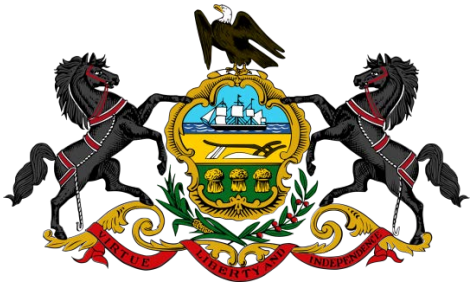
Environmental Hearing Board

Adjudications and Opinions



2015
VOLUME I

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

2015

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 2015.

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 – 2015 EHB DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2011-105-CP-C**
FRANCIS SCHULTZ, JR., AND DAVID FRIEND, d/b/a SHORTY AND DAVE'S USED TRUCK PARTS	:	**Issued: January 2, 2015**

OPINION AND ORDER ON
MOTION FOR NONSUIT

By Michelle A. Coleman, Judge

Synopsis

The Board grants defendants' motion for nonsuit where the Department improperly named the individual shareholders and officers of a corporation in its complaint and did not name the corporate entity itself.

O P I N I O N

This matter began on July 25, 2011, with the Department of Environmental Protection (the "Department") filing a complaint for the assessment of civil penalties against Francis Schultz, Jr. and David Friend, d/b/a Shorty and Dave's Used Truck Parts (the "Defendants") for alleged violations of both the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, and the erosion and sedimentation control regulations located at 25 Pa. Code Chapter 102. The alleged violations arose from earth disturbance activities on a property located at 588 Swedeland Road in Upper Merion Township, Montgomery County from September 25, 2007 through December 11, 2007.

In May 2006, the consulting firm Gannett Fleming, on behalf of Shorty and Dave's Used Truck Parts, submitted to the Montgomery County Conservation District (the "Conservation District") an application for adequacy review of an erosion and sediment control plan for a project involving the relocation of Matsunk Creek at the Swedeland Road property.[1] (Department Exhibit No. ("DEP Ex.") 1.) The plan was approved by the Conservation District. (Notes of Transcript page ("T.") 42.) On September 25, 2007, the Conservation District made an inspection of the site and determined that there was work being done outside of the scope of the approved erosion and sedimentation plan from the May 2006 application. (T. 45-49; DEP Ex. 1, 4.) The report produced following the inspection also noted that the Department had informed the Conservation District that an emergency permit or dam permit had not yet been issued. (DEP Ex. 4.) That permit was issued on November 30, 2007 to "construct and maintain an emergency spillway for a proposed storm water facility along Flint Hill Road for the purpose of reducing flooding problem[s] during major storm event[s]." (DEP Ex. 3.) Follow up inspections occurred on October 18, November 2, November 15, November 27, and December 11, 2007. (DEP Ex. 5-9.) All of the inspection reports note work being done outside the limit of disturbance of the approved erosion and sedimentation plan, a failure to implement erosion and sediment controls and stabilization, and the failure to obtain an appropriate permit for the work.

The parties first convened for a hearing on the merits on February 4, 2014. During the hearing, the Department requested sanctions against the Defendants for failing to provide verified answers to the Department's request for admissions during discovery. (T. 4-9.) The hearing was continued because the parties represented that they might be able to work out a

[1] The Montgomery County Conservation District has been deemed a level two conservation district, meaning the Department has delegated certain responsibilities to it, including reviewing and approving erosion and sediment control plans, and conducting inspections related to those plans. (T. 88.) The Conservation District, however, does not have enforcement powers.

settlement. (T. 23.) The parties subsequently filed letters with the Board indicating that the settlement discussions did not result in the resolution of the matter and, therefore, the hearing on the merits should proceed. On May 29, 2014, we issued an Opinion and Order denying the Department's oral motion for sanctions and setting a new hearing date for July 15, 2014. *See DEP v. Schultz*, EHB Docket No. 2011-105-CP-C (Opinion issued May 29, 2014).[2]

At the close of the Department's case-in-chief during the July 15, 2014 hearing, the Defendants made a motion for nonsuit, arguing that the Department had not produced any evidence to establish liability for the individually named defendants, Francis Schultz, Jr. and David Friend.[3] (T. 130.) The presiding Judge noted that such a motion can only be granted by the entire Board. (T. 133.) *See* 25 Pa. Code § 1021.116(a) ("All final decisions shall be decisions of the Board decided by majority vote."). Ruling on the motion was reserved and, without prejudice to the motion for nonsuit, the Defendants proceeded with their case. (T. 134.) At the conclusion of the hearing, the parties elected to brief the motion for nonsuit following the receipt of transcripts and then file full post-hearing briefs, if necessary, following the resolution of the motion for nonsuit. (T. 205-06.)

In hearings before the Board, the party with the burden of proof is required to present a prima facie case by the close of its case-in-chief. 25 Pa. Code § 1021.117(b). The Department bears the burden of proof in cases initiated by a complaint seeking civil penalties. 25 Pa. Code § 1021.122(b)(1). The Board may enter a nonsuit if the party bearing the burden of proof fails to present a prima facie case establishing a cause of action. *Fox v. DEP*, 2011 EHB 320, 323;

[2] Additional procedural background is provided in our prior Opinions. *See DEP v. Shultz*, 2012 EHB 381; *DEP v. Shultz*, 2012 EHB 436 (caption subsequently amended to reflect the correct spelling of Schultz).

[3] This is not the first time the issue has come before us of whether the Department named the correct defendants in its complaint. In our Opinion denying the Defendants' motion for summary judgment, we noted that there still existed a dispute of material fact whether the Schultz and Friend were properly names as individual defendants. *DEP v. Shultz*, 2012 EHB 436.

Clabbatz v. DEP, 2006 EHB 263, 264-65; *Van Tassel v. DEP*, 2002 EHB 625, 627; *Decker v. DEP*, 2002 EHB 610, 612. The non-moving party's case must be clearly insufficient. *Fox, supra*, 2011 EHB at 323; *Decker, supra*, 2002 EHB at 612. The Board must view all evidence and all reasonable factual inferences arising out of that evidence in a light most favorable to the nonmoving party, with all conflicts and doubts resolved in favor of the nonmoving party. *Daddona v. Thind*, 891 A.2d 786, 816 (Pa. Cmwlth. 2006); *Leone v. Commonwealth*, 780 A.2d 754, 756 (Pa. Cmwlth. 2001); *Decker*, 2002 EHB at 612; *Nottingham Network of Neighbors v. DER*, 1996 EHB 4, 6.

The standard for granting a motion for nonsuit is high. Typically, the Board grants a motion for nonsuit in circumstances where the nonmoving party has failed to present almost any evidence in support of its case. *See Fox*, 2011 EHB at 325 ("There is no evidence, anywhere in the record, to indicate that the Phillips Farm is unsuitable to receive the two biosolids."); *Clabbatz, supra*, 2006 EHB at 265 ("The only record we have before us is Clabbatz's unsworn statement. Even if we could consider that statement as evidence, it fails to address any specific error that the Department made by approving the Township's official plan revision."); *Decker*, 2002 EHB at 614 ("There is no record evidence to support any of the criteria prerequisite to standing. In fact, although there have been various representations along the way about Mrs. Decker's connection to this matter, we have no *record* evidence that in any way describes her interest.").

Here, in contrast to the instances above where there was a marked lack of testimony and evidence presented by the party bearing the burden of proof, the Department presented the testimony of two witnesses and introduced fourteen exhibits into evidence, eleven of which were admitted by the close of its case-in-chief. The testimony included that of Heath Lahr, a former

employee of the Conservation District, employed for ten years, who conducted the six site inspections from September to December, 2007, and prepared the corresponding inspection reports, all of which were admitted into evidence. (DEP Ex. 4-9.) The Department also presented the testimony of Frank DeFrancesco, a compliance specialist with 27 years of experience with the Department, who testified as to what he believed was an appropriate penalty amount for the alleged violations.

Although the Department did produce evidence that violations were observed at the site in question, the Defendants' motion for nonsuit argues that the Department has failed to connect the alleged violations to the conduct of the individual defendants, Francis Schultz and David Friend. The Defendants state that the Department did not present any evidence to establish that Schultz and Friend engaged in any unlawful activity at the site. They argue that it was not Schultz and Friend in their individual capacities that were responsible for any alleged violations, but rather the company Shorty and Dave's, Inc., of which Schultz and Friend are officers and shareholders. The Defendants contend that the record establishes that it was an entity and not any individual that was always the party that sought to conduct, and in fact conducted the activities at the site.

The Department's response to the motion for nonsuit hangs on the May 2006 application submitted to the Conservation District for earth disturbance activities at the site.[4] Under the "Applicant Information" section appears the following:

[4] Count II of the Department's complaint alleges that the responsible party conducted activities at the site without obtaining a proper permit. It appears that the activities observed in 2007 are related to the work contemplated in the May 2006 permit application, although the activities allegedly exceed the scope of the work outlined in the application. Therefore, the Department suggests that the applicant from the May 2006 application is the same party responsible for the alleged violations at the site.

APPLICANT Francis Schultz and David Friend
(Responsible Official)
Shorty & Dave's Used Truck Parts
ADDRESS: 588 Swedeland Road
CITY: King of Prussia State: PA

(DEP Ex. 1.)[5] The application is signed by Francis Schultz. The Department argues that there is nothing on the application form to indicate that Schultz and Friend were applying in anything but their individual capacities. The Department contends that although the name Shorty and Dave's Used Truck Parts appears on the form, there is nothing to suggest that the name is anything but a descriptive term without any independent legal significance.

We strongly disagree with the Department's characterization of the application form. The face of the application instead indicates the opposite of the Department's contention—there is nothing that would suggest that Schultz and Friend were applying in anything but their *representative* capacities. The words "Responsible Official" clearly appear under the names Francis Schultz and David Friend. These words are not without significance. An "official" is someone "authorized to act for a corporation or organization, esp. in a subordinate capacity." BLACK'S LAW DICTIONARY 1195 (9th ed. 2009). The use of the words "Responsible Official" signals that Schultz and Friend are acting for some kind of entity, the logical referent being what appears on the line immediately below, Shorty and Dave's Used Truck Parts. To bolster the point, the cover letters accompanying the permit application explicitly state that the application is being submitted on behalf of Shorty and Dave's Used Truck Parts. (DEP Ex. 1.) The Department never explains why it believes Shorty and Dave's Used Truck Parts is simply a descriptive term, or what that even means. We are not sure what the term would describe if not a business entity. It is difficult to imagine one coming to a different conclusion regarding the relation between Schultz and Friend and Shorty and Dave's Used Truck Parts.

[5] "Shorty and Dave's, Inc." does not appear anywhere on the application form.

Furthermore, although the Department repeatedly contends that the application indicates that the individuals are the applicants, the Department ignores the fact that regardless of what is contained on the application, the individuals have never been the permittees. The Department did not issue the emergency permit to Francis Schultz or David Friend, but to Shorty and Dave's Used Truck Parts. (T. 82, 84-85; DEP Ex. 3.) In addition, all six inspection reports, which serve as the basis for the violations alleged in the complaint, list the responsible party as Shorty and Dave's Used Truck Parts. (DEP Ex. 4-9.) There is no evidence in the record to suggest that Schultz and Friend were involved individually in this matter at any point before the Department named them as defendants in its complaint.

It is unclear why the Department decided to name Schultz and Friend individually. Being an official authorized to act for a business organization is not the same as being held individually liable for the actions of that business organization. Frank DeFrancesco testified in support of the Department's conception of the Defendants, stating that his understanding of the responsible party, based on the application and the permit, was Francis Schultz and David Friend, doing business as Shorty and Dave's Used Truck Parts. (T. 90.) However, during the Department's direct examination of Heath Lahr, in response to the question of "[W]hat was your understanding of who the responsible party was here?" Lahr stated, "Shorty and Dave's Used Truck Parts." (T. 52.) Lahr then said that his basis for this information was the application form submitted by the applicant. In addition, Lahr, in response to questions on cross-examination, acknowledged that he did not identify Schultz and Friend as the responsible parties in his inspection reports; they each identify Shorty and Dave's Used Truck Parts. (T. 69; DEP Ex. 4-9.)

By naming Schultz and Friend individually, the Department essentially seeks to pierce the corporate veil and impart individual liability without producing any facts in support of veil

piercing. Piercing the corporate veil is a doctrine that allows courts in exceptional circumstances to disregard the protections afforded by a corporate entity and impart liability on a corporation's individual shareholders or officers. *Harvilchuck v. DEP*, EHB Docket No. 2013-013-M, slip op. at 33 (Opinion issued Sep. 17, 2014) (citing *Newcrete Prods. v. City of Wilkes-Barre*, 37 A.3d 7, 12 (Pa. Cmwlth. 2010)). In Pennsylvania there is a strong presumption against piercing the corporate veil. *Lumax Indus., Inc. v. Aultman*, 669 A.2d 893, 895 (Pa. 1995).

Pennsylvania courts have generally found the application of veil piercing appropriate in circumstances where it would "prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat the public purpose or shield someone from liability for a crime." *In re LMcD, LLC*, 405 B.R. 555, 560 (Bankr. M.D. Pa. 2009) (quoting *Vill. at Camelback Prop. Owners Ass'n, Inc. v. Carr*, 538 A.2d 528, 533 (Pa. Super. 1988)). In deciding whether to pierce, Pennsylvania courts have typically considered the factors of "undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs and use of the corporate form to perpetrate a fraud." *Lumax, supra*, 669 A.2d 893, 895 (quoting *Kaites v. Dep't of Envtl. Res.*, 529 A.2d 1148, 1151 (Pa. Cmwlth. 1987)); *Harvilchuck, supra*, slip op. at 34. However, when considering whether to pierce the corporate veil, any court must start from the proposition that the corporate entity should be upheld unless specific circumstances call for an exception. *Lumax*, 669 A.2d at 895 (citing *Wedner v. Unemployment Comp. Bd.*, 296 A.2d 792, 794 (Pa. 1972)).

We briefly recap the law on piercing the corporate veil to emphasize the point that it is no easy matter to disregard the corporate form. A party must produce facts and evidence speaking to the factors outlined above. The Department has not produced any evidence that would prompt

us to pierce the corporate veil. The corporate form cannot be disregarded by the mere naming of its individual shareholders and officers in a complaint.

The Defendants argue that the Department could have performed a search with the Pennsylvania Department of State's Bureau of Corporations at any time to determine that Shorty and Dave's, Inc. was the proper defendant. The Department responds that this argument is problematic because a search for Shorty and Dave's Used Truck Parts would turn up nothing since "Shorty and Dave's Used Truck Parts" is not a name that is registered with the Bureau of Corporations. The Department is correct. Instead, the fictitious name of "Shorty and Dave's U-Pull It Used Truck Parts" is registered, with an owner of that name listed as Shorty and Dave's, Inc.[6] The words "U-Pull It" do not appear anywhere on the permit or the application. (DEP Ex. 1, 3.)

The Department makes much of this point. The Department argues in its brief that it is critical that agencies be able to rely on the accuracy of information provided on permit applications. While we generally agree (*see O'Reilly v. DEP*, 2001 EHB 19, 53 ("We cannot expect the Department to look past certifications on applications that appear to be legitimate on the face of the document."); *see also Colbert v. DEP*, 2006 EHB 90, 111; *Shuey v. DEP*, 2005 EHB 657, 700), we do not see how that proposition leads to the conclusion that Schultz and Friend are properly named as individual defendants. As we stated above, the application form strongly suggests the existence of a business entity for which Schultz and Friend are acting. The Department suggests but does not explicitly argue that the omission of "U-Pull It" is a defect in the application that allows it to hold Schultz and Friend personally liable for the activities on the site. However, even if we pursue the notion that the failure to list the correct fictitious name

[6] We previously noted this in our Opinion denying the Defendants' motion for summary judgment. *See DEP v. Shultz*, 2012 EHB 436, 438-39.

somehow alters the relationship of the parties, we would not reach the conclusion that Schultz and Friend are individually liable.

Shorty and Dave's U-Pull It Used Truck Parts was registered pursuant to the Fictitious Names Act, 54 Pa.C.S.A. §§ 301 – 332. The Act defines a fictitious name as "[a]ny assumed or fictitious name, style or designation other than the proper name of the entity using such name. The term includes a name assumed by a general partnership, syndicate, joint adventureship or similar combination or group of persons." 54 Pa.C.S.A. § 302. Section 331 of the Act states in part that the "failure of any entity to register a fictitious name as required by this chapter shall not impair the validity of any contract or act of such entity and shall not prevent such entity from defending any action in any tribunal of this Commonwealth." 54 Pa.C.S.A. § 331.

In *W.F. Meyers Co., Inc. v. Stoddard*, 526 A.2d 446 (Pa. Super. 1987), our Superior Court interpreted a prior version of the fictitious name statute and found that the provision preserving the validity of a contract entered into by a corporation through an unregistered fictitious name did not alter or affect the general law relating to the liability of shareholders and officers of corporations. The Court stated:

> This is not a situation where individuals held themselves out as representing a corporation which did not exist. The corporation did exist but the individuals referred to the corporation by a name which was not registered. Absent a showing of fraud on the part of appellants in this representation and relying on the applicable statute, we must find that the rights and liabilities of the parties are the same as if the name was registered.

W.F. Meyers, 526 A.2d at 449 (footnote omitted). The Court then declined to hold the shareholders and directors of the corporation individually liable for any corporate debts. Looking at the Fictitious Names Act, and in consideration of the reasoning of *W.F. Meyers*, it appears to us that the omission of "U Pull-It" on the permit application is irrelevant. The

corporation, Shorty and Dave's, Inc., is still the party to be held accountable for its contracts, environmental permits included, whether or not the fictitious name of Shorty and Dave's Used Truck Parts is registered. Further, we have no evidence that the omission was done intentionally in a way to perpetrate a fraud or with any other deceptive motive.

We have on at least one other occasion considered the issue of the liability of an individual operating under a fictitious name. In *Bell v. DER*, 1986 EHB 273, the Department issued an order directing Olivia Bell to cease and desist all discharges of industrial waste from a landfill to waters of the Commonwealth. Olivia Bell appealed the order, arguing that she was not liable because she was not a permittee under the water quality management permit. On the permit application, the Applicant Name was listed as "Herbert & Olivia Bell DBA O.M. Bell Trucking and Landfill." *Bell*, 1986 EHB at 278. The application was signed by Herbert M. Bell. The Department subsequently issued a permit to "O. M. Bell Trucking & Landfill c/o Herbert & Olivia Bell R. D. #2 Towanda, PA 18848." Olivia Bell contended that the permittee was O. M. Bell Trucking and Landfill and, therefore, she was not liable individually. Looking at the records filed with the Department of State, we noted that O. M. Bell Trucking and Landfill was a registered fictitious name owned by Herbert and Olivia Bell. Accordingly, we found that because Olivia Bell was the owner of the fictitious name listed as the permittee, Bell was a permittee herself and liable as a matter of law for the terms of the permit. *Bell*, 1986 EHB at 279-80.

The situation here is much the opposite. First, Francis Schultz and David Friend did not employ a "doing business as" indicator on the application like the applicant in *Bell*. Second, on the permit itself Schultz and Friend are not designated individually as the permittees, only Shorty and Dave's Used Truck Parts. Third, and perhaps most important, Schultz and Friend are not the

owners of the registered fictitious name, Shorty and Dave's U-Pull It Used Truck Parts; it is owned by Shorty and Dave's, Inc. On its own, a fictitious name does not contain any shield from personal liability. The personal liability shield is inherent in the corporate form. Therefore, while it was appropriate to hold an individual personally liable in *Bell*, here the facts dictate a different conclusion.

As noted above, there is a high standard for granting a motion for nonsuit, and we do not grant it lightly in this case. However, we cannot overlook an improperly named defendant. Legally, Francis Schultz, Jr. and David Friend are not doing business as Shorty and Dave's Used Truck Parts (or more accurately, Shorty and Dave's U-Pull It Used Truck Parts), as named in the Department's complaint. The Department did not present a prima facie case establishing a cause of action against the named Defendants. The Department has provided us with no evidence that would prompt us to disregard the corporate form and to hold liable the individual shareholders and officers of a corporate entity. We are told that the Department became aware of the issue of the improperly named Defendants during the depositions of Schultz and Friend, which occurred on May 29, 2012. (T. 94, 116-17); *DEP v. Schultz*, *supra*, slip op. at 2. The Department had ample opportunity to make a motion to amend its complaint to change the named defendant or to add a corporate defendant, but it consistently neglected to do so.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2011-105-CP-C**
FRANCIS SCHULTZ, JR., AND DAVID FRIEND, d/b/a SHORTY AND DAVE'S USED TRUCK PARTS	:	

O R D E R

AND NOW, this 2nd day of January, 2015, it is hereby ordered that the Defendants' motion for nonsuit is **granted**. The Department's complaint 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: January 2, 2015

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

ROSTRAVER TOWNSHIP	:	
	:	
v.	:	
	:	**EHB Docket No. 2014-085-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TERVITA, LLC, Permittee	:	**Issued: January 7, 2015**

OPINION AND ORDER ON MOTION TO COMPEL RESPONSES TO FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS DIRECTED TO ROSTRAVER TOWNSHIP

By: Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Pennsylvania Environmental Hearing Board grants a Motion to Compel Responses to Interrogatories and Requests for Production of Documents. Pursuant to the discovery provisions of the Pennsylvania Rules of Civil Procedure, which have been adopted by the Board, Responses to Interrogatories and Requests for Production of Documents are due thirty days after service.

O P I N I O N

Presently before the Pennsylvania Environmental Hearing Board is the Permittee Tervita, LLC's (Permittee or Tervita) Motion to Compel Responses to First Set of Interrogatories and Requests for Production of Documents Directed to Rostraver Township (Motion to Compel). Appellant Rostraver Township indicated in its Response to the Motion to Compel that the interrogatories and requests for production directed to it were "voluminous and require extensive research to complete." *See* Rostraver Township's Response to Motion to Compel, Paragraph 12. Rostraver Township argues we should deny the Motion to Compel and grant it an additional 60

days to provide full and complete answers to the discovery requests.

The discovery requests were served in mid-September 2014 with Answers and Responses due in mid-October 2014. Pa. R. Civ. Procedure 4006 & 4009.12. Counsel for Tervita contacted Rostraver Township's counsel several times in an attempt to amicably obtain responses to the discovery requests but was unsuccessful.

We have reviewed the requests and we respectfully disagree with Rostraver Township's contention that the information requested is voluminous. Moreover, the interrogatories and requests for production have been specifically crafted to seek information clearly discoverable based on the Pennsylvania Rules of Civil Procedure. Some of the interrogatories and requests for production reference information raised by the Appellant in its Notice of Appeal. We do not find the discovery burdensome; especially since the Appellant has had months to file its Responses.

We will grant the Motion to Compel.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROSTRAVER TOWNSHIP	:	
	:	
v.	:	
	:	**EHB Docket No. 2014-085-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TERVITA, LLC, Permittee	:	

O R D E R

AND NOW**,** this 7th day of January, 2015**,** following review of Tervita's Motion to Compel and Rostraver Township's Response, it is ordered as follows:

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

2) Rostraver Township shall serve Answers and Responses to the First Set of Interrogatories and Requests for Production of Documents on or before **January 21, 2015.**

ENVIRONMENTAL HEARING BOARD

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

DATED: January 7, 2015

c: **DEP, General Law Division**
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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: January 8, 2015**

OPINION AND ORDER ON
MOTION FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a permittee's motion for partial summary judgment on certain objections against appellants who failed to respond to the motion as required by the Board's Rules at 25 Pa. Code § 1021.94a.

O P I N I O N

On April 28, 2014, nine appellants filed an 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. On May 16, 2014, the appellants filed an amended notice of appeal containing revised objections and adding six new appellants. We subsequently dismissed the six appellants who were untimely added in the amended appeal in an Opinion granting a motion to dismiss filed by Chesapeake. *See Stedge v. DEP*, EHB Docket No. 2014-042-L (Opinion issued Jul. 31, 2014). Two appellants filed a letter with the Board withdrawing their appeals on October 17, 2014.

Seven appellants remain in the appeal, five proceeding *pro se*—Rose Marie Grzincic, Tina Manzer, Milda Baiba Guidotti, Ronald Brown, and Joyce Brown—and Richard Stedge and Bruce Kennedy being represented by counsel.

On November 24, 2014, Chesapeake filed a motion for summary judgment against all of the appellants, arguing that they failed to produce any evidence to support their claims that the Radiation Protection Action Plan submitted with Chesapeake's permit application has inadequate monitoring or testing protocols or is otherwise deficient. Chesapeake seeks summary judgment on three objections involving radiation claims that are listed in the appellants' amended notice of appeal. Those objections are:

> Is there appropriate monitoring of radiation? What measures are there to prevent radiation from getting into the soil and waterways when it rains?
> ….
> Water is only measured for radiation while it is on the truck coming in and out of the facility. What testing is being done on the site for radiation? What testing is being done for the separated materials being removed from the production water? Where are they going to be stored? How much is going to be stored on the site at any given time?
> ….
> There are no regulations or testing currently of the air emissions from the tankers. Additionally if the site is used for recycling water to re-use for fracking there should be safety measures in place for monitoring emissions, chemicals, radiation and other possible contaminants to the environment.

(Am. Notice of Appeal at ¶¶ 6(d)(xi), 6(d)(xiii), 6(f).)

Appellants Stedge and Kennedy filed a response to Chesapeake's motion on December 22, 2014.[1] Attached to Stedge and Kennedy's response is an affidavit from Stedge stating that he retained Kathy J. Martin, P.E. to prepare an expert report on the Lamb's Farm permit and that

[1] We note that Stedge and Kennedy's response did not comply with our Rules insofar as it did not contain a response to Chesapeake's statement of undisputed material facts and it did not contain a brief to support their legal argument. *See* 25 Pa. Code § 1021.94a(f).

the report supports the radiation objections contained in the amended notice of appeal. A relevant portion of Martin's report discussing Chesapeake's Radiation Protection Action Plan is also attached to Stedge and Kennedy's response. None of the five *pro se* appellants filed a response to Chesapeake's motion. The Department did not weigh in on the motion.

On December 30, 2014, Chesapeake filed a reply to Stedge and Kennedy's response. Chesapeake states that it received the Martin report on November 24, 2014, the deadline for filing dispositive motions and well after the close of discovery. Chesapeake notes with dissatisfaction that it requested from Stedge and Kennedy on May 22, 2014 copies of any expert reports they intended to rely upon and that it followed up on that request four different times without any reports being provided. Despite this, Chesapeake states that it withdraws its motion for partial summary judgment as to Stedge and Kennedy. However, Chesapeake maintains its motion with respect to the remaining appellants who did not file a response.

Our Rule governing motions for summary judgment requires that a response to such a motion shall be filed within 30 days of service. 25 Pa. Code § 1021.94a(f). It pointedly contains mandatory language for responding. The Rule further provides that in the absence of a response, the Board may grant summary judgment against the non-responsive party. 25 Pa. Code § 1021.94a(k). This portion of our Rule mirrors the summary judgment provisions of the Pennsylvania Rules of Civil Procedure. *See* Pa.R.C.P. No. 1035.3(d) ("Summary judgment may be entered against a party who does not respond."). We have dealt with this circumstance numerous times and we have frequently granted summary judgment against a party who has failed to respond to a summary judgment motion. *See Morris v. DEP*, 2012 EHB 65; *Langille v. DEP*, 2010 EHB 516; *Thornberry v. DEP*, 2010 EHB 61; *Koch v. DEP*, 2010 EHB 42; *J&D Holdings v. DEP*, 2009 EHB 15; *Lucas v. DEP*, 2005 EHB 913; *Brian E. Steinman Hauling v.*

DEP, 2004 EHB 846; *Hamilton Bros. Coal, Inc. v. DEP*, 2000 EHB 1262; *Kochems v. DEP*, 1997 EHB 428, *aff'd*, 701 A.2d 281, 283 (Pa. Cmwlth. 1997) (Board permitted to grant summary judgment solely upon a party's failure to respond to a summary judgment motion). There is nothing about the current situation that would prompt us to act any differently.

Accordingly, we grant Chesapeake's motion for partial summary judgment against the five appellants who failed to respond to the motion. They will no longer be permitted to pursue the three objections cited above to the extent that those objections state claims relating to radiation issues. Appellants Stedge and Kennedy may continue to fully pursue the radiation objections.

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	:	

O R D E R

AND NOW, this 8th day of January, 2015, it is hereby ordered that Chesapeake Appalachia's motion for partial summary judgment is **granted**. Appellants Rose Marie Grzincic, Tina Manzer, Milda Baiba Guidotti, Ronald Brown, and Joyce Brown may no longer pursue their objections to the extent that they relate to radiation issues.

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: January 8, 2015

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

ANDREW LESTER	:	
	:	
v.	:	**EHB Docket No. 2014-025-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 15, 2015**

OPINION ON
MOTION TO STRIKE

By Steven C. Beckman, Judge

Synopsis

The Board grants the Department's motion to strike the Appellant's amended notice of appeal where: the Appellant failed to seek leave to amend under 25 Pa. Code Section 1021.53; the amended notice of appeal seeks to add an additional appellant; and the addition of a new claim at this stage in the proceedings would be prejudicial to the opposing party.

O P I N I O N

On March 21, 2014, Appellant Andrew Lester filed a *pro se* appeal of a Department of Environmental Protection ("Department") administrative order dated February 19, 2014 ("Order") and issued under the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101–6021.2104 ("the Act") with the Environmental Hearing Board ("Board"). The Order was directed to both Andrew Lester and his father, Kenneth D. Lester, and required, among other things, the closure of underground storage tanks located on property owned by Kenneth Lester. Kenneth Lester has not appealed the Department's Order. Following the deadline for filing dispositive motions, the Board scheduled a hearing in this

matter for December 17, 2014. On December 16, 2014, counsel for Appellant filed a notice of appearance and motion for continuance. The same day, following a conference call with counsel for both parties, the Board issued an order rescheduling the hearing for January 15, 2015 and providing the Appellant with one week to "amend his Pre-hearing Memorandum."[1] In response to the Board's order, the Appellant filed an Amended Notice of Appeal and Amended Pre-Hearing Memorandum.[2] Predictably, the Department filed the present Motion to Strike. A conference call was held on January 12, 2015, during which the parties had the opportunity to present arguments regarding the Department's motion. At the close of the call, the Board granted the Department's motion and subsequently issued an order to that effect on January 13, 2015. This opinion outlines the Board's reasoning for granting the motion.

Appellant Andrew Lester's Amended Notice of Appeal seeks to add the objection that the Department's Order constitutes a taking of property in violation of the Pennsylvania and United States Constitutions. Specifically, the Amended Notice of Appeal states:

> It is the purpose and intent of the Appellant to challenge the statute and the regulations promulgated thereto on a constitutional basis that permanent closure of the tanks seriously diminishes the value of the property owned by Kenneth D. Lester[,] rendering it effectively worthless without just compensation to Kenneth D. Lester, particularly where there is no evidence of any leakage into the environment[,] as the tanks are empty.

The Board perceives numerous problems which independently and collectively counsel us against adjudicating the proposed additional claim.

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[1] The December 16, 2014 order also permitted the Department to amend its prehearing memorandum in response to amendments made by the Appellant and rescheduled the deadline for filing motions in limine.

[2] Documents electronically submitted by counsel for Appellant through the Board's electronic filing system were corrupted and inaccessible to the Board. Accordingly, Appellant's filings with the Board have additionally been submitted via facsimile. The faxed copy of Appellant's Amended Notice of Appeal filed on December 23, 2014 was missing a page. Appellant resubmitted his complete Amended Notice of Appeal and Amended Pre-Hearing Memorandum by fax on December 29, 2014. In this Opinion, "Appellant's Amended Notice of Appeal" refers to both the Amended Notice of Appeal filed on December 23, 2014 as well as the "corrected" Amended Notice of Appeal filed on December 29, 2014.

First, by its own terms, the Amended Notice of Appeal seeks to add a claim on behalf of a person who is not a party to this appeal. As noted above, while the Department directed the Order to Kenneth D. Lester in addition to Andrew Lester, Kenneth Lester did not file an appeal with the Board. The failure of a person to file a timely appeal of an order or other administrative action of the Department deprives the Board of jurisdiction to hear an appeal with respect to that person. 35 P.S. § 6021.1313; 25 Pa. Code § 1021.52(a)(1); *see also Stedge, et al. v. DEP and Chesapeake Appalachia, LLC*, EHB Docket No. 2014-042-L (Opinion issued July 31, 2014); *Weaver v. DEP*, 2013 EHB 381, 382. Simply put, Kenneth Lester is not a party to this appeal, and the Board is jurisdictionally barred from adjudicating his takings claim. "This jurisdictional defect may not be overcome by way of an amendment to another party's timely appeal." *Weaver*, 2013 EHB 381, 382.

While it is not necessary to our decision to grant the Department's motion, we additionally note that it is undisputed that Andrew Lester has no property interest in the tanks or the land on which they are situated. The Department's Order describes Kenneth Lester as both the owner of the property as well as the tanks for the purposes of the Act. Andrew Lester, in both his original Notice of Appeal and Amended Pre-Hearing Memorandum, specifically denies any ownership interest. Where the Appellant asserts no ownership interest in the property subject to a Department administrative order, it is difficult to conceive how the Appellant would have standing to challenge the order as an unconstitutional taking of private property. *Cf. Stop the Beach Renourishment, Inc. v. Florida Dept. of Envt'l Protection et al.*, 130 S.Ct. 2592 (2010) (finding no taking existed where governmental action did not contravene any established property rights of the individuals bringing the claim).

The Board sees two additional reasons that Appellant's Amended Notice of Appeal should be stricken. Rule 1021.53(b) gives the Board discretion to permit a party to amend its appeal after the 20 days to amend as of right has elapsed. 25 Pa. Code § 1021.53(b). However, the rule requires that the party file a motion for leave to amend its appeal. *Id.* Further, the party is required to verify and support a motion for leave to amend with affidavits. 25 Pa. Code § 1021.53(c). Here, the Board's order of December 16, 2014 only permitted the parties to amend their prehearing memoranda. The Appellant neither moved for leave to amend his notice of appeal, nor supported the Amended Notice of Appeal with an affidavit.

Finally, the Board's discretion to grant a party leave to amend its notice of appeal is limited to those situations where "no undue prejudice will result to the opposing parties." 25 Pa. Code § 1021.53(b). Discovery closed in this matter on July 23, 2014, and the hearing has already been rescheduled once. The Appellant has made no effort to show that the Department would not be prejudiced by the addition of an entirely new claim on the eve of the hearing that arguably implicates a person who is not a party to this appeal. We find that the Department would be severely prejudiced. For these reasons, the Board granted the Department's Motion to Strike Appellant's Amended Notice of Appeal. A copy of our previously issued order is attached.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANDREW LESTER	:	
	:	
v.	:	**EHB Docket No. 2014-025-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 13th day of January, 2015, following review of the Department's Motion to Strike Appellant's Amended Notice of Appeal and Corrected Amended Notice of Appeal as well as a conference call with the parties, the Board **grants** the Department's motion. Issues presented at the hearing shall be limited to those in Andrew Lester's Notice of Appeal docketed March 25, 2014. No claims raised in the Amended Notice of Appeal or the Corrected Notice of Appeal filed December 29, 2014, including, but not limited to, that the Department's Order of February 19, 2014 constitutes an unconstitutional taking under both the Pennsylvania and United States Constitutions, as well as any claims asserted on behalf of Kenneth Lester, shall be permitted at the hearing. An opinion in support of this order will follow.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: January 15, 2015

c: **DEP, General Law Division**
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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: January 29, 2015**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT AGAINST BRUCE D. KENNEDY

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a permittee's motion for summary judgment because it is not clear as a matter of undisputed material fact that the appellant does not have standing.

O P I N I O N

On April 28, 2014, nine appellants filed an 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. On May 16, 2014, the appellants filed an amended notice of appeal containing revised objections and adding six new appellants. We subsequently dismissed the six appellants who were untimely added in the amended appeal in an Opinion granting a motion to dismiss filed by Chesapeake. *See Stedge v. DEP*, EHB Docket No. 2014-042-L (Opinion issued Jul. 31, 2014). Two appellants filed a letter with the Board withdrawing their appeals on October 17, 2014. Seven appellants remain in the appeal, five proceeding *pro se*—Rose Marie Grzincic, Tina

Manzer, Milda Baiba Guidotti, Ronald Brown, and Joyce Brown—and Richard Stedge and Bruce Kennedy being represented by counsel.

On November 24, 2014, Chesapeake filed a motion for summary judgment against Bruce Kennedy, arguing that Kennedy lacks standing to pursue his appeal because he does not have a substantial, direct, and immediate interest in the outcome of the litigation. Chesapeake argues that Kennedy does not use or enjoy any portion of the environment near the Lamb's Farm Facility that would give rise to standing, nor does he live in sufficiently close proximity to the site to be adversely affected for purposes of standing. In support of its motion Chesapeake points to statements made by Kennedy during Chesapeake's deposition of him. (Mot. for Summ. J., Ex. B.) For instance, Kennedy states in his deposition that he does not hike in the area of the Lamb's Farm Facility, nor has he ever been on the Lamb's Farm property. Kennedy also states that he has never walked or fished Browns Creek, which is a watercourse nearby to the west of Lamb's Farm. When asked to detail his concerns regarding the project, Kennedy was unable to do so. (Ex. B at 31.) When asked how he will be impacted by the Lamb's Farm operation, Kennedy responded, "It's affected a lot of people that I care about, and it's affected a lot of properties, and I'm very defensive about what happens in my hometown." (Ex. B at 24.)

On December 22, 2014, Kennedy filed a response to the motion for summary judgment.[1] The response argues that there is a genuine issue of material fact regarding whether Kennedy's "land and legally protected interest" will be affected by the Lamb's Farm operation. In the affidavit attached to the response, Kennedy avers,

> The basis for the appeal is essentially that the residents of the township learned without adequate notice or opportunity to be heard that Chesapeake Appalachia LLC was permitted to install at

[1] We note that Kennedy's response did not comply with our Rules insofar as it did not contain a response to Chesapeake's statement of undisputed material facts and it did not contain a brief to support Kennedy's legal argument. *See* 25 Pa. Code § 1021.94a(g).

> the Lamb's Farm site in the township a hazardous waste storage and manufacturing facility that poses serious contamination threats to the air, water and soil in the general area surrounding the facility and throughout Smithfield Township. I live in Smithfield Township only six (6) miles away from this dangerous facility. If the hazardous chemicals leak from the facility either into the soil or the air from faulty operation of the facility, the 350 acres of land that I own may become contaminated and the fresh air and clean water that my family enjoys may be permanently contaminated. My land value will substantially decrease and I and my family will lose the right to enjoy our clean environment.

(Kennedy affidavit at ¶ 4.)

The Board may grant summary judgment if the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a(m); *Casey v. DEP*, EHB Docket No. 2012-070-C, slip op. at 4-5 (Opinion issued Jun. 20, 2014); *Berks Cnty. v. DEP*, 2012 EHB 23, 23-24; *Yoskowitz v. DEP*, 2005 EHB 401, 404; *Zlomsowitch v. DEP*, 2003 EHB 636, 641. The Board views the record in the light most favorable to the nonmoving party and resolves all doubts regarding the existence of a genuine issue of material fact against the moving party. *City of Phila. v. DEP*, EHB Docket No. 2013-047-L, slip op. at 5 (Opinion issued Mar. 19, 2014); *Holbert v. DEP*, 2000 EHB 796, 808. In evaluating a motion for summary judgment contesting standing, we look to whether there are genuine issues of fact regarding the issue and if it is clear that one or more appellants do not have standing as a matter of law. *Tri-County Landfill v. DEP*, EHB Docket No. 2013-185-L, slip op. at 4 (Opinion issued Mar. 11, 2014); *Giordano v. DEP*, 2000 EHB 1184, 1187. Chesapeake must therefore establish that there are no material facts in dispute regarding Kennedy's standing. *Matthews Int'l Corp. v. DEP*, 2011 EHB 402, 404.

In order to have standing, one must have a substantial, direct, and immediate interest in the outcome of the appeal. *Fumo v. City of Phila.*, 972 A.2d 487, 496 (Pa. 2009); *Tri-County*

Landfill, supra, slip op. at 2. A substantial interest is one that is greater than the abstract interest all citizens have in ensuring that others comply with the law. *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). Direct and immediate mean that there must be a sufficiently close causal connection between the person's interest and the actual or potential harm associated with the challenged action. *Id.*

Kennedy's allegation of a threat of contamination from the Lamb's Farm Facility requires us to analyze the issue in terms of the Board's gatekeeper function. We have held that we "will not allow a waste of resources on cases where there is no actual harm or credible threat of harm to anybody and, therefore no legitimate case or controversy." *Hendryx v. DEP*, 2011 EHB 127, 136 (quoting *Giordano, supra*, 2000 EHB 1184, 1186). Although appellants are not required to prove their case on the merits, "they must show that they have more than subjective apprehensions, and that the likelihood of adverse effects is not merely speculative." *Id.* Stated another way, in order to have standing, there must be "an objectively reasonable threat of adverse effects." *Tri-County Landfill*, slip op. at 5.

Here, we struggle to see how there is an objectively reasonable threat of contamination to Kennedy, who lives six miles away from the Lamb's Farm Facility. Kennedy's affidavit does not deviate from his deposition statements that he does not use the area near the Lamb's Farm site. He does not allege any recreational or aesthetic interest in the area immediately surrounding the Lamb's Farm Facility. *See Tri-County Landfill*, slip op. at 5 (the Board has repeatedly held that a threat of lessening the aesthetic or recreational value of an area qualifies for purposes of standing) (citing *Consol Pa. Coal Co. v. DEP*, 2011 EHB 251, 253; *Drummond v. DEP*, 2002 EHB 413, 414; *LTV Steel Co. v. DEP*, 2002 EHB 605, 606-07)).

Kennedy never details beyond his subjective apprehensions how he will be affected by the Lamb's Farm Facility. He never explains how or why the value of his land stands to decrease due to the presence of the facility six miles away. He does not describe how a potential leak or spill at the site might enter the soil, water, or air and adversely affect him. Kennedy's concern appears to be that a leak or spill may occur at the site, may infiltrate through the soil and into the groundwater, and may then migrate through the groundwater approximately six miles to his property, which may or may not have a drinking water well. He does not point to anything in the record to suggest that there is a legitimate concern over this facility to someone who lives six miles away. Without providing us with any more, and with nothing in the record to substantiate the claim, Kennedy's stated fears are too attenuated from the facility and its operations to provide a basis for standing with respect to contamination.

That leaves us with the issue of public notice. Kennedy states that he did not receive adequate notice of the permitting of the Lamb's Farm facility and he did not have an adequate opportunity for his concerns to be heard. Similar statements regarding public notice are contained in the Appellants' amended notice of appeal:

> Chesapeake did not fully disclose the intended purpose of the facility to the public. A Public Hearing was not held as required by law.
>
> ….
>
> The township residents, particularly those in close proximity, were not notified of the application of this facility by the Department of Environmental Protection and Chesapeake Energy. No opportunity was given for questions and concerns of these residents to be answered.
>
> ….
>
> There was not public hearing with regard to this facility. A 30 day hearing should have been held because it is a proposed recycling facility.

(Am. Notice of Appeal at 3.)

Being deprived of the opportunity to submit meaningful comments due to deficient public notice is undoubtedly a serious matter. Former Chief Judge Krancer emphasized the importance of public notice in the context of an NPDES permit:

> The right to public notice, by its very nature, is a right granted to everyone in the public. That would include economic competitors and everyone else. It is virtually definitional that the notice provisions of the law are intended to protect the right of the public to have proper notice and that protection of that right to receive public notice is the essence of the policy underlying the legal rules requiring public notice.
>
> Everyone has the right to try to convince the Department to not issue the permit before the permit is issued. The Appellants here are within the definition of those intended to be served and protected by the public notice provision governing the NPDES permitting process. Each of the Appellants here was entitled to have the change of plan re-noticed before the Permit was issued.

PRIZM Asset Mgmt. Co. v. DEP, 2005 EHB 819, 838-39. *See also Hanslovan v. DER*, 1992 EHB 1011, 1023 (recognizing in the context of a surface mining permit that the "requirement for public notice is the foundation for public involvement in the permit issuance process, as mandated by the Legislature."); *Throop Prop. Owner's Ass'n v. DEP*, 1998 EHB 618, 625 (stating in the context of municipal waste permits, "It is axiomatic that, in order to reap the benefits underlying the public comment policy, the notice to the public must be crafted so as to inform the ordinary citizen of what is being sought in the application and then published in a newspaper likely to reach those targeted citizens.") Although we do not know if Kennedy was in fact deprived of the opportunity to provide meaningful comment, as we stated above an inquiry into the merits is not appropriate at this juncture.

Furthermore, it seems to be somewhat unsettled at this point whether concerns over deficient public notice alone can be enough to confer standing. *See PRIZM Asset Mgmt. Co., supra*, 2005 EHB 819, 838-39; *Citizen Advocates United to Safeguard the Env't v. DEP*, 2007

EHB 632, 676. *See also Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2143 n.7-8 (1992). Chesapeake's motion, Kennedy's response, and Chesapeake's reply all fail to address the issue of public notice as it relates to standing. The Department did not weigh in. Without adequate briefing, we are not in a position to address the issue at this time.

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	:	

O R D E R

AND NOW, this 29th day of January, 2015, it is hereby ordered that Chesapeake Appalachia's motion for summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: January 29, 2015

c: DEP, General Law Division:
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2013-187-CP-C**
ALLEGHENY ENTERPRISES, INC.	:	**Issued: February 10, 2015**

OPINION IN SUPPORT OF
ORDER GRANTING MOTION FOR LEAVE TO WITHDRAW AS COUNSEL

By Michelle A. Coleman, Judge

Synopsis

The Board grants an unopposed motion asking the Board to allow counsel to withdraw from representing a corporate defendant. Counsel's client has failed to substantially fulfill an obligation to counsel and withdrawal will not prejudice the litigants or impede the efficient administration of justice. The corporate defendant shall obtain new counsel.

O P I N I O N

The Department of Environmental Protection (the "Department") filed a complaint with the Board against Allegheny Enterprises, Inc. on October 22, 2013. The complaint alleges that Allegheny Enterprises conducted earth disturbance activities without an erosion and sediment control permit and without implementing applicable erosion and sediment control best management practices, in violation of the Clean Streams Law of 1937, 35 P.S. §§ 691.1 – 691.1001 and the regulations promulgated pursuant to the Clean Streams Law at Chapter 102 of Title 25 of the Pennsylvania Code. The Board conducted a hearing on the matter on October 1, 2014. In accordance with our briefing order, the Department filed its post-hearing brief on

December 22, 2014. Allegheny Enterprises' post-hearing brief was scheduled to be filed on February 5, 2015.

On January 19, 2015, Jesse D. Daniel, Esquire, counsel for Allegheny Enterprises, filed a petition for leave to withdraw as counsel for Allegheny Enterprises.[1] In the filing, Daniel alleges that Allegheny Enterprises has failed to pay him for the services he has rendered thus far, contrary to the agreement with Allegheny Enterprises defining his representation. Attached to the filing is an affidavit of Randy F. Stout, the President and CEO of Allegheny Enterprises. Stout avers that he has reviewed Daniel's request to withdraw, that he consents to the withdrawal, and that he understands his duty to act in a timely fashion to find replacement counsel. The Department responded on January 27, 2015. The Department states that although it does not oppose Daniel's withdrawal in this matter, it has certain reservations. The Department points out the Board's requirement under our Rules at 25 Pa. Code § 1021.21 that corporations be represented by counsel. The Department also expresses doubt about whether Allegheny Enterprises will sincerely pursue new counsel.

On January 29, 2015, we issued an order granting Daniel leave to withdraw as counsel for Allegheny Enterprises. In the order, we have given Allegheny Enterprises until March 20, 2015 to have new counsel enter an appearance. We also state that we will revisit the issue of the filing of the remaining post-hearing briefs at the time that new counsel enters an appearance on behalf of Allegheny Enterprises. This Opinion follows in support of that order.

In ruling on a request 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."

[1] We will treat the petition as a motion for the purposes of our Rules at 25 Pa. Code § 1021.23(b).

25 Pa. Code § 1021.23(b); *L.A.G. Wrecking, Inc. v. DEP*, EHB Docket No. 2014-126-C, slip op. at 3 (Opinion issued Oct. 31, 2014) (citing *Mann Realty Assocs., Inc. v. DEP*, EHB Docket No. 2013-153-M, slip op. at 4 (Opinion in Support of Order Granting Motion to Withdraw as Counsel 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.

Pennsylvania Rule of Professional Conduct 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). Daniel specifically directs our attention to Pa.R.P.C. 1.16(b)(5), which states that a lawyer may withdraw from representation if "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." Daniel states that Allegheny Enterprises' failed in its obligation to pay the money due to Daniel for his legal services in accordance with their agreement. We have previously allowed an attorney to withdraw from representation in part for the failure of a client to pay money owed to the attorney. In *Mann Realty, supra*, slip op. at 4, we explicitly recognized that the non-payment of money due to an attorney constituted the failure to substantially fulfill an obligation.[2] In addition, as required by the rule, it appears that the client has been fully advised of Daniel's withdrawal given the statements in Stout's affidavit.

[2] In *Mann Realty* we also found that continued representation would result in an unreasonable financial burden on the firm, a reason for withdrawal recognized by Pa.R.P.C. 1.16(b)(6). Slip op. at 4. We note that Daniel has maintained representation of Allegheny Enterprises as he transitioned from a small firm to a solo practice. *See* Praecipe to Substitute Counsel, Docket Entry 14 (Aug. 5, 2014). Accordingly, although not alleged by Daniel in his petition, it stands to reason that continued representation may also present an unreasonable financial burden.

At this stage in the proceedings all that remains for Allegheny Enterprises to do is file its post-hearing brief. While this is undoubtedly an important aspect of our proceedings and a crucial component of any party's case before the Board, with a hearing lasting only a portion of one day it should not be an insurmountable challenge for new counsel to compose on a cold record a post-hearing brief in accordance with our Rules at 25 Pa. Code § 1021.131. It is for these reasons that we believe that withdrawal will not prejudice the litigants or impede the efficient administration of justice. *See* 25 Pa. Code § 1021.23(b). Although permitting withdrawal delays the resolution of the matter, we will allow such a delay where it does not appear prejudicial and where the opposing party has not opposed the withdrawal. *See Mann Realty* (allowing withdrawal one week before the scheduled hearing on the merits). However, we caution that we will be reluctant to take any action that will further prolong the resolution of the matter.

While we are permitting Daniel to withdraw from this matter, we advise him of his responsibility to Allegheny Enterprises 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). In this regard, we are encouraged by the statements contained in Stout's affidavit.

Finally, we acknowledge the Department's concern of having Allegheny Enterprises obtain new counsel quickly to have this matter resolved. However, in the event that Allegheny Enterprises fails to have counsel enter an appearance as required by our Rules, the Department is

not without recourse. We advise Allegheny Enterprises that a failure to abide by our Rules may necessitate the imposition of sanctions, which could include entering adjudication against Allegheny Enterprises. 25 Pa. Code § 1021.161. We have previously imposed sanctions against corporate parties who have failed to obtain counsel. *See Falcon Coal and Constr. Co. v. DEP*, 2009 EHB 209; *R. J. Rhodes Transit, Inc. v. DEP*, 2007 EHB 260; *Potts Contracting Co. v. DEP*, 1999 EHB 958; *Bucket Coal Co. v. DEP*, 1999 EHB 288. We also note that a failure to file a post-hearing brief may constitute a waiver of a party's arguments under our Rules. 25 Pa. Code § 1021.131(c); *DEP v. Seligman*, EHB Docket No. 2013-060-CP-L, slip op. at 27 n.13 (Adjudication issued Oct. 22, 2014) (citing *Rural Area Concerned Citizens (RACC) v. DEP*, EHB Docket No. 2012-072-M, slip op. at 21 n.1 (Adjudication issued Jun. 11, 2014); *Jake v. DEP*, EHB Docket No. 2011-126-M, slip op. at 10 n.3 (Adjudication issued Feb. 18, 2014); *Gadinski v. DEP*, 2013 EHB 246, 273 n.7).

Attached to this Opinion is the Order for which it supports.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: February 10, 2015

c: DEP, General Law Division:
Attention: Maria Tolentino
9th Floor, RCSOB

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Office of Chief Counsel – Northcentral Region

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Allegheny Enterprises Inc.
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Corsica, Pennsylvania 15829

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2013-187-CP-C**
ALLEGHENY ENTERPRISES, INC.	:	

O R D E R

AND NOW, this 29th day of January, 2015, upon consideration of Allegheny Enterprises' motion to withdraw as counsel, it is hereby ordered that the motion is **granted**. Pursuant to 25 Pa. Code § 1021.21(b), Allegheny Enterprises shall obtain new counsel and have that counsel enter an appearance with the Board on or before **March 20, 2015**. The Board will revisit the issue of the due date of Allegheny Enterprises' post-hearing brief upon the appearance of new counsel. An opinion in support of this order will follow.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: January 29, 2015

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Office of Chief Counsel – Northcentral Region

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOL PENNSYLVANIA COAL COMPANY, LLC	:	
v.	:	**EHB Docket No. 2014-027-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CENTER FOR COALFIELD JUSTICE, Intervenor	:	**Issued: February 12, 2015**

OPINION AND ORDER ON
DEPARTMENT'S MOTION TO DISMISS*

By Steven C. Beckman, Judge

Synopsis

The Board dismisses for mootness an appeal of a permit revision where the appellant complied with the obligations of a special condition contained in the revised permit and the Department thereafter deleted the special condition from the permit. In resolving a motion to dismiss, the Board views the motion in the light most favorable to the non-moving party, assumes that all supported factual averments of the non-moving party are true, and will only grant the motion where the moving party is entitled to judgment as a matter of law. The Board denies a motion for leave to amend a notice of appeal which fails to conform to the Board's rules or show that no prejudice will result to opposing parties.

O P I N I O N

Pending before the Board is the Department of Environmental Protection's ("Department") November 19, 2014 Motion to Dismiss as moot the appeal of Consol

* Opinion of the Board by Judge Beckman in which Judge Coleman and Judge Mather join.
Concurring Opinion by Judge Mather in which Judge Coleman joins.
Dissenting Opinion by Judge Labuskes in which Chief Judge Renwand joins.

Pennsylvania Coal Company, LLC ("Consol"). Consol responded on December 19, 2014, filing a brief and exhibits in opposition to the Motion. Also on December 19, 2014, Intervenor Center for Coalfield Justice ("CCJ") filed a response and memorandum in support of the Department's Motion.[1] The Department filed a reply on January 5, 2015. Following a thorough review of the Parties' arguments and supporting documents, the Motion to Dismiss is ripe for decision.

In this appeal, Consol challenges the February 21, 2014 revision by the Department of Coal Mining Activity Permit No. 30841316 ("Permit Revision 173"). Subject to its terms, conditions, and revisions, Coal Mining Activity Permit No. 30841316 ("Bailey Permit") authorizes certain activities associated with the operation of Consol's Bailey Mine & Prep Plant located in Greene County. Permit Revision 173 amended the Bailey Permit to allow longwall coal mining of approximately 2539 acres previously limited to development mining. However, longwall mining under four stream sections covered by Permit Revision 173 was conditioned by Special Condition 77, which required Consol to submit satisfactory Biological Monitoring scores for those stream sections prior to commencement of mining in that area. The facts—viewed in the light most favorable to Consol—are as follows.[2]

Background

Applicants for a permit to operate an underground coal mine are required to complete and submit various modules which document, among other things, the geology, hydrology, and biology of the permit area. For example, Module 8, entitled "Hydrology/Baseline Biology," requires in Section 8.9 certain baseline biological information for streams in settings where mining will cause subsidence "of a stream or an area of a valley floor that is proximate to a

[1] The Board revised its rules regarding dispositive motions other than summary judgment motions on November 22, 2014. CCJ's response was timely filed under the rules in effect at the time the Department filed its Motion, which provided for 30 days to respond to a dispositive motion.

[2] For the purpose of deciding this Motion, the Board accepts as true Consol's supported factual averments. *See Ehmann v. DEP*, 2008 EHB 386, 390.

stream" or "of springs that are crucial to the maintenance of flow in a 'biologically diverse' or 'biologically variable' stream segment." (Consol's Opp'n Br. Ex. C (Folman Dep. Ex. 4, at 8-6, 8-15) [hereinafter Module 8].) Specifically, portions of Section 8.9 direct the applicant to:

> b. Using Form 8.8B, (Stream Delineation and Bioassessment Summary), include baseline information on fish and macroinvertebrae communities sufficient to delineate stream segments that qualify as "biologically diverse", "biologically variable", and point of first use based on the criteria and procedures outlined in Appendix A of the Technical Guidance Document "563-2000-655".
>
> . . . .
>
> c. Provide an assessment of the condition of the macroinvertebrae community in each stream segment identified as "biologically diverse" in item "b" above, using Form 8.8C (Quantitative Multi-Habitat Bioassessment Of Diverse Community) and 8.8D (Biometric And Total Biological Score Summary). Each assessment should consist of Form 8.8C documenting the results of each sampling event (minimum of two) and Form 8.8D documenting biometric calculations and calculation of the "Mean Total Biological Score." (Additional information on performing aquatic life use assessment is found in the Technical Guidance Document 563-2000-655).

(Module 8 at 8-15.) Section 8.10 of the Module requires substantially the same information for streams which have gradients of 2% or less and that "will be subsided as a result of proposed mining," which could potentially result in pooling within the stream. (Module 8 at 8-23.) Neither the regulations addressing coal mining nor the Department's water quality regulations define the terms "biologically diverse" or "biologically variable."

Technical Guidance Document No. 563-2000-655, entitled *Surface Water Protection—Underground Bituminous Coal Mining Operations*, comprises the Department's interpretation of "the existing legal requirements applicable to surface water protection, and its recommended approach for mine operators to comply with these existing requirements, in the context of impacts on streams and wetlands caused by underground mining operations." (Consol's Opp'n

Br. Ex. A, at 6 [hereinafter *Guidance*].) The *Guidance* encompasses two appendices: Appendix A outlines a protocol for delineating stream segments that are subject to the *Guidance*, while Appendix B consists of a protocol "intended to yield aquatic life use attainment scores that can be used to document the condition of a stream before and after mining and to assess the magnitude of mining-induced change." (*Guidance* at 25, 30.) While the "Definitions" section of the *Guidance* does not define "biologically diverse" or "biologically variable," Appendix A explains the terms through written descriptions and an illustrative figure. (*Id.* at 25.) The *Guidance* is used by Department staff in reviewing permit applications for deep mining involving full extraction mining. (Consol's Opp'n Br. Ex. C (Folman Dep. 58:7–13).)

In early June 2010, Consol applied for a revision of the Bailey Permit ("Mining Application") to conduct longwall mining of the approximately 2539 acres (the "Revision Area") that would ultimately be approved, subject to Special Condition 77, in Permit Revision 173. (Consol's Opp'n Br. Ex. B ¶ 4.) In accordance with Module 8, Section 8.9, Consol submitted the Form 8.8B Stream Delineation and Bioassessment Summary. (*Id.* ¶ 7.) Consol identified 26 stream segments of Patterson Creek, Brown's Creek, or of their tributaries, as "biologically diverse" and submitted biological score data to the Department for each identified segment. (*See Id.*) The Department sent two "comment letters" to Consol in regard to the Mining Application, but it appears that neither contained any request for Module 8, Section 8.9 biological monitoring data for other stream segments. (*Id.* ¶ 10.) Because obtaining the permit revision sought by the Mining Application was a top priority, Consol repeatedly inquired about its status during 2010–2013. (*Id.* ¶ 9.) On January 7, 2014, Consol Supervisor Jaculyn Duke emailed Brian Lohr, a Geologic Specialist at the Department, seeking an update regarding the status of the Mining

Application, and stating that Consol was "down to the wire" and in need of having the review completed so that it could commence mining in the Revision Area. (*Id*. ¶ 11.)

On January 13, 2014, the Department sent a letter to Consol outlining a number of deficiencies with the Mining Application, including the identification of nine additional stream segments for which it would require Module 8 biological monitoring points. (Consol's Opp'n Br. Ex. C (Folman Dep. Ex. 8).) Following a January 23, 2014 site visit to the additional stream segments, Department biologist Joel Folman determined that four of the nine segments should be included in the Mining Application. (Consol's Opp'n Br. Ex. B ¶ 13.) On February 21, 2014, the Department issued Permit Revision 173, which permitted longwall mining of the Revision Area, subject to Special Condition 77. Special Condition 77 provides:

> The company shall submit two Biological Monitoring (Appendix B) scores within 16 percent in accordance to Surface Water Protection document 563-2000-655 for the following locations prior to the commencement of longwall mining under the following stream sections: (A1 Panel) 40547-L4 and 40547-L9 ([A3] Panel) 40561 and 40565 downstream.

(Notice of Appeal Ex. A.) The Department used the *Guidance* both in reviewing Consol's Module 8 submission as well as determining what information it would require in Special Condition 77. (Consol's Opp'n Br. Ex. C (Folman Dep. 131:6–132:20).) Consol agreed to include the additional streams in the Mining Application, under protest, in order to secure the approval of Permit Revision 173. (Consol's Opp'n Br. Ex. B ¶ 13.) Consol submitted the additional monitoring locations, maps, and data required by Special Condition 77 on March 5, 2014. (Consol's Opp'n Br. Ex. B ¶ 18.)

On March 24, 2014, Consol filed the present appeal of Permit Revision 173. Specifically, Consol listed the following eight grounds in its Notice of Appeal:

> 3. [Consol] is aggrieved by, objects to and appeals the Department's action because the action is arbitrary, capricious,

> contrary to law and constitutes an abuse of discretion, in that, inter alia:
>
> > (a) The imposition of Special Condition No. 77 is arbitrary, capricious, and abuse of discretion and contrary to law;
> >
> > (b) The imposition of Special Condition No. 77 improperly modified a previously agreed to monitoring plan and was unreasonably inserted as a Special Condition shortly prior to revising Appellant's permit;
> >
> > (c) Special Condition No. 77 was imposed without a factual or scientific basis;
> >
> > (d) Special Condition No. 77 imposes costly and unnecessary monitoring requirements;
> >
> > (e) There exists no lawful basis for imposing Special Condition No. 77;
> >
> > (f) The stream segments covered by Special Condition No. 77 are not perennial for purposes of Subchapter F of Chapter 89 of 25 Pa. Code and the Department thus lacks the regulatory authority to impose said condition;
> >
> > (g) By relying upon Technical Guidance Document 563-2000-655, Surface Water Protection-Underground Bituminous Coal Mining Operations, to justify the imposition of Special Condition No. 77 the Department has improperly imposed binding norms and regulatory requirements through a guidance document in violation of statutory rulemaking procedures;
> >
> > (h) The Department's pervasive use and reliance on Technical Guidance Document 563-2000-655, Surface Water Protection-Underground Bituminous Coal Mining Operations in establishing what information permit applicants must submit and in the Department's review of applications for underground coal mining permits is arbitrary, capricious and contrary to law because the Department has imposed binding norms and regulatory requirements through a guidance document in violation of statutory rulemaking procedures.

(Notice of Appeal.) Subsequently, on April 4, 2014, the Department removed Special Condition 77 from the Bailey Permit with its issuance of Permit Revision 176. (Consol's Opp'n Br. Ex. B ¶ 22.)

Legal Standard for Dispositive Motions and Mootness

The Board's current rules treat dispositive motions as either (1) motions for summary judgment or (2) "dispositive motions other than summary judgment motions." Our rule at 25 Pa. Code Section 1021.94a specifically and comprehensively lays out the procedure, substantive requirements, and standard of review governing summary judgment motions. On the other hand, at the time the Department filed its Motion to Dismiss, Section 1021.94 described more generally the substantive requirements for "other" dispositive motions.[3] Examples of "other" dispositive motions entertained by the Board include motions to dismiss and motions for nonsuit, among others. *See, e.g.*, *Morris Twp. v. DEP*, 2006 EHB 55 (motion to dismiss); *DEP v. Shorty and Dave's Used Truck Parts*, EHB Docket No. 2011-105-CP-C (Opinion issued Jan. 2, 2015) (motion for nonsuit).

A motion to dismiss is typically appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, some issue of justiciability, or another preliminary concern. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *E.g.*, *Burrows v. DEP*, 2009 EHB 20, 22. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving motions to dismiss, we accept the nonmoving party's version of events as true. *Ehmann v. DEP*, 2008 EHB 386, 390. In contrast, a motion for summary judgment requests that the Board make a ruling *specifically regarding the merits of the appeal*, and will be granted where the "record shows that there is no genuine issue as to any

[3] For example, while the previous rules did not provide any standards for the memoranda of law or briefs required to be submitted, our current rules, amended at 44 Pa. Bull. 7365 (Nov. 22, 2014), require a party opposing the motion to "set forth issues of fact or law showing there is a genuine issue for hearing." 25 Pa. Code § 1021.94(f).

material fact and that the moving party is entitled to judgment as a matter of law." 25 Pa. Code § 1021.94a(l).

We feel that this is a subtle—but important—distinction that requires some clarification. The two standards have been conflated, as parties often file motions to dismiss that should properly be characterized as motions for summary judgment. Part of the confusion appears to stem from an old Board case where the then Department of Environmental Resources filed a motion to dismiss, and, in the alternative, for judgment on the pleadings. *City of Scranton v. DER*, 1995 EHB 104, 108.[4] In that case, and in others resolving similar motions, the Board used the standard of review for judgment on the pleadings, which is essentially the same as that for summary judgment. *Compare City of Scranton v. DER*, 1995 EHB 104, 108 *with* 25 Pa. Code § 1021.94a(l). As a practical matter, whether or not there are "factual disputes" on the record is irrelevant with respect to a motion to dismiss, because the operative question is: even assuming everything the non-moving party states is true, can—or should—the Board hear the appeal?

"Mootness is a prudential limitation related to justiciability," and, thus generally is an issue properly resolved by a motion to dismiss. *M & M Stone Co. v. DEP*, 2009 EHB 495, 500. "A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome." *Horsehead Res. Dev. Co. v. DEP*, 1998 EHB 1101, 1103, *aff'd*, 780 A.2d 856 (Pa. Cmwlth. 2001). By way of example, we have specifically found that a permittee's compliance with, and the subsequent removal of, a permit revision renders an appeal objecting to that revision moot. *Morris Twp. v. DEP*, 2006 EHB 55, 56. To be sure, rescission of a Department action will not always moot an appeal: for example, where concrete, continuing obligations exist.

[4] Most documents filed before the Board do not constitute "pleadings" and, therefore, a motion for judgment on the pleadings generally would not be appropriate in matters before the Board. *Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 790; 25 Pa. Code § 1021.2 (defining "pleading").

Ehmann, 2008 EHB 386 (revocation of the authority to mine did not discharge liability for reclamation or duty to prevent discharges). In such instances, the Board can clearly provide effective relief. *Id.* at 388, 389. Nevertheless, "[i]t is axiomatic that a court should not address itself to moot questions and instead should only concern itself with real controversies, except in certain exceptional circumstances." *Goetz v. DEP*, 2001 EHB 1127, 1131. Some nonexclusive examples of exceptional circumstances include where the conduct complained of is capable of repetition yet likely to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision. *See, e.g.*, *Robinson Coal Co. v. DEP*, 2011 EHB 895, 899. The existence of any one of these circumstances "may justify" the Board retaining jurisdiction of the matter. *Ehmann*, 2008 EHB at 390. For example, the Board retained jurisdiction where the Department withdrew an *enforcement order* subsequent to the appellant's compliance, but without an admission or finding of fault, because the alleged violation was capable of repetition and the Department could issue another order. *ELG Metals v. DEP*, 2011 EHB 741.

Discussion

As evidenced by the brevity of its Motion to Dismiss, the Department believes the issues in this matter can be boiled down to a few essential contentions. The Motion to Dismiss avers that the objections in Consol's Notice of Appeal of Permit Revision 173 relate solely to Special Condition 77. It avers that, after Consol complied with the obligations of Special Condition 77, the condition was deleted from the Bailey Permit. Finally, it contends that, because Special Condition 77 was deleted from the Bailey Permit, Consol no longer has a stake in the outcome of the appeal and the Board cannot provide effective relief. The Department elaborates its position in its Reply, adding arguments that Special Condition 77 does not impose any future obligations

on Consol, and that Consol failed to show that any exceptions to the mootness doctrine apply in this case.

In response, Consol contends that its appeal has not been rendered moot by the Department's removal of Special Condition 77 and that factual disputes preclude the Board from granting the Department's Motion to Dismiss. First, Consol argues that it "is still subject to potential future obligations pursuant to Special Condition No. 77." (Consol's Opp'n Br. at 12.) It additionally argues that the Notice of Appeal presented various challenges to Permit Revision 173 beyond just the inclusion of Special Condition 77. For instance, Consol notes, the Notice of Appeal challenges the timing of the imposition of Special Condition 77, as well as the Department's regulatory authority—and its required use of the *Guidance*—to impose the condition. In paragraph 3(h) of the Notice of Appeal, Consol asserts a broad challenge to the pervasive use of and reliance on the *Guidance* as imposing binding norms and regulatory requirements in violation of statutory rulemaking procedures.

Consol argues in the alternative that, even if the appeal is moot, exceptions to the doctrine apply in this case such that its appeal should go forward. Finally, in the alternative again, Consol moves for leave to amend its Notice of Appeal pursuant to 25 Pa. Code Section 1021.53(b).

Intervenor CCJ filed a response and memorandum in support of the Department's Motion to Dismiss. CCJ contends the appeal is moot because Consol has complied with the obligations of Special Condition 77 and the Department has removed the condition from the Bailey Permit. CCJ further argues that none of the exceptions to the mootness doctrine are applicable in this matter. CCJ notes, for instance, that a regulated entity's challenge of the use of a guidance

document will not evade review where the objection may be raised "in any timely appeal of an appealable [Department] action that implicates the guidance document." (CCJ's Mem. at 5.)

Consol's Appeal Is Moot

As an initial matter, we reject Consol's argument that Special Condition 77 subjects it to future obligations. Consol's contention that, notwithstanding its compliance with the condition and the subsequent removal of the condition from the permit, it may "still [be] subject to potential future obligations *pursuant to* the inclusion of additional monitoring requirements required by Special Condition No. 77" is clearly speculative, and ultimately inconsistent with the plain language of Special Condition 77. (Consol's Opp'n Br. Ex. B ¶ 23 (emphasis added).) Special Condition 77 required that Consol "shall submit" two Biological Monitoring scores in accordance with the *Guidance* for each of four stream segments "*prior to the commencement of longwall mining*." (Notice of Appeal Ex. A (emphasis added).) The plain language of Special Condition 77 imposed only *pre-mining* obligations. That fact is not changed by speculation that the Department may compare the pre-mining information Consol submitted in response to Special Condition 77 to *post-mining* data obtained from Consol, or any other source.[5] Consol acknowledges that it submitted the necessary information before filing its appeal. It has already complied with all obligations imposed by Special Condition 77.

