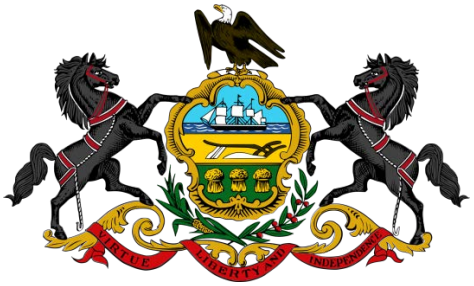
Environmental Hearing Board

Adjudications and Opinions



2014
VOLUME II

COMMONWEALTH OF PENNSYLVANIA
Thomas W. Renwand, Chief Judge and Chairman

2014

JUDGES OF THE

ENVIRONMENTAL HEARING BOARD

Chief Judge and Chairman	Thomas W. Renwand
Judge	Michelle A. Coleman
Judge	Bernard A. Labuskes, Jr.
Judge	Richard P. Mather, Sr.
Judge	Steven C. Beckman
Secretary	Vincent F. Gustitus, Jr.

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FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2014.

The Pennsylvania Environmental Hearing Board is a quasi-judicial agency of the Commonwealth of Pennsylvania charged with holding hearings and issuing adjudications on actions of the Pennsylvania Department of Environmental Protection that are appealed to the Board. *Environmental Hearing Board Act*, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §§ 7511 to 7516; and Act of December 3, 1970, P.L. 834, No. 275, which amended the *Administrative Code*, Act of April 9, 1929, P.L. 177.

ADJUDICATIONS

OPINIONS

ENVIRONMENTAL HEARING BOARD

SUBJECT MATTER INDEX – 2014 EHB DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD L. STEDGE, et al.	:	
	:	
v.	:	**EHB Docket No. 2014-042-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHESAPEAKE APPALACHIA, LLC, Permittee	:	**Issued: July 31, 2014**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a permittee's motion to dismiss certain appellants who attempted to be added to an existing appeal by filing an amended notice of appeal after the 30-day appeal period had lapsed as to those appellants. The dismissed appellants are not precluded from petitioning to intervene.

OPINION

On April 28, 2014, a number of individuals filed a timely appeal of the Department of Environmental Protection's (the "Department's") approval of Chesapeake Appalachia, LLC's ("Chesapeake's") registration under General Permit WMGR123NC027 for the processing and beneficial use of oil and gas liquid waste at the Lamb's Farm Storage Facility in Smithfield Township, Bradford County. Notice of the Department's approval was published in the *Pennsylvania Bulletin* on March 29, 2014. 44 Pa.B. 1925 (Mar. 29, 2014). The notice of appeal lists the following persons as appellants: Richard L. Stedge, Rose Marie Grzincic, Tina Manzer,

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http://ehb.courtapps.com

Bruce D. Kennedy, Milda Baiba Guidotti, Ronald and Joyce Brown, and Eric and Jennifer Brown.

On May 16, 2014, the appellants filed an amended notice of appeal. The amended appeal contained revised objections, but it also added the following persons as appellants: Thomas Donnelly, Barry Lee Ford, Rita Kennedy, Lester H. Nichols, Mark Sarfini, and Debra L. Stedge. Chesapeake has filed a motion to dismiss the new appellants. Chesapeake argues that the amended appeal attempts to add additional appellants beyond the 30-day window for filing an appeal of the Department's action, and therefore, the appeal is untimely as to those appellants. The appellants did not respond to the motion to dismiss. For the reasons set forth below, we agree with Chesapeake.

Under our statute and our rules, the Board's jurisdiction does not attach to appeals of Department actions unless those appeals are timely filed. 35 P.S. § 7514(c); 25 Pa. Code § 1021.52(a); *Rostosky v. Dep't of Envtl. Res.*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976). Third-party appellants may file appeals of Department actions within 30 days of receiving actual notice or within 30 days of notice being published in the *Pennsylvania Bulletin*. 25 Pa. Code § 1021.52(a)(2). Thus, any third-party appellant seeking to appeal the Department's approval of Chesapeake's registration of a WMGR123 general permit (who did not receive actual notice) had 30 days from publication in the *Pennsylvania Bulletin* to do so. That means that an appeal needed to be filed on or before April 28, 2014. The new appellants did not meet this deadline. Instead, they have sought to be added to an existing appeal by filing an amendment to that appeal after the 30-day deadline had passed. This they cannot do.

We addressed the issue of amending an appeal to add appellants recently in *Weaver v. DEP*, 2013 EHB 381. In *Weaver*, the Department issued an order to a husband and wife. The

order was taped to the front of the house where they lived together. Only the husband appealed the order, filing a notice of appeal with the Board four days after the order was issued. The husband then sought to amend the appeal more than two months after the order was issued to refine his objections and to add his wife as an appellant. We found that because the wife received actual notice on the same day as her husband, her appeal period also ran 30 days from that date. As such, her failure to file a timely appeal deprived the Board of jurisdiction and she could not be added to her husband's appeal by way of an amendment. *Weaver*, 2013 EHB at 382; *see also Gemstar Corp. v. DEP*, 1997 EHB 367, 369.

The situation in this case is very similar. The new appellants cannot circumvent the 30-day window by way of an amendment of another party's appeal. Allowing an amendment to add one or more appellants after the 30-day appeal period has run to those prospective appellants would "effectively vitiate the 30-day jurisdictional requirement." *Weaver*, 2013 EHB at 382. Consequently, the new appellants may seek to be added as intervenors, but they cannot retain their status as appellants. Since the contested appellants chose not to respond to Chesapeake's motion, they have provided us with no reason to conclude otherwise. *See* 25 Pa. Code § 1021.91(f) (failure to respond to a motion deemed to be an admission of all properly-pleaded facts contained in that motion). Finally, we note that the original appellants' amended grounds for appeal, done within 20 days as of right, are not affected by this Opinion.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD L. STEDGE, et al.	:	
	:	
v.	:	**EHB Docket No. 2014-042-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHESAPEAKE APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 31st day of July, 2014, it is hereby ordered that Chesapeake Appalachia's motion to dismiss is **granted**. Thomas Donnelly, Barry Lee Ford, Rita Kennedy, Lester H. Nichols, Mark Sarfini, and Debra L. Stedge are dismissed as appellants from this appeal.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 31, 2014

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HENRY CHRISTOPHER NOFSKER	:	
	:	
v.	:	**EHB Docket No. 2013-216-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 8, 2014**

OPINION AND ORDER ON
APPELLANT'S MOTION TO DISMISS

By Steven C. Beckman, Judge

Synopsis

The Board treats Appellant's Motion to Dismiss as a Motion for Summary Judgment. The motion is denied for failure to comply with the Board's Rules.

O P I N I O N

Appellant Henry Christopher Nofsker filed his appeal of the Department of Environmental Protection's Assessment of Civil Penalty on December 9, 2013. The Parties engaged in discovery, including the exchange of documents and taking of depositions. On July 7, 2014, Appellant Nofsker filed a Motion to Dismiss, requesting that the Board "enter an Order . . . against [the Department], dismissing their claims against [the Appellant]." The Department filed its response on August 6, 2014. For the reasons that follow, the Board will treat Appellant's filing as a Motion for Summary Judgment and deny the Motion.

The Appellant's Motion to Dismiss Will Be Treated as a Motion for Summary Judgment

Appellant filed his motion "pursuant to Pennsylvania Rule of Civil Procedure 230." In doing so, Appellant and his counsel demonstrate a distinct lack of understanding of the nature of proceedings before the Board. "[T]he Pennsylvania Rules of Civil Procedure, as a whole, are not

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generally applicable to proceedings before the Board." *McKees Rocks Forging v. DEP*, 1991 EHB 405, 408. "Ordinarily, the Board . . . only looks to the Rules of Civil Procedure for issues not addressed in either the Board's rules or the General Rules of Administrative Procedure, 1 Pa. Code Chaps. 31-35." *Allegro Oil & Gas v. DEP*, 1998 EHB 790, 796. The exception to this principle is where the Board's Rules expressly refer to the Rules of Civil Procedure. *See, e.g.*, 25 Pa. Code § 1021.94a (supplementing the Board's Rule on summary judgment); 25 Pa. Code § 1021.102 (discovery generally governed by the Rules of Civil Procedure). A cursory glance at the Board's Rules reveals provisions for both summary judgment motions (25 Pa. Code § 1021.94a) as well as other dispositive motions (25 Pa. Code § 1021.94), which we expect to be followed by parties appearing before the Board.

Appellant's lack of understanding of Board practice and procedure is further underscored by the inapplicability of Rule 230 to the present matter. Rule 230 of the Pennsylvania Rules of Civil Procedure cited by Appellant concerns the *voluntary termination of an action by the plaintiff* during the course of trial. If the Board were to take Appellant's motion to dismiss with reference to Rule 230 at face value and terminate Nofsker's appeal, the Department's Assessment of Civil Penalty would still stand—a result clearly not intended by Appellant based on the content of his Motion. The deficiencies in Appellant's Motion to Dismiss create difficulties for the Board in deciding the Motion and, quite frankly, we expect a better adherence to Board Rules than demonstrated here, particularly when the party is represented by counsel. Nevertheless, the Board construes its rules liberally and, at its discretion, "may disregard any error or defect of procedure which does not affect the substantial rights of the parties." 25 Pa. Code § 1021.4.

Dispositive motions before the Board generally take one of two forms. A motion to dismiss is typically appropriate where the Board is not ruling on the merits of an appeal because of lack of jurisdiction or some defect or lack of legal basis for the appeal. On the other hand, summary judgment motions are appropriate "where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Brawand v. DEP*, 2013 EHB 865, 867. It appearing from the context and content of the Motion that Appellant desires the Board to enter a ruling against the Department on the merits of the appeal; we will treat the Motion as a motion for summary judgment and evaluate it according to our rules governing such motions. *See* 25 Pa. Code § 1021.94a.

Appellant's Motion is Denied Because of Its Procedural Defects and Disputed Material Facts

We agree with the Department that Appellant Nofsker's Motion fails to comply with the Board's rule governing summary judgment motions. Rule 1021.94a(b)(1) requires that the summary judgment record contain the following separate items:

> (i) A motion prepared in accordance with subsection (c).
> (ii) A statement of undisputed material facts in accordance with subsection (d).
> (iii) A supporting brief prepared in accordance with subsection (e).
> (iv) The evidentiary materials relied upon by the movant.
> (v) A proposed order.

25 Pa. Code § 1021.94a(b)(1). More specifically, the motion "must contain only a concise statement of the relief requested and the reasons for granting that relief. The motion should not include any recitation of the facts and should not exceed two pages in length." 25 Pa. Code § 1021.94a(c). Additionally, the statement of undisputed material facts must cite to the record to establish the fact or demonstrate that it is uncontroverted. 25 Pa. Code § 1021.94a(d). The

evidentiary materials should include "affidavits, deposition transcripts, [and] other documents relied upon in support of a motion for summary judgment." 25 Pa. Code § 1021.94a(h).

While Appellant filed a separate motion and supporting brief, he did not file a separate statement of undisputed facts. Rather, his motion contains a numbered list of factual allegations. Even if the Board were to overlook the deficiency in form of the motion (*see* 25 Pa. Code § 1021.4), the allegations largely have no citation to the record. The only evidentiary material attached is a small excerpt from the Deposition of Brian Mummert. Despite many of the allegations coming from Appellant Nofsker himself, he attached no affidavit or deposition transcript to establish his allegations as fact. There is no contention by the Appellant that the facts are undisputed. These deficiencies are sufficient for the Board to deny Appellant's motion, and we deny Appellant's motion on that basis. *See, e.g.*, 25 Pa. Code § 1021.161 (the Board may impose sanctions upon a party for failure to abide by a Board rule of practice or procedure); *Plymouth Township v. EHB*, 1990 EHB 1288, 1291 (grant of summary judgment not warranted where a party "has failed to plead undisputed material facts in its motion").[1]

We enter the following order.

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[1] In any event, the Department's response shows that the facts of this matter are disputed. The crux of Appellant's argument appears to be that the amount of the assessment of civil penalty is unreasonable. The factors that bear on the reasonableness of a penalty, including things such as Nofsker's level of cooperation and compliance, are clearly disputed between the parties. Summary judgment will only be granted where there are no genuine issues of material fact. *Brawand*, 2013 EHB at 867.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HENRY CHRISTOPHER NOFSKER	:	
	:	
v.	:	
	:	**EHB Docket No. 2013-216-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 8th day of August, 2014, it is hereby ORDERED that Appellant Henry Christopher Nofsker's Motion to Dismiss is denied for the reasons set forth in this Opinion.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 8, 2014

c: **DEP, General Law Division**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID VANSCYOC AND ANNA P. VANSCYOC	:	
v.	:	**EHB Docket No. 2013-052-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMERALD COAL RESOURCES, L.P., Permittee	:	**Issued: August 15, 2014**

OPINION AND ORDER ON DISPOSITIVE MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Pennsylvania Environmental Hearing Board denies a coal company's dispositive motion for summary judgment and in the alternative its motion to dismiss because the facts are in dispute as to whether a radio tower damaged by mine subsidence is a protected structure under the Pennsylvania Bituminous Mine Subsidence Act.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is Emerald Coal Resources' (Emerald Coal) Motion to Dismiss or in the Alternative Motion for Summary Judgment. Emerald Coal contends that it is not required to repair, restore or compensate Appellants David and Anna Vanscyoc (Mr. and Mrs. Vanscyoc, Appellants, or Homeowners) for damage caused by underground coal mining to their radio tower because the radio tower is not within the category of structures covered by the Pennsylvania Bituminous Mine Subsidence

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Land Conservation Act, Act of April 27, 1966, P.L. 31, 52 P.S. Sections 1406.1 *et seq.* (Mine Subsidence Act). The Pennsylvania Department of Environmental Protection and the Vanscyocs oppose Emerald Coal's Motions.

Emerald Coal operates a long-wall coal mine in Greene County, Pennsylvania. After mining was completed under Appellants' property, subsidence damage occurred. At issue in this Appeal is damage to a radio tower attached by wires to Appellants' residence. The radio tower was evidently constructed in 1977. The tower is approximately fifty feet from the Vanscyoc home. There is also a small windmill on the tower which is attached by wires to the home where it generates some electricity used by the Vanscyocs to run electrical equipment in their house.

The Pennsylvania Department of Environmental Protection contends that the radio tower is a customer-owned utility that is connected to the dwelling. As such, based on the factual averments in the Affidavit of the Department's Mine Subsidence Section Chief, the regulatory agency argues that it is a "permanently affixed appurtenant structure" which is entitled to protection under the Mine Subsidence Act. Appellants make a similar argument.

The Board will dismiss an Appeal only where there are no material factual disputes and the law is clear that the moving party is entitled to judgment as a matter of law. *Eljen Corp. v. Pennsylvania Department of Environmental* Protection, 2005 EHB 918, 926; *Neville Chemical Company v. Pennsylvania Department of Environmental* Protection, 2003 EHB 530, 531. The Board evaluates Motions to Dismiss, as well as Motions for Summary Judgment, in the light most favorable to the opposing party. *Tri-County Landfill, Inc. v. Pennsylvania Department of Environmental Protection & Grove City Factory Shops Limited Partnership*, 2010 EHB 747,

749; *Solebury Township v. Pennsylvania Department of Environmental Protection*, 2007 EHB 729, 731.

We believe that neither Summary Judgment nor a Motion to Dismiss is appropriate to resolve the issues in this Appeal. Based on our review of the pleadings, there are genuine issues of material fact and the inferences that arise from those facts, including what constitutes a "customer owned utility" and whether the facts show that the radio tower is a "permanently affixed appurtenant structure." Emerald Coal's dispositive motions raise disputed issues of fact as well as issues of mixed fact and law that we think are best suited to be developed more fully at a hearing. *Parks v. Pennsylvania Department of Environmental Protection and Con-Stone, Inc.*, 2007 EHB 413, 414. These essentially factual disputes must be resolved through a factual record developed at a hearing. *Lower Paxton Township v. Pennsylvania Department of Environmental Protection*, 2001 EHB 753, 769. A hearing will bring the operative facts into better focus, and the development of a full record will greatly benefit the Board in resolving the factual and legal issues. *Rural Area Concerned Citizens v. Pennsylvania Department of Environmental Protection and Bullskin Stone & Lime, LLC,* 2013 EHB 94, 97; *Perkasie Borough v. Pennsylvania Department of Environmental Protection et al.*, 2008 EHB 454, 471; *Ehmann et al. v. Pennsylvania Department of Environmental Protection and Kilmer*, 2008 EHB 325, 329.

Accordingly, we will issue an Order denying the Permittee's Motions.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID VANSCYOC AND ANNA P. VANSCYOC	:	
	:	
v.	:	**EHB Docket No. 2013-052-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMERALD COAL RESOURCES, L.P., Permittee	:	

AND NOW, this 15th day of August, 2014, after careful review of the Permittee's Motion to Dismiss or in the Alternative Motion for Summary Judgment (Motions, Motion to Dismiss, or Motion for Summary Judgment),it is ordered as follows:

1. Permittee's Motion for Summary Judgment is **denied.**
2. Permittee's Motion to Dismiss is **denied.**
3. On or before **August 21, 2014,** Counsel shall file a Joint Status Report with the Board. As part of the Joint Status Report, Counsel shall advise the Board of any dates in **November or December, 2014** that they are **not** available for trial.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: August 15, 2014

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 2, 2014**

OPINION AND ORDER ON
RANGE RESOURCES-APPALACHIA, LLC'S MOTION
TO COMPEL SAMPLING OF APPELLANT'S WATER SUPPLY

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Pennsylvania Environmental Hearing Board denies the oil and gas company's motion to compel sampling of the homeowner's water supply because the company waited until the eve of trial to file its motion. The Board granted the oil and gas company permission to conduct extensive sampling on the homeowner's property over one and one-half years ago. The Board's original order and subsequent order set forth that the testing be done quickly and by the conclusion of discovery. To allow such testing now far after the close of discovery, the preparation of expert reports, and the filing of prehearing memoranda would be prejudicial to the homeowner.

Procedural Background:

Presently before the Pennsylvania Environmental Hearing Board (Board) is Range Resources-Appalachia, LLC's (Range Resources, oil and gas company, or Permittee) Motion to Compel Sampling of Appellant's Water Supply and For Expedited Consideration Thereof (Motion to Compel). The Motion to Compel was filed on August 6, 2014. The Pennsylvania

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Department of Environmental Protection does not object to the relief requested in the Motion to Compel. Not surprisingly, the Appellant, Loren Kiskadden (Appellant, Mr. Kiskadden, or the homeowner), objects to the Motion to Compel. Mr. Kiskadden filed his Response and Objection on August 15, 2014.

Mr. Kiskadden filed his Notice of Appeal in October 2011. Mr. Kiskadden appealed an action of the Department set forth in a letter dated September 9, 2011. The parties have conducted robust discovery which has required frequent and direct oversight by the Pennsylvania Environmental Hearing Board.

"In order to evaluate Mr. Kiskadden's complaints in this appeal, Range sought to perform soil and water testing on Mr. Kiskadden's property." Paragraph 2, Motion to Compel. Counsel for Range Resources and Mr. Kiskadden were unable to reach agreement as to the scope of the testing. Therefore, on December 7, 2012, Range Resources filed a Motion for Order Authorizing Entry Upon Property of Appellant (Motion for Entry). On December 19, 2012, Mr. Kiskadden filed a Response opposing the Motion for Entry. On December 20, 2012, the Board held oral argument on the Motion for Entry. On January 11, 2013, Counsel for Range Resources filed a letter with accompanying affidavit informing the Board of recent developments observed on the Kiskadden property which "reinforces the urgent need for the inspection that Range requested in the December 7, 2012 Motion."

On January 16, 2013, the Board issued its Opinion and Order. *Kiskadden v. Commonwealth of Pennsylvania, Department of Environmental Protection and Range Resources,* 2013 EHB 21. The Board granted part of the relief requested by the oil and gas company. The Board allowed Range Resources the opportunity to conduct extensive soil and water testing and sampling including the drilling of multiple bore holes. We originally directed

that these tests be performed by February 8, 2013. We later entered a joint proposed order extending the deadline to perform the work until March 31, 2013.

For whatever reasons, Range Resources did not perform the soil and water testing in the period of time we afforded them. That was their choice. Now more than a year and a half after we entered our Order, Range Resources files its Motion to Compel.

Range Resources has waited too long. Discovery, with minor exceptions not relating to this testing, concluded months ago. Indeed, expert reports were due on July 10, 2014 and prehearing memoranda have been filed by all parties. In May 2014 we warned Counsel that because the hearing in this case had been rescheduled numerous times we would not be rescheduling it again. We find Appellant's claim of prejudice extremely credible if we allowed such testing on the eve of trial. *See Commonwealth of Pennsylvania, Department of Environmental Protection v. Land Tech Engineering, Inc.*, 2000 EHB 1133, 1141.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 2nd day of September, 2014, after review of Range Resources' Motion to Compel Sampling of Appellant's Water Supply and for Expedited Consideration Thereof (Motion to Compel), the Department's Response, and Appellant's Response and Objection, it is ordered as follows:

1) The Motion to Compel is **denied.**

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 2, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 2, 2014**

OPINION AND ORDER ON MOTION FOR DETERMINATION OF SCOPE OF REBUTTABLE PRESUMPTION AND FOR ENTRY OF AN ORDER DIRECTING APPELLANT TO DISCLOSE ALLEGED CONTAMINANTS IN HIS WATER SUPPLY

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Range Resources' motion for entry of an order directing the Appellant to disclose alleged contaminants in his water supply is denied as moot where it appears that the information requested by Range has been supplied by the Appellant in his expert reports and prehearing memorandum. Range's motion for leave to depose the Appellant's experts is also denied where cause has not been established for allowing their deposition. Finally, we decline to certify this Opinion and Order for interlocutory appeal where it would not materially advance the ultimate termination of this matter and, instead, would result in further delay.

OPINION

The background of this matter is more fully set forth in the Environmental Hearing Board's Opinion and Order of June 10, 2014. *See, Kiskadden v. DEP and Range Resources – Appalachia, LLC*, EHB Docket No. 2011-149-R (Opinion and Order on Motion for Contempt

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and Sanctions in the Form of an Adverse Inference, *slip op.* issued June 10, 2014). In that Opinion, the Environmental Hearing Board (Board) denied the Appellant Loren Kiskadden's request for a sanction in the form of an adverse inference, but granted to Mr. Kiskadden a rebuttable presumption as follows:

> The Appellant is granted a rebuttable presumption that contaminants present in the Appellant's water supply may have been used at the Yeager site and/or in Range's operations. The Appellant still has the burden of proving a hydrogeologic connection.

The rebuttable presumption was granted in response to Range Resources' failure to comply with a July 19, 2013 Order of the Board that directed Range to provide information requested by the Appellant in discovery. Range did not challenge the July 19, 2013 Order or the subsequent Opinion and Order of June 10, 2014.

Presently before the Board is Range Resources' Motion for Determination of Scope of Rebuttable Presumption and For Entry of an Order Directing Appellant to Disclose Alleged Contaminants in His Water Supply filed on July 7, 2014. The Appellant filed a response opposing the motion on July 18, 2014. The Department of Environmental Protection (Department) filed a response on July 21, 2014 that took no position on the relief requested by Range but which responded to certain allegations made by Range in its motion.

Range's motion seeks the following:

1) An order directing the Appellant to identify the alleged contaminants in his well that he contends were caused by Range's gas drilling operation;

2) An order granting Range leave to depose the Appellant's expert witnesses concerning the alleged contamination; and

3) Should the Board deny the first two requests, Range asks us to certify this matter for interlocutory appeal.

Order directing Mr. Kiskadden to identify alleged contaminants in his well

As noted above, in its motion Range seeks an order directing the Appellant to identify alleged contaminants in his water that he attributes to Range's operation. Range filed its motion on July 7, 2014. This was prior to the filing of expert reports on July 10, 2014.[1] In its response to Range's motion, the Appellant asserts that the expert reports identify the constituents present in his water supply that he attributes to Range's activities. Additionally, since the filing of Range's motion, the Appellant has also submitted his prehearing memorandum which addresses the issue of contaminants in the Appellant's water supply. Because the Appellant's expert reports and prehearing memorandum appear to respond to Range's request for additional information, we find that Range's request for an order on this matter is now moot.[2]

Deposition of Mr. Kiskadden's expert

Range also seeks leave to depose the Appellant's expert witnesses. The Appellant opposes the motion on the grounds that Range has not demonstrated circumstances warranting the deposition of his experts, especially at this late stage of the proceedings.

Discovery of expert testimony is governed by Pa. R.C.P. 4003.5 Subsection (a)(2) of the rule states that discovery of an expert by means other than answers to expert interrogatories or the filing of an expert report may be permitted only with leave of the court "upon cause shown." Range requests leave to conduct the deposition of the Appellant's experts so that it may have "a meaningful opportunity to rebut the presumption" set forth in the Board's Order of June 10,

[1] The parties agreed to the concurrent filing of expert reports on July 10, 2014, which agreement was adopted by the Board in its Third Amended Pre-Hearing Order No. 2 issued on May 9, 2014.
[2] If Range feels that this matter has not been addressed by the filing of the Appellant's expert reports and prehearing memorandum, it may raise it in a *motion in limine*.

2014. We point out that the Board's June 10, 2014 Order was granted as a sanction, necessitated by Range's own failure to comply with the Board's earlier July 19, 2013 discovery order. Additionally, Range's request to depose the Appellant's experts was made prior to the filing of extensive reports by those experts. The combined total of the Appellant's two expert reports is 162 pages, not including exhibits. We assume that much of the information sought by Range is contained in the reports, and, therefore, we find no basis for authorizing the deposition of these experts.

Supplement to Range's Motion

On August 6, 2014, Range filed a Notice of Supplemental Authority (supplemental authority) in support of its Motion for Determination of Scope of Rebuttable Presumption. The Supplemental Authority attaches and discusses the Commonwealth Court's recent decision in *Township of Robinson v. Department of Environmental Protection*, 284 M.D. 2012 (July 17, 2014), which addressed certain provisions of the Oil and Gas Act, Act of February 14, 2012, P.L. 87, 58 Pa. C.S. § 3201 et seq., (Act 13), including the disclosure obligations of manufacturers, vendors and operators in the oil and gas industry.

The disclosure provisions addressed by the Court in *Robinson* - 58 Pa. C.S. § 3222.1(b)(10) and (11) - are not at issue in the *Kiskadden* appeal. Those provisions address under what circumstances a vendor, service provider or operator may be required to disclose alleged trade secret information when such information is requested by a health professional. Range argues, however, that the Court in *Robinson* recognized that operators may not have complete information about the chemical make-up of products used or stored at their site due to trade secret protections and, as a result, a failure to produce such information cannot be the basis of a motion for sanctions.

We find that the supplemental authority filed by Range has no bearing on the Orders issued by the Board on July 19, 2013 or June 10, 2014. The *Robinson* decision did not change an operator's disclosure obligations under Act 13 from those that were in place when the Orders were issued. Range never raised the disclosure provisions of Act 13 in a challenge to the July 19, 2013 Order, nor did it seek reconsideration.[3] Any challenge to the July 19, 2013 and June 10, 2014 Orders at this stage of the proceedings is untimely.

Additionally, the Department disputes Range's assertion that "the Department and the public may not have complete information about the chemical make-up [of products used or stored at the Range site] due to trade secret protections under the Act." (Supplement to Range's Motion, p. 3) The Department argues, to the contrary, that under Chapter 78 of the Department's regulations, Range is in fact required to provide the Department with a listing of all chemicals used in their drilling process.

Interlocutory Appeal

Range asks that if the Board does not grant its discovery requests we should certify our Order in this matter for interlocutory appeal under 42 Pa. C.S. § 702(b). That section provides as follows:

> (b) Interlocutory appeals by permission – when a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

[3] Requests for reconsideration of an interlocutory order must be filed within 10 days of the order. 25 Pa. Code § 1021.151(a).

We are not of the opinion that our Order today involves a controlling question of law as to which there is a substantial ground for difference of opinion. Additionally, we believe the Appellant's argument is correct that an interlocutory appeal of our Order, rather than "materially advanc[ing] the ultimate termination of the matter," will instead simply result in further delay. The trial in this matter has been postponed several times, most recently for nearly a year while the Board and the parties awaited the results of chemical testing promised by Range. We see no reason to postpone this matter further.

Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 2nd day of September, 2014, it is hereby **ORDERED** that the Motion for Determination of Scope of Rebuttable Presumption and for Entry of an Order Directing Appellant to Disclose Alleged Contaminants in His Water Supply is ***denied***.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 2, 2014

c: **DEP, General Law Division:**
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9th Floor, RCSOB

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 4, 2014**

OPINION AND ORDER ON PERMITTEE'S MOTION FOR SITE VIEW

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Because the Board finds that it will benefit from a second site view in this matter, the Permittee's Motion for a Site View is granted. Where the original site view was held nearly two years ago and the trial in this matter has been rescheduled several times due to prehearing and discovery issues, a second site view will assist the Board in fully understanding the testimony and exhibits presented at trial.

O P I N I O N

This matter originated with a complaint filed by Mr. Loren Kiskadden (Mr. Kiskadden or the Appellant) with the Pennsylvania Department of Environmental Protection (Department). The Appellant alleges that the water supply for his residence in Amwell Township, Washington County has been polluted by oil and gas activities conducted by Range Resources – Appalachia, LLC (Range) at its Yeager well site. In response to the complaint, the Department conducted an investigation and determined that the contaminants found in the Appellant's water supply were

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not the result of Range's actions at its Yeager site or any other gas well related activities. The Appellant appealed the Department's determination to the Environmental Hearing Board (Board). After several years of discovery, numerous motions and extensive prehearing proceedings, this matter is now scheduled for trial beginning September 23, 2014 and running through October 9, 2014.

Before the Board is a Motion for Site View filed by Range on August 27, 2014. The Department filed a response in support of the motion. The Appellant opposes the motion and filed a response in opposition on September 3, 2014. The Appellant points out that a site view has already been held in this matter and he asserts that it is not necessary for the Board or the parties to expend further resources to undertake an activity that it has already done.

The Board conducted a site view in this matter nearly two years ago in October 2012. Range contends that in the nearly two years since that initial site view, Mr. Kiskadden has "identified what he believes to be the alleged pathway(s) from the Yeager well site to his well." (Range's Motion, para. 6) Range goes on to state:

> Rather than identifying a single pathway, Appellant claims multiple possible pathways – surficial pathways, groundwater pathways, and even deep vertical pathways from the gas-bearing shales at depths exceeding 7,000 feet to the Appellant's water supply well. The alleged pathways form the linchpin of Appellant's case and, based on Mr. Kiskadden's 'expert' reports, Range suspects that Appellant will likely devote much of his case-in-chief at the hearing to this topic.

Id.

Range sets forth the need for a site view as follows:

> Because these alleged pathways span very long distances over and under large tracts of land that are topographically varied, the true physical scale is best comprehended through a site view. The October 2012 site view did not consider potential pathways and thus did not involve observing or walking some or all of the alleged pathways. . .Consequently, a site view in advance or on the

> first day of the merits hearing. . .would benefit the Board by assisting it in visualizing the maps, diagrams, and other similar materials that will likely serve as exhibits in the hearing.

Id. at para. 9-10.

The Appellant opposes the site view on the basis that the sites set forth in Range's motion were already viewed by the Board on its previous visit. He correctly points out that a site view is not evidence. The purpose of a site view is to assist the Board in understanding the evidence. *Giordano v. DEP and Browning-Ferris Industries et al.*, 2000 EHB 1163, 1164. The Appellant argues that because the site view is not evidence there is no benefit to performing a second view during or prior to the start of the trial on the merits. The Appellant notes that Range's motion states that the site view will allow the Board to view the hydrogeologic pathways identified by the Appellant's experts in their expert reports. The Appellant argues that because these pathways are subterranean a site view is of no benefit. He asserts that a site view cannot establish where a hydrogeologic connection exists because this is something that must be established through expert testimony. Finally, the Appellant also asserts that a site view at this time would be less helpful to the Board than the view that was held two years ago since the Yeager drill cuttings pit is now closed and the Yeager impoundment is in the process of being closed.

The Board's rules permit a site view "when the Board is of the opinion that a viewing would have probative value in a matter in hearing or pending before the Board." 25 Pa. Code § 1021.115. The decision of whether to conduct a view is within the Board's absolute discretion. *Lucky Strike Coal Corp. v. DEP*, 1986 EHB 1233, 1235. The Board has recognized that a site view, though not evidence, can be used as an aid to furthering the Board's understanding of a case. *Giordano, supra* at 1164.

Although we recognize the Appellant's concerns, we agree with Range that a site view at this time would benefit the Board as an aid in understanding the parties' presentation of their cases. It is true that the Board has already visited the site and conducted a view, but that view was nearly two years ago. The initial site view was extremely beneficial in understanding many of the issues presented by the parties in their pretrial motions. However, a second site view would be helpful now, at this stage of the proceedings, in order to aid the Board in understanding the testimony and exhibits that will be presented at trial. When a significant amount of time passes between pretrial proceedings and the actual trial, it may be necessary to schedule more than one view at the Board's discretion.[1]

Additionally, we understand the Appellant's concern that the site has changed since the Board's initial visit in October 2012. Let us be clear: the purpose of this site visit is not to serve as evidence of conditions at the site. Rather, it is merely to serve as a visual aid to the Board with regard to the topography and location of various areas and structures that will be beneficial in providing perspective when testimony or exhibits are presented on issues addressing the location of those areas. *Giordano, supra* at 1165.

The Appellant points out that the Board's Order scheduling the original site view stated that the view was being conducted, "to assist the Board in better understanding the testimony and exhibits when it conducts the hearing on the merits in this case." (Board's Order of October 11, 2012) At the time the Board issued its Order, it was not anticipated that two years would pass before the trial would finally be held. Based on the passage of time and the complexity of issues involved in this case, a second view at or around the time of trial would be greatly beneficial.

---

[1] In the case of *Chestnut Ridge Conservancy v. DEP and Tasman Resources*, Docket No. 96-022-R, which involved a lengthy and complicated pretrial process much like that in the present case, the Board found it necessary to conduct three site views.

The Appellant argues that neither he nor the Board should have to expend their limited resources to undertake an activity that has already been done. However, I agree wholeheartedly with the viewpoint articulately expressed by my colleague Judge Labuskes in *Giordano*:

> [E]ven if we accept that there might be some prejudicial impact, and acknowledge that the view will involve some cost and inconvenience for all concerned, we nevertheless conclude that the value of a view in helping this Administrative Law Judge understand the issues so that he can do his best to prepare intelligent and accurate findings of fact substantially outweighs that cost and presumed prejudicial impact.

Giordano, supra at 1167.

We find that a view of the topography of the area and the location of various sites and structures in relation to each other will greatly benefit the Board at trial. Therefore, we grant Range's motion.

The trial in this matter is scheduled to begin on September 23, 2014 and run through September 25 and then resume again on September 29. Rather than interfere with the scheduling of witness' testimony, the Board is available to conduct the site view on September 26, 2014. If that date does not fit into counsel's schedules, we will select a date that is mutually convenient for counsel and the Board.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 4th day of September, 2014, it is hereby **ORDERED** that Range's Motion for Site View is *granted.* An order scheduling the date of the site view will be issued separately.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 4, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MANN REALTY ASSOCIATES, INC.	:	
	:	
v.	:	**EHB Docket No. 2013-153-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 8, 2014**

OPINION IN SUPPORT OF ORDER DENYING MOTION TO DISMISS

By: Richard P. Mather, Sr., Judge

Synopsis

The Board denies the Department's motion to dismiss where the motion was filed untimely and, although the parties agree that the remedial action required by a Department order under appeal has been completed, a case or controversy still exists because the order, which alleges that the appellant committed certain violations, otherwise remains part of the appellant's compliance history, and the appellant has an interest in challenging the validity of the order and vindicating itself of the alleged violations. Further, the Department's motion to dismiss the appeal because the appellant allegedly raised issues in a pre-hearing memorandum that were outside the scope of issues raised in its notice of appeal is an issue of relevance that should have been raised in a motion in limine.

O P I N I O N

The Appellant, Mann Realty Associates, Inc. ("Mann Realty"), filed an appeal before the Environmental Hearing Board (the "Board") objecting to an order issued by the Department of

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Environmental Protection (the "Department") which found that Mann Realty had violated various provisions of Pennsylvania's Solid Waste Management Act, 35 P.S. §§ 6018.101-6018.1003, and The Clean Streams Law, 35 P.S. §§ 691.1-691.1001, and directed Mann Realty to take certain corrective actions to identify, inventory and dispose of materials on property owned by Mann Realty (the "Order"). Mann Realty appealed the Department's issuance of the Order on August 23, 2013, arguing that the Order was not lawfully issued.

The deadline for filing dispositive motions in this matter passed on April 25, 2014. A hearing was scheduled to begin on September 11, 2014. On August 18, 2014, after the deadline for filing dispositive motions had passed and after both parties had already filed pre-hearing memoranda in anticipation of the upcoming hearing, the Department filed a motion to dismiss the appeal ("Motion to Dismiss"). The Board ordered the Appellant to respond to the Department's Motion to Dismiss by August 29, 2014. On August 29, 2014, Robert B. Eyre, Esquire, then-counsel for Mann Realty, filed a motion to extend the time to respond to the Motion to Dismiss.[1] Mann Realty ultimately filed a response to the Department's Motion to Dismiss on September 2, 2014, and the Department filed a reply on September 3, 2014. On September 4, 2014, following a conference call with the parties, the Board issued three separate orders: one canceling the hearing, one denying the Department's Motion to Dismiss, and one granting Mr. Eyre's Motion to Withdraw. This opinion is in support of the Board's order denying the Motion to Dismiss.

We deny the Motion to Dismiss in part because it was filed untimely. The Department failed to file the motion before the April 24, 2014 deadline for filing dispositive motions, then it waited until 24 days before the start of the hearing to file the motion, which left Mann Realty

[1] Mr. Eyre filed this motion in conjunction with a motion to withdraw as counsel for Mann Realty and a motion to adjourn the upcoming hearing.

with less than the 30 days provided under the Board's Rules to file a response. The untimely filing of the Department's motion is alone sufficient to deny it.

In addition to the untimely filing, we also deny the Motion to Dismiss in part because we disagree with the arguments set forth by the Department. The Department raises two issues in support of its Motion to Dismiss. First, the Department argues that because the parties agree that the Order has been complied with, the matter is now moot. The parties agree that since the Department issued the Order work has been conducted at the site to the point where the Department believes that the Order has been complied with. In other words, the parties agree that the Order requires no further action from Mann Realty. Mann Realty, however, counters that "[w]hat remains in dispute is whether Mann itself was ever in violation . . . ." Appellant's Response at 3. Mann Realty denies that it violated the Solid Waste Management Act or The Clean Streams Law. Mann Realty also claims that a case or controversy exists because the Department separately issued a civil penalty assessment of $15,640 against Mann Realty ("Civil Penalty Assessment") which relies entirely on the terms of the Order. *Id.* The Department points out that actions of the Department not appealed to the Board within 30 days are deemed administratively final and may no longer be appealed. The Department argues that the Civil Penalty Assessment is a separate agency action that was not appealed within 30 days, can no longer be appealed, and is therefore administratively final.

We agree with the Department that the existence of the Civil Penalty Assessment does not prevent this appeal from becoming moot. However, we ask this question of the Department: If you believe the Order has been complied with, why not simply rescind the Order, and why instead file a lengthy motion to dismiss? The answer, quite simply, is that the Department may

wish to maintain the Order on file for potential future compliance history reviews.[2] In that sense, we agree with Mann Realty that what remains in dispute is whether the Order was ever lawfully issued in the first place. Mann Realty has an interest in challenging the validity of the Order and defending its compliance history.

Second, the Department argues that Mann Realty has raised issues in its Pre-Hearing Memorandum that are outside the scope of the issues raised in its Notice of Appeal. The Department argues that the Board's consideration of these issues would be highly prejudicial to the Department because the Department has not yet had an opportunity to conduct discovery on these issues. Mann Realty replies that it has not broadened the scope of the issues raised in its Notice of Appeal and that what the Department characterizes as new claims are simply elaborations of issues raised in its Notice of Appeal.[3]

We disagree with the Department. We will not dismiss Mann Realty's entire appeal because it may have added a few new issues in its Pre-Hearing Memorandum. If the Department wanted the Board to exclude the alleged new issues from consideration at a hearing, the Department should have filed a motion in limine seeking to prevent Mann Realty from raising these issues on the basis of relevance. The Department did not file such a motion. The Board, nevertheless, retains authority to consider individual objections based on relevance raised during a hearing.

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[2] We are surprised by the Department's statement in its Reply that: "In this case Mann argues that it will suffer a detriment without the Board's decision. What detriment?" The Department knows quite well what detriment Mann Realty will suffer without a favorable decision by the Board.

[3] Mann Realty argues in the alternative that if the Board finds that it broaden the scope of its issues outside of those raised in its Notice of Appeal, that the Board accept Mann Realty's Pre-Hearing Memorandum as an amendment to its Notice of Appeal. Appellant's Response at 5. Appellants have 20 days to amend their appeal as of right. 25 Pa. Code § 1021.53(a). After the 20-day period for amendment as of right, the Board, upon motion by the appellant, may grant leave for further amendment of the appeal. 25 Pa. Code § 1021.53(a). Mann Realty has not moved for leave to amend its appeal, and we do not accept its Pre-Hearing Memorandum as an amendment to its Notice of Appeal.

For all of these reasons, we issued an order denying the Department's Motion to Dismiss. A copy of that order is attached.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MANN REALTY ASSOCIATES, INC.	:	
	:	
v.	:	**EHB Docket No. 2013-153-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 4th day of September, 2014, in consideration of the Department's Motion to Dismiss, filed on August 18, 2014, as well as Mann Realty Associates, Inc.'s Response, the Department's Reply and a conference call between the parties, it is hereby ordered that the Department's Motion to Dismiss is **denied**. An opinion in support of this order will follow.

ENVIRONMENTAL HEARING BOARD

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

DATED: September 4, 2014

c: **For the Commonwealth of PA, DEP:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MANN REALTY ASSOCIATES, INC.	:	
	:	
v.	:	**EHB Docket No. 2013-153-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 8, 2014**

OPINION IN SUPPORT OF ORDER GRANTING MOTION TO WITHDRAW AS COUNSEL

By: Richard P. Mather, Sr., Judge

Synopsis

The Board grants a motion by an appellant's counsel requesting to withdraw as counsel where the appellant has a substantial unpaid bill, where the appellant has failed to provide information and cooperation necessary for effective representation and preparation for a hearing, and where, by canceling an upcoming hearing and providing the appellant with a period of time to obtain new counsel, the withdrawal of appearance will not have a material adverse effect on the interests of the appellant, will not prejudice the litigants, will not delay resolution of the case and will not impede the efficient administration of justice.

O P I N I O N

The Appellant, Mann Realty Associates, Inc. ("Mann Realty"), filed an appeal before the Environmental Hearing Board (the "Board") objecting to an order issued by the Department of Environmental Protection (the "Department") which found that Mann Realty had violated various provisions of Pennsylvania's Solid Waste Management Act, 35 P.S. §§ 6018.101-6018.1003, and the Clean Streams Law, 35 P.S. §§ 691.1-691.1001, and directed Mann Realty to

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take certain corrective actions to identify, inventory and dispose of materials on property owned by Mann Realty (the "Order"). Mann Realty is a corporation authorized to conduct business in Pennsylvania. Mann Realty appealed the Department's issuance of the Order on August 23, 2013. Throughout the entirety of this appeal, Mann Realty was represented by Robert B. Eyre, Esquire of Foehl & Eyre, P.C.

A hearing was scheduled to begin in this matter on September 11, 2014. Both parties filed pre-hearing memoranda in anticipation of the hearing. On August 18, 2014, after the deadline for dispositive motions had passed, the Department filed a Motion to Dismiss the appeal for mootness. The Board ordered the Appellant to respond to the Department's Motion to Dismiss by August 29, 2014. On August 29, 2014, Mr. Eyre filed a Motion to Withdraw as Counsel to Mann Realty Associates, Inc. (the "Motion to Withdraw"). The Motion to Withdraw was accompanied by a request to adjourn the upcoming hearing and a request for additional time to respond to the Department's Motion to Dismiss. Mann Realty ultimately filed a response to the Department's Motion to Dismiss. On September 4, 2014, following a conference call with the parties, the Board issued three separate orders: one canceling the hearing, one denying the Department's Motion to Dismiss, and one granting Mr. Eyre's Motion to Withdraw. This opinion is in support of the Board's order granting the Motion to Withdraw.

Mr. Eyre provides two reasons in support of his Motion to Withdraw. First, Mr. Eyre believes that continued representation of Mann Realty will result in an unreasonable financial burden on him and his firm. He asserts that his firm has performed approximately 120 hours of professional services for Mann Realty, including preparing and filing a Notice of Appeal, conducting discovery, defending against discovery motions and motions for sanctions filed by the Department, participating in efforts to resolve the appeal, and preparing and filing a pre-

hearing memorandum. Mr. Eyre claims that his firm billed Mann Realty an amount of $14,284.83 for costs and expenses incurred through April 30, 2014 and that Mann Realty has not paid this bill. He expects that approximately $4,550.00 will be billed for work completed after April 30, 2014, and that preparing for and participating in a hearing in this matter will result in Mr. Eyre's firm incurring an additional $10,000 to $15,000, which would increase Mann Realty's total bill to approximately $28,834.83 to $33,834.83. Mr. Eyre claims that he and his firm have repeatedly requested payment and offered to continue representation with partial payments or adequate assurance of future payment, but Mr. Eyre has received none of these. For example, on August 13, 2014, Mr. Eyre sent an email to Mann Realty's Vice President, Robert M. Mumma II, advising Mann Realty of Mr. Eyre's intention to move to withdraw as counsel unless $10,000 and adequate assurance of payment of the balance due was received within ten days. Mr. Eyre did not receive payment or assurances of payment before filing the Motion to Withdraw on August 29, 2014. On a September 4, 2014 conference call between the parties, Mr. Mumma did not deny Mann Realty's failure to pay Mr. Eyre's bill.

Second, Mr. Eyre claims that he has not received information and cooperation from Mann Realty necessary for effective representation and preparation for a hearing, and that the attorney-client relationship has deteriorated to the point that continued representation has been rendered unreasonably difficult. Mr. Eyre's August 13, 2014 email to Mr. Mumma also requested confirmation of Mann Realty's intentions to comply with Notices to Attend served by the Department on some of Mann Realty's officers. Mr. Eyre did not receive a response to this email prior to filing the Motion to Withdraw on August 29, 2014.

Under the Pennsylvania Rules of Professional Conduct, a lawyer may withdraw from representing a client if:

> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
>
> . . .
>
> (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
>
> (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
>
> (7) other good cause for withdrawal exists.

Pa. R.P.C 1.16(b). In ruling on a motion to withdraw as counsel, the Board considers the following factors: "the reasons why withdrawal is requested; any prejudice withdrawal may cause to the litigants; delay in resolution of the case which would result from withdrawal; and the effect of withdrawal on the efficient administration of justice." 25 Pa. Code § 1021.23(b); *Manning v. DEP*, 2013 EHB 845, 847.

We agree with Mr. Eyre's reasons for requesting withdrawal. By failing to pay its bill, Mann Realty has failed substantially to fulfill an obligation to Mr. Eyre regarding his services, and the continued representation of Mann Realty will result in an unreasonable financial burden on Mr. Eyre and his firm. Mann Realty was provided reasonable warning that Mr. Eyre would withdraw unless Mann Realty's obligations to Mr. Eyre were met.

While the financial burden is an important consideration, the more important consideration for the Board in this appeal is Mr. Eyre's second reason for requesting withdrawal. We agree with Mr. Eyre that Mann Realty's failure to provide information and cooperation necessary for effective representation and preparation for a hearing has rendered Mr. Eyre's representation of Mann Realty unreasonably difficult. Mr. Eyre's Motion to Withdraw set forth a compelling argument to support withdrawal. In addition, during the September 4, 2014

conference call, which included counsel and representatives of the parties, the Board heard firsthand the difficulties between Mr. Eyre and the representative of his corporate client. Under these circumstances, good cause for withdrawal exists.

Further, based on the Board's orders canceling the upcoming hearing and providing Mann Realty with a period of time to retain new counsel, the Board does not believe that the withdrawal of Mr. Eyre will cause any prejudice to the litigants or will have a material adverse effect on the interests of Mann Realty. In addition, if, for example, Mann Realty's new attorney prefers a legal strategy that differs from the approach taken by Mr. Eyre, that attorney may request leave to amend certain documents filed on behalf of Mann Realty, such as its Notice of Appeal or its pre-hearing memorandum. Also, while the withdrawal of Mr. Eyre will result in a slight delay of the hearing, it is uncertain at this point in the proceedings whether the withdrawal will delay resolution of the case as a whole. Finally, the withdrawal of Mr. Eyre will not impede the efficient administration of justice. The relationship between Mann Realty and Mr. Eyre has deteriorated to the point where requiring the two to continue their difficult relationship would actually have a deleterious effect on the efficient administration of justice. By requiring Mann Realty to retain new counsel, we are promoting the efficient administration of justice in this matter.

For all of these reasons, we issued an order granting the Motion to Withdraw as Counsel to Mann Realty Associates, Inc. A copy of that order is attached.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MANN REALTY ASSOCIATES, INC.	:	
	:	
v.	:	**EHB Docket No. 2013-153-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 4th day of September, 2014, in consideration of a Motion of Robert B. Eyre and Foehl & Eyre, P.C. to Withdraw as Counsel to Mann Realty Associates, Inc., filed on August 29, 2014, as well as a conference call between the parties, it is hereby ordered that the Motion to Withdraw as Counsel to Mann Realty Associates, Inc. is **granted**, and it is further ordered that under 25 Pa. Code § 1021.21(b), which requires corporations to be represented by an attorney of record admitted to practice before the Supreme Court of Pennsylvania, Mann Realty Associates, Inc. shall retain new counsel and shall have counsel enter an appearance in this matter by no later than **October 6, 2014**. An opinion in support of this order will follow.

ENVIRONMENTAL HEARING BOARD

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

DATED: September 4, 2014

c: **For the Commonwealth of PA, DEP:**
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Robert J. Schena, Esquire
Office of Chief Counsel – Southcentral Region

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FOEHL & EYRE, P.C.
27 East Front Street
Media, PA 19063

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 10, 2014**

OPINION AND ORDER ON MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY REGARDING GRACE KISKADDEN'S WATER WELL AS BEING HYDROLOGICALLY ISOLATED FROM THE YEAGER SITE

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Where the parties agreed to delay responding to expert discovery until the filing of expert reports two and a half months before trial, claims of unfair surprise must be considered in the light of what constitutes fair rebuttal. Additionally, where the Department can point to evidence of record in support of its expert conclusions and statements in its prehearing memorandum, we find there is no unfair surprise to the Appellant.

O P I N I O N

This matter involves an appeal filed by Mr. Loren Kiskadden (the Appellant) from a determination by the Department of Environmental Protection (Department) that gas well related activities by Range Resources – Appalachia, LLC (Range Resources) at its Yeager site did not cause contamination to Mr. Kiskadden's water well. A trial in this matter is set to begin before

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http://ehb.courtapps.com

the Pennsylvania Environmental Hearing Board (Board) on September 23, 2014 and continue through October 9, 2014.

Numerous motions have been filed throughout the course of this proceeding, including seventeen motions recently filed by Range Resources and the Appellant seeking to limit or exclude the presentation of certain evidence and testimony at trial. Presently before the Board is the Appellant's Motion in Limine to exclude Expert Testimony Regarding Grace Kiskadden's Water Well as Being Hydrologically Isolated from the Yeager Site.

The Appellant resides on Banetown Road in Amwell Township, Washington County. His residence is located on a portion of a larger tract of land owned by his mother, Grace Kiskadden, who also has a residence on Banetown Road. Both the Appellant and his mother have wells that service their residences.

The Appellant takes issue with the following statement made by the Department in its prehearing memorandum: "Grace Kiskadden's water supply is a water well that is hydrologically isolated from the Yeager Site, within a reasonable degree of scientific certainty based on the Department's analyses." (Department Prehearing Memorandum, p. 13) The Appellant contends that neither of the expert reports filed by the Department contain any mention of Grace Kiskadden's water well, any conclusions or opinions regarding its hydrologic connection to the Yeager site, or any underlying data to support a conclusion that the well is hydrologically isolated from the Yeager site. It is the Appellant's contention that the Department makes this allegation for the first time in its prehearing memorandum. The Appellant also asserts that there is no factual basis to support the Department's conclusion since there is no underlying data or testing. The Appellant claims that he would be unfairly prejudiced if any such evidence were to be presented at trial. Finally, the Appellant argues that any testimony

regarding whether there is a hydrologic connection between Grace Kiskadden's water well and the Yeager site would not help the Board to understand the evidence and would be speculative at best.

The Department and Range Resources have filed responses in opposition to the Appellant's motion. The Department disputes the Appellant's claim of unfair surprise and argues that the Appellant has been on notice about the Department's inquiry into the hydrology and geology of the area surrounding both of the Kiskadden wells since 2012 when it produced topographic and geologic maps, notes and reports in discovery. Most importantly, the Department points out that neither the Appellant nor Range Resources served expert discovery on the Department; nevertheless, the Department filed expert reports. (Department's Memorandum in Support of Response, p. 8, n. 2) The Department also points out that it deposed Grace Kiskadden and asked her about her water quality and results of sampling done in October 2011 and that it answered written discovery requests pertaining to this subject.[1]

The Department also states that although it requested expert discovery from the Appellant in March 2012, the Appellant requested to wait to respond to expert discovery until the filing of expert reports, which was done on July 10, 2014 (discussed more below). The Department contends that when it received the Appellant's expert report on July 10 it was surprised to see that the Appellant's expert did not compare his water well to his mother's water well located on the same property and claimed that the Appellant's well is down gradient southward from the Yeager site. Based on the Appellant's report, the Department stated in its prehearing memorandum that the Appellant's expert's theory would "be rebutted by showing the similarities of Mr. Kiskadden's Water Supply to a water supply owned by Grace Kiskadden." (Department Prehearing Memorandum, p. 21) The Department also intends to rebut the Appellant's expert's

[1] The Department provides copies of the discovery responses as exhibits to its response.

theory by demonstrating that Grace Kiskadden's water supply is separated by a topographic ridge from the Yeager site. (*Id.*)

Range Resources supports the Department's position that testimony regarding a hydrologic connection, or lack thereof, between Grace Kiskadden's well and the Yeager site is within the fair scope of the Department's expert reports. Range Resources points to analyses of samples taken from the Kiskadden wells and groundwater quality data as supporting the Department's position. Range Resources also argues that such testimony is relevant to the issue of whether the Appellant's water supply has been impacted by the oil and gas company's operations.

We believe that this motion as well as many of the seventeen motions in *limine* (or motions to strike) filed since the end of August stem from the agreement the parties entered into with regard to how to conduct expert discovery in this matter. Generally, the Board's Rules of Practice and Procedure (Rules) provide for the exchange of expert discovery during the discovery period that is set forth in the first order issued in an appeal, Prehearing Order No. 1. 25 Pa. Code § 1021.101(a). The discovery schedule is often extended, often more than once, particularly so whenever complex issues are involved, such as those in the present appeal. The Board's Rules ensure that the parties have adequate time for conducting expert discovery and for any necessary supplementation to that discovery so as to avoid any unfair surprise or prejudice to a party at trial.

However, in this case, the Appellant and Range Resources agreed to forego answering expert interrogatories during the course of discovery. Instead, they agreed the parties should produce expert reports and/or answers to expert discovery simultaneously on July 10, 2014, two

and half months prior to the start of trial.[2] The Board adopted the parties' agreement in numerous orders entered at the request of the parties. Now, many of the motions that have been filed claim unfair surprise at the information contained (or not contained) in the expert reports. Had expert discovery been conducted earlier in this proceeding, we believe that many of these motions could have been avoided. By agreeing to delay answering expert discovery until the exchange of expert reports at the eleventh hour, it is not surprising that we are now faced with a flurry of motions seeking to limit many of the issues raised in the expert reports or prehearing memoranda. Where information is not requested through expert discovery, it is not surprising that such information may show up for the first time in a party's prehearing memorandum.

At this stage of the proceeding, it is difficult to draw the line between what constitutes unfair surprise and fair rebuttal. Had many of the expert conclusions and theories and factual assertions been proposed earlier in the proceeding during discovery, what now looks like unfair surprise could have been addressed in a timely manner. The parties' agreement to delay the production of expert discovery should not be used to prohibit what would otherwise be fair rebuttal.

That being said, we find that the Department properly complied with prehearing procedures with respect to the issues it has raised regarding Grace Kiskadden's water well. Ms. Kiskadden was deposed and was asked questions regarding her water well and location, and the Department appears to have been ready and willing to respond to expert discovery on this issue had it been served with any. We find no unfair surprise or prejudice to the Appellant on this issue. Accordingly, we enter the following order:

---

[2] The Board's rules allow for an expert report to be substituted for answers to expert interrogatories. 25 Pa. Code § 1021.101(a)(2). However, the rules contemplate that this exchange will take place earlier than 2 ½ months prior to the start of trial.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 10th day of September, 2014, it is hereby **ORDERED** that the Motion in Limine to Exclude Expert Testimony Regarding Grace Kiskadden's Water Well as Being Hydrologically Isolated from the Yeager Site is *denied.*

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 10, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 11, 2014**

OPINION AND ORDER ON MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY OF JOHN STOLTZ

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Where there is insufficient evidence to determine at this time whether the testimony of a fact witness listed in the Permittee's prehearing memorandum is relevant, it is premature to grant the Appellant's motion to exclude his testimony. The Board will rule on this issue at trial if the witness is called to testify. Because this individual was listed as a fact witness, any testimony he may be permitted to provide cannot consist of expert testimony.

OPINION

This matter involves an appeal filed by Mr. Loren Kiskadden (the Appellant) from a determination by the Department of Environmental Protection (Department) that gas well related activities by Range Resources – Appalachia, LLC (Range Resources) at its Yeager site did not cause contamination to Mr. Kiskadden's water well. A trial in this matter is set to begin before the Pennsylvania Environmental Hearing Board (Board) on September 23, 2014 and continue through October 9, 2014.

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Numerous motions have been filed throughout the course of this proceeding, including seventeen motions recently filed by Range Resources and the Appellant seeking to limit or exclude the presentation of certain evidence and testimony at trial. Presently before the Board is the Appellant's Motion to Exclude the Testimony of John Stoltz. Range filed a response on September 10, 2014, opposing the motion. The Department submitted a letter on September 8, 2014, advising the Board that it would not be filing a response to the motion.

Range Resources identified Professor John Stoltz as a fact witness in its prehearing memorandum. It is the Appellant's contention that Professor Stoltz's testimony would be irrelevant and lack probative value and should therefore be excluded. In his motion, the Appellant asserts that Professor Stoltz has never performed any inspections of the Appellant's property or any testing of the Appellant's water, nor did he have any involvement in the Department's decision in this appeal. The Appellant references corresponding litigation before the Washington County Court of Common Pleas, *Haney et al. v. Range Resources, et al.*, and states that Professor Stoltz's deposition was taken in connection with that litigation. According to the Appellant, Professor Stoltz, with the assistance of students, undertook limited testing of the water of some of the Appellant's neighbors. The Appellant argues that any testimony in connection with his water testing requires expert testimony and Professor Stoltz was not identified as an expert. On the other hand, the Appellant argues, if Range Resources simply intends to offer Professor Stoltz to provide fact testimony, his testimony will be of little probative value.

In response, Range Resources asserts that it intends to introduce the testimony of Professor Stoltz for the narrow purpose of rebutting any evidence offered by the Appellant regarding contamination of his neighbors' water supplies and does not intend to call him as an

expert witness. Range Resources states that if it is necessary to call Professor Stoltz for rebuttal, he will be simply asked to provide factual testimony that he took samples of Mr. Kiskadden's neighbors' waters supplies and the constituents that were or were not detected in the samples. Range Resources points out that the Appellant provides no citations in support of the factual assertions made about Professor Stoltz in his motion and that it is prepared to provide a proffer as to his testimony if he is called to testify.

Under Pa. R.E. 401, evidence is relevant if:

> (a) It has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) The fact is of consequence in determining the action.

Evidence may be excluded where its limited probative value is outweighed by one of the following factors: unfair prejudice, confusion of issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence. Pa. R.E. 403.

Here, we have insufficient information as to the exact nature of Professor Stoltz's testimony. We agree with Range Resources that it is premature to rule on the relevance or admissibility of Professor Stoltz's testimony at this time. If Range Resources decides to offer Professor Stoltz's testimony at trial, the Appellant can raise an objection at that time and we will order Range to provide a proffer as to the scope of Professor Stoltz's testimony. We agree with the Appellant, however, that Professor Stoltz's testimony cannot consist of expert opinion. For example, if he is permitted to testify, he may testify that he conducted water sampling and the constituents, if any, that were found to be present in the samples, but he is not permitted to provide expert testimony thereon.

:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 11th day of September, 2014, it is hereby **ORDERED** that the Motion in Limine to Exclude Testimony of John Stoltz is *denied.*

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 11, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 11, 2014**

OPINION AND ORDER ON APPELLANT'S MOTION TO STRIKE THE DEPARTMENT'S AND RANGE'S CONCLUSIONS AND DETERMINATIONS REGARDING THE ORIGIN OF METHANE IN APPELLANT'S WATER

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Department and Permittee will not be precluded from presenting testimony and evidence regarding the origin of methane in the Appellant's water supply where the letter upon which the Appellant bases its motion does not appear to apply to the testing upon which the Department relied in reaching its conclusions with regard to the Appellant's water supply. We disagree with the Permittee that it was under no obligation to supplement its discovery responses and we find that the Permittee's production of the letter in question was untimely. However, because the letter does not apply to the isotopic testing upon which the Department relied in reaching its conclusions, we find no basis for precluding the Department or Range Resources from presenting testimony on this issue.

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http://ehb.courtapps.com

OPINION

This matter involves an appeal filed by Mr. Loren Kiskadden (the Appellant) from a determination by the Department of Environmental Protection (Department) that gas well related activities by Range Resources – Appalachia, LLC (Range Resources or Range) at its Yeager site did not cause contamination in Mr. Kiskadden's water supply. A trial in this matter is set to begin before the Pennsylvania Environmental Hearing Board (Board) on September 23, 2014 and continue through October 9, 2014.

Numerous motions have been filed throughout the course of this proceeding, including seventeen motions recently filed by Range Resources and the Appellant seeking to limit or exclude the presentation of certain evidence and testimony at trial. Presently before the Board is the Appellant's Motion to Strike the Department's and Range Resources' Conclusions and Determinations Regarding the Origin of Methane in Mr. Kiskadden's Water Including All Evidence, Testimony and Expert Opinion Regarding the Same.

The Appellant's motion centers on a letter that was included in a supplemental discovery production served by Range Resources on August 25, 2014. With limited exceptions, discovery in this matter closed approximately a year ago. According to the Appellant, the supplemental production served by Range Resources consists of over 5,000 pages of documents, including a letter from GeoMark, a company that performed isotopic testing on behalf of Range. The letter is dated May 28, 2014 and states solely as follows:

> Reviewing the data for the Kiskadden Well Water sample, at best, the gas composition should be used as an estimation and not relied upon. There was almost no headspace in the bottle, and the composition of the gas is nearly all air with almost negligible concentrations of hydrocarbons.

(Exhibit 4 to Appellant's Motion)

The Appellant attaches to his motion a copy of the Department's letter that found that the Appellant's water had not been polluted by Range's gas well activities and which gave rise to this appeal (the Department's determination letter). That letter states in relevant part as follows:

> The methane gas in your water well was clearly identified through isotopic analysis to be drift gas, not natural gas that would be coming from a gas well. Drift gas is produced by the bacteriological conversion of carbon dioxide into methane, a well-documented occurrence in **southwestern Pennsylvania** and across the country. Isotopic analysis is a definitive test for identifying the source of underground gas, and there can be little doubt that the methane in your water well is not coming from the Yeager gas well or any other natural gas source.

(Exhibit 3 to Appellant's Motion) (emphasis in original)

Finally, the Appellant attaches copies of discovery requests in which he requested information regarding testing and isotopic analyses with regard to methane. (Exhibit 1 to Appellant's Motion, Interrogatories 9-13)

The Appellant asserts that the Department relied on the GeoMark testing to determine the nature of the methane found in the Appellant's water supply. The Appellant argues as follows:

> Because Range withheld this letter indicating the seminal piece of evidence that [the] Department relied on, the GeoMark isotopic testing of Mr. Kiskadden's water, was not reliable, the Department's determination based upon that test must now be stricken from this case. Laboratory analysis, documentation and information regarding the isotopic methane testing performed by GeoMark was previously requested by the Appellant during discovery. However, it was never provided to the Appellant, or assumedly the Department, until the eve of the hearing. In its determination, the Department has explained that it solely and exclusively relied upon the GeoMark testing to "conclusively" determine the origin of the methane in Mr. Kiskadden's well. Now, because this testing is seemingly unreliable, as specifically explained by the company that performed the testing, it must be stricken from this appeal. Likewise, because the Department relied upon the GeoMark testing and performed no independent isotopic analysis work regarding the source of methane, any determination

> made by the Department regarding the methane and its origin must be stricken from this case.

(Appellant's Memorandum of Law in Support of Motion, p. 2-3)

The Department and Range Resources have filed responses in opposition to the motion. In its response, the Department asserts that while the GeoMark letter states that the compositional gas analysis may not be reliable, the isotopic analysis remains valid and, therefore, there is no basis for striking it or evidence or testimony relying upon it. The Department also asserts that isotopic analysis of the Appellant's water well conducted in March 2012 by the federal Environmental Protection Agency (EPA) shows nearly identical results to those of GeoMark. (Exhibit A to Department's Response) The Department argues that the EPA test results may be offered as evidence to support the Department's conclusions regarding the methane gas in the Appellant's water well since proceedings before the Environmental Hearing Board are *de novo*.

Range Resources also asserts that the isotopic analysis is separate and independent from the gas composition analysis and any unreliability concerning the gas composition analysis does not affect the isotopic analysis. Range Resources argues that because the Department did not rely on the gas composition analysis to support its determination regarding the methane found in the Appellant's water well, there is no basis for striking its determination.

Additionally, Range Resources disputes the Appellant's claim that its production of the May 28 GeoMark letter was untimely. Range Resources contends that it had no duty to supplement its earlier discovery responses with the May 28, 2014 letter and points to Pennsylvania Rule of Civil Procedure 4007.4 which states in relevant part as follows:

Rule 4007.4. Supplementing Responses

> A party or an expert witness who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters and the identity of each person expected to be called as an expert witness at trial. . .
>
> (2) A party or an expert witness is under a duty seasonably to amend a prior response if he or she obtains information upon the basis of which he or she knows that
>
> (a) the response was incorrect when made, or
>
> (b) the response though correct when made is no longer true.

Pa. R.C.P. 4007.4

Range Resources argues that its responses to the Appellant's discovery requests were complete when they were made and the exceptions set forth in Rule 4007.4 do not apply here. Range Resources also contends that even if it were under a duty to supplement, none of the Appellant's discovery requests encompass the May 28, 2014 letter.

We disagree with Range Resources that it had no duty to supplement its earlier discovery responses with the May 28, 2014 letter. Range Resources itself admits that the Appellant asked for "testing/analyses performed by Geomark" in its August 24, 2012 discovery request. This would seem to encompass the gas composition analysis and where such analysis is later found to be unreliable by the very company that performed the analysis, we believe Range Resources was under a duty to supplement its previous discovery responses to the Appellant under Pa. R.C.P. 4007.4(2).

However, because this late-produced information does not relate to the isotopic analysis on which the Department and Range Resources contend the Department's determination letter was based, we find no basis for striking the Department's findings regarding the methane in the Appellant's water supply or for preventing the Department and Range Resources from introducing evidence regarding that part of the GeoMark testing that was not found to be unreliable.

Additionally, proceedings before the Environmental Hearing Board are *de novo.* We fully consider the case anew and are not bound by prior decisions of the Department. *Smedley v. DEP,* 2001 EHB 131; *O'Reilly v. DEP*, 2001 EHB 19. As stated in *Smedley*, "Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it." 2001 EHB 156 (*citing Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19).

This means that the Board can consider evidence that was not before the Department when it made its determination and also disregard evidence that it does not find to be credible. Therefore, even if the Appellant can demonstrate that the Department relied in part on testing that was subsequently found to be unreliable, we still must decide the case anew. This is simply one piece of evidence that the Board will consider in determining whether to uphold or overturn the Department's action.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 11th day of September, 2014, it is hereby **ORDERED** that the Appellant's Motion to Strike the Department's and Range Resources' Conclusions and Determinations Regarding the Origin of Methane in Mr. Kiskadden's Water Including All Evidence, Testimony and Expert Opinion Regarding the Same is *denied.*

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 11, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 12, 2014**

OPINION AND ORDER ON MOTION

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Where it appears that the Permittee's dispute is with the conclusions reached by the Appellant's experts and not their methodology, we decline to grant the Permittee's motion to limit the testimony of the Appellant's experts pursuant to the *Frye* standard. We find that it would be more helpful to resolve this issue based on testimony presented at trial than in the context of a motion in *limine.*

O P I N I O N

This matter involves an appeal filed by Mr. Loren Kiskadden (the Appellant) from a determination by the Department of Environmental Protection (Department) that gas well related activities by Range Resources – Appalachia, LLC (Range Resources) at its Yeager site did not cause contamination to Mr. Kiskadden's water well. A trial in this matter is set to begin before the Pennsylvania Environmental Hearing Board (Board) on September 23, 2014 and continue through October 9, 2014.

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Numerous motions have been filed throughout the course of this proceeding, including seventeen motions recently filed by Range Resources and the Appellant seeking to limit or exclude the presentation of certain evidence and testimony at trial. Presently before the Board is Range Resources' Motion to Exclude Expert Testimony Based on Methodologies Lacking General Acceptance in the Scientific Community. The Appellant filed a response opposing the motion on September 10, 2014. The Department submitted a letter on September 8, 2014 stating that it did not intend to file a response to the motion.

In its motion, Range Resources asks the Board to limit the testimony of the Appellant's two experts, Mr. Paul Rubin and Dr. Michael Sommer, on the basis that their testimony does not meet the standard established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), for admission of expert testimony. It is Range Resources' contention that Mr. Rubin and Dr. Sommer "offer several opinions that are supported by neither fact-based scientific evidence nor any generally accepted methodology." (Range Resources' Memorandum in Support of Motion, p. 1)

When determining whether expert testimony may be offered on a particular scientific subject, Pennsylvania courts have adopted the standard set forth in *Frye*, *supra*. *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038 (Pa. 2003); *Commonwealth v. Dengler,* 890 A.2d 372, 381 (Pa. 2005); Comment to Pa. R.E. 702. Under *Frye*, "novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community." *Grady, supra* at 1044-45 (*citing Commonwealth v. Blasioli,* 713 A.2d 1117, 1119 (Pa. 1998). The requirement of general acceptance in the scientific community assures that those most qualified to assess the general validity of a scientific method will have the determinative

voice *Commonwealth v. Topa*, 369 A.2d 1277, 1282 (Pa. 1977) (quoting *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974).

As further explained by the Board in *Pine Creek Valley Watershed Assn. v. DEP et al.*, 2011 EHB 761 (Adjudication issued November 10, 2011) ("*Pine Creek Valley Watershed* Adjudication"), "The *Frye* standard provides that an expert opinion based on a scientific technique is only admissible if the technique as well as its application to the particular situation at hand are generally accepted as reliable in the relevant scientific community." *Id.* at 777 (*citing Grady,* 839 A.2d at 1044, 1047*; Dennis Groce v. DEP,* 2006 EHB 856, 927, *aff'd,* 921 A.2d 567 (Pa. Cmwlth. 2007). It is important to keep in mind that it is the *methodology* that must be generally accepted in the field, not necessarily the expert's conclusions. *Grady*, 839 A.2d at 1045; *Pine Creek Valley Watershed Assn. v. DEP et al.*, 2011 EHB 90 (Opinion and Order on Motion to Exclude Expert Testimony issued February 15, 2011) ("*Pine Creek Valley Watershed* Opinion").

The Appellant disputes Range Resources' motion and argues that, while Range may not like the conclusions reached by the Appellant's experts, the methodology utilized by both Mr. Rubin and Dr. Sommer is straightforward and generally accepted in the scientific community. It is the Appellant's contention that Range Resources' experts utilized many of the same processes and reviewed the same information to arrive at their conclusions as did the Appellant's experts; they simply arrived at different conclusions. Finally, the Appellant asserts that Range Resources' motion should not be considered because much of it is based on the statements of experts that the Appellant has sought to exclude as untimely since they were not produced until after the expert report deadline.

As noted in the *Pine Creek Valley Watershed* Opinion, "[t]here is a fine line between methodology and conclusions." 2011 EHB at 93. However, in examining the motion in *limine*, we must agree with the Appellant that Range Resources' dispute is primarily with the conclusions reached by the Appellant's experts, not with the methodologies they utilized to reach their conclusions. For example, Range Resources argues that Mr. Rubin does not offer any reliable methodology or scientific evidence in support of his opinion that the Appellant's water is polluted by anything other than the natural geology in the area. However, a review of Range Resources' argument reveals that Range takes issue with Mr. Rubin's conclusions regarding the Appellant's water supply, rather than any specific methodology. Likewise, Range Resources attacks what it calls Mr. Rubin's "mix of contaminants" theory. Again, this is an attack on his conclusions, not the method used to reach his conclusions. Range Resources also disputes Mr. Rubin's conclusions regarding the vertical migration of drilling fluids from the Yeager site to the Appellant's water well. We find this to be more appropriately addressed through cross-examination and not as a *Frye* challenge.

Range Resources also challenges the opinions of Dr. Sommer as being speculative and not based on generally accepted science. In particular, Range Resources focuses on what is termed Dr. Sommer's "fractionator" theory regarding the type of methane found in the Appellant's well. Range's rebuttal witness, Dr. Stout,[1] describes Dr. Sommer's theory as "novel and, not only unaccepted, but *unrecognized* by the scientific community studying and publishing on the source(s) of methane in groundwater." (Range Resources' Memorandum in Support of Motion, p. 27) (emphasis in original) Again, Range Resources' dispute seems to be with the theory itself, not the methodology used by Dr. Sommer to reach it. The Appellant goes to great

[1] The Appellant has filed a motion to exclude any testimony by Dr. Stout and certain other expert witnesses that were identified by Range Resources after the deadline for filing expert reports.

lengths in his responsive memorandum to explain the methodologies used by both Mr. Rubin and Dr. Sommer that he contends are not only accepted in the scientific community but utilized by Range Resources' own experts. Indeed, the Appellant argues that Range Resources' motion merely advances its experts' theory of the case and the conclusions reached by them, rather than the methodologies utilized to reach the differing results.

Finally, Range Resources points to certain studies that were relied upon by Dr. Sommer that it contends were unreliable. The Appellant counters that some of those very studies were relied upon by Range Resources and its experts so it cannot now make the claim they are unreliable. As for an EPA study that Range Resources says cannot be relied upon because it never moved beyond the draft stage, the Appellant counters that it does not mean the data in the study was unreliable and that Range Resources ignores the political reasons for not moving forward to finalize the study.

In addressing a similar motion to exclude testimony, Judge Labuskes explained the difficulty of applying a *Frye* analysis simply based on arguments presented in a motion and response:

> In a way, resolving a *Frye* dispute itself requires expert opinion. The experts need to tell us whether a method is generally accepted in their field. There is certainly no prohibition against the expert who is proposing the use of allegedly novel methods testifying that the methods are generally accepted. Opposing experts may of course disagree. We evaluate the credibility of the testimony just like any other expert testimony, and a meaningful evaluation of credibility is difficult without taking live testimony. Thus, where there are conflicting expert views, this is simply another version of a battle of the experts. . . .While we do not wish to entirely rule out the possibility of a Frye motion in *limine* being an appropriate vehicle for resolving the question in an EHB appeal, we suspect that resolving such questions at the hearing itself will almost always be the better approach.

Pine Creek Valley Watershed Opinion, 2011 EHB at 93-94.

The *Frye* test is designed to ensure that opinions based upon unaccepted science are not presented to impressionable jurors. *Blum v. Merrell Dow Pharm., Inc.*, 705 A.2d 1314, 1317 (Pa.Super. 1997), *aff'd,* 764 A.2d 1 (Pa. 2000). However, the Board "operates in a nonjury setting. We deal with scientific theories every day." *Pine Creek Valley Watershed* Adjudication, 2011 EHB at 778-79. The judges of the Environmental Hearing Board have a level of expertise far above that of the average jury and can more easily determine how much credibility should be given to expert testimony presented at trial. Of course, where opinions are founded upon scientific theories that amount to "junk science" it wastes precious time at trial and does not aid us in our adjudication of a matter. "Therefore, although we may be less inclined than a judge presiding over a jury trial to exclude expert opinion altogether, we will nevertheless consider the degree of acceptance of the underlying science in deciding how much weight to accord an opinion." *Id.* at 779.

There is no question that there is a great deal of dispute among the parties' experts, and we find that it would be helpful to hear testimony in determining which witnesses we find more credible. As stated in *Pine Creek Valley Watershed*, "[w]e see no merit in attempting to resolve this dispute in advance of the hearing." *Pine Creek Valley Watershed* Opinion, 2011 EHB at 95.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 12th day of September, 2014, it is hereby **ORDERED** that Range Resources' Motion to Exclude Expert Testimony Based on Methodologies Lacking General Acceptance in the Scientific Community is *denied.*

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 12, 2014

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MR. LOREN KISKADDEN	:	
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	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 12, 2014**

OPINION AND ORDER ON APPELLANT'S MOTION TO STRIKE EXPERT REPORTS AND EXPERT REBUTTAL REPORTS

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Pennsylvania Environmental Hearing Board grants a Motion in Limine to strike three expert reports filed late and without permission. The Board finds that allowing the three new experts to testify at the trial would cause severe prejudice to the Appellant.

OPINION

This matter involves an appeal filed by Mr. Loren Kiskadden (Mr. Kiskadden or the Appellant) from a determination of the Pennsylvania Department of Environmental Protection (the Department) that gas well related activities by Range Resources-Appalachia, LLC (Range Resources, Range, or the Permittee) at its Yeager site in Washington County did not cause contamination to Mr. Kiskadden's water well. A trial in this matter is scheduled to begin before the Pennsylvania Environmental Hearing Board (the Board) in Pittsburgh on September 23, 2014 and continue through October 9, 2014.

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Numerous motions have been filed in this matter, including seventeen motions recently filed by Mr. Kiskadden and Range Resources seeking to limit or exclude the presentation of certain evidence and testimony at trial. Presently before the Board is the Appellant's Motion to Strike Expert Report and Expert Rebuttal Reports and for Expedited Consideration Thereof (Motion to Strike or Motion to Strike Expert Reports) which was filed on August 28, 2014. On September 3, 2014 Range Resources filed a timely Response and supporting brief opposing the Motion to Strike. The Department opposes the relief requested by Appellant.

Neither the experts nor their reports were disclosed to the Appellant until they were filed in contravention of the Board's Third Amended Pre-hearing Order No. 2 (the Order) which was issued after a pre-hearing Conference with all Counsel. The reports were filed approximately one month before trial and six weeks after the deadline for the filing of expert reports.

The Order, issued after consultation with Counsel, was at least the sixth such Order, all jointly requested by Counsel, scheduling the filing or exchange of expert reports. The Order required all expert reports to be filed on July 10, 2014. The Board had advised Counsel in both an Order issued on May 5, 2014 and at the prehearing Conference that because the hearing had already been postponed four times the trial dates would not be changed absent exigent circumstances.

According to a filing by the Pennsylvania Department of Environmental Protection on July 10, 2014 the parties voluntarily postponed over a period of many months the identification of the Appellant's and Permittee's experts and the exchange of expert reports. In fact, the parties agreed that all expert reports would be filed on July 10, 2014. Just prior to the filing of the parties' expert reports, on July 10, 2014 the Board denied a Motion to Stay Prehearing deadlines

filed by Appellant thus emphasizing to the parties and Counsel the necessity to timely file their expert reports as set forth in the Order. On July 10, 2014 all parties filed expert reports.

On August 11, 2014, Appellant, in conformance with our Order, filed his Pre-hearing Memorandum. On August 22, 2014 and August 24, 2014 Permittee, without seeking Board permission for the late filing as required by our Order ("Any request for ...extending any filing deadline must be made as a formal motion...., Paragraph 7), filed three new expert reports from three new experts. These reports were extensive, detailed, and responsive to the expert reports filed by the Appellant on July 10, 2014.

Appellant claims he is severely prejudiced in trying to respond to this avalanche of new and complex expert testimony filed in flagrant disregard of our Order. We agree.

Earlier this week we denied Appellant's Motion in Limine attempting to preclude the Department from raising issues regarding Grace Kiskadden's water well. We found no unfair surprise or prejudice to the Appellant based on the discovery which had taken place on these issues. *See Kiskadden v. Commonwealth of Pennsylvania, Department of Environmental Protection and Range Resources-Appalachia, LLC,* Slip Opinion and Order issued on September 10, 2014, at page 5. In contrast, we have no difficulty here in holding that such a course of action constitutes not only unfair surprise and prejudice to the Appellant, but also a textbook case of "trial by ambush." We find manifest prejudice to Mr. Kiskadden inherent in the last-minute filing of these extensive expert reports.

Our Order required all expert reports to be filed on July 10, 2014. We have previously rejected attempts to skirt prehearing disclosure requirements by Parties couching expert reports as "rebuttal" or "merely responsive." Proper rebuttal testimony is not testimony which the Permittee should have brought forward in his case in chief. *Higgins v. Commonwealth of*

Pennsylvania, Department of Environmental Protection and Eighty-Four Mining Company, 2007 EHB 230,233. To allow such sophistry would be to excuse parties from having to timely identify experts and produce their reports. *Township of Paradise and Lake Swiftwater Club v. Commonwealth of Pennsylvania, Department of Environmental Protection and Aventis Pasteur, Inc.,* 2002 EHB 68, 71. If expert discovery has been directed to a party, then the party must provide the information required by the Pennsylvania Rules of Civil Procedure and this Board's Orders and case law. Pa. R. Civ. Proc. 4003.5; 25 Pa. Code Section 1021.102(a); *McGinnis v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 2010 EHB 489, 493-494; *Warren County Quality of Life Coalition v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 2004 EHB 423, 424; and *Pennsylvania Trout v. Commonwealth of Pennsylvania,* 2003 EHB 652, 657. In *Borough of Edinboro v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 2003 EHB 725, 772 the Board in a unanimous Adjudication announced bright-line rules regarding expert witnesses, requiring that they be fully identified and provide timely expert reports.

Here, expert discovery was directed to both the Permittee and Appellant. They both agreed, as did the Department, that this information would be identified and produced at the same time. That time, although extended numerous times, was finally mutually agreed to as July 10, 2014 and memorialized in the Board's Order of May 9, 2014.

At the prehearing Conference on May 7, 2014, Counsel could have requested the opportunity to file Responsive Expert Reports and the Board would have granted such a request. There was plenty of time at that point to allow such filings. We would have worked with Counsel to craft an Order in this regard. Indeed, even after the filing of expert reports on July 10, 2014, a Motion promptly filed requesting permission to file responsive expert reports could

have been filed in accordance with Paragraph 7 of our May 9, 2014 Order and our Rules of Practice and Procedure. Of course, there is no guarantee the Board would have granted such a Motion but the positions of all parties would have been carefully considered and weighed by the Board in deciding the Motion. Because we would have had more time we would have had more options. Indeed, we have sometimes granted such motions if there is adequate time remaining in the prehearing schedule and each party's due process rights are protected. *See Groce v. Commonwealth of Pennsylvania, Department of Environmental Protection and Wellington Development-WDYT, LLC,* 2006 EHB 322, 324-325.

Thus, although we may or may not have permitted a reasonable extension of the July 10, 2014 expert report filing deadline, by proceeding unilaterally and in direct violation of our Order, Range Resources has left us with little choice but to grant Appellant's Motion to Strike Expert Reports. Our options, because of Range's election not to seek our help, are extremely limited at this point. Postponing the trial under these circumstances is also not an option. It has been postponed four times already and further delay is not warranted. *Commonwealth of Pennsylvania, Department of Environmental Protection v. Angino,* 2006 EHB 278, 286. There is simply not enough time to prevent a "trial by ambush" if we do not exclude these late filed expert reports. Although the Board dislikes precluding testimony, especially expert testimony, we have no hesitancy in doing so here.

The uniform and fair enforcement of the deadlines in our Orders, especially those where Counsel were closely consulted and involved as they were here, helps to ensure that the parties and their Counsel can adequately prepare for the hearing without having to address new information raised in contravention of such Orders and our Rules. Counsel for Mr. Kiskadden, rather than focusing on trial preparation, had to file a detailed Motion to Strike and supporting

Memorandum of Law and then wait until today to obtain our ruling. This alone is prejudicial. It is also outrageous. Parties and their Counsel should not have to scurry around in the final weeks before trial trying to address new reports and testimony where such information was literally sprung on them at the eleventh hour in a case that is nearly three years old. To allow this type of information to be filed in contravention of our Orders would be to sanction trial by ambush and make a mockery of our proceedings.

We will issue an appropriate Order consistent with our Opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 12th day of September, 2014, following review of Appellant's Motion to Strike Range Resources' Expert Report and Rebuttal Expert Reports and For Expedited Consideration Thereof (Motion to Strike Expert Reports) and the Responses, it is ordered as follows:

1) Appellant's Motion to Strike Expert Reports is **granted.**
2) The expert reports identified in the Motion to Strike Expert Reports may not be introduced at the trial of this case.
3) Tarek Saba, Ph.D., Samuel A. Flewelling, Ph.D., and Scott A. Stout, Ph.D., P.G. may not be called as expert witnesses at the trial of this case as they were neither identified nor were their expert reports filed in conformance with the Board's Order of May 9, 2014.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 12, 2014

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MR. LOREN KISKADDEN	:	
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 15, 2014**

OPINION AND ORDER ON
APPELLANT'S MOTION IN LIMINE
TO EXCLUDE EVIDENCE OF CRIMINAL RECORD

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

Without additional information regarding the contents of a criminal record, the Board is unable, at this time, to make a determination of admissibility under Rule 609 of the Pennsylvania Rules of Evidence. A determination on the relevancy and admissibility of the criminal record will be made by the Board prior to trial.

OPINION

This matter involves an appeal filed by Mr. Loren Kiskadden (the Appellant) from a determination by the Department of Environmental Protection (Department) that gas well related activities by Range Resources – Appalachia, LLC (Range Resources) at its Yeager site did not cause contamination to Mr. Kiskadden's water well. A trial in this matter is set to begin before the Pennsylvania Environmental Hearing Board (Board) on September 23, 2014 and continue through October 9, 2014.

