  
Jessica R. O'Neill, Esquire  
(via *electronic filing system*)

**For Appellants, Maya K. van Rossum, the Delaware Riverkeeper,  
and Delaware Riverkeeper Network:**

Kacy C. Manahan, Esquire  
(via *electronic filing system*)

**For Permittee:**

Andrew T. Bockis, Esquire  
John R. Dixon, Esquire  
Elizabeth U. Witmer, Esquire  
Pamela S. Goodwin, Esquire  
(via *electronic filing system*)