Considering that all obligations stemming from Special Condition 77 have been complied with, and the condition has been deleted from the permit, the inquiry turns to whether Consol's appeal is moot. It is clear to us that it is. Consol articulates eight grounds for objecting to Permit

[5] Nor is it changed by whether hypothetical post-mining obligations are imposed pursuant to the *Guidance*, as opposed to some regulatory or statutory provision. Consol is free to raise challenges to future Department actions at the appropriate time on the grounds it believes are appropriate.

We further note that a dismissal for mootness is *not* a decision on the merits, and therefore will not directly limit the issues that may be raised in future appeals. *Contra White Glove, Inc. v. DEP*, 1998 EHB 372 (Under previous Board rules, a withdrawal prior to adjudication constituted a withdrawal *with prejudice*, such that *res judicata* would bar subsequent attempts to raise the issues of the earlier appeal.).

Revision 173. We note that seven of the eight grounds specifically relate to the *imposition* of Special Condition 77. Consol's Notice of Appeal questions Special Condition 77 on various and specific grounds: the timing, the factual and scientific basis, the cost and burden of compliance, the legal and regulatory basis, the Department's reliance on the *Guidance* in imposing the condition, and whether the "stream segments covered by Special Condition No. 77" are "perennial." (Notice of Appeal ¶¶ 3(a)–(g).) Assuming Consol's objections were meritorious, the Board clearly could have provided effective relief, if Consol appealed Permit Revision 173 *prior to Consol's compliance with* and prior to the Department's removal of the condition. As the circumstances stand today, we are unaware—and Consol provides no suggestion of—what relief the Board can provide, or what stake Consol continues to have in its appeal with respect to its objections concerning Special Condition 77, particularly given its compliance with the requirements of that condition prior to filing its appeal.[6] Accordingly, those claims are moot. *Morris Twp. v. DEP*, 2006 EHB 55, 56; *Centre Lime & Stone Co. v. DER*, 1992 EHB 947, 950 ("The Board will dismiss a case as moot when, due to a change in circumstances, the Board is no longer able to grant effective relief.").

In contrast to Consol's other objections, Paragraph 3(h) of the Notice of Appeal is a general objection to the use of the *Guidance* by the Department:

> (h) The Department's pervasive use and reliance on Technical Guidance Document 563-2000-655, Surface Water Protection-Underground Bituminous Coal Mining Operations in establishing what information permit applicants must submit and in the

[6] The Department imposed Special Condition 77 unusually late in the game, despite Consol's repeated attempts to secure prompt review of the Mining Application. We understand that this placed Consol in the unenviable position of choosing between complying at "substantial monetary costs" with a Department requirement that it felt was not legitimate or, alternatively, delaying a top priority project while it sought review of the permit condition. The Board observes, however, that the resolution of that dilemma—whether "under protest" or not—is the type of business decision that regulated entities are sometimes required to make. That type of business issue, would rarely, however, alter the legal analysis on which the Board is required to decide cases.

> Department's review of applications for underground coal mining permits is arbitrary, capricious and contrary to law because the Department has imposed binding norms and regulatory requirements through a guidance document in violation of statutory rulemaking procedures.

(Notice of Appeal ¶ 3(h).) It is without question that the Board can rule on the propriety of the Department's use of guidance documents. *Dauphin Meadows v. DEP*, 2000 EHB 521, 527–530. However, the Board's jurisdiction over an appeal is inextricably linked to *an action of the Department*. 35 P.S. § 7514. The action appealed, in this case, is Permit Revision 173. Consol has not identified any manner in which the *Guidance* was used regarding Permit Revision 173—other than to impose the obligations embodied in Special Condition 77. As we have stated, those objections are moot as a result of Consol's decision to comply with Special Condition 77 and the Department's removal of it from Permit Revision 173. The fact that we find the underlying objections surrounding the specific application of the *Guidance* to be moot makes it unwise to address the Department's overall use of the *Guidance* untethered from the Department's specific actions in this case. To the extent Consol is attempting to object to the use of the *Guidance* with respect to hypothetical future obligations, or regarding the Department's review of applications for underground coal mining permits *generally*, such a claim before the Board is improper outside the context of a viable appeal of a Departmental action relating to those obligations.

No Exceptions to the Mootness Doctrine Apply

Having found that Consol's appeal is moot, the question becomes whether it is appropriate to allow the appeal to go forward because of exceptional circumstances, including under one or more of the recognized exceptions to the mootness doctrine cited by Consol in its Brief. "Nonexclusive examples of exceptional circumstances include cases where the disputed conduct is of a recurring nature yet likely repeatedly to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision."

Ehmann, 2008 EHB at 389; *see also Horsehead Res. Dev. Co. v. DEP*, 780 A.2d 856, 858 (Pa. Cmwlth. 2001).

Consol asserts in its Brief that the circumstances of this case satisfy each of the exceptions to the mootness doctrine listed above. Taking the last exception first, Consol argues that it will suffer a detriment without a decision of the Board because "the Department can later use the data that it impermissibly required [Consol] to collect in crafting and imposing post-mining requirements." (Consol's Opp'n Br. at 22.) As we have stated, Consol is free to challenge the imposition of post-mining requirements that it believes lack statutory or regulatory basis *when such an appeal is ripe*. We do not believe that speculation about a hypothetical future action of the Department, which may or may not be lawful, creates the type of exceptional circumstance that warrants overcoming a finding of mootness. "Board review is unnecessary and inappropriate in academic disputes." *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1124.

Consol also argues that the Board should hear its appeal even if it is moot because:

> [T]he imposition of Special Condition No. 77 is capable of repetition, but will continue to evade review where [Consol] is able to satisfy the condition, or is required to do so as a predicate to obtaining a permit to mine under streams that the Department determines fall within Appendix A of the Guidance Document, before [Consol's] challenge to it is fully adjudicated or the Department merely deletes the similar condition.

(Consol's Opp'n Br. at 21.) The Board has indeed recognized an exception to the mootness doctrine where the conduct complained of is capable of repetition yet likely to evade review. By way of example, we have applied this exception where the Department, based on its erroneous belief that the appellant was a source of pollution, had issued and then revoked an administrative order without clearing the appellant of any wrongdoing. *ELG Metals v. DEP*, 2011 EHB 741. It is important to note, however, that the Board additionally found in *ELG Metals* that it would be unreasonable to expect the appellant to seek expedited review through a petition for supersedeas

where it would result in shifting the burden of proof of the underlying claim from the Department to the appellant. *Id.* at 748. In this appeal, by contrast, the burden would remain on Consol whether at a supersedeas hearing or under a normal hearing. 25 Pa. Code § 1021.122(c).

Consol's reliance on *Davison Sand & Gravel v. DEP*, 1997 EHB 972, is also misplaced. In that case, the Board recognized it was appropriate to address the merits of Davison's argument that the Department had not adequately established a legal basis for requiring mussel surveys as a basis for extending a permit. However, the Board in *Davison* recognized that the Department actually *refused to grant* the permit extension. *Id.* In contrast, Consol's application to revise its permit was granted, subject to a minor condition for which Consol has fulfilled all obligations.

In evaluating Consol's argument that this exception applies, it is important to note that with respect to the permit condition at issue, Consol is in control of the mootness of its appeal. Consol recognizes that the obligations of Special Condition 77 will evade review where Consol "is able to satisfy the condition . . . before [its] challenge to it is fully adjudicated." (Consol's Opp'n Br. at 21.) This is not strictly correct, however; the obligations will evade review only where Consol takes an action satisfying the condition, or the Department removes it. Consol could have elected to challenge the permit condition without complying, or proceeded with mining without satisfying the condition—the latter of which we note would have likely lead to an appealable action. However, Consol chose to comply, presumably for reasons it found more compelling than challenging the condition. Further, as the Intervenor points out, Consol currently has a separate appeal before the Board that implicates the Department's use of the *Guidance*. *See Consol Pennsylvania Coal Co. v. DEP*, EHB Docket 2014-110-R (Notice of Appeal). By all indications, this issue is not likely to evade review.

Finally, the Board has exercised discretion to hear moot matters where an issue raised in the appeal constitutes a matter of great public importance. Consol argues that its appeal raises such an issue because "the Department's use of the Guidance Document to impose regulatory requirements will continue to affect [Consol] and other companies with bituminous coal mining operations." (Consol's Opp'n Br. at 22.) We first note that "courts have rarely applied the public importance exception to the mootness doctrine." *Morris Twp.*, 2006 EHB at 57. For example, we declined to apply the exception, despite there being potentially millions of dollars at stake, where the parties had "another forum for resolution of the issues" and the Board's failure to reach a decision would not threaten public health or lead to significant environmental damages. *Tinicum Twp. v. DEP*, 2003 EHB 493, 497. It is a point that bears repeating: should Consol or another company believe that the Department *acts* in unlawful reliance upon the *Guidance*, they may bring an appeal of that action before the Board before some event—such as the company's compliance—causes the appeal to be moot. "The mere fact that it may be inconvenient for . . . the parties to litigate the issues in another proceeding does not bring them within one of the recognized exceptions to the mootness doctrine." *Horsehead Res. Dev. Co*, 1998 EHB at 1110 (Judge Coleman, concurring).

We do not find the cases cited by Consol to be persuasive. In *Emerald Coal Resources*, we specifically found that the Board could provide relief and, accordingly, the appeal was not moot in the first place. *Emerald Coal Res. v. DEP*, 2008 EHB 532, 539, 548. We need only consider the exceptions to the mootness doctrine *after* the appeal has been established as moot. Further, the Department has not taken (or revoked) any enforcement action against Consol, as it had against the appellant in *ELG Metals*. 2011 EHB 741. Enforcement actions, which can be the basis of civil penalties or subsequent permit denials, involve more onerous obligations and

consequences than the permit condition at issue here. With regard to *Lower Milford Township*, we note that the Department's action at issue—the waiver from the requirement to obtain a permit to conduct noncoal exploration activities—was "inherently of a fleeting nature." *Lower Milford Twp. v. DEP*, 2006 EHB 387, 394. Thus, the Board retained jurisdiction of that case in part because the Department's permit waivers were recurring yet likely to evade review *in addition* to being a matter of public importance. *Id.*

Consol's claim that use of the *Guidance* is a matter of great public importance under the circumstances of this appeal is undermined by the fact that Consol did not refuse to comply with Module 8 when it initially filed the Mining Application in 2010. Presumably, in Consol's view, the application of the *Guidance* to the 26 other stream segments was then unlawful, and yet Consol chose not to address this matter, that it now alleges is of great public importance, at a point when the Board could have addressed it in a timely manner. Most importantly, however, the Board regards as fundamentally flawed Consol's characterization that "a claim falls under the 'matter of great public importance' exception . . . where the challenged action involves the Department *exceeding its lawful authority*." (Consol's Opp'n Br. at 26 (emphasis added).) Nearly every single appeal filed with the Board contains an allegation that the Department acted unlawfully and/or arbitrarily and capriciously, *i.e.*, in a manner exceeding its lawful authority. An exception as broad as Consol desires would completely swallow the mootness doctrine. In this case, the appellant's disagreement with the Department's decision to require pre-mining monitoring, even if the manner in which such a decision was reached involved the use of the *Guidance*, by itself, does not create a matter of great public importance and is insufficient rationale for the Board to allow a moot appeal to proceed. Our prior case law should not be read to suggest otherwise.

Consol's Motion for Leave to Amend Its Notice of Appeal is Denied

After an initial period where amendment is permitted as of right, the Board may grant a party's motion for leave to amend its notice of appeal, if no undue prejudice will result to the opposing parties. 25 Pa. Code § 1021.53. The burden, however, of proving that no undue prejudice will result to the opposing parties is on the party requesting the amendment. 25 Pa. Code § 1021.53(b). "Regardless of when a motion to amend is submitted, whether to allow an amendment after the period for amendments as of right is, of course, within the Board's discretion." *Robachele, Inc. v. DEP*, 2006 EHB 373, 379. When assessing whether the opposing parties will suffer undue prejudice, the Board considers numerous factors such as (i) the time when amendment is requested relative to other developments in the litigation; (ii) the scope and size of the amendment; (iii) whether the opposing party had actual notice of the issue (e.g. whether the issue was raised in other filings); (iv) the reason for the amendment; and (v) the extent to which the amendment diverges from the original appeal. *See, e.g.*, *Borough of St. Clair v. DEP*, 2013 EHB 171, 173.

In its reply brief, Consol contends that neither the Department nor the Intervenor will be prejudiced in any way by the amendment because the issues in this case "are well known to them and were addressed in both the Notice of Appeal and [Consol's] written discovery requests." (Consol's Opp'n Br. at 26.) Beyond stating that it "believes that it has more than sufficiently provided notice of its challenges to the Departmental action discussed herein," Consol declined to explain the nature of its proposed amendment, why amendment would be warranted at this stage in the litigation, or how the amended appeal may be different than its current appeal. (*Id.*) In short, Consol's conclusory averment regarding prejudice to other parties fails to provide the Board with grounds to rule in its favor.

Lastly, we note that Consol did not amend the notice of appeal as of right within the first 20 days following its filing of the appeal. Nor did Consol request leave to amend the notice of appeal at any other time prior to the filing of the Department's Motion to Dismiss. Even if those points were of little import and Consol had better supported its averment regarding prejudice, the motion fails to follow the Board's rules regarding motions practice. 25 Pa. Code §§ 1021.53(c); 1021.91; 1021.95. It appears to us that Consol's request to amend is simply an attempt to pull its appeal back from the brink of mootness. The Board is unable to conceive of any information or allegation that Consol could set forth in an amended notice of appeal that would render its appeal not moot. As such, and for the reasons stated above, Consol's motion for leave to amend its Notice of Appeal is denied.

In accordance with the reasons set forth in our Opinion, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOL PENNSYLVANIA COAL COMPANY, LLC	:	
v.	:	**EHB Docket No. 2014-027-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CENTER FOR COALFIELD JUSTICE, Intervenor	:	

O R D E R

AND NOW, this 12th day of February, 2015, for the reasons set forth in the preceding Opinion, it is hereby ordered that Consol's Motion for Leave to Amend the Notice of Appeal is **denied** and the Department's Motion to Dismiss is **granted**. Consol's appeal is hereby **dismissed** as moot, and the docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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: February 12, 2015

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

CONSOL PENNSYLVANIA COAL COMPANY, LLC	:	
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CONCURRING OPINION OF JUDGE MATHER IN WHICH JUDGE COLEMAN JOINS

By Richard P. Mather, Sr., Judge

I am in full agreement with the majority opinion. The appeal of Special Condition No. 77 is moot because the Appellant has already obtained the baseline biological monitoring data for four additional stream sections or monitoring points and submitted this data to the Department for its review and approval. That bell cannot be un-rung. In addition, none of the exceptions to the mootness doctrine apply under the facts of this appeal for the reasons set forth in the majority opinion.

I write this concurring opinion to question the Department's decision to issue the permit to the Appellant with the challenged Special Condition No. 77 that allowed the Appellant to collect and submit additional, required and necessary baseline biological monitoring data after the Department issued the permit. It is well established that the Department should not issue a permit before it completes its technical review of all required and necessary materials in a permit application. *See Jefferson Cnty. Comm'rs v. DEP*, 2002 EHB 132, *aff'd* 819 A.2d 604 (Pa. Cmwlth. 2003); *Borough of St. Clair v. DEP*, EHB Docket No. 2012-148-L (Adjudication issued

Mar. 3, 2014). In *Jefferson County*, the Department issued a landfill permit with a condition that deferred submission and review of a bird hazard mitigation plan until a later indeterminate time "prior to accepting waste at the landfill." 2002 EHB at 163. The Board decided that the permit was issued in error where the landfill permit was issued before the submission, review and approval of the bird hazard mitigation plan. More recently in *Borough of St. Clair*, the Department again issued a permit with a permit condition that deferred technical review and approval of a required and necessary mine subsidence plan. The Board decided that this approach to defer technical review and approval of a required plan until after issuing the permit "is inconsistent with the transparent review of permits that is mandated by applicable law. *Borough of St. Clair v. DEP*, slip op. at 37. In this appeal, the Department has conditioned an underground bituminous coal mining permit revision to defer both the Appellant's collection and submission of baseline biological monitoring data for four additional stream sections or monitoring points and the Department's review and approval of such necessary and required data until after the permit was issued. The permit condition in this appeal is very similar to the permit conditions in *Jefferson County* and *Borough of St. Clair*.

The facts, as set forth by the Appellant in its Response and Brief, illustrate my concern with the Department's action to issue the permit to the Appellant with Special Condition No. 77 and without all necessary information in hand before making its permit decision.[1] Special Condition No. 77 required the Appellant to secure and submit baseline biological monitoring data for four additional stream sections. In its initial application for permit revision of Coal Mining Activities Permit No. 30841316 (Permit Revision No. 173) the Appellant included

[1] As alleged by the nonmoving party, I accept the Appellant's version of the facts as true. *See, e.g., Burrows v. DEP*, 2009 EHB 20, 22. Reliance on these facts as alleged by the nonmoving party is never "out of place."

baseline biological monitoring data for twenty-six stream sections or monitoring points.[2] The Appellant's application was separated into various modules and related instructions including Module 8 that includes instructions for submitting baseline biological monitoring data for various stream section or monitoring points as part of the permit revision application. (Consol's Opp'n Br. at 3–5.) The Appellant submitted the permit revision application in June 2010 and in January 2014, the Appellant alerted the Department that it was "down to the wire" and in need of a prompt permit decision. The Appellant also asserts that the Department, as part of the permitting process, requires permit applicants, such as the Appellant, to submit the required baseline biological monitoring data for stream sections or monitoring points in support of the permit application and that DEP could have found the Appellant's permit application administratively incomplete without this necessary data. (Consol's Opp'n Br. at 17–18.) According to the Appellant, the Department's customary practice when such required and necessary baseline biological monitoring data is missing is: "the permit revision would not have been issued, and CPCC [the Appellant] would not have been authorized to conduct the mining activities it sought to engage in under Permit Revision No. 173." *Id.* For some reason not fully explained by anyone, the Department issued Permit Revision No. 173 to the Appellant without first obtaining and reviewing all of the required and necessary baseline biological monitoring data for all of the stream sections or monitoring points.[3] The Department only had data for twenty-six stream sections in hand when it issued the permit and the record before the Board, as

[2] The Appellant objected to the Department's direction to obtain baseline biological monitoring data for four additional stream sections having already willingly provided such data for twenty-six stream sections with its initial submittal.

[3] The Appellant filed its application in 2010 and the Department issued the permit revision in 2014 when according to the Appellant it was "down to the wire." The apparent lengthy review time and the Appellant's timing concerns do not excuse the Department's decision to defer technical review of the monitoring data for the four additional stream sections.

alleged by the Appellant, clearly establishes that the Department wanted data for thirty stream sections.[4]

This appeal demonstrates the folly of the Department's decision to issue the permit under appeal before it completed its technical review and approval of all of the required and necessary information in Appellant's permit application. If the Department wanted the Appellant to submit baseline biological monitoring data for thirty stream sections or monitoring points, and not just the twenty-six identified by the Appellant, then it should have directed the Appellant to submit the required and necessary information, as determined by the Department, before it issued the permit to the Appellant. If the data for twenty-six stream sections or monitoring points was required before the permit was issued, no one has even attempted to explain why the data for four additional stream sections or monitoring points should have been viewed differently. There is no rational reason to defer the collection, submission and review of this additional data. By issuing the permit with Special Condition No. 77, the Department impermissibly deferred review and approval of the baseline biological monitoring data for the four additional stream sections or monitoring points that it decided were necessary and required. By issuing the permit prematurely and by deferring technical review and approval of all of the required data, the Department may have encouraged the Appellant to file this appeal, with its just issued permit safely in hand.[5]

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[4] The Appellant's claim that the Department misapplied its Guidance Document as an improperly promulgated regulation when it required that the Appellant submit data for four more stream sections beyond the twenty-six stream sections that the Appellant had already provided is not supported by the facts it alleges. Data on twenty-six stream sections is allowed, but asking for more data on four additional stream sections is not? Moreover, the Department initially identified nine additional stream sections, but after a site visit with the Appellant, the Department, according to the Appellant, exercised its discretion, made a case-specific decision and decided that the Appellant only needed to provide additional data for only four more stream sections or monitoring points.

[5] If the Department had required the Appellant to submit the data for the four additional stream sections before making a permit decision, the Appellant would have had a much more difficult decision. The

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

DATED: February 12, 2015

Appellant would have either had to challenge the Department's decision in the context of a permit denial with no permit in hand, or it would have had to submit the data before the Department issued the permit revision.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOL PENNSYLVANIA COAL COMPANY, LLC	:	
v.	:	**EHB Docket No. 2014-027-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CENTER FOR COALFIELD JUSTICE, Intervenor	:	

DISSENTING OPINION OF
JUDGE LABUSKES IN WHICH CHIEF JUDGE RENWAND JOINS

By Bernard A. Labuskes, Jr., Judge

I respectfully dissent. Where the Board's *jurisdiction* is at issue, we need to be very careful, which means we should look at all of the facts, including those stated outside of the appeal, even in the context of a motion to dismiss. *Felix Dam Pres. Ass'n v. DEP*, 2000 EHB 409; *Florence Twp. v. DEP*, 1996 EHB 282. However, where, as here, we are merely presented with a question of *justiciability*, I agree with the majority that we should accept the nonmoving party's version of events as true in the context of a motion to dismiss. In reviewing a motion to dismiss, where it is clear that the Board lacks jurisdiction, we will not hesitate to dismiss an appeal. However, in cases where we clearly have jurisdiction but are told that it would be "prudent" to dismiss the appeal anyway, we should hesitate before depriving a party of its right to due process before the only forum that can provide an opportunity to be heard at the only time that party will have that opportunity.

Concepts of prudential restraint such as mootness and ripeness are largely judge-made doctrines that originated in the courts and are applied to ensure among other things that the courts do not unnecessarily trammel on the prerogatives of the other branches of government.

See Robinson Twp. v. Cmwlth., 83 A.3d 901, 917 (Pa. 2013) (standing); *Ehmann v. DEP*, 2008 EHB 386. I think it is a mistake to lift those concepts indiscriminately and apply them strictly in administrative appeals before our agency. Indeed, it has been questioned whether we should ever be throwing out a Board appeal due to an alleged lack of ripeness. *See Sayreville Seaport Assoc. v. Dep't of Envtl. Prot.*, 60 A.3d 867 (Pa. Cmwlth. 2012) (analyzing case in term of jurisdiction, not ripeness); *Army for a Clean Env't v. DEP*, 2006 EHB 698 (questioning application of ripeness to Board cases); *Potratz v. DEP*, 2005 EHB 186 (Labuskes, J., concurring) (same). Mootness is merely the other side of the coin. (Ripeness says an appeal is too early; mootness says an appeal is too late.) Our legislatively mandated charge is to review actions of the Department in challenges brought by persons aggrieved by those actions and we should not unnecessarily turn away from that charge. In close cases such as the one before us now, prudence dictates that we not toss out a party, at least in the context of a motion to dismiss. This may be Consol's one and only chance to be heard on an important issue, and I think we are being too quick to dismiss its case.

Although the majority says we should accept the nonmoving party's version of events as true, I do not think we have actually done that. An appeal from a Department action is not moot if the Department's action retains its validity and it can continue to have a tangential impact on the recipient. *UMCO v. DEP*, 2006 EHB 235; *Goetz v. DEP*, 2001 EHB 1127. Whether Special Condition 77 will have an ongoing impact is at least in part a question of fact. Consol has credibly alleged that there will be a continuing impact that would not have occurred but for Special Condition 77. That should have been the end of our inquiry at this stage.

For example, Consol has alleged that the Department's denomination of the stream segments in question as perennial-diverse or diverse will likely have a continuing effect. In her

affidavit in support of Consol's opposition to the motion to dismiss, Consol's Environmental Engineer avers as follows:

> 23. It is my opinion that notwithstanding the removal of Special Condition No. 77 from the Bailey Permit, CPCC is still subject to potential future obligations pursuant to the inclusion of additional monitoring requirements required by Special Condition No. 77.
>
> 24. Based upon past experience, it is my understanding that if the Department determines that any of the streams identified in Special Condition No. 77 have been adversely impacted by CPCC's mining activities, the Department can impose post-mining biological monitoring obligations on CPCC using the data that CPCC was required to collect pursuant to Special Condition No. 77.

In its request for admissions, Consol asked the Department to admit that a continuing requirement has been imposed on Consol to conduct biological monitoring at the locations in question. Although the Department denied the request, its response is somewhat circular: "[Consol] will only be required to conduct biological monitoring at those locations in the future if its mining results in the loss of flow *or if the uses of the stream are impaired*." (Emphasis added.) How will the Department determine if "uses are impaired" short of obvious flow loss or pooling unless it compares premining to postmining data?[1] In its answer to interrogatories, the Department's permit reviewer said:

> Exhibit 8.9 (map) and Table 8.9(a) provided by CPCC showed the streams in question to be perennial diverse. In order to protect the hydrologic balance, provide adequate premining hydrologic information and assure that fish, wildlife and related environmental values are protected from the adverse effects of CPPC's mining, CPCC must sample, monitor and provide a premining biological

[1] I suspect and will assume for current purposes that the Department has the authority to require a postmining assessment to determine whether there has been an impact as well as whether restoration efforts have been successful in the event of an impact. Stated another way, I am not sure that the Department can only require postmining monitoring if it first decides there has been an impact. I confess that I have a less than complete understanding of how the Department implements its Technical Guidance Manual, but unfortunately, the distinction between evaluating a potential impact and evaluating the success of restoration efforts will not be explored further now that the appeal is being dismissed.

> score within the diverse stream sections in order to accurately determine if streams have recovered to their premining conditions after mining has occurred. Premining samples must be collected from the same location as the postmining samples. In addition, the premining data that is collected must be consistent with the postmining data that is collected. The Department identified the locations where premining samples must be collected either because CPCC lacks access to some streams for sampling, or because the CPCC identified the stream or stream segment as perennial-diverse but failed to provide for a monitoring point within the appropriate panel.

It is true that there is nothing in these averments to suggest that there is a 100 percent chance of a future impact. However, that is too strict of a standard in deciding whether prudence compels us to dismiss a case as moot in the context of a motion to dismiss. It is no stretch at all for me to envision that Consol's concern of possible future effects is quite credible and Special Condition 77 will in effect have created future obligations that would not have otherwise existed. It is certainly possible that nothing will ever come from Special Condition 77. However, if that were the standard for judging mootness, I suspect that many of the appeals filed before the Board would be moot *ab initio*. Here, it is quite possible that the Department's action could have a lingering effect. This possibility, far from remote, counsels in favor of erring on the side of preserving Consol's appeal rights. Indeed, our case law advises that we should exercise restraint in dismissing appeals as moot if the circumstance is not entirely free from doubt. *See Perano v. DEP*, 2010 EHB 449 (declining to dismiss an appeal as moot where it is not clear that the subject of the appeal was rescinded by a subsequent Department action); *see also Ehmann v. DEP*, 2008 EHB 386 (denying motion to dismiss as moot where not entirely convinced appeal is moot and three exceptions to mootness doctrine apply).

In order for the Department to have required biological sampling at the disputed locations, it determined that those streams at those locations are subject to the provisions of the

Department's Technical Guidance Document No. 563-2000-655. That determination found its outward manifestation in Special Condition 77. By appealing Condition 77, Consol also appealed that determination. (*See, e.g.*, Notice of Appeal ¶ 3(f) (challenging finding that the streams are perennial).)

It appears that the Department determined that one or more of the stream segments are diverse, which means it has determined that under the normal range of conditions "a diverse community of uni/semivoltine taxa and other macroinvertebrates, that are building blocks of aquatic ecological systems, can exist. The macroinvertebrate community in these segments is suitable for water use attainment evaluations performed in accordance with Appendix B." (*Guidance* at 25.) The record is not clear, but the Department may have also determined that the streams are perennial. In the context of mining, these are very important determinations. For example, the Department takes the position that only certain streams are protected from subsidence impacts. The finding that these streams are covered will have a key effect going forward in terms of evaluating the mine's effect on the environment and determining what if any action needs to be taken in response to any adverse impacts that may occur or look like they might have occurred.

The Department also must have determined that the streams in question are potentially susceptible to mining-induced flow loss or pooling. Otherwise, a biological assessment would not have been called for under the Guidance Manual and, of course, Special Condition 77. This determination does not now go away. To the contrary, I suspect that the streams will be subject to heightened scrutiny both during and after mining. I actually do not see a great deal of difference between the monitoring required by Special Condition 77 and, say, the Department's selection of the location for monthly monitoring pursuant to a discharge permit. The appellant is

challenging the choice of a location for monitoring, and that choice can be very significant. I would add that given the streams' alleged vulnerability, it is more than mere speculation for Consol to be concerned about future postmining consequences. The Department's determination that these streams are vulnerable (a determination that has now been insulated from review) detracts from the majority's assurance that nothing is ever likely to follow as a result of the determinations that led to Special Condition 77. If nothing else, it is virtually certain that postmining sampling and how it is evaluated will be different than it otherwise would have been but for Special Condition 77, if the streams show signs of an impact.

I am not willing to assume that these issues can all be hashed out in the future if the Department requires postmining sampling. This is akin to a ripeness argument, which as previously mentioned has little place in Board proceedings. Also, the heightened scrutiny that I suspect the streams will now be subject to during mining as a direct result of Special Condition 77 is not alleviated by waiting until something else happens. Furthermore, I see no benefit to deferring a decision. The reasons for the Department's selection of these streams for study are fresh in witnesses' minds now. In the future, administrative finality may rear its head. In the event of a future sampling requirement, an enforcement action, civil penalties, or some other action involving the stream segments in question, Consol's right, let alone ability, to argue that premining sampling was improperly required is now in jeopardy. *See White Glove, Inc. v. DEP*, 1998 EHB 372. At the very least, if the Department asks for postmining monitoring (an event as I have said above is hardly far-fetched), Consol will be faced with yet another Hobson's choice of performing monitoring at locations that it feels should never have been monitored in the first place or facing down a compliance order.

Deciding what the appropriate relief might be in this case feels somewhat premature, but I am not prepared to conclude as the majority has done that there is *no* opportunity for *any* kind of meaningful relief. Most importantly, we could reverse the Department's rather significant finding that the stream segments in question are diverse or perennial-diverse. We could find that, for whatever reason, the segments chosen were not appropriate, which would constrain any future decisions regarding the evaluation and/or remediation of those segments. At least arguably it might be appropriate to exclude any future use of the assay results generated in response to directives of the Department imposed unlawfully or without authority. We should not simply assume in the context of a motion to dismiss that any future use of the results would be appropriate. If the validity or legality of the results is in question, it would be better to resolve that issue now so that there is no unwarranted reliance upon them in the future.

Circling back to my initial point, we are not required to dismiss an appeal even if circumstances show that a case is moot. This case is not moot, but even if it was, I think it raises important issues regarding how the Department regulates the effects of subsidence on streams. The Department has chosen to highlight in a discrete permit condition issues that would normally be obscured in the application review process. One of the consequences of that choice is that these issues have now been squarely and properly presented for Board review. The issues raised by Consol are not going away, and I see no value in deferring to the Department's request that we voluntarily cede jurisdiction. The fact that other existing or future appeals raise similar issues does not dictate a voluntary dismissal of this appeal.

Finally, the Department does not explain why it deleted Special Condition 77 from the permit. It certainly has not conceded that it imposed the condition in error. The Department *implies* that the condition was deleted because Consol submitted the premining data, but it never

actually says that. The implied explanation is not particularly convincing. There are doubtless numerous conditions and requirements in the permit that create one-time obligations that have already been complied with. I am not aware that the Department routinely goes back and deletes all of those conditions and requirements in future permit revisions.

Faced with the illusory choice set up here by the Department, Consol had no realistic alternative other than to comply with the Department's demand.[2] What troubles me here is that, after getting what it wanted, the Department seems to have gone out of its way to delete the condition. By doing so, the legality of its action has been successfully insulated from review. This seems like a more likely explanation for the deletion than some supposed need or desire to clean up the permit.

We should be wary of the Department's practice of compelling a party to take some action and then "withdrawing," "rescinding," "lifting," "superseding," or otherwise retreating from that action, not because it acknowledges a mistake, but instead, for no apparent purpose other than to aid insulating its action from review. Whether a *de facto* gaming of the system would independently justify denying the Department's motion is a question I need not decide, but if anything, it reinforces my belief that this case is not moot. I would have denied the Department's motion and allowed this appeal to move forward.[3]

[2] Whether it was appropriate for the Department to issue the permit with a condition subsequent is a question that goes to the merits, not mootness. That issue was not briefed and dealing with it now is premature and out of place. Since we are dismissing the appeal, the issue will also evade review.

[3] At the risk of stating the obvious, I express no opinion whatsoever on the merits of the objections in Consol's notice of appeal.

ENVIRONMENTAL HEARING BOARD

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

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

DATED: February 12, 2015

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BIG SPRING WATERSHED ASSOCIATION and CUMBERLAND VALLEY CHAPTER OF TROUT UNLIMITED	:	
v.	:	**EHB Docket No. 2014-028-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LEWIS MARTIN, Permittee	:	**Issued: February 20, 2015**

OPINION AND ORDER ON
MOTION TO STRIKE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board rules that certain emails between Department program staff and Department attorneys that were attached as an exhibit to the appellants' motion for summary judgment are protected from disclosure by the attorney-client privilege.

O P I N I O N

Big Spring Watershed Association and Cumberland Valley Chapter of Trout Unlimited (hereinafter collectively referred to as "Big Spring") filed this appeal from the Department of Environmental Protection's (the "Department's") issuance of NPDES Stormwater Construction Permit No. PAI-0321-11-013 to Lewis Martin. Big Spring has filed a motion for partial summary judgment. It claims that the Department issued the permit without adequate public notice. Big Spring relies in part on an email exchange between Department program staff and Department attorneys. Big Spring cited the emails between the Department attorneys and

program staff in its brief in support of its motion for summary judgment, and it attached a copy of the email chain to its brief as Exhibit E.[1]

The Department has filed a motion to strike Exhibit E and all references to the email chain from Big Spring's motion for partial summary judgment. It asserts that the emails constitute communications that are covered by the attorney-client privilege. It argues that a paper copy of the email chain must have been disclosed inadvertently, although it does not really know how Big Spring obtained a copy of the emails. It argues that the inadvertent disclosure does not constitute a waiver of the attorney-client privilege.

Big Spring responds that there is no mystery to how it obtained the document: It was simply handed over with the rest of the file in response to a request for a file review conducted by a citizen-member of Big Spring before Big Spring obtained counsel. Although the circumstances presented here might have suggested a possible waiver of the attorney-client privilege,[2] Big Spring has chosen not to pursue that issue. Instead, Big Spring argues that the communications are not privileged due to the crime-fraud exception to the general rule that attorney-client communications are privileged. It also says that the privilege should be tempered because government lawyers are involved, and it argues that the Department attorneys' duty of candor to this Board trumps any privilege that might otherwise have obtained.[3]

In conjunction with its motion to strike, the Department filed a motion for immediate relief asking us to restrict public access to Big Spring's motion for partial summary judgment on the Board's electronic docket pending our review of the motion to strike. When Big Spring

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[1] The motion for partial summary judgment is under review and we will address it in a separate Opinion.

[2] *See Dep't of Transp. v. Drack*, 42 A.3d 355 (Pa. Cmwlth. 2012); *Bd. Supervisors of Milford Twp. v. McGogney*, 13 A.3d 569 (Pa. Cmwlth. 2011); *Carbis Walker, LLP v. Hill, Barth & King, LLC*, 930 A.2d 573 (Pa. Super. 2007); *Amerisourcebergen Corp. v. Doe*, 2012 Pa. Dist & Cnty. Dec. LEXIS 469.

[3] The permittee has not filed a response to the motion to strike.

advised us that it had no objection, we granted the motion and restricted public access to the motion for partial summary judgment. Access has also been restricted to Big Spring's brief in opposition to the motion to strike and the Department's reply brief filed in support of its motion to strike. Access has not been restricted to Big Spring's reply brief in support of its motion for partial summary judgment because that brief does not reference the emails at issue.

The Emails Are Privileged

Attorney-client communications made outside of the presence of strangers and related to securing legal assistance are normally protected from disclosure. *Carbis Walker, LLP v. Hill, Barth & King*, 930 A.2d 573, 579 (Pa. Super. 2007). The attorney-client privilege "is deeply rooted in our common law" and is "the most revered of our common law privileges." *Commw. v. Maguigan*, 511 A.2d 1327, 1333 (Pa. 1986). The privilege has a statutory basis as well: "[C]ounsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client." 42 Pa. C.S. §§ 5916, 5928. The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Gillard v. AIG Insurance Co.*, 15 A.3d 44, 47 n.1 (Pa. 2011) (quoting *Upjohn Co. v. United States*, 101 S.Ct. 677, 682 (1981)).

Big Spring does not deny that the emails that are at issue in this case bear all of the hallmarks of attorney-client communications that would normally be privileged. However, it asserts that the emails are entitled to some sort of lesser status because government lawyers were involved. We can easily dispense with this contention. At least in civil proceedings, it is well established that attorney-client communications involving government lawyers are entitled to the

same level of protection as any other attorney-client communications. *Gould v. City of Aliquippa*, 750 A.2d 934, 937 (Pa. Cmwlth. 2000); *Sedat, Inc. v. DER*, 641 A.2d 1243, 1245 (Pa. Cmwlth. 1994); *PA Waste, LLC v. DEP*, 2009 EHB 317, 320. Big Spring's heavy reliance on *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204 (Pa. 2014), is misplaced. That case merely held that communications between a Commonwealth agency and its counsel may be viewed by the Office of Attorney General where the Commonwealth agency is the subject of a criminal investigation that is being conducted by the Office of the Attorney General. The case's narrow holding has no applicability here.

Big Spring next contends that the communications are not privileged because the advice of counsel was sought in furtherance of the commission of criminal or fraudulent activity. Such communications are not protected because it cannot be an attorney's legitimate business to further any criminal object or to contrive a fraud. *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d at 217; *Nadler v. Warner Co*., 184 A. 3 (Pa. 1936). In order for the crime-fraud exception to apply, the party wishing to invoke the exception must make a prima facie showing that the attorney was used to promote intended or continuing fraudulent or criminal activity. *Brennan v. Brennan*, 422 A.2d 510, 515 (Pa. Super. 1980). There must be a prima facie showing that a crime or fraud was intended or has been committed, *Id*. at 517, and Commonwealth Court seems to have suggested that a "true crime," such as one involving potential imprisonment, as opposed to a "regulatory violation" with likely lighter penalties, must be involved. *Heintzelman v. Dep't. of Cmty. & Econ. Dev*., 2014 Pa. Commw. Unpub. LEXIS 644, at *11 (Pa. Cmwlth. 2014). *See also, Commw. v. Koczwara*, 155 A.2d 825, 827-28 (Pa. 1959).

Department personnel in this case were not engaged in anything even remotely constituting the sort of criminal or fraudulent scheme contemplated by the crime-fraud exception to the attorney-client privilege. The communications in question were not in furtherance of any such scheme. The emails show government employees conscientiously conducting their duties in a thoughtful manner. These are exactly the type of deliberative communications that the attorney-client privilege should protect. The Department's program person was doing what he is supposed to do: seek legal advice on how to properly implement a complicated regulatory program. He asked perfectly legitimate questions regarding applicable regulations, and Department counsel did exactly what they are supposed to do: give responsive regulatory legal advice. There was no fraudulent or criminal conduct here, no wrongful intent or design. The privilege that applies to the emails was not lost pursuant to the crime-fraud exception.

Alleged Ethics Violations

Counsel have hurled accusations at each other regarding alleged violations of the Pennsylvania Rules of Professional Conduct. The Department initiated it by charging Big Spring's counsel with violating Pa.R.P.C. 4.4(b), which says: "A lawyer who receives a document relating to the representation of the lawyer's client who knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The Department says Big Spring's attorneys had a duty to notify the Department when they came into possession of the email chain, which included clear statements in bold and capital letters saying "privileged and confidential attorney-client communication attorney work product." Big Spring's counsel respond that they had no reasonable basis to believe that the document had been inadvertently produced so as to trigger any obligation under Rule 4.4(b) because the document

had been voluntarily turned over by the Department to a citizen-member of the Big Spring group in response to a file-review request.

Big Spring in turn accuses the Department's counsel of violating Pa.R.P.C. 3.3, which says that a "lawyer shall not knowingly make a false statement of material fact or law to a tribunal." Big Spring says Department counsel of record in this appeal (as opposed to the attorneys involved in the email chain) has made statements in the Department's brief that are false and "proof of that falsity" is demonstrated by the statements in the email chain. The Department, of course, denies the allegation and adds that the statements in its brief do not conflict with the emails, the facts, or the law.

We have not found this exchange of accusations to be helpful. First, this Board has very limited authority to address purported violations of the Rules of Professional Conduct. The "Scope" section of the Preamble to the Rules of Professional Conduct instructs as follows:

> The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct **through disciplinary agencies.** They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing counsel as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer **under the administration of a disciplinary authority,** does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the **extra-disciplinary consequences** for violating such a duty.

Preamble ¶ 19 (emphasis added).

Thus, under this language, the "antagonists" in a Board appeal as a general rule do not have standing to seek enforcement of a Rule of Professional Conduct in the Board proceeding. *Id*. The Rules are not to be invoked by opposing counsel as procedural weapons. *Id*. The Rules are not designed to be used in the pursuit of "extra-disciplinary consequences." *Id*. That said,

we do have an overarching obligation to ensure that we conduct the fair hearing that due process requires. *In re Estate of Pedrick*, 482 A.2d 215 (1984). Therefore, in some cases we may need to rely on a Rule of Professional Conduct in support of some action on our part that is essential to preserve the orderly and just disposition of an appeal. *See, e.g., Commw. v. Gibson*, 670 A.2d 680, 683 (Pa. Super. 1996) (disqualification of attorney who is a witness). But absent such unusual circumstances, it is not this Board's job to enforce the Rules. *L.A.G. Wrecking v. DEP*, EHB Docket No. 2014-126-C, slip op. at 4 (Opinion issued Oct. 31, 2014); *Hartztown Oil & Gas Exploration Co. v. DEP*, 2005 EHB 959, 961; *DEP v. Whitemarsh Disposal Corp.*, 1999 EHB 588, 589-90; *Dunkard Twp. v. DER*, 1994 EHB 1635, 1637 n.2.

The parties have not explained here why we need to enforce the rules of conduct in order to attain just and orderly proceedings. They have not explained why the purported violations of the rules should translate into a ruling regarding the privileged documents. The Department says Big Spring's counsel had a duty to turn over the documents, but any such duty is an obligation that is separate and independent from the determination of whether the documents are protected by the attorney-client privilege. Whether a communication is privileged does not turn on whether an attorney has an obligation to hand it over, and whether an attorney must hand over a document does not turn on whether it is privileged. An attorney's duty under Rule 4.4 does not in and of itself create or destroy a privilege. If the documents should be restricted from public view, it is because they are privileged, not because of any duty on counsel's part to turn them over.

Similarly, it does not follow from counsel's duty of candor to the tribunal that otherwise privileged documents should be disclosed in this appeal. Big Spring says the documents are "proof of the falsity." If that were true they might be of use in disciplinary hearings in assessing

whether the attorney has been less than candid in his brief, but the rule regarding the duty of candor does not make the email chain any more or less relevant or privileged in this case where we are focused on the merits of an NPDES permit. Witnesses may be impeached, not counsel.

Finally, it is perhaps worth noting that we actually see no merit in either of the parties' accusations. We are not entirely convinced that the documents were provided "inadvertently." Even if they were, the Department normally implements careful procedures designed to avoid inadvertent disclosure of privileged materials. The fact that it apparently failed to take any such precautions in this case gives credence to Big Spring counsel's claim that they had no reason to believe the documents were disclosed inadvertently. The boilerplate warning that appeared at the end of the emails that they contained confidential materials now seems to appear on more emails than not and tends to blend into the background. As to Big Spring's accusation, we disagree that the Department's counsel has made "a false statement of material fact or law." He has presented learned legal argument based on essentially undisputed facts. We detect no "falsity" whatsoever and no lack of candor toward the Board, and in any event, we tend to agree that the brief and the opinions of other Department attorneys as expressed in the emails are not necessarily inconsistent.

In conclusion, Big Spring has not contended in response to the Department's motion to strike that the emails fail to satisfy the basic elements of privileged communications. It has failed to show that any exception applies, and it has not argued that the privilege was waived. Accordingly, we will grant the Department's motion.

With respect to the appropriate remedy, the Department has asked for some rather extensive relief in the context of a motion to strike, including such items as an order directing Big Spring counsel to submit a written certification, executed under penalty of perjury, that they

have returned or destroyed all copies of the privileged emails and that no one else to their knowledge has retained any copies. We think the Department's objective is achieved if we leave the filings that included or referenced the emails in restricted status on our website, and preclude the parties from any further reference to the emails going forward. The emails will play no part in the Board's deliberations.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BIG SPRING WATERSHED ASSOCIATION and CUMBERLAND VALLEY CHAPTER OF TROUT UNLIMITED	:	
v.	:	**EHB Docket No. 2014-028-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LEWIS MARTIN, Permittee	:	

O R D E R

AND NOW, this 20th day of February, 2015, it is hereby ordered that the Department's motion to strike is **granted.** Exhibit E and all references made thereto are hereby stricken. The privileged emails may not be used during the course of this appeal. All previous filings referring to or incorporating the privileged emails have been restricted from public view on the Board's website and shall remain so.

ENVIRONMENTAL HEARING BOARD

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

DATED: February 20, 2015

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PATRICIA A. WILSON, et al.	:	
	:	
	:	
v.	:	**EHB Docket No. 2013-192-M**
	:	**(Consolidated with 2013-200-M)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: February 23, 2015**
PROTECTION and NEWTOWN TOWNSHIP,	:	
Permittee	:	

OPINION AND ORDER DENYING
PETITION TO REOPEN THE RECORD

By: Richard P. Mather, Sr., Judge

Synopsis

The Board denies a petition by the Appellant requesting to reopen the record prior to the issuance of a Board adjudication where Appellant's petition is moot in light of the Board's orders granting SPEHOA Intervenor's request to withdraw its intervention and DeRita Appellants' request to withdraw their appeal. In addition, where Appellant's petition fails to show that the evidence sought to be introduced satisfies all of the criteria of 25 Pa. Code § 1021.133, the Board could deny the petition for this reason.

O P I N I O N

The Appellant, Patricia A. Wilson, filed an appeal before the Environmental Hearing Board (the "Board") objecting to the Department of Environmental Protections (the "Department") approval of Permittee Newtown Townships (the "Township") Act 537 Sewage Facilities Plan Update. On October 14 and 15, 2014, the Department, the Township, and Wilson participated in an EHB hearing on Appellant Wilson's appeal.

Wilson filed her Post-Hearing Brief on December 11, 2014. The Township filed its Post-Hearing Brief on January 19, 2015. The Department filed its Post-Hearing Brief on January 20, 2015. In its Post-Hearing Brief, the Department sought to dismiss the DeRita Appellants and SPEHOA Intervenors because the DeRita Appellants and the SPEHOA Intervenors had failed to withdraw their appeals as specified in their respective settlement agreements as of January 20, 2015.

On January 22, 2015, counsel for the DeRita Appellants wrote a letter to the Board withdrawing their appeal. On February 3, 2015, counsel for SPEHOA wrote a letter to the Board withdrawing its intervention in the appeal. Both letters expressed agreement that there is a complete settlement in their matters.

On January 28, 2015, Wilson filed a Petition to Reopen the Record Prior to Adjudication. The Wilson Petition asserts that the record needs to be reopened to include evidence that the SPEHOA Intervenors did not withdraw its intervention because the Township had not given it a final copy of the settlement agreement for execution.

On February 17, 2015, the Board issued orders granting the DeRita Appellant's request to withdraw from the proceeding and the SPEHOA Intervenor's request to withdraw from the proceeding. The Board orders closed and discontinued DeRita's appeal and SPEHOA's intervention in the matter.

After the conclusion of a hearing on the merits of a matter pending before the Board and before the Board issues an adjudication, the Board, upon its own motion or upon a petition filed by a party, may reopen the record. 25 Pa. Code § 1021.133(a). The record may be reopened by showing that (1) recently discovered evidence conclusively establishes a material fact of the case or contradicts a fact of the case which had been assumed or stipulated by the parties to be true;

(2) is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence; and (3) is not cumulative. 25 Pa. Code § 1021.133(b)(1-3).

A petition to reopen the record prior to adjudication shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. *Spang & Co. v. DER*, 592 A.2d 815, 140 Pa. Commw. 306, 1991 Pa. Commw. LEXIS 324 (Pa. Commw. Ct. 1991). A decision to grant or deny a petition to reopen the record is within the administrative agency's discretion and will not be disturbed absent a clear abuse of discretion. *Wheeling-Pittsburgh v. DEP*, 979 A.2d 931 (2009); *Upper Moreland Twp. Dist. v. Pa. Labor Relations Bd*., 695 A.2d 904 (Pa. Cmwlth. 1997); *Ball Incon Glass Packaging v. Workmen's Comp. Appeal Bd*. (Lentz), 682 A.2d 85 (Pa. Cmwlth. 1996)

The Board finds that Wilson's petition to reopen the record is moot because the Board has issued orders granting both SPEHOA's request to withdraw its intervention and the DeRita Appellant's request to withdraw its appeal. A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *In re Gross*, 382 A.2d 1000 (Pa. Super. 1980); *New Hanover Corporation v. DER*, 1991 EHB 1127[1].

Because the Board has granted both the SPEHOA and DeRita Appellant's requests to withdraw, Wilson's petition to reopen the record to add evidence regarding why the intervention and appeal have not yet been withdrawn is now moot. Both Counsel for SPEHOA and Counsel for DeRita have communicated in letters to the Board that they agree that there is a complete

[1] The mootness doctrine includes three exceptions: "(1) the conduct complained of is capable of repetition but will evade review; (2) where the case involves issues of great public importance; or (3) where one party will suffer a detriment without the court's decision." *Eureka Stone Quarry v. DEP*, 2007 EHB 419, 462. The exceptions to the mootness doctrine are not applicable here.

settlement of their clients' appeals. In response to their letters, the Board issued orders on February 17, 2015 to close and discontinue SPEHOA's intervention and the DeRita Appellants' appeal. There is no reason to reopen the record to allow Wilson to introduce evidence that the Derita appeal and SPEHOA intervention have not yet been withdrawn when they have in fact been withdrawn.

In the alternative, even if Wilson's petition was not moot, the petition fails to satisfy the criteria for reopening the record under 25 Pa. Code § 1021.133. Wilson's petition does not demonstrate that there is newly discovered evidence that conclusively establishes a material fact. Material facts are ones upon which the outcome of the litigation depends. *Amant v. Pacific Power & Light Co.*, 520 P.2d 181, 182 (Wash. App. 1974). The e-mails attached to Wilsons's petition purport to show that the DeRita Appellants and SPEHOA Intervenors did not withdraw their respective appeal and intervention as they agreed to do in the their respective settlement agreements. The reasons why the intervention and appeal were not presumably withdrawn are not relevant to the ultimate issue of whether the Department unlawfully approved the Township's 2013 Act 537 plan update. Additionally, Wilson's petition does not demonstrate that there is newly discovered evidence that contradicts a fact of the case that the parties have stipulated or assumed is true. Finally, the petition does not explain why the new evidence is significant and fails to point out what stipulated facts are contradicted by the evidence presented in the petition. Wilson's petition is therefore substantively deficient.

For all of these reasons, we issued an order denying the Petition to reopen the record prior to adjudication.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PATRICIA A. WILSON, et al.	:	
	:	
	:	
v.	:	**EHB Docket No. 2013-192-M**
	:	**(Consolidated with 2013-200-M)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and NEWTOWN TOWNSHIP,	:	
Permittee	:	

O R D E R

AND NOW, on this 23rd day of February, 2015, in consideration of a Petition by Appellant Patricia A. Wilson to reopen the record prior to adjudication, as well as a conference call between the parties, it is hereby ordered that the petition to reopen the record prior to adjudication is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: February 23, 2015

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BIG SPRING WATERSHED ASSOCIATION and CUMBERLAND VALLEY CHAPTER OF TROUT UNLIMITED	:	
v.	:	**EHB Docket No. 2014-028-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LEWIS MARTIN, Permittee	:	**Issued: March 3, 2015**

OPINION AND ORDER ON
MOTION FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board suspends and remands an NPDES permit because the Department never published notice of the draft permit.

O P I N I O N

On or about December 7, 2011, Lewis Martin filed an application that eventually led to the issuance of National Pollutant Discharge Elimination System Permit #PAI-0321-11-013 (the "Permit") authorizing the discharge of stormwater associated with the construction of a poultry operation located at 489 Big Spring Road, Newville, Pennsylvania into Big Spring Creek, a High Quality water of the Commonwealth and a cold water trout fishery. On December 24, 2011, the Department of Environmental Protection (the "Department") published notice in the *Pennsylvania Bulletin* that an application for the Permit had been submitted. *See* 41 Pa.B. 6883 (Dec. 24, 2011). On February 4, 2012, the Department published notice in the *Pennsylvania Bulletin* of a public hearing on the application. *See* 42 Pa.B. 678 (Feb. 4, 2012). The Department

generated a draft permit on February 29, 2012. The Department never published notice of the draft permit. On February 22, 2014, the Department published notice in the *Pennsylvania Bulletin* that it was issuing the final Permit to Lewis Martin. *See* 44 Pa.B. 1030 (Feb. 22, 2014).

Big Spring Watershed Association and the Cumberland Valley Chapter of Trout Unlimited (hereinafter collectively referred to as "Big Spring") filed this appeal from the Department's issuance of the Permit. Big Spring's notice of appeal contains numerous objections, including an objection that the permit was issued without proper public notice. Big Spring has now filed a motion for partial summary judgment. It argues that we must invalidate the Permit because the Department failed to publish notice of the draft permit.

Lewis Martin has not opposed the motion for partial summary judgment. The Department does oppose the motion. Its position, however, is somewhat less than precise. Pointedly, the Department does not deny that it erred by failing to publish notice of the draft permit under the circumstances presented here.[1] It does not contend that public notice of the draft permit was not required. Thus, that the Department failed to comply with a regulatory requirement we now see as being undisputed.

Instead of denying its error, the Department argues that failure to publish notice of the draft permit is not a basis for overturning or revoking the permit.[2] This seems to be an argument that goes more to the remedy for correcting the Department's regulatory violation than the merits of Big Spring's contention that there was in fact a regulatory violation. The Department does not tell us what remedy, if any, short of revocation would be appropriate. The Department's position

[1] This appeal does not raise the issue of whether the plans set forth in an application for a stormwater permit can suffice as the "draft permit," and if so, what notice is required regarding such a "draft permit" because in this case the Department actually prepared an individual draft permit.

[2] The Department adds that there are disputed issues of material fact, but it has failed to show us that there are any such disputed facts that are in any way material to our resolution of Big Spring's motion.

is perhaps best summarized as being that we should simply disregard its regulatory violation as a harmless error. In support of its view that failure to provide notice of its draft permit was harmless error that does not need to be rectified, the Department characterizes its lapse as nothing more than a "minor, procedural error." It says that it published notice of the permit *application*, held a public hearing on the application, and received numerous comments regarding the application, and these efforts make up for its failure to publish notice of its draft permit. It says that Big Spring has not suffered any actual prejudice. We do not agree with any of these points, and we cannot agree that the Department's error was a harmless one that does not need to be rectified.

First, failure to publish notice that the Department has prepared a draft permit is hardly a "minor, procedural error." To the contrary, the Department committed a serious breach of an important regulatory requirement. This is not a case where there was public notice but it was deficient in some way. *See, e.g. Jake v. DEP*, EHB Docket No. 2011-126-M (Adjudication, Feb. 18, 2014) (failure to include the latest address of the county conservation office); *PRIZM Asset Mgmt. v. DEP*, 2005 EHB 819 (failure to include both receiving streams); *Hopewell Twp. v. DEP*, 1996 EHB 956 (debate whether notice was published in the correct newspaper). Nor is it a case where there were some other inconsequential errors in the processing of the permit application. *See, e.g., O'Reilly v. DEP*, 2001 EHB 19 (PPC plan not in place prior to issuance of permit but in place before commencement of permitted activity). Here, the Department failed to give any notice anywhere or at any time that it had prepared a draft permit.

Subchapter F of Chapter 92a in Title 25 of the Pennsylvania Code governs public participation in the NPDES permit process. Section 92a.82 sets forth the requirements for public notice. Section 92a.82(a) specifies that "public notice of every complete application for an

NPDES permit will be published in the *Pennsylvania Bulletin*." Section 92a.82(b) requires that "public notice of every new draft individual permit, or major amendment to an individual permit, will be published in the *Pennsylvania Bulletin*." These regulations go on to specify the detail that must be provided in each type of notice. For notice of permit applications, Section 92a.82(a) requires the following:

> (a)…The contents of public notice of applications for NPDES permits will include at least the following:
>
> (1) The name and address, including county and municipality, of each applicant.
>
> (2) The permit number and type of permit applied for.
>
> (3) The stream name of the waterway to which each discharge is proposed.
>
> (4) The address of the State or interstate agency premises at which interested persons may obtain further information, request a copy of the NPDES forms and related documents.

For notice of a draft permit, Section 92a.82(b) requires that different and more extensive information be included in the notice:

> (b)…The contents of public notice for draft NPDES permits will include at least the following in addition to those specified in subsection (a):
>
> (1) A brief description of each applicant's activities or operations that result in the discharge described in the application.
>
> (2) The name and existing use protection classification of the receiving surface water under 93.3 (related to protected water uses) to which each discharge is made and a short description of the location of each discharge on the waterway indicating whether the discharge is a new or an existing discharge.
>
> (3) A statement of the tentative determination to issue or deny an NPDES permit for the discharge described in the application. If there is a tentative determination to issue a permit, the determination will include proposed effluent limitations for those effluents proposed to be limited, a proposed schedule of compliance including interim dates and requirements for meeting the proposed effluent limitations and

> a brief description of any proposed special conditions that will have a significant impact upon the discharge described in the application.
>
> (4) The rate or frequency of the proposed discharge; if a discharge is continuous, the average daily flow in GPD or MGD.
>
> (5) A brief description of the procedures for making final determinations, including the 30-day comment period required by subsection (d) and any other means by which interested persons may influence or comment upon those determinations.

As these regulations show, the NPDES permitting process must be open and transparent. The Department should not be reviewing and issuing NPDES permits behind closed doors. *Perano v. DEP*, 2011 EHB 587, 593. *See also Stedge v. DEP*, EHB Docket No. 2014-042-L (Opinion, Jan. 29, 2015) (importance of public notice); *PRIZM Asset Mgmt. v. DEP*, 2005 EHB 819 (same); *Kleissler v. DEP*, 2002 EHB 737 (the Board must be wary of any attempt to shield the public from what the regulations intend to be an open review process). The Department does not have the authority to waive or disregard these important procedural requirements. *Perano*, 2011 EHB at 593. *See also Citizens for Pa.'s Future v. DEP*, 2007 EHB 502 (process and procedural safeguards are essential to the administrative process generally, and to environmental protection in particular). Agreeing to abide by these requirements was a condition for the Commonwealth to obtain and maintain primacy to administer the NPDES program. *Id*. *See* 40 C.F.R. Parts 123, 124. *See also* 33 U.S.C. § 1342.

The Department's compliance with the requirement that it provide notice of the permit *application* and the fact that it held a public hearing regarding that application does not compensate for its failure to provide notice of the draft permit or render that failure a harmless error. A duly promulgated regulation has the force and effect of law and it is improper for an agency to ignore or fail to apply its own regulations. *Teledyne Columbia-Summerhill Carnegie v.*

Unemp't Comp. Bd. of Rev., 634 A.2d 665, 668 (Pa. Cmwlth. 1993); *Citizens for Pa.'s Future*, *supra*, 2007 EHB at 506. The Department does not get to pick and choose which of the notice requirements it will honor in any given case. The notices are mandatory. Complying with one notice requirement does not excuse the need to comply with other applicable notice requirements.

The requirement to publish notice of the draft permit is hardly a superfluous or extraneous step that can be easily ignored as suggested by the Department. The draft permit is the first chance that anyone gets to comment on what could actually be in the permit, as opposed to what an applicant has proposed in its permit application. The draft permit includes such critical terms as the proposed effluent limits. Big Spring never had an opportunity to comment on the Department's proposed permit terms. The fact that it was able to comment on the application is no substitute for that opportunity.

It is not clear to us why the Department wants to skirt the notice requirement or at least minimize its import. As pointed out by Big Spring, the Department's position sends a signal that the Department does not really care what the public thinks about its proposed action. Public comments offer the possibility of revealing something the Department might have otherwise missed. *See Throop Prop. Owners Ass'n v. DEP*, 1998 EHB 618, 624. The Department might not have fully appreciated the implications of a certain permitting decision on persons not otherwise personally involved in the review process. Comments in response to a draft permit can be more specific and helpful to the Department because commentators have specific terms and conditions to deal with.

The Department makes the wholly speculative argument that because it made changes to the permit in response to comments at some point during the permit review process, the lack of

notice of the draft permit has no continuing relevance. We think this completely misses the mark. Noticing the draft permit is one of the key steps in the permit review process. Simply because some changes were made along the way in response to some comments does not mean that the final permit is in the same form that it would have been had the universe of comments been derived from a review of the draft permit. It is impossible to conclude that noticing the draft permit would not have produced different, more robust, more nuanced, or more numerous comments.

Finally, the Department asserts that Big Spring was not prejudiced in this case, so the Department's error should be forgiven. Once again, we disagree. To the extent that the Department's regulatory violation can ever be excused because an appellant had actual notice as opposed to proper, published notice, *see Hopewell Twp.*, *supra*; *Jake v. DEP*, *supra*, Big Spring did not in fact have any actual notice of the draft permit in this case until after the Department issued the final permit. Big Spring was deprived of its basic right to receive notice of a draft permit and be provided with an opportunity to comment thereon. No showing of prejudice beyond that is necessary.

The Department clearly erred in this case. The question, then, becomes what to do about it. In selecting a remedy, we have considered a number of factors. The Department provided no notice, rather than deficient notice. Notice was not given of a key step in the permitting process. The permittee has not defended his permit. The permit at issue involves stormwater associated with construction as opposed to, say, a process discharge from an active industrial facility. The Department took three years to review the application, the permit was issued a year ago, and Big Spring did not seek a supersedeas. The receiving stream is a high quality trout fishery and the permit has generated significant public interest.

The point of publishing notice of a draft permit is to give interested persons an opportunity to try and convince the Department why the proposed permit should be changed or not issued. Stated another way, the notice gives the Department potentially valuable input that it might otherwise have missed when it devises its proposed permit terms. This is the defect that we need to fix. Although no remedy seems fully satisfactory here, we believe that the best course is to suspend the permit and remand it to the Department for further consideration after providing notice that generally conforms with 25 Pa. Code § 92a.82(b) but notes that comments are being sought on a final, but suspended, permit. After giving full and fair consideration to any comments received, it will then be up to the Department to decide whether to lift the suspension, revise the permit, revoke the permit, or take whatever other action it deems to be appropriate. We also leave it to the Department to determine what, if any measures should be taken on the site during the period of the permit suspension and thereafter. Notice of the Department's final action must also be published in accordance with the regulatory requirements relating to final permits. This remedy is generally consistent with our prior case law. *See Groce v. DEP*, 2006 EHB 856; *PRIZM Asset Mgmt. v. DEP*, 2005 EHB 819; *Kleissler v. DEP*, 2002 EHB 737; *Fontaine v. DEP*, 1996 EHB 1333. *See also Crum Creek Neighbors v. DEP*, 2009 EHB 548 (suspension and remand of NPDES permit to consider antidegradation requirements).

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BIG SPRING WATERSHED ASSOCIATION and CUMBERLAND VALLEY CHAPTER OF TROUT UNLIMITED	:	
v.	:	**EHB Docket No. 2014-028-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LEWIS MARTIN, Permittee	:	

O R D E R

AND NOW, this 3rd day of March, 2015, it is hereby ordered as follows:

1) The Appellants' motion for partial summary judgment is **granted.** Their appeal is **sustained.**

2) NPDES Permit No. PAI-0321-11-013 is suspended and remanded to the Department for further consideration in accordance with the foregoing Opinion.

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: March 3, 2015

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: March 10, 2015**
	:	

OPINION AND ORDER DISMISSING APPEAL

By: Richard P. Mather, Sr., Judge

Synopsis

The Board dismisses the appeal of Mann Realty Associates, Inc. Under Board rules, parties which are corporations, are required to be represented by an attorney at all stages of the proceedings after filing an appeal pursuant to 25 Pa. Code § 1021.21(b) and (c). Mann Realty is a corporation, and it has not complied with the Board's orders requiring it to be represented by an attorney in this appeal. The appeal is dismissed pursuant to 25 Pa. Code § 1021.161 as a sanction for failure to comply with the Board's rules and orders.[1]

O P I N I O N

On August 23, 2013, Mann Realty Associates, Inc. ("Mann Realty") filed a Notice of 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. The

[1] On February 13, 2015, the Department filed a Motion for Sanctions in the Form of a Dismissal against Mann Realty Associates, Inc. Mann Realty has not responded to the Department's Motion. The Board did not rely upon the Department's Motion in reaching its decision to dismiss Mann Realty's appeal as a sanction.

Department's order, which was issued on July 19, 2013 directed Mann Realty to take certain corrective actions to identify, inventory and dispose of materials on the property owned by Mann Realty.

Mann Realty is a corporation authorized to conduct business in Pennsylvania. Mann Realty filed an appeal of the Department Order on August 23, 2013, arguing that the Department Order was unlawfully issued. When it filed its appeal, Mann Realty was represented by an attorney. After the time period for discovery closed, a hearing was scheduled to begin in this matter on September 11, 2014. Both parties filed pre-hearing memoranda in anticipation of the hearing.

Before the hearing, Appellant's counsel Robert B. Eyre, Esquire, filed a Motion to Withdraw as Counsel to Appellant on August 19, 2014 citing unpaid legal bills and a deterioration of the attorney-client relationship. The Board held a conference call with the Parties and their counsel, including Mr. Robert Mumma, II, who is an officer of Mann Realty and its owner. After the conference call, the Board issued three separate orders on September 4, 2014: one canceling the hearing, one denying the Department's Motion to Dismiss and one granting Mr. Eyre's Motion to Withdraw. The Board order, which granted Mr. Eyre's Motion to Withdraw, stated that under 25 Pa. Code § 1021.21(b), which requires corporations to be represented by at attorney, Mann Realty shall retain new counsel and shall have new counsel enter an appearance in the matter no later than October 6, 2014. On September 8, 2014, the Board issued an opinion in support of the order granting Mr. Eyre's Motion to Withdraw. The Board found that Appellant failed to provide information and cooperation necessary for effective representation and preparation for a hearing. Additionally, the Board found that Mr. Eyre's

continued representation of Mann Realty would result in an unreasonable financial burden on Mr. Eyre's firm because Mann Realty failed to pay its legal bills.

On October 6, 2014, Mr. Shaun E. O'Toole, Esquire, filed a Notice of Appearance on behalf of Mann Realty. The Board held several conference calls with the Parties' counsel to provide time for Mann Realty's new counsel to prepare for the anticipated hearing. After an appropriate period of time, a hearing was scheduled for January 27, 2015 at the Board's Harrisburg office. Before the hearing was held, Mr. O'Toole filed a Motion to Withdraw as Counsel to Mann Realty on November 25, 2014, citing unpaid legal bills and deterioration of the attorney-client relationship. The Board again held a conference call with the Parties and their counsel, specifically requesting that Mr. Mumma participate in the conference call as he did when Mann Realty's first lawyer sought to withdraw as counsel. Notwithstanding the Board's request to participate, Mr. Mumma did not participate in this call to address Mr. O'Toole's pending request to withdraw as counsel. On November 25, 2014, the Board issued an Order granting Mr. O'Toole's Motion to Withdraw as Counsel and ordered that Mann Realty retain new counsel by January 5, 2015. On December 11, 2014, the Board issued an Opinion in support of its order granting Mr. O'Toole's Motion to Withdraw as Counsel. The Board again found that by failing to pay its legal bill, Mann Realty failed substantially to fulfill an obligation to Mr. O'Toole regarding his services and the continued representation of Mann Realty would result in an unreasonable financial burden on Mr. O'Toole and his firm.

Mann Realty did not comply with the Board's order to retain counsel by January 5, 2015. On January 6, 2015, the Board issued a Rule to Show Cause requiring Mann Realty to demonstrate why the appeal should not be dismissed for failure to comply with the Board's December 5, 2014 Order to retain counsel. The Rule to Show Cause was returnable on or before

January 27, 2015. Mann Realty submitted a letter to the Board on January 30, 2015, in which it stated that Mann Realty was in the process of retaining new counsel. To date, no new counsel has entered an appearance on behalf of Mann Realty. The Board has provided Mann Realty with ample time to retain counsel and it has not complied with the Board's orders and rule requiring that it retain counsel.

The Board has the power to impose sanctions, including dismissal of an appeal for failure to comply with Board orders. 25 Pa. Code § 1021.161; *Martin v. DEP*, 1997 EHB 158. Failure to comply with Board orders clearly demonstrates a lack of intent to pursue an appeal and dismissal is warranted. *Scottie Walker v. DEP*, 2011 EHB 328; *K H Real Estate, LLC v. DEP*, 2010 EHB 151; *Pearson v. DEP*, 2009 EHB 628, 629 (citing *Bishop v. DEP*, 2009 EHB 259; *Miles v. DEP*, 2009 EHB 179, 181; *RJ Rhodes Transit, Inc. v. DEP*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54). The Board's rules clearly require that a corporation must be represented by an attorney. 25 Pa. Code § 1021.21(b). The Board has imposed sanctions in the form of a dismissal of an appeal when a corporate party has failed to retain counsel. *Falcon Coal and Constr. Co. v. DEP*, 2009 EHB 209.