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Numerous motions have been filed throughout the course of this proceeding, including seventeen motions recently filed by Range Resources and the Appellant seeking to limit or exclude the presentation of certain evidence and testimony at trial. Presently before the Board is Appellant's Motion in Limine to Exclude Evidence of Criminal Record (Motion) filed on September 3, 2014. The Department and Range oppose the Motion and filed responses in opposition on September 5, 2014 and September 9, 2014, respectively. Both the Department and Range characterize the Motion as premature, and it is Range's contention that the Appellant failed to offer any factual basis in support of the inadmissibility of the record.

A motion in limine is the "proper and even encouraged vehicle for addressing evidentiary matters in advance of the hearing." *M & M Stone Co. v. Department of Environmental Protection and Telford Borough Authority, Intervenor,* 2009 EHB 213, 221; *Angela Cres Trust v Department of Environmental Protection*, 2007 EHB 595, 596; *Dauphin Meadows v. Department of Environmental Protection,* 2002 EHB 235, 237. The purpose of a motion in limine is to provide the trial court an opportunity to consider potentially prejudicial and harmful evidence and preclude such evidence *before* it is referenced or offered at trial. *See, Commonwealth of Pennsylvania v. Johnny Padilla, Jr.,* 207 Pa. Super. 130, 923 A.2d 1189, 1194 (Pa. Super. 2007).

Appellant first asserts in his Motion that his criminal record is irrelevant to this appeal. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa. R.E. 401. Solely relevant evidence is admissible and irrelevant evidence must be excluded. Pa. R. E. 402. The Appellant contends that any prior criminal acts have no bearing on whether or not his water supply was contaminated by Range's

drilling activities or whether the Department acted lawfully and reasonably in making that determination. As such, the Appellant asserts that the evidence of those acts is irrelevant and thus, should be excluded.

The Appellant next argues that should the Board find the evidence of the criminal record to be relevant, the evidence should still be excluded on the grounds that its probative value is outweighed by its prejudicial effect. Rule 403 of the Pennsylvania Rules of Evidence states, "[a]lthough relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence, Pa. R.E. 403. Prejudice has been defined by the court as evidence with "an undue tendency to suggest decision on an improper basis." *Whistler Sportswear, Inc. v. Rullo,* 433 A.2d 40, 47 (Pa.Super. 1981). It is the Appellant's contention that not only does the prejudice of the evidence severely outweigh its probative value, but the introduction of that evidence will also lead to confusion of the issues, undue delay and waste of time.

The Appellant further asserts that his criminal record cannot be used for impeachment purposes under either Rule 404 or Rule 609 of the Pennsylvania Rules of Evidence. Under Rule 404, prior crimes are inadmissible to prove a person's character in order to show that on a particular occasion, the person acted in accordance with his character. Pa. R.E. 404. The Appellant goes on to address Rule 609, which is an exception to Rule 404. Under Rule 609, evidence of a prior conviction may be used to impeach the credibility of a witness if the prior conviction involved a crime of "dishonesty or false statement." Pa. R.E. 609. The Appellant asserts that his record does not contain convictions for any crimes involving dishonesty or false statement and in any case, the convictions all occurred more than ten years ago.

Range, in its response in opposition to the Motion, takes issue with both the impeachment and relevancy arguments made by the Appellant. Range contends that a reasonable determination cannot be made on the admissibility of Appellant's criminal record for impeachment purposes without further information as to the nature of the criminal convictions and the time period during which they occurred. The Department makes a similar argument, stating "[a]t this point the Department does not know the extent of Appellant's criminal record . . . [t]he balancing that may be appropriate to this decision cannot be done at this preliminary stage in the proceedings." (Department's Memorandum in Support of Response, p. 1-2). Range goes on to characterize the Appellant's argument regarding the irrelevance of his criminal record as a "red herring" and asserts that the relevancy of the criminal record lies not in the contamination of the well or the Department's actions, but in the credibility of Appellant's testimony, specifically his assertion that he had never experienced problems with his well water prior to Range's gas well activities at the Yeager site. Range contends that if it is determined that Appellant's convictions include crimes of dishonesty or false statement, the evidence of his criminal record may be admissible to impeach that testimony.

In making relevancy determinations, the Board has the discretion to exclude evidence where it lacks reasonable probative value. *M & M Stone Co.,* 2009 EHB 213, 218. Generally, the Board looks to the Pennsylvania Rules of Evidence to guide these decisions and applies the rules to the evidence at hand to balance the probative value with the possible prejudicial effect of such evidence. In this case, however, there is no evidence at hand. We cannot apply rules of evidence to information that we do not have. Both Range and the Department offer a valid argument in terms of the difficulty of making an assessment of the relevancy of specific evidence that is not before the Board. Without additional information regarding the content of the

criminal record, we cannot, at this time, make a ruling on the relevancy of the evidence or exclude it in its entirety.

As discussed above, Rule 404 makes prior crimes inadmissible to prove a person's character in order to show that on a particular occasion, the person acted in accordance with his character. Pa. R.E. 404. However, Rule 609 acts as an exception to this rule. Specifically, the Rule states:

> (a) *In General.* For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or *nolo contendere,* must be admitted if it involved dishonesty or false statement.
>
> (b) *Limit on Using the Evidence After 10 Years.* This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:
>
> (1) its probative value substantially outweighs its prejudicial effect; and
>
> (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

Pa. R.E. 609.

Rule 609 allows the use of a witness' criminal convictions to impeach that witness if the convictions involved crimes of dishonesty or false statement and those convictions or confinement for them occurred within the past 10 years. If the *crimen falsi* convictions occurred or the confinement for them ended more than 10 years ago, the evidence can be admitted only if the probative value substantially outweighs its prejudicial effect and after written notice is given to the adverse party to provide an opportunity to challenge its use.

In this case, as stated earlier, the Board is without sufficient information regarding the contents of the criminal record at issue. We do not know if the Appellant's convictions, if any,

were for crimes involving dishonesty or false statements. We do not know if those convictions or confinements for those convictions occurred or ended within the past 10 years. Therefore, this matter will be addressed with counsel at the prehearing conference to be held on September 16, 2014. Counsel for Range should either bring a copy of the criminal record to the prehearing conference or file it electronically under seal.

We will issue an appropriate order consistent with our opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 15th day of September, 2014, after consideration of Appellant's Motion in *Limine* to Exclude Evidence of Criminal Record and the Responses filed by the Department and Range Resources-Appalachia, LLC, it is hereby **ORDERED** as follows:

1) Counsel for Range shall either bring a copy of the criminal record to the prehearing conference on September 16, 2014 or file it electronically under seal.

2) The Board will rule on the admissibility of the criminal record at the prehearing conference.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 15, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
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v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 15, 2014**

OPINION AND ORDER ON APPELLANT'S MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY AND EXPERT REPORT OF A. ELIZABETH PERRY, P.G.

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Pennsylvania Environmental Hearing Board denies a Motion in Limine to exclude expert testimony. A Motion in Limine may not be used in place of a motion for partial summary judgment. Issues of material fact will be decided by the Board after a merits hearing. A well operator in an appeal of a Department action related to a claim of water contamination is a recipient of the action and may present evidence supporting the Department's determination that is relevant and consistent with the Board's *de novo* review.

O P I N I O N

This matter involves an appeal filed by Mr. Loren Kiskadden (Mr. Kiskadden or the Appellant) from a determination of the Pennsylvania Department of Environmental Protection (the Department) that gas well related activities by Range Resources-Appalachia, LLC (Range Resources, Range, or the Permittee) at its Yeager site in Washington County did not cause contamination to Mr. Kiskadden's water well. A trial in this matter is scheduled to begin before

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the Pennsylvania Environmental Hearing Board (the Board) in Pittsburgh on September 23, 2014 and continue through October 9, 2014.

Numerous motions have been filed in this matter, including seventeen motions recently filed by Mr. Kiskadden and Range Resources seeking to limit or exclude the presentation of certain evidence and testimony at trial. Presently before the Board is the Appellant's Motion in Limine to Exclude Expert Testimony and Expert Report of A. Elizabeth Perry, P.G. (Motion or Motion to Exclude Ms. Perry's Expert Testimony) which was filed on September 3, 2014. On September 10, 2014 Range Resources filed a timely Response and supporting brief opposing the Motion. The Department indicated it would not be filing a Response to the Motion to Exclude Ms. Perry's Expert Testimony.

Mr. Kiskadden argues that Ms. Perry's expert report sets forth opinions that are not in full agreement or even contradictory with views expressed in the Pennsylvania Department of Environmental Protection's so-called Determination Letter under appeal in this action. Appellant contends that a Permittee cannot stray from the Department's position in defending an action brought by third parties, such as Mr. Kiskadden.

The Permittee, Range Resources, disagrees. It disputes Mr. Kiskadden's interpretation of the Determination Letter. Moreover, Range Resources argues that Appellant's Motion in Limine is really a Motion for Partial Summary Judgment in disguise. It also argues that it may raise arguments and present evidence supporting the Department's position even if those positions were not raised or considered by the Department in taking its original action.

We agree with Range Resources on this issue. Due process considerations certainly support Range's position. The Board's jurisdiction and *de novo* review not only afford full due process protections to Appellants but to all parties before the Board which necessarily includes

Permittees, recipients of the action, Intervenors, and the Department. Although specific situations may limit the rights of specific parties to raise certain issues we need not delve into those areas in deciding this specific issue before us now in the context of a Motion in Limine. The Pennsylvania Environmental Hearing Board's standard of review is *de novo*, and the Board may consider evidence that was not considered by the Department of Environmental Protection at the time it took its action. *Smedley v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 2001 EHB 131, 156. *See also O'Reilly v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 2001 EHB 19, 33.

As we have noted in earlier Opinions issued in this case, expert discovery was directed to both Range Resources and Mr. Kiskadden. Those two parties agreed, as did the Pennsylvania Department of Environmental Protection, that their experts and their reports would be identified and produced at the same time. That time was extended numerous times by agreement of counsel for all three parties. By agreeing to delay answering expert discovery until the exchange of expert reports approximately 2 ½ months prior to the start of the trial, it is not surprising that the Board is now faced with a flurry of motions seeking to limit much of the testimony raised in the expert reports or prehearing memoranda. If this information would have been exchanged earlier, as is envisioned in our Rules and the Rules of Civil Procedure, specifically Pa. R. Civ. Proc. 4003.5, we believe many of these issues would never have materialized. There would have likely been no claims of surprise. The parties could have actually conducted more robust expert discovery which would have likely alleviated many of their present concerns. *See Kiskadden v. Commonwealth of Pennsylvania, Department of Environmental Protection and Range Resources-Appalachia, LLC,* Slip Opinion and Order issued on September 10, 2014, at page 5. If expert discovery has been directed to a party, then the party must provide the information

required by the Pennsylvania Rules of Civil Procedure and this Board's Orders and case law. Pa. R. Civ. Proc. 4003.5; 25 Pa. Code Section 1021.102(a); *McGinnis v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 2010 EHB 489, 493-494; *Warren County Quality of Life Coalition v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 2004 EHB 423, 424; and *Pennsylvania Trout v. Commonwealth of Pennsylvania,* 2003 EHB 652, 657. In *Borough of Edinboro v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 2003 EHB 725, 772 the Board in a unanimous Adjudication announced bright-line rules regarding expert witnesses requiring that they be fully identified and provide timely expert reports.

The expert report of Ms. Perry was filed timely on July 10, 2014 in accordance with a schedule mutually agreed upon by the parties and set forth in our Order of May 9, 2014. By pushing back the exchange of expert reports the parties voluntarily hamstrung themselves by stopping the mechanisms set forth to protect them from the very situation they are in now.[1]

Many of Appellant's arguments go to the weight to be given Ms. Perry's testimony rather than its admissibility. Appellant also contrasts it with testimony of Department witnesses which he parses from depositions. Likewise, the Permittee points to other pages of testimony which support its contentions. These are factual issues for the most part that are best resolved at a hearing. *Dauphin Meadows v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 2002 EHB 235.

We will issue an appropriate Order consistent with our Opinion.

---

[1] We will decide at the hearing, after proper objection, if any piece of evidence allegedly relied upon by Ms. Perry in formulating her expert opinions, should be precluded. Our ruling today does not foreclose those objections although the parties' voluntary decision to stop expert discovery "in its tracks" may prevent us from sustaining such objections.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 15th day of September, 2014, following review of Appellant's Motion in Limine to Exclude Expert Testimony and Expert Report of A. Elizabeth Perry, P.G. (Motion to Exclude Ms. Perry's Expert Testimony) and the Responses, it is ordered as follows:

1) Appellant's Motion to Exclude Ms. Perry's Expert Testimony is **denied.**

2) However, Ms. Perry's expert report, just like the expert reports of all experts in this case, may not be introduced at the trial of this case.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 15, 2014

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
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	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 15, 2014**

OPINION AND ORDER ON APPELLANT'S MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF DR. CRYSTAL G. MORRISON, BO VALLI AND DR. JAMES PINTA AND THE RJ LEE GROUP REPORT

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Pennsylvania Environmental Hearing Board grants in part and delays ruling on in part a Motion in Limine to exclude the testimony of three witnesses. The Permittee has withdrawn one of the witnesses so the Motion to Exclude is granted as to that witness. As for the other two witnesses it is unclear from the Motion in Limine and the Responses if the testimony from Dr. Morrison and Mr. Valli will be expert testimony and if so, to what extent the Appellant is prejudiced. To the extent that it is expert testimony the Appellant is not precluded from making objections that the testimony is not in accordance with the reports referenced by the Permittee or does not otherwise comply with the pre-hearing disclosure requirements required by our Rules, Orders, and the Pennsylvania Rules of Civil Procedure.

OPINION

This matter involves an appeal filed by Mr. Loren Kiskadden (Mr. Kiskadden or the Appellant) from a determination of the Pennsylvania Department of Environmental Protection

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(the Department) that gas well related activities by Range Resources-Appalachia, LLC (Range Resources, Range, or the Permittee) at its Yeager site in Washington County did not cause contamination to Mr. Kiskadden's water well. A trial in this matter is scheduled to begin before the Pennsylvania Environmental Hearing Board (the Board) in Pittsburgh on September 23, 2014 and continue through October 9, 2014.

Numerous motions have been filed in this matter, including seventeen motions recently filed by Mr. Kiskadden and Range Resources seeking to limit or exclude the presentation of certain evidence and testimony at trial. Presently before the Board is the Appellant's Motion in Limine to Exclude the Testimony of Dr. Crystal G. Morrison, Bo Valli and Dr. James Pinta and the RJ Lee Group Report (Motion or Motion to Exclude) which was filed on September 3, 2014. On September 10, 2014 Range Resources filed a timely Response and supporting brief opposing the Motion to Strike. The Department took no position on the Motion.

Appellant moves to exclude Dr. Morrison, Mr. Valli and Dr. Pinta from testifying because they were neither identified as experts nor were there any expert reports filed on July 10, 2014 in accordance with our Order of May 9, 2014. They were identified by Permittee as witnesses who would testify as to technical efforts undertaken on Range's behalf such as the sampling of products and environmental media. Appellant contends that these experts were not only identified even later than the three experts the Board excluded as set forth in its Opinion and Order issued in this case on September 12, 2014, *Kiskadden v. Commonwealth of Pennsylvania, Department of Environmental Protection and Range Resources-Appalachia, LLC,* Slip Opinion and Order issued on September 14, 2014, but it is unclear to him what their testimony will be. Moreover, at the time the Appellant filed his Motion the expert qualifications of these witnesses had not been provided.

According to Range's Response, the expert qualifications of Mr. Valli and Dr. Morrison have been made available. Appellant also cries foul because in related litigation before the Commonwealth Court, Range successfully argued that information concerning Civil and Environmental Consultants, Inc., Mr. Valli's and Dr. Pinta's employer, was not discoverable because the company had been retained by Range as a non-testifying expert consultant, and any facts, opinions, or information possessed by Civil and Environmental Consultants was protected by Pa. R. Civ. P. 4003.5(a)(3). Appellant now raises the logical argument that Mr. Valli and Dr. Pinta should be judicially estopped from testifying because any information was shielded from discovery in the companion litigation and it would be unfair to allow them to testify now at the hearing.

Range in its Response, without any detailed explanation, except to say that "in an effort to narrow the issues in dispute, Range withdraws its listing of Dr. Pinta as a witness." Range's Memorandum of Law filed on September 10, 2014 at page 2, footnote 1. We will therefore grant the Motion to Exclude as to Dr. Pinta.

Range indicates that Dr. Morrison will testify about the matters addressed in the RJ Lee Group Report which was produced to the Appellant in April 2014. Range takes the position that it "does not concede that the deadlines and cases cited by Appellant relating to the provision of experts retained for litigation apply to the testimony anticipated from Dr. Morrison and Mr. Valli." Range's Memorandum of Law filed on September 10, 2014 at page 3. Range says instead that since "certain of those efforts involved technical efforts (such as sampling of products and environmental media) Range listed these witnesses, out of an abundance of caution, as providing expert testimony." Range further argues that Dr. Morrison's testimony is necessary so Range can rebut the rebuttable presumption the Board entered as a sanction for Range's

violation of a Board Order. "Dr. Morrison's anticipated testimony is part of Range's effort to rebut the rebuttable presumption adopted by the Board's June 10, 2014 Order." Range's Response to Motion to Exclude filed on September 10, 2014, page 4, paragraph 8. Range further states, without any citation of support or explanation, that "any order precluding Dr. Morrison from testifying beyond the scope of the Lee Report is unsupported, unnecessary and premature." Range's Memorandum of Law filed on September 10, 2014 at page 5.

As for Mr. Valli, Range argues that it has produced numerous documents from his employer so Appellant cannot show prejudice, the Commonwealth Court did not preclude Appellant's ability "to conduct future discovery of expert witnesses expected to testify for Intervenor at trial," and that he will testify as to efforts to address the Yeager Site, including the impoundment and the drill cuttings pit.

According to a filing by the Pennsylvania Department of Environmental Protection on July 10, 2014 the parties voluntarily postponed over a period of many months the identification of the Appellant's and Permittee's experts and the exchange of expert reports. In fact, the parties agreed that all expert reports would be filed on July 10, 2014. This agreement was adopted by the Board following a prehearing Conference with Counsel for the specific purpose of selecting prehearing filing dates and hearing dates, and the Board issued its Order dated May 9, 2014. Just prior to the filing of the parties' expert reports, on July 10, 2014 the Board denied a Motion to Stay Prehearing deadlines filed by Appellant thus emphasizing to the parties and Counsel the necessity to timely file their expert reports as set forth in the Order. On July 10, 2014 all parties filed expert reports.

Range filed one expert report on July 10, 2014. It was a report authored by A. Elizabeth Perry, P.G. No other experts or reports were identified by Range at that time.

On August 11, 2014, Appellant, in conformance with our Order, filed his Pre-hearing Memorandum. On August 22, 2014 and August 24, 2014 Permittee, without seeking Board permission for the late filing as required by our Order ("Any request for ...extending any filing deadline must be made as a formal motion...., Paragraph 7), filed three new expert reports from three new experts. These reports were extensive, detailed, and responsive to the expert reports filed by the Appellant on July 10, 2014.

On August 26, 2014, Range filed its Pre-hearing Memorandum. For the first time, it identified Dr. Crystal G. Morrison, Mr. Bo Valli, and Dr. James Pinta as experts. Range contends that the RJ Lee Report is the "expert report" of Dr. Morrison and the various reports and documents produced by Mr. Valli's employer constitute his report.

Our Order of May 9, 2014 required all expert reports to be filed on July 10, 2014. Range seems to argue that the testimony of Dr. Morrison and Mr. Valli is not traditional expert testimony by stating "Range seeks to call Dr. Morrison of the RJ Lee Group and Mr. Valli of CEC to testify, as a factual matter, about the efforts undertaken by them, as reflected in their documents produced in this matter." Range's Memorandum of Law filed on September 10, 2014 at page 3. At the same time, Range argues that any order to limit Dr. Morrison's testimony to the four corners of the RJ Lee Group report is "unsupported, unnecessary and premature." Range further states that Dr. Morrison's testimony is necessary to allow Range to rebut the rebuttable presumption set forth in our Order of June 10, 2014 and if precluded by the Board, would transform the rebuttable presumption into an adverse inference. Range's Memorandum of Law filed on September 10, 2014 at page 5, footnote 5.

If expert discovery has been directed to a party, then the party must provide the information required by the Pennsylvania Rules of Civil Procedure and this Board's Orders and

case law. Pa. R. Civ. Proc. 4003.5; 25 Pa. Code Section 102. Here, expert discovery was directed to both the Permittee and Appellant. They both agreed, as did the Department, that this information would be identified and produced at the same time. That time, although extended numerous times, was finally mutually agreed to as July 10, 2014 and memorialized in the Board's Order of May 9, 2014.

Range does not provide an explanation as to why it did not timely list Dr. Morrison and Mr. Valli as expert witnesses on July 10, 2014 or file what it is now identifying as their expert reports. This is especially true as to Dr. Morrison and her testimony which Range alleges is necessary to rebut the rebuttable presumption set forth in our Opinion and Order of June 10, 2014 which was entered as a sanction against Range for violation of an earlier discovery Order.

In numerous Board cases, including *Borough of Edinboro v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 2003 EHB 725, 772 and *Commonwealth of Pennsylvania, Department of Environmental Protection v. Angino, King Drive Corporation, and Sebastiani Brothers,* 2006 EHB 278, 281-283, we announced certain bright-line rules regarding expert witnesses:

> [F]rom this point forward, if any party, including the Department, wishes to proffer expert testimony, it will need to fully follow both the Pennsylvania Rules of Civil Procedure and the Board's Rules and Orders and identify its proposed experts, answer expert interrogatories and/or provide expert reports, and identify the expert and summarize his or her testimony in its pre-hearing memorandum. If any party, including the Department, does not follow these requirements, it may be precluded from offering such witnesses at trial in accordance with applicable law.

Borough of Edinboro, 2003 EHB at 772.

As Judge Labuskes clearly set forth in *Angino*:

> An expert witness is a person who will be asked to express an opinion to us on our record. It must be given under tightly

> controlled circumstances...If [the witness] is being called to testify about facts regarding his involvement with the site, and/or about what advice he has given in the past, he is not an expert witness. If, however, [the party] intends to qualify him as an expert and introduce substantive opinions on the record given to a reasonable degree of professional certainty, he is an expert witness. If the latter situation turns out to be the case, [the party] had an obligation to comply with the discovery rules regarding expert witnesses.

Angino, 2006 EHB at 282-283.

Like Judge Labuskes in *Angino*, "we would be hard pressed to conclude that Range Resources has complied with the pre-hearing disclosure requirements" as to Dr. Morrison and Mr. Valli. *Angino,* 2006 EHB at 283. In addition, just like parties cannot skirt our expert disclosure requirements by calling their experts "rebuttal" or "merely responsive" they also cannot avoid disclosure requirements by arguing that the witnesses really are just going to testify as to factual matters. All experts rely on and testify about various facts which they contend are important and crucial in reaching their expert conclusions. Their expert opinions include and encompass facts which help form, explain, and support their bottom line conclusions.

It also is not clear to us at this point what documents Mr. Valli and Dr. Morrison will be basing their testimony on. If much of this information was filed just before the filing of Range's Pre-hearing Memorandum in late August, 2014, at least as to Mr. Valli, that factor will bear on our decision at hearing as to how to further address the Motion to Exclude filed by Mr. Kiskadden. Likewise, if Dr. Morrison's testimony is based on the RJ Lee report produced in April 2014 that fact will bear on our decision at hearing. If rulings need to be made, we will make them at the hearing in the context of specific questions. At this point, we do not discern that any prejudice to Mr. Kiskadden necessitates the drastic remedy of preclusion. We may

change our mind once the hearing begins and the testimony becomes concrete. Right now we are not clear what the scope of the testimony will entail.

We will issue an appropriate Order consistent with our Opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 15th day of September, 2014, following review of Appellant's Motion in Limine to Exclude the Testimony of Dr. Crystal G. Morrison, Bo Valli and Dr. James Pinta and the RJ Lee Group Report (Motion to Exclude) and the Responses, it is ordered as follows:

1) Appellant's Motion to Exclude the Testimony of Dr. James Pinta, who has been withdrawn as a witness by Range Resources after the filing of the Motion, is **granted.**
2) Appellant's Motion to Exclude the Testimony of Dr. Morrison and Mr. Valli will be taken under advisement. If these witnesses are offered as expert witnesses at the hearing, Appellant may object to specific areas of testimony and upon a specific showing of prejudice and other relevant factors.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 15, 2014

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 15, 2014**

OPINION AND ORDER ON APPELLANT'S MOTION IN *LIMINE* TO EXCLUDE TESTIMONY OF REPRESENTATIVES FROM CONSOLIDATION COAL COMPANY AND UNIVERSAL WELL SERVICES, INC.

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Permittee may present certain fact witnesses listed in its prehearing memorandum. However, where the Permittee has failed to provide information requested in discovery and in violation of a Board order, it may not then produce that same information as "rebuttal" during trial. The rebuttable presumption which the Permittee seeks to overcome was necessitated by the Permittee's own failure to produce the subject information despite being ordered to do so by the Board. Allowing the Permittee to present this information at trial – which has never been provided to the Appellant – amounts to unfair surprise.

OPINION

This matter involves an appeal filed by Mr. Loren Kiskadden (the Appellant) from a determination by the Department of Environmental Protection (Department) that gas well related activities by Range Resources – Appalachia, LLC (Range Resources) at its Yeager site did not cause contamination to Mr. Kiskadden's water well. A trial in this matter is set to begin before

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the Pennsylvania Environmental Hearing Board (Board) on September 23, 2014 and continue through October 9, 2014.

Numerous motions have been filed throughout the course of this proceeding, including seventeen motions recently filed by Range Resources and the Appellant seeking to limit or exclude the presentation of certain evidence and testimony at trial. Presently before the Board is the Appellant's Motion to Exclude the Testimony of Representatives from Consolidation Coal Company and Universal Well Services, Inc. Range filed a response on September 10, 2014, opposing the motion. The Department submitted a letter on September 8, 2014, advising the Board that it would not be filing a response to the motion.

We examine the Appellant's motion as to each of the proposed witnesses as follows:

Representative from Consolidation Coal Company

In its prehearing memorandum, Range Resources identifies as one of its fact witnesses a "representative from Consolidation Coal Company (Consol) or affiliate to authenticate mine shaft records for Kiskadden's water well." (Range Resources' Prehearing Memorandum, p. 53) The Appellant focuses on statements made by Range Resources in the "Disputed Facts" section of its prehearing memorandum that discuss coal activity in the area where the Appellant's well is located. One of the disputed facts set forth in Range Resources' prehearing memorandum is the following:

> 57. Mr. Kiskadden's water well likely was drilled into or through coal seams. Coal beds release methane gas.

The Appellant argues that, to the extent Range Resources intends to have the Consol representative testify that a coal seam is the source of methane in the Appellant's water supply, any such testimony requires expert opinion and, therefore, must be excluded.

Range Resources replies that it simply intends to present factual testimony from the Consol representative for a limited purpose, that of authenticating records created by Hillman Coal and Coke Company of which Consol is successor in interest. Range Resources also argues that the records are presumptively self-authenticating under the Ancient Document rule since they were created in the 1950's. It also asserts that the records are admissible as business records. Range Resources states that if the Appellant is willing to stipulate to the authenticity of the records, it will not need to present the testimony from the Consol representative.

Based on the limited purpose for which Range Resources intends to present the testimony of a representative of Consol, we find no basis for excluding this testimony.

Universal Well Services, Inc.

In contrast, we do see problems with the testimony Range Resources intends to elicit from the "representative from Universal Well Services, Inc." (Range Resources' Prehearing Memorandum, p. 53) Namely, it appears that Range Resources intends to have the representative testify, at least in part, as to information that Range failed to produce in discovery, despite being ordered to do so by the Board.

According to the parties' filings, Universal Well Services provided services related to the hydraulic fracturing of the 7H well at the Yeager site. Range Resources states that it intends to present the testimony of a representative of Universal Well Services to discuss factual information concerning the following:

> the services provided, including quantities of various products used, the purposes for which they were used, how they were applied, whether certain products were combined and in what proportion.

(Range Resources' Memorandum in Support of Response, p. 6)

On its face, this appears to us to be permissible testimony. However, Range Resources' response goes on to say:

> To the extent that the [Universal Well Services] representative is able to obtain and provide information about *the chemical constituents of the products used at the Yeager Site* not previously made available by the third parties in possession, custody and control of such information, the Board should not prematurely preclude any such testimony.

(*Id.* at 7) (emphasis added)

Throughout this proceeding, Range Resources has been requested to provide information about the chemical constituents of the products used at its site and in its operations. The Appellant has sought this information through discovery and motions to compel. The Board has ordered the production of this information, most notably following oral argument in an Order dated July 19, 2013 which stated in relevant part as follows:

> On or before August 20, 2013, Permittee [Range] shall provide Appellant with a list identifying any and all proprietary chemicals comprising each and every product identified by Permittee as used at the Yeager Site. In addition, Permittee will provide Appellant with a list of all chemicals for each Material Safety Data Sheet of the products Permittee earlier identified as used at the Yeager Site that lacked full information regarding all of the chemicals and components of those particular products.

Kiskadden v. DEP and Range Resources – Appalachia, LLC, EHB Docket No. 2011-149-R (Order issued July 19, 2013), para. 9.

In all instances, Range Resources represented to this Board that it had acted diligently in requesting this information from the manufacturers and vendors of the products and that, despite its best efforts, was unable to obtain the information on the basis that it was protected by trade secret. Now, one week before trial, Range seems to have obtained this information for use in its own case.

Range Resources makes the argument that it should be permitted to use this information to rebut the presumption set forth by the Board in its Opinion of June 10, 2014.[1] We remind Range that the Board set forth this presumption *solely* because Range had failed to produce the very information it now seeks to use in rebuttal. In our June 10, 2014 Opinion we made the following observation:

> We understand that Range's failure to comply is due to the fact that it has been unable to obtain this information from its suppliers and the manufacturers of the products. The question, then, is who must bear the burden for this lack of information. Range purchased the products, exercised control over their usage and was in the best position to provide information regarding their chemical make-up and, as such, it must bear responsibility for the lack of information about those products. We have already ruled that Range is responsible for providing this information. The only question that remains is how to address the failure to do so.

Kiskadden v. DEP and Range Resources- Appalachia, LLC, EHB Docket No 2011-149-R (Opinion and Order on Motion for Adverse Inference issued June 10, 2014), slip op. at 8. Clearly, and apparently contrary to assertions made to the Board, Range was in a position to obtain the chemical information through its contractor, Universal Well Services, or directly from the manufacturers themselves. In its response herein to Appellant's motion, Range states that it "continues to seek relevant product information from third-party manufacturers. To the extent Range successfully obtains any such information, Range should be allowed to introduce it into evidence during the Hearing." (Range Resources Memorandum in Support of Response, p. 7-8)

We agree with the Appellant that while Range is certainly permitted to rebut the presumption set forth in the Board's June 10, 2014 Opinion, "it cannot unfairly surprise Appellant with information that should have properly been provided in discovery." (Appellant

[1] In our June 10, 2014 Opinion, due to Range Resources' failure to comply with the Board's July 19, 2013 Order, we granted the Appellant a rebuttable presumption that chemicals found in his water supply may have been used by Range in its operation or on its site. We denied the Appellant's request for an adverse inference.

Memorandum in Support of Motion, p. 9) According to the Appellant, Range Resources has never provided any additional discovery responses identifying the chemical composition of the products used at the Yeager site. If indeed Range Resources was able to access this information, it was under a duty – and a Board Order – to provide it to the Appellant. Instead, Range Resources has consistently held to the position that this information is "outside of its reach and cannot be obtained." (*Id.*)

The Appellant argues that because this information was never provided to him in a timely fashion, any testimony by the Universal Well Representative at trial identifying the chemicals in the products used at the Yeager site must be excluded. Otherwise, it will constitute trial by ambush. It is our understanding that even now, one week before trial, the information has not been provided to the Appellant.

As we explained in *McGinnis v. DEP*, 2010 EHB 489:

> Full disclosure of a party's case underlies the discovery process. *Pennsylvania Trout v. DEP*, 2003 EHB 652, 657. The main purposes of discovery are so all sides can accumulate information and evidence, plan trial strategy, and discover the strong points and weaknesses of their respective positions. *DEP v. Neville Chemical Company*, 2004 EHB 744, 746. As we have stated before and emphasize again now, it is very important to the integrity of the litigation process that the deadlines we set are viewed as meaningful and important. Parties have a right to rely on our Orders and the deadlines they impose. Likewise, and most importantly, they have a right to rely on a party's discovery responses and deposition testimony in preparing for trial. *American Iron Oxide Company v. DEP*, 2005 EHB 779, 784.

Id. at 493.

As we further held:

> '[A] fundamental purpose of the discovery rules is to prevent surprise and unfairness and to allow a fair trial on the merits.' *Maddock v. DEP*, 2001 EHB 834, 835. As we have stated numerous times – the discovery process is not a game.

Id. at 495.

We find that to allow Range Resources to provide testimony on this subject – without having provided this information to the Appellant – would constitute unfair surprise. Therefore, Range Resources may not present any evidence or testimony in its case in chief or to rebut the June 10, 2014 presumption that involves information that should have been provided to the Appellant in discovery or as ordered by the Board. This includes any evidence or testimony regarding the chemical constituents of the products used at the Yeager site that should have been provided to the Appellant as directed by the Board's July 19, 2013 Order.

The witness may be permitted to testify as to other factual matters pertaining to the services provided by Universal Well Services in connection with the Yeager site, as set forth on page 6 of Range Resources' Memorandum in Support of its Response. Any objections that the Appellant may have to that testimony may be raised at the trial and addressed by the Board at that time.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 15th day of September, 2014, it is hereby **ORDERED** that the Motion in Limine to Exclude Testimony of Representatives from Consolidation Coal Company and Universal Well Services, Inc. is *granted in part and denied in part*, as set forth in our Opinion.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 15, 2014

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 16, 2014**

OPINION AND ORDER ON
APPELLANT'S MOTION IN *LIMINE* TO EXCLUDE
SCIENTIFIC EVIDENCE REGARDING AUTO SALVAGE YARD

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Appellant in this matter has the burden of proving by a preponderance of the evidence that the Department abused its discretion or committed an error of law in determining that the Permittee's oil and gas well operations were not the cause of alleged contamination to the Appellant's water supply. The Department and Permittee do not have to prove that another activity was the source of contamination.

OPINION

This matter involves an appeal filed by Mr. Loren Kiskadden (the Appellant) from a determination by the Department of Environmental Protection (Department) that gas well related activities by Range Resources – Appalachia, LLC (Range) at its Yeager site did not cause contamination to Mr. Kiskadden's water well. A trial in this matter is set to begin before the Pennsylvania Environmental Hearing Board (Board) on September 23, 2014 and continue through October 9, 2014.

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Numerous motions have been filed throughout the course of this proceeding, including seventeen motions recently filed by Range Resources and the Appellant seeking to limit or exclude the presentation of certain evidence and testimony at trial. Presently before the Board is the Appellant's Motion to Exclude Scientific Evidence Regarding Auto Salvage Yard. Both the Department and Range have filed responses opposing the motion.

The Appellant lives in Amwell Township, Washington County. Adjacent to his property is an auto salvage yard that the Appellant avers was operated as a business by members of his family. The Appellant seeks to exclude Range and the Department from offering any scientific evidence that the auto salvage yard is a potential source of contamination of his water supply. The Appellant bases his motion on two grounds: First, he asserts that any evidence regarding the cause of his water contamination is scientific and technical in nature and requires expert testimony. Second, he argues that any evidence that Range and the Department could offer regarding the auto salvage yard as the cause of his water contamination would be purely speculative since neither Range nor the Department undertook any scientific testing or analysis with regard to the auto salvage yard. The Appellant argues as follows:

> In order to point [to] the auto-salvage as "the" source of contamination, Range and the Department, at a minimum, must have undertaken some testing to identify constituents likely present in the yard to determine if those constituents are comparable to those found in Mr. Kiskadden's water. Yet, no such testing or analyses were performed.

(Appellant's Memorandum in Support of Motion, p. 9) (emphasis in original)

In response, the Department argues that facts about the immediate area surrounding the Appellant's well, such as the auto salvage yard, are relevant, and its environmental investigators are familiar with the threats that such activities can pose. The Department contends that it does not intend to opine that the auto salvage yard is the cause of the Appellant's contamination but

simply intends to testify that, based on the surrounding activities in the area of the Appellant's well, pristine water quality cannot be expected.

Range does not dispute the Appellant's argument that speculative evidence is not sufficient to prove causation, but contends that this principle is not applicable here since Range does not have the same burden of proof as does the Appellant. Range asserts that it is not obligated to prove *what*, if anything, polluted the Appellant's water supply, but simply to present evidence that discredits the Appellant's case and lends support to the Department's determination.

The Appellant has the burden of proof in this proceeding. 25 Pa. Code § 1021.122(a). That means that the Appellant must establish by a preponderance of the evidence that the Department committed an error of law or abused its discretion when it determined that any contamination in the Appellant's well was not due to Range's operations. Once the Appellant presents his case, the burden of proceeding then shifts to Range and the Department. However, neither Range nor the Department is under any obligation to prove an alternate cause of any alleged contamination.

The Appellant relies on *Smith v. German*, 253 A.2d 107 (Pa. 1969), in support of his position. The Court in Smith held as follows:

> Just as the plaintiff was required to offer expert testimony in order to establish the medical connection between the injuries arising from the accident and the personality change, so too is such expert testimony required by the party seeking to establish that it was not the injury but some other factor which caused the change.

As Range notes in its response, the holding of *Smith* was subsequently distinguished as applying in only limited circumstances. The Pennsylvania Superior Court clarified in *Kennedy v. Sell*, 816 A.2d 1153, 1158-59 [citations omitted]:

> [A]bsent special circumstances (such as presented in *Smith* or where the defendant is attempting to use an affirmative defense) the defendant carries no burden of proof. . . .Put another way, a defendant may chose [sic] to present no evidence and may simply argue that the plaintiff has not met its burden of proof. A jury may find for the defendant in such a situation.

We do not find that the limited circumstances of *Smith* are applicable here. As a result, there is no burden on the Department or Range to prove that the auto salvage yard is *the* cause of any alleged contamination to the Appellant's water supply. Of course, the Board will weigh the evidence presented at trial, and based on that evidence, determine whether the Appellant has met his burden of proof.

As for the question of whether the testimony of the Department's and Range's witnesses crosses the line into expert testimony, we will address this matter if and when the testimony is presented at trial.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 16th day of September, 2014, it is hereby **ORDERED** that the Motion in Limine to Exclude Scientific Evidence Regarding Auto Salvage Yard is **denied.**

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 16, 2014

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LAURENCE HARVILCHUCK	:	
	:	**EHB Docket No. 2013-013-M**
v.	:	**(Consolidated with 2013-014-M,**
	:	**2013-015-M, 2013-016-M and**
COMMONWEALTH OF PENNSYLVANIA,	:	**2013-017-M)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and WPX ENERGY	:	**Issued: September 17, 2014**
APPALACHIA, LLC, Permittee	:	

OPINION AND ORDER ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT

By: Richard P. Mather, Sr., Judge

Synopsis

The Board grants motions for summary judgment filed by the Department and the permittee and denies a motion for summary judgment filed by the appellant. The Board finds that there are no disputed material facts which would prevent the Board from granting the motions for summary judgment and that the Department and permittee are entitled to judgment as a matter of law. Locational data submitted with applications for well permits under appeal was not as accurate as later acquired survey-derived locational data, but it was accurate enough to enable the permittee and the Department to identify the appellant's water supply and to provide the required notice. In addition, the permittee eventually updated the locational data after the permits were issued, so the dispute over the accuracy of the initial submittal has no continuing relevance and amounts to harmless error. The Board also finds that the Department's failure to require the permittee to disclose the information and methods used to initially determine the well location is likewise harmless error. Finally, the Board finds that the

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Department satisfied its duties in issuing the well permits to the permittee and not to the permittee's parent company.

OPINION

Introduction

WPX Energy Appalachia, LLC ("WPX") is a Delaware limited liability company that operates and maintains offices in Pennsylvania, including an office at 6000 Town Center Boulevard, Suite 300, Canonsburg, Pennsylvania. WPX is registered as a foreign corporation with the Pennsylvania Department of State. (Permittee's Ex. 1.) The Appellant is Laurence Harvilchuck, who owns property jointly with Valerie Harvilchuck at 22845 State Route 167, Brackney, Pennsylvania.

On December 27, 2012, the Pennsylvania Department of Environmental Protection (the "Department") issued the following five well permits: 37-115-21059-00-00, 115-21059-01-00 McNamara 36 7H; 37-115-21060-00 McNamara 39 9H; 37-115-21061-00-00 McNamara 39 11H; 37-115-21062-00-00 McNamara 39 13H; and 37-115-21063-00-00 McNamara 39 15H (the "Well Permits"). The Well Permits authorize WPX to drill and operate certain wells in Silver Lake Township, Susquehanna County.

On January 28, 2013, the Appellant, Laurence Harvilchuck, filed timely appeals of the five Well Permits. Those five appeals have been consolidated at EHB Docket No. 2013-013-M.

Presently before the Board are motions for summary judgment filed by each of the three parties. The motions raise the same three issues, all of which stem from the Appellant's three objections in his Notices of Appeal.[1] The Appellant's first objection is that the Permittee and

[1] The Appellant's Notices of Appeal originally included an objection arguing that the issuances of the Well Permits denied him preservation of the presumption under 58 Pa. C.S. § 3218(c)(2) that WPX would be responsible for any pollution to his potable water supply. The Appellant argued that his request for proof of liability insurance from WPX prior to surveying his property does not constitute a refusal of

the Department knew that the location of the Appellant's potable water supply identified in the original permit applications was inaccurate and, therefore, the Department erred by issuing the Well Permits with that knowledge in hand. The Appellant's second objection is that the Department erred by issuing the Well Permits without requiring the Permittee to disclose the information and method used to locate the Appellant's potable water supply. The Appellant's third objection is that WPX Energy, Inc., the parent company of the Permittee, is the alter ego of the Permittee and, therefore, the Department erred in issuing the Well Permits to the Permittee instead of WPX Energy, Inc. The Appellant requests that the Board vacate the Well Permits and remand the applications for the Well Permits to the Department for "lawful prosecution."

Standard of Review and Burden of Proof

The Board reviews appeals *de novo*. In *Smedley v. DEP*, 2001 EHB 131, then Chief Judge Michael L. Krancer explained the Board's *de novo* standard of review:

> [T]he Board conducts its hearings *de novo*. We must fully consider the case anew and we are not bound by prior determinations made by [the Department]. Indeed, we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "de novo review involves full consideration of the case anew. The [Board], as reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001). Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

Smedley v. DEP, 2001 EHB 131, 156. The Board's broad *de novo* review plays an important role in addressing the parties' cross-motions for summary judgment in this appeal.

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access under 58 Pa. C.S. § 3218(d)(2)(ii) and therefore does not provide grounds to rebut the presumption. On January 17, 2014, the Board granted the Appellant's unopposed motion for leave to withdraw that objection. We will not consider the merits of that objection in the context of this appeal.

The Board may grant a motion for summary judgment if the record indicates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *The City of Philadelphia v. DEP*, EHB Docket No. 2013-074-L, slip op. at 5 (Opinion and Order issued Mar. 19, 2014). In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party, and resolves all doubt as to the existence of a genuine issue of material fact against the moving party.[2] *Id.*; *Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81.

A party is entitled to judgment as a matter of law if an adverse party who will bear the burden of proof at the hearing has failed to produce evidence of facts essential to the cause of action. Pa. R.C.P. 1035.2(2); *Jones v. SEPTA*, 772 A.2d 435, 438 (Pa. 2001); *Screck v. Department of Transportation*, 749 A.2d 1041, 1042 (Pa. Cmwlth. 2000); *Goetz v. DEP*, 2003 EHB 16, 19; *Eagleshire v. DEP*, 1998 EHB 610, 614-615; *Belitskus v. DEP*, 1997 EHB 939, 944. Under the Board's Rules, a party appealing an action of the Department bears the burden of proof if that party is not the recipient of the action, and therefore the Appellant bears the burden of proof in this matter. 25 Pa. Code § 1021.122(c)(2); *Jake v. DEP*, EHB Docket No. 2011-126-M, slip op. at 10 (Adjudication issued Feb. 18, 2014). The Appellant must prove by a preponderance of the evidence that the Department's issuances of the Well Permits were not lawful and reasonable exercises of the Department's discretion supported by the evidence presented. *Jake*, slip op. at 10. In this case, then, WPX and the Department are entitled to judgment as a matter of law if the Appellant, who bears the burden of proof, has failed to

[2] The "record" for purposes of motions for summary judgment consists of the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, if any. Pa. R.C.P. 1035.01. Thus, the record for summary judgment review in this case is derived entirely from the Appellant's Notices of Appeal and the parties' various filings related to the cross-motions for summary judgment. *Goetz v. DEP*, 2003 EHB 16, 19 n.4.

produce either any evidence to support his allegations or not enough evidence to have made out a prima facie case. *Goetz*, 2003 EHB at 19.

Statutory Framework Under 2012 Oil and Gas Act

Before addressing the merits of the issues raised in the cross-motions for summary judgment, we will provide a brief overview of the relevant statutory provisions under the 2012 Oil and Gas Act.

A person must obtain a well permit before drilling or altering a well. 58 Pa. C.S. § 3211(a). A permit application for an unconventional well "shall be accompanied by a plat prepared by a competent engineer or a competent surveyor, on forms furnished by the department, showing," in part, "the name of all surface landowners and water purveyors whose water supplies are . . . within 3,000 feet from the vertical well bore." 58 Pa. C.S. § 3211(b)(1). An applicant for an unconventional well permit "shall forward by certified mail a copy of the plat to . . . all surface landowners and water purveyors, whose water supplies are . . . within 3,000 feet of the proposed unconventional vertical well bore . . . ." 58 Pa. C.S. § 3211(b)(2). The applicant must submit proof of notification with the well permit application. 58 Pa. C.S. § 3211(b.1).

Section 3236(b) provides:

> (b) Accuracy.--Where accuracy of a map or data filed *under this chapter* is in issue, the person that filed the map or data shall:
>
> (1) at the request of an objecting party, disclose the information and method used to compile the map or data, along with any information available to the person that might affect current validity of the map or data; and
>
> (2) have the burden of proving accuracy of the map or data.

58 Pa. C.S. § 3236(b) (emphasis added). Section 3236(b) applies to all plats filed under Chapter 32.[3]

Section 3251(a) provides interested persons with the opportunity to formally meet with the Department and applicants for well permits. That section states, in relevant part, as follows:

> The department or any person having a direct interest in a matter subject to this chapter may, at any time, request that a conference be held to discuss and attempt to resolve by mutual agreement a matter arising under this chapter.
>
> . . .
>
> An agreement reached at a conference shall be consistent with this chapter and, if approved by the department, it shall be reduced to writing and shall be effective, unless reviewed and rejected by the department within ten days after the conference . . . .

58 Pa. C.S. § 3251(a).

Section 3218(c) provides a rebuttable presumption "that a well operator is responsible for pollution of a water supply if: . . . (2) in the case of an unconventional well: (i) the water supply is within 2,500 feet of the unconventional vertical well bore; and (ii) the pollution occurred within 12 months of the later of completion, drilling, stimulation or alteration of the unconventional well." 58 Pa. C.S. § 3218(c).

To rebut the presumption established in Section 3218(c), an operator of an unconventional well must affirmatively prove any of the following:

> (i) the pollution existed prior to the drilling, stimulation or alteration activity as determined by a predrilling or prealteration survey;
> (ii) the landowner or water purveyor refused to allow the operator access to conduct a predrilling or prealteration survey;
> (iii) the water supply is not within 2,500 feet of the unconventional vertical well bore;

[3] The Department and WPX interpret Subsection (b) more narrowly, but the Board rejects this more narrow interpretation. For a further discussion of this issue, see *supra* pp. 24-26.

(iv) the pollution occurred more than 12 months after completion of drilling or alteration activities; or

(v) the pollution occurred as the result of a cause other than the drilling or alteration activity.

58 Pa. C.S. § 3218(d). An unconventional well operator "must provide written notice to the landowner or water purveyor indicating that the presumption established under subsection (c) may be void if the landowner or water purveyor refused to allow the operator access to conduct a predrilling or prealteration survey. . . ." 58 Pa. C.S. § 3218(e.1).

The "predrilling or prealteration survey" described in Section 3218 is the same term used in Section 208 of the earlier Oil and Gas Act. 58 P.S. § 601.208. Under the Department regulations promulgated to implement these requirements, it is clear that the "survey" set forth in these statutory and regulatory requirements is a survey of the water quality of a protected water supply. 25 Pa. Code § 78.52. It is not a survey of the water supply location, although identifying the location of the water supply is a mandatory part of the report describing the results of the predrilling or prealteration survey. The predrilling or prealteration survey provides a predrilling or prealteration analysis of the water quality of the water in the landowner's well, and it is required under Sections 3218(d)(1)(i) and 3218(d)(2)(i) for an operator to preserve its defense to the rebuttable presumption that the operator adversely affected the water quality of the landowner's water supply that is within the statutorily created presumption zone. Section 78.52(c) provides:

> The survey shall be conducted by an independent Pennsylvania accredited laboratory. A person independent of the well owner or well operator, other than an employee of the accredited laboratory, may collect the sample and document the condition of the water supply, if the accredited laboratory affirms that the sampling and documentation is performed in accordance with the laboratory's approved sample collection, preservation and handling procedure and chain of custody.

25 Pa. Code § 78.52(c). In addition, the operator must provide a copy of all the sample results taken as part of the survey to the Department and the landowner. 25 Pa. Code § 78.52(d).

The regulations at 25 Pa. Code § 78.52 (Predrilling or prealteration survey) were initially promulgated to implement the prior Oil and Gas Act. Recently, the Environmental Quality Board proposed revisions to the Department's regulations to reflect the requirements of Section 3218. *See* 43 Pa. B. 7377 (December 14, 2014) (proposing to revise Section 25 Pa. Code § 78.52). The proposed revisions to Section 78.52 contain minor changes to the prior language and a new subsection (g) that contains new notice requirements. *Id.* Under Section 4(1) of the 2012 Oil and Gas Act, the regulations adopted under the prior Oil and Gas Act remain in effect until revoked, vacated or modified under 58 Pa. C.S. Chapter 32 or 33. The recently proposed regulations will, when adopted, modify the currently effective regulation at 25 Pa. Code § 78.52, which was earlier promulgated under the prior Oil and Gas Act. Section 4(1) of the Act of February 14, 2012 (P.L. 87, No. 13).

Well Plats

The following are the undisputed material facts contained in the record before the Board. On September 18, 2012, WPX identified the Appellant, Laurence Harvilchuck, as an affected owner of private water supplies that may be located within 2,500 feet of WPX's proposed wells. (Permittee's Ex. 9; Appellant's Ex. 23.) WPX provided the Appellant with notice of its applications for the Well Permits and requested permission to conduct a predrilling or prealteration survey of his water supplies, which would include identifying the location of the water supplies.

On October 2, 2012, prior to the Department's receipt of the applications for the five Well Permits, the Appellant contacted the Department and WPX, raising formal objections to the

applications and requesting a conference with the Department under 58 Pa. C.S. § 3251(a) to discuss the activities proposed in the applications. (Appellant's Ex. 2; Department's Ex. A; Permittee's Ex. 4.) The Appellant claimed, in part, that the applications for the Well Permits were defective because the well location data was not true and accurate and that WPX therefore had made a "willfully false representation."[4] (Department's Ex. A.)

WPX's consultant, ARM Group, attempted to conduct a predrilling or prealteration survey, which would include identifying the location of the Appellant's water supply. The Appellant, however, initially refused to allow ARM Group to conduct a survey unless it provided proof of liability insurance. From July 30, 2012 to September 21, 2012, the Appellant tried to resolve a number of concerns with WPX before allowing WPX or its third party consultants to enter his property. WPX did not directly respond to the Appellant's initial requests to provide proof of liability insurance. WPX and ARM Group did not resolve this issue with the Appellant prior to the time WPX submitted the applications for the Well Permits on October 12, 2012, and instead of relying on a survey to locate the Appellant's water supply, WPX relied on what it referred to as "public records" or "public land use records." (Permittee's Ex. 4.)

On October 12, 2012, WPX submitted permit applications and accompanying plats (the "Plats") to the Department for the following five wells: McNamara 36 7H, McNamara 39 9H, McNamara 39 11H, McNamara 39 13H, and McNamara 39 15H. (Appellant's Ex. 1.) All five

[4] In addition, the Appellant charged WPX with discriminating against the colorblind because a certain line in the applications was in red and not bolded, contrary to printed instructions. The Appellant also claimed that the proposed wells would travel under his property and that their path violated his property rights. Further, the Appellant raised two additional objections in his October 2, 2012 letter, claiming that numerical mistakes, such as writing 35 instead of 36 and 37 instead of 36, rendered WPX's notice to affected parties null and void. These objections, which were not raised in the Appellant's Notices of Appeal or in the Appellant's Cross-Motion for Summary Judgment, are deemed waived, and we will not address these issues in the context of this appeal. *Thomas v. DEP*, 1998 EHB 93, 97 (stating that objections not raised in a notice of appeal are waived).

of those wells are unconventional wells as that term is defined in Section 1 of the 2012 Oil and Gas Act, 58 Pa. C.S. § 3201, and all five wells are located on the McNamara well pad.

The Plats identified a water supply located on property owned jointly by the Appellant, Laurence Harvilchuck, and Valerie Harvilchuck, at 22845 State Route 167, Brackney, Pennsylvania. The Plats indicated that the distances between the Appellant's water supply and the vertical well bores associated with WPX's proposed wells were 1925 feet (McNamara 36 7H); 1935 feet (McNamara 39 9H); 1945 feet (McNamara 39 11H); 1960 feet (McNamara 39 13H); and 1975 feet (McNamara 39 15H).[5]

On December 3, 2012, the Appellant sent a letter to the Department providing a list of issues to discuss at a conference required under 58 Pa. C.S. § 3251(a). (Department's Ex D; Permittee's Ex. 5; Appellant's Ex. 3.) Among those issues, the Appellant requested to discuss his allegations that WPX provided "false statements with respect to well location data." (Department's Ex. D; Permittee's Ex. 5; Appellant's Ex. 3.)

The conference was held on December 14, 2012 between the Department, the Appellant, and WPX. During the conference, representatives from WPX stated that a survey was not used to locate the Appellant's water supply, and instead, WPX relied upon "public records." To this date, WPX has refused the Appellant's requests to disclose the nature of the public records that were used to locate the water supply, and the Department has not compelled WPX to disclose the nature of those public records.[6] The Appellant asserts that no such public records exist.[7]

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[5] The Plats also identified a potable water supply located on property owned solely by the Appellant at 22779 State Route 167, Brackney, Pennsylvania. The location of that water supply, however, is not at issue in this appeal. Results of a survey conducted after the Well Permits were issued indicates that the location of that water supply depicted in the original Plats was accurate, and the Appellant has not disputed the results of that survey.

[6] The record does not include the public records that WPX claims it relied upon. The Appellant has not indicated to the Board whether the Appellant requested the public records from WPX or the Department through discovery or in a request under Pennsylvania's Right-To-Know Law, or whether the Appellant

During the December 14, 2012 meeting, the participants formally agreed that WPX would provide proof of insurance covering activities that WPX and its third party consultants would complete at the Appellant's residence, at which time WPX or its third party consultants would be permitted access to obtain a precise location of the Appellant's water supply and to obtain a water sample for analysis. (Department's Ex. E; Permittee's Exs. 6, 7; Appellant's Ex. 7.) The Department formally approved that agreement under 58 Pa. C.S. § 3251(a). (Department's Ex. E; Permittee's Exs. 6, 7.) The Department's letter approving the parties' agreement was not appealed to the Environmental Hearing Board. WPX provided proof of liability insurance on December 19, 2012. (Appellant's Ex. 24.)

Prior to acting on the applications for the Well Permits, the Department performed a compliance review of the Permittee and its parent company, WPX Energy, Inc. and determined that the Department had taken no final actions against either entity. (Department's Ex. G, Affidavit of S. Craig Lobbins; Permittee's Ex. 19; Appellant's Ex. 14.)

On December 27, 2012, the Department issued the following five well permits: 37-115-21059-00-00, 115-21059-01-00 McNamara 36 7H; 37-115-21060-00 McNamara 39 9H; 37-115-21061-00-00 McNamara 39 11H; 37-115-21062-00-00 McNamara 39 13H; and 37-115-21063-00-00 McNamara 39 15H. (Appellant's Ex. 8.)[8] The Well Permits, which are all located on the

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requested an appointment with the Department to conduct an in-person review of the relevant case files. All that we know about the Appellant's diligence to uncover these public records is that the Appellant at no point filed a motion to compel WPX or the Department to turn over those documents. The Board views the Appellant's failure to file a motion to compel to suggest that the Appellant either failed to diligently uncover the documents or else was satisfied with the documents received through discovery or other means.

[7] The Appellant claims that his water well was drilled in 1967, that the water well's borehole is located approximately 53 inches from his home, and that the view of the borehole is obstructed by a wooden patio that was constructed in 1984. The Appellant suggests that the public records WPX originally relied upon included "overhead imagery." Appellant's Reply at 4.

[8] The 2012 Oil and Gas Act requires the Department to "issue a permit within 45 days of submission of a permit application unless the department denies the permit application for one or more of the reasons set forth in subsection (e.1), except that the department shall have the right to extend the period for 15 days

McNamara well pad, authorize WPX to drill and operate certain wells in Silver Lake Township, Susquehanna County. WPX has a $600,000.00 bond in place, which covers the wells that are subject to the Well Permits. (Permittee's Response, Ex. 2.)

On January 28, 2013, the Appellant appealed the Department's issuance of the five Well Permits. Those appeals have been consolidated at EHB Docket No. 2013-013-M.

On February 28, 2013, before WPX commenced drilling on the McNamara well pad, WPX's consultant, ARM Group, provided the Appellant with pre-drill test results from the Appellant's potable water supply. (Permittee's Ex. 17.) On June 3, 2013, WPX supplemented the files for the Well Permits to include a map and survey of the location of the Appellant's water supply, conducted on February 8, 2013, which included a revised location of the water supply. (Department's Ex. H; Permittee's Ex. 18.) The revised location of the Appellant's water supply located on the property owned jointly by Valerie and Laurence Harvilchuck is approximately 78 feet (McNamara 36 7H); 74 feet (McNamara 39 9H); 79 feet (McNamara 39 11H); 76 feet (McNamara 39 13H); and 75 feet (McNamara 39 15H) *further* from WPX's vertical well bores than the location previously depicted in the Plats submitted with the original well permit applications. (Department's Ex. G, Affidavit of S. Craig Lobbins; Permittee's Ex. 19; Appellant's Ex. 14.) The revised distances from the water supply to the vertical well bores are still within 2,500 feet, and for that matter 3,000 feet, of the vertical well bores subject to the Well Permits.

The first two issues raised in the parties' cross-motions for summary judgment relate to the location of the Appellant's water supply depicted on the Plats which accompanied the

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for cause shown upon notification to the applicant for of the reasons for the extension." 58 Pa. C.S. § 3211(e). It is not apparent from the record whether the Department formally extended the period for 15 days, but if it had, the deadline to approve the Well Permits would have been November 26, 2012, which means the Department issued the Well Permits at least 31 days late.

applications for the Well Permits. The first issue is whether the location of the water supply identified in the applications was inaccurate and, if so, whether the Department erred by relying on that information in issuing the Well Permits. If the information was inaccurate, then a related sub-issue is whether the Permittee and the Department were aware that this initial locational data was inaccurate. The second issue is whether the Department erred by issuing the Well Permits without requiring the Permittee to disclose the basis on which it determined the location of the Appellant's water supply. The third issue is whether WPX Energy, Inc., the parent company of the Permittee, is the alter ego of the Permittee, and, if so, whether the Department erred in issuing the Well Permits to the Permittee instead of WPX Energy, Inc. We will address each of these issues in turn. Ultimately finding no disputed issues of material fact, we find that WPX and the Department, and not the Appellant, are entitled to judgment as a matter of law on all three issues.

Location of Appellant's Water Supply

The Appellant, in his Notices of Appeal, argues that WPX failed to determine the location of the Appellant's potable water supply within a tolerance of thirty feet as required by the Department's application forms, and that WPX failed to provide "any notation, reference, or indication within the permit applications that the information was not obtained from a survey or other reliable means, in conflict with 58 Pa. C.S. § 3211(b)(1)." (Notices of Appeal.)

The Appellant also draws attention to the certification on the signature block of WPX's applications, which states: "The person signing this form attests that they have the authority to submit this application on behalf of the applicant, and that the information, including all related submissions, is true and accurate to the best of their knowledge." (Appellant's Ex. 1.) The Appellant claims that WPX and the Department *knew* that the well location data in the Plats was

inaccurate because, the Appellant argues, they were "explicitly told so in writing by the Appellant." Appellant's Brief in Support of Cross-Motion for Summary Judgment at 6. As a result, the Appellant contends, the applications for the Well Permits "contained information known by the Department to be materially untrue, namely the misrepresentation of the location of the Appellant's potable water supply," and that these "misrepresentations" constitute three separate violations and resulted in the issuances of permits contrary to law. First, the Appellant alleges a violation of 58 Pa. C.S. § 3259(4), which prohibits any "[a]ttempt to obtain a permit . . . by misrepresentation or failure to disclose all relevant facts." Second, the Appellant alleges a violation of 18 Pa. C.S. § 4904(a)(3), which states that "[a] person commits a misdemeanor of the second degree if, with intent to mislead a public servant in performing his official function, he: . . . submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he knows to be false." Third, the Appellant alleges that WPX committed "fraud in the inducement." Appellant's Brief in Support of Response to Permittee's Motion for Summary Judgment at 5-7. Under Pennsylvania law, the elements of fraud in the inducement are as follows:

> (1) a representation;
> (2) which is material to the transaction at hand;
> (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
> (4) with the intent of misleading another into relying on it;
> (5) justifiable reliance on the misrepresentation; and
> (6) the resulting injury was proximately caused by the reliance.

Partners Coffee Co., LLC v. Oceana Servs. & Prods. Co., 700 F. Supp. 2d 720, 727 (2010).[9]

[9] WPX argues that the Appellant did not raise alleged violations of 18 Pa. C.S. § 4904(a)(3) or fraud in the inducement in his Notices of Appeal, and that those arguments should therefore be deemed waived. Permittee's Reply at 2 n.1; *see also* Permittee's Brief in Support of Response at 3 n.1. We disagree. The Appellant, in his first objection, argues that WPX submitted information to the Department that WPX knew was materially untrue. The violations of 18 Pa. C.S. § 4904(a)(3) and fraud in the inducement, alleged by the Appellant, merely support the Appellant's first objection.

The Appellant claims that the Department was aware of these violations and, with that knowledge in hand, erred by issuing the Well Permits to WPX. The Appellant also claims that because WPX inaccurately identified his potable water supply in the original applications, that the applications for the Well Permits were therefore incomplete. As such, the Appellant argues, the Department should have denied the applications under 58 Pa. C.S. § 3211(e.1), for the following reasons: "1) The well site for which a permit is required is in violation of any of this chapter or issuance of the permit would result in a violation of this chapter or other applicable law. 2) The permit application is incomplete. . . ." 58 Pa. C.S. § 3211(e.1). The Appellant argues that the Department, before issuing the Well Permits, should have required WPX to submit corrected applications or else should have attached conditions to the Well Permits requiring WPX to correct information related to the location of the Appellant's water supply. For a number of reasons, we strongly disagree with the Appellant's objection.

We do not believe that the Permittee's inability to initially identify the Appellant's water supply within a tolerance of 30 feet is fatal to the Department's issuance of the Well Permits. Section 3211(b.1) provides that "[n]otification of surface landowners or water purveyors shall be on forms, and in a manner prescribed by the department, sufficient to identify the rights afforded those persons under section 3218 (relating to protection of water supplies) and to advise them of the advantages of taking their own predrilling or prealteration survey." 58 Pa. C.S. § 3211(b.1). The Department's instructions for completing a well plat direct applicants to identify the latitude and longitude coordinates of the water supplies of all surface landowners located within 3,000 feet of the vertical well bore for an unconventional well. Forms accompanying well permit applications direct applicants to identify the latitude and longitude coordinates to an accuracy of

plus or minus 30 feet. (Appellant's Ex. 1, p. 37.)[10] The Department has also released two technical guidance documents which address the accuracy of locational data contained in oil and gas well plats. The first, Document Number 013-0830-003, states that "[t]he ultimate goal is for a 10-meter/32.8 Feet or better level of accuracy." (Appellant's Ex. 11, p. 4 (Locational Data Policy).) The second, Document Number 550-2100-009, states that "[t]he accuracy of the data must meet the Department's Policy (#013-0830-003) goal of 10-meter accuracy . . . ." (Appellant's Ex. 10, p. 2 (Oil and Gas Locational Guidance).)

Section 3211(b.1) requires only that notification to landowners should be on forms sufficient to identify certain rights of nearby landowners. Nothing in Section 3211(b.1) discusses the necessary range of accuracy of locational data provided within a notification. The Department's guidance documents also do not provide a binding norm accuracy requirement. *See, e.g., Borough of Bedford v. Dep't of Envtl. Prot.*, 972 A.2d 53 (Pa. Cmwlth. 2009) (holding that an agency's guidance document that is applied as a binding norm is a regulation that must be promulgated as a regulation). The guidance document merely provides guidance and discretionary standards concerning a certain level of accuracy. The Department has the discretion to approve applications that vary from such discretionary standards under appropriate circumstances.[11] Failure to identify the location of the Appellant's water supply within a tolerance of 30 feet is not, per se, a violation of the 2012 Oil and Gas Act.

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[10] Other instructions for completing a well plat state that the Department's "minimum requirement is that latitude and longitude be determined within (plus or minus) 10 meters (33 feet)." (Appellant's Ex. 9, p. 3 (Locational Plat for Oil and Gas Well, form 8000-PM-OOGM0002); Department's Ex. I.) WPX is correct, however, that these particular instructions refer to the location of the permitted well, not nearby potable water supplies. Potable water supplies are addressed in the last sentence on page three of those instructions.

[11] The Board notes that the Department's guidance documents aim for an accuracy of 10 meters whereas the Department's well permit application forms request an accuracy of 30 feet. While these numbers are close, they are not equal, and the Department does not explain which of the two distances it prefers.

Further, we disagree with the Appellant's basis for his argument that the applications are "in conflict with 58 Pa. C.S. § 3211(b)(1)" because WPX failed to provide "any notation, reference, or indication within the permit applications that the information was not obtained from a survey or other reliable means . . . ." The plain language of Section 3211(b)(1) simply does not require applicants to provide a "notation, reference, or indication" within a permit application if supporting information "was not obtained from a survey or other reliable means." Section 3211(b)(1) requires only that a plat be "prepared by a competent engineer or a competent surveyor, on forms furnished by the department." The record indicates that WPX complied with those requirements.

We also disagree with the Appellant's assertion "that the Department knew of the defective certification early in the Application review process when the objections were filed . . . prior to approval and the issuance of the Permits." That claim simply has no basis in fact. The only evidence the Appellant offers in support of this assertion is that he, the Appellant, told WPX and the Department that the locational data was inaccurate simply because the Appellant believed that the "public records," which WPX claimed it relied upon, did not exist. Obviously the Appellant's mere assertion does not conclusively prove that the data was inaccurate. At most, the Appellant's assertion would put the accuracy of the locational data in dispute, from the Department's objective point of view.[12]

[12] The Appellant claims that a copy of notes taken by a Department employee during the December 12, 2012 meeting indicates that the Department believed that WPX's surveyor was in doubt about the accuracy of location of the Appellant's water supply. (Appellant's Ex. 6.) The notes, at most, provide preliminary thoughts that ultimately led to the parties' agreement, which was approved by the Department, and in which the Appellant agreed to allow WPX or its third party consultant to survey his property if WPX or the third party consultant provided proof of liability insurance. Nothing in the Department's notes indicates that the Department *knew*, at the time of the meeting, that the locational data was inaccurate.

Drawing all reasonable inferences in favor of the Appellant, the record is without any indication that WPX and the Department knew that the initial locational data was not accurate at the time it was submitted or at the time the Well Permits were issued. The undisputed fact that the initial locational data indicated that the Appellant's water supply was closer to WPX's proposed well bores than it actually is undermines the Appellant's claims that WPX willfully misrepresented the location of the Appellant's water supply and fabricated data resulting in violations of various provisions of law. Placing the Appellant's water supply closer to its well bores provides no logical benefit to WPX, and it only helps to ensure that the Appellant's water supply receives the protection that the law provides.

As a result, we agree with WPX and the Department that because WPX provided locational data which WPX believed, to the best of its knowledge, was accurate at the time the data was submitted, WPX did not violate 58 Pa. C.S. § 3259(4) or 18 Pa. C.S. § 4904(a)(3) and did not commit fraud in the inducement. WPX did not attempt to obtain the Well Permits by misrepresentation. The initial locational data was not as accurate as the later survey-derived data, but WPX did not act with recklessness as to whether the locational data was true or false, and did not submit or invite reliance on the locational data with the intent to mislead the Department or others.

We do not agree with the Appellant's suggestion that the Department, before issuing the Well Permits, should have required WPX to submit corrected applications or else should have attached conditions to the Well Permits requiring WPX to correct information related to the locations of the Appellant's water supply. The Appellant has failed to acknowledge that even if the initial locational data provided by WPX was inaccurate as alleged, those mistakes were subsequently corrected, and there is therefore no remedy we can provide to the Appellant. The

Board generally will not remand a permit where the Department's "failures to comply with applicable regulations have been purely procedural, easily correctable and environmentally inconsequential." *Kwalwasser v. DEP,* 1986 EHB 24, 55; *Shippensburg Township P.L.A.N. v. DEP*, 2004 EHB 548, 550-51. In *O'Reilly v. DEP*, 2001 EHB 19, the Board stated:

> The goal of Board proceedings is not to go back through the entire course of permit application procedures to pick out errors that may have been made along the way. . . . There will be errors in virtually any permit application review of even modest complexity. If the errors have been corrected, there is no need to dwell upon them. Errors may have been rendered immaterial or moot by subsequent events or even the passage of time. A party who would challenge a permit must show us that errors committed during the application process have some *continuing relevance*.

O'Reilly, 2001 EHB at 51 (emphasis added); *see also Goetz v. DEP*, 2003 EHB 16, 27; *Shippensburg Township P.L.A.N. v. DEP*, 2004 EHB 548, 550; *County of Berks v. DEP*, 2005 EHB 233, 267. The Board, in *O'Reilly*, also stated that "[i]n an appeal from a permit issuance, our review of the permit is not a vehicle for punishment, but a determination of what, if any, changes need to be made to make the permit consistent with the law." *O'Reilly*, 2001 EHB at 56.

In *Kleissler v. DEP,* 2002 EHB 737, the Board stated:

> [I]t makes no sense to dwell inordinately on the permit application review process if any alleged defects are immaterial in the final analysis.
>
> . . .
>
> Whether errors occurred is only half the question. If an error occurred, the effect and consequences of the error must be weighed when the Board fashions its order. An inconsequential error or an error that this Board can do little to correct given the realities of a situation is not likely to result in a permit suspension or revocation, and even a remand may be a waste of time and effort. A party that advances these points does not exhibit disdain for the law.

Kleissler, 2002 EHB at 751-52.

The Board also recognizes a long history of precedent stating that the Board will generally not remand a permit if the objections raised by an appellant amount to harmless error. *Shippensburg Township P.L.A.N. v. DEP*, 2004 EHB 548, 550 ("In short, we will not remand a permit to correct harmless procedural errors."); *City of Harrisburg v. DEP*, 1996 EHB 709, 780; *Stevens v. DEP,* 2002 EHB 249, 259; *Gadinski v. DEP*, 2013 EHB 246, 275. In *Stevens v. DEP*, we stated:

> [T]he Stevenses do not explain how or why the arguments should make a difference in this case. They do not explain why -- even if they are correct on all of the points -- they are entitled to any relief in their favor. It is not independently apparent to us that resolution of any of these issues in the Stevenses' favor would justify any action on our part regarding the use of [the site]. Even if we assume for purposes of discussion that the Department erred in any of these respects, the errors are meaningless, immaterial, and harmless in the context of this appeal.

Stevens, 2002 EHB at 259. In fact, the Commonwealth Court has stated that if "there was a procedural error during the processing of a permit application, it does not provide a basis for remand if it was harmless." *Berks County v. Department of Environmental Protection, et al.,* 894 A.2d 183, 193 (Cmwlth. Ct. 2006).

The Appellant has provided no evidence that any foreseeable harm will result from WPX's need to update the permit files. The only harm alleged by the Appellant that we can glean from his filings reads as follows:

> Hypothetically, if the error had been allowed to stand by Appellant and Appellant had subsequently drilled another borehole on his premises in close proximity to an existing borehole subsequent to any drilling activity under the Permits, there would be little to preclude either Permittee or the Department from allowing confusion over the locations of the hypothetical wells and their respective ages to vex Appellant's effort to seek relief under the law and result in litigation that could otherwise have been avoided

> by Permittee's compliance with the level of accuracy required by the Department.

Appellant's Reply to Department's Response at 6. WPX *did* correct the error, however, so the Appellant's alleged hypothetical harm will never materialize.[13]

The Board does not support the Appellant's extreme efforts to make a mountain out of a molehill. First, no party disputes that the initial locational data was less accurate than the subsequently filed survey-derived locational data, but that the initial locational data is more protective or conservative than the survey-derived locational data. As the record indicates, after the Well Permits were issued, WPX prepared a survey of the location of the Appellant's water supply, then supplemented the permit files to reflect that the location of the Appellant's water supply was actually 74 to 79 feet *further* from WPX's proposed well bores than WPX previously believed. This amendment to the initial locational data did not affect the overall conclusion that WPX located the Appellant's water supply within 2,500 feet of WPX's proposed well bores. WPX, having identified that the Appellant's water supply is within 3,000 feet of the proposed unconventional wells for purposes of preparing the Plats, and is within 2,500 feet of the proposed unconventional wells for purposes of a predrilling or prealteration survey, provided the required notice to the Appellant under 58 Pa. C.S. § 3211(b)(2) and 58 Pa. C.S. § 3218(e.1).

Second, the Appellant's objections to the accuracy of the initial locational data are now moot before the Board in this appeal because the parties agree that WPX obtained survey data after the permits were issued and submitted this more accurate survey-derived locational data to the Department. WPX provided the Appellant with the notice mandated by the 2012 Oil and Gas

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[13] The Appellant, in one of his reply briefs, for the first time introduced an objection under Article 1, Section 27 of the Pennsylvania Constitution in light of the Pennsylvania Supreme Court's recent decision in *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013). Appellant's Reply at 1-3. The Appellant did not include that objection in his Notices of Appeal, and that argument is therefore waived. *Thomas v. DEP*, 1998 EHB 93, 97 (stating that objections not raised in a notice of appeal are waived).

Act in a timely manner and conducted the predrilling and prealteration survey before drilling. We agree with the Department that the "Appellant has not identified any effect, impact or harm occasioned by the Permittee [originally] identifying his water supply as being 70 feet closer to the proposed vertical well bores than it actually is." Department's Brief in Support of its Response at 10. As WPX correctly states, "[t]here is no practical or meaningful relief this Board can offer at this point. The Appellant's wells have been surveyed, properly located, and tested prior to drilling so that the public record now contains the surveyed exact locations of his water wells." Permittee's Brief in Support of Motion for Summary Judgment at 9-10.

We agree with the Department that the modification to the distances "is immaterial to the final analysis and is really a permitting procedural error" which has no continuing relevance. The "Appellant has not identified any ongoing effect, impact or harm to the alleged deficiencies." Permittee's Brief in Support of Response at 5. WPX's error was purely procedural, easily correctable and environmentally inconsequential. Our review of the Well Permits is not a vehicle for punishment. We must weigh the effect and consequences of the error when we fashion our order, and we find here that because the error has been corrected, a remand would be a waste of time and effort. In essence, WPX's initial submission of the less accurate locational data, which has since been corrected, amounts to harmless error.

Similarly, we disagree with the Appellant's argument that the applications for the Well Permits were incomplete because they contained the initial less accurate locational data, and should have been denied by the Department under 58 Pa. C.S. § 3211(e.1)(2). This information has been updated to reflect the accurate location of the Appellant's water supply, and, as explained above, there is simply no longer any issue to remedy. The Appellant's objection has no continuing relevance and amounts to harmless error.

The Appellant claims that "[t]hese alleged violations are of continuing relevance for renewals pending before the Department for two of the permits," (Appellant's Ex. 15), "the issuance of a new, third permit at the same site," (Appellant's Ex. 16), "and a previously issued renewal of a fourth permit," (Appellant's Ex. 17). Appellant's Brief in Support of Cross-Motion for Summary Judgment at 7. The Board, however, agrees with WPX that such renewals and new permit applications are not the subject of this appeal and do not support a basis for the continuing relevance of the violations alleged by the Appellant.

We find that, in drawing all inferences in favor of the Appellant, the record does not support his first objection. The accuracy of the initial locational data was sufficient to allow the Department to issue the Well Permits, and any lingering concerns about the accuracy of the locational data were eliminated when WPX conducted its predrilling or prealteration survey and actually surveyed the location of the Appellant's water supply.

Failure to Disclose Information and Method Used to Locate Appellant's Water Supply

The Appellant's second objection is that the Department failed to uphold 58 Pa. C.S. § 3236(b) and violated the law by not requiring WPX to disclose the information and method used to generate the location of the Appellant's water supply. Appellant's Brief in Support of Cross-Motion for Summary Judgment at 3, 8.

Section 3236 states:

> § 3236. Reliance on maps and burden of proof.
> (a) General rule.--In determining whether a coal mine or operating coal mine is or will be within a particular distance from a storage reservoir which is material under this chapter, the owner or operator of the coal mine and the storage operator may rely on the most recent map of the storage reservoir or coal mine filed by the other party with the department.
> (b) Accuracy.--Where accuracy of a map or data filed *under this chapter* is in issue, the person that filed the map or data shall:

> (1) at the request of an objecting party, disclose the information and method used to compile the map or data, along with any information available to the person that might affect current validity of the map or data; and
>
> (2) have the burden of proving accuracy of the map or data.

52 Pa. C.S. § 3236 (emphasis added). The Appellant questioned the accuracy of the locational data in WPX's applications and asserts that under this provision WPX has the burden to prove the accuracy of its data. In response to the Appellant's objections regarding the accuracy of the locational data, WPX indicated that it used "public records" to determine the location of the Appellant's water supply without disclosing what public records were used.

The Appellant is not satisfied with WPX's answer that it relied on "public records" and its refusal to disclose any further detailed information about the location of the Appellant's water supply.[14] The Appellant argues that in response to his requests WPX should have disclosed the exact information and method used to locate his water supply identified on the Plats submitted with WPX's applications for the Well Permits. The Appellant further argues that when WPX failed to disclose its information and methods, that the Department should have required their disclosure, and that the Department, having failed to enforce 58 Pa. C.S. § 3236(b) by not requiring WPX to disclose its information and methods, abused its discretion and acted arbitrarily, capriciously, and contrary to law in issuing the Well Permits.

WPX and the Department argue that Section 3236 applies only to the underground storage of gas in a storage reservoir and does not apply to all plats submitted under the 2012 Oil and Gas Act. They argue that because Section 3236 is found in Subchapter C, which addresses

[14] There is a dispute between the Appellant and WPX regarding the basis upon which WPX determined the location of the Appellant's water supply in the initial submittal. WPX asserts it used "public records," and the Appellant asserts that there are no public records and that WPX falsified the locational data. This dispute is not a dispute of material fact in light of the subsequent predrilling or prealteration survey of the Appellant's water supply that WPX conducted, which included the surveyed location of the Appellant's water supply.

underground storage of gas, and because Section 3236(a), the "General rule," pertains only to maps submitted by operators of storage reservoirs, that Section 3236(b) is limited in application to only those provisions found in Subchapter C that address storage reservoirs. They argue in the alternative that even if Section 3236(b) is applicable to the Appellant's objection and WPX's disclosure was therefore required under Section 3236(b), the Appellant does not demonstrate how that failure to disclose has caused the Department's issuance of the Well Permits to be unlawful. Department's Brief in Support of Response at 12.

We disagree with WPX and the Department that Section 3236(b) applies only to the underground storage of gas in a gas reservoir. As the Appellant correctly points out, 58 Pa. C.S. § 3236(b) refers to a map or data filed *under this chapter*, and therefore applies to the totality of Chapter 32 which encompasses all permit applications under Section 3211(a). Appellant's Brief in Support of Cross-Motion for Summary Judgment at 9. WPX and the Department show disdain for the plain language of Section 3236(b) by ignoring the phrase *under this chapter*. The General Assembly chose for Section 3236(b) to apply to the entirety of Chapter 32, not simply to a subchapter, and could easily have included the prefix "sub-" if it so desired. Further, whereas Section 3236(a) refers only to "maps," Section 3236(b) refers to "maps or data," which suggests that Section 3236(b) is not limited by Section 3236(a). Section 3236(b) applies to the entirety of Chapter 32 and is therefore applicable to the Appellant's second objection in this appeal.

Section 3236 of the 2012 Oil and Gas Act is patterned after the language in Section 601.306 ("Reliance on Maps: burden of proof) of the 1984 Oil and Gas Act. Section 601.306 contained two similar subsections to Section 3236: subsection (a) addressed use of maps showing distance of operating coal mines to a gas storage reservoirs; and subsection (b) addressed challenges to "the accuracy of maps or data filed by any person pursuant to the

requirements of this act." Subsection (b) of Section 601.306 is not limited in scope to maps or data filed under subsection (a), but, like subsection (b) of Section 3236, it extends to maps or data filed under the requirements of the act. Under Paragraph (2) of Section 4 of the 2012 Oil and Gas Act,

> Except as set forth in paragraph (3), any difference in language between 58 Pa.C.S. Ch. 32 and the Oil and Gas Act is intended only to conform to the style of the Pennsylvania Consolidated Statutes and is not intended to change or affect the legislative intent, judicial construction or administration or implementation of the Oil and Gas Act.

Section 4(2) of the Act of February 14, 2012 (P.L. 87, No. 13).

Section 3236 is not listed in Paragraph (3), so the General Assembly did not intend to change the meaning of subsection 601.306(b) when it replaced it with subsection 3236(b) in 2012. Both subsections include all maps or data filed under Chapter 32 or the replaced 1984 Oil and Gas Act. The General Assembly has, in both laws, clearly stated its intention to expand the scope of the requirements in subsection (b) beyond the limited scope of subsection (a).

Further, Section 3236(b), by its express terms, applies to all maps or data filed under Chapter 32. A "plat" is defined under Chapter 32 of the 2012 Oil and Gas Act as "[a] map, drawing or print accurately drawn to scale showing the proposed or existing location of a well or wells." 58 Pa. C.S. § 3203 (Plat). In other words, a plat is defined as a type of map. Therefore, Section 3236(b) applies to all plats filed under Chapter 32.

Where we agree with WPX and the Department is that the Appellant's concern has no continuing relevance. The Department correctly argues that the Appellant does not demonstrate how WPX's failure to disclose the information and method of locating the Appellant's water supply has caused the Department's issuance of the Well Permits to be unlawful. Similar to our reasoning above in dismissing the Appellant's first objection, there is simply no practical or

meaningful relief the Board can offer at this point. The Appellant's water supply has now been surveyed, more accurately located, and tested prior to drilling so that the public record now contains the precise surveyed location of his water supply.

The Appellant claims that the alleged violations are of continuing relevance because of an application for the issuance of a new permit at the same site that is pending before the Department. (Appellant's Ex. 16.) The Appellant also identifies a renewal permit issued on September 25, 2013, (Appellant's Ex. 17), that contains the same less accurate locational data contained in the original Plats filed with the applications for the Well Permits, even though WPX and the Department were in possession of the updated information on June 3, 2013, more than three months earlier. Appellant's Reply at 7. While we find it remarkable that WPX and the Department could make such an oversight in light of the ongoing litigation of this appeal, we do not find that such a mistake is of continuing relevance to *this* consolidated appeal.

Alter Ego

The third issue presented in the cross-motions for summary judgment is whether WPX Energy, Inc., the parent company of the Permittee, is the alter ego of the Permittee and, if so, whether the Department erred in issuing the Well Permits to the Permittee instead of WPX Energy, Inc. The Appellant asks the Board to pierce the corporate veil of the Permittee and to decide that the Permittee's parent corporation is the real party in interest and should be the permittee.

The Permittee, WPX Energy Appalachia, LLC, is wholly owned by WPX Energy Production, LLC, which is wholly owned by WPX Energy, Inc. In that sense, WPX Energy Appalachia, LLC is indirectly wholly owned by WPX Energy, Inc., making WPX Energy, Inc. the parent company of its subsidiary, WPX Energy Appalachia, LLC. The parent company,

WPX Energy, Inc., is a public traded company (NYSE: WPX) and a Delaware corporation with principal offices at One Williams Center in Tulsa, Oklahoma, whereas the subsidiary and Permittee, WPX Energy Appalachia, LLC, is a Delaware limited liability company that operates and maintains offices in Canonsburg, Pennsylvania.

On September 20, 2013, the Board denied the Appellant's Motion for Leave to Join WPX Energy, Inc. as Permittee ("Motion to Join"). *Harvilchuck v. DEP*, 2013 EHB 536. The Appellant, in his Motion to Join, asserted that WPX Energy, Inc. ("WPX Energy") is the actual party-in-interest and that WPX Energy is using the identity of WPX Energy Appalachia, LLC ("WPX Energy Appalachia") as its alter ego. The Appellant based his Motion to Join on a number facts that the Appellant asserted were sufficient to pierce the corporate veil. The Appellant also argued that the Board's May 7, 2013 Order granting admission *pro hac vice* of Lisa A. Decker constituted a de facto joinder of WPX Energy.

The Board denied the Motion to Join and explained that it lacks the authority to join a non-party in an appeal before the Board.[15] The Board also held that the error in the Board's May 7, 2013 Order was not a de facto joinder of WPX Energy. The Board noted that the Appellant, in his Motion to Join, may have been implicitly arguing that the Department issued the Well Permits to the wrong corporate entity, and if the Motion to Join in fact raised that issue, the Board declined to address it in the context of ruling on the Motion to Join and reserved judgment on that issue until a later date. The Board also indicated that it was not apparent from the

[15] The Board noted that its Rules of Practice and Procedure contain no provision addressing joinder or authorizing the Board to involuntarily join parties to an appeal. *Harvilchuck*, 2013 EHB 536, 536. In *Ferri Contracting Company, Inc. v. DEP*, 506 A.2d 981 (Pa. Cmwlth. 1986), the Commonwealth Court affirmed the Board's interpretation of its regulations that the Board lacks the authority to involuntarily join parties. 506 A.2d at 985; *see also Parker Twp. Bd. of Supervisors v. DER*, 1991 EHB 1724, 1725-26; *Lower Paxton Twp. Auth. v. DER*, 1995 EHB 131, 138; *Thomas v. DEP*, 2000 EHB 452, 458.