Mann Realty has not retained counsel despite the Board's December 4, 2014 Order and the subsequent Rule to Show Cause. The repeated failure of Mann Realty to comply with the Board's orders, as well as its failure to follow the Board's Rules, demonstrates a lack of intent to pursue its appeal. The repeated indifference to the Board's orders and Rules affects the integrity of the appeal process before the Board. *Swistock v. DEP*, 2006 EHB at 401. In addition, the Board and the Department have expended time, effort and resources during the extended timeframe in which the Board has attempted to schedule and then reschedule a hearing. Mann Realty's obvious difficulties in keeping counsel, once retained, is a clear signal that Mann Realty

may never be able to comply with the Board's Order to retain counsel. Therefore, the Board dismisses this appeal for Appellant's repeated failures to comply with Board orders as a sanction pursuant to 25 Pa. Code § 1021.161.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 10th day of March, 2015, it is HEREBY ORDERED that this appeal shall be **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: March 10, 2015

c: **DEP, General Law Division**
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614 North Front Street
Harrisburg, PA 17101

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOL PENNSYLVANIA COAL COMPANY, LLC	:	
v.	:	**EHB Docket No. 2014-027-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CENTER FOR COALFIELD JUSITICE, Intervenor	:	**Issued: March 13, 2015**

OPINION AND ORDER ON
APPELLANT'S PETITION FOR RECONSIDERATION*

By Steven C. Beckman, Judge

Synopsis

The Board denies Appellant's Petition for Reconsideration where the Appellant fails to show compelling and persuasive reasons warranting the Board reconsidering its prior order. The issues raised by Appellant are based upon significant misunderstandings of the Board's Opinion and Order and the Petition raises no crucial facts that are inconsistent with or would justify revisiting or reversal of the Board's prior Opinion and Order.

O P I N I O N

Pending before the Board is a timely Petition for Reconsideration filed by Consol Pennsylvania Coal Company, LLC ("Consol") of the Board's February 12, 2015 Opinion and Order granting the Department of Environmental Protection's ("Department") motion to dismiss and denying Consol leave to amend its notice of appeal.[1] Board Rule 1021.152 governs the

* Opinion of the Board by Judge Beckman in which Judge Coleman and Judge Mather join.
Dissenting Opinion by Judge Labuskes in which Chief Judge Renwand joins.

[1] Our rules require petitions for reconsideration to be filed within ten days of the date of the final order which the party seeks to have the Board reconsider. 25 Pa. Code § 1021.152(a). Because Consol's

reconsideration of final orders. "Reconsideration is within the discretion of the Board and will be granted only for *compelling and persuasive reasons*." 25 Pa. Code § 1021.152(a) (emphasis added). By way of example, the rule goes on to state reasons that *may* justify reconsideration of an order:

> (1) The final order rests on a legal ground or a factual finding which has not been proposed by any party.
> (2) The crucial facts set forth in the petition:
> (i) Are inconsistent with the findings of the Board.
> (ii) Are such as would justify a reversal of the Board's decision.
> (iii) Could not have been presented earlier to the Board with the exercise of due diligence.

25 Pa. Code § 1021.152(a).

While the list is nonexclusive, we note that "Rule 1021.152 establishes a high standard for reconsideration of final orders of the Board." *Rural Area Concerned Citizens v. DEP*, 2013 EHB 374, 375. Petitions for reconsideration may be appropriate when the Board simply misses a key legal or factual point, but are available not simply as a vehicle for arguing issues that should have been raised previously. *See Solebury Twp. v. DEP*, 2008 EHB 718, 720 (citing *Mountain Watershed Ass'n v. DEP*, 2005 EHB 592, 594.) As the Board stated before: "We have now held on many occasions that mere disagreement is *not* a basis for reconsideration." *Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 577, 579 (emphasis in original). The policy has a sound basis:

> If reconsideration were available whenever a party disagreed with the Board's application of the law, reconsideration would cease to be an extraordinary remedy and would be granted as a matter of course. That is clearly not the intent of the rule.

Starr v. DEP, 2002 EHB 799, 808.

Petition was filed on the first day after the tenth day following the February 12, 2015 Opinion and Order which was *not* a Saturday, Sunday, or holiday, the Petition is timely. *See Koch v. DEP*, 2010 EHB 146, 147; 25 Pa. Code § 1021.1(c); 1 Pa. Code § 31.12.

Consol Has Not Shown any Compelling or Persuasive Reasons to Grant Reconsideration

We find that the arguments set forth by Consol in its Petition for Reconsideration are neither compelling nor persuasive—as a result, we deny the Petition. Consol seizes very limited sections of the Board's opinion to make its arguments, and then proceeds to misconstrue those sections in an attempt to fit its arguments within the Board's rule governing reconsideration. It is clear that Consol simply disagrees with the Board's decision and is using the Petition for Reconsideration to re-argue its case.

"A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome." *Horsehead Res. Dev. Co. v. DEP*, 1998 EHB 1101, 1103. The Board's Opinion and Order found that:

> 1. Seven of the eight objections raised by Consol in its notice of appeal were mooted because Consol's compliance with all obligations of the permit condition deprived the Board of the ability to provide effective relief and Consol of a stake in the outcome of the appeal.
>
> 2. Consol's eighth objection was a generalized objection to the Department's use of a technical guidance document, which, given the mootness of the other objections, would not be appropriate for the Board to resolve outside the context of a non-moot appeal of a final action of the Department.
>
> 3. No exceptions to the mootness doctrine applied to the appeal.

Consol Pa. Coal Co. v. DEP, EHB Docket No. 2014-027-B, slip op. at 11–17 (Opinion issued Feb. 12, 2015).

With the goal of establishing that it had "no reasonable choice" but to comply, Consol spends much of its brief reciting previously unraised—but presumably crucial—facts discussing potential economic harms that it faced had it not taken a comply first, challenge later approach to the issuance of Permit Revision 173. Consol focuses the bulk of its new facts on responding to

footnote 6 of the Board's Opinion, which Consol clearly misapprehends. The Board's footnote was intended to show that, while the Board was empathetic to Consol's position, nothing about the economic circumstances faced by Consol altered the mootness analysis on which the Board decided the motion.

Putting aside that Consol misconstrued the Board's Opinion in an effort to create an issue, it is also clear that the facts set forth by Consol on the extent of economic harm do not justify reconsideration. As Judge Labuskes stated in *Pecora*:

> If a party believes that a "crucial fact" justifies reconsideration, it must explain how that fact is inconsistent with our findings, is such that it would justify a reversal of the Board's decision, and why it could not have been presented earlier to the Board with the exercise of due diligence.

DEP v. Pecora, 2007 EHB 156, 159. Consol states in a footnote that the new facts "demonstrate significant inconsistencies with the factual assumptions made by the Majority." (Consol's Supp. Mem. 5 n.4.). We simply disagree that the facts offered in Consol's Petition are inconsistent with the facts as understood by the Board. Even if Consol is correct on this point, however, Consol fails to explain why such facts *could not have been presented earlier* with the exercise of due diligence. Clearly, Consol was aware of all of the facts it sets forth in its Petition at the time it filed its initial response to the Department's motion to dismiss. Consol itself brought up the economic issues and timing pressures that it believed it faced with respect to Permit Revision 173 in the first instance. (*See* Consol's Opp'n Br. 7 (stating Consol incurred "substantial monetary costs in complying" with the permit condition.) The failure to assert these new and allegedly crucial facts in its response to the Department's motion undercuts any claim that reconsideration is warranted.

Consol next asserts that the Board relied on certain legal positions not proposed by any Party and that these positions are in error. Consol claims that the Board placed on or shifted to

Consol a burden to "specifically describe the relief it sought" and to prove that post-mining obligations that "arise from Special Condition 77" are more than speculative. Consol once again seriously misconstrues the Board's Opinion and likewise is incorrect on the law. In its motion to dismiss, the Department argued that the Board could not provide any effective relief to Consol.[2] (Department's Mot. ¶¶ 18–23; *see also* Department's Mem. 5–7.) After the Department properly raised the issue of effective relief, the Board must determine—as a fundamental part of mootness analysis—whether effective relief is available, accepting the facts as Consol posits them. Unfortunately for Consol, the Board concluded that there was none.[3]

While Consol correctly states that the Board noted in its Opinion that Consol provided no suggestion of what relief was still available or what stake Consol continued to have in the appeal, it draws the dubious inference that the statement shifted a burden to Consol. Rather, the quote cited by Consol as support for its position simply notes that Consol failed to provide any response to the Department's argument that the Board could not provide effective relief and, therefore, the matter was moot. The issue of effective relief was raised by the Department and the burden shift alleged by Consol relies on an inaccurate reading of the Board's Opinion. Accordingly, Consol has failed to demonstrate that the Board relied on a legal position not proposed by the Parties or that the legal position was in error. Reconsideration is not appropriate under these circumstances.

Consol also argues that the Board shifted to it a burden to prove that there would be negative consequences as a result of the inclusion of Special Condition 77. No such shifting

[2] The Board will not issue an advisory opinion. *E.g.*, *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1124 ("Board review is unnecessary and inappropriate in academic disputes.").

[3] We note that the relief suggested by the February 12, 2015 Dissenting Opinion all pertains to relief from potential *future* Department actions. Those actions, as we have repeatedly noted, would be appealable if and when they adversely affected Consol.

occurred and, yet again, Consol misinterprets the language of the Opinion to try to create an issue warranting reconsideration. In both its motion to dismiss and its reply to Consol's response, the Department set forth the argument that Consol's appeal of that condition was moot because the condition imposed no future obligations. (Department's Mot. ¶¶ 6–12; Department's Mem. 2–3; Department's Reply 2–3.) While Consol clearly does not, the Board agreed with the Department on this position.

Consol correctly identifies the distinction between the obligations *actually imposed* by the condition and what it calls "the totality of its consequences"; it merely disagrees with the Board whether that the distinction makes a difference. It also warrants repeating the distinction between *enforcement orders or actions*—such as those at issue in *Goetz v. DEP*, 2001 EHB 1127—and permit conditions like the one in this case, which, by its plain language, impose no future obligations. Both of these distinctions matter. Consol's attempt to muddle the issue by its mischaracterization of statements in the Folman Deposition and the Department's discovery responses is unavailing. At the core, the Department's statements discuss obligations—speculative ones, at that—which arise solely from independent causes—for example, if a stream is in fact impacted. (Consol's Opp'n Br. Ex. C (Folman Dep.48:11–19; 89:8–21 (discussing use of control streams to determine stream impacts); Ex. 10, Department's Resp. to Req. for Admis. Nos. 6–8 (stating Consol's obligation to conduct post-mining biological monitoring stems from the mining operations causing impairment or flow loss in the stream)).) Consol's response to the motion to dismiss and its Petition offer only speculative obligations arising from *independent causes*, not Permit Revision 173 itself or Consol's compliance with thereof.

In summary, while the Board accepted Consol's facts as true, the Board nevertheless found that no future obligations arose specifically from the permit condition and rejected

Consol's arguments to the contrary. As we have stated time and again, "[s]imply because the Board did not agree with the Appellants' assertion does not mean that our decision rested on grounds not proposed by any party." *Mountain Watershed Ass'n v. DEP*, 2005 EHB 592, 594. The Board did not shift or create in Consol any burden, or rely upon grounds not raised by a Party to the appeal. Therefore, Consol has not presented any compelling or persuasive reasons for the Board to reconsider its decision.

Finally, in both its Petition and supporting memorandum, Consol notes that neither the Department nor the Intervenor contested its request for leave to amend its notice of appeal. While the Board believes it was sufficiently clear in the February 12, 2015 Opinion and Order, its rationale for denying the request apparently bears repeating here. Consol's "motion" failed to substantially comport with the Board's rules. *See* 25 Pa. Code §§ 1021.53, 1021.91, 1021.95. It contained no verification, nor an affidavit in support of the motion. There was no proposed order or supporting memorandum of law. Frankly, the "motion" itself was so devoid of substance, offering only conclusory statements that the Department and CCJ would not be prejudiced by amendment of the appeal, that the Board questions to what exactly Consol expected the other Parties to respond. We see no reason to revisit our denial of leave for Consol to amend its notice of appeal.

In accordance with the reasons set forth in this Opinion, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOL PENNSYLVANIA COAL COMPANY, LLC	:	
	:	
v.	:	**EHB Docket No. 2014-027-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CENTER FOR COALFIELD JUSITICE, Intervenor	:	

O R D E R

AND NOW, this 13th day of March, 2015, Consol Pennsylvania Coal Company's Petition for Reconsideration is **denied**.

ENVIRONMENTAL HEARING BOARD

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: March 13, 2015

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

CONSOL PENNSYLVANIA COAL COMPANY, LLC	:	
v.	:	**EHB Docket No. 2014-027-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CENTER FOR COALFIELD JUSTICE, Intervenor	:	

DISSENTING OPINION OF JUDGE LABUSKES
IN WHICH CHIEF JUDGE RENWAND JOINS

By Bernard A. Labuskes, Jr., Judge

I respectfully dissent from the decision to deny Consol's petition for reconsideration, not because I agree with Consol's arguments on whether this appeal is moot, which I obviously do given my dissent, but because Consol's petition illuminates the fact that the majority's decision on the motion to dismiss "rests on a legal ground or a factual finding which has not been proposed by any party." 25 Pa. Code § 1021.152 (reconsideration of final orders).

The Department's motion to dismiss was based almost exclusively on the fact that it deleted Special Condition 77 from Consol's permit. The majority, correctly in my view, paid little heed to that argument, instead relying on Consol's voluntary compliance with the permit condition,[1] combined with the lack of any demonstrated ongoing effects.[2] The decision "rests

[1] As Consol points out in its petition, its compliance with the condition was only voluntary if one ignores the reality of the supposed choices it faced. It is also not clear to me why it matters whether compliance is voluntary. Still further, lost in the rather odd debate about whether Consol needs to violate the law in order to protect its due process rights is the fact that one thing that Consol did not have a choice about was whether to file an appeal if it wanted to protect its rights. It is black letter law that an aggrieved party has no duty to appeal, but if it does not appeal, it does not "preserve to some indefinite future time in some indefinite future proceedings" the ability to contest an unappealed order. *Cmwlth. v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1995). The majority's opinion has deferred to some indefinite future time in some indefinite future proceeding Consol's ability—if it can overcome

on" the lack of any demonstrated ongoing effects because, as Judge Coleman said in *Goetz v. DEP*, 2001 EHB 1127, compliance alone is not a basis for dismissing a case as moot if there can continue to be a tangential impact from the Department's action.[3] Thus, the critical finding in this case was the lack of any potential tangential impact, which in turn led the majority to conclude that Consol no longer had a stake in the outcome and we could grant no effective relief. The problem for purposes of the petition for reconsideration is that the Department did not argue that point. The Department did not argue or contend that the Special Condition (or the determinations implicit in the condition that the streams in question were vulnerable and perennial streams) would have no ongoing effect. To the contrary, to quote Consol,

> Further, the record before the Board is clear that the likelihood of postmining obligations being imposed upon [Consol] is much more than speculative. In fact, the Department did not dispute the likelihood that it would impose obligations as a result of its application of the [technical guidance document "TGD"] in connection with the data collected pursuant to Special Condition 77. Instead, the Department contended that Special Condition 77 in and of itself only imposed premining requirements, drawing a distinction without a difference between the condition itself and the totality of its consequences as a result of the Department's use of the TGD and the data gained by such use.

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administrative finality—to challenge the issues related to the special permit condition. So now Consol, who has complied with the law and incurred more than a year of litigation expenses, is deprived of its right to appeal a clearly appealable action because of a justiciability concern. Such deference to the Department at the expense of Consol is not warranted.

[2] Consol should not have been required to *prove* future effects in contesting the motion to dismiss. I agree with Consol's statement in its petition for reconsideration:

> The Majority's analysis of the Notice of Appeal and CPCC's [Consol's] Response to the Motion to Dismiss can best be described as requiring the establishment of claims as if the Notice of Appeal were a fact pleading and as if CPCC were presenting evidence at a summary judgment stage or at a hearing rather than in response to a motion to dismiss. … Although the Majority correctly stated the standard for considering the Motion to Dismiss and how to consider the position of CPCC as the nonmoving party, these expectations, among others, place a much higher burden of proof on CPCC to factually establish its claim than the standard allows.

[3] The Intervenor attempts to distinguish *Goetz* by saying the "possible tangential future impacts" that prevent a case from being moot should be limited to "'significant' codified consequences." I do not know what that means, and I would not add that additional gloss to the holding in *Goetz*.

(Consol's Supp. Mem. 20.)

Whether Special Condition 77 will have a lingering effect is at least in part a factual question. Both the Department and the Intervenor acknowledge that the Board made its own factual finding here, with the Intervenor saying that we were entitled to do so. The possible answers to the factual question range from "absolutely not" to "ongoing consequences are a certainty." Consol credibly averred that ongoing consequences are likely, which is obviously somewhere in between absolutely and absolutely not. The majority, instead of accepting Consol's averment, made the contrary finding that ongoing consequences are "clearly speculative." It said whether the Department will use the data generated as a result of Special Condition is "speculation." This is the functional equivalent of a finding that there will not be any tangential effects.

Not even the Department made that claim. To the contrary, it acknowledged repeatedly that there may be future effects. It does so even in its response to the petition for reconsideration. The Department never said future effects are "clearly speculative." By saying future effects *may* not come to pass, one seems to acknowledge that in fact they may. The Department and the majority discount this future possibility by saying Consol can appeal in the future, but in my view, the fact that Consol may *also* have future appeal rights does not justify dismissing its current appeal. Saying something is not ripe is not a basis for saying it is also moot. Those are two different points, neither of which justifies dismissal here.[4]

[4] As previously mentioned, having found as a factual matter that there will be no future effects, the majority found comfort in the fact that the issues raised in Consol's appeal can be appealed again if they reappear. I am encouraged that the majority believes that Consol will not be precluded by administrative finality from raising its objections in future appeals, but I do not think we should be deciding issues about future appeals in this case. This further shows why it is an error to decide *this* appeal is moot because of possible future appeal rights.

As I said in my dissent, I think future consequences are far from speculative, but more importantly, we should not be making that finding in the face of a credible, contrary allegation by Consol in the context of a motion to dismiss. To the immediate point, that key finding should not have been made without having been at least proposed by a party. Because the majority went beyond what even the Department argued or proposed, I would have granted reconsideration in accordance with 25 Pa. Code § 1021.152(a)(1). If the possibility (I would say probability) of future consequences flowing from the Special Condition is accepted, it is not clear that the Opinion granting the motion to dismiss for mootness would stand.

In my view, Consol is not raising crucial new facts in its petition for reconsideration, so 25 Pa. Code § 1021.152(a)**(2)** is not implicated. Consol raised the factual argument that ongoing effects from the special condition are likely. This is not a new fact. The new fact, not proposed by any party, is that there will be no future effects. Reconsideration is warranted under Section 1021.152(a)(1) not 1021.152(a)(2).

ENVIRONMENTAL HEARING BOARD

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

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

DATED: March 13, 2015

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBINSON COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 2010-186-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 16, 2015**

A D J U D I C A T I O N*

By Richard P. Mather, Sr., Judge

Synopsis

The Board dismisses the appeal of the Department's compliance order which enforced a 1994 Consent Order and Agreement to treat a post-mining discharge on the Putt Mine. Treatment of this discharge is still necessary and will remain necessary until the discharge meets the applicable effluent limitations for such post-mining discharge without further treatment.

BACKGROUND

This appeal involves a challenge to a Department of Environmental Protection (Department or DEP) compliance order issued to the Appellant, Robinson Coal Company (Robinson) on November 17, 2010. The Department issued the order in connection with Robinson's longstanding obligation to treat a post-mining discharge on this mine site, which was previously mined and reclaimed. The Department's order listed two alleged violations of Robinson's legal obligations: a failure to treat the post-mining discharge so that it met the applicable effluent limitations established under Section § 87.102 of the surface coal mining regulations, 25 Pa. Code § 87.102; and a failure to submit required quarterly monitoring reports

* Opinion of the Board by Judge Mather in which Chief Judge Renwand, Judge Coleman, and Judge Beckman join.
Opinion of Judge Labuskes concurring in part and dissenting in part.

for the Putt mine post-mining discharge in violation of Sections 87.116 and 87.117 of surface coal mining regulations, 25 Pa. Code §§ 87.116 – 87.117, and a 2002 Post-Mining Treatment Trust Consent Order and Agreement (2002 CO&A) governing Robinson's obligation to treat the post-mining discharge on the Putt Mine. For each alleged violation the Department ordered a specific corrective action.

Robinson filed an appeal with the Board of the Department's November 17, 2010 compliance order in which it challenged the Department's action. Robinson raised specific objections to each of the alleged violations and to the corrective actions set forth in the order. Robinson asserted that there was no alleged failure to meet applicable effluent limitations, as set forth in Paragraph one of the order, because the sample, upon which the alleged violation was based, was collected in the wrong location. Robinson also asserted that there was no failure of the requirement to submit quarterly monitoring results, as set forth in Paragraph two of the order, because quarterly monitoring of the post-mining discharge is no longer necessary or required.

In addition, Robinson raised several general objections regarding Robinson's overall obligation to treat the Putt Mine post-mining discharge. Robinson claimed that it was not responsible for the Putt Mine discharge. Robinson also asserted that treatment of the discharge is no longer needed and therefore the treatment system, the monitoring requirements and treatment trust for the Putt Mine discharge should terminate.

As a result of post-appeal developments the Department filed a motion to dismiss and a motion for summary judgment to seek to have the Board dismiss Robinson's appeal. First, the Department ultimately agreed with Robinson that the samples, which supported paragraph one of its order and the alleged violations of the effluent limitations, were collected at the wrong place and did not support the violations alleged in paragraph one. The Department therefore vacated

paragraph one of its order. The Department filed its Motion to Dismiss claiming that the appeal of paragraph one was moot because the Department had vacated that part of the order. *See e.g., Goetz v. DEP*, 2001 EHB 1127.

Second, the Department filed its Motion for Summary Judgment to resolve the appeal of paragraph two of the order which was based on Robinson's alleged failure to submit quarterly water quality monitoring reports. Because the Department asserted that Robinson did not dispute that it had failed to submit quarterly water quality monitoring reports, the Department argued it was entitled to summary judgment on this part of Robinson's appeal as a matter of law.

On Robinson's general objections to the Department's order, the Department asserted that the Board lacked jurisdiction over these claims because the Department's order "did not address in any fashion or by any means the Treatment Trust or the Treatment Trust Consent Order and Agreement." The Department believed that the CO&A is entirely separate from the order under appeal and that the issues arising the order have no connection to the CO&A.

The Board denied the Department's two dispositive motions in a single opinion. *Robinson Coal Company v. DEP*, 2011 EHB 895. The Board denied the Department's motion to dismiss even though the Department had earlier vacated paragraph one of its order because the appeal met some of the exceptions to the mootness doctrine. The Board decided that Robinson would suffer a detriment without Board review of the underlying issue of whether Robinson's treatment of the Putt Mine discharge is still necessary. The Department had vacated paragraph one of its order because it took the sample at the incorrect monitoring point. The issue of continued liability for the Putt Mine discharge remained and it is capable of repetition and could evade review. The Department is free to issue another compliance order, using the agreed to correct sampling point, at any time in the future.

The Board also rejected the Department's argument that the Board lacked jurisdiction finding that the order that the Department issued to Robinson in 2010 is directly related to the parties' 2002 CO&A governing Robinson's treatment of the Putt Mine discharge. The Board decided that the Department's November 2010 order was an attempt to enforce Robinson's commitments under the 2002 CO&A.

In its Motion for Summary Judgment, the Department asserted that it was entitled to summary judgment on the appeal of paragraph two regarding the requirement to submit quarterly monitoring reports. According to the Department, Robinson did not dispute that it failed to submit quarterly monitoring reports to the Department, and since Robinson did not dispute this fact, the Department alleged it was entitled to judgment on this part of the appeal. The Board rejected this argument because the Board decided that Robinson's admission that it had not submitted quarterly monitoring report could, nevertheless, not be an admission of a violation of the CO&A, if Robinson could establish that treatment under the 2002 CO&A is no long necessary.

In its earlier opinion, the Board identified the problem with this appeal: The underlying problem in this appeal is the parties failure in 2002 to include language in their 2002 CO&A that establishes agreed to procedures for Robinson to demonstrate that treatment under the 2002 CO&A and its related monitoring, reporting, and bonding requirements are no longer necessary. *Robinson Coal Company v. DEP*, 2011 EHB at 911-912. In the absence of agreed to procedures, Robinson has attempted to work with the Department to make such a demonstration, but in the absence of any meaningful Department response, as set forth above and in the earlier opinion, Robinson has been shooting blindly at a target in the dark. The Board faces a similar problem in this appeal from an order issued by the Department to compel Robinson to comply with its

obligations under the 2002 CO&A. While it appears that the two specific obligations imposed by the order on Robinson may have been addressed, the underlying issue still remains and Robinson is no further along with the Sisyphean task of getting an answer from the Department regarding the type of demonstration required to terminate Robinson's obligation under the CO&A. In the absence of agreed to procedures or a meaningful response from the Department, this appeal provides Robinson with its only opportunity to challenge whether it is still obligated to treat the mine discharge in question under the 2002 CO&A. In the context of this appeal from the order, which attempts to enforce the 2002 CO&A, the Board will address the issue the parties failed to address in 2002 when they failed to identify procedures and criteria for determining when treatment of the Putt Mine discharge is no longer necessary. *Robinson Coal Company* 2011 EHB at 911-912. The Board concluded that a more complete record was required to address this problem and to address the issues in this appeal. The Board conducted its evidentiary hearing and has reviewed the Post Hearing Briefs of the Parties. The Board is now in a position to address the remaining issues in this appeal, including the critical issue whether treatment of the Putt Mine discharge is still necessary under the 2002 CO&A and the Department's surface coal mining regulations.

FINDINGS OF FACT

The Parties

1. The Department is the administrative agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, P.S. §§ 1396.1-1396.19a ("Surface Mining Act"), The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691-1001 ("Clean Streams Law"), the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27,

1966, P.L. 31, *as amended*, 52 P.S. §§ 1406.1-14061 ("Mine Subsidence Act") and Section 1917-A of the Administrative Code, Act of April 29, 1929, *as amended*, 71 Pa. Code C.S. §§ 510-517.

2. Robinson Coal Company ("Robinson") is a Pennsylvania corporation with a business mailing address of Box 9391, Pittsburgh PA, 15225.

3. David Aloe ("Aloe") is the President of Robinson. Aloe has worked in the coal mining industry for about 47 years. (Notes of Testimony ("N.T.") 322.)

Putt Mine

4. Robinson operated the Putt Mine under Surface Mining Permit ("SMP") No. 63840106. The Putt Mine is a surface coal mine located in Robinson Township, Washington County. (N.T. 30; Commonwealth Exhibit 1 (Putt Mine Site map).)

5. Robinson submitted the permit application in 1984. The permit was issued and mining began in 1985. Mining was completed in 1989, and reclamation was completed in 1991. Robinson submitted a bond release request to the Department in 1991. The Department did not approve Robinson's 1991 request for bond release. (N.T. 323, 327 - 328.)

6. The Department released Robinson's reclamation bond in 2003 after the post-mining treatment trust was established as an alternative financial mechanism for its post mining pollutional discharge. (N.T. 31.)

7. The NPDES permit for the Putt Mine has expired and Robinson has not submitted a permit renewal application. (N.T. 31, 200.)

8. Under the Putt Mine permit, Robinson mined coal from the Pittsburgh coal seam and removed remnants of old underground deep mines. (N.T. 203.)

9. The backfill for the Putt Mine consists of the soils and broken up overburden that were initially removed from the site as well as remnants of coal. It is a highly variable, heterogeneous mixture of earth materials. (N.T. 312-313.)

10. Groundwater moves through the backfill via flow paths in between the rocks and other backfill material in response to the hydraulic gradient. (N.T. 313.)

Daylighting method of mining

11. Mining conducted under the Putt Mine permit included removal of the coal left in place by mines that operated in the 1940s and 1950s. This procedure is known as "daylighting" and involves removal of the stumps, ribs and pillars left over from those prior mining operations. (N.T. 203.)

12. Coal has been mined in Washington County for many decades by both underground and surface mining methods. (N.T. 201.)

13. Typically, about 20% to 30% of the coal was left in the old underground mines after mining ceased. Many of the old underground mines also had post-mining discharges of poor water quality. (N.T. 202.)

14. Since the 1970s, the Department has issued surface mine permits which authorize daylighting. (N.T. 201-202.)

15. Daylighting can improve the quality of the post-mining discharges by removing the coal and other acid forming materials which are the causes of acidic water and elevated metals and by adding alkaline material, such as limestone, which contributes alkalinity to the backfill. The limestone or other alkaline material serves to neutralize the acidic mine water. (N.T. 203.)

Department's 1993 hydrologic investigation of SP-1

16. Paul Cestoni ("Cestoni"), P.G., a licensed professional geologist and a Department hydrogeologist, conducted a hydrologic investigation of a seep and background monitoring point identified as SP-1 in 1993 at the request of Mike Hassett, the Mine Conservation Inspector Supervisor for the Greensburg District Mining Office, as part of the Department's review of Robinson's request to release its reclamation bond. (N.T. 204.)

17. At the time of his review, the spring which had been the SP-1 monitoring point had been replaced by a green pipe several feet away from its original location. Water flowed from the green pipe but the spring had gone dry. (N.T. 342, 343, 347, 402.)

18. Cestoni was asked to do the hydrologic investigation because the water quality of SP-1 discharge had changed from alkaline with low metals, to acidic with high levels of iron, manganese and sulfates. (N.T. 204-205.)

19. Cestoni concluded that the SP-1 discharge was hydrologically connected to the Putt Mine and that Robinson's mining had caused the water quality of the discharge to change from alkaline to acidic with higher concentrations of iron, manganese and sulfates. (N.T. 204-205; Robinson Exhibit A (Cestoni 1994 hydrologic investigation report.)

20. In his 1994 Report, Mr. Cestoni stated that "the best possibility of abating this discharge is for Robinson Coal Company to obtain an SMP on the Burgoon property adjacent to the Putt Mine and daylight the abandoned underground mines found there." Sometime around 1998, Robinson obtained an SMP for the adjacent Burgoon property and Robinson daylighted the abandoned underground mine on this property. (N.T. 331-332.)

21. Robinson also removed the Burgoon high wall remnant, as well as the A-1 and A-4 wells that were of concern to Aloe and Linberg in their 1996 Report. (N.T. 409-411.) Exhibit A.

22. Robinson added cement kiln dust to the Burgoon site to add more alkaline material with more neutralization potential to the backfill material on the Burgoon site. (N.T. 560-562.)

1994 Compliance Order

23. The Department issued an order to Robinson and to Robert Burgoon, the adjacent property owner, on July 1, 1994. Paragraph 1 of the July 1, 1994 Order directed Robinson to begin interim chemical treatment of the SP-1 discharge and to submit plans for the permanent treatment of the SP-1 discharge. (N.T. 41-43; Commonwealth Exhibit 20 (Exhibit A to the 1994 Consent Order and Agreement).)

24. Paragraph 4 of the order directed Burgoon to grant Robinson access to his property in order to install, operate and maintain the permanent treatment system. (N.T. 45; Commonwealth Exhibit 20 (Exhibit A to the 1994 Consent Order and Agreement.)

25. Paragraphs 2 and 3 of the order directed Robinson to submit a plan and schedule for permanent treatment of the SP-1 discharge and to implement the plan once it was approved by the Department. (N.T. 45; Commonwealth Exhibit 20 (Exhibit A to the 1994 Consent Order and Agreement).)

26. Robinson installed a temporary water treatment system that used soda ash briquettes to raise the pH of the discharge and hay bales to contain the water so that the iron in the discharge could precipitate out of solution. (N.T. 39, 334.)

1994 Consent Order and Agreement

27. Robinson appealed the July 1, 1994 Order to the Environmental Hearing Board. The Department and Robinson then entered into a Consent Order and Agreement, dated November 28, 1994, and Robinson withdrew its appeal of the July 1, 1994 order.

28. Under the November 1994 Consent Order and Agreement, Robinson agreed to upgrade its temporary treatment system, to evaluate different methods for treating or abating the discharge, to submit plans for permanent treatment of the SP-1 discharge, and to install the treatment system upon Department approval. Commonwealth Exhibit 20, Paragraphs 3, 4 and 5.

Putt Mine treatment system

29. As required by the 1994 Consent Order and Agreement, Robinson installed a passive treatment system at the Putt Mine. The system consists of two separate parts: an anoxic limestone drain ("ALD"); and a settling basin and ditch. (N.T. 46; Commonwealth Exhibit 1 (Putt Mine site map.) The system was installed in early 1995. (N.T. 338.)

30. The purpose of the ALD is to raise the pH of any acidic groundwater flowing into the drain so that the water is alkaline when it leaves the ALD. (N.T. 214.)

31. Water comes out of the ALD through an outlet pipe and then flows into the settling basin. (N.T. 213-214; Commonwealth Exhibit 3 ("As-built drawings"); Commonwealth Exhibit 20 B; (Photograph of ALD outlet.)

32. The ALD is approximately 250 feet long, forty feet wide on one side and twelve feet wide on the opposite side. Commonwealth Exhibit 3 ("As-built drawings"). The "as built drawings" show the size, area and shape of the ALD as it was actually constructed. (N.T. 213.)

33. Approximately 750 tons of crushed limestone was placed within the ALD to establish the drain. (N.T. 213; Commonwealth Exhibit 3 ("As-built drawings".) The water entering the ALD cannot be sampled: It can only be sampled at the outlet. (N.T. 215.)

Settling basin & ditch

34. The Department's Mine Conservation Inspector Supervisor, William Shuss, ("Shuss") who was at the Putt Mine in 1995, recalls that two settling basins, each about 100 feet in diameter, were constructed as part of the treatment system. Now, only one small basin exists at the site. (N.T. 46-47.)

35. The purpose of the settling basin is to remove metals, in particular iron, from the discharge. Alkaline water from the ALD outlet flows into the basin where it is exposed to oxygen. This exposure to oxygen allows the iron that is in solution to oxidize and precipitate out as ferrous oxide, commonly known as iron sludge. (N.T. 47, 215-216.) The water must remain alkaline in order for this process to occur. (N.T. 234.)

36. If the water from the outlet is acidic, iron will not oxidize and will not precipitate out of solution. (N.T. 234.)

37. The outlet from the settling basin flows through a culvert and then into a ditch. The ditch then crosses the Burgoon property, goes under the township road, and discharges to the North Branch of Robinson Run through a second culvert. (N.T. 37-38; Commonwealth Exhibit 1 (Putt Mine site map); Commonwealth Exhibit 22 E, F, and G. (Photographs of ditch.)

38. It is difficult to accurately measure the current size or depth of the settling basin because it has become overgrown with cat-tails, multi-flora rose and other vegetation. (N.T. 47, 113-115; Commonwealth Exhibit 22 A, C, and D.) (Photographs of settling basin.)

39. In spring 2012 the Department's Mine Conservation Inspector, Jeff Kohut, ("Kohut") estimated the depth of iron sludge in the basin to be about one to two feet. (N.T. 114.)

40. Kohut estimates that approximately eighteen to twenty four inches of iron oxide sludge has accumulated in the upper section of the ditch between the settling basin outlet and the midpoint between the settling basin outlet and the permit boundary. (N.T. 117-119.)

41. There is no visible sludge in the ditch at the compliance monitoring point at the permit boundary. (N.T. 120.)

42. The ALD and settling basin are within the original Putt Mine permit boundary. Robinson revised the Putt Mine permit boundary in late 1995 to include the ditch. (N.T. 35; Commonwealth Exhibit A (Putt Mine site map).)

2002 Treatment Trust Consent Order and Agreement

43. The Department and Robinson executed the Treatment Trust CO&A in November 2002 with the Clean Streams Foundation for the benefit of the Commonwealth of Pennsylvania. The initial trust corpus was $25,893. Commonwealth Exhibit 15 (Post-Mining Treatment Trust CO&A), Paragraph 6.

44. The Trust corpus is based on the cost for collecting quarterly samples at three locations and the cost to rebuild the ALD. The cost to rebuild the ALD is the largest component of the Trust corpus. Commonwealth Exhibit 15 (Post-Mining Treatment Trust CO&A), Paragraph M, and attachments showing cost calculations.

45. The Trust secures Robinson's obligation to "treat the Putt Mine discharge, and to operate and maintain the treatment system, in perpetuity, or until water treatment is no longer necessary." The Trust also provides financial resources to the Department and the citizens of the Commonwealth to maintain and operate the Treatment System, and to treat the discharge in

perpetuity if Robinson becomes unable or unwilling to meet these obligations. Commonwealth Exhibit 15 (Treatment Trust CO&A), Paragraph 5.

46. The 2002 Treatment Trust CO&A does not provide any detail or description regarding how to determine or establish that "water treatment is no longer necessary." Commonwealth Exhibit 15 (Treatment Trust CO&A), Paragraph 5.

47. At the time the Trust was established, the Department held reclamation bonds for the Putt Mine in the amount of $200,969. Commonwealth Exhibit 15 (Treatment Trust CO&A), Paragraph K. These bonds were released in full after the treatment trust in the amount of $25,893 was established. (N.T. 30-31.)

48. Under the Treatment Trust CO&A the Department and Robinson are required to hold annual meetings to discuss the sampling results, the status of the treatment system, to review sampling and treatment costs, and make any needed adjustments to the treatment trust. (N.T. 173, 198-200; Commonwealth Exhibit 15 (Treatment Trust CO&A), Paragraph 16.)

49. The Department did not schedule the required meeting for several years. Robinson and the Department held the first annual meetings in 2010 and a second was held in 2011. (N.T. 198-200.)

50. The Department only scheduled the required annual meetings under the Treatment Trust CO&A after Robinson took various steps to try to terminate its obligation to treat the Putt Mine discharge. (N.T. 198-200.)

Additional mining and remedial activity in the area since 1995

51. In 1995, construction of the ALD and settling basin was complete. (T. 414-415; Ex. H.)

52. From 1995 to 2000, Robinson undertook substantial mining and remedial activity to help abate the mine drainage. (N.T. 331-332, 409-411, 560-562.)

53. Robinson removed a 250-300 foot coal crop line on the Putt site located along the intended installation line for the ALD. The crop line had been impounding water and elimination of the crop line allowed the water to flow. (NT. 339-340, 408.)

54. Robinson mined the Burgoon site from 1998-2000. Mining the Burgoon site as identified by Cestoni in his 1994 report as a way to abate the discharge. Robinson removed a high wall remnant on the Burgoon site. (N.T. 331-332, 409-411.)

55. Robinson added cement kiln dust to the Burgoon site during reclamation to increase the neutralizing potential in the backfill material. (N.T. 560-562.)

Monitoring points for the Putt Mine

56. "SP-1" was a spring, designated as a background monitoring point for the Putt Mine in the permit application, and was a water quality monitoring point for the Putt Mine while the mine was operating. (N.T. 36, 341-342; Commonwealth Exhibit 12 (Environmental Resources Module 6.2 Map).)

57. SP-1 is shown on the "Environmental Resources Module 6.2 Map" for the Putt Mine, Commonwealth Exhibit 2, however the spring that was the original SP-1 monitoring point no longer flows. (N.T. 37, 342, 343, 347, 402.)

58. At the time the Module 6.2 map was prepared, SP-1 was a spring located outside the Putt Mine permit boundary on the property owned by Robert Burgoon ("Burgoon") about 200 feet south of the township road. (N.T. 35-36.)

59. A green pipe was installed up slope from SP-1 in 1987. Water then flowed from the green pipe and the spring that was SP-1 went dry. (N.T. 342, 401, 402.)

60. Prior to Robinson's mining SP-1 was down dip and down slope of the Putt Mine. (N.T. 233, 259, 260.)

61. Prior to mining, SP-1 was alkaline with no iron and low levels of manganese and sulfates. During the course of mining at the Putt Mine, the water quality of SP-1 changed from alkaline or neutral with low metals, to acidic with high levels of iron, manganese and sulfates. Exhibit A and Exhibit W.

62. The "road culvert" monitoring point is located at the outlet of a culvert that conveys flow from the ditch under the township road. The culvert discharges into the North Branch of Robinson Run. (N.T. 39; Commonwealth Exhibit 1 (Putt Mine site map).)

63. The Department recognized the "road culvert" monitoring point as a substitute monitoring point for the original SP-1 monitoring point when Burgoon refused to grant access to Robinson to sample at SP-1 during mining. (N.T. 349-350.)

64. The Department also recognized the "road culvert" monitoring point as a substitute monitoring point for the original SP-1 monitoring point when the interim treatment system to treat the discharge was in place. (N.T. 39, 40, 65, 83.)

65. The regulatory effluent limits for the Putt Mine treatment system are acidity less than alkalinity and the iron concentration less than 7 mg/l. 25 Pa. Code § 87.102.

66. In order to monitor the performance of the treatment system, the Department collects samples from four locations: i) at the outlet from the ALD; ii) at the Putt Mine permit boundary; iii) at the road culvert; and iv) from a point mid-way between the settling basin outlet and the permit boundary. (N.T. 97; Commonwealth Exhibit 1 (Putt Mine site map).)

67. The compliance point for the Putt Mine discharge is at the permit boundary. This is the monitoring point used to determine whether the discharge meets the applicable effluent

limits. (N.T. 74, 108.) The permit boundary monitoring point is not shown on the Module 6.2 map, but can be located in the field by measuring the distance from the township road to the permit boundary. (N.T. 125-127.)

68. The ALD outlet sampling point is used to evaluate whether the ALD discharge meets the effluent limits for acidity less than alkalinity. (N.T. 38.)

69. The midway sampling point is used to determine the levels of iron in the Putt Mine discharge in the ditch further away from the settling basin. This sampling point is a check on the system's functioning. (N.T. 38.)

70. The road culvert sampling point is another check point, used to confirm that the Putt Mine discharge meets the applicable effluent limits before it enters the North Branch of Robinson Run. (N.T. 127.)

Monitoring wells

71. Robinson installed two sets of monitoring wells on the Putt Mine, an "A" set and a "B" set. (N.T. 416.) The "A-set" wells are shown in Figure 3 of the Aloe Linberg Report (Commonwealth Exhibit 21). They were later mined through by Robinson's mining and no longer exist. (N.T. 409, 417.)

72. Robinson's mining also eliminated all but four of the "B-set" wells. (N.T. 416-417.)

73. The four remaining "B-set" wells are the wells shown on Commonwealth Exhibit A (Putt Mine site map). Robinson drilled those wells in 1994 and began sampling them in 2005. (N.T. 418.) Robinson Exhibit R (Pruent Report), monitoring well logs and Analytical Summary Sheet. The wells were drilled to the pit floor. (N.T. 557-558.)

74. The Department identified and located the four remaining "B-set" wells on the Putt Mine site map (Commonwealth Exhibit 1). The map was created by Matt Cavanaugh, a Mining Permit Compliance Specialist with the Department's California District Mining Office. (N.T. 11-12.)

75. The base map Cavanaugh used was an aerial photo obtained from the Department of Conservation and Natural Resource's PA Map repository. (N.T. 13.)

76. Cavanaugh went to the Putt Mine site with the Mine Conservation Inspector, Jeff Kohut, to identify and locate the four wells in the field. Cavanaugh used a Trimble GeoXT GPS unit to determine the location of the wells and then using these GPS readings, marked the four monitoring wells on Commonwealth Exhibit A. (N.T. 18, 21-23.)

77. The four monitoring wells are also shown on a map that is an exhibit to the report for Robinson's expert, Patrick Pruent, P.G. Robinson Exhibit R. The distances between the monitoring wells and the ALD and their orientation are not accurate on Mr. Pruent's map. (N.T. 226-228.) Mr. Pruent recognized Commonwealth Exhibit 1, the Putt Mine site map, as an accurate depiction of the location of the four monitoring wells. (N.T. 549-551, 555.)

78. The Department began sampling the four remaining "B-set" wells in 2012. Commonwealth Exhibit 5 (Monitoring well sample results).

79. Robinson sampled the four monitoring wells in October and November 2005, in January 2006, January through May 2009, and in November 2010. Robinson did not sample the four monitoring wells and there are no sampling results for 2007, 2008, or 2011 and no sample results exist for those years. (N.T. 580-582; Robinson Exhibit R (Pruent Report), Analytic Summary Sheet.)

80. In some months, a sample could not be collected from monitoring wells No. 2 and No. 3. (N.T. 314; Robinson Exhibit R (Pruent Report) Analytic Summary Sheet.)

81. The Robinson sample results show that the water in all four monitoring wells contains elevated concentrations of iron, manganese, aluminum and sulfate, all constituents of acid mine drainage. In addition, acidity is less than alkalinity in all sample analyses. (N.T. 308-31; Robinson Exhibit R (Pruent Report), Analytic Summary Sheet.)

82. The Department's 2012 sampling results also show that the water in the four monitoring wells contains the constituents of acid mine drainage, specifically elevated concentrations of iron, manganese, aluminum and sulfate, and that the acidity is less than alkalinity. Commonwealth Exhibit 5 (DEP's samples from monitoring wells).

Department sampling

83. The Department collected water samples from the outlet from the ALD, the mid-way point, the permit boundary and the road culvert locations in May 2011, September 2011, and monthly beginning in January 2012. (N.T. 120-121.)

84. Samples from the ALD outlet show that the iron concentrations in the water leaving the ALD range from 9.7 to 18.6 mg./l. This shows that the concentration of iron at the ALD outlet has consistently exceeded the applicable effluent limit for iron of 7 mg/l. (N.T. 54, 123-125; Commonwealth Exhibit 4 ("ALD Outlet-Iron" chart); Commonwealth Exhibit 6 (DEP samples at ALD outlet).)

85. The alkalinity has consistently exceeded acidity at the ALD outlet. (N.T. 52-53; Commonwealth Exhibit 4 ("ALD outlet alkalinity v. acidity" chart).)

86. The level of alkalinity in the ALD outlet has increased over time. Commonwealth Exhibit 4 ("ALD outlet alkalinity v. acidity" chart.)

87. Samples from the permit boundary monitoring point show that the iron concentrations are consistently below the effluent limitation of 7 mg/l iron and that alkalinity exceeds acidity. (N.T. 55, 127; Commonwealth Exhibit 8 (DEP samples at permit boundary).)

88. The sampling results also show elevated concentrations of sulfate at the outlet from the ALD, and at the mid-way point. Commonwealth Exhibit 6 (DEP samples at ALD outlet); Commonwealth Exhibit 7 (DEP samples at the mid-point.)

The Department's November 2010 Order

89. The Department's Surface Mining Conservation Inspector, Jeffery Kohut ("Kohut") conducted a quarterly inspection of the Putt Mine on October 13, 2010 and collected a sample of the Putt Mine discharge at the outlet for the settling basin. (N.T. 98-99; Commonwealth Exhibit 22A (outlet from settling basin).)

90. Kohut has been a mining inspector with the Greensburg District Mining Office since 2005. He was assigned to inspect the Putt Mine in the fall of 2010, and was at the site for the first time on October 13, 2010. (N.T. 94-96.)

91. Kohut knew there was a monitoring point for the Putt Mine discharge identified as "SP-1", and observed that the Module 6.2 map showed a monitoring point, marked as "SP-1." He assumed that SP-1 was the monitoring point for the Putt Mine discharge. (N.T. 100.)

92. Using the scale for the Module 6.2 map (Commonwealth Exhibit 2) and a ruler, he calculated the distance from Township Road 841 to the "SP-1" point. At the Putt Mine site, he walked the same distance from the township road to determine where he understood the "SP-1" point on the Putt Mine site should be located at the mine site. That location was the outlet of the settling basin. (N.T. 100.)

93. The sample results from the outlet of the settling basin showed an iron concentration of 12.4 mg/l of iron, which would be above the effluent limit for the Putt Mine discharge. (N.T. 100, 102; Commonwealth Exhibit 10 (November 5, 2010 sample results for October 13, 2010 sample).)

94. The Department issued a field order to Robinson on November 17, 2010 based on the sample results for the sample collected on October 13, 2010. (N.T. 102-103; Commonwealth Exhibit 11 (November 2010 order).)

95. Paragraph one of the order was based on Inspector Kohut's belief that the sampling results revealed Robinson's apparent violation of the effluent limitations for the Putt Mine discharge. The order cited to Section 87.102(a) of the surface mining regulations, 25 Pa. Code § 87.102(a) and referenced Paragraph G of the findings of fact section of the Treatment Trust CO&A. (N.T. 104-105; Commonwealth Exhibit 11 (November 2010 order).) Section 87.102(a) of the regulations establishes effluent limits for discharges of water from surface coal mines. Paragraph G of the Treatment Trust CO&A recites the effluent limit for iron for the Putt Mine discharge, as set forth in as Pa. Code § 87.102. (N.T. 104-105; Commonwealth Exhibit 11 (November 2010 order).)

96. Section 87.102(a) of the Department's regulations establishes effluent limits for discharges of water from surface coal mines. Paragraph G of the Treatment Trust CO&A recites the effluent limit for iron for the Putt Mine discharge, as set forth in 25 Pa. Code § 87.102. (N.T. 104-105; Commonwealth Exhibit 11 (November 2010 order).)

97. Paragraph two of the November 2010 order was based on Robinson's alleged failure to submit quarterly water quality monitoring reports as required by Sections 87.116 and

87.117 of the surface coal mining regulations, 25 Pa. Code §§ 87.116, 87.117. (N.T. 107; Commonwealth Exhibit 11 (November 2010 order).)

98. Robinson contacted the Department after it received the November 2010 order and met with Kohut and Shuss at the Putt Mine site in early December 2010. (N.T. 48-49, 109.)

99. At that meeting, the parties discussed the correct location of the Putt Mine discharge monitoring point. The Department advised Robinson that the permit boundary is the compliance monitoring point for the Putt Mine discharge. (N.T. 108.)

100. Following the December 2010 field meeting, Kohut vacated Paragraph one of the November 2010 order because the October 13, 2010 sample was not taken at the permit boundary compliance point. (N.T. 109-110; Commonwealth Exhibit 12 (December 27, 2010 Inspection Report).)

101. By letter dated December 27, 2010, the Department placed Robinson in satisfactory progress with respect to Paragraph two of the November 2010 order. (N.T. 108-109; Commonwealth Exhibit 12 (December 27, 2010 letter and Inspection Report).)

102. "Satisfactory progress" means an operator has taken steps toward compliance but needs additional time to come fully into compliance with the order. (N.T. 108-109.)

103. The Department placed Robinson in "satisfactory progress" because Robinson had collected samples from the compliance point but had not received the results of that sampling. (N.T. 109; Commonwealth Exhibit 12 (December 27, 2010 letter and Inspection Report).)

104. Robinson submitted the water monitoring reports required by Sections 86.192 - 86.193 of the mining regulations, 25 Pa. Code §§ 86.192 - 86.193, and on January 11, 2011, the

Department lifted Paragraph two of the November 2010 order. (N.T. 110; Commonwealth Exhibit 12 (January 11, 2011 Inspection Report).)

105. The Department prepared a civil penalty assessment and calculated a proposed civil penalty, based on the violations in the November 2010 order. The Department did not ultimately assess a civil penalty against Robinson or require it to pay the penalty. (N.T. 110-11; Robinson Exhibit M (Department's December 7, 2010 letter to Robinson).)

Current status of Putt Mine discharge

106. The Putt Mine continues to produce mine drainage that exceeds the applicable effluent limits for iron at the outlet to the ALD sampling point where the drainage from the ALD outlet flows into the settling basin and then to the ditch. (Commonwealth Exhibit 4 ("ALD Outlet-Iron" chart).)

107. The water quality of the mine drainage at the outlet to the ALD sampling point has improved over the years. (Commonwealth Exhibit 4 ("ALD Outlet Alkalinity v. Acidity" chart).)

108. While the historic monitoring data reveals that the discharge from the ALD has consistently met the requirements of alkalinity over acidity, the discharge at this interim point along the two-part Putt Mine treatment system consistently exceeds the applicable effluent limitation for iron. (N.T. 54, 123-125; Commonwealth Exhibit 4 ("ALD Outlet-Iron" chart); Commonwealth Exhibit 6 (DEP samples at ALD Outlet).)

109. The excess iron in the ALD discharge is removed in the settling basin and ditch which is the second part of the two part Putt Mine treatment system. (N.T. 46-47, 215-216.)

110. The settling basin and ditch remain necessary as long as the discharge from the ALD has iron in excess of the applicable limits in 25 Pa. Code § 82.102. (N.T. 123-125.)

111. Robinson's expert witnesses agree with the Department that treatment in the settling basin and ditch is still necessary to precipitate out the excess iron of the Putt Mine discharge to meet the applicable effluent limits for iron in 25 Pa. Code § 87.102. (N.T. 216, 233-34, 500-501, 571-573.)

112. The Parties agree there is no practical means to measure the water quality of the water in the backfill material as it enters the ALD. (N.T. 214-216, 531-532.)

DISCUSSION

This is an appeal from an order the Department issued to Robinson to compel Robinson to comply with its obligations to treat the Putt Mine discharge under the CO&A. When the Department issued the order, it imposed two specific obligations on Robinson regarding its continuing obligation to provide treatment for the post-mining discharge from the Putt Mine. This post-mining discharge is subject to the terms of the CO&A and the applicable statutes and regulations, administered by the Department, that govern liability for such discharges under Pennsylvania law. While the Department is correct that the two specific obligations set forth in the order have been resolved, the overall issue remains whether treatment of the Putt Mine discharge is still necessary. Robinson now asserts that treatment is no longer necessary under the 2002 CO&A. The Department disagrees. The Department also continues to assert that Robinson is not entitled to challenge whether treatment is still necessary in this appeal. The Board agrees that Robinson is entitled to challenge whether treatment of the Putt Mine discharge is still necessary in the context of Robinson's appeal of the Department's order. The Board has already recognized the Department's efforts to defer consideration of this important issue, and the Board, in the context of this appeal, provides Robinson with an opportunity to challenge the

Department's underlying decision that Robinson is still required to provide treatment of the Putt Mine discharge. *See Robinson Coal Company v. DEP*, 2011 EHB at 902-905.

Burden of Proof and Standard of Review Section

The Department bears the burden of proof in this matter. Under the Board's Rules, the Department bears the burden of proof when it issues an order. 25 Pa. Code § 1021.122(b)(4). Specifically, the Department must prove by a preponderance of the evidence that its issuance of the Compliance Order to Robinson constituted a lawful and reasonable exercise of the Department's discretion supported by the evidence presented. *See Perano v. DEP*, 2011 EHB 623,633; *GSP Management Company v. DEP*, 2010 EHB 456, 475; *see also* 25 Pa. Code §§ 1021.117(b), 1021.122(a). The Board defines "preponderance of the evidence" to mean that "the evidence in favor of the proposition must be greater than that opposed to it." *Clancy v. DEP*, 2013 EHB 554, 572.

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 [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 finding 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. Due to the nature of the Board's *de novo* review, the Board does not conduct a review of the record the Department relied upon to make its decision under appeal; rather the Board relies on the record established before the Board, which may include evidence that the Department did not consider. *Pennsylvania Trout v. Dep't of Envlt. Prot.*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004).

In addition, under the Board's Rules, Robinson has the burden of proof for any of its affirmative defenses to the Department's Compliance Order. *See, e. g., McKees Rocks Forging Inc. v. DER*, 1994 EHB 220, 269; *Carroll Township v. DEP*, 2009 EHB 401, 409 n. 3. Robinson now asserts in defense of the Department's order that treatment of the Putt Mine discharge is no longer necessary and that the 2002 Treatment Trust should be terminated. This affirmative argument amounts to an affirmative defense to the Department's Compliance Order and Robinson has the burden to establish that treatment of the Putt Mine discharge is no longer necessary.

Department's Order sought to enforce Robinson's obligations under CO&A

As a preliminary matter the Board will again briefly address an argument that the Department advanced in its Post-Hearing Brief that the Board should dismiss the Robinson appeal for lack of jurisdiction because the Department's order under appeal did not constitute an action to enforce the CO&A. The Board previously addressed this argument, in detail, when it denied the Department's motion to dismiss and motion for summary judgment. *Robinson Coal Company v. DEP*, 2011 EHB 895, 908-910. The Board still "does not understand how the Department can assert, with a straight face, that the order" does not enforce Robinson's obligations under the CO&A to treat the Putt Mine discharge. For the reasons set forth in its earlier decision, the Board again rejects the Department's argument. *Id.*

The Board disagrees with the Department's position that there is no evidence that the Department's November 2010 order was "designed to compel compliance with the Treatment Trust CO&A." Department's Post-Hearing Brief at page 37. To the contrary, there is overwhelming evidence to establish that the Department's November, 2010 compliance order sought to compel Robinson to comply with its longstanding obligation to treat the Putt Mine discharge. While the Department is correct that this obligation is governed, in part, by the mining laws and regulations, the Department ignores the clear fact that the Parties executed the 2002 CO&A to also govern Robinson's obligation to treat the Putt Mine discharge. When the Department issued the November, 2010 order to compel Robinson to continue to treat and monitor the Putt mine discharge, the order enforced the 2002 CO&A obligations as well as the related requirements governed by the mining laws and regulations administered by the Department. The Department cannot avoid the conclusion that the order enforces Robinson's obligation to treat and monitor the Putt Mine discharge governed by the CO&A by merely eliminating references to the 2002 CO&A and by selectively only listing Robinson's regulatory requirements to treat the Putt Mine discharge. Robinson's obligation to treat the Putt Mine discharge is, in part, governed by the 2002 CO&A and the Department's November 2010 order attempted to enforce Robinson's obligation to treat and monitor the Putt Mine discharge.

Timeline for mining and reclamation of the Putt Mine

It is helpful to briefly describe the timeline for mining and reclamation of the Putt Mine. Robinson submitted a permit application for the Putt Mine in 1984. After the permit was issued, Robinson began mining in 1985. In 1989, mining of the Putt Mine was completed, and in 1991 surface reclamation was also completed. Robinson applied for a bond release at this time.

In 1993, Paul Cestoni, P.G., a Department licensed professional geologist conducted a hydrologic investigation of a background monitoring point identified as SP-1. Mr. Cestoni conducted the investigation at the request of Mike Hassett, the Department Mine Conservation Inspector Supervisor from the Greensburg District Mining Office who was involved in the Department's review of Robinson's 1991 request for bond release at the Putt Mine.

At the time of Cestoni's investigation, the SP-1 monitoring point, which had previously been identified as a spring, had been replaced by a green pipe located several feet away from the original location of SP-1. Water flowed from the green pipe, but not from the location of the spring which had gone dry. Cestoni conducted the hydrologic investigation because the water quality of the discharge had changed from alkaline with low metals to acidic with high levels of iron, manganese, and sulfates. In his 1994 Report, Cestoni concluded that the SP-1 discharge was hydrologically connected to Robinson's Putt Mine and that Robinson's mining has caused the discharge to change to acidic with high concentration of iron, manganese and sulfates.

As a result of Cestoni's 1993 investigation and 1994 Report the Department issued an order dated July 1, 1994 to Robinson and to Robert Burgoon, an adjacent property owner. The Order directed Robinson to provide interim treatment for the SP-1 discharge and directed Burgoon to provide Robinson with access to install, operate and maintain a treatment system. In addition, the Department's 1994 order directed Robinson to submit a plan and schedule to provide long term treatment of the Putt Mine discharge from SP-1.

Robinson appealed the Department's July 1, 1994 order. To resolve the appeal Robinson and the Department entered into a Consent Order and Agreement dated November 28, 1994, ("1994 CO&A"), and Robinson withdrew its appeal. The 1994 CO&A required Robinson to design and install a passive treatment system at the Putt Mine to treat the SP-1 discharge. The

passive treatment system consists of two separate parts: an anoxic limestone drain ("ALD"); and a settling basin and ditch. The ALD increases the pH of groundwater flowing into it. The water flows out of the ALD through an outlet pipe and then flows into the settling basin. The alkaline water from the ALD outlet pipe flows into the settling basin where it is exposed to oxygen that allows the iron, which is in solution, to oxidize and precipitate out of solution as ferious oxide.[1]

Robinson's construction of the ALD and related settling basin was completed in 1995. When the ALD and related settling basin was completed, the Department held Robinson's remaining reclamation bonds for the Putt Mine in the amount of $200,969. The ALD and settling basin and ditch provide treatment of the Putt Mine SP-1 discharge. During construction and after Robinson completed construction of the ALD and settling basin and ditch to provide treatment of the Putt Mine SP-1 discharge, Robinson continued to conduct mining and reclamation activities in the general area of the Putt Mine. From 1995 to 2000 Robinson undertook substantial mining and remedial activity to help abate the Putt Mine discharge. As part of it ALD construction activities, Robinson removed a 250-300 coal crop line along the intended installation location for the ALD. This coal crop line had been impounding water behind it, and after it was eliminated water was better able to flow.

In his 1994 Report Mr. Cestoni determined that "the best possibility of abating this discharge [SP-1] is for Robinson Coal Company to obtain an SMP on the Burgoon property adjacent to the Putt Mine and daylight the abandoned underground mines found there." Robinson Exhibit A. When Robinson first mined the Putt Mine and daylighted the underground mines found there, it did not have a permit to mine the Burgoon property.

[1] The water discharged from the ALD outlet pipe must be alkaline in order for the iron in solution to oxidize and precipitate out of solution. If the water is acidic, the iron in solution will not oxidize and precipitate out. (N.T. 234).

Around 1998 Robinson obtained the rights to mine the Burgoon property and a mining permit. From 1998 to 2000 Robinson mined the Burgoon property. Robinson daylighted the underground mine on the Burgoon property and removed a highwall remnant on a portion of the Burgoon property. In addition Robinson added cement kiln dust, an alkaline material, to the backfill materials during reclamation to increase the neutralizing potential (alkalinity) of the backfill material.

In 2002 the Department and Robinson evaluated the amount of financial assurance that the Department wanted to ensure the long term treatment of the Putt Mine discharge. The Parties concluded that a treatment trust of $25,893 was needed to secure Robinson's obligation to provide for long term treatment of the Putt Mine SP-1 discharge and the parties executed the 2002 Treatment Trust CO&A.[2] At the time the treatment trust was established in 2002 the Department continued to hold reclamation bonds for the Putt Mine in the amount of $200,969. These traditional reclamation bonds were released in full after the treatment trust in the amount of $25,893 was established.

In summary, Robinson has undertaken substantial additional mining and reclamation activities on or near the Putt Mine since Robinson began mining the site in 1985. Over time and as a result of these activities the water quality of the mine discharge, initially known as the SP-1 discharge and now known as the Putt Mine discharge, has improved.

Treatment of the Putt Mine discharge is still necessary

Robinson asserts that treatment of the Putt Mine discharge under the 2002 CO&A is no longer necessary. Robinson's primary support for this assertion is its belief that the ALD is no

[2] The Department and Robinson executed the 2002 Treatment Trust CO&A with the Clean Streams Foundation for the benefit of the Commonwealth of Pennsylvania. The initial trust corpus was $25,893.

longer necessary to treat the Putt Mine discharge.[3] The Department contests both of these assertions and argues that treatment is still necessary, including the ALD portion of the treatment system. For the reasons set forth below, the Board agrees with the Department that the record before the Board clearly establishes that treatment under the 2002 CO&A is still necessary.[4]

For all of the Department's efforts to avoid responding to Robinson's repeated assertion that treatment is no longer necessary, *see Robinson Coal Company v. DEP*, 2001 EHB at 902-905, the answer to Robinson's claim that treatment is no longer necessary is fairly easy to address based upon the record before the Board.[5] There is no disagreement that the Putt Mine discharge treatment system consists of two parts. The ALD is designed to neutralize acidic mine drainage and the settling basin and ditch are designed to oxidize and precipitate out excess iron in the ALD discharge.

While the Parties vigorously disagree about the continued need for the ALD to neutralize any acidic mine drainage flowing through the Putt Mine backfill before discharging at the ALD outfall also known as the SP-1 monitoring point, there is no disagreement that the discharge from the ALD outlet does not meet the current regulatory discharge limits for iron at this time. There is no dispute that the settling basin and ditch are still required to allow oxidation to occur, which enables the excess iron to precipitate out and allows the Putt Mine discharge to meet the

[3] Robinson relied upon the expert testimony of two witnesses to support this assertion that the ALD is no longer necessary: Brute Leavitt, P.E., P.G. and Patrick E. Pruent, L.P.G. (Exs. R. and S.).

[4] At this point, the Board is less certain about the continued need for the ALD portion of the two part treatment system. The Board will resolve this uncertainty later in this adjudication.

[5] Because the answer to Robinson's claim is so easy and obvious to provide, the Board strongly question the Department's longstanding reluctance to engage Robinson in meaningful discussions on this point. The Department must have feared the follow-up question to the finding that treatment is still necessary now. The Board will address this follow-up question later in this adjudication when it addresses the issue: When will treatment of the Putt Mine discharge no longer be necessary? *See* Adjudication at pages 31-34. Because the Parties failed to establish standards to resolve this question in either the 1995 CO&A or the 2002 Treatment Trust CO&A, the Board is compelled to resolve this question in this Adjudication and to establish the criteria to allow the Parties to move forward.

applicable discharge limits. To decide that treatment is still necessary, the Board does not have to resolve the more difficult issue whether the ALD component of the treatment system is still needed to elevate the pH of the Putt Mine discharge and to change it from acidic to alkaline because, regardless of the answer to this question, there is no dispute that the settling basin and ditch are still necessary to treat the excess iron in the discharge from the ALD outlet.

Robinson's expert witnesses agree with the Department that the Putt Mine treatment system consist of two parts: the ALD and the settling basin and ditch. (N.T. 500-501, 573.) Robinson's expert witnesses also agree with the Department that the alkaline discharge from the ALD outlet enters the settling basin and ditch where the iron in excess of the applicable limits oxidizes and precipitates out of solution. (N.T. 500-501, 571-573.) There is, therefore, no dispute that at a minimum, the settling basin and ditch portion of the approved Putt Mine discharge treatment system is currently necessary to allow Robinson to meet the applicable limits for post-mining discharges. As long as the discharge from the ALD outlet exceeds the applicable limit for iron, the settling basin and ditch will still be necessary. For this reason alone, the Board finds that Robinson has not met its burden to establish that treatment of the Putt Mine discharge is no longer necessary.

The Board has also determined that the water quality of the Putt Mine discharge at the ALD outlet has improved over time. There is the possibility that over time the water quality of the Putt Mine discharge at the ALD outlet will improve to the point where the settling basin and ditch component of the two part treatment system will no longer be necessary to meet the applicable regulatory effluent limits for iron. Then the remaining issue will be whether the ALD component of the two part Putt Mine discharge treatment system is still necessary.

While the Board could wait until that time in the future to address this possible contingency, the Board declines to follow this approach for several reasons. First and most importantly the record before the Board contains the evidence to resolve this issue now. Second, based upon the Department's prior efforts to ignore Robinson's numerous requests for meaningful discussions regarding the duration of Robinson's obligation to treat the Putt Mine discharge and the criteria for deciding when treatment is no longer necessary, the Board will now address this issue that the Parties neglected to resolve when they negotiated the earlier CO&A in 2002.

When will treatment of the Putt Mine discharge no longer be necessary

As the Board previously observed "the underlying problem in this appeal is the parties' failure in 2002 to include language in their CO&A that establishes agreed to procedures for Robinson to demonstrate that treatment under the CO&A and its related monitoring, reporting and bonding requirements, are no longer necessary." *Robinson* 2011 EHB at 911. The parties advance extreme positions to address their oversight. Robinson asserts in this appeal that treatment is no longer necessary if the discharge from the settling basin and ditch meets the applicable effluent limitations. The Board rejected this argument earlier in this Adjudication. The fact that treatment is properly working in no way supports the proposition that treatment is no longer necessary. If the record establishes that treatment of the ALD discharge to the settling basin and ditch are still necessary to remove excess iron in the discharge at this interim point of the treatment system, then it is crystal clear that "treatment is still necessary," and Robinson is still responsible to treat the discharge. The Board rejects Robinson's position that treatment is "no longer necessary" under the CO&A if treatment is currently working as designed. The fact, which all parties recognize, that the settling basin removes excess iron from the ALD discharge

is the basis to conclude that treatment is necessary and it in no way supports Robinson's position that treatment of the Putt Mine discharge is no longer necessary.

The Department takes an equally extreme position on the question of when will treatment of the Putt Mine discharge no longer be necessary. The Department asserts that because there is no way to sample all of the water in the backfill before it enters the ALD, Robinson will have to treat the discharge forever because there is no way to demonstrate that the ALD is no longer necessary. According to the Department, the impossibility of measuring the water quality of the water in the backfill entering the ALD dooms Robinson's efforts to show that treatment is no longer necessary at any time in the future. The Board also rejects the Department's extreme position, which is inconsistent with the language of the Parties 2002 CO&A that on its face allows Robinson to cease treatment when it is no longer necessary.

The Board finds that treatment under the 2002 CO&A will no longer be necessary when the discharge from the ALD meets the applicable effluent limitations at Section 87.102 on a consistent basis without further treatment.[6] The Board selects this point as the place to demonstrate that treatment is no longer necessary for several reasons based upon the record before that Board.

First, as a practical matter this is the first place that the parties can monitor water quality of the Putt Mine discharge to evaluate whether treatment is no longer necessary. The Parties recognize the difficulties in monitoring the water quality of the water in the backfill before it enters the ALD. The water flowing through the backfill is too diffuse to allow appropriate monitoring. If the Board does not select the ALD outlet as a compliance point for monitoring

[6] At this point the Parties are free to discuss and decide what monitoring data will establish "on a consistent basis" that treatment is no longer necessary considering seasonal variations and precipitation events. If the Parties are unable to agree, the Board is here to address the dispute in any future appeal of a future Department action.

whether treatment is still necessary, then the Board agrees with the Parties that there is no place to measure compliance and Robinson will be required to provide perpetual treatment with no opportunity to demonstrate that treatment is no longer necessary.

Second, the Board recognizes that the Putt Mine site is different today when compared to the mine site when the Department initially imposed liability on Robinson to treat the Putt Mine discharge back in the 1990's. After Robinson initially mined the Putt Mine site, Robinson undertook significant additional mining and reclamation activities on or near the site for the purpose of improving or eliminating the Putt Mine discharge. The Board recognizes that these activities have in fact improved the overall quality of the Putt Mine discharge as monitored at the ALD outlet. These measures are above and beyond the installation of the ALD.

The Department does not appear to recognize these additional reclamation activities or entertain the thought that these additional reclamation activities have eliminated the need for the ALD. The Board does not share the Department's views. The Board recognizes that Robinson has undertaken additional reclamation measures to improve the water quality of the Putt Mine discharge above and beyond the installation of the ALD. In the absence of any other possible monitoring or compliance points the Board is willing to use the ALD outlet as a place to measure whether these additional measures have improved the water quality of the Putt Mine discharge to the point where treatment is no longer necessary.

Third, the Department negotiated the 2002 CO&A with Robinson and it agreed that Robinson only had to continue to treat the Putt Mine discharge while treatment was still necessary. The Department recognized that Robinson's responsibility to treat the discharge would terminate if treatment was no longer necessary. Now the Department, in effect, argues that Robinson has no means to demonstrate that treatment is no longer necessary, and Robinson

is required to treat the Putt Mine discharge forever with no end in sight. That is not the result that the parties negotiated, and the Board rejects this extreme position that is inconsistent with the Parties' agreement.

The Board finds that the Department's decision to seek to impose absolute and perpetual responsibility on Robinson without providing Robinson with a meaningful opportunity to demonstrate that treatment is no longer necessary is unreasonable and an abuse of discretion.[7] Having approved Robinson's treatment plans and recognized that treatment was only required until it was no longer necessary, the Department cannot ignore the agreement it negotiated and Robinson's numerous requests for meaningful discussions with it regarding standards to demonstrate that treatment is no longer necessary. In light of the Department's repeated refusals to have meaningful discussion with Robinson, the Board has decided to provide the Parties with appropriate standards and a monitoring point to demonstrate whether or not continued treatment by Robinson of the Putt Mine discharge is still necessary in the future.

The Department was not biased against Robinson or Mr. Aloe

Robinson asserted that the Department and several Department employees, who were involved in the Putt Mine discharge matter over the years, are biased against Robinson Coal and David Aloe. According to Robinson, the Department did not like the Aloes and in particular Paul Cestoni held a grudge against Robinson and Mr. Aloe.[8] This alleged bias is the reason why the Department continues to hold Robinson liable for the treatment of the Putt Mine discharge.

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[7] 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. *Browning-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.

[8] Robinson also asserted that there was animosity towards Aloe among other Greensburg District Mining Office staff. In particular, Robinson identified C. R. Greene as a person who wanted to put the Aloes out of business. (N.T. 364-365).

In addition to the testimony of Mr. Aloe on the issue of bias, Robinson provided the testimony of Thomas Kovalchuck who served as the Chief of Permits and Technical Services at the Greensburg District Mining Office until late 2011.[9] He testified that there was noticeable animosity towards Robinson among some Department staff at the Greenburg District Mining Office. (N.T. 365, 394-398.)

The Department disagrees and asserts that the Department's determinations regarding the treatment of the Putt Mine discharge were not based on bias against Robinson or Mr. Aloe. While the Department acknowledged that Mr. Cestoni was not friends with Robinson or Mr. Aloe, the Department asserts there is no evidence to support Robinson's claim that Mr. Cestoni's decisions regarding the Putt Mine discharge were in fact biased. The Board agrees with the Department that there is no evidence that Mr. Cestoni or anyone at the Department allowed alleged bias against Robinson or Mr. Aloe to influence the Department's decision to require Robinson to continue to treat the Putt Mine discharge. Robinson's witnesses' testimony on the issue of bias in this appeal is not credible in the context of the issues in this appeal. As set forth above, there is no doubt that treatment of the Putt Mine discharge is still necessary because the water discharged from the ALD outlet still requires further treatment to remove excess iron from the discharge before it meets applicable effluent limitations in 25 Pa. Code § 87.102.

Robinson's claims of bias are not supported by the record in this appeal where the issue of the need for continued treatment of the Putt Mine discharge is relatively narrow in scope and time. The Board views Robinson's current claims of bias against Robinson or Mr. Aloe as an attempt to relitigate the more fundamental issue of Robinson's underlying liability to treat the Putt Mine discharge. The issue of Robinson's liability to treat the Putt Mine discharge was

[9] Mr. Kovalchuk left the Department in October 2011, and he now works for the Amerikohl Mining Company. (N.T. 351-352.)

resolved decades ago. This issue is not before the Board in this appeal, and the Board declines to revisit an issue that the Parties resolved years ago by agreement in the 1994 CO&A. Robinson agreed it was liable for the Putt Mine discharge, and the only issues that remain today are whether treatment is still necessary and when will treatment of the Putt Mine discharge no longer be required.

Attorney fees request

Robinson asserts that it is entitled to an award of attorney's fees and costs under Section 7708(c)(3) which authorizes the Board to award attorney's fees and costs "to a permittee from the Department in a matter concerning coal mining activities issued…a compliance order…in bad faith and for the purpose of harassing or embarrassing the permittee." 27 Pa. C.S.A. § 7708(c)(3). The Department asserts that Robinson's request for attorney's fees and cost is premature. The Board agrees with the Department. The request is clearly premature because the Board had not yet issued a final adjudication when Robinson requested that the Board award attorneys' fees and costs.

CONCLUSION

For the reasons set forth above, the Board dismisses Robinson's appeal of the Department's compliance order because the record established before the Board clearly establishes that treatment of the Putt Mine discharge is still necessary. The record also shows that the quality of the discharge has improved over time, and if and when the discharge from the ALD outlet meets the applicable effluent limitations without additional treatment on a consistent basis treatment will no longer be necessary.

CONCLUSIONS OF LAW

1. The Department has the burden of proof to show that it acted reasonably in issuing the November 2010 order. 25 Pa. Code § 1021.122(b)(4).

2. Robinson has the burden of proof to show that treatment of the Putt Mine discharge is no longer necessary. 25 Pa. Code § 1021.122(a); *McKees Rocks Forging, Inc. v. Department of Environmental Resources*. 1994 EHB 220.

3. Robinson agreed that it has the liability for and responsibility to treat the Putt Mine discharge. 1994 Consent Order and Agreement between the Department of Environmental Resources and Robinson Coal Company.

4. Robinson is required to operate and maintain the Putt Mine treatment system because treatment of the discharge is still necessary to remove excess iron from the ALD discharge to meet

5. The Department's order under appeal was a reasonable exercise of the Department's discretion that is supported by the facts. *GSP Management Company v. Department of Environmental Protection*, 2010 EHB 456; *M&M Stone v. Department of Environmental Protection and Telford Borough Authority*, 2008 EHB 24; 25 Pa. Code § 1021.122(b)(4).

6. The Department's position that treatment of the Putt Mine discharge will always be necessary because there is no means to measure whether the water entering the ALD meets applicable limits is unreasonable and an abuse of discretion.

7. The only practical place to measure whether the mine drainage from the Putt Mine has improved to the extent that treatment is no longer necessary is at the outlet to the ALD sampling point.

8. When the mine drainage from the Putt Mine at the outlet to the ALD sampling point meets the applicable effluent limitations at 25 Pa. Code § 87.102 for a consistent period of time, including the limit for iron, without the need for additional treatment in the settling basin or ditch, treatment will no longer be necessary under the 2002 CO&A.

9. The Department's November, 2010 order attempted to enforce the terms of the 2002 CO&A, *inter alia*, imposed a duty on Robinson to treat the Putt Mine discharge until treatment is no longer necessary.

10. 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. *Browning-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.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBINSON COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 2010-186-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 16th day of March, 2015, the Board dismisses the appeal of Robinson because treatment of the Putt Mine discharge is still necessary until such time as the discharge from the ALD outlet meets the applicable effluent limitations on a sustained basis.

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: March 16, 2015

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

ROBINSON COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 2010-186-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

OPINION OF JUDGE LABUSKES
CONCURRING IN PART AND DISSENTING IN PART

By Bernard A. Labuskes, Jr., Judge

This appeal originates from a Department order issued to Robinson Coal on November 17, 2010. The Department wrote the order after samples taken from the treatment system at Robinson's Putt Mine appeared to show that the discharge exceeded the applicable effluent limits for iron. Robinson is responsible for treating the Putt Mine discharge. Robinson's treatment obligation is supported by a Post Mining Treatment Trust, which provides financial assurance for the benefit of the Commonwealth in the event Robinson abandons the treatment system or ceases to treat the discharge from the Putt Mine.

The Department's order identified two violations: (1) a violation of the effluent limitations established under Section 87.102 of the surface coal mining regulations, and (2) a violation of Sections 87.116 and 87.117, which require Robinson to submit quarterly monitoring reports for the Putt Mine discharge. 25 Pa. Code §§ 87.102, 87.116, 87.117. Paragraph one of the order, based on the violation of the effluent limits for the discharge, directed Robinson to submit a plan for treating the discharge. Paragraph two of the order, based on Robinson's failure to submit quarterly monitoring reports for the Putt Mine discharge since 2003, directed Robinson to submit to the Department the past-due water quality monitoring reports.

The Department vacated Paragraph one of the order in December 2011 after it determined that its sample was not collected at the proper compliance point. With respect to the violation identified in Paragraph two of the order, the Department first placed Robinson in satisfactory progress status after Robinson agreed to conduct the sampling. The Department then lifted the violation identified in Paragraph two of the order after Robinson came into compliance by submitting the past-due water quality monitoring reports.

The Department admits that it sampled at the wrong location. Robinson admits that it failed to submit quarterly monitoring reports. The law and the facts do not support the first part of the order, but they do support the second part. The Department erred in issuing the first part, and the second part was a reasonable and lawful exercise of the Department's discretion. That could have been the end of this matter. Notwithstanding the time and effort that has gone into this appeal, it really is as simple as that. I have no problem with any of that.

However, acting essentially as a court in equity, the majority has gone well beyond what needed to be done to decide this case. It goes well beyond deciding whether the order under appeal constituted a reasonable and lawful exercise of the Department's discretion. The majority has created a construct whereby the order under appeal was more than a determination that Robinson had exceeded its effluent limits and failed to submit sampling results; it was a determination that "treatment is still necessary." The majority then uses that characterization as a basis for turning its attention away from the order under appeal and directing it instead to a consent order and agreement (CO&A) that Robinson and the Department entered into 13 years ago. It then finds that the CO&A, not the compliance order under appeal, was an abuse of discretion. It then goes on to *sua sponte* revise the CO&A in a way that was not anticipated or agreed to by the parties. The majority has stepped onto a slippery slope that has caused it to slide

so far away from the Board's proper role that I cannot join in the Adjudication. Unfortunately, I object to every one of the steps that the majority has taken in the wrong direction.

First, I reject the characterization that the compliance order under appeal constituted a determination that "treatment is still necessary." The record does not support that finding. The majority has proceeded as if the order under appeal was a response to Robinson's (to borrow the majority's references to mythology) Herculean efforts to terminate the Trust Agreement. The Department responded to Robinson's efforts with phone calls and letters, *not* with a compliance order. The inspector who issued the order had, at most, limited knowledge regarding Robinson's history and the Trust Agreement. Neither he nor the Department were "deciding" that treatment is "still necessary" by issuing the order.

What we fundamentally do as the Board is review the Department's decisions. As we have discussed in a few cases, *Redbank Valley Municipal Authority v. DEP*, 2006 EHB 813, 830-40 (Labuskes, J., concurring in the result); *Borough of Kutztown v. DEP*, 2001 EHB 1115; *Stern v. DEP*, 2001 EHB 628, 640; *Felix Dam Preservation Association v. DEP*, 2000 EHB 409, the decision must be embodied in a concrete action, but it is the decision that ultimately matters. The decisions embodied in the Robinson compliance order are unquestionably the subject of our proper review, but those decisions simply do not include a decision that "treatment is still necessary." In fact, saying treatment is "still" necessary is not a decision at all. As the Commonwealth Court recently reaffirmed in *Chesapeake Appalachia, LLC v. Department of Environmental Protection*, 89 A.3d 724 (Pa. Cmwlth. 2014), a Department letter that merely delineates a party's already existing obligations does not constitute an appealable action. 89 A.3d at 727. (*See also* cases cited therein, especially *Pickford v. Dep't of Envtl. Prot.*, 967 A.2d 414, 420 (Pa. Cmwlth. 2008).) So even if the order issued to Robinson embodied a finding that

Robinson's preexisting obligations are continuing, that finding is not an appealable action. After that, the majority's construct falls apart.

Before turning to the next faulty step in the majority's analysis, it is worth pointing out that the majority is not answering the question posed by Robinson. Robinson concedes that "treatment is still necessary" in the sense that the pond and ditch need to remain in place. So the question posed by the majority and no one else is, not surprisingly, "fairly easy to address." (Majority slip op. at 30.) What Robinson really wants is to terminate the Trust Agreement because it says the ALD is not necessary, and the potential cost of repairing or replacing the ALD represents the bulk of the trust corpus. The majority does not answer that question, and suggests it may be unanswerable. If I had to answer the question, I would agree that it is unanswerable as a practical matter, but my main point is that deciding whether the ALD component of treatment is needed is a further deviation from the proper scope of this appeal.

The next hamartia in the majority's analysis, which is by far the most serious, is its use of the appeal from the compliance order to review the lawfulness and reasonableness of an entirely separate Department action, namely, the CO&A that was voluntarily entered into 13 years ago. It criticizes the Department for failing 13 years ago to identify procedures and criteria for determining when treatment would no longer be necessary. It finds that "the Department's decision to seek to impose absolute and perpetual responsibility on Robinson without providing Robinson with a meaningful opportunity to demonstrate that treatment is no longer necessary is unreasonable and an abuse of discretion." (Majority slip op. at 35.) Thus, according to the majority, the Department abused its discretion with respect to the 13-year-old Trust Agreement, not the order under review. This is an unprecedented departure from our proper scope of review.

To my knowledge, this is the first time in the history of the Board that we have found no abuse of discretion regarding the Department action under appeal, but went on to find an abuse of discretion in another action not under appeal and then substituted our discretion for that exercised by the Department, in this case 13 years ago. On the other hand, we have held quite frequently that parties cannot use one appeal as a collateral attack on another action of the Department. *Greif Packaging, LLC v. DEP*, 2012 EHB 85, 88; *Love v. DEP*, 2010 EHB 523, 525; *Northampton Twp. v. DEP*, 2008 EHB 563, 568; *Winegardner v. DEP*, 2002 EHB 790, 793; *Grimaud v. Dep't of Envtl. Res.*, 638 A.2d 299, 303 n.7 (Pa. Cmwlth. 1994) (citing *Fuller v. Dep't of Envtl. Res.*, 599 A.2d 248 (Pa. Cmwlth. 1991)). In *Winegardner, supra*, an appellant appealed an update to a township's Act 537 plan, but some of his objections reached beyond the scope of the update and touched on the unmodified portions of the plan. As we plainly stated:

> Our role is necessarily circumscribed by the Departmental action that has been appealed. 35 P.S. § 7514 (defining Board's jurisdiction). Our responsibility is limited to reviewing the propriety of *that action.* We may not use an appeal from one Departmental action as a vehicle for reviewing the propriety of prior Departmental actions….
>
> Reviewing the propriety of the separate Departmental action is futile because we can only offer relief with respect to the Departmental action under appeal. We cannot, for example, reverse, revise, remand, or do anything regarding the Department's historical actions in approving or disapproving prior sewage plan updates or revisions in an appeal from the latest plan update. We can only take action with regard to that latest update.

Winegardner, 2002 EHB at 793. The appellant in *Winegardner* was limited in the scope of his appeal to the contents and effects of the planning update, and our review was consequently limited in the same way.

Similarly, *Northampton Township, supra*, involved an appeal from a compliance order enforcing the municipality's Act 537 plan. In that case we said:

> Just as we cannot alter the [Act 537] Plan in any way, we cannot consider its merits. Our analysis starts from the irrefutable antecedent that the Plan is beyond reproach in this appeal. With that antecedent in place, we are free to consider whether there is anything in or about *that order* that is unreasonable or unlawful, but nothing more.

Northampton Twp., 2008 EHB at 568. Much like *Winegardner* and *Northampton Township*, our review here is limited to the action under appeal, namely, the Department's 2010 compliance order. Just as we cannot reach back in time to address whether an unappealed Act 537 plan from several years prior was properly approved, we cannot go back and re-evaluate the propriety of a CO&A.

Reaching back to review a CO&A seems even less appropriate than reaching back to review a 537 plan because the CO&A is the product of the parties' negotiations. Robinson voluntarily entered into a deal. It is true that, just as with the appellant in *Chesapeake Appalachia*, Robinson retained the right to challenge any decision made under the CO&A, or in the majority's words, any decision "enforcing" the CO&A, but the right to contest a decision under the agreement does not equate to a right to challenge the CO&A itself. The majority has used the occasion of the order to open up the entirety of the CO&A, and that is inappropriate. Changing the terms of the treatment obligation is no different than, say, deciding the trust amount is too high or too low.

It is well-settled that we need to find an abuse of discretion before we can substitute our discretion for that of the Department. *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975). However, even if there was an abuse of discretion, that does not entitle us to go back and rewrite the terms of the CO&A. Any abuse of discretion that would prompt us to substitute our discretion for that of the Department is necessarily constrained to the action under appeal. In this instance, finding an abuse of discretion potentially would allow us to

rewrite the terms of the Department's compliance order, but only the compliance order. Under no circumstances are we empowered to reach back and involve ourselves in a wholly separate action that is not the subject of the appeal.

Although we should not be reviewing the CO&A at all, I must say that I would not agree with the majority's conclusion that the CO&A constituted an abuse of discretion even if it were appropriate for me to answer that question. The CO&A seems entirely reasonable to me. Even the majority recognizes in its footnote 6 that it is difficult or even impossible to define in an agreement (or Opinion) what data will support a finding that treatment is no longer necessary considering such things as seasonal variations and precipitation events. The majority criticizes the parties for not being specific enough for its tastes in the CO&A, but the majority itself is less than specific. Also, the agreement on its face recognizes that treatment may be needed "in perpetuity," a not unreasonable recognition given the propensity for some AMD discharges to continue for a very long time. The very fact that the parties went to the trouble of creating a trust reflects the fact that the obligations secured thereby could last a very long time. I also note that, in exchange for that agreement, Robinson had $200,969 of bonds released in exchange for funding a $25,893 trust.

The next faulty step in the majority's analysis is, having found that the CO&A constitutes an abuse of discretion, it revises the CO&A in a way that was not agreed to by the parties. The majority has fashioned terms of its own that are unanticipated, unbargained-for, and not supported by any factual record regarding the parties' negotiations. In my view, if we find that a CO&A represents an abuse of discretion, the appropriate course of action is not to revise the CO&A, but to terminate it. We then leave the parties to renegotiate, the Department to act unilaterally, or the parties to take whatever other actions they deem to be appropriate.

Otherwise, we are essentially creating a bargain that is different from the one made by the parties. We are devising and imposing terms that were never contemplated or agreed upon when the parties gave their consent. There is a failure of consideration. And in this case, we are doing it without any record support whatsoever.

The CO&A was presumably the end result of negotiations between the parties involving some give and take. We have no record regarding those discussions, but perhaps Robinson agreed to the possibility of perpetual treatment in exchange for having $200,969 in bonds released in exchange for funding a trust with $25,893. Perhaps the parties negotiated at length about when the trust would be closed out, and in the end by mutual agreement decided to leave the issue somewhat vague.

A consent order *and agreement* is obviously, in part, a contract. In *Global Eco-Logical Services, Inc. v. DEP*, 2001 EHB 99, *aff'd* 789 A.2d 789 (Pa. Cmwlth. 2001), we stated:

> A negotiated agreement with the Department is somewhat different than a direct action under a statute, such as the issuance of a permit or the assessment of a civil penalty. The contours of the Department's authority in the latter instances are explicitly defined by statute. In contrast, a consent order and agreement, is "merely an agreement between the parties. It is in essence a contract binding the parties thereto." *Commonwealth of Pennsylvania v. United States Steel Corp*., 325 A.2d 324, 328 (Pa. Cmwlth. 1974). As such, its enforceability is governed by principles of contract law, *Mazzella v. Koken*, 739 A.2d 531, 536 (Pa. 1999), subject to any applicable statutory or constitutional limits on the enforcement of the contract. Accordingly, we should only modify its terms, which were negotiated by the parties, with great reluctance. *See U.S. Steel Corp*. (a court has no authority to modify or vary the terms of a consent decree absent fraud, accident or mistake).

2001 EHB at 102. *See also AH and RS Coal Corp. v. DEP*, 1995 EHB 1074, 1080-81 ("We must interpret the CO&A to give effect to the intentions of the parties—discernable by the language

they employed. If the language is unambiguous, the intentions of the parties will be determined on the basis of the clear wording of the contract.")

The fundamental policy consideration underlying contract law is the protection of bargained-for expectations of the parties to the contract. *Hazleton Area Sch. Dist. v. Bosak*, 671 A.2d 277, 282-83 (Pa. Cmwlth. 1996). Neither a court nor this Board should go back in time and rewrite a contract unless it finds that the contract as written does not reflect the actual agreement of the parties. *See Habjan v. Habjan*, 73 A.3d 630, 640 (Pa. Super. 2013) (citing *Creeks v. Creeks*, 619 A.2d 754, 756 (Pa. Super. 1993) ("The court must construe the contract only as written and may not modify the plain meaning of the words under the guise of interpretation. When the terms of a written contract are clear, this Court will not re-write it or give it a construction in conflict with the accepted and plain meaning of the language used.")); *Steuart v. McChesney*, 444 A.2d 659, 662 (Pa. 1982) (quoting *Moore v. Stevens Coal Co.*, 173 A. 661, 662 (Pa. 1934) ("It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, without regard to its wisdom or folly.")). In other words, there must have been a meeting of the minds or manifestation of mutual assent, but the contract as written does not reflect that meeting of the minds. *See A.S. v. Quakertown Cmty. Sch. Dist.*, 88 A.3d 256, 266 (Pa. Cmwlth. 2014) (citing *Holt v. Dep't of Pub. Welfare*, 678 A.2d 421, 423 (Pa. Cmwlth. 1996) (a party wishing to invalidate a contract must show fraud or mutual mistake)); *Voracek v. Crown Castle USA, Inc.*, 907 A.2d 1105, 1108 (Pa. Super. 2006) (mutual mistake occurs when the written instrument does not set forth the true agreement of the parties). Only then, should a court, acting in equity, take measures to effectuate the intent of the parties through a revision of the contract's terms.

A consent order and agreement is similar to a consent decree approved by a court. It is well-established that a court should not modify a consent decree absent fraud, accident, or mistake, none of which are present here. Thus, for example, in *Commonwealth v. U.S. Steel Corporation*, 325 A.2d 324 (Pa. Cmwlth. 1974), the Court stated:

> A consent decree is not a legal determination by the court of the matters in controversy but is merely an agreement between the parties. It is in essence a contract binding the parties thereto. As a contract, such a decree requires a mutual understanding of and concerted action by the parties….A court has neither the power nor the authority to modify or vary the terms set forth in a consent decree, under such circumstances, in the absence of fraud, accident or mistake….The consent decree derives its efficacy from the agreement of the parties and the approval of the chancellor. It bound the parties with the same force and effect as if a final decree had been rendered after a full hearing upon the merits.

325 A.2d at 328 (citations omitted) (quoting *Cmwlth v. Rozman*, 309 A.2d 197, 199-200 (1973)). *See also Cecil Twp. v. Klements*, 821 A.2d 670, 673-74 (Pa. Cmwlth. 2003) (a consent decree is not treated as a legal determination by the court, but rather, an agreement between parties; while a court may construe or interpret a consent decree as it would a contract, the court has neither the power nor the authority to modify or vary the decree unless there has been fraud, accident, or mistake); *Penn Twp. v. Watts*, 618 A.2d 1244, 1247 (Pa. Cmwlth. 1992) (same).

In this case, the Board has ignored these well-established principles by going back and unilaterally revising the terms of that agreement without first finding that the agreement as written does not reflect the true agreement of the parties. There is absolutely no basis in the record for making such a finding.

I would not rewrite the parties' agreement, but even if I did, I would not do it the way the majority has done it. In an apparent attempt to provide some relief to Robinson, the majority actually seems to be punishing it. The compliance point for the discharge should be the permit

boundary, or at least the end of the treatment chain. 25 Pa. Code § 87.102. An operator is only prohibited from allowing a pollutional discharge to leave the area disturbed by coal mining activities. *Id.* The majority, without sufficient legal or factual justification as far as I can tell, has moved the monitoring point up the treatment chain to the discharge from the ALD. This deprives Robinson of the benefits of iron precipitation provided by the pond and the ditch.

Inevitably, I find myself asking why the majority felt a need, in Icarian fashion, to go as far as it has in this appeal. However, I have come up empty. There is no pressing need to rewrite the CO&A *now*. The majority finds that "Robinson has undertaken substantial additional mining and reclamation activities," and "[o]ver time and as a result of these activities the water quality of the mine discharge, initially known as the SP-1 discharge and now known as the Putt Mine discharge, has improved." (Majority slip op. at 29.) In my view, the data that is available from the monitoring wells is too scant and otherwise of limited value to support this conclusion. Even Robinson's expert only testified that water quality "could be" improving. Although I hesitate to cite it because I think the groundwater monitoring in this case is virtually meaningless due to the heterogeneity of the backfill and other factors, it is worth noting that the most recent samples taken from MW#3 had acidity at 298 versus alkalinity at 287. Iron was at 37.6. Other indicators of acid mine drainage, manganese, and sulfates remain elevated.

With respect to the discharge itself, which is more significant, I tend to agree with Cestoni's conclusion that "the water quality of the water as measured at the outlet from the ALD has remained relatively consistent for many years." (C. Ex. 19.) Although alkalinity has steadily increased, acidity has not decreased. Iron at the ALD has not changed much since 2005 or so, and iron at the permit boundary has not changed at all since 1995. (C. Ex. 4.)

I do not see any other pressing reason to rewrite the CO&A now. The order itself is limited to sampling. Robinson apparently is not required to maintain the pond and ditch, and it acknowledges that "[n]o maintenance has been required or undertaken for the ALD, basin, or ditch for the past 17 years. Robinson has expended no costs for maintenance of the treatment system." (Robinson Brief at 9.) This is a case of a solution in search of a problem.

The majority has, perhaps, decided to take such a proactive role in the dispute because it is dissatisfied with the Department's perceived lack of responsiveness regarding Robinson's requests to terminate the Trust Agreement. I do not think that is an appropriate basis for the Board to step into the fray, as it were, but even if it was, I find the majority's criticisms unduly harsh. To quote the Department, "[t]he volume of correspondence from Robinson should not be confused with the merits of its requests." (DEP Brief at 36.) Robinson was not seeking clarification or looking for a defined endpoint at some point in the future, or "trying to evaluate its legal obligations under the Department's programs," "shooting blindly at a target in the dark," or engaged in an "Odyssey" and "Sisyphean task of getting an answer from the Department"; it was trying to get out of its Trust Agreement effective immediately. I do not fault Robinson for trying to get its money back, but I also do not fault the Department for declining to elaborate on an agreement that requires no elaboration. I am not sure what the majority is looking for when it repeatedly says there were no "meaningful discussions." The majority has described an illusory scenario wherein Robinson is the frustrated suitor desperately seeking an answer from a reluctant flame, and it used that scenario as justification for stepping in as the matchmaker. The Board did not need to step in as Aphrodite did to help Melanion prevail over Atlanta. That is simply not our role.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 16, 2015

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-REALTY COMPANY	:	
	:	
v.	:	**EHB Docket No. 2014-107-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and URSINUS COLLEGE, Permittee	:	**Issued: March 20, 2015**

OPINION AND ORDER ON
MOTION FOR PROTECTIVE ORDER

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants in part and denies in part a motion for protective order filed by a non-party seeking protection from a subpoena served on the non-party by an appellant requesting the production of documents. The non-party has established good cause that portions of an expert report warrant a protective order.

O P I N I O N

Tri-Realty Company ("Tri-Realty") has appealed the Department of Environmental Protection's (the "Department's") approval of a Remedial Investigation Report ("RIR") submitted by Ursinus College following the release of a quantity of Number 6 fuel oil from an underground storage tank on the Ursinus campus, located in Collegeville, Montgomery County. Tri-Realty owns the College Arms Apartments, a property adjacent to Ursinus that comprises approximately ten acres and houses around 350 individuals. Tri-Realty alleges that the release of the oil contaminated the College Arms property. Tri-Realty describes in its Notice of Appeal a

number of aspects of the RIR that it believes are inadequate and argues that the Department should have required additional investigation on these points.

On January 26, 2015, ICF International ("ICF"), a non-party to this appeal, filed a motion for a protective order requesting that the Board enter an order relieving ICF from fulfilling requests for document production contained in a subpoena served upon it by Tri-Realty on December 23, 2014. ICF is the third-party claims administrator that investigated and administered the indemnification claims filed by Ursinus under the Underground Storage Tank Indemnification Fund (the "Fund"), which was created by the Storage Tank and Spill Prevention Act, 35 P.S. §§ 6021.101 – 6021.2104.

Tri-Realty's subpoena contains three requests for document production:

> 1. Any and all agreements between [ICF] and Ursinus, USTIF, PADEP, or the Insurance Department regarding the purported confidentiality of any documents you exchanged concerning Claim No. 2004-0023(M), Claim No. 2004-0216(M), the 2012 RIR, and/or the 2014 RIR.
> 2. Any and all agreements between [ICF] and any other third party entity for the provision of services involving review of the 2012 RIR, 2014 RIR, or any other remedial actions proposed or taken by Ursinus.
> 3. Any and all non-privileged, non-Exempt documents in [ICF's] possession which relate, refer to, document, or demonstrate any work performed by any third party entity [ICF] contracted with to review the 2012 RIR, 2014 RIR, or any other remedial actions proposed or taken by Ursinus.

Tri-Realty states that in response to its subpoena ICF produced one document, ICF's services subcontract with the company Groundwater Sciences Corporation.[1]

ICF argues four points in support of its motion for protective order: (1) the documents sought by Tri-Realty are not relevant because they were not relied upon by the Department when

[1] Tri-Realty also seeks to depose ICF's Records Custodian, but that deposition has been postponed pending our determination on this motion.

it approved the RIR; (2) certain documents are protected by the attorney-client privilege, the work product doctrine, or other applicable privilege, and an expert report prepared in anticipation of litigation is not discoverable; (3) certain documents are protected from disclosure by a Joint Defense and Confidentiality Agreement executed by Ursinus and the Fund; and (4) certain documents were previously deemed privileged and exempt from disclosure in a decision by the Office of Open Records. Tri-Realty responds that the documents it seeks are relevant, that ICF has not met its burden that any Joint Defense Agreement applies, and that it is not seeking any documents that are privileged or covered by the decision of the Office of Open Records.[2] On February 25, 2015, ICF filed a reply brief without first seeking leave from the Board. Moving parties are not permitted to file a reply to a response to a discovery motion unless the Board orders otherwise. 25 Pa. Code § 1021.91(g). However, after reviewing the reply, there is nothing in it that would prompt us to decide the motion any differently.

Discovery before the Board

We begin by briefly recapping the law on discovery. Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. However, no discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense with regard to the person from whom discovery is sought. Pa.R.C.P. No. 4011.

As a general rule, the Board is liberal in allowing discovery that "is either directly related to the contentions raised in the appeal or is likely to lead to admissible evidence that is related to

[2] Neither the Department nor Ursinus weighed in on the motion one way or the other.

the contentions raised in the appeal." *Haney v. DEP*, EHB Docket No. 2013-112-R, slip op. at 4-5 (Opinion issued Apr. 25, 2014) (quoting *Solebury Twp. v. DEP*, 2007 EHB 325, 327). "[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205. Our charge is the same with respect to discovery sought from non-parties.

The Board authorizes parties to serve subpoenas in accordance with the applicable Rules of Civil Procedure. 25 Pa. Code § 1021.103. Under the Rules, a party may obtain through subpoena on a non-party any documents that are normally within the scope of discovery under Rules 4003.1 – 4003.6. Pa.R.C.P. No. 4009.1(a). A person who is the subject of a subpoena may motion for a protective order under Rule 4012. Pa.R.C.P. No. 4009.21(d)(2). Pursuant to Rule 4012, the Board is empowered to issue a protective order upon good cause shown to protect a person from unreasonable annoyance, embarrassment, oppression, burden, or expense. *Haney, supra*, slip op. at 5; *Chrin Bros. v. DEP*, 2010 EHB 805, 811. The term "good cause" has not been well defined in Pennsylvania law.[3] However, whether to grant or deny a motion for a protective order is within the sound discretion of the trial court, or here, the Board. *See Allegheny West Civic Council v. City Council of Pittsburgh*, 484 A.2d 863, 866 (Pa. Cmwlth. 1984); *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199, 2209 (1984) ("The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders."); *see*

[3] *See Dougherty v. Heller*, 97 A.3d 1257, 1267 (Pa. Super. 2014) ("No Pennsylvania appellate court has addressed what constitutes 'good cause' in this context."); *Id.* at 1268 ("As oft used as the term 'good cause' is when discussing protective orders, the phrase is not well defined under Pennsylvania law." (Mundy, J., concurring and dissenting)). The Pennsylvania Supreme Court has recently granted a petition for allowance of appeal in *Dougherty* to address, among other things, "good cause." *See also Allegheny West Civic Council v. City Council of Pittsburgh*, 484 A.2d 863, 866 (Pa. Cmwlth. 1984) ("There are no hard-and-fast rules as to how a motion for a protective order is to be determined by the court.")

also Cooper v. Schoffstall, 905 A.2d 482, 492-93 (Pa. 2006) (trial courts should determine the appropriate scope of discovery in individualized circumstances).

Relevance

ICF's first contention is that the documents sought by Tri-Realty are not relevant. ICF argues that Tri-Realty is requesting documents and information that the Department did not review in the course of its approval of Ursinus's RIR and, therefore, those documents are outside the scope of the appeal. (*See* ICF Brief at 6 ("[U]nless any of the documents sought by the Subpoena were provided or considered by DEP in approving the RIR, they are irrelevant to the instant appeal.").) This contention, however, ignores the concept of the Board's *de novo* review. We review actions of the Department and decide the case anew based on the record that is developed before us. *Solebury School v. DEP*, EHB Docket No. 2011-136-L, slip op. at 38 (Adjudication issued July 31, 2014); *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32 (quoting *Young v. Dep't of Envtl. Res.*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991)); *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975). We are in no way constrained to consider what the Department considered when it made its decision. *Borough of St. Clair*, 2013 EHB 177, 180 (dismissing this argument when presented by a party in support of why it need not produce certain documents in discovery).

Indeed, our *de novo* review means that we may consider evidence not considered by the Department when it took the action under appeal. *Chimel v. DEP*, EHB Docket No. 2011-033-M. slip op. at 28 (Adjudication issued Nov. 25, 2014). We do not step into the shoes of the Department to second-guess its decision based upon the record it had before it. Instead, we make our own decision based on a record created entirely before us that is not limited in either time or scope by what the Department considered. *See Pa. Trout v. Dep't of Envtl. Prot.*, 863 A.2d 93,

106 (Pa. Cmwlth. 2004); *see also R.R. Action and Advisory Comm. v. DEP*, 2009 EHB 472 (noting that subsequent events are not only often relevant, but it is also important to remember that a Department action appealed to the Board is not final until the Board makes its decision).

Accordingly, ICF's argument for a protective order based on a lack of relevance of the requested documents is improper. In addition, we are satisfied with Tri-Realty's contention that the documents are relevant or likely to lead to the discovery of admissible evidence because ICF and/or other third-parties working under ICF's direction reviewed, analyzed, or investigated the remediation plans submitted by Ursinus to the Department, and these are the same plans Tri-Realty alleges are deficient in its appeal.[4]

Privilege and Expert Discovery

ICF asserts that Tri-Realty's subpoena is improper, and a protective order is warranted, because Tri-Realty requests documents protected by the attorney-client privilege, the work-product doctrine, or other applicable privilege, and no exception or waiver applies. ICF never clearly explains why any of those privileges apply. For instance, Pennsylvania law generally applies a burden-shifting framework to assertions of attorney-client privilege, where the party invoking the privilege must first set forth facts establishing that the privilege is properly invoked, and the party seeking the information must then set forth facts establishing that disclosure will not violate the privilege. *See St. Luke's Hosp. of Bethlehem v. Vivian*, 99 A.3d 534, 542 (Pa. Super. 2014). Here, ICF does not take the time to explain why any of these privileges apply. Tri-Realty responds that it is not seeking any privileged documents in its third request and the agreements covered by the first two requests would not be protected by attorney-client privilege. ICF has not established good cause for a protective order on the basis of privilege.

[4] ICF argues in its reply that Tri-Realty fails to establish relevance. We note that as the moving party, ICF must explain why good cause exists to issue a protective order. With respect to relevance, ICF has failed to do so by fundamentally misunderstanding the Board's review.

However, within its privilege argument, ICF mentions an expert report that was allegedly prepared in anticipation of litigation with Ursinus over the tender of the limits of the Fund's coverage obligations. ICF argues that this report is protected from disclosure under Rule 4003.5. This portion of ICF's motion gives us pause. We are presented here with a unique circumstance. Tri-Realty has subpoenaed a non-party for an expert report that was in fact produced in anticipation of litigation, however, in a separate yet related litigation. Further, the subpoenaed non-party, ICF, contracted the report to be developed for it by another firm. Neither ICF nor Tri-Realty has directed us to a case that is directly on point with this factual scenario.

Rule 4003.5(a)(3) provides a distinct limitation on non-testifying experts: "A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial…" absent an order of the court upon a showing of "exceptional circumstances" that the information cannot be obtained by other means.[5] However, this rule raises a number of interpretive issues. First, on its face the rule appears to apply only to experts retained by parties. It does not directly address experts retained by non-parties.[6] However, Rule 4009.1, which incorporates Rule 4009.21 (relating to subpoenas on non-parties), is expressly limited by Rule 4003.5. If we presume the coherence of these two rules operating together, we would conclude that the limitation also applies to experts retained by non-parties. *See* Pa.R.C.P. No. 131 ("Rules or parts of rules are in pari materia when they relate to the same

[5] The comment to Rule 4003.5 further instructs that "exceptional circumstances" are to be construed narrowly:

> [E]ven if the inquirer knows the name of this expert, or knows that there is a report, he is forbidden to seek discovery of facts known or opinions held, unless he convinces the court that he must have the discovery. This is a heavy burden, which explains the small use of this provision under the Federal Rule. We can anticipate an equally small use in Pennsylvania.

[6] We note that the Rules of Civil Procedure do not define "party." *See* Pa.R.C.P. No. 76.

proceedings or class of proceedings. Rules in pari materia shall be construed together, if possible, as one rule or one chapter of rules.")

Second, Rule 4003.5(a)(3) does not elaborate on the meaning of "in anticipation of litigation or preparation for trial." For our purposes, it is unclear whether the phrase is limited to the litigation/trial at hand. Third, must the witness be not called in the trial at hand, or at any trial? Under ICF's reading, the second element is broad, meaning any litigation, and the third element is narrow, meaning the trial at hand. Therefore, according to ICF, since the expert report was prepared for some litigation and the author of the report is not going to be called as a witness before the Board, the rule is satisfied. It is unclear whether ICF's interpretation is accurate. Tri-Realty has not offered its own interpretation, or an argument to why ICF's interpretation is not accurate.

Our own research reveals that courts have not come to a consensus regarding the application of Rule 4003.5(a)(3) to experts retained by non-parties. *See Bizmart Inc. v. Facility Constr. Mgmt.*, 2004 Pa. Dist. & Cnty. Dec. LEXIS 197 (applying a broader reading of the term "party" under Pa.R.C.P. No. 4003.5(a)(3) and finding that an expert employed by the parent company of a subsidiary plaintiff is a real party in interest and the Rule precluded the expert from obtaining expert information). *But see Wuerl v. Tedco Constr. Corp.*, 2006 Pa. Dist. & Cnty. Dec. LEXIS 177 ("Rule 4003.5(a)(3) protects only facts and opinions held by an expert who has been retained 'by another party.' The expert whose report is sought was not retained by any party to this litigation. Instead, the expert was retained by plaintiff's insurance company." (footnote omitted)); *Yablonski v. Stephens*, 1998 Pa. Dist. & Cnty. Dec. LEXIS 31 (same).

At the risk of getting bogged down in the morass of a scenario where there is little guidance, we think it is best to fall back on certain fundamentals of expert discovery. The ambit

of the rule governing expert discovery is that expert discovery is to be conducted under tightly controlled circumstances. Discovery outside of what is specifically allowed by Rule 4003.5 is only to be allowed upon cause shown. Pa.R.C.P. No. 4003.5(a)(2). In addition, we have previously stood by the proposition that a court has no power to compel expert testimony because a private litigant has no greater right to compel a citizen to give up the product of his brain than he has a right to compel the giving up of material things. *Primrose Creek Watershed Ass'n v. DEP*, 2013 EHB 187, 188-89; *Casey v. DEP*, 2012 EHB 461, 463-64; *Columbia Gas Transmission Corp. v. Piper*, 615 A.2d 979, 982 (Pa. Cmwlth. 1992). We think these overarching principles are instructive in the current situation.

It appears sufficient to us in this case that the expert report was prepared in anticipation of litigation concerning the same subject matter that is currently on appeal before the Board. It is not difficult to imagine that expert reports may be prepared with an eye toward litigation, but without first knowing the specific litigation in which they may be used. For instance, it is conceivable that an expert report could be used to establish liability under a Board proceeding and then be used to establish damages in a proceeding in another forum. We do not think that the Rules of Civil Procedure would condone such a workaround that would permit a party in related litigation to obtain something it was not permitted to obtain in the initial litigation, particularly when the initial litigation is ongoing. In addition, we are told that the author of the expert report is not going to be a testifying witness at any hearing before this Board. Allowing the expert's opinions to be used without the expert being present to explain or defend those opinions would be contrary to the spirit of the rules.

Accordingly, we think here that a middle ground approach is appropriate. To the extent that ICF is in the possession of any hard data that the expert collected or measured, and to the

extent that the expert's report identifies hard data, that information is to be produced. The data and measurements are valuable information that does not concern the expert's opinions. Any discussion of methodology and any opinions and conclusions that the expert made regarding that data are to be redacted. We view this resolution to be appropriate in light of our role in discovery as elucidated by our Supreme Court "to center discovery on the main issues and to reduce the intrusiveness and burden of collateral forays, while permitting such additional inquiries as the interests of justice may require in special circumstances, as determined within the sound discretion of the supervising court." *Cooper, supra*, 905 A.2d at 493.

Joint Defense and Confidentiality Agreement

ICF's remaining arguments can be dispensed with easily. ICF next argues that some of the documents it has in its possession that would be responsive to Tri-Realty's requests are covered by a Joint Defense and Confidentiality Agreement (the "Agreement"). ICF states that, because of the Agreement, it is in possession of documents that it would otherwise not have been privy, and presumably disclosure of those documents would violate the Agreement. Tri-Realty responds that ICF has not met its burden of showing that the joint defense privilege (also referred to as the common legal interest privilege) applies to the documents Tri-Realty is requesting.

The joint defense privilege is an extension of the attorney-client privilege that applies to co-defendants and their attorneys working collectively and it holds that the attorney-client privilege is not waived when confidential communications are shared among a number of defendants and their attorneys in furtherance of a common group defense. *In re Condemnation by City of Phila.*, 981 A.2d 391, 397 (Pa. Cmwlth. 2009). Commonwealth Court has looked to federal courts for a three-factor test for establishing the applicability of the privilege. The party asserting the privilege must show that "(1) the communications were made in the course of a

joint defense effort; (2) the statements were designed to further that effort; and (3) the privilege has not been waived." *In re Condemnation by City of Phila.*, 981 A.2d at 398 n.4 (citing *In re Bevill, Bresler and Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986)). As Tri-Realty notes, ICF does not provide any information speaking to the factors of the test.

Perhaps more fundamentally, we are unsure of the applicability of the joint defense or common legal interest privilege in the context of a subpoena on a non-party. The nature of the privilege extends to co-defendants in criminal or civil actions. Here, we are dealing with a non-party to an administrative appeal before the Board. ICF does not explain the specific circumstances giving rise to the Agreement; it merely alludes to a pending federal action and an administrative appeal.

As noted by Commonwealth Court, many issues concerning the joint defense or common interest privilege have yet to be addressed by Pennsylvania courts. *In re Condemnation by City of Phila.*, 981 A.2d at 398; *see also id.* ("The undisputed facts undermine the City's assertion that it shares a common *legal* interest with RDA. Far from being co-defendants, the City and RDA were adverse parties in the present condemnation proceedings. The mere assertion that the parties 'supported' each other's prior, separate, legal pursuits (the City's request for permission to acquire Parcel C and RDA's declaratory judgment action), even if proved, sheds no light on the underlying common legal interest allegedly motivating such support." (footnote omitted)). Accordingly, without more from ICF we cannot find that the joint defense privilege applies.

Office of Open Records Decision

ICF's final contention is that while it appears Tri-Realty limited its subpoena to documents not precluded by a May 2011 decision of the Office of Open Records, it is not certain of that. *See Falk v. Dep't of Ins.*, OOR Docket No. AP 2011-0487. The decision, which is

attached to ICF's motion, and which was also attached to Tri-Realty's subpoena, involves a Right to Know Law request for documents related to claims made by Ursinus to the Fund after the 2004 underground storage tank releases, and documents in possession of ICF as a result of its investigation of the claims. The decision upheld the determination of the Pennsylvania Department of Insurance that some of the requested records were exempt under the Right to Know Law as investigative materials related to a noncriminal investigation. The decision then found that the remaining 13 documents under consideration were properly excluded from production as subject to attorney-client privilege and/or the attorney work product doctrine.

While it is not clear to us the intersection of a Right to Know Law request determination of the Office of Open Records and discovery before the Board, Tri-Realty states in response to ICF's motion that it has crafted its subpoena to exclude these documents from those that it is requesting. In a footnote to its motion, ICF requests at a minimum an order confirming that all documents and information deemed privileged and exempt by the Office of Open Records decision are protected from disclosure. We think that ICF's point is uncontested and, therefore, ICF does not need to provide the information covered by the Office of Open Records decision.

In summation, ICF has established good cause that a protective order is warranted for the identified expert report for the portions that do not simply reflect hard data. ICF has not established good cause for a protective order covering the remainder of the information requested in Tri-Realty's subpoena. We issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-REALTY COMPANY	:	
	:	
v.	:	**EHB Docket No. 2014-107-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and URSINUS COLLEGE, Permittee	:	

O R D E R

AND NOW, this 20th day of March, 2015, it is hereby ordered that ICF International's Motion for Protective Order is **granted in part and denied in part**. A protective order is hereby issued for the expert report in accordance with this Opinion. ICF International shall comply with Tri-Realty's subpoena and produce all other documents otherwise discoverable under the Pennsylvania Rules of Civil Procedure and not covered by the decision of the Office of Open Records.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 20, 2015

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SARABETH BROCKLEY AND DAN PORESKY	:	
v.	:	**EHB Docket No. 2014-092-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DELTA THERMO ENERGY A, LLC, Permittee	:	**Issued: April 3, 2015**

OPINION AND ORDER
ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants the Department's unopposed motion to dismiss a third-party appeal that was filed more than 30 days after notice of the action being appealed was published in the *Pennsylvania Bulletin*.

O P I N I O N

On July 1, 2014, the Appellants filed an appeal of the Department of Environmental Protection's (the "Department's") issuance of Waste Management General Permit 047 to Delta Thermo Energy A, LLC. The Department published notice of the issuance in the *Pennsylvania Bulletin* on May 31, 2014, thirty-one days earlier. *See* 44 Pa.B. 3276 (May 31, 2014). Due to the untimeliness of the appeal, the Department has now filed a motion to dismiss. The Appellants have not opposed the motion.

We are receptive to a motion to dismiss where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999

EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. Motions to dismiss will be granted only when a matter is free from doubt. *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Res., LP v. DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511. The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Cooley v. DEP*, 2004 EHB 554, 558; *Neville Chem. Co. v. DEP*, 2003 EHB 530, 531. Where, as here, the Appellants fail to respond to the Department's motion to dismiss, the Board deems all properly pleaded and supported facts in the Department's motion to be true. 25 Pa. Code § 1021.91(f); *Tanner v. DEP*, 2006 EHB 468, 469; *Gary Berkley Trucking, Inc. v. DEP*, 2006 EHB 330, 331-32.

Any person other than the recipient of the Department action who is aggrieved by a Department action that has been noticed in the *Pennsylvania Bulletin* must file an appeal within 30 days of publication of that notice. 25 Pa. Code § 1021.52(a)(2)(i). The 30-day appeal period starts to run from the date the notice is published in the *Pennsylvania Bulletin*. *Fontaine v. DEP*, 1996 EHB 1333, 1337-38. If an appeal is filed beyond the 30-day deadline, the Board is deprived of jurisdiction to hear the appeal. *Rostosky v. Dep't of Envtl. Res.*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *Pikitus v. DEP*, 2005 EHB 354, 357; *Burnside Twp. v. DEP*, 2002 EHB 700, 702; *Sweeney v. DER*, 1995 EHB 544, 546. The Board has held that even appeals that are filed one day late must be dismissed. *Piccolomini v. DEP*, 2011 EHB 803, 804; *Pedler v. DEP*, 2004 EHB 852, 854; *Burnside Twp.*, 2002 EHB at 703.

As we explained in *GEC Enterprises v. DEP*, 2010 EHB 305, 311:

> Pennsylvania courts have long held that the failure to timely appeal an administrative agency's action is a jurisdictional defect that mandates the quashing of the appeal. *See Falcon Oil Co., Inc. v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth 1992); *Cadogan Township Board of Supervisors v. DER*, 549 A.2d 1363, 1364 (Pa. Cmwlth. 1988); *Pennsylvania Game Comm'n v. DER*, 509 A.2d 877, 886

> (Pa. Cmwlth. 1986), *aff'd*, 555 A.2d 812 (Pa. 1989); *Weaver*, 2002 EHB at 276; *Dellinger v. DEP*, 2000 EHB 976, 980. Untimely appeals are granted very little leniency by the court. *See Bass v. Commonwealth*, 401 A.2d 1133, 1135 (Pa. 1979) ("[T]he time for taking an appeal cannot be extended as a matter of grace or mere indulgence."); *Rostosky*, 364 A.2d at 763 ("Where a statute has a fixed time within which an appeal may be taken, we cannot extend such time as a matter of indulgence.") Moreover, the Board is not permitted to disregard such a defect and grant an extension of time "in the interests of justice." *See West Caln Township v. DER*, 595 A.2d 702, 705-06 (Pa. Cmwlth. 1991); *Weaver*, 2002 EHB at 277. Accordingly, the untimeliness of the appeal, although only slightly overdue, deprives the Board of jurisdiction over the appeal and operates as a waiver of all legal rights to contest the violation or the penalty amount. *See, e.g.*, *Spencer v. DEP*, 2008 EHB 573, 575 (appeal dismissed because it was filed one day too late); *Pedler v. DEP*, 2004 EHB 852, 854 (same); *Tanner*, 2006 EHB at 469 (dismissing an appeal of a compliance order where the appeal was filed 32 days after receipt of the order); *Martz*, 2005 EHB at 349-50 (dismissing an appeal of an enforcement order where the appeal was filed 41 days after the issuance of the order); *Weaver*, 2002 EHB at 279 (dismissing appeal where Notice of Appeal was filed 41 days after the delivery of a civil penalty assessment to the appellant's residence).

Here, the appeal was filed one day too late. The Appellants have not disputed that point or opposed the motion to dismiss. Because the appeal was not initiated within 30 days of publication of the notice of permit issuance in the *Pennsylvania Bulletin*, the Board lacks jurisdiction to hear the appeal and it must be dismissed.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SARABETH BROCKLEY AND DAN PORESKY	:	
v.	:	**EHB Docket No. 2014-092-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DELTA THERMO ENERGY A, LLC, Permittee	:	

O R D E R

AND NOW, this 3rd day of April, 2015, it is hereby ordered that this appeal is **dismissed** for lack of jurisdiction.

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.
RICHARD P. MATHER, SR.
Judge

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 3, 2015

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

BONNE NATALE SOUTH, BREENA HOLLAND AND RICH FEGLEY	:	
	:	
v.	:	**EHB Docket No. 2014-082-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DELTA THERMO ENERGY A, LLC, Permittee	:	**Issued: April 16, 2015**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion to dismiss as moot an appeal from a general permit because it is not clear whether the Department has revoked the permit in its entirety or it has merely revoked the application of the general permit to a particular project.

O P I N I O N

On May 13, 2014, the Department of Environmental Protection (the "Department") issued General Permit No. WMGM047. The permit authorizes processing by size reduction and thermal treatment using hot pressurized steam of municipal solid waste mixed with sewage sludge prior to its beneficial use as pulverized fuel for electricity generation. The approval granted under the permit was granted to Delta Thermo Energy A, LLC, the Permittee ("Delta"). The approval is granted "statewide." The permit will expire on May 13, 2024. Because Delta is the first party to benefit from the permit, it was not issued a separate Determination of Applicability ("DOA"). However, any person that proposes to operate under the permit in the

future will need to obtain a DOA.

The Appellants are local citizens who oppose the issuance of the permit. They argue among other things that the general permit is actually a facility-specific permit intended, designed, and issued for a project that should have been individually permitted. The Department disputes that claim. The Appellants also argue that the pertinent statutes and regulations prohibit the issuance of a general permit for a project that they say is really a resource recovery facility. The Department also disputes that claim. The Appellants filed a motion for summary judgment based on these arguments, but our review revealed that there are too many issues of disputed material fact to resolve the claims in the context of a motion for summary judgment and we denied that motion.

The Department and Delta have now filed a joint motion to dismiss based on mootness. The Department and Delta say that this appeal is moot because, on February 9, 2015, the Department sent a letter to Delta captioned "Revocation of General Permit WMGM047." The important part of the letter reads as follows:

> On May 13, 2014, the Department issued to Delta Thermo Energy A, LLC (Delta Thermo) municipal waste general permit WMGM047 for the processing and conversion of municipal waste and sewage sludge into a fuel product for electricity generation. The department suspended WMGM047 on November 14, 2014. Since that time Delta Thermo has not submitted additional information regarding the operation of the facility. Pursuant to its authority under 35 P.S. 6018.503, the department is hereby revoking WMGM047 for the following reasons:
>
> 1) Delta Thermo does not have a site available for the operation of the facility at this time. Any new site location and permit application will require department review and approval prior to Delta Thermo conducting any activities at an actual facility site.
>
> 2) The department has not received the required financial bond to demonstrate sufficient financial responsibility for the operation of the facility. Further, since the Allentown site is no longer

> available, it is not practical to calculate or approve an appropriate bond. If a new site is located, all facilities and activities on that site must be identified and addressed in the bond calculations.

The Department and Delta take the position that there is no longer a permit in place and, as such, Delta lacks the legal authority to undertake the activities that were allowed under WMGM047. Delta has not appealed the Department's letter, and the time for doing so has now passed. The Department and Delta say that there is now no effective relief that the Board can grant the Appellants, and that their appeals are moot and should be dismissed.

The Appellants oppose the motion. They question whether the general permit has really been revoked. They point out that the Department continues to show the permit as an active and valid permit on its website. The permit on its face does not apply to Delta alone. To the contrary, the permit contemplates that it will apply to other facilities, and it authorizes activity "statewide." As discussed by the Department in its opposition to the Appellants' motion for summary judgment,

> [o]ther facilities at other locations using this same or similar technology could seek an applicability determination, or DOA from the Department to operate under WMGM047. In fact, as discussed above, Section B of WMGM047 sets out the requirements for other applicants who may fit within this category and who wish to apply for coverage under the general permit. While WMGM047 originated with the Delta Thermo facility and the process it intends to employ, the law allows companies, like Delta Thermo, to apply to the Department for general permits for categories of processing of municipal waste when processing is necessary to prepare the waste for beneficial use. 25 Pa. Code § 271.821. While Delta Thermo is currently the only applicant and permitted facility under this general permit, similar facilities in the future may also seek an applicability determination from the Department and authorization to operate under WMGM047. Therefore, it is not a "facility-specific permit."

(Record citation omitted.)

Only a few weeks ago, we had occasion to address both the standard for reviewing motions to dismiss and mootness. Although we issued divided Opinions in *Consol Pennsylvania Coal Company v. DEP*, EHB Docket No. 2014-027-B (Opinion and Order, February 12, 2015), *recon. denied*, (Opinion and Order, March 13, 2015), there was no disagreement regarding the following points:

> A motion to dismiss is typically appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, some issue of justiciability, or another preliminary concern. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *E.g.*, *Burrows v. DEP*, 2009 EHB 20, 22. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving motions to dismiss, we accept the nonmoving party's version of events as true. *Ehmann v. DEP*, 2008 EHB 386, 390.
>
> . . . .
>
> As a practical matter, whether or not there are "factual disputes" on the record is irrelevant with respect to a motion to dismiss, because the operative question is: even assuming everything the non-moving party states is true, can—or should—the Board hear the appeal?
>
> "Mootness is a prudential limitation related to justiciability," and, thus generally is an issue properly resolved by a motion to dismiss. *M & M Stone Co. v. DEP*, 2009 EHB 495, 500. "A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome." *Horsehead Res. Dev. Co. v. DEP*, 1998 EHB 1101, 1103, *aff'd*, 780 A.2d 856 (Pa. Cmwlth. 2001).

(Slip op. at 8-9.)

As we understand it, the way that general permits ordinarily work is that the Department issues a general permit that applies to a particular process or beneficial use either on a statewide or regional basis. 25 Pa. Code § 271.812; *Citizens for Pa.'s Future v. DEP*, 2012 EHB 260, 267. The Department then issues determinations of applicability (DOAs) that grant approval to

operate under the general permit at individual sites or projects. However, in this case, Delta was the first party to apply for and operate pursuant to an entirely new general permit. The Department apparently does not issue a separate DOA to the first permittee. Because there was no separate DOA in this case, the general permit that was issued to Delta actually represents two determinations: (1) the beneficial use as pulverized fuel for electricity generation of municipal solid waste mixed with sewage sludge that has been subjected to size reduction and thermal treatment using hot pressurized steam is something that can be permitted everywhere in the state subject to certain conditions; and (2) Delta's use of that process is permitted at its proposed Allentown facility.

It is not clear what the Department intended in its revocation letter to Delta. The letter seems to be couched in terms that recognize that the general permit, as opposed to the approval under the general permit for this particular site, retains vitality. The Department says in its letter that Delta does not have a site available "at this time." It says any new site and permit application will require Department review. It sounds like that review may be limited to site choice and bonding. The letter says if a new site is located, all facilities and activities on that site will need to be identified. This language is consistent with the notion that Delta (or any other party for that matter) will only need to obtain a DOA for a new site. We suspect that obtaining a DOA under a preexisting general permit may not be as complicated as advocating for the issuance of a general permit in the first place. *Compare* 25 Pa. Code § 271.821 with §§ 271.841 & 271.842. Public notice and comment requirements may be different for general permits than they are for DOAs under general permits. *Compare* 25 Pa. Code §§ 271.823 with 271.842.

Accepting the Appellants' version of the facts as true, General Permit WMGM0147 has not been revoked so much as Delta's authority to operate at the particular Allentown site at this

time has been revoked. The general permit itself remains in place. Thus, the Department action giving rise to this appeal is still vital. We remain in a position to grant effective relief with respect to the action under appeal. Here, the Appellants' appeal implicates both the general and site-specific aspects of the approval granted to Delta. Even though it appears that Delta's project may not go forward "at this time," the Appellants may need to rely on certain aspects of that project to support their argument that a general permit is not an appropriate vehicle for permitting these types of facilities. The issues cannot be entirely separated.

If the Department had issued an individual permit to Delta and then revoked it, this case would probably have been moot. If the Department had clearly revoked the general permit in its entirety and not just with respect to Delta's Allentown project, this case would probably have been moot. Neither of those situations are presented here, so this appeal cannot be dismissed as moot in the context of a motion to dismiss.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BONNE NATALE SOUTH, BREENA HOLLAND AND RICH FEGLEY	:	
	:	
v.	:	**EHB Docket No. 2014-082-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DELTA THERMO ENERGY A, LLC, Permittee	:	

O R D E R

AND NOW, this 16th day of April, 2015, it is hereby ordered that the Department and Delta's motion to dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: April 16, 2015

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

CECILIA BAKER VITI	:	
	:	
v.	:	**EHB Docket No. 2015-019-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PARTNERS MARKETING & TERMINALS, L.P., Permittee	:	**Issued: April 20, 2015**

OPINION AND ORDER ON
FAILURE TO PERFECT

By: Richard P. Mather, Sr., Judge

Synopsis

The Pennsylvania Environmental Hearing Board, in accordance with 25 Pa. Code § 1021.161, dismisses several Appellants from the appeal as a sanction following certain Appellants' failure to perfect their appeals pursuant to 25 Pa. Code § 1021.51 and the Board's March 6, 2015 Order. The Board also determines that several other Appellants have complied with the Board's earlier order and have perfected their appeals. The Appellants that have complied with the Board's earlier order will be added to this appeal.

O P I N I O N

On February 23, 2015, a number of individuals attempted to file a notice of appeal regarding the Department of Environmental Protection's (the "Department") approval of a de minimis emissions increase issued to Sunoco Partners Marketing & Terminals LP resulting from the installation of a John Zink flare stack at the Mechanicsburg station located in Hampden Township, Pennsylvania. The notice of appeal was signed by only Cecilia Baker Viti. She was the only appellant who had perfected her appeal at that time. The notice of appeal also included

the names and addresses of 18 (eighteen) other Appellants. When the notice of appeal was filed, none of the Appellants were represented by counsel.

On March 5, 2015, the Board held a conference call with the Parties to explain the Board's procedures for filing a notice of appeal. The Board explained that at the time of the call, the only person who had filed a complete notice of appeal was Ms. Baker Viti. The Board informed the Parties on the call that all other individuals listed in the notice of appeal must file a separate, signed notice of appeal in accordance with Board rules. On March 6, 2015, the Board issued an order stating that in order to perfect their appeals, all other Appellants listed on the appeal must supply information required by 25 Pa. Code § 1021.51 and complete the signature page on the Notice of Appeal Form on or before April 6, 2015. The Order further explained that failure to supply the missing information to perfect their appeals, as ordered, may result in a dismissal of the appeal under 25 Pa. Code § 1021.161.

After the Board issued its Order on March 6, 2015, some of the Appellants complied with the Order to perfect their appeals while others did not. Now that the April 6, 2015 deadline has passed, the Board is in a position to address the status of both groups of Appellants.

It is axiomatic that the Board may impose sanctions upon a party for ignoring Board orders. *Yourshaw v. DEP*, 1998 EHB 1063. Under the facts set forth above, some Appellants have taken the necessary and mandated steps to perfect their appeals and some have not. Those Appellants who met the deadline to perfect their appeals will be added to the appeal.

The Board's March 6, 2015 Order explained that failure to perfect the appeal within the 30 day period may result in a dismissal of the appeal under 25 Pa. Code § 1021.161. Parties are only required to take a few simple steps to perfect appeals in order to ensure that the rights of the Department (and in this case a permittee) under the Board's Rules are protected. *Mon View*

Mining Corp. v. DEP, 2005 EHB 937 (Board dismissed an appeal as a sanction for not providing a copy of the Department's action with the appeal as required by the Board's rules and orders). Here, the Board will dismiss, as a sanction pursuant to 25 Pa. Code § 1021.161, those Appellants who failed to comply with the Board's March 6, 2015 Order. Therefore, we will enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CECILIA BAKER VITI	:	
	:	
v.	:	**EHB Docket No. 2015-019-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PARTNERS MARKETING & TERMINALS, L.P., Permittee	:	

AND NOW, this 20th day of April, 2015, it is hereby ordered as follows:

1. The Appellants **Cecilia Baker Viti**, **Frank Davis**, **Sandy Wolfe**, **Dashell Fritty**, **Sharon Lopez**, **Keith Thomas**, **Pam Shur**, **April Rudick**, **Jason and Meridith Noel**, **Wendi Taylor**, **John L. Bruner and Emily Thorpe**, have satisfied the provisions of the Board's Order dated March 6, 2015 and have **perfected** their appeals without prejudice. The new caption is revised as follows:

CECILIA BAKER VITI, FRANK DAVIS, SANDY WOLFE, DASHELL FRITTY, SHARON LOPEZ, KEITH THOMAS, PAM SHUR, APRIL RUDICK, JASON AND MERIDITH NOEL, WENDI TAYLOR, JOHN L. BRUNER AND EMILY THORPE	:	
	:	
v.	:	**EHB Docket No. 2015-019-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PARTNERS MARKETING & TERMINALS, L.P., Permittee	:	

2. Appellants **Bonnie and James Peckham**, **Jason Peckham**, **Kathy Albright**, **Suzy Williamson**, **Kathleen White and Kim Van Fleet** have failed to perfect their

appeals as required by 25 Pa. Code § 1021.51 and the Board's March 6, 2015 Order. The Appeals of these Appellants are **dismissed** as a sanction pursuant to 25 Pa. Code § 1021.161.

ENVIRONMENTAL HEARING BOARD

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

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

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

s/ Michelle A. Coleman.
MICHELLE A. COLEMAN
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 20, 2015

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2014-140-CP-L**
v.	:	**Issued: April 22, 2015**
EQT PRODUCTION COMPANY	:	

OPINION AND ORDER ON
MOTION FOR PROTECTIVE ORDER

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a defendant's motion for a protective order in a civil penalty action. There is enough general financial information regarding the defendant that is readily available in the defendant's Securities and Exchange Commission filings that its recent tax returns need not be produced.

O P I N I O N

The Department of Environmental Protection has filed a complaint for civil penalties against EQT Production Company ("EQT") seeking at least $4.5 million for alleged violations of the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, at EQT's Phoenix Pad S Marcellus shale operation in Duncan Township, Tioga County. The Department and EQT have been engaged in a discovery dispute regarding the extent to which EQT is required to turn over financial information in discovery regarding it and its corporate parent, EQT Corporation. The dispute has been narrowed down, but the point of contention that has not been resolved despite the parties' good faith efforts is whether EQT needs to produce its and its corporate parent's tax returns and

supporting documents for the tax years 2012, 2013, and 2014. Specifically, the Department has asked EQT to produce the following documents for it and its corporate parent for 2012 – 2014:

a. Federal Income Tax Return;

b. All forms and schedules accompanying the Federal Income Tax Return;

c. All tax working papers which provide the supporting information for what is ultimately entered on each line of the Federal Income Tax Return; and

d. All documents supporting publicly disclosed financial reports, including the trial balance and general ledger that support the formulation of the Balance Sheet, Income Statement, and Statement of Cash Flows.[1]

EQT has filed a motion for a protective order. It argues that producing the tax records would be a massive and wasteful undertaking that would produce mountains of confidential information that would be useless in this litigation. The Department responds that the information will provide the Board with as full a financial picture of the net worth of the corporations as possible so that there is a basis on which the Board can consider the element of deterrence in imposing the appropriate penalty. It says that the vastly different objectives of tax accounting and the financial accounting that is used to prepare SEC filings means that the information contained in the SEC filings provides only a partial picture of the corporations' finances.[2] We find ourselves in basic agreement with EQT.

It is undoubtedly true that tax returns can potentially be relevant in a civil penalty case where we need to determine the amount of cost savings enjoyed by a violator or the size of a

[1] Despite the broad language of subsection d. it appears from the parties' memoranda in support of and against issuance of a protective order that the documents sought in that subsection are limited to supporting documents and working papers related to EQT's federal income tax returns.

[2] Notably, the Department does not contend that the tax records will assist it or the Board in calculating cost savings associated with any alleged violations.

penalty necessary to create a deterrent effect. *DEP v. Allegheny Enterprises*, 2014 EHB 338. However, this case is an example of the situation we acknowledged in *Allegheny Enterprises* where financial information is readily available in public filings with the Securities Exchange Commission. 2014 EHB at 347. In *Allegheny Enterprises*, we explicitly declined to establish any bright line rules for the discovery of tax records in recognition that such situations, as is often the case in discovery disputes, are best decided on a case-by-case basis upon consideration of the relevant circumstances. *See* 2014 EHB at 343, 348-49. Where, as here, detailed SEC filings are readily available, we are not persuaded that tax records will provide any marginal value, at least in this case.

A quick review of EQT Corporation's Form 10-K reveals that EQT Production had operating revenues of $1.6 billion in 2014. The financial report shows an operating income of $506 million. We do not see how any additional information that might be included in EQT's tax records would add any information that would be potentially useful to us in evaluating the deterrent effect of a penalty. The Department, for its part, has not clearly explained how the delta of information obtained from EQT's tax filings will assist the Board in the determination of a penalty amount, provided the Department carries its burden of proof in the case.

The Board may issue an order to protect a party from unreasonable burden or expense in complying with discovery requests. Pa.R.C.P. No. 4012; *Tri-Realty Co. v. DEP*, EHB Docket No. 2014-107-L (Opinion, Mar. 20, 2015). Here, such an order is appropriate because EQT should not be required to suffer *any* burden or expense to gather and produce financial information that appears to be entirely superfluous.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2014-140-CP-L**
v.	:	
EQT PRODUCTION COMPANY	:	

O R D E R

AND NOW, this 22nd day of April, 2015, it is hereby ordered that EQT's motion for a protective order is **granted.** EQT is not required to respond to the Department's Third Request for Production of Documents.

ENVIRONMENTAL HEARING BOARD

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

DATED: April 22, 2015

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

BROCKWAY BOROUGH MUNICIPAL AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2013-080-L**
	:	**(Consolidated with 2014-086-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and FLATIRONS DEVELOPMENT, LLC, Permittee	:	**Issued: April 24, 2015**

A D J U D I C A T I O N

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses a water authority's appeal of a well permit for an unconventional gas well that will be drilled on an existing well pad on the authority's property. The water authority has not met its burden of proof. It has not demonstrated that the permitting of the well presents an unreasonable risk to one of its ancillary water supplies, that the drilling and operation of the well will negatively affect the water authority's ability to meet its customers' needs for water, or that the drilling and operation of the well will violate any provision of the law.

PROCEDURAL BACKGROUND

On May 24, 2013, the Department of Environmental Protection (the "Department") issued a gas well permit for the DUI-6-2H well (the "2H Well") to the Permittee, Flatirons Development, LLC ("Flatirons"). The permit authorizes Flatirons to drill a second well on an existing well pad ("Well Pad 6") located on land owned by the Appellant, the Brockway Borough Municipal Authority (the "Authority"), in Snyder Township, Jefferson County. On June 25, 2013, the Authority filed the appeal docketed at EHB Docket No. 2013-080-L from the

issuance of the permit. We conducted a three-day hearing on the Authority's appeal from the permit issuance beginning on May 20, 2014 in Pittsburgh.

Flatirons did not yet drill the well. With the permit due to expire, Flatirons applied for a permit renewal. The Department renewed the permit on May 23, 2014, the day before it was due to expire. On June 19, 2014, the Authority filed the appeal docketed at EHB Docket No. 2014-086-L from the permit renewal.

The parties then filed a joint motion asking that the two appeals be consolidated. They indicated that the hearing held on the original permit would suffice for both appeals, and they agreed that the Authority could only pursue its Article I, Section 27 constitutional challenge in the appeal from the permit renewal because that issue had not been raised in the appeal from the original permit. We granted the motion and consolidated the appeals on July 11, 2014.

The Authority filed its post-hearing brief on August 27, 2014. Starting on September 18, 2014, the parties submitted a series of requests for extensions based upon the possibility that the case might settle. Settlement apparently was not successful because the Department and Flatirons submitted their post-hearing briefs on March 2 and 3, 2015, respectively. The Authority has not filed a reply brief, so the matter is now ripe for adjudication.

FINDINGS OF FACT

Stipulated Facts

1. The Authority is a Pennsylvania municipal authority incorporated under the former Pennsylvania Municipal Authorities Act of 1935, Act of June 28, 1935, P.L. 463, No. 191 or the former Pennsylvania Municipal Authorities Act of 1945, Act of May 2, 1945, P.L. 382, No. 164. (Parties' Joint Stipulation Regarding Facts ("Stip.") 1.)