Appellant's Notice of Appeal that the Appellant had objected to the Department's issuance of the Well Permits to WPX Energy Appalachia rather than to WPX Energy.

On November 8, 2013, the Board granted leave to the Appellant to amend his consolidated appeals to include the following objection:

> 4. The Department abused its discretion and acted arbitrarily, capriciously, and contrary to law by failing to perform due diligence to ascertain whether or not the person named as Permittee, WPX Appalachia, was the proper person to which the Permits should have been issued pursuant to 58 Pa. Cons. Stat. § 3211(a) which states that no person shall drill or alter a well without having first obtained a well permit.
>
> (a) The Department did not perform any inquiry or investigation, beyond the identification of Permittee as a duly established corporate entity that is authorized to do business in Pennsylvania, as to whether or not the named Permittee was, in fact, the person responsible for causing or conducting operations or other activities involving the wells and/or sites identified in the Permits issued by the Department.

Harvilchuck v. DEP, 2013 EHB 670, 672. The Department did not oppose the Appellant's motion for leave to amend his appeal. The Board granted that motion but did not consider the merits of the Appellant's new objection. *Id.* at 675-76.

In the Appellant's pending Cross-Motion for Summary Judgment, the Appellant argues that WPX Energy, not WPX Energy Appalachia, is the real party in interest in the permitted activities and that the actions of WPX Energy Appalachia, rather than WPX Energy, filing the applications for the Well Permits as WPX Energy Appalachia are repeated violations of 58 Pa. C.S. § 3259(4) in the misrepresentation or failure to disclose all relevant facts, namely the scope and extent of the involvement of WPX Energy as the real party in interest. Appellant's Brief in Support of Cross-Motion for Summary Judgment at 3-4. The Appellant also claims that WPX Energy Appalachia violated 18 Pa. C.S. § 4904(a), and that WPX Energy's use of WPX Energy Appalachia "as a shield to knowingly make misstatements of fact in order to induce the

Department to approve [the Well Permits] for monetary gain [of WPX Energy, Inc.]" amounts to fraud in the inducement. The Appellant also suggests that WPX Energy Appalachia violated 18 Pa. C.S. § 4114, which prohibits securing execution of documents by deception.

The Appellant claims that WPX Energy Appalachia failed to disclose its function as the alter ego of WPX Energy. Appellant's Brief in Support of Cross-Motion for Summary Judgment at 10. The Appellant argues that because the Department investigated the compliance histories of WPX Energy and WPX Energy Appalachia, but not WPX Energy Production, LLC, which is an intermediate subsidiary of WPX Energy, that the Department has disregarded the corporate form.

The Appellant further argues that "[t]he failure of the Department to accurately identify the real party in interest in the course of exercising its permitting function is of continuing relevance to the Board to avoid having a shell corporation or an individual who is judgment proof assume the identity of Permittee and take apparent responsibility for the permitted activities while the activities are under the actual direction and control of a separate real party in interest, [WPX Energy, Inc.]" Appellant's Brief in Support of Cross-Motion for Summary Judgment at 4. The Appellant also claims that "[t]hese alleged violations are of continuing relevance for renewals pending before the Department for two of the permits," (Appellant's Ex. 15), "the issuance of a new, third permit at the same site," (Appellant's Ex. 16), "and a previously issued renewal of a fourth permit," (Appellant's Ex. 17). Appellant's Brief in Support of Cross-Motion for Summary Judgment at 11.

The Appellant has asserted a number of facts in support of a piercing the corporate veil theory. The Appellant claims that WPX Energy Appalachia uses a service mark issued exclusively to WPX Energy, Inc. as US Trademark Registration Number 4302164. (Appellant's

Exs. 23, 24.) WPX Energy Appalachia claims that this service mark "is part of the WPX corporate family." The Appellant claims that the internet domain name wpxenergy.com, which is registered to "WPX Energy," is used by both WPX Energy, Inc. and WPX Energy Appalachia, LLC. (Appellant's Exs. 20, 21, 25, 26, 27.) The Appellant argues that this fact alone is sufficient evidence to pierce the corporate veil because technology has advanced in recent years and the use of shared internet domain name implies the use of a common server, which inherently requires "extensive commingling." Appellant's Reply at 8-9. WPX Energy Appalachia contends that this is not sufficient evidence to disregard the corporate form. WPX Energy Appalachia agrees that wpxenergy.com is WPX Energy, Inc.'s email domain, but states that this email domain "is part of the WPX corporate family."

The Appellant claims that the telephone number provided in the applications for the Well Permits is the same telephone number as one identified on wpxenergy.com as a public contact telephone number for one of its Basin Field Offices. (Appellant's Exs. 1, 22.) The Permittee claims that the number is for a location where the Permittee, and not its parent company, conducts business. The Appellant also claims that a mailing address provided in the Well Permits and in the applications for the Well Permits is the same address provided in correspondence sent by representatives of "WPX Energy" to the Appellant. (Appellant's Exs. 4, 5.) The Permittee claims that "[t]he fact that the WPX website mentions and identifies Permittee's phone numbers and office location is not in and of itself a basis for piercing the corporate veil under Pennsylvania law." Permittee's Brief in Opposition to Appellant's Cross-Motion for Summary Judgment at 12.

In general, the Appellant argues that all references to "WPX Energy" are intended to refer to WPX Energy, Inc., the parent company, while the Permittee argues that all references to

"WPX Energy" are intended to refer to WPX Energy Appalachia, LLC. An ambiguity exists here. When analyzing a motion for summary judgment, we view all material facts in the light most favorable to the non-moving party. Therefore, when analyzing the Appellant's motion, we will adopt his factual averment, that all ambiguous references to WPX Energy are intended to identify WPX Energy, Inc., and when analyzing the Permittee's motion, we will adopt its factual averments, that such references refer to WPX Energy Appalachia, LLC.

For example, the Appellant claims that WPX Energy, Inc. was also a participant in the December 14, 2012 conference, while the Permittee claims that only the Permittee, WPX Energy Appalachia, LLC, was a participant. Correspondence is often sent from "WPX Energy," without reference to whether the correspondence is being sent from the parent company or one of its subsidiaries. (Appellant's Exs. 4, 5, 18, 19, 26, 27.) Two of the Appellant's exhibits are correspondence specifically sent by WPX Energy Appalachia, LLC. (Appellant's Exs. 23, 24.) Another of the Appellant's exhibits is an email sent by WPX Energy, Inc. (Appellant's Ex. 27.) The Appellant was identified by "WPX Energy" as having potable water supplies that needed to be addressed in the applications for the Well Permits. (Appellant's Exs. 4, 5.) When we view the record in the light most favorable to the Appellant, we can presume that at least some employees do work for both WPX Energy and WPX Energy Appalachia. Appellant's Brief in Support of Response to Permittee's Motion for Summary Judgment at 16. The Permittee argues that this fact, even if true, is not a sufficient basis on which to ignore the corporate form.

The Appellant also claims that the Board's admission *pro hac vice* of Lisa A. Decker, who serves as in-house counsel to WPX Energy, to represent WPX Energy Appalachia is

evidence of comingling. (Appellant's Ex. 26.) The Permittee claims that WPX Energy has no involvement in WPX Energy Appalachia's relationship with the Appellant.[16]

Piercing the corporate veil is an equitable doctrine, which allows courts to provide relief during exceptional circumstances and to impose liability on a corporation's shareholder, in contravention of traditional limitations on corporate liability. *See Newcrete Prods. v. City of Wilkes-Barre*, 37 A.3d 7, 12 (Pa. Cmwlth. 2012); *see also Commw. v. Price Bar, Inc.*, 201 A.2d 221, 222 (Pa. Super. Ct. 1964). Veil-piercing allows courts, in rare circumstances, to "assess liability for the acts of a corporation to the equity holders in the corporation by removing the statutory protection otherwise insulating a shareholder from liability." *Newcrete Prods. v. City of Wilkes-Barre*, 37 A.3d 7, 12 (Pa. Cmwlth. 2012). Each state may apply different criteria for determining whether or when a court may pierce the corporate veil. *See, e.g., Pearson v. Component Tech. Corp.*, 247 F.3d 471, 488-489,491 (3d Cir. 2001); *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 149 (3d Cir. 1988) (applying New Jersey state law to evaluate veil-piercing).

Pennsylvania law imposes a "strong presumption against piercing the corporate veil," preferring preservation of the corporate form. *Lumax Indus. v. Aulman*, 669 A.2d 893, 895 (Pa. 1995) (citing *Wedner v. Unemp't Board*, 296 A.2d 792 (Pa. Cmwlth. 1972)). Corporations are presumed independent, even when wholly owned by a single individual or other entity. *See id.* (citing *College Watercolor Grp., Inc. v. William H. Newbauer, Inc.*, 360 A.2d 200, 207 (Pa. 1976)). Under the alter ego theory, the corporate veil may be pierced only when the corporate owner controls the corporation to the point where the owner can be held liable. *Miners, Inc. v.*

[16] The Appellant argues that Lisa Decker's representation of the Permittee is barred by Pennsylvania's Rules of Professional Conduct. Appellant's Brief in Support of Response to Permittee's Motion for Summary Judgment at 15-16. The Board rejected this argument in a related appeal where the Appellant challenged Ms. Decker's request for admission *pro hac vice*. *See Harvilchuck v. DEP*, EHB Docket No. 2014-046-M (Opinion and Order issued September 17, 2014).

Alpine Equip. Corp., 722 A.2d 691, 695 (Pa. Super. 1998) (distinguishing alter ego theory from single entity theory). Although veil-piercing is not routinely applied by Pennsylvania courts in the context of limited liability companies, it is permissible to apply general principles of equity law, such as veil-piercing, to limited liability companies when appropriate. *See* 15 Pa. C.S. §§ 110, 8904(b); *see also Advanced Tel. Sys., Inc. v. Com-Net Prof'l Mobile Radio, LLC*, 846 A.2d 1264, 1281 (Pa. Super. 2004) (noting lack of cases applying veil-piercing to limited liability companies).

Pennsylvania has "no clear test" to determine whether or not to pierce the corporate veil. *Good v. Holstein*, 787 A.2d 426, 430 (Pa. Super. 2001) (citing *Kellytown Co. v. Williams*, A.2d 663, 668 (Pa. Super. 1981) (quoting *Barium Steel Corp. v. Wiley*, 108 A.2d 336, 341 (Pa. 1954))). Courts conduct a fact-specific inquiry and permit piercing of the corporate veil to impose liability on individual corporate owners only in exceptional circumstances, where factors indicate misuse of the corporate liability structure. *Longenecker v. Commw.*, 596 A.2d 1261, 1262 (Pa. Cmwlth. 1991) (citing *Kaites v. DER*, 529 A.2d 792 (Pa. Cmwlth. 1987)). Courts consider factors such as "undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs, and use of the corporate form to perpetrate a fraud," to determine whether the situation and evidence presented rises to the level where piercing the corporate veil is appropriate. *Id.* Courts may pierce the corporate veil if a corporate entity was used "to commit fraud, illegality, or wrongdoing," and a court may disregard the corporate form "whenever it is necessary to avoid injustice." *Vill. at Camelback Prop. Owners Ass'n v. Carr*, 538 A.2d 533 (Pa. Super. 1988).

The Board has reviewed several cases in which one party sought to apply the doctrine of piercing the corporate veil to impose direct liability on a corporation's owner or shareholder.

See, e.g., *Old Manor Home v. DER*, 1983 EHB 396, 419; *Wood Processors, Inc. v. DER*, 1994 EHB 315, 342-345; *Whitemarsh Disposal Corp., Inc. v. DEP*, 2000 EHB 300, 356-358. In those prior cases, the Department asked the Board to pierce the corporate veil in the context of civil liability. The Department, as the party seeking to pierce the corporate veil, bore the burden of entering evidence to justify veil-piercing. *See W.C. Leasure v. DER*, 1987 EHB 1000, 1025 ; *see also La Fata v. Raytheon Co.*, 223 F. Supp. 2d 668, 678-79 (E.D. Pa. 2002) (citing *Culbeth v. Amosa (PTY), Ltd.*, 898 F.2d 13, 14 (3d Cir. 1990) (stating that, under Pennsylvania law, a party seeking to pierce the corporate veil bears the burden justifying such decision). In no prior case has the Board been asked to pierce the corporate veil in a permitting context to revoke a permit issued to a corporate permittee in the context of a third party appeal.

The Department has authority and duties to administer permitting procedures under the 2012 Oil and Gas Act. 58 Pa. C.S. §§ 2301-3504. The Act limits the Department's authority to deny a permit application. 58 Pa. C.S. § 3211(e.1). In this role, the Department's authority is limited to the duties authorized by statute, and the Department must conduct its regulatory review duties according to those legislative boundaries. The permitting process, therefore, is limited in scope. WPX and the Department point to at least four "checks" provided by the 2012 Oil and Gas Act that act to ensure that an appropriate entity has applied and qualified for a well permit. The Board agrees. First, Section 3211(a) states that "no person shall drill or alter a well . . . without having first obtained a well permit . . . . 58 Pa. C.S. § 3211(a). The definition of "person" under the Act includes corporations and other legal entities. 58 Pa. C.S. § 3203 ("Person"). Corporate entities such as limited liability companies registered with the Commonwealth may apply for and obtain a permit from the Department. There is no dispute that the Permittee is a Delaware limited liability company that operates and maintains offices in

Pennsylvania and is registered as a foreign corporation with the Pennsylvania Department of State. (Permittee's Ex. 1.)

Second, a designated agent is required for any permit applicant that is not a person residing in the Commonwealth of Pennsylvania. Out-of-state entities must provide a designated agent within the Commonwealth as part of their permit applications.[17] 58 Pa. C.S. § 3211(c) ("If the applicant for a well permit is a corporation, partnership or person that is not a resident of this Commonwealth, the applicant shall designate the name and address of an agent for the operator of this Commonwealth upon whom notices, orders or other communications issued under this chapter may be served and upon whom process may be served."). In the instant case, there is no dispute that the Permittee provided such a designee in its applications for the Well Permits. Department's Brief in Support of Motion for Summary Judgment at 14.

Third, the Act provides the Department with the authority to deny permits according to unsatisfactory compliance history of the applicant or its affiliates. The Department can, in its discretion, deny a permit whenever the applicant's compliance history includes past and continuing violations and a failure to remedy past violations to the Department's satisfaction. *See* 58 Pa. C.S. § 3211(e.1). Section 3211(e.1) states that the Department may deny a permit if:

> (5) The department finds that the applicant, or any parent or subsidiary corporation of the applicant, is in continuing violation of this chapter, any other statute administered by the department, any regulation promulgated under this chapter or a statute administered by the department or any plan approval, permit or order of the department, unless the violation is being corrected to the satisfaction of the department. The right of the department to deny a permit under this paragraph shall not take effect until the department has taken a final action on the violations and:

[17] The Permittee claims that this provision expressly acknowledges that a permittee does not have to be a "person responsible for causing or conducting operations or other activities involving the wells and/or sites identified in the Permits issued by the Department." Permittee's Brief in Support of Motion for Summary Judgment at 14. This is an incorrect reading of the statute. Section 3211(c) only states that a permittee need not be a resident of the Commonwealth.

> (i) the applicant has not appealed the final action in accordance with the act of July 13, 1988 (P.L.530, No.94), known as the Environmental Hearing Board Act; or
>
> (ii) if an appeal has been filed, no supersedeas has been issued. . . .

58 Pa. C.S. § 3211(e.1). This provides the Department with authority to review a parent company's compliance history and to consider it when determining whether to issue a permit. 58 Pa. C.S. § 3211(e.1)(5). Prior to acting on the five above-referenced well permit applications, there is no dispute that the Department performed a compliance review of the Permittee, WPX Energy Appalachia, LLC and its parent company, WPX Energy, Inc. and determined that the Department had taken no final actions against either entity. (Department's Ex. G, Affidavit of S. Craig Lobbins; Permittee's Ex. 19; Appellant's Ex. 14.) Moreover, the broad compliance history review mandated by Section 3211(e.1), which includes a review of the compliance history of parent and subsidiary corporations, implicitly recognizes that permittees can have appropriate parent or subsidiary relationships with other corporate entities.

Fourth, the Act contains bonding requirements that serve as additional safeguards to prevent the issuance of a permit to a judgment proof shell company. 58 Pa. C.S. § 3225; *see also* Department's Response at 13; Permittee's Brief in Opposition to Appellant's Cross-Motion for Summary Judgment at 10. Section 3211(e.1) states that the Department may deny a permit if "[t]he requirements of section 3225 (related to bonding) have not been met." 58 Pa. C.S. § 3211(e.1)(4). The Permittee, WPX Energy Appalachia, LLC, in fact, has a $600,000.00 bond in place, which covers the wells that are subject to the Well Permits. (Permittee's Response, Ex. 2.) The Appellant argues that the existence of a bond under 58 Pa. C.S. § 3225 does not excuse the Department from a basic inquiry to correctly identify the real party in interest in the Well Permits. Appellant's Reply at 7. The Board is not asserting that filing of a bond is the sole

means to establish that an appropriate entity has applied and qualified for a permit. As we have explained, there are at least four checks provided by the Act, including bonding, that provide the Department with an opportunity to determine whether a permit is being issued to an appropriate corporate entity.

The Board has serious reservations about whether the concept of piercing the corporate veil has any relevance in a permitting context as presented in this appeal where the Appellant asserts that the Department erred in issuing the Well Permits to a subsidiary corporation rather than to one of its parent corporations. Piercing the corporate veil is a means of assessing liability for the acts of a corporation against the equity holder in the corporation. At this preliminary stage there are no allegations that the Permittee has outstanding liabilities that it has or will not address properly. Applying the concept of piercing the corporate veil may therefore be premature in this appeal.

Even if we were to accept piercing the corporate veil as an applicable doctrine in the permitting context, the Permittee correctly states that "as a matter of law, the Appellant's assertions, even if true, do not give rise to prove that WPX Energy, Inc. is the alter ego of Permittee, or that WPX Energy, Inc. is the real party in interest to which the permits should have been issued."

The facts alleged by the Appellant do not provide a basis, as a matter of law, to disregard the corporate form. There is no evidence of undercapitalization of the Permittee in this case. Just the opposite, the Permittee has put forth and met its bonding requirements prior to permit approval. There is also no indication of a failure to adhere to corporate formalities. Although the use of shared internet domain, service mark, address, phone number of the parent's field office and main number of the subsidiary, and employees, may support an argument for

intermingling of affairs between a parent and subsidiary, these factors do not rise to the level necessary to overcome the strong presumption against piercing the corporate veil.

The Appellant relies on the Board's decision in *O'Reilly*, where a third party appellant argued, *inter alia*, that Wal-Mart should have been a co-permittee for a storm water management permit at a construction site because it was a prospective future tenant for the site and allegedly exercised virtually complete control of the construction at the site. *See O'Reilly v. DEP*, 2001 EHB 19, 46. However, *O'Reilly* did not address the issue of piercing the corporate veil of related corporations. Rather, *O'Reilly* dealt with the situation where one entity is alleged to be in charge of site development but the project is in reality completely under the strict direction and control of a separate real party in interest. In *O'Reilly*, the Board acknowledged that there might be circumstances where the Department could reasonably insist that a party in actual control of site development be made a co-permittee of a stormwater discharge permit, which would subject its compliance history to review. *O'Reilly*, 2001 EHB at 47. The Board reasoned that this could avoid

> a mere ruse where, for example, a shell corporation or an individual who is judgment proof assumes apparent responsibility for site development but the project is completely under the strict direction and control of a separate real party in interest. If a party can be shown to be in actual control of site development, it might well be appropriate to insist that that party be made a permittee, which subjects its compliance history to review.

Id. We went on to hold, however, that the third party appellant had fallen short of proving by a preponderance of the evidence that Wal-Mart actually controlled site development or that Wal-Mart was a *de facto* operator. Similarly, in this case, the Appellant failed to point to any record evidence to suggest that WPX Energy, Inc. will be the *de facto* operator at the site.

We find that the undisputed material facts do not indicate that the Permittee violated 58 Pa. C.S. § 3259(4), 18 Pa. C.S. § 4904(a)(3), or 58 Pa. C.S. § 4114, or committed fraud in the inducement. The Permittee did not attempt to misrepresent or conceal information regarding its relationship with WPX Energy, Inc. during the permitting process. The facts do not indicate an intention to mislead the Department. There is also no evidence to support the Appellant's claim of fraud in the inducement. The Department approved the Well Permits with a sufficient understanding of the relationship between the Permittee and WPX Energy, Inc. Indeed, there is no dispute that the Department performed a compliance history review of both the Permittee and WPX Energy, Inc. Finally, the Appellant, while providing no argument in support of his claim that the Permittee secured execution of documents by deception, failed to meet his burden to prove by a preponderance of the evidence that the Permittee violated 58 Pa. C.S. § 4114.

Conclusion

The Appellant requests that the Board vacate the Well Permits and remand WPX's well permit applications to the Department for "lawful prosecution," or, in other words, take enforcement action against WPX. While we do have authority to vacate permits, although are choosing not to exercise that authority here, we have repeatedly held that we have no authority to order or direct the Department to take enforcement action. *Rural Area Concerned Citizens v. DEP*, EHB Docket No. 2012-072-M (Adjudication issued June 11, 2014); *Dobbin v DEP*, 2010 EHB 852, 860.

The Appellant, who bears the burden of proof in this appeal, has failed to produce sufficient evidence to support his allegations. *Goetz v. DEP*, 2003 EHB 16, 19. Evaluating the Department's and WPX's motions for summary judgment in the light most favorable to the Appellant, the Board finds that no material issues of fact are in dispute and the Department and

WPX are entitled to judgment as a matter of law. Evaluating the Appellant's motion for summary judgment in the light most favorable to the Department and to WPX, the Board finds that, although no material issues of fact are in dispute, the Appellant is not entitled to judgment as a matter of law.

Accordingly, the Board issues the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LAURENCE HARVILCHUCK	:	
	:	
v.	:	**EHB Docket No. 2013-013-M**
	:	**(Consolidated with 2013-014-M,**
COMMONWEALTH OF PENNSYLVANIA,	:	**2013-015-M, 2013-016-M and**
DEPARTMENT OF ENVIRONMENTAL	:	**2013-017-M)**
PROTECTION and WPX ENERGY	:	
APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 17th day of September, 2014, it is hereby ordered that the Motions for Summary Judgment filed by the Pennsylvania Department of Environmental Protection and WPX Energy Appalachia, LLC are **granted**, and the Cross-Motion for Summary Judgment filed by Laurence Harvilchuck is **denied**. Accordingly, the above-captioned appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 17, 2014

c: **DEP, General Law Division:**
Attention: April Hain
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LAWRENCE HARVILCHUCK	:	
	:	
v.	:	**EHB Docket No. 2014-046-M**
	:	**(Consolidated with 2014-047-M**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2014-048-M)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and WPX ENERGY	:	**Issued: September 17, 2014**
APPALACHIA, LLC, Permittee	:	

OPINION AND ORDER ON
PERMITTEE'S MOTION FOR ADMISSION
***PRO HAC VICE* OF LISA A. DECKER**

By: Richard P. Mather, Sr., Judge

Synopsis

The Board grants a motion for admission *pro hac vice* filed by a permittee where the Board, in its discretion, does not find good cause for denying the motion. Although the attorney at issue is employed as senior counsel for the permittee's parent company, the appellant has not demonstrated that admission of the attorney would prejudice the appellant or that any conflict of interest exists between the permittee and its parent company.

O P I N I O N

Background

The Appellant, Laurence Harvilchuck, filed an appeal before the Environmental Hearing Board (the "Board") challenging decisions by the Department of Environmental Protection (the "Department") to issue Renewal Permit Number 115-21060 for the McNamara 39 9H Well; Renewal Permit Number 115-21507 for the McNamara 36 5H Well; and Renewal Permit Number 115-21059 for the McNamara 36 7H Well (the "Renewal Permits"). The Renewal

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http://ehb.courtapps.com

Permits authorize WPX Energy Appalachia, LLC (the "Permittee") to drill and operate the aforementioned wells, which are located in Silver Lake Township, Susquehanna County.

Before the Board is a Motion for Admission *Pro Hac Vice* of Lisa A. Decker (the "Motion") filed on behalf of the Permittee, requesting that Ms. Decker be permitted to appear before the Board.[1] The Permittee is wholly owned by WPX Energy Production, LLC, which is wholly owned by WPX Energy, Inc, making WPX Energy, Inc. the parent company of the Permittee. Ms. Decker is employed by WPX Energy, Inc. Permittee's Reply at 2; Appellant's Response at 1.

The Appellant filed a Response in opposition to the Motion, arguing that the admission of Ms. Decker is barred by the Pennsylvania Rules of Professional Conduct and that the admission of Ms. Decker would prejudice his case. The Appellant claims that because Ms. Decker is employed by the Permittee's parent company, WPX Energy, Inc., the Board's admission of Ms. Decker would be evidence that WPX Energy, Inc. is directly involved in this appeal and that the Board approves of WPX Energy, Inc.'s direct involvement in this appeal and the use of the Permittee as its alter ego. The Appellant does not dispute that the Motion complies with Pa. R.C.P 1012.1(b)-(d).[2] The Department does not oppose the Permittee's Motion. The Permittee subsequently filed a Reply, and the Appellant filed a Sur-Reply. We will address each of the Appellant's arguments in turn.

---

[1] Ms. Decker is admitted to practice law in the State of Colorado, but she is not admitted to practice law in the Commonwealth of Pennsylvania.

[2] The Appellant, in his Sur-Reply, does make a passing claim that Ms. Decker "has mis-stated to IOLTA the identity of her employer." Appellant's Sur-Reply at 2. Ms. Decker, in her letter to the IOLTA Board, lists at the top of the letter, under her name, "WPX Energy Appalachia, LLC." Permittee's Ex. C. The Board does not find that this reference to the Permittee was intended to identify Ms. Decker's employer; rather, it was intended to identify who she plans to represent in the context of the request for the admission of Ms. Decker *pro hac vice*.

Rules of Professional Conduct

The Appellant argues that the parent-subsidiary relationship between WPX Energy Inc. and the Permittee prevents Ms. Decker's admission *pro hac vice* under Rule 1.7 of the Pennsylvania Rules of Professional Conduct. The Board disagrees with the Appellant's assertion. We agree with the Permittee that the record does not support the Appellant's contention that Ms. Decker's concurrent employment by WPX Energy, Inc. and representation of the Permittee in this appeal violates the Pennsylvania Rules of Professional Conduct.

A candidate for admission *pro hac vice* in the Commonwealth of Pennsylvania must adhere to the Pennsylvania Rules of Professional Conduct. 231 Pa. Code § 1012.1(c)(2). The Board will grant a motion for admission *pro hac vice* unless the Board, "in its discretion, finds good cause for denial." 231 Pa. Code § 1012.1(e). Good cause for denial may include that "the candidate is not . . . ethically fit to practice law" or "any other reason the court, in its discretion, deems appropriate." 231 Pa. Code § 1012.1(e) (Official Note).

Rule 1.7(a) of the Pennsylvania Rules of Professional Conduct states that a lawyer shall not represent a client if "the representation of one client will be directly adverse to another client." Pa. R.P.C. 1.7(a); 204 Pa. Code § 81.4. However, even if the representation of one client will be directly adverse to another client, Rule 1.7(b) states that a lawyer may still represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent.

Pa. R.P.C. 1.7(b); 204 Pa. Code § 81.4.

Comment 34 to Rule 1.7 reads:

> A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

Rule 1.7 (Comment 34). Applying the first sentence of Comment 34 to the facts of this appeal, Ms. Decker, who represents WPX Energy, Inc. does not, by operation of the Rules of Professional Conduct, represent the Permittee. The first sentence, however, does not prevent a lawyer from deciding to represent any constituent or affiliated organization. The remainder of Comment 34 would apply if the representation of the Permittee would be adverse to WPX Energy, Inc., or vice versa. We disagree with the Appellant's broad assertion that Comment 34 provides a blanket prohibition of corporate in-house counsel's representation of a subsidiary.

The Appellant additionally cites to a non-binding New York City Bar Association ethical opinion for persuasive support, which states that when in-house counsel represents both a parent corporation and one of the parent's wholly owned affiliates,

> inside counsel's representation is not of entities whose interests may differ because the parent's interests completely preempt those of its wholly owned affiliates. As a matter of corporate law, '. . . the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interest of the parent . . . .

Formal Opinion 2008-2, The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics. The Appellant misconstrues this opinion to mean that the interests of a parent corporation and its wholly owned subsidiaries are per se in conflict. To the

contrary, the opinion, in straightforward fashion, explains that a wholly owned subsidiary, by law, must be operated in the best interest of its sole shareholder, i.e., its parent company, and therefore the interests of a parent company and its wholly owned subsidiary are generally aligned, as a matter of corporate law.

A mere parent-subsidiary relationship is insufficient to create a conflict of interest, per se, under the Pennsylvania Rules of Professional Conduct. Parent companies can represent subsidiaries, provided no conflict of interest exists. *See, e.g., In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 373 (3d Cir. 2007) ("That companies should have separate counsel on the matter of the spin-off transaction, however, does not mean that the parent's in-house counsel must cease representing the subsidiary on all other matters."). Parent and subsidiary corporations may have divergent interests at times, particularly in the case of spin off, sale, or insolvency proceedings. When a subsidiary has or anticipates a conflict of interest with a parent company on a matter, the subsidiary should obtain separate counsel. *Id.* We will not, however, create a blanket prohibition on a corporate in-house counsel's representation of a subsidiary.

The record does not support the Appellant's contention that the Rules of Professional Conduct bar the admission of Ms. Decker *pro hac vice* in this appeal.[3] The Appellant asserts that Ms. Decker's employment with WPX Energy, Inc. may inhibit her ability to place the interests of the Permittee over WPX Energy, Inc., if the situation arises where she must do so. Appellant's Memorandum of Law in Support of Appellant's Response at 2. First, as discussed above, the interests of a parent and its wholly owned subsidiary are generally aligned. Second, the record contains no evidence indicating that a conflict of interest exists between the Permittee and WPX Energy, Inc. In fact, the Permittee, which is in the best position to indicate whether a conflict of

[3] Contrary to the Appellant's assertion, no ethical rule exists that requires attorneys to be listed in the "yellow pages" or to otherwise offer their services to the general public. Appellant's Sur-Reply at 5.

interest exists, states in its Reply Brief that "there is no conflict between WPX Energy and its operating entity, Permittee." Permittee's Reply at 4. If a conflict arises, the Permittee and WPX Energy, Inc., as well as Ms. Decker, are best suited for determining whether that conflict would prohibit Ms. Decker's representation of the Permittee under Rule 1.7.

Prejudice to the Appellant

The Appellant also argues that the admission of Ms. Decker *pro hac vice* would prejudice his case. The Appellant argues that representation of the Permittee by an employee of WPX Energy, Inc. is a back-door attempt by WPX Energy, Inc. to be directly involved in this appeal without formally intervening and is evidence indicating that WPX Energy, Inc. is using the Permittee as its alter ego. The Appellant believes that the Board's admission of Ms. Decker would imply that the Board approves of WPX Energy, Inc.'s direct involvement in this appeal and the use of the Permittee as its alter ego. Appellant's Memorandum of Law in Support of Appellant's Response at 1 (citing Appellant's Reply to Permittee's Response to Appellant's Cross-Motion for Summary Judgment, EHB Docket No. 2013-013-M). The Appellant is concerned that the admission of Ms. Decker *pro hac vice* without WPX Energy, Inc. "first obtaining intervenor status is prejudicial against Appellant as the Board would then be effectively issuing summary judgment against a portion of Appellant's case without first permitting a full hearing on the facts." Appellant's Sur-Reply at 5.

The Permittee believes that the admission of Ms. Decker *pro hac vice* merely reflects the Permittee's choice of counsel and would not prejudice the Appellant's case. The Permittee claims that the "Appellant is not the party with the authority to decide which lawyer will represent Permittee," and that it is the "Permittee's decision to choose its counsel." Permittee's Reply at 2.

Under the Pennsylvania Rules of Civil Procedure, the Board, in its discretion, may find good cause for denial of a motion for admission *pro hac vice* if the admission "may be detrimental to legitimate interests of the parties to the proceedings other than the client whom the candidate proposes to represent" or for "any other reason the court, in its discretion, deems appropriate." 231 Pa. Code § 1012.1(e) (Official Note). At the same time, we are "loathe to interfere with a party's choice of counsel," particularly in the absence of any prejudice. *Hartstown Gas and Oil Exploration Co. v. DEP*, 2005 EHB 959, 963; *DEP v. Whitemarsh Disposal Corp.*, 1999 EHB 588, 590. When determining whether a party's choice of counsel should be set aside, the Board reviews the relevant facts and weighs the right of the party's choice of counsel against any alleged prejudice. *Hartstown Gas and Oil Exploration Co. v. DEP*, 2005 EHB 959, 963. The Board has the authority to prohibit counsel from entering an appearance "not for purposes of imposing discipline or even necessarily for purposes of protecting the interests of a represented party, but rather, for purposes of protecting the interests of the opposing party and ensuring the orderly and just conduct and disposition of proceedings that are before it." *DEP v. Whitemarsh Disposal Corp.*, 1999 EHB 588, 590.

First, we disagree with the Appellant that WPX Energy, Inc. has effectively intervened in this appeal without going through the Board's formal intervention procedures at 25 Pa. Code § 1021.81 simply because Ms. Decker represents both the Permittee and WPX Energy, Inc. The Appellant has provided us with no evidence to indicate that WPX Energy, Inc. is directly involved in this appeal, other than the fact that Ms. Decker works as in-house counsel for WPX Energy, Inc. and WPX Energy, Inc. wholly owns the Permittee. The Board does not generally require parent companies to intervene in appeals involving subsidiaries, and the fact that Ms.

Decker will represent the Permittee is not sufficient evidence for us to carve out an exception to that general rule.

Second, Ms. Decker's representation of the Permittee does not support a finding that WPX Energy, Inc. is using the Permittee as its alter ego. The Appellant asserts that Ms. Decker's concurrent employment with WPX Energy, Inc. and representation of the Permittee demonstrates a "commingling of affairs." Appellant's Sur-Reply at 1. The Appellant raised the same argument in a related appeal, in which he argued that WPX Energy, Inc. was using the Permittee as its alter ego, and supported that argument with the corporate law theory of piercing the corporate veil. *See Harvilchuck v. DEP*, EHB Docket No. 2013-013-M. The Board dismissed that argument, finding that even if a theory of piercing the corporate veil is appropriate in the permitting context, the Appellant failed to provide sufficient evidence for the Board to ignore the corporate form. *See Harvilchuck v. DEP*, EHB Docket No. 2013-013-M, slip op. at 35-39 (Opinion and Order issued September 17, 2014). We found that Ms. Decker's representation of the Permittee did not tend to indicate that the Permittee is the alter ego of WPX Energy, Inc. *Id.*

The Appellant would like us to deny the Motion, in part, because he believes a denial would bolster his claim that WPX Energy, Inc. is using the Permittee as its alter ego. He argues that the Board's admission of Ms. Decker *pro hac vice* will undermine that claim and therefore prejudice his case. The Appellant's logic is self-serving and unconvincing. We will grant the Permittee's Motion, but by granting the Permittee's Motion we are not necessarily issuing summary judgment on the Appellant's objection that WPX Energy, Inc. is using the Permittee as its alter ego. The Permittee is merely exercising its choice of Ms. Decker as counsel in this appeal, and we are not persuaded by the Appellant's reasons for interfering with that choice.

Conclusion

Evaluating the Permittee's Motion for Admission *Pro Hac Vice* of Lisa A. Decker, the Board finds no evidence in support of the Appellant's claim that the admission of Ms. Decker *pro hac vice* would result in an ethical violation. A lawyer is not barred from representing both a parent company and its subsidiary under Rule 1.7 of the Pennsylvania Rules of Professional Conduct unless the representation of one will be directly adverse to the other, and the record before the Board does not indicate that a conflict of interest exists. Further, the Board finds insufficient evidence in the record to indicate that the admission of Ms. Decker *pro hac vice* may be detrimental to the legitimate interests of the Appellant to the proceedings. Based on the record before the Board, we find that the Permittee's choice of counsel clearly outweighs any claim of potential prejudice to the Appellant's case that may result from the admission of Ms. Decker *pro hac vice*.

Accordingly, the Board issues the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LAWRENCE HARVILCHUCK	:	
	:	
v.	:	**EHB Docket No. 2014-046-M**
	:	**(Consolidated with 2014-047-M**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2014-048-M)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and WPX ENERGY	:	
APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 17th day of September, 2014, it is hereby ordered that WPX Energy Appalachia, LLC's Motion for Admission *Pro Hac Vice* of Lisa A. Decker is **granted**.

ENVIRONMENTAL HEARING BOARD

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

DATED: September 17, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 17, 2014**

OPINION AND ORDER ON PERMITTEE'S MOTION IN *LIMINE* TO EXCLUDE EVIDENCE OR ARGUMENT CONCERNING "POLLUTANTS" THAT FAIL TO EXCEED MAXIMUM CONTAMINANT LEVELS UNDER PA SAFE DRINKING WATER ACT

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Board denies the Permittee's motion in *limine* based on its argument that only constituents that exceed maximum contaminant levels under the Safe Drinking Water Act should be labeled "pollutants" in this appeal. The Permittee failed to demonstrate that the Safe Drinking Water Act maximum contaminant levels should be used as a standard of pollution under the oil and gas regulations. The parties may address what standard, if any, is applicable in this matter in their post hearing briefs.

OPINION

This matter involves an appeal filed by Mr. Loren Kiskadden (the Appellant) from a determination by the Department of Environmental Protection (Department) that gas well related activities by Range Resources – Appalachia, LLC (Range) at its Yeager site did not cause contamination to Mr. Kiskadden's water well. A trial in this matter is set to begin before the

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Pennsylvania Environmental Hearing Board (Board) on September 23, 2014 and continue through October 9, 2014.

Numerous motions have been filed throughout the course of this proceeding, including seventeen motions recently filed by Range Resources and the Appellant seeking to limit or exclude the presentation of certain evidence and testimony at trial. Presently before the Board is Range's Motion in *Limine* to Exclude Evidence or Argument Concerning "Pollutants" that Fail to Exceed Maximum Contaminant Levels Under Pennsylvania's Safe Drinking Water Act. By its motion, Range seeks to limit evidence or argument that any constituents in the Appellant's water supply constitute "pollutants" if those constituents do not exceed primary or secondary maximum contaminant levels established pursuant to Pennsylvania's Safe Drinking Water Act or do not have any such level assigned to them. Range bases its argument on Section 78.51 of the oil and gas regulations:

> The quality of a restored or replaced water supply will be deemed adequate if it meets the standards established under the Pennsylvania Safe Drinking Water Act.

25 Pa. Code § 78.51.

The Appellant opposes Range's motion, arguing that neither the 2012 Oil and Gas Act, 58 Pa.C.S.A. §§ 3201 *et seq.*, nor the 1984 Oil and Gas Act, 58 P.S. 601.100 *et seq.,* contains a definition of "pollution" or "pollutant" nor a "standard of pollution."[1] The Appellant represents that on multiple occasions the Department has determined that water supplies have been impacted by oil and gas operations even though the contaminants present in the water supply do not have a corresponding maximum contaminant level.

[1]Since the filing of the appeal, the 1984 Oil and Gas Act was repealed and replaced by the 2012 Oil and Gas Act. Range and Appellant contend that the 1984 law applies. In footnote 1 of its memorandum, the Department states that "it is not disputing which law applies and, for sake of addressing Range's arguments only, assumes that the 1984 law applies." (Department Memorandum in Support of Response, p. 2, n. 1) The question of which law applies may be addressed in the parties' post hearing briefs.

The Department also does not support Range's motion because it does not agree with Range's contention that Safe Drinking Water standards have been adopted as a standard for determining pollution of a water supply under the oil and gas laws and regulations. Both the Department and the Appellant assert that the reference to Safe Drinking Water Act standards in Section 78.51(d)(2) of the oil and gas regulations is limited to restoration of water supplies and does not create a standard of pollution under the 1984 Oil and Gas Act.

The Department advocates for use of the definition of "pollution" in Pennsylvania's Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001.

We find that Range has not presented sufficient authority for granting its motion in *limine*. As for the Department's advocacy for use of the definition of "pollution" as found in the Clean Streams Law, we find that this matter is not appropriately addressed in the context of a motion in *limine*, particularly where the other parties have not had an opportunity to weigh in on it. The parties may address this issue in their post hearing briefs, if they feel it is relevant to their discussion of the law in this case. The Board recognizes that when witnesses use the term "pollution" or "pollutant" they may be using the term as a laymen would use it and not in accordance with its legal definition. Any legal argument regarding the definition of "pollution" or "pollutant" may be addressed in the parties' post hearing briefs.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 17th day of September, 2014, it is hereby **ORDERED** that the Motion in *Limine* to Exclude Evidence or Argument Concerning "Pollutants" that Fail to Exceed Maximum Contaminant Levels Under Pennsylvania's Safe Drinking Water Act is **denied.**

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 17, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 17, 2014**

OPINION AND ORDER ON PERMITTEE'S MOTION IN *LIMINE* TO EXCLUDE EVIDENCE OR ARGUMENT CONCERNING CERTAIN ALLEGED RELEASES AT OR NEAR YEAGER SITE

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Whether the Appellant can establish a hydrogeologic connection between alleged releases at the Permittee's site and the Appellant's water well can only be resolved after hearing factual and expert testimony. Therefore, Permittee's motion in *limine* to exclude evidence or argument on this issue is denied.

OPINION

This matter involves an appeal filed by Mr. Loren Kiskadden (the Appellant) from a determination by the Department of Environmental Protection (Department) that gas well related activities by Range Resources – Appalachia, LLC (Range) at its Yeager site did not cause contamination to Mr. Kiskadden's water well. A trial in this matter is set to begin before the Pennsylvania Environmental Hearing Board (Board) on September 23, 2014 and continue through October 9, 2014.

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Numerous motions have been filed throughout the course of this proceeding, including seventeen motions recently filed by Range Resources and the Appellant seeking to limit or exclude the presentation of certain evidence and testimony at trial. Presently before the Board is Range's Motion in *Limine* to Exclude Evidence or Argument Concerning Certain Alleged Releases at or Near Yeager Site. The Department filed a response in support of the motion. The Appellant filed a response in opposition.

By its motion, Range seeks to prevent the Appellant from presenting evidence or argument that various alleged leaks and spills in the vicinity of the Yeager drilling site impacted the Appellant's water supply. Range argues that the Appellant has offered neither analysis nor proof that the releases have a hydrogeologic connection to his water well.

In response the Appellant states that he has consistently argued that spills, leaks and releases in and around the Yeager site have contributed to contamination of his well and points to a motion for partial summary judgment filed on January 10, 2013 in which he raised this issue. He argues that this issue is inappropriate for consideration in the context of a motion in *limine* and that it is a determination that the Board must make at a trial on the merits after hearing expert testimony. We agree. The question of whether the Appellant has sufficient evidence to prove a hydrogeologic connection between his well and the alleged releases at or near the Yeager site can only be resolved after hearing factual and expert testimony. It cannot be decided in the context of a motion in *limine.* As the Board held in *Blythe Township v. DEP*, 2011 EHB 433, 437:

> "Where there is a dispute between opposing experts, we have repeatedly refused to resolve such questions in the **context** of summary judgment motions." *CMV Sewage Company, Inc. v. DEP,* 2010 EHB 540, 543; *Pileggi v. DEP,* 2010 EHB 244, 250; *ADK Development v. DEP,* 2009 EHB 251, 253-54. The same

approach applies to motions in **limine.** *Pine Creek Valley Watershed Association v. DEP,* 2011 Pa. Envirn. Lexis 12.

Range also argues that this matter is not sufficiently addressed in the expert reports submitted by the Appellant's experts. Again, this is an issue best resolved at trial in the context of the actual testimony presented. The Board will rule on any objections, if raised, at that time.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 17th day of September, 2014, it is hereby **ORDERED** that the Motion in *Limine* to Exclude Evidence or Argument Concerning Certain Alleged Releases at or Near Yeager Site is **denied.**

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 17, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: September 22, 2014**

OPINION AND ORDER ON RANGE-RESOURCES – APPALACHIA, LLC'S PETITION FOR RECONSIDERATION OF THE ENVIRONMENTAL HEARING BOARD'S OPINION AND ORDER ON APPELLANT'S MOTION TO STRIKE EXPERT REPORT AND REBUTTAL EXPERT REPORTS

Synopsis

The Board denies the Permittee's Petition to Reconsider the Board's earlier interlocutory Opinion and Order that granted the Motion to Strike Expert Reports that were filed late and without permission. Permittee has failed to demonstrate extraordinary circumstances to support its Petition to Reconsider as required by 25 Pa. Code § 1021.151.

OPINION

Presently before the Pennsylvania Environmental Hearing Board (Board) is Permittee Range Resources' Petition for Reconsideration of the Board's September 12, 2014 Opinion and Order granting Appellant's Motion to Strike Expert Report and Rebuttal Expert Reports (Range's Petition for Reconsideration). We granted the Motion to Strike three expert reports filed late and without permission in violation of a specific Board Order. The Board found that allowing three new experts to testify at the trial would cause severe prejudice to the Appellant, Mr. Loren Kiskadden.

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A petition for reconsideration of an interlocutory order "must demonstrate that extraordinary circumstances justify consideration by the Board." 25 Pa. Code § 1021.151(a). We are mindful that reconsideration is "an extraordinary remedy and is inappropriate in the vast majority of the rulings issued by the Board." 25 Pa. Code § 1021.151 (comment). Indeed, Judge Mather recently held that the "standard of reconsideration of interlocutory orders, under Rule 1021.151, is even higher" than the "high standard for reconsideration of final orders of the Board." *Rural Area Concerned Citizens (RACC) v. Commonwealth of Pennsylvania, Department of Environmental Protection and Bullskin Stone and Lime, LLC*, 2013 EHB 374, 375.

After carefully reviewing the Petition to Reconsider and the Appellant's Response in Opposition, we find no new arguments of any merit that would warrant reconsideration. Permittee's arguments are mostly a rehash of its earlier arguments advanced in its Response to Appellant's Motion to Strike Expert Report and Rebuttal Expert Reports. Further, we are more convinced than ever that allowing the three experts, or any combination thereof, to testify at this late date would severely prejudice the Appellant. Parties have a right to rely on our Orders and the deadlines they impose. *Commonwealth of Pennsylvania, Department of Environmental Protection v. Neville Chemical Co.*, 2005 EHB 1, 4. Range's petition has not met the high standard set forth in Rule 1021.151 and therefore reconsideration is inappropriate here.

We will enter an appropriate Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 22nd day of September, 2014, following review of the Permittee's Petition for Reconsideration and the Appellant's Response, it is ordered as follows:

1) The Petition for Reconsideration is **denied.**

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 22, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LEXINGTON LAND DEVELOPERS CORP.	:	
	:	
v.	:	**EHB Docket No. 2013-109-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 10, 2014**

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

By: Richard P. Mather, Sr., Judge

Synopsis

The Board denies motions for summary judgment filed by the Department and the appellant where guidance documents directing Department staff to issue a pre-denial letter did not create a binding norm, and the Department therefore did not err per se in its decision to stray from that process. The Board also rejects the Department's assertion that, given admissions made by the appellant and because the appellant has not yet identified an expert witness, the appellant under no foreseeable circumstances can satisfy its burden to prove that the Department erred by denying an application for a National Pollution Discharge Elimination System permit.

O P I N I O N

Introduction

On July 23, 2013, Lexington Land Developers Corp. ("Lexington") appealed a decision made by the Department of Environmental Protection (the "Department") to deny an application for a National Pollution Discharge Elimination System ("NPDES") Permit, Application No. PAI-0321-09-007 (the "Application"), which was submitted by Lexington in connection with a proposed residential subdivision consisting of approximately 200 townhomes and single family

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homes to be located in South Middletown Township, Cumberland County, Pennsylvania. On August 7, 2014, Lexington and the Department each filed motions for summary judgment. Lexington requests that we remand the Application to the Department for further consideration, and the Department requests that we dismiss Lexington's appeal. Both parties filed responses. For the reasons set forth below, we will deny both motions and allow this matter to proceed.

Standard of Review

The Board reviews appeals *de novo*. In *Smedley v. DEP*, 2001 EHB 131, then Chief Judge Michael L. Krancer explained the Board's *de novo* standard of review:

> [T]he Board conducts its hearings *de novo*. We must fully consider the case anew and we are not bound by prior determinations made by [the Department]. Indeed, we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "de novo review involves full consideration of the case anew. The [Board], as reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001). Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

Smedley v. DEP, 2001 EHB 131, 156. The Board's broad *de novo* review plays an important role in addressing the parties' cross-motions for summary judgment in this appeal.

The Board may grant a motion for summary judgment if the record indicates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *The City of Philadelphia v. DEP*, EHB Docket No. 2013-074-L, slip op. at 5 (Opinion and Order issued Mar. 19, 2014). In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in

favor of the nonmoving party, and resolves all doubt as to the existence of a genuine issue of material fact against the moving party.[1] *Id.*; *Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81.

Background

The following is a recitation of the undisputed facts in the record before the Board. The Department maintains a guidance document entitled "Model Permit Application Process," dated July 11, 1994 ("1994 Model Permit Application Process"). (Appellant's Ex. C.) This document provides a process for Department staff to follow when reviewing a permit application. It explains that if the Department finds that an application is not technically complete, Department staff are to issue a technical deficiency letter to the applicant.

If the applicant does not respond to the technical deficiencies within the timeframe specified in the Department's technical deficiency letter, and the applicant does not request that the Department make a decision on the application based on the information already submitted by the applicant, the 1994 Model Permit Application Process directs the Department to deny the application.

If the applicant responds to the technical deficiencies within the timeframe specified in the Department's technical deficiency letter, but Department staff finds that the applicant failed to correct the deficiencies, the 1994 Model Permit Application Process states that Department staff should issue a pre-denial letter to the applicant. If an applicant fails to correct deficiencies after receiving a pre-denial letter, the 1994 Model Permit Application Process directs the Department to deny the application.

---

[1] The "record" for purposes of motions for summary judgment consists of the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, if any. Pa. R.C.P. 1035.01. Thus, the record for summary judgment review in this case is derived entirely from the Appellant's Notices of Appeal and the parties' various filings related to the cross-motions for summary judgment. *Goetz v. DEP*, 2003 EHB 16, 19 n. 4.

The Department received Lexington's Application in 2009. In response, the Department issued at least two technical deficiency letters to Lexington. The final technical deficiency letter was sent by the Department in February of 2010 and requested that Lexington provide a response within 60 days. Lexington notes that the technical deficiency letter stated that there would be a pre-denial letter if Lexington's response was insufficient. Lexington's Reply at 1. Lexington did not respond to the February 2010 technical deficiency letter for nearly three years.

In the meantime, on September 20, 2012, Deputy Secretary for the Department, Dana Aunkst, sent an email to Department staff entitled "Eliminating the Queue" ("Aunkst Email"). (Appellant's Ex. A.) The Aunkst Email was intended to help eliminate what Deputy Secretary Aunkst described as a "rather large permit queue from past years." The Aunkst Email indicates that the 1994 Model Permit Application Process should continue to be followed, but the Aunkst Email directs Department staff to revisit certain applications that have not yet been acted on, in an attempt to eliminate the Department's permit queue. For applications awaiting a response to a technical deficiency letter, the Aunkst Email directs the Department to communicate with the applicant that the Department is attempting to eliminate the permit queue and that it is awaiting a response to the technical deficiency letter. The Aunkst Email directs Department staff to communicate to these applicants that if a response is not received within ten business days, the Department may move forward with denial of the application, and, if the Department does deny the application, fees may be refunded for applications received after 2006. If the response does not correct the deficiencies, the Aunkst Email states that "staff should send a pre-denial letter."

After distribution of the Aunkst Email, the Department contacted Lexington in December of 2012 and requested that Lexington respond to the Department's February 2010 technical deficiency letter within ten business days. The Department received a response in the form of a

revision to the Application. The Department believed that the revision did not address the outstanding technical deficiencies. Department staff subsequently prepared a pre-denial letter, but for reasons unknown to the Board, that pre-denial letter was never issued. On June 24, 2013, the Department formally denied the Application. Lexington appealed that denial on July 23, 2013. On August 7, 2014, Lexington and the Department each filed motions for summary judgment. We will address both motions for summary judgment in turn. For the reasons set forth below, we will deny both motions and allow this matter to proceed.

Appellant's Motion for Summary Judgment

Lexington argues that it was legally entitled to a pre-denial letter before the Department denied the Application. Lexington requests that the Board remand the Application to the Department for further consideration and order the Department to meet with Lexington in further consideration of the Application. Lexington also requests, if the Board grants Lexington's motion, that the Board retain jurisdiction over this appeal in the event that on remand Lexington is unable to produce an Application that is satisfactory to the Department.

The Department responds that the 1994 Model Permit Application Process and the Aunkst Email did not *require* the Department to issue a pre-denial letter. The Department asserts that it maintains discretion over whether to deviate from guidance policies and that it considers a number of factors in the permit application review process, including, but not limited to applicable statutes, regulations, policies, and technical guidance. The Department explains that the 1994 Model Permit Application Process and the Aunkst Email are only two factors that the Department considers. The Department also argues that its deviation from its internal operating procedure actually provided Lexington with an "extra step" in the process.

To clarify the record, the Department did in fact stray from its application review guidance policy. Prior to distribution of the Aunkst Email, the 1994 Model Permit Application Process would have guided the Department to deny the Application without issuing a pre-denial letter because, at that time, a response to the Department's February 2010 technical deficiency letter had not been received, and Lexington had not requested that the Department make a decision on the Application based on the information already submitted by Lexington. If the Department had denied the Application *before* the Aunkst Email was sent, then it would have been following its then-existing guidance policy. The Aunkst Email supplemented the Department's guidance policy to address a "rather large permit queue from past years" by requiring Department staff to reconnect with certain applicants whose applications were still awaiting a final determination. For applications still awaiting a response to a technical deficiency letter, such as the Application at issue in this appeal, the Aunkst Email guided the Department to contact the applicant, to provide the applicant with ten business days to correct any deficiencies, and to issue a pre-denial letter if those deficiencies were not corrected within ten business days. The Department did contact Lexington and did provide Lexington with ten business days to correct deficiencies, but the Department did not issue a pre-denial letter. The Department, therefore, did deviate from the Aunkst Email, which was part of the Department's permit review process at the time the Department denied the Application. As set forth below, the Department has the authority or discretion to vary from its permit review process established by a guidance document or management directive.

The Department's belief that it provided Lexington with an "extra step" in the process is a misnomer. In December 2012, the Department contacted Lexington and requested that Lexington respond to the Department's February 2010 technical deficiency letter within ten

business days. The Department implies that its December 2012 request was not necessary under its guidance policy. As we explained above, however, the Aunkst Email added an extra layer to the 1994 Model Permit Application Process and, for applications awaiting a response to a technical deficiency letter, guided the Department to issue a pre-denial letter if no response was received with ten business days after the Department contacted the applicant. In that sense, the Department did not provide Lexington with an "extra step" above and beyond what its permit application process provided. The Department, in fact, provided *one less step* than its process provided.

We agree with the Department, however, that neither the 1994 Model Permit Application Process nor the Aunkst Email created a "binding norm" which the Department was required to follow. A regulation has the effect of a binding norm, and a statement of policy does not. *Borough of Bedford v. Department of Environmental Protection*, 972 A.2d 53, 63 (Pa. Cmwlth. 2009). The Commonwealth Court has explained that "'[b]inding norm' means that the agency is bound by the statement until the agency repeals it, and if the statement is binding on the agency, it is a regulation." *Id.* (quoting *Home Builders Association of Chester and Delaware Counties v. Department of Environmental Protection*, 828 A.2d 446, 451 (Pa. Cmwlth. 2003).

In *Pennsylvania Human Relations Commission v. Norristown Area School District*, 374 A.2d 671 (Pa. 1977), the Pennsylvania Supreme Court explained:

> An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents. A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications.

> The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings . . . . A properly adopted substantive rule establishes a standard of conduct which has the force of law . . . .
>
> A general statement of policy, on the other hand, does not establish a 'binding norm' . . . . A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.

Id. at 679 (quoting *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974)); *Borough of Bedford*, 972 A.2d at 63. To determine whether a binding norm has been created, "the reviewing tribunal must consider the provision's plain language, the manner in which it has been implemented by the agency and whether the section restricts the agency's discretion." *Borough of Bedford*, 972 A. 2d at 63 n.15 (quoting *Millcreek Manor v. Department of Public Welfare*, 796 A.2d, 1020, 1026 (Pa. Cmwlth. 2002)); *GSP Management Co. v. DEP*, 2011 EHB 203, 208.

The parties agree that neither the 1994 Model Permit Application Process nor the Aunkst Email was ever promulgated as a regulation.[2] Brief in Support of Lexington's Motion for Summary Judgment at 5; Department's Memorandum of Law in Opposition to Appellant's Motion for Summary Judgment at 3-4. Furthermore, we agree with the Department that neither of these two documents created a binding norm that the Department was required to follow. The two documents are simply an announcement of a policy which the agency hopes to implement in future permit review processes. They constitute a general statement of policy and do not

[2] Lexington points to case law discussing the circumstances under which deference to the Department's interpretation of its own regulations is appropriate. Neither the 1994 Model Permit Application Process nor the Aunkst Email, however, is a regulation or creates a binding norm, and therefore that case law does not dictate our standard of review of the Department's decision not to issue a pre-denial letter.

establish a binding norm. The Aunkst Email in particular was never distributed to the broader public, which only further supports the Department's assertion that these documents constitute "internal operating procedures."[3] Department's Memorandum of Law in Opposition to Appellant's Motion for Summary Judgment at 5. We agree with the Department that, "[a]s a matter of law, Lexington is incorrect about the force and effect of the Department's internal operating procedure." *Id.*

Further, the Department correctly points out that "no affirmative Department obligation exists in statute or regulation to require the Department to issue a pre-denial letter before denying a permit application. The concept of a pre-denial letter is a creation of the Department's internal procedure." Department's Response to Appellant's Motion for Summary Judgment's Statement of Undisputed Material Facts at 3. The 1994 Model Permit Application Process and the Aunkst Email do not create a binding norm and do not carry the force and effect of a regulation. Lexington has failed to point to any legal requirement that would have mandated that the Department issue a pre-denial letter before denying the Application. The Department, therefore, did not err in its decision to stray from these guidance documents and to not issue a pre-denial letter.

Lexington asserts that the Department "is not free to pick and choose which of its procedures and regulations it will follow and when it will do so," and that "[t]o permit this would

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[3] There is no doubt that the 1994 Model Permit Application Process, under review in this appeal, is a formal guidance document of the Department. The nature of the Aunkst Email is less certain, and it may just be directions from a Deputy Secretary to his subordinates regarding the exercise of their job duties under his management supervision. This type of management directive is less formal than a Department technical guidance document and does not give rise to the same concerns about the improper use of guidance documents or statements of policy. In rejecting Lexington's motion for summary judgment, the Board does not need to resolve whether the Aunkst Email is a guidance document or merely a management directive because both of these types of documents are similar in one key aspect. Neither creates binding norm requirements, and the Department retains the discretion to vary from each as circumstances allow.

put an applicant in the untenable position of now knowing what rules the applicant has to follow and when it has to do so." Brief in Support of Lexington's Motion for Summary Judgment at 5. On this point, Lexington is wrong as a matter of law. The Department has discretion to vary from procedures it creates by guidance or management directive under appropriate circumstances because these documents do not create binding norm requirements. The Department has no discretion to vary from procedures established by *regulation* because regulations establish binding norm requirements. The permit application process requirements that Lexington seeks to enforce are not regulations and they are not binding norm requirements. The Department has discretion to vary from these procedures in appropriate circumstances. Moreover, as the Department points out, Lexington was not aware of the Aunkst Email until obtaining it through discovery *after* the denial was issued. We agree with the Department that this fact undermines Lexington's assertion about the need for procedural consistency. Without knowledge of the Aunkst Email, Lexington would have believed that the 1994 Model Permit Application Process was still the Department's sole guidance policy on this issue, which, under the facts of this appeal, would not have required a pre-denial letter.

For these reasons, we deny Lexington's motion for summary judgment. By denying the basis for Lexington's motion for summary judgment, we need not address Lexington's requested relief.[4]

Department's Motion for Summary Judgment

The Department, in its motion for summary judgment, argues that Lexington cannot satisfy its burden to prove that it is entitled to approval of the Application because Lexington admits that deficiencies still exist with the Application and because Lexington does not refute

[4] We do note, however, that aside from remanding the Application for further consideration we would not be inclined to explicitly require the Department to meet with Lexington to discuss the Application if we ultimately rule in Lexington's favor.

each of the Department's bases for its denial of the Application. The Department further argues that Lexington cannot support the objections in its Notice of Appeal without the testimony of an expert witness. The Department believes that because Lexington has not listed an expert in its responses to the Department's discovery requests and has not provided the Department with an expert report, that Lexington cannot meet its burden of proof.

Lexington, in response, maintains that the Department erred in denying the Application for a number of reasons. Lexington argues that it has provided the identities of expert witnesses and disagrees with the Department that expert witnesses are required to sustain Lexington's burden of proof in this appeal.

The Department is not entitled to summary judgment based on the arguments set forth in its motion. The Department claims that it had a number of different bases for denying the Application, but nevertheless the Department at no point in its motion cites to a single statutory or regulatory basis that definitively provided it with the authority, under the facts in the record before the Board, to deny the Application. In other words, there has not been a showing that any "deficiencies" that have been admitted to allowed the Department, as a matter of law, to deny the Application.

The Department cites only two provisions of law in support of its argument, neither of which the Board is convinced provide a sufficient basis for granting summary judgment at this time. The first is a provision of the Pennsylvania Municipalities Planning Code providing that "[s]tate agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities." 53 P.S. § 11105(a)(2). Lexington disputes whether it needed municipal approval *before* the Application could be granted. Secondly, the Department states that an E&S Plan is a required part of a

NPDES permit application, citing 25 Pa. Code § 102.4(b)(2) and 25 Pa. Code § 92a.32(d) in support. Those provisions, however, do not provide that a failure to provide an E&S Plan with a NPDES permit application allows the Department to deny an application for a NPDES permit, and furthermore, we have not been provided with evidence to indicate that even if the Department did have the authority to deny the permit application on that basis, that it in fact lawfully exercised that authority. Overall, the Department's motion produces more questions than it does answers. We cannot grant summary judgment to the Department without a more thorough understanding of the facts and law presented in this appeal.

Further, we are not convinced that Lexington, under any foreseeable circumstances, cannot meet its burden of proof without an expert witness. Lexington may have a weaker case without an expert witness, but it is premature for us to conclude that simply because the objections in Lexington's Notice of Appeal involve, at least in part, issues that an expert witness *may* testify on, that under any foreseeable circumstances Lexington cannot prove its case without an expert witness.

Lexington also disputes the Department's factual assertion that Lexington has failed to identify an expert witness. We understand that the document marked as Exhibit A to the Department's motion, which consists of some of Lexington's responses to the Department's interrogatories, states that Lexington had not yet identified its expert witnesses. However, we also understand that Lexington may have in fact provided the Department with two expert witnesses who the Department deposed. At this point in the proceedings, the Department has not moved to limit Lexington from providing expert testimony at a hearing. While we understand that Lexington may not yet have formally identified any expert witnesses to supplement its response to the Department's interrogatories, the record is not clear as to whether the Department

is actually aware of the expert witnesses that Lexington intends to call. It seems as though the Department's argument could have been stronger if its motion was accompanied by a motion in limine. For the reasons set forth above, the Department has failed to prove that no material facts are in dispute and that it is entitled to judgment as a matter of law at this time.

Accordingly, the Board issues the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LEXINGTON LAND DEVELOPERS CORP.	:	
	:	
v.	:	**EHB Docket No. 2013-109-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 10th day of October, 2014, it is hereby ordered that the Motions for Summary Judgment filed by the Pennsylvania Department of Environmental Protection and Lexington Land Developers Corp. are **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

DATED: October 10, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2013-060-CP-L**
GERARD J. SELIGMAN	:	**Issued: October 22, 2014**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board assesses a civil penalty of $3,400 against an individual defendant who conducted unpermitted earth disturbance activities in a stream, in the floodways of two streams, and in a wetland.

FINDINGS OF FACT

1. The Pennsylvania Department of Environmental Protection (the "Department") is the agency of the Commonwealth that administers the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 – 693.27, and the regulations promulgated under those statutes. (Stipulation of the Parties Number ("Stip.") 1.)

2. Gerard J. Seligman is an adult individual who owns the 32.16 acre property located at 1428 Windsor Castle Road, Hamburg, Perry Township, Pennsylvania, which is the property that is at issue in this case. (Stip. 2, 4; Notes of Transcript page ("T.") 35, 36; Commonwealth Exhibit Number ("C. Ex.") 1, 2.)

3. Seligman purchased the property from Dean and Susan Parsons on April 30, 2012. (Stip. 3.)

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4. Dean and Susan Parsons owned and resided on the property from 1969 until 2012 when they sold it to Seligman. (Stip. 5; D. Ex. 3.)

5. Seligman's property includes a low-lying field, a warm water fishery watercourse named Pigeon Creek, and an unnamed tributary to Pigeon Creek. (T. 41, 43-44, 48, 50, 53, 69, 74-75, 77-79, 84; C. Ex. 5, 6, 9, 11-13, 15A, 18, 22, 24, 26, 33, 37A; Defendant's Exhibit Number ("D. Ex.") 15-A.)

6. The unnamed tributary to Pigeon Creek that runs through Seligman's property begins upslope of Windsor Castle Road, passes under the road, and then flows west across Seligman's field to Pigeon Creek. (T. 40, 45, 79, 113, 125-29; C. Ex. 5, 18.)

7. The unnamed tributary is a watercourse. (T. 78-79; C. Ex. 5, 18.)

8. The unnamed tributary flows intermittently in a channel that has a defined bed and banks. (T. 79-80, 98-99, 112-13, 141, 259; C. Ex. 18, 24.)

9. The unnamed tributary drains at least 120 acres. (T. 96.)

10. On August 29, 2012, Seligman received from Natural Energy Solutions, LLC ("Natural Energy"), 878 Sunbury Road, Pottsville, Pennsylvania 17901, a proposal for the installation of a loop field geothermal heating and cooling system. (Stip. 7.)

11. Seligman subsequently contracted with Natural Energy for the installation of the geothermal heating and cooling system. (Stip. 8.)

12. On or about December 15, 2012, the Department received a complaint that someone was draining wetlands on Seligman's property. (T. 74.)

13. Felicia Chirico and Andrew McDonald conducted the first of three inspections of the property on behalf of the Department on December 21, 2012. (Stip. 10; T. 75; C. Ex. 15, 15A.)

14. Chirico observed that earthmoving activity was taking place in the low-lying field on the property. (C. Ex. 15.)

15. The total disturbed area was approximately 90 by 415 feet. (C. Ex. 15.)

16. In order to install the geothermal system, among other things, three trenches were excavated in the field, which were approximately two feet to four feet wide, at least four feet deep, and ranged from 292 feet to 415 feet in length. (Stip. 9; T. 80, 217, 253, 258; C. Ex. 5; D. Ex. 5-A, 5-B, 15-B.)

17. Seligman was in the midst of this project when the Department conducted its first inspection. (T. 225; C. Ex. 5, 15.)

18. Seligman deposited fill from his excavations alongside the trenches (sidecast material). (T. 113; C. Ex. 5, 10-14, 15, 15A, 37A.)

19. Seligman excavated in and through the unnamed tributary stream channel in order to install a pipe under the streambed to connect his house with the geothermal system's loop field in the field. (T. 39, 49, 90, 96, 161; C. Ex. 4, 5.)

20. Seligman cut a ditch so that one of the trenches could drain directly into the unnamed tributary. (T. 87-89, 96; C. Ex. 13-15A.)

21. At the time of the Department's inspection, the trenches were filled with water, and the disturbed area was generally in an unstabilized condition with very muddy conditions, saturated soils, and sediment-laden water standing throughout the area and flowing into the unnamed tributary and Pigeon Creek. (T. 81-82, 90, 129, 160-62, 164, 168; C. Ex. 6, 7, 11, 13, 15; D. Ex. 6.)

22. The streams themselves were laden with excess sediment originating from the disturbed area. (T. 87, 90, 129, 160-68; C. Ex. 13, 14, 15.)

23. Seligman excavated trenches and placed fill in areas within 50 feet of the top of the stream banks of the unnamed tributary and Pigeon Creek, which was within the floodways of the streams. (T. 77, 86-87, 90, 95, 112-14; C. Ex. 10, 13, 15, 15A, 37, 37A.)

24. The field where Seligman installed the geothermal system constituted wetlands, as demonstrated by the fact that all three wetland indicators were present: wetland vegetation, hydric soils, and hydrology. (T. 90-92, 111-12, 124.)

25. Felicia Chirico is a credible, qualified expert in the identification of wetlands. (T. 61-74.)

26. Chirico credibly and expertly opined without contradiction from any other expert that Seligman performed his work in a wetland. (T. 111-13, 124.)

27. The field supported hydrophytic vegetation, that is, plants that tolerate anaerobic or saturated soil conditions during the biological growing season. (T. 67, 80-81, 91, 97, 111-12, 118-19, 124; C. Ex. 6, 15, 16.)

28. The field contains hydric soils, which indicate that saturated or inundated conditions sufficient to produce anaerobic conditions have existed over the long term. (T. 66-67, 82-84, 85, 91, 111, 119-21, 124, 142; C. Ex. 7, 8, 10, 15, 27.)

29. That the hydrology of the field is consistent with wetlands is evidenced by its low-lying location next to streams. The field had areas of standing water at the time of the Department's December 21 inspection, some of which were caused by rain the night before. (T. 41-46, 66, 81-82, 87, 92, 111, 121, 240, 260; C. Ex. 6, 7, 10, 11.)

30. An area up the hill from the field and outside of the wetlands was dry notwithstanding the night's rain. (T. 37, 39, 77, 92, 140, 260; C. Ex. 3, 4.)

31. Water drains from higher areas of the property to the low-lying field. (T. 37, 39, 121; C. Ex. 3.)

32. Standing water and saturated conditions existed in the field during all three Department inspections. (T. 41, 51, 122, 123, 139-42; C. Ex. 5, 10.)

33. Seligman excavated and installed large portions of the geothermal system in wetlands. (T. 90-92, 112-13, 124.)

34. Seligman placed fill in and otherwise encroached upon wetlands. (T. 99-102, 105-07, 110, 113; C. Ex. 7, 8, 15, 19-23, 28-32, 34, 35, 37.)

35. Seligman should have but did not apply for or obtain permits authorizing the encroachments in the unnamed tributary to Pigeon Creek, the floodways of the unnamed tributary and Pigeon Creek, and the wetlands in the field. (T. 59, 145-46.)

36. The permit application would have needed to include an erosion and sedimentation (E&S) control plan. (T. 146-47.)

37. The fees for the necessary permits would have been approximately $2,400. (T. 150.)

38. The application would have included, *inter alia*, a site plan, an explanation of why disturbance of wetlands was necessary (alternatives analysis), and an inspection for the presence of cultural resources and threatened or endangered species. (T. 145-49.)

39. Seligman would have needed to employ one or more qualified consultants to help with the permit application. (T. 149-50.)

40. Aside from the unnamed tributary and Pigeon Creek and their floodways, which were obviously present (C. Ex. 24, 36; D. Ex. 2, 7, 15-A, 15-B), it would not necessarily have been obvious to a layperson that the field contained wetlands, and Seligman was not personally

aware that the field contained areas that qualified as jurisdictional wetlands. (T. 58-59, 206-07, 211-12, 218-22, 240, 257-58, 266; D. Ex. 2, 5-A – 5-F.)

41. Seligman did not perform a wetland delineation before encroaching upon the wetland. (T. 59, 245.)

42. There is no evidence of a wetland determination ever being performed on the property prior to the Department's first inspection. (D. Ex. 9-A, 9-B.)

43. Seligman did not set out to intentionally disturb wetlands knowing they were wetlands. (Finding of Fact Number ("FOF") 40-42.)

44. The Department did not require Seligman to stop work and obtain a permit and/or an approved corrective action plan, but instead it waived those requirements in order to allow him to stabilize the site and get his geothermal system up and running. (T. 169-73, 194-95.)

45. The Department allowed the geothermal system to remain in place. (T. 154.)

46. The Department did not issue an order or notice of violation (NOV) but instead asked Seligman to voluntarily undertake corrective action. (T. 114-15, 228.)

47. Seligman voluntarily undertook some corrective action. (T. 165, 186-93, 228-35, 241; C. Ex. 24, 29; D. Ex. 6, 11.)

48. As part of Seligman's initial efforts, trenches were partially dewatered and filled, floodway areas were regraded, a portion of the floodway of the unnamed tributary was stabilized with straw mulch, and the trench leading directly into the stream was plugged. (T. 102-15, 130-31, 136-37, 165; C. Ex. 24-26, 28-37; D. Ex. 6-D, 6-E, 6-R.)

49. During the course of his remediation effort, Seligman improperly discharged some sediment-laden water directly into the receiving streams, but some of his efforts entailed

properly discharging the water into a vegetated area so that the sediments could settle out. (T. 133-34, 164; D. Ex. 6-H, 6-I.)

50. Seligman cooperated with the Department in the beginning of the restoration work. (T. 131-39, 165, 228-37; D. Ex. 6-A – 6-P.)

51. The Department performed a follow-up inspection on December 31, 2012. (T. 97; C. Ex. 23.)

52. The follow-up inspection revealed that unauthorized fill remained in the wetlands and unauthorized excavations remained in the wetlands. (T. 97-102; C. Ex. 16-23.)

53. The Department performed another follow-up inspection on January 14, 2013. (T. 102; C. Ex. 37.)

54. The same deficiencies noted in the December 31, 2012 inspection continued to exist, except that there had been some temporary stabilization of the disturbed areas along the unnamed tributary to Pigeon Creek. (T. 103-11; C. Ex. 25-37, 37A.)

55. After January 14, 2013, the relationship between Seligman and the Department appears to have deteriorated, and Seligman asked the Department not to return to the property. (T. 115, 130.)

56. Seligman asked for but did not receive permission to wait until Spring to complete restoration. (T. 139, 236.)

57. No final inspection was conducted by the Department after Seligman completed all earth disturbance activities.

58. The site has been fully restored. (T. 237.)

59. There were no known impacts to cultural resources or endangered or protected species as a result of Seligman's encroachment. (T. 151-54.)

60. The Board performed a site view on June 17, 2014.

Prior Converted Cropland Defense

61. The Department would not have required a permit or otherwise pursued enforcement action for the portion of the work performed in the wetlands (as opposed to the work in the stream and the floodways) if the field consisted of "prior converted cropland." (T. 151, 167.)[1]

62. Seligman's property has been put to productive agricultural use, primarily for the boarding of horses, and has been placed in agricultural preservation. (T. 13, 16-21, 180-81, 206-07; D. Ex. 8.)

63. Approximately 40 years ago, sometime in the early 1970s, drains and drainfields were installed somewhere in the field in an effort to dry it out and make it more amenable to growing hay for horses. (Stip. 6; T. 13, 17, 23, 28, 132; D. Ex. 3 at ¶ 8.)

64. Dean Parsons, the prior owner of the property, never maintained the drains and he does not remember exactly where they were. (T. 24-25, 28, 30.)

65. Parsons thought that most of the drain tiles were in the area of the field closest to Windsor Castle Road. (T. 28.)

66. There is no credible evidence that the drains or drainfields still exist.

67. There is no evidence that any tile fields or drains were intercepted or detected in the course of digging the 4-foot trenches for the geothermal system.

68. Simply installing drainage tiles does not equate to converting wetlands; the wetlands may remain wetlands (e.g. supporting hydrophytic vegetation and exhibiting wetland hydrology) notwithstanding the failed or incomplete attempt at drainage. (T. 201.)

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[1] The prior-converted-croplands defense does not relate to the streams themselves or the floodways of the streams.

69. Parsons sporadically seeded the field. He let the horses into the area to graze, and in some years, he would mow the field for hay and bale it up using heavy equipment. (T. 20-26, 31-32, 208-09.)

70. No hay or crops were planted or harvested in the field after the mid-1990s. (T. 22, 25, 27, 31; D. Ex. 3 at ¶ 10.)

71. It is not clear when Parsons stopped pasturing horses in the field. (T. 21-22, 25, 32-33; D. Ex. 3.)

72. The record does not support a finding that the wetlands in the field were ever successfully converted into non-wetlands. (T. 179.)

73. The field does not constitute prior converted cropland. (T. 176-77, 199-200.)

DISCUSSION

The Department filed a complaint with the Board seeking a civil penalty against Gerard J. Seligman for alleged violations of the Dam Safety and Encroachments Act, the Clean Streams Law, and the regulations promulgated pursuant to those statutes. The complaint alleges three counts against Seligman: (1) unpermitted excavation in a waterbody, floodway, and wetland and placing sidecast material in a wetland; (2) failure to implement and maintain appropriate erosion and sedimentation (E&S) best management practices during excavation; and (3) failure to implement permanent stabilization.

The Department has the burden of proof when it files a complaint for a civil penalty assessment. 25 Pa. Code § 1021.122(b)(1). The Department must show by a preponderance of the evidence that Seligman violated the applicable statutes and regulations and there is a lawful basis for the assessment of a civil penalty. *DEP v. Simmons*, 2010 EHB 262, 276; *DEP v. Strubinger*, 2006 EHB 740, 748, *aff'd*, 2195 C.D. 2006 (Pa. Cmwlth. June 13, 2007).

Count I – Unpermitted Encroachments in Waters of the Commonwealth

Turning first to the issue of whether the violations occurred, Count I of the Department's complaint alleges that Seligman without a permit excavated trenches within an unnamed tributary to Pigeon Creek and a wetland, which are waters of the Commonwealth, and deposited the excavated material within the wetland, as well as within the floodways of Pigeon Creek and its unnamed tributary. The Department alleges that these actions are in violation of Section 6(a) of the Dam Safety and Encroachments Act, Section 611 of the Clean Streams Law, and the regulation at 25 Pa. Code § 105.11. Section 6(a) of the Dam Safety and Encroachments Act imposes a permit requirement upon persons wishing to undertake any obstruction or encroachment activity within watercourses, floodways, or bodies of water: "No person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the department." 32 P.S. § 693.6(a). The regulation at 25 Pa. Code § 105.11(a) contains similar language imposing a permit requirement.[2] Section 611 of the Clean Streams Law, among other things, makes it unlawful to fail to comply with any Department rule or regulation, violate any provision of the Clean Streams Law or any regulation adopted pursuant to the Clean Streams Law, or cause water pollution. 35 P.S. § 691.611.

There is no question that Seligman's improper excavation and filling activities occurred. He excavated straight through the unnamed tributary, excavated three long trenches, placed fill in the floodways of both streams and along the trenches, and generally left the field in a very muddy, unstable condition that resulted in excess erosion and sedimentation of the streams. Seligman's defense to the violations relating to the stream, floodways, and E&S controls is his

[2] "A person may not construct, operate, maintain, modify, enlarge or abandon a dam, water obstruction or encroachment without first obtaining a written permit from the Department." 25 Pa. Code § 105.11(a).

insistence that the stream that he excavated through is nothing more than "a ditch." (T. 40, 79.) This is a distressingly common, but in this case unavailing, defense. In support of his argument that the unnamed tributary is not a regulated body of water, Seligman points out that the unnamed tributary does not appear on the USGS topographic map for the area. (D. Ex. 14.) Although true, it is not uncommon for streams such as unnamed tributaries to not be documented on USGS maps. Regardless, this evidence does not negate the fact that the unnamed tributary to Pigeon Creek meets the statutory definition of a watercourse under the Dam Safety and Encroachments Act.[3] The photographs admitted by both parties clearly show a stream with running water and a defined bed and banks.

Seligman's primary focus in this case is his claim that the field did not contain wetlands. However, Seligman presented no expert testimony to suggest that his field did not meet the three wetland criteria. The Department, on the other hand, presented uncontradicted, highly credible expert testimony that areas of the field where Seligman dug the trenches met the three criteria of a wetland—wetland vegetation, hydric soils, and hydrology. (T. 99-102, 105-07, 110, 113; C. Ex. 7, 8, 15, 19-23, 28-32, 34, 35, 37.) The photographs of the site clearly back up the Department's testimony. Since the field is a wetland, it is a regulated body of water under the Dam Safety and Encroachments Act and the regulations at Chapter 105.[4] Seligman's digging of the trenches and placing fill in the wetland meets the definition of an encroachment in a body of water because his activity changed, expanded, or diminished the wetland. 32 P.S. § 693.3; 25 Pa. Code § 105.1. Therefore, Seligman's work installing the geothermal system required a permit. (T. 89, 96, 102, 109-10, 145-46; C. Ex. 15, 23, 37.) It is undisputed that he had no such permit.

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[3] *See* 32 P.S. § 693.3, defining watercourse as "[a]ny channel of conveyance of surface water having a defined bed and banks, whether natural or artificial, with perennial or intermittent flow."

[4] *See* 32 P.S. § 693.3, defining body of water as "any natural or artificial lake, pond, reservoir, swamp, marsh or wetland." *See also* 25 Pa. Code § 105.1.

The Department inspector observed sidecast material in the wetland and also within the floodways of Pigeon Creek and its unnamed tributary—50 feet from the banks of the streams.[5] The Department presented a host of photographs depicting the presence of fill in the wetlands and floodways. (C. Ex. 5, 6, 10-14, 17, 19, 21, 22, 25, 26, 28-32, 34-36.) Placing fill alongside the trenches in the wetland and in the floodways of Pigeon Creek and its unnamed tributary meets the definition of water obstruction.[6] Both Seligman's digging of the trenches and his placing of fill are activities that require proper permits under the Dam Safety and Encroachments Act and his failure to do so constitutes a violation. Although Seligman directs us to the permit waiver requirements at 25 Pa. Code §§ 105.12(a)(7) and (8), these waivers apply strictly to drainage field maintenance and crop production. They in no way excuse the permit requirement for excavating a wetland to install a geothermal heating and cooling system.

Prior Converted Cropland

In his defense, Seligman, without citing any helpful authority other than the regulation itself, argues that his field is exempt from regulation under the Dam Safety and Encroachments Act and the Chapter 105 regulations because the field meets the definition of "prior converted cropland" contained in 25 Pa. Code § 105.452. Section 105.452 provides as follows:

> (a) This section sets forth the policy of the Department as to the status of prior converted cropland in this Commonwealth.
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> . . .

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[5] Floodway is defined as "[t]he channel of the watercourse and portions of the adjoining floodplains which are reasonably required to carry and discharge the 100-year frequency flood....[I]t is assumed, absent evidence to the contrary, that the floodway extends from the stream to 50 feet from the top of the bank of the stream." 25 Pa. Code § 105.1.

[6] *See* 32 P.S. § 693.3, defining water obstruction as including "any dike, bridge, culvert, wall, wing wall, *fill*, pier, wharf, embankment, abutment or other structure located in, along, across or projecting into any watercourse, floodway or body of water." (emphasis added). *See also* 25 Pa. Code § 105.1, defining fill as "[s]and, gravel, earth or other material placed or deposited to form an embankment or raise the elevation of the land surface. The term includes material used to replace an area with aquatic life with dry land or to change the bottom elevation of a regulated water of this Commonwealth."

> (c) Naturally occurring events may result in either creation or alteration of wetlands. It is necessary to determine whether alterations to an area have resulted in changes that are now ''normal circumstances'' of the particular area. The Department recognizes ''prior converted cropland,'' as defined in the *National Food Security Act Manual* (180-V-NFSAM, Third Edition, March 1994), as ''normal circumstances'' as the term is used in the definition of wetlands in § 105.1 (relating to definitions). These prior converted croplands are not regulated as wetlands under the Commonwealth's Wetland Protection Program contained in this chapter. Prior converted cropland is defined in the *National Food Security Act Manual*, as wetlands that were drained, dredged, filled, leveled or otherwise manipulated, including the removal of woody vegetation, before December 23, 1985, and have not been abandoned, for the purpose of, or to have the effect of making the production of an agricultural commodity possible, and an agricultural commodity was planted or produced at least once prior to December 23, 1985...

25 Pa. Code § 105.452. Before turning to the details of this defense, we need to point out that the prior converted cropland defense has nothing to do with Seligman's violations for placing fill in floodways and excavating the stream. It only relates to Seligman's unpermitted activities in the wetland.

Prior converted cropland is a federal concept that has been adopted by the Department in a codified statement of policy. 25 Pa. Code § 105.452. Neither party has directed us to any state authority or precedents regarding the issue. Where a Commonwealth regulation is based upon federal law, we have found it appropriate to look to federal case law and rulings of the governing federal agency to aid us in interpreting the regulation. *Groce v. DEP*, 2006 EHB 856, 949, *aff'd*, 921 A.2d 567 (Pa. Cmwlth. 2007) (citing *Gosewich v. Dep't of Revenue,* 397 A.2d 1288, 1293 (Pa. Cmwlth. 1979)). Prior converted cropland originates not under the Clean Water Act, but rather under the Food Security Act of 1985, 16 U.S.C. §§ 3801 – 3862, and the regulations promulgated pursuant to the Act at Title 7 of the Code of Federal Regulations, which are administered by the United States Department of Agriculture. However, the United States

Environmental Protection Agency and the United States Army Corps of Engineers have adopted the concept into the administration of the federal wetlands program. *See* 40 C.F.R. § 232.2 (EPA regulation exempting prior converted cropland from the definition of waters of the United States); 33 C.F.R. § 328.3(a)(8) (Army Corps regulation providing same). *See also* 58 Fed. Reg. 45008 (Aug. 25, 1993) (preamble discussing the promulgation of these changes to the regulations). At the outset we note that exemptions to regulation as wetlands are to be construed narrowly. *See U.S. v. Brace*, 41 F.3d 117, 124 (3d Cir. 1994).

Relying on the definition contained in the *National Food Security Act Manual* (3d ed. 1994),[7] the Department defines prior converted cropland as:

> [W]etlands that were drained, dredged, filled, leveled or otherwise manipulated, including the removal of woody vegetation, before December 23, 1985, and have not been abandoned, for the purpose of, or to have the effect of making the production of an agricultural commodity possible, and an agricultural commodity was planted or produced at least once prior to December 23, 1985.

25 Pa. Code § 105.452(c). This definition generally tracks the current federal definition when read in conjunction with the federal definition of converted wetland.[8] The key difference is that

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[7] The *National Food Security Act Manual* (NFSAM), which is developed by the USDA Natural Resources Conservation Service (NRCS) (formerly the Soil Conservation Service (SCS)), is now in its Fifth Edition (Nov. 2010), but there is no indication that the Department has deviated from its statement of policy to adopt the most current manual. In its reply brief, the Department never cites the NFSAM in anything more than a passing reference. The Department apparently takes the position that the current federal regulations, many of which were adopted or amended after the NFSAM 3rd Edition was published, are the pertinent guidance to the issue of prior converted cropland. The Department never explains the differences, if any, between the 1994 NFSAM and the current regulations. Our own research indicates that the NFSAM 3rd Edition was substantially amended in 1996 following the promulgation of new regulations. It is unclear whether the Department accepts those amendments, or any subsequent amendments, since it has never revised or updated its statement of policy at 25 Pa. Code § 105.452 to correspond to the federal changes.

[8] "*Prior-converted cropland* is a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria: (i) Inundation was less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); and (ii) If a pothole, playa or pocosin, ponding was less than 7 consecutive days during the growing season in most

the current federal definition is more detailed and delineates specific hydrologic criteria. This expanded definition is also consistent with the NFSAM language. *See* NFSAM at 514-32.

The Department's definition of prior converted cropland provides a caveat that in order to maintain prior converted cropland status the cropland must not be abandoned. Abandonment is defined as:

> [T]he cessation of cropping, forage production or management on prior converted cropland for 5 consecutive years, so that:
> (i) Wetland criteria are met.
> (ii) The area has not been enrolled in a conservation set-aside program.
> (iii) The area was not enrolled in a State or Federal wetland restoration program other than the Wetland Reserve Program.

25 Pa. Code § 105.452(c)(1).

The Department's regulations only expressly mention prior converted cropland, but the federal scheme also contains definitions of "farmed wetland" and "farmed wetland pasture," which each have specific hydrologic criteria differentiating them.[9] The Department's statement

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years (50 percent chance or more) and saturation was less than 14 consecutive days during the growing season most years (50 percent chance or more)...

"*Converted wetland* is a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose of or to have the effect of making possible the production of an agricultural commodity without further application of the manipulations described herein if: (i) Such production would not have been possible but for such action, and (ii) Before such action such land was wetland, farmed wetland, or farmed-wetland pasture and was neither highly erodible land nor highly erodible cropland." 7 C.F.R. § 12.2(a).

[9] "*Farmed wetland* is a wetland that prior to December 23, 1985, was manipulated and used to produce an agricultural commodity, and on December 23, 1985, did not support woody vegetation and met the following hydrologic criteria: (i) Is inundated for 15 consecutive days or more during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more), or (ii) If a pothole, playa, or pocosion, is ponded for 7 or more consecutive days during the growing season in most years (50 percent chance of more) or is saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more);

"*Farmed-wetland pasture* is wetland that was manipulated and managed for pasture or hayland prior to December 23, 1985, and on December 23, 1985, met the following hydrologic criteria: (i) Inundated or ponded for 7 or more consecutive days during the growing season in most years (50) percent chance or

of policy contains no explicit adoption of land that is referred to federally as farmed wetland or farmed wetland pasture, although the Department does allow people to farm wetlands. (T. 176.) *See* 25 Pa. Code §§ 105.12(a)(7) and (8). We are not by way of this Adjudication adopting or endorsing those concepts as having the force and effect of law in Pennsylvania. However, given that the Department's statement of policy relies on the NFSAM, which contains detailed analysis of these terms, viewing how the NRCS and the federal government treat these concepts is instructive in determining the line between what constitutes prior converted cropland, and everything that is not prior converted cropland.

Although it does not directly address prior converted cropland, one of the seminal cases discussing wetland versus converted wetland is *Gunn v. U.S. Department of Agriculture*, 118 F.3d 1233 (8th Cir. 1997). In *Gunn*, the central issue was whether Charles Gunn had converted wetlands and would therefore lose his eligibility for certain federal farm benefit programs. Gunn's property had been farmed since 1906, when drainage tiles were installed in what were previously wetlands to make the land farmable. *Gunn*, 118 F.3d 1233, 1235. By 1947, the drainage system was becoming overwhelmed, leaving portions of the property wet and no longer suitable for farming. In 1992, new drain tiles were installed that compensated for the shortcomings of the prior system. Gunn sought certification in 1991 from SCS so that he could be eligible for farm benefits. After a series of appeals with SCS, the agency determined that Gunn's installation of new drain tiles in 1992 was a conversion of wetlands and, although he could continue to farm the wetlands, he would lose his benefits. 118 F.3d at 1235-36.

Citing an exemption for agricultural activity on wetlands converted before December 23, 1985 and the plain language of the definition of converted wetland, Gunn argued that converted

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more), or (ii) Saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more)." 7 C.F.R. § 12.2(a).

wetland simply means wetland that has been drained or otherwise manipulated for the purpose or to have the effect of making the production of an agricultural commodity possible. He then argued that the manipulation of his land occurred in 1906, he has been producing an agricultural commodity on it ever since, and therefore he is eligible for the exception. Although the Court in *Gunn* agreed that the isolated words of the statute could yield that interpretation, it deferred to the interpretation of SCS:

> The agency stresses the requirement that "converted wetland" is land that before drainage "was wetland." On this view, land is either wetland or converted wetland. If significant wetland characteristics remain, the land remains wetland and cannot be converted wetland. If the drainage or other manipulation has been sufficient to make crops producible, as is the case here, the land is best described as "farmed wetland," a term that does not appear in the statute but that the agency's regulations have adopted. "Farmed wetland" can continue to be farmed without the loss of benefits, but only so long as the previously accomplished drainage or manipulation is not significantly improved upon, so that wetland characteristics are further degraded in a significant way.

118 F.3d at 1238. The Court held that the 1992 improvements to the drainage system further degraded the wetland characteristics of the land and that the land only became a converted wetland upon the implementation of those improvements, because from 1906 to 1992 the land retained its wetland characteristics. 118 F.3d at 1238-39. The Court in *Gunn* explicitly rejected the argument that if any drainage or manipulation of a wetland took place before 1985 for the purpose of making possible the production of agricultural commodity, whether successful or not, it would render the area permanently exempt from regulation as a wetland because such an interpretation would frustrate the purpose of the Farm Security Act to preserve wetlands. 118 F.3d at 1238.

We find *Gunn* instructive for our purposes. We also find useful for our analysis *U.S. v. Hallmark Construction*, 30 F. Supp. 2d 1033 (N.D. Ill. 1998), a case discussing prior converted

cropland versus farmed wetland. In 1988, Hallmark Construction purchased farm property for the development of a residential subdivision, a portion of which became the subject of a dispute as to its wetland status. *Hallmark*, 30 F. Supp. 2d 1033, 1035. The area in question, "Area B," had been cultivated for farming and had been drained by buried clay field tile to make the area suitable for farming. Hallmark Construction's consultants determined that Area B was properly classified as prior converted cropland, not farmed wetland. 30 F. Supp. 2d at 1036. However, the Army Corps and NRCS determined that the area was a jurisdictional farmed wetland.

Ultimately, the Court found that the Corps did not establish that the area was a farmed wetland. The Court focused on the inundation requirement of 7 C.F.R. § 12.2(a)(i) that inundation "less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more)" is prior converted cropland, not farmed wetland. In reaching this conclusion, the Court underscored the fact that the Corps did not show that Area B demonstrated all three criteria for wetlands under the 1987 Army Corps Wetlands Delineation Manual and instead primarily relied on ambiguous aerial photographs to establish the area's inundation. 30 F. Supp. 2d at 1039-40. On the other hand, Hallmark Construction presented factual testimony that the prior owner never observed the land inundated for more than three to five days at most, as well as expert testimony and computer modeling that the land could not possibly be inundated for more than ten days given soil permeability and rainfall depths. 30 F. Supp. 2d at 1039.

Importantly, the Court in *Hallmark* analyzed the history of the promulgated regulations, specifically citing to a pertinent section of the Federal Register discussing the addition of the prior converted cropland exemption to the regulatory definition of waters of the United States: "By definition, [prior converted] cropland has been significantly modified so that it no longer

exhibits its natural hydrology or vegetation. Due to this manipulation, [prior converted] cropland no longer performs the functions or has the values that the area did in its natural condition." 30 F. Supp. 2d at 1038 (citing 58 Fed. Reg. 45008, 45032 (Aug. 25, 1993)).

What emerges from *Gunn* and *Hallmark* is the idea that land is either wetland or converted wetland. This distinction is consistent with the NFSAM and the federal scheme. The essential characteristic of a *converted* wetland is that the land no longer exhibits fundamental wetland criteria. It no longer performs the functions or has the values that the area had before it was "converted." So long as the conversion occurred before December 23, 1985, the conversion itself is excused, and permits are not required to install encroachments in the area so long as it retains its status as active cropland. Wetlands that are manipulated and used for cropping or forage production or management but nevertheless continue to exhibit the criteria of wetlands are better described as farmed wetland or farmed wetland pasture. They exhibit wetland characteristics; they simply happen to also support certain agricultural activities. Such land may be farmed, but it is not exempt from regulation. In short, prior converted cropland has been converted to non-wetland; farmed wetland is still wetland.

In stating this we also look to Army Corps Regulatory Guidance Letter RGL-07 (Sep. 26, 1990):

> In contrast to "farmed wetlands", "prior converted croplands" generally have been subject to such *extensive and relatively permanent physical hydrological modifications and alteration of hydro-phytic vegetation* that the resultant cropland constitutes the "normal circumstances" for purposes of section 404 jurisdiction. Consequently, the "normal circumstances" of prior converted croplands generally do not support a "prevalence of hydro-phytic vegetation" and as such are not subject to regulation under section 404. In addition, our experience and professional judgment lead us to conclude that because of the magnitude of hydrological alterations that have most often occurred on prior converted

> cropland, such cropland meets, minimally if at all, the Manual's hydrology criteria.

RGL-07 at ¶ 5(d) (emphasis added).[10] In sum, an area converted to prior converted cropland generally must have undergone an extensive degree of modification so that the area no longer exhibits wetland criteria and the modification is relatively permanent.

The Department interprets the prior converted cropland regulation as an exception from its program regulating wetlands. *See* 26 Pa.B. 494-95 (Feb. 3, 1996) ("This policy excludes areas identified as prior converted cropland as defined in the *National Food Security Act Manual* (180-V-NFSAM, 3rd Edition, March 1994) from jurisdiction under the Department's Wetland Protection Program.") As such, the Department contends that individuals asserting this exception do so as an affirmative defense.

The Department's interpretation that prior converted cropland is essentially an affirmative defense is reasonable and consistent with the language and purposes of the applicable statutes and regulations. If upon inspection the Department reasonably believes that activities are occurring on wetlands inconsistent with its wetlands program, it is logically the landowner's responsibility to present evidence that the area in question was previously designated or should qualify as a prior converted cropland pursuant to 25 Pa. Code § 105.452. Seligman in his posthearing brief does not contest that an assertion of prior converted cropland is an affirmative defense. Accordingly, although the Department still retains the burden of proof in the case, it is incumbent upon Seligman to present credible evidence that his property is exempt from wetland regulation as a prior converted cropland.

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[10] RGL-07 expired in 1993, but we find persuasive the *Hallmark* Court's interpretation of the guidance: "Although RGL-07 has expired, the Corps and the EPA have revised their regulations 'to codify existing policy, as reflected in RGL-07.' 58 Fed. Reg. 45008, 45031 (Aug. 23, 1993). RGL-07 provides guidance on the determination of 'normal circumstances,' as well as a thorough discussion on the jurisdictional status of 'farmed wetlands.' RGL-07 remains the definitive regulatory guideline for agricultural wetlands." 30 F. Supp. 2d at 1039 n.2.

In the case before us, the Department provided uncontroverted testimony that all three wetland criteria were present at the property. The Department's well-qualified expert noted the presence of soft rush, a type of hydrophytic vegetation that grows in wetlands. (T. 81, 91; C. Ex. 6.) She noted soils characteristic of wetlands, including oxidized rhizospheres, which are a primary indicator of wetland hydrology under the 1987 Army Corps Wetlands Delineation Manual, the standard in the field. (T. 91; C. Ex. 7, 8.) She also documented saturated soils. (T. 81-82, 87, 92, 122-23, 139, 142, 162; C. Ex. 7, 8, 28.) These observations were made in accordance with generally accepted practice in her field of expertise using well-accepted field guides and plant identification keys. (T. 119.)

The fact that Seligman's field is now clearly a wetland made it incumbent upon Seligman to put forth a credible showing that at some point in the past the land had been "converted" into a non-wetland. Seligman made no such showing. We start with the fact that there is no evidence apparent in the field itself that it was ever formerly converted. Seligman's field was and is in a low-lying area that naturally collects water at the intersection of two streams. Before the Department's inspection there is no evidence of a wetland delineation being made of the property. (T. 59.) Seligman presented no evidence or expert testimony that would support a finding on our part that the field at any point in its history stopped being a wetland. Seligman pointed out that he is able to get heavy farm equipment into the field, but that in no way suggests that the field does not meet the criteria of wetlands.

Seligman offered the testimony of Dean Parsons, the prior owner of the property from 1969 to 2012. Parsons testified over the telephone and his testimony was at times rather vague and somewhat inconsistent, which is not surprising since he was largely testifying about events from decades ago. He testified that he primarily used the field in question for grazing horses and

for growing hay for use by the horses. (T. 18, 20-21; D. Ex. 3.) Parsons testified that he had a drainage system installed sometime in the early 1970s to facilitate the production of crops in the field. (T. 23-25; D. Ex. 3.) He did no further work or maintenance on the drainage system after it was installed. (T. 24-25; D. Ex. 3.) He did not know where the drainage system was, although he thought it might have been close to Windsor Castle Road. Despite this testimony, Seligman never showed that the property at any point ceased being a wetland, or that it was ever effectively converted to the point where it lost one or more of the defining indicia of wetlands. Like the Court in *Gunn*, we do not believe that an unsuccessful manipulation is enough in and of itself to qualify as prior *converted* cropland. As the *Gunn* Court noted, such a narrow reading of the regulatory language would completely frustrate the overarching purpose of the wetlands program to preserve and maintain wetlands. 118 F.3d 1233, 1238.

Further, although we are not questioning Mr. Parsons' testimony that drains were installed 40 or 50 years ago, there is no evidence that those drains still exist. Seligman dug long, deep trenches in the field, yet there is no indication that any drainage system was encountered. Seligman's photograph of what he thought might be a drainage outlet did not really show anything. (D. Ex. 7-D.) Our own observation of what appears to be a relatively new PVC pipe upgradient of the field near the unnamed tributary does not appear to be related to any 40-year old drainage system. Seligman conceded that he had no personal knowledge of an extant drainage system.

In further support of his prior converted cropland argument, Seligman points to correspondence from the USDA that states there were no wetlands violations on the property. (D. Ex. 9-A, 9-B.) The FSA-156 Abbreviated Farm Record Seligman cites was sent to him in response to his notification to the USDA that there had been a change in ownership of the

property. (D. Ex. 9-A.) Although the Farm Record does state that there are no documented wetlands violations, directly above that line it indicates "Wetland Status: Wetland determinations not complete." (D. Ex. 9-B.) If no wetlands determination had ever been made on the Seligman property, then this correspondence cannot be used to prove that Seligman's land is not wetlands. If anything, it suggests the contrary. If Seligman's property was in fact prior converted cropland, the USDA FSA-156 Record might well have indicated as much in terms of the property's wetland status. Instead, it shows that the USDA had no record of ever designating the property prior converted cropland. Although we are not suggesting that an official designation is required, Seligman's exhibit is not particularly helpful one way or the other.

As previously noted, prior converted cropland can return to the regulatory fold if it is "abandoned." If the land is successfully converted (before 1985) into non-wetlands and farmed, but then "cropping, forage production or management" ceases for five consecutive years and the land reverts to wetlands in fact, it is once again subject to permitting requirements. 25 Pa. Code § 105.452(c)(1). *See also* 58 Fed. Reg. 45008, 45034 ("In particular, [prior converted] cropland which now meets wetland criteria is considered to be abandoned *unless*: For once every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production." (emphasis in original)); *Huntress v. U.S. Dep't of Justice*, 2013 U.S. Dist. Lexis 73805 (W.D.N.Y. May 23, 2013) (upholding this interpretation of abandonment).[11] In this case, Seligman's field was never

[11] In the federal scheme, the continued production of an agricultural commodity is integral to the retention of prior converted cropland. Agricultural commodity is defined as "any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters, or sugarcane." 7 C.F.R. 12.2(a). The production of an agricultural commodity is also referenced in the Department's regulation. *See* 25 Pa. Code § 105.452(c). We note that it is unclear whether Parsons' activities qualify as the production of an agricultural commodity, but we do not need to decide the issue.

successfully converted, so abandonment does not come up. Nevertheless, the Department in the alternative argues that, even if we assume for the purposes of argument that the wetlands were converted, the conversion was abandoned. In other words, Seligman lost the exemption for prior converted cropland because "cropping, forage production or management" ceased for five consecutive years.

We once again must return to the only historical evidence in this case of any value, the testimony (and affidavit) of the prior owner, Mr. Parsons. Parsons testified that hay was grown "sporadically" and that it was grown during the 1980s and 1990s. (T. 22.) Parsons also testified that the last time the horses grazed on planted hay was in the early to mid-1990s. (T. 25.) Parsons' affidavit states that hay and other crops were planted and harvested from the 1970s through the 1990s. (D. Ex. 3.) From the totality of Mr. Parsons' testimony we got the strong impression that he did not actively use the field after the 1990s. It is true that in response to a series of highly leading questions on redirect Parsons testified that horses were in the field up until 2012 (T. 32-33), but we are not convinced that the field was put to more than *de minimus* use for "cropping, forage production or management" after the 1990s. (T. 21-22, 25, 32-33; D. Ex. 3.) In any event, as previously stated, a conversion can only be abandoned if the land was converted in the first place, and that never occurred here.

In making the determination that Seligman's property is not prior converted cropland, we find supportive the sentiment expressed in the Federal Register:

> [W]e are attempting, in an area where there is not a clear technical answer, to make the difficult distinction between those agricultural areas that retain their wetland character sufficiently that they should be regulated under Section 404, and those areas that [have] been so modified that they should fall outside the scope of the CWA.

58 Fed. Reg. 45008, 45032. Prior converted cropland is excluded from regulatory jurisdiction for a simple reason, it no longer provides the necessary conditions for wetland vegetation and thus falls outside of the Department's goal of protecting the state's aquatic resources. Here, Seligman's field retained its wetland character and it should be subject to appropriate regulation.

Count II – Failure to Implement E&S Best Management Practices

Count II of the complaint alleges that Seligman conducted earth disturbance activities without implementing appropriate erosion and sedimentation (E&S) control best management practices in violation of the Clean Streams Law and 25 Pa. Code § 102.11(a). In a footnote to his posthearing brief, Seligman argues that the issue of E&S best management practices was not included in the Department's pre-hearing memorandum, and he objects to our consideration of it now. At the hearing, Seligman made this same objection. (T. 80.) We have reviewed the Department's pre-hearing memorandum and found that Seligman is entirely correct. The text of the Department's pre-hearing memorandum contains no mention of E&S controls or E&S best management practices, or the failure to implement same. There is nothing in the memorandum that even indirectly or tangentially references the issue. Accordingly, the issue is deemed waived. *Jake v. DEP*, EHB Docket No. 2011-126-M, slip op. at 23 (Adjudication, Feb. 18, 2014); *Citizen Advocates United to Safeguard the Environment, Inc. v. DEP*, 2007 EHB 632, 677; *UMCO Energy, Inc. v. DEP*, 2006 EHB 489, 573. *See also* Paragraph 4 of our Pre-Hearing Order No. 3-CP ("A party may be deemed to have abandoned all contentions of law or facts not set forth in its pre-hearing memorandum."). No violation will be assessed under Count II of the complaint.

Count III – Failure to Implement Permanent Stabilization

The Department's final count alleges that, once Seligman finished his earth disturbance activities, he failed to seed or mulch or otherwise protect the disturbed area from accelerated erosion in violation of the Clean Streams Law and 25 Pa. Code § 102.22. That regulation provides in part: "Upon final completion of an earth disturbance activity or any stage or phase of an activity, the site shall immediately have topsoil restored, replaced, or amended, seeded, mulched or otherwise permanently stabilized and protected from accelerated erosion and sedimentation." 25 Pa. Code § 102.22(a). Subsection (a)(1) of the regulation then requires the implementation and maintenance of E&S best management practices until permanent stabilization is completed. 25 Pa. Code § 102.22(a)(1).

The failure to implement proper stabilization is a way by which sediment pollution can reach waters of the Commonwealth. The Department observed no stabilization implemented on its first and second inspections and incomplete stabilization on its third inspection. However, the Department failed to prove that there was no permanent stabilization *upon completion* of the earth disturbance activity. The Department never conducted a final inspection of the property. The Department's third inspection report notes that fill still needed to be removed from the wetlands, the trenches needed to be filled in, and there was still grading and leveling to be done in the field. (C. Ex. 37.) The Department's photographs from the January 14 inspection depict an area that is still in the midst of earth disturbance activity. (C. Ex. 25, 26, 28-32, 34-36.) Although Seligman requested that the Department not return to his property after the January 14 inspection, the Department could have obtained a warrant to conduct a final inspection. Furthermore, much of the property can be viewed from Windsor Castle Road, obviating the need for direct access to the property. (T. 97; C. Ex. 16.)

Although Section 102.22 goes beyond permanent stabilization (*see* 25 Pa. Code § 102.22(b) (temporary stabilization)), the failure to implement temporary stabilization is not alleged in the Department's complaint as a distinct violation. In Count III, the Department simply alleges, "Upon completion of the earth disturbance activity, Seligman failed to immediately seed, mulch or otherwise protect the site from accelerated erosion." (DEP Complaint at ¶ 17.) The only evidence of record that we have regarding the condition of the site "upon completion of the earth disturbance activity" is Seligman's uncontradicted testimony that the site has been returned to its predisturbance condition. (T. 237.)[12] Accordingly, the Department did not meet its burden of proof for this count of its complaint and no penalty will be assessed for it.[13]

Civil Penalty

The Dam Safety and Encroachments Act authorizes the Board to assess a civil penalty of no greater than $10,000, plus $500 for each day of continued violation of the Act. 32 P.S. § 693.21(a). The Clean Streams Law, for its part, authorizes the Board to assess a civil penalty up to $10,000 per day for each violation. 35 P.S. § 691.605(a).

In a complaint for civil penalties, the Board makes an independent determination of the appropriate penalty amount. The Department suggests to the Board a civil penalty amount, but that suggestion is merely advisory. *DEP v. Colombo*, 2013 EHB 635, 649 (citing *DEP v. Leeward Constr.*, 2001 EHB 870, 885, *aff'd*, 821 A.2d 145 (Pa. Cmwlth. 2003)); *Westinghouse v. DEP*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998). The Board's responsibility is to assess a penalty

[12] The Board conducted a site view, but our impressions do not constitute record evidence. *Kiskadden v. DEP*, EHB Docket No. 2011-149-R, slip op. at 3 (Opinion and Order, Sep. 4, 2014).

[13] It is also worth noting that the Department provides no discussion of Count III in its posthearing brief, so it appears to have waived this issue as well. *See Rural Area Concerned Citizens (RACC) v. DEP*, EHB Docket No. 2012-072-M, slip op. at 21 n.1 (Adjudication, Jun. 11, 2014) (citing *Jake v. DEP*, EHB Docket No. 2011-126-M, slip op. at 10 n.3 (Adjudication, Feb. 18, 2014)); *Gadinski v. DEP*, 2013 EHB 246, 273 n.7).

based upon applicable statutory criteria, any applicable regulatory criteria, and our own precedent. *DEP v. Perano*, 2011 EHB 867, 878; *DEP v. Weiszer*, 2011 EHB 358, 381; *DEP v. Kennedy*, 2007 EHB 15, 25. The Dam Safety and Encroachments Act, the Clean Streams Law, and our precedent outline specific factors to consider in determining the amount of a civil penalty. The factors include the willfulness of the violation, the damage to the waters of the Commonwealth, the cost of repairing the damage, the costs incurred by the Commonwealth in undertaking enforcement, the cost savings to the violator, the size of the violating facility, the volume of a polluting discharge, the deterrent effect of the penalty, and other relevant factors. 32 P.S. § 693.21(a); 35 P.S. § 691.605(a); *Perano*, 2011 EHB at 878-79 (quoting *Weiszer*, 2011 EHB at 382); *DEP v. Angino*, 2007 EHB 175, 203; *Kennedy*, 2007 EHB at 26; *DEP v. Breslin*, 2006 EHB 130, 141-42.

On the whole, the Department introduced virtually no evidence in the record substantiating its proposed civil penalty. Although Ronald Eberts, the Department's Compliance Specialist, testified that he completed the penalty calculation and determined that the violations warranted a penalty of $14,000, he never explained how he arrived at those specific amounts beyond explaining that, in his opinion, the Dam Safety and Encroachment Act violations amounted to $10,000 and the Clean Streams Law violations amounted to $4,000 when considering permit fees and damages to natural resources. (T. 159.) The Department never explicitly detailed how it determined those figures. The Department did not offer into evidence any analysis of a base penalty or the various aggravating and mitigating factors that the Board

should consider when calculating a penalty. Eberts simply opined that in his professional opinion $14,000 was a reasonable civil penalty given what Seligman had done.[14]

For our purposes, we will start with the cost of compliance. Subject to the statutory limits, we have repeatedly said that civil penalties should be no less than what it would have cost to comply with the law because it is unfair to those who do comply. *See, e.g. Perano*, 2011 EHB at 892 ("[T]he Board's civil penalty should, at a minimum, be high enough to deprive the violator of any savings or profit achieved through non-compliance with the law."); *Breslin*, 2006 EHB at 141 n.6 ("[I]t should *never* be cheaper to violate the law than to comply with the law. Civil penalties should, at an absolute minimum, recoup any savings or excess profit that resulted from the choice to violate the law. We, once again, strongly encourage the Department and other parties to produce evidence along these lines in future cases where this Board is asked to assess a penalty." (emphasis in original)); *Leeward*, 2001 EHB at 910. Allyson McCollum, a water quality specialist supervisor at the Department, testified that the fees that would have been necessary for the appropriate applications for Seligman's work in his field included $1,750 for a water obstruction and encroachment permit application, $250 for a general permit (GP-5) application, and $400 per tenth of an acre as a temporary disturbance fee.[15] (T. 150.) Beyond this, the Department provided us with no evidence regarding the penalty amount.

The cost of seeking the appropriate permits would certainly be higher when accounting for the consultant fees, including the wetland delineation and the bog turtle survey, however,

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[14] For his part, Seligman's only argument with respect to the *amount* of the civil penalty is that the Department was motivated by a desire for publicity. We do not find this allegation to be credible or supported by the record.

[15] The disturbed area encompassed .857 acres (*see* FOF 15: the disturbed area was approximately 90 feet by 415 feet, 90 x 415 = 37,350 ft.^{2} (1/43,560 ft.^{2} per acre) = .857438 acres). Rounding up to .9 acres, we believe the temporary disturbance fee would equal $3,600. This would bring the total fees for the necessary applications to $5,600. However, in its posthearing brief the Department contends that the temporary disturbance fee equals $400. *See* DEP Brief at 16. We will use the lower figure.

there is nothing in the record as to what those costs would be so we will not factor them into our base penalty. In addition, there would be costs for E&S controls and perhaps operational changes in, for example, how the stream was excavated, but again, there is no record on the amount of those costs. Therefore, we will use a base penalty of $2,400 and make adjustments accordingly based on the statutorily-prescribed factors and what we have historically evaluated as other relevant factors.

In terms of costs to the Commonwealth, this case involved considerable enforcement resources on the part of the Department at the expense of taxpayers. The Department conducted three inspections of the property, which involved multiple Department personnel. It is appropriate to account for that cost in the penalty, but here there is no record evidence of that cost. The Department did not account for the amount of time its inspectors spent on site, traveling to and from the site, or how long they spent in the office compiling reports, etc. In addition, the Department provided no evidence of the cost of prosecution of the case. Therefore, we will not assess an additional penalty amount for the costs to the Commonwealth.

In evaluating the environmental harm to the waters of the Commonwealth we note that the site was in bad shape when the Department conducted its first inspection. However, it has now been fully restored. (T. 237.) No long-term damage was shown. The stream was not diverted. The stream channel was not dredged, nor were the banks permanently altered. There was no evidence of any cultural or species damages incurred by Seligman's activities. There was no evidence of degradation regarding the water uses of Pigeon Creek and its unnamed tributary. We also note that Seligman's activities did not have any permanent detrimental impact to the function and value of the wetlands, since all three wetland indicators are still currently present and wetland vegetation was found to be growing.

When looking at intent and cooperation, Seligman did not set out to knowingly damage wetlands. His field, although obviously a wetland to trained experts, is not something that perhaps every layman would recognize as an obvious wetland. However, given the soggy nature of the field, it would have been prudent to retain a knowledgeable person to assess whether the field contained jurisdictional wetlands. Once the issue was brought to Seligman's attention, he worked to restore the site. Although his cooperation was good, it was not complete. Seligman abruptly and inexplicably stopped cooperating approximately a month after the first inspection. Nevertheless, at the end of the day, Seligman completely restored the site.

One of the other relevant factors the Board considers in determining a civil penalty is deterrence. *See Weiszer*, 2011 EHB at 391-92; *Pines at West Penn, LLC v. DEP*, 2010 EHB 412, 423, *aff'd*, 24 A.3d 1065 (Pa. Cmwlth. 2011); *DEP v. Pecora*, 2008 EHB 146, 159; *Leeward*, *supra* at 890; *DER v. Jefferson Twp.*, 1978 EHB 134, 140. Assessing a penalty that merely duplicates the cost of permit fees is not enough to disincentivize avoiding the permit process. We note, however, that this matter involves an individual, as opposed to a construction company or a developer, for instance. The general deterrence as it relates to other violators is less critical when it is an individual unknowingly committing violations on his own property.

Factoring in these considerations, especially the need to encourage persons to investigate possible wetlands and follow proper permitting procedures, we find that the violations listed in Count I warrant a penalty of $1,000 in addition to the $2,400 of permitting costs for a total penalty of $3,400. Although the assessed penalty is modest with respect to our relevant precedent, *Colombo, supra* (assessing a penalty of $9,500 against an individual for reckless violations of the Dam Safety and Encroachments Act and the Clean Streams Law that caused significant damage by dredging a stream and placing fill in its floodway and adjacent wetlands);

DEP v. Sabot, 2009 EHB 38 (upon reconsideration) (assessing a penalty of $5,000 against an individual for placing fill in 0.07 of an acre of wetlands, but recognizing the willfulness of the violator, as well as his cost savings, and the excessive enforcement costs to the Commonwealth); *Strubinger*, *supra* (assessing a penalty of $9,110 for intentional violations of the Dam Safety and Encroachments Act and the Clean Streams Law that caused damage to a High Quality Cold Water Fishery watercourse); *compare with Simmons*, *supra* (assessing a penalty of $21,000 against an individual for reckless violations of the Clean Streams Law and for 167 days of continuing violations), Seligman's low-level *scienter*, relatively quick and ultimately successful restoration, and lack of any evidence of significant harm to the waters of the Commonwealth distinguish his conduct.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 32 P.S. § 693.1; 35 P.S. § 7514.2.

2. In filing a complaint for a civil penalty, the Department bears the burden of proof. 25 Pa. Code § 1021.122(b)(1).

3. In complaints for civil penalties, the Board makes an independent determination of the appropriate penalty amount based on statutory and regulatory guidelines and relevant Board case law. *DEP v. Colombo*, 2013 EHB 635, 649 (citing *DEP v. Leeward Constr.*, 2001 EHB 870, 885, *aff'd*, 821 A.2d 145 (Pa. Cmwlth. 2003)); *DEP v. Perano*, 2011 EHB 867, 878; *DEP v. Weiszer*, 2011 EHB 358, 381; *DEP v. Kennedy*, 2007 EHB 15, 25; *Westinghouse v. DEP,* 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998).

4. The Clean Streams Law authorizes the Board to assess a penalty of up to $10,000 per day, per violation. 35 P.S. § 691.605.

5. The Dam Safety and Encroachments Act authorizes the Board to assess a penalty of up to $10,000, plus $500 per day of continuing violation. 32 P.S. § 693.21(a).

6. When assessing a civil penalty, the Board considers the willfulness of the violation, the damage to the waters of the Commonwealth, the cost of repairing the damage, the costs incurred by the Commonwealth in undertaking enforcement, the cost savings to the violator, the size of the violating facility, the volume of a polluting discharge, the deterrent effect of the penalty, and other relevant factors. 32 P.S. § 693.21(a); 35 P.S. § 691.605(a); *DEP v. Perano*, 2011 EHB 867, 878-79 (quoting *Weiszer*, 2011 EHB at 382); *Pines at West Penn, LLC v. DEP*, 2010 EHB 412, 423, *aff'd*, 24 A.3d 1065 (Pa. Cmwlth. 2011); *DEP v. Pecora*, 2008 EHB 146, 159; *DEP v. Angino*, 2007 EHB 175, 203; *Kennedy*, 2007 EHB 15, 26; *DEP v. Breslin*, 2006 EHB 130, 141-42; *DEP v. Leeward Constr.*, 2001 EHB 870, 885; *DER v. Jefferson Twp.*, 1978 EHB 134, 140.

7. Civil penalties should be no less than what it would have cost to comply with the law. *DEP v. Perano*, 2011 EHB 867, 892; *DEP v. Breslin*, 2006 EHB 130, 141 n.6; *DEP v. Leeward Constr.*, 2001 EHB 870, 910.

8. Seligman conducted earth disturbance activities in a stream, within the floodways of streams, and within a wetland without a proper permit, contrary to the Dam Safety and Encroachments Act and the Clean Streams Law. 32 P.S. § 693.6(a); 35 P.S. § 691.611.

9. Issues not raised in a party's pre-hearing memorandum may be deemed waived. *Jake v. DEP*, EHB Docket No. 2011-126-M, slip op. at 23 (Adjudication, Feb. 18, 2014); *Citizen Advocates United to Safeguard the Environment, Inc. v. DEP*, 2007 EHB 632, 677; *UMCO Energy, Inc. v. DEP*, 2006 EHB 489, 573.

10. Issues not argued in a party's posthearing brief may be deemed waived. 25 Pa. Code § 1021.131(c); *Rural Area Concerned Citizens (RACC) v. DEP*, EHB Docket No. 2012-072-M, slip op. at 21 n.1 (Adjudication, Jun. 11, 2014) (citing *Jake v. DEP*, EHB Docket No. 2011-126-M, slip op. at 10 n.3 (Adjudication, Feb. 18, 2014)); *Gadinski v. DEP*, 2013 EHB 246, 273 n.7.

11. The Department did not establish by a preponderance of the evidence that Seligman failed to implement and maintain permanent stabilization *upon completion* of his earth disturbance activities. 25 Pa. Code § 1021.122; 25 Pa. Code § 102.22.

12. Seligman's field does not meet the definition of prior converted cropland. 25 Pa. Code § 105.452; *Gunn v. U.S. Department of Agriculture*, 118 F.3d 1233 (8th Cir. 1997); *U.S. v. Hallmark Construction*, 30 F. Supp. 2d 1033 (N.D. Ill. 1998).

13. The violations of the Dam Safety and Encroachments Act and the Clean Streams Law documented by the Department warrant a civil penalty of $3,400.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2013-060-CP-L**
GERARD J. SELIGMAN	:	

ORDER

AND NOW, this 22nd day of October, 2014, it is hereby ordered that a civil penalty is assessed against Gerard J. Seligman in the amount of **$3,400**.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 22, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2014-020-CP-R**
SUNOCO LOGISTICS PARTNERS, L.P., and SUNOCO PIPELINE, L.P., Defendants	:	**Issued: October 24, 2014**

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Pennsylvania Environmental Hearing Board denies a motion for partial summary judgment that a 12,000 gallon gasoline leak is only subject to a one day violation of the Pennsylvania Clean Streams Law and supporting regulations. In order to properly address the issues involved in this Appeal a more developed factual record is required. Therefore, questions of material fact exist which cannot be decided at this time.

O P I N I O N

Presently before the Pennsylvania Environmental Hearing Board (Board) is the Motion for Partial Summary Judgment filed by the Defendants. On November 25, 2008, a discharge of approximately 12,000 gallons of gasoline occurred on a section of pipeline owned by Defendant Sunoco Pipeline, L.P. (together with Defendant Sunoco Logistics Partners, L.P. referred to as "Sunoco"), located in Westmoreland County. According to the Complaint, gasoline "rained down" and "saturated the surface and soil." Some of the gasoline entered the waters of the Commonwealth.

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http://ehb.courtapps.com

Earlier this year, the Pennsylvania Department of Environmental Protection filed a Complaint for Civil Penalties before the Board. As pointed out by the Board in *Department of Environmental Protection v. Leeward Construction, Inc.,* 2001 EHB 870, 885 our role where a complaint for penalties under the Clean Streams Law has been filed is different from our review in an appeal where the Department has assessed a civil penalty. In an appeal from a civil penalty assessment, we determine whether the underlying violations occurred, and if so, we then decide whether the amount the Department assessed is lawful, reasonable, and appropriate. Where a Complaint has been filed, as in this case, the Board must make an independent determination of the appropriate penalty amount. Indeed, the Department suggests an amount in its Complaint, but the suggestion is purely advisory. *Westinghouse v. Department of Environmental Protection,* 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998) ("*Westinghouse I*"). In determining the penalty amount, the Board considers various factors including the willfulness of the violation(s), damage or injury to the waters of the Commonwealth or their uses, costs of restoration, and other relevant factors. *Department of Environmental Protection v. Leeward Construction, Inc.*, at 886. Another relevant consideration is the deterrent value of the penalty. *Westinghouse v. Department of Environmental Protection,* 745 A.2d 1277, 1280-1281 (Pa. Cmwlth. 2000) ("*Westinghouse II*").

Sunoco, in its motion, asks the Board to hold that it is, at most, liable for civil penalties for one day of violation based on its discharge of gasoline over a one hour period. The Department strongly opposes the motion. Following the filing of briefs, the Board, *en banc*, conducted oral argument in its Pittsburgh Court Room.

A motion for summary judgment may be granted only where there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *New Hanover*

Township v. Department of Environmental Protection, 2012 EHB 440; *Bertothy v. Department of Environmental Protection,* 2007 EHB 254, 255. Summary judgment, including partial summary judgment may only be granted where the right is clear and free from doubt. *Clean Air Council v. Department of Environmental Protection and MarkWest Liberty Midstream and Resources, LLC.,* 2013 EHB 346, 352. When deciding motions for summary judgment, we must view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. *Rural Area Concerned Citizens (RACC) v. Department of Environmental Protection and Bullskin Stone & Lime, LLC.,* 2013 EHB 94, 96-97.

The various sections of the Clean Streams Law and the Department's supporting regulations are set forth in detail in the motion, response, and briefs and will not be fully set forth here. Suffice it to say that the respective statutes and regulations are nuanced. For example, Section 301 of the Clean Streams Law provides as follows:

> No person . . . shall place or permit to be placed, or discharged or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any industrial wastes, except as hereinafter provided in this act.

35 P.S. § 691.301.

In reviewing the respective arguments of the parties the only way for us to decide in Sunoco's favor would be to look at the facts in the light most favorable to Sunoco rather than the Department. Sunoco contends that it does not matter how many days, weeks, or months the gasoline moved from the soil to groundwater and/or surface water as under its version of the facts and its version of the law there is only one violation.

There are many factual issues presently undecided before the Board in this Appeal. The proper development of these facts may involve expert testimony. For example, when did the

gasoline enter the groundwater? When did the gasoline enter the surface water? Did this occur all at once or over a period of days, weeks, and months? Would this be a single violation or is the determination more involved? What is the intent of the statutes and regulations? Sunoco's legal argument focuses on gasoline being discharged from the pipeline. But is this the real legal question we should focus on or should we be focused on the migration of the gasoline to the groundwater and the surface water of the Commonwealth? Is that migration from soil to groundwater to surface water relevant in assessing civil penalties under the Clean Streams Law? If Sunoco is correct in its application of the law to the facts then why do the provisions of the Clean Streams Law discuss place, discharge, permit to flow, or as Counsel for Sunoco says discharge and "all those other verbs?" Sunoco would have us treat this matter as one unitary incident. Is that how it should be treated? We are not ready to decide this issue without development of the facts in proper context. Moreover, Sunoco's case is heavily dependent on very old Board case law which has not been reviewed in decades. We are not comfortable in making this important and far reaching legal determination on this scant record.

The issues raised in the motion for partial summary judgment are not as simple as Sunoco sets forth and they are certainly not free from doubt. Therefore, to decide these issues summarily would not be in accordance with the law. In order to properly address the complex and important issues that are raised in this Appeal, the full development of the factual issues in context is necessary and fully appropriate. *Clean Air Council,* 2013 EHB at 360.

We will therefore issue an Order consistent with this Opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2014-020-CP-R**
SUNOCO LOGISTICS PARTNERS, L.P., and SUNOCO PIPELINE, L.P., Defendants	:	

ORDER

AND NOW, this 24th day of October, 2014, following review of Sunoco's Motion for Partial Summary Judgment and the Department's Response together with the supporting Briefs and after oral argument before the entire Board, it is ordered as follows:

1) The Motion for Partial Summary Judgment is **denied.**
2) On or before **October 31, 2014,** the Parties shall file a *Joint Proposed Case Management Order* with the Board setting forth proposed discovery and other prehearing deadlines.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.

s/ Richard P. Mather, Sr
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 24, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2014-140-CP-L**
EQT PRODUCTION COMPANY	:	**Issued: October 28, 2014**

OPINION IN SUPPORT OF
ORDER DENYING MOTION FOR A STAY

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion that asked for a stay of Board proceedings pending resolution of a declaratory judgment action pending in Commonwealth Court. The declaratory judgment action is not an appropriate substitute for the Board's proceedings.

O P I N I O N

The Department of Environmental Protection (the "Department") has filed a complaint for civil penalties pursuant to Section 605 of the Clean Streams Law, 35 P.S. § 691.605, and 25 Pa. Code § 1021.71 against EQT Production Company ("EQT"). The complaint alleges that EQT has polluted and continues to pollute waters of the Commonwealth without a permit.

Under most environmental statutes, the Department assesses a civil penalty and the recipient of that assessment may file an appeal with this Board. *See, e.g.*, Section 605 of the Solid Waste Management Act, 35 P.S. § 6018.605. However, the Clean Streams Law is not like that. Under the Clean Streams Law, the Department does not assess a penalty, but instead must file a complaint before this Board asking *the Board* to assess a penalty. The Department

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http://ehb.courtapps.com

proposes a suggested penalty amount, but its suggestion is merely that: a suggestion. *DEP v. Pecora*, 2008 EHB 146, 158 (citing *DEP v. Angino*, 2007 EHB 175, 202). This Board, not the Department, determines the appropriate amount of any penalty and assesses the penalty under the Clean Streams Law.

EQT has filed a motion asking us to stay this action because it has filed a declaratory judgment action in the Commonwealth Court. The impetus for the declaratory judgment action was a letter that the Department sent in May 2014. The letter contained a settlement offer. The Department asked EQT if it would be willing to pay a civil penalty for alleged violations relating to discharges at its gas well facility in Duncan Township, Tioga County. EQT rejected the offer. EQT said that any civil penalty should be based on fewer days of violations for continuing discharges than the number of days of violations under the Department's theory. EQT not only rejected the settlement, it filed a declaratory judgment action in Commonwealth Court challenging what it understands to be the legal theory underlying the Department's settlement proposal. Perhaps in recognition of the fact that it may be difficult to seek a declaratory judgment from a Departmental theory espoused in nothing more than a settlement offer, EQT also referred the Commonwealth Court to the Department's position as expressed in opposition to a summary judgment motion that was filed in an unrelated case currently pending before the Board, *DEP v. Sunoco Logistics Partners, L.P.*, EHB Docket No. 2014-020-CP-R.

Now that the Department has filed a complaint against EQT, EQT says that the complaint, the settlement offer, and the Department's response to a summary judgment motion in *Sunoco Logistics* are all based on the same flawed legal theory. EQT would prefer that we skip resolution of the theory in this case and have the theory resolved in the context of its declaratory judgment action instead. It argues that addressing the legal issue in this proceeding would

essentially be a waste of time because, whatever the Environmental Hearing Board decides in this case and/or the *Sunoco Logistics* matter, our ruling will eventually be appealed to the Commonwealth Court anyway. Therefore, it asks us to stay this proceeding until the Commonwealth Court rules on the legal issue.

The Department opposes the motion for a stay. It tells us that it has filed preliminary objections in EQT's declaratory judgment action asking that the case be dismissed. It says that a stay in our case would be pointless because the declaratory judgment action is likely to be dismissed because of, among other things, EQT's failure to exhaust administrative remedies. It says that EQT's declaratory judgment action is an inappropriate attempt at forum shopping. It says that EQT should not be allowed to evade Board review by manipulating the appropriate processes with an attempt at a preemptory strike in Commonwealth Court. It adds that waiting for the Commonwealth Court to rule on only one aspect of this case will not materially advance the proceedings because there are numerous others factual and legal issues that will ultimately play a part in this Board's calculation of a civil penalty. Because the motion for a stay is based entirely on the fact that a declaratory judgment action is pending in the Commonwealth Court and that action is likely to be dismissed or at most address one issue of many in this case, the Department asks that we deny the motion and allow this case to move forward.

The Board has a duty to resolve cases in a timely fashion. *Pa. Game Comm'n v. DEP*, 2013 EHB 478, 483. Although the Code of Judicial Conduct does not apply to us (*see* 207 Pa. Code Ch. 33, Canons, Application at Paragraph (2)), it nevertheless sets forth a set of worthy goals that we strive to emulate. Rule 2.5 of the Code provides that judges should perform their duties with competence and diligence. Comment (4) to the Rule says, "In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be

heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs."

A "dilatory practice" is one that causes or tends to cause delay and is meant to gain time or defer action. *See* WEBSTER'S NEW WORLD DICTIONARY (2d Coll. ed.). The term has a negative connotation, which suggests that the dilatory practices that should be reduced or eliminated are delays that have not been agreed to, are not based on solid grounds, or are not otherwise in the public interest. A request for a stay by its very nature tends to be a dilatory practice. Therefore, we have traditionally viewed a stay of proceedings as "an extraordinary measure that should only be granted for compelling reasons." *Pa. Game Comm'n*, 2013 EHB at 480; *Ziviello v. DEP*, 1998 EHB 1138, 1139; *Valley Forge Chapter of Trout Unlimited v. DEP*, 1997 EHB 925, 930.

If all of the parties in a case agree to a stay, and granting a stay will not delay a previously scheduled hearing, we will be more amenable to such a request. On the other hand, where, as here, at least one party is opposed to delay, a stay is less likely to be granted. *Pa. Game Comm'n*, 2013 EHB at 482; *Borough of Danville v. DEP*, 2008 EHB 399, 404. *See generally* Code of Judicial Conduct, Rule 2.6 ("A judge shall accord to every person or entity who has a legal interest in a proceeding, or that person or entity's lawyer, the right to be heard according to the law.") At a minimum, if a request is opposed by at least one party, we need to take a harder look at the request and consider whether, notwithstanding one party's desire to be heard, it is likely to be more efficient in the long run to grant the stay.

We are not infrequently asked to stay our proceedings because of some allegedly related litigation in some other forum. "We are ordinarily hesitant to stay appeals contingent on

litigation in related cases absent a strong legal or policy reason." *Pa. Game Comm'n*, 2013 EHB at 482. "We have sometimes held that the Environmental Hearing Board will be receptive to staying our proceedings in deference to related civil litigation where it is clear that the related litigation will effectively resolve our case *one way or the other*." *Stout v. DEP*, 2007 EHB 482, 491 (emphasis in original). *See also Lower Paxton Twp. Auth. v. DEP*, 1995 EHB 290, 292. The pendency of related litigation may also support a stay if it involves some issue that is clearly beyond this Board's jurisdiction, such as an ownership dispute over mining rights, but even in those situations it will often make more sense to proceed on parallel fronts at the same time. *See, e.g., Rausch Creek Land, LP v. DEP*, 2013 EHB 587. Staying Board proceedings will never be viewed as automatic.

In *Sechan Limestone Industries, Inc. v. DEP*, 2004 EHB 185, the Department denied an application for a landfill permit based on the applicant's failure to satisfy the harms/benefits test described in 25 Pa. Code § 287.127(c). The applicant/appellant and the Department moved for a stay, which was opposed by citizens' groups that had intervened on the side of the Department. The motion was based on the fact that the Pennsylvania Supreme Court had already accepted review of the validity of the harms/benefits test in another case. Because the two main parties in the case agreed to a stay, the only parties opposed to the stay were intervenors, and it was certain that the Supreme Court was going to address what would unquestionably be the major focus and deciding factor in our case, we stayed the appeal. 2004 EHB at 187. We also noted the absence of serious harm to the objecting intervenors because the permit in question had been denied.

The appropriate administrative and appellate process in the proper sequence is what led to the Supreme Court review referenced in *Sechan Limestone*. Here, in contrast, EQT is attempting an end run around that process. Here, unlike in *Sechan Limestone*, it is not at all

certain that the Commonwealth Court will ever reach the merits in EQT's declaratory judgment action. Quite to the contrary, we agree with the Department that the Court is unlikely to reach the merits, which means that a delay of this case would be pointless. We think the Department is likely correct because, first, we find it very hard to believe that a Departmental legal theory as purportedly reflected in nothing more than a settlement offer is an appropriate foundation for a declaratory judgment action. The Department's legal position in response to a summary judgment motion in an unrelated case also does not seem like an appropriate basis for bolstering a request that the Commonwealth Court declare the Department's settlement offer invalid in EQT's case.

Secondly, EQT's effort to, in the Department's words, "manipulate[] the circumstances...by initiating parallel litigation" appears to us to be irreconcilable with the fact that this Board has exclusive jurisdiction over the Department's complaint. 35 P.S. § 7514; 35 P.S. § 691.605. *See also Faldowski v. Eighty Four Mining Co.*, 725 A.2d 843 (Pa. Cmwlth. 1998); *Burnham Coal Co. v. PBS Coals, Inc.*, 442 A.2d 3 (Pa. Cmwlth. 1982), *aff'd*, 451 A.2d 443 (Pa. 1982). It also appears to be entirely at odds with the rule requiring the administrative process to run its course. The rule regarding the exhaustion of administrative remedies provides that a party may not forego an adequate and available administrative process in favor of seeking judicial relief. *SEPTA v. City of Phila.*, No. 20 EAP 2013, 2014 Pa. LEXIS 2510 at *25 (Pa. Sep. 24, 2014); *Bayada Nurses, Inc. v. Dep't of Labor & Indus.*, 8 A.3d 866 (Pa. 2010). "[A]n unjustified failure to follow the administrative scheme undercuts the rationale upon which the administrative process is founded; that the technical nature of the subject and the ability of a statutorily created administrative tribunal expert in environmental litigation matters is sufficient to displace preliminary court action." *Stout*, 2007 EHB at 487 (citing *Texas Keystone, Inc. v.*

Dep't of Conservation and Natural Res., 851 A.2d 228, 234-35, 239 n.16 (Pa. Cmwlth. 2004)). Where a statutory remedy exists, it is to be preferred over remedies that exist in equity and at common law. 1 Pa.C.S. § 1504; *Danville*, 2008 EHB at 405. "This is particularly true within the context of proceedings before a quasi-judicial administrative agency." *Danville*, 2008 EHB at 405 (citing *Nagle v. Pa. Ins. Dep't*, 406 A.2d 1229, 1237 (Pa. Cmwlth. 1979)).

Although an exception from the duty to exhaust administrative remedies exists for cases in which a litigant makes a purely legal challenge to an agency's jurisdiction, *City of Phila., supra*, 2014 Pa. LEXIS 2510 at *25-26; *Empire Sanitary Landfill, Inc. v. Dep't of Envtl. Res.*, 684 A.2d 1047, 1054 (Pa. 1996), EQT's declaratory judgment action does not involve a challenge to this Board's jurisdiction. Preenforcement review of a new regulation is appropriate in some cases, *Borough of Bedford v. Cmwlth.*, 972 A.2d 53, 58 n.5 (Pa. Cmwlth. 2009); *Home Builders Ass'n v. Dep't of Envtl. Prot.*, 828 A.2d 446, 452 n.6 (Pa. Cmwlth. 2003), but EQT's declaratory judgment action does not involve a challenge to a new regulation.

In point of fact, this case is precisely the sort of case that is the *raison d'être* for the Environmental Hearing Board. It involves precisely the sort of legal and factual issues that we are designed to address. The issues are well within our technical and legal expertise. We cannot imagine why it would be appropriate to disregard the process that we afford.

Whether viewed as a lack of standing or absence of ripeness, it also appears to us that EQT's declaratory judgment action is premature because simply filing a complaint asking for civil penalties, let alone making a settlement offer (which is the actual basis for EQT's action), does not amount to aggrievement. *Empire Coal Mining & Dev., Inc. v. Dep't of Envtl. Res.*, 623 A.2d 897, 900 (Pa. Cmwlth. 1993) (the mere possibility of a future adverse judicial ruling is not sufficient to establish an immediate injury for purposes of standing). *See also Cmwlth. v.*

Donahue, No. 10 MAP 2013, 2014 Pa. LEXIS 2089 (Pa. Aug. 18, 2014) (plaintiff seeking declaratory judgment must have standing); *Empire Sanitary Landfill, supra* (declaratory judgment action must be ripe for review). EQT was free to reject the Department's settlement offer, and it is not required to change its conduct in any way pending resolution of the Department's civil penalty complaint. There is no other immediate effect upon EQT's status, legal rights, or responsibilities.

Contrast *Donahue*, *supra*, in which the Office of Open Records made an official, formal pronouncement of policy that was said to be immediately binding upon all Commonwealth agencies. Given the immediate impact of the pronouncement, the Supreme Court held that a declaratory judgment action was appropriate. *Id.*, 2014 Pa. LEXIS 2089 at *28. *Donahue* involved an announcement of official binding policy following Office of Open Records procedures, not the Governor's litigation position in the proceedings that led up to the announcement. Yet, that is what EQT is trying here. In this matter, the Department has expressed a litigation position and nothing more. Its view of the law as previously expressed in a settlement offer and now in a complaint is not binding on anybody. Its argument relates to only one aspect or component of this Board's authority to assess civil penalties under the Clean Streams Law. This Board has yet to act on that argument.

The rule requiring administrative remedies to be exhausted is actually not a perfect fit here because that rule presupposes that the government has taken some action that affects someone's rights, and relief from that action is sought. For example, the majority of this Board's cases involve an appeal from an action of the Department. The availability of an appeal to this Board is the "administrative remedy" that must be "exhausted" before the recipient of the Department's action can go to the Commonwealth Court. In this matter, however, it is this

Board that assesses the civil penalty. The only thing that the Department has done so far is ask us to assess a penalty. The Department has among other things asked us to assess daily penalties for continuing violations, but we may or may not assess such penalties for any number of reasons, only one of which is whether such penalties are legally assessable under the law. The point is that nothing other than a Departmental request for action has happened yet, so immediate Court action is even less appropriate in this case than in a case where the government acts and administrative review procedures have been established but not followed.

We think it would be a mistake to attempt to address EQT's abstract argument divorced as it is from any relevant facts. *Dep't of Envtl. Res. v. Bethlehem Steel Corp.*, 367 A.2d 222, 230 n.28 (Pa. 1977) (courts are not to intervene, under the ripeness doctrine, when the challenged administrative action is "abstract, hypothetical, or remote.") *Cf. Clean Air Council v. DEP*, 2013 EHB 346, 360 ("In order to properly address the complex issues that are involved in this appeal, cross examination and the development of factual issues in context are often necessary in order to ensure due process."). Although factual development in this case is barely in its infancy, EQT's position appears to be that it may only be penalized on days when there is an "actual discharge." The first problem with the attempt to frame the issue in this abstract, generic way is that the pertinent legal provisions do not refer to "actual discharges," so it is not clear why we would focus our attention in this way. For example, Section 301 of the Clean Streams Law does not refer to "actual discharges;" rather, it creates a prohibition against the following activities without a permit:

- Placing industrial waste into waters of the Commonwealth
- Permitting the placement of industrial waste into waters of the Commonwealth
- Discharging industrial waste into waters of the Commonwealth

- Permitting industrial waste to flow into the waters of the Commonwealth
- Continuing to discharge industrial waste into the waters of the Commonwealth
- Continuing to permit industrial waste to flow into the waters of the Commonwealth

35 P.S. § 691.301. If the law refers to a list of different activities, we see no point in allowing a stay while only one of those activities—at best—is the subject of the Commonwealth Court.

Perhaps more importantly, it is impossible to address EQT's issue in a vacuum, divorced as it is from the reality of individual factual circumstances. For example, EQT's position seems to be that "actual discharges" only occurred when contaminants crossed the liner of its impoundment and entered the environment outside of the impoundment. It is not clear why that moment in time should matter because it is the waters of the Commonwealth that are the focus of the Clean Streams Law, not the exit from some confined source. *Cmwlth. v. Harmar Coal Co.*, 306 A.2d 308 (Pa. 1973). If pollutants never enter the waters of the Commonwealth, at least the term "discharge" does not appear to be implicated, so EQT appears to be asking the wrong question.

EQT characterizes the Department's position to be that penalties may be assessed for each day there is "passive migration of material in the environment." This has the same problems as EQT's "actual discharge" characterization, and then some. We have no idea at this point what the Department's view is on the many possible facets of this issue, and we have no reason to simply accept EQT's characterization thereof. Even the Department's presentation on the issue at oral argument in the *Sunoco Logistics* case was not entirely clear or cohesive. "Passive migration" is a concept that most often appears in the context of federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) litigation. However, "passive migration" is not a term that appears anywhere in Pennsylvania's statutes or regulations

to our knowledge. "Passive migration" seems different than entry into waters of the Commonwealth. If the leaked contaminants only entered the soil at first, but then washed into the groundwater, is that the "actual discharge" or "passive migration," or neither? If the contaminants travel through the groundwater but then emerge on the surface or become part of the baseflow of surface water, is that a distinct "actual discharge"? Would it not be better to have some understanding of the facts before attempting to address the many possible variants of the legal question in an artificially created vacuum? We think it obviously would be.

Furthermore, any ruling that we make in this case may or may not implicate EQT's issue, vague as it is. *See Larry Pitt & Assocs., P.C. v. Butler* 785 A.2d 1092, 1099 (Pa. 2001) (litigants not allowed to circumvent the administrative process where the litigant can achieve full relief in front of the agency, but the relief may be granted on bases different from those advocated by the litigant). *See also Cnty. of Berks ex. rel Baldwin v. Pa. Labor Relations Bd.*, 678 A.2d 355, 360 (Pa. 1996) (proper inquiry is whether party can obtain an adequate remedy, not whether it can obtain an adequate remedy via disposition of particular issues; even though constitutional issue was beyond power of administrative agency, issue could be rendered moot if relief granted on other grounds); *Empire Sanitary Landfill*, 684 A.2d at 1054 (same); *Dep't of Pub. Welfare v. Eisenberg*, 454 A.2d 513, 515 n.9 (Pa. 1982) (same).

For very similar reasons, a few days ago we refused to resolve similar issues in the context of a motion for summary judgment in *Sunoco Logistics*. That case and this one involve very different facts, but they appear to involve a similar issue regarding the number of days of an allegedly continuing situation. There, as here, the defendant sought to avoid the development of a factual record and instead have us decide one abstract legal issue generically. There, as here, we were not receptive to the strategy. Our recent opinion there is worth quoting at length here:

The various sections of the Clean Streams Law and the Department's supporting regulations are set forth in detail in the motion, response, and briefs and will not be fully set forth here. Suffice it to say that the respective statutes and regulations are nuanced. For example, Section 301 of the Clean Streams Law provides as follows:

> No person . . . shall place or permit to be placed, or discharged or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any industrial wastes, except as hereinafter provided in this act.

35 P.S. § 691.301.

In reviewing the respective arguments of the parties the only way for us to decide in Sunoco's favor would be to look at the facts in the light most favorable to Sunoco rather than the Department. Sunoco contends that it does not matter how many days, weeks, or months the gasoline moved from the soil to groundwater and/or surface water as under its version of the facts and its version of the law there is only one violation.

There are many factual issues presently undecided before the Board in this Appeal. The proper development of these facts may involve expert testimony. For example, when did the gasoline enter the groundwater? When did the gasoline enter the surface water? Did this occur all at once or over a period of days, weeks, and months? Would this be a single violation or is the determination more involved? What is the intent of the statutes and regulations? Sunoco's legal argument focuses on gasoline being discharged from the pipeline. But is this the real legal question we should focus on or should we be focused on the migration of the gasoline to the groundwater and the surface water of the Commonwealth? Is that migration from soil to groundwater to surface water relevant in assessing civil penalties under the Clean Streams Law? If Sunoco is correct in its application of the law to the facts then why do the provisions of the Clean Streams Law discuss place, discharge, permit to flow, or as Counsel for Sunoco says discharge and "all those other verbs?" Sunoco would have us treat this matter as one unitary incident. Is that how it should be treated? We are not ready to decide this issue without development of the facts in proper context. Moreover, Sunoco's case is heavily dependent on very old Board case law which has not been reviewed in decades. We are not comfortable in making this important and far reaching legal determination on this scant record.

> The issues raised in the motion for partial summary judgment are not as simple as Sunoco sets forth and they are certainly not free from doubt. Therefore, to decide these issues summarily would not be in accordance with the law. In order to properly address the complex and important issues that are raised in this Appeal, the full development of the factual issues in context is necessary and fully appropriate.

DEP v. Sunoco Logistics Partners, L.P., EHB Docket No. 2014-020-CP-R, slip op. at 3-4 (Opinion and Order issued Oct. 24, 2014).

To be clear, it is not our place to decide whether the Commonwealth Court *should* allow the declaratory judgment action to proceed. Rather, our immediate task is to decide whether we should halt proceedings in our case because the Court *might* allow the declaratory judgment action to proceed. That is the only reason that we are trying to predict how the Court will act. Since we strongly suspect that the declaratory judgment action will not proceed, we see no value in delaying the inevitable.

Even if the declaratory judgment action goes forward, that action cannot possibly resolve how EQT's abstract legal question applies to the facts at hand. Those facts have not been developed. There is significant value and efficiency in allowing that factual development to commence through discovery and otherwise because that factual development will eventually be needed one way or the other.

Addressing EQT's theory regarding the number of days of violation relating to a continuing discharge would not even resolve all of the legal issues that are bound to arise in this case. It is only one issue in what is likely to be a complex case that involves many issues. As the Department correctly points out, "the interests of the parties, the public, and the development of this area of the law are best served by developing a complete factual record which takes into consideration *all* of the relevant legal issues." (emphasis added). Deciding one issue in the

abstract and in isolation seems to us to be the exactly the type of piecemeal litigation that we strive to avoid in all cases.

EQT says that granting a stay will avoid the potential for inconsistent decisions on a common legal issue. It does not explain how this potential for an inconsistency arises. This is not a case where one new regulation affects an entire industry, *Arsenal Coal, Co. v. Dep't of Envtl. Res.*, 477 A.2d 1333 (Pa. 1984), or a multitude of permits, *Borough of Bedford, supra.* As far as we know there are only two cases pending before this Board that involve this issue. The Board acts collectively, so there is no real threat of inconsistent rulings.

EQT says a stay would be in the public interest. We do not see how the public interest is served by delaying these proceedings. EQT's approach of singling out one abstract legal issue for initial decision at the appellant level without any consideration of the law let alone the facts at the trial level strikes us as a very inefficient way to go about things, which is hardly in the public interest. Rather, the public interest would best be served by proceeding toward an adjudication of the dispute as expeditiously as possible without unnecessary delays and distractions. A stay would inevitably postpone the time when EQT would have to pay any penalty that is ultimately imposed, which may be in its interest, but it is not clear how that is in the public interest. Furthermore, if the Department is to be believed, violations may be continuing and penalties may be continuing to accrue, so getting this case resolved would seem to be in everybody's interest.

For all of these reasons, a stay in our case is not warranted due to the pendency of EQT's declaratory judgment action in the Commonwealth Court. That is why we issued our Order denying the motion to stay on October 21, 2014.

ENVIRONMENTAL HEARING BOARD

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

DATED: October 28, 2014

c: **DEP, General Law Division:**
Attention: April Hain
9th Floor, RCSOB

For the Commonwealth of PA, DEP:
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Office of Chief Counsel – Northcentral Region

For Defendant:
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2014-140-CP-L**
EQT PRODUCTION COMPANY	:	

ORDER

AND NOW, this 21st day of October, 2014, it is hereby ordered as follows:

1. EQT Production Company's motion for a stay is **denied**.

2. EQT Production Company's motion to defer the deadline to answer the complaint is **granted**. EQT shall file its answer on or before **November 20, 2014**.

ENVIRONMENTAL HEARING BOARD

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

Dated: October 21, 2014

c: **For the Commonwealth of PA, DEP:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

L.A.G. WRECKING, INC.	:	
	:	
v.	:	**EHB Docket No. 2014-126-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 31, 2014**

OPINION AND ORDER ON
MOTION FOR LEAVE TO WITHDRAW APPEARANCE

By Michelle A. Coleman, Judge

Synopsis

The Board grants a motion for leave to withdraw the appearance of counsel for a corporate appellant. Counsel's representation of his client presents a potential conflict of interest and withdrawal will not prejudice the litigants, delay the resolution in the case, or impede the efficient administration of justice. The corporate appellant shall obtain new counsel.

OPINION

This matter involves L.A.G. Wrecking, Inc.'s ("L.A.G. Wrecking's") appeal from an administrative order of the Department of Environmental Protection (the "Department") dated August 13, 2014. The Department alleges in its order, among other things, that L.A.G. Wrecking is the owner of a deteriorating bridge spanning the Susquehanna River between the boroughs of Duryea and Exeter in Luzerne County and that the condition of the bridge violates various provisions of the Department's regulations at 25 Pa. Code Chapter 105, as well as the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 – 693.27. On September 10, 2014, Michael Sklarosky, Esquire, counsel for L.A.G. Wrecking, filed an appeal of that order with the Board

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contesting the Department's allegations as arbitrary and capricious and not supported by evidence.

Approximately a month later, on October 14, 2014, Attorney Sklarosky filed a Motion for Leave to Withdraw Appearance pursuant to 25 Pa. Code § 1021.23 seeking leave to withdraw as counsel for L.A.G. Wrecking and requesting a 30-day extension with respect to all existing deadlines in this matter. The motion states that Ms. Pilar Glodzik is the president of L.A.G. Wrecking. The motion then states that Sklarosky's office, the Law Office of Joseph F. Sklarosky, Sr., represented Ms. Glodzik's brother, Leo Glodzik, III, in a Luzerne County Court of Common Pleas action in May 2014 in connection with theft charges and that the office is planning to represent Mr. Glodzik in an upcoming proceeding in federal court in connection with several criminal charges, including bank fraud. The motion notes that Ms. Glodzik has retained her own counsel in regard to the federal charges against her brother. Because of the potential conflicts that may arise in the law office while representing Mr. Glodzik in the federal matter and Ms. Glodzik in the appeal before the Board, Sklarosky requests that we grant his motion.

The Board held a conference call on October 24, 2014 with Mr. Sklarosky and counsel for the Department. Later that day in a letter filed with the Board, the Department memorialized the position it expressed during the conference call. The Department does not object to Sklarosky's withdrawal or the representations Sklarosky makes within the motion regarding the potential conflict of interest. The Department states that no discovery has yet been conducted in the matter and it does not believe that any party would be prejudiced by the withdrawal at this early stage in the proceedings. The Department also notes that, pursuant to our rules, corporations must be represented by counsel in proceedings before the Board. 25 Pa. Code § 1021.21(b).

In ruling on a motion for leave to withdraw an appearance in a circumstance that will leave a party unrepresented, the Board considers "the reasons why withdrawal is requested; any prejudice withdrawal may cause to the litigants; delay in resolution of the case which would result from withdrawal; and the effect of withdrawal on the efficient administration of justice." 25 Pa. Code § 1021.23(b); *Mann Realty Assocs., Inc. v. DEP*, EHB Docket No. 2013-153-M, slip op. at 4 (Opinion and Order issued Sep. 8, 2014); *Manning v. DEP*, 2013 EHB 845, 847. For the reasons set forth below, and in consideration of the Pennsylvania Rules of Professional Conduct, we believe withdrawal is appropriate here.

Under the Rules of Professional Conduct, a lawyer is generally precluded from representing a client if that representation presents a conflict of interest between clients:

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Pa.R.P.C. 1.7(a). Comment 1 to Rule 1.7 underscores the importance of attorneys avoiding conflicts of interest: "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests."

Based on the assertions of Mr. Sklarosky, we believe that there is a significant risk that the representation of L.A.G. Wrecking, with Ms. Glodzik as president, may be materially limited by the law office's responsibilities to Mr. Glodzik. Since Ms. Glodzik has obtained different

counsel in the federal action, it is not difficult to imagine that a circumstance may arise in which the interests of Ms. Glodzik and Mr. Glodzik do not align, which may then have a collateral impact on Mr. Sklarosky's representation of L.A.G. Wrecking in this matter. Although it is possible that any conflict of interest could be avoided through the informed consent of the clients (*see* Pa.R.P.C. 1.7(b)(4)), this Board, as a non-disciplinary body, is not in the position to determine whether or not that is a viable or desirable option under the Rules of Professional Conduct. In this instance, it is enough that counsel has represented that he thinks a conflict of interest is likely to arise, or currently exists, and he is taking proactive measures in an effort to avoid any adverse effect on his clients due to such a conflict.

With that in mind, Rule 1.16(b), governing declining or terminating representation, states that a lawyer may withdraw from representing a client if "withdrawal can be accomplished without material adverse effect on the interests of the client." Pa.R.P.C. 1.16(b)(1). Because of the early stage of the proceedings in this matter, and the fact that no discovery has been conducted so far, we believe that withdrawal can be accomplished without an adverse effect on the interests of L.A.G. Wrecking. In addition, we believe that withdrawal at this early stage in the proceedings will not prejudice the litigants, delay the resolution of the matter, or impede the efficient administration of justice. 25 Pa. Code § 1021.23(b).

While we are permitting Attorney Sklarosky to withdraw from this matter, we remind him of his responsibility to L.A.G. Wrecking in ending representation:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Pa.R.P.C. 1.16(d). Despite Sklarosky's withdrawal, our Rules require that corporations be represented by counsel at all stages of the proceedings subsequent to the filing of a notice of appeal. 25 Pa. Code § 1021.21. We are cognizant that obtaining new counsel will take time. Therefore, we will stay this matter for 30 days to provide L.A.G. Wrecking with an opportunity to obtain new counsel and have that person enter a notice of appearance.

The motion before us also requests a 30-day extension of all existing deadlines. The Department does not object to this. Since we are staying this matter for 30 days, we will set new pre-hearing deadlines upon the expiration of the stay. In addition, we note that if L.A.G. Wrecking's new attorney prefers to pursue a legal strategy that differs from the one outlined by Mr. Sklarosky in L.A.G. Wrecking's Notice of Appeal, that attorney may request leave to amend the Notice of Appeal to refine and/or add objections. *See* 25 Pa. Code § 1021.53; *Mann Realty, supra* at 5.

Finally, 25 Pa. Code § 1021.23(c) provides that withdrawing counsel shall provide the Board with a single contact person in the event that a party is left unrepresented before the Board. Sklarosky's motion provides the address of L.A.G. Wrecking and the name of Pilar Glodzik. Until such time as new counsel enters an appearance on behalf of L.A.G. Wrecking, future service shall be provided directly to L.A.G. Wrecking, Inc., care of Pilar Glodzik, at 83 Foote Ave., Duryea, PA 18642.

For the reasons discussed above, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

L.A.G. WRECKING, INC.	:	
	:	
v.	:	**EHB Docket No. 2014-126-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 31st day of October, 2014, upon consideration of counsel for the appellant's Motion for Leave to Withdraw Appearance, it is hereby ordered that the motion is **granted**. It is further ordered that this matter is **stayed** until **December 1, 2014** while L.A.G. Wrecking, Inc. obtains new counsel. Counsel shall enter an appearance on behalf of L.A.G. Wrecking, Inc. on or before **December 1, 2014**.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: October 31, 2014

c: **DEP, General Law Division:**
Attention: April Hain
9th Floor, RCSOB

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Office of Chief Counsel – Northeast Region

For Appellant:
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Forty Fort, PA 18704

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NATIONAL FUEL GAS MIDSTREAM CORPORATION, NFG MIDSTREAM MT. JEWETT, LLC AND SENECA RESOURCES CORPORATION	:	
v.	:	**EHB Docket No. 2013-123-B (Consolidated with 2013-124-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 31, 2014**

OPINION AND ORDER ON APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION FOR PARTIAL SUMMARY JUDGMENT

By Steven C. Beckman, Judge

Synopsis

The Board denies Appellants' motion for summary judgment where the right is not clear and free from doubt. The Board also finds disputes of material fact that can be resolved only upon a fully developed factual record.

OPINION

Introduction

On August 21, 2013, National Fuel Gas Midstream Corporation and NFG Midstream Mt. Jewett, LLC (collectively, "NFG Midstream") and Seneca Resources Corporation ("Seneca") filed separate appeals from the Department of Environmental Protection's ("Department") July 22, 2013 determination that air emission sources at NFG Midstream's Mt. Jewett Interconnect facility and Seneca's Mt. Jewett Pad G Gas Compressor Station would be treated as a single source for air permitting purposes including Prevention of Significant Deterioration ("PSD"), Non-attainment New Source Review ("NSR") and Title V. This Board consolidated the two appeals on May 1, 2014. NFG Midstream filed a motion for summary judgment on

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August 26, 2014.[1] The Department filed its response to the motion on September 25, 2014, and NFG Midstream filed its reply on October 13, 2014. For the reasons set forth in this Opinion below, we deny NFG Midstream's motion and allow these consolidated matters to proceed.

Standard of Review

The Board may grant a motion for summary judgment if the record indicates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lexington Land Developers Corp. v. DEP*, EHB Docket No. 2013-109-M, slip op. at 2 (Opinion and Order issued Oct. 10, 2014). Summary judgment, including partial summary judgment, may only be granted in cases where the right to summary judgment is clear and free from doubt. *Clean Air Council v. DEP and MarkWest Liberty Midstream and Resources, LLC.*, 2013 EHB 346, 352. In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party, and resolves all doubt as to the existence of a genuine issue of material fact against the moving party. *Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81. The record on which the Board decides a summary judgment motion consists of any pleadings, as well as discovery responses, depositions, affidavits, and other documents accompanying the motion or response labeled as exhibits. *See* 25 Pa. Code § 1021.94a(a), (h); Pa.R.C.P. 1035.1.

Background

Seneca explores for and produces natural gas. NFG Midstream operates natural gas processing and pipeline gathering facilities. On or about April 19, 2013, NFG Midstream applied to the Department for coverage under the Pennsylvania General Plan Approval and/or General Operating Permit for Natural Gas Compression and/or Processing Facilities ("GP-5" or "General

[1] Seneca did not join in NFG Midstream's motion or file its own motion for summary judgment.

Permit 5") for the construction and operation of a natural gas interconnect ("Mt. Jewett Interconnect") facility in Jones Township, Elk County. During approximately the same time frame, Seneca filed with the Department an application for coverage under GP-5 to authorize the construction and operation of a compressor engine, three produced water tanks, and three natural gas processing units at its existing well pad in Wetmore Township, McKean County ("Well Pad G").

General Permit 5 authorizes the construction, modification, and/or operation of certain natural gas compression and/or gas processing facilities. DEP Ex. 1, § A(3). GP-5 defines "natural gas compression and/or processing facility" as: "A facility that produces, compresses and/or processes natural gas, coal bed methane, or gob gas starting with gas dehydration, compression, fractionation, and storage." DEP Ex. 1, § A(2). However, GP-5 may not be used for the construction, modification, or operation of certain air contamination sources, such as those sources subject to permitting requirements specified in 25 Pa. Code Chapter 127, Subchapters D, E, F and G (relating to Prevention of Significant Deterioration, Nonattainment New Source Review, and Title V, respectively). DEP Ex. 1, § A(4)(b).

In a letter to NFG Midstream dated July 22, 2013, the Department authorized the operation of certain machinery including an emergency generator, a natural gas dehydrator, and other associated equipment at the Mt. Jewett Interconnect under General Permit 5. In a second letter dated July 22, 2013, the Department authorized Seneca to install and operate the additional equipment associated with its existing well pad operations ("Pad G Compressor Station"). However, as part of its review of NFG Midstream's and Seneca's GP-5 applications, the Department conducted a Single Source Determination and Aggregation Analysis to determine whether sources at the Mt. Jewett Interconnect and the Pad G Compressor Station should be

aggregated for air quality permitting purposes, including PSD, Nonattainment NSR, and the Title V permitting programs. Following its review, the Department determined that the air emissions sources at the Mt. Jewett Interconnect and the Pad G Compressor Station should be aggregated and treated as a single source. In support of its determination, the Department concluded that:

> Seneca Resources' *Mt. Jewett Pad G Compressor Station* facility and NFG Midstream Mt. Jewett's *Mt. Jewett Interconnect* facility:
>
> 1. are considered by the Department to have a support relationship and any difference in SIC code is irrelevant;
> 2. are on one property;
> 3. have a support facility relationship and contractual / financial agreements which establish common control, although they do not meet the definition of "control" as provided by the Securities and Exchange Commission; and
> 4. function together to create a single common product meeting the "common sense notion of a plant".

NFG Ex. B, p. 2; *see also Seneca Resources Corporation v. DEP*, EHB 2013-124-B, Docket No. 2 (Notice of Appeal), Attachment B, pp. 1–2. NFG Midstream's appeal is from the Department's determination as set forth in the July 22, 2013 letter.

Discussion

The fundamental question in these consolidated matters is whether the Department properly determined that the sources at the Mt. Jewett Interconnect and the Pad G Compressor Station that were the subjects of separate GP- 5 applications should be treated as a single source for air permitting purposes such as PSD, Nonattainment NSR, and Title V programs. NFG Midstream and the Department agree that the air emissions from the two distinct sources in this matter may be aggregated and treated as a single source only if they satisfy all three of the following regulatory criteria:

1. the sources are located on one or more contiguous or adjacent properties;
2. the sources are under the common control of the same person (or persons under common control); and

3. the sources belong to the same major industrial grouping.[2]

See NFG Br, p. 1; DEP Br., p. 7. These regulatory criteria are derived from the definitions of "facility", "Title V facility", "stationary source" and "building, structure, facility, or installation" found in the Department's regulations. *See, e.g.*, 25 Pa. Code §§ 121.1, 127.83. Further, in conjunction with the three regulatory criteria set forth above, the Department also looks to whether the two sources fit the "common sense notion of a plant" as part of its aggregation analysis.

NFG Midstream argues in its Brief in Support of Motion for Summary Judgment that it is entitled to summary judgment for a number of reasons. Its primary argument is that the two sources do not satisfy two of the three regulatory criteria required to find that these sources can be treated as one single source because the Mt. Jewett Interconnect and the Pad G Compressor Station are not on contiguous or adjacent properties and do not belong to the same major industrial grouping (i.e. they have different two digit SIC codes). Additionally, NFG Midstream argues that, even if the regulatory criteria are satisfied, as a matter of law, the Mt. Jewett Interconnect and the Pad G Compressor Station do not fit the common sense notion of a plant, and therefore cannot be considered a single source for air permitting purposes. Finally, in the alternative, NFG seeks partial summary judgment that "the mere existence of a contractual relationship between two entities" cannot, by itself, support a finding of "common control" between the Mt. Jewett Interconnect and the Pad G Compressor Station.

The Department, in response, argues that the two regulatory criteria for aggregation disputed by NFG Midstream were met in this case, or, in the alternative, that there are issues of material fact regarding those two criteria such that summary judgment should be denied. In

[2] The Board recognizes that the NSR regulations do not require distinct sources to belong to the same major industrial grouping. *See* 25 Pa. Code § 121.1 (definition of "facility").

support of its position, the Department first asserts that because the Mt. Jewett Interconnect and the Pad G Compressor Station are located on one parcel of property owned by Collins Pine Company, the Department correctly determined that the sources satisfy the requirement that they be located on "one or more contiguous or adjacent properties." The Department argues in the alternative that there is a dispute of material fact whether Midstream's characterization of the sources' boundaries is sufficient to find that the properties are not contiguous or adjacent. The Department also argues, as noted above, that there is a dispute of material fact regarding the proper SIC Code for the NFG Midstream Interconnect facility. NFG Midstream asserts that the proper SIC Code is 4922. The Department contends that this is not correct and the proper major industrial group is 13, which is the same group as the Seneca facility, and therefore the regulatory criterion for aggregation is satisfied.

Beyond the specific arguments regarding the regulatory criteria just discussed, the Department also argues that it is appropriate to "look at the entire circumstances of the sources in each case" before concluding whether the Mt. Jewett Interconnect and the Pad G Compressor Station meet the common sense notion of a plant. In this case, the Department argues, the sources function together to produce transmission-quality natural gas and were developed together as a coordinated business strategy. Thus, the Mt. Jewett Interconnect and the Pad G Compressor Station function as a plant. Finally, the Department opposes NFG Midstream's motion for partial summary judgment on the issue of what type of contractual relationships rise to the level of "common control" on the basis that it is the *specific facts of the contractual relationship* that matters, not merely the existence of a contract between parties.

In its reply, NFG Midstream contends that, even if multiple sources are located on one piece of property, the Department must determine whether those *sources* are sufficiently

contiguous or adjacent to warrant aggregation. It contends that the Department submitted no evidence disputing that (1) the Mt. Jewett Interconnect and the Pad G Compressor Station are located more than a mile apart on property owned by the Collins Pine Company, (2) that the sources are located in separate townships and separate counties, and (3) that both sources have "readily discernable boundaries" and are separated by undeveloped forestland. NFG Midstream further argues that there are no disputed issues of fact regarding the proper SIC code for the Interconnect. Rather, NFG Midstream believes that there is only a disagreement on the application of the law between the parties—which the Board can resolve from the record before it. Finally, NFG Midstream argues that the Department's litigation position in another matter before this Board is inconsistent with its present position regarding what constitutes a common sense notion of a plant. It further argues that the functions of the Mt. Jewett Interconnect and the Pad G Compressor Station are demonstrably different, and that the Department offered no evidence demonstrating that the two sources were planned as part of a coordinated business strategy.

In analyzing the arguments of the Parties, we note that we are not writing on an entirely clean slate. At least two prior appeals before the Board involved the issue of aggregation of distinct oil and gas related air emissions sources in the summary judgment context: *Group Against Smog Pollution v. DEP and Laurel Mountain Midstream Operating, LLC*, EHB 2011-065-R ("*GASP*"), and *Clean Air Council v. DEP and MarkWest Liberty Midstream & Resources, LLC*, EHB 2011-072-R ("*Clean Air Council*"). In both cases, the parties argued about the Department's application of one or more of the three regulatory criteria to the facts of their situations similar to the arguments put forth by NFG Midstream in this case. In *GASP*, the Board granted a summary judgment motion on the issue of a common SIC code brought by GASP and

denied the summary judgment motion of Laurel Mountain Midstream, finding that there were issues of fact regarding the question of common control and mixed issues of fact and law regarding the question of whether the sources were located on adjacent or contiguous properties.[3] *GASP*, 2012 EHB 329. In *Clean Air Council*, the Board denied a summary judgment motion brought by MarkWest Liberty Midstream seeking a determination regarding the proper factors to be considered in analyzing the issue of whether two sources were located on adjacent properties because it found there were factual issues in dispute. *Clean Air Council*, 2013 EHB 346. Both *GASP* and *Clean Air Council* were discontinued after the Board's summary judgment decision so the Board did not have the opportunity to further address the issue of aggregation of air sources in the oil and gas industry, leaving the law in this area unsettled in Pennsylvania.

Underpinning the Board's decisions in *GASP* and *Clean Air Council* is the recognition by the Board that the air aggregation issue in the oil and gas industry context is complex and typically poses mixed issues of fact and law. In these cases, and other similar recent decisions, the Board has determined that these complex issues are best addressed after a full hearing is held so that the law can be applied to a fully developed factual record. *See, e.g.*, *DEP v. Sunoco Logistics Partners, L.P. and Sunoco Pipeline, L.P.*, EHB Docket No 2014-020-CP-R, slip op. at 4 (Opinion dated October 24, 2014). This approach is consistent with the requirement that summary judgment should only be granted where there are no issues of material fact and the right to summary judgment is clear and free from doubt.

Applying this to NFG Midstream's request for summary judgment, we find that the right to summary judgment is not clear or free from doubt and, therefore, the motion is properly

[3] It is important to note that the midstream operator and gas wells at issue in *GASP* were both assigned SIC codes under the same major industrial group (13). The Board was not presented with the unique factual and legal disputes present in this matter, and partial summary judgment was appropriate in that case.

denied. Looking first at the issue of whether the sources in this case are on adjacent or contiguous properties, the Board is faced with a mixed question of fact and law. The parties agree that the sources are located more than a mile apart on property owned by Collins Pine Company. It is also clear that the sources are located in different townships in different counties and it appears that the sources are on separate tax parcels. *See* NFG Ex. A, p. DEP000528. There is no evidence of record that the Collins Pine Company owned property where the sources are located is part of one common deeded property. Nor are there any details regarding the exact nature of the property interests held by NFG Midstream and Seneca for the operations at issue in this case. NFG Midstream's Brief describes them as "lots," but the Department notes that there is no evidence of a subdivision of the Collins Pine Company property.

Beyond these issues of fact, the Board also needs to consider what constitutes the relevant property in cases of this type. NFG Midstream argues that the relevant properties are defined by the readily discernable boundaries of the two sources that are being aggregated. The Department disputes that and argues that the relevant property is the Collins Pine Company owned property on which both sources are located. We were not provided any significant legal discussion of this issue in the Briefs or any citations to case law on how other courts have looked at this issue. At this point, given the factual and legal issues regarding this regulatory criterion, we find that the right to a summary judgment is not clear and the Board would be best served by having a fully developed factual record, along with the benefit of post-hearing briefs before ruling on this issue.

Turning next to the issue of the regulatory requirement that the sources belong to the same industrial grouping, the Board is again faced with a mixed question of fact and law and there are clear issues of material fact. NFG contends that the Mt. Jewett Interconnect is properly

identified by SIC code 4922, which describes "[e]stablishments engaged in the transmission and/or storage of natural gas for sale." NFG Ex. F, 1987 Manual Excerpts, p. 284. The Department denies this and contends that the activities taking place at the Interconnect fit within the Major SIC group 13, which is undisputed as being the correct group for Seneca's source. At this point, we do not believe that the record is sufficiently detailed for the Board to determine exactly what activities are occurring at the sources and how these activities fit within the SIC code classifications.

Furthermore, the Department's argues that a "support relationship" between the Mt. Jewett Interconnect and the Pad G Compressor Station makes the sources' SIC codes irrelevant, relying on language from the preamble to Federal Prevention of Significant Deterioration regulations published in the Federal Register in 1980. We think there are issues of material fact as to whether a support relationship exists as well as a legal issue of whether the alleged support relationship allows the Department to state, as it did in this case, that "any difference in SIC code is irrelevant." *See* NFG Ex. C, p. 6. Given these issues, it is apparent that there is no clear right to a summary judgment and again the Board would benefit from a fully developed factual record and post-hearing briefs before deciding this issue. Simply stated, as in the issue regarding the adjacent or contiguous property, "we think that this issue is one in which there exist material questions of fact which would be best developed at a hearing on the merits." *GASP*, 2012 EHB 329, 340.