2. Flatirons is a Colorado limited liability company engaged in the exploration for oil and gas resources in Pennsylvania and elsewhere. (Stip. 2.)

3. The Department is the agency with the duty and authority to administer and enforce the Oil and Gas Act, Act of February 14, 2012, P.L. 87, No. 13, 58 Pa.C.S. §§ 3201-3274 ("2012 Oil and Gas Act"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. §§ 691.1-691.1001 ("The Clean Streams Law"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder ("Regulations"). (Stip. 3.)

4. Flatirons has acquired certain property interests in the subsurface of property owned by the Authority and located in Snyder Township, Jefferson County, Pennsylvania. (Stip. 4.)

5. Flatirons purchased the rights, title and interests in and to the oil, gas and other minerals relevant to these appeals on December 14, 2009, authorizing Flatirons to develop those resources pursuant to applicable law, regulations and permits. (Stip. 5.)

6. On or about July 14, 2010, the Authority and Flatirons entered a Surface Use and Damage Agreement and Easement for the use of the Authority surface for certain oil and gas activities, and on January 4, 2011, the Authority and Flatirons executed an Addendum to the Surface Use Agreement. (Stip. 6.)

7. The Surface Use and Damage Agreement addresses Flatirons's surface use of the Authority's property in Snyder Township, Jefferson County, providing for an easement, right of way and permission to install facilities, including tank batteries, compression facilities,

dehydration facilities, separation equipment and electric lines, and to install pipelines that are necessary in connection with the production and marketing of hydrocarbons. (Stip. 7.)

8. Pursuant to the Surface Use and Damage Agreements, Flatirons paid the Authority a one-time payment of $10,000 for water testing costs, reimbursed the Authority for other costs, as agreed, in excess of $20,000, and conducts quarterly water quality monitoring of the Authority's three water wells and two surface water sources. (Stip. 8.)

9. Section 2(b) of an Addendum to the Surface Use and Damage Agreement provides that Flatirons shall within 24 hours of any pollution or contamination of the Authority's water supply provide alternative potable water supplies to all of the Authority's customers that are affected. (Stip. 9.)

10. The Authority owns and operates a water system in Jefferson County consisting of a surface water reservoir on the Whetstone Branch; two groundwater wells that discharge to the Whetstone Reservoir; a surface water reservoir on Rattlesnake Creek; a groundwater well that discharges to the Rattlesnake Creek Reservoir; a surface water treatment facility for each of these sources; and a storage and distribution system that serves customers in the Borough of Brockway and the surrounding vicinity ("Water Supply"). (Stip. 10.)

11. The Authority operates the Water Supply pursuant to multiple public water supply permits, a water allocation permit, and dam safety permits issued by the Department. (Stip. 11.)

12. The Authority was issued Water Allocation Permit WA 33-224D ("WA Permit") on March 27, 1990, granting the right to withdraw surface water, under certain conditions to protect stream uses, from Whetstone Branch and Rattlesnake Creek for use as a public water supply. The WA Permit identifies the two dams on Whetstone Branch as "Whetstone Dam No. 1" and "Whetstone Dam No. 2" and one dam on Rattlesnake Creek. (Stip. 12.)

13. In addition to the surface water withdrawals authorized under the WA Permit, the Authority also operates three groundwater supplementary sources as part of the Water Supply, including one groundwater well known as "Well No. 5." Well No. 5 is permitted by the Department to supplement the Rattlesnake Creek surface water source by supplying groundwater into the Rattlesnake Creek Reservoir. (Stip. 13.)

14. Well No. 5 was drilled and completed in 1999 and is approximately 200 feet deep in a confined aquifer that seasonally produces water at the ground surface, without pumping, at a rate that generally varies between 15 gallons per minute and 75 gallons per minute. (Stip. 14.)

15. In drier times of the year, the Authority is permitted to mechanically pump water from Well No. 5 at a rate of up to 150 gallons per minute. (Stip. 15.)

16. Between 2007 and 2013, Authority was not required to pump Well No. 5 to meet customer demand. (Stip. 16.)

17. Water from Well No. 5 is directed to the Rattlesnake Creek Reservoir by means of a pipe that discharges above the surface of Rattlesnake Creek Reservoir. (Stip. 17.)

18. Water from Well No. 5 is combined with the surface water of Rattlesnake Creek in the Rattlesnake Creek Reservoir before entering the Rattlesnake Creek Water Treatment Plant. (Stip. 18.)

19. Rattlesnake Creek at and upstream of the Rattlesnake Creek Reservoir is designated High Quality Cold Water Fishery (HQCWF) by the Department. (Stip. 19.)

20. Below the Rattlesnake Creek Reservoir, Rattlesnake Creek is designated Cold Water Fishery (CWF) by the Department and is not a special protection watershed. (Stip. 20.)

21. The Authority requires an average of 500,000 gallons per day of water to supply its customers. (Stip. 21.)

22. The Authority's water sources can supply a total of 1.5 million gallons per day. (Stip. 22.)

23. The Whetstone Reservoir and its associated groundwater sources alone can supply one million gallons per day of the source water for the Authority's Water Supply. (Stip. 23.)

24. The Authority's Water Supply includes a surface water treatment plant for source water from Rattlesnake Creek that is equipped to address turbidity in the source water it receives to meet the requirements for finished water in the Authority's public water supply permits. (Stip. 24.)

25. The Authority has not reported an exceedance of its Water Supply limits for turbidity. (Stip. 25.)

26. On July 15, 2010, the Department approved a water management plan submitted by Flatirons that proposed the withdrawal of up to 200,000 gallons per day from Well No. 5. (Stip. 26.)

27. On August 20, 2010, the Department approved Flatirons's coverage under General Permit ESCGP-1 for the construction of a well pad, roads, and related earth disturbance designated by Flatirons as "Well Pad 6" and located on property owned by the Authority in Snyder Township, Jefferson County. The ESCGP-1 approval is designated as "ESX10-047-0008." (Stip. 27.)

28. Well Pad 6 is located within the Rattlesnake Creek watershed, more than 1,000 feet from the Rattlesnake Creek Reservoir. Well No. 5 is located between Well Pad 6 and the Rattlesnake Creek Reservoir. (Stip. 28.)

29. On January 10, 2011, the Department issued Permit #065-26927 to Flatirons for the drilling of an unconventional well, designated by Flatirons as "DU3-6-1H," ("1H Well") on Well Pad 6 ("1H Well Permit"). (Stip. 30.)

30. As permitted, the 1H Well is located approximately 960 feet away from Well No. 5. (Stip. 30.)

31. At the time Flatirons began drilling the 1H Well, Well No. 5 was producing groundwater at the ground surface without the aid of pumping. (Stip. 31.)

32. Before drilling the 1H Well, Flatirons collected and analyzed pre-drilling water samples from the Authority's Water Supply, including Well No. 5, and took flow measurements of Well No. 5 reading 70 gallons per minute on January 4, 2011. (Stip. 32.)

33. The pre-drill sample of Well No. 5 taken on January 4, 2011 shows a turbidity level of .27 NTU. (Stip. 33.)

34. The 1H Well was drilled using an underbalanced method to minimize the introduction of any substances into the groundwater during drilling. (Stip. 34.)

35. On February 10, 2011, at approximately 1:45 a.m., during the drilling of the 1H Well, Well No. 5 stopped producing water at the ground surface. (Stip. 35.)

36. On February 11, 2011, at approximately 6:45 a.m., after Flatirons finished setting the surface casing of the 1H Well, Well No. 5 began producing water at the ground surface without pumping. (Stip. 36.)

37. During the casing and cementing of the surface string of the 1H Well, Flatirons temporarily redirected the flow of Well No. 5 from the Rattlesnake Creek Reservoir to holding tanks so that the water could be sampled before discharging to the Rattlesnake Creek Reservoir. (Stip. 37.)

38. As per a water purchase agreement with the Authority, Flatirons paid the Authority approximately $3,400 for approximately 567,570 gallons of water that flowed into the 1H Well during drilling. (Stip. 38.).

39. On February 15, 2011, the Department sent a Notice of Violation to Flatirons regarding the loss of flow from Well No. 5 at the ground surface during the drilling of the 1H Well. (Stip. 39.)

40. On February 16, 2011, Flatirons measured the flow of groundwater from Well No. 5 and determined that it had returned to 75 gallons per minute, exceeding its pre-drilling flow rate of 70 gallons per minute. (Stip. 40.)

41. A sample of Well No. 5 taken on April 15, 2011 shows a turbidity level of 1.38 NTU. (Stip. 41.)

42. On December 27, 2010, the Department issued Permit #065-26926 to Flatirons for the drilling of a second well on Well Pad 6. (Stip. 42.)

43. In February 2011, the Department requested that Flatirons not drill the second well on Well Pad 6 until the cause of the loss of flow from Well No. 5 could be further investigated, and Flatirons agreed to postpone drilling. (Stip. 43.)

44. On February 23, 2011, the Department requested that Flatirons submit a plan to detail measures that Flatirons proposed to minimize the potential impacts to Well No. 5 when drilling additional wells on Well Pad 6. (Stip. 44.)

45. On March 21, 2011, Moody and Associates, Inc., on behalf of Flatirons, submitted to the Department a draft document entitled “Brockway Borough Municipal Authority Well No. 5 Protection Plan” (“Well No. 5 Protection Plan”). (Stip. 45.)

46. The Well No. 5 Protection Plan was submitted to the Authority and Advantage Engineers provided comments on behalf of the Authority by letter dated May 31, 2011. (Stip. 46.)

47. On April 26, 2011, the Department requested that Flatirons address the Department's comments on the Well No. 5 Protection Plan and confirmed that Flatirons had committed to postponing any drilling on Well Pad 6 until the Department approved Flatirons's mitigation plans. (Stip. 47.)

48. On June 15, 2011, Moody and Associates submitted the first iteration of the Well No. 5 Protection Plan to the Department on behalf of Flatirons. (Stip. 48.)

49. The June 15, 2011 version of the Well No. 5 Protection Plan was provided to the Authority for comment. (Stip. 49.)

50. On August 2, 2011, Moody and Associates responded to the comments of Advantage Engineers. (Stip. 50.)

51. On August 3, 2011, the Department held a conference among Flatirons, the Authority, and members of the Brockway Area Clean Water Alliance to discuss the Authority's objections to Flatirons's drilling activities in the Rattlesnake Creek watershed. (Stip. 51.)

52. On January 26, 2012, Moody and Associates submitted to the Department a first revised draft of the Well No. 5 Protection Plan incorporating changes made in response to the comments of Advantage Engineers on behalf of the Authority. (Stip. 52.)

53. On December 27, 2011, Permit #065-26926 expired. (Stip. 53.)

54. On December 27, 2011, Flatirons submitted a new permit application for the 2H Well. (Stip. 54.)

55. On January 6, 2012, counsel for the Authority submitted a letter to Brian Babb of the Department objecting to the issuance of a permit for the 2H Well. (Stip. 55.)

56. On February 22, 2012, the Department held a public meeting at the Brockway Area High School to inform the public regarding the drilling activities of Flatirons in the Whetstone and Rattlesnake Creek watersheds. (Stip. 56.)

57. On September 4, 2012, Moody and Associates submitted a final copy of the Well No. 5 Protection Plan. (Stip. 57.)

58. On September 7, 2012, the Department received a final revision to the Well No. 5 Protection Plan. (Stip. 58.)

59. On May 20, 2013, Flatirons submitted to the Department: (1) a Field Preparedness, Prevention and Contingency Plan dated January 13, 2013; (2) a Master Containment Plan dated May 16, 2013; and (3) a description of its planned Green Completion methods. (Stip. 59.)

60. On July 26, 2012 and May 23, 2013, the Department approved Flatirons's Proposed Alternate Method or Material for Casing, Plugging, Venting or Equipping the 2H Well. (Stip. 60.)

61. On May 24, 2013, the Department issued the 2H Well Permit to Flatirons, including in the 2H Well Permit the following special permit conditions:

a. Flatirons will notify the Authority 24 hours before drilling of the well commences;
b. Flatirons will implement the alternate method for casing the well as outlined in the Proposed Alternate Method or Material for Casing, Plugging, Venting, or Equipping Form, 5500-PM-OG 0024, submitted February 1, 2012;
c. Flatirons will implement the provisions in the Protection Plan for the following as provided in the Protection Plan:
    i. Under balanced drilling technique;
    ii. Casing specifics and cementing plan;

iii. Pump testing plan;
iv. Water quality sampling and flow monitoring
v. Contingency measures.

d. Flatirons will implement Green Completion flowback to minimize flaring and/ or venting of gas during completion operations.

e. The permittee shall not withdraw or use water from water sources within the Commonwealth of Pennsylvania, for drilling and fracing activities unless the permittee does so in accordance with a Water Management Plan approved by the Department.

f. Prior to fracturing the well, as part of its Preparedness, Prevention and Contingency Plan the permittee shall implement a Control and Disposal Plan for the control and disposal of fluids and residual wastes in accordance with 25 Pa. Code § 78.55. The Control and Disposal Plan shall identify the control and disposal methods and practices utilized to prevent pollutants from directly or indirectly reaching the waters of the Commonwealth during the impoundment, production, processing and transportation of pollutants, including identification of the permitted processing or disposal facilities where residual wastes will be processed or disposed, in accordance with 25 Pa. Code §§ 78.55 and 91.34.

g. Prior to transport of the residual wastewater off site, chemical analysis and characterization of the waste shall be conducted and provided to the processing or disposal facility intended for acceptance of the waste in accordance with 25 Pa. Code § 287.54.

h. The operator shall run a complete angular deviation survey of the intentionally deviated well. The deviation survey is to be obtained by a responsible well surveying company and shall be filed with the Department within thirty (30) days after drilling is completed along with other regularly required reports. The deviation report shall include a well location plat and vertical section of the borehole as drilled.

(Stip. 61.)

62. On June 25, 2013, the Authority filed a notice of appeal with the Board objecting to the issuance of 2H Well Permit. (Stip. 62.)

63. The use of Green Completion flowback methods will reduce the emission of air contaminants from the flaring or venting operations during the completion of the 2H Well. (Stip. 63.)

64. The 2H Well Permit authorizes the drilling, alteration, and operation of the 2H Well, requires compliance with the Pennsylvania Oil and Gas Act of 2012, and does not relieve the operator from the obligation to comply with the Pennsylvania Clean Streams Law and all statutes, rules, and regulations administered by the Department. (Stip. 64.)

Additional Findings of Fact

65. The Authority supplies about 20 – 23 million gallons of water per month to approximately 4,500 people. (T. 13, 31, 150-51.)

66. Approximately 80 to 90 percent of the water the Authority uses comes from the Whetstone Reservoir and its associated groundwater sources. The remainder of the water comes from the Rattlesnake Creek Reservoir and its associated groundwater sources. (T. 553.)

67. The Authority's water wells are supplemental sources of water to its Water Supply. The primary water sources are the Whetstone Branch and Rattlesnake Creek streams. (T. 551, 561-63, 567.)

68. Water Well No. 6 replaced Water Well No. 1, which along with Water Well No. 3, is no longer in use by the Authority. (T. 66, 92, 563.)

69. Water Well Nos. 2 and 6 are located in the Whetstone watershed and Water Well No. 5 is located in the Rattlesnake Creek watershed. (T. 87, 92, 465, 576; Authority Exhibit ("BBMA Ex.") 15.)

70. Water Well Nos. 2 and 6 are located approximately one mile to one and one-quarter miles from Well Pad No. 6. (T. 271-72, 429, 440, 514; Flatirons Exhibit ("F. Ex.") N.)

71. No party has undertaken any study or characterization of the potential effects on Water Well Nos. 2 or 6 from the drilling of the 2H Well. (T. 475-76, 504, 510-11, 546, 576.)

72. Water Well No. 5 taps into a confined bedrock aquifer under pressure, which causes it to flow artesian. (T. 431-32, 465.)

73. Water Well Nos. 2, 5, and 6 each derive their water from the same aquifer. (T. 271-72, 440, 465.)

74. The upper reaches of the Rattlesnake Creek watershed serve as the primary recharge zone for the confined aquifer that the Authority's water wells tap into. (T. 98-99.)

75. Well Pad No. 6 is not located in the upper reaches of the Rattlesnake Creek watershed. (T. 98-99; F. Ex. N.)

76. Flatirons negotiated the location of Well Pad No. 6 with the Authority. (T. 320-22.)

77. The cause of the temporary interruption of artesian flow at Water Well No. 5 during the drilling of the surface casing of the 1H Well was a positive pressure differential between the aquifer and the 1H Well, resulting in the movement of water from the aquifer to the surface through the wellbore and causing the water level in Well No. 5 to drop so that it was no longer flowing artesian to the Rattlesnake Creek Reservoir. (T. 447, 452, 538-39, 554; F. Ex. G, N.)

78. There is no evidence of any effect on the Authority's ability to serve its customers from the interruption of flow during the drilling of the 1H Well. (T. 316, 452-53, 554-56.)

79. It is anticipated that the drilling of the 2H Well will cause a similar temporary interruption of artesian flow to Water Well No. 5 that occurred during the drilling of the 1H Well. (T. 458, 462, 494-95, 539; F. Ex. G, N.)

80. Beyond the temporary interruption of flow, there are no long-term anticipated impacts on the water quality or quantity of Water Well No. 5. (T. 447-50, 462-63, 556; F. Ex. N.)

81. Following the flow loss incident during the drilling of the 1H Well, Flatirons developed a Water Well No. 5 Protection Plan, which is designed to ensure that water quality and quantity are maintained during the drilling of the 2H Well. The plan details an alternate casing and cementing plan, a baseline water quality sampling and flow monitoring plan, and a two-stage pump test plan to determine if there will be any long-term impacts on water quantity. (T. 455-59; F. Ex. G.)

82. Flatirons intends to once again employ an underbalanced drilling technique for the drilling of the 2H Well, however, it has modified the underbalanced drilling plan with the expectation that less water will be captured than when drilling the 1H Well. (T. 407-08, 421; F. Ex. F, R.)

83. In underbalanced drilling, the pressure in the borehole is less than the pressure in the aquifer being drilled through, allowing water to flow into the borehole from the aquifer, provided there is sufficient permeability, and it is designed to minimize any contaminants flowing out of the borehole and into the aquifer. (T. 383-85, 494-95; F. Ex. R.)

84. In contrast, in overbalanced drilling the pressure in the borehole is greater than the pressure in the aquifer, exerting pressure outward and allowing drilling fluid or drilling mud to flow into the aquifer. (T. 383, 495; F. Ex. R.)

85. The use of underbalanced drilling was agreed upon by Flatirons, the Department, and the Authority during meetings prior to the issuance of the 2H Well Permit. (T. 409, 493-95.)

86. Flatirons intends to use an alternative casing and cementing plan during the drilling of the 2H Well that was not used during the drilling of the 1H Well. (T. 495-97; F. Ex. F.)

87. The alternate casing and cementing plan approved by the Department for the 2H Well is designed to minimize the potential for cement and other fluids to be lost in the groundwater aquifer since the aquifer will be isolated with cement at the bottom and cement above. (T. 403-06, T. 495-97; F. Ex. F.)

88. Water samples collected from Water Well No. 5 after the drilling of the 1H Well did not exceed any Maximum Contaminant Level (MCL) or other water quality standard. (T. 555-56; BBMA Ex. 2.)

89. Turbidity readings for the Rattlesnake Creek portion of the Authority's Water Supply, and specifically Water Well No. 5, have routinely fluctuated in degrees that would be consistent with natural and seasonal variability. (T. 37-39, 470, 478, 558-59; BBMA Ex. 2, 9; F. Ex. N.)

90. Depending on sample location, whether at the Water Well No. 5 wellhead or at the outflow pipe to the Rattlesnake Creek Reservoir, iron concentrations can be higher due to exposure to aerobic conditions, which can in turn also increase turbidity. (T. 435-38; F. Ex. N.)

91. The lowest turbidity samples were taken at the Well No. 5 wellhead before flowing through the pipe to the Rattlesnake Creek reservoir. (T. 440-42; F. Ex. N.)

92. Any potential surface runoff from Well Pad No. 6 has been designed to be directed downstream of the Authority's Rattlesnake Creek reservoir, into areas of Rattlesnake Creek that are not special protection bodies of water. (T. 234-36, 324, 524; F. Ex. T.)

93. The Department investigated the Authority's objections to the permitting of the 2H Well and prepared memoranda addressing each of the objections. (T. 490-93; Department Exhibit ("DEP Ex.") 9, 10, 11, 13.)

DISCUSSION

In third-party appeals of Department actions the appellant bears the burden of proof. 25 Pa. Code § 1021.122(c)(2). The appellant must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that it is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976); *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269. In this appeal, the Authority must show by a preponderance of the evidence that the Department erred in issuing the 2H Well Permit to Flatirons. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

The Authority has preserved five objections to the issuance of the 2H Well Permit in its post-hearing brief: (1) issuance of the permit will cause pollution to the waters of the Commonwealth; (2) issuance of the permit will cause or allow a public nuisance; (3) the Department violated the Authority's procedural due process rights; (4) issuance of the permit is arbitrary and capricious and contrary to law; and (5) the permit renewal is in violation of Article I, Section 27 of the Pennsylvania Constitution. The Authority's arguments that the permit will cause pollution and a nuisance and that the permit's issuance was unreasonable and contrary to law are all essentially the same. The Authority is quite legitimately concerned that drilling the 2H Well will harm the Authority's Water Well No. 5, and to a lesser extent, its other, more distant water supply wells. The Authority's water wells are, of course, a precious resource that must be protected. Water Well No. 5 is located a mere 960 feet away from the pad where the 2H

Well will be drilled. To add to the worry, when Flatirons drilled the 1H Well on that pad, Water Well No. 5 lost its artesian flow for about 29 hours.

As a result of the Authority's well-founded concern, the Department conducted a protracted and careful review of Flatirons's permit application. The Department kept the Authority advised and involved in its deliberations. At the end of the day, the Department concluded that it would be possible to drill the 2H Well safely. There would be a risk, indeed a likelihood, that Water Well No. 5 would lose artesian flow for several hours, but that risk was the consequence of a special drilling technique that would greatly reduce the risk, with much greater consequences, of contaminating the aquifer that supplies the water well. The Department determined, correctly in our view, that the temporary water loss would have no effect whatsoever on the Authority's ability to provide water to its customers. It determined that there would be no harm to the quality or quantity of the well water beyond the short interruption during drilling. It imposed eight special conditions in the permit designed to minimize the temporary disturbance to Water Well No. 5.

The Authority, again quite legitimately, remains concerned, which is why it has pursued these consolidated appeals. We share its concern, and have brought that concern to bear in our *de novo* review of the Department's action to ensure that the Department's action was reasonable, lawful, and consistent with the facts and the Department's responsibilities under the Pennsylvania Constitution. We conclude that it was.

The Authority, of course, bears the burden of proof in its appeals. The difficulty with the Authority's case is that it gave us very little to go on in the way of supported criticisms of the Department's conclusions. This is a very technical case involving not only the intricacies of drilling but the science of hydrogeology as well. We are highly dependent on expert testimony

in such cases. The only expert testimony offered by the Authority was that of Steven Read, a hydrogeologist at the Authority's consulting firm, Advantage Engineers. Although Read has worked with the Authority over the last several years, he performed no studies on the relation between the drilling of the 1H or 2H Wells and their effect on any of the water wells under the Authority's control. (T. 81.) He was the principal author of a 2010 report on the potential for developing an additional groundwater source for the Authority; however, that report was not prompted by or related to any concerns over oil and gas development. (T. 85-86, 94; BBMA Ex. 14.) Read could only generally opine on the types of concerns that he would have with oil and gas drilling on the Authority's property. (T. 81-82.)

Parties who do not put on expert testimony usually have a difficult time meeting their burden of proof in an appeal such as this one involving technical issues. Cases before the Board often involve complex, technical, and scientific issues that hinge on expert evidence. What we previously stated in the context of a third-party appeal of the issuance of a non-coal mining permit is particularly apropos here:

> Where the appellants argue that the granting of a permit will destroy or pollute a valuable natural resource it is not enough to meet their burden to simply focus on the value of the natural resource. The natural resource's value is usually acknowledged by all parties involved, including the Department whose primary function it is to protect the environment. They must come forward with evidence, usually in the form of expert testimony, to prove their claims. In some cases, not only does the party making the claim not come forward with evidence proving their claims, but often, in cases of this type, the Department and permittee will come forward with a tremendous amount of expert testimony refuting the claims of the third-party appellant. In such situations, the Board has no choice but to follow the law and dismiss the appeal. We cannot revoke a permit because someone raises a concern about a natural resource if that concern is not supported by a preponderance of the evidence. An appellant cannot simply come forth with a laundry list of potential problems and then rest its

> case. It must prove by a preponderance of the evidence that these problems have occurred or are likely to occur.

Shuey v. DEP, 2005 EHB 657, 711-12.

With little in the way of its own expert testimony, the Authority was largely confined to meet its burden of proof through cross-examination and/or through the identification of one or more statutory or regulatory provisions that were not satisfied in the permitting of the 2H Well. In pursuing this course, the Authority has been unable to sustain its burden of proof. On balance, without the support of expert testimony, the Authority's arguments that the 2H Well will cause untoward harm amount to little more than conjecture.

For example, the Authority claims that there has been a steady increase in conductivity at Water Well No. 5 since the drilling of the 1H Well. It points to a table in Flatirons's expert report from Moody and Associates that compiles water sampling results from January 2011 to July 2011. (BBMA Ex. 2; F. Ex. N.) The single pre-drilling reading is 164 micromhos per centimeter (µmhos/cm). The post-drilling readings are as follows: 197, 175.4, 179, 178, and 201 µmhos/cm. The variability in the readings not only belies the contention that there has been a "continued increase in conductivity," but experts from Flatirons and the Department consistently and credibly testified that the changes were not statistically significant. (T. 472, 580, 582.) The Authority, for its part, had no expert testify that there was a significant increase in conductivity, or that any changes in conductivity were attributable to the drilling of the 1H Well.

The Authority is concerned that Water Well No. 5 had a pre-drill turbidity reading of .27 Nephelometric Turbidity Units (NTU) and, following the drilling of the 1H Well, it had a turbidity reading of 1.32 NTU—what the Authority construes as a five-fold increase. (BBMA Ex. 2.) However, all experts for Flatirons and the Department credibly testified that there is nothing unusual about such a turbidity fluctuation, and that the fluctuation is within the range of

expected seasonal variability. Experts from Flatirons and the Department testified that differences in turbidity readings may be affected by sampling location after the ferrous iron naturally contained in the water comes into contact with oxygen in the pipe leading from Water Well No. 5 to the Rattlesnake Creek Reservoir. (Finding of Fact ("FOF") 90, 91.) The Department also presented expert testimony that any turbidity level below 5 to 8 NTU is very common for groundwater. (T. 561.) Once again, the Authority did not contest these conclusions with any of its own expert testimony.

The extent to which the Authority needed to increase maintenance and cleaning of its slow sand filtration system is unclear in light of somewhat inconsistent testimony of the Authority's fact witnesses. Taken in total, the testimony from the Authority suggests that for approximately four weeks after the drilling of the 1H Well, the Authority may have had to clean the filter slightly more than usual. (T. 154-56, 166, 195, 244-45.) However, the Authority had no data or measurements to substantiate or quantify any alleged increase in maintenance of the filter system. Perhaps more crucially, the Authority had no expert testimony to link any increase in filter maintenance to the drilling of the 1H Well. In short, the Authority's claim that drilling the 1H Well had a deleterious effect on the water quality of Water Well No. 5, which shows in turn that drilling the 2H Well will have a similar effect, is not supported by the record because drilling the 1H Well was not shown to have had a deleterious effect on water quality.

The Authority also argues that the drilling of the 2H Well will cause a temporary interruption of flow to its Water Well No. 5. The Authority's concern of diminution from the drilling of the 2H Well once again stems from its experience with the drilling of the 1H Well on the same well pad. During the drilling of the 1H Well, there was a temporary loss of artesian flow to the Authority's Well No. 5, one of its supplementary sources of water as a public water

supply. The loss of artesian flow lasted for approximately 29 hours before it returned. The Authority views this incident as indicative of what will happen to the artesian flow of Water Well No. 5 during the drilling of the 2H Well. The Authority's concern is warranted. Flatirons and the Department concede that there will very likely be another interruption in artesian flow due to the underbalanced drilling technique that Flatirons will again employ during the drilling of the 2H Well. (FOF 79.) Underbalanced drilling is designed to limit any material migrating into an aquifer during the casing and cementing of a well. However, as a trade-off, the pressure differential allows water from the aquifer to flow into the borehole, which is then pumped out, thereby drawing on the aquifer's artesian flow.

While we do not take lightly the interruption of flow to the Authority's Water Well No. 5, we believe it is important to keep the situation in context. The Authority obtains the majority of its water from Whetstone Branch and Rattlesnake Creek. (FOF 67.) Its water wells are supplemental sources to those primary sources. Approximately 80 to 90 percent of the Authority's water comes from the *Whetstone* watershed. (FOF 66.) This means that Water Well No. 5, located in the *Rattlesnake Creek* watershed, supplies only a fraction of the Authority's overall water for use by its customers. Further, it must be remembered that Water Well No. 5 is normally not actively pumped. Artesian flow from the well simply rolls down the hill into the Rattlesnake Creek Reservoir. It is only that passive flow that will be temporarily interrupted, based upon the credible expert testimony of the Department and Flatirons. Even in the face of a loss of artesian flow, the Authority can still pump Water Well No. 5 at a rate of 150 gallons per minute if it needs to. (FOF 15.) Perhaps most importantly, there is no evidence that the temporary loss of artesian flow during the drilling of the 1H Well had any impact on the

Authority's ability to serve the water needs of its customers, nor is the drilling of the 2H Well expected to have any such impact. (FOF 78, 80.)

The Authority says that even this temporary flow loss is unreasonable and unlawful. It bases that claim on Section 3211 of the Oil and Gas Act, which provides in part that the Department may deny a well permit if "[t]he well site for which a permit is requested 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." 58 Pa.C.S. § 3211(e.1)(1). The Department correctly interprets this provision to mean that the Department may deny a well permit if its issuance will cause a violation of any applicable statutory or regulatory provision, including those contained within and promulgated pursuant to the Oil and Gas Act and the Clean Streams Law. (T. 512-13.)

The Authority also directs us to Section 301 of the Clean Streams Law, which provides that "[n]o person or municipality 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. The Authority never details why the industrial waste provision of the Clean Streams Law applies as opposed to the more general prohibition against unpermitted pollution contained in Section 401. 35 P.S. § 691.401.

The Authority also cites Section 3252 of the Oil and Gas Act, which provides:

> A violation of section 3217 (relating to protection of fresh groundwater and casing requirements), 3218 (relating to protection of water supplies), 3219 (relating to use of safety devices) or 3220 (relating to plugging requirements), or a regulation, order, term or condition of a permit relating to any of those sections constitutes a public nuisance.

58 Pa.C.S. § 3252. Section 3218 in turn provides in part that "a well operator who affects a public or private water supply by pollution or diminution shall restore or replace the affected

supply with an alternate source of water adequate in quantity or quality for the purposes served by the supply." 58 Pa.C.S. § 3218. The Clean Streams Law deems a public nuisance any discharge into waters of the Commonwealth that causes or contributes to pollution or creates a danger of pollution. 35 P.S. § 691.3.

Under the unique circumstances of this case, we do not find that the Department's permitting of a well that will likely result in a relatively brief interruption in artesian flow violated these laws or was otherwise unreasonable. It is a fact of life that normal development cannot be accomplished without *some* environmental incursion. *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976). One cannot walk across a stream without stirring up some sedimentation, which might constitute a discharge of pollutants in some pedantic sense. The point of the environmental laws is not to prohibit the discharge of all pollutants, but to intelligently regulate such activity so that regulatory standards are met, environmental incursions are minimized, and any remaining harms are justified. *Id.*

Permits exist to provide a limited allowance of what might otherwise constitute an unlawful activity. *Casey v. DEP*, 2014 EHB 439, 449. The majority of environmental permitting regimes contemplate some amount of environmental impact, whether it be a discharge to waters of the Commonwealth, or the surface and subsurface disturbances associated with oil and gas development. *See, e.g.,* 35 P.S. §§ 691.202, 307, & 402; 58 Pa.C.S. § 3211. The permitting regimes require that the proposed environmental impact be carefully vetted through an application process and a review of that application by the Department. The question then becomes whether the Department's decision to permit the discharge of pollutants or temporary diminution in flow was unreasonable. Here, we find the Department's decision to be reasonable and in accordance with the law.

The Authority next tells us that the aquifer that supplies Water Well No. 5 also supplies its Well Nos. 2 and 6 and that Flatirons and the Department did not conduct any study on the potential impact to these wells. The Department and Flatirons do not dispute that fact. However, the Authority, which bears the burden of proof, did not present any evidence or expert testimony that drilling the 2H Well has a potential to cause an impact on the Authority's other wells. The Authority did not present any evidence or expert testimony that any hydrogeological analysis or investigation was warranted with respect to the other wells. The record does not support a finding that the drilling of the 2H Well will have any impact on the other wells. The other wells are somewhat distant (more than one mile away) and it is certainly not obvious or self-evident that further study was warranted. To the contrary, the impact from drilling on the closest well, Well No. 5, was minimal and in our view tolerable. With regard to the Authority's other wells, common sense would suggest there would be no greater impact on the remote wells. There is no evidence to support a finding that a temporary impact on the flow of the other wells, even if it occurred, would alone or in combination have an adverse impact on the Authority's ability to service its customers.

The Authority also tells us that the Department has permitted the 2H Well in an area covered by the Authority's Source Water Protection Plan. The Plan was developed as a proactive measure to identify all of the Authority's water sources and any potential sources of contamination. (T. 106; BBMA Ex. 13.) The Authority never explains the legal or factual significance of its Source Water Protection Plan. However, even if the Source Water Protection Plan did have any legal significance, it does not prohibit all oil and gas activity. It only proposes a management strategy stating that oil and gas development should be monitored. (T. 131; BBMA Ex. 13 at 44.)

Finally, although the Authority raises concerns about potential surface water runoff from Well Pad No. 6 reaching Rattlesnake Creek, it has not supported that concern with any evidence. There is no evidence of any risk of a discharge. There is no evidence of any adverse impact on any streams.

In contrast to the minimal expert opinion in support of the Authority's case, the Department and Flatirons presented credible opinions from multiple qualified experts that drilling the 2H Well will not have an adverse effect on the quality or quantity of flow from Water Well No. 5 other than the short-term loss of non-pumping flow. (T. 384-85, 394-99, 447, 450-52, 494-502, 515.) Furthermore, the temporary loss of artesian flow will not have an adverse impact on the Authority's ability to provide a safe and continuous water supply to its customers. (T. 555.) Nor will the drilling have any adverse effect on the watersheds themselves. (T. 502.)

We emphasize that the Department imposed eight special conditions on the 2H Well Permit pursuant to its authority under 58 Pa.C.S. § 3211(e). These include the alternate casing and cementing plan, underbalanced drilling, increased water quality sampling and flow monitoring, and green completion. These measures were designed to minimize any disturbance caused by the drilling of the 2H Well and to protect Water Well No. 5. The Authority was unable to demonstrate that any of these measures, either individually or in the aggregate, would not be sufficiently protective of the Authority's ability to serve the water needs of its customers. The Authority likewise did not propose any alternative or additional conditions that in its view would be more protective. The special conditions developed specifically with the Authority's

concerns in mind undermine the contention that the Department acted improperly in issuing the permit.[1]

Due Process

The Authority's contention that its procedural due process rights were violated has no merit. The Authority was notified of Flatirons's permit application immediately. The Authority has been involved in the permit review process from the very start. Flatirons submitted its proposed Well No. 5 Protection Plan to the Authority, and the Authority's consultants provided comments. The revised version of the plan was submitted to the Authority for comment, and it again provided comments. The Authority requested and was provided with two conferences with the Department and Flatirons to air its objections to Flatirons's drilling activities.

The Authority's counsel submitted a letter to the Department objecting to the issuance of the permit. (DEP Ex. 17.) The Department held a public meeting at the Brockway Area High School regarding the permit. Several special conditions were added to the permit to address the Authority's concerns. The Authority has now had an opportunity to pursue its objections in two appeals before the Board. We held three days of hearings, and there has been extensive briefing by all of the parties.

To comport with due process, states must provide persons with a meaningful opportunity to be heard before depriving them of life, liberty, or property. *Jake v. DEP*, 2014 EHB 38, 50. The history of this matter shows that the Authority has unquestionably been provided with a meaningful opportunity to be heard. The Authority's only specific complaint in this regard seems to be that the Department did not provide "meaningful responses" to its objections and comments. Due process requires no such duty to respond, but even if it did, the averment is

[1] Although it perhaps goes without saying, the well permit in no way approves or excuses any loss of water quantity or quality greater than that which has been predicted here. 58 Pa.C.S. § 3218; 25 Pa. Code § 78.51.

simply not true. The Department did in fact respond to the Authority's concerns during the review process. (*See, e.g.*, DEP Ex. 9, 10, 11, 13.) Ultimately, the permit, together with the special conditions crafted with the Authority's concerns in mind, provided the Department's final response.

In any event, the Board's jurisdiction and de novo review afford due process to all appellants such as the Authority. *Kiskadden v. DEP*, EHB Docket No. 2011-149-R (Opinion and Order, Sept. 15, 2014). "Due process is provided by the Pennsylvania Environmental Hearing Board, not the Department of Environmental Protection which is a party in the case." *Kiskadden v. DEP*, 2013 EHB 21, 25. The Department's position regarding the Authority's concerns was obviously presented in great detail in the proceedings before this Board. The Authority had the opportunity to conduct discovery, depose Department witnesses, present its objections to this Board, and cross-examine the Department and Flatirons's witnesses. The Authority's right to due process has clearly been satisfied. *See Kiskadden v. DEP*, 2014 EHB 642, 643-44; *Consol Pa. Coal Co. v. DEP*, 2011 EHB 571, 575.

Article I, Section 27

The Authority lastly argues that the Department violated Article I, Section 27 of the Pennsylvania Constitution by renewing the 2H Well Permit. Article I, Section 27 reads as follows:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27. As the owner of the surface and the operator of a public water supply, the Authority argues that it is entitled to protect that supply and related water sources under

Article I, Section 27. It is clear to the Board that the Authority has had the opportunity to do so by participating actively in the permit review process and by pursuing this appeal.

Flatirons points out, correctly, that the Authority by law, Board order, and stipulation is limited to raising the Article I, Section 27 argument in the Authority's appeal from the permit renewal docketed at EHB Docket No. 2014-086-L, as opposed to its appeal from the original permit docketed at EHB Docket No. 2013-080-L. (*See* Board Order, Docket Entry 37 (Jul. 11, 2014).) The Authority did not raise the Article I, Section 27 issue in its original appeal, but it did in the appeal from the permit renewal. An appellant ordinarily may not challenge an original permit in the context of an appeal from the renewal of that permit. *See Solebury School*, *supra*, 2014 EHB at 524-27; *Wheatland Tube Co. v. DEP*, 2004 EHB 131, 135-36; *Solebury Twp. v. DEP*, 2004 EHB 95, 112-14; *Tinicum Twp. v. DEP*, 2002 EHB 822, 835; *Yourshaw v. DEP*, 1998 EHB 37, 39-40. The scope of the review of an application for a permit renewal is more limited than the scope of the review for the original permit under the applicable statutes and regulations (*compare* 58 Pa.C.S. § 3211 (providing detailed application requirements), *with* 25 Pa. Code § 78.17 (requiring an affidavit affirming that the information contained in the original application is still accurate)), which would suggest that the application of Article I, Section 27 to a renewal would be commensurately limited. However, in this case, the Authority has appealed both the permit and the renewal, the original permit and the renewal have not become final with respect to the Authority due to its appeals, the appeals from the original permit and the renewal have been consolidated, and Flatirons, at least based upon the record before us, has not yet drilled the well. Under these circumstances there is no occasion to apply some diminished version of the Article I, Section 27 analysis because a renewal is involved.

In *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 108 A.3d 140 (Pa. Cmwlth. 2015), the Commonwealth Court instructed that, notwithstanding the Supreme Court's plurality decision discussing Article 1, Section 27 in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), the Commonwealth Court's decision in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976), remains the standard for reviewing Article I, Section 27 challenges to the Department's decisions. We, of course, are bound by the Commonwealth Court's holding. In *Payne*, the Court held as follows:

> We hold that Section 27 was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania. The result of our holding is a controlled development of resources rather than no development.
>
> We must recognize, as a corollary of such a conclusion, that decision makers will be faced with the constant and difficult task of weighing conflicting environmental and social concerns in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historical resources.
>
> Judicial review of the endless decisions that will result from such a balancing of environmental and social concerns must be realistic and not merely legalistic. The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Payne, 312 A.2d 86, 94. Although the Court spoke in terms of judicial review by the courts, this Board has traditionally held that the *Payne* analysis applies to our review of Department actions. *Smedley v. DEP*, 2001 EHB 131, 204-05.

The burden is on the party challenging the Department's action to show that the Department acted unconstitutionally. *Smedley, supra*, 2001 EHB at 204. The Authority has failed to meet that burden in this case. To the extent that drilling the 2H Well is the "environmental incursion" as that term is used in *Payne*, the only harm shown to be potentially associated with that incursion is a relatively brief loss of flow from a supplemental drinking water source that is credibly predicted to last no more than approximately 30 hours. The record shows that this temporary loss of flow will have *no* adverse impact on the Authority's ability to provide water to its customers. No other environmental harms or threats have been shown to exist on the record before us.

Although any loss of flow is unquestionably of concern, Article I, Section 27 allows for "controlled" development of resources rather than no development. *Payne*, 312 A.2d at 94. The Department has reasonably concluded that the brief interruption in flow that will not be felt in any way by the Authority's customers does not constitute a violation of any "applicable statute or regulation relevant to the protection of the Commonwealth's public natural resources," which is the first question to be asked under *Payne. Id.* (T. 499-500.) The drilling process must be conducted under tightly controlled circumstances in a special manner designed to provide enhanced protection to the aquifer that will be intercepted and pursuant to procedures set forth in the Well No. 5 Protection Plan.[2] The drilling will take place on an existing well pad. This demonstrates "a reasonable effort to reduce the environmental incursion to a minimum," the second question in *Payne. Id.* Finally, the Authority has failed to prove or even argue that the minimal environmental harm that will result from the permitted drilling will so clearly outweigh

[2] Based upon the concession of the permittee's own expert witness (T. 476), it would be prudent to monitor the effects of the drilling on Wells 2 and 6 as well.

the benefits to be derived from the drilling (e.g. energy production)[3] that issuance of the permit constituted an abuse of discretion, the third *Payne* question. *Id.*

CONCLUSIONS OF LAW

1. Arguments not preserved in the post-hearing brief are waived. 25 Pa. Code 1021.131(c); *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, 291, *aff'd*, 971 C.D. 2004 (Pa. Cmwlth. 2004).

2. The Authority as a third-party appellant bears the burden of proof. 25 Pa. Code § 1021.122(c)(2).

3. The Authority must show by a preponderance of the evidence that the Department's action is unreasonable, contrary to law, not supported by the facts, or inconsistent with the Department's obligations under the Pennsylvania Constitution. *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976); *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269.

4. The Board reviews Department actions *de novo*. *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

5. The Authority did not establish that the drilling and operation of the 2H Well will result in the pollution of waters of the Commonwealth. 58 Pa.C.S. § 3211; 35 P.S. § 691.301.

6. The law does not prohibit pollution, only pollution without a permit. *Casey v. DEP*, 2014 EHB 439, 449.

7. The Authority did not establish that the drilling and operation of the 2H Well will cause or allow a public nuisance. 58 Pa.C.S. §§ 3218, 3252; 35 P.S. § 691.3.

[3] The safe development of oil and gas resources is a public benefit. *See* 58 Pa.C.S. § 3202(1).

8. To comport with due process, states must provide persons with a meaningful opportunity to be heard before depriving them of life, liberty, or property. *Jake v. DEP*, 2014 EHB 38, 50.

9. The Authority's right to due process has been satisfied. *Kiskadden v. DEP*, 2014 EHB 642, 643-44; *Consol Pa. Coal Co. v. DEP*, 2011 EHB 571, 575.

10. An appellant ordinarily may not challenge an original permit in the context of an appeal from the renewal of that permit. *Solebury School*, 2014 EHB 482, 524-27; *Wheatland Tube Co. v. DEP*, 2004 EHB 131, 135-36; *Solebury Twp. v. DEP*, 2004 EHB 95, 112-14; *Tinicum Twp. v. DEP*, 2002 EHB 822, 835; *Yourshaw v. DEP*, 1998 EHB 37, 39-40.

11. "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." PA. CONST. art. I, § 27.

12. The Commonwealth Court's decision in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976), is the standard for reviewing Article I, Section 27 challenges to the Department's decisions. *Pa. Envtl. Def. Found. v. Cmwlth.*, 108 A.3d 140 (Pa. Cmwlth. 2015); *Smedley v. DEP*, 2001 EHB 204-05.

13. The Authority did not demonstrate that the issuance of the 2H Well Permit violated Article I, Section 27 of the Pennsylvania Constitution. *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BROCKWAY BOROUGH MUNICIPAL AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2013-080-L**
	:	**(Consolidated with 2014-086-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and FLATIRONS DEVELOPMENT, LLC, Permittee	:	

O R D E R

AND NOW, this 24th day of April, 2015, 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: April 24, 2015

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOUTH FAYETTE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2014-071-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES-APPALACHIA, LLC, Permittee	:	**Issued: April 27, 2015**

OPINION AND ORDER ON APPELLANT'S MOTION TO EXTEND DISCOVERY AND THE DEPARTMENT'S MOTIONS TO STRIKE AND FOR SANCTIONS

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Pennsylvania Environmental Hearing Board grants the Pennsylvania Department of Environmental Protection's Motion to Strike Appellant's Objections and orders Appellant to serve its Answers and produce documents. The Board denies the Department's Motion to dismiss the Appeal. The Board orders a slight extension of the prehearing deadlines so the parties can conduct discovery and if appropriate file dispositive motions.

O P I N I O N

Appellant South Fayette Township ("Appellant" or "South Fayette") filed this Appeal on May 29, 2014. The Appeal objects to the Pennsylvania Department of Environmental Protection's (the "Department") authorization for coverage under an Expedited Erosion and Sedimentation Control General Permit 2 (the "Permit") to Permittee Range Resources Appalachia, LLC ("Permittee" or "Range Resources") for the Cuddy Well Site in South Fayette Township, Allegheny County, Pennsylvania.

On November 21, 2014, the Department served Interrogatories, Requests for Production of Documents, and Requests for Admissions on Appellant. Appellant failed to respond to the Department's Discovery. Subsequently, the Department filed a Motion to Compel with the Pennsylvania Environmental Hearing Board (the "Board"). Appellant did not file a Response to the Motion to Compel.

On February 18, 2015, the Board issued an Order granting the Department's Motion to Compel and ordering South Fayette to serve full and complete Responses to the Department's Interrogatories, Requests for Production of Documents and Requests for Admissions on or before March 4, 2015. South Fayette filed a Motion to Extend Discovery on March 3, 2015. On March 4, 2015, Appellant filed objections to nearly every one of the Department's Discovery requests.

Both the Department and Range Resources oppose a further extension of discovery. They contend, and we agree, that South Fayette has not adequately answered the discovery propounded to it. Therefore, it is argued that the Appellant should not be rewarded for these actions and their Motion to Extend Discovery should be denied.

The Department has also filed a Motion to Strike Appellant's Objections and a Motion for Sanctions ("Department's Motion"). The Department points out that even after the Board granted its Motion to Compel, South Fayette provided no substantive answers or any facts to the Department's Discovery. The Department's Motion asks us to sanction South Fayette by dismissing its Appeal for failing to comply with our February 18, 2015 Order. In the alternative, the Department requests that we bar Appellant from introducing any witnesses or expert witnesses at the merits hearing. South Fayette argues that its Objections are well made and should be sustained by the Board.

As a general rule, discovery before the Board is governed by our Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). A party may obtain discovery regarding any matter which is not privileged and is relevant to the subject matter of the Appeal. Pa. R. Civ. P. 4003.1(a); *Borough of St. Clair v. Commonwealth of Pennsylvania, Department of Environmental Protection and Blythe Township,* 2013 EHB 177, 179; *T.W. Phillips Oil & Gas Co., v. Commonwealth of Pennsylvania, Department of Environmental Protection*, 1996 EHB 608, 610.

It is the Board's duty to monitor and regulate discovery in the cases before us. *Clean Air Council v. Commonwealth of Pennsylvania, Department of Environmental Protection and MarkWest Liberty Midstream & Resources, LLC.,* 2011 EHB 832, 833; *Cappelli v. Commonwealth of Pennsylvania, Department of Environmental Protection and Maple Creek Mining, Inc.*, 2006 EHB 426, 427. The main purposes of discovery are so all sides can accumulate information and evidence, develop the facts necessary to support their legal contentions, plan trial strategy, and ascertain the strong points and weaknesses in their respective positions. *McGinnis v. Commonwealth of Pennsylvania, Department of Environmental Protection and Eighty-Four Mining, Inc.*, 2010 EHB 489, 493; *Commonwealth of Pennsylvania, Department of Environmental Protection v. Neville Chemical Co.*, 2004 EHB 744, 746.

Full disclosure of a party's case underlies the discovery process before the Board. *Pennsylvania Trout v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 2003 EHB 652, 657. After reviewing the discovery requested and the Appellant's Objections we grant the Department's Motion to Strike the Objections. The Department's Discovery is seeking information discoverable under the Pennsylvania Rules of Civil Procedure. Appellant through its Objections has stymied the Department's legitimate requests such as those

seeking the identity of witnesses and exhibits. Appellant has simply refused to provide any information whatsoever. This is neither in accordance with the Pennsylvania Rules of Civil Procedure nor our Order.

We have never seen a party after being ordered to file full and complete responses to discovery requests instead file objections to every interrogatory, request for production, and request for admission except to identify the attorney of the party who prepared the responses. Appellant's objections have totally stymied the legitimate discovery requested by the Department. A party is entitled to discovery of a broad array of information in discovery such as the very basic information requested by the Department in this case which Appellant has refused to provide.

Although we would be well within our discretion to grant the Department's Motion for Sanctions and dismiss the Appellant's Appeal or limit it from calling any witnesses at the merits hearing, we believe this is too severe a sanction at this point in the litigation. *See Schlafke v. Commonwealth of Pennsylvania, Department of Environmental Protection*, 2013 EHB 678, 680; *Lebo v. Commonwealth of Pennsylvania, Department of Environmental Protection*, 2013 EHB 469, 475-476. Instead, we will enter an appropriate Order overruling the Objections and directing the Appellant to Answer the Interrogatories and produce documents pursuant to the Request for Production.

In the interests of justice, we will also extend the discovery period for a relatively short period of time and consequently extend the deadline for the filing of dispositive motions. At the end of this period, if no dispositive motions are filed we will promptly schedule this matter for hearing.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOUTH FAYETTE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2014-071-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND RANGE RESOURCES-APPALACHIA, LLC, Permittee	:	

O R D E R

AND NOW, this 27th day of April, 2015, following review of the Motion to Strike, the Motions for Sanctions, and the Motion to Extend Discovery, it is ordered as follows:

1) The Objections of the Appellant to the Interrogatories, Requests for Production, and the Request for Admissions are overruled.
2) On or before **May 8, 2015,** Appellant shall serve full and complete answers to Interrogatories including the Interrogatories served with the Request for Admissions and shall further produce all documents responsive to the Requests for Production.
3) Discovery shall be completed on or before **June 29, 2015.**
4) Dispositive Motions, if any, shall be filed on or before **July 31, 2015.**
5) Counsel shall file a *joint status report* with the Board on **June 10, 2015.**

ENVIRONMENTAL HEARING BOARD

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

DATED: April 27, 2015

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M.C. RESOURCE DEVELOPMENT COMPANY a/k/a M.C. RESOURCES DEVELOPMENT, INC.	:	
v.	:	**EHB Docket No. 2015-023-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 7, 2015**

OPINION AND ORDER ON
PETITION FOR SUPERSEDEAS

By Michelle A. Coleman, Judge

Synopsis

The Board grants an appellant's petition for supersedeas of the Department's revocation of its public water supply permit. The appellant has established that it will suffer irreparable economic harm from the revocation of its permit and that one of its customers also stands to suffer significant economic injury. There is no evidence of harm to the environment. The appellant has potential for success on the merits.

O P I N I O N

M.C. Resource Development Company a/k/a M.C. Resources Development, Inc. ("MCRD") has appealed a January 28, 2015 letter from the Department of Environmental Protection (the "Department") revoking MCRD's public water supply permit no. 3546482, which authorizes the operation of Pine Valley Farms Spring #1 ("Pine Valley Springs") as a bulk water hauling system located in East Brunswick Township, Schuylkill County. The permit is issued pursuant to the Pennsylvania Safe Drinking Water Act of 1984, 35 P.S. §§ 721.1 – 721.17 ("Safe Drinking Water Act" or "the Act"). On March 10, 2015, MCRD filed a petition for

supersedeas accompanied by an application for a temporary supersedeas. The Department responded to MCRD's application for temporary supersedeas on March 12, 2015. The Board held a conference call with the parties on the same day, granting MCRD's application for a temporary supersedeas and setting a date for a hearing on the petition for supersedeas. The Board conducted a one-day hearing on March 20, 2015. After the conclusion of the hearing we issued an order extending the temporary supersedeas until the Board reached a decision on the supersedeas itself, which, with the agreement of the parties, was conditioned on MCRD's compliance with its permit conditions. (Notes of Transcript page ("T.") 341.) Having had the benefit of reviewing the transcript of the supersedeas hearing received on April 21, 2015, the matter is now ripe for decision.

Background

MCRD's sole asset is Pine Valley Springs. (T. 28.) Pine Valley Springs consists of two groundwater well sources, and a small infrastructure network of pipelines, water treatment instruments, and distribution buildings. (MCRD Ex. 16; T. 28, 31.) The treatment at Pine Valley Springs consists of ultraviolet light and cartridge treatment, but that treatment is not used for the purpose of generating finished water.[1] (T. 32-33, 42, 59-61, 119-20, 268.) MCRD has never provided finished water. (T. 57.) MCRD uses Pine Valley Springs for harvesting spring water for sale to bottled water plants in the area. MCRD sells raw water to three customers—Crossroads Beverage Group, Niagara Bottling, and Ice River Springs—that provide further treatment to produce water for human consumption that is then bottled and sold. (T. 35-35, 147, 150.) The water sold by MCRD consists of water that it harvests from Pine Valley Springs and

[1] Finished water is defined as "[w]ater that is introduced into the distribution system of a public water system and is intended for distribution and consumption without further treatment, except as necessary to maintain water quality in the distribution system (for example, booster disinfection or addition of corrosion control chemicals)." 25 Pa. Code § 109.1. Water not deemed finished water is referred to as raw water.

water that it purchases from several other sources. (T. 147.) Crossroads Beverage Group is the only bottling company among the three that is regulated by the Department since it sells bottled water in containers exceeding one-half gallon in volume; smaller volume containers are regulated exclusively by the U.S. Food and Drug Administration. (T. 34, 161.)

MCRD first obtained a public water supply construction permit for Pine Valley Springs in 2001. (DEP Ex. 3.) It obtained its public water supply operations permit in 2002. (DEP Ex. 5.) The operations permit indicates that MCRD is a public water supply that operates as a bulk water hauling system.[2] Discussions between the Department and MCRD occurred in 2007 regarding whether MCRD met the definition of a public water system due to the fact that it did not appear to be hauling water to 25 customers at least 60 days out of the year, and it did not appear to be hauling finished water. (DEP Ex. 25; T. 134-40.) The Department later suspended MCRD's permit in March 2013 due to MCRD's alleged failure to meet the definition of a public water supply.[3] (MCRD Ex. 7; T. 65.). After some discussions back and forth between the Department and MCRD, the Department reinstated the permit in April 2014 with revised special conditions requiring MCRD to make more frequent reports to the Department. (MCRD Ex. 11.) Pine Valley Springs was inspected in the fall of 2014 and was found to be in violation of its permit conditions. (DEP Ex. 13, 16.) The Department conducted an enforcement conference

[2] A "bulk water hauling system" is defined as:

> A public water system which provides water piped into a carrier vehicle and withdrawn by a similar means into the user's storage facility or vessel. The term includes, but is not limited to, the sources of water, treatment, storage or distribution facilities. The term does not include a public water system which provides only a source of water supply for a bulk water hauling system.

25 Pa. Code § 109.1.

[3] MCRD states at one point that it understood the Department's 2013 suspension of its permit as only a suspension of the bulk water hauling portion of the permit. (MCRD Ex. 6; T. 67-68.) The Department counters that there is only one permit. The permit is not parsed out in terms of a public water supply permit with a divisible bulk water hauling section; rather, bulk water hauling is merely the *type* of public water supply permit MCRD possessed. (T. 227, 316-17.)

with James J. Land, Jr., managing partner of MCRD, on November 20, 2014, at which point it became clear to the Department that MCRD was not operating in a way that the Department believed to be consistent with the definition of a public water supply. (DEP Ex. 19, 20, 21.) The permit revocation followed.

After MCRD has possessed a public water supply permit for 14 years, the Department now takes the position that MCRD is not an entity subject to regulation under the Safe Drinking Water Act because MCRD does not meet the Act's definition of a public water system. While under some circumstances a Department determination that an entity should no longer be regulated might mean that the entity could continue its business without being subject to permitting requirements, the situation here is not that simple. The Department has conditioned the permit of MCRD's primary customer, Crossroads Beverage Group, on its purchasing raw water only from permitted entities. (DEP Ex. 10.) The Department has, therefore, placed MCRD in something of a bind. The Department will not give MCRD a permit because its operations do not constitute a public water system, yet MCRD cannot continue with a substantial portion of its water selling business without a permit.

Supersedeas Standard of Review

A supersedeas is an extraordinary remedy that is only appropriate when there is a clear demonstration of requisite need. *Guerin v. DEP*, 2014 EHB 18, 22; *Dougherty v. DEP*, 2014 EHB 9, 11; *Oley Twp. v. DEP*, 1996 EHB 1359, 1361-62. The Environmental Hearing Board Act of 1988, 35 P.S. §§ 7511 – 7514, and the Board's rules provide that the grant or denial of a supersedeas will be guided by relevant judicial precedent and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a). Among the factors to be considered are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the

likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a); *Neubert v. DEP*, 2005 EHB 598, 601.

In order for the Board to grant a supersedeas, a petitioner generally must make a credible showing on each of the three regulatory criteria. *Neubert v. DEP*, 2005 EHB at 601; *Lower Providence Twp. v. DER*, 1986 EHB 395, 397. If a petitioner fails to carry its burden on any one of the factors listed under 25 Pa. Code § 1021.63(a), the Board need not consider the remaining requirements for supersedeas relief. *Dickinson Twp. v. DEP*, 2002 EHB 267, 268; *Oley Twp. v. DEP*, 1996 EHB at 1369. The Environmental Hearing Board Act also provides a distinct limitation that "[a] supersedeas shall not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect." 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b) (Board rule providing same). In circumstances where there will not be pollution or injury to the public, the issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802; *Svonavec, Inc. v. DEP*, 1998 EHB 417, 420; *see also Pa. PUC v. Process Gas Consumers Group*, 467 A.2d 805, 808-09 (Pa. 1983).

Irreparable Harm to the Petitioner[4]

MCRD alleges that it will suffer irreparable financial harm if the supersedeas is not granted due to its inability to sell water to Crossroads Beverage Group. After suspending

[4] MCRD cites in its petition *Mundis, Inc. v. DEP*, 1998 EHB 766 and *202 Island Car Wash v. DEP*, 1998 EHB 443, for the proposition that irreparable harm and harm to the public need not be considered where the Department acts without authority. MCRD has not argued that the Department's revocation is not authorized by Section 7(k) of the Safe Drinking Water Act, regarding permit suspension, revocation, and modification. 35 P.S. § 721.7(k). MCRD instead argues that the Department's interpretation of the definition of "public water system" in the Safe Drinking Water Act is clearly erroneous and contrary to its plain meaning. At this point, it is clear that the parties have a significant disagreement over the proper interpretation of what constitutes a public water system under the Act. Neither party has firmly established that the position it has advanced is the indisputably correct interpretation. Therefore, a discussion of the relevant harms is warranted.

MCRD's permit in 2013, the Department informed Crossroads that, because Pine Valley Springs was no longer permitted, Crossroads could no longer purchase water from MCRD and continue to operate under the permit by rule provisions of the regulations.[5] (MCRD Ex. 24; T. 152.) *See* 25 Pa. Code § 109.1005(c)(1). The same holds true with regard to the Department's revocation of MCRD's permit. Since the Department does not regulate MCRD's other two customers, Niagara Bottling and Ice River Springs, MCRD's ability to sell water to them is apparently not directly impacted by the permit revocation.

Managing partner James Land testified that MCRD stands to lose $400,000 per year from the loss of the Crossroads account. (T. 87.) Land testified that MCRD already lost $35,000 – $40,000 in revenue in February of this year from not being able to sell water to Crossroads. (T. 90.) Land also testified that MCRD could lose $300,000 in yearly revenue if Niagara and Ice River decide to find other water sources due to a perceived issue with MCRD's reputation as a result of the permit revocation, although Land says he has assuaged those concerns for now. (T. 90.) We do not need to dwell inordinately on irreparable harm. With the loss of Crossroads as a customer, it is clear that MCRD would suffer a severe financial loss consisting of more than half of its yearly revenue. This kind of economic injury constitutes irreparable harm. *Power Operating Co. v. DEP*, 1997 EHB 1186, 1198-99; *Keystone Cement Co. v. DER*, 1992 EHB 590, 597; *Baumgardner v. DER*, 1988 EHB 786, 788.

Injury to the Public and Other Parties

In terms of harm to other parties, Kirk Richmond, Chief Operating Officer of Crossroads, testified that the inability to purchase water from Pine Valley Springs will likewise have a serious financial impact on Crossroads. Crossroads purchases all of its water from MCRD, and

[5] There is no evidence of the effect on MCRD or any other entity during the time of the permit suspension.

approximately 50% of that water comes from Pine Valley Springs. (T. 147, 151, 160.) The other 50% of the water MCRD purchases from other sources and resells it to Crossroads. Richmond testified that losing Pine Valley Springs as a source of water will put it at a competitive disadvantage and will result in an economic loss that could mean the termination of 20 of its 110 employees, as well as a monetary loss of anywhere between several hundred thousand dollars to millions of dollars. (T. 163-64.) Richmond stated that he did not believe there were any other sources on the market that could replace the volume of water that he currently receives from Pine Valley Springs, and that any new sources would likely necessitate an expansion of his freight. (T. 160.)

The Department has suggested to Crossroads that Crossroads could amend its own permit to incorporate Pine Valley Springs as a source. (T. 161.) Richmond contends that adding a source to a permit takes an "extreme amount of time." (T. 160.) The level of effort involved in adding a source to a permit is unclear. It is also unclear what business implications are involved in incorporating an unpermitted source of one company into the public water supply permit of another company. Although we do not need to resolve these issues here, it is clear that Crossroads will be impacted by the revocation of MCRD's permit for a period of time sufficient enough to cause economic injury.

Regarding injury to the public, the Department voices concern over a potential impact to Indian Run, a stream that is fed in part by an unnamed tributary originating from a spring nearby Pine Valley Springs' two groundwater wells. (DEP Ex. 29; T. 182-84, 278-80.) This concern centers on a special condition in MCRD's permit that the parties have referred to as the passby flow requirement. The permit condition reads as follows:

> When production begins, the conservation bypass of 56.1 gpm (.125cfs) shall be maintained immediately downstream from the

> spring and be measured at least daily. When the stream flow is less than 56.1 gpm (.125 cfs) no water may be withdrawn from Wells 1 and 2. The bypass flow shall be recorded daily, and all data shall be submitted monthly to the Pottsville District Office, c/o Sanitarian Supervisor.

(DEP Ex. 6.) This condition originates from a study conducted in 2001 by the Pennsylvania Fish and Boat Commission on the potential impact of MCRD's proposed water withdrawal on Indian Run and the unnamed tributary to Indian Run. (MCRD Ex. 22.) Considering the biological habitat of Indian Run and its unnamed tributary, the Fish and Boat Commission recommended that flow be maintained at 56.1 gallons per minute (gpm). A substantially similar version of this condition has been in MCRD's permit since 2002. (DEP Ex. 5.)

We are certainly concerned about any impacts to Indian Run and its unnamed tributary; however, the Department did not clearly explain what those impacts will be. The Department did not present the testimony of anyone who could explain the detriment to Indian Run given MCRD's continued operation, or the net effect on Indian Run after 14 years of operation. Although the burden rests with the petitioner in a supersedeas proceeding, if the Department has concerns of impacts to the environment that are not self-evident, it is incumbent upon the Department to come forward and explain the harm. *See Power Operating Co. v. DEP*, 1997 EHB at 1200; *Pa. Mines Corp. v. DEP*, 1996 EHB 808, 814.

Gary Kribbs, MCRD's consulting hydrogeologist, was the only witness to offer testimony on the impact to the environment. Kribbs and his associates conduct the water sampling for Pine Valley Springs and send the samples to a certified lab for water quality analysis. (MCRD Ex. 18, 19; T. 173-74.) Although admittedly not a stream biologist, he offered the opinion that water quality has always been very good and there would be no harm to Indian Run due to MCRD's continued operation. (T. 173-74, 178-79, 182.) Conversely, there is no indication of what the impact to Indian Run will be if MCRD's permit revocation stands. As it

is, MCRD augments the flow to the unnamed tributary so that it flows at 56.1 gpm. We are told that the 56.1 gpm requirement is reiterated as a requirement of the Delaware River Basin Commission. (T. 92, 185.) Presumably the condition will still be complied with if MCRD continues its operation without a public water supply permit from the Department. (*See* DEP Ex. 22.) We do not have any information to conclude that MCRD is currently harming Indian Run. At the same time, we do not know whether Indian Run would suffer greater or lesser harm if MCRD stops operating at its current level, or if there are any alternative measures that would benefit Indian Run.[6]

We hope to have a fuller characterization of any environmental harms, if they exist, as this case proceeds on the merits. Based on what we have so far, there is not enough evidence to conclude that allowing MCRD's permit to remain in place will cause any harm to the environment. To the extent that there is a potential risk of harm from any failure on MCRD's part to comply with its permit conditions, we will exercise our discretion to condition the supersedeas on continued compliance with those permit conditions. 25 Pa. Code § 1021.63(c).

Likelihood of Success on the Merits

Under the Safe Drinking Water Act, the Department "may issue such orders suspending, revoking, or modifying permits that are necessary to correct any violation of this act or regulations adopted under this act, or for noncompliance with a condition of the permit, or upon a finding of a condition prejudicial to the public health." 35 P.S. § 721.7(k). The Department's

[6] Kribbs also opined that there has been an inadequate characterization of the baseflow to the spring and to Indian Run. (T. 197-99.) The passby permit condition suggests that there is a hydrogeologic connection between MCRD's groundwater wells, the surface spring giving rise to the unnamed tributary, and Indian Run, but there was no evidence substantiating such a connection.

stated reason for revoking MCRD's permit is that Pine Valley Springs does not meet the definition of a public water system under the Safe Drinking Water Act.[7] (DEP Ex. 22.)

Assuming for now that the Department may revoke a permit for this reason, the merits of this case primarily hinge on the interpretation of what constitutes a "public water system." The Safe Drinking Water Act defines a public water system as:

> A system for the provision to the public of water for human consumption which has at least 15 service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year. The term includes:
>
> (1) Any collection, treatment, storage and distribution facilities under control of the operator of such system and used in connection with such system.
>
> (2) Any collection or pretreatment storage facilities not under such control which are used in connection with such a system.
>
> (3) A system which provides water for bottling or bulk hauling for human consumption.

35 P.S. § 721.3.[8] The parties advance different interpretations. The Department argues that any public water system must first meet the requirements of the initial sentence of the definition—15 service connections or regularly serving at least 25 individuals daily for 60 days out of the year. (T. 246.) The Department also argues that the three examples that follow are circumscribed by that limitation. MCRD, on the other hand, argues that those examples provide three discrete

[7] Failing to meet the definition of a public water system is not explicitly identified as grounds for revocation. The Department has not told us whether it views this as a violation of the Act.

[8] The regulatory definition of public water system is similar but not identical:

> A system which provides water to the public for human consumption which has at least 15 service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year. The term includes collection, treatment, storage and distribution facilities under control of the operator of the system and used in connection with the system. The term includes collection or pretreatment storage facilities not under control of the operator which are used in connection with the system. The term also includes a system which provides water for bottling or bulk hauling for human consumption. Water for human consumption includes water that is used for drinking, bathing and showering, cooking, dishwashing or maintaining oral hygiene.

25 Pa. Code § 109.1.

categories expanding the definition of a public water system. In MCRD's view, for instance, it does not matter if a "system which provides water for bottling or bulk hauling for consumption" regularly serves at least 25 individuals 60 days out of the year or if it has at least 15 service connections, it still meets the definition of a public water system.

Proper statutory interpretation involves a careful analysis of the web of interrelated provisions of a statutory and regulatory scheme to effectively discern the meaning of a particular section or term operating within the greater whole. *See Dep't of Envtl. Res. v. Rannels*, 610 A.2d 513, 515 (Pa. Cmwlth. 1992). Thus, to divine the proper meaning of a public water system, it is necessary to look to several other terms that are encompassed by the definition of a public water system. Crucially among these we believe is the definition of "system," a recurring term in the definition of a public water system that appears to be a necessary prerequisite to meeting the definition of a public water system. The regulations define a system as:

> (i) A group of facilities used to provide water for human consumption including facilities used for collection, treatment, storage and distribution. The facilities shall constitute a system if they are adjacent or geographically proximate to each other and meet at least one of the following criteria:
>
> (A) The facilities provide water to the same establishment which is a business or commercial enterprise or an arrangement of residential or nonresidential structures having a common purpose and includes mobile home parks, multi-unit housing complexes, phased subdivisions, campgrounds and motels.
>
> (B) The facilities are owned, managed or operated by the same person.
>
> (C) The facilities have been regulated as a single public water system under the Federal act or the act.
>
> (ii) This definition may not be interpreted to require two or more currently-regulated public water systems to become one system.

25 Pa. Code § 109.1. The regulations define a "facility" as "[a] part of a public water system used for collection, treatment, storage or distribution of drinking water." 25 Pa. Code § 109.1. A

"source" is defined as "[t]he place from which water for a public water system originates or is derived, including, but not limited to, a well, spring, stream, reservoir, pond, lake or interconnection." 25 Pa. Code § 109.1. Admittedly, the definitions can be somewhat circular. *See Dirian v. DEP*, 2013 EHB 224, 233. We note that the above definitions are only a selection of the provisions that we believe will become important as the case moves forward.

Thus far, neither party has presented us with a comprehensive analysis of the interaction of the various terms and definitions used across the Safe Drinking Water Act and its regulations, and how those terms and definitions apply to MCRD's Pine Valley Springs. The Department presented testimony that it does not regulate merely sources. (T. 249.) Instead, it permits entire systems, which consist of source, treatment, and distribution. (T. 232.) While the Department's interpretation appears consistent with the definitions, Pine Valley Springs is not merely a source. There is also a network of infrastructure, some amount of treatment, and an outlet for distribution via trucking. Although there is evidence that MCRD has not served 25 individuals at least 60 days out of the year, at this point neither party has convinced us that its interpretation will carry the day.

In reaching our decision,

> It is helpful to remember that the Board is not called upon to decide the case on the merits in the context of a supersedeas application. The Board is, at most, required to make a prediction based upon a limited record prepared under rushed circumstances of how an appeal might be decided at some indeterminate point in the future. Based upon that prediction, as well as an assessment of who will be hurt the most if the status quo is maintained during the litigation process, the administrative law judge is simply called upon to decide whether that status quo should be maintained until the case can be decided based upon a proper record by the full Board. Of course, it is worth repeating that all bets are off if there is ongoing harm to the environment.

Global Eco-Logical Servs., Inc. v. DEP, 1999 EHB 649, 651-52; *see also Weaver v. DEP*, 2013 EHB 486, 489-90. Weighing the likelihood of success on the merits and balancing the relevant harms to MCRD and Crossroads, we find that a supersedeas should be issued until the case can be adjudicated based upon a more complete record by the full Board. We do not find that maintaining the status quo will result in harm to the environment or other members of the public, while the harm to MCRD and Crossroads is quite significant. We look forward to a more robust and detailed analysis by the parties as the case moves forward on the merits.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

M.C. RESOURCE DEVELOPMENT COMPANY a/k/a M.C. RESOURCES DEVELOPMENT, INC.	:	
v.	:	**EHB Docket No. 2015-023-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 7th day of May, 2015, it is hereby ordered as follows:

1. The appellant's petition for supersedeas is **granted**;

2. The appellant shall continue to comply with all conditions and special conditions of its public water supply permit no. 3546482 or risk the termination of the supersedeas.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: May 7, 2015

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: May 8, 2015**

OPINION IN SUPPORT OF
ORDER GRANTING APPELLANTS' AND INTERVENOR'S MOTIONS IN LIMINE
TO EXCLUDE THE DEPARTMENT'S EXPERT TESTIMONY

By Steven C. Beckman, Judge

Synopsis

The Board grants Appellants' and Intervenor's motions in limine to exclude the testimony of the Department's expert witness. The Board does not allow experts to give opinions on questions of law.

O P I N I O N

Presently before the Pennsylvania Environmental Hearing Board are motions in limine by Appellants National Fuel Gas Midstream Corporation and NFG Midstream Trout Run, LLC (collectively, "NFG Midstream") and Intervenor Seneca Resources Corporation ("Seneca") to exclude expert testimony by Frank Macciocca, a proposed witness for the Department of Environmental Protection ("Department").[1] On or about August 14, 2013, NFG Midstream

[1] Attorney Macciocca is Assistant Counsel with the Department's Office of Chief Counsel, General Law Division, and also licensed as a certified public accountant. The Department contends Attorney Macciocca provided the expert opinion in his capacity as a CPA. Appellants and Intervenor contend that Attorney Macciocca is opining in his capacity as an attorney for the Commonwealth.

applied to the Department for Pennsylvania General Plan Approval and/or General Operating Permit for Natural Gas Compression and/or Processing Facilities ("GP-5") for the construction and operation of a natural gas compressor facility ("Bodine Compressor Station") in McIntyre Township, Lycoming County. The Department issued a GP-5 for the Bodine Compressor Station on October 10, 2013. As part of its consideration of the GP-5 application, the Department performed a Single Source Determination and Aggregation Analysis ("Determination") which resulted in aggregation of the emissions from the Bodine Compressor Station with those from a natural gas well pad ("Well Pad E") owned and operated by Seneca. NFG appealed this determination on November 12, 2013, and Seneca was granted intervention on April 30, 2014.

Apparently, while the Parties conducted discovery and attempted to negotiate a settlement in this matter, the Department reevaluated the original Determination based on new information obtained from NFG Midstream. The conclusions of that reevaluation were memorialized in a second document dated March 31, 2015 (the "Reevaluation"). Relevant to the issues raised in present motions, the Reevaluation noted that NFG Midstream and Seneca were owned by the same corporate parent (National Fuel Gas Company), the three corporate entities shared a number of executive officers, and that the corporate parent's operations were integrated to such extent that NFG Midstream and Seneca were "more like different sections of one organization."[2] The Reevaluation concluded that "[t]he totality of the circumstances . . . supports the Department's conclusion that [the] corporate relationships [between NFG Midstream and Seneca] fulfill the SEC definition of 'control'." In contrast, the original

[2] A Department guidance document provides for a case-by-case determination of the existence of common control, to be guided by the Securities and Exchange Commission's definition of "control" as well as contractual arrangements or the existence of a support/dependency relationship.

Determination found "common control" based upon NFG Midstream and Seneca's mutual corporate parent, the two entities' contractual arrangement, and a determination that a support/dependency relationship existed between the two.

The Department's prehearing memorandum states that "Frank Macciocca will be called to provide an expert opinion testify[ing] that the corporate relationships among the business entities establish common control." Among other reasons, Appellants and Intervenor argue that Mr. Macciocca's expert testimony must be excluded because it constitutes a legal opinion. We agree.

The Board discussed expert testimony at length in *Rhodes v. DEP*, 2009 EHB 237. As we noted there, "[i]t is black-letter law that experts may not give legal opinions." 2009 EHB at 239. One of the fundamental issues contested in this matter is whether NFG Midstream and Seneca are under "common control" for the purposes of aggregating air emission sources. *See* 25 Pa. Code § 127.83 (adopting 40 C.F.R. § 52); 25 Pa. Code § 121.1 (defining "facility" and "Title V facility"). The finding of facts regarding the relationship between NFG Midstream and Seneca, and the application of those facts to the regulations to determine whether common control exists in this case, is solely the Board's responsibility. *See Rhodes*, 2009 EHB at 239, 241 (citing *Bergman v. United Services Auto Ass'n*, 742 A.2d 1101 (Pa. Super. 1999)).

The Department argues that the "Board's decision here turns on an interpretation of the facts, law, and evidence concerning the Securities and Exchange Commission's definition of control." Setting aside that the Board's decision actually turns on the Pennsylvania regulations cited above—rather than an SEC regulatory definition—the Board notes that Macciocca's application of facts to federal securities regulations is still legal analysis leading to a legal opinion.[3]

[3] Further, expert testimony will generally only assist us to understand the evidence or determine a fact in issue if it represents scientific, technical, or other specialized knowledge beyond that possessed by a

Mr. Macciocca's sole opinion presented in his report is that "a 'common control relationship' of ownership as that phrase is used in the Department's Guidance Document, exists between the Bodine Compressor Station and Well Pad E." This Opinion reserves ruling on the question of the significance of the Guidance Document in deciding the issues in this case. Even assuming the Guidance Document applies, however, by accepting Mr. Macciocca's conclusion, the Board would derogate its duty to independently adjudicate disputes based upon the evidence of record. *See Rhodes*, 2009 EHB at 239. Accordingly, the Board granted Appellants' and Intervenor's motions by order dated May 5, 2015. A copy of that order is attached.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: May 8, 2015

c: **DEP, General Law Division:**
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typical layperson, or for that matter, the Judges of this Board. *Rhodes*, 209 EHB at 239 (citing Pa.R.Ev. 702). We do not find the facts discussed in Mr. Macciocca's expert report, derived from publicly available information, as so complicated that the assistance of expert testimony is necessary.

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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	:	

O R D E R

AND NOW, this 5th day of May, 2015, following review of the Motions in Limine filed by Appellants National Fuel Gas Midstream Corporation and NFG Midstream Trout Run, LLC and Intervenor Seneca Resources Corporation for the exclusion of expert testimony of Frank Macciocca, the Board orders that the Motion is granted. An opinion on the Motions will follow.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: May 5, 2015

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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: May 8, 2015**

OPINION IN SUPPORT OF
ORDER GRANTING THE DEPARTMENT'S MOTION IN LIMINE
TO PRECLUDE CALLING DEPARTMENT COUNSEL AS FACT WITNESSES

By Steven C. Beckman, Judge

Synopsis

The Board grants the Department's motion in limine to preclude Appellants and Intervenor from calling the Department's counsel as fact witnesses. Legal analysis and advice given by Department attorneys to the client as part of the decision-making process is protected from discovery or being subject to testimony at hearing except in certain circumstances that do apply in this case.

O P I N I O N

This Opinion is issued in support of the Board's May 5, 2015 order granting a motion in limine by the Department of Environmental Protection ("Department") to preclude Appellants National Fuel Gas Midstream Corporation and NFG Midstream Trout Run, LLC (collectively, "NFG Midstream" or "Appellants") and Intervenor Seneca Resources Corporation ("Seneca") from calling Department Counsel Geoffrey Ayers and Douglas Moorhead as fact witnesses during the hearing on this matter.

On or about August 14, 2013, NFG Midstream applied to the Department for Pennsylvania General Plan Approval and/or General Operating Permit for Natural Gas Compression and/or Processing Facilities ("GP-5") for the construction and operation of a natural gas compressor facility (the "Bodine Compressor Station") in McIntyre Township, Lycoming County. The Department issued a GP-5 for the Bodine Compressor Station on October 10, 2013. As part of its consideration of the GP-5 application, the Department performed a Single Source Determination and Aggregation Analysis ("Determination") which resulted in aggregation of the emissions from the Bodine Compressor Station with those from a natural gas well pad ("Well Pad E") owned and operated by Seneca. NFG Midstream appealed the Determination on November 12, 2013, and Seneca was granted intervention on April 30, 2014.

During the pendency of the appeal, the Parties conducted discovery and attempted to negotiate a settlement. During that time, the Department reevaluated the original Determination based on new information obtained from NFG Midstream. The conclusions drawn were then memorialized in a second document dated March 31, 2015 (the "Reevaluation"). As it did in the original Determination, the Department concluded in the Reevaluation that all three criteria for aggregating air emission sources were met, such that the Bodine Compressor Station and Well Pad E must be treated as a single source for air pollution permitting purposes. In their prehearing memorandum, the Appellants identified Regional Counsel Ayers and Assistant Counsel Moorhead as fact witnesses they intended to call during the hearing. [1]

[1] Intervenor Seneca did not respond to the Department's motion, presumably because it had not listed either Regional Counsel Ayers or Assistant Counsel Moorhead as a proposed fact witness in its prehearing memorandum. The Department represents in its motion, however, that counsel for Seneca expressed an interest in also eliciting testimony from Regional Counsel Ayers regarding the Reevaluation.

The Board has previously had occasion to consider motions in limine by the Department to preclude Appellants from calling Department counsel as witnesses in appeals where they are counsel-of-record. The Department quotes one such case, noting that "the Board will rarely allow a party to depose or otherwise interrogate another party's attorney." *PA Waste, LLC v. DEP*, 2010 EHB 77, 78. Indeed, Board case law places "the burden of convincing us that the information sought is unique to counsel and will not violate the attorney-client privilege or the attorney work-product doctrine" on the party seeking to call another party's counsel-of-record to testify at the hearing. *M & M Stone v. DEP*, 2009 EHB 213, 225.

In their response to the Department's motion, Appellants argue that testimony from Regional Counsel Ayers is necessary to explore the Department's determination of common control in the Reevaluation.[2] They argue that the deposition testimony of other Department staff establishes (1) that Attorney Ayers was the author of most of the section of the Reevaluation discussing the common control factor and (2) that no other witness can testify to the factual basis for the conclusion that the compressor station and well pad are under common control. Appellants are further concerned that the factual basis for the conclusion is contained in an undisclosed email from Attorney Frank Macciocca—from whom the Department sought to elicit expert testimony on the subject—to Attorney Ayers.

It strikes us that NFG Midstream's arguments are substantially the same as those made by the appellants in an earlier discovery dispute in *PA Waste*. PA Waste asserted that the Department attorney at issue there was intimately involved in the decision being appealed, and

[2] At an in-person prehearing conference on May 4, 2015, the Parties stipulated that the issue of the proper Standard Industrial Classification ("SIC") code for installations such as the Bodine Compressor Station remained in dispute, notwithstanding a settlement exercise which identified the Station as having the same SIC code as Well Pad E. Accordingly, the impetus for questioning Assistant Counsel Moorhead has been resolved.

had personal knowledge of facts bearing on that decision. In our opinion precluding PA Waste from deposing the Department attorney, we stated:

> [I]n most situations, the attorney is only one member of a team of advisors and is not the final decision-maker, which means that any factual information that the attorney might impart is typically obtained indirectly and is more productively available from direct sources with personal knowledge.

PA Waste, 2009 EHB 320. Between the Parties' filings and oral arguments during the May 4, 2015 prehearing conference, there appears to be no dispute that the information underpinning the Reevaluation's "common control" conclusion came from publicly available documents provided by NFG Midstream itself. NFG Midstream provides no other explanation or suggestion of what facts may be in the exclusive knowledge of Attorney Ayers.

Further, "there is no exception to the attorney-client privilege for advice given by an attorney as part of the adjudicatory decision making process." *Sedat, Inc. v. Dept. of Envtl. Res.*, 641 A.2d 1243, 1245 (Pa. Cmwlth. 1994). To the extent that Attorney Ayers' communications with Department staff consisted of his application of facts to law, the analysis would appear to be protected by both the attorney-client privilege and the attorney work-product doctrine.[3] It is not Attorney Ayers' or Attorney Macciocca's interpretation of common control that matters in this case, but the *Department's* interpretation. *See PA Waste*, 2009 EHB 321. We further observe that if "the Department's decision-makers relied upon an official Departmental interpretation [communicated to them by a Department attorney], they are fully capable of saying so in their ongoing depositions," or during testimony at the hearing. *Id.* In any event, it is up to the Board to decide whether the Department acted in accordance with the law. For the foregoing reasons,

[3] We note that Appellants and Intervenor contended that Attorney Macciocca was offering an expert report in his capacity as a Department attorney, and that they successfully moved to preclude his testimony on the grounds that it was a legal opinion.

the Board granted the Department's motion by order dated May 5, 2015. A copy of that order is attached.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: May 8, 2015

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	:	

O R D E R

AND NOW, this 5th day of May, 2015, following review of the Department's Motion in Limine to Preclude Calling Department Counsel Geoffrey Ayers and Douglas Moorhead as Fact Witnesses ("Motion"), the Board orders that the Motion is granted. An opinion on the Motion will follow.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: May 5, 2015

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BOROUGH OF ST. CLAIR	:	
	:	
v.	:	**EHB Docket No. 2013-118-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLYTHE TOWNSHIP, Permittee	:	**Issued: May 20, 2015**

A D J U D I C A T I O N

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses a neighboring municipality's appeal from an encroachment permit. The municipality has failed to show that it has an interest in the permit that is substantial enough to support standing. The Board finds that the municipality would not have prevailed even if it had standing because it is collaterally estopped from raising some issues, and it has failed to show that there is anything wrong with the Department's analysis or conclusions regarding the merits of the permit. The Board, however, clarifies the scope of the permit due to ambiguous language on the face of the permit.

FINDINGS OF FACT

Stipulated Facts

1. The Pennsylvania Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, No. 325, *as amended*, 32 P.S. §§ 693.1 – 693.27 ("Encroachments Act"); the Clean Streams Law, Act of June 22, 1937, P.L.

1987, No. 394, *as amended*, 35 P.S. §§ 691.1 – 691.1001 ("Clean Streams Law"); the Flood Plain Management Act, the Act of October 4, 1979, P.L. 581, *as amended*, 32 P.S. §§ 679.101 – 679.601 ("Flood Plain Management Act"); Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder. (Parties' Joint Stipulation of Fact Number ("Stip.") 1.)

2. The Department has the duty and authority to administer and issue water obstruction and encroachment permits to developers seeking to impact wetlands, waters of the Commonwealth, and other aquatic resources. (Stip. 2.)

3. Blythe Township is a second-class township of the Commonwealth of Pennsylvania located in Schuylkill County. (Stip. 3.)

4. Blythe seeks to construct and operate the Blythe Recycling and Disposal Site ("BRADS Landfill"), a new construction and demolition waste landfill and recycling facility located on Burma Road in Blythe Township, Pennsylvania. (Stip. 4.)

5. The Borough of St. Clair is located in Schuylkill County, Pennsylvania, approximately 2.3 miles west of the BRADS landfill. (Stip. 5.)

6. The Little Wolf Creek is a watercourse with defined bed and banks that flows intermittently and terminates in a pond (the "1364 Pond") that is located between 700 feet and 1,400 feet to the east of the BRADS Landfill site on property owned in full or in part by M. Christopher McCoach. (Stip. 6.)

7. No portion of the Little Wolf Creek currently flows onto the BRADS Landfill site. (Stip. 7.)

8. On February 16, 2006, Blythe Township and the Department entered into an agreement concerning the potential future restoration of the Little Wolf Creek ("the LWC Agreement"). Pursuant to the LWC Agreement under Option 3, the parties agreed as follows:

a. Upon the issuance of a Solid Waste Permit, Blythe Township would install a 1,600 foot pipe of sufficient size to convey the storm flow of the Little Wolf Creek around the landfill from Point A to Point B and to discharge into an open swale on property owned by Reading Anthracite conveying flow to the west;

b. Should the Department seek to restore the Little Wolf Creek, then the Department would seek to obtain any and all permits, permissions, and easements required for the installation of the stream restoration and stormwater conveyance channel, piping, and fill (of the Eastern Pit);

c. If the Department obtained all necessary permits, permissions, and easements, the Department would construct open channels from the 1364 Pond to Point A and from Point B across Reading Anthracite's property to the drainage swale constructed pursuant to the BAMR [Bureau of Abandoned Mine Reclamation] project to the west; and

d. If the Department obtained all necessary permits, permissions, and easements to fill the Eastern Pit and installed the channels to Point A and from Point B, then Blythe Township agreed to provide and install fill materials required to backfill the Eastern Pit creating sufficient grades for positive surface runoff drainage to the Department's channel from the 1364 Pond to Point A.

(Stip. 8.)

9. On July 18, 2012, Blythe Township filed a revised joint permit application prepared by Martin and Martin, Inc. for a wetlands fill permit with the Department. (Stip. 9.)

10. The permit application included, among other things: an application form, site plans, a project narrative, an April 6, 2006 environmental assessment prepared by Seth Bacon, CPSS, an alternatives analysis, a mitigation plan, an analysis of backwater, and a design of pipe and channels. (Stip. 10.)

11. In the Analysis of Backwater Section of the permit application, Martin and Martin, Inc., provided a stormwater hydrology analysis concerning surface water runoff for both pre-

development (existing) and post-development (post-landfill) conditions, and rendered an opinion that no greater build-up of water would occur from the 100-year/24-hour storm event from the construction and use of the BRADS Landfill than would occur prior to such construction and use. (Stip. 11.)

12. In the Design of Pipe and Channels Section of the permit application, Martin and Martin, Inc., provided a stormwater hydrology analysis assuming that the Eastern Pit had been backfilled and the channel and pipe system described in the LWC Agreement had been installed, and rendered an opinion that the permitted channel system and 42-inch HDPE pipe were sufficient to handle all stormwater flow following a 100-year/24-hour storm event. (Stip. 12.)

13. On June 18, 2013, the Department issued State Water Obstruction and Encroachment Permit No. E54-325 to Blythe Township for the BRADS Landfill. (Stip. 13.)

14. The permit authorizes Blythe Township to participate in the restoration of the Little Wolf Creek in the manner described in the LWC Agreement, assuming that the Department obtains all necessary permits, permissions, and easements to do so. (Stip. 14.)

15. On July 13, 2013, notice of the encroachment permit was published in the *Pennsylvania Bulletin*, 43 Pa.B. 4018 (Jul. 13, 2013). (Stip. 15.)

16. On August 9, 2013, St. Clair filed a Notice of Appeal with the Environmental Hearing Board concerning the Department's issuance of the encroachment permit. (Stip. 16.)

17. St. Clair has not performed any scientific tests relevant to any of the issues in this appeal. (Stip. 17.)

18. St. Clair's interest in real property in Blythe Township is limited to two $1.00 fractional leasehold interests obtained from Charles A. Hauser and Julie Fatula. (Stip. 18.)

19. St. Clair acquired these fractional leasehold interests in order to monitor the development of the BRADS Landfill project and to attempt to be in a position to challenge certain actions of the Department concerning the permitting of that project. (Stip. 19.)

20. The owners of the properties adjacent to the eastern boundary of the BRADS Landfill, including M. Christopher McCoach and Taryn Fatula (as a representative of the Bucklar property owners), and Roland Price, Jr. (as a representative of the Borough of St. Clair), on whose property interests the Little Wolf Creek, a portion of the Eastern Pit, the 1364 Pond, and a proposed Department channel is located, will not grant any easements or permit any work to be performed on their property interests concerning the solid waste permit and the encroachment permit issued to Blythe Township. (Stip. 20.)

21. On properties to the immediate west of the BRADS Landfill site, the Pennsylvania Bureau of Abandoned Mines Reclamation ("BAMR") reclaimed abandoned deep and strip pit mines and installed a rip rap drainage swale, but did not install a lined channel. (Stip. 21.)

Additional Findings

22. Blythe Township has now obtained a solid waste permit to build and operate the BRADS Landfill. St. Clair has appealed that permit as originally issued, *Borough of St. Clair v. DEP*, EHB Docket No. 2012-148-L, and as revised, *Borough of St. Clair v. DEP*, EHB Docket No. 2015-017-L. That permit is *not* the subject of this appeal.

23. The majority of the landfill site consists of an unreclaimed surface mine. (*Borough of St. Clair v. DEP*, 2014 EHB 76, Finding of Fact 66.)

24. The surface mine includes an old pit to the east of the landfill footprint that the parties refer to as the "Eastern Pit." (Notes of Transcript Page ("T.") 45-46; Borough of St. Clair Exhibit Number ("S.C. Ex.") 1.)

25. Many decades ago, Little Wolf Creek used to run where the abandoned mine workings are now located. However, the mine workings obliterated the stream. (T. 294, 313; Department of Environmental Protection Exhibit Number ("DEP Ex.") 14.)

26. A small remnant of the stream still exists upgradient (east) of the landfill and the Eastern Pit. (T. 46, 184-85, 189-90; Blythe Township Exhibit Number ("B. Ex.") 20, 21.)

27. Little Wolf Creek is about a foot wide and an inch deep when it flows into the 1364 Pond. (T. 189; B. Ex. 21.)

28. Little Wolf Creek no longer exists downgradient of the 1364 Pond. Any water that overtops the pond does not flow within a defined bed and banks and ends up in abandoned surface mine workings where it ultimately disappears into abandoned deep mine workings below the surface. (T. 45-46, 115, 182-83; B Ex. 1, 20, 21.)

29. There is no existing plan to restore Little Wolf Creek. (T. 295.)

30. In discussing the landfill project with Blythe Township, the Department decided that it wanted to allow for the theoretical possibility that it might someday want to restore Little Wolf Creek. (T. 191, 295.)

31. Therefore, the Department entered into discussions with Blythe Township on how the landfill could be designed to allow for that possibility. (T. 192-95; B. Ex. 5, 6.)

32. Since reestablishing the stream in its historic location through the landfill was not deemed to be a feasible alternative, it was decided to relocate the historic channel around the perimeter of the proposed landfill. This option consisted of the following components: (1) an open rip-rap channel would be installed from the 1364 Pond to a point on the southeast corner of Blythe's property, a distance of approximately 1,200 feet; (2) from there, any flow could enter an inlet to a 42-inch pipe that would be installed approximately 60 feet below the southwestern edge

of the BRADS Landfill and travel 1,600 feet to the southern portion of the BRADS Landfill property; and then, (3) the flow would discharge into an open swale on property owned by Reading Anthracite that would carry the flow into a drainage swale installed pursuant to the BAMR project to the west. (T. 193, 195-97, 201, 342-43; B. Ex. 1, 6, 7.)

33. The hypothetical restored stream would look like this:

a. The small remaining remnant of the natural stream would continue to flow as it does now from its headwaters to the 1364 Pond;

b. The 1364 Pond would empty, if at all, into an open channel designated as Channel A;

c. Channel A would connect to the 1,600-foot pipe at Point A;

d. The water would flow through the pipe;

e. The water would exit the pipe at Point B and enter another open channel designated Channel B;

f. The water would flow through Channel B into the open drainage swale built on the BAMR project and gradually disappear into the ground.

(T. 46, 195-97, 201; S.C. Ex. 1; B. Ex. 6, 7.)

34. The encroachment permit that is the subject of this appeal only authorizes *Blythe Township* to do two things:

a. Fill an isolated .3-acre pocket of non-exceptional value wetlands on the site that is unrelated to the theoretical stream restoration; and

b. Install the 1,600-foot, 42-inch diameter pipe on the landfill site to channel any hypothetical future stream flow in a restored Little Wolf Creek from Point A to Point B.

(T. 54, 202, 292, 299, 301, 329-30, 351-55; B. Ex. 15.)

35. The permitted scope of work is confined to land owned by Blythe Township. (Stip. 8, 14; B. Ex. 6.)

36. The permit does not authorize Blythe Township to install Channel B. (B. Ex. 6.) In the hypothetical event that Little Wolf Creek is ever restored, Channel B would be built by someone else on property owned by Reading Anthracite. (T. 194, 272, 342-43; B. Ex. 1, 6.)

37. If Little Wolf Creek is restored, Blythe Township will backfill the Eastern Pit to provide for positive drainage from Little Wolf Creek into Channel A and through the conveyance pipe. (T. 197.) While the Eastern Pit is being filled, an appropriately-sized channel will be built concurrently to accommodate the stormwater flow that previously would have gone into the Eastern Pit. (T. 215-16.)

38. If Little Wolf Creek is not restored, Blythe Township, as it develops the landfill, will install a mechanically stabilized earthen wall (referred to be the parties as the "MSE Wall") so that the landfill mass does not encroach upon the Eastern Pit. (T. 202-05.)

39. The encroachment permit as written incorrectly says that it covers 6,700 feet of riprap-lined trapezoidal channel when it actually only permits the pipe from Point A to Point B. (T. 354; B. Ex. 6.)

40. The encroachment permit does not authorize any work to be performed by Blythe Township (or anyone else) upgradient (east) of the inlet to the 1,600-foot pipe (i.e., Channel A.) (T. 299, 341, 351, 353-54.)

41. The encroachment permit does not authorize the filling of any wetlands other than the isolated .3-acre pocket of wetlands mentioned in the permit. (T. 356-58; B. Ex. 14, 15.)

42. Flow from Channel B into the unlined rip-rap drainage swale previously built by BAMR would be lost into the ground with or without the landfill in place because that channel is not designed to hold water. No surface water would ever reach the Borough of St. Clair. (Stip. 21; T. 222-24, 272-73.)

43. The Department considered comments submitted by St. Clair during the permit application and review process. (T. 331-34; DEP Ex. 10, 11.)

44. Blythe Township responded to comments from the Pennsylvania Fish and Boat Commission regarding the potential restoration of Little Wolf Creek as a natural watercourse. (T. 81-82, 222-24; B. Ex. 11.)

45. The landfill will not result in the elimination, pollution, or destruction of any portion of a perennial stream. (T. 111, 115.)

46. The 42 inch, 1,600-foot pipe is adequately sized. (T. 102, 229-30, 235-36, 270, 370-72, 377-78, 380-81, 389-91.)

47. The 1,600-foot pipe will not cause any upstream flooding or any other environmental harm, whether or not Little Wolf Creek is ever restored. (T. 168, 172, 198-99, 216-18, 226-35, 330-37; B. Ex. 1.)

48. The Department correctly concluded that the 1,600-foot pipe is the best alternative allowing for the hypothetical restoration of Little Wolf Creek. (T. 191-95, 320, 331-38, 342-43, 368; B. Ex. 1, 5, 11; DEP Ex. 4.)

49. Restoring Little Wolf Creek to a natural water course would not be feasible. (T. 222-24, 343.)

50. The Department correctly concluded that there are no practicable alternatives to avoid further minimizing the impact to the .3-acre isolated wetland on the site. (T. 220-21, 288-95; B. Ex. 12; DEP Ex. 14.)

51. The encroachment permit requires an acceptable mitigation plan for the impact upon the .3-acre wetland by requiring Blythe Township to make a $5,000 contribution to the National

Fish and Wildlife Foundation, Pennsylvania Wetlands Replacement Fund. (T. 221, 288-92; B. Ex. 15; DEP Ex. 14.)

DISCUSSION

Blythe Township is planning to build a construction and demolition waste landfill known as the BRADS Landfill on a site located on Burma Road in Blythe Township, Schuylkill County. The landfill site currently consists of abandoned, unreclaimed coal mine pits. A stream known as Little Wolf Creek used to run where the abandoned pits are now, but that stream was obliterated many decades ago by the surface mining of anthracite coal. A small vestige of the former stream still exists upgradient and east of a pond that is approximately 700 feet east of the landfill site. The remnant of the stream is roughly one foot wide and one inch deep. (T. 189.) There is no longer any stream below the pond.

There are no current plans to restore the stream. Nevertheless, in order to allow for the theoretical possibility that a stream might someday be restored, the Department is requiring Blythe Township to install a pipe at its landfill site to direct and channelize a portion of the hypothetical stream should it ever be restored. In order to build the pipe for the nonexistent stream, the Department required Blythe Township to obtain an encroachment permit, and on June 18, 2013, the Department issued Water Obstruction and Encroachment Permit No. E54-325 (the "encroachment permit") to Blythe Township. The permit authorizes the installation of a 42-inch diameter, 1,600-foot long pipe on the landfill property to accommodate the flow of Little Wolf Creek in case it is ever restored, as well as the filling of an isolated .3-acre pocket of wetlands at another area of the site. (The .3-acre fill is unrelated to the stream restoration issue.) Restoring the stream would require work both upstream and downstream of the pipe, but Blythe Township is not required to do any of that work under the permit. Actual restoration of the

stream seems extremely unlikely because, after the water flows to a drainage swale downgradient of the landfill, the water would simply seep into old abandoned mine workings since the swale was not built to hold surface flow. The Borough of St. Clair, whose border is approximately two miles away from the site of the encroachment, filed this appeal from the issuance of the permit.

I. Standing

The Department argues in its post-hearing brief that St. Clair lacks standing to challenge the encroachment permit. It says that St. Clair's admitted standing with respect to Blythe Township's *solid waste permit*, which authorized the operation of the landfill and has been the subject of other appeals before this Board, does not carry over and apply to St. Clair's appeal of the encroachment permit. It says that the record is devoid of any evidence that St. Clair has standing in *this* appeal. St. Clair does not address the standing issue in either its post-hearing brief or, somewhat to our surprise, in its reply brief after the issue had been clearly raised by the Department. We agree with the Department that St. Clair has failed to show that it has standing in this appeal.

Issues such as standing are a threshold matter that generally should be resolved before addressing the merits of the parties' dispute. *Robinson Twp. v. Cmwlth.*, 83 A.3d 901, 917 (Pa. 2013); *Borough of Roaring Spring v. DEP*, 2004 EHB 889. Only parties who have been "aggrieved" by an action of the Department under the Dam Safety and Encroachments Act have the right to file an appeal from that action before the Environmental Hearing Board. 32 P.S. § 693.24(a). Similarly, only persons and municipalities that have an interest which is or may be "adversely affected" by any action of the Department under the Clean Streams Law have the right to file an appeal. 35 P.S. § 691.7(a). Section 4(c) of the Environmental Hearing Board Act is to the same effect. 35 P.S. § 7514(c). In order to be "aggrieved" or "adversely affected" by an

action of the Department, a party must have a substantial, direct, and immediate interest in the outcome of an appeal from the Department's action. *Wm. Penn Parking Garage, Inc. v. City of Pgh.*, 346 A.2d 269 (Pa. 1975); *Tri-County Landfill v. DEP*, 2014 EHB 128, 128; *Jake v. DEP*, 2014 EHB 38, 59-60; *Wilson v. DEP*, 2014 EHB 1, 2. Standing in environmental cases often turns on the use of an area or natural feature. *Robinson Twp.*, 83 A.3d 901, 921-23; *Consol Pa. Coal Co. v. DEP*, 2011 EHB 251, 253; *Pa. Trout v. DEP*, 2004 EHB 310, 358-59, *aff'd*, 863 A.2d 93 (Pa. Cmwlth. 2004); *Drummond v. DEP*, 2002 EHB 413, 414; *Giordano v. DEP*, 2000 EHB 1184, 1186. As we said in *Greenfield Good Neighbors Group v. DEP*,

> [i]n order to have standing in an environmental case, the appellant must demonstrate by his or her use of the site in question or relation thereto that his or her interest rises above that of the public at large. In *Friends of the Earth, Incorporated v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. 693 (2000), the United States Supreme Court held that environmental plaintiffs adequately allege injury in fact if they aver that (1) they use the affected area and (2) the defendant's conduct has (or will) adversely affect that use by lessening the aesthetic and recreational values of the area. *Id.*, 120 S. Ct. at 705, *quoting Sierra Club v. Morton*, 92 S. Ct. at 1361 (1972).

2003 EHB 555, 562-63.

A political subdivision has a substantial, direct, and immediate interest in protecting the environment and the quality of life within its borders, as well as the quality of life of its citizens. *Robinson Twp.*, 83 A.3d at 919-21. An activity or site that is the subject of the Department's action under appeal does not necessarily need to be located within the political subdivision's borders in order for the municipality to have standing, but the activity or site must have or threaten to have an adverse impact within the municipality's borders or on its citizens. *Giordano v. DEP*, 2001 EHB 713, 730; *City of Scranton v. DEP*, 1997 EHB 985, 989-91; *Morning v. DEP*, 1989 EHB 702, 704.

Of critical importance here, an appellant must be aggrieved *by the action under appeal*. *Citizen Advocates United to Safeguard the Env't v. DEP* (*CAUSE*), 2007 EHB 632, 673; *Greenfield Good Neighbors*, 2003 EHB 555, 564; *Giordano*, 2000 EHB 1184, 1185. Just as a party may not challenge one Department action in an appeal from an entirely different Department action, *Greif Packaging, LLC v. DEP*, 2012 EHB 85, 88, a party cannot use its interest with respect to one Department action as a basis for standing to challenge an entirely different Department action. *CAUSE*, 2007 EHB 632, 676. Standing does not simply carry over as a matter of course.

An appellant is not required to allege the basis for its standing in its notice of appeal. *Winner v. DEP*, 2014 EHB 135, 140 (quoting *Ziviello v. DEP*, 2000 EHB 999, 1003); *Mayer v. DEP*, 2012 EHB 400, 401; *Riddle v. DEP*, 2001 EHB 417, 419. Indeed, if an appellant's standing is never challenged, it does not need to be proven. *Oley Twp. v. DEP*, 1996 EHB 1098, 1126. However, when standing is challenged in pre-hearing memoranda, and in post-hearing briefs, an appellant must demonstrate by a preponderance of the evidence that it has the requisite interest in the outcome of the appeal. *Greenfield Good Neighbors*, 2003 EHB at 564; *Giordano*, 2000 EHB at 1187.

Applying these principles here, it was incumbent upon St. Clair to demonstrate by a preponderance of the evidence that it has a substantial, direct, and immediate interest in seeing the encroachment permit overturned. We have searched the record in vain for evidence of any such interest. St. Clair has failed to show that its interest in protecting the quality of life of its citizens or the environment within its borders will in any way be adversely affected by the issuance of the encroachment permit, the action under appeal in this case.

Ordinarily when looking into standing in an appeal from an encroachment permit we would assess the appellant's use of the water body or the area where the water body is located and then assess how the encroachment will affect or threaten that use. *See Pa. Trout*, *supra*, 2004 EHB 310, 356-59 (members of organization will be aggrieved by granting of encroachment permit to fill in wetlands on site of proposed shopping center where members fish, walk, and observe wildlife in affected area, and thus the members and organization have standing). Here, there is no stream on the landfill site or the proposed encroachment. There is currently no plan to ever restore the stream. There is no evidence that either St. Clair or any of its citizens use the nonexistent stream, so it obviously follows that there has been no adverse impact upon any use. Neither St. Clair nor any of its citizens have been shown to use or benefit from the small headwater remnant of the stream. St. Clair has not argued that it or any of its citizens have any aesthetic or recreational interest in the historic Little Wolf Creek area that stands to be impacted by the encroachment permit. St. Clair has not shown or even alleged that it or any of its citizens now use or ever have used the area where the pipe is to be installed.

To the extent it is appropriate to consider potential future uses, there is no evidence that anyone hopes to use or benefit from the stream or the area of the stream even if a stream is ever restored, with or without a landfill being present. There is no record support for a finding that the permitted encroachment would adversely affect any speculated use of a theoretical stream. Even if a stream were ever restored in the vicinity of the permitted encroachment, an event that we view as extremely unlikely, it would flow onto an unlined rip-rap drainage channel on reclaimed minelands and soak into the ground. It would never reach St. Clair. (T. 222-24, 272-73.)

Similarly, St. Clair presented no evidence regarding its use or potential use of the isolated .3 acre pocket of wetlands that was also the subject of the encroachment permit. It presented no evidence of harm to any use. Accordingly, it has also failed to show that it has standing with respect to that aspect of the encroachment permit.

As an adjacent municipality, St. Clair clearly had legitimate concerns about, among other things, traffic through the Borough, odors detectable in the Borough, and property values within the Borough, all of which were arguably implicated by the operation authorized by Blythe Township's landfill permit. That is undoubtedly why St. Clair's standing was not contested in its appeal from the solid waste permit. Had it been contested, there is little doubt that we would have found that it had standing due to its legitimate concerns. However, it was the landfill that threatened to harm the Borough and its citizens in that appeal, not the pipe that is the subject of this appeal. The encroachment threatens no harm to the Borough or its citizens. St. Clair is neither aggrieved nor adversely affected by the permitting of the encroachment. It is not clear on the record whether the encroachment is necessary for the landfill to go forward, but even if it were, it would not be the encroachment permit that authorizes construction of the landfill. The encroachment permit is not what threatens harm. We agree with the Department that St. Clair's standing with respect to the landfill permit does not carry over to the separate encroachment permit.

As previously mentioned, only parties who are or are likely to be adversely affected in a substantial, direct, and immediate way may pursue an appeal. This means that the Department action must be the cause in fact ("direct") and proximate cause ("immediate") of the harms. *Giordano*, 2000 EHB at 1186. Here, St. Clair has not identified any harms to it or its citizens, but if we assume there are potential harms associated with the operation of the landfill (odors or

traffic), those harms would not be either the direct and the proximate result of the encroachment.[1]

Although to some extent we are fumbling in the dark because St. Clair has inexplicably failed to brief the question, it may be that it believes that it has standing because the parties stipulated to the following facts:

> St. Clair's interest in real property in Blythe Township is limited to two $1.00 fractional leasehold interests obtained from Charles A. Hauser and Julie Fatula.
>
> St. Clair acquired these fractional leasehold interests in order to monitor the development of the BRADS Landfill project and to attempt to be in a position to challenge certain actions of the Department concerning the permitting of that project.

(Stip. 18, 19.) These stipulations do not independently support a finding that St. Clair has standing. First, as just noted, St. Clair does not argue or even explain how these stipulated facts support its standing to appeal the encroachment permit. We do not know where the "fractional leasehold interests" are. There is no evidence of how the permitted encroachment might directly or proximately harm or threaten St. Clair's use of its "fractional leasehold interests" or the value of those interests. Furthermore, a holding that it is sufficient to create standing to obtain two $1.00 fractional leasehold interests, which were obtained for the sole purpose of attempting to create standing, would not be consistent with the letter or the spirit of the statutory requirements that a party must be aggrieved or adversely affected by a Departmental action in order to pursue an appeal. St. Clair's purported interest by no stretch appears to be "substantial."

[1] The point we are making regarding standing in appeals from separate Department actions should not be confused with issue standing. The question with respect to issue standing is whether a party that is harmed by an action of the Department can raise every conceivable basis for challenging that action in an appeal. Here, there are two separate Department actions.

The parties also stipulated as follows:

> The owners of the properties adjacent to the eastern boundary of the BRADS Landfill, including M. Christopher McCoach and Taryn Fatula (as a representative of the Bucklar property owners), and Roland Price, Jr. (as a representative of the Borough of St. Clair), on whose property interests the Little Wolf Creek, a portion of the eastern pit, the 1364 Pond, and a proposed Department channel is located, will not grant any easements or permit any work to be performed on their property interests concerning the Solid Waste Permit and the encroachment permit issued to Blythe Township.

(Stip. 20.) Again, this stipulation is too vague to provide a basis for standing. If anything, it seems to support a finding that St. Clair is not threatened with any harm. The stipulation seems to say that St. Clair has a property interest adjacent to the landfill, but there was never any indication of that at the hearing. In any event, there is no record that St. Clair's undefined interest is substantial or that the encroachment will directly or proximately adversely affect or threaten to adversely affect the use or value of its property interest.[2]

II. Merits

This appeal must be dismissed because St. Clair lacks the requisite standing to pursue it. Nevertheless, given the amount of time and resources that have been devoted to the case, in the interest of a complete record, we will describe why St. Clair would not have prevailed even if it had shown that it has standing.

Before turning to the Little Wolf Creek portion of the permit, with respect to the .3-acre wetland portion of the permit, St. Clair's arguments are limited to the rather conclusory contention that the Department performed an inadequate analysis of alternatives to filling the

[2] In *Borough of St. Clair v. Blythe Township*, No. 1169 C.D. 2014, 2015 Pa. Commw. Unpub. LEXIS 249 (Pa. Cmwlth., Mar. 12, 2015), the Commonwealth Court in an unpublished opinion affirmed the Schuylkill County Court of Common Pleas' holding that St. Clair's property interests were insufficient to confer standing on St. Clair to challenge Blythe Township's entry into agreements with FKV, LLC regarding the development and operation of the landfill.

wetlands. St. Clair's references to the wetland are so limited that Blythe Township and the Department take the position that the issue has been waived.[3] In any event, St. Clair did not identify any better alternatives to filling the wetland, and indeed, never actually posits that the Department reached the wrong conclusion in permitting the fill as opposed to some other solution. In fact, we find that the Department performed a satisfactory analysis and reached the lawful and reasonable conclusion that filling the wetland coupled with a monetary contribution satisfied the regulatory prerequisites for issuing the permit and was otherwise lawful and reasonable. 25 Pa. Code § 105.18a(b). (Finding of Fact ("FOF") 50, 51; Conclusion of Law ("COL") 10.)

A. Waiver

Both Blythe Township and the Department devote a considerable portion of their briefs to their contention that St. Clair has gotten into issues in its post-hearing brief that unfairly went beyond the issues identified in its notice of appeal and prehearing memorandum. It is true that issues not raised in a notice of appeal and preserved in a prehearing memorandum, or approved amendments thereto, are waived. 25 Pa. Code § 1021.104; *DEP v. Seligman*, 2014 EHB 755, 779. However, we have reviewed St. Clair's materials and the only issue in its post-hearing brief not fairly encompassed in its earlier filings is its complaint that the permit on its face authorizes more work than was intended or properly reviewed. St. Clair is excused from having raised this issue earlier because, frankly, the issue only came to light in response to the Presiding Judge's efforts at the hearing to understand exactly what the Department had permitted. That questioning revealed that the Township's expert did not "personally care either way" (T. 211) about the scope of the permit, and the Department's witnesses seemed to have a less than

[3] At the hearing, we reserved ruling on Blythe Township's objection on the basis of waiver to any testimony on wetlands from St. Clair. (T. 70-74.) We now overrule the objection.

complete and consistent understanding of the bounds of the permitted action. (T. 301, 324, 341, 351, 354.) By the end of the hearing, the Department's project manager conceded that the permit on its face referred to more work than was intended to be approved in the permit itself. (T. 383-84.) Under these circumstances, St. Clair cannot be faulted for failing to identify the issue earlier on its own.

B. Permit Ambiguity

Blythe Township's encroachment permit is mostly boilerplate, but the key language in the permit provides that the Department gives its consent to "relocate and reestablish the 'historic' Little Wolf Creek (CWF) with the construction and maintenance of 6,700 feet of riprap-lined trapezoidal channel and a 1,600-foot long, 42-inch diameter HDPE stream enclosure, and to place fill in 0.3 acres of isolated wetlands." (B. Ex. 15.)[4] However, we have found as a matter of fact that the permit does *not* authorize 6,700 feet of riprap channel and a 1,600-foot long pipe. (FOF 34, 36, 39, 40.) Kevin White, the Department's project manager, testified that he believed the permit authorized the pipe and the downstream channel between the end of the pipe (Point B) and the preexisting BAMR channel. (T. 341, 354, 383-84.) This connection channel is referred to in the exhibits as Channel B. (S.C. Ex. 1.) Blythe Township's engineer also thought the permit included Channel B. (T. 211.) However, there is no dispute that Blythe Township is not required to install Channel B (Stip. 8, 14), so it is not clear why Blythe Township's permit would authorize some unknown party, presumably acting at the Department's behest, to build Channel B. A permit should not be issued to an unidentified permittee. *Borough of St. Clair v. DEP*, 2014 EHB 76, 113. Therefore, we have concluded that the encroachment permit only authorizes the 1,600-foot pipe from Point A to Point B. This is consistent with the landfill permit, which expressly incorporates the parties' Little Wolf Creek agreement. (B. Ex. 9

[4] The wetland fill is not related to the permit ambiguity question.

¶ 34(j).) That agreement very clearly provides that Blythe Township's only obligation is to install the pipe. (Stip. 8; B. Ex. 6.)

In considering the propriety of 1,600-foot pipe, the Department reasonably could and in fact did consider the hypothetical restoration project as a whole and how the pipe fits into that project. To have reviewed the pipe in isolation would have been a mistake. For example, the location of the pipe needs to square with the other channels envisioned as part of the hypothetical stream restoration. That, perhaps, explains (if not justifies) the ambiguity in the permit language.[5] However, while it may have been appropriate to consider the project as a whole as important background, to be perfectly clear, only the 1,600-foot pipe is permitted by the encroachment permit. Any other work above or below the pipe, if it requires a permit (e.g. it involves an encroachment), will require a separate permit. The parties seem to have acknowledged this in their stipulations. (Stip. 8, 14.)

St. Clair makes much of the error on the face of the permit, but it never explains the ramifications that result from the error. For instance, it does not say how the Department's analysis was different due to the apparent confusion over the length of channel and pipe that was permitted. St. Clair does not say that the error in the permit is the result of a faulty analysis that will result in environmental harm. It does not say how the Department's allegedly over-inclusive analysis failed to account for environmental harm. St. Clair does not tell us how it believes the encroachment should have been designed differently. It never claimed that the pipe is too small or in the wrong location. St. Clair does not explain in any way how the error is of any consequence. It certainly falls short of explaining why the error is grounds for overturning the permit.

[5] It might also be explained by the fact that the permit involves a nonexistent stream that in all likelihood will never be restored. Dealing in the realm of the fanciful is less than an ideal setting for cogent analysis.

The important question to be answered in the immediate context is whether the Department conducted the proper analysis and arrived at the correct conclusion given the permit as it should have been accurately scribed. For the reasons discussed below, we find that it did, which renders the Department's scrivener's error harmless. No remand is necessary or appropriate, so long as the permit is read in conjunction with this Adjudication to be limited to an approval of the 1,600-foot pipe.

C. Collateral Estoppel

The doctrine of collateral estoppel is designed to prevent parties from being forced to relitigate the same static issues over and over again. *Lucchino v. DEP*, 1998 EHB 473, *aff'd*, No. 1730 C.D. 1998 (Pa. Cmwlth. Dec. 4, 1998). The doctrine "relieves parties of the cost and vexation of multiple lawsuits, conserves judicial resources, and, by preventing inconsistent decisions, encourages reliance on adjudication." *Shaffer v. Smith*, 673 A.2d 872, 875 (Pa. 1996) (citing *Allen v. McCurry*, 101 S. Ct. 411, 415 (1980)). Collateral estoppel applies when:

> (1) The issued decided in the prior action is identical to the one presented in the action in which the doctrine is asserted;
>
> (2) The prior action resulted in a final judgment on the merits;
>
> (3) The party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action;
>
> (4) The party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action; and
>
> (5) The determination in the prior proceeding was essential to the judgment.

Kuzemchak v. DEP, 2010 EHB 564, 566 (citing *Office of Disciplinary Counsel v. Kiesewetter*, 889 A.2d 47, 50-51 (Pa. 2005); *Church of God Home, Inc. v. Dep't of Pub. Welfare*, 977 A.2d 591, 593 (Pa. Cmwlth. 2009); *Emp'rs Mut. Cas. Co. v. Boiler Erection and Repair Co.*, 964 A.2d 381, 394 (Pa. Super. 2008)). Regarding the fifth element, the key is that the issue must have

been put to the test. "A finding that was of no consequence in the first case should not be given immutable weight in another case where it could have determinative consequences." *Sedat, Inc. v. DEP*, 2000 EHB 927, 939-40. Nevertheless, we are cognizant of the fact that collateral estoppel does not require that a party "take every avenue to challenge and appeal a decision," only that "the issue was decided in prior litigation, that that decision became final, and that the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior litigation." *Spisak v. Edelstein*, 768 A.2d 874, 877 (Pa. Super. 2001) (internal citation omitted).

The doctrine does not come up much in Board cases because it tends to be overshadowed by the concepts of administrative finality and the principle that the parties cannot challenge one Department action in an appeal from another Department action. *Greif Packaging, LLC v. DEP*, 2012 EHB 85, 88; *Love v. DEP*, 2010 EHB 523, 525; *Northampton Twp. v. DEP*, 2008 EHB 563, 568; *Winegardner v. DEP*, 2002 EHB 790, 793; *Grimaud v. Dep't of Envtl. Res.*, 638 A.2d 299, 303 n.7 (Pa. Cmwlth. 1994) (citing *Fuller v. Dep't of Envtl. Res.*, 599 A.2d 248 (Pa. Cmwlth. 1991)). However, the doctrine of collateral estoppel is not entirely without its place in Board proceedings, and Blythe Township and the Department argue that it has application here. They argue that St. Clair had an opportunity to raise, and did in fact raise, some of the issues regarding the interrelationship between the landfill project and the hypothetical Little Wolf Creek restoration project in its appeal from the landfill permit, which we adjudicated at *Borough of St. Clair v. DEP*, 2014 EHB 76. *See Borough of St. Clair v. DEP*, EHB Docket No. 2012-148-L, Docket entry 38, Appellant's Pre-Hearing Memorandum, Expert Report of Brian W. Baldwin, PE at 13 (Jul. 12, 2013). They say that St. Clair should not be permitted to argue precisely the same issues again here. We agree, and find that the elements of collateral estoppel have been

met. St. Clair litigated the following issues in the landfill appeal without success, and it is precluded from relitigating them again here:

- The proposed piping is not an appropriate restoration of Little Wolf Creek and its values;
- Little Wolf Creek should be restored to an open-channel condition throughout its length in a manner which represents a natural waterway;
- The site and shape of the landfill will create a great depression on the private properties to the east causing flooding;
- Necessary easements for adjacent properties have not been obtained.

On a related point, we reject the idea that it was incumbent on the Department to reexamine the entire issue of the landfill being built in the context of its review of the encroachment permit application. The Department already conducted a harms-benefits analysis and alternatives analysis precedent to issuance of the landfill permit. Those analyses included an evaluation of the interrelationship of the landfill project and the hypothetical Little Wolf Creek restoration. St. Clair challenged that analysis in the landfill case. *See Borough of St. Clair*, 2014 EHB at 88. Neither the Department nor this Board is required to reevaluate precisely the same issues in this appeal from the encroachment permit. Thus, for example, it simply was not necessary for the Department to consider alternate sites for the landfill in the context of reviewing the encroachment permit. For the Department to have issued the landfill permit and then have turned around and denied the encroachment permit based on the location of the landfill would have been irresponsible. The location and basic design of the landfill must be taken as a given in this appeal under the circumstances presented here.

St. Clair argues that the waste regulations say that a construction and demolition landfill may not be operated in "a valley, ravine, or head of hollow where the operation would result in the elimination, pollution or destruction of a portion of a perennial stream, except that

rechanneling may be allowed as provided in Chapter 105." 25 Pa. Code § 277.202(a)(6). Putting aside that the BRADS Landfill has not been shown to be in a valley, ravine, or head of hollow, or that the landfill would not result in the elimination, pollution, or destruction of a perennial stream, and that even the imagined future stream's "rechanneling," if we can call it that, has been permitted, this issue regarding the location of the landfill does not belong in this appeal from the encroachment permit. This argument relates to the landfill location and needed to be presented in the appeal from the landfill permit.

As yet another example, St. Clair argues that the Department "failed to consider the landfill stormwater issues and the MSE [mechanically stabilized earthen] Wall." The MSE Wall is a structure that Blythe Township will construct as the landfill is developed in the event that Little Wolf Creek is *not* restored. (FOF 38.) These are landfill issues, not issues related to the encroachment permit. Perhaps St. Clair is arguing that stormwater and/or water backing up against the MSE Wall has something to do with the size or design of the pipe, but if that is the case, it never says that or explains how or why the pipe is improperly designed, or what it thinks should have been done instead. In any event, there is no evidence that water will back up upstream of the landfill because of the MSE Wall, stormwater flowing off of the landfill, or for any other reason. (FOF 47.)

D. Technical Merits

Finally, putting aside all of the fatal flaws in St. Clair's case as discussed above, St. Clair has also failed to show by a preponderance of the evidence that there is anything wrong with the Department's technical review and conclusions regarding the encroachment permit. Blythe Township and the Department performed a rather exhaustive analysis that, if anything, seems rather disproportionate to the amount of attention that a purely hypothetical stream restoration

deserves. The Department lawfully and reasonably concluded that Blythe Township's construction of a pipe to channel the theoretical stream was an appropriate accommodation between developing the landfill and allowing for the possible restoration of a stream. No better alternatives have been identified. Furthermore, the encroachment is properly engineered, well designed, and satisfies all regulatory criteria. There is no credible evidence that it will cause any upstream flooding or any other problems.

St. Clair's lack of credible evidence is fatal to meeting its burden of proof. As we recently reiterated in *Brockway Borough Municipal Authority v. DEP*, EHB Docket No. 2013-080-L, slip op. at 17-19 (Adjudication, Apr. 24, 2015), when an appellant raises technical or scientific objections to the issuance of a permit, it must then substantiate those objections with technical and scientific evidence. "An appellant cannot simply come forth with a laundry list of potential problems and then rest its case. It must prove by a preponderance of the evidence that these problems have occurred or are likely to occur." *Shuey v. DEP*, 2005 EHB 657, 712. In this case, St. Clair actually stipulated that it did not perform any scientific tests relevant to any of the issues in this appeal. (Stip. 17.)

With this in mind, it is not difficult for us to see that St. Clair's criticisms are not well supported by credible expert testimony. Unfortunately its experts' opinions are based on pure conjecture and are otherwise not credible. St. Clair presented the testimony of two expert witnesses, Brian Baldwin, P.E. and Ryan Fasnacht, P.E. What we have from Baldwin is little more than a series of unsubstantiated objections. Baldwin makes speculative and less than credible statements such as: (1) Blythe will fill in the abandoned mine workings to stabilize any subsidence, which will create a flow barrier to the drainage of the Eastern Pit, causing it to back up with water and overflow (T. 63-67, 89-93); (2) the 1364 Pond will overflow with stormwater

and contribute to the water filling up in the Eastern Pit (T. 46-47); and (3) the MSE Wall will cause future flooding (T. 68-69). St. Clair never fully explains why any of this matters or is relevant in this appeal, but if the point is that the encroachment is inadequate to handle flow, St. Clair never actually makes that connection. Notably absent from Baldwin's broad contentions is any analysis to substantiate the conclusions that he has drawn. There is very little indication in the record as to why he holds these opinions and why he believes these things will happen. He did not do any hydrologic analysis of the pre and post construction impacts on stormwater runoff. (T. 28, 32, 99-100, 102-03.) Baldwin's analysis consisted of merely a general overview of Blythe Township's application materials. (T. 99-100.) The lack of any scientific evidence to buffer Baldwin's points is palpable, and his willingness to make these statements without any apparent foundation is disconcerting in terms of his credibility.

Fasnacht's testimony was equally unavailing. Fasnacht expressed concern that Blythe Township's application indicated that the Eastern Pit could fill up with water and come within one to two feet of overtopping. (T. 139-40.) He stated that Blythe's analysis assumed that there would be no infiltration in the Eastern Pit and that, although Blythe calculated for a 100-year frequency flood, it did not account for the effect of potential multiple storm events in addition to the 100-year storm. (T. 140-41, 154.) Fasnacht also did not support his contentions with any evidence. St. Clair's experts' willingness to testify in this manner and without any scientific support means that we are hesitant to rely on *any* of their testimony in this case. When we pick at the record for support for its technical contentions, St. Clair's case falls apart at its loosely stitched seams.

Blythe Township's expert, Richard Bodner, P.E., on the other hand, credibly testified based on personal observations and the application of sound engineering practices to debunk all

of St. Clair's unfounded fears. Bodner conducted a SEDCAD 4 stormwater analysis of the capacity of the Eastern Pit—a comprehensive computer modeling program that accounts for ground characteristics, slope, soil cover, vegetation cover, all physical constraints, and the design of the project that is to be evaluated, and facilitates the calculation of peak runoff rates and volumes. (T. 170-72, 337.) This analysis assumed that there would be no evaporation in the Eastern Pit and that the pit would actually hold water, which are clearly overly conservative assumptions, to say the least, and then measured the effects of a 100-year frequency flood.[6] (T. 198-99.) The result of the analysis with these parameters in place was that the Eastern Pit would still have approximately a foot of space left before it would overtop with water. (T. 227.)

However, the assumption that there would be no infiltration in the Eastern Pit is somewhat absurd, according to Bodner. (T. 234.) We agree. Baldwin's conjecture that water will back up due to changes in underground mine workings is one of the more glaring misconceptions inherent in his testimony that preclude us from finding it to be credible. In reality there is a tremendous amount of infiltration in the Eastern Pit, and that will continue to be the case if it is not filled in. Bodner's personal observations after significant storm events revealed that any increase in water level was negligible and that the water readily passed through the bottom of the pit. (T. 199-200, 226-27.) Even coupled with any overflow from the 1364 Pond, the Eastern Pit is more than capable of handling the water. (T. 182-83.) Bodner also dispensed of Blythe's concern over the filling of the underground mine workings and what Blythe says is the potential to block drainage from the Eastern Pit. (T. 216-18.) Bodner stated that recent drilling analysis of the underground mine workings determined that the mine roof has already collapsed and that no additional filling of the mine workings will be necessary. (T. 217-

[6] A 100-year frequency flood is defined as "[t]he flood magnitude expected to be equaled or exceeded on the average of once in 100 years; it may also be expressed as the flood having a 1.0% chance of being equaled or exceeded in a given year." 25 Pa. Code § 105.1.

18.) This means that even in its current collapsed state, water is still passing through the bottom of the Eastern Pit. (T. 218.) The SEDCAD modeling was simply a worst-case scenario analysis that showed that even in such a state, the Eastern Pit is fully capable of handling stormwater flow. (T. 228.) There will be no flooding to any upstream properties.[7] (T. 230.) Kevin White of the Department supported Blythe Township's analysis. (T. 338; B. Ex. 15.) St. Clair's experts did not critique the SEDCAD computer modeled hydrologic analysis that Blythe Township and the Department used to determine whether stormwater impacts were properly accounted. In fact, at one point even Baldwin admitted that Blythe Township's analysis was "probably correct." (T. 102.)

The remainder of St. Clair's passing arguments are equally unfounded. These arguments mostly relate to the issues we have determined that St. Clair is precluded from pursuing on the basis of collateral estoppel. However, even allowing them our consideration reveals nothing that would prompt us to conclude that the Department erred in issuing the permit. First, St. Clair contends that the Department should have considered requiring a more natural channel than the piped conveyance in accordance with comments from the Fish and Boat Commission, which the Commission says will provide a more natural habitat for aquatic organisms. (T. 81-82; B. Ex. 11.) Blythe Township provided a detailed reply to this concern in writing in response to a Department technical deficiency letter. (B. Ex. 11.) Blythe Township argued that requiring it to construct the landfill to accommodate a natural channel was not cost effective and was somewhat pointless given the fact that the BAMR channel downstream of the encroachment is unlined and unable to provide an aquatic habitat. At the hearing, Bodner further testified that restoring Little Wolf Creek as a natural watercourse was not feasible and would be a "disaster." (T. 222-24.)

[7] Even if we briefly entertain the highly implausible event of the Eastern Pit overflowing, there is absolutely no evidence to suggest that such an overflow would have any effect on St. Clair or its residents. There is nothing to support the theory that an overflow would travel the 2.3 miles to St. Clair.

Bodner testified that maintaining a natural channel as the landfill is built up over time would require the creation of a 250-foot deep and 60-foot wide chasm, yet the stream would still disappear into the underground mine workings in the BAMR channel. Kevin White concurred that maintaining a natural channel is not a feasible option. (T. 343.) Therefore, the provided pipe is an appropriate restoration of Little Wolf Creek.

Second, Bodner testified in contradiction of St. Clair's claim that the MSE Wall will result in flooding that necessitates flooding easements with neighboring property owners. Bodner testified that the MSE Wall will not result in any flooding because the water will be directed to Point A of the 42-inch pipe. (T. 202-05; S.C. Ex. 1.) Although St. Clair's experts did not explicitly challenge the adequacy of the size of the conveyance pipe beginning at Point A, Bodner testified that at 42-inches in diameter, it is sized for accommodating the worst-case scenario of water volume from a 100-year frequency flood, which includes a portion of stormwater runoff from the landfill itself. 25 Pa. Code § 105.201(a). (T. 270, 389-91; S.C. Ex. 7; B. Ex. 1.) In addition, the landfill will be designed with an overflow channel from the Eastern Pit as a belt and suspenders measure. (T. 207, 210.) Third, contrary to St. Clair's unsupported theory that the landfill will create a depression that will cause flooding east of the landfill, as already discussed, there will be no flooding to any upstream properties. (FOF 47.)

In sum, St. Clair's aggregated fears are not supported by any evidence, or credible expert analysis and testimony. If St. Clair's appeal were not being dismissed on standing grounds, St. Clair nevertheless would have failed to meet its burden of proof.

CONCLUSIONS OF LAW

1. The Borough of St. Clair, as a third-party appellant, bears the burden of proving by a preponderance of the evidence that the Department acted unlawfully or unreasonably or that

its action is not supported by the facts as found by the Board. 25 Pa. Code § 1021.122(c)(2); *Gadinski v. DEP*, 2013 EHB 246, 269.

2. Issues such as standing are a threshold matter that generally should be resolved before addressing the merits of the parties' dispute. *Robinson Twp. v. Cmwlth.*, 83 A.3d 901, 917 (Pa. 2013); *Borough of Roaring Spring v. DEP*, 2004 EHB 889.

3. Only parties who have been "aggrieved" or "adversely affected" by an action of the Department have the right to file an appeal from that action before the Environmental Hearing Board. 32 P.S. § 693.24(a); 35 P.S. § 691.7(a); 35 P.S. § 7514(c).

4. In order to be "aggrieved" or "adversely affected" by an action of the Department, a party must have a substantial, direct, and immediate interest in the outcome of an appeal from the Department's action. *Wm. Penn Parking Garage, Inc. v. City of Pgh.*, 346 A.2d 269 (Pa. 1975); *Tri-County Landfill v. DEP*, 2014 EHB 128, 128; *Jake v. DEP*, 2014 EHB 38, 59-60; *Wilson v. DEP*, 2014 EHB 1, 2.

5. To establish standing in environmental cases, a party must often show that its use of an area stands to be adversely affected by the specific action under appeal. *Pa. Trout v. DEP*, 2004 EHB 310, 358-59, *aff'd*, 863 A.2d 93 (Pa. Cmwlth. 2004); *Greenfield Good Neighbors Group v. DEP*, 2003 EHB 555, 562-63.

6. An appellant must be aggrieved by the specific action under appeal. *Citizen Advocates United to Safeguard the Env't v. DEP*, 2007 EHB 632, 673; *Greenfield Good Neighbors Group v. DEP*, 2003 EHB 555, 564; *Giordano v. DEP*, 2000 EHB 1184, 1185.

7. A party cannot use its interest with respect to one Department action as a basis for standing to challenge an entirely different Department action. *Citizen Advocates United to Safeguard the Env't v. DEP*, 2007 EHB 632, 676.

8. When an appellant's standing is challenged in pre-hearing memoranda, and in post-hearing briefs, the appellant must demonstrate by a preponderance of the evidence that it has the requisite interest in the outcome of the appeal. *Greenfield Good Neighbors Group v. DEP*, 2003 EHB 555, 564; *Giordano v. DEP*, 2000 EHB 1184, 1187.

9. St. Clair has not proven by a preponderance of the evidence that it is aggrieved or adversely affected by the Department's issuance of the encroachment permit to Blythe Township; therefore, St. Clair does not have standing in this appeal. *Wm. Penn Parking Garage, Inc. v. City of Pgh*., 346 A.2d 269 (Pa. 1975); *Greenfield Good Neighbors Group v. DEP*, 2003 EHB 555, 564; *Giordano v. DEP*, 2000 EHB 1184, 1187.

10. The filing in of the .3-acre wetland authorized by the encroachment permit, coupled with mitigation in the form of a monetary contribution, complied with all regulatory criteria for permitting an encroachment in a wetland, including 25 Pa. Code § 105.18a(b).

11. The encroachment as permitted complied with all regulatory criteria, including but not limited to 25 Pa. Code § 105.201.

12. A permit should not be issued to an unidentified permittee. *Borough of St. Clair v. DEP*, 2014 EHB 76, 113.

13. The doctrine of collateral estoppel is designed to prevent parties from being forced to relitigate the same static issues over and over again. *Lucchino v. DEP*, 1998 EHB 473, *aff'd*, No. 1730 C.D. 1998 (Pa. Cmwlth. Dec. 4, 1998).

14. Collateral estoppel applies when:

> (1) The issued decided in the prior action is identical to the one presented in the action in which the doctrine is asserted;
>
> (2) The prior action resulted in a final judgment on the merits;
>
> (3) The party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action;

(4) The party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action; and

(5) The determination in the prior proceeding was essential to the judgment.

Kuzemchak v. DEP, 2010 EHB 564, 566.

15. St. Clair is precluded on the basis of collateral estoppel from litigating issues that it previously litigated in *Borough of St. Clair v. DEP*, 2014 EHB 76. *Kuzemchak v. DEP*, 2010 EHB 564, 566; *Lucchino v. DEP*, 1998 EHB 473, *aff'd*, No. 1730 C.D. 1998 (Pa. Cmwlth. Dec. 4, 1998).

16. When an appellant raises technical or scientific objections to the issuance of a permit, it must then substantiate those objections with technical and scientific evidence. *Brockway Borough Municipal Authority v. DEP*, EHB Docket No. 2013-080-L, slip op. at 17-19 (Adjudication, Apr. 24, 2015); *Shuey v. DEP*, 2005 EHB 657, 712.

17. St. Clair has failed to prove its case by a preponderance of the evidence and has failed to meet its burden of proof. 25 Pa. Code § 1021.122(c)(2); *Gadinski v. DEP*, 2013 EHB 246, 269.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF ST. CLAIR	:	
	:	
v.	:	**EHB Docket No. 2013-118-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLYTHE TOWNSHIP, Permittee	:	

O R D E R

AND NOW, this 20th day of May, 2015, 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: May 20, 2015

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-COUNTY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 2013-185-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PINE TOWNSHIP and GROVE CITY FACTORY SHOPS LP, Intervenors	:	**Issued: May 22, 2015**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion for summary judgment because it is not clear as a matter of law that the Department acted lawfully and reasonably when it denied an application for a landfill permit instead of giving the applicant an opportunity to modify its application in light of final and unappealable determinations by local zoning hearing boards and the courts that the landfill as currently designed would violate local zoning requirements. The Board rejects the parties' request to bifurcate the proceedings to focus on the zoning issue, to the exclusion of the compliance history of entities associated with the applicant, which formed another basis for the permit denial, as well as possibly the other issues raised by the intervenors in support of a permit denial.

O P I N I O N

In 2004, Tri-County Landfill, Inc. ("Tri-County") applied to the Department of Environmental Protection (the "Department") for a permit to reopen and expand its closed landfill in Pine and Liberty Townships, Mercer County. On September 19, 2013, the Department

denied Tri-County's permit application on two grounds: (1) the height of the landfill conflicts with local zoning requirements that limit the height of structures to 40 feet; and (2) companies affiliated with Tri-County had a history of noncompliance with the Solid Waste Management Act, 35 P.S. §§ 6018.101 – 6018.1003. This is Tri-County's appeal from that permit denial.

Pine Township, Grove City Factory Shops, L.P., and several local citizens have intervened in the appeal in support of the Department's permit denial (hereinafter the "Intervenors"). The Intervenors have filed a motion for summary judgment and in the alternative, to bifurcate.[1] They argue, correctly, that it is now undisputed based upon years of litigation before zoning hearing boards and the courts that Tri-County cannot build the 140-foot landfill as it is described in Tri-County's permit application. The landfill as it is currently designed far exceeds the 40-foot height limitation that applies under the local zoning laws. Accordingly, the Intervenors argue that the Department was constitutionally compelled to deny the permit pursuant to Article I, Section 27 of the Pennsylvania Constitution, and that it was otherwise lawful and reasonable for the Department to have denied the permit based upon the undisputed material facts as a matter of law. The Department joins in the Intervenors' motion, but disagrees that it is bound by Article I, Section 27 to comport its action with local zoning requirements.

Tri-County concedes that its permit application would need to be substantially modified based upon the final resolution of the zoning issue, but it argues that the Department, rather than denying the permit outright, should have issued the permit with a condition or at least given Tri-County an opportunity to modify its application to reflect the 40-foot height limitation. Tri-County says that choosing among those alternatives was a matter within the Department's

[1] The Board may grant a motion for summary judgment where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a.

discretion and the Department's exercise of that discretion should not be evaluated in the context of a motion for summary judgment. It adds that it agrees with the Department that Article I, Section 27 did not compel a permit denial. All of the parties have asked us to bifurcate further proceedings in the case and focus our attention exclusively on the zoning issue and not the compliance history issue or other issues raised in this appeal.

We turn first to the Intervenors' argument that the Department could not have issued Tri-County's permit consistent with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution.[2] They say the Department would have fallen short of its constitutional obligations if it had issued the permit once it was definitively determined that the landfill as proposed would violate local zoning requirements. The Department parts company with the Intervenors on this point. The Department says that it is required to *consider* local requirements, but it retains absolute discretion on whether or not to rely on those requirements when deciding whether to issue the permit. Presumably, this means that the Department believes that it can issue a permit even though it knows that there is no question or dispute that the permitted project would violate zoning. Tri-County agrees with the Department on this point, arguing that local zoning does not bind the Department's discretion by virtue of Article I, Section 27. Again, taking this position to its logical conclusion, this means the Department may issue a permit for a project that it knows for certain violates local zoning, so long as it at least "considers" that fact.

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[2] Article I, Section 27 reads as follows:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27.

The Department and Tri-County's position that the Department can permit a project that is knows violates local land use requirements seems counterintuitive. As we recently held in *Brockway Borough Municipal Authority v. DEP*, EHB Docket No. 2013-080-L (Adjudication, Apr. 24, 2015), the first step in evaluating whether the Department's action passes muster under Article I, Section 27 is: "Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?" *Brockway*, slip op. at 29 (quoting *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976)). *See also Pa. Envtl. Def. Found. v. Cmwlth.*, 108 A.3d. 140 (Pa. Cmwlth. 2015).[3] The Department and Tri-County assume without much discussion that the phrase "all applicable statutes and regulations" is limited to state statutes and regulations. The problem with that position is that the *Payne v. Kassab* test refers to *all* applicable statutes and regulations, not just state statutes and regulations. The question, then, is whether local zoning laws should be considered "applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources." We think that they should.

"[Z]oning in Pennsylvania is implemented through the Municipalities Planning Code (MPC), which provides that each municipality has the authority to enact, amend, and repeal zoning ordinances." *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 1002 (Baer, J., concurring) (quoting *Hoffman Mining Co. v. ZHB of Adams Twp*., 32 A.3d 587, 603 (Pa. 2011)). *See* 53 P.S. § 10601. The MPC expressly states that one of the purposes of local planning and land use regulation is to promote the preservation of this Commonwealth's natural and historic resources and prime agricultural land. 53 P.S. § 10105. Similarly, one of the authorized purposes of

[3] The other two questions are: Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum; and, does the environmental harm that will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion? *Payne*, 312 A.2d 86, 94.

zoning ordinances is "[t]o promote, protect and facilitate…preservation of the natural, scenic and historic values in the environment." *Id*.

Local land use regulations are not entirely preempted by state laws regarding the development and protection of the Commonwealth's natural resources. *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 964 A.2d 855, 865 (Pa. 2009); *New Hanover Twp. v. DEP*, 2011 EHB 645. Rather, zoning focuses on controlling the use of land in a manner that is consistent with local demographic and environmental concerns. *Robinson Twp.*, 83 A.3d 932 (Pa. 2015) (plurality); *Huntley*, *supra*. Although it is admittedly an oversimplification, state laws tend to prescribe *how* a landfill may be developed and operated while local laws tend to prescribe *where* a landfill may be developed. There is a complimentary role for both state and local regulation, and both levels of regulation play a part in the protection of the Commonwealth's resources. The Solid Waste Management Act frequently mentions cooperation between state and local authorities working together toward comprehensive waste management. *See, e.g*., 35 P.S. §§ 6018.102 (purpose of act includes establishing and maintaining cooperative state and local waste program), 6018.104 (Department duty to cooperate with local units of government), and 6018.504 (host municipality review of permit applications). Of course, much of Act 101 is about empowering municipal involvement in the oversight of waste management. *See, e.g*., 53 P.S. § 4000.304 (powers and duties of municipalities). Both the plurality opinion as well as the concurring opinion of Justice Baer in *Robinson Township, supra*, recognize the important and distinct role of local land use controls in protecting the environment, and the dissenting opinions of Justices Saylor and Eakin are not inconsistent with the conclusion that local land use regulations are relevant to the protection of the environment.[4] In the joint reply brief, the

[4] Rather, Justices Saylor and Eakin would have held that the Legislature has the power, not constrained by any constitutional provision, to supersede some of the duties and responsibilities municipalities would

Department and the Intervenors acknowledge "that DEP should not ignore the role of local government in protecting rights secured by the Pennsylvania Constitution. *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2015)." Clearly, local zoning is "relevant to the protection of the Commonwealth's public natural resources."

While arguing generally that the Department need only measure compliance with state laws, the Department and Tri-County specifically argue that Article I, Section 27 as interpreted in *Payne v. Kassab* does not impose any obligation on the Department greater than that set forth in two statutory provisions that are commonly referred to as Act 67 and 68, 53 P.S. §§ 10619.2 and 11105. Those statutes provide that the Department *must* consider local land use decisions and plans and *may* rely on those local decisions and plans when making permitting decisions. *See New Hanover Twp.*, 2011 EHB 645, 680.[5] Although neither the Department nor Tri-County develop their argument in any detail, they seem to be saying that, because Acts 67 and 68 only say that the Department *may* rely on local decisions, the Department is free to ignore those local decisions if the Department feels like it.

We do not read Acts 67 and 68 that way. Acts 67 and 68 were designed to give Commonwealth agencies such as the Department the express authority to consider or rely on local requirements, an authority that previously was in doubt. *Id*. They were designed to allow state agencies to give greater respect to local decisions, not to disregard those decisions in the guise of "considering" them. In any event, whether or not the Department can ignore local

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historically exercise in relation to protection of the environment. *See Robinson Township*, 83 A.3d at 1010 (Saylor, J., dissenting).

[5] Section 11105 is applicable where municipalities have adopted a county plan or a multimunicipal plan under Article 11 of the MPC and participating municipalities have conformed their local plan and ordinances to the county or multimunicipal plan by implementing cooperative agreements and adopting appropriate ordinances and resolutions. Section 10619.2(a) and (c) is applicable when either a county adopts comprehensive plans and zoning ordinances in accordance with applicable requirements or when municipalities adopt a joint municipal zoning ordinance.

requirements and still technically be in compliance with Acts 67 and 68, we do not read those statutes as being intended to constrain or circumscribe the Department's independent obligation under Article I, Section 27 as interpreted in *Payne v. Kassab* to ensure that there has been compliance with all applicable statutes and regulations relevant to the protection of the environment.

The parties disagree whether the Department had the authority under Acts 67 and 68 to consider local zoning in its review of Tri-County's application due to questions regarding the relative timing of the municipalities' enactment of zoning, passage of the statutes, and the Department's review process. We need not resolve that disagreement because the Department clearly had the authority and indeed the obligation to honor zoning requirements under Article I, Section 27.

Having concluded that local zoning falls within the scope of the first step of the *Payne v. Kassab* test, we need to decide what level of effort is necessary on the part of the Department to ensure that there has been "compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources." Actually, we find that level of effort to be rather limited due, in large part, to the need on the part of the agency to defer to local authorities when it comes to local matters such as zoning. We have frequently held that neither the Department nor this Board has the duty or even the authority to act as a statewide zoning hearing board. To the contrary, local zoning issues must be decided at the local level. *Casey v. DEP*, 2014 EHB 439; *Lyons v. DEP*, 2011 EHB 169; *Cnty. of Berks v. DEP*, 2005 EHB 233. The Department has no role in actually enforcing local land use and zoning requirements. *New Hanover Twp.*, 2011 EHB at 680. Indeed, the Department is not required to conduct an independent investigation whether a project complies with local zoning requirements before

permitting the project. *Heasley v. DER*, 1991 EHB 1758. It is only where a potential conflict between the project and local laws is brought to its attention in the course of its permit review that the Department must take the local issue into account. The Department is not required to decide the local zoning issue; it is only required to decide what to do about the permit application in light of the zoning issue. In this respect, the Department's role is analogous to its role when a legitimate dispute regarding a permittee's legal right to enter land is identified; the Department must account for the dispute, not decide it. *Empire Coal Mining & Dev. v. DER*, 678 A.2d 1218, 1222-23 (Pa. Cmwlth. 1996); *Rausch Creek Land, LP v. DEP*, 2013 EHB 587, 599-606, 613; *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, 229.

Once a potential conflict between the project and local zoning is identified, the Department must decide what to do about it. The Department has a number of options, and this is where we part company with the Intervenors in this case, who suggest that the only reasonable course once the conflict is identified is to deny the permit. It may be appropriate in some cases to deny the permit, but it might be appropriate in other cases to suspend review of the permit, as was previously done with respect to this project. *See Tri-County Landfill v. DEP*, 2010 EHB 747. Although the option of suspending review until the zoning dispute is resolved is obviously not available here because the dispute has been fully and finally resolved, suspension to allow for modification of the permit application is another option. It may be appropriate under other circumstances to issue the permit with conditions. *See New Hanover, supra*; *Lyons, supra*. Choosing among these options may depend on any number of factors, one of which might involve the degree of the perceived conflict between the project and local requirements.

This case is, perhaps, somewhat unusual in that there is no ambiguity or doubt surrounding the zoning issue. Here, the tribunals with the appropriate authority to decide the

zoning issue have ruled, and available appeals have been exhausted. Under these unique circumstances, we agree with the Intervenors that the option of simply issuing the permit was not available. Here, doing so would have been inconsistent with the first step of the *Payne v. Kassab* test, which requires that the Department determine that there has been compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources. Therefore, we agree with the Intervenors that the Department would have acted unlawfully if it had simply issued the permit to Tri-County.

It does not necessarily follow, however, that the Department was required to deny the permit outright. As previously mentioned, it may be lawful and reasonable in some cases to issue a permit with a condition that issuance of the permit does not substitute for or excuse compliance with all local land use requirements. This is a common permit condition, and under normal circumstances, there is nothing necessarily wrong with such an action. *New Hanover Township, supra*. Indeed, issuing such a conditional permit acknowledges that the Department does not make zoning decisions; rather, it defers to local authorities on zoning issues. Such permit conditions make clear that the permit does not supersede zoning requirements.

Again, however, this case is unusual in that it is beyond dispute that to permit the landfill as described in the application would in fact violate local land use requirements. In this unique situation, issuing the permit with such a condition as suggested by Tri-County as an option would have been misleading and disingenuous because Tri-County cannot under any circumstances build its proposed landfill as it is currently designed and at the same time comply with such a condition. Complying with the condition would have been impossible. A conditional permit could suggest that the local issue is unknown or unsettled, which is not accurate here. A condition stating that a project is approved subject to local approvals might

have been appropriate if the zoning issue was unsettled and everything else about the permitted project was generally acceptable, but here, Tri-County conceded that many material changes would need to be made to the landfill design, which would in turn require material revisions of the permit application and a fresh analysis of those changes by the Department. A conditional permit, quite simply, would make no sense.

We are still not convinced that the Department was required to deny the permit outright. Tri-County has identified another option: suspend further review of the permit application and give Tri-County an opportunity to modify the application to comport with the 40-foot height restriction. Tri-County points out that the Department gave it similar opportunities in the past in the long history of its application process. The Department and Intervenors seem to concede that the Department could have given Tri-County that opportunity, but they argue that refusing to do so was not an abuse of discretion given the many years of review that have gone into this project. However, once we enter the world of reviewing the Department's *discretion*, we tend to exit the world where summary judgment is appropriate.

We can imagine any number of factors that might legitimately inform the Department's decision whether to give Tri-County another chance to modify its permit application, or stated another way, inform our review of the Department's decision not to give Tri-County such a chance. In addition to considering the time and effort that has already gone into the permit review, there is the difference in cost between modifying the existing application and submitting an entirely new application.[6] Parts of the application, which presumably go back to 2004, may have gone stale. *Cf. New Hanover Twp. v. DEP*, 2014 EHB 834 (abuse of discretion to approve permit extensions for nine years). There does not seem to be complete agreement about the

[6] There does not seem to be any dispute that Tri-County could start from scratch with a whole new application if it wanted to if zoning were the only issue.

scope of the amendments to the permit application that would be required.[7] There may be some grandfathering or repermitting benefits that would be lost with an entirely new application. There is a question whether a radical redesign would be practical. At some point, modifications are no longer really modifications, and the changes become so extensive that it is better to start from scratch.

These factors to some extent, however, pale in comparison to the other large issue in this case; namely, the Department's determination that Tri-County's and/or its affiliates' compliance history would have compelled denial of this permit in any event. Arguably, it would have been an abuse of discretion for the Department to have encouraged or allowed Tri-County to modify its permit application to address the zoning issue, knowing all the while that it would deny the application in any event due to the compliance history issue. Similarly, if we find that the Department's decision regarding compliance history should be upheld, a remand with instructions to allow modifications of the permit application would not make sense. Alternatively, the zoning and compliance history issues, while not each independently precluding a modification opportunity, might have combined to support the denial. Notwithstanding the parties' effort to treat the zoning issue and the compliance history issues as separate and distinct, we think that both the Department and this Board can and should consider the whole picture when choosing among available remedies.

Thus, not only is summary judgment unavailable due to the disputed issues of fact and law surrounding the Department's decision to deny the permit (as opposed to allowing a modification of the permit) based upon the zoning issue, bifurcation of our proceedings to address only the zoning issue is equally inappropriate. Furthermore, Intervenors are not limited to the reasons for denial relied upon by the Department. *Sludge Free UMBT v. DEP*, 2014 EHB

[7] The parties agree that a new harms-benefits analysis would be required.

939; *Kiskadden v. DEP*, 2014 EHB 642. The Intervenors have argued that Tri-County's permit should have been denied because the Department incorrectly concluded that the benefits of the landfill outweigh the harms of the landfill.[8] All of these issues need to be considered holistically.

Accordingly, we issue the Order that follows, and we will schedule the hearing on the merits in short order.

[8] It may be that the Intervenors' other issues have fallen by the wayside now that all parties agree that the harms-benefits analysis based on a 140-foot landfill would need to be re-done. Indeed, given the undisputed fact that the permit application would at a minimum require major changes, it may be that the *most* that this Board could do as a practical matter is hold that Tri-County should be given a chance to revise its application instead of being required to submit an entirely new application. Of course, the compliance history issue might make a new application a waste of time.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-COUNTY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 2013-185-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PINE TOWNSHIP and GROVE CITY FACTORY SHOPS LP, Intervenors	:	

O R D E R

AND NOW, this 22nd day of May, 2015, it is hereby ordered that the motion for summary judgment is **denied.**

ENVIRONMENTAL HEARING BOARD

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

*** Judge Steven C. Beckman is recused in this matter.**

DATED: May 22, 2015

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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: May 29, 2015**
	:	

OPINION AND ORDER ON
MOTION TO DISMISS

By Michelle A. Coleman, Judge

Synopsis

The Board dismisses a corporation's appeal where the corporation has failed to obtain counsel as required by the Board's rules at 25 Pa. Code § 1021.21(b), and where it has failed to abide by or respond to the Board's orders.

O P I N I O N

This matter involves the appeal of L.A.G. Wrecking, Inc. ("L.A.G. Wrecking") 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 railroad 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 Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 – 693.27, the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, and the regulations at Title 25, Chapter 105 of the Pennsylvania Code. The Department's order requires L.A.G. Wrecking to submit a permit application for the repair or removal of the bridge, and then to follow through with the repair or removal within 180 days of the issuance of the permit. On September 10, 2014, L.A.G.

Wrecking, with the representation of counsel, filed an appeal contesting the Department's order as arbitrary and capricious, an abuse of discretion, and not supported by evidence.

Approximately a month after the appeal was filed, L.A.G. Wrecking's attorney filed a motion for leave to withdraw his appearance as counsel due to a potential conflict of interest in the continued representation of L.A.G. Wrecking and the representation of another client in a federal matter. We held a conference call with counsel for the parties, and on October 31, 2014 we issued an Opinion and Order granting the withdrawal of L.A.G. Wrecking's counsel. *L.A.G. Wrecking, Inc. v. DEP*, 2014 EHB 813. Our Opinion noted that under the Board's rules, corporations are required to be represented by counsel. 25 Pa. Code § 1021.21(b). Accordingly, we stayed the matter for 30 days and ordered L.A.G. Wrecking to have new counsel enter an appearance on or before December 1, 2014. After the issuance of the Opinion, staff from the Board contacted the president of L.A.G. Wrecking by telephone to confirm her receipt of the Opinion and her understanding of L.A.G. Wrecking's obligation to obtain new representation.

When no counsel entered an appearance, we issued a Rule to Show Cause on December 3, 2014, entering a rule on L.A.G. Wrecking to show cause why the Board should not impose sanctions for failing to abide by our October 31, 2014 Order. The rule would be satisfied by the entry of appearance of counsel on or before December 17, 2014. L.A.G. Wrecking did not respond to the Rule to Show Cause. Attempts by Board staff to again reach the president of L.A.G. Wrecking by telephone were unsuccessful. On December 29, 2014, we sent a letter to L.A.G. Wrecking reiterating the withdrawal of its prior counsel and our rule requiring corporations to be represented in proceedings before the Board. We noted our attempts to reach L.A.G. Wrecking by telephone. We explained that failure to have counsel enter an appearance

could result in the dismissal of the appeal. Despite our persistent effort, we have had no further communication from L.A.G. Wrecking.

On April 24, 2015, the Department filed a motion to dismiss L.A.G. Wrecking's appeal.[1] In its motion, the Department notes that a party who fails to abide by the Board's rules is subject to sanctions under 25 Pa. Code § 1021.161, sanctions which include the possible dismissal of the party's appeal. It argues that this appeal should be dismissed on the basis of L.A.G. Wrecking's continued failure to obtain counsel in the face of the Board's rules and orders requiring it to do so. The response to the Department's motion was due on May 26, 2015. 25 Pa. Code § 1021.94(c). L.A.G. Wrecking did not file a response.

The Board evaluates motions to dismiss in the light most favorable to the non-moving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *South v. DEP*, EHB Docket No. 2014-082-L, slip op. at 4 (Opinion, Apr. 16, 2015) (quoting *Consol Pa. Coal Co. v. DEP*, EHB Docket No. 2014-027-B, slip op. at 7 (Opinion, Feb. 12, 2015)); *Cooley v. DEP*, 2004 EHB 554, 558; *Neville Chem. Co. v. DEP*, 2003 EHB 530, 531; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925. Motions to dismiss will be granted only when a matter is free from doubt. *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Res., LP v. DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511. Where, as here, an appellant fails to respond to a motion, the Board deems all properly pleaded and supported facts in the motion to be true. 25 Pa. Code § 1021.91(f); *Brockley v. DEP*, EHB Docket No. 2014-092-L, slip op. at 2 (Opinion, Apr. 3, 2015); *Tanner v. DEP*, 2006 EHB 468, 469; *Gary Berkley Trucking, Inc. v. DEP*, 2006 EHB 330, 331-32.

[1] The Department's motion to dismiss was not supported by a memorandum of law as required by 25 Pa. Code § 1021.94(a). However, we do not view that to be grounds for the motion's denial in this circumstance.

The Board's rules require that corporations "shall be represented by an attorney of record admitted to practice before the Supreme Court of Pennsylvania." 25 Pa. Code § 1021.21(b). In considering the mandatory language of our rule, we have consistently held that corporations may not proceed with an appeal without legal representation. *Falcon Coal and Constr. Co. v. DEP*, 2009 EHB 209, 210; *R. J. Rhodes Transit, Inc. v. DEP*, 2007 EHB 260, 261; *Potts Contracting Co. v. DEP*, 1999 EHB 958, 960; *Bucket Coal Co. v. DEP*, 1999 EHB 288, 289-90. L.A.G. Wrecking is a registered business corporation in the state of Pennsylvania. For the past seven months it has been unrepresented in this appeal. We have given L.A.G. Wrecking numerous chances to have counsel enter an appearance and it has neglected to do so at every turn.

In addition, L.A.G. Wrecking's non-responsive conduct is a classic example of an appellant that has failed to prosecute its case and evinced an intention to no longer continue with its appeal. L.A.G. Wrecking has ignored our Opinion and Order, our Rule to Show Cause, our letter, and now the Department's motion to dismiss. We have frequently held that dismissal is appropriate under such circumstances. *See Casey v. DEP*, 2014 EHB 908, 910-11; *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. L.A.G. Wrecking's failure to obtain counsel, its failure to abide by our rules and orders, and its disinterest in prosecuting its case compel us to dismiss this appeal.

Accordingly, we issue the Order that follows.

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	:	

O R D E R

AND NOW, this 29th day of May, 2015, it is hereby ordered that the Department's motion to dismiss is **granted**. The appeal of L.A.G. Wrecking, Inc. 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: May 29, 2015

c: DEP, General Law Division:
Attention: Maria Tolentino
9th Floor, RCSOB

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For Appellant:
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c/o Pilar Glodzik
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Duryea, PA 18642

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIDNEY L. MILES and DEBRA A. MILES	:	
	:	
v.	:	**EHB Docket No. 2014-146-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 3, 2015**

OPINION AND ORDER ON
THE DEPARTMENT'S MOTION TO DISMISS

By Steven C. Beckman, Judge

Synopsis

Where the Appellants have demonstrated a lack of intent to pursue their appeal by their failure to follow Board rules and orders, the Board dismisses the appeal as a sanction.

O P I N I O N

Rita: Do you ever have déjà vu?
Phil: Didn't you just ask me that?[*]

Presently before the Pennsylvania Environmental Hearing Board ("Board") is a motion by the Department of Environmental Protection ("Department") to dismiss the appeal of Sidney and Debra Miles ("the Appellants") of the release of a portion of the reclamation bond for a surface coal mine operated by Glenn O. Hawbaker, Inc. The appeal stems from the Appellants' belief that reclamation of the mine did not result in the restoration of the Appellants' property to approximate original contours and surface conditions. Under an unusually familiar set of circumstances, the Board dismisses the Appellants' appeal as a sanction for failing to abide by Board orders.

[*] *Groundhog Day* (Columbia Pictures 1993).

This appeal got off to a rocky start when the Appellants failed to submit a copy of the Department's action with their notice of appeal filed October 22, 2014, as required by the Board's regulations. 25 Pa. Code § 1021.51(d). The following day, the Board ordered the Appellants to, first, file the missing documentation on or before November 12, 2014, and second, register for electronic filling. After they failed to respond to that order or to file a copy of the Department's action, the Board issued on November 17, 2014 a rule to show cause why the Mileses' appeal should not be dismissed. While the Appellants did not respond to the rule, the Board nevertheless held a conference call on December 22, 2014, during which the Appellants represented that they did not have a copy of the letter memorializing the Department's action.[1] The same day, the Department filed a copy of the letter in question. After the Department's filing, the Board withdrew its rule to show cause and again ordered the Appellants to register for electronic filing. The December 22, 2014 order also advised the Appellants that failure to comply with any future orders of the Board would result in dismissal of their appeal.[2]

On March 27, 2015, four days after the deadline for filing dispositive motions, and thirty-five days after the close of discovery, the Department filed a motion to compel responses to discovery requests that it had served to the Appellants on January 20, 2015. In addition to alleging the Appellants' failure to respond to its discovery requests, the Department also represented that the Appellants never served discovery requests of their own to the Department. The same day that the Department filed the motion to compel, we issued an order directing the Appellants to respond to the Department's motion on or before April 3, 2015, and extending the deadlines for discovery and dispositive motions to May 15, 2015 and June 19, 2015,

[1] The Notice of Appeal states that Appellants received notice of the action by certified mail on September 29, 2014, but the Board was given no explanation as to what may have happened to the letter thereafter.

[2] Appellants eventually registered for electronic filing.

respectively. Following the Appellants' failure to respond to the motion to compel, on April 6, 2015, the Board issued an order to the Appellants to file complete answers to the Department's discovery requests with the Board on or before April 15, 2015. Appellants again failed to respond. Finally, on April 28, 2015 the Department filed the present motion to dismiss. The Appellants—yet again—failed to respond as required by the Board's regulations. 25 Pa. Code § 1021.94(c).

The Appellants' actions and inactions in this matter bear a striking resemblance to an appeal they filed back in 2008. *Miles v. DEP*, 2009 EHB 179. That case also involved the Mileses' appeal of an action concerning the disposition of bonds posted for surface coal mines.[3] *Id.* Just as in the present case, there, the Appellants initially failed to file a copy of the action being appealed. They also failed to serve any discovery, to respond to the Department's discovery, and to respond to any orders of the Board subsequent to perfecting their notice of appeal. *Id.*

Section 1021.161 of the Board's Rules of Practice and Procedure provides:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

25 Pa. Code § 1021.161. Dismissal is justified when an appellant fails to comply with Board orders and demonstrates a lack of intent to pursue the appeal. *See, e.g., Casey v. DEP*, 2014 EHB 908; *Schlafke v. DEP*, 2013 EHB 733; *Miles*, 2009 EHB 179. While the Board is cognizant

[3] In the 2008 appeal, it appears that the Mileses were the operators of the mines which were subject to a Department declaration of bond *forfeiture*, in contrast to this case, where they appeal the partial release of bonds for a mine apparently operated by a third party on the Mileses' property.

that the Appellants do not have legal representation, proceeding *pro se* does not excuse a party from following the Board's rules, procedures, and orders. *Schlafke*, 2013 EHB at 736. As we concluded in the Appellants' previous appeal, the actions and failures to act taken by the Appellants demonstrate a lack of interest in pursuing the appeal. Therefore, the Board dismisses the appeal for failure to comply with a Board order pursuant to 25 Pa. Code § 1021.161, and issues the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIDNEY L. MILES and DEBRA A. MILES	:	
	:	
v.	:	**EHB Docket No. 2014-146-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 3rd day of June, 2015, 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: June 3, 2015

c: **DEP, General Law Division:**
Attention: Maria Tolentino
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Clarion, PA 16214

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PA WASTE, LLC	:	
	:	
v.	:	**EHB Docket No. 2015-056-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 4, 2015**

OPINION AND ORDER ON
PETITION TO INTERVENE

By: Richard P. Mather, Sr., Judge

Synopsis

The Board grants Clearfield County's Petition to Intervene where the County's interest in the appeal is substantial, direct and immediate. The Department denied an application for a landfill permit, and the permit applicant filed an appeal. The County, which is the county in which the proposed landfill was to be sited, filed its Petition to Intervene in support of the Department's decision to deny the landfill permit. The County is an interested party under Section 4 of the Environmental Hearing Board Act and is entitled to intervene.

O P I N I O N

The Appellant, PA Waste, LLC ("PA Waste"), filed an appeal before the Environmental Hearing Board (the "Board") challenging a decision by the Department of Environmental Protection (the "Department") to deny PA Waste's Application for the Camp Hope Run Municipal Waste Landfill, letter dated April 9, 2015.

Before the Board is a Petition to Intervene (the "Petition") filed on behalf of Clearfield County (the "County") pursuant to 25 Pa. Code § 1021.81. The County filed the Petition to

support the Department's decision to deny the permit application. PA Waste filed an Answer challenging the Petition. The Department did not file anything. Petitioner then filed a reply to Appellant's Answer.

Section 4 of the Environmental Hearing Board Act provides that "[a]ny interested party may intervene in any matter pending before the board."[1] 35 P.S. § 7514(e). "Any interested party" actually means "any person or entity interested, i.e., concerned, in the proceedings before the Board." *Browning Ferris, Inc. v. DER*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991). The interest must be "more than a general interest in the proceedings . . . such that the person or entity seeking intervention will either gain or lose by direct operation of the Board's ultimate determination." *Jefferson County v. Department of Environmental Protection*, 703 A.2d 1063, 1065 n.2 (Pa. Cmwlth. 1997); *Wheelabrator Pottstown, Inc. v. Department of Environmental Resources*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *Browning-Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991); *Hostetter v. DEP*, 2012 EHB 386, 388; *Pagnotti Enterprises, Inc. v. DER*, 1992 EHB 433, 436. In other words, "an intervenor must have standing." *Pileggi v. DEP*, 2010 EHB 433, 434 (quoting *Connors v. State Conservation Commission*, 1999 EHB 669, 670).

To that end, a person or entity seeking to intervene in a Board proceeding to challenge a Department action "must show a direct and substantial interest" and "must show a sufficiently close causal connection between the challenged action and the asserted injury to qualify the interest as 'immediate' rather than 'remote.'" *Borough of Glendon v. Department of Environmental Protection*, 603 A.2d 226, 231 (Pa. Cmwlth. 1992) (quoting *William Penn*

[1] This language establishes a low burden for intervention in Board proceedings. *Barnside Farm Composting Facility v. DEP*, 2011 EHB 165, 166 ("[I]t does not take much to be able to intervene in Board proceedings." (quoting *TJS Mining v. DEP*, 2003 EHB 507, 508)); *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 602, 606 ("The Board's governing statute and rules do not make it difficult to intervene in a pending matter.").

Parking Garage v. City of Pittsburgh, 346 A.2d 269, 286 (Pa. 1975)); *see also Hostetter*, 2012 EHB at 387 ("An appropriate interested party is one where the petitioner's interest is 'substantial, direct and immediate.'"); *Ganzer Sand & Gravel, Inc. v. DER*, 1990 EHB 625, 626.

Under the Board's Rules, a petition to intervene must establish the following: (1) The reasons the petitioner seeks to intervene; (2) The basis for asserting that the identified interest is greater than that of the general public; (3) The manner in which that interest will be affected by the Board's adjudication; and (4) The specific issues upon which the petitioner will offer evidence or legal argument. 25 Pa. Code § 1021.81. The County filed the Petition with the Board under this rule.

The County makes several arguments in support of its Petition. First, the County states that it seeks to intervene for the following reasons:

(i) There is no need for the Landfill and the County's Solid Waste Plan does not include the Landfill;

(ii) Pennsylvania has significant excess capacity, thus there is no need for the Landfill;

(iii) Many county residents have expressed opposition to the Landfill for reasons including odor, litter, noise, traffic, insects and birds, and potential negative effects on values of properties in close proximity to the Landfill;

(iv) The permitting and operation of the Landfill would adversely affect the County and its citizens and is a threat to human health, safety and the environment; and

(v) The benefits of the Landfill do not clearly outweigh the known or potential harms of the Landfill.

Paragraph 16 of Petition to Intervene. Second, the County further asserts that it has an interest that is greater than the general public because the County is the host county and the Board's adjudication may affect the County's interest in protecting its citizens. Paragraph 24 of Petition to Intervene. Third, the County asserts that its interest will be affected because sustaining the Appeal could result in a detriment to the County and the health, safety and welfare of its citizens by endangering County residents who live and work in nearby areas and depend on sensitive groundwater aquifers for drinking water. *Id*. Fourth, the County asserts it will produce one or more experts to provide testimony regarding geologic features in the area of the Landfill that are likely to lead to the contamination of a sensitive groundwater aquifer relied upon by County residents for drinking water. *Id*. The County alleges that Appellant did not adequately address these issues in its application materials, and, therefore, DEP did not properly review these issues. *Id*.

PA Waste filed an Answer to the County's Petition to Intervene in which PA Waste opposed the County's intervention. In support of its Answer, PA Waste raised several objections. First, PA Waste asserts that the County is not an aggrieved party because it supports the action that the Department took to deny PA Waste's permit application. Second, PA Waste asserts that the County's Petition includes matters which are beyond the scope of PA Waste's pending appeal. Finally, PA Waste asserts that allowing the County to intervene could potentially result in undue delay or resolution of this appeal. PA Waste is particularly concerned with the County's participation in any future settlement discussions with the Department.[2]

[2] On a related note, PA Waste also asserts that granting intervention "on the side of the Department will likely have a chilling effect on the exercising of appellant's constitutional due process rights". The Board disagrees. Allowing the County to intervene in a matter does not deter PA Waste from pursuing its due process rights.

The County filed a Reply to PA Waste's Answer to its Petition to Intervene. In its Reply, the County argued that a party needs to be aggrieved to file an appeal "but only interested to intervene." The Board disagrees. A party needs standing to intervene just as a party needs standing to appeal as set forth above. *Pilleggi v. DEP*, 2010 EHB at 434. In addition, the County addressed several other issues in its reply that will be briefly discussed below.

To resolve the dispute regarding the County's Petition to Intervene the Board needs to address two major issues and a number of other related items. The first is a general objection of PA Waste that a person who supports a Department action is not aggrieved by the Department's action under appeal because the person supports the action. Under this approach, a person who supports a Department's action may not intervene in an appeal of the Department action filed by a party which opposes the action. The second is a more narrow focused issue regarding the standing of a host county to participate in an appeal of a municipal waste permit denial where the county supports the denial. For the reasons set forth below the Board finds that the County has standing to intervene in this appeal. The Board will address the later issue first.

Clearfield County is the host county for PA Waste's proposed landfill. The Pennsylvania Supreme court recently recognized that a political subdivision has a substantial, direct, and immediate interest in protecting the environment and the quality of life within its borders, as well as the quality of life of its citizens. *Robinson Twp. v. Cmwlth. of Pa.*, 83 A.3d, 919-21 (Pa. Cmwlth. 2013). "Direct" and "immediate" interest means that there must be a sufficiently close causal connection between the person's interest and the actual *or potential* harm associated with the challenged action. *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). Whether the Landfill will in fact have the impact, which the County alleges, is not the subject of inquiry at this point so long as there is an objectively reasonable threat of adverse

effects. *Tri-County Landfill, Inc., v. DEP*, 2014 EHB 132 *citing Giordano v. DEP*, 2000 EHB 1154, 1156 (*citing Friends of Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 180-184 (2000).

Here, there are potential harms associated with the challenged action. There is an objectively reasonable threat that the permitting and operation of the Landfill will adversely affect the County and its citizens. The County has more than a general interest in this appeal primarily because the Landfill will be constructed within Clearfield County. The County's interest in this appeal is substantial, direct and immediate. The County's interest in preventing odor, litter, noise, traffic and pollution from the landfill are hardly remote. The County will either gain or lose by direct operation of the Board's ultimate determination on PA Waste's appeal, and thus the County has standing.

As we explained in *Multilee*, "the interests of a host municipality are sufficient to warrant intervention in an appeal of the Department's denial of a permit to construct and operate a municipal waste disposal facility." *Multilee, Inc. v DER*, 1994 EHB at 992. The County's interest in *potential* harm associated with the challenged action is sufficient. *William Penn Parking Garage,* 346 A.2d at 282. It is not the appropriate time to address Appellant's claim that the Landfill will not in fact have the adverse effects that the County asserts. The Board is satisfied with the County's claim that the proposed Landfill could potentially have a deleterious impact on the County's use of the area in the vicinity of the landfill as well as the County's economic and environmental well-being.[3]

[3] The Board recently dismissed an appeal of a municipality for lack of standing involving the issuance of an encroachment permit in a nearby municipality. *Borough of St. Clair v. DEP*, EHB Docket No. 2013-118-L, Adjudication issued May 20, 2015. This decision is clearly distinguished from the appeal at hand. First, as the Board noted in the Adjudication, an adjacent municipality would likely have standing in an appeal of a landfill permit, but in the appeal of the encroachment permit the municipality failed to present any evidence of harm to show it had standing. Second, a host county has a well-defined role in planning

The Board also disagrees with PA Waste's general objection to the County's standing premised upon the fact that the County supports the Department's decision to deny the permit. The Board has previously decided that a person may intervene in an appeal of a Department action that it supports. *Connors v. State Conservation Commission*, 1999 EHB 669 (Citizens group allowed to intervene in support of nutrient management plan disapproval); *Multilee* at 989 (Host township allowed to intervene in support of permit denial); *Tri-County Landfill* at 132 (Private citizens allowed to intervene in support of permit denial). Even if the County did not have special status as the host county for the proposed municipal waste landfill, which independently supports the County's standing, the Board would not support PA Waste's broad argument that no person who supports a Department action has standing to intervene and participate in an appeal of that action by another party. If a host county supported a Department decision to issue a particular permit and a third-party filed an appeal, then under PA Waste's narrow view of intervention, the person who supported the decision would be unable to intervene to support the Department's permit decision. The fact that a particular person supports a Department decision to either issue or deny a permit does not automatically prevent that person from intervening in an appeal. That person is entitled to pursue intervention under the customary rules governing intervention and the Board will evaluate that person's petition under these rules and make a decision. Here, the County has standing to support its intervention in this appeal of the Department's decision to deny PA Waste's permit application for a municipal waste landfill proposed to be sited in the County.

In granting the County's Petition to Intervene, the Board has not yet addressed the follow-up question regarding PA Waste's claim that the County seeks to raise issues that are

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for proper municipal waste management and in permitting facilities within the County. In this appeal, Clearfield County is the host county and the permit at issue is a municipal waste landfill permit. Under these parts the County has standing to support its Petition.

beyond the scope of its appeal. PA Waste raises a valid consideration regarding the scope of the appeal. The Board has held that an intervenor will not be permitted to expand the scope of an appeal. *Multilee,* 1994 EHB at 993. At this preliminary stage of the appeal, the scope of the appeal is not yet clearly determined and the Parties, in their Petition, Answer and Reply, dispute the exact scope of the appeal. The Department's silence on this issue and the other Parties' dispute prevents the Board from fully addressing PA Waste's concern. At this stage of the appeal, the Board is only addressing the issue of the County's intervention. Whether the Board will preclude the County from raising certain issues in this appeal as we did in *Multilee* is an issue the Board does not have to decide today. The Board will address issues regarding the scope of the appeal in the future if the need arises.

The remaining argument that PA Waste makes concerns the potential that the County's intervention may, in the future, lengthen litigation or complicate settlement discussions between the Department and PA Waste. While PA Waste is obviously correct that three party negotiations to settle a matter have the potential to be more complicated and difficult than two party negotiations to settle a matter, the potential to complicate future settlement discussions is not a basis to deny the County's intervention. The same can be said regarding the litigation of a matter. In the long run, the Board believes that the County's participation in this appeal has the potential to reduce the overall timeframe to resolve disputes among all interested parties to this appeal, and this is one of the reasons the Board's Rules allow intervention by interested parties.

Accordingly, the Board issues the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PA WASTE, LLC	:	
	:	
v.	:	**EHB Docket No. 2015-056-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 4th day of June, 2015, in consideration of Clearfield County's Petition to intervene, it is hereby ordered that Clearfield County's Petition to Intervene is **GRANTED**. The caption shall be revised as follows:

PA WASTE, LLC	:	
	:	
v.	:	**EHB Docket No. 2015-056-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CLEARFIELD COUNTY, Intervenors	:	

ENVIRONMENTAL HEARING BOARD

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

DATED: June 4, 2015

c: DEP, General Law Division:
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P.O. Box 1146
Harrisburg, PA 17108-1146

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID W. RUSSELL	:	
	:	
v.	:	**EHB Docket No. 2014-031-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 10, 2015**

A D J U D I C A T I O N

By Steven C. Beckman, Judge

Synopsis

The Board reduces a civil penalty assessment against the Appellant from $ 17,162.00 to $7,881.00 for failing to obey two Department administrative orders. The Board finds that, while the Appellant bears some responsibility, it is unreasonable to assign the Appellant with elevated levels of culpability under the circumstances.

Background

This matter originates with Appellant David W. Russell's ("Mr. Russell" or "the Appellant") timely appeal to the Environmental Hearing Board ("Board") of a Department of Environmental Protection ("Department") Assessment of Civil Penalty, issued February 28, 2014, against Mr. Russell and Amy J. Herp-Russell in the amount of $17,162.00 for alleged violations of the Pennsylvania Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, *as amended*, 35 P.S. §§ 721.1–721.17 and regulations promulgated thereunder. Ms. Herp-Russell did not appeal the Assessment of Civil Penalty. The Board held a one-day hearing in this matter on January 13, 2015 in Erie. The Department and Appellant submitted their posthearing briefs on March 11, 2015 and April 10, 2015, respectively, and the Department filed a reply brief on April 27, 2015.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Safe Drinking Water Act, 35 P.S. §§ 721.1–721.17 ("the Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510–17 ("Administrative Code"); and the rules and regulations promulgated under both the Act and the Administrative Code ("Regulations").

2. Mr. Russell and Ms. Herp-Russell are the owners of the Country Gables Apartments located on property in Girard Township, Erie County. (Notes of Transcript ("T.") 15; DEP Ex. 1.)

3. Mr. Russell and Ms. Herp-Russell purchased Country Gables Apartments in 2009. (T. 15; DEP Ex. 1.)

4. Mr. Russell and Ms. Herp-Russell own the water supply that serves Country Gables Apartments ("Water Supply"). (T. 14–15.)

5. The Water Supply is a "system," as that term is defined in 25 Pa. Code § 109.1, and is a "community water system," as that term is defined in 35 P.S. § 721.3, and 25 Pa. Code § 109.1. (DEP Ex. 3.)

6. Mr. Russell is the permittee for the Water Supply and is authorized to operate a community water system under Water Supply Operation Permit No. 2509502 ("Operation Permit") issued to him on April 26, 2010. (DEP Ex. 2.)

7. The Operation Permit requires, among other things, a minimum entry point disinfectant residual of 0.70 milligrams per liter ("mg/l"), a maximum instantaneous flow rate of 43 gallons per minute ("gpm"), and a minimum storage volume of 475 gallons to provide 4-log treatment of viruses. (DEP Ex. 2.)

8. From September 2009 until March 15, 2013, Richard Kreider was employed by Mr. Russell and Ms. Herp-Russell as the certified operator at the Water Supply. (T. 52–53.)

9. For several months prior to March 2013, Ms. Herp-Russell had been paying Mr. Kreider. However, Mr. Kreider left on March 15, 2013, because Ms. Herp-Russell had fallen behind in the payments for his services as a certified operator. (T. 54.)

10. On March 15, 2013, Mr. Kreider notified the Department that he was no longer the certified operator at the Water Supply. (T. 54.)

11. Following March 15, 2013, the Erie County Health Department ("ECHD") conducted a series of inspections and identified violations of the Operation Permit. (DEP Ex. 3.)

12. On March 29, 2013, the Department issued an administrative order to Mr. Russell and Ms. Herp-Russell regarding the operation of the Water Supply and the violations that were identified during the ECHD inspections ("the Department's Order"). (DEP Ex. 3.)

13. Mr. Russell and Ms. Herp-Russell did not appeal the Department's Order. (T. 18.)

14. Mr. Russell and Ms. Herp-Russell did not immediately comply with the Department's Order. (T. 26.)

15. On April 25, 2013, the Department filed a petition to enforce the Order with the Erie County Court of Common Pleas at Docket No. 11103-2013. (T. 19; DEP Ex. 4.)

16. On approximately May 3 or 4, 2013, Ms. Herp-Russell paid Mr. Kreider most of the money he was owed and he returned as the certified operator of the Water Supply. (T. 55.)

17. Upon his return in early May 2013, Mr. Kreider began to collect and report the minimum disinfectant residual at the entry point of the Water Supply as required by Paragraphs 2, 4, and 5 of the Department's Order. (T. 27, 55; DEP Ex. 4.)

18. On June 3, 2013, the Erie County Court of Common Pleas entered an Order enforcing the Department's Order ("Court's Order"). (T. 20; DEP Ex. 4.)

19. On June 5, 2013, the Department received a problem corrected notice, a copy of the public notice sent to the Water Supply's customers, and confirmation that a colorimeter was present at that Water Supply, and determined that Mr. Russell and Ms. Herp-Russell were in compliance with the Department's Order. (T. 27.)

20. On October 4, 2013, Mr. Kreider was informed by Ms. Herp-Russell that she had retained a new certified operator and that his services were no longer needed. (T. 56, 62–63.)

21. Mr. Kreider returned as the certified operator on November 2, 2013 at the request of the tenants because the new certified operator was gone and they were afraid of losing their homes. (T. 63.)

22. During the time Mr. Kreider was not serving as the certified operator in October 2013, the minimum entry point disinfectant residual of 0.70 mg/l was not maintained at the Water Supply on October 22–24, and October 26, and no one collected and reported an entry point disinfectant residual concentration on October 29, October 31, and November 1, in violation of Paragraphs 2 and 4 of the Department's Order and the Court's Order. (T. 28.)

23. The Department was not notified of, or aware of, any of the customers of the Water Supply becoming sick or going to the doctor and/or the hospital as a result of the violations that form the basis of the penalty. (T. 38–39.)

24. In January 2014, Mr. Russell contacted Mr. Kreider and the two entered into a contract for his services as a certified operator. Mr. Kreider has remained the certified operator for the Water Supply from that time up until the date of the hearing. (T. 56–58.)

25. During 2013, when the violations were occurring with regard to the Water Supply, Mr. Russell and Ms. Herp-Russell were having marital difficulties and were separated and in the process of obtaining a divorce. (*See generally* T. 73–98.)

26. On January 26, 2012, the Erie County Court issued an order that provided that all future rental income, including that from Country Gables Apartments, was to be transferred to Ms. Herp-Russell. (Russell Ex. A.)

27. On March 5, 2012, Ms. Herp-Russell obtained a temporary protection from abuse ("PFA") order that excluded Mr. Russell from their residence and forbade him from having any contact with Ms. Herp-Russell. (Russell Ex. B.)

28. After the Erie County Court's March 5, 2012 PFA order, Mr. Russell did not go to Country Gables Apartments until mid-December 2013. (T. 80.)

29. The PFA was discontinued on March 27, 2012. (DEP Ex. 9.)

30. Even after the PFA was discontinued, Mr. Russell sought to avoid any contact with Ms. Herp-Russell and avoided going to any place she might be found including Country Gables Apartments. (T. 91–93.)

DEP's Assessment of Civil Penalty

31. As part of its duty to enforce the Safe Drinking Water Act, the Department may assess a civil penalty of up to $5,000.00 per day for each violation. (T. 23.)

32. On February 28, 2014, the Department issued an Assessment of Civil Penalty in the amount of $17,162.00 to Mr. Russell and Ms. Herp-Russell ("the Penalty Assessment") for violations of the Safe Drinking Water Act. (DEP Ex. 4.)

33. On March 28, 2014, Mr. Russell appealed the Penalty Assessment arguing that the penalty was excessive and that violations that occurred were the responsibility of Ms. Herp-Russell. (Notice of Appeal.)

34. Ms. Herp-Russell did not appeal the Penalty Assessment.

35. The Department utilized a penalty matrix and the Department's Compliance Strategy document ("Compliance Strategy") to calculate the civil penalties for violations at the Water Supply. (T. 23, 24; DEP Ex. 5.)

36. The Department considers the seriousness of the violation and the culpability of the violator in calculating civil penalties under the Compliance Strategy. (T. 24.)

37. The Department identified nine distinct violations in total regarding the Country Gables Apartments, but only calculated a penalty for two types of violations: failures to comply with the Department's Order from March 29, 2013 through June 5, 2013 ("Violation No. 8") and failures to comply with both the Department's Order and the Court's Order after June 5, 2013 ("Violation No. 9"). (T. 24–26; DEP Ex. 5.)

38. The Department characterized the failures to comply with the Department's and Court's Orders at the highest level of seriousness of violation under the penalty matrix and the Compliance Strategy. (T. 31; DEP Ex. 6.)

39. With respect to Violation No. 8, the Department determined that Mr. Russell and Ms. Herp-Russell were not in full compliance with the Department's Order until June 5, 2013, resulting in over 60 days of violation. (T. 27.)

40. The Department determined that Mr. Russell's conduct was reckless for Violation No. 8, since he had demonstrated an ability to meet the minimum disinfectant residual at the Water Supply from 2010 until the events giving rise to the Department's Order. (T. 31–32.)

41. The Department only calculated a penalty for 30 days of violation for failing to comply with the Department's Order in Violation No. 8. (T. 27.)

42. With respect to Violation No. 9, the Department calculated a penalty for each day in October and November 2013 that either the disinfectant residual reported was below the minimum or no disinfectant residual was reported, for a total of seven days of violation. (T. 30; DEP Ex. 5.)

43. The Department determined that Mr. Russell's conduct was deliberate and willful for Violation No. 9, since Mr. Russell and Ms. Herp-Russell had previously begun to comply with the Department's Order, continuing to do so for a few months before the Department then had to take further enforcement action to regain compliance. (T. 32; DEP Ex. 5.)

44. The Department considered the cost savings to Mr. Russell for not employing a certified operator but did not include this in the penalty calculation. (T. 33.)

45. The Department considered its personnel costs spent on this matter and included this in the penalty calculations in the amount of $962.00, based upon 17 hours of time. (T. 33; DEP Ex. 5.)

46. The Department determined that a total civil penalty of $17,162.00 for the violations of the Department's Order was appropriate and assessed that amount against Mr. Russell and Ms. Herp-Russell, jointly and severally. (T. 34; DEP Ex. 5.)

DISCUSSION

This appeal concerns a Department civil penalty assessed jointly and severally against Appellant David Russell and Amy Herp-Russell, a non-party in this matter, as the joint-owners of the Country Gables Apartments in Girard Township, Erie County. There is not much on the record that is in dispute; Mr. Russell has adopted most of the findings of fact proposed by the Department and does not contest that he initially failed to comply with the Department's Order and the Court's Order. As such, the Board finds that the violations that are the basis of the Penalty Assessment sought by the Department are adequately demonstrated by the record in this

matter. However, while Mr. Russell does acknowledge some responsibility for these violations, he contends that the Department abused its discretion in determining the civil penalty. Specifically, he contests both the amount and reasonableness of the $17,162.00 penalty, as it applies to *him*. For the reasons discussed below, we agree that the penalty, as assessed, is unreasonable as applied to the Appellant. Accordingly, we reduce David W. Russell's joint and several share of liability for the civil penalty from $17,162.00 to $7,881.00.

Legal Standard

As an initial matter, we must make clear the scope of our decision. This Board "has the power and duty to hold hearings and adjudications . . . on orders, permits, licenses or decisions of the department"—that is, actions of the Department of Environmental Protection. 35 P.S. § 7514(a). Once the Department has taken an action, that action is not final as to any adversely-affected person until that person has had the opportunity to bring an appeal before the Board. 35 P.S. § 7514(c). "If a person has not perfected an appeal in accordance with" our rules and regulations, the "action shall be final *as to [that] person*." *Id.* (emphasis added). Amy Herp-Russell never filed an appeal of the Penalty Assessment at issue—though the Department assessed it jointly and severally upon both her and Mr. Russell. "[J]urisdiction 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." 25 Pa. Code § 1021.52(a); *see also Rajkovich v. DEP*, 2014 EHB 287; *Rostokosky v. Dep't of Envtl. Res.*, 364 A.2d 761 (Pa. Cmwlth. 1976) ("[T]he untimeliness of the filing deprives the Board of jurisdiction."). Similarly, the Safe Drinking Water Act provides: "Failure to appeal [an assessment of civil penalty] within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty." 35 P.S. § 721.13(g). Thus, the Penalty Assessment is final as applied to Ms. Herp-Russell. Accordingly, neither the Penalty Assessment's findings nor the amount of the penalty imposed therein—as

applicable to Ms. Herp-Russell—are disturbed by our adjudication of Mr. Russell's timely appeal. 35 P.S. § 7514(c).[1]

Under the Board's Rules, the Department bears the burden of proof in an appeal of a civil penalty assessment. 25 Pa. Code § 1021.122(b)(1); *see, e.g.*, *Rhodes v. DEP*, 2009 EHB 599, 623. In an appeal from a civil penalty assessment based on violations of the Safe Drinking Water Act, the Board determines first whether the underlying violations occurred, and then whether the amount assessed by the Department is reasonable. *Wilbar Realty, Inc. v. DER*, 1994 EHB 999, *aff'd*, 663 A.2d 857 (Pa. Cmwlth. 1995). As the Department observes, the Board's scope of review of Department actions is *de novo*. *See, e.g.*, *Jake v. DEP*, 2014 EHB 38; *Smedley v. DEP*, 2001 EHB 131. We must determine whether the Department has shown, by a preponderance of evidence, that there is a factual basis for the violations underlying the assessment of the civil penalty, and that the penalty imposed on the appellant is appropriate given the circumstances surrounding the violations—in short, that it reasonably fits.

Furthermore, the Board is not bound by the Department's civil penalty matrix. *DEP v. Stambaugh*, 2012 EHB 93, 96 n.1 ("*Stambaugh I*"). "Our task is not to review the Department's civil penalty matrix. The matrix is a guidance document which may be a useful tool to Department personnel, but it is not binding on the Department or the Board." *DEP v. Thebes*, 2010 EHB 370, 398. Where the civil penalty is not reasonable, the Board will adjust the penalty appropriately. *See, e.g.*, *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287. Because the

[1] The Board recognizes the practical complexities that arise associated with civil penalties assessed by the Department jointly and severally on multiple parties where only one party appeals the assessment. To be clear, our adjudication is simply a determination of what is a reasonable penalty to impose on Mr. Russell, individually, given the circumstances surrounding the violations. It limits the amount of the $17,162.00 Penalty Assessment that the Department can seek to collect from Mr. Russell to $7,881.00. Because the Penalty Assessment was imposed jointly and severally, and Ms. Herp-Russell did not appeal it, the Department may choose to collect the entire amount of the Penalty Assessment from Ms. Herp-Russell or any portion of the Penalty Assessment that is not paid by Mr. Russell.

Department's determination of the Appellant's level of culpability was unreasonable, we reduce David W. Russell's liability for the civil penalty from $17,162.00 to $7,881.00.

The Appellant's Culpability

Findings on culpability must be based on "substantial evidence." *Stambaugh v. Dep't of Envtl. Prot.*, 11 A.3d 30, 37 (Pa. Cmwlth. 2010) ("*Stambaugh II*") (citing *Leeward Construction, Inc. v. Dep't of Envtl. Prot.*, 821 A.2d 145, 149 n.3 (Pa. Cmwlth. 2003)). In other contexts, such as the Solid Waste Management Act, liability for violations must be premised on some affirmative participation in the violations. *See Blosenski v. DER*, 1992 EHB 1716, 1729. Analogously, where an appellant has no knowledge of or involvement in the violations in question, but is the spouse of the culpable party, the Department's claim against the appellant may be unjust. *DEP v. Danfelt*, 2012 EHB 308. Generally, there are four levels of culpability that may be assigned to an actor when the Department calculates penalties: (1) no culpability, (2) negligence, (3) recklessness, and (4) deliberate or intentional.

"Negligence is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm." *Stambaugh I*, 2012 EHB at 97 (citation omitted).

In contrast, the Commonwealth Court has defined reckless as "the creation of a substantial and unjustifiable risk of harm to others and . . . conscious disregard for or indifference to that risk . . . ." *Stambaugh II*, 11 A.3d at 37 (citing *Black's Law Dictionary* 1787 (9th ed. 2009)). For a finding of recklessness, the record must show evidence to support a finding that an appellant "knew [his or her] actions would cause a risk of pollution and did so in wanton disregard of that risk." *Stambaugh II*, 11 A.3d at 38. For instance, we found in *Stambaugh I* that

a delay of seven weeks to begin cleaning up pollution and over two years to implement preventative measures merited a finding of recklessness. *Stambaugh I*, 2012 EHB at 98.

Finally, an "intentional or deliberate violation of law constitutes the highest degree of willfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result." *F.R. & S., Inc. v. DEP*, 1999 EHB 241, 269.

The Department determined that Mr. Russell's actions were reckless in failing to timely comply with the requirements of the Administrative Order when it was initially issued and were deliberate when there were further violations of the Administrative Order and the Court of Common Pleas Order on the following dates: October 22–24, 26, 29, and 31, 2013; and November 1, 2013. The Department bases these determinations in part on the fact that Mr. Russell, alone, was the permittee of the Water Supply. It also maintains that Mr. Russell was aware of its administrative orders and that it was unreasonable for him to fail in his obligations due to his reliance on Ms. Herp-Russell managing the apartments or lingering concerns based on the earlier PFA.

Mr. Russell argues that Ms. Herp-Russell was managing the property at the time of the violations, and primary responsibility for the violations and poor management of the Water Supply accordingly lies with her. Russell claims he had no monetary or operational control of Country Gables Apartments at that time based on the January 26, 2012 order of the Court of Common Pleas. He states that he was following the advice of counsel, and at least at times, the spirit of the orders of the divorce court, through avoiding any contact with Ms. Herp-Russell, in part by staying away from Country Gables Apartments. Even if he felt permitted to go to the apartments, Russell argues that he did not have the financial wherewithal to pay for the certified

operator or prevent most of the violations. Russell recognizes that his circumstances and arguments do not absolve him of liability or responsibility, but believes they certainly should mitigate the amount of the penalty. Any recklessness and deliberateness with respect to the violations, he implies, would apply only with respect to Ms. Herp-Russell's conduct. In contrast, Mr. Russell points out, once he regained control of the property, all violations were resolved and his actions demonstrate an ability and intent to comply with all requirements of the law.

We do not intend to diminish the shortcomings of Mr. Russell with regard to his actions in this matter; nevertheless, we find that, based on a review of all the facts and circumstances in this case, his actions are better characterized as the result of negligence on his part. Mr. Russell was the permittee during the entire time period at issue. He therefore retained regulatory responsibility for ensuring that the Water System was operated properly. However, it is clear to the Board that the basic day-to-day operations of the Water Supply during this period were conducted by Ms. Herp-Russell and that, because of the marital discord occurring at the time, Mr. Russell was not in a position to fully carry out his responsibilities under the permit.

The first set of violations that form the basis of the Administrative Order date from mid-March to early May 2013. At this time, Ms. Herp-Russell was receiving all of the rental income from Country Gables Apartments as a result of the January 26, 2012 order issued by the Erie County Court in the divorce proceedings. Furthermore, Mr. Russell was not physically present at the Country Gables Apartments because of his concerns that he might encounter Ms. Herp-Russell. The violations were largely the result of Mr. Kreider resigning as the certified operator of the Water Supply. Mr. Kreider testified that during the months preceding this time period he was being paid by Ms. Herp-Russell and getting his instructions from her. Prior to resigning, Mr. Kreider notified the Department, Ms. Herp-Russell, and Mr. Russell that he had not been

paid and that he intended to stop performing as the certified operator if the situation continued. Mr. Russell acknowledged that he was aware of the payment issue; however, because of the financial difficulties resulting from the divorce proceedings, he was not in a position to make the payments instead of Ms. Herp-Russell. In the end, Mr. Kreider left in mid-March 2013 because Ms. Herp-Russell was behind in paying him for his services and Mr. Russell was unable to make any payments. The Department found these actions by Mr. Russell to be reckless but we think that they are better characterized as negligent and the penalty should be revised to reflect that determination.

The second set of violations occurred in October 2013. Ms. Herp-Russell apparently made a unilateral decision to replace Mr. Kreider with a new certified operator during the relevant time period. The new operator did not work out for reasons that were not revealed to the Board. There was no testimony at the hearing that Mr. Russell played any role in replacing Mr. Kreider in October 2013, such as hiring or supervising the new certified operator, or that he directly participated in any of the resulting violations. Despite that, the Department determined that Mr. Russell's actions in violating the Administrative Order in October 2013 were deliberate and calculated its penalty based in part on that determination. Mr. Russell was aware of the requirements of the Administrative Order and had a responsibility as the permittee to be aware of what was occurring at the Water Supply and his failure to meet those responsibilities certainly subjects him to penalty liability. However, again, we think the Department has improperly and unreasonably characterized Mr. Russell's actions as deliberate when they are properly characterized as negligent.

We also note that when Mr. Russell stepped back into the picture in late-2013 and early-2014, he rehired Mr. Kreider and entered into a written contract with him for his services.

Mr. Kreider has served as the certified operator since that time and has been paid for his services by Mr. Russell. The testimony at the hearing was that the Water Supply has been in compliance since that time through the date of the hearing. It was further testified to by both the Department and Mr. Russell that Mr. Russell is working with the Department to connect Country Gables Apartments to a municipal water supply.

When we view the totality of circumstances in this matter, we are forced to conclude that the Department's penalty is unreasonable and should be reduced to reflect those circumstances. While the Board is not bound by the Department's Compliance Strategy, in the circumstances presented on the record, we found it helpful in determining an appropriate penalty. We conclude that his actions with regard to the Department's Order as well as the underlying violations were negligent and that, accordingly, it is reasonable that Mr. Russell be sanctioned at the lower end of the penalty range. We reduced the daily penalty amount to $200.00 per day for each of the days identified as violations by the Department. The Department sought penalties for thirty days for the failure to comply with the initial Administrative Order and seven days for the violations in October 2013. The resulting penalty is $7,400.00 (37 days x $200.00). In addition, the Department assessed $962.00 for its costs associated with attempting to enforce its administrative orders. The Board finds it to be reasonable for Mr. Russell, as the permittee of the water supply, to bear one-half of the responsibility for those costs ($481.00).

An overall penalty of $7,881.00 is the appropriate penalty amount, given his level of involvement and in light of the facts of this case. It is by no means a mere slap on the wrist and is likely to serve as an adequate reminder to Mr. Russell that, regardless of his personal circumstances, a drinking water permittee has the responsibility to ensure that the end users have a safe water supply. If the whole point of the penalty matrix is to "provide incentive for the

water supplier to not have repeat violations," then it is apparent to the Board that the reduced penalty is sufficient for that purpose while properly taking into account the circumstances of Mr. Russell, against whom the civil penalty is levied.

CONCLUSIONS OF LAW

1. The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Safe Drinking Water Act, 35 P.S. §§ 721.1–721.17; Section 1917-A of 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 thereunder.

2. The Board has jurisdiction over the parties and subject matter of this proceeding. 35 P.S. § 721.13(g).

3. The Department bears the burden of proof when it assesses a civil penalty. 25 Pa. Code § 1021.122(b).

4. The Board reviews a Department assessment of civil penalty under the Safe Water Drinking Act to see whether there is a reasonable fit between the violations and the amount of the penalty. *Wilbar Realty, Inc. v. DER*, 1994 EHB 999, *aff'd*, 663 A.2d 857 (Pa. Cmwlth. 1995).

5. The Department abused its discretion in determining that Appellant David W. Russell acted recklessly with respect to Violation No. 8 and deliberately/willfully with respect to Violation No. 9.

6. Mr. Russell negligently failed to comply with Department's Order and the Court of Common Pleas' Order.

7. Given Mr. Russell's circumstances and his level of culpability in this case, imposing upon him liability in the amount of $7,881.00 is reasonable and appropriate for his share of responsibility for the February 28, 2014 civil penalty assessment.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID W. RUSSELL	:	
	:	
v.	:	**EHB Docket No. 2014-031-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 10th day of June, 2015, the appeal of David W. Russell in the above-captioned matter is sustained. David W. Russell's liability in the February 28, 2014 civil penalty assessment is reduced from $17,162.00 to $7,881.00.

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: June 10, 2015

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

For the Commonwealth of PA, DEP:
Angela N. Erde, Esquire
(via electronic filing system)

For Appellant:
Dan Susi, Esquire
(via electronic filing system)

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: June 12, 2015**

A D J U D I C A T I O N

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Pennsylvania Environmental Hearing Board finds that the Appellant has not met his burden of proving by a preponderance of the evidence that his water well was impacted by gas drilling operations conducted by Range Resources. Although the Appellant presented extensive evidence of leaks and spills that occurred at Range's site, some of which were not reported to the Department of Environmental Protection in a timely manner, he did not demonstrate by a preponderance of the evidence that a hydrogeological connection exists between his water well and the Range site. It is not enough for the Appellant to simply show that the Department was not aware of all the leaks or spills or that the Department had not reviewed all of the sampling data when it made its determination. Because the Board's review is *de novo*, we consider the case anew and may examine evidence that was not available to the Department when it made its decision.

Background

This matter involves an appeal filed by Mr. Loren Kiskadden (Mr. Kiskadden or the Appellant), challenging a determination by the Pennsylvania Department of Environmental Protection (Department) that natural gas drilling activities conducted by Range Resources-Appalachia, LLC (Range) at its Yeager site in Washington County did not pollute Mr. Kiskadden's water supply. Mr. Kiskadden lives along Banetown Road in Amwell Township, Washington County, Pennsylvania. His water supply is a well that is situated on his property. Mr. Kiskadden does not know the age or details regarding the construction of the well, but believes it is anywhere from 300 to 397 feet in depth. His property is adjacent to a vehicle scrap yard which was run by his family since at least the 1960s.

Mr. Kiskadden's well is approximately one half mile from Range's Yeager site.[1] The Yeager site is located on a hilltop to the northeast of Mr. Kiskadden's property which sits in a valley. At the time of Mr. Kiskadden's appeal, Range was operating one unconventional gas well at the Yeager site, the 7H well, which was drilled from September to November 2009 and hydraulically fractured in December 2009. The 7H well produces gas from the Burkett Shale within the Upper Devonian Formation at a depth of approximately 7,200 feet. Two additional wells were added at a later date, the 1H and 2H gas wells, which were drilled vertically from approximately December 2010 to January 2011 and drilled horizontally and hydraulically fractured in 2014. The 1H and 2H wells' target formation is the Marcellus Shale. At the time period relevant to this appeal, the Yeager site also consisted of an impoundment and a drill cuttings pit that was in the process of being reclaimed.

[1] Range Ex. 222, a map of the Yeager site and the surrounding area, is attached as an appendix to this Adjudication.

It is clear from evidence presented by Mr. Kiskadden at trial that problems existed at the Yeager site. A number of leaks and spills occurred there, in particular during the timeframe from 2010 through 2011.[2] At least some of the leaks and spills were never reported to the Department or were not reported in a timely or accurate manner. A summary of the leaks and spills that occurred at the Yeager site during 2010 and 2011 include, but are not necessarily limited to, the following: A Department inspection of the drill cuttings pit on March 25, 2010 revealed that the drill cuttings pit had leaked, releasing production fluids into the soil. (F.F. 36)[3] Because the drill cuttings pit did not have a leak detection system, the only way to determine if it was leaking was after the leak had escaped the contained area. (T. 454-55) On April 12, 2010, fluid was placed in the Yeager impoundment before a hole in the double liner system had been patched. (F.F. 45) On June 18, 2010, ten gallons of drilling mud were spilled onto the ground at the Yeager site. (F.F. 46) On July 14, 2010, a secondary containment overflowed and flowback water was released to the ground. The Department was unaware of how much fluid was released. (F.F. 47) In August 2010, hydrogen sulfide was detected and treated in the Yeager impoundment. (F.F. 48) On August 18, 2010, a spill of brine water occurred at the Yeager site. The amount was approximately one to two barrels, with 42 gallons in a barrel. (F.F. 49) On August 24, 2010, "a couple hundred gallons" of clarified brine spilled from a tank outside the containment area on the Yeager site. (F.F. 50) Also in August 2010, holes were discovered in the containment system, which allowed spilled fluids to leak into the ground. (F.F. 51) On November 10 and 19, 2010, testing of the impoundment's leak detection zone revealed that the impoundment was leaking. (F.F. 52) Sampling data that would have indicated a leak was occurring was not revealed to the Department at the time of its discovery. (F.F. 53) Based on

[2] The Appellant's post hearing brief includes a concise and thorough summary of the leaks and spills that occurred during this time period. (Appellant's Post Hearing Brief, p. 193-197)
[3] "F.F." refers to a Finding of Fact set forth later in this Adjudication.

the design of the leak detection system, a leak from the impoundment would not be discovered until it had made contact with the ground. (F.F. 54)[4]

On December 7, 2010, the secondary containment at the Yeager impoundment overflowed. (F.F. 56) On the same day, December 7, 2010, 15 gallons of diesel fuel spilled in the same area. (F.F. 56) On January 3, 2011, 10-15 barrels of blended water were released onto the ground at the Yeager site; blended water consists of flowback, frac water or treated water. (F.F. 57) On January 26, 2011, a leak occurred on a transfer line that was transferring flowback water between the Yeager site and another drill site. (F.F. 58) On February 8, 2011, a truck overturned at the Yeager site, spilling a load of frac water, diesel fuel and oil. (F.F. 59) On March 10, 2011, a truck left its valve open and fluid spilled onto the ground at the Yeager site. The spill ran down the access road and into a field owned by Ron and Sharon Yeager. (F.F. 60) The amount of fluid was reported by Range to be 20-25 gallons, but the driver believed it to be approximately 100 gallons. (F.F. 60, 61) On June 2, 2011, a truck left its valve open at the Yeager site and spilled recycled water that had been removed from the Yeager impoundment. (F.F. 62)

On or about June 3, 2011, Mr. Kiskadden contends that, while filling a child's sized swimming pool, his water began foaming, contained gray sludge and had a rotten egg odor. Mr. Kiskadden filed a complaint with the Department, and the Department conducted an investigation that consisted of visits to the site and water quality testing.[5] On September 9, 2011

[4]Testing of the impoundment's leak detection zone on August 15, 2011, September 27, 2011 and May 10, 2012 demonstrated that the impoundment was again leaking. (F.F. 55)

[5]Problems continued after the filing of Mr. Kiskadden's complaint. For example, on July 14, 2011, without obtaining prior approval from the Department, Range flushed the drill cuttings pit with 30,000 gallons of water. (F.F. 64) At the time of the flushing, the soil still contained contaminants above background levels. (T. 482-83) The Department's Mr. Yantko expressed concern with this action because flushing the pit could cause contaminants in the soil to be pushed further into the ground and into groundwater. (T. 485, 678)

the Department sent a letter to Mr. Kiskadden informing him that the Department had completed its investigation and had concluded that his water supply had not been impacted by gas drilling activities. Mr. Kiskadden appealed the Department's determination to the Pennsylvania Environmental Hearing Board (Board). The parties engaged in extensive, often heated, discovery[6] and filed numerous pretrial motions. The Board's electronic docket contains 400 docket entries for this case.

On January 9, 2012, shortly after the filing of the appeal, the Department moved to dismiss the case on the basis that the Department's September 9, 2011 letter was not an appealable action. In an Opinion and Order issued on May 16, 2012, the Board denied the Department's motion, holding that "[w]here the Department conducts an investigation of a water supply complaint under the Oil and Gas Act and makes a determination that the permittee's activities have not affected the water supply, that determination is appealable to the Environmental Hearing Board by the complainant." *Kiskadden v. DEP*, 2012 EHB 171. On December 12, 2012, Range filed a discovery motion seeking authorization to enter onto Mr. Kiskadden's property to conduct various tests of his air, soil, water and septic system, involving both visual observations and more invasive methods, including drilling. The Board held oral argument on Range's motion on December 20, 2012 and issued an Opinion and Order in which we granted permission to Range to perform limited and minimally invasive testing on Mr. Kiskadden's property. *Kiskadden v. DEP*, 2013 EHB 21. As we held in that Opinion, "[t]he main purposes of discovery are so all sides can accumulate information and evidence, develop the facts necessary to support their legal contentions, plan trial strategy and ascertain the strong points and weaknesses of their respective positions." *Id.* at 24 (*citing Clean Air Council v. DEP*,

[6] For example, in its post hearing brief, the Department states that it produced 10,000 pages of documents in discovery, and its employees underwent 15 days of depositions.

2013 EHB 9, 11). To our knowledge, Range did not perform any of the testing that was authorized by our Order.

On July 19, 2013, following oral argument, the Board granted the Appellant's Motion to Compel Discovery Responses from the Permittee and ordered Range to respond to discovery that had been served on it by Mr. Kiskadden (the July 19, 2013 Order). The discovery included a request for a list of all products and composition of all products used at the Yeager site. The Board ordered Range to respond to the discovery request on or before August 20, 2013. Range argued that it was unable to obtain this information because it was proprietary. It offered to reverse engineer the products used at the Yeager Site in order to determine their chemical composition. The results of the reverse engineering failed to obtain nearly all of the requested information. Therefore, on September 17, 2013, the Appellant filed a Motion for Contempt and for Sanctions in the Form of an Adverse Inference as a result of Range's failure to fully comply with the July 19, 2013 Order. The Appellant requested that the Board preclude Range from arguing that its drilling operation had not caused pollution to his water well.

As a sanction for Range's failure to comply with the Board's July 19, 2013 Order, the Board granted the Appellant's motion in part. Although the Board denied the Appellant's motion for an adverse inference because the requisite criteria had not been met, we granted the Appellant a rebuttable presumption which eliminated the Appellant's need to prove that chemicals found in his water well were contained in products used at the Yeager site. In an Opinion issued on June 10, 2014, Chief Judge Renwand ruled as follows:

> While we disagree that spoliation has occurred, since Range has not engaged in the destruction or withholding of evidence, we do agree that it, as the party that used the products in question, bears some responsibility for producing information regarding the chemical composition of the products. We have determined after extensive argument and briefing that the Appellant has a right to

> such information through discovery, and the party in the best position to obtain this information is Range, the purchaser and user of the products.
>
> Range argues that the product information is equally accessible to the Appellant and that the Appellant should be seeking this information directly from the manufacturers. We think it disingenuous of Range to suggest that the Appellant has just as much access to this information as does Range. As the purchaser of the products, Range is certainly in a much better position to obtain this information from the manufacturers or suppliers, particularly if it continues to be a customer. Range exercises control over which manufacturers and suppliers it uses to purchase the chemicals and products used at its operation and has much better access to information about the products than does the Appellant.

Kiskadden v. DEP, 2014 EHB 380, 385-86.

Shortly before trial was set to begin, the parties filed numerous motions in *limine*. Included among those motions was the Appellant's Motion to Strike Expert Reports and Expert Rebuttal Reports and for Expedited Consideration Thereof. The motion sought to prevent Range from introducing the testimony of three expert witnesses whose expert reports were filed on August 22 and 24, 2014, after the deadline agreed to by the parties and without seeking leave of the Board. The Board issued an Opinion and Order on September 12, 2014 granting the Appellant's motion, finding that the filing of the untimely reports severely prejudiced the Appellant. *Kiskadden v. DEP*, 2014 EHB 626.

The Board held a twenty day trial on Mr. Kiskadden's appeal from September 22, 2014 through November 19, 2014 with Chief Judge Thomas Renwand presiding. Additionally, Judge Renwand conducted two site views, the first on October 19, 2012 and the second shortly before the start of trial in September 2014. The record consists of a transcript numbering 4,931 pages and hundreds of exhibits consisting of thousands of pages. Following the trial, the parties filed

post hearing briefs on February 27, 2015 and reply briefs on April 24, 2015. Based on the voluminous record developed in this case, the Board makes the following findings of fact:

FINDINGS OF FACT

1. The Appellant is Mr. Loren Kiskadden, an individual residing at 771 Banetown Road, Amwell Township, Washington County, Pennsylvania 15301. (Notice of Appeal; T. 2241) He maintains a mobile home on his property. (T. 2241) He moved into this residence in 2008. (T. 2244)

2. The Permittee is Range Resources – Appalachia, LLC, which operates the Yeager gas well site in Amwell Township, Washington County, Pennsylvania. (T. 90-94)

3. The Department of Environmental Protection is the agency charged with administering and enforcing the Oil and Gas Act, Act of February 14, 2012, P.L. 87, *as amended*, 58 Pa. C.S. §§ 3201-3274; and its predecessor, the 1984 Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S. §§ 601.101 – 601.605; and the rules and regulations promulgated under these acts.

4. Mr. Kiskadden's property is located approximately ½ mile, or approximately 2,900 feet, southwest of the Yeager site. (T. 90, 95, 96, 785, 786, 1321, 4284)

5. The Yeager site sits at a higher elevation than Mr. Kiskadden's property. (T. 785, 2045)

6. Banetown Road is at a higher elevation than Mr. Kiskadden's property. (T. 4599-4600)

7. Horses graze on the other side of Banetown Road across from Mr. Kiskadden's property. (T. 106, 109-10)

8. Bane Creek flows behind Mr. Kiskadden's property. (T. 1486, 1494; Range Ex. 222) It flows from the northwest to the south/southeast. (T. 1494)

9. A small stream, Unnamed Tributary 4, runs north-south to Bane Creek. It begins on property owned by Ron and Sharon Yeager to the west of the Yeager site, enters a culvert under the road in front of Mr. Kiskadden's property, and runs through Mr. Kiskadden's property until it enters Bane Creek. (T. 712, 1237-38, 1244, 1449, 3510-11; Range Ex. 222) Unnamed Tributary 4 begins in a pasture where two springs known as the Yeager springs are located. (T. 838-39)

10. Mr. Kiskadden's water supply consists of a water well on his property, approximately 150 feet from his home. (T. 101-03, 795; Range Ex. 222)

11. Unnamed Tributary 4 is approximately 50 feet northwest of the water well. (T. 103-04, 712)

12. The water well is approximately 11-12 inches in diameter. It has an uncemented casing that is flush to the ground. It is covered by an unsecured metal cap and surrounded by a ring that is not water-tight. (T. 102-03, 125-26, 128-29, 715-17, 791-95)

13. Mr. Kiskadden believes that his well is 300-397 feet deep. (T. 714-15, 2261) He believes his well pump retrieves water at a depth of approximately 150-175 feet. (T. 2263)

14. Mr. Kiskadden's well shows signs of surface water infiltration. There is mud or dirt on the wiring on the inside of the well and on the inner walls. (T. 103, 716-17, 791-97; DEP Ex. 2, photograph 215)

15. Puddles of surface water have been observed near Mr. Kiskadden's well. (T. 742-43, 834, DEP Ex. 2, photograph 204)

16. Mr. Kiskadden's property is located adjacent to a vehicle scrap yard which was operated by Mr. Kiskadden's family. (T. 106-09, 2270, 2379-81, 2405-09) Remnants of vehicles remain on the property. (DEP Ex. 2, photographs 211 and 213; T. 788, 790, 2354-55)

17. Vehicles were disassembled and fluids drained at the scrap yard. (T. 2380-84)

18. Additionally, Mr. Kiskadden's property contains vehicles, a bus and pieces of salvaged items. (T. 788-90, 2268-69, 2346-55) He stored a boat on his property at one time. (T. 2361) He has used a backhoe to scrap vehicles on his property. (T. 2350-51) People have washed cars on his property in the front yard and behind a trailer on his property. (T. 2373-74)

19. Mr. Kiskadden has used an acetylene torch to cut up cars, metals and old appliances on his property. (T. 2385-87)

20. Mr. Kiskadden has a septic system on his property. (T. 2340-41) From the time that Mr. Kiskadden moved into his residence in 2008 until his complaint in 2011, he did not take any action to maintain the septic system. (T. 2341)

21. Mr. Kiskadden replaced the pump to his well in February, March or April of 2013 because it stopped operating. (T. 2262-63, 2297) Mr. Kiskadden testified that when he removed the old pump, "all this brown stuff buildup came off of it and just kept falling off and the pump itself was all plugged up, looked like it had some kind of stuff wrapped around it. It was real hard." (T. 2263)

22. Mr. Kiskadden had never done any work on his well prior to his complaint. (T. 2290)

23. The Yeager drill site is located on McAdams Road in Amwell Township, Washington County, Pennsylvania. (DEP Ex. 17; Range Ex. 222)

24. Range produces gas from unconventional gas wells at its Yeager site. "Unconventional" means that the drilling occurs into shale rather than cavities filled with oil or natural gas. (T. 1802, 4023-24)

25. At the time period relevant to this appeal, the Yeager site included a centralized impoundment, a drill cuttings pit and a mud processing pit. (T. 2515; Range Ex. 222).

26. There are three wells on the Yeager site: wells 1H, 2H and 7H. (DEP Ex. 17) The first to be drilled was the 7H well, which Range began drilling on September 11, 2009; the vertical drilling was completed on November 13, 2009 to a depth of 7,200 feet. (T. 4030-31, 4040) The well was then horizontally drilled and hydraulically fractured in December 2009. (T. 4043-44)

27. Hydraulic fracturing creates induced fractures by which natural gas is released from low permeability rocks. (T. 4123-50)

28. After the shale is fractured, the water absorbs constituents that are naturally present in the shale which causes the water to become salty or briny. (T. 4123-24, 4144-45)

29. Flowback water is a water-based fracturing fluid that flows back to the surface after the completion of hydraulic fracturing. (T. 4144-45)

30. The 7H well produces gas from the Burkett Shale within the Upper Devonian Shale Formation at a depth of approximately 7,200 feet. (T. 3380)

31. The Upper Devonian Shale is above the Marcellus Shale. (T. 4044)

32. From December 23, 2010 to January 17, 2011 the vertical portions of the 1H and 2H wells were drilled, but they were not hydraulically fractured until 2014. (T. 4048-50)

33. The impoundment was constructed for the purpose of storing oil and gas waste fluids, flowback and production water. (T. 94, 217-18)

34. Fluids in the impoundment were dominated by chlorides. (T. 416, 422-23, 1839-45, 2632-33)

35. The drill cuttings pit was constructed for the purpose of holding drill cuttings, drilling fluid and related residues generated during the drilling of the 7H well. (T. 93)

36. The drill cuttings pit leaked on or about March 24 or 25, 2010. (T. 772-77; Range Ex. 41) The pit again leaked in May 2011. (T. 4292; Appellant's Ex. 310)

37. There are springs on the Yeager property located approximately 200 feet northwest of the location of the drill cuttings pit. (T. 95; Range Ex. 222)

38. The March 2010 leak from the drill cuttings pit caused contamination to the Yeager springs. (T. 175, 4282, 4535)

39. Pre-drill sampling of the Yeager springs showed that total dissolved solids were present at a concentration of 301 mg/l and chlorides at 3.7mg/l. (Appellant's Ex. 252)

40. Following the leak, chlorides in the Yeager springs went up to a high of 981 mg/l, compared to predrill levels of 3.7 mg/l. (T. 658, 1879-81, 2201-03, 4541, 4542; Range Ex. 203D)

41. Following the leak, sodium levels in the springs had a less dramatic increase. They went up to 58.1 mg/l compared to predrill levels of 6.06 mg/l. (T. 658, 1880, 2201-03, 4543; Range Ex. 203D)

42. The water type signature of the Yeager springs changed from calcium bicarbonate to calcium chloride as a result of pollution from the Range operation. (T. 4546, 4550)

43. Contamination of the Yeager springs provides a case study and comparison of what contamination from operations at the Yeager site would look like. (T. 4535)

44. Contamination in the springs could have made its way to Unnamed Tributary 4. (T. 839-40)

45. On April 12, 2010, fluid was placed into the impoundment on the Yeager site before a hole had been patched. (T. 875-77; Range Ex. 41)

46. On June 18, 2010, ten gallons of drilling mud were spilled onto the ground at the Yeager site. (T. 882-83; Range Ex. 41)

47. On July 14, 2010, flowback water overflowed a secondary containment at the Yeager site. The Department was unaware of how much fluid was released. (T. 936)

48. The impoundment was treated for hydrogen sulfide on August 10, 2010, after the Department received complaints of a hydrogen sulfide odor at the Yeager site. (T. 452, 941-43, 2184)

49. On August 18, 2010, a spill of approximately 42-84 gallons of brine water occurred at the site. (T. 299)

50. On August 24, 2010, a "couple hundred" gallons of clarified brine spilled from a tank outside the containment area on the Yeager site. (T. 306-07)

51. Additionally on August 24, 2010, holes were discovered in the containment system under tanks at the Yeager site. (T. 318-20)

52. A leak in the impoundment on the Yeager site was discovered in November 2010 based on testing performed on November 10 and 19, 2010. (T. 417-18, 421-24; Range Ex. 211H, 211K, 213E)

53. Range failed to report sampling results to the Department that may have indicated there was a leak in the impoundment. (T. 404, 407, 410, 418)

54. The impoundment's leak detection zone was located underneath the liner; as a result, leaks would not be detected until the fluid had already come into contact with the ground. (T. 349, 350, 451)

55. Subsequent leaks of the impoundment were detected in August and September 2011 and May 2012. (T. 431; Appellant's Ex. 289 and 291; Range Ex. 212D)

56. On December 7, 2010, the secondary containment at the Yeager impoundment overflowed. (T. 921) Also on that day, 15 gallons of diesel fuel spilled in the same area. (T. 921)

57. On January 3, 2011, 10-15 barrels of blended water, consisting of flowback, frac water or treated water, was released onto the ground at the Yeager site. (T. 850-51)

58. On January 26, 2011, a leak occurred from a transfer line that was transferring flowback water between the Yeager site and another drill site, and approximately 3.5 barrels of flowback leaked onto the ground. (T. 939-40)

59. On February 8, 2011, a truck overturned at the Yeager site spilling a load of frac water, diesel fuel and oil. (T. 851-53)

60. On March 10, 2011, a truck left its valve open and approximately 100 gallons of fluid was spilled onto the ground at the Yeager site. The spill ran down the access road, across McAdams Road and onto the Yeagers' field. (T. 853-55, 864-65) The amount of fluid was reported by Range to be 20-25 gallons, but the driver believed it to be approximately 100 gallons. (T. 854-55, 864-65; Range Ex. 55; Appellant's Ex. 50)

61. Range reported the March 10, 2011 spill as being only a 20-25 gallon spill despite the fact that it covered an area 70 feet long by 50 feet wide in the Yeager field. (T. 983-86; Appellant's Ex. 272)

62. On June 2, 2011, a truck left its valve open at the Yeager site and spilled recycled water that had been removed from the Yeager impoundment. (T. 327)

63. On July 13, 2011 a seep was discovered coming out of the Yeager impoundment. (T. 1329-30, 1874-75)

64. On July 14, 2011, Range flushed the drill cuttings pit with 30,000 gallons of water without permission from the Department. (T. 486) The flushing could have caused contaminants to be pushed into the groundwater. (T. 678)

65. During remediation of the drill cuttings pit soil samples were collected and a number of contaminants were found in the soil. (T. 496-98; Appellant's Ex. 91)

66. Sodium was one of the contaminants found in the soil under the drill cuttings pit and one that Range had difficulty bringing under control. (T. 2108-09; Appellant's Ex. 81) Sodium concentrations in the soil exceeded chloride concentrations. (T. 4360-61)

67. On or about June 3, 2011, the Department received a telephone complaint from Mr. Kiskadden regarding his water supply. (T. 2281; Notice of Appeal) Mr. Kiskadden reported that while he was filling a child's size swimming pool, the water became cloudy, began foaming, contained sediment and had an odor of rotten eggs. (Notice of Appeal; T. 114, 714, 2246-47, 2249, 2281)

68. An odor of rotten eggs may be indicative of hydrogen sulfide. (T. 738)

69. It is not unusual for water wells to experience a hydrogen sulfide odor. It can be caused by changes in the barometric pressure and water table. (T. 965, 2191-92)

70. On June 6, 2011, Department Water Quality Specialist, Bryon Miller, went to Mr. Kiskadden's home. He interviewed Mr. Kiskadden, inspected the well and the surrounding area, and took a sample of Mr. Kiskadden's water. (T. 696, 713-15, 720, 782-83, 803)

71. On the day of Mr. Miller's visit, the water was clear and had no odor. (T. 720, 721, 735, 739; DEP Ex. 3)

72. The June 6, 2011 sampling of Mr. Kiskadden's water showed the presence of various constituents, including the following: 748 mg/l of total dissolved solids, 297 mg/l of sodium, 44.3 mg/l of chlorides, 5.162 mg/l of calcium, alkalinity of 592.2 mg/l, and a pH level of 9.0. (DEP Ex. 3) It also showed the presence of coliform bacteria. (DEP Ex. 3, 13)

73. On June 9, 2011, a contractor for Range also sampled Mr. Kiskadden's water. The sampling results included the following: 670 mg/l of total dissolved solids, 305 mg/l of sodium, 33.38 mg/l of chlorides, 4.57 mg/l of calcium, alkalinity of 612 mg/l, and a pH of 9.1. (DEP Ex. 8, 30)

74. On July 27, 2011, Range's contractor again sampled Mr. Kiskadden's water. The sampling results included the following: 1120 mg/l of total dissolved solids, 285 mg/l of sodium, 39.2 mg/l of chlorides, 13.5 mg/l of calcium, alkalinity of 554 mg/l, and a pH of 8.4. (DEP Ex. 8, 30)

75. Due to the elevated levels of sodium and total dissolved solids in the Department's June 2011 sample results, the Department returned to the property on August 1, 2011 to sample for volatile organic compounds. (T. 601-02, 722, 803) On that date, the water had a slight odor of hydrogen sulfide (or rotten egg smell). (T. 738, 803)

76. The Department's August 1, 2011 sampling showed that Mr. Kiskadden's water contained low levels of acetone, t-butyl alcohol and chloroform. (T. 804-05; DEP Ex. 6)

77. Acetone, t-butyl alcohol and chloroform are present in drilling fluids, but are not unique to drilling fluids. (T. 1917-18, 2812-13, 3488-90)

78. It would not be uncommon to find organic compounds such as acetone, t-butyl alcohol or chloroform in Mr. Kiskadden's water supply due to its proximity to Banetown Road, agricultural operations, the adjacent salvage yard and vehicles on his property. (T. 1856-57)

79. Acetone is naturally occurring in the environment and is associated with the degradation of organic constituents. (T. 4601-02)

80. A field blank sample taken on the same day as the sampling of Mr. Kiskadden's well contained acetone. (T. 813) A field blank sample is a sample that is filled with pure water and sent for analysis under the same conditions as the actual sample in order to verify that proper handling procedures are followed and to ensure that no field contaminants are in the sample. (T. 736-37, 1175-77).

81. The presence of acetone in the blank sample could be an indication that the acetone was a field contaminant. (T. 813, 4603-05, 4607-08)

82. At the direction of the Department, in June or July 2011 Mr. Kiskadden began pouring bleach into his water well in order to kill bacteria and/or eliminate the rotten egg odor. (T. 2254, 2312-15, 2317) Mr. Kiskadden did not dilute the bleach. (T. 2312-15) Bleach can cause chloroform to appear in water. (T. 300-01,1856-58, 2087, 2812, 2922, 3037)

83. Gasoline from vehicles can be a source of t-butyl alcohol. (T. 2922, 4595)

84. Department hydrogeologist, Michael Morgart, conducted a hydrogeological study of the area that includes Mr. Kiskadden's well and the Yeager site. (T. 1807)

85. Mr. Morgart concluded there was no obvious hydrogeological connection between the Yeager site and Mr. Kiskadden's water well. (T. 1681)

86. On September 9, 2011, the Department sent Mr. Kiskadden a letter stating that it had completed its investigation of his water supply complaint and had not determined that his well was impacted by oil and gas well related activities. (DEP Ex. 13)

87. In January 2012, counsel for Mr. Kiskadden called the Department regarding Mr. Kiskadden's water quality. (T. 815, 2403-04)

88. On January 26, 2012, at the request of Mr. Kiskadden's legal counsel, the Department again sampled Mr. Kiskadden's water. (T. 723-24, 731-33, 815, 2403-04) On that date, the water was clear with no odor. (T. 723-24, 731-33; DEP Ex. 9)

89. The results of the January 26, 2012 included, *inter alia*, the following: 652 mg/l of total dissolved solids, 163 mg/l of sodium, 41.6 mg/l of chlorides, 47.7 mg/l of calcium, alkalinity of 460 mg/l, and a pH of 8.2. (T. 723-24, 731-33, 738-39; DEP Ex. 9)

90. EPA sampled Mr. Kiskadden's water on March 27, 2012. (Appellant's Ex. 297) The sampling included, *inter alia*, the following results: 666 mg/l of total dissolved solids, 265 mg/l of sodium, 41.2 mg/l of chlorides, 6.46 mg/l of calcium, 15.5 mg/l of methane, 0.291 mg/l of ethane and a pH of 8.93. (DEP Ex. 15, 30) Acetone, t-butyl alcohol and chloroform were not present at reporting limits. (T. 1902-03, 2025, 4611-12, DEP Ex. 15) Propane and butane were not detected above the quantitation limit. (DEP Ex. 15)

91. As of March 27, 2012, Mr. Kiskadden's water did not contain acetone, t-butyl alcohol or chloroform. (T. 3007; DEP Ex. 15)

92. None of the parties produced sampling results more recent than March 27, 2012 at trial.

93. Mr. Kiskadden testified that he has continued to experience problems with his water, including odor, discoloration and clogs in his toilet and hot water tank from sediment. (T. 2258-

59, 2273-74) He testified that the odor "comes and goes" and returns more frequently the more water he uses. (T. 2311) He testified that his water has foamed and bubbled "a couple of times." (T. 2409)

94. A number of constituents found in sampling at the Yeager site were also present in Mr. Kiskadden's water. (Appellant's Ex. 275, 278, 284, 289, 291, 295, 297; DEP Ex. 3, 8, 9, 30)

95. A number of the constituents found in Mr. Kiskadden's water can be naturally occurring. (T. 1845-46, 2962, 3643-44, 3906, 4432, 4490-91, 4818-19)

96. Groundwater can contain minerals, chemicals, biological substances and metals. (T. 2915-16) Arsenic, aluminum, antimony, barium, boron, cadmium, chromium, cobalt, copper, iron, lead, magnesium, mercury, manganese, molybdenum, nickel, phosphorous, potassium, selenium, silica, silver, thallium, uranium, vanadium, and zinc all exist naturally in groundwater in Pennsylvania, and in groundwater in Washington County in particular. (T. 2916, 2962-2967)

97. Gas well related waters typically exhibit elevated chlorides, sodium and calcium concentrations, high total dissolved solids and heavy metals. (T. 1578-79, 1827, 1836)

98. Mr. Kiskadden's water exhibits high levels of sodium and total dissolved solids, but does not exhibit high levels of chlorides. (T. 1843)

99. In gas well related waters, concentrations of chloride typically exceed sodium by two to three times. (T. 164, 1827, 1836, 1844-47)

100. The chlorides in Mr. Kiskadden's water were significantly lower than the level of sodium. (T. 1843-47)

101. Mr. Kiskadden's water samples are not typical of water impacted by gas well related activity. (T. 1843-44, 1846-47)

102. If the sodium levels in Mr. Kiskadden's water were attributable to impacts from oil and gas-related fluids, one would have expected to see chloride levels that were ten to twenty times higher. (T. 1847)

103. Chloride is a conservative anion, which means that it does not engage in chemical reactions with the material through which it flows. (T. 1835, 3798-99)

104. Chlorides migrate more quickly through groundwater than other constituents do. (T. 1585-86, 2633-34, 4530-34)

105. Sodium is less conservative than chlorides. It chemically and physically interacts with the media through which it travels and the constituents with which it travels. (T. 1898-99, 2188, 2199, 2200, 3469-70)

106. Sodium may interact with soil by absorbing onto it. (T. 2188-89, 4636-41)

107. Sodium found in soil samples does not necessarily translate into sodium in groundwater. Sodium may leave the groundwater and bind to the soil. (T. 2004-05, 2110-11, 2188-89)

108. Some sodium will remain in soil or clay, while chlorides will move through it. (T. 3470)

109. In a release from the drill cuttings pit, it is likely that some of the sodium would have remained in the underlying soil while the chlorides would have migrated through the groundwater. (T. 3470)

110. Properties owned by the Voyles and Haney families are located between the Yeager site and Mr. Kiskadden's property. (Range Ex. 222; T. 4584-85)

111. Springs and wells located on the Voyles and Haney properties were sampled in November 2010 and February 2011. (Range Ex. 179C, 179E, 179H, 198E, 199C, 199E)

112. The sampling results for the Voyles and Haney water supplies show lower levels of chlorides, sodium, total dissolved solids and pH than the samples of Mr. Kiskadden's well. (*Id*.; T. 156-63; DEP Ex. 30)

113. Springs, in particular, provide helpful monitoring points because they provide information about groundwater migration. (T. 4579)

114. Methyl Blue Activated Substance (MBAS) was found in Mr. Kiskadden's water. (T. 2761-62) MBAS refers to soaps. (T. 1220)

115. The Department was not made aware of the presence of certain substances at the Yeager site or in Mr. Kiskadden's water prior to making its determination. (T. 886-87, 2760-63, 2772, 2775)

116. The Department was not made aware that the Yeager impoundment had leaked prior to making its determination. (T. 389-90, 1354-55, 1871-72, 2161-62, 4284)

117. Mr. Kiskadden's well is located in the Washington Formation. (T. 1484)

118. The Greene Formation overlies the Washington Formation. The two formations are separated by the Upper Washington Limestone. (T. 1484-85)

119. There are no predrill samples for Mr. Kiskadden's well. (T. 116)

120. The Department recommends that homeowners test their water for certain parameters prior to the start of drilling operations. (T. 274-76) The list of parameters to be tested includes alkalinity, chloride, conductivity, hardness, oil and grease, pH, sulfate, total dissolved solids, residue (filterable and non-filterable), total suspended solids, barium, calcium, iron, magnesium, manganese, potassium, sodium, strontium, ethane, methane and total coliform/E. coli. (Appellant's Ex. 198)

121. If a homeowner cannot test for the entire package of parameters, the Department recommends a minimum set of parameters that should be tested. At the time period in question, the minimum number of parameters included the following: sodium, methane, ethane, pH, total dissolved solids, iron and manganese. It did not include chloride. (T. 277, 1949; Appellant's Ex. 198)

122. Chloride was not added to the list of minimum parameters to be tested until 2014, during this litigation. (T. 1949-50)

123. The water chemistry type of Mr. Kiskadden's water is sodium bicarbonate. (T. 4468-69)

124. Sodium bicarbonate water often has higher methane concentrations because it consists of deeper groundwater that is further from a recharge area. (T. 4844-45)

125. Sodium bicarbonate water is common in valley settings in Washington County and has been part of the groundwater system since glaciation. (T. 4468-69, 4816-17)

126. A published groundwater survey of Washington County documents occurrences of groundwater having sodium levels in excess of chloride levels. (T. 4852-55)

127. Mr. Kiskadden's water type signature is consistent with the water type in his area and Washington County. (T. 4468, 4477-78, 4619-20)

128. Elevated total dissolved solids, sodium, pH and alkalinity is the natural background condition of much of the groundwater in the area of Mr. Kiskadden's water well. (T. 1850-53)

129. The consistency of Mr. Kiskadden's water sample results over time indicates that the water quality is attributable to natural conditions, rather than spills or releases related to oil and gas activities. (T. 1846-47, 1855-56, 1872-73)

130. Background levels for groundwater in southwestern Pennsylvania do not always meet drinking water standards. (T. 1424-25, 579-81, 4743-44) Many background chloride concentrations in Washington County exceed drinking water standards. (T. 4490-91)

131. Hillside springs are not good comparisons of background water quality for wells in valley settings because they have different water signature types due to different residence times, i.e., the amount of time the water has spent in contact with rocks. (T. 4467-68, 4504-13)

132. Springs typically intersect shallow groundwater. (T. 1466-67, 1482, 1495, 1556-57)

133. The Yeager and Puscarich springs are at higher elevations than the Kiskadden well and, therefore, they do not intercept the same rock units as Mr. Kiskadden's well. (T. 3439)

134. As groundwater gets deeper, it is exposed to rock units for a longer period of time, causing changes in groundwater due to the chemistry that occurs when water interacts with rock formations. (T. 1466, 2914-15)

135. The water chemistry of hillside wells and springs is usually calcium bicarbonate characterized by low total dissolved solids, whereas valleys have sodium bicarbonate or sodium chloride groundwater. (T. 4508-20)

136. Because the water chemistry is different, predrill samples for the springs on the Yeager farm do not serve as accurate indicators of the predrill water quality of Mr. Kiskadden's well. (T. 1876-78, 1881, 4517-22)

137. Mr. Kiskadden's mother, Grace Kiskadden, lives at 789 Banetown Road, in the Bane Creek Valley. (T. 2390-94, 2405-06) Her well is located approximately 0.2 miles upstream of Mr. Kiskadden's well, along Bane Creek. (T. 1535)

138. Sampling results for Grace Kiskadden's well are similar to those for Mr. Kiskadden's well in that they show high levels of sodium and alkalinity, high pH, lower chlorides, and calcium and total dissolved solids in a similar range as Mr. Kiskadden's. (T. 1883-84)

139. Grace Kiskadden's water also contains methane. (T. 4846)

140. There is a topographic ridge to the east of Grace Kiskadden's water well. (T. 1545-47)

141. The Department concluded that the ridge acts as a topographic barrier hydrogeologically separating Grace Kiskadden's well from Unnamed Tributary No. 4. (T. 1548-52; DEP Demonstrative Ex. 5)

142. On November 14, 2012 Department water quality specialist, John Carson, took water samples at locations in Bane Creek and Unnamed Tributary 4. (T. 1214, 1234; DEP Ex. 29)

143. Sample Bane 01 was taken in Bane Creek downstream from Mr. Kiskadden's property. Sample Bane 02 was taken in Unnamed Tributary 4 across the road from Mr. Kiskadden's property before entering his property. Sample Bane 03 was taken upstream of Mr. Kiskadden's property as a control sample. (T. 1237-38; DEP Ex. 29)

144. Sample Bane 02 had a chloride concentration of 29.4 mg/l and a sodium concentration of 6.5 mg/l. (T. 1262) These concentrations are lower than the chloride and sodium concentrations in Mr. Kiskadden's water supply. (DEP Ex. 30)

145. Methane and ethane were detected in Mr. Kiskadden's well in the August 1, 2011 sampling conducted by the Department and the March 27, 2012 sampling conducted by EPA. (DEP Ex. 6; Appellant's Ex. 297)

146. There are two primary types of methane: biogenic and thermogenic. (T. 1859)

147. Biogenic gas results from bacterial action. There are two types of bacterial action: (a) fermentation, where bacteria act upon organic material and (b) carbon dioxide reduction, where bacteria act upon carbon dioxide and convert it to methane. (T. 1859)

148. Thermogenic gas results from heat and pressure at great depths. (T. 1859)

149. Gas produced from the Marcellus Shale is thermogenic. (T. 1863)

150. Isotopic analysis can determine the type of gas. (T. 1863-65)

151. All three parties' experts plotted the gas in Mr. Kiskadden's well as carbon dioxide reduction. (T. 1863-66, 2791, 3016, 4618, 4624; DEP Demonstrative Ex. 12)

152. Although Mr. Kiskadden's expert, Dr. Sommer, testified that the methane in his well was deep seated, he did not testify that it was thermogenic. (T. 3015-16, 3020-21)

153. Dr. Sommer did not testify that the methane in Mr. Kiskadden's well migrated from Range's well lateral to Mr. Kiskadden's water well. (T. 2944)

154. Methane can be naturally occurring in wells in Washington County and southwestern Pennsylvania, either from coal seams or from biological processes involving carbon dioxide reduction. (T. 1858-59)

155. The isotopic ratio for the ethane in Mr. Kiskadden's water is different than that of Range's wells. (T. 1929-39, 2190)

156. Ethane can be produced by bacteria and can be present in biogenic gas. It can come from coal seams. (T. 2925-26, 4615-16)

157. Strontium ratios can be used to identify the age and likely source of water. (T. 3288-89)

158. The Marcellus Shale is the target formation of the Yeager 1H and 2H wells. The Upper Devonian Shale is the target formation of the 7H well. (T. 3380)

159. Mr. Kiskadden's strontium ratio is outside the established ranges for the Marcellus Shale and Upper Devonian Shale in Washington and Greene Counties. (T. 3450-51, 3456-57)

160. Mr. Kiskadden's strontium ratio is within the established range for water in the Pittsburgh coal seam. (T. 3449-52)

161. Shale rock near the Yeager site is a poor transmitter of water. Fractures tend to fill with clay. (T. T. 4460-61)

162. Siltstone and limestone in the Greene and Washington Formations also tend to be poor transmitters of water. (T. 4461)

163. Coal is a good transmitter of water in southwestern Pennsylvania. (T. 4461)

164. Instead of moving through the rock units in the area surrounding Mr. Kiskadden's well, groundwater tends to move laterally along the bedding planes. (T. 4455-60)

165. Although predrill samples of the Yeager springs are not indicative of predrill levels for Mr. Kiskadden's water supply, the manner in which they were impacted by contamination from Range's operation is instructive in determining whether Mr. Kiskadden's water supply was also impacted. (T. 4535)

166. The Myers computer models, on which Mr. Kiskadden's expert hydrogeologist, Paul Rubin, relied, posit that vertical migration of gas and fluids from the target shale to the surface could occur in "tens or hundreds of years." (T. 3613) Less than two years had passed between the hydraulic fracturing of the 7H well and Mr. Kiskadden's June 2011 water supply incident. (T. 3616-17)

167. “Raw data” are the numbers generated when a sample is put through a laboratory instrument. (T. 1016, 1028-29)

168. Raw data must be verified by a laboratory analyst in order to be considered reliable. (T. 1014-16)

169. Results falling below the “reporting limit” are considered to be estimated. (T. 1031-34, 1059, 1109)

170. A “detection limit” (or “method detection limit”) is the concentration at which the instrument detects the presence of a parameter in a sample. The detection limit falls below the reporting limit. Values below the detection limit are considered to be electronic noise and do not indicate that a parameter was actually present in a sample. (T. 1032-34, 1061-62)

171. “Electronic noise” means that the analyst is not able to determine whether the analyte was actually detected or whether it is simply the result of the instrument’s background signal. (T. 1034)

172. Where a result falls below the reporting limit but above the detection limit, it is considered to be detected to a 99% degree of certainty, but the actual numeric value is not verified to a scientific degree of certainty. (T.1033, 1059, 1109) In other words, one can be 99% certain that the parameter was detected at some level above zero, but one cannot rely on the accuracy of the exact numeric level shown in the sample results because the amount is too small to be quantified. (T. 1059, 1061-62, 1109)

173. On July 24, 2014, the Department issued a Notice of Violation to Range for, among other things, leaks from the Yeager impoundment. (Appellant’s Ex. 101)

DISCUSSION

Applicable Law

The parties agree that the law applicable to this appeal is the 1984 Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S. §§ 601.101 – 601.605, which was in effect at the time the Department took its action,[7] and the rules and regulations promulgated thereunder. Under both the 1984 law and the current law, a gas well operator who affects a public or private water supply by pollution or diminution must restore or replace the supply with an alternate source of water adequate in quality or quantity.[8] The Department is charged with investigating any such claims and ordering restoration or replacement where it determines that a water supply has been impacted.

Range's Motion for Directed Adjudication

Following the presentation of the Appellant's case, Range moved for a directed adjudication. In *Krushinski v. DEP*, 2008 EHB 579, 581, Judge Coleman explained that a directed adjudication is similar to a motion for directed verdict and requires a showing that the appellant failed to establish a *prima facie* case. However, because we are deciding this case on the merits, we need not make a ruling on the motion. As Judge Beckman explained in *Winner v. DEP*, 2014 EHB 1023, 1024, "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." (*quoting Krushinski , supra,* and *citing Charles E. Brake Co. v. DEP*, 1999 EHB at 967-68, and *Ron's Auto Service v.DER*, 1992 EHB 711, 722).

[7] This law was superseded in 2012 by the current Oil and Gas Act, Act of February 14, 2012, P.L. 87, 58 Pa. C.S. §§ 3201 – 3274.

[8] This language is found in Section 3218(a) and (b) of the current Act. The 1984 Act contained similar language.

The Department's Investigation

On June 6, 2011, Department Water Quality Specialist Bryon Miller responded to Mr. Kiskadden's complaint. He went to Mr. Kiskadden's home, took water samples and inspected Mr. Kiskadden's well. He identified that the nearest oil and gas activities to Mr. Kiskadden's home were those at Range's Yeager site. The June 6, 2011 sample results from Mr. Kiskadden's well indicated high levels of sodium and total dissolved solids and a pH level of 9.0. Chlorides were present at a much lower concentration. Range also sampled Mr. Kiskadden's water on June 9, 2011 and July 27, 2011. Those sampling results also indicated high levels of sodium, total dissolved solids and pH, and a lower concentration of chlorides. Due to the high level of sodium and total dissolved solids, Mr. Miller returned to Mr. Kiskadden's home on August 1, 2011 to sample for volatile organic compounds. Those results indicated the presence of methane and ethane, as well as acetone, t-butyl alcohol and chloroform.[9]

In addition to the sampling of Mr. Kiskadden's water, the Department also conducted a study of the hydrogeology of the area. Department hydrogeologist, Michael Morgart, prepared two reports as part of his investigation in which he concluded that a hydrogeologic connection between the Yeager site and Mr. Kiskadden's well would not be expected. The Department summarized the results of its investigation in a letter to Mr. Kiskadden dated September 9, 2011, which stated in relevant part as follows:

> Since early June 2011, DEP has been investigating your complaint that Range Resources – Appalachia LLC's ("Range") activities have contaminated your water supply. We have concluded our investigation and cannot make the determination, for the reasons summarized below, that the problems in your water well are caused by gas well related activities, particularly those at the Yeager well site operated by Range.

[9] Mr. Miller conducted additional sampling of Mr. Kiskadden's water on January 26, 2012, following the issuance of the Department's determination letter. The U.S. Environmental Protection Agency also conducted sampling of Mr. Kiskadden's water on March 27, 2012 as part of a regional survey.

(DEP Ex. 13)

The letter went on to summarize the reasons why the Department had concluded that Mr. Kiskadden's well had not been impacted by Range's operation. These included the hydrology of the area and the chemical make-up of Mr. Kiskadden's water. The Department concluded that the hydrology of the area did not support a link between Mr. Kiskadden's well and the Yeager site because it identified Mr. Kiskadden's recharge area as being to the northwest, whereas the Yeager well site sits to the northeast. The Department also concluded that the water chemistry of Mr. Kiskadden's well did not support a connection to oil and gas related fluids. The Department noted that although gas well waste fluids are high in sodium and total dissolved solids, they characteristically show the highest concentration in chlorides, and the concentration of chlorides in Mr. Kiskadden's well were only 1/8 the sodium level. As for the methane found in Mr. Kiskadden's well, the Department stated that isotopic testing had shown that it was not natural gas originating from a gas well, but, rather, from bacteriological sources. The Department explained the presence of acetone, t-butyl alcohol and chloroform as coming either from laboratory contamination, surface runoff or the salvage yard adjacent to Mr. Kiskadden's property.

Burden of Proof and *De Novo* Review

The Appellant, Mr. Kiskadden, bears the burden of proving by a preponderance of the evidence that the Department erred in determining that Range's operations had not contaminated his water supply. 25 Pa. Code § 1021.122(a); *Kiskadden v. DEP*, 2014 EHB 667. "Preponderance of the evidence" means "that the evidence in favor of the proposition must be greater than that opposed to it." *Clancy v. DEP*, 2013 EHB 554, 572 (*quoting McGinnis v. DEP*, 2012 EHB 109, 125.) In order to meet his burden of proof, Mr. Kiskadden must demonstrate

that contaminants entered his well from operations conducted by Range, whether from the actual operation of its wells, the fracturing process or from leaks and spills that occurred at the Yeager site. To meet this burden, he must demonstrate a hydrogeologic connection between the Yeager site and his well. Mr. Kiskadden does not need to prove that Range used or stored products on its site containing the same constituents that were found in his well.[10] Due to Range's failure to produce information about the products used in its operation in discovery, in violation of a Board order, the Board granted Mr. Kiskadden a rebuttable presumption that the constituents found in his well were also present at the Yeager site. *See*, *Kiskadden v. DEP*, 2014 EHB 380. The rebuttable presumption reduced the burden that Mr. Kiskadden had to meet in order to prove his case. Nonetheless, even with the reduced burden that had to be met, Mr. Kiskadden did not prove his case.

Mr. Kiskadden attempts to meet his burden of proof by pointing to various errors he contends the Department made in reaching its decision. The alleged errors involve the Department's method of reporting laboratory results and the fact that the Department was not made aware of certain leaks and spills at the Yeager site until after it had made its decision. Mr. Kiskadden is critical of the Department's method of reporting laboratory results for the sampling of his water and other locations including the Yeager site. The Technical Director of the Department's Bureau of Laboratories testified that the lab verified and reported results for only those parameters that were requested. It is Mr. Kiskadden's contention that the entire data package resulting from the testing should have been reported. Mr. Kiskadden also asserts that parameters that were detected but which fell below the reporting limit should have been considered by the Department in determining whether Range's operation had impacted his water supply.

[10] Mr. Kiskadden did, nevertheless, introduce evidence of such.

It is unnecessary to get into a discussion of the Department's Bureau of Laboratories' reporting policy. Whether the entire data package was reported by the Bureau of Laboratories to the Department's program office is irrelevant at this stage of the proceeding. The entire data package was introduced at trial and it is part of the record before the Board. Thus, in the Board's *de novo* review of this matter, all of the data was available to us in reaching our decision. As the Commonwealth Court explained in *Warren Sand & Gravel, Inc. v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa Cmwlth. 1975):

> [T]he Board is not an appellate body with a limited scope of review attempting to determine if [the Department's] action can be supported by the evidence received at [the Department's] factfinding hearing. The Board's duty is to determine if [the Department's] action can be sustained or supported by the evidence taken by the Board.

In other words, *de novo* review means that we decide the case on the record developed before us. *Brockway Borough Municipal Authority v. DEP*, EHB Docket No. 2013-080-L (Consolidated) (Adjudication issued April 24, 2015), *slip op*. at 16. We are not limited to information that may have been available to the Department at the time it made its determination. *Smedley v. DEP*, 2001 EHB 131, 156. The Pennsylvania Legislature and the Commonwealth Court have delineated that the Board is a quasi-judicial tribunal of first impression. As explained in *Smedley*:

> The Board proceeding is the *first* instance that a party challenging a DEP action has the right to judicial-type discovery and, in turn, to present evidence so developed to an independent quasi-judicial tribunal. 35 P.S. §§ 7513(a), 7514(c), 25 Pa. Code § 1021.111. The Board is the *first* opportunity any party challenging a DEP action has to a full adjudicatory hearing where one can present a full case in open court with the rights to subpoena witnesses, examine and crossexamine witnesses and present oral and documentary evidence. 35 P.S. §§ 7514(a), (f); 25 Pa. Code §§ 1021.85 – 1021.98, 1021.107 – 1021.108.

> Given the nature of this role and function, a standard of review which is premised on the assumption that a full record has been developed below as would be the case of an appellate tribunal reviewing the result of a trial court is not a good fit.

2001 EHB at 157 (emphasis in original).

Thus, we are not dependent on the record developed by the Department or the documents or information it reviewed prior to reaching its decision on the action appealed. *Kiskadden v. DEP*, 2013 EHB 21, 24-25; *Clean Air Council v. DEP,* 2011 EHB 832, 834; *S.H.C. Inc. v. DEP,* 2010 EHB 619, 664. Instead we can consider all relevant and admissible evidence duly presented and admitted at a hearing before the Board. *Kiskadden, supra,* 2013 EHB at 25. In fact, "that record may and almost always does include evidence not previously considered by the Department." *Rail Road Action and Advisory Committee v. DEP,* 2009 EHB 472, 477.

Because the Board does not simply review a matter on the basis of an already developed record, simply pointing out alleged deficiencies in the Department's review is generally not enough to meet one's burden of proof. As Judge Labuskes stated in *Rail Road Action*:

> [G]oing through the record to pick at errors the Department may have made along the way in reaching a decision is usually an unnecessary and unproductive distraction. *O'Reilly v. DEP*, 2001 EHB 19, 51. What really matters is whether the Department made the right call in the end.

2009 EHB at 476.

Thus, it is not enough for Mr. Kiskadden simply to demonstrate that the Department did not consider certain evidence in making its decision; rather, he must show that the evidence makes a difference in the final outcome. It is not enough for Mr. Kiskadden to provide hundreds of pages of laboratory data that were not reviewed by the Department. He must demonstrate to

us, the Board, that the laboratory data proves that Range's operations at the Yeager site contaminated his water well.

Likewise, Mr. Kiskadden does not meet his burden of proof by demonstrating that the Department was not aware of certain leaks or spills at the Yeager site prior to making its decision. It is true that there were numerous problems at the Yeager site, including leaks from the impoundment and drill cuttings pit and spills from trucks and other sources. At least one of those leaks resulted in the contamination of springs located on property owned by Ron and Sharon Yeager. It is also true, based on the testimony of Department witnesses and exhibits introduced by the Appellant, that the Department was not made aware of all of the problems that occurred at the Yeager site prior to its September 2011 determination. While we do not take Range's failure to report leaks and spills at its site lightly, this evidence is not dispositive in and of itself. The Appellant argues that if the Department had had prior knowledge of all of the spills and leaks at the Yeager site, the information might have led it to reach a different conclusion. That may be true. But, at this stage of the proceeding, the Appellant's job is not to convince us that the Department might have made a different decision if it had been given additional information by Range, but to convince us, the Board, to reach a different conclusion.

As we held in *O'Reilly v. DEP*, 2001 EHB 19, 45:

> Our function in this proceeding is not to critique the Department's procedures generally or as employed in this case. While an inadequate investigatory process may be evidence of a potentially dispositive finding, it is not dispositive in and of itself. . . . Any party who rests on the fact of an inadequate investigation alone does so at its almost certain peril.

Thus, it is normally not enough for the Appellant to argue that the Department has conducted an inadequate investigation. Instead, the Appellant must convince the Board that, based on the record developed at trial, we should overturn the Department's decision. *Id.* As

Judge Mather held in *New Hanover Township v. DEP*, 2014 EHB 834, 865, because our review is *de novo*, our concern is not with procedural mistakes that the Department is alleged to have made along the way, but in whether the record developed before the Board supports the Department's decision (citing *Giordano v. DEP*, 2001 EHB 713, 739).

Moreover, even assuming that proof of an inadequate investigation can justify a remand in some cases, there is no basis for such a remand here. The Department personnel who were assigned to Mr. Kiskadden's case conducted a comprehensive investigation based on the information that was available to them. They studied the hydrogeology of the area and considered the chemical make-up of the Appellant's water. Certainly, the Department's unconventional gas program is new and evolving, and this case has shown that there are areas where it can be improved. However, we do not find the Department's investigation to be severely deficient, as alleged by the Appellant in his post-hearing brief. Nonetheless, any information that the Appellant contends should have been considered by the Department, but was not, has been considered by this Board.

The Appellant must demonstrate to us, the Board, that the leaks or spills or other activities at the Yeager site caused contamination to his well. In order to meet this burden, Mr. Kiskadden must demonstrate – by a preponderance of the evidence – that a hydrogeologic connection exists between the Yeager site and his water well. We find that Mr. Kiskadden has not made that showing by a preponderance of the evidence.

Appellant's Theories of Hydrogeologic Connection

Mr. Kiskadden presented the testimony of Paul Rubin to support his contention that a hydrogeologic connection exists. Mr. Rubin has decades of professional experience as a hydrogeologist, including with the Environmental Protection Bureau of the New York Attorney

General's Office and the New York City Department of Environmental Protection. He has also worked as a hydrogeologist for a private consulting firm and for the Oak Ridge, Tennessee National Laboratory. Mr. Rubin has also spoken at conferences and has presented testimony on what he believes to be the dangers associated with the hydraulic fracturing of gas wells. For this reason, Range argues that we should dismiss Mr. Rubin's testimony in its entirety because he is "grossly biased against natural gas drilling." We disagree with Range's assessment. We are not so naïve as to believe that experts never hold a personal view about the subject matter on which they present testimony. To paraphrase the Appellant: An expert is likely to make certain discoveries through his or her work through scientific research which is likely to shape his or her personal views. (Appellant's Reply to Range's Post Hearing Brief, p. 45) We suspect this is true not just for Mr. Rubin, but for each of the experts who testified in this case. Moreover, a passion for one's work does not necessarily equate to bias. One of the purposes of cross examination is to help us assess an expert's credibility and the weight to give his or her testimony. In this case, both direct and cross examination of the experts was critical in helping us reach a decision. While all of the experts in this case were quite knowledgeable, we found some more persuasive than others under the unique facts of this case.

For example, despite Mr. Rubin's extensive knowledge, we found much of his testimony to be conclusory and difficult to follow. In many cases, he simply provided a conclusion without explanation and frequently did not answer from his own knowledge but based on what he had heard from others. Mr. Rubin spent a great deal of time discussing his work in other cases, rather than answering the questions posed to him about *this* case. In contrast, we found the testimony of Range's expert hydrogeologist, Elizabeth Perry, to be clear, concise and easy to follow. She answered the question at hand and her theories were well articulated and supported.

Ms. Perry holds a Bachelor's degree in math with a minor in geology, as well as a Master's degree in engineering geology with a specialization in hydrogeology. Her testimony on the hydrogeology of the area, groundwater quality and water type signatures was particularly helpful.

Mr. Kiskadden argues that we should not afford any weight to Ms. Perry's testimony because she did not do a study of fractures in the area. Yet, neither did Mr. Rubin perform a study of the fracture network below ground. Mr. Kiskadden asserts that Ms. Perry relied on incomplete data. Yet, her research into groundwater databases for southwestern Pennsylvania was more exhaustive – and more fully explained – than Mr. Rubin's. We find no merit to the Appellant's claim that we should reject Ms. Perry's testimony.

We address each of Mr. Rubin's theories of a hydrogeologic connection below.

1. Underground fractures connection

As part of his investigation, Mr. Rubin went into the drill cuttings pit to examine the exposed bedrock and measure the visible fractures. Fractures provide pathways for the movement of groundwater and contaminants. He also reviewed a contour map of the area and literature regarding a fracture network within the Appalachian Basin. Mr. Rubin concluded that an underground network of fractures provides a direct link between the Yeager site and Mr. Kiskadden's well.

Mr. Rubin's theory is dependent on the fractures that he observed in the drill cuttings pit continuing underground. However, Mr. Rubin admitted that fractures can "anneal" or close with depth. Additionally, Ms. Perry presented credible testimony that strata of lower permeability in the vicinity of the Yeager site would have prevented groundwater from penetrating vertically and would instead cause the groundwater to perch on top and travel horizontally in the direction of

the Yeager springs. The fact that the springs became contaminated after the March 2010 leak from the drill cuttings pit provides evidence of groundwater moving in that direction. In contrast, sampling of water wells and springs on the Voyles and Haney properties located between the Yeager site and Mr. Kiskadden's well had lower concentrations of chlorides, sodium, total dissolved solids and pH than did Mr. Kiskadden's well. This data does not support the theory that contamination is moving toward Mr. Kiskadden's well through a series of fractures.

2. Surface connection

Mr. Rubin posited that contaminants could travel downslope to Mr. Kiskadden's property by means of surface flow. This would involve the migration of fluids from the Yeager site to Unnamed Tributary 4 which flows onto Mr. Kiskadden's property approximately 50 feet from his well. The Department verified that an examination of the inside of Mr. Kiskadden's well indicated that there was surface water infiltration to the well. However, Mr. Kiskadden presented no samples from the portion of Unnamed Tributary 4 that flows on his property to demonstrate that it is, in fact, contaminated. A sample of Unnamed Tributary 4 taken by the Department on November 14, 2012 across the street from Mr. Kiskadden's property, before the tributary enters his property, showed chloride and sodium concentrations lower than the concentrations in Mr. Kiskadden's well. (F.F. 142) Moreover, Mr. Kiskadden did not recall Unnamed Tributary 4 flooding on his property around the time of his complaint. The only time he recalls it flooding over its banks was in the summer of 2010, a year prior to when he says he began to experience problems with his water. (T. 2401) Without more, we cannot find that Mr. Kiskadden has demonstrated by a preponderance of the evidence that surface flow provides a hydrogeologic connection between the Yeager site and his well.

3. Deep Migration Connection

Mr. Rubin also testified that a hydrogeologic connection exists as a result of a deep fracture network created by Range's drilling in the area. According to Mr. Rubin, when a gas well is pressurized deep into a geologic formation, additional fractures are created and existing fractures are expanded, causing new and existing fractures to create interconnections where none previously existed. According to Mr. Rubin, the new fracture networks allow for the upward migration of gas and contaminants into people's water wells. Mr. Rubin mapped the legs of Range's 7H gas well which run under Mr. Kiskadden's property. It is Mr. Rubin's theory that the hydraulic fracturing of the well created a network of fractures that allowed gas and contaminants to migrate to Mr. Kiskadden's well.

However, the literature and studies that Mr. Rubin relies on in support of his theory do not coincide with the timeline involved in this case. The Myers computer model, on which Mr. Rubin relied, posits that vertical migration of gas and fluids from the target shale to the surface could occur in "tens or hundreds of years." (T. 3613) Less than two years had passed between the hydraulic fracturing of the 7H well and Mr. Kiskadden's June 2011 water supply incident. Additionally, the Myers opinion was based on a theoretical computer model that assumed there was a cavity, six-meters in width, extending from drilling depth directly to the ground surface through which gas and other fluids could travel unencumbered.

Methane and Ethane

Mr. Rubin points to the presence of methane and ethane in Mr. Kiskadden's well as evidence of deep upward migration.[11] There are various sources of methane and ethane, and they are not necessarily the result of gas drilling. Isotopic analysis is a method used to identify

[11] Mr. Kiskadden also contends that propane was detected in his well; however, there is no evidence that it was detected above the detection limit which is necessary for any degree of reliability.

types of gas. This method characterizes gas by utilizing ratios of carbon and hydrogen. All three parties presented expert testimony on the isotopic analysis of the gas found in Mr. Kiskadden's water well. Range presented expert testimony by Ms. Perry on this topic. The Department presented the testimony of Alan Eichler who managed the Department's Oil and Gas Program in the Southwest Region at the time of the Department's determination in this matter. Lastly, the Appellant presented the testimony of Dr. Michael Sommer. Dr. Sommer holds a Bachelor of Science degree in geology, a Master's degree in the analysis and interpretation of gases in rocks and minerals and a Ph.D. in the analysis of lunar rocks.

Mr. Kiskadden urges us to strike Alan Eichler's testimony regarding isotopic gas analysis. Mr. Kiskadden argues that Mr. Eichler is not an expert in this field because he has no formal education or training in isotopic analysis and was simply trained by a colleague. We find that Mr. Eichler is qualified to testify as an expert in the field of isotopic analysis. Mr. Eichler trained with Fred Baldassare, recognized as one of the leaders in the field of isotopic analysis. (T. 1764-65) As the Department correctly points out, technology transfer is a common and recognized means of education for professionals in a technical field. Pennsylvania law permits a person to be qualified as an expert "based upon knowledge, skill, experience, training or education. . ." Pa. R.E. 702 The Department cites to cases where the Board has recognized that technical professionals gain knowledge and expertise through their work: *E.g., UMCO Energy, Inc. v. DEP*, 2006 EHB 489, 546, and *Eagle Environmental, L.P., v. DEP*, 1998 EHB 896, 931-32, *aff'd on other grounds*, No. 2704 CD 1998 (Pa. Cmwlth. October 19, 2001). Additionally, Mr. Eichler took undergraduate and graduate classes at the University of Pittsburgh that discussed isotopes and isotopic analysis. (T. 1748, 1759-60) Based on Mr. Eichler's educational

background and training, we affirm the ruling at trial recognizing Mr. Eichler as an expert on the subject of isotopic gas evaluation.

Mr. Eichler testified that there are two primary types of methane gas: (1) thermogenic, which is created by heat and pressure at great depth, and (2) biogenic, which is created by biological processes. The latter, biogenic gas, can be made through two bacteriological processes: (i) fermentation by bacteria acting on organic material, and (ii) bacterial reduction of carbon dioxide (carbon dioxide reduction). All three parties' experts agreed that thermogenic gas emanates from a petroleum source. And, all three experts plotted the gas in Mr. Kiskadden's well as carbon dioxide reduction, and *not* as thermogenic. Where they differed was the source of the carbon dioxide reduction gas in Mr. Kiskadden's well. Whereas the Department and Range's experts believe carbon dioxide reduction gas to be produced at the surface, Dr. Sommer believes that carbon dioxide reduction gas is deep seated. He testified that both thermogenic gas and carbon dioxide reduction gas have a deep seated source.

However, contrary to the assertion in the Appellant's post hearing brief, none of the experts, including Dr. Sommer, testified that the gas in Mr. Kiskadden's well was "thermogenic." The Appellant states in his post hearing brief that "'thermogenic' gas refers to gases that emanate from a petroleum source or as a result of carbon dioxide reduction" and that "the methane in Mr. Kiskadden's water derives from a thermogenic, deep-seated gas." (Appellant's Post Hearing Brief, p. 217) Those statements contradict the testimony of the Appellant's own expert, who did not testify that the gas in Mr. Kiskadden's well was thermogenic.

We found Dr. Sommer's testimony to be forthright, credible and well explained. However, the Appellant relies on Dr. Sommer's testimony for conclusions that he did not reach.

For example, although he concluded that both the gas in Mr. Kiskadden's well and the production gas in Range's well were deep seated, he did not testify that Range was the source of the gas in Mr. Kiskadden's well. In plotting the gas from Range's well and the gas detected in Mr. Kiskadden's well, he testified that they were "indicative of deep seated gases" but "distinctly different." (T. 2792) The most he concluded was that both gases were deep seated. (*Id*.) Whereas he testified that the gas in Mr. Kiskadden's well was carbon dioxide reduction, he concluded that Range's production gases were thermogenic in nature. (T. 3119) The Appellant argues that although the two gases plot differently, they can still be from the same source due to isotopic fractionation which theorizes that as gases move they become fractionated. However, although Dr. Sommer did testify that it was his expert opinion that the gas in Mr. Kiskadden's well was due to hydraulic fracturing, he stated he had no reason to believe that the gas in Mr. Kiskadden's water well had any relationship to the gas at Range's production well. (T. 2794) He further testified that it was his expert opinion that the ethane found in Mr. Kiskadden's water supply came from a different source than the ethane generated by Range's Yeager production. (T. 3125)

The Importance of Chloride Levels

The Appellant argues that the Department erred by focusing solely on the level of chlorides in Mr. Kiskadden's water without focusing on the presence of other parameters. The Department's determination letter states in relevant part as follows:

> Gas well waste fluids are high in many parameters, including sodium and [total dissolved solids]. However, they characteristically show the highest concentration in chloride, usually 2-3 times that of sodium. Your water supply shows a chloride concentration of between 33 and 44 mg/l, or about 1/8 of the sodium level. *This fact alone largely rules out gas well contamination at your well.*

(DEP Ex. 13) (emphasis added).

Mr. Kiskadden points out that, whereas the composition of flowback water might consist of high levels of chloride in comparison to sodium levels, not all of the releases at the Yeager site involved flowback water. Mr. Kiskadden further points out that releases also occurred from the drill cuttings pit and that soil samples beneath the drill cuttings pit contained higher amounts of sodium in comparison to chloride. Therefore, argues Mr. Kiskadden, the fact that his well contains higher levels of sodium in comparison to chlorides could be an indication that it was polluted by a release from the drill cuttings pit.

We agree with Mr. Kiskadden that the ratio of chloride to sodium should not be the sole factor in determining whether his water supply was impacted by gas related operations. Of particular note, the Department maintains a list of predrill parameters that it recommends to homeowners prior to gas well drilling taking place in their area. The Department recommends that homeowners test their water for a list of various parameters within one year prior to gas well drilling. The list includes a number of organics, inorganics and trace metals. If a homeowner cannot test for the entire package of parameters, the Department recommends a shortened list that at a minimum should be tested. At the time of Mr. Kiskadden's appeal, chloride was not on the minimum list of parameters to be tested. (F.F. 122) In fact, chloride was not added to the list until 2014, following the onset of Mr. Kiskadden's appeal before the Board. Clearly, if the Department did not consider chloride to be an essential parameter for which to test, it would be improper to base its determination of gas well-related impact on this one parameter.

We find, however, that the Department did not base its determination solely on the chloride-sodium ratio. Rather, it also investigated the hydrogeology of the area and sampled for other constituents. The chloride-sodium ratio is one of many pieces of evidence presented at the

trial in this matter. And while the chloride-sodium ratio should not be the sole basis for concluding that Mr. Kiskadden's water was not impacted by Range's operation, it is nonetheless an important piece of the puzzle. If sodium from gas-related waters made it to Mr. Kiskadden's well, then chlorides would have been present in much higher concentrations.

Mr. Kiskadden points to soil samples collected from underneath the drill cuttings pit as evidence that high levels of sodium are indicative of pollution from the Yeager site. He points out that in nearly all of the soil samples taken from underneath the drill cuttings pit, the sodium concentrations were higher than chloride concentrations. However, all of the experts testified that chlorides are more mobile than sodium. A higher concentration of sodium in the soil indicates that the sodium stayed in the soil while the chlorides moved with the fluids through the soil. As such, the Department is correct that one would expect a higher concentration of chlorides in Mr. Kiskadden's water. As noted earlier, although the level of chlorides cannot be the only factor in determining whether there has been an impact on Mr. Kiskadden's water from Range's operations, it is nonetheless an important factor. The high levels of sodium and low levels of chloride in the soil beneath the drill cuttings pit reinforce the Department's position that chlorides would have traveled to Mr. Kiskadden's well if it had been impacted by contamination traveling from the Yeager site.

Background Water Quality Levels

Unfortunately, there are no predrilling samples of Mr. Kiskadden's water from which background water quality can be determined. In order to avoid liability under the rebuttable presumption set forth in the 1984 Oil and Gas Act, which was in effect at the time the Department investigated Mr. Kiskadden's complaint, a gas well operator would have been required to conduct predrill sampling for water supplies within 1,000 feet of a gas well. Mr.

Kiskadden's well is 2,900 feet or approximately one half of a mile from the Yeager site.[12] Therefore, we have no way of knowing the exact quality of Mr. Kiskadden's water prior to the start of operations by Range.[13]

Mr. Kiskadden asserts that predrill samples for the Yeager springs and Puskarich springs are an appropriate comparison for background water quality data for his well. The Yeager springs are located on property owned by Ron and Sharon Yeager and are situated northwest of Range's Yeager operation. (Range Ex. 222) The Puskarich springs are south of the Yeager site. (Range Ex. 222) Both are situated on hillsides. Predrilling, the springs exhibited low levels of chlorides, sodium and total dissolved solids, and pH levels in the normal range. Mr. Kiskadden asserts that the predrilling quality of his water would have been comparable to the predrill samples of the Yeager and Puskarich springs.

However, hillside springs and valley wells are hydrogeologically different. Water flowing from a spring has a shorter residence time, i.e., the amount of time it has been in contact with rock formations. Because of its shorter residence time, water from a spring is likely to be less mineralized than water from a well which has a longer residence time. In contrast to the Yeager and Puskarich hillside springs, Mr. Kiskadden's well is hundreds of feet deep in a stream valley. As a result it intercepts multiple rock formations that affect its quality. (F.F. 131-135)

The Department and Range contend that a more appropriate comparison for purposes of background water quality is the water well of Mr. Kiskadden's mother, Grace Kiskadden. Her well is approximately 1,000 feet northwest and upstream of Mr. Kiskadden's well and intercepts the same rock formations as Mr. Kiskadden's well. According to the Department, Mrs.

[12] Predrill sampling would not have been required under the current law either, which expanded the distance for the rebuttable presumption to 2,500 feet.

[13] A predrill sample of Mr. Kiskadden's well would have helped tremendously in this matter and doubtless would have resulted in a shorter and more efficient trial and pretrial schedule.

Kiskadden's well is hydrogeologically separated from the Yeager site by a ridge that runs between her well and the drainage area for the Yeager site, and for this reason it serves as an example of water that has not been impacted by Range's operations at the Yeager site. Mrs. Kiskadden's water shows similar characteristics to that of Mr. Kiskadden: high sodium and total dissolved solids, elevated pH and lower chloride concentration. (T. 1883-84; DEP Ex. 30) Both wells also show calcium and alkalinity in the same ranges. (T. 1883; DEP Ex. 30)

Mr. Kiskadden disputes that his mother's water is hydrogeologically separated from the Yeager site, and he contends that her water has also been contaminated by Range's operations. According to Mr. Kiskadden, the fact that his mother's water contains a similar profile to his only verifies that her water has also been polluted. He disputes the Department's contention that a ridge separates Grace Kiskadden's water supply from the Yeager site since the Department did not conduct a hydrogeologic investigation of Mrs. Kiskadden's water supply and its connection or lack thereof to the Yeager site.

Even if we were to accept Mr. Kiskadden's assertion that without a hydrogeologic investigation we cannot be certain that Grace Kiskadden's well is hydrogeologically separated from the Yeager site, the background water quality of the area appears to be quite similar to Mr. Kiskadden's. Mr. Kiskadden's water supply is a relatively deep well located in a valley setting. As such, it is inappropriate to assume that it would have the same water chemistry as a spring, such as the Yeager or Puskarich springs, or even a well located on a hilltop or hillside. Water type signature is affected by topographic location. Ms. Perry explained that springs located on hillsides and hilltops in southwestern Pennsylvania tend to be calcium bicarbonate water type while wells in valleys tend to be sodium bicarbonate type. Groundwater data for southwestern

Pennsylvania confirms this conclusion. Therefore, it is unlikely that Mr. Kiskadden's water quality was ever similar to the predrill samples for the Yeager and Puscarich springs.

The Appellant produced hundreds of pages of sampling results showing that numerous parameters had been detected in Mr. Kiskadden's water that were also detected in sampling at the Yeager site. The problem is that most of those parameters can also be found naturally in groundwater. Thus, their mere detection in a sample is not enough to prove a hydrogeologic connection. Those that are not found naturally in groundwater are also associated with products and activities unrelated to hydraulic fracturing operations. As noted earlier, Mr. Kiskadden admitted to disassembling vehicles on or near his property and draining their fluids, cutting up vehicles and appliances with an acetylene torch, and storing vehicles on his property. A salvage yard was operated for decades adjacent to his property. He also testified that he did no maintenance on his well prior to his complaint. In fact, when he replaced the well pump in the Spring of 2013 he testified that it was covered with a hard brown build up. We cannot ignore these factors in reaching our decision.

Interestingly, none of the parties, including the party with the burden of proof, the Appellant, introduced any water sampling more recent than March 27, 2012 for Mr. Kiskadden's well. More current information would have been helpful and relevant. As stated in *Rail Road Action, supra* at 476, because no appealed action of the Department is final until it has been ruled on by the Board, "any evidence generated up until *now* is potentially relevant." (emphasis in original). It also would have been extremely helpful to see the results of more extensive water sampling for the wells and springs on properties located between the Yeager site and Mr. Kiskadden's property – i.e., the Haney, Voyles, Bennett and Garrett water supplies. The record contains limited sampling results for the Voyles and Haney water supplies from November 2010

and February 2011. Range attempted to introduce more extensive sampling results, but they were excluded from evidence based on the Appellant's objection that they had not been produced in discovery. Although the sampling results were produced in discovery in related litigation in the Court of Common Pleas of Washington County, they were not produced in this case by Range and, therefore, we had no choice but to exclude this information from the record. Had this information been admissible, it would have helped to develop a more complete picture of groundwater movement in the area.

Strontium Analysis

EPA's March 27, 2012 testing of Mr. Kiskadden's water well included an analysis of strontium isotopes. (DEP Ex. 15) The ratio of Strontium 87 to Strontium 86 can be used to determine the age of water. Mr. Rubin testified that the strontium ratio for Mr. Kiskadden's water indicates that it is old water which would have come from depths where gas is produced. However, the strontium ratio for Mr. Kiskadden's water falls outside the range for water from the gas producing formations at issue in this case, the Marcellus Shale and the Upper Devonian Shale. On cross examination, Mr. Rubin admitted that the strontium value for Mr. Kiskadden's water did not fall within the ranges for the Marcellus Shale and Upper Devonian Shale but fell within the value for the Pittsburgh Coal Seam. (T. 3451, 3857)

Organic Compounds

Low concentrations of acetone, t-butyl alcohol and chloroform were reported in the Department's August 1, 2011 sampling. Those constituents were not reported when EPA tested the water on March 27, 2012, although EPA's testing did indicate the presence of diesel range organics. (DEP Ex. 15) The Department's Mr. Eichler testified that such low concentrations of organic compounds would not be unexpected in private water supplies, especially given the

proximity of Mr. Kiskadden's property to the auto salvage yard and Banetown Road. The presence of these constituents in his water could reflect background conditions, surface runoff or impact from the adjacent salvage yard. Chloroform, in particular, could be due to Mr. Kiskadden adding bleach to his well after the Department's testing revealed the presence of coliform bacteria.[14] Additionally, acetone was found to be present in a field blank sample that was taken for the purpose of ensuring that the presence of any constituents found in Mr. Kiskadden's water was not due to field contamination. The presence of acetone in the field blank sample raises at least some doubt as to whether acetone was truly present in Mr. Kiskadden's well.

The sporadic presence of low concentrations of organic compounds in Mr. Kiskadden's water supply does not contradict the Department's finding that gas-related activities have not contaminated Mr. Kiskadden's well, especially given his location adjacent to an auto salvage yard and his admission that he has disassembled and drained fluids from vehicles on his property. As we have noted, the Appellant has not established a hydrogeologic connection between Range's operation and his water well. He has not convinced us that his water evidences the effects of pollution by gas well activities. In short, the evidence presented by the Appellant does not meet his burden of proof.

Timing of Department's Determination

Mr. Kiskadden asserts that he should prevail because the Department did not make a determination on his water supply complaint within 45 days, as required under Section 208 of the 1984 Oil and Gas Act, 58 P.S. § 601.208(b), and Section 78.51 of the Oil and Gas regulations, 25 Pa. Code § 78.51(c).[15] Mr. Kiskadden telephoned his complaint to the Department on or about June 3, 2011. Subsequently, the Department conducted water sampling on June 6, 2011 and

[14] Mr. Kiskadden testified that he did not dilute the bleach before adding it to the well.
[15] The 45 day requirement is also contained in Section 3218(b) of the current Oil and Gas Act, 58 Pa. C.S. § 3218(b).

August 1, 2011; conducted a hydrogeologic investigation during that timeframe; and issued its determination on September 9, 2011, approximately 90 days after being notified of the complaint.

Although the Oil and Gas Act calls on the Department to make a determination within 45 days of being notified of a water supply complaint, neither the Act nor the implementing regulations provide for deemed approval should the Department fail to act within that timeframe. The Act provides no penalty for a determination that is issued after the 45 day deadline.

In the case of Mr. Kiskadden's water supply complaint, the record shows that the Department acted promptly to investigate his complaint, that it conducted a thorough investigation consisting of water sampling and a hydrogeologic study of the area, and that it issued a decision promptly after receiving the results of the water sampling and hydrogeologic investigation. Although the determination was not issued within 45 days, the Department was not dilatory in conducting its investigation and in reaching a determination on whether Mr. Kiskadden's well had been polluted by Range's operation.

The Commonwealth Court has held, "Generally, a statute requiring a public official to take action within a specific time frame is directory unless the statute indicates it is mandatory or time is of the essence for the action that the statute requires." *JPay, Inc. v. Department of Corrections*, 89 A.3d 756, 763 (Pa. Cmwlth