Having determined that NFG Midstream is not entitled to summary judgment, we turn next to its request for a partial summary judgment. NFG Midstream seeks partial summary judgment "regarding whether the mere existence of a contractual relationship between two entities can support the finding of 'common control.' " NFG Br., p. 19. As discussed above, the

Department may only aggregate distinct sources of air emissions after determining, among other things, that the sources are under the common control of the same person (or persons under common control). The problem with NFG's request, however, is that it appears to be inconsistent with the actual action taken by the Department in this case as reflected in its July 22, 2013 determination letter.

In that letter, the Department states its conclusion that the two sources "have a support facility relationship and contractual/financial agreements which establish common control." NFG Notice Of Appeal, Attachment B. Reviewing the Single Source Determination and Aggregation Analysis memorandum supporting the Department's determination, it is clear that the Department did not rely exclusively on the mere fact that there was a contract between the parties in finding that the sources satisfied the regulatory criteria of common control. *See* NFG Ex. C. The issue of "the mere existence of a contractual relationship" supporting a finding of common control is not before the Board in this matter. Stated another way, NFG is asking the Board for an advisory opinion. "Judicial restraint counsels against making a potentially unnecessary decision. We do not issue advisory opinions." *Sayreville Seaport Associates v. DEP*, 2011 EHB 815, 822.

Conclusion

We find that, when viewing the record in the light most favorable to, and drawing all reasonable inferences in favor of, the Department and further resolving all doubts as to the existence of a genuine issue of material fact against NFG Midstream—all of which we are required to do—the right to a summary judgment on behalf of NFG Midstream is not clear and free from doubt and, therefore, should not be granted. The issues of air aggregation in the oil and gas industry are legally and factually complex and the Board strongly believes that these issues,

which remain a matter of first impression in Pennsylvania, will be best decided with the benefit of a full factual record and post-hearing briefs.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NATIONAL FUEL GAS MIDSTREAM CORPORATION AND NFG MIDSTREAM TROUT RUN, LLC, AND SENECA RESOURCES CORPORATION	:	
v.	:	**EHB Docket No. 2013-123-B**
	:	**(Consolidated with 2013-124-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 31st day of October, 2014, following review of the Appellants' Motion for Summary Judgment, the Department's Response thereto, and Appellants' Reply, together with the supporting briefs and exhibits, it is ordered that the Motion for Summary Judgment is **DENIED**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 31, 2014

c: **DEP, General Law Division:**
Attention: April Hain
9th Floor, RCSOB

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HANOVER TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2010-185-M**
	:	**(Consolidated with 2011-083-M**
COMMONWEALTH OF PENNSYLVANIA,	:	**2011-121-M, 2011-171-M,**
DEPARTMENT OF ENVIRONMENTAL	:	**2012-025-M, 2012-106-M,**
PROTECTION and GIBRALTAR ROCK, INC.,	:	**2012-154-M, 2012-183-M,**
Permittee	:	**2013-026-M, 2013-055-M,**
	:	**2013-117-M, 2013-203-M,**
	:	**2014-010-M, 2014-069-M,**
	:	**2014-119-M, and 2014-149-M)**
	:	
	:	**Issued: November 3, 2014**

ADJUDICATION

By Richard P. Mather, Sr., Judge

Synopsis

The Board sustains, in part, the third party appeals of the Department's approvals of requests for temporary cessation of mining activity conducted pursuant to a noncoal surface mining permit. Under the unusual facts of this appeal the Department retained the authority under Section 77.128(b) to reasonably extend Gibraltar Rock's permit deadline to fully commence noncoal surface mining activities where Gibraltar Rock had commenced site preparation surface mining activities but was enjoined from completing these activities and commencing mineral extraction activities. The Department abused its discretion by approving extensions that continued the permit for over nine years without requiring the Permittee to file an application for a permit renewal that would allow the Department to determine that the permit issued in 2005 was still current and up-to-date from a noncoal surface mining regulatory perspective.

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FINDINGS OF FACT

Joint Stipulated Facts

1. The Appellant is New Hanover Township (the "Township), a Township of the Second Class with offices at 2943 North Charlotte Street, Gilbertsville, PA 19525-9718. (Stipulation of Fact ("SF") 1.)

2. The Permittee is Gibraltar Rock, Inc. ("Gibraltar Rock"), a Pennsylvania corporation with offices at 355 Newbold Road, Fairless Hills, PA 19030. (SF 2.)

3. The Appellee is the Pennsylvania Department of Environmental Protection (the "Department"), District Mining Operations, Pottsville Office, 5 West Laurel Boulevard, Pottsville, PA 17901-2522. (SF 3.)

4. In March 2001, Gibraltar Rock filed an application to the New Hanover Township Zoning Hearing Board (the "ZHB") challenging the substantive validity of the New Hanover Township Zoning Ordinance (the "Zoning Ordinance") and seeking zoning relief to operate a quarry on lands situated in the Heavy Industrial ("HI") and Light Industrial ("LI") zoning districts of New Hanover Township in which Gibraltar Rock was the legal or equitable owner and, in the alternative, seeking a special exception to operate a quarry on land situated in the HI zoning district (the "GR I Zoning Application"). (SF 4.)

5. The GR I Zoning Application encompassed approximately 223 acres. (SF 5.)

6. In January 2003, Gibraltar Rock filed a second application to the ZHB challenging the substantive validity of the Zoning Ordinance and seeking zoning relief to operate a quarry on approximately 241 acres of land located in the HI and LI zoning districts (the "GR II Zoning Application"). The 241 acres of land in the GR II Zoning Application consists of the 223 acres encompassed by the GR I Zoning Application plus an additional contiguous 18 acres of

land on the north side of Hoffmansville Road at the intersection of Church and Colflesh Roads. (SF 6.)

7. On April 15, 2005, the Department issued Noncoal Surface Mining Permit No. 46030301 (the "Permit"). (SF 7; Appellant's Ex. 1.)

8. The Permit pertains to 241 acres situated in the HI and LI zoning districts which were the subject of the GR II Zoning Application. (SF 8.)

9. Pursuant to 25 Pa. Code § 77.128(b), the Permit was required to be activated by April 15, 2008. (SF 9.)

10. In June of 2007, the ZHB issued its decision relative to the GR I Zoning Application denying Gibraltar Rock's request for relief to allow quarrying in both the HI and LI zoning districts, and granting a Special Exception permitting quarrying only on the portion of the property located in the HI zoning district subject to conditions (the "GR I Zoning Decision") (SF 10; Appellant's Ex. 2.)

11. In July, 2007, Gibraltar Rock appealed the denial of its request for relief to allow quarrying in both the HI and LI zoning districts, as well as the imposition of certain of the conditions imposed by the ZHB to the Special Exception by filing a Notice of Land Use Appeal in the Court of Common Pleas of Montgomery County (*Gibraltar Rock, Inc. v. New Hanover Township Zoning Hearing Board and New Hanover Township*, Docket No. 2007-16658) (the "GR I Land Use Appeal"). The Montgomery County Court of Common Pleas affirmed the denial of Gibraltar Rock's substantive challenge to the validity of the Zoning Ordinance and struck a number of the conditions which the ZHB imposed on the Special Exception it granted. Gibraltar Rock appealed the denial of its challenge to the substantive validity of the Zoning

Ordinance to the Commonwealth Court of Pennsylvania. The GR I Land Use Appeal is currently pending in the Commonwealth Court. (SF 11.)

12. On November 13, 2007, Gibraltar Rock, through its counsel, Stephen B. Harris, Esquire, wrote to the Department and requested approval of an Application for Permit Extension Pursuant to 25 Pa. Code § 77.128(b), citing continuing litigation with the Township over the boundaries of the area that Gibraltar Rock will be permitted to mine. (SF 12; Appellant's Ex. 3.)

13. On December 10, 2007, the Department granted an extension of the date of activation of the Permit, pursuant to 25 Pa. Code § 77.128(b), until October 15, 2008. (SF 13; Appellant's Ex. 4.)

14. On August 11, 2008 and September 15, 2008, Mr. Harris again wrote to the Department and requested an extension of the date to activate the Permit, pursuant to 25 Pa. Code § 77.128(b). (SF 14; Appellant's Ex. 5.)

15. On October 14, 2008, the Department granted an extension of the date of activation of the Permit until April 15, 2009. (SF 15; Appellant's Ex. 6.)

16. On February 13, 2009, Mr. Harris requested a further extension pursuant to 25 Pa. Code § 77.128(b). (SF 16; Appellant's Ex. 7.)

17. On March 24, 2009, the Department granted an extension of the date of activation of the Permit until August 15, 2009, (Appellant's Ex. 8), and advised Gibraltar Rock that no further extensions would be granted. (SF 17.)

18. On May 11, 2009, Gibraltar Rock, through its counsel Mr. Harris, provided notice to the Township of its intent to activate the Permit prior to August 15, 2009 (the "Notice of Intent to Activate"). (SF 18; Appellant's Ex. 9.)

19. The Notice of Intent to Activate was given in accordance with Part B, Special Conditions and Requirements Number 2 of the Permit. (SF 19.)

20. On May 26, 2009, Township Solicitor Paul A. Bauer, III, Esquire wrote to the Department and advised of the Township's objection to Gibraltar Rock's activation of the Permit. (SF 20; Appellant's Ex. 10.)

21. On May 29, 2009, Gibraltar Rock, through its counsel, Mr. Harris, confirmed Gibraltar Rock's intent to proceed with activation of the Permit. (SF 21; Appellant's Ex. 11.)

22. On June 4, 2009, Township Solicitor Paul A. Bauer, III, Esquire wrote to the Department renewing the Township's objection to the activation of the Permit. (SF 22; Appellant's Ex. 12.)

23. On June 9, 2009, Mr. Harris submitted a letter on behalf of Gibraltar Rock to the Department regarding Gibraltar Rock's intent to activate the Permit. (SF 23; Appellant's Ex. 13.)

24. On September 11, 2009, the Township filed a Petition for Preliminary Injunction in the Montgomery County Court of Common Pleas (*New Hanover Twp. v. Gibraltar Rock, Inc.*, Docket No. 2009-28162). (SF 24.)

25. On November 6, 2009, a hearing on the Petition for Preliminary Injunction was held in the Montgomery County Court of Common Pleas before the Honorable Kent H. Albright. (SF 25.)

26. On January 7, 2010, the ZHB issued its decision relative to the GR II Zoning Application denying Gibraltar Rock's substantive challenge to the validity of the Zoning Ordinance and granting a Special Exception permitting quarrying only on the portion of the site

located in the HI zoning district subject to the same conditions it imposed in the GR I Zoning Decision (the "GR II Zoning Decision"). (SF 26; Appellant's Ex. 14.)

27. On February 2, 2010, Gibraltar Rock appealed the denial of its substantive challenge to the validity of the Zoning Ordinance and the imposition of the same conditions imposed by the ZHB on Gibraltar Rock in the GR I Zoning Decision by filing a Notice of Land Use Appeal in the Montgomery County Court of Common Pleas (*Gibraltar Rock, Inc. v. New Hanover Township Zoning Hearing Board and New Hanover Township Board of Supervisors*, Docket No. 2010-02570) (the "Gibraltar Rock GR II Land Use Appeal"). (SF 27.)

28. On February 8, 2010, the Township appealed that portion of the GR II Zoning Decision that granted Gibraltar Rock a Special Exception to allow quarrying in the HI zoning district by filing a Notice of Land Use Appeal in the Court of Common Pleas of Montgomery County, (*New Hanover Township v. New Hanover Township Zoning Hearing Board and Gibraltar Rock, Inc.*, Docket No. 2010-02952) (the "Township GR II Land Use Appeal"). (SF 28.)

29. The Township GR II Land Use Appeal and Gibraltar Rock GR II Land Use Appeal are currently pending in the Montgomery County Court of Common Pleas. (SF 29.)

30. On May 17, 2010, Judge Albright entered an Order in the Montgomery County Court of Common Pleas, (Appellant's Ex. 15), relative to the Township's Petition for Preliminary Injunction, granting the Petition and providing in part:

> Gibraltar Rock, Inc. is ENJOINED from quarrying or mining the property which is the subject of both the Plaintiff's Petition and the Noncoal Surface Mining Permit No. 46030301, previously issued to the Defendant, being that same premises which is described therein and located in New Hanover Township, Montgomery County, Pennsylvania, within an area bounded generally by Church Road, Colflesh Road, Layfield Road and Big Road and a District zoned HI Heavy Industrial (see 'GRI' Application for Special Exception, dated March 23, 2001), pending the following:

> a. New Hanover Township's approval of a properly submitted Land Development Application and Plan regarding the property to be mined and which is the subject of the Permit forementioned issued to Gibraltar Rock, Inc.

(SF 30.)

31. At the time that Judge Albright entered his Order, Gibraltar had completed the following: installation of a driveway into the site, leveling a portion of the process area and construction of sediment, basins and berms, all of which were completed in the summer and fall of 2009. Upon completion of those activities, Gibraltar Rock ceased operation for the winter. Gibraltar Rock intended to resume its activities in the spring of 2010 but was prevented from doing so by Judge Albright's Order. (SF 31.)

32. On May 28, 2010, Gibraltar Rock through its counsel, Stephen B. Harris, submitted a letter to the Department phrased as an "application for temporary cessation of surface mining activities pursuant to Section 77.651(b) of the Noncoal Regulations, 25 Pa. Code § 77.651(b)." (SF 32; Appellant's Ex. 16.)

33. On October 8, 2010, the Township, through its counsel, submitted a letter to the Department, objecting to the Application for Approval of Temporary Cessation. (SF 33; Appellant's Ex. 17).

34. On October 19, 2010, Gibraltar Rock, through its counsel, Mr. Harris, submitted a letter to the Department amending its Application to request an extension of time to continue noncoal surface mining activities pursuant to Section 77.128(b) of the Noncoal Regulations, 25 Pa. Code § 77.128(b). (SF 34; Appellant's Ex. 18.)

35. On October 25, 2010, the Township, through its counsel, submitted a letter to the Department objecting to Gibraltar Rock's request for an extension of time to continue noncoal surface mining activities pursuant to 25 Pa. Code § 77.128(b). (SF 35; Appellant's Ex. 19.)

36. On October 25, 2010, Gibraltar Rock filed an Application for Land Development with the Township relative to a 168.30 acre portion of the quarry. (SF 36; Appellant's Ex. 20.)

37. On November 19, 2010, the Department issued its approval of temporary cessation status for six months, until May 8, 2011, pursuant to Section 13(e) of the Noncoal Surface Mining Conservation and Reclamation Act (the "Noncoal Act"). (SF 37; Appellant's Ex. 21.)

38. On December 10, 2010, the Township filed an appeal of the November 19, 2010 action of the Department of granting a six month temporary cessation. (SF 38.)

39. By letters dated May 13, 2011 and May 18, 2011, Gibraltar Rock requested that the Department approve an additional 90-day temporary cessation pursuant to Section 77.651(b) of the Noncoal Regulations. (SF 39; Appellant's Ex. 22.)

40. By letters dated May 16, 2011 and May 20, 2011, the Township through its counsel objected to Gibraltar Rock's request for an additional temporary cessation. (SF. 40; Appellant's Ex. 23).

41. On May 19, 2011, the Department issued its approval of a temporary cessation until August 8, 2011. (SF 41; Appellant's Ex. 24.)

42. On June 3, 2011, the Township filed an appeal of the May 19, 2011 action of the Department of granting a temporary cessation until August 8, 2011. (SF 42.)

43. By letter dated July 26, 2011, Gibraltar Rock requested that the Department approve a temporary cessation of mining pursuant to Sections 77.128(b) and 77.651(b) of the Noncoal Regulations from the extension expiring August 8, 2011 for an additional ninety (90) days. (SF 43; Appellant's Ex. 25.)

44. By letter dated August 5, 2011, the Township, through its counsel, objected to Gibraltar Rock's request for an additional temporary cessation. (SF 44; Appellant's Ex. 26.)

45. On August 5, 2011, the Department issued its approval of a temporary cessation status until November 7, 2011 in accordance with 25 Pa. Code §§ 77.128(b) and 77.651(b). (SF 45; Appellant's Ex. 27.)

46. On August 25, 2011 the Township filed an appeal of the August 5, 2011 action of the Department of granting a temporary cessation until November 7, 2011. (SF 46.)

47. By letter dated November 8, 2011, Gibraltar Rock requested that the Department approve a temporary cessation of mining pursuant to Sections 77.128(b) and 77.651(b) of the Noncoal Regulations from the extension expiring November 7, 2011 for an additional ninety (90) days. (SF 47; Appellant's Ex. 28.)

48. By letter dated November 8, 2011, the Township, through its counsel, objected to Gibraltar Rock's request for an additional temporary cessation. (SF 48; Appellant's Ex. 29.)

49. On November 8, 2011, the Department issued its approval of a temporary cessation status until February 6, 2012 in accordance with 25 Pa. Code §§ 77.128(b) and 77.651(b). (SF 49; Appellant's Ex. 30.)

50. On December 8, 2011 the Township filed an appeal of the November 8, 2011 action of the Department of granting a temporary cessation until February 6, 2012. (SF 50.)

51. By letter dated January 31, 2012, Gibraltar Rock requested that the Department approve a temporary cessation of mining pursuant to Sections 77.128(b) and 77.651(b) of the Noncoal Regulations from the extension expiring February 6, 2012 for an additional ninety (90) days. (SF 51; Appellant's Ex. 31.)

52. By letter dated February 7, 2012, the Township, through its counsel, objected to Gibraltar Rock's request for an additional temporary cessation. (SF 52; Appellant's Ex. 32.)

53. On February 6, 2012, the Department issued its approval of a temporary cessation status until May 6, 2012 in accordance with 25 Pa. Code §§ 77.128(b) and 77.651(b). (SF 53; Appellant's Ex. 33.)

54. On February 21, 2012 the Township filed an appeal of the February 6, 2012 action of the Department of granting a temporary cessation until May 6, 2012. (SF 54.)

55. By letter dated April 27, 2012, Gibraltar Rock requested that the Department approve a temporary cessation of mining pursuant to Sections 77.128(b) and 77.651(b) of the Noncoal Regulations from the extension expiring May 6, 2012 for an additional ninety (90) days. (SF 55; Appellant's Ex. 34.)

56. On May 1, 2012, the Department issued its approval of a temporary cessation status until July 31, 2012 in accordance with 25 Pa. Code §§ 77.128(b) and 77.651(b). (SF 56; Appellant's Ex. 35.)

57. On May 30, 2012 the Township filed an appeal of the February 6, 2012 action of the Department of granting a temporary cessation until July 31, 2012. (SF 57.)

58. Gibraltar Rock has not begun to quarry its Property i.e. strip overburden and mine stone from the proposed quarry pit. (SF 58.)

Additional Facts

The Permit

59. The Department received public input during its initial review of the Permit application. Meetings were held between the local community and the Township's legal representatives. The local community and the Township commented on draft conditions of the

Permit. The Department took the comments into consideration, and some of the conditions were amended to address those concerns. (N.T. 101.)

60. The Permit requires Gibraltar Rock to comply with all federal and state laws and regulations and local ordinances, and specifically with all local ordinances adopted pursuant to the Municipalities Planning Code. (N.T. 18-19; Appellant's Ex. 1.)

61. The Township did not appeal the Department's issuance of the Permit because the Township was satisfied with the Permit's language requiring Gibraltar Rock to comply with all federal and state laws and regulations and local ordinances. (N.T. 30.)

62. The Permit prohibits Gibraltar Rock from conducting mining activities within the HI and LI zoning districts unless approved by the Township or a subsequent court decision. (N.T. 19; Appellant's Ex. 1.)

Special Exception

63. The ZHB's GR I Zoning Decision granted a Special Exception to operate a quarry in the HI zoning district on the southern side of Hoffsman Road in accordance with the Conceptual Mine Plan. (N.T. 21-22; Appellant's Ex. 2, 60.)

64. The Conceptual Mine Plan depicts that the entire mining pit will lie in the HI zoning district and that no portion of the mining pit will lie in the LI zoning district. (N.T. 22, 36-38; Appellant's Ex. 60.)

65. The Special Exception granted by the ZHB in the GR I Zoning Decision was conditioned on Gibraltar Rock's compliance with all federal, state and local laws, rules, regulations and ordinances. (N.T. 22; Appellant's Ex. 2.)

Extension of Activation Date

66. The letters dated November 13, 2007, August 11, 2008 and February 13, 2009 sent by the Township's counsel, Mr. Harris, to the Department requesting an extension of the activation date of the Permit pursuant to 25 Pa. Code § 77.128(b) relied on continuing litigation with the Township over the boundaries of the area that Gibraltar Rock will be permitted to mine. (Appellant's Ex. 1, 5, 7.)

67. On March 24, 2009, when the Department granted an extension of the activation date of the Permit until August 15, 2009 and advised Gibraltar Rock that no further extensions would be granted, the Department determined that Gibraltar Rock needed to activate the Permit because Gibraltar Rock had a Special Exception to mine in the HI zoning district and because Gibraltar Rock could have support-related facilities within the LI zoning district. Further, the Department advised Gibraltar Rock that if it did not activate the Permit and comply with the Permit's conditions regarding notice and installation of erosion and sedimentation controls, then the Permit would be considered null and void. (N.T. 84-85, 91-92, 111-112; Appellant's Ex. 8.)

Notice of Intent to Activate

68. Gibraltar Rock's May 11, 2009 Notice of Intent to Activate advised the Township that Gibraltar Rock expected to be in "full production," which meant "extracting material," in the fall of 2009, and does not indicate that Gibraltar Rock is only activating that portion of the Permit area located in the HI zoning district. (N.T. 23, 74; Appellant's Ex. 9.)

69. As of May 11, 2009, when Gibraltar Rock issued the Notice of Intent to Activate, Gibraltar Rock had not received approval from the ZHB to operate a quarry in the LI zoning district, nor had Gibraltar Rock obtained Land Development Plan approval from the New Hanover Township Board of Supervisors. (N.T. 23-24.)

70. The Township's May 26, 2009 objection to Gibraltar Rock's Notice of Intent to Activate alleged Gibraltar Rock's failure to comply with the conditions of the Permit and the conditions of the ZHB's GR I Zoning Decision. (N.T. 24-25; Appellant's Ex. 10.)

71. The Department did not respond to the Township's May 26, 2009 objection to the Notice of Intent to Activate. (N.T. 25, 83.)

72. On October 6, 2009, the Department conducted a site investigation in response to a formal complaint letter submitted to the Department by the Township. The Investigation Report states as follows:

> Mr. Brant's major concern was that the land use approvals for Gibraltar have not been finalized. Department Counsel Craig Lambeth explained that the Department does not enforce local zoning. New Hanover Township would need to obtain a court order against Gibraltar and the Department would review the order and determine what, if any action would be taken. The Department's position at this time is Gibraltar is in compliance with Special Conditions #3, 4, 8 & 9.

(Appellant's Ex. 61.)

73. Gibraltar Rock does not believe that a Land Development Plan approval is required and asserts that it did not appeal Judge Albright's Order issuing the Injunction because it believed the Order was interlocutory and further predicted, albeit unsuccessfully, that the Land Development Plan approval process would be "straightforward." (N.T. 74-75.)

74. Mr. Menghini testified that if Gibraltar Rock had not ceased operations after Judge Albright's Order issuing the Injunction, the Department would have ordered Gibraltar Rock to cease operations. (N.T. 115.)

Work Completed and Work Remaining

75. The Department continues to inspect the erosion and sedimentation controls on a regular basis to ensure that the site is functioning in accordance with regulations. (N.T. 68.)

76. Piezometers are small wells drilled into the soil and rock for purposes of monitoring the local perched water table that surrounds a given stream, which in this case is a meandering intermittent stream that flows in and out of the Permit area and contains two pockets of wetlands. (N.T. 69.)

77. Weirs measure the flow rate of a stream. (N.T. 69-70.)

78. The Department required installation of piezometers and weirs as a condition of the Permit so that the Department can obtain background information before the mining activities would affect the groundwater and so that the Department can oversee the flow and extent of wetness of the stream channel as it flows into and out of the wetlands. (N.T. 69, 105.)

79. On October 4, 2010, Judge Albright denied Gibraltar Rock's Motion to Clarify the Court's Order of May 17, 2010 requesting permission to install a fence and stream monitoring devices, i.e., piezometers and weirs, in accordance with Special Condition/Requirement Nos. 5, 26 and 27 of the Permit, prior to obtaining Land Development Plan approval. (Permittee's Ex. 2, 3.)

80. Special Condition/Requirement No. 5 of the Permit states "Prior to commencement of mining activities the permittee must fence in all the bonded areas to prevent unauthorized access to the site." (Appellant's Ex. 1).

81. Following Judge Albright's Order, on October 25, 2010 Gibraltar Rock filed an application for Land Development Plan approval, which was pending before the Township at the time of the October 12, 2012 hearing before the Board. (N.T. 28; Appellant's Ex. 20.)

82. The New Hanover Township Planning Commission has recommended that the New Hanover Board of Supervisors approve Gibraltar Rock's Land Development Plan on the condition that Gibraltar Rock must request that the Department revise the Permit because the

Township believes that Permit's conditions are inconsistent with the Township's regulations. (N.T. 28-29, 34-35.)

83. A pending dispute over stormwater management controls will have to be resolved by a declaratory judgment before the land development issues are resolved. (N.T. 34-35.)

84. Until Gibraltar Rock obtains Land Development Plan approval, the Township continues to oppose Gibraltar Rock from taking any steps to come into compliance with the Permit, other than obtaining a Land Development Plan approval. The Township opposes such steps as installing a fence around the quarry and installing piezometers and weirs, as required by Special Conditions/Requirements 5, 26 and 27 of the Permit. (N.T. 32.)

85. Tasks remaining before Gibraltar Rock can begin to extract minerals from the Permit site will take between approximately nine months and a year to complete and include, but are not necessarily limited to, construction of a fence around the perimeter of the Permit area, installing piezometers and weirs in the stream adjacent to the area to be mined, installing a scale house and scales, installing a truck wheel washing area, paving the driveway, bringing electricity to the site, bringing and installing the process equipment necessary to crush the stone which will be mined at the site and conducting pre-blast surveys of surrounding residences. (N.T. 60-62, 73.)

86. The Department's witness, Mr. Menghini, testified that Gibraltar Rock activated the Permit. (N.T. 109, 119.)

87. Gibraltar Rock, through letters sent by Gibraltar Rock's counsel to the Department dated May 28, 2010, May 18, 2011, July 26, 2011, November 8, 2011, January 31, 2012 and April 27, 2012, stated that Gibraltar Rock "activated" the Permit. (N.T. 46-48; Appellant's Ex. 16, 22, 25, 28, 31, 34.)

88. Gibraltar Rock's witness, Mr. Patankar, testified that Gibraltar Rock activated the Permit, (N.T. 52, 133); however, Mr. Patankar also testified that Gibraltar Rock had only begun to activate the Permit and that activation is a process that includes receiving a permit from the Pennsylvania Department of Transportation to build and maintain a road on the site; acquiring access to the site; constructing a driveway on the site; installing erosion and sedimentation controls; clearing the area on the site that will house the operations area for the crushers and the conveyors and stockpiles; installation of berms and a fence as well as piezometers and weirs in any stream adjacent to the mining area; building a scale house with an appropriate septic unit; constructing a truck-washing station; connecting electricity to the site; bringing all the processing equipment, including crushers and screens, onto the site; and conducting a pre-blast survey of all the houses and dwellings located within a certain distance of the quarry. (N.T. 57-62.)

Application for Permit Renewal and New Permit Application

89. In addition to the option of activating the Permit, Gibraltar Rock also had the option of applying for a permit renewal, but it chose not to do so. (N.T. 52-53, 133.)

90. Applying for a new permit would require a review by the Department, preparation of review letters that would require responses, and addressing input from the public and the Township Planning Commission. (N.T. 130.)

91. Applying for a permit renewal would have required public notice and comment. (N.T. 52-53.)

92. In the process of applying for and reviewing a renewal permit, the Department and Gibraltar Rock would likely receive "numerous complaints" attempting to reopen issues that were already addressed during the review process for the initial Permit. (N.T. 120.)

93. Gibraltar Rock did not want to proceed with the public notice and comment procedures required for a permit renewal because Gibraltar Rock "went through a lot of hardship and a lot of effort" to obtain the Permit. (N.T. 53.)

94. The cost incurred by Gibraltar Rock to prepare the original permit application was approximately $500,000, which included, but was not necessarily limited to, costs for technical studies, compiling information, consulting fees and testing and monitoring of the location. (N.T. 129.)

95. Reapplying for a permit would cost Gibraltar Rock a substantial portion of the $500,000 spent to prepare the original permit application. (N.T. 129.)

96. Preparing a new permit application would consume approximately a year to a year-and-a-half. (N.T. 130.)

97. Preparing a new permit application would require updating most, if not all, the documents prepared for the original permit application; updating raw monitoring data and an inventory of resources; and complying with changes in updated modules and other agencies' requirements. (N.T. 129-130.)

98. Mr. Menghini testified that if Gibraltar Rock had applied for a new permit, that new permit would contain largely the same, if not identical, terms as the original Permit. (N.T. 100-101, 119). Nevertheless, a number of permit modules that would be part of a new permit, such as the blasting module, have changed rather substantially since the original approval process, so preparing and reviewing a renewal application is not just a matter of retreading the same issues that were addressed in the original permit application, but rather would entail a showing of compliance with many new requirements. (N.T. 126, 129.)

99. Reviewing a renewal application for a noncoal mining permit will place a significant burden on the Department. (N.T. 101.)

100. Requiring Gibraltar Rock to apply for a permit renewal or a new permit would place burdens on agencies other than the Department, including, but not necessarily limited to, the Pennsylvania Fish and Boat Commission, the Pennsylvania Game Commission, and the United States Fish and Wildlife Service. (N.T. 127-128, 129-130.)

101. From April 15, 2008, the original activation date of the Permit, through October 8, 2012, 424 new homes were constructed in New Hanover Township. (N.T. 40-41; Appellant's Ex. 64.)

102. When Gibraltar Rock purchased the properties underlying the Permit site, it was aware that there were no guarantees that the properties could be quarried, and Gibraltar Rock recognized that the ability to quarry the properties was a business risk. (N.T. 131.)

Temporary Cessations

103. Mr. Menghini testified on behalf of the Department that the Department's November 19, 2010 letter granting the first temporary cessation to Gibraltar Rock incorrectly cited Section 13 of the Noncoal Surface Mining and Reclamation Act. (N.T. 92-93; Appellant's Ex. 21.)

104. Although the Department's November 19, 2010 letter granting the first temporary cessation to Gibraltar Rock did not cite to 25 Pa. Code § 77.128, Mr. Menghini testified on behalf of the Department that the Department had intended to rely on 25 Pa. Code § 77.128 based on the Injunction instituted by Judge Albright's Order. (N.T. 94, 106; Appellant's Ex. 21.)

105. Gibraltar Rock's May 18, 2011 letter to the Department revised Gibraltar Rock's May 13, 2011 letter and, in addition to relying on Section 77.651(b), cited Section 77.128(b) as a basis for granting an additional 90-day temporary cessation. (Appellant's Ex. 22.)

106. The Department's May 19, 2011 letter granting a temporary cessation until August 8, 2011 to Gibraltar Rock cited both 25 Pa. Code §§ 77.128(b) and 77.651(b). (Appellant's Ex. 24.)

107. Mr. Menghini testified that the Department granted the first three temporary cessations to Gibraltar Rock pursuant to 25 Pa. Code § 77.128(b). (N.T. 106.)

108. The Department's primary consideration for granting at least the first three temporary cessations of operation to Gibraltar Rock was the litigation which precluded any further activity on the Permit site until Gibraltar Rock obtains Land Development Plan approval. The Department's secondary consideration was the substantial economic loss that will be suffered by Gibraltar Rock if the Permit were lost. (N.T. 106-107.)

109. The Department, when it granted the first three temporary cessations to Gibraltar Rock, considered the potential hardship on Gibraltar Rock, such as additional time and expense required in re-applying for a permit or seeking a permit renewal, because the Department believed that preparing a renewal application would require a repeat of the extensive discussions and meetings among the parties that already took place. (N.T. 53, 99-100.)

110. Mr. Menghini testified that if it were not for the presence of litigation precluding Gibraltar from mining under its Permit, namely the Injunction, then the Department believes it would be limited and bound by the criteria under 25 Pa. Code § 77.651 for temporary cessations. (N.T. 113.)

111. The Department does not believe that 25 Pa. Code § 77.651 was or is applicable to the requests for temporary cessations sought by Gibraltar Rock. (N.T. 126-127.)

112. The reason for the Department's approval of each of the first three temporary cessations to Gibraltar Rock was not a seasonal shutdown, labor strike or absence of a regional market for the mineral to be mined. (N.T. 77-78.)

113. The Department included 25 Pa. Code § 77.651 in the initial three letters granting temporary cessations to Gibraltar Rock because the Department believes that the term "temporary cessation," appearing in 25 Pa. Code § 77.651, serves as a "coverall." (N.T. 127.)

114. The Department has not intended to use the phrase "temporary cessation" to refer to only those explicit conditions enumerated in 25 Pa. Code § 77.651; rather, the Department uses the phrase colloquially, such that a grant of extension of time under 25 Pa. Code § 77.128 is still referred to as a "temporary cessation," even if that temporary cessation is not granted under 25 Pa. Code § 77.651. (N.T. 94-95, 112-115.)

Size of Permit Area Intended to be Activated

115. After Gibraltar Rock filed its October 25, 2010 Application for Land Development with the Township relative to a 168.30 acre portion of the quarry, Gibraltar Rock did not file an application to amend the Permit area. (SF 36; N.T. 40, 49; Appellant's Ex. 20.)

116. The first request for temporary cessation did not indicate that Gibraltar Rock had activated less than the entire Permit area. (N.T. 48; Appellant's Ex. 16.)

117. The third request for temporary cessation indicated that only 162.09 acres had been activated. (N.T. 48; Appellant's Ex. 25.)

Additional Temporary Cessations Granted by Department

118. On July 31, 2012, the Department issued a 90-day temporary cessation until October 29, 2012 pursuant to 25 Pa. Code §§ 77.128(b) and 77.651(b), (Appellant's Ex. 63), and the Township appealed that action on August 26, 2012. (EHB Docket No. 2012-154-M.)

119. On October 26, 2012, the Department issued a 90-day temporary cessation until January 28, 2013 pursuant to 25 Pa. Code §§ 77.128(b) and 77.651(b), and the Township appealed that action on November 9, 2012. (EHB Docket No. 2012-183-M.)

120. On January 25, 2013, the Department issued a 90-day temporary cessation until April 28, 2013 pursuant to 25 Pa. Code §§ 77.128(b) and 77.651(b), and the Township appealed that action on February 25, 2013. (EHB Docket No. 2013-026-M.)

121. On April 26, 2013, the Department issued a 90-day temporary cessation until July 26, 2013 pursuant to 25 Pa. Code §§ 77.128(b) and 77.651(b), and the Township appealed that action on May 13, 2013. (EHB Docket No. 2013-055-M.)

122. On July 26, 2013, the Department issued a 90-day temporary cessation until October 25, 2013 pursuant to 25 Pa. Code §§ 77.128(b) and 77.651(b), and the Township appealed that action on August 5, 2013. (EHB Docket No. 2013-117-M.)

123. On October 25, 2013, the Department issued approval of a temporary cessation until January 23, 2014 under 25 Pa. Code §§ 77.128(b) and 77.651(b) and the Township appealed that action on November 7, 2013. (EHB Docket No. 2013-203-M).

124. On January 17, 2014, the Department issued a temporary cessation until April 23, 2014 under 25 Pa. Code §§ 77.128(b) and 77.651(b) and the Township appealed that action on January 24, 2014. (EHB Docket No. 2014-010-M).

125. On April 21, 2014, the Department issued a temporary cessation until July 22, 2014 under 25 Pa. Code §§ 77.128(b) and 77.651(b) and the Township appealed that action on May 21, 2014. (EHB Docket No. 2014-069-M).

126. On July 15, 2014, the Department issued its approval of a temporary cessation until October 21, 2014 under 25 Pa. Code §§ 77.128(b) and 77.651(b) and the Township appealed that action on August 20, 2014. (EHB Docket No. 2014-119-M).

127. On October 20, 2014, the Department issued its approval of a temporary cessation until January 19, 2015 under 25 Pa. Code §§ 77.128(b) and 77.651(b) and the Township appealed that action on October 21, 2014. (EHB Docket No. 2014-149-M).

128. The Department has issued extensions, which it describes as temporary cessations, under Section 77.128(b) for more than nine years without evaluating whether the permit that was issued in 2005 is still current and up-to-date from a noncoal surface mining regulatory perspective.

DISCUSSION

I. Background

In March 2001, Gibraltar Rock, Inc. ("Gibraltar Rock") filed an application to the New Hanover Township Zoning Hearing Board ("ZHB") challenging the substantive validity of the New Hanover Township Zoning Ordinance ("Zoning Ordinance") and seeking zoning relief to operate a quarry on approximately 223 acres of land situated in the Heavy Industrial ("HI") and Light Industrial ("LI") zoning districts of New Hanover Township and, in the alternative, seeking a special exception to operate a quarry on land situated in the HI zoning district ("GR I Zoning Application"). In January 2003, Gibraltar Rock filed a second application to the ZHB again challenging the substantive validity of the Zoning Ordinance and seeking zoning relief to

operate a quarry on approximately 241 acres of land situated in the HI and LI zoning districts of New Hanover Township and, in the alternative, seeking a special exception to operate a quarry on land situated in the HI zoning district ("GR II Zoning Application").

On April 15, 2005, the Department issued to Gibraltar Rock Noncoal Surface Mining Permit No. 46030301 ("Permit"), which pertained to the 241 acres situated in the HI and LI zoning districts and subject to the GR II Zoning Application. The Permit was required to be activated by April 15, 2008, and the Permit requires Gibraltar Rock to comply with all federal and state laws and regulations and local ordinances, and specifically with all local ordinances adopted pursuant to the Municipalities Planning Code. The Permit prohibits Gibraltar Rock from conducting mining activities within the HI and LI zoning districts unless approved by the Township or a subsequent court decision.

In June 2007, the ZHB issued its decision on the GR I Zoning Application, denying Gibraltar Rock's request for relief to allow quarrying in both the HI and LI zoning districts, but granting a Special Exception to operate a quarry on land situated in the HI zoning district, conditioned on Gibraltar Rock's compliance with all federal, state and locals laws, rules, regulations and ordinances. Gibraltar Rock appealed this decision to the Montgomery County Court of Common Pleas ("MCCCP") with the respect to the ZHB's denial of Gibraltar Rock's request for relief to allow quarrying in both the HI and LI zoning districts as well as the imposition of a number of conditions imposed by the ZHB on the Special Exception. The MCCCP affirmed the EHB's decision but struck a number of conditions on the Special Exception. Gibraltar Rock then appealed that decision to the Commonwealth Court. The Commonwealth Court struck down the trial court's affirmance of one of the conditions imposed on the Special Exception but otherwise affirmed the trial court's decision, thus upholding the

ZHB's denial of relief to allow quarrying in both the HI and LI zoning districts and also upholding the ZHB's grant of a Special Exception to operate a quarry on land situated in the HI zoning district. *In Re: Appeal of Gibraltar Rock, Inc.*, No. 2287 C.D. 2011 (Pa. Cmwlth., Oct. 11, 2013).

In January 2010, the ZHB issued its decision on the GR II Zoning Application, which mirrored its ruling on the GR I Zoning Application. Gibraltar Rock appealed this decision to the MCCCP on the same grounds that it appealed the ZHB's ruling on the GR I Zoning Application. New Hanover Township (the "Township") also filed an appeal in the MCCCP, challenging the ZHB's decision to grant a special exemption to Gibraltar Rock to allow quarrying in the HI zoning district. Both Gibraltar Rock's appeal and the Township's appeal are currently pending in the MCCCP.

Meanwhile, on December 10, 2007, October 14, 2008 and March 24, 2009, the Department approved three of Gibraltar Rock's requests for extensions of the date by which Gibraltar Rock was required to activate the Permit pursuant to 25 Pa. Code § 77.128(b). Each request cited continuing litigation over the boundaries of the area that Gibraltar Rock will be permitted to mine. The third permit extension extended the deadline to activate the Permit to August 15, 2009. After the Department issued the third permit extension, it advised Gibraltar Rock that it would not grant any further extensions and that Gibraltar Rock needed to activate the Permit because Gibraltar Rock had a Special Exception to mine in the HI zoning district and could have support-related facilities within the LI zoning district. The Department further advised Gibraltar Rock that if it did not activate the Permit and comply with the Permit's conditions regarding notice and installation of erosion and sedimentation controls, then the Permit would be considered null and void.

Rather than apply for a permit renewal, Gibraltar Rock notified the Township in writing on May 11, 2009 of its intent to activate the Permit prior to August 15, 2009, at which point Gibraltar Rock expected to be in "full production," which was later clarified through testimony to mean "extracting material" ("Notice of Intent to Activate"). The Township objected, and on September 11, 2009, the Township filed a Petition for Preliminary Injunction in the MCCCP. On May 17, 2010, the Honorable Kent H. Albright of the MCCCP issued an order enjoining Gibraltar Rock from quarrying or mining the property located in the HI zoning district within the Permit area pending the Township's approval of Gibraltar Rock's application for a Land Development Plan (the "Injunction").

As of May 17, 2010, Gibraltar Rock had installed a driveway into the site, leveled and partially excavated a portion of the process area, began construction of berms and constructed erosion and sedimentation controls, including sediment basins, all of which were completed in the summer and fall of 2009. Gibraltar Rock discontinued activity for the winter and had intended to resume in the spring of 2010 but was prohibited by the Injunction. The Department continues to inspect the erosion and sedimentation controls on a regular basis to ensure that the site is functioning in accordance with regulations.

Gibraltar Rock still needs to complete a number of requirements before it can begin extracting minerals from the Permit site. Those activities include, but are not necessarily limited to, clearing the area on the site that will house the operations area for the crushers and the conveyors and stockpiles; installation of berms and a fence as well as piezometers and weirs in any stream adjacent to the mining area; building a scale house with an appropriate septic unit; constructing a truck-washing station; connecting electricity to the site; bringing all the processing equipment, including crushers and screens, onto the site; and conducting a pre-blast survey of all

the houses and dwellings located within a certain distance of the quarry. Gibraltar Rock expects that completing these remaining activities will consume nine months to a year.

On May 28, 2010, Gibraltar Rock submitted a letter to the Department phrased as an "application for temporary cessation of surface mining activities" pursuant to 25 Pa. Code § 77.651(b),"[1] claiming that the ongoing Injunction was preventing Gibraltar Rock from performing further work on the site. On October 19, 2010, shortly after the Township issued an objection to Gibraltar Rock's request, Gibraltar Rock amended its May 28, 2010 letter, phrasing the amended request as an extension of time to continue noncoal surface mining activities pursuant to 25 Pa. Code § 77.128(b), to which the Township objected on October 25, 2010. On November 19, 2010, the Department issued its approval of a temporary cessation for six months, until May 8, 2011, pursuant to Section 13(e) of the Noncoal Surface Mining Conservation and Reclamation Act (the "Noncoal Act"), 52 P.S. § 3313(e). Mr. Menghini testified on behalf of the Department that the Department mistakenly cited to Section 13(e) of the Noncoal Act, which the Board consequently notes does not even exist and likely was intended to read Section 13(b);[2] rather, Mr. Menghini testified that the Department had intended to rely on 25 Pa. Code § 77.128(b). The Township appealed the Department's approval on December 10, 2010. That appeal is docketed at EHB Docket No. 2010-185-M.

In the meantime, on October 25, 2010 Gibraltar Rock submitted an Application for Land Development with the Township relative to a 168.30 acre portion of the quarry, all of which was situated within the HI zoning district, pursuant to the Judge Albright's Order.

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[1] Section 77.651(b) actually refers to a temporary cessation of "operations," not "surface mining activities." 25 Pa. Code § 77.651(b).

[2] Section 13(b) of the Noncoal Act, 52 P.S. § 3313, contains the same language as 25 Pa. Code § 77.651(b).

On May 13, 2011, Gibraltar Rock submitted a letter to the Department requesting an additional temporary cessation pursuant to Section 77.651(b), then on May 18, 2011, after becoming aware that it had sent the request to the wrong Department official, sent an additional letter to the Department requesting a temporary cessation, but this time pursuant to both Section 77.128(b) and Section 77.651(b).[3] Both letters claimed that the ongoing Injunction was preventing Gibraltar Rock from performing further work on the site. The Township objected to both requests. On May 19, 2011, the Department approved Gibraltar Rock's request for a temporary cessation until August 8, 2011,[4] but this time pursuant to both Section 77.128(b) and Section 77.651(b), unlike the previous approval which was issued pursuant to only Section 13 of the Noncoal Act, 52 P.S. § 3313. The Township appealed that action on June 3, 2011. That appeal is docketed at EHB Docket No. 2011-083-M.

This pattern has continued, for the most part, ever since. The following is a summary of the additional temporary cessations approved by the Department:

- On July 26, 2011, Gibraltar Rock submitted a letter to the Department requesting approval of a temporary cessation under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), to which the Township objected on August 5, 2011. On August 5, 2011, the Department issued its approval of a temporary cessation until November 7, 2011,[5] under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), and the Township appealed that action on August 25, 2011. That appeal is docketed at EHB Docket No. 2011-121-M.

- On November 8, 2011, Gibraltar Rock submitted a letter to the Department requesting approval of a temporary cessation under 25 Pa. Code § 77.128(b) and 25 Pa. Code §

[3] It appears that although Gibraltar Rock did not submit its May 13, 2011 and May 18, 2011 requests until after the prior temporary cessation had expired on May 8, 2011, Gibraltar Rock may have actually issued its original request on February 22, 2011, prior to the deadline. In any event, the Township failed to raise any objection to this issue in its post-hearing brief and has therefore waived that objection.

[4] Although the Department issued the temporary cessation for 92 days instead of 90 days, the Township failed to raise any objection to this issue in its post-hearing brief and has therefore waived that objection.

[5] Although the Department issued the temporary cessation for 91 days instead of 90 days, the Township failed to raise any objection to this issue in its post-hearing brief and has therefore waived that objection.

77.651(b), to which the Township objected on November 8, 2011.[6] On November 8, 2011, the Department issued its approval of a temporary cessation until February 6, 2012,[7] under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), and the Township appealed that action on December 8, 2011. That appeal is docketed at EHB Docket No. 2011-171-M.

- On January 31, 2012, Gibraltar Rock submitted a letter to the Department requesting approval of a temporary cessation under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), to which the Township objected on February 7, 2012. On February 6, 2012, the Department issued its approval of a temporary cessation until May 6, 2012, under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), and the Township appealed that action on February 21, 2012. That appeal is docketed at EHB Docket No. 2012-025-M.

- On April 27, 2012, Gibraltar Rock submitted a letter to the Department requesting approval of a temporary cessation under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b). On May 1, 2012, the Department issued its approval of a temporary cessation until July 31, 2012, under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), and the Township appealed that action on May 30, 2012. That appeal is docketed at EHB Docket No. 2012-106-M.

- On July 31, 2012, the Department issued its approval of a temporary cessation until October 29, 2012, under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), and the Township appealed that action on August 26, 2012. That appeal is docketed at EHB Docket No. 2012-154-M.

- On October 26, 2012, the Department issued its approval of a temporary cessation until January 28, 2013, under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), and the Township appealed that action on November 9, 2012. That appeal is docketed at EHB Docket No. 2012-183-M.

- On January 25, 2013, the Department issued its approval of a temporary cessation until April 28, 2013, under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), and the Township appealed that action on February 25, 2013. That appeal is docketed at EHB Docket No. 2013-026-M.

- On April 26, 2013, the Department issued its approval of a temporary cessation until July 27, 2013, under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), and the Township appealed that action on May 13, 2013. That appeal is docketed at EHB Docket No. 2013-055-M.

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[6] Although Gibraltar Rock submitted its November 8, 2011 request one day after the previous temporary cessation expired on November 7, 2011, the Township failed to raise any objection to this issue in its post-hearing brief and has therefore waived that objection.

[7] Although the Department issued the temporary cessation for 91 days instead of 90 days, the Township failed to raise any objection to this issue in its post-hearing brief and has therefore waived that objection.

- On July 26, 2013, the Department issued its approval of a temporary cessation until October 25, 2013, under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), and the Township appealed that action on August 5, 2013. That appeal is docketed at EHB Docket No. 2013-117-M.

- On October 25, 2013, the Department issued its approval of a temporary cessation until January 23, 2014, under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), and the Township appealed that action on November 7, 2013. That appeal is docketed at EHB Docket No. 2013-203-M.
- On January 17, 2014, the Department issued its approval of a temporary cessation until April 23, 2014, under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), and the Township appealed that action on January 24, 2014. That appeal is docketed at EHB Docket No. 2014-010-M.

- On April 21, 2014, the Department issued its approval of a temporary cessation until July 22, 2014, under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), and the Township appealed that action on May 21, 2014. That appeal is docketed at EHB Docket No. 2014-069-M.

- On July 15, 2014, the Department issued its approval of a temporary cessation until October 21, 2014, under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), and the Township appealed that action on August 20, 2014. That appeal is docketed at EHB Docket No. 2014-119-M.

- On October 20, 2014, the Department issued its approval of a temporary cessation until January 19, 2015, under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b), and the Township appealed that action on October 21, 2014. That appeal is docketed at EHB Docket No. 2014-149-M.

The Township's appeals have been consolidated at EHB Docket No. 2012-185-M.

On January 3, 2012, the Township filed a Motion for Summary Judgment, which it later amended on January 6, 2012 to comply with the Board's rules. The Township argued that the Department lacked a basis on which to issue a temporary cessation for longer than ninety (90) days pursuant to Section 13(b) of the Noncoal Act, 52 P.S. § 3313, and 25 Pa. Code § 77.651(b). *See* Township's Amended Motion for Summary Judgment at 2. The Township also argued that the Department lacked the authority to issue a temporary cessation under 25 Pa. Code § 77.128(b) because that section "applies to extensions of the date to commence mining activities," and those activities had already commenced. *See Id.*

On March, 26, 2012, the Board issued an Opinion and Order denying the Township's Motion for Summary Judgment on the basis that important unresolved issues of material fact remained before judgment could be entered on the Township's appeal. At that time, the record lacked sufficient evidence to allow the Board to determine how much work had been completed on the site as well as how much work still needed to be completed. Also, the parties at that point had not yet filed any legal argument on the standard used to determine when a permit is activated under the Noncoal Act and Noncoal Regulations.[8]

On October 12, 2012, the Honorable Richard P. Mather, Sr. presided over a hearing at the Board's Norristown offices. The issues have been fully briefed, and the matter is ripe for adjudication.

The issue presented before the Board is whether the Department's decision to allow Gibraltar Rock to retain its permit while subject to an injunction to cease activities on the site without forfeiting the Permit was lawful and reasonable as supported by the facts. As the Board stated in its earlier Opinion, the issue presented must be addressed in two parts. First, the Board must determine what authority the Department exercised in taking the actions under appeal. Second, the Board must then determine whether the Department's exercise of that authority was lawful and reasonable as supported by the facts.

Gibraltar Rock and the Department now argue that the Department indeed had authority to approve the requests for temporary cessations under 25 Pa. Code § 77.128(b). The Township argues, in opposition, that the Department lacked authority under both 25 Pa. Code § 77.128(b) and 25 Pa. Code § 77.651(b) to approve the requests for temporary cessations. As a result, the Township would have it, the Permit is now null and void, and Gibraltar Rock must apply for a

[8] Section 11(a) of the Noncoal Act provides the Environmental Quality Board with the authority to "promulgate such regulations as it deems necessary to carry out the provisions and purposes of this act and for the health and safety of those persons employed at surface mining operations." 35 P.S. 3311.(a).

new permit, thus starting the paperwork over from scratch. The Board agrees with the Township that the Department lacked authority under 25 Pa. Code § 77.651(b) to approve the requests for temporary cessations; however, the Board disagrees with the Township's conclusion that the Department lacked authority under Section 77.128(b) and that the Board must invalidate the Permit.

II. Burden of Proof and Standard of Review

The Township bears the burden of proof in this matter. Under the Board's rules, a party appealing an action of the Department shall have the burden of proof when a party who is not the recipient of an action by the Department protests the action. 25 Pa. Code § 1021.122(c)(2); *see Gadinski v. DEP*, Docket No. 2009-174-M (Adjudication, May 31, 2013); *McGinnis v. DEP*, 2012 EHB 109, 125; *Pine Creek Valley Water Assoc., Inc. v. DEP*, 2011 EHB 761, 772. Specifically, the Township must prove by a preponderance of the evidence that the Department's decisions to approve the "temporary cessations" were not lawful and reasonable exercises of the Department's discretion supported by the evidence presented. *See Pine Creek Valley Water Assoc., Inc.*, 2011 EHB at 772; *Wilson v. DEP*, 2010 EHB 827, 833; *Smedley v. DEP*, 2001 EHB 131, 156.

The question before the Board is whether the Department's decision to allow Gibraltar Rock to retain its permit while subject to an injunction to temporarily cease its noncoal mining activities on its site was lawful and reasonable as supported by the facts. *See Wilson v. DEP*, 2010 EHB 827, 833. The Board reviews appeals *de novo*. In the seminal case of *Smedley v. DEP*, 2001 EHB 131, then Chief Judge Michael L. Krancer explained the Board's *de novo* standard of review:

> [T]he Board conducts its hearings *de novo*. We must fully consider the case anew and we are not bound by prior

> determinations made by DEP. Indeed, we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "de novo review involves full consideration of the case anew. The [EHB], as reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001). Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

Smedley, 2001 EHB at 156. As such, we are less concerned with procedural mistakes that the Department may have made on the way to its decision. *Giordano v. DEP*, 2001 EHB 713, 739.

III. Regulatory Framework under 25 Pa. Code § 77.128 and 25 Pa. Code § 77.651

As the Board previously described, the Noncoal Surface Mining and Reclamation Act and the regulations promulgated thereunder establish requirements that govern the typical lifecycle of a permitted noncoal surface mine. *New Hanover Township v. DEP and Gibraltar Rock, Inc.*, 2012 EHB 44, 46-48; *see* 52 P.S. § 3313(b); 25 Pa. Code § 77.128 and 77.651. A noncoal mining permit is typically issued without a specific permit term for the duration of the mining and reclamation operation. 25 Pa. Code § 77.128(a).[9] Section 77.128(b) limits the open ended permit term, to some extent, by imposing the requirement that the "permit will terminate if the permittee has not begun noncoal mining activities covered by the permit within 3 years of the issuance of the permit." 25 Pa. Code § 77.128(b). Section 77.128(b) further provides that the Department may grant reasonable extensions of time for commencement of these activities for several listed reasons. *Id.* If a permit has not been activated within the 3-year period or the

[9] Section 77.128(a) contains an exception to this open ended permit term for the NPDES permit associated with the noncoal mining permit. *Id.* The NPDES permit has a 5-year permit term, and it must be renewed every 5 years.

permittee has not obtained an extension, Section 77.128(b) further provides that a permittee may apply for a permit renewal under Section 77.143. *Id.*

After a permit has been activated within the timeframes prescribed by Section 77.128, Section 3313(a) provides:

> **(a) General rule.**–Except with the express written approval of the department as provided in subsection (b), the operator shall maintain mining and reclamation equipment on the site at all times, shall conduct an active operation and shall conduct surface mining operations on the site on a regular and continuous basis.

52 P.S. § 3313(a). The exception subsection (b) provides that the Department may approve a temporary cessation of an operation for a period not exceeding 90 days unless the cessation is due to seasonal shutdown. 52 P.S. § 3313(b); *see* 25 Pa. Code § 77.651 (regulatory authority to allow temporary cessation of operations that mirrors statutory authority). The statutory language in Section 3313 is nearly identical to the regulatory authority language in Section 77.651.

In summary, after a permit is issued, a permittee shall begin noncoal mining activities within 3 years unless an extension of the commencement of activities deadline is obtained or the permit is renewed. After the permittee begins noncoal mining activities and commences operations the permitted operator shall maintain mining and reclamation equipment on-site at all times and shall conduct surface mining operations on the site on a regular and continuous basis unless the operator secures approval from the Department for a temporary cessation of operations from the Department. These requirements support the open ended noncoal surface mining permit term because they regulate the commencement of activities within a specified period and mandate regular and continuous operations until mining and reclamation is completed unless the Department approves a temporary cessation of operations.

There is a slight difference in the regulatory language in the related requirements to begin "noncoal mining *activities*" within three years of the issuance of the permit under Section 77.128(b) and the subsequent lifecycle requirement to conduct surface mining *operations* on the site on a regular and continuous basis under Section 3313(b), and its implementing regulations in Section 77.651. This difference in regulatory language is important under the unusual facts of this appeal as set forth below.

The term "noncoal mining activities" is not explicitly defined in the Noncoal Act or its underlying regulations. However, the terms "surface mining" and "noncoal surface mining activities," which the Board and the Township interpret are synonymous with the term "noncoal mining activities," are defined broadly to include both the extraction of minerals and all surface activity connected with mining, including preliminary "site preparation."[10] 52 P.S. § 3303 (defining "surface mining"); 25 Pa. Code § 77.1 (defining "noncoal surface mining activities").

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[10] The terms "surface mining" and "noncoal surface mining activities" are defined, in relevant part, as follows:

> The extraction of minerals from the earth, from waste or stockpiles or from pits or from banks by removing the strata or material that overlies or is above or between them or otherwise exposing and retrieving them from the surface. The term includes strip mining, auger mining, dredging, quarrying and leaching and *the surface activity connected with surface or underground mining, including, but not limited to,* exploration, *site preparation*, entry, tunnel, drift, slope, shaft and borehole drilling and construction and activities related thereto. The term does not include mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings.

52 P.S. § 3303 (emphasis added); 25 Pa. Code § 77.1 (emphasis added). The term "noncoal mining activities" includes both "noncoal surface mining activities" and "underground noncoal mining activities." The term "underground noncoal mining activities" is defined in the Noncoal Regulations as "[a]n operation whereby noncoal minerals are extracted from beneath the surface by means of shafts, tunnels, adits or other mine openings, including underground construction, operation and reclamation of mine openings; underground mining, hauling, pumping and blasting; in situ processing, and other subsurface activities in connection with the mine." 25 Pa. Code § 77.1.

Noncoal surface mining activities heretofore is broadly construed to include both preliminary site preparation and the subsequent mineral extraction and eventual reclamation.[11]

Section 77.128(b) further provides that "[i]f a permit has not been activated within 3 years or the permittee has not been granted an extension, the permittee may apply for a permit renewal." Permit renewal applications must be filed pursuant to 25 Pa. Code § 77.143 (relating to permit renewals). 25 Pa. Code § 77.128(c). If an operator has activated its permit, then the permit renewal process is no longer necessary nor is it available. Similarly, once a permit is activated, an operator no longer needs to apply for an extension under 25 Pa. Code § 77.128(b). After activities have begun, generally, "the operator shall maintain mining and reclamation equipment on the site at all times, shall conduct an active operation and shall conduct surface mining operations on the site on a regular and continuous basis." 52 P.S. § 3313(a); 25 Pa. Code § 77.651(a). This general requirement is designed to prevent the abandonment of mining operations where there are outstanding reclamation obligations which the Commonwealth will be left to perform to avoid public health, safety, welfare and environmental problems.

In limited circumstances, an operator may request express written approval from the Department for a "temporary cessation of operations" pursuant to Section 13(b) of the Noncoal Act, which is mirrored by 25 Pa. Code § 77.651(b) of the Noncoal Regulations, and provides:

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[11] The Noncoal Regulations provide four possible permit statuses for noncoal mining permits under the definition of "permit statuses" 25 Pa. Code § 77.1. A permit qualifies as "not started" "where the mining permit has been issued, but mining activities have not begun." 25 Pa. Code § 77.1. A permit is "active" where the mine site does "not qualify for inactive status, not started status or released status." *Id.* A permit qualifies as "inactive" if "mineral extraction activity has been completed but final bond release has not been completed," and a permit qualifies as "released" "where the final bond release has been completed." *Id.* Here, the Permit is not "inactive" or "released" because neither mineral extraction activity nor final bond release has been completed. Yet again, another term, "mining activities," is not defined in the Noncoal Act or its regulations. Nevertheless, the Board interprets the term as being synonymous with the terms "noncoal mining activities," "surface mining" and "noncoal surface mining activities." In summary, a noncoal mining permit is arguably "activated" when the permittee begins surface activity connected with mining, including preliminary site preparation. These general rules assume a typical surface mine lifecycle, and they do not address the unusual facts of this appeal where an injunction stops site preparation activities before mineral extraction operations begin.

> Application for temporary cessation.—Before temporary cessation of operations, the operator shall submit a written application to the Department including a statement of the number of acres that have been affected, the reason for cessation, the date on which temporary cessation is anticipated and the date on which the operator anticipates that operations will resume . . . .[12]

52 P.S. § 3313(b). The Department may not approve a temporary cessation of operations for a period of greater than ninety (90) days unless the cessation is due to "seasonal shutdown," "labor strikes" or, for operations producing highway or construction aggregates, if there is an "absence of a current regional market for the mineral being mined."[13] 52 P.S. §§ 3313(b)-(c); 25 Pa. Code §§ 77.651(b)-(c). The limited nature of this exception reflects the overall intention to avoid having active mining operations with outstanding reclamation obligations slide into a state of abandonment.

To obtain a temporary cessation of operations, Section 13(b) of the Noncoal Act, 52 P.S. § 3313(b), and 25 Pa. Code § 77.651 require an operator to submit "the date on which the operator anticipates that *operations* will resume." (emphasis added). Therefore, an application for temporary cessation is appropriate only after surface mining operations have begun. The term operation is defined in Section 3 of the Noncoal Act, 52 P.S. § 3303, and 25 Pa. Code § 77.1 as "[t]he pit located upon a single tract of land or a continuous pit embracing or extending upon two or more contiguous tracts of land." "Pit" is defined as "[t]he place where any minerals are being mined by surface mining." 52 P.S. § 3303; 25 Pa. Code § 77.1. In other words, the term "operations" is limited to the construction of the pit and the actual physical extraction of minerals from a pit, unlike the term "noncoal mining activities" and synonymous terms which

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[12] "Temporary cessation does not relieve the operator of the obligation to comply with the act, this chapter, the conditions of the permit, including, but not limited to, compliance with applicable environmental protection performance standards." 52 P.S. § 3313(d); 25 Pa. Code § 77.651(d).

[13] "For operations producing highway or construction aggregates, where the temporary cessation is due to the absence of a current regional market for the mineral being mined, temporary cessation may not exceed five years." 52 P.S. § 3313(c); 25 Pa. Code § 77.651(c).

more broadly include other surface activity, such as general site preparation. Therefore, the Department may grant a request for "temporary cessation of operations" pursuant to Section 13(b) of the Noncoal Act, and 25 Pa. Code § 77.651(b), only when the operator has commenced work at the pit, including construction of the pit and the extraction of minerals from the pit.

Important to note is that an "activated" permit status under Section 77.128's extension provision differs from an "active operation" at issue under Section 77.651's temporary cessation provision. An "active operation" is "[a]n operation in which a minimum of 500 tons of minerals for commercial purposes have been removed in the preceding calendar year." 25 Pa. Code § 77.1. Under the facts of this appeal, and for the reasons discussed below, the Permittee has commenced site preparation noncoal mining activities but was enjoined during these preliminary activities before they were completed. Gibraltar Rock is not yet conducting active operations at the Permit site. This not yet fully "activated" permit status, along with the Injunction stopping the completion of site preparation activities and preventing active operations, presents the Board with an unusual situation to apply the Department's legal authority to approve Gibraltar Rock's numerous requests for "temporary cessation."

IV. Department's Authority to Approve Requests

In a typical situation, once Gibraltar Rock commenced site preparation activities it would have continued on to conclude site preparation activities and then it would have begun actual mineral extraction operations from the pit area. This is the typical noncoal surface mine lifecycle where mining operations would continue on a regular and continuous basis until the completion of all mining and reclamation activities unless the Department approved a temporary cessation of regular and continuous operations.

This appeal does not involve a typical situation. While Gibraltar Rock began site preparation noncoal surface mining activities, the Township obtained the Injunction that stopped these site preparation activities before these preliminary noncoal mining activities were completed and before mineral extraction operations began. This unusual situation is not specifically addressed by the Department's regulations which assume a continuous commencement of noncoal surface mining activities reaching the commencement of operations, i.e., the extraction of minerals from the pit area. Here, the Township secured the Injunction after Gibraltar Rock began site preparation but before site preparation concluded and mineral extraction from a pit began.

Under the Department's statutory and regulatory authority, after Gibraltar Rock began site preparation activities and the Township secured the Injunction to stop these activities before operations began, what approval from the Department, if any, did Gibraltar Rock need to preserve its noncoal surface mining permit while it pursued a necessary local approval? Did Gibraltar Rock need a further extension of the deadline in Section 77.128(b) to fully begin noncoal surface mining activities? Or did Gibraltar Rock need an approved temporary cessation of its not yet started mining operations under Section 3313 and its implementing regulations at Section 77.651? Or did the commencement of the site preparation noncoal mining activities and the Injunction place Gibraltar Rock where it needed no subsequent Department approval to maintain its Permit and also comply with the Injunction? If it still needed an extension under Section 77.128(b), was the extension reasonable? These are questions the Board needs to address.

The Township argues that the Department abused its discretion under 25 Pa. Code §§ 77.128 and 77.651 in approving the temporary cessations. First, the Township argues that

Gibraltar Rock activated the Permit, which precluded the Department from issuing any approval under Section 77.128(b). Second, the Township argues that the Department lacked the authority to approve Gibraltar Rock's initial request for a temporary cessation for a period of greater than ninety (90) days because Gibraltar Rock's reasons for requesting a temporary cessation did not fall under any of the grounds enumerated in Section 13(b) of the Noncoal Act and Section 77.651(b) of the Noncoal Regulations that would permit the Department to approve a request for a temporary cessation for a period of greater than ninety (90) days. Township's Post-Hearing Brief at 11.

Gibraltar Rock and the Department, on the other hand, now, before the Board claim that the Department relied solely on 25 Pa. Code § 77.128(b) in approving all of the temporary cessations, arguing that the extensions of time to commence noncoal mining activities were necessary because the Injunction, which the Township secured, interrupted the commencement of noncoal mining activities and threatened substantial economic loss to Gibraltar Rock. The Department claims that it mistakenly cited Section 13 of the Noncoal Act in approving the initial request for a temporary cessation and that it cited 25 Pa. Code § 77.651 in the subsequent approvals only because the Department views the term "temporary cessation" as a broad coverall and uses the term in many instances in a "colloquial" sense. (N.T. 112-15, 127.) The Department's witness, Mr. Menghini, was particularly forthcoming about the applicability of Section 77.651, conceding that upon further reflection the Department lacked authority to approve a temporary cessation for Gibraltar Rock under this provision. (N.T. 127-27.)

As discussed above, as well as in the Board's March 26, 2012 Opinion, the Board will decide this case in two parts. First, the Board must determine which authority the Department relied on in issuing the approvals at issue in this consolidated appeal. The Board is less

concerned with any procedural mistakes the Department has made in issuing the approvals of the temporary cessations. *Giordano v. DEP*, 2001 EHB 713, 739. Second, the Board must determine whether the Department abused its discretion in exercising that authority.

The facts of this appeal complicate the Board's resolution of the first legal issue listed above. The Department's statements or more precisely its longstanding misstatements regarding the authority it exercised further complicate resolution as set forth below. After the Department initially issued the noncoal mining permit to Gibraltar Rock in 2005, Gibraltar Rock still needed to secure necessary local approvals to begin mining under its permit. As Gibraltar Rock approached the initial deadline to begin "the noncoal mining activities covered by the permit within 3 years of the issuance of the permit," 25 Pa. Code § 77.128(b), Gibraltar applied for an extension of this deadline that the Department approved on December 10, 2007. Gibraltar Rock subsequently requested and the Department approved two additional extensions on October 14, 2008 and March 24, 2009 under 25 Pa. Code § 77.128(b) that allows the Department to approve extension to the deadline to begin noncoal mining activities.[14]

After the Department issued the third extension for commencement of noncoal mining activities deadline, the Department advised Gibraltar Rock that it would not grant any further extensions because the Department believed that Gibraltar Rock had local approval to mine in the HI zoning district portion of its mining permit. Gibraltar Rock decided to activate its noncoal mining permit and begin site preparation noncoal mining activities. Gibraltar Rock notified the Township of its intentions to activate its permit and the Township objected. The Township obtained the Injunction from Honorable Kent H. Albright of the MCCCP. The Injunction

[14] These initial approvals of extension of the commencement of noncoal mining activities deadline were not appealed.

stopped Gibraltar Rock's site preparation activities before mineral extraction operations occurred.

A. Authority Exercised after Injunction Stopped Site Preparation Activities

After the Township secured the Injunction to stop Gibraltar Rock's site preparation noncoal surface mining activities before they were completed and operation began, Gibraltar Rock applied for a "temporary cessation" of its operations. The Department approved the request and over the past 4 years the Department has approved a series of "temporary cessations" that are the subject of this consolidated appeal. The Department's description of the type of action it approved has changed over the years. First, the Department stated it relied on Section 77.651, which implements Section 13, for a "temporary cessation," to approve the request. Then, the Department stated that it relied on both Section 77.651 and Section 77.128 to approve the request for a "temporary cessation."

Now, Gibraltar Rock and the Department claim that the Department mistakenly cited only Section 13 of the Noncoal Act (and Section 77.651 that mirrors this authority) in approving Gibraltar Rock's initial temporary cessation request and others that followed and instead intended to just rely upon 25 Pa. Code § 77.128. The Township does not vigorously dispute this point, and instead asserts arguments undermining the Department's exercise of authority under both provisions. The evolving nature of the Department's legal position on the issue of the authority it exercised is a concern when considering whether to give the Department's regulatory views deference.[15]

[15] The Department's interpretation of its regulations or a stature is not entitled to deference if the Department has changed its interpretation. *See RAG Cumberland Res. v. Dep't of Envtl. Prof.* 869 A.2d 1065, 1072 n. 11 (The Department's new interpretation was an "abrupt *volte face* from the interpretation it had followed for more than thirty years" and was not entitled to deference.) Here the Department has changed its interpretation of its regulations regarding the source of its authority for the approvals it

Notwithstanding the lack of deference to the Department's interpretation, the Board has identified three reasons that support the Board's position that the Department relied on Section 77.128, and not Section 13 and its implementing regulations at Section 77.651, in issuing the first and all subsequent approvals of temporary cessations. The Board ultimately agrees with the Department's view but not on the basis of deference. First, the initial temporary cessation was approved for a period of six months which, under the circumstances, was permitted under Section 77.128 but not under Section 13 of the Noncoal Act or 25 Pa. Code § 77.651. Under Section 77.128(b), the Department may grant "reasonable extensions" which may very well be for a period of six months. However, under Section 13 of the Noncoal Act and 25 Pa. Code § 77.651(b), the Department may not approve a temporary cessation of an operation for more than ninety (90) days unless the cessation is due to "seasonal shutdown," "labor strikes" or, for operations producing highway or construction aggregates, an "absence of a current regional market for the mineral being mined."[16] 52 P.S. §§ 3313(b)-(c); 25 Pa. Code §§ 77.651(b)-(c). The Department conceded that none of these three factors were present at the time it issued an approval of a temporary cessation for a period of six months.

Second, the approvals were granted based on the ongoing Injunction, which is one of the grounds specifically enumerated in 25 Pa. Code § 77.128(b) but absent from Section 13 of the Noncoal Act and 25 Pa. Code § 77.651(b). Third, all of the Department's approvals issued subsequent to its initial approval cited both 25 Pa. Code §§ 77.128 and 77.651, which is consistent with the Department's position that it relied on Section 77.128 and not Section 77.651.

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granted Gibraltar Rock, and the Board declines to give the Department's latest interpretation any deference in light of the Department's several changes of interpretation.

[16] Section 13(c) reads in full: "For operations producing highway or construction aggregates, where the temporary cessation is due to the absence of a current regional market for the mineral being mined, temporary cessation may not exceed five years." 52 P.S. § 3313(c).

The Township argues, and the Department concedes, that the Department could not have relied on Section 13 of the Noncoal Act and 25 Pa. Code § 77.651 in approving the temporary cessations. The Board agrees. Two reasons support this conclusion. First, as discussed above, a request for a temporary cessation is required only after an "operation" commences. An operation refers to construction of a pit and the extraction of minerals from a pit, which Gibraltar Rock was not able to initiate. Second, as explained immediately above, the initial temporary cessation was granted for six months, which, under the circumstances, was not permitted under Section 13 of the Noncoal Act or 25 Pa. Code § 77.651.

With the 20/20 hindsight that *de novo* review provides, it appears that the Department made several mistakes during the initial stages of this appeal. First, the Department decided that Gibraltar Rock has all necessary local approvals to begin noncoal surface mining activities and operations on a portion of its permitted site. This mistake prompted the Department to warn Gibraltar Rock that unless it activated the permit it would be considered null and void. This statement prompted Gibraltar Rock to announce plans to activate the permit which in turn led that Township to request and secure the Injunction. Obviously, the Department was wrong that Gibraltar Rock had the necessary approvals to begin its noncoal mining activities.

Since the Township secured the Injunction, the Department has approved a series of approvals it describes as "temporary cessations." At first the Department described the approvals as 'temporary cessations" approved under Section 13 and its implementing regulations at 25 Pa. Code Section 77.651 that allow a mine operator to temporarily cease active mining operations for a short period of time for a limited number of reasons. The Department later altered its position to describe the action as a "temporary cessation" approved under the authority

of both Sections 77.128(b) and 77.651. Now, before the Board the Department asserts that the Department approved the series of "temporary cessations" under just Section 77.128(b).

The Department still uses the terminology "temporary cessation" in its approval letter, and this is another complicating factor. The "temporary cessation" language is in the title to Section 77.651, and this Section governs the temporary cessation of active surface mining operations on a permitted site that are otherwise mandated "on a regular and continuous basis." 25 Pa. Code § 77.651(a). The Department attempts to gloss over this misuse of regulatory language by suggesting to the Board that the term "temporary cessation" has a broad meaning beyond Section 77.651. The Board rejects this suggestion which flies in the face of the regulatory language and just provides more confusion.

After the Township obtained the Injunction, the Department should have quickly reassessed whether Gibraltar Rock had all necessary approvals to commence noncoal mining activities. Then it should have decided that it retained authority under Section 77.128(b) to approve reasonable extensions from the deadline to begin noncoal surface mining activities where the site preparation activities are begun but the Injunction prevents their completion before mineral extraction operations can begin. The Department eventually reached this position, and this appeal would not be as complicated as it is if the Department would have quickly come to this conclusion.

Consequently, the Board finds that the Department did not rely, nor could it have relied, on Section 13 of the Noncoal Act and 25 Pa. Code § 77.651 in issuing the "temporary cessations" to Gibraltar Rock. Instead, the Board finds that the Department relied on Section 77.128(b).

B. Whether Department Abused its Discretion in Exercising its Authority

Next, we turn to the issue of whether the Department lawfully exercised its authority under 25 Pa. Code § 77.128(b) in approving Gibraltar Rock's requests for "temporary cessations" under the facts presented. Section 77.128(b) of the Noncoal Regulations, which provides for extensions of time for commencement of "noncoal mining activities," states:

> The Department may grant reasonable extensions of time for commencement of these activities upon receipt of a written statement showing that the extensions of time are necessary if litigation precludes the commencement or threatens substantial economic loss to the permittee or if there are conditions beyond the control and without the fault or negligence of the permittee.

25 Pa. Code § 77.128(b). The Board now needs to determine whether that the approvals granted by the Department are authorized by this provision.

As a preliminary matter under Section 77.128(b), the Township argues that should the Board find that Gibraltar Rock did not activate the Permit, the Department still lacked authority to approve Gibraltar Rock's requests pursuant to 25 Pa. Code § 77.128(b) because, as the Township asserts, the existing Injunction, which would supply the legal basis for the Department's approval of Gibraltar Rock's requests, was "not beyond the control nor without the fault or negligence of Gibraltar Rock" because "Gibraltar Rock chose to take the risk of activating the Permit without complying with the Permit condition of obtaining all necessary approvals, including Land Development approval and zoning approval to operate a quarry in the LI Zoning District," which, in effect, precludes the Department from issuing an approval under 25 Pa. Code § 77.128(b). Township's Post-Hearing Brief at 11. The Township further points out that Gibraltar Rock did not file its application for Land Development Plan approval until nine years after it filed the GR I Zoning Application and three years after the EHB decision granting the Special Exemption. Had Gibraltar Rock filed its application for Land Development Plan

approval before or shortly after the ZHB granted the Special Exception, the Township argues, Gibraltar Rock may have already obtained Land Development Plan approval, thus negating the need for further approvals from the Department. (N.T. 131.)

Gibraltar Rock disagrees and asserts that it

> was not at fault or negligent in failing to secure land development plan approval at an earlier date. The question of whether land development plan approval is required after one obtains a Noncoal Permit which approves a mining plan was one of first impression. Gibraltar Rock believed, and still believes, that the requirement for land development plan approval is preempted by Section 16 of the Noncoal Act, 52 P.S. § 3316, because a land development plan regulates the operation of the mine. See *Pennsylvania Coal Co. v. Conemaugh Township,* 612 A.2d 1090 (Pa. Cmwlth. 1992); *Tinicum Township v. Delaware Valley Concrete,* 812 A.2d 758, 763 (Pa. Cmwlth. 2002). Taking a position on a question of first impression is not negligence even if that question is ultimately decided against you.

Gibraltar Rock's Post-Hearing Brief at 15-16. The Township disputes the efficacy of Gibraltar Rock's position, arguing that, "[w]hile Gibraltar Rock may have 'believed' that they were right, Judge Albright found that they were wrong." Township's Reply Brief at 5-6.

The Department further claims that "[i]t is not for the Department to delve into the substance of the underlying land use litigation" and that the Township's appeal is a back-door attempt to require the Department to enforce local land use requirements. Department's Post-Hearing Brief at 11, 13. Important to note here is that when the Township appealed the Department's April 15, 2010 renewal of Gibraltar Rock's NPDES permit, the Board dismissed that appeal, holding that the Department is not "an enforcer of local land use requirements." *New Hanover Twp. v. DEP*, 2011 EHB 645, 678, 680. The Township objects to this characterization. Township's Reply Brief at 3-5. The Board disagrees with the Department's position that this consolidated appeal is a back-door attempt to enforce local land use

requirements, and we believe that the Department's view is misguided. The Department's actions at issue in this consolidated appeal are not local approvals, they are Department approvals of "temporary cessations" under the Department's regulations. None of these Department approvals required the Department to choose to enforce or not to enforce local land use requirements. These decisions merely maintained the status quo while Gibraltar Rock applied for a local approval.

Nonetheless, any potential fault on behalf of Gibraltar Rock is not fatal to the Department's approvals because, as the Department correctly points out, the Township

> fails to note that the clauses of Section 77.128(b) are presented in the disjunctive "or"; in other words, the clause about "conditions beyond the control and without the fault or negligence of the permittee" is not necessarily controlling, as it is not presented in the conjunctive. As long as the permittee has satisfied one of the other clauses, which in this case Gibraltar has, the Department has the discretion to grant reasonable extensions of time.

Department's Post-Hearing Brief at 11. Put differently, Section 77.128(b) contains two possible conditions that a permittee may rely upon, both signaled by the word "if," the first clause pertaining to litigation and the second clause pertaining to fault. Here, Gibraltar Rock and the Department have relied on the litigation clause, not the fault clause. The Board therefore concludes that whether the Injunction was "beyond the control or without the fault or negligence" of Gibraltar Rock is not relevant to determining whether the Department abused its discretion by issuing an approval pursuant to 25 Pa. Code § 77.128 on the basis of the Injunction.

Returning to the issue of whether Gibraltar Rock activated the Permit, the Board noted in its earlier Opinion that no party had filed legal argument on what standard should be used to determine whether a noncoal permit has been activated. The Township argues that the Permit

was activated by the work Gibraltar Rock completed in 2009, which in turn barred the Department from thereafter approving any requests for relief under Section 77.128(b).

Gibraltar Rock argues that the Permit was never activated because Gibraltar Rock had not commenced noncoal mining activities. It claims that activation is "not an instant in time," but rather, activation is process which Gibraltar Rock has not yet completed. Gibraltar Rock's Post-Hearing Brief at 14. More specifically, Gibraltar Rock would define permit activation under 25 Pa. Code § 77.128 as

> that period of time during which a mine operator works to complete all of the conditions precedent in its noncoal mine permit, together with all of the site work and construction which must be undertaken before mining can commence at the site. A permit should be deemed to be "activated" once it can commence mining on the site, i.e. begin extraction of minerals from the site.

Gibraltar Rock's Post-Hearing Brief at 11. In fact, Special Condition/Requirement No. 5 of the Permit states: "Prior to commencement of mining activities the permittee must fence in all the bonded areas to prevent unauthorized access to the site," (Appellant's Ex. 1), which essentially memorializes in the Permit the Department's view that some site preparation can occur prior to permit activation. The Department joins in Gibraltar Rock's arguments on this point. Department's Post-Hearing Brief at 10.

As a general rule, the Department's interpretation of its own regulations is entitled to deference so long as its interpretation is not clearly erroneous. *Browning-Ferris Indus., Inc. v. DEP,* 819 A.2d 148, 153 (Pa. Cmwlth. 2003) (citing *DEP v. North American Refractories Co.*, 791 A.2d 461, 466 (Pa. Cmwlth. 2002)). Further, the Department's "interpretation of its own regulations is to be given great weight unless the interpretation is plainly erroneous or inconsistent with the regulations." *Tri-State Transfer Co. v. DEP,* 722 A.2d 1129, 1133 (Pa. Cmwlth. 1999) (citing *Carlson Mining Co. v. DER,* 639 A.2d 1332, 1335 (Pa. Cmwlth. 1994),

petition for allowance of appeal denied, 649 A.2d 676 (Pa. 1994)). Deference need not be given "to an agency where its construction of a regulation is contrary to its plain meaning . . . or where the agency ignores the language of its own regulations." *Tri-State Transfer Co.*, 722 A.2d at 1133 (citations omitted). In addition, deference need not be given if the Department has changed its interpretation as it has done here. *See RAG Cumberland Res. v. Dep't of Envlt. Prot.*, 869 A.d at 1072, n. 11. Under the facts of this consolidated appeal, the Board gives no deference to the Department's interpretation of its regulations because the Department has changed its interpretation.

Moreover, the positions taken by Gibraltar Rock and the Department are quite at odds with statements made by Gibraltar Rock's counsel prior to trial and by both parties' witnesses at trial whereby both parties repeatedly conceded that the Permit had been activated. For example, Gibraltar Rock, through letters sent by Gibraltar Rock's counsel to the Department dated May 28, 2010, May 18, 2011, July 26, 2011, November 8, 2011, January 31, 2012 and April 27, 2012, stated that Gibraltar Rock "activated" the Permit. (N.T. 46-48; Appellant's Ex. 16, 22, 25, 28, 31, 34.) The Department's witness, Mr. Menghini, testified that Gibraltar Rock activated the Permit. (N.T. 109, 119.) Gibraltar Rock's witness, Mr. Patankar, also testified that Gibraltar Rock activated the Permit, (N.T. 52, 133.)

Mr. Patankar provided contradictory testimony that Gibraltar Rock had only begun to activate the Permit and that activation is a process that includes receiving a permit from the Pennsylvania Department of Transportation to build and maintain a road on the site; acquiring access to the site; constructing a driveway on the site; installing erosion and sedimentation controls; clearing the area on the site that will house the operations area for the crushers and the conveyors and stockpiles; installing berms and a fence as well as piezometers and weirs in any

stream adjacent to the mining area; building a scale house with an appropriate septic unit; constructing a truck-washing station; connecting electricity to the site; bringing all the processing equipment, including crushers and screens, onto the site; and conducting a pre-blast survey of all the houses and dwellings located within a certain distance of the quarry. (N.T. 57-62.)

The parties stipulated that at the time the Injunction was issued, Gibraltar Rock had commenced the following activities: installed a driveway into the site; leveled and partially excavated a portion of the process area; began construction of berms; and constructed erosion and sedimentation controls, including sediment basins, all of which were completed in the summer and fall of 2009. Upon completion of those activities, Gibraltar Rock ceased activities for the winter. Gibraltar Rock intended to resume its activities in the spring of 2010 but was prevented from doing so by Judge Albright's Order. (SF 31.)

The facts also indicate that tasks remaining before Gibraltar Rock can begin to extract minerals from the Permit site will take nine months to a year to complete and will include construction of a fence around the perimeter of the Permit area, installing piezometers and weirs in the stream adjacent to the area to be mined,[17] installing a scale house and scales, installing a truck wheel washing area, paving the driveway, bringing electricity to the site, bringing and installing the process equipment necessary to crush the stone which will be mined at the site and conducting pre-blast surveys of surrounding residences. (N.T. 60-62, 73.) Gibraltar Rock argues that were it not for the Injunction as well as Judge Albright denial of Gibraltar Rock's Motion to Clarify the Court's Order of May 17, 2010 requesting that the Court permit Gibraltar Rock to

[17] Ironically, the Township opposes all efforts by Gibraltar Rock to continue conducting activities under the Permit, even the installation of piezometers and weirs, which the Department required as a condition of the Permit so that the Department can obtain background information before the mining activities would affect the groundwater and so that the Department can oversee the flow and extent of wetness of the stream channel as it flows into and out of the wetlands. (N.T. 69, 105.) In other words, the Township opposes the commencement of at least some activities intended to ensure environmental protection at the Permit site.

install a fence and stream monitoring devices, i.e., piezometers and weirs, in accordance with Special Condition/Requirement Nos. 5, 26 and 27 of the Permit prior to obtaining Land Development Plan approval, (Permittee's Ex. 2, 3), Gibraltar Rock would have continued to activate the Permit.

Judge Albright's Injunction stopped Gibraltar Rock's site preparation noncoal mining activities at the site before these preliminary activities were fully completed and mineral extraction operations from a pit were begun. The Injunction thereby interrupted the typical lifecycle of a noncoal surface mine. Under these exceptional circumstances, the Board finds that the Department retains authority under Section 77.128(b) to continue to regulate the interrupted noncoal surface mining activities by requiring Gibraltar Rock to comply with the requirements in this regulation.

The Board finds that Gibraltar Rock never fully activated the Permit, so that the Department was not stripped of its authority to approve requests for reasonable extensions pursuant to 25 Pa. Code § 77.128(b).[18] The regulatory language supports the Board's interpretation of Section 77.128(b). The operative language provides:

> ". . . The Department may grant reasonable extensions of time for commencement of *these activities* upon receipt of a written statement showing that the extensions of time are necessary . . . ."

25 Pa. Code § 77.128(b). (emphasis added.) Reasonable extensions are authorized for multiple activities and not just for some initial site preparation activities. As set forth above, noncoal mining activities includes noncoal surface mining activities which includes all activities associated at a mine starting with site preparation continuing during mineral extraction and

[18] The Board recognizes that the unusual facts of this case have created confusion whether the Department approved an extension or a temporary cessation. In light of the Board's Adjudication, the Department should discontinue describing its approvals as temporary cessations under similar unusual circumstances when the approval is really an extension under Section 77.128(b).

concluding with reclamation activities. Under Section 77.128(b) the Department has the authority to allow reasonable extensions until operations begin and the Department's authority under Section 13 and its implementing regulations in Section 77.651 begin to require regular and continuous operations and to allow temporary cessations from this requirement governing mineral extraction and reclamation requirements.

The Board now needs to evaluate whether the Department properly exercised its discretion under Section 77.128(b) to approve reasonable extensions to Gibraltar Rock. For the reasons set forth below, the Board finds that the Department has abused its discretion in providing extensions to Gibraltar Rock for more than nine years after the permit was issued without evaluating whether the permit that was issued in 2005 is current and up-to-date in 2014 from a noncoal surface mining regulatory perspective.

The Department issued the noncoal surface mining permit to Gibraltar Rock on April 15, 2005 which is more than nine years ago. Gibraltar Rock has not fully activated its permit for the reasons previously described in detail, and it still awaits necessary local approvals before it can recommence site preparation activities and commence operations. With the passage of time, nearly a decade since the permit was initially issued, there is no evidence in the record that the Department has ever evaluated whether the permit is still current and up-to-date from a noncoal surface mining regulatory perspective. Without such an evaluation, after the passage of more than nine years, the Board finds that the Department has abused its discretion under Section 77.128(b) by routinely extending the permit without an evaluation of whether the permit is still current and up-to-date.[19]

[19] The Board does not need to decide exactly when during the nine year span, the Department abused its discretion and approved an unreasonable extension. It is sufficient to find that after nine years the line has been crossed and the Department may not approve additional extensions without first determining whether the permit is still current and up-to-date from a noncoal surface mining regulatory perspective.

If the Department acts pursuant to a mandatory provision of a statute or regulation then the only question is whether to uphold or vacate the Department's action. *Warren Sand and Gravel Co. v. Dep't of Envitl. Res.*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). Upon appeal of discretionary Department action, the Board may substitute its discretion for that of the Department only where the Board has determined that the Department has abused its discretion, and may take evidence and rely upon facts not before the Department. *Browing-Ferris Industries, Inc. v. DEP*, 819A.2d 148, 153 (Pa. Cwlth 2003; *Warren Sand and Gravel; New Hanover Township v. DEP and Gibraltar Rock, Inc.*, 2011 EHB 645, 656. In approving Gibraltar Rock's requests in this consolidated appeal, the Board has determined that the Department has abused its discretion. The Board is therefore authorized to substitute its discretion for that of the Department as set forth below.

Under Section 77.128(b) a regulatory mechanism exists to allow the Department to evaluate whether the 2005 permit is still up-to-date from a noncoal surface mining regulatory perspective by reviewing an application for a permit renewal. Under this provision, Gibraltar Rock has an opportunity to apply for a permit renewal of its 2005 permit, and the application for renewal shall be filed under § 77.143 (relating to permit renewals). 25 Pa. Code § 77.128(c).

Under the Noncoal Regulations in Chapter 77, a permit renewal of the noncoal mining permit is a rare event. Under Section 77.128(a), the Department may issue a noncoal mining permit without a fixed permit term for the entire duration of the mining and reclamation operation. 25 Pa. Code § 77.128(a). The Department issued Gibraltar Rock's noncoal mining permit in this manner. Under this approach, a renewal of the noncoal mining permit is never necessary, as a general rule. The exception to the general rule arises under Section 77.128(b), which provides that if a permit has not been activated or the permittee has not obtained a

reasonable extension from the activation deadline, the permittee may apply for a permit renewal under Section 77.143. The lack of routine permit renewals, and the absence of specific regulatory requirements in Section 77.143 that apply in the unusual circumstances in this appeal compels the Board to exercise its discretion and to provide directions to the Parties to implement the permit renewal option set forth below.

The starting point is the regulatory requirements regarding permit renewals in Section 77.128 and Section 77.143. As previously mentioned Section 77.128(b) provides that the permittee may apply for a permit renewal if the permit has not been activated in three years and the permittee has not obtained reasonable extension. Section 77.128(c) provides that "a permit renewal application shall be filed under § 77.143 (relating to permit renewals)" 25 Pa. Code § 77.128(c).

Section 77.143(b) establishes the general requirements for mining permit renewals and provides:

> (b) *Mine permit renewals – general requirements*
>
> (1) A valid, existing permit issued by the Department will carry with it the presumption of successive renewals
>
> (2) A permit renewal will not be available for extending the acreage of the operation beyond the boundaries of the permit area approved under the existing permit. Addition of acreage to the operation will be considered a new application. A request for permit revision may accompany a request for renewal and shall be supported with the information required for application as described in this chapter.
>
> (3) A complete application for renewal of a permit, as established in this chapter, shall be filed with the Department at least 180 days before the expiration date of the particular permit in question. A renewal application shall be filed in the format required by the Department.
>
> (4) An application for renewal shall be for a term not to exceed the period of the original permit.
>
> (5) A permit renewal shall be for a term not to exceed the period of the original permit.

(6) Unless the Department finds that the permit should not be renewed under paragraph (7), it will issue a permit renewal after finding that the requirements of this chapter and the requirements of public participation and notification are satisfied.

(7) A permit will not be renewed if the Department finds that one of the following applies:

(i) The requested renewal substantially jeopardizes the operator's continuing ability to comply with the act, the environmental acts, this title and the regulatory program on existing permit areas.

(ii) The operator has failed to provide evidence that a bond required to be in effect for the activities will continue in full force and effect for the proposed period of renewal, as well as additional bond the Department might require.

(iii) Additional revised or updated information required by the Department has not been provided by the applicant.

(8) The Department will send copies of its decision to the applicant, persons who field objections or comments to the renewal and to persons who were parties to an informal conference held on the permit renewal.

25 Pa. Code § 77.143(b). Under these requirements a permit will carry a presumption of successive renewals. The application for a permit renewal shall be filed at least 180 days before the expiration date in a particular permit. The renewal application shall be in a format required by the Department. Public notice and participation requirements in Section 77.121 apply to an application for permit renewal. The Department may require that the permittee provide additional, revised or updated information as part of the renewal application.

Gibraltar Rock's permit in this appeal has no specific expiration date and the extensions that have been issued have been for 180 days so it is difficult to apply the general requirement in Section 77.143(b) (3) (application shall be filed at least 180 days before expiration date in the permit) in this appeal without clarification from the Board. Within 30 days, from the date of the Board's Adjudication and Order in this appeal, the Department shall notify Gibraltar Rock of the format for the renewal application. The Department shall also, within this timeframe, identify

what additional, revised or updated information is required as part of the renewal application, to allow the Department to determine that the permit, which was issued almost a decade ago in 2005, is still current and up-to-date.

Within sixty days of the Department's notification described in the above paragraph concerning the contents of a permit renewal application, Gibraltar Rock may file an application for a permit renewal. If Gibraltar Rock decides not to file an application for permit renewal within the timeframes set forth in this Adjudication, the Permit will terminate. If Gibraltar Rock elects to file an application for permit renewal within the timeframes set forth in this Adjudication and complies with the public notice requirement in Section 77.121, the Department shall review the application and take appropriate action consistent with applicable requirements governing permit renewals.

In this consolidated appeal before the Board, the Township has asked for relief from the Board in several forms. In its Pre-Hearing Memorandum the Township asked the Board to revoke the temporary cessation status under either Section 77.128(b) or 77.651 as improper and to revoke Gibraltar Rocks permit or deem it to have terminated under applicable requirements. In its initial Post-Hearing Brief, the Township again asked that the Board revoke or terminate to permit or in the alternative require Gibraltar Rock to apply for a permit renewal under Section 77.143. In its Reply Brief, the Township just asked for the Board to direct Gibraltar Rock to proceed with a renewal application. The Board is not willing to simply revoke and terminate the Permit issued to Gibraltar Rock without providing Gibraltar Rock with the opportunity to file an application for a permit renewal consistent with applicable regulatory requirements and this Adjudication. This result is in line with the Township's alternative request for relief and allows the Board to sustain the Township's appeal, in part.

Arguing that the Department lacked the authority both to approve an extension of the deadline to commence noncoal mining activities pursuant to 25 Pa. Code § 77.128(b) and to approve a temporary cessation of operations pursuant to Section 13 of the Noncoal Act, 52 P.S. § 3313, and 25 Pa. Code § 77.651(b), the Township concludes, without citing legal support, that the Board should revoke the Permit or else require Gibraltar Rock to apply for a permit renewal under 25 Pa. Code § 77.143. Township's Post-Hearing Brief at 17. The Township argues, in fact, that Gibraltar Rock, when faced with the choice of whether to activate the Permit or apply for a permit renewal, chose to activate the Permit with the intent to avoid public notice and comment procedures, effectively denying over 400 new residents notice of and the opportunity for public participation in the renewal of the Permit.[20]

The Department, on the other hand, urges the Board to maintain the status quo of the Permit activities pending the outcome of the ongoing land use litigation. Department's Post-Hearing Brief at 13-15. The Department points out that "there is no indication that the pending litigation and outstanding zoning and land development disputes will be resolved any time soon. *Id.* at 13-14 (citing *New Hanover Twp. v. DEP*, 2011 EHB 645, 659). Also, the Board, in its adjudication of New Hanover's previous appeal of Gibraltar Rock's NPDES permit, determined that "[i]t was also reasonable and prudent to maintain the status quo of the Department's surface mining permit issued to Gibraltar Rock while the protracted local land use disputes and litigation were addressed at the local level." *Id.* at 14 (citing *New Hanover Twp.*, 2011 EHB at 677). The Department highlights its "need to have continued Department authority over Gibraltar's obligations, especially the ongoing maintenance of all erosion and sedimentation controls." *Id.*

[20] The Township also claims that the Department did not want to proceed with a permit renewal because a permit renewal is an appealable action. Appellant's Reply Brief at 5-6. The Township, however, failed to produce any evidence to support this assertion. The Department's approvals are also appealable actions, and this helps to defeat the Township's claim.

at 15. The permit renewal option allowed by this Adjudication maintains the status quo to some extent, but it also requires the Department to ensure that the permit issued in 2005 is still current and up-to-date.

Requiring Gibraltar Rock to apply for a permit renewal has some added benefits.[21] For example, "[a]n application for renewal is subject to the requirements of public notification and participation of § 77.121 (relating to public notices of filing of permit applications)." 25 Pa. Code § 77.143(b)(4). In addition, although Mr. Menghini testified on behalf of the Department that if Gibraltar Rock had applied for a new permit, that new permit would contain largely the same, if not identical, terms as the original Permit, (N.T. 100-101, 119), he and Gibraltar Rock's witness, Mr. Patankar, later testified that a number of permit modules that would be part of a new permit, such as the blasting module, have changed rather substantially since the original approval process, so preparing and reviewing a renewal application may not be just a matter of retreading the same issues that were addressed in the original permit application, but rather may entail a showing of compliance with some new requirements. (N.T. 126, 129.) The Department will need to decide within the thirty day timeframe established by this Adjudication what Gibraltar Rock will need to include in its permit renewal application to allow the Department to ensure that the permit issued in 2005 is still current and up-to-date in 2014.

The Department also complains about the added work involved in reviewing a new permit or permit renewal application. Department's Post-Hearing Brief at 17-18. The Department points out that "[l]arge surface mining permit reviews, such as was conducted leading up to issuance of Gibraltar's 2005 SMP, are typically time-consuming and resource-

[21] The Department argues that the Township has failed to demonstrate that it is aggrieved by the Department's decision to maintain the validity of the Permit pending resolution of ongoing land use disputes between the Township and Gibraltar Rock. Department's Post-Hearing Brief at 15-16. This argument, however, is off the mark. The Township may experience a number of benefits if Gibraltar Rock were required to apply for a permit renewal or a new permit.

dwindling efforts." *Id.* at 17. Requiring Gibraltar Rock to apply for a new permit or permit renewal would have secondary adverse effects on non-parties as well. Burdens would be felt by agencies other than the Department, including, but not necessarily limited to, the Pennsylvania Fish and Boat Commission, the Pennsylvania Game Commission, and the United States Fish and Wildlife Service. (N.T. 127-128, 129-130.) In addition, as the Department points out,

> If it is determined that there are wetlands that may be affected, then the U.S. Army Corps of Engineers must get involved in review. Review usually engenders a considerable back and forth between and among the agencies and the prospective permittee, often generating more material for review, and requiring more staff time and resources to evaluate.

Department's Post-Hearing Brief at 17-18. The Board agrees with the Department regarding its objection to requiring that Gibraltar Rock file an application for a new permit. At this time, the Board does not believe that it is necessary. The Board does agree with the Township, in part, that after more than nine years the Department needs to do more to ensure that Gibraltar Rock's noncoal surface mining permit remains up-to-date from a noncoal surface mining regulatory perspective. Section 77.143 and the Board's Adjudication provide the Department with some direction regarding the contents of a permit renewal application, but also the Department has some discretion in deciding what "additional, revise or updated information" it will require from Gibraltar Rock to allow the Department to ensure that the permit it issued in 2005 to Gibraltar Rock is still up-to-date from a noncoal surface mining regulatory perspective.

Gibraltar Rock and the Department dispute the Township's claim that Gibraltar Rock elected to activate the Permit rather than apply for a permit renewal with the intent to avoid additional public notice and public participation. From April 15, 2008, the original activation date of the Permit, through October 8, 2012, 424 new homes were constructed in New Hanover Township. (N.T. 40-41; Appellant's Ex. 64.) The Township argues that by deciding not to

apply for a permit renewal, Gibraltar Rock effectively denied at least 424 new residents, as well as the Township Planning Commission and all other effected members of the public, notice of and the opportunity for public participation in the renewal of the Permit. The Township points out as purported evidence of the Department's ill intent that the Department's witness, Mr. Menghini, testified that in the process of applying for and reviewing a renewal permit, the Department and Gibraltar Rock would likely receive "numerous complaints" attempting to reopen issues that were already addressed during the review process for the initial Permit. (N.T. 120.) Gibraltar Rock and the Department deny that either avoided the permit renewal process with the intent of evading public notice and public participation. The Board does not have to resolve this dispute because it has decided that Gibraltar Rock must file an application for a permit renewal consistent with the Adjudication or its permit will terminate. At this point, it is not necessary to evaluate why Gibraltar Rock never filed an application in the past.

Even if the Board agreed with the Township about the Department's lack of authority under Section 77.128(b), the Board would still not invalidate Gibraltar Rock's permit. The Township asserts that the Department lacked the authority to approve Gibraltar Rock's requests under Section 77.128(b) because Gibraltar Rock has already activated the noncoal mining permit. Once activated, the Township argues, that the Department loses the authority to approve an extension from the requirement to begin noncoal mining activities within the deadline prescribed by Section 77.128. For the reasons set forth above the Board disagrees with the Township that the Department lost the authority under Section 77.128 and under the unusual facts of this appeal. The continued applicability of Section 77.128(b) allows the Board to require that Gibraltar Rock file a permit renewal application as authorized by this regulation.

Under Section 77.128, the deadline to commence noncoal mining activities is eliminated after the permitted operator begins such activities within the prescribed timeframes.[22] After the commencement of such activities, the permit is issued for the duration of the mining and reclamation operation. If the Board agreed with the Township that Gibraltar Rock commenced its activities to an extent necessary to eliminate the Department's authority under Section 77.128, then the permit is fully activated and there is an open ended permit duration that will not expire for the duration of the mining and reclamation operations.[23]

Allowing the Department to continue to closely regulate Gibraltar Rock's interrupted commencement of its noncoal mining activities under Section 77.128(b), while the Injunction is in place, is the proper result from a number of perspectives. First, continued Department oversight during this period helps to ensure environmental protection of the site. By allowing the Department to regulate the activities during the time the Injunction is in place, the Department maintains tight control over the site and it has a mechanism to require adequate environmental controls a the site. Now after nine years, Section 77.128(b) allows the Department to require a permit renewal application to ensure the permit is up-to-date. If as the Township argues, the site is fully activated to the extent that the Department loses its authority under Section 77.128(b),

[22] The regulation provides a three year deadline from the issuance of the permit unless the Department grants reasonable extensions of time from the commencement of activities deadline. 25 Pa. Code § 77.129 (b). Here, the Department has approved extensions to the deadline to commence noncoal mining activities in light of the Injunction.

[23] Once a permit is activated, there is also the additional requirement that the operators keep equipment on site and conduct operations on a regular and continuous basis. *See* 25 Pa. Code § 77.651(a). Under the definition of "active operation" there is a minimum 500 tons of mineral mined per calendar year requirement. 25 Pa. Code § 77.1. Here the Injunction stopped commencement activities and precludes active operations.

then the Department has no clear regulatory mechanism to continue to regulate Gibraltar Rock's enjoined activities during the time period the Injunction is in effect.[24]

Second, the Department's continued oversight of the Gibraltar Rock mining site during the Injunction provides support to the ongoing local regulatory efforts that form the basis for the Injunction. Rather than simply deciding that it has no regulatory authority once site preparation noncoal mining activities were commenced, the Department has decided to exercise continued regulatory oversight while Gibraltar rock pursues the necessary local approvals. Continued Department regulatory oversight will allow the Department to consider and rely upon any subsequent local approval decisions. The Department has general authority under the Municipality Planning Code to consider and rely upon local land-use decisions when making certain permitting decisions. In 2000, the General Assembly provided state agencies with the express authority to consider and rely upon local land use and plans and decisions when reviewing applications for permitting of facilities, such as Gibraltar Rock's noncoal surface mine *See* 53 P.S. §§ 10619.2(a) and (c) 1110.5(a)(2).[25]

Third, the Department's continued oversight helps to maintain the status quo to some extent while Gibraltar Rock purses the necessary local approvals mandated by the Injunction. The Department and others have already expended considerable time and resources in reviewing and approving Gibraltar Rock's noncoal surface mining application. There is no evidence in the record before the Board to support the Township's request to upset the status quo entirely and to invalidate the existing permit and to require Gibraltar Rock to begin again and apply for a new permit. The preparation and review of an application for a permit review entails an expenditure

[24] All parties agree now that the Department lacks the authority under Section 13 and its implementing regulations to allow a "temporary cessation" under the facts of the appeal. For the reasons previously stated the Board agrees.

[25] The Board discussed the Department's authority under these provisions in greater detail in *New Hanover Twp. v. DEP*, 2011 EHB 645, 666-676.

of some time and resources, but this is balanced by the need to ensure the permit remains up-to-date after more than nine years.

Fourth, as set forth above, the Board's interpretation of Section 77.128(b) closes a possible regulatory gap between the Department's authority under Section 77.128(b) to extend the commencement of noncoal mining activities deadline and its authority to allow a "temporary cessation" of mineral extraction operations under Section 77.561. Under the Board's interpretation, the Department's authority to extend the deadline for "these activities" does not end until mineral extraction operations begin and the Department's regulatory authority to allow a "temporary cessation" of operations begins under Section 77.651.

In summary, the Department has authority under Section 77.128(b) under the unusual facts of this appeal. Under the provision, the Department may grant reasonable extensions of the deadline to fully activate the noncoal mining activities. After more than nine years, routine extensions are no longer reasonable, and Gibraltar Rock is required to apply for a permit renewal to allow the Department to review the application to ensure that the 2005 permit is still up-to-date from a noncoal surface mining regulatory perspective.

V. Incremental Activation of Permit

The Township also argued that Gibraltar Rock effectively amended the permit boundary by activating only a portion of the Permit and that the Department acquiesced to that amendment without requiring a formal amendment of the Permit. Township's Post-Hearing Brief at 13. In support of this claim, the Township cites 25 Pa. Code § 77.141(a), which states only that "[a] revision to a permit shall be obtained for a change to the noncoal mining activities, as defined by the Department, set forth in the application." The Township explained that whereas the first two requests for temporary cessation contained no limitation on the area activated, Gibraltar Rock

indicated in the third request that it had activated only 162.9 acres south of Hoffmansville Road, even though the Permit area encompasses 241 acres. The Township concluded, citing no support, that approvals of temporary cessations related to a partial activation equates to an amendment of the Permit area without requiring Gibraltar Rock to comply with 25 Pa. Code § 77.141.

As Gibraltar Rock correctly points out, however, "nothing requires a permittee to activate its entire mine plan when it opens a new mine. Mines are opened incrementally, which is precisely what Gibraltar Rock is doing by opening its mine initially on the south side of Hoffmansville Road." Gibraltar Rock's Post-Hearing Brief at 16. The Department added that

> the number of acres being affected by Gibraltar has no relevance. . . . Gibraltar can affect any number of acres of the permit and still have the permit considered as active; Gibraltar still has the right under the permit to affect the entire area specified by the permit, as long as Gibraltar is in compliance with the permit and the regulations.

Department's Post-Hearing Brief at 12. The Department also point out that activating a noncoal mining permit in a "piecemeal, phased" manner is a standard industry practice. *Id.* The Board agrees with Gibraltar Rock and the Department and finds that the Township failed to carry its burden to show that by activating only a portion of the permit area, Gibraltar Rock effectively amended the Permit and therefore failed to comply with 25 Pa. Code § 77.141.

VI. Collateral Attack on Permit

In an effort to prevent a potential collateral attack on the Department's issuance of the Permit, the Department points out that the Appellant failed to appeal the Permit, which is now administratively final. Department's Post-Hearing Brief at 13. The Department also explains, referring to the Permit as the "2005 SMP," that:

> To the extent that New Hanover continues to allege deficiencies in the 2005 SMP, the Department observes that the 2005 SMP is administratively final and cannot be revisited in the context of the appeal of the NPDES permit renewal. Administrative finality operates to preclude a collateral attack on an administrative action where a party could have appealed the action, but chose not to do so. *Winegardner v. DEP*, 2002 EHB 790, 791-92; *Moosic Lakes Club v. DEP*, 2002 EHB 396, 406. As New Hanover clearly was aware of the issuance of the 2005 SMP and chose not to appeal that permit, New Hanover is without recourse to revisit the 2005 SMP conditions in the course of the current consolidated appeals.

Department's Post-Hearing Brief at 18 n.1.

The Township, however, notes that "it actively participated in the review process prior to the issuance of the Permit and actively negotiated certain conditions of the Permit" and "[i]t was for that very reason that the Township did not appeal the Permit." Township's Reply Brief at 2. The Township asserts that it was satisfied with the conditions placed on the Permit and expected the Department to enforce all of those conditions. *Id.* The Township argues that it "had no way of knowing that the Department would fail and refuse to enforce the conditions of the Permit which required Gibraltar Rock to comply with all local ordinances, including the Township Subdivision and Land Development Ordinances, prior to commencing mining activities." *Id.* at 2-3.

The Board appreciates the Department's concern with a potential collateral attack on the Permit, but we see no such argument asserted by the Township in the context of this consolidated appeal. The Township is appealing the Department's approvals of the "temporary cessations", not the Permit. The Township has not raised any substantive concerns with the extended noncoal surface mining permit, but rather that Township has argued that the Department lacks the authority to provide such extensions.

VII. Conclusion

For the reasons set forth above, the Board finds that the Department retained the authority to approve a request for a reasonable extension of deadline to fully commence noncoal mining activities pursuant to 25 Pa. Code 77.128(b). The Board, however, finds that the Department did not properly exercise this authority. Further reasonable extensions are no longer available after more than nine years and Gibraltar Rock may apply for a permit renewal if it wants to maintain its Permit while it pursues necessary local approvals. Further, the Board also finds that Gibraltar Rock did not effectively amend the Permit by incrementally activating it.

Accordingly, we sustain the Appellant's consolidated appeals in part, and make the following:

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has the power and duty to issue adjudications on decisions of the Department. 35 P.S. § 7514.

2. The Township bears the burden of proof in this matter pursuant to 25 Pa. Code § 1021.122(c)(2), and must prove by a preponderance of the evidence that the Department's decisions to approve Gibraltar Rock's requests for temporary cessation were not lawful and reasonable exercises of the Department's discretion supported by the evidence presented.

3. The Board reviews appeals *de novo*. *Smedley v. DEP*, 2001 EHB 131, 156.

4. A noncoal mining permit "will terminate if the permittee has not begun the noncoal mining activities covered by the permit within 3 years of the issuance of the permit." 25 Pa. Code § 77.128(b).

5. After a permittee commences noncoal mining activities,

> The Department may grant reasonable extensions of time for commencement of these activities upon receipt of a written statement showing that the extensions of time are necessary if litigation precludes the commencement or threatens substantial economic loss to the permittee or if there are conditions beyond the control and without the fault or negligence of the permittee.

25 Pa. Code § 77.128(b).

6. The Department has authority to allow reasonable extensions from the commencement of noncoal mining activities under Section 77.128(b) where an operator has commenced site preparation activities but is stopped from completing these site preparation activities and starting operations. After an operator has commenced mineral extraction operations at a site, the Department loses the authority to allow extensions under Section 77.128(b) and may only allow temporary cessations of operations under Section 13 and its implementing regulations at Section 77.651.

7. The terms "surface mining" and "noncoal surface mining activities" are defined to include the extraction of minerals and all surface activity connected with mining, including "site preparation." 52 P.S. § 3303; 25 Pa. Code § 77.1.

8. The term "noncoal mining activities," although not defined in the Noncoal Act or its regulations, includes the terms "surface mining" and "noncoal surface mining activities."

9. The term "mining activities," although not defined in the Noncoal Act or its regulations, includes the terms "surface mining" and "noncoal surface mining activities."

10. The Department may not approve a temporary cessation of an operation for more than ninety (90) days unless the cessation is due to "seasonal shutdown," "labor strikes" or, for operations producing highway or construction aggregates, if there is an "absence of a current regional market for the mineral being mined."[26] 52 P.S. § 3313(b)-(c); 25 Pa. Code § 77.651(b)-(c).

11. "Operation" is defined as "[t]he pit located upon a single tract of land or a continuous pit embracing or extending upon two or more contiguous tracts of land." 52 P.S. § 3303; 25 Pa. Code § 77.1.

12. The term "operation" is limited to the construction of a pit and the extraction of minerals from a pit, and therefore, the Department may grant a request for "temporary cessation of operations" pursuant to Section 13(b) of the Noncoal Act, 52 P.S. § 3313(b), and 25 Pa. Code § 77.651(b), only after the operator has begun construction of a pit or extraction of minerals from a pit.

[26] "For operations producing highway or construction aggregates, where the temporary cessation is due to the absence of a current regional market for the mineral being mined, temporary cessation may not exceed five years."

13. An "active operation" is "[a]n operation in which a minimum of 500 tons of minerals for commercial purposes have been removed in the preceding calendar year." 25 Pa. Code § 77.1.

14. Gibraltar Rock has not yet begun an operation or an active operation.

15. The Department relied on 25 Pa. Code § 77.128(b), not 25 Pa. Code § 77.651(b), in approving the requests for temporary cessation at issue in this consolidated appeal.

16. Where a permittee has commenced site preparation noncoal mining activities but where litigation precludes that permittee from beginning its operations, the Permit is not necessarily rendered invalid or expired. The Department retains authority under Section 77.128(b) over the permitted site pending the outcome of that litigation.

17. The Department only has authority to approve reasonable extensions of the deadline under Section 77.128(b).

18. The Department abused its discretion under Section 77.128(b) by providing extensions for more than nine years without evaluating whether the permit which was issued in 2005 is still current and up-to-date from a noncoal surface mining regulatory perspective. It is not reasonable to provide extensions of the deadline to commence noncoal mining activities for more than nine years without conducting an evaluation to determine that the permit is still up-to-date from a noncoal surface mining regulatory perspective.

19. The permit renewal option authorize by Section 77.128(b) provides a reasonable opportunity for the Department to ensure that the permit is still current and up-to-date.

20. If the Department acts pursuant to a mandatory provision of a statute or regulation then the only question is whether to uphold or vacate the Department's action. *Warren Sand and Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 56, 565 (Pa. Cmwlth. 1975).

21. Upon appeal of discretionary Department action, the Board may substitute its discretion for that of the Department only where the Board has determined that the Department has abused its discretion, and may take evidence and rely upon facts not before the Department. *Browing-Ferris Industries, Inc. v. DEP*, 819 A.2d 148, 153 (Pa. Cmwlth. 2003; *Warren Sand and Gravel*; *New Hanover Township v. DEP and Gibraltar Rock, Inc.*, 2011 EHB 645, 656.

22. In approving Gibraltar Rock's requests for extensions in this consolidated appeal, the Department exercised its discretion.

23. The Board has determined that the Department has abused its discretion. The Board is therefore authorized to substitute its discretion for that of the Department as set forth in this Adjudication.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HANOVER TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2010-185-M**
	:	**(Consolidated with 2011-083-M**
COMMONWEALTH OF PENNSYLVANIA,	:	**2011-121-M, 2011-171-M,**
DEPARTMENT OF ENVIRONMENTAL	:	**2012-025-M, 2012-106-M,**
PROTECTION and GIBRALTAR ROCK, INC.,	:	**2012-154-M, 2012-183-M,**
Permittee	:	**2013-026-M, 2013-055-M,**
	:	**2013-117-M, 2013-203-M,**
	:	**2014-010-M, 2014-069-M,**
	:	**2014-119-M, and 2014-149-M))**
	:	

ORDER

AND NOW, this 3rd day of November, 2014, it is hereby ordered that the above-captioned appeal is **sustained**, in part.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 3, 2014

* Judge Bernard A. Labuskes, Jr. has filed a separate opinion in which he concurs in the result.

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HANOVER TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2010-185-M**
	:	**(Consolidated with 2011-083-M**
COMMONWEALTH OF PENNSYLVANIA,	:	**2011-121-M, 2011-171-M,**
DEPARTMENT OF ENVIRONMENTAL	:	**2012-025-M, 2012-106-M,**
PROTECTION and GIBRALTAR ROCK, INC.,	:	**2012-154-M, 2012-183-M,**
Permittee	:	**2013-026-M, 2013-055-M,**
	:	**2013-117-M, 2013-203-M,**
	:	**2014-010-M, 2014-069-M,**
	:	**2014-119-M, and 2014-149-M)**

OPINION OF
JUDGE BERNARD A. LABUSKES, JR. CONCURRING IN THE RESULT

Under the first sentence of 25 Pa. Code § 77.128(b), a permit terminates if the permittee has not begun noncoal surface mining activities covered by the permit within three years of the issuance of the permit plus any additional extensions granted by the Department. Gibraltar Rock, with the knowledge and express approval of the Department, and despite knowing that the Township strongly disagreed that local requirements had been satisfied, began mining activities. *See Paradise Watchdogs v. DEP*, 2010 EHB 31. At the point that Gibraltar Rock commenced its mining activities, it lost the ability to seek further extensions from the Department under Section 77.128(b).

Gibraltar Rock never fully activated its permit because it never mined a minimum of 500 tons of minerals. *See* 25 Pa. Code § 77.1 (definition of active operation). Therefore, Gibraltar Rock violated 25 Pa. Code § 77.651(a) (operator must conduct an active operation, i.e., remove at least 500 tons of minerals a year), so I agree with the majority's conclusion that a temporary cessation of an active operation was not available under 25 Pa. Code § 77.651(b).

Admittedly, Gibraltar Rock's situation does not fit perfectly with any of the regulations, but the closest thing to a fit is the last sentence of Section 77.128(b), which I read to mean that, if a permit has not been timely activated, the permittee needs to apply for a permit renewal. The discretionary language of "the permittee may apply for a permit renewal" in the final sentence of Section 77.128(b) places the onus on the permittee if it wants to conduct mining operations. Conducting mining operations after the permittee has failed to activate the mine is conditioned upon the permittee applying for a permit renewal.

Even if the Department did have the authority to repeatedly approve the extensions, I agree with the majority's conclusion that the Department abused its discretion in doing so for nine years without determining whether what is now a very stale permit was based on up-to-date data, information, and circumstances. The language of Section 77.128(b) provides for "reasonable extensions of time." Section 77.651 provides for very short 90-day lapses in continuous operations. Nine years of such extensions left the realm of reasonable long ago. Nine years of extensions violates the spirit, if not the letter, of Sections 77.128(b) and 77.651.

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

DATED: November 3, 2014

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KEVIN CASEY	:	
	:	
v.	:	**EHB Docket No. 2012-070-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PENNSY SUPPLY, INC., Permittee, and DORRANCE TOWNSHIP, Intervenor	:	**Issued: November 4, 2014**

OPINION AND ORDER
ON RULE TO SHOW CAUSE

By Michelle A. Coleman, Judge

Synopsis

The Board dismisses an appeal for an appellant's failure to prosecute his case by not filing a pre-hearing memorandum and not responding to a Rule to Show Cause.

OPINION

Kevin Casey appealed the Department of Environmental Protection's (the "Department's") March 12, 2012 issuance of Noncoal Surface Mining Permit No. 40090302 to Permittee Pennsy Supply, Inc. ("Pennsy Supply") for the Small Mountain Quarry III, located in Dorrance Township, Luzerne County. The permit was issued pursuant to the Noncoal Surface Mining Conservation and Reclamation Act of 1984, 52 P.S. §§ 3301 – 3326. Casey's appeal was filed on April 10, 2012 and perfected on May 2, 2012. The permit at issue encompassed and replaced Noncoal Surface Mining Permits 40870301 and 40010301 and added an additional 184.0 acres to the permit area. In September 2012, Dorrance Township intervened in this matter as an interested party.

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http://ehb.courtapps.com

A brief, relevant summary of the case follows. On September 11, 2012, Pennsy Supply filed a Motion to Compel answers to discovery requests that had gone unanswered by Kevin Casey. Casey did not respond to the Motion to Compel and we granted the motion through an Order on September 27, 2012. On October 15, 2012, Pennsy Supply filed a Motion in Limine requesting that Kevin Casey be precluded from using as his expert witness Robert Hershey, a hydrogeologist who had been retained to do work for Intervenor Dorrance Township during zoning hearings regarding Small Mountain Quarry III. Casey did not respond to the Motion in Limine and we granted it on December 19, 2012. *Casey v. DEP*, 2012 EHB 461.

On June 20, 2014, in response to a Motion for Summary Judgment filed by Pennsy Supply and a Motion to Dismiss filed by the Department, we issued an Opinion and Order granting the Motion for Summary Judgment on four out of the six issues raised by Casey in his Notice of Appeal. *Casey v. DEP*, EHB Docket No. 2012-070-C (Opinion and Order issued June 20, 2014). In our Opinion, we noted the fact that Casey failed to fully respond to the two motions:

> Notably, in Casey's briefs submitted in opposition to the motion to dismiss and motion for summary judgment, he only discusses two of the six issues raised in his Notice of Appeal, all of which are addressed in the two pending dispositive motions. Nowhere in his briefs does he make an argument with regard to adverse impacts to adjacent property owners, Pennsy Supply's ownership of mineral rights, impacts to Small Mountain Road, or the conditional use permit.

Casey v. DEP, supra, slip op. at 4. Recognizing Casey's apparent abandonment of those four issues, we held:

> An appellant's failure to respond to a motion for summary judgment citing evidence of record indicating that the appellant might be able to meet the burden of proof at a hearing on the merits is fatal under our Rules and the Pennsylvania Rules of Civil Procedure. Mr. Casey's failure to address four out of the six issues

> subject to the dispositive motions leaves us with little by which to evaluate his opposition to the motions. Therefore, summary judgment is granted pursuant to Pa.R.C.P. No. 1035.2(2)...

Casey v. DEP, supra, slip op. at 18 (internal citations omitted).

After we issued our Opinion, we held a conference call to discuss the status of the case and to determine a schedule for proceeding to a hearing on the merits. Counsel for all parties participated in the conference call. We then issued our Pre-hearing Order No. 2, which, among other things, set a hearing date of December 2, 2014, and required Kevin Casey to file his pre-hearing memorandum on or before October 10, 2014. Casey did not file a pre-hearing memorandum. On October 16, 2014, we issued a Rule to Show Cause upon Casey to show why he failed to file a pre-hearing memorandum in accordance with our Order. We required Casey to respond to the Rule by October 24, 2014. Casey filed no response.

Pennsy Supply filed a Motion for Sanctions late in the day on October 16, 2014, requesting that we impose sanctions against Casey for failing to file a pre-hearing memorandum. Pennsy Supply argued that it would be prejudiced by a tardily-filed pre-hearing memorandum and that the Board should preclude Casey from presenting any evidence at the hearing as a sanction for his conduct. Casey's response to the Motion for Sanctions was due on November 3, 2014. *See* 25 Pa. Code §§ 1021.35(b)(1) and 1021.95(c). Casey did not file a response. To this date, Casey has not filed a pre-hearing memorandum, a response to our Rule to Show Cause, or a response to Pennsy Supply's motion.

Our rules authorize the Board to impose sanctions upon parties for failing to abide by our Orders or our rules of practice and procedure. 25 Pa. Code § 1021.161. These sanctions include the dismissal of an appeal. Although dismissing a party's appeal is a drastic sanction, we have often held that it is appropriate in circumstances where a party has evinced an intention to no

longer continue with its appeal. *See Nitzschke v. DEP*, 2013 EHB 861, 862; *Zazo v. DEP*, 2006 EHB 650, 654; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54, 56; *Recreation Realty, Inc. v. DEP*, 1999 EHB 697, 698. As detailed above, throughout the arc of this appeal Casey has repeatedly failed to make filings where our rules and orders make such filings mandatory. *See* 25 Pa. Code §§ 1021.93(c) and 1021.104. His conduct throughout this proceeding shows a demonstrable disinterest in prosecuting his appeal and therefore dismissal of the appeal is an appropriate sanction.

Because we are dismissing Casey's appeal, Pennsy Supply's Motion for Sanctions is moot. Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KEVIN CASEY	:	
	:	
v.	:	**EHB Docket No. 2012-070-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PENNSY SUPPLY, INC., Permittee, and DORRANCE TOWNSHIP, Intervenor	:	

ORDER

AND NOW, this 4th day of November, 2014, it is hereby ordered that the appeal of Kevin Casey is **dismissed**. The hearing scheduled to begin in Harrisburg on December 2, 2014 is **cancelled**.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 4, 2014

c: **DEP, General Law Division**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NATIONAL FUEL GAS MIDSTREAM CORPORATION AND NFG MIDSTREAM TROUT RUN, LLC, Appellants, and SENECA RESOURCES CORPORATION, Intervenor	:	
v.	:	**EHB Docket No. 2013-206-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 4, 2014**

OPINION AND ORDER ON APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION FOR PARTIAL SUMMARY JUDGMENT AND INTERVENOR'S MOTION FOR SUMMARY JUDGMENT

By Steven C. Beckman, Judge

Synopsis

The Board denies Appellants' and Intervenor's motions for summary judgment where the right to summary judgment is not clear and free from doubt. The Board also finds disputes of material fact that can be resolved only upon a fully developed factual record. The Board also denies Appellants' motion for partial summary judgment where it would require the Board to issue an advisory opinion.

OPINION

Introduction

On November 12, 2013, National Fuel Gas Midstream Corporation and NFG Midstream Trout Run, LLC (collectively, "NFG Midstream") filed an appeal from the Department of Environmental Protection's ("Department") October 10, 2013 determination that air emission sources at NFG Midstream's natural gas compressor facility ("Bodine Compressor Station" or "Compressor Station") and Seneca Resources Corporation's ("Seneca") natural gas well pad

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("Well Pad E") would be treated as a single facility for air permitting purposes including Prevention of Significant Deterioration ("PSD"), Non-attainment New Source Review ("NSR") and Title V. On April 14, 2014, Seneca petitioned to intervene in the appeal. Both NFG Midstream and Seneca filed Motions for Summary Judgment on August 26, 2014. The Department filed its responses to the motions on September 26, 2014, and NFG Midstream and Seneca both filed their reply briefs on October 13, 2014. For the reasons set forth in the Opinion below, we deny NFG Midstream's and Seneca's motions and allow this matter to proceed.

Standard of Review

The Board may grant a motion for summary judgment if the record indicates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lexington Land Developers Corp. v. DEP*, EHB Docket No. 2013-109-M, slip op. at 2 (Opinion and Order issued Oct. 10, 2014). Summary judgment, including partial summary judgment, may only be granted where the right to summary judgment is clear and free from doubt. *Clean Air Council v. DEP and MarkWest Liberty Midstream and Resources, LLC.,* 2013 EHB 346, 352. In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party, and resolves all doubt as to the existence of a genuine issue of material fact against the moving party. *Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81. The record on which the Board decides a summary judgment motion consists of any pleadings, as well as discovery responses, depositions, affidavits, and other documents accompanying the motion or response labeled as exhibits. *See* 25 Pa. Code § 1021.94a(a), (h); Pa.R.C.P. 1035.1.

Background

Presently before the Pennsylvania Environmental Hearing Board (Board) are two Motions for Summary Judgment, one filed by Appellants NFG Midstream and another filed by

Intervenor Seneca. Seneca explores for and produces natural gas. NFG Midstream builds, owns and operates natural gas processing and pipeline gathering facilities. On or about August 14, 2013, NFG applied to the Department for coverage under the Pennsylvania General Plan Approval and/or General Operating Permit for Natural Gas Compression and/or Processing Facilities ("GP-5" or "General Permit 5") for the construction and operation of a natural gas compressor facility in McIntyre Township, Lycoming County. On October 10, 2013, the Department issued the requested GP-5 for the Bodine Compressor Station.

General Permit 5 authorizes the construction, modification, and/or operation of certain natural gas compression and/or gas processing facilities. GP-5 defines "natural gas compression and/or processing facility" as: "A facility that produces, compresses and/or processes natural gas, coal bed methane, or gob gas starting with gas dehydration, compression, fractionation, and storage." However, GP-5 may not be used for the construction, modification, or operation of certain air contamination sources, such as those sources subject to permitting requirements specified in 25 Pa. Code Chapter 127, Subchapters D, E, F and G (relating to Prevention of Significant Deterioration, Nonattainment New Source Review, and Title V, respectively).

In relation to the issuance of the GP-5, the Department performed a Single Source Determination and Aggregation Analysis ("Single Source Determination" or "Determination") dated October 10, 2013. The Single Source Determination resulted in aggregation of the emissions from the Bodine Compressor Station with those from the upstream natural gas Well Pad E owned and operated by Seneca. As such, the Department considers the midstream Bodine Compressor Station and the upstream exploration and production facilities at Well Pad E to be a single source for air permitting purposes, including the PSD, Nonattainment NSR, and the Title V programs. In making its determination, the Department evaluated applicable SIC codes,

common control of the facilities and contiguousness or adjacency of the sites. The Department concluded the following:

1. A support relationship existed between the Bodine Compressor Station and Well Pad E, thus overriding the difference in SIC codes;
2. Based on common ownership, contractual agreement and a support/dependency relationship, the facilities share common control; and
3. The sites are contiguous or adjacent based on the distance between them, their location on DCNR land (Tiadaghton State Forest) and the lack of a physical boundary between the two sites.

NFG Ex. C, pp. 5–6. Accordingly, the Bodine Compressor Station and Well Pad E would be treated by the Department as a single source for air permitting purposes.

Discussion

The question before the Board is whether the Department properly aggregated the Bodine Compressor Station and Well Pad E as a single source for air permitting purposes such as the PSD, Nonattainment NSR, and Title V programs. NFG Midstream, Seneca, and the Department agree that the air emissions from the two distinct sources in this matter may be aggregated and treated as a single source only if they satisfy all three of the following regulatory criteria:

1. the sources are located on one or more contiguous or adjacent properties;
2. the sources are under the common control of the same person (or persons under common control); and
3. the sources belong to the same major industrial grouping.[1]

See NFG Br, p. 1; DEP Br., p. 7; Seneca Br., p. 7. These regulatory criteria are derived from the definitions of "facility", "Title V facility", "stationary source" and "building, structure, facility, or installation" found in the Department's regulations. *See, e.g.*, 25 Pa. Code §§ 121.1, 127.83.

[1] The Board recognizes that the NSR regulations do not require distinct sources to belong to the same major industrial grouping. *See* 25 Pa. Code § 121.1 (definition of "facility").

Further, in conjunction with the three regulatory criteria set forth above, the Department also looks to whether the two sources fit the "common sense notion of a plant" as part of its aggregation analysis.

NFG Midstream argues in its Brief in Support of Motion for Summary Judgment that it is entitled to summary judgment for a number of reasons. It first argues that the Bodine Compressor Station and Well Pad E are neither contiguous nor adjacent. Second, it contends that the Compressor Station and Well Pad E do not belong to the same industrial grouping and as such, have different SIC Codes and therefore cannot be aggregated. NFG Midstream goes on to argue that the Bodine Compressor Station and Well Pad E do not comport with the common sense notion of a "plant," and thus, cannot be considered a single source for air permitting purposes. Additionally, NFG Midstream seeks partial summary judgment on the basis that "the mere existence of a contractual relationship between two entities" cannot, by itself, support a finding of "common control" between the Bodine Compressor Station and Well Pad E.

The Department, in response, first points out that NFG Midstream fails to address all six findings in the Department's Single Source Determination. The Department found the following:

1. the most accurate Standard Industrial Classification (hereinafter "SIC" Code) for both of those facilities was in the thirteen hundred series;
2. the purported differences in the SIC Codes assigned to the two facilities by the companies involved was irrelevant because of the potential support relationship between Bodine Compressor Station and Well Pad E;
3. the two facilities meet the criterion for being contiguous or adjacent;
4. common control over the two facilities was present as a result of common ownership;
5. common control over the two facilities was present as a result of a contract entered into by NFG Midstream and Seneca regarding the

transfer of gas from Seneca's Well Pad E to the Bodine Compressor Station; and

6. common control over the two facilities was present as a result of the support/dependency relationship between the two facilities.

DEP Br., p. 5. The Department asserts that since NFG Midstream failed to address all of these specific grounds, the Board should deny their motion for summary judgment.

The Department goes on to argue that because both the Bodine Compressor Station and Well Pad G are located on a single parcel of DCNR property and NFG Midstream failed to provide any evidence of record of any subdivision of that property, the "contiguous or adjacent" prong of the test has been met. In addition, the Department asserts that properties located beyond a quarter-mile range may be considered contiguous or adjacent on a case-by-case basis. The Department also argues, as noted above, that there is a dispute of material fact whether NFG Midstream properly characterized the Bodine Compressor Station's SIC Code.

Aside from the specific arguments regarding the regulatory criteria just discussed, the Department asserts that there are other disputes of material facts in this appeal, specifically, whether or not the sources have a support relationship and whether the Bodine Compressor Station and Well Pad E meet the common sense notion of a plant. In this case, the Department argues, the sources function together to produce transmission-quality natural gas and the Compressor Station provides the conditioning, metering and compression needed to deliver natural gas from Well Pad E downstream. Thus, the Bodine Compressor Station and Well Pad E have a support relationship and function as a plant. Finally, the Department opposes NFG Midstream's motion for partial summary judgment on the issue of what type of contractual relationships rise to the level of "common control." The Department asserts that it did not rely solely on the "mere existence of a contract" but that common control existed here for three

alternative reasons: (1) common ownership; (2) a contractual agreement; and (3) a support/dependency relationship.

In its reply, NFG Midstream contends that, even if multiple sources are located on one piece of property, the Department must determine whether those *sources* are sufficiently contiguous or adjacent to warrant aggregation. It contends that the Department submitted no evidence disputing that (1) the Bodine Compressor Station and Well Pad E are located more than a quarter of a mile apart on undeveloped forestland in the Tiadaghton State Forest, and (2) that both sources have "readily discernable boundaries" and are separated by undeveloped forestland owned by a third party. NFG Midstream further argues that there are no disputed issues of fact regarding the proper SIC code for the Bodine Compressor Station. Rather, NFG Midstream believes that there is only a disagreement on the application of the law between the parties—which the Board can resolve from the record before it. Finally, NFG Midstream argues that the Department's litigation position in another matter before this Board is inconsistent with its present position regarding what constitutes a common sense notion of a plant. It further argues that the functions of the Bodine Compressor Station and Well Pad E are demonstrably different, and that the Department admits in its response to NFG Midstream's statement of undisputed material facts that the combined sources lack other typical characteristics of a "plant" previously identified by the Department.

In its separate Motion for Summary Judgment, Seneca focuses its arguments around the Department's position in another matter before this Board, *Clean Air Counsel v. DEP*, EHB Docket No. 2011-072-R (*"Clean Air Counsel"),* going so far as to offer to stipulate as undisputed the Department's previous position as to what comprises the "common sense notion of a plant" and "contiguous and/or adjacent" as well as the factual and legal analysis used by the

Department in the previous litigation. In *Clean Air Counsel,* the Department declined to aggregate several compressor stations owned by MarkWest Liberty Midstream with each other and with a large processing facility on the basis that the function of the facilities at issue were different, the distance and the character of the land between the two facilities was not consistent with a "plant;" and comparison of the facilities at hand to facilities recognized by the Department to be "plant-like" illustrated there was no "common sense notion of a plant." Seneca, Ex. 13, p. 19. Applying the Department's analysis from *Clean Air Counsel* to this case, Seneca argues that the functions of the Bodine Compressor Station and Well Pad E are different and that they operate within different market segments. The Bodine Compressor Station operates in the midstream segment of the industry while Well Pad E is an upstream production operation. Seneca also argues that the Compressor Station and Well Pad E lack other typical characteristics of a plant as previously identified by DEP, such as the distance between the facilities, the character of the land separating the facilities, and the lack of a defined, secure boundary between the sources. In addition, Seneca points out that the facilities are unmanned, do not share common security or process equipment, and each has its own management structure and its own work and safety rules. In light of these differences, Seneca asserts that aggregating the Bodine Compressor Station and Well Pad E does not comport with the "common sense notion of a plant" as recognized by the Department.

Seneca goes on to argue that the Bodine Compressor Station and Well Pad E are not located on contiguous or adjacent properties. Seneca points out that there is no issue regarding contiguousness since the Department admitted that the facilities are not contiguous. DEP Resp. to Intervenor's Statement of Undisputed Facts at 4; Deposition of J. Twardowski, Ex 15, p. 131 line 18-20. As for adjacency, Seneca again relies on the Department's previous litigation

position that adjacency should be determined not on distance alone but on a case-by-case basis by also looking at things such as intervening land uses, sight lines and the physical characteristics of the land. Seneca argues that the facilities at issue are 0.3 miles "as the crow flies" apart, the intervening land uses are neither industrial nor related to the Bodine Compressor Station's activities, and Well Pad E cannot be seen from the Compressor Station. As such, according to Seneca, the Bodine Compression Station and Well Pad E do not show the requisite closeness to establish adjacency. Finally, Seneca addresses the issue of "interdependence" of facilities in an adjacency determination and asserts that the Bodine Compressor Station is not interrelated with Well Pad E. Well Pad E extracts raw natural gas from the ground. The Bodine Compressor Station conditions the raw material and transports it to the interstate pipeline. According to Seneca, these are not similar functions occurring at separate facilities and thus, there is no interdependence between the facilities. In the alternative, Seneca argues that if the facilities could be construed as interrelated, they are not so interrelated as to be considered adjacent as Well Pad E is not solely dependent on the Bodine Compressor Station because the raw natural gas extracted at Well Pad E can be directed to another midstream facility.

In its response, the Department first addresses Seneca's reliance on the Department's previous litigation position in *Clean Air Council*. The Department characterizes Seneca's use of this as a bid to persuade the Board to substitute the factual record and legal conclusions of another case for the record in this case under the guise of the Board's authority to take judicial notice of certain facts. The Department argues that a court may take judicial notice of only those facts that are not subject to reasonable dispute and there are numerous material facts at issue in this case. Further, the Department asserts that the aggregation analysis in *Clean Air Council* was done prior to when the Department's Guidance Document was in effect. The record before the

Board at this time does not establish the extent to which the Guidance Document was applied in that case, but it was used in the Department's aggregation analysis in the present case. On these grounds, the Department argues that Seneca's attempt to substitute the record and legal conclusions from another case should be rejected.

The Department goes on to address Seneca's other arguments regarding both the "common sense notion of a plant" and the contiguous and/or adjacent determination for aggregation of the Bodine Compressor Station and Well Pad E. In summary, the Department alleges that Seneca has failed to detect and acknowledge a multitude of disputed material facts in this case. The Department contends that the Guidance Document was applied to the facts of this case and conclusions supporting the Single Source Analysis were made. These include the support relationship found between the Bodine Compressor Station and Well Pad E overriding the different SIC codes, the establishment of common control through common ownership, contractual agreement and a support/dependency relationship, criterion met for the contiguous/adjacent test, and the determination that the two facilities "comport with the common sense notion of a plant" because the facilities are dependent. The Department concludes that the presence of numerous disputed material facts is clear and Seneca's motion for summary judgment should, therefore, be denied.

In its reply, Seneca argues that since (1) the parties are in agreement on the conceptual framework within which to assess the "common sense notion of a plant", (2) the Department has not articulated in its Response any additional factors to be considered, (3) the Department does not dispute that the "common sense notion of a plant" must inform and guide any single source determination and (4) the specific facts in this case that are relevant to the conceptual framework have been admitted, summary judgment is proper. Seneca also addresses its reliance on the

Department's previous litigation position and presents a host of cases supporting the use of that position in this case. Finally, Seneca points out that it moved for summary judgment on the basis of 35 material undisputed facts and the Department denied only four and a half of those material facts, none of which are critical to Seneca's motion. Seneca concludes that its motion for summary judgment should be granted based on the undisputed facts admitted by the Department.

In analyzing the arguments of the Parties, we note that we are not writing on an entirely clean slate. At least two prior appeals before the Board involved the issue of aggregation of distinct oil and gas related air emissions sources in the summary judgment context: *Group Against Smog Pollution v. DEP and Laurel Mountain Midstream Operating, LLC*, EHB 2011-065-R ("*GASP*"), and *Clean Air Council*. In both cases, the parties argued about the Department's application of one or more of the three regulatory criteria to the facts of their situations similar to the arguments put forth by NFG Midstream and Seneca in this case. In *GASP*, the Board granted a summary judgment motion on the issue of a common SIC code brought by GASP and denied the summary judgment motion of Laurel Mountain Midstream, finding that there were issues of fact regarding the question of common control and mixed issues of fact and law regarding the question of whether the sources were located on adjacent or contiguous properties.[2] *GASP*, 2012 EHB 329. In *Clean Air Council*, the Board denied a summary judgment motion brought by MarkWest Liberty Midstream seeking a determination regarding the proper factors to be considered in analyzing the issue of whether two sources were located on adjacent properties because it found there were factual issues in dispute. *Clean Air*

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[2] It is important to note that the midstream operator and gas wells at issue in *GASP* were both assigned SIC codes under the same major industrial group (13). The Board was not presented with the unique factual and legal disputes present in this matter, and partial summary judgment was appropriate in that case.

Council, 2013 EHB 346. Both *GASP* and *Clean Air Council* were discontinued after the Board's summary judgment decision so the Board did not have the opportunity to further address the issue of aggregation of air sources in the oil and gas industry, leaving the law in this area unsettled in Pennsylvania.

Underpinning the Board's decisions in *GASP* and *Clean Air Council* is the recognition by the Board that the air aggregation issue in the oil and gas industry context is complex and typically poses mixed issues of fact and law. In these cases, and other similar recent decisions, the Board has determined that these complex issues are best addressed after a full hearing is held so that the law can be applied to a fully developed factual record. *See, e.g., DEP v. Sunoco Logistics Partners, L.P. and Sunoco Pipeline, L.P.*, EHB Docket No 2014-020-CP-R, slip op. at 4 (Opinion dated October 24, 2014). This approach is consistent with the requirement that summary judgment should only be granted where there are no issues of material fact and the right to summary judgment is clear and free from doubt.

Applying this to both NFG Midstream's and Seneca's requests for summary judgment, we find that the right to summary judgment is not clear or free from doubt and, therefore, the motion is properly denied. Looking first at the issue of whether the sources in this case are on adjacent or contiguous properties, the Board is faced with a mixed question of fact and law. The parties appear to agree that both the Bodine Compressor Station and Well Pad E are located on a single parcel of DCNR-owned forestland in the Tiadaghton State Forest but that is where any agreement ends. The parties do not agree on the distance between the sources or even how that distance should be determined. NFG Midstream describes the sources as being "more than a quarter mile apart (straight-line distance)." NFG Br., p. 4. Seneca states that "the center of the Seneca Well Pad E (the 'centroid') is approximately 0.3 miles (as the crow flies) from the center

of the Midstream Bodine Compression Facility." Seneca Br., p. 14. The Department for its part asserts that the "Seneca Well Pad E is approximately 0.24 miles from the Midstream Bodine Compression Facility, fenceline to fenceline." DEP, Statement of Add'l Disputed Material Facts, No. 25. The alleged distance has heightened importance in this case according to the parties because the Department Guidance Document relies on a rule of thumb that properties more than a quarter of a mile apart are not presumed to be contiguous or adjacent but that issue should be decided on a case-by-case basis. None of the parties provide any supporting discussion on why the manner on which they rely to determine the distance (for example, straight-line distance, center to center, as the crow flies, or fenceline to fenceline) is the correct method or should be adopted by the Board. Nor do the parties provide any significant discussion about what the relevant "property" is in cases of this type. NFG Midstream argues that the sources have readily discernable boundaries and that the lots on which they are located are separated by undeveloped forestland. Seneca discusses similar points. The Department argues that the sources are located on a single parcel of DCNR property and consequently lie on one contiguous property.[3] At a minimum, these issues would appear to create an issue of disputed fact on whether the sources are contiguous or adjacent that would preclude summary judgment. Furthermore, we do not think that the right to summary judgment is clear and therefore, it should not be granted on this issue.

NFG Midstream, and Seneca in particular, spend a significant amount of their briefs discussing the issue of whether the sources meet a "common sense notion of a plant," both as a

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[3] In its brief responding to NFG's motion, the Department argues in footnote that it "did not rely on the contiguousness of the property in its Single Source Analysis." DEP Br., p. 9, note 5. Whether or not the Department came to a conclusion regarding the contiguousness of the sources, the Board may do so under its *de novo* review.

separate requirement, and as part of the determination of whether the sources are contiguous or adjacent. NFG Midstream and Seneca assert that the sources do not satisfy the common sense notion of a plant citing to a number of characteristics such as a lack of a common secure boundary, the distance between the sources, the uneven nature of the intervening land and the fact that the sources are not visible from each other. The Department disputes the other parties' position and asserts that the facilities are adjacent and comport with the common sense notion of a plant or at least there remain issues regarding that determination that preclude summary judgment. The Department contends that the factors relied on by NFG Midstream and Seneca are not the only factors that can be considered and that the nature of the relationship between the sources is one of interdependence which supports a finding that these two sources meet a common sense notion of a plant. The issue of whether these two sources should be viewed as a plant once again requires the Board to address a mixed question of fact and law regarding what factors to consider in determining whether sources should be considered a single plant and what significance to give the issue in analyzing whether it satisfies the regulatory requirement. Given the facts and issues raised by the parties, we find that the right to summary judgment on this point is far from clear, and should therefore be denied. We think that this is the type of issue that is best decided on a fully developed factual record and with the benefit of post-hearing briefs.

NFG Midstream also contests the Department's determination regarding the requirement that the sources belong to the same industrial grouping.[4] In viewing this issue, the Board again is faced with a mixed question of fact and law and there are clear issues of material fact. NFG Midstream and the Department agree that the proper two digit SIC Group for Seneca's Well Pad

[4] Seneca does not raise this issue.

E is Major Group 13. NFG Midstream contends that the Bodine Compressor Station is properly identified with Major Group 49, specifically, SIC Code 4922. Therefore, NFG Midstream asserts that, because sources must belong to the same industrial grouping, the regulatory criteria in order for the sources to be aggregated is not met in this case. The Department denies that 4922 is the proper SIC Code for the Bodine Compressor Station and contends that the activities at the Bodine Compressor Station fit squarely under SIC Code 1311. *See* DEP Br., p. 11. Thus, under the Department's position, both the Bodine Compressor Station and Well Pad E belong to the same industrial grouping, Major Group 13. SIC classifications are determined based on the specific activities at the sources and how those activitie fit within the broad categories outlined in the manual for determining SIC Codes. At this point, we do not believe that the record is sufficiently detailed for the Board to determine exactly what activities are occurring at the sources and how these activities fit within the different SIC Codes advocated by the parties.

Furthermore, the Department argues that it can disregard any difference in the SIC Codes between Well Pad E and the Bodine Compressor Station because the sources support each other to produce one product. This "support relationship" approach, which is outlined in the Department's Guidance Document, relies on language from the preamble to Federal Prevention of Significant Deterioration regulations published in the Federal Register in 1980. We think there are issues of material fact in this case as to whether a support relationship exists as well as a legal issue of whether the alleged support relationship allows the Department to "override the difference in SIC codes for PSD/Title V purposes." NFG Notice of Appeal, Att. C, p. 5. Given these issues, it is apparent that there is no clear right to summary judgment and, again, the Board would benefit from a fully developed factual record and post-hearing briefs before deciding this issue.

Having determined that NFG Midstream is not entitled to summary judgment, we turn next to its request for a partial summary judgment. NFG Midstream seeks partial summary judgment "regarding whether the mere existence of a contractual relationship between two entities can support the finding of 'common control.' " NFG Br., p. 18. As discussed above, the Department may only aggregate distinct sources of air emissions after determining, among other things, that the sources are under the common control of the same person (or persons under common control). The problem with NFG Midstream's request, however, is that it appears inconsistent with the actual actions taken by the Department in this case in deciding to aggregate the two sources.

In determining that the sources meet the common control regulatory criteria in order to be aggregated, the Department determined that based on common ownership, a contractual agreement and a support/dependency relationship, the sources shared common control. NFG Notice of Appeal, Att. C, pp. 5–6. Based on our review of the Department's determination, it is clear that the Department did not rely exclusively on the mere fact that there was a contract between the parties in finding that the sources satisfied the regulatory criteria of common control. The issue of "the mere existence of a contractual relationship" supporting a finding of common control is not before the Board in this matter. Stated another way, NFG Midstream is asking the Board for an advisory opinion. "Judicial restraint counsels against making a potentially unnecessary decision. We do not issue advisory opinions." *Sayreville Seaport Associates v. DEP,* 2011 EHB 815, 822.

Conclusion

We find that, when viewing the record in the light most favorable to, and drawing all reasonable inferences in favor of, the Department and further resolving all doubts as to the existence of a genuine issue of material fact against NFG Midstream and Seneca—all of which

we are required to do—the right to a summary judgment on behalf of NFG Midstream and Seneca is not clear and free from doubt and, therefore, should not be granted. The issues of air aggregation in the oil and gas industry are legally and factually complex and the Board strongly believes that these issues, which remain a matter of first impression in Pennsylvania, will be best decided with the benefit of a full factual record and post-hearing briefs.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NATIONAL FUEL GAS MIDSTREAM CORPORATION AND NFG MIDSTREAM TROUT RUN, LLC, Appellants, and SENECA RESOURCES CORPORATION, Intervenor	:	
	:	**EHB Docket No. 2013-206-B**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 4th day of November, 2014, following review of the Appellant's and Intervenor's Motions for Summary Judgment, the Department's Responses thereto, and the Appellant's and Intervenor's Reply Briefs, together with the supporting briefs and exhibits, it is ordered that the Motions for Summary Judgment, along with Appellant's Motion for Partial Summary Judgment are DENIED.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 4, 2014

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SLUDGE FREE UMBT, et al.	:	
	:	
v.	:	**EHB Docket No. 2014-015-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND SYNAGRO, a.k.a. SYNAGRO MID-ATLANTIC, INC., Permittee	:	**Issued: November 4, 2014**

OPINION AND ORDER ON PETITION TO INTERVENE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a petition to intervene filed by a citizens group, and rejects the Department and the permittee's request that the group's participation be limited to issues raised in the notice of appeal.

OPINION

The Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper (hereinafter collectively the "Riverkeeper"), petition to intervene in this appeal. The existing appellants do not object to the Riverkeeper's intervention. The Department of Environmental Protection (the "Department") and the permittee, Synagro, a.k.a. Synagro Mid-Atlantic, Inc. ("Synagro"), do not object to the Riverkeeper's intervention, but they do argue that her intervention should be limited to the objections set forth in the appellants' notice of appeal. Synagro says that the Riverkeeper has added objections in her petition to intervene that impermissibly attempt to expand the scope of the appeal, and that she has impermissibly attempted to reserve the right to add still further objections.

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We will decline the Department and Synagro's invitation to specifically order the Riverkeeper to limit her participation to the issues raised in the appellants' notice of appeal at this time, largely because such an order does not appear to be necessary. First, the Riverkeeper's attempt in her petition to intervene to "reserve the right to alter or add to the issues upon which [she] will offer evidence or legal argument" is essentially meaningless. Whether she will be permitted to "alter or add to the issues" is a matter of the Board's discretion, which we will exercise in accordance with our rules and precedent at the time there is a request to do so. The Riverkeeper's reservation will play no part in our deliberation.

Secondly, we disagree that the Riverkeeper has attempted to expand the scope of the appeal in her petition. Our rules require a would be intervenor to identify "[t]he specific issues upon which petitioner will offer evidence or legal argument." 25 Pa. Code § 1021.81(b). In response to that requirement, the Riverkeeper avers as follows:

> Petitioners will present legal and factual argument on the issues already raised by the current Appellants, in particular on the issues of Delaware River Basin SPW water quality standards and how the proposed sludge application impacts existing water quality in SPWs.

Synagro says that the Riverkeeper has attempted in other parts of her petition to add several new issues that allegedly go beyond the notice of appeal, such as the need to protect both "ecological balance" and the "Township's reputation and credibility." However, the petition does not attempt to add those issues. Rather, the passages cited by Synagro merely describe the petitioner's member's interest in the matter that gives rise to standing. For example, Paragraph 50 of the petition says that, "[i]n her various roles serving the Township, [the member] has invested considerable time and effort to protecting the ecological balance in the Townships, including the areas where the proposed sludge sites are located." In Paragraph 62, the

petitioner's member says she is directly interested in the outcome of this appeal because she is worried about the Township's reputation and credibility as a clean and healthy place to live. We do not interpret these averments regarding standing to represent an attempt to add new issues to this case on the merits.

Finally, we do not want to leave the impression that an intervenor is necessarily or automatically limited to issues raised in a notice of appeal as the Department and Synagro seem to contend. Such a blanket statement is inconsistent with the Board's broad discretion in this area. On that point our rules provide:

> If the Board grants the petition [to intervene], the order may specify the issues as to which intervention is allowed. An order granting intervention allows the intervenor to participate in the proceedings remaining at the time of the order granting intervention.

25 Pa. Code § 1021.81(f). As we said in *Connors v. DEP*, 1999 EHB 669,

> In short, subject to the Board's discretion based upon the facts of individual cases, 25 Pa. Code § 1021.62(f), an intervenor in Board proceedings is not automatically limited as a result of its status as an intervenor on what arguments it can make. Arguments might be precluded for evidentiary reasons, ... because the issue was already decided prior to its intervention, because an issue is not identified in a petition to intervene, or for a slew of other reasons, but not simply because it is an intervenor who wants to raise issues that are different than those raised by the existing parties.

Id., 1999 EHB at 676 (footnote omitted) (citing *Appeal of Municipality of Penn Hills*, 546 A.2d 50 (Pa. 1988)). *See also Ruddy v. DEP*, 2003 EHB 268, 270 (refusing to limit petitioner's participation in appeal at early point in proceedings where Board was presented with insufficient facts and legal arguments). *But see Wilson v. DEP*, EHB Docket No. 2013-192-M (January 2, 2014) (Board in exercise of its discretion limited intervenor to objections currently listed in notice of appeal, subject to further developments in the case). Indeed, until relatively recently, intervention could be denied unless the petitioner had something new or different to add to the

proceedings. *See, e.g., Harman Twp. v. DEP*, 1990 EHB 301 (neighboring landowner's participation limited to issues that were not identical to the appellant's). This issue does not require further refinement here because, as previously mentioned, the Riverkeeper has not actually made any attempt to add new issues, which is not particularly surprising since the same counsel will represent the appellants and the intervenors, and the original notice of appeal is so comprehensive that it is difficult to imagine what new issues there might be.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SLUDGE FREE UMBT, et al.	:	
	:	
v.	:	**EHB Docket No. 2014-015-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION AND SYNAGRO, a.k.a.	:	
SYNAGRO MID-ATLANTIC, INC., Permittee	:	

ORDER

AND NOW, this 4th day of November, 2014, it is hereby ordered that the Riverkeeper's petition to intervene is **granted.** The caption is amended to read as follows:

SLUDGE FREE UMBT, et al., Appellants, and	:	
DELAWARE RIVERKEEPER NETWORK	:	
AND MAYA VAN ROSSUM, Intervenors	:	
	:	
v.	:	**EHB Docket No. 2014-015-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION, AND SYNAGRO, a.k.a.	:	
SYNAGRO MID-ATLANTIC, INC., Permittee	:	

ENVIRONMENTAL HEARING BOARD

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

DATED: November 4, 2014

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SLUDGE FREE UMBT, et al., Appellants, and DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, Intervenors	:	
v.	:	**EHB Docket No. 2014-015-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND SYNAGRO, a.k.a. SYNAGRO MID-ATLANTIC, INC., Permittee	:	**Issued: November 17, 2014**

OPINION AND ORDER ON
MOTION TO COMPEL MORE COMPLETE RESPONSES

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion to compel where the party supporting the motion has failed to explain why the requested information is relevant and/or reasonably calculated to lead to the discovery of admissible evidence and where the opposing party has already produced all of the information within its control.

OPINION

On February 18, 2014, Sludge Free UMBT ("Sludge Free"), a citizens group consisting of residents of Upper Mount Bethel Township in Northampton County, along with five pairs of individual appellants, all of whom are members of Sludge Free, filed an appeal of the Department of Environmental Protection's (the "Department's") approval of three site suitability notices submitted by Synagro, a.k.a. Synagro Mid-Atlantic, Inc. ("Synagro") for the application of biosolids on three sites in the Township. The three sites are: (1) Ron Angle – Potomac Farm

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Biosolids Site, (2) Ron Angle II – Sunrise Farm Biosolids Site, and (3) Ron Angle III – Stone Church Farm Biosolids Site. The Department administers a general permit (PAG-08) for the beneficial use of biosolids through land application under which these sites are covered. The Appellants' notice of appeal contains a host of objections in support of an overarching contention that the sites in question are not appropriate for the application of sewage sludge.

Currently at issue is Synagro's motion to compel more complete responses, which seeks more information from the Appellants than they provided in response to Synagro's requests for admissions and interrogatories served on Sludge Free and each of the five pairs of individual appellants.[1] For a number of reasons, Synagro views the Appellants' responses as deficient, both in form and substance. The Appellants respond that many of Synagro's requests do not appear to be reasonably calculated to lead to the discovery of admissible evidence, and that the Appellants have provided all of the information they have that is not subject to privilege. The Appellants also repeatedly contend that Synagro's discovery requests have been unduly burdensome, harassing, and contrary to the Pennsylvania Rules of Civil Procedure. On November 11, 2014, Synagro filed a letter with the Board withdrawing six of the fourteen issues raised in its motion to compel. The Department has not weighed in on the dispute. For the reasons discussed below, we deny Synagro's motion as to the issues not previously withdrawn.

Discovery in proceedings before the Board is governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102. Generally, parties may obtain through discovery any matter, not privileged, that is related to the subject matter of the pending action and is reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. This Board

[1] We recently granted a petition to intervene filed by the Delaware Riverkeeper Network and Maya van Rossom, whose interests generally align with the existing Appellants. *Sludge Free UMBT v. DEP*, EHB Docket No. 2014-015-L (Opinion and Order issued Nov. 4, 2014). This discovery dispute arose before the intervention and any discovery involving the Riverkeeper is not currently at issue.

typically favors and encourages broad discovery. *DEP v. Allegheny Enterprises, Inc.*, EHB Docket No. 2013-187-CP-C, slip op. at 3 (Opinion and Order issued May 13, 2014) (citing *PA Waste, LLC v. DEP*, 2009 EHB 317, 318; *Raven Crest Homeowners Ass 'n v. DEP*, 2005 EHB 803, 806). *See also Solebury Twp. v. DEP,* 2007 EHB 325, 327 ("As a general rule, the Board is liberal in allowing discovery which is either directly related to the contentions raised in the appeal or is likely to lead to admissible evidence that is related to the contentions raised in the appeal.") We allow broad discovery because one of the primary purposes of discovery is to avoid unfair surprise and trial by ambush. *Kiskadden v. DEP*, 2013 EHB 21, 26 n.1; *PA Waste, supra*, 2009 EHB at 318 (citing *Pa. Trout v. DEP*, 2003 EHB 652, 657). However, in overseeing the discovery process, we have wide discretion to determine whether discovery is being conducted appropriately and we may limit discovery where appropriate. *Northampton Twp. v. DEP*, 2009 EHB 202, 205 (citing *DEP v. Neville Chem. Co.,* 2005 EHB 1, 3-4). For the purposes of assessing a discovery motion in this case, it is important to keep in mind the scope of the appeal, meaning we must keep our eye toward how the requested information is relevant to determining whether the Department erred in approving the site suitability notices.

As a precursor to filing a discovery motion, our rules require that the parties make a good-faith effort to confer about the resolution of discovery disputes. 25 Pa. Code § 1021.93(b). Synagro sent a letter to the Appellants dated August 18, 2014 expressing its view that the Appellants' responses to Synagro's discovery requests were deficient, and outlining the responses it believed had not been satisfactorily answered. (Mot. to Compel, Ex. S.) The Appellants responded in a letter dated September 2, 2014, which included a table containing the discovery requests identified by Synagro and the Appellants' responses to Synagro's concerns.

(Mot. to Compel, Ex. T.) All of the disputed requests subject to the present motion to compel were contained in Synagro's letter and the Appellants' response.

The Appellants' complaint that Synagro's discovery requests are overly broad, burdensome, and intended to harass is not without merit. Synagro served requests for admissions, five differently ordered sets of 88 interrogatories, and 14 document requests for each of the pairs of individual appellants as well as Sludge Free. Synagro unnecessarily scrambled the order of the questions on each one of these separate interrogatory sets, despite the fact that each question was exactly the same. The deliberate scrambling of numbering in the repetitive requests served no legitimate purpose and undoubtedly made responding far more time-consuming than it otherwise needed to be.

With respect to the substance of the discovery, Synagro asked each appellant to state whether they have entered upon another person or entity's real property without permission. It asked them to describe the ventilation system of their homes, all of the computers and electronic devices in their homes, and all "activities" they have ever conducted on their property in the last three years. It asked whether they smoked or chewed tobacco. It asked them to identify any solid, liquid, or gaseous material that has entered onto their property since 2012—every chemical of any kind whatsoever on their property, such as shoe polish for example—and perhaps most amazingly, "how frequently you clean your home and...the extent and duration of the cleaning."[2] (*See* Mot. to Compel, Ex. A.) It is true that scattered among these rather ridiculous questions are many legitimate subjects of inquiry, but frankly, it is difficult to take Synagro's complaints with respect to legitimate questions as seriously as we otherwise might have had the kernels of wheat not been mixed in with so much chaff.

[2] The author of this opinion is relieved that he has not been required to answer this last question.

Keeping our attention on the forest rather than the individual trees for a moment more, it is clear that the Appellants' overall level of effort in response to Synagro's rather daunting discovery has generally been appropriate. We have no indication whatsoever of bad faith or laziness on the part of the Appellants in preparing their responses. They are not trying to hide anything as far as we can tell. Among other things, we are told that they have produced more than 1,000 pages of documents and responded to the Department's **142** interrogatories. At some point, it is difficult to view parties' prehearing behavior as anything other than an attempt to quell interested parties' appeal rights.

Turning now to Synagro's specific complaints, Synagro asked the individual appellants to admit that "the application of biosolids onto the Potomac Farm has no impact on your Property," Potomac Farm being one of the land application sites in dispute. If the request to make that admission was denied, Synagro requested that the individual appellants specify the impact that the application of biosolids has had on each of their properties. In a separate request for admission, Synagro mirrors this request as to the application of biosolids on another land application site in dispute, the Stone Church Farm. The Appellants respond that the requests for admission are rather oddly phrased because the application of biosolids has not yet commenced, so there has not yet been any impact. The Appellants go on to argue that these are extremely broad requests that essentially seek to have them admit that they have no case. They say that they have already described in great detail—starting with the 124 objections in their amended notice of appeal, the thousand pages of documents that have been produced, and their answers to more tailored questions—what they believe the impact of the project will be on their properties.

Requests for admissions are a discovery tool intended to clarify issues, expedite the litigation process, and promote a decision based on the merits. *Stimmler v. Chestnut Hill Hosp.*,

981 A.2d 145, 160 n.18 (Pa. 2008). We fail to see how asking the Appellants to admit that they have no case helps to clarify issues beyond what they have already provided or otherwise advances this litigation, so we will deny Synagro's motion to compel more specific answers to these requests.

Synagro next seeks to compel information regarding the Appellants' "oral communications with any person not a party to this action concerning the subject matter of this appeal." This request is extremely broad. It is unreasonable to expect persons to remember or document all oral communications with non-parties before and after the commencement of the action. Although Synagro states that it is trying to "determine the truth of the allegations in the notice of appeal," it fails to state how this information will help them do that, or more fundamentally, how such information could lead to the discovery of admissible evidence.

In order to assess whether Synagro's discovery requests are reasonably calculated to lead to the discovery of admissible, that is to say relevant, evidence, we need to ask what evidence is likely to be admissible in this case. Our sole focus is whether the Department's approval of the site suitability notices was lawful, reasonable, and supported by the facts. *Solebury School v. DEP*, EHB Docket No. 2011-136-L, slip op. at 38 (Adjudication issued July 31, 2014); *Gadinski v. DEP*, 2013 EHB 246, 269. That inquiry is limited to the objections raised by the Appellants, who bear the burden of proof in their notice of appeal. 25 Pa. Code § 1021.122(c)(2). Generally speaking, whether the Department acted lawfully and reasonably will turn on such things as the topography and characteristics of the sites, the buffers observed from bodies of water and other features, and the nature of the material to be placed on the sites. *See* 25 Pa. Code §§ 271.914, 271.915, 275.201, 275.202, and 275.203 (general requirements, prohibitions, and pollutant limits for the land application of sewage sludge).

As might be expected, the Appellants' objections in their notice of appeal relate to the nature and characteristics of the sites in question that the Appellants believe make those sites unsuitable for the land application of biosolids. For example, they say the sites have slow infiltration rates, acidic soils, steep slopes, shallow groundwater tables, wetlands, wildlife habitat, access problems, nearby water supplies, and nearby streams, all of which make them unsuitable. They complain that the Department failed to comply with proper procedures and apply proper regulatory standards. In a typical third-party appeal such as this, the individual appellants have little to offer in the way of relevant testimony of their own beyond their basis for standing and their knowledge of the surroundings, nor do we expect otherwise. These cases ultimately usually seem to turn on a battle of the experts. This is not an action for damages or a toxic tort case; it is an administrative review of the Department's action. With that as our scope of review, it is not clear to us why identification of the Appellants' oral discussions will lead to evidence that will help us decide whether the Department erred. Therefore, we will deny the request to compel a more specific response to that question.

Synagro next requests the identity or identities of who "created, administers, manages, and maintains" Sludge Free's Facebook profile page and persons who post on the page. Synagro contends that the information posted on the Sludge Free Facebook page relates to the subject matter of the litigation, is public and available to anyone who wants to see it, is relevant, and it should be provided. The Appellants respond that Synagro can obviously see the information on the page, but that knowing the identity and contact information of the persons involved to the extent not otherwise shown on the page is not relevant or reasonably calculated to lead to the discovery of admissible evidence.

Although a number of Courts of Common Pleas across the Commonwealth have addressed the discovery of Facebook information, the majority of the Common Pleas cases dealing with the issue relate to personal injury matters and are not particularly helpful here.[3] However, in *Trail v. Lesko*, No. GD-10-017249, 2012 Pa. Dist. & Cnty. Dec. Lexis 194 (Allegheny C.P. Jul. 3, 2012), the esteemed Judge Wettick of the Allegheny Court of Common Pleas noted that information on Facebook is no different than any other information when it comes to the duty to disclose it in discovery: "The courts recognize the need for a threshold showing of relevance prior to discovery of any kind, and have nearly all required a party seeking discovery in these cases to articulate some facts that suggest relevant information may be contained within the non-public portions of [a Facebook] profile." *Trail, supra*, at *19. *See also Hoy v. Holmes, supra* at *8-9 ("[W]e agree that a factual predicate has to be shown by the party seeking discovery for non-public information posted on social media....The mere allegation that a lawsuit has been commenced against the Defendant and that the Plaintiffs are claiming certain damages does not identify nor establish such a factual predicate.").

Our analysis regarding the discovery of social media information is fundamentally no different from how we analyze any other discovery dispute. *Cf. Perano v. DEP*, 2011 EHB 17 (spoliation principles apply equally to electronically stored information as they do to tangible things). For example, reviewing information or authorship of information contained on a public Facebook page is no different than reviewing the information or authorship of information

[3] *See, e.g. McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 Pa. Dist. & Cnty. Dec. Lexis 270 (Jefferson C.P. Sep. 9, 2010) (plaintiff injured in car accident); *Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535, 2011 Pa. Dist. & Cnty. Dec. Lexis 187 (Northumberland C.P. May 19, 2011) (plaintiff injured while operating forklift); *Largent v. Reed*, No. 2009-1823 (Franklin C.P. Nov. 8, 2011) (plaintiff injured in motorcycle accident); *Hoy v. Holmes*, No. S-57-12, 2013 Pa. Dist. & Cnty. Dec. Lexis 204 (Schuylkill C.P. Jan. 31, 2013) (plaintiff injured in car accident); *Perrone v. Rose City HMA, LLC*, No. CI-11-14933 (Lancaster C.P. May 3, 2013) (plaintiff injured in hospital elevator). *See also Facebook Discovery Scorecard* at http://www.torttalk.com for a periodically updated catalog of Pennsylvania cases involving discovery disputes and Facebook.

contained in an old style, mimeographed public newsletter. There is no constitutional right of privacy or privilege that automatically prevents the discovery of information contained on Facebook or other social media. *See Hoy v. Holmes* at *8. Therefore, a decision on whether to compel the information sought is guided by the relevant Rules of Civil Procedure governing discovery, which require a demonstration that the information sought is reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1(b).

Synagro has failed to explain how the identity and contact information of the individual(s) administering Sludge Free's Facebook page is relevant or reasonably calculated to lead to the discovery of admissible evidence in terms of whether or not the Department's approval of the site suitability notices was lawful, reasonable, and supported by the facts. It is not obvious to us how the identity and contact information of the administrator of Sludge Free's Facebook page is relevant or will lead to the discovery of admissible evidence relating to site suitability and the Department's review process. We would suppose that there is no point to asking for someone's identity and contact information unless there is an intent to follow up, but it is not readily apparent why anything that a Facebook page administrator has to say will help us decide whether the Department correctly decided that the sites in question are suitable for the application of biosolids. Without some explanation of why it might ultimately be helpful directly or indirectly, we see no need to compel its disclosure.

In a related request, Synagro seeks information on three pictures uploaded to the Sludge Free Facebook page, including who took the photographs, where they were taken, the date they were taken, the reason they were taken, to whom they were distributed, and the use of the photographs. Once again, Synagro does not explain why this information about these photographs is relevant to the proceedings, or may lead to admissible evidence. Synagro does

not provide us with a reason why these photographs, which are identified as a biosolids operation in an adjacent township, have any bearing on whether the Department properly approved the site suitability notices that are the subject of this appeal. Previously we have recognized that "it will generally be enough to require information to the divulged if there is a reasonable *potential* that it will ultimately prove to be relevant." *Borough of St. Clair v. DEP*, 2013 EHB 177, 179 (citing *T. W. Phillips Oil & Gas Co. v. DEP*, 1997 EHB 608, 610). Yet here, without any assistance from Synagro, we struggle to find that potential. Instead, Synagro devotes its discussion on this issue to privacy concerns raised by Sludge Free. Synagro tells us it is "entitled to this information," but it never explains why the information is discoverable in the first place in terms of its relevance to this appeal.

In regard to other portions of Synagro's motion, the Appellants have verified that they have provided all that they have. For example, one of the requests concerns the individual appellants' water wells. In its interrogatory, Synagro requests such information as the date the well was drilled, the well's depth, the depth to water measured at completion, the present depth to water in the well, the amount of water currently produced, if repairs have been made, if the well has been inspected, if the system has been routinely maintained, the distance of the wells to a septic leech field, and any supporting documents relating to the above. (*See* Mot. to Compel, Ex. B at 33-34.) Unlike some of Synagro's other requests, this information clearly is relevant because the Appellants have raised a concern in their amended notice of appeal that their wells may be impacted. (*See, e.g.*, Objections 13 and 14.)

In response to this interrogatory, after listing a series of objections, the Appellants' state:

> [I]n regards to the Zimmerer Appellants: the well is drilled to 140 feet

> in regards to the Gorman Appellants: the well is 140 or 160 feet deep; and the septic system is approximately 150 feet away from the water well;
>
> in regards to the Bodine Appellants: the well was put in operation in their newly-constructed home on or about December 2013
>
> in regards to the Schneider Appellants: The well was drilled to 340 feet; the depth of water was 300 feet measured on 11/14/04
>
> in regards to the Dellatore Appellants: the well was drilled to a depth of 420 feet. By way of further response, see documents produced in response to the request for production of documents.

(Mot. to Compel, Ex. M at 37.) The Appellants supplemented this response with the following: "Appellants gave what information they had at the time. The Gorman Appellants further state that, in regard to repairs, a new motor was put in their water well in 2014 by Miller Brothers Inc., 264 Johnsonville Rd. Bangor, PA 18013." (Mot. to Compel, Ex. T at 12.)

Clearly the responses do not fulfill the litany of information requested by the interrogatory. However, the Appellants again state in response to Synagro's motion that they provided what they have. The Appellants have responded to the discovery requests with verifications and there is nothing to indicate that they are improperly withholding information. We must take their word on these matters. We cannot compel a party to produce material that it does not have. However, as a corollary, the consequence of not producing information that one does have is that the evidence may be precluded from admission during the hearing on the merits. *Borough of St. Clair, supra*, 2013 EHB at 184.

The Appellants have responded similarly to the wealth of information Synagro requests regarding the individual appellants' septic systems, stating that they have provided all they have. Again, although the responses do not provide all the information Synagro seeks, we cannot

compel a party to produce information it does not have and the parties should understand the consequences of that.[4]

Finally, Synagro seeks the identification of all members of Sludge Free, arguing that the identity of the members is relevant to determining whether Sludge Free has standing. We have previously stated that "the membership list of an advocacy group is not discoverable unless the need for discovering such information clearly outweighs the chilling effect such disclosure would have on the members' First Amendment right of association." *Hanson Aggregates, PMA, Inc. v. DEP*, 2003 EHB 1, 6. *See also Chrin Bros., supra*, 2010 EHB at 814-15 ("Chrin has failed to show that its need for the information sought from the Movants clearly outweighs our First Amendment concerns."). *Cf. Northampton Twp., supra*, 2009 EHB 202. Synagro has not provided us with a compelling reason for the disclosure of Sludge Free's membership list. It is well-settled that a group or organization has standing if at least one of its members has standing. *Citizen Advocates United to Safeguard the Env't, Inc. v. DEP*, 2007 EHB 632, 674 (citing *Groce v. DEP*, 2006 EHB 856, 895, *aff'd*, 921 A.2d 567 (Pa. Cmwlth. 2007)); *Wurth v. DEP*, 2000 EHB 155, 170-71 (citing *Valley Creek Coal. v. DEP*, 1999 EHB 935, 942; *Raymond Proffit Found. v. DEP*, 1998 EHB 677, 680). Here, multiple members of the group have already been identified. Synagro does not need Sludge Free's entire membership list to determine whether the organization has standing.

Accordingly, we deny Synagro's motion to compel and issue the following Order.

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[4] The Appellants have stated more than once in their responses that they will supplement information as necessary according to the Pennsylvania Rules of Civil Procedure. We note that under the Pennsylvania Rules, any duty to supplement is rather constrained unless agreed to by the parties or imposed by order of the court. Pa.R.C.P. No. 4007.4. *See Berks Cnty. v. DEP*, 2012 EHB 16.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SLUDGE FREE UMBT, et al., Appellants, and DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, Intervenors	:	
v.	:	**EHB Docket No. 2014-015-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND SYNAGRO, a.k.a. SYNAGRO MID-ATLANTIC, INC., Permittee	:	

ORDER

AND NOW, this 17th day of November, 2014, it is hereby ordered that Synagro's motion to compel more complete responses is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

DATED: November 17, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	**Issued: November 19, 2014**

OPINION AND ORDER ON PERMITTEE RANGE RESOURCES-APPALACHIA, LLC'S MOTION FOR LEAVE TO FILE REBUTTAL EXPERT REPORTS AND PRESENT REBUTTAL EXPERT TESTIMONY

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Board denies the Permittee's Motion to File Rebuttal Expert Reports and Present Rebuttal Expert Testimony. This Motion could be considered as a second Motion to Reconsider the Board's earlier interlocutory Opinion and Order that granted the Motion to Strike Expert Reports that were filed late and without permission. Permittee has failed to demonstrate why the Board should reverse its earlier rulings. Appellant would suffer extreme prejudice if the Board would grant the Motion.

O P I N I O N

Presently before the Pennsylvania Environmental Hearing Board (Board) is Permittee Range Resources' Motion to File Rebuttal Expert Reports and Present Rebuttal Expert Testimony (Motion). We earlier denied Range Resources' Petition for Reconsideration of the Board's September 12, 2014 Opinion and Order granting Appellant's Motion to Strike Expert Reports and Rebuttal Expert Reports (Range's Petition for Reconsideration). Originally, we

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granted the Motion to Strike three expert reports filed late and without permission in violation of a specific Board Order. The Board found that allowing three new experts to testify at the trial would cause severe prejudice to the Appellant, Mr. Loren Kiskadden.

After carefully reviewing the Motion, we find no new arguments of any merit that would warrant our granting the request. We are more convinced than ever that allowing the three experts or any combination thereof, to testify at this late date would severely prejudice the Appellant. Parties have a right to rely on our Orders and the deadlines they impose. *Commonwealth of Pennsylvania, Department of Environmental Protection v. Neville Chemical Co.*, 2005 EHB 1, 4. Permittee's arguments are mostly a rehash of its earlier arguments advanced which we found equally unpersuasive. The fact that their testimony would be more streamlined does not obviate the fact that these experts should have been identified and their reports filed with the Board on July 10, 2014.

Although the Appellant has had their expert reports since late August the prejudice to the Appellant might be even greater now than earlier if we were to grant the Motion. Appellant has already presented his case in reliance on our earlier Orders granting his Motions to Strike and denying Range Resources' Petition for Reconsideration. Indeed, the parties have concluded 19 days of hearing in reliance on our earlier Orders.

We will enter an appropriate Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 19th day of November, 2014, following review of the Permittee's Motion for Leave to File Rebuttal Expert Reports and Present Rebuttal Expert Testimony, and the Department's and Appellant's Responses, it is ordered as follows:

1) The Motion is **denied.**

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

DATED: November 19, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOSEPH D. CHIMEL AND PAUL PACHUSKI	:	
	:	
v.	:	**EHB Docket No. 2011-033-M**
	:	**(Consolidated w/ 2011-034-M)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and D. MOLESEVICH & SONS	:	**Issued: November 25, 2014**
CONSTRUCTION CO., INC., Permittee	:	

ADJUDICATION

By Richard P. Mather, Sr., Judge

Synopsis

The Board dismisses a third-party appeal of the Department's issuance of a transfer and renewal of a surface mining permit but sustains the Appellants' appeal of the Department's issuance of a permit revision to add acreage and make a boundary correction for the surface coal mining permit. The Appellants failed to prove that the renewed permit inadequately mitigates noise and dust and failed to prove that the permit transfer and renewal did not carry with it valid existing rights. The Appellants, however, met their burden to show that the Department's issuance of a permit revision to add acreage to a permit area was contrary to law because the record did not demonstrate that the permittee had the right of access for all of the acreage proposed to be added.

FINDINGS OF FACT

Parties

1. The Appellee is the Department of Environmental Protection (the "Department"), which is the administrative agency with the duty and authority to administer and enforce the

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Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §§ 1396.1-1396.19a; the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §§ 4001-4015; the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17; and the rules and regulations promulgated under those laws.

2. The Permittee is D. Molesevich & Son's Construction Co., Inc., ("Molesevich"), a Pennsylvania corporation with a business address of 333 South Pine Street, Mount Carmel, Pennsylvania 17851. (Department Exhibit ("Ex.") 35.)

3. Appellant Joseph D. Chimel is an adult individual residing at 146 West Saylor Street, Atlas, Pennsylvania 17851. (Stipulated Fact ("Stip.") 1.)

4. Mr. Chimel lives approximately 300 feet from the Atlas Coal Breaker (the "Breaker"). (N.T. 27.)

5. Mr. Chimel grew up at 146 West Saylor Street, Atlas, Pennsylvania 17851. (N.T. 21.)

6. Mr. Chimel has always maintained an official address of 146 West Saylor Street, Atlas, Pennsylvania 17851, which has served as his primary residence for approximately half of his life. (N.T. 21-23.)

7. Mr. Chimel permanently moved back to Atlas in March 2008. (N.T. 23-24.)

8. Five or six times a week, Mr. Chimel walks along a path in a playground between his house and the Breaker. Mr. Chimel testified that during these walks he can hear noise emanating from the Breaker. (N.T. 27-28.)

9. Mr. Chimel applied for a job from Molesevich to work at its Atlas Coal Breaker operations. Mr. Chimel was not hired. (N.T. 53.)

10. Appellant Paul Pachuski is an adult individual residing at 105 West Saylor Street, Atlas, Pennsylvania 17851. (Stip. 2.)

11. Mr. Pachuski lives less than 200 feet from the Breaker. (N.T. 265-266; Appellants' Ex. 38.)

12. Mr. Pachuski's home is at the corner of West Saylor Street and Mulberry Street. (N.T. 265-266; Appellants' Ex. 38.)

13. Trucks accessing the Breaker from its Mulberry Street entrance pass Mr. Pachuski's home. (N.T. 278; Appellants' Ex. 38.)

14. Mr. Pachuski enjoys spending time in his garden in his backyard on a daily basis. (N.T. 267-268.)

15. Mr. Pachuski is a quadriplegic and is paralyzed from the chest down. He has limited use of his upper extremities and no finger dexterity. (N.T. 264.)

16. There are occupied houses in the Village of Atlas that are nearer to the Atlas Coal Breaker than the houses of Mr. Chimel or Mr. Pachuski. (Appellants' Ex. 38.)

Renewal and Transfer of Surface Mining Permit

17. The Atlas Coal Breaker was originally owned by Savitski Brothers Coal Company ("Savitski Brothers") and operated under Surface Mining Permit ("SMP") No. 49851602 (the "Permit"). (Stip. 3.)

18. Anthony Savitski owned and operated Savitski Brothers as a sole proprietorship from 1947 until his death in 1984, at which time ownership passed to his wife, Irene Savitski, and their son, Ronald Savitski, began operating the company. (Stip. 4, 5.)

19. Irene Savitski died on January 13, 2003. Her will named her children, Ronald and Linda Savitski, as co-executors. (Stip. 6.)

20. After Irene Savitski's death in 2003, her children disputed the ownership and operation of Savitski Brothers. (Stip. 7.)

21. A Complaint (the "Estate Litigation") was filed against Ronald Savitski in the Court of Common Pleas of Northumberland County on September 13, 2005, to remove him as co-executor of Irene Savitski's estate. (Stip. 8; Department Ex. 1, 2, 3.)

22. The Breaker was inactive from 2005 until 2010, while the Estate Litigation was pending. (Stip. 9; N.T. 125, 167-176, 248-249; Appellants' Exs. 17, 19, 26, 28, 42.)

23. SMP No. 49851602 had an expiration date of December 10, 2006. (Stip. 10.)

24. By letter dated March 31, 2006, the Department notified Savitski Brothers that SMP No. 49851602 would expire on December 10, 2006 and that written notice to the Department may be provided requesting that the Permit be renewed for reclamation only in lieu of submitting a complete renewal application, so long as Savitski Brothers attested that all of the following conditions applied:

> coal extraction, coal preparation and/or coal refuse disposal would not be conducted after the Permit expiration date;
>
> treatment facilities were not required after the Permit expiration date; and
>
> the remaining surface mining activities would consist solely of reclamation activities.

(Stip. 11; Appellant's Ex. 7, Department's Ex. 4.)

25. On or about September 27, 2006, Ronald Savitski, on behalf of Savitski Brothers, submitted an application to the Department to renew SMP No. 49851602, but the Department has no record of this application. (N.T. 80, 111, 117, 153-154, 424.)

26. The Department sent a letter to Savitski Brothers, dated September 27, 2006, returning the application because deficiencies were found, and requesting that Savitski Brothers

resubmit by October 20 a renewal application, proof of a valid mining license and insurance for Savitski Brothers and bond calculations for the site. At that time, there was also a question as to who was authorized to sign for Savitski Brothers due to the Estate Litigation. (N.T. 111, 117, 153-155, 424; Appellant's Ex. 8.)

27. As of December 10, 2006, the Department had not renewed the SMP No. 49851602. (Stip. 12.)

28. The Estate Litigation was resolved in January 2007, rendering Linda Savitski the sole executor of her mother's estate, which in turn provided her with effective control of Savitski Brothers. (Stip. 13, 14.) Beginning at that time, Ronald Savitski was no longer permitted to act on behalf of the estate. (N.T. 239.)

29. In January 2007, Linda Savitski petitioned a court for permission to sell the Atlas Coal Breaker. (Stip. 15.)

30. The Department had difficulty communicating with Linda Savitski because she was suffering from a terminal illness. (N.T. 426.)

31. Linda Savitski became unavailable for a time because she developed cancer and was in intensive care for a significant period of time after she became sole executor. (N.T. 240.) After a period of improvement she became sick again and ultimately died. *Id.*

32. On July 11, 2008, Ronald Savitski, purporting to be acting on behalf of Savitski Brothers, submitted a letter to the Department requesting that the SMP No. 49851602 be renewed for reclamation purposes only. (Stip. 16; Appellant's Ex. 9, 10.)

33. Also on July 11, 2008, John F. Beadle, P.E., on behalf of Savitski Brothers, hand delivered a letter dated July 11, 2008, to Nathan Houtz, P.G., Environmental Manager, Commonwealth of Pennsylvania, Department of Environmental Protection, regarding the annual

bond review of SMP No. 49851602, which indicated that Savitski Brothers had requested renewal of SMP No. 49851602 for reclamation only. (Stip. 17; Appellant's Ex. 11.)

34. By letter dated July 22, 2008, the Department acknowledged the receipt of the July 11, 2008 permit renewal application filed by Savitski Brothers, but the Department noted deficiencies with the documents that were submitted. (Stip. 18, 19; Appellant's Ex. 12, 15, 18.)

35. The Department did not renew the Permit for reclamation only. (N.T. 113, 249, 434.)

36. On February 9, 2009, the wooden breaker structure located at the site was damaged by a fire which destroyed the wooden breaker and prep plant and left behind a burned-down structure and other associated debris. (Stip. 20, 25.)

37. As a part of Linda Savitski's ongoing attempt to sell the Atlas Coal Breaker, a meeting was held on February 24, 2009, between the Department and representatives of D. Molesevich & Son's Construction Co., Inc., at which the Department advised Molesevich of what would need to be accomplished to bring the Atlas Coal Breaker into compliance, including, but not limited to, demolition of the portion of the site damaged from the fire, including the breaker and preparation plant, and removal of a large number of waste tires, old vehicles and junk equipment. (Stip. 21.)

38. While the Breaker was owned by Savitski Brothers, the Department did not suspend or revoke the Permit and did not take any action to forfeit the bond posted for the Breaker. (N.T. 113, 138-139, 187, 241, 431, 443.)

39. On May 18, 2009, the Department issued a Notice of Violation ("NOV") to Savitski Brothers because the liability insurance for the site had expired. (Stip. 23; Appellant's Ex. 17.)

40. The May 18, 2009 NOV directed Savitski Brothers to begin reclamation of the site in phases, first demolishing the damaged breaker structure, and then continuing reclamation of the entire permit area until it met the appropriate reclamation standards approved in the Permit. (Stip. 24.)

41. On June 22, 2009, the Department issued Compliance Order No. 09-5-046-S to Savitski Brothers, requiring Savitski Brothers to remove health and safety hazards resulting from the February 9, 2009 fire. (Stip. 25; Appellant's Ex. 19; Department Ex. 21.)

42. On March 1, 2010, after Savitski Brothers failed to comply with Compliance Order No. 09-5-046-S, the Department issued Failure to Comply Order No. 10-5-026-S. (Stip. 26; Appellant's Ex. 26.)

43. Linda Savitski's petition to sell the Atlas Coal Breaker was granted on April 29, 2010. (Stip. 22.)

44. On May 25, 2010, the Atlas Coal Breaker was sold to Molesevich. (Stip. 27.)

45. Savitski Brothers did not take or intend to take any action to abandon the Breaker or SMP No. 49851602 or any valid existing rights associated with the area covered by SMP No. 49851602. (N.T. 242, 248-249.)

46. During an onsite meeting on July 19, 2010, the Department discussed with Dennis Molesevich what action would be needed to transfer the permit from Savitski Brothers to Molesevich; the proposed additional acreage to be added to the permit for purposes of constructing an alternate access road to address concerns raised by citizens, including the Appellants; various regulatory requirements for operation of the site, including the need for a highway occupancy permit; and the permit transfer and renewal applications. (Stip. 28.)

47. The Department determined that the regulations regarding areas where mining is prohibited or limited are not applicable to this site because the site was permitted and in operation prior to 1977, i.e., since 1947, and those areas on the permit located within 300 feet of occupied dwellings and other public facilities, such as public parks, had been previously disturbed during earlier underground and/or surface mining at the site and are considered "valid existing rights" as that term is defined under 25 Pa. Code § 86.1 and 30 CFR § 761.5, and as a result, the Department determined, a 300-foot buffer requirement was not applicable. (Stip. 57; N.T. 91-96, 402, 405.)

48. After Molesevich purchased the Breaker, but prior to the renewal and transfer of the Permit, Molesevich spent approximately one year cleaning up the property and performing the required demolition work, i.e., removing the burned down structures and other debris, resulting in the Department's determination on February 10, 2011 that Compliance Order No. 09-5-046-S had been satisfactorily complied with and resulting in the lifting of Failure to Comply Order No. 10-5-026-S. (Stip. 61; N.T. 139, 184, 225-226, 492-495, 502-503; Appellant's Ex. 45; Permittee's Ex. 1.)

49. The Department requested a revised permit renewal application from Molesevich because technical aspects of the previous renewal application were several years old, and additional acreage was being added to the Permit in connection with construction of alternate access roads. (Stip. 30.)

50. On September 23, 2010, the Department received an Application for Permit Renewal, permit transfer and boundary correction to transfer the SMP from Savitski Brothers to Molesevich. (Stip. 29; Appellant's Ex. 32; Department Ex. 35.)

51. Molesevich advertised public notice of the permit application in *The News Item* for four consecutive weeks beginning September 23, 2010. (Stip. 31.)

52. In response to the public notice, an Informal Conference was requested under 25 Pa. Code § 86.34 and was held on November 17, 2010 at the Mount Carmel Township Municipal Building. (Stip. 32, 33.)

53. The Department advertised public notice of this hearing in *The News Item* on November 2, 2010. (Stip. 34.)

54. Eight people, including the Appellants, attended the Informal Conference. (Stip. 35.)

55. Concerns that were raised during the Informal Conference included: 1) increased truck traffic on local roads; 2) dust from the mining operation; 3) noise from mining vehicles and mineral processing equipment would be an annoyance; and 4) the establishment of a coal mining operation as proposed would have a negative effect on the quality of life of the local population and prosperity of businesses in the area. (Stip. 37; N.T. 37; Appellant's Ex. 40.)

56. Department personnel reviewed the Department's file on the Breaker, including aerial photographs dating back to the 1940s, and concluded that the original permit boundary and the proposed permit boundary were the same, except for 2.8 acres that were added through a boundary correction for an alternate access road, and from that review determined that the permit area had valid existing rights. (N.T. 95-96, 404, 407; Department Ex. 35, Exhibit 5; Department Ex. 43, Exhibit 9.)

Boundary Correction

57. Although not required by the Department, Molesevich agreed to use an alternate access road that would connect to Route 54 to alleviate truck traffic through the Village of Atlas. (Stip. 38.)

58. On November 1, 2010, Molesevich proposed to the Department two alternate access roads, both of which would avoid the Village of Atlas altogether and exit at the southwest corner of the Permit to Route 54. (Stip. 40, 41.)

59. These two alternate access roads required the additional permitting of 2.8 acres. (Stip. 42.)

60. In exhibit H-3 of the application for the Boundary Correction, Molesevich listed the following narrative description for the proposed additional acreage: "The acres to be added currently contain an existing common use road. This common use road will be used a [sic] haul road to exit the existing SMP." (Department Ex. 35.)

61. The Department has a technical guidance document entitled "Boundary Changes to Mining Permits," which explains the use of an "insignificant boundary correction." (Department Ex. 44.)

62. The technical guidance document defines "insignificant boundary correction" as:

> A small and inconsequential change to the permit boundary to correct an error in mapping, surveying, or other minor adjustment that results in no significant difference in environmental impact. This type of one-time only boundary correction will have no effect on the final reclamation and no negative environmental impact. An [insignificant boundary correction] can be for a maximum of 5 acres or approximately 10% of the permitted area, whichever is less.

(Department Ex. 44.)

63. The technical guidance document explains the Department's interpretation for when an insignificant boundary correction is appropriate, but, in a separate stand-alone section, provides for a different type of boundary correction, which the technical guidance document refers to as a "boundary revision" or the "addition or redistribution of acreage for mining and/or support area." That section provides that a "permittee may apply to the Department to add or modify acreage of the permit area to . . . [a]dd acreage for necessary support facilities." The Department would allow a boundary revision of 5 acres or 20% of the permitted area, whichever is less. (Department Ex. 44.)

64. Although Mr. Menghini testified that the Department considered the addition of the 2.8 acres to be an insignificant boundary correction, Mr. Menghini testified that the Department's basis for its decision actually appears in the technical guidance's "boundary revision" section, not in the "insignificant boundary correction" section. (N.T. 439-441.)

65. Mr. Menghini testified that none of the three conditions appearing in the technical guidance document under the section "insignificant boundary correction" apply to the addition of the 2.8 acres in this case. (N.T. 460-462.)

66. Under the technical guidance document, applications for boundary revisions must contain a revised Operations Map that identifies the revised permit boundary and the 1,000 feet perimeter to the revised permit boundary and all structures within as required. The technical guidance document also requires applicants to follow public notice requirements, update Modules if needed, and demonstrate the following:

a. Need for the additional area.

b. Specific use of the area.

c. Because of the size or location, the area to be added should be not economical to mine under a separate permit.

d. The correction cannot result in adverse environmental impacts of a larger scale or different nature than those anticipated and addressed in the original permit.

e. The added area would not contribute drainage to a new receiving stream.

f. The added area meets the requirements of the regulations with regards to distance limitations.

(Department Ex. 44.)

67. Under the technical guidance document, permittees, in most cases, will be required to post additional bond for the added area and/or update the bond amount for the entire permit. If the acreage assigned to the permit will change, the technical guidance document directs applicants to complete a Mining Permit Amendment – Change in Acreage form. (Department Ex. 44.)

68. The Department concluded that the addition of the 2.8 acres for an alternate access road constituted a necessary support facility which would be permitted as an incidental boundary or insignificant boundary correction. (N.T. 97-101, 435-436, 437-441, 455-456.)

69. The Department will also consider equipment storage, stockpiling, and preparation plant activities under this "necessary support facility" characterization. (N.T. 101.)

70. Under the technical guidance document, the maximum acreage allowed to be added through a permit revision is 5 acres or 20 percent of the permit area, whichever is less. (N.T. 441, 455-456; Department Ex. 44.)

71. The Department testified that had Molesevich's request been for the addition of more than 5 acres, the Department would have required Molesevich to apply for a new permit. (N.T. 106; Department Ex. 44.)

72. A PennDOT highway occupancy permit was issued for the alternate access road, and an easement for the alternate access road was granted and recorded with the Northumberland County Recorder of Deeds. (Stip. 39.)

73. When Savitski Brothers operated the Atlas Breaker, all traffic utilized the Mulberry Street access. (N.T. 141.)

74. The original entrance, which takes traffic down Mulberry Street and through downtown Atlas is still open. (Stip. 44.)

75. Mulberry Street is accessed from Route 61. (Stip. 45.)

76. There is no signage on Route 61 directing traffic to the Route 54 entrance. (Stip. 46.)

77. Construction of the alternate access road is in progress and traffic is able to enter the Atlas Coal Breaker from the Route 54 entrance. (Stip. 43.)

78. As of July 2013, construction of the alternate access road was approximately 50 percent complete. (N.T. 332.)

79. Molesevich has a sign posted near the scale house directing trucks to use the entrance from Route 54 and to not use the entrance from Mulberry Street. (N.T. 511-512.)

80. Approximately ten trucks enter and leave the Breaker site each day. (N.T. 336-337.)

81. When Savitski Brothers owned and operated the Breaker site, approximately ten to twenty trucks entered and left the site each day. (N.T. 414.)

82. Molesevich is currently using onsite feedstock for the Breaker rather than bringing material on to the property from offsite. If feedstock had to be brought from offsite, truck traffic to the Breaker would increase tenfold. (N.T. 352-353.)

83. On February 18, 2011, the Department issued the renewal of SMP No. 49851602, transferred the Permit to D. Molesevich & Sons Construction Co., Inc., and approved a boundary correction adding an additional 2.8 acres to the Permit to accommodate the proposed alternate access road. (Stip. 59; Appellant's Ex. 47, 48; Department Ex. 37, 39.)

84. The purpose of the boundary correction was to add approximately 2.8 acres for the possibility of a second mine access to decrease truck traffic through the Village of Atlas. (Stip. 60.)

85. Mr. Menghini testified that the addition of the 2.8 acres to the permitted area could also be considered as a permit revision, and if so, the Department complied with permit revision procedures because the boundary correction was advertised. (N.T. 240.)

86. After Molesevich acquired an easement and a highway occupancy permit for SR 54 and constructed an alternate access road, Reading Anthracite and Helfrich Construction both claimed to have title to portions of the 2.8 acres and began demanding wheelage, which now prohibits continued access to the entire 2.8 acres to access SR 54. (N.T. 226, 237-238, 330, 350-351.)

87. Molesevich does not have the clear right to access all of the 2.8 acres for which the Department approved the permit revision. (N.T. 226, 237-238, 330, 350-351.)

88. Molesevich is now seeking to remove the additional 2.8 acres from the permitted area through a permit renewal and permit revision submitted to the Department. (N.T. 350.)

89. For property to become part of a permitted area under bond, an applicant or permittee must provide the Department with a Consent of Landowner or a lease indicating that the applicant or permittee has the right to enter the property and conduct mining activities. (N.T. 237-238.)

90. The Department approved the boundary correction without verifying whether Molesevich had the right to access all of the 2.8 acres it sought to be added to the permitted area. (N.T. 226, 237-238, 330, 350-351; Department Ex. 35, Module H.)

Noise

91. There are no regulatory standards adopted under the Surface Mining Conservation and Reclamation Act regarding noise levels emanating from a surface mining operation other than those involving the use of explosives which are not at issue in this matter. (Stip. 52.)

92. There are no regulatory standards that define a specific decibel level at which noise levels constitute a public nuisance. (Stip. 53.)

93. The Department considers a continuous reading of over 68 decibels during the day and over 65 decibels at night at the property line to be a public nuisance. (N.T. 197, 235-236.)

94. Gene Crossley, a Department surface mining conservation inspector, investigated the Breaker site approximately 30-50 times but only used a noise meter during approximately ten of those investigations. (N.T. 203.)

95. On approximately ten occasions, Mr. Crossley measured the noise emanating from the Breaker, testing each time for a total of thirty to sixty minutes at various locations for several minutes at a time. Mr. Crossley determined that noise levels at the site spiked above 68 decibels when a truck within the permit boundary approached the permit boundary, but that noise

generated by activities at the site did not exceed an average of 68 decibels and, rather, averaged in the mid-60s. (N.T. 197-198, 204-205.)

96. Michael Menghini, the Pottsville District Mining Manager, monitored the noise at the Breaker twice, and on both occasions the average decibel readings were 60 decibels or less, and noise produced by activities at the site did not exceed 68 decibels. (N.T. 234-235, 247.)

97. The Department did not record spikes in its decibel readings but rather only recorded average decibel levels. (N.T. 205.)

98. Mr. Chimel testified that he used a decibel reader to monitor the Breaker site and noted readings ranging from 60 to 80 decibels, but Mr. Chimel did not maintain a record of these readings. (N.T. 59-60.)

99. Noise from the Breaker starting up in the morning at 7:00 a.m. sometimes wakes the Appellants from their sleep. (N.T. 41, 278.)

100. Mr. Chimel testified that noise from the Breaker sometimes impedes his ability to talk with his neighbors. (N.T. 41.)

101. Mr. Pachuski testified that he can hear noise from the Breaker from within his house with the windows closed, and he does not open his windows in the summertime because he finds the noise from the Breaker to be "unbearable." (N.T. 277-278.)

102. Although not required by the Department, Molesevich indicated to the Department its intention to install deflection siding on the conveyor feed bin and install sound damping insulation in the processing plant to reduce noise. (Stip. 55.)

103. Although not required by the Department, Molesevich is constructing eight to ten foot concrete walls around the first floor of the Breaker to reduce noise. At the time of the hearing, Molesevich had completed the western wall and had partially completed the eastern

wall. Molesevich's goal is to construct walls around the entire first floor of the Breaker except for the entrance. (N.T. 489, 510, 511, 529, 535; Permittee Ex. 1.)

104. Above the concrete walls on the first floor of the building, the remaining walls and the ceiling of the 60-foot building are constructed of steel with eight-inch thick fiberglass wrapping which serves to reduce noise. (N.T. 529, 535.)

105. Savitski Brothers did not have any sound insulation for its old breaker, except for the wood used to enclose the structure. (N.T. 411.)

106. Although not required by the Department, Molesevich indicated to the Department his intention to possibly install alternate backup alarms that use ultrasonic proximity detectors to detect the presence of objects behind equipment and only sound when an object is detected, if MSHA approved, cost effective and readily available, but this action has not been taken. (Stip. 56.)

107. Molesevich has reduced the sound of its back-up alarms on all its equipment to the lowest extent permitted by law. (N.T. 515-516.)

108. Although not required by the Department, Molesevich constructed a sound barrier berm on the northern boundary of the Atlas Breaker. The berm is fifteen to twenty-five feet high at places. At the time of the hearing, construction of the berm was approximately 80 percent complete. After completion of the berm, it will be covered with soil and planted. (N.T. 347, 505, 509-510.)

109. Savitski Brothers did not have any sound barrier berms along the northern boundary of the Atlas Breaker. The only sound barrier along the northern boundary was some scrub trees. (N.T. 245, 414-415.)

110. Savitski Brothers operated its two breakers Monday through Friday and on Saturday mornings. (N.T. 234, 354-355.)

111. Molesevich operates the Breaker Monday through Friday, 7:00 a.m. to 5:00 p.m., and occasionally for a half day on Saturdays. (N.T. 341.)

112. Although not required by the Department, Molesevich constructed a privacy fence which helps deflects sound and mitigate dust. (N.T. 489-490, 505.)

113. The Department, in its review of the permit application, concluded that the amount of noise to be generated by the operation of the Breaker would not constitute a public nuisance. (Stip. 54.)

114. The Department received approximately 200 complaints regarding Molesevich's operation of the Atlas Coal Breaker. (N.T. 185.) Although a few others may have made a few complaints the vast majority of complaints were from the two Appellants. *Id.* Mr. Chimel made about one hundred complaints and Mr. Pachuski made about fifty. (N.T. 60, 276.)

115. While over 200 complaints have been made to the Department by citizens regarding the Breaker since Molesevich began operating the Breaker, the Department has never issued a notice of violation following an inspection of those complaints. (N.T. 41, 181-182, 186.)

116. Noise levels from the prior Savitski Brothers operation of the Atlas Coal breaker were higher than the noise levels from the current Molesevich's operation of the Atlas Coal breaker. (N.T. 356-358, 411-412 and 416-417.)

117. Noise and traffic from use of the Mulberry Street access route has decreased substantially since Molesevich constructed and began using the alternate access road that connects to Route 54. (N.T. 292.)

Dust

118. Mr. Chimel testified that he finds black dirt in buckets that he uses to collect water from his gutters to water his garden, and he believes that this dust originates from the Breaker and deposits onto his garage roof. (N.T. 39.)

119. Mr. Pachuski testified that he washes black coal dirt off his windows every day and that he occasionally finds black dust deposited on his van. (N.T. 269, 276.)

120. Although not required by the Department, Molesevich indicated to the Department its intention to partially enclose the coal conveyors, (Stip. 55.). As of the time of the hearing before the Board, Molesevich had not enclosed any of the coal conveyors. (N.T. 38, 162.)

121. Mr. Crossley did not witness dust leaving the site during any of his inspections. (N.T. 198.)

122. Air Quality GP-12 ("GP-12") addresses Fugitive Dust Control emanating from the property. (Stip. 47.)

123. Molesevich applied for and received coverage under the GP-12. (N.T. 379; Appellant's Ex. 47; Department Ex. 39.)

124. The Appellants did not appeal the GP-12. (N.T. 401.)

125. In its application for the coverage under the GP-12, Molesevich anticipated that total annual coal throughput at the Breaker site would be less than 180,000 tons of coal product per year. (N.T. 381; Department Ex. 39.)

126. Molesevich's actual total annual coal throughput for 2012 was approximately 120,000 to 125,000. (N.T. 491.)

127. For coal preparation operations with a total annual coal throughput of less than 200,000 tons per year, the GP-12 requires the following:

a. For coal storage, any storage silos on site used for the stock piling of thermally dried coal shall be equipped with a bin vent fabric collector.

b. For roadways, plant roadways shall be delineated by paving or periodic chipping, and all trucks must be tarped and a notice of tarping requirements clearly posted on site.

c. For crushers/vibratory screens, all rotary breakers and crushers shall be enclosed.

d. For loading/unloading, front-end loaders may be used for loading/unloading of coal, but all front-end loaders used to stockpile, transfer and load coal shall maintain a minimum drop height from the front-end loader at all times. In others, only raise the bucket of a front-end loader to the minimum height necessary to minimize dust.

e. The permittee shall conduct upwind/downwind dustfall monitoring at the request of the Department.

f. The permittee shall post speed limit signs on all in plant roads limiting speeds to 15 miles per hour.

g. Any discharge into the atmosphere from any pneumatic coal cleaning equipment shall be limited to 0.018 gr/dscf and less than 10% opacity. (N.T. 381-383; Department Ex. 39.)

128. No conditions apply to conveyors. (N.T. 382.)

129. The Breaker site does not contain a storage silo. (N.T. 382.)

130. At the Mulberry Street entrance, Molesevich applied an 8 to 10 inch thick layer of 2.5-3.0 inch aggregate stone and periodically replaces the stone every few months as needed. (N.T. 508.)

131. The Breaker site does not contain any rotary breakers or crushers. (N.T. 382-383.)

132. The Department never required the permittee to conduct upwind/downwind dustfall monitoring, in part because it was the opinion of the Department's Bureau of Air Quality that dustfall monitoring is not a reliable method for measuring fugitive dust. (N.T. 395-396, 399-400.)

133. The plant uses wet coal processing techniques. (Stip. 51.)

134. The requirement that any discharge into the atmosphere from any pneumatic coal cleaning equipment shall be limited to 0.018 gr/dscf and less than 10% opacity is not an issue for operation of the Breaker because the plant uses wet coal processing techniques. (N.T. 384.)

135. The GP-12 requires that all trucks be tarped and that a notice of the tarping requirement be posted. (N.T. 382, Department Ex. 39.)

136. A sign has been posted at the site to inform truckers that their loads are to be tarped on the Permit property. (Stip. 50.)

137. The GP-12 requires permittees to post speed limit signs on all in-plant roads, limiting speeds to 15 miles per hour. (N.T. 384, Department Ex. 39.)

138. A sign has been posted at the site limiting speeds to 15 miles per hour on the Permit property. (Stip. 50.)

139. Molesevich is required to use best management practices to control dust and dirt from leaving the site as a result of vehicular traffic, such as watering the roads and using chemical dust suppressants within the Permit area when necessary to control dust. (Stip. 48.)

140. To suppress dust, Savitski Brothers would put water in the bucket of a front-end loader, drive along, and occasionally hit the brakes to slosh water onto the roads. Savitski Brothers did not use a water truck to suppress dust on the roads at the site. (N.T. 143.)

141. Molesevich purchased a 4000 gallon water truck which it uses to suppress dust on the roads as needed. (N.T. 504-505.)

142. Savitski Brothers did not have a street sweeper. (N.T. 418.)

143. Molesevich purchased a street sweeper which was donated to the Township. (Stip. 49.)

144. Molesevich maintains an account with the Township to cover the costs for Township personnel to clean Mulberry Street with the street sweeper as needed. (N.T. 232-233, 506.)

145. The Department does not monitor how often the street sweeper is used. (N.T. 233.)

146. Although not required by the GP-12, Molesevich has installed spray bars on the open conveyors and the crushing system which turn on automatically when the plant runs. (N.T. 322-323, 386; Department Ex. 39.)

Appeal

147. On March 15, 2011, both of the Appellants filed separate Notices of Appeal with the Environmental Hearing Board, objecting to the Department's issuance of the transfer,

renewal and boundary correction to Molesevich. (Notices of Appeal, EHB Docket Nos. 2011-033-M, 2011-034-M.) Those appeals were consolidated at EHB Docket No. 2011-033-M.

148. The Honorable Richard P. Mather, Sr. presided over a hearing on the merits on September 16, 2013 at the Board's Harrisburg hearing room, on September 17, 2013 at the Mount Carmel Township Municipal Building, and again on September 18, 2013 at the Board's Harrisburg hearing room.

149. Judge Mather conducted a site view of the Breaker on September 17, 2013.

DISCUSSION

Background

On February 18, 2011, the Department issued the renewal of Surface Mining Permit ("SMP") No. 49851602 (the "Permit"), transferred the Permit to D. Molesevich & Sons Construction Co., Inc. ("Molesevich"), and revised the permit by adding 2.8 acres to the Permit area for a proposed alternate access road. The Permit allows Molesevich to operate the Atlas Coal Breaker in Atlas, Pennsylvania (the "Breaker").

The Breaker was originally owned by Savitski Brothers Coal Company ("Savitski Brothers") and was operated under SMP No. 49851602. Anthony Savitski owned and operated Savitski Brothers from 1947 until his death in 1984, at which time his son, Ronald Savitski, began operating the company. After Anthony Savitski's death, ownership passed to his wife, Irene Savitski, until her death in 2003. Irene Savitski's will named her children, Ronald and Linda Savitski, as co-executors of her estate. In 2005, a Complaint was filed against Ronald Savitski seeking to remove him as an executor of his mother's estate ("Estate Litigation").

The Permit had an expiration date of December 10, 2006. On September 27, 2006, Ronald Savitski submitted a renewal application to the Department, but due to a number of

technical deficiencies in the application, as well as the Department's belief that the Estate Litigation raised doubt about whether Ronald Savitski was authorized to act on behalf of Savitski Brothers, that application was returned to him. The Permit was not renewed prior to December 10, 2006. The Department was, however, aware of the Savitski Estate's intent of maintaining the permit for the Atlas Coal Breaker.

The Estate Litigation was resolved in January 2007, declaring Linda Savitski the sole executor of her mother's estate and providing her with effective control of Savitski Brothers, at which time Linda Savitski petitioned a court for permission to sell the Breaker. The resolution of the Estate Litigation effectively prevented Ronald Savitski from acting on behalf of Savitski Brothers. Nevertheless, on July 11, 2008, Ronald Savitski submitted a letter to the Department requesting that the Permit be renewed for reclamation purposes only, but again the Department found technical deficiencies with the application and returned it to him. The Department did not renew the Permit for reclamation only. Again, the Department was aware of Savitski Estate's intent of maintaining the permit for the Atlas Coal breaker at this time.

On February 9, 2009, a large wooden breaker structure at the site was damaged by a fire which destroyed the wooden breaker and left behind a large amount of debris. On February 24, 2009, the Department met with Molesevich, as an interested purchaser of the site, to discuss what Molesevich would need to accomplish to bring the Breaker into compliance. On May 18, 2009, after liability insurance at the site expired, the Department issued a Notice of Violation ("NOV") directing Savitski Brothers to begin reclamation of the site in phases, first demolishing the wooden breaker structure, then continuing reclamation of the entire permit area until it met the appropriate reclamation standards approved in the Permit. On June 22, 2009, the Department issued a Compliance Order to Savitski Brothers, requiring the removal of certain health and

safety hazards resulting from the fire. On March 1, 2010, after Savitski Brothers failed to comply with the Compliance Order, the Department issued a Fail to Comply Compliance Order.

Linda Savitski's petition to sell the Breaker was granted on April 29, 2010, and the Breaker was sold to Molesevich on May 25, 2010. During an onsite meeting on July 19, 2010, the Department discussed with Molesevich what action would be needed to renew the Permit and transfer it to Molesevich and how Molesevich could add 2.8 acres to the Permit area to create an alternate access road to alleviate noise impacts and truck traffic through the Village of Atlas. At that point, Molesevich spent approximately one year cleaning up the property, resulting in the Department's determination on February 10, 2011 that the Compliance Order had been satisfactorily complied with and resulting in the lifting of the Failure to Comply Compliance Order.

On September 23, 2010, the Department received an application for permit renewal, permit transfer and revision including a boundary correction for SMP No. 49851602, requesting to transfer the Permit from Savitski Brothers to Molesevich. On November 17, 2010, at an Informal Conference held under 25 Pa. Code 86.34 at the Mount Carmel Township Municipal Building, eight attendees, including the Appellants, raised concerns about increased truck traffic, dust, noise, and the general negative effect on the quality of life brought on by the proposed coal mining operation. On February 18, 2011, the Department issued the renewal of SMP No. 49851602, transferred the Permit to Molesevich, and revised the Permit by adding 2.8 acres to the Permit to accommodate a proposed alternate access road.

Appellant Joseph D. Chimel is an adult individual who lives approximately 300 feet from the Breaker. Appellant Paul Pachuski is an adult individual who lives less than 200 feet from the Breaker. On March 15, 2011, the Appellants filed separate Notices of Appeal with the

Environmental Hearing Board (the "Board"), objecting to the Department's issuance of the permit transfer, renewal and revision to Molesevich. Those appeals were consolidated at EHB Docket No. 2011-033-M. The Appellants amended their notices of appeal on April 5, 2011 and June 24, 2011.

The Honorable Richard P. Mather, Sr. presided over a hearing on the merits on September 16, 2013 at the Board's Harrisburg hearing room, on September 17, 2013 at the Mount Carmel Township Municipal Building, and again on September 18, 2013 at the Board's Harrisburg hearing room. Judge Mather conducted a site view of the Breaker on September 17, 2013. The issues have been briefed, and this matter is now ripe for adjudication.

The Appellants raise a number of objections to the Department's issuance of the renewal, transfer and revision. The Appellants argue that because the Permit was not renewed prior to its December 10, 2006 expiration date, the Department should have required Molesevich to apply for a new permit. The Appellants also believe that valid existing rights on the property were abandoned and that Molesevich should therefore have to comply with more stringent setback requirements promulgated since the Permit was originally issued. The Appellants also argue that the Department erred by issuing an insignificant boundary correction and should have instead required Molesevich to apply for a new permit to add acreage for an alternate access road. Finally, the Appellants argue that the Permit insufficiently mitigates noise and dust produced by operations at the site.[1]

The Department and Molesevich argue that Molesevich was not required to apply for a new permit and that valid existing rights at the property were not abandoned. They further argue

[1] All other objections listed in the Appellant's Notice of Appeal that were not raised in the Appellant's Post-hearing Brief are deemed waived under 25 Pa. Code § 1021.131(c), which states that "[a]n issue which is not argued in a post-hearing brief may be waived." *Jake v. DEP*, EHB Docket No. 2011-126-M, slip op. at 10 n.3 (Opinion and Order issued Feb. 18, 2014).

that the permit revision to add acreage was appropriate and that the Permit adequately controls noise and dust at the site.

The Board will address each issue in turn. For the reasons set forth below, the Board agrees with the Department and Molesevich that the Permit renewal and transfer was procedurally valid and that the Appellants failed to demonstrate that the Permit inadequately controls noise and dust. The Board, however, rescinds the permit revision that the Department approved to add 2.8 acres for an alternative access road. The Board disagrees with the Appellants that the permit revision was an improperly issued insignificant boundary correction because it was not this type of permit revision. The Department, however, failed to ensure compliance with a more fundamental requirement that Molesevich identify his legal right to enter and use the additional acreage for mining activities. Molesevich's legal right to enter and use the old railroad for an alternative access road was challenged by another party. Molesevich has also announced its intention to delete and not use this acreage in the future in a pending permit revision, and the Board's action today moots out this pending request for a permit revision.

Burden of Proof and Standard of Review

The Appellants bears the burden of proof in this matter. Under the Board's rules, a party appealing an action of the Department bears the burden of proof if that party is not the recipient of the action. 25 Pa. Code § 1021.122(c)(2); *see Gadinski v. DEP*, 2013 EHB 246, 269. Specifically, the Appellant must prove by a preponderance of the evidence that the Department's issuance of the permit transfer, renewal and boundary correction to Molesevich was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented. *See Pine Creek Valley Water Assoc., Inc. v. DEP*, 2011 EHB 761, 772.

The Board reviews appeals *de novo*. In the seminal case of *Smedley v. DEP*, 2001 EHB 131, then Chief Judge Michael L. Krancer explained the Board's *de novo* standard of review:

> [T]he Board conducts its hearings *de novo*. We must fully consider the case anew and we are not bound by prior determinations made by DEP. Indeed, we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "de novo review involves full consideration of the case anew. The [EHB], as reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001). Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

Smedley, 2001 EHB at 156. The Board is therefore able to consider evidence that was not considered by the Department when it took the permit actions under appeal. As the party challenging the permit issuance, the Appellants bear the burden of proving by a preponderance of the evidence that renewing, transferring and revising the permit for Molesevich was an error of law or unreasonable and inappropriate. 25 Pa. Code § 1021.101 (c)(2); *Philip O'Reilly v. DEP and JDN Development Company, Inc.*, 2001 EHB 19, 32.

Permit Renewal and Valid Existing Rights

The Appellants argue that the Department erred by renewing the Permit and that the Department should have instead required Molesevich to apply for a new permit. The Appellants provide three reasons in support of this argument. First, the Appellants point out that the Permit expired more than four years before the Department renewed the Permit. Second, the Appellants argue that an application for a renewal of the Permit was not submitted within 180 days prior to the Permit's expiration date, as required by law. Third, the Appellants argue that any "valid

existing rights" associated with the permit area have been abandoned and that the Department should have required Molesevich to comply with existing, more stringent regulations, namely, residential setback requirements found at 25 Pa. Code § 86.37, which would have had the practical effect of constricting the available permit area and substantially disrupting activities at the site. As a result of issuing an invalid permit, the Appellants argue, the Department also erred by approving the transfer of the Permit to Molesevich. The Board will address the Appellants' three reasons in order.

Appellants argue that the Department has no authority to renew a permit after the permit has expired. Under Pennsylvania mining law, "[a] valid, existing permit issued by the Department will carry with it the presumption of successive renewals upon expiration of the term of the permit." 25 Pa. Code § 86.55(a). The Commonwealth Court has held that a mining permit "does not automatically expire; the renewal must be expressly denied . . . ." *People United to Save Homes v. DEP*, 792 A.2d 1, 9-10 (Pa. Cmwlth. 2001). The Appellants also point out that Department regulations provide that if a permit was renewed for reclamation only and a permittee would like to recommence active mining, the permittee must apply for a new permit. *See* 25 Pa. Code §§ 86.55(i). Here, although the Permit expired before the Department approved the renewal application for the Permit, the Department never expressly denied any of the permit renewal applications submitted by the Savitski Brothers, nor did it ever issue a renewal permit for reclamation only. The presumption of successive renewals in Section 86.55(a) therefore applies to the Permit, and the Department was not precluded from issuing a renewal of the Permit when it did simply because the Permit had already expired.

It is worth noting that after Irene Savitski's death in 2003, her children disputed the ownership and operation of the Savitski Brothers' Atlas Coal Breaker. In 2005, the Estate

Litigation was filed against Ronald Savitski to remove him as co-executor of Irene Savitski's estate. The Estate Litigation was not resolved until 2007 when Linda Savitski prevailed and was named sole executor of Irene Savitski's estate and assumed effective control of the Savitski Brothers permitted operations at the Atlas coal Breaker. The 2005-2007 timeframe of the Estate Litigation includes the 2006 timeframe when the permit for the Atlas Coal Breaker was set to expire unless it was renewed.[2]

We also disagree with the Appellant's second point and find that the failure to file a renewal application at least 180 days before the expiration of the Permit did not preclude the Department from issuing a renewal of the Permit. Department regulations provide that a complete application for renewal of a permit "shall be filed with the Department at least 180 days before the expiration date of the particular permit in question." 25 Pa. Code § 86.55(c). The Commonwealth Court, while reviewing this provision, discussed the difference between a mandatory and a directory provision:

> To hold that a provision is directory rather than mandatory does not mean that it is optional - to be ignored at will. *Department of Transportation v. Claypool*, 152 Pa. Commw. 332, 618 A.2d 1231 (Pa. Cmwlth. 1992). Both mandatory and directory provisions of the legislature are meant to be followed. *Id.* It is only in the effect of non-compliance that a distinction arises. *Id.* A provision is mandatory when failure to follow it renders the proceedings to which it relates illegal and void; it is directory when the failure to follow it does not invalidate the proceedings. *Id.*

People United to Save Homes v. DEP, 792 A.2d 1, 5-6 (Pa. Cmwlth. 2001). The Court held that Section 86.55(c) is directory, not mandatory. *Id.* at 1, 2, 4.[3] This provision does not provide a

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[2] Linda Savitski also had personal health concerns at this time. The Department had difficulty communicating with Linda Savitski at this time because she was suffering from a terminal illness and she spent considerable time in the hospital.

[3] Although the renewal application in *People United to Save Homes* was still submitted prior to the expiration date of the Permit, whereas the renewal application at issue in this appeal was submitted after the expiration date of the Permit, we do not find that to be a sufficient point of distinction. The important

mandatory due date after which point failure to submit a renewal application requires the Department to reject the application. Instead, the goal of this provision is to provide ample time for the Department to conduct its review of a renewal application, respond with any necessary corrections, and provide opportunity for public notice. *People United to Save Homes v. DEP*, 2000 EHB 1309, 1325-27. Further, as we have noted in the past, unless the Department finds that a permit should not be renewed under 25 Pa. Code 86.55(g), the Department's regulations direct the Department to issue a permit renewal after finding that the requirements of 25 Pa. Code Chapter 86 and that requirements of public participation and notification are satisfied. 25 Pa. Code § 86.55(f). Section 86.55(g) does not list late filing of a permit application as a possible basis for denying a permit renewal. *People United to Save Homes v. DEP*, 2000 EHB 1309, 1327. Here, the failure to submit a renewal application at least 180 days before the expiration of the Permit did not preclude the Department from issuing the renewal of the Permit when it did in 2010.

In addition, the Board finds that the Appellants have failed to carry their burden to prove that the Department erred in finding that the Permit carried with it valid existing rights and that those valid existing rights have not been abandoned. The Pennsylvania definition of "valid existing rights" refers to the federal definition, which states:

> Valid existing rights means a set of circumstances under which a person may, subject to regulatory authority approval, conduct surface coal mining operations on lands where 30 U.S.C. 1272(e) and § 761.11 would otherwise prohibit such operations. Possession of valid existing rights only confers an exception from the prohibitions of § 761.11 and 30 U.S.C. 1272(e). A person seeking to exercise valid existing rights must comply with all other pertinent requirements of the Act and the applicable regulatory program.

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point of comparison is that neither application was filed at least 180 days before the respective permit expired.

30 CFR 761.5; 52 P.S. § 1396.4e (h); 25 Pa. Code 86.1 ("Rights which exist under the definition of "valid existing rights" in 30 CFR 761.5 (relating to definitions)). Valid existing rights allow mining operators to continue conducting mining activities in areas otherwise prohibited under the federal Surface Mining Control and Reclamation Act of 1977 and Pennsylvania's Surface Mining Conservation and Reclamation Act (Pennsylvania SMCRA). *See* 30 U.S.C. § 1272 and 52 P.S. § 1396.4e and 30 CFR § 761.5 and 25 Pa. Code § 86.102. Without valid existing rights, federal and state coal mining laws establish various setback requirements. For example, if the site at issue in this appeal was found to *lack* valid existing rights, then no surface coal mining operations would be permitted within 300 feet of any public park; within 300 feet of any occupied dwelling, unless waived by the owner thereof; or within 100 feet of the outside right-of-way line of any public road, with certain exceptions. 30 U.S.C. 1272(e)(4)-(5); 30 CFR 761.11(d)-(f); 52 P.S. § 1396.4e; 25 Pa. Code 86.102(8)-(10).

In Section 1396.4e of the Pennsylvania SMCRA the General Assembly decided to limit state regulatory authority to define "valid existing rights" and to follow the federal definition of valid existing rights" promulgated under Section 1272 of Federal SMCRA. *See* 52 P.S. § 1396.4e(h); *Willowbrook Mining Company v. Dep't of Envlt. Res.*, 499 A.2d 2, 4-6 (Pa. Cmwlth. 1985) (The prior state regulation purporting to define "valid existing rights" is of no legal effect because it breaches provisions of the statute under which it was promulgated"). There is therefore no state regulation that defines "valid existing rights" other than a reference to the federal definition. The Department and the Board rely upon the federal definition of "valid existing rights" to apply the state requirements governing "valid existing rights" that is found at 30 CFR § 761.5. The current federal regulation was promulgated in 1999 so it was applicable during all time periods in this appeal. *See* 64 FR 7031, (December 17, 1999).

Under the applicable federal regulation a permittee claiming an entitlement to valid existing rights "must demonstrate that a legally binding conveyance, lease, deed, contract, or other document vests that person, or a predecessor in interest, with the right to conduct the type of surface coal mining operations intended," and that right must have existed prior to August 3, 1977. 30 CFR 761.5. A permittee claiming an entitlement to valid existing rights must also demonstrate that "[a]ll permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith effort to obtain all necessary permits and authorizations had been made," before August 3, 1977. 30 CFR 761.5. This is the definition of "valid existing rights" that is applicable in Pennsylvania.

Department personnel reviewed the Department's file on the Breaker, including aerial photographs dating back to the 1940s, and concluded that the original permit boundary and the proposed permit boundary are the same, except for 2.8 acres that were added through a permit revision for an alternate access road. (N.T. 95-96, 404, 407; Department Ex. 35, Exhibit 5; Department Ex. 43, Exhibit 9.) The Department determined that the occupied dwelling and public park setback requirements stated above are not applicable to this site because the site was permitted and in operation prior to 1977, i.e., since 1947, and those areas on the permit located within 300 feet of occupied dwellings and other public facilities, such as public parks, had been previously disturbed during earlier underground and/or surface mining at the site and are considered valid existing rights. (Stip. 57; N.T. 91-96, 402, 405.) The Board agrees with this determination.

The Appellant does not dispute that valid existing rights existed for the Breaker at least prior to December 10, 2006, the expiration date of the Permit. Instead, the Appellant argues that valid existing rights were abandoned at some time after December 10, 2006, which was the

expiration date of the Permit, and February 18, 2011, when the Department renewed the Permit. The Appellants do not provide a specific date on which valid existing rights were abandoned, but instead cite a list of facts which they argue, when considered together, indicate that valid existing rights were abandoned. The Appellants cite the following facts in support of their abandonment theory: Savitski Brothers did not submit a renewal application within 180 days before the expiration date of the Permit and did not renew the Permit before it expired on December 10, 2006, and instead let the Breaker sit idle for over four years; Ronald Savitski submitted a letter to the Department on July 11, 2008 requesting that the Permit be renewed for reclamation purposes only; and Savitski Brothers failed to rebuild the wooden breaker in a timely manner after the fire and failed to remedy the NOV, the Compliance Order and the Failure to Comply Order.

While there is no case law specifically addressing the issue of the abandonment of valid existing rights, the Appellants point to case law discussing the abandonment of property rights in Pennsylvania generally, which we decline to apply or follow. As explained above, the Pennsylvania General Assembly gave the Department and Pennsylvania Courts specific statutory directions concerning the application of Section 1396.4e and the definition of "valid existing rights." *See* 52 P.S. § 1396.4e(h); *Willowbrook Mining Company, supra.* The General Assembly decided that the Board should follow the definition of valid existing rights as they are defined under § 522 of the Federal Surface Mining Control and Reclamation Act and the federal regulations at 30 CFR § 761.5. The federal definition does not provide for abandonment. The Pennsylvania caselaw that Appellants' cite regarding the abandonment of property rights in Pennsylvania has no place in guiding the Board's application of the state coal mining requirements concerning "valid existing rights" which the General Assembly clearly tied to the federal definition of "valid existing rights."

In addition, even if the Board were to consider the case law provided by the Appellants, the Board would reject Appellants' argument that the valid existing rights were abandoned under this authority because mere nonuse of a property interest does not constitute abandonment. *Lawson v. Simonsen*, 417 A.2d 155, 160 (Pa. 1980); *Moody v. Allegheny Valley Land Trust*, 976 A.2d 484, 488 (Pa. 2009); *Buffalo Township v. Jones*, 813 A.2d 659, 664-65 (Pa. 2002); *Yellow Cab Company of Pittsburgh v. Pa. Public Utility Commission*, 431 A.2d 1106, 1107-08 (Pa. Cmwlth. 1981); *Burnier v. Dept. of Envt'l Resources*, 611 A.2d 1366, 1368 (Pa. Cmwlth. 1992); *Troha v. United States*, 692 F. Supp. 2d 550, 558 (W.D. Pa. 2010). The Pennsylvania Supreme Court stated in *Buffalo Township v. Jones*, 813 A.2d 659 (Pa. 2002), that "[i]n evaluating whether the user abandoned the property, the court must consider whether there was an intention to abandon the property interest, together with external acts by which such intention is carried into effect." *Id.* at 664-65 (citing *Lawson v. Simonsen*, 417 A.2d 155, 160 (Pa. 1980); *see also Burnier v. Dep't of Envtl. Resources*, 148 Pa. Commw. 530, 611 A.2d 1366, 1368 (Pa. Cmwlth. 1992). Whether a property interest has been abandoned is an issue of fact. *Lawson*, 417 A.2d at 160 (citing *United Natural Gas Co. v. James Brothers Lumber Co.*, 191 A. 12, 14 (1937)). Under the facts of this appeal, there was never any intent on the part of Savitski Brothers or their representatives to abandon the Atlas Coal Breaker as a mining operation or the valid existing rights associated with that permitted operation.

At no point during the Estate Litigation did Savitski Brothers or any of their representatives display intent to abandon the valid existing rights associated with the Permit, nor did Savitski Brothers ever take any action to abandon those rights. The record clearly indicates the intent to continue mining activities at the site and ultimately after the Estate Litigation to transfer the Permit with the valid existing rights to a new owner who could run the Breaker.

For example, while Ronald Savitski was still listed as an executor of his mother's estate, he submitted a renewal application to the Department on or about September 27, 2006, before the expiration date of the Permit. Although the application was returned due to certain deficiencies, the submission of the application indicates an intent to continue mining activities at the Breaker. Then, in January 2007, in the same month that Linda Savitski was rendered the sole executor of her mother's estate, she petitioned a court for permission to sell the Breaker. Her intent was not to abandon the Breaker or any valid existing rights associated with it. Her intent was to sell the Breaker and transfer the valid existing rights that run with it.

Although the Appellants argue that Ronald Savitski's July 11, 2008 application requesting that the Permit be renewed for reclamation purposes only indicates an intent to shut down and abandon the Breaker, Ronald Savitski was not authorized at that time to file that renewal application. As such, his submission of that application cannot be attributed to Savitski Brothers. Moreover, the Department did not act on this application and renew the Permit for reclamation only.

After the wooden breaker structure at the site was damaged by a fire, the Department met with Molesevich, which was identified as a potential purchaser of the Breaker, to discuss what action needed to be taken to bring the site into compliance. Although between May 2009 and March 2010 the Department issued a NOV, a Compliance Order, and a Failure to Comply Order, and Savitski Brothers failed to comply with all of them, the record indicates that the understanding between the Department, Molesevich and Savitski Brothers was that Molesevich would purchase the Breaker as soon as Linda Savitski's petition to sell it was granted. Indeed, the Breaker was sold in May 2010, and Molesevich did in fact take measures to remedy the NOV, Compliance Order, and Failure to Comply Order. Savitski Brothers' failure to remedy

these three Department actions did not indicate an intent to abandon the Breaker or any valid existing rights associated with it. The delay in compliance was caused by the more than two-year wait that Linda Savitski had to endure to ultimately receive a decision on her petition to sell the Breaker. In conclusion, the Appellants have failed to carry their burden to prove that valid existing rights associated with the Breaker were abandoned. The continued existence of the valid existing rights associated with the Savitski Brothers Permit allowed the Department to renew and transfer it to Molesevich without regards to certain residential buffer zone requirements.

We also find that the Appellants have failed to prove that the Department's transfer of the Permit to Molesevich was unlawful. Surface mining permits may be transferred as new owners acquire a property. 25 Pa. Code § 86.56. The Appellants' entire objection to the Department's issuance of the permit transfer is that the underlying renewal was invalid and that an invalid permit may not be transferred. In finding that the Appellants failed to meet their burden to prove that the Department erred by renewing the Permit, we also find that the Appellants failed to meet their burden to prove that the Department erred in transferring the Permit to Molesevich.

Insignificant Boundary Correction Objection

The third action under appeal, in addition to the permit renewal and transfer, is the revision of the permit to add 2.8 acres for an alternative access road. To alleviate truck traffic through the Village of Atlas, an additional 2.8 acres was requested to be added to the Permit area to allow for an alternate access road to connect to Route 54 ("Boundary Correction"). The only description in the application for the Bounder Correction is as follows: "The acres to be added currently contain an existing common use road. This common use road will be used a [sic] haul road to exit the existing SMP." (Department Ex. 35.)

The Appellants, upon review of the Department's coal mining regulations governing permit renewals or revisions at 25 Pa. Code §§ 86.52 and 86.55, argue that the addition of the 2.8 acres does not qualify as an insignificant boundary correction and "it was contrary to law for the Department to approve the addition of acreage to the permitted facility without going through a full new application process." This argument is legally flawed and is based upon a misreading of the coal mining regulations at Sections 86.52 and 86.55 governing permit revisions and permit renewals and a misunderstanding of the regulatory concept of an "insignificant boundary correction."

Section 86.55(b) governs permit renewals and it provides:

> (b) Permit renewal will not be available for extending the acreage of the operation beyond the boundaries of the permit area approved under the existing permit. Addition of acreage to the operation will be considered a new application. A request for permit revision may accompany a request for renewal and shall be supported with the information required for application as described in this chapter.

25 Pa Code § 86.55 (b). Under this provision, a person may not add additional "acreage of the operation beyond the boundaries of the permit area approved under existing permit." The term "operation" is not defined in the coal mining regulations, but it is defined by statute in Section 1396.3 as:

> "Operation" shall mean the pit located upon a single tract of land or a continuous pit embracing or extending upon two or more contiguous tracts of land.

52 P.S. § 1396.3 Additional acreage for actual coal mining from a pit area may not be added, but Section 86.55(b) further provides that a person may submit a request for a permit revision along with a request for a permit renewal. This is what Molesevich ultimately did, and the Department ultimately approved the requests.

The requirements governing permit revisions in Section 86.52 are consistent with Section 86.55. Section 86.52(d) provides:

> (d) The addition of acreage for mining of coal shall be considered as an application for a new permit, except for insignificant boundary correction.

25 Pa. Code § 86.52(d). Under Section 86.52, a person may request a revision to the coal mining activities authorized by the existing permit with a few limited exceptions. As set forth above, one exception is that a person may not request the addition of acreage for mining coal as a permit revision, although there is a limited exception to this exception to allow additional acreage for coal mining for an "insignificant boundary correction." An application for permit revision may be filed in connection with a permit renewal application, but the permit revision application may not include more acreage for actual coal mining except for an insignificant boundary correction. The Appellants claim that the Department misapplied its authority under Section 86.52 and Section 86.55 when it approved Molesevich's permit revision because the approved permit revision to add additional acreage for a new alternative access road did not qualify "within any of the three situations where an IBC (insignificant boundary correction) is appropriate."

The term "insignificant boundary correction" is not defined in Department regulations, but the Department does maintain a technical guidance document entitled "Boundary Changes to Mining Permits," which explains the use of an insignificant boundary correction. (Department Ex. 44.) The guidance document defines insignificant boundary correction as:

> A small and inconsequential change to the permit boundary to correct an error in mapping, surveying, or other minor adjustment that results in no significant difference in environmental impact. This type of one-time only boundary correction will have no effect on the final reclamation and no negative environmental impact. An [insignificant boundary correction] can be for a maximum of 5 acres or approximately 10% of the permitted area, whichever is less.

(Department Ex. 44.) The section of the Guidance Document entitled "Insignificant Boundary Corrections (IBC)" contains three situations where the Department may approve an insignificant boundary correction. Department witnesses testified that the addition of the 2.8 acres for an alternate access road clearly does not fall within any of these categories.

The Guidance Document contains another section entitled "Addition or Redistribution of Acreage with a Boundary Revision." This "boundary revision" section provides, in part, that a permittee may apply to the Department to add acreage for "necessary support facilities." Here is where the Department's testimony gets confusing. Department witnesses testified that the basis for their determination that adding the 2.8 acres was an insignificant boundary correction was that they considered the alternate access road to be a "necessary support facility." Department witnesses, however, conceded that the "necessary support facility" basis falls under the boundary revision section, not the insignificant boundary correction section. (N.T. 439-441.) Molesevich also argues in its post-hearing brief that the Boundary Correction was an insignificant boundary correction for the addition of a necessary support facility. To further muddy the waters, the Department, in its post-hearing brief, argues that the addition of the acreage was a "permit revision," not an insignificant boundary correction. The Appellants did not address whether the Boundary Correction could be considered as a permit revision and whether the Department followed procedural requirements for issuing a permit revision. They only objected to the addition of the acreage it characterizes as an insignificant boundary correction. This objection is fundamentally flawed for the reason set forth below.

The Board agrees that the approved permit revision does not fit within any of the three situations described by the Department in its guidance document as an acceptable insignificant boundary correction. This observation overlooks the obvious point that the approved permit

revision to add acreage for an alternative access road is not an approved insignificant boundary correction within the meaning of Section 86.52(d). As set forth above, an insignificant boundary correction is an exception to the general rule that a permit revision may not add additional acreage for actual coal mining. A permittee may add coal mining acreage as part of a permit revision under Section 86.52(d) only if it qualifies as an insignificant boundary correction.

The Appellants' fundamental flaw in its objection to Molesevich's approved permit revision is that the permit revision does not add additional coal mining acreage, and it does not have to qualify as an insignificant boundary correction. The revision only adds additional acreage for an alternative access road which is a support area and is not an area where coal extraction will occur. The Department has the authority under Section 86.52 to approve such a permit revision. The entire discussion about the requirements to qualify for an insignificant boundary correction is unnecessary because the Department did not approve Molesevich's permit revision as an insignificant boundary correction. The permit revision merely added 2.8 acres to the permit to allow an alternative access road.[4]

The dispute over the Department's approval to add 2.8 acres for an alternative access road as an insignificant boundary correction is, however, not a moot point. In its application for a permit revision, Molesevich described the additional 2.8 acres as a common use road. After the permit was issued and the acreage was bonded, a party came forward to contest Molesevich's right to use the common use road along railroad bed. (N.T. 349, 351.)

This challenge to Molesevich's right to enter and use this additional acreage presents another unrelated concern. The Department has an obligation under its regulations to ensure that

[4] The Board recognizes that the Department's witnesses and Molesevich sometimes mis-labeled the approved permit revision as an insignificant boundary and this only adds to the confusion. What is clear under the applicable regulations is that the approved permit revision to add 2.8 acres for an alternative access road is not an insignificant boundary correction within the meaning of Section 86.52(d).

applicant has a legal right to use the permitted area for mining activities. The Board has noted in *Hopwood v. DEP*, 2011 EHB 1254,

> "[t]he addition of acreage for mining to an existing coal mining permit is considered to be a Permit Revision and, unlike a Permit Renewal, is treated administratively as an application for a new permit. Stated another way, in determining whether to grant the application to add acreage to the existing permit, the Department must apply the same criteria and conduct the same evaluation as it would for a new permit to mine the area."

Hopwood v. DEP, 2001 EHB 1254, 1256. In *Hopwood v. DEP*, the Board reviewed a challenge to the Department's renewal of an existing underground mining permit, which was followed by a separate revision to the permit to include an additional 9,369 acres. *Hopwood v. DEP*, 2001 EHB 1254, 1256-60. The Department acknowledged that "[i]n reviewing a mine permit application, the Department must ensure the applicant has a legal right to enter and commence mining activities in the permit area." Department's Brief at 39 (citing 52 P.S. 1396.4(a)(2)(F) and 25 Pa. Code 86.64). By implication, a permittee must also have a legal right to enter acreage proposed to be added through a permit revision. Here, the Department did not require proof that Molesevich has the legal right to enter all of the 2.8 acres proposed to be added to the permitted area through the Boundary Correction. The Department apparently relied upon the description of the additional acreage as a common use road.[5] Molesevich conceded at the hearing that its legal right to enter all of the 2.8 acres is under challenge. Regardless of whether the addition of the 2.8 acres for an alternative access road could be considered a permit revision, the Department erred in a fundamental way to require any proof that Molesevich had the legal right to enter upon

[5] Common use roads are a particular type of road or accessway under the Anthracite surface coal mining regulations. *See* 25 Pa. Code §§ 88.1, 88.243 and 88.347. By definition, these accessways may be used by two or more operators. The challenge to Molesevich's right to use this area for an alternative access road includes a challenge to its status as a common use road. The Board does not have to sort out these challenges to Molesevich's right to use the area or its status as a common use road because Molesevich has announced its intentions to delete this area from the Permit and to construct the alternative access road on other property.

the additional acreage and to use it for an alternative access. For these reasons, we are vacating the Boundary Correction.

Molesevich testified that he no longer intends to pursue use of the railroad bed to access Route 54. In fact, he testified that he has a permit revision pending before the Department to drop this acreage from the currently bonded area (N.T. 349-351). The Board decision to vacate the earlier permit revision eliminates the need for Molesevich's pending permit revision to remove the contested railroad bed acreage.

Noise

The Appellants raise several related objections regarding noise from the Molesevich's operations. First, the Appellants assert that the Department failed to fully consider the noise impact from Molesevich's operation at the Atlas Coal Breaker. Second, the Appellants claim that the Department abused its discretion when it decided that the Molesevich's operations would not result in an increase in noise when compared to the prior Savitski Brothers operations at the site. In addition, the Appellants assert that the Department further abused its discretion when it failed to include permit conditions in Molesevich's permit to prevent noise from the operations from becoming a public nuisance. Finally, the Appellants assert that noise from the Molesevich's operations constitute a public nuisance.

The Department and Molesevich disagree. They assert that the Department fully considered the noise impact from Molesevich's operations when it made its permit decision. They also claim that Molesevich has undertaken a number of voluntary actions to further reduce any noise impacts, and that the noise levels from Molesevich's operations will be lower than those from the prior Savitski Brothers' operations at the site. The Department and Molesevich assert that the Appellants have failed to meet their burden to demonstrate that noise from the

Molesevich's operations constitute a public nuisance. Finally, the Department claims that the Appellants are barred by the doctrine of administrative finality from raising objections regarding noise because the Savitski Brothers' operated the site for decades under permits previously issued by the Department.

The Board has determined that it would be an abuse of discretion for the Department not to consider the noise generated by a surface mine and to determine whether that noise will constitute a public nuisance under Section 1917-A of the Administrator Code of 1929, the Act of April 7, 1929, P.L. 177, as amended, 25 P.S. § 510-17. *Plumstead Township v. DER*, 1995 EHB 741, 789, *citing Snyder Township v. DER*, 1988 EHB 1202, 1212; *see also Robert Kwalwasser v. DER*, 1986 EHB 24, 65.[6] The Department's authority to regulate or consider the noise impacts from surface mining operations is well established, but there are no applicable statutory or regulatory standards that limit the operational noise from a surface coal mine or quarry. *Id.* In the absence of clear standards regulating noise from surface mining operations, the Department nevertheless has a clear duty to consider noise impacts when reviewing an application for a surface mining permit to ensure that the Department does not permit an operation that constitutes a public nuisance. *Id.*

The Board will find that the Department abused its discretion in this appeal if the Appellants can demonstrate either:

1. That the Department failed to evaluate noise when reviewing Molesevich's application; or

2. That the noise to be generated by the Breaker will constitute a public nuisance. *See Plumstead Township*, 1995 EHB at 789; *Snyder Township*, 1988 EHB at 1212. All Parties

[6] In *Kwalwasser* the appellant proved that the Department did not consider noise when reviewing the application, and the Board found the Department abused its discretion. In *Snyder Township*, the appellant was unable to prove that the Department failed to consider noise, and the Board dismissed the appeal.

agree with the legal proposition that the Department has a duty to consider noise when reviewing an application for a surface mining permit. The Parties disagree whether the Appellants have met their burden of proof to establish that the Department failed to evaluate the noise to be generated by the quarry when it reviewed Molesevich's application for a permit.[7]

The record before the Board establishes that the Department considered the noise to be generated from the Molesevich's operations when it reviewed the combined application for permit renewal, transfer and revision. As part of its review and consideration of the application the Department conducted a public hearing. The Appellants voiced their concerns at the public hearing and one of their main concerns was about noise from the proposed Molesevich operations. The Department also had several discussions with Molesevich about additional measures to reduce noise and traffic impacts. The Appellants seem to recognize this obvious point that the stipulated record contains sufficient evidence to establish that the Department did in fact consider the noise impact, but the Appellants attempt to discount the evidence by asserting that the Department did not "fully" consider the noise impacts.

The Appellants offered no evidence to support a finding that the Department failed to consider noise impacts when it reviewed Molesevich's application. At best, the Appellants have asserted that the Department did not "fully" consider the noise impact to the Appellants' satisfaction, but that is not the legal standard. The Board also rejects the factual support for Appellant's argument that the Department did not "fully" consider the noise impacts. In support of their argument that the Department failed to "fully consider the noise impacts," the Appellants assert that the Department "baselessly" decided that Molesevich's proposed operation would

[7] In *Plumstead Township*, the Board decided that the appellant in that appeal "has failed to prove that the Department did not evaluate the noise generated by the quarry when it reviewed Miller's permit application." *Plumstead*, 1995 EHB at 790-91.

generate less noise than the prior Savitski Brothers' operations on the site. This assertion is not supported by the record.

The Appellants claim that the noise levels from Molesevich's current operations are much higher than the noise levels from the Savitski Brothers' operations at the Atlas Coal Breaker. Not surprisingly, Molesevich and the Department contest this comparison and assert that the noise levels from Molesevich's current operations are lower than those noise levels when the Savitski Brothers operated the site. The Board finds the Department's and Molesevich's evidence more credible on this narrow issue of a comparison of noise levels. The Board finds that Molesevich's current operations, based upon the testimony and evidence received at the hearing, produce noise levels that are lower than the prior operations of the Savitski Brothers.

The Savitski Brothers prior operations at the site consisted of two breakers: a wooden breaker; and a fine coal plant. The wooden breaker was very noisy when operating and it had virtually no noise suppression. (N.T. 411.) The wooden breaker was destroyed in a fire and it is not part of Molesevich's current operations. The fine coal plant was operated by the Savitski Brothers, and it is part of Molesevich's current operations. Molesevich's has modified this plant to wrap the walls of the plant and the ceiling with 8 inches of fiberglass for insulation and for sound deadening. This insulation reduces noise levels from operations within the fine coal plant. The Appellants also assert that Molesevich operates the Atlas Coal Breaker on a much larger scale and that the larger scale of operations accounts for more noise even though the wooden breaker is not now in operation. (N.T. 266-268.) The Department and Molesevich disagree. The Board finds the Department's witnesses more credible on the issue of comparison of noise levels between the prior Savitski Brothers operations and the current Molesevich's operations.

(N.T. 356-358, 411-412 and 416-417). The current Molesevich's operations generate less noise than the prior Savitski Brothers' operations.

The comparison of noise levels issue is not dispositive of the second issue whether the noise levels from Molesevich's current operations constitute a public nuisance. The current noise levels could be lower than before, but could still rise to the level of constituting a public nuisance. In addition the Board recognizes that there are really three different points in time to compare noise levels. For a period of five years or more there were limited or no operations at the Atlas Coal Breaker site while the Estate Litigation and the efforts to sell the site occurred. Compared to this brief lull in operations at the site immediately before Molesevich began its operations, there is probably more noise, more truck traffic and more dust in the nearby Village of Atlas residential areas. Likewise, the noise levels from current Molesevich's operations could be higher than during the brief lull period, but still not rise to the level of a public nuisance.

While the comparison of noise levels during the two or three relevant time periods has some relevance to the Board's review of the Department's decision to renew, transfer and revise the Savitski Brothers permit for the Atlas Coal Breaker, such comparisons have only limited weight. The Board still needs to consider all the evidence regarding noise to determine if the Department abused its discretion in permitting an operation that constitutes a public nuisance.

Turning now to the second consideration, the Appellants also assert that the noise generated by Molesevich's operations at the Atlas Coal Breakers constitutes a public nuisance. *Plumstead Township*, 1995 EHB at 789; *Snyder Township*, 1988 EHB at 65. Under the Board's Rules, the Appellants have the burden to demonstrate that the noise to be generated by the Atlas Coal Breaker will constitute a public nuisance. 25 Pa. Code § 1021.101(c)(2). For the reasons

set forth below, the Board finds that Appellants have not met their burden to demonstrate that the noise levels from Molesevich's Atlas Coal Breaker constitutes a public nuisance.

As with the situation before the Board in *Plumstead Township* and *Snyder Township*, there are no statutory or regulatory standards governing the operational noise generated by an anthracite coal processing facility like the Atlas Coal Breaker. *See* 52 P.S. § 1396.1 et seq.; 25 Pa. Code §§ 88.1 et seq. In *Plumstead Township*, the Board applied the provisions of the Restatement (Second) of Torts § 821B as the applicable standard for determining whether an activity rises to the level of a public nuisance. *Plumstead Township*, 1995 EHB 791.[8] According to the Restatement:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) Whether the conduct is proscribed by a statute, ordinance or administrative regulation,
>
> (c) Whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement of (Second) of Torts § 821B. The Board will apply the same standards in determining whether the noise from Molesevich's Atlas Coal Breaker will constitute a public nuisance. In addition, the Pennsylvania Supreme Court has addressed the issue of whether noise constitutes public nuisance and has stated:

> Although not entitled to absolute quiet in enjoyment of property, every person has the right to require a degree of quietude which is consistent with the standard of comfort prevailing in the locality wherein he lives. *See: Firth v. Scherzberg*, 366 Pa. 443, 447, 77 A.2d 443 (1951); *Crew v. Gallagher*, 358 Pa. 541, 548, 58 A.2d

[8] The Board in *Plumstead Township* applied this standard because this was the standard adopted by Commonwealth Court in *Muhlieb v. City of Philadelphia*, 574 A.2d 1208, 1211 (Pa. Cmwlth. 1990).

> 179 (1948); *Collins v. Wayne Iron Works*, 227 Pa. 326, 331, 76 A.24 (1910).

Township of Bedminster v. Vargo Dragway, Inc., 253 A.2d 759, 761 (Pa. 1969). Commonwealth Court has more recently noted:

> ....To constitute a nuisance based upon noise, the question is whether the noise is unreasonable and unnecessary considering all of the circumstance. *Hannum v. Gruber*, 31 A2d 99 (Pa. 1943). Such a decision obviously requires factual findings ....

Gray v. Barnhart, 601 A.2d 924, 927 n.4. (Pa. Cmwlth. 1992). To meet its burden of proof in this appeal, the Appellants must demonstrate that the noise from Molesevich's operations at the Atlas Coal Breaker is unreasonable or unnecessary considering all of the circumstances. Absolute quiet in the use and enjoyment is not required, but every person has the right to a degree of quietude consistent with the standard of comfort prevailing in the locality in which he lives.

In the *Plumstead Township* appeal the appellant relied upon the testimony of an expert in predicting the noise levels to be generated by various activities. The expert testified that the operational noise from the mine would result in an ambient noise level greater than 67 dBA on areas surrounding the site and an increase of 15 dBA in the ambient noise level on an additional area. Based on this information, the appellant in *Plumstead Township* contended the mine was a public nuisance. The Board held that the Appellant's "argument is without merit." *Plumstead Township*, 1995 EHB at 792. The Board further stated that:

> As the Board stated above, the burden of proof in this appeal lies with Plumstead, which is required to prove by a preponderance of the evidence that the Department's issuance of the SMP was an abuse of discretion. In order to satisfy this burden, Plumstead must do more than offer the Board projected sound pressure levels, since these levels alone do not provide the Board with enough information to satisfy the criteria for a public nuisance. In other words, there is no way for the Board to determine whether an

> ambient noise level of 67 dBA or greater, or an increase in the ambient noise level of 15 dBA or greater, will unreasonably interfere with a right common to the general public. In other public nuisance cases, the court relied on testimony from the people subjected to the alleged nuisance in order to determine its effects. *See, e.g., Township of Bedminister v. Vargo Dragway, Inc.*, 434 Pa. 100, __, 253 A.2d 659, 661-662 (1969). While Mr. Wong's testimony is helpful in determining how far away the effects of operational noise from the quarry will be felt, it does not establish how this noise will be perceived by the community. *See, Muhlieb*, 574 A.3d at 1212.

Id. The Board concluded that the evidence introduced at the hearing was "not helpful in determining whether a certain noise level amounts to an unreasonable interference with a public right. *Plumstead Township*, 1995 EHB at 792, n. 28. Thus, the Board in this appeal needs to consider the testimony from the person subject to the alleged nuisance in order to determine its effects.

Before reviewing the testimony of Appellants' witnesses, the Board needs to address Appellants' mistaken assertion that the "Board has acknowledged that an ambient noise level of 67 dBA or greater constitutes a public nuisance." The Board did not acknowledge that an ambient noise level of 67 dBA or greater constitutes a public nuisance in *Plumstead Township* or any other Board decision. In *Plumstead Township* the appellant's noise expert calculated that the noise levels surrounding a site from mine operations would result in ambient noise levels greater than 67 dBA and that this noise level would materially interfere with the ordinary comforts of life and impair reasonable enjoyment on property surrounding the site. Contrary to Appellants' assertion, the Board in *Plumstead Township* rejected appellant's argument as "without merit" and that is not a ringing endorsement of the 67 dBA as a public nuisance noise standard.

The Department witnesses in this appeal testified that the Department uses 68 decibels during the day and 65 decibels at night at the property line to evaluate whether the noise from a

permitted operation constitutes a public nuisance. (N.T. 234.) According to the Department noise at this level was required on a sustained or continuous basis to support a violation and not just a spike. (N.T. 196-198, 234, 236.) According to Mr. Menghini, the Department developed its noise standards based upon the Board's decision in *Plumstead Township* (N.T. 235.) This is a surprising statement since the Board expressly declined to adopt any particular noise levels as constituting a public nuisance in *Plumstead Township.* Perhaps the Department's noise standards were developed after the Board decided *Plumstead Township.* In the absence of any regulatory noise level standards, the Board expressed a preference for testimony from the people subject to the alleged nuisance.

No party introduced evidence at the hearing regarding appropriate noise levels to evaluate whether noise from a particular operation constituted a public nuisance, other than the Department's witnesses. The Department witnesses testified that someone decided years ago that 68 dBA during the day and 65 dBA at night on a sustained or continuous basis are appropriate noise standards for evaluating noise complaints.[9] The Appellants assert that the Board "acknowledged" 67 dBA as an appropriate noise standard in *Plumstead Township*, but the Board did not. Without a regulatory context or expert testimony, the Board has no basis to evaluate numerical noise levels and claims that noise at certain levels constitutes a public nuisance.

There is also little evidence in the record before the Board regarding measured noise levels at the Atlas Coal Breaker. Mr. Chimel testified he had a noise meter and he measured

[9] The Department's witness Eugene Crossly testified he heard the over 68 decibels threshold from Mr. Menghini. Mr. Menghini, another Department witness, testified he heard the standard from Tom Whitcomb who "actually was our noise expert". According to Mr. Menghini, the Department didn't have actual regulatory numbers for noise so Mr. Whitcomb went to other states and the Department of Transportation for the noise level numbers at some point in the past. The legendary Mr. Whitcomb did not testify so the Board has no evidence in the record about his noise numbers.

noise levels on his property on different days. He testified that the measurements varied on different days and ranged, "maybe from 60 to 80." The Board gives no credibility to Mr. Chimel's testimony regarding measured noise level on his property. (N.T. 59-60.)[10] He did not identify when he took the measurements or what type of instruments he used. He also never recorded the measurements or provided any notice or documentation to the Department regarding his alleged noise measurements on his property. *Id.* Without such details or documentation regarding the noise measurements, which Mr. Chimel testified he took, the Board declines to give Mr. Chimel's testimony any credibility.

In the absence of expert testimony regarding appropriate noise levels from surface coal mining operations or regulatory standards, the Board has no basis in the record to identify an appropriate noise level or levels. The Appellants have the burden of proof, and the evidence in the record does not support the Appellants' efforts to demonstrate that the measured noise levels from the Molesevich's operations at the Atlas Coal Breaker constitute a public nuisance. The very limited and conclusory testimony from the Department's witnesses is almost as lacking in support as the Appellant's testimony. Based on the record in this appeal, the Board only knows that nearly two decades ago after the Board's *Plumstead Township* adjudication, someone by the name of Tom Whitcomb investigated appropriate noise levels in some general manner and identified the 68 dBA during the day and 65 dBA during the night as appropriate standards for some purpose.[11] The Board has no record to "recognize" or "acknowledge" these noise levels that someone at the Department selected nineteen years ago and which current Department witnesses cannot justify other than one Department witness testifying that he "heard" about these

[10] For reasons discussed later in this Adjudication, the Board has also serious reservations regarding the credibility of Mr. Chimel's testimony in general.

[11] It is not clear whether these limits were designed for a permitting context requiring noise experts to generate expected noise levels or for an enforcement context where an inspector could use a noise meter.

numbers from another DEP employee. The "I Heard it Through the Grapevine" justification is not an appropriate basis for a Department permitting standard that the Department wants the Board to follow.[12] In the future, if the Department wants the Board to consider various noise levels that the Department uses, the Department needs to provide the Board with evidence to support the use of such noise levels and witnesses who are able to explain why the levels are appropriate.

As the Board described in *Plumstead Township*, the Appellants need to prove that the noise from the operations "will reasonably interfere with a right common to the general public" to sustain its burden to demonstrate that the noise generated from operations at the mine site constitutes a public nuisance. In support of its position that the noise generated by Molesevich's operations constituted a public nuisance, the Appellants rely upon their own testimony.[13] The Board needs to determine how the noise from the Atlas Coal Breaker is or will be perceived by the community in the Village of Atlas. For the reasons set forth below, the Board finds that the Appellants have not sustained their burden to establish that noise from the Atlas Coal Breaker constitutes a public nuisance.

The Appellants rely primarily on their own testimony to assert that the noise from the Molesevich's operation of the Atlas Coal Breaker constitutes a public nuisance. This testimony addresses conditions at the site after DEP took the permit action to renew, transfer and revise the permit for the Atlas Coal Breaker. To sustain its burden, the Appellants need to demonstrate that

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[12] The Motown Records classic song "I Heard it Through the Grapevine" was recorded by Marvin Gaye in 1968 when it went to the top of the Billboard Pop Singles Chart for seven weeks.

[13] In addition, the Appellants rely upon the testimony of several Department witnesses and readings from their noise meter to assert that the combination of this evidence and Appellants' testimony is sufficient to demonstrate that the noise from Molesevich's operations constitute a public nuisance. The Board previously addressed this aspect of Appellants' argument and rejected it.

the noise "is an unreasonable interference with a right common to the general public." Restatement (Second) of Torts, § 821.B. The Pennsylvania Supreme Court recognized that:

> It has also been said: 'whether the use is reasonable generally depends upon many and varied facts. No hard and fast rule controls the subject.'

Township of Bedminster v. Vargo Dragway, Inc., 253 A.2d at 661. Applying this approach to noise the Pennsylvania Supreme Court further stated:

> Although not entitled to absolute quiet in the enjoyment of property, every person has the right to require a degree of quietude which is consistent with the standard of comfort prevailing in the locality wherein he lives.

Id. The Commonwealth Court has also addressed the issue of whether noise from a particular activity constitutes a public nuisance and stated:

> To constitute a nuisance based upon noise, the question is whether the noise is unreasonable and unnecessary considering all of the circumstances involved.

Gray v. Barnhart, 601 A.2d 924, 927, n. 4 (Pa. Cmwlth. 1992). Consistent with these directions, the Board needs to review the testimony in the record of the people in the community who allege that the noise from Molesevich's operation of the Atlas Coal Breaker constitutes a public nuisance.

Both Appellants testified about noise impacts from Molesevich's current operations. Mr. Chimel was raised at 146 West Saylor Street, and he maintained his legal residence at this address for his entire life. (N.T. 21-24.) For about 30 years he moved away and only returned on weekends about once a month. *Id.*[14] In 2008, he returned to Atlas fulltime. *Id.* When asked to explain how the noise interferes with his communications or sleep, Mr. Chimel testified that if

[14] Mr. Chimel's absence from Atlas for approximately 30 years from 1986-2008, only returning on weekends once a month, is sufficient reason to discredit Mr. Chimel's testimony regarding noise from the Savitski Brothers' operations. He was not in Atlas when they operated.

he was not up and awake by 7:10 a.m. on most days, the starting of the breaker would cause him to get up. (N.T. 40-41.) He testified that there are times when the noise interferes with talking to his neighbor. *Id.* Mr. Chimel's main objection, regardless of the noise levels from 65 dBA to 50 dBA, is noise at any level for the ten hours a day that the Breaker is in operation. He testified he does not want to live listening to noise for the rest of his life. (N.T. 45.)

While Mr. Chimel testified that noise is the biggest problem, his testimony falls far short of meeting the Appellants' burden of proof to establish that the noise from the operations of the Atlas Coal Breaker constitutes a public nuisance. His testimony was very general in nature and he did not give any specific examples of noise impacts on particular days that adversely affected him.

In addition, there is another reason to discount Mr. Chimel's testimony regarding noise. Although Mr. Chimel asserted that he was against the Molesevich operation "from the very start." Mr. Chimel admitted that he applied for a job with Molesevich. (N.T. 53.) The fact that Mr. Chimel applied for a job to work at the Atlas Coal Breaker after Molesevich took over ownership severely damages his credibility for several reasons. First, he was not hired, so he may be biased. (N.T. 518.) Second, if the noise from the current Molesevich operation was so bad that it constituted a public nuisance, why would Mr. Chimel apply for a job at such an operation in his community? The Board does not find Mr. Chimel's testimony credible on the alleged noise impacts for these reasons.

Mr. Pachuski was the second appellant who testified about noise impacts for Molesevich's operation of the Atlas Coal Breaker. Mr. Pachuski lives at 105 West Saylor Street in Atlas which is at the corner of West Saylor Street and Mulberry Street. Mulberry Street is the access route to the Atlas Coal Breaker from Route 61. Mr. Pachuski's house is about 200 feet

from the Breaker. Mr. Pachuski is a C-6, C-7 quadriplegic and he is basically paralyzed from his chest down. (N. T. 264.) Mr. Pachuski has an accident in 1987, and he has been disabled ever since. (N.T. 263.) He has a garden in his yard and he spends quite a bit of time outside in his garden depending upon weather. (N.T. 267-268.) Mr. Pachuski is a more credible witness than Mr. Chimel, but his testimony is not sufficient to satisfy the Appellants' burden of proof.

Mr. Pachuski testified that he did not remember the Savitski Brothers operations as "being as loud as it is now." (N.T. 266.) He testified that there are more heavy diesel engines running now at the same time than before. (N.T. 267.) He is able to identify particular pieces of equipment that are running, and his is able to identify the type of truck traversing the Mulberry Street access route that runs alongside his house. (N.T. 267.) He has made complaints regarding noise from backing beepers on equipment and truck traffic on the Mulberry Street access route. He testified that the noise sometimes starts when he is waking up on the morning, and he does not open windows in the summertime because he knows the noise will be unbearable. (N.T. 276-278.)

To meet their burden of proof in this appeal on the issue of whether noise from Molesevich's current operations constitute a public nuisance, Appellants have to demonstrate that the noise is unreasonable or unnecessary considering all of the circumstances. The Board finds that the Appellants have not met the burden after a consideration of all of the circumstances. The Atlas Coal Breaker is in the Village of Atlas. The residential area in which appellants reside is sandwiched between Route 61 that forms the northern border of the residential area and the Atlas Coal Breaker to the south. Route 61 also forms the eastern border and Route 54 forms the western border. Traffic noise and noise from the Atlas Coal Breaker operations are considerations in evaluating the standard of comfort prevailing in the locality

wherein the appellants live.[15] The residents of Atlas are entitled to a degree of quietude, but the presence of the state roads and associated traffic noise and the long term operations of the Atlas Coal Breaker are relevant circumstances to consider.

In addition, the Board notes the limited hours of operations of the Atlas Coal Breaker. The testimony before the Board indicated that there is only one shift at the Breaker from approximately 7:00 a.m. until 4 or 5 p.m. in the afternoon. The Breaker does not operate at night where noise from operations could disrupt sleep of nearby residents. As a general rule, noise during normal business hours is less likely to be viewed as unreasonable or unnecessary than noise at the same levels at night. The hours of the Breaker operations are also a consideration.

There are a number of houses in the residential area near the Atlas Coal Breaker in the Village of Atlas. The Department testified that it received approximately 200 complaints regarding noise or dust from Molesevich operations. This is a large number of complaints, but the testimony indicated that the vast majority of the complaints to the Department were from the two Appellants' who coordinated their efforts to register complaints. (N.T. 61-62.) The lack of widespread complaints from residents other than the Appellants is an indication that the noise levels do not exceed the standard of comfort prevailing in the locality where the Appellants live. In conclusion, the Appellants have not met their burden of proof to demonstrate that the noise from Molesevich's operators constitute a public nuisance considering all of the circumstances.

In addition, and as a result of the public hearing and the concerns raised by the Appellants and others regarding noise impacts, Molesevich identified a number of additional

[15] The Atlas Coal Breaker is one of three coal breakers in the immediate area, and these other breakers are also a consideration. (N.T. 56-57.)

measures to reduce noise impacts from its operation of the Atlas Coal Breaker. The measures to reduce noise from the operations include:

1. Construction of an earthen sound barrier along the northern edge of the permitted site towards the Appellants' houses west of the Mulberry Street entrance;

2. Installation of 8 inches of insulation in the fine coal plant walls and ceiling;

3. Construction of several concrete walls next to the fine coal plant to shield activities;

4. Installation of new backup alarms on equipment that are set at the lowest noise levels permitted by law;

5. Construction of a privacy fence along the northern edge of the permitted site towards Appellants' houses east of the Mulberry Street entrance.

6. Construction of an alternative access road to the site to avoid using the Mulberry Street access route that runs along Pachuski's house on West Saylor Street.

The Appellants discount these measures and assert that the Department should have imposed permit conditions to require Molesevich to perform the measures that it announced it would perform. The Board finds that Molesevich has in fact implemented these measures and as a practical matter the Appellants' objection is therefore moot. The construction of sound barriers, concrete walls and a privacy fence has already happened. The installation of the insulation and the new backup alarms has already happened. The new access road is currently in use and its use has resulted in a noticeable drop in traffic and associated noise on the Mulberry Street access route. The Appellants concede that the use of the alternative access route has already improved traffic and noise impacts associated with the use of the Mulberry Street access route that runs by Pachuski's house. The use of permit conditions, in this instance, adds no

further value because the measures Molesevich committed to undertake have already been all been performed.

There is one final point to address concerning Appellants' noise objection. The Department asserts that the Board should not consider the noise levels at the Atlas Coal Breaker since it renewed, transferred and revised the permit for Molesevich. The Department asserts that Appellants' objections regarding noise are barred by the doctrine of administrative finality because the Appellant failed to object to the noise when the Atlas Coal breaker site was initially permitted when operated by the Savitski Brothers. The Board rejects the Department's administrative finality argument because the Department may not permit an activity that constitutes a public nuisance under Section 1917A. There is no dispute that the Department's action to renew, transfer and revise the permit for the Atlas Coal Breaker is an appealable action, and in the context of an appeal of this action the Appellants are entitled to assert that the Department abused its discretion and committed an error in permitting an activity that constitutes a public nuisance. The fact that they did not file an appeal and previously raise the issue when the facility was initially permitted does not bar the Appellants from raising the issue in this appeal. While the Appellants have not satisfied their burden of proof to prevail on this issue, the Board finds that they were entitled to an opportunity to raise the issue in their appeal.

The Department also asserts that evidence of dust and noise conditions at the permitted site after the Department took the action to renew, transfer and revise the permit are not relevant to the Board's review of the permit renewal, transfer and revision. The Department views Appellants' use of post-issuance complaints as a backdoor attack upon the Department's exercise of its prosecutorial discretion. The Board disagrees with the Department's assertion. The Board has *de novo* review, and it is entitled to consider evidence of conditions at a site after the

Department took the action under appeal. This information is useful to the Board as it considers Appellants' argument that the operations at the Atlas Coal Breaker constitute a public nuisance, which according to the Appellants, the Department should not have permitted when it renewed, transferred and revised the permit for the Atlas Coal Breaker for Molesevich.

In addition, the Department and Molesevich were keen to testify about all of the actions undertaken by Molesevich to address Appellants' noise concerns. These actions have also occurred after the Department took the permit actions under appeal. If the Department and Molesevich want to use evidence of conditions after the Department took the challenged permit actions that are supportive of the Department's permit actions, it is only fair to allow the Appellants' the same opportunity to provide evidence of conditions after the permit actions. The Board's *de novo* allows all Parties to use evidence that the Department did not review when it took its challenged actions, including evidence that did not exist when the Department took the action. All Parties are entitled to rely upon such evidence that is relevant to the appeal of the challenged permitting actions.[16]

The Department also asserts that violations that occur after the approval of a permit are irrelevant in a third-party appeal to establish that the permit should not have been issued *citing North Pocono Taxpayer Ass'n v. DER*, 1994 EHB 449. The Board disagrees. In *North Pocono* the Appellant asserted that the Permittee violated its permit by affecting more wetlands acreage than the permit allowed. Here, where there are no regulatory noise standards, the Appellants assert that noise from the operations constitutes a public nuisance. The issue is not whether the permittee has violated the terms of the permit, but whether operations under and consistent with

[16] The Board agrees with the Department that the Appellants are not entitled to challenge the Department's exercise of its prosecutorial discretion. *See e.g., Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005). Here, however, Appellants are only challenging the Department's permit decisions.

the permit constitute a public nuisance. In this appeal, the Appellants are entitled to use evidence of conditions under the permit to show that the permit should not have been issued.

Dust

The Appellants also complain about dust emanating from the Breaker and claim that the Breaker's emission of this dust amounts to a public nuisance. The Appellants argue that the Permit should have contained additional measures to control dust migration and request that the Board remand the renewal of the Permit and direct the Department to add the following conditions to the Permit:

- Regularly as needed, but no less frequently than every other day, utilize water trucks and/or chemical dust suppressants and wet coal processing techniques at and around the Operation.

- Keep wet at all times all unpaved roads at the Operation.

- To the extent there is dust, dirt or debris on the Township roads in Atlas surrounding the Operation, including 250 feet of public highway on either side of the Operation's access roads, utilize a street sweeper for dust control in conjunction with water sprays, oils or other dust surfactants so as to avoid accumulation of dust, dirt and debris. Permittee acknowledges and agrees that it is required to conduct such clean-up so as to comply with applicable law and further agrees that it shall conduct such street cleaning as frequently as needed to address accumulation of dust, dirt and debris on said roads, but in no event less frequently than twice per week, unless there is snow or ice on said roads. Said cleaning will be done at Permittee's sole cost and expense.

- Permittee shall completely macadam, and maintain such macadam surface in good repair, so long as Permittee operates at the Operation, the parking lot near Mulberry Street to reduce the amount and dissemination of dust, dirt and debris from the Operation.

- Completely macadam the area of the Operation where the scales are located in order to reduce the amount and dissemination of dust and dirt, and maintain such macadam

> surface in good repair so long as Permittee operates at the Operation.

Appellants' Post-Hearing Brief at 35-37. The Appellants, however, do not cite to a single statutory or regulatory requirement related to dust. The failure to cite to any legal requirements creates a tremendous barrier to the Appellants' ability to carry their burden of proof.

The Department argues that the Appellants failed to raise its dust-related argument in their post-hearing brief and that the Board should therefore deem that argument waived. In the alternative, the Department argues, the Appellants failed to meet their burden of proof. The Appellants counter at length in their Reply Brief that they did in fact raise an objection to dust in their post-hearing brief. Our reading of the Appellant's post-hearing brief indicates that the Appellants at least preserved this argument by raising it, to some limited extent. We, however, agree with the Department that the Appellants ultimately failed to meet their burden to prove that the Permit lacks provisions to adequately control dust.

The only evidence offered by the Appellants in support of this argument includes a few statements in the Appellants' testimony. Mr. Chimel testified that he finds black dirt in buckets that he uses to collect water from his gutters to water his garden, and he believes that this dust originates from the Breaker and deposits onto his garage roof. (N.T. 39.) Mr. Pachuski testified that he washes black coal dirt off his windows every day and that he occasionally finds black dust deposited on his van. (N.T. 269, 276.) The Appellants' testimony does not prove that dust from the Breaker left Molesevich's property boundary and deposited onto the Appellants' property. The Appellants have not offered a single statutory or regulatory violation that has occurred. They simply argue that dust emanating from the Breaker is causing a public nuisance.

Even if dust did in fact leave Molesevich's property boundary and deposit onto the Appellants' property, that still may not prove that the conditions in the Permit are insufficient.

Instead, those violations could be the result of Molesevich's failure to comply with certain Permit conditions. In *Rural Area Concerned Citizens v. DEP*, EHB Docket No. 2012-072-M (Adjudication and Order issued June 11, 2014) slip op. at 26-31, we were faced with a similar issue. We held in that adjudication that merely alleging that dust left a property boundary does not necessarily indicate that the terms of a permit are inadequate. It may only show that the terms of the permit are not being complied with, which could result in an enforcement action. When a third-party challenges the terms of a permit, the onus is the third-party to prove that the terms of the permit, if fully complied with, are still inadequate to control dust migration. Here, we are faced with a similar issue, and, for similar reasons as in *Rural Area Concerned Citizens*, we find that, under the facts of this appeal, any evidence of dust migration, without additional evidence of whether the terms of the Permit were being complied with, is inadequate per se to prove that the terms of the Permit inadequately control dust.

The Appellants have the burden of proof in this appeal, and we find that the Appellants have not proven by a preponderance of the evidence that dust from the Breaker is causing a public nuisance. We need not address the terms of the GP-12 and the impact of the Appellants' failure to appeal the GP-12, although it appears to the Board that Molesevich has fully complied with the GP-12 and has even gone above and beyond its requirements.

Conclusion

For the reasons set forth above, the Board finds that the Appellant failed to meet its burden to prove by a preponderance of the evidence that the Department's renewal of the Permit and transfer to Molesevich was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented. The Appellants have met their burden with

respect to the Permit revision. Accordingly, we dismiss the Appellant's appeal in part and sustain it in part and make the following:

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has the power and duty to issue adjudications on decisions of the Department. 35 P.S. § 7514.

2. The Appellants bear the burden of proof in this matter pursuant to 25 Pa. Code § 1021.122(c)(2), and must prove by a preponderance of the evidence that the Department's issuance of the Permit to Molesevich was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented.

3. The Board reviews appeals *de novo*. *Smedley v. DEP*, 2001 EHB 131, 156.

4. The Appellants failed to meet their burden to prove by a preponderance of the evidence that the Department's approval of the Permit renewal and transfer was not a lawful and reasonable exercise of the Department's discretion supported by the evidence presented.

5. The Appellants met their burden to prove by a preponderance of the evidence that the Department's approval of the Permit revision was not lawful and was not a reasonable exercise of the Department's discretion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOSEPH D. CHIMEL AND PAUL PACHUSKI	:	
	:	
v.	:	**EHB Docket No. 2011-033-M**
	:	**(Consolidated w/ 2011-034-M)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and D. MOLESEVICH & SONS	:	
CONSTRUCTION CO., INC., Permittee	:	

ORDER

AND NOW, this 25th day of November, 2014, it is hereby ordered that the above-captioned appeal is **dismissed in part and sustained in part**. The Board upholds the Permit renewal and transfer and vacates the Permit revision.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 25, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SHANE M. WINNER	:	
	:	
v.	:	**EHB Docket No. 2013-120-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LIMESTONE TOWNSHIP SUPERVISORS, Permittee	:	**Issued: December 8, 2014**

ADJUDICATION

By Steven C. Beckman, Judge

Synopsis

The Board dismisses an appeal of a Department approval of a Component 1 Planning Module under the Sewage Facilities Act (Act 537). The evidence presented at hearing showed that the information provided by the municipality in the Planning Module was sufficient to except the municipality from the requirement to revise its official sewage plan with regard to a proposed two-lot subdivision.

BACKGROUND

Appellant Shane M. Winner filed a Notice of Appeal with the Environmental Hearing Board on August 13, 2013, objecting to the Department of Environmental Protection's July 16, 2013 approval of a Component 1 Sewage Facilities Planning Module for a proposed two-lot subdivision adjoining Mr. Winner's property in Limestone Township, Lycoming County. In short, Mr. Winner believes that the site is unsuitable for an onlot septic system based on the site's previous failures of septic testing. He also objects to the manner of testing and to the limited number of test areas excavated, believing that the Department should have followed the best practices outlined in its guidance document.

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A one-day hearing was held on June 24, 2014 before the Honorable Steven C. Beckman. At the close of Appellant's case-in-chief, the Department, with the concurrence of Limestone Township, moved for a directed verdict. (Notes of Transcript ("N.T.") 134:12–135:2.) The Board denied that motion, but permitted the parties to raise this issue in their posthearing briefs.[1] (N.T. 136:14–19.) The Township and the Department thereafter presented their cases. Because we are deciding this case on the merits, we will not make a ruling on the motion for directed adjudication. As we discussed in *Krushinski v. DEP and Ralpho Township*:

> The Board has stated in the past that in order for a moving party to prevail on its motion for directed adjudication it would also have to prevail on the adjudication of the merits. *Charles E. Brake Co. v. DEP*, 1999 EHB at 968. Specifically, "when ruling on a motion for a directed adjudication, the Board considers all of the evidence submitted by all the parties—the same evidence it would consider if adjudicating the merits." *Id.* at 967, citing *Ron's Auto Service v. DER*, 1992 EHB 711, 722.

Krushinski v. DEP and Ralpho Township, 2008 EHB 579, 581. Appellant has not shown by a preponderance of evidence that the proposed onlot septic system failed to meet the requirements necessary to except the Township from revising its official sewage plan and that the Department's approval was in error. We make the following findings of fact.

FINDINGS OF FACT

1. This appeal concerns the approval of a Component 1 Sewage Facilities Planning Module ("Planning Module") for construction of an onlot septic system for an 11.489 acre newly

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[1] Because the Board does not have juries, such motions are traditionally referred to by the Board as "directed adjudications." *See Krushinski v. DEP and Ralpho Twnp.*, 2008 EHB 579, 580; *Byler v. DEP*, 1994 EHB 874, 876, n. 1; *Ron's Auto Service v. DER*, 1991 EHB 711, 720-21. It is important to note that the Board's Rules disallow a single judge to rule on such a motion. An order on a directed adjudication is a final order requiring the full Board to grant the motion. *Ron's Auto Service*, 1991 EHB at 727.

subdivided lot at 115 Welshans Lane, Jersey Shore, PA 17740 ("Stackhouse Lot") previously owned by Samuel U. Stoltzfus and purchased by Matthew J. Stackhouse in December 2013.

2. Appellant Shane M. Winner owns property adjacent to the Stackhouse Lot. (N.T. 12:8–14.)

3. Appellant Winner previously negotiated to purchase substantially the same property as the Stackhouse Lot; however, soil testing performed on the lot in 1995 indicated that the site was unsuitable for onlot sewage disposal. (N.T. 23:16–25:8; Appt's Exs. 9, 10.)

4. Jeffrey B. Kreger is the certified Sewage Enforcement Officer ("SEO") for twenty-five townships, including Limestone Township. He has been an SEO since June of 1976. (N.T. 144:8–19.)

5. Robert W. Everett III is a Sewage Planning Specialist with the Clean Water Program of the Department of Environmental Protection. He is also a certified SEO. (N.T. 215:16–216:6; 216:17.)

6. Mr. Everett is one of the Department staff who reviews Component 1 Sewage Facilities Planning Modules for the Northcentral Region, and specifically, for Lycoming County. (N.T. 217:5–16.)

7. Mr. Everett reviewed and approved the Component 1 Sewage Facilities Planning Module at issue in this appeal in a letter dated July 16, 2013. (Appt's Ex. 16.)

8. Thomas M. Randis is the Environmental Program Manager of the Clean Water Program for the Department of Environmental Protection. (N.T. 195:15-196:5.)

9. Joseph Eckenrode is a certified professional soils scientist with over forty years of experience. He is also a certified SEO. (N.T. 177:22–178:10.)

10. At the request of Mr. Stoltzfus, Mr. Eckenrode went to the Stackhouse Lot and reevaluated the soil test pits. (N.T. 159:5–160:14; 187:2–20.)

11. The Appellant's expert, Mark S. Mills, is a certified professional soils scientist and certified SEO. Mr. Mills is involved in training SEOs and was one of the authors of the Department's Field Manual for Pennsylvania Sewage Enforcement Officers. (N.T. 82:5–24; 84:18–85:12.)

Timeline and Soil Conditions at the Site

12. In the spring of 2013, Matthew J. Stackhouse contacted Mr. Kreger to schedule soils testing for the property he was considering purchasing. (N.T. 145:14–20.)

13. On April 23, 2013 SEO Kreger conducted the soils testing of the Stackhouse Lot. (N.T. 146; DEP Ex. D-1, pp. 13–15.)

14. It is Mr. Kreger's general practice to notify the Department when he is scheduled to do soils testing. (N.T. 145:17–146:3.)

15. Mr. Everett attended the soils testing on the Stackhouse Lot conducted by SEO Kreger on April 23, 2013. (N.T. 217:25–218:2.)

16. A contractor excavated the three test pits for proposed siting of absorption areas on the property in the presence of Mr. Kreger and Mr. Everett. (N.T. 142:21–143:5.)

17. A proposed absorption area will not be permitted if it has a limiting zone within twenty inches of the mineral soil surface. 25 Pa. Code § 73.14(a)(5).

18. In the first test pit, Mr. Kreger observed gray mottling at a depth of thirteen inches. (N.T. 147:21–24.)

19. Mr. Mills testified that mottling is an indicator of where saturated soil conditions may occur. Saturated soils are a restrictive condition in the soil, or a limiting zone. (N.T. 86:17–25.)

20. Test pit two showed soil mottling at a depth of twenty-two inches. (N.T. 148:19–24.)

21. Mr. Kreger stated that, because one test pit showed soils unsuitable for onlot sewage disposal and the second test pit showed suitable soils, the general suitability of the Stackhouse Lot showed "marginal conditions." (N.T. 149:8–13.)

22. One manner in which development can occur on a site with marginal conditions is by establishing and testing a primary absorption area and a replacement absorption area. (N.T. 104:18–22.)

23. Mr. Kreger believes it was his idea to dig a third test pit to establish a replacement absorption area on the Stackhouse Lot. (N.T. 149:14–20.)

24. The third test pit showed soil mottling at a depth of twenty-three inches. (N.T. 150:17.)

25. On May 16, 2013, Mr. Kreger returned to the site to do a percolation test on the two proposed absorption areas—where test pits two and three were located. (N.T. 153:8–13.)

26. Mr. Kreger saw nothing in the soils he excavated for the percolation holes that would indicate a limiting zone in that area. (N.T. 153:22–24.)

27. After inspection of the Stackhouse Lot, Mr. Kreger determined that the soil conditions were marginal, but that long-term sewage disposal needs could be met through the use of an onlot system. (N.T. 156:10–158:18.)

28. On or about July 3, 2013, Samuel U. Stoltzfus submitted to Limestone Township, Lycoming County ("Township') a Component 1 Sewage Facilities Planning Module for construction of an onlot septic system for an 11.489 acre newly subdivided lot at 115 Welshans Lane, Jersey Shore, PA 17740 ("Stackhouse Planning Module"). (DEP Ex. D-1, p. 3.)

29. Via a letter dated July 16, 2013, the Department notified Limestone Township that the Stackhouse Planning Module qualified as an exception to the requirement that the Township revise its Official Sewage Facilities Plan. (Appt's Ex. 16.)

30. Based on its review of the Stackhouse Planning Module, the Department determined that the submission complied with the requirements of the Act 537 and the Sewage Facilities Planning Regulations. (N.T. 239:5–14.)

31. Based on the Department's review of the Stackhouse Planning Module, the Department advised Limestone Township, via the Department's July 16, 2013 letter that is the subject of this Appeal, that the Township did not have to revise its Official Sewage Facilities Plan. (N.T. 227:6–9.)

32. The Department's July 16, 2013 Letter to the Limestone Township Supervisors indicated that the Township could proceed with the issuance of an Onlot Sewage Disposal System Permit ("Disposal System Permit") upon receiving a satisfactory permit application. (Appt's Ex. 16.)

33. On August 13, 2013, Appellant Shane M. Winner ("Appellant Winner") filed the instant Appeal. (Notice of Appeal, Docket Entry 1 (Aug. 13, 2013).)

34. On or about December 16, 2013, Limestone Township issued a Disposal System Permit to Stackhouse. (Twp. Ex. T-4; N.T. 137:12–138:9.)

35. The sewage system proposed in the Stackhouse Planning Module was for an individual onlot sewage system to serve a detached single family dwelling unit on the Stackhouse Lot. (DEP Ex. D-1, p. 11.)

36. The Stackhouse Planning Module submitted for the Stackhouse Lot included a satisfactory soil test pit excavation for both a Primary Absorption Area and a Replacement Area. (N.T. 241:2–8.)

37. Appellant Winner's expert, Mr. Mark Mills ("Mr. Mills"), testified that on lots found to have "marginal" soil conditions more than one soil probe is "generally warranted." (N.T. 98:7–9.)

38. Appellant Winner's expert, Mr. Mills, testified that on lots found to have "marginal" soil conditions more than one soil probe "might be required" according to Department guidance. (N.T. 99:15–18.)

39. Appellant Winner's expert, Mr. Mills, testified that "it's really up to the SEO" as to the number of soil probes to perform in testing a lot for suitability for an onlot septic system. (N.T. 101:19–102:14.)

40. At the June 24, 2014 EHB Hearing, Mr. Joseph Eckenrode ("Mr. Eckenrode") was qualified as an expert on behalf of Limestone Township in soils science with over 40 years of working experience with the U.S. Department of Agriculture, Soil Conservation Service, now known as the Natural Resources Conservation Service. (N.T. 177:22–179:18.)

41. Mr. Eckenrode tested the soil conditions on the Stackhouse Lot for suitability for an onlot septic system without first reviewing Limestone Township SEO Kreger's testing results. (N.T. 183:15–19.)

42. Mr. Eckenrode determined that soil conditions on the Stackhouse Lot were suitable for an onlot septic system. (N.T. 185:13–23.)

43. Appellant Winner acknowledged that the "state required minimum" is one (1) soil probe for verifying soil suitability for an onlot septic system. (N.T. 39:1–15.)

DISCUSSION

Under the Sewage Facilities Act, Act of January 24, 1966 (P.L. 1535, No. 537) (1965), as amended; 35 P.S. §§ 750.1–750.20a ("Act 537"), the Department has broad authority to regulate sewage facilities throughout the Commonwealth. A local municipality is required to adopt and implement an official plan for the provision of adequate sewage systems in the community. 35 P.S. § 750.5(a); 25 Pa. Code § 71.31. The Department, however, is ultimately responsible for approving or disapproving a local municipality's plan as well as revisions to the plan. 35 P.S. § 750.5(e); 25 Pa. Code § 71.32. In general, the municipality is required to revise its official plan to address new development in the community and when otherwise necessary. *See* 25 Pa. Code § 71.51. However, a municipality may request an exception to the requirement to revise its official plan. The potential exceptions to the requirement of a plan revision are spelled out in the regulations at 25 Pa. Code Sections 71.51 and 71.55. If a municipality submits one, "the Department may act on requests for exceptions to the requirement to revise official plans within 30 days of the Department's receipt of the properly completed and submitted components of the Department's sewage facilities planning module." 25 Pa. Code § 71.55(d). If the Department

does not act within that timeframe, "the exception to the requirement to revise the official plan shall be deemed to be applicable." *Id.*[2]

The overlapping roles and responsibilities of Limestone Township and the Department for sewage facilities planning created some confusion in this case. As we previously stated in our opinion denying the Department's motion to dismiss this matter, "[t]he exception pertinent to the present appeal concerns a Component 1 Sewage Facilities Planning Module, which [municipalities, on behalf of developers,] submit to the Department for evaluation of whether certain small-scale developments may commence without a revision in the official plan." *Winner v. DEP*, EHB Docket No. 2013-120-B, slip op. at 4 (Opinion and Order issued March 13, 2014). "The regulations underlying this component except a municipality from its duty to revise its official plan 'when the *Department determines* that the proposal is for the use of individual onlot sewage systems serving detached single family dwelling units.' 25 Pa. Code § 71.55(a) (emphasis added)." *Id.* When the Department acts on a request for exception, the Department has responsibilities under the regulations to determine the appropriateness of the exception. For example, the Department must determine, among other things, that "the subdivision has been determined to have soils and site conditions which are generally suitable for onlot sewage disposal systems under [25 Pa. Code Section] 71.62." 25 Pa. Code § 71.55(a)(2). The Department supports its determination through reviewing the Component 1 Sewage Facilities Planning Module, including the "evidence of review by the municipality's sewage enforcement officer." 25 Pa. Code § 71.55(b)(2).

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[2] This case did not involve a situation where the exception was deemed applicable but instead involved a determination by the Department that the exception applied as set forth in the July 16, 2013 letter from the Department.

In order for the SEO—and the Department—to determine if the project area is suitable for the use of individual onlot systems, the Component 1 Sewage Facilities Planning Module requires comprehensive information about the proposed site. (*See* Appt's Ex. 19; Dept's Ex. D-1.) For example, the Component 1 Sewage Facilities Planning Module requires a plot plan which shows the slopes and locations "of all soil profile excavations and percolation test sites, including those which documented unsuitable conditions for the use of onlot sewage disposal." (Appt's Ex. 19, p. 3.) The Component 1 Sewage Facilities Planning Module must also include information about nearby existing and proposed water supplies. (*Id.*, p. 4.) And of particular importance to this appeal, the Component 1 Sewage Facilities Planning Module also requires documentation of soils information that demonstrates that the site is suitable for long-term onlot sewage disposal. As we stated above, the proposed site must have "been determined to have soils and site conditions which are generally suitable for onlot sewage disposal systems under [25 Pa. Code] § 71.62 (relating to individual and community onlot sewage systems." 25 Pa. Code § 71.55. In relevant part, the referenced regulation provides:

> (b) When an official plan or revision proposes the renovation of sewage effluent by means of a subsurface absorption area . . . the following shall be provided:
>
> * * *
>
> (2) Documentation that the soils and geology of the proposed site are generally suitable for the installation of the systems including:
>
> * * *
>
> (iii) Soil profiles as described in Chapter 73 (relating to standards for onlot sewage treatment facilities) shall be performed to insure that an adequate area with suitable soils is available in the area of the proposed system. . . .

25 Pa. Code § 71.62(b). In Chapter 73, Section 73.14(a) describes the requirements for investigating the suitability of a site for onlot disposal of sewage through an absorption area. Prior to a permit being issued by the municipality, the regulation requires that, "[o]n all locations where the installation of an absorption area is proposed, *at least one excavation* for examination of the soil profile shall be provided." 25 Pa. Code § 73.14(a)(1) (emphasis added).

Complicating matters in this case, testing at the Stackhouse Lot revealed the presence of marginal soils. If "marginal soil conditions for long-term onlot sewage disposal" exist at the site, additional documentation is required "to assure that both the short-term and long-term sewage facilities needs of the area will be met." (Appt's Ex. 19, p. 5; *see also* Dept's Ex. D-1, pp. 3–4, 6, 12–14.) As one might infer, marginal soil conditions do not necessarily exclude a site from using an onlot sewage system for disposal. Where marginal soil conditions exist, as they did in this case, the developer and municipality have a number of options that may provide for long-term sewage disposal at the subdivision, including the provision of a sewage management program, documented replacement area testing, or scheduled replacement with sewerage facilities (that is, connection to a community sewage system). For the Stackhouse Lot, the developer and Limestone Township selected the replacement area testing option to address the marginal soil conditions. Replacement area testing requires that the subdivision have an adequate primary absorption area and an adequate replacement absorption area that can be used if the primary area becomes unusable in the future.

Mr. Winner's fundamental argument in his appeal was that the Department's determination permitting the exception was not proper because the soil testing completed by the SEO was not sufficient to demonstrate that the site was suitable for an onlot sewage disposal system and that the Department was, or should have been, aware that the soil testing was

inadequate. In support of his position, he relied primarily on past and current soil testing conducted on the Stackhouse Lot and the Department's *Field Manual for Pennsylvania Sewage Enforcement Officers* ("*Field Manual*"). Specifically, Mr. Winner contended that the past soil tests, as well as the soil testing completed for the current submittal, demonstrated marginal soil conditions on the Stackhouse Lot. When faced with marginal soil conditions, Mr. Winner contends that the *Field Manual* requires, or at least suggests, that the best practice would be to undertake more than the one soil excavation per absorption area that was completed at the Stackhouse Lot.

Addressing Mr. Winner's arguments, we first find that the past soil testing completed on the Stackhouse Lot does not change the basic regulations applicable to the current testing. While we allowed testimony regarding the past soil testing, it carried little weight in our decision. The Board understands Mr. Winner's concern with respect to a new onlot sewage system being constructed adjacent to his property. It was reasonable for him to be concerned that the testing on the Stackhouse Lot be done correctly given evidence of prior sampling done in the area showing soils unsuitable for a sand mound absorption area. Nevertheless, the presence of past failed tests does not change the requirements of the laws and regulations at issue in this case, which we find were satisfactorily complied with by the Township.

We also reject Mr. Winner's argument that 25 Pa. Code Section 73.14(a)(1), which requires "at least one excavation for examination of the soil profile shall be provided," should be read to require more than one test pit per absorption area. The plain reading of the language of the regulation makes it clear that only one test pit per absorption area is required. The phrase "at least one excavation" cannot be read as "more than one excavation" which is clearly how Mr. Winter proposes it be read. The testimony at the hearing demonstrated that there was no genuine

debate over the proper reading of the regulation. Mark Mills, a soils scientist and expert witness for the Appellant, acknowledged as much. (N.T. 117:4–10.) Joseph Eckenrode, who was Limestone Township's expert witness and a soils scientist and SEO, agreed. (N.T. 190:22–24.) Mr. Everett also testified that "[t]here is no requirement" for more than one excavation for examining soil profiles per absorption area. (N.T. 246:5.) Even Mr. Winner acknowledged that "the state-required minimum" was "at least one" test probe. (N.T. 39:14–15.)

All parties discussed the relevance of the Department's *Field Manual* towards the issues at hand. The *Field Manual* was produced for the Department by the Pennsylvania State Association of Township Supervisors. According to its purpose:

> The [*Field Manual*] has diagrams, instructions, and procedures to help assist SEOs in performing their duties in the field. [It] also serves as a resource to help others understand what the SEO must do to follow the Sewage Facilities Act (Act 537) and the Pennsylvania Code Title 25, Environmental Protection Chapters 71, 72, and 73 regulations.

(DEP Ex. D-3, p. 2.) Mr. Winner directs the Board's attention to his Exhibit 11, an excerpt of the *Field Manual*. Specifically, he explained at the hearing that the *Field Manual* "guidelines would indicate that the best practical effort would be to evaluate multiple probes for each absorption area and define the extent of good soils." (N.T. 37:25–38:2.)

While best practice may counsel multiple test pits for each absorption site, that is not what the regulations require. *See* 25 Pa. Code § 73.14(a)(1). The Board has repeatedly found that guidance documents—like the *Field Manual*—do not have the force of law. Guidance documents are "not intended as a measuring stick or guide with which to evaluate [The Department's] action. It is not a statute or a regulation and is not entitled to the weight of either of these." *Bagnato v. DER*, 1992 EHB 177, 187. Here, it is also telling that the *Field Manual*'s

purpose is to *assist SEOs in their duties*, not the Department with respect to its review of Component 1 Sewage Facilities Planning Modules. (*See* DEP Ex. D-1, p. 2.) Further, the *Field Manual* itself cautions that it is intended as "general guidance" and that "[i]t should not be considered a substitute for the Sewage Facilities Act (Act 537) or the Pennsylvania Code Title 25 Environmental Protection Chapters 71, 72, and 73 regulations." *Id.* With respect to the final point, we have previously found that a manual is merely a statement of policy, especially where it expressly states that it is not to be considered a regulation. *See, e.g., United Refining Co. v. DEP*, 2006 EHB 846.

We understand Mr. Winner's desire to have the Township and the Department more closely adhere to the guidance provided in the *Field Manual* and under the circumstances it may have been prudent to have done so for the Stackhouse Lot. However, ultimately the regulations take precedence over any guidance set forth by the *Field Manual* and the regulations only require one excavation per absorption area. The overwhelming evidence in this case is that this regulatory requirement was satisfied by Limestone's SEO in his evaluation of the Stackhouse Lot. Moreover, the evidence presented at hearing adequately demonstrates that there are satisfactory primary and replacement absorption areas available on the Stackhouse Lot. This information was provided to the Department in the Stackhouse Planning Module submitted by Limestone Township. The Board has no difficulty determining, like the Department, that the information available satisfied the requirements for granting an exception to the plan revision requirements. Given this Board's determination, it is also clear that Mr. Winner failed to demonstrate by a preponderance of evidence that the Department acted outside its authority under the Sewage Facilities Act or the applicable regulations when it determined that the

requirements for an exception were met by the information submitted by Limestone Township on the Component 1 Planning Module.

CONCLUSIONS OF LAW

1. The Department is the executive agency of the Commonwealth of Pennsylvania with the duty and authority to administer and enforce Act 537 and the Sewage Facilities Planning Regulations. *See, e.g.*, 35 P.S. §§ 750.5, 750.7, 750.10; *see also* 25 Pa. Code §§ 71.1 *et seq.*

2. This Board has jurisdiction over the parties and the subject matter of this appeal pursuant to Act 537. 35 P.S. § 750.16(b).

3. The *Field Manual for Pennsylvania Sewage Enforcement Officers* is a guidance document for SEOs and does not have the force or effect of law or regulations.

4. The regulatory requirement that there be "at least one soil sample" is satisfied by one soil sample. 25 Pa. Code § 73.14(a)(1).

5. The soil testing on the Stackhouse Lot conducted by Limestone Township SEO, Mr. Kreger on April 23, 2013 was performed in accordance with the Department's rules and regulations.

6. The Board's review of the Stackhouse Planning Module and the evidence presented at hearing showed that the requirements of Act 537 and the Sewage Facilities Planning Regulations were satisfied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SHANE M. WINNER	:	
	:	
v.	:	**EHB Docket No. 2013-120-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LIMESTONE TOWNSHIP SUPERVISORS, Permittee	:	

ORDER

AND NOW, this 8th day of December, 2014, it is hereby ordered that this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: December 8, 2014

c: **DEP, General Law Division:**
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Office of Chief Counsel – Northcentral Region

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Muncy, PA 17756

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MANN REALTY ASSOCIATES, INC.	:	
	:	
v.	:	**EHB Docket No. 2013-153-M**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 11, 2014**

OPINION IN SUPPORT OF ORDER GRANTING MOTION TO WITHDRAW AS COUNSEL

By Richard P. Mather, Judge

Synopsis

The Board grants a motion by an appellant's counsel requesting to withdraw as counsel where the appellant's counsel has a substantial unpaid bill, where counsels continued representation of appellant will create an unreasonable financial burden on counsel's sole practitioner law practice, where the deterioration of the attorney-client relationship between counsel and appellant would make it impossible for counsel to prepare for the upcoming trial, and where, by canceling an upcoming hearing and providing the appellant with a period of time to obtain new counsel, the withdrawal of appearance will not have a material adverse effect on the interests of the appellant, will not prejudice the litigants, will not delay resolution of the case and will not impede the efficient administration of justice.

O P I N I O N

The Appellant, Mann Realty Associates, Inc. ("Mann Realty"), filed an appeal before the Environmental Hearing Board (the "Board") objecting to an order issued by the Department of Environmental Protection (the "Department") which found that Mann Realty had violated

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http://ehb.courtapps.com

various provisions of Pennsylvania's Solid Waste Management Act, 35 P.S. §§ 6018.101-6018.1003, and the Clean Streams Law, 35 P.S. §§ 691.1-691.1001, and directed Mann Realty to take certain corrective actions to identify, inventory and dispose of materials on property owned by Mann Realty (the "Order"). Mann Realty is a corporation authorized to conduct business in Pennsylvania[1]. Mann Realty appealed the Department's issuance of the Order on August 23, 2013.

A hearing was scheduled to begin in this matter on September 11, 2014. Both parties filed pre-hearing memoranda in anticipation of the hearing. On August 18, 2014, after the deadline for dispositive motions had passed, the Department filed a Motion to Dismiss the appeal for mootness. The Board ordered the Appellant to respond to the Department's Motion to Dismiss by August 29, 2014. On August 29, 2014, Mr. Robert B. Eyre Esquire Foehl & Eyre, P.C., Appellant's former counsel, filed a Motion to Withdraw as Counsel to Mann Realty Associates, Inc. (the "Motion to Withdraw"). The Motion to Withdraw was accompanied by a request to adjourn the upcoming hearing and a request for additional time to respond to the Department's Motion to Dismiss. Mann Realty ultimately filed a response to the Department's Motion to Dismiss. On September 9, 2014, the Board granted Mr. Eyre's Motion to Withdraw.

On October 6, 2014, Mr. Shaun O'Toole, Esquire filed a notice of appearance on behalf of Mann Realty Associates. On October 29, 2014, The Board ordered a hearing scheduled for January 27, 2015, as well as a pre-hearing conference scheduled for January 15, 2015. On November 25, 2014, Mr. O'Toole filed a Motion to Withdraw as counsel to Mann Realty. On January 5, 2014, the Board issued two separate orders: one granting Mr. O'Toole's Motion to

[1] Robert M. Mumma, II ("Mr. Mumma") is a principal in and the Vice President of Mann Realty. At the time that Mr. O'Toole entered his appearance in this appeal to represent Mann Realty, Mr. O'Toole represented Mr. Mumma, in his individual capacity in various matters before the Cumberland County Orphan's Court and the Pennsylvania Superior Court.

Withdraw, and one canceling the hearing scheduled for January 27, 2015. This opinion is in support of the Board's order granting the Motion to Withdraw.

Mr. O'Toole provides two reasons in support of his Motion to Withdraw. First, Mr. O'Toole believes that continued representation of Mann Realty will result in an unreasonable financial burden on him and his firm. Mr. O'Toole claims that Mann Realty owes Counsel in excess of $24,000.00 for legal services rendered. Despite Mr. O'Toole's numerous e-mails and discussions with Mann Realty regarding the payment for Mr. O'Toole's legal services, Mann Realty has not paid its outstanding legal fees, nor has Mann Realty provided Mr. O'Toole with realistic alternatives to pay the fees. Mr. O'Toole asserts that if he were to continue as counsel for Mann through the trial, he would generate an additional $12,000.00 in legal fees for which he will not be compensated, bringing the total owed by Mann Realty to Counsel in excess of $36,000.00. Mr. O'Toole is a sole practitioner without the resources of a medium or large law firm. Mr. O'Toole's continued representation of Mann Realty without compensation would create an unreasonable financial burden on Mr. O'Toole's law practice.

Second, Mr. O'Toole claims that his attorney-client relationship with Mann Realty has deteriorated and Mann Realty has severed the relationship to the point that continued representation has been rendered unreasonably difficult. Due to the deterioration of the attorney-client relationship between Mr. O'Toole and Mann Realty, Mr. O'Toole asserts that it would be impossible for him to prepare an upcoming hearing.

During the call that the Board scheduled to discuss Mr. O'Toole's Motion to Withdraw, Mr. O'toole stated that Mr. Mumma severed the attorney-client relationship between Mr. O'Toole and Mr. Mumma and requested that Counsel request to withdraw as counsel in the matters in which Mr. O'Toole represents Mr. Mumma and his business entities. The Mann

Realty appeal is one of those matters. Mr. Mumma was invited to participate in the call regarding Mr. O'Toole's motion, but he declined to participate and offer any further insight[2].

Under the Pennsylvania Rules of Professional Conduct, a lawyer may withdraw from representing a client if:

> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
>
> . . .
>
> (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
>
> (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
>
> (7) other good cause for withdrawal exists.

Pa. R.P.C 1.16(b). In ruling on a motion to withdraw as counsel, the Board considers the following factors: "the reasons why withdrawal is requested; any prejudice withdrawal may cause to the litigants; delay in resolution of the case which would result from withdrawal; and the effect of withdrawal on the efficient administration of justice." 25 Pa. Code § 1021.23(b); *Manning v. DEP*, 2013 EHB 845, 847.

We agree with Mr. O'Toole's reasons for requesting withdrawal. By failing to pay its bill, Mann Realty has failed substantially to fulfill an obligation to Mr. O'Toole regarding his services, and the continued representation of Mann Realty will result in an unreasonable financial burden on Mr. O'Toole and his firm. Mann Realty was provided reasonable warning that Mr. O'Toole would withdraw unless Mann Realty's obligations to Mr. O'Toole were met. Instead of fulfilling its obligations, Mann Realty has severed its relationship with Mr. O'Toole. Mr. Mumma has taken the affirmative step to sever the attorney-client relationship in all matters

[2] Mr. Mumma did participate in the Board's earlier conference call to consider the Motion to Withdraw of Mann Realty's prior counsel, Mr. Robert B. Eyre. Mr. Eyre's withdrawal prompted Mann Realty to retain Mr. O'Toole.

where Mr. O'Toole represents Mr. Mumma or his business interests such as Mann Realty and directed Mr. O'Toole to seek to withdraw in all such matters. Mann Realty's failure to provide compensation and cooperation necessary for effective representation and preparation for a hearing has rendered Mr. O'Toole's representation of Mann Realty unreasonably difficult. Mr. O'Toole's Motion to Withdraw set forth a compelling argument to support withdrawal. Under these circumstances, good cause for withdrawal exists.

Further, based on the Board's orders canceling the upcoming hearing and providing Mann Realty with a period of time to retain new counsel, the Board does not believe that the withdrawal of Mr. O'Toole will cause any prejudice to the litigants or will have a material adverse effect on Mann Realty's interests. In addition, if, for example, Mann Realty's new attorney prefers a legal strategy that differs from the approach taken by Mr. O'Toole, that attorney may request leave to amend certain documents filed on behalf of Mann Realty, such as its Notice of Appeal or its pre-hearing memorandum. Finally, the withdrawal of Mr. O'Toole will not impede the efficient administration of justice. The relationship between Mann Realty and Mr. O'Toole has deteriorated to the point where requiring the two to continue their difficult relationship would actually have a deleterious effect on the efficient administration of justice. By requiring Mann Realty to retain new counsel, we are promoting the efficient administration of justice in this matter.

For all of these reasons, we issued an order granting the Motion to Withdraw as Counsel to Mann Realty Associates, Inc. A copy of that order is attached.

ENVIRONMENTAL HEARING BOARD

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

DATED: December 11, 2014

c: **DEP, General Law Division:**
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Harrisburg, PA 17101

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MANN REALTY ASSOCIATES, INC.	:	
	:	
v.	:	**EHB Docket No. 2013-153-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 5th day of December, 2014, in consideration of a Motion of Shaun E. O'Toole, Esquire to Withdraw as Counsel to Mann Realty Associates, Inc., filed on November 25, 2014, as well as a conference call between the parties, it is hereby ordered that the Motion to Withdraw as Counsel to Mann Realty Associates, Inc. is **granted**, and it is further ordered that under 25 Pa. Code § 1021.21(b), which requires corporations to be represented by an attorney of record admitted to practice before the Supreme Court of Pennsylvania, Mann Realty Associates, Inc. shall retain new counsel and shall have counsel enter an appearance in this matter by no later than **January 5, 2015**.

ENVIRONMENTAL HEARING BOARD

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

DATED: December 5, 2014

c: **For the Commonwealth of PA, DEP:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF KUTZTOWN AND KUTZTOWN MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2014-064-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, MAXATAWNY TOWNSHIP, Permittee, and ADVANTAGE POINT, LP, Intervenor	:	**Issued: December 16, 2014**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board sustains an appeal filed by a permittee and owner of a sewer line from a Department approval of a request for a sewage facilities planning exemption for a new land development. The Department approved the request without the permittee having provided a written certification of capacity as required by 25 Pa. Code § 71.51(b)(2)(iii).

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, 35 P.S. §§ 750.1 – 750.20a, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated thereunder. (Stipulation ("Stip.") 1.)

2. The Borough of Kutztown is a borough organized under the laws of the Commonwealth of Pennsylvania, with its principal office at 45 Railroad Street, Kutztown, Berks County, Pennsylvania 19530. (Stip. 2.)

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http://ehb.courtapps.com

3. Kutztown Municipal Authority is a municipal authority incorporated under the Municipality Authorities Act of 1945, 53 Pa.C.S.A. §§ 5601 – 5623, with its principal office at 45 Railroad Street, Kutztown, Berks County, Pennsylvania 19530. (Unless otherwise noted, the Borough of Kutztown and the Kutztown Municipal Authority shall be collectively referred to as "Kutztown.") (Stip. 3.)

4. Maxatawny Township ("Maxatawny") is a township of the second class organized under the laws of the Commonwealth of Pennsylvania, with its principal office at 127 Quarry Road, Suite I, Kutztown, Berks County, Pennsylvania 19530. (Stip. 4.)

5. Advantage Point, LP ("Advantage Point") is the owner and developer of a parcel of real estate located in Maxatawny commonly known as the Advantage Point Apartments. (Stip. 5.)

6. The Advantage Point Apartments are to consist of three buildings and 337 units, along with a clubhouse facility. (Stip. 6; Notes of Transcript page ("T.") 238-39.)

7. The Advantage Point Apartments were planned with the idea that about 69,000 gallons per day (gpd) of sewage from the development would flow into a Maxatawny sewer line. All of Maxatawny's sewage in the line, including Advantage Point's sewage, would be measured, and then flow into a 20-inch sewer interceptor line owned by the Borough of Kutztown, where it commingles with Kutztown's sewage. (Stip. 7, 9; T. 137, 267; Maxatawny Exhibit ("M. Ex.") 36.)

8. After flowing in Kutztown's interceptor for a certain distance, the amount of commingled sewage corresponding to the amount of measured flow originating from the upstream Maxatawny line is split off and directed to a sewer plant in Maxatawny, which is owned and operated by the Maxatawny Township Municipal Authority. (T. 86-87, 262.)

9. Kutztown's interceptor is the only existing way to get Advantage Point's sewage to the treatment plant in Maxatawny. (T. 259.)

10. Sewage that is not diverted by the flow splitter continues down the line to a Kutztown plant. (T. 84, 87.)

11. A program of intermunicipal cooperation between Kutztown Borough, Kutztown Municipal Authority, Maxatawny, and Maxatawny Township Municipal Authority, including Maxatawny's use of Kutztown's interceptor, was the subject of an Intermunicipal Sanitary Sewage Service and Treatment Agreement entered into between the parties on or about May 4, 2006. (Kutztown Exhibit ("K. Ex.") 9.)

12. The parties agreed to form a joint municipal authority to be called the Saucony Creek Regional Authority. (K. Ex. 9.)

13. A contentious relationship has now developed between Kutztown and Maxatawny that has manifested in ongoing litigation concerning the continuing viability of the intermunicipal agreement and the program for intermunicipal cooperation embodied in that agreement. (T. 210-11; K. Ex. 7, 8.)

14. It is Kutztown's view that Maxatawny cannot use its interceptor for the Advantage Point sewage if the intermunicipal agreement is no longer viable. (T. 210-11; K. Ex. 8.)

15. The Department has at all relevant times been aware of the dispute between Maxatawny and Kutztown. (Stip. 12; T. 25-26, 36.)

16. In the midst of this dispute, Advantage Point, on behalf of Maxatawny, submitted a sewage facilities planning exemption request to the Department on February 25, 2014. (K. Ex. 1.)

17. An exemption request seeks permission from the Department to be excused from the more extensive sewage facilities planning that would normally be required for a new development. (T. 29, 57; K. Ex. 1.)

18. The requirements for obtaining an exemption from planning are contained in 25 Pa. Code § 71.51(b)(2), which reads as follows:

> Revisions for new land development and supplements are not required for subdivisions proposing a connection to or an extension of public sewers when all of the following have been met:
>
> (i) The Department or delegated agency determines that existing collection, conveyance and treatment facilities are in compliance with The Clean Streams Law and the rules and regulations thereunder.
>
> (ii) The Department or delegated agency determines that the permittees of the receiving sewerage facilities have submitted information under Chapter 94 (relating to municipal wasteload management) which documents that the existing collection, conveyance and treatment system does not have an existing hydraulic or organic overload or 5-year projected overload.
>
> (iii) The applicant has provided written certification from the permittees of the collection, conveyance and treatment facilities to the municipality in which the subdivision is located and the Department or delegated agency with jurisdiction over the municipality in which the subdivision is located that there is capacity to receive and treat the sewage flows from the applicant's proposed new land development and that the additional wasteload from the proposed new land development will not create a hydraulic or organic overload or 5-year projected overload.
>
> (iv) The municipality has a current approved sewage facilities plan update revision which is being implemented. For the purposes of exempting a subdivision from completing sewage facilities planning under this section, the phrase "a current approved sewage facilities plan update revision which is being implemented" shall include official plans of municipalities which are not under an order from the Department to submit an update revision or special study for the area in which the subdivision is proposed.

19. The Department interprets 25 Pa. Code § 71.51(b)(2) to mean that an applicant for an exemption *must* obtain a certification from the permittee(s) of the sewage facilities that are

proposed to be used. Even if a certification is withheld for an improper reason or no reason at all, an exemption is not available under the Department's interpretation. (T. 16, 216-17, 219, 223.)

20. If the exemption cannot be obtained, the applicant must go through the normal planning process. (T. 66, 217.)

21. The normal planning process, however, also requires a similar certification in Section J of Component S of the planning modules. (T. 67-68, 217-18.)

22. If the certification is not obtained for whatever reason, the Department will not approve the planning modules. (T. 218-19.)

23. Among other things, the exemption package supplied by the Department includes a form, the use of which is not mandatory, that includes the following at Section 8.d:

> d. Public Sewerage Service (i.e., ownership by municipality or authority)
>
> Based upon written documentation, I certify that the facilities proposed for use have capacity and that no overload exists or is projected within 5 years. (Attach documents.)
>
> _____ / _____
> (Signature of Municipal Official) Date
>
> _____ / _____
> Name (Print) Title
>
> _____
> Municipality (must be same as in 2.b.)
>
> Telephone # _____

(K. Ex. 1.)

24. In its exemption request, Advantage Point filled out most of the form but left Section 8.d blank, and it did not otherwise include a certification from Kutztown as required

under 25 Pa. Code § 71.51(b)(2)(iii) that the use of Kutztown's interceptor would not cause an overload. (K. Ex. 1.)

25. The Department sent Maxatawny an incompleteness letter on March 21, 2014, which reads as follows:

> The subject module received on February 28, 2014 has been reviewed and is incomplete for the following reasons:
>
> 1. Since the sewage flows from this development will flow through Kutztown Municipal Authority's University Village interceptor, a signed written certification statement from Kutztown Municipal Authority is needed. I have attached a copy of the written certification form for your convenience.
>
> Failure to submit a complete planning module within 60 days will result in disapproval.

(T. 20-21; K. Ex. 2.)[1]

26. The Department attached a form of certification to its incompleteness letter. That form is not mandatory, but it may be used in lieu of completing Section 8.d of the basic exemption form. (K. Ex. 2.)

27. The form asks for the signature of an "Authorized Official" certifying capacity. (K. Ex. 2.)

28. Maxatawny did not complete the alternate certification form. (T. 33.)

29. The Department routinely accepts certifications without the use of any particular form. (T. 30-31.)

---

[1] This letter and other documents incorrectly referred to Kutztown's "University Village interceptor" when in fact Advantage Point's sewage would flow into Kutztown's Interceptor Main. (Stip. 7, 8, 9.) The parties all agree that this error has no significance. Furthermore, the interceptor in question is actually owned by Kutztown Borough, not the Kutztown Municipal Authority (T. 56, 92), but that mistake is also of no moment in this appeal. Still further, it would have been more accurate to refer to an exemption request rather than "complete planning module," and there is no regulatory requirement to submit a complete exemption request within 60 days of receiving an incompleteness letter.

30. At some point, Advantage Point's exemption request was forwarded to Kutztown's engineer, Darryl A. Jenkins, P.E. of the SSM Group, Inc., for comment. (T. 79.)

31. Jenkins sent a letter dated April 15, 2014 to Gabriel Khalife, the Kutztown Borough Manager, providing his comments regarding Maxatawny's exemption request. (Stip. 10; K. Ex. 5.)

32. Due to its central importance in this case, the body of Jenkins's letter is quoted here in its entirety:

> This letter is provided as a review of the recently submitted Sewage Facilities Planning Module[2] for the proposed Advantage Point Apartments projects located along Baldy Road in Maxatawny Township. As background information, the comments contained in this letter are directed toward the "Planning Module Exemption" package that was provided to us for review via email on March 29, 2014 (and updated on April 3, 2014). The Planning Module was initially provided to the Reading office of the PA Department of Environmental Protection on February 28, 2014. This correspondence amends our initial letter dated April 9, 2014.
>
> As previously noted, the project is located within the area designated for service by the Maxatawny Township Municipal Authority per the Saucony Creek Regional Authority (SCRA) service agreement. Sewage from this proposed project would eventually drain to the Koffee Lane sewage pumping station, and subsequently be discharged to the Borough of Kutztown's 20" diameter sewer interceptor.
>
> The PA DEP provided a single review comment regarding the planning module, whereby it requested that the Borough of Kutztown provide certification that the proposed sewage discharge is able to be accommodated within the Borough's sewage interceptor, and that the additional proposed flow of 69,544 gpd will not create a 5 year projected hydraulic overload within the interceptor or other Borough related facilities. The language in the PA DEP review letter refers to the University Village Interceptor, but that pipeline is not the facility that would be utilized by the proposed project.
>
> We provide the following comments regarding the technical/administrative components of the Planning Module:
>
> 1. The planning Module is administratively complete and contains the required information needed for review.

[2] The letter mistakenly repeatedly characterizes the request for an exemption as a planning module.

With respect to the request for certification of the proposed flow of 69,544 gallons per day to be added to the interceptor, the following comments apply. Our review is based on current flow data from the Borough of Kutztown's and the Maxatawny Township Municipal Authority's Chapter 94 Reports for Year 2013, and the provisions of the existing Saucony Creek Regional Authority (SCRA) Agreement and on the provisions of the SCRA Agreement related to the allocation of capacity in the Kutztown Interceptor.

1. Our calculations show that the Borough's 20" interceptor has sufficient capacity to accommodate an average daily flow of 1,200,000 gallons per day through its critical section. The five-year annual average flow from the Borough through the interceptor is 876,000 gallons per day. Capacity of approximately 300,000 gallons per day is available in the critical portion of the interceptor at this time, subject to normal variations due to inflow and infiltration.
2. The SCRA Agreement requires that an allocation of 150,000 gallons per day be provided in the Kutztown Interceptor for transportation of Maxatawny Township "ultimate" sewage flows. Approximately 26,174 gallons per day (per the 2013 Maxatawny Township Municipal Authority Chapter 94 Report) of the allocation is currently being used for the transportation of the Township's sewage flows.
3. It is our understanding that on December 27, 2013 Maxatawny Township Municipal Authority filed a Declaratory Judgment action against Kutztown Borough and Kutztown Municipal Authority seeking to have the SCRA Agreement declared to be terminated. The Intermunicipal Sanitary Sewage and Treatment Agreement relied upon by the Developer for capacity in the University Interceptor has as its consideration for capacity in said interceptor the Borough of Kutztown's reserved capacity in the SCRA Treatment Plant.

In summary:

- The Kutztown Interceptor has reserve flow capacity of approximately 300,000 gallons per day, with 150,000 gallons per day of that amount allocated to transport ultimate flows from Maxatawny Township.
- From the 150,000 gpd of available capacity for sewage flows emanating from Maxatawny Township, 26,174 gpd of that allocation is in use. Approximately 123,826 gpd of the allocation remains available.
- The proposed sewage flow from the Advantage Point Apartments project totals 69,544 gallons per day. The Borough should request a full accounting from Maxatawny Township of

the aggregate amount of sewage flows which are proposed to be connected to the Interceptor to ensure that the prescribed allocation of 150,000 gpd of flow is not exceed [sic]. All flows entering the Kutztown system through the Koffee Lane connection are to be diverted to the SCRA facility, and the Borough should have assurance that no more than 150,000 gpd of flow will be contributed. It is important to confirm committed capacity, actual connections, remaining connections for the committed capacity, and proposed connections, inclusive of the Advantage Point Apartments project. The Borough is aware that all of the mandated connections within Maxatawny Township have not yet been completed, and the Year 2013 Chapter 94 Report flows for the MTMA cannot be considered final or definitive since usage will continue to increase as additional mandated connections for failed on-lot systems are made.

- Until the issue is resolved regarding whether or not the SCRA agreements remain in full force and effect, it would seem that the Township and MTMA's authority to flow sewer through the Kutztown Interceptor is at issue and must be resolved.

The Kutztown Interceptor would be able to accommodate the proposed flows from the Advantage Point Apartments should the Borough decide to approve the Planning Module.[3] However, the total amount of flow being contributed within the Maxatawny Township allocation and the validity of the SCRA agreements should first be addressed. Therefore, it is recommended that the appropriate representatives from Maxatawny Township or its Authority be contacted to resolve the issue.

As you are aware, Mr. James Dimmerling (engineer for the developer) was present at the April 9, 2014 meeting of the Borough's Water/Wastewater committee, and he took exception to our statement that there was 75,000 gpd of capacity available in the Kutztown Interceptor for use by Maxatawny Township projects. We have since reviewed the SCRA Agreement with respect to the allotted capacities in the interceptor, and have confirmed that Maxatawny was provided a total flow allocation of 150,000 gpd from identified service areas, those being the orange, brown, and white areas depicted in "Exhibit A."

Please contact us should you have any questions, or require any additional information.

(K. Ex. 5.)

[3] Again, the letter should have said "sign off on the exemption request" rather than "approve the Planning Module."

33. The key points that emerge from the letter are as follows:

- About 300,000 gallons per day of reserve flow capacity exists in the interceptor;
- Maxatawny had been allocated about 150,000 gpd of that amount;
- Maxatawny is only using 26,174 gpd so far;
- Thus, 123,826 gpd of Maxatawny capacity is available today;
- The Advantage Point project would use 69,544 gpd;
- Although the interceptor could currently handle the 69,544 gpd of additional flow from Advantage Point, Kutztown's engineer was concerned about two things:
    - First, he advised Kutztown to get a full accounting of all anticipated flows from all sources to ensure that the 150,000 gpd of flow allocated to Maxatawny would not be exceeded;
    - Second, he said it was uncertain whether Maxatawny still had the legal ability to use the interceptor under the intermunicipal agreement that was now in litigation, and this issue should be resolved before Kutztown signed off on the exemption.

(T. 111; K. Ex. 5.)

34. Jenkins has not been asked to review any additional information since he sent his letter to Kutztown, so in his opinion his concerns are still unresolved. (T. 138-40, 144-45.)

35. Khalife, Kutztown's Borough Manager, pursuant to the instructions of Borough Council, forwarded Jenkins's letter to Maxatawny on April 16, 2014. The forwarding letter read as follows:

> Attached please find correspondence from the Borough's engineer regarding the Planning Module for the Advantage Point Apartments project. The engineer has recommended that the Borough request a detailed accounting of the committed capacity to be conveyed through the Koffe [sic] Lane pumping station to ensure that the 150,000 gallon per day flow requirement is not exceeded. The Borough does not wish to be placed in the position of treating any excess sewage flows that cannot be diverted to the SCRA facility, and therefore it is important to define committed capacity; the number of existing connections; remaining connections for the committed capacity; and, projected flows, including calculations demonstrating how the flow projections were derived.

(K. Ex. 6.)

36. Jenkins's April 15 letter was not intended as a recommendation that Kutztown sign off on the exemption. (T. 89-90.)

37. Jenkins's letter was not a certification on behalf of Kutztown that capacity was available in its interceptor now and/or for the next five years. (T. 91, 166, 168, 181-85, 209-12.)

38. Kutztown did not authorize Jenkins to provide a certification. (T. 91, 168.)

39. Kutztown only asked Jenkins to review the exemption request and prepare comments. (T. 91, 164.)

40. The Department was not copied on the letter, and neither Jenkins nor Kutztown sent the letter to the Department. (T. 22; K. Ex. 5.)

41. Although Kutztown did not tell Jenkins to provide a copy of his comments to Advantage Point or Maxatawny (T. 189-90), Advantage Point's engineer nevertheless obtained a copy of the letter from Jenkins (T. 47, 116-17, 237).

42. Advantage Point's engineer sent a copy of the letter to the Department without clearing it with Kutztown, and asked if the letter could serve as the required certification of Kutztown. (T. 47, 52-53, 238.)

43. The Department did not contact either Jenkins or Kutztown about the letter to ask whether it was intended as Kutztown's certification. (T. 22, 26, 43, 55-56, 104, 224.)

44. The Department treated Jenkins's letter as if it were the written certification of current and future capacity that is required under 25 Pa. Code § 71.51. (T. 22, 47-48, 53-54, 217, 223-24, 238.)

45. On April 30, 2014, the Department granted the exemption in a letter to Maxatawny Township, which provided as follows:

> This confirms the Department's determination that the above referenced project is exempt from the requirement to revise the official plan for new land development. This determination is based in part on municipal and other sign-offs.
>
> The project will be connected to the Maxatawny Township Municipal Authority and the Kutztown Borough Authority collection system and will generate 69,544 gallons of sewage per day to be treated at the Maxatawny Township Municipal Authority Wastewater Treatment Facility.

(K. Ex. 4.)

46. This appeal by Kutztown followed.

DISCUSSION

On April 30, 2014, the Department of Environmental Protection (the "Department") granted Maxatawny Township's request for an exemption from the regulatory requirement to revise its official plan to accommodate a new land development, the Advantage Point Apartments project, owned and developed by Advantage Point, LP. The Advantage Point Apartments are projected to generate about 69,000 gallons per day (gpd) of sewage. That sewage would flow into a Maxatawny sewer line where the sewage is measured before connecting to a 20-inch sewer interceptor line owned by the Borough of Kutztown, commingling with Kutztown's sewage. After flowing in the Kutztown interceptor, an amount of commingled

sewage commensurate with that originating from Maxatawny is split off and directed to a Maxatawny Township Municipal Authority sewage plant, with the remainder flowing to a Kutztown plant. Kutztown's interceptor is the only way that Advantage Point's sewage can reach the Maxatawny plant.

The Borough of Kutztown and the Kutztown Municipal Authority appealed the exemption, arguing, among other things, that in order for the exemption to be granted, Kutztown would have had to provide a written certification that its interceptor line had sufficient capacity to handle the additional sewage from the Advantage Point Apartments. *See* 25 Pa. Code § 71.51(b)(2)(iii). Although Kutztown's engineer prepared a letter for Kutztown analyzing whether the interceptor line had sufficient capacity, Kutztown claims that it never provided the required certification and, therefore, the Department improperly granted Maxatawny's request for an exemption. The Department, Maxatawny, and Advantage Point generally take the position that Kutztown's engineer's letter was enough to serve as a certification, that regardless of the certification Kutztown's line does in fact have sufficient capacity, and that the exemption was properly approved by the Department.

Section 71.51(b)(2)(iii) of Title 25 of the Pennsylvania Code states that the sewage facilities planning that would ordinarily be required for a subdivision proposing to connect to existing public sewers is not necessary if the municipality (among other things) provides "written certification from the permittees of the collection, conveyance and treatment facilities...that there is capacity to receive and treat the sewage from the applicant's proposed new land development and that the additional wasteload from the proposed new development will not create a hydraulic or organic overload or 5-year projected overload." This regulatory requirement for a certification makes perfect sense. A plan for handling sewage should not be

approved unless the parties who will be actually handling the sewage certify that they have the capacity to handle the flow.

The requirement to obtain a certification is mandatory. The Department does not have the authority to waive the requirement. The Department acknowledges this point. (Findings of Fact ("FOF") 19-22.) The Department may not ignore the regulatory requirement for a certification from the permittee even if the Department independently determines that capacity is in fact available. Likewise, the written certification from the permittees whose facilities will be used is required even if the Department independently determines that there is in fact no existing or projected overload. Section 71.51(b)(2) lists the requirements for obtaining an exemption and then says they "all" must be met. Section 71.51(b)(2) requires *both* a Departmental finding (25 Pa. Code § 71.51(b)(2)(ii)) *and* a written certification from the permittee (25 Pa. Code § 71.51(b)(2)(iii)) of present and future capacity.[4]

Because the requirement for a certification is mandatory and cannot be waived, it follows that a permittee's reasons for withholding a certification are irrelevant from the Department's perspective. Again, the Department concedes as much. (T. 216-221.) A certification may be withheld for any reason or no reason at all, but since the requirement cannot be waived, the reasons do not matter. There is no occasion for the Department (or this Board) to scrutinize the permittee's motivation in withholding its certification.

Here, Kutztown has withheld its certification regarding the use of its interceptor. Maxatawny and Advantage Point complain bitterly that they are being held hostage to Kutztown's unreasonable and unfair demands regarding the use of its interceptor. We are not

[4] To the extent that the parties argue that the certification requirement *should* be waivable, that argument must be made to the Environmental Quality Board, which promulgates regulations, not us. To the extent the appellees argue that Kutztown can be forced to execute a certification by injunction, mandamus, order, or otherwise, that is an issue for another day and/or another tribunal. This appeal is limited to the question of whether a certification was in fact issued.

convinced that Kutztown's position is unreasonable or unfair, but even if it were, it would not matter. Maxatawny *must* obtain Kutztown's certification or its request for an exemption from planning requirements cannot be approved under 25 Pa. Code § 71.51.[5]

Although there is no question that a certification is required, the Department says that it has a certain amount of flexibility in determining whether a particular submittal constitutes a certification. It adds that no particular municipal official is required to execute the certification. We agree with both points. No particular form or attesting municipal official is required so long as it is clear that a person who is authorized to do so certifies that current and five-year capacity are available. The Department need not elevate form over substance. *See City of Philadelphia v. DEP,* EHB Docket No. 2013-074-L (Opinion issued Mar. 19, 2014).

The Department goes too far, however, by suggesting that certification by a person with *apparent*, as opposed to *actual*, authority is sufficient. It suggests in its brief that it was reasonable to accept Kutztown engineer Darryl A. Jenkins's letter as a certification because Jenkins had apparent authority to certify capacity. He is said to have apparent authority because the large engineering firm that employs Jenkins submitted comments concerning sewage facilities matters to the Department on behalf of Kutztown back in 2007. There is nothing in the Department's testimony (as opposed to its brief) that supports this interpretation, which is

[5] One of the side benefits of the certification requirement is that neither the Department nor the Board is forced to take sides in the context of a request for an exemption from planning requirements when there is an underlying dispute between the parties. Here, from Maxatawny and Advantage Point's perspective, Maxatawny has a new, underutilized plant that needs more flow in order to ease the burden on existing ratepayers. The Advantage Point flow would help a great deal, but the only way to get that flow to the plant is through Kutztown's line. There is no obvious lack of current capacity in the line. Kutztown's interest, on the other hand, arises not only with respect to the line itself, but from the fact that the Maxatawny sewage that is not or cannot be diverted back to Maxatawny's treatment plant after flowing in the interceptor (e.g. if that plant lacked capacity) inevitably flows to Kutztown's downstream plant. The parties' plan for intermunicipal cooperation seems to have fallen apart, which has resulted in ongoing litigation in the Court of Common Pleas and Commonwealth Court, but the merits of that dispute are not before this Board.

fortunate because such an interpretation would be clearly erroneous. Putting aside the strained and remote connection between comments in 2007 and the request for a planning exemption in 2014, suggesting that a person pretending to have authority can commit an unwilling permittee to make its facilities available is inconsistent with the letter and the spirit of the regulation. The person certifying capacity on behalf of the permittee under 25 Pa. Code § 71.51(b)(2)(iii) *must* have *actual* authority to act on behalf of the permittee.

The testimony is very clear and it is in fact undisputed that Jenkins had no actual authority to certify capacity on behalf of Kutztown. (FOF 36-40.) Kutztown did not authorize Jenkins to certify capacity. Indeed, it did not even authorize him to communicate directly with the Department. The letter is clearly addressed to Kutztown, not Maxatawny, Advantage Point, or the Department. Jenkins viewed himself as providing comments for the sole use of his client. He did not intend the letter to substitute for a certification. He did not hold himself out as having any authority. Nothing that he said or did supports a finding that he had the authority to certify capacity on behalf of Kutztown.

Lest there be any doubt, Kutztown followed up on Jenkins's comments by directing its borough manager to forward the comments to Maxatawny for a response. The manager's cover letter confirmed that questions needed to be answered before certification would be provided. (FOF 35.) This is wholly inconsistent with the notion that Jenkins was authorized to bind his client or that the letter was intended to serve as Kutztown's certification. Kutztown's review was ongoing. The Department inexplicably cut short that review.

Even if we assume *arguendo* that Jenkins had the necessary authority, the letter itself cannot fairly be characterized as an actual certification of capacity. Interestingly, no party in this case contends that Kutztown intended Jenkins's letter to be a certification. Clearly it did not.

Indeed, the letter rather clearly says that the Borough should *not* provide certification until some questions are resolved.

Here again, the Department exceeds the bounds of reason by arguing that it may simply ignore the undisputed fact that Kutztown did not intend to certify capacity and treat the letter as if it were a *de facto* certification. The regulatory language that a permittee must "certify" capacity should be respected. To certify means to attest authoritatively or officially, to inform with certainty. *Penn Square Gen. Corp. v. Lancaster Cnty.*, 936 A.2d 158, 173-74 (Pa. Cmwlth. 2007) (citing MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 11th ed. 2004). The concept of "certifying" something does not allow for disregarding a permittee's intent or relying on nebulous language. Any doubts regarding language that is less than authoritative, certain, or official should be resolved against a finding that there has been a "certification." *Cf. City of Philadelphia v. DEP, supra* (Department erred by issuing major modification to a permittee's solid waste permit even though it knew that the landowner of the site did not approve of the modification).

Jenkins's letter on its face never uses the word certify. The letter instead raises unanswered concerns and advises Kutztown to get those questions resolved before committing to the use of its line. In addition, the letter never affirmatively says that there will not be a five-year projected overload. The Department's standard exemption form provides that the certification should be "based upon written documents" and indicates that the documents relied upon should be attached. Although these requirements are not regulatorily required, it is worth noting that no documents were referenced in or attached to Jenkins's letter.

Advantage Point says in its brief that the Department was entitled to *assume* the April 15, 2014 letter was intended for the Department's consideration. This is a telling statement because

it concedes, accurately, that the Department's reliance on the letter as a certification was at best an assumption on the Department's part. The Department admitted to having internal doubts about whether the letter should qualify as a certification. (T. 26-28, 47.) In cases like this where the facts are at the very least not clear, and the letter has not even been addressed to or sent directly to the Department, the Department really should not be assuming anything. A simple phone call would have sufficed. This seems to be a case of willful ignorance on the Department's part, which is difficult to justify or explain. Timothy Wagner, the Department employee who approved the exemption, testified as follows:

> Q. You've heard testimony today from several representatives of the borough; correct?
>
> A. Correct.
>
> Q. You've heard that the borough did not authorize there to be a written certification.
>
> A. Yes, I heard that.
>
> Q. You heard Mr. Jenkins say his letter was not intended to be a written certification.
>
> A. Yes.
>
> Q. Wouldn't you agree with me that in light of that, DEP should not have issued the exemption?
>
> A. None of that information was made available to me when we were looking at the letter, trying to determine what it was.
>
> Q. But you never contacted either Mr. Khalife, Mr. Jenkins, or anybody at the borough to find out what that letter was really intended for?
>
> A. That's correct.

(T. 224.)

The Department has at all relevant times been aware that the relationship between Maxatawny and Kutztown has broken down. Knowing this, the Department should have clarified whether Jenkins's letter was intended as a certification of capacity. Furthermore, once the project is built and connected to the line, the connection is as a practical matter irreversible,

which again warrants caution in case of doubt. It should also be remembered that this appeal involves the exemption from planning requirements. An exemption from planning requirements should be reserved for straightforward, uncomplicated, noncontroversial situations where everyone involved is on board and there are no complicating factors. This case is nothing like that. The need for rational planning with appropriate input from all concerned parties as well as the public would seem to be particularly acute in cases such as this.

Maxatawny invites us to bypass any further planning and simply approve the project based upon our *de novo* review. By doing so, however, we would be guilty of the same error as the Department; namely, bypassing the requirement in Section 71.51(b)(2)(iii) that the *permittee* sign off on the use of its facilities, which is in addition to and independent of the requirement in Section 71.51(b)(2)(ii) that the Department verify capacity. We can step into the shoes of the Department in this situation, but not into the shoes of the permittee.

To the extent Maxatawny argues that Kutztown's certification as a permittee is not required because Kutztown's line is not in Maxatawny Township, it is simply wrong. The requirement of Section 71.51(b)(2)(iii) is not limited to a permittee within the municipality in which the subdivision is located. The locus of the permittee is irrelevant. The operative fact is that its facilities, wherever they are, are being used to collect, convey, or treat sewage.

The Appellees tell us that the municipalities' latest Official Plans envisioned Maxatawny's use of Kutztown's line. They do not tell us exactly why this is relevant. It may be that they believe concepts of administrative finality or estoppel mean that Kutztown's certification is not required, but that belief is unfounded. The new land development unquestionably requires a plan revision or exemption from planning, and with that requirement comes a need for the permittee whose facilities will be used to sign off on the project.

There is only one issue in this case: Did Kutztown, a permittee whose line must be used to transport sewage from the proposed new land development, provide the written certification required under Section 71.51(b)(2)(iii)? It is very clear that it did not, which means that the Department erred in granting the planning exemption to Maxatawny Township for the Advantage Point project.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 750.16(b); 35 P.S. § 7514.

2. In third-party appeals of Department actions, an appellant bears the burden of proof. 25 Pa. Code § 1021.122(c)(2).

3. The appellant must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, or that its decision is not supported by the facts. *Solebury School v. DEP*, EHB Docket No. 2011-136-L, slip op. at 38 (Adjudication issued Jul. 31, 2014); *Gadinski v. DEP*, 2013 EHB 246, 269.

4. Exemptions from sewage facilities planning for a new land development require, among other things, written certification of capacity to treat the additional sewage from all permittees of the collection, conveyance, and treatment facilities. 25 Pa. Code § 71.51(b)(2)(iii).

5. The certification requirement is mandatory and cannot be waived or otherwise ignored, even if the Department independently determines that present and future capacity is in fact available. 25 Pa. Code § 71.51(b)(2).

6. To certify means to attest authoritatively or officially, to inform with certainty. *Penn Square Gen. Corp. v. Lancaster Cnty.*, 936 A.2d 158, 173-74 (Pa. Cmwlth. 2007) (citing MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 11th ed. 2004).

7. Jenkins's letter was not a certification on behalf of Kutztown that capacity was available in its interceptor now and/or for the next five years.

8. The Borough of Kutztown and Kutztown Municipal Authority proved by a preponderance of the evidence that the Department erred when it approved the planning exemption for the Advantage Point Apartments project without a written certification of capacity from Kutztown. 25 Pa. Code § 71.51(b)(2).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF KUTZTOWN AND KUTZTOWN MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2014-064-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, MAXATAWNY TOWNSHIP, Permittee, and ADVANTAGE POINT, LP, Intervenor	:	

ORDER

AND NOW, this 16th day of December, 2014, it is hereby ordered that this appeal is **sustained**. The Department's approval of Maxatawny's request for an exemption is reversed.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: December 16, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WEST PIKE RUN TOWNSHIP MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2014-141-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 18, 2014**

OPINION AND ORDER
ON DEPARTMENT'S MOTION TO DISMISS

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Environmental Hearing Board dismisses an appeal filed more than 30 days after the appellant received notice of the action. The Board lacks jurisdiction over an untimely filed appeal. A party's failure to respond to a dispositive motion is deemed to be an admission of all properly-pleaded facts in the motion.

OPINION

This matter involves an appeal filed by West Pike Run Township Municipal Authority (West Pike), challenging certain conditions in its NPDES permit issued by the Department of Environmental Protection (Department) on August 11, 2014. On October 31, 2014, the Department filed a motion to dismiss West Pike's appeal on the basis that it is untimely and, therefore, the Environmental Hearing Board (Board) lacks jurisdiction over it.

The Board's rules at 25 Pa. Code § 1021.52 address the timeliness of appeals. Section 1021.52(a) states in relevant part as follows:

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> (a) Except as specifically provided in § 1021.53 (relating to amendments to appeal or complaint), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, unless a different time is provided by statute:
>
> (1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.

According to the Department's motion, West Pike received the NPDES Permit by certified mail on August 15, 2014. The appeal was filed with the Board on October 8, 2014, fifty-four days after receiving the permit. Under the Board's rules the appeal is untimely.[1] *Maddock v. DEP*, 2001 EHB 1000, 1001 ("The Board lacks jurisdiction over an appeal by a person to whom a Departmental action is directed or issued if it is filed more than 30 days after the person received written notice of the action.") (*citing Rostosky v. Department of Environmental Resources*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *Broscious Construction Co. v. DEP*, 1999 EHB 383, 384.)

West Pike filed no response contradicting the Department's motion to dismiss, despite being given ample opportunity to do so. Under the Board's rules at 25 Pa. Code § 1021.94(b), West Pike had 30 days, or until December 1, 2014, to respond to the Department's motion. When no response was received by that date, the Board gave West Pike an additional opportunity to respond on or before December 9, 2014. Again, no response was filed. A party's failure to respond to a dispositive motion is deemed to be an admission of all properly-pleaded facts in the motion. 25 Pa. Code § 1021.91(f); *Burnside Twp. v. DEP*, 2002 EHB 700, 701.

[1] According to West Pike's notice of appeal, it received the permit on August 18, 2014. However, the Department filed the signed certified delivery notice in support of its motion, which shows that the receipt was signed on August 15 (Exhibit B to Motion). Whether we accept August 15 or August 18 as the date of delivery, in either case the appeal is untimely.

Because the Board lacks jurisdiction over an untimely appeal, we enter an order dismissing this matter.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WEST PIKE RUN TOWNSHIP MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2014-141-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 18th day of December, 2014, it is hereby **ORDERED** that the appeal of West Pike Run Township Municipal Authority at EHB Docket No. 2014-141-R is **dismissed.**

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chairman and Chief Judge

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: December 18, 2014

c: **DEP, General Law Division:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAPLE CREEK MINING AND CANTERBURY COAL COMPANY	:	
v.	:	**EHB Docket No. 2014-066-R (Consolidated with 2014-067-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 31, 2014**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Where the terms of two Consent Orders and Agreements are clear the Board will grant the Pennsylvania Department of Environmental Protection's Motion for Summary Judgment. The terms of the Consent Orders and Agreements provided a 90 day grace period for the first payments but all other payments were due on the anniversary date of the Participation Agreements with the trustee which are in November rather than February.

OPINION

We are faced here with a simple issue of contract interpretation. This consolidated appeal involves two coal companies who executed Consent Orders and Agreements with the Pennsylvania Department of Environmental Protection to treat long standing environmental problems caused by mining operations. The two companies, Maple Creek and Canterbury, both signed Participation Agreements with the Clean Streams Foundation to set up trusts which would each be funded by eleven annual payments. In the case of Maple Creek, the annual payments are $533,816. Canterbury's annual payments to the Clean Streams Foundation are $233,087.

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http://ehb.courtapps.com

All of the payments except the first one are to be made annually on or before the anniversary date of the establishment of the trusts which are the dates Maple Creek and Canterbury executed the Participation Agreements with the Clean Streams Foundation. This occurred in November, 2010. For the first payment, and only the first payment, Maple Creek and Canterbury had a grace period of an additional ninety days beyond the anniversary date for when the annual payments are due to make that initial payment.

Nevertheless and in contravention of the Consent Orders and Agreements, subsequent payments were also made in February 2012, 2013, and 2014 rather than in November 2011, 2012, and 2013. The Department freely admits that it did not discover this error until early in 2013. The Department subsequently advised the companies that the payments should be made in November of each year rather than the following February. The companies continued making the payments in February with the latest payments being made in February 2014.

Under each Consent Order and Agreement, there are stipulated penalties of $100 per day for late payment. The Department in these Appeals is only seeking the liquidated penalties for one year or $8200 and $8700 respectively.

Following the filing of the Department's Motion for Summary Judgment and briefing the Board granted the coal companies' request for oral argument. Oral argument was held in Pittsburgh on November 13, 2014 and the transcript has now been received.

The coal companies attempt to create ambiguity where none exists. They contend that the Binding Agreement, in which the settlement of not only these matters but other matters involving other related entities was reached in May 2009, somehow contradicts the clear payment terms of the Consent Orders and Agreements. We disagree. We see neither a conflict

nor an ambiguity. Indeed the documents are entirely consistent with each other in establishing a 90 day grace period after the formation of the trusts for the first payment only.

The specific terms of the Consent Orders and Agreements conclusively establish that the November anniversary dates are the due dates for all future payments. Paragraph 5 of the Maple Creek Consent Order and Agreement provides that "[Maple Creek] shall fund the [Maple Creek Trust] ...by making eleven annual payments of $533,816 each....The first payment of $533,816 shall be made within ninety (90) days of execution of the Participation Agreement. The subsequent ten (10) annual payments of $533,816 each shall be made on or before each anniversary of the Participation Agreement." The Canterbury Consent Order and Agreement contains similar specific language. The February 2011 payment date is the 90 day grace period specifically agreed to by the parties *only* for the initial payments. This is not changed by the Department's failure to initially point out the coal companies' late payments.

Therefore, the Department is entitled to Summary Judgment as a matter of law. We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAPLE CREEK MINING AND CANTERBURY COAL COMPANY	:	
v.	:	**EHB Docket No. 2014-066-R**
	:	**(Consolidated with 2014-067-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 31st day of December, 2014, following review of the Pennsylvania Department of Environmental Protection's Motion for Summary Judgment, the coal companies' Responses, the Briefs, and further following oral argument conducted in Pittsburgh, it is ordered as follows:

1) The Department's Motion for Summary Judgment is **granted.**
2) Judgment is granted in favor of the Department against Maple Creek for the stipulated penalty for a late payment of 82 days in the amount of **$8,200.**
3) Judgment is granted in favor of the Department against Canterbury for the stipulated penalty for a late payment of 87 days in the amount of **$8,700.**

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: December 31, 2014

c: **DEP, General Law Division:**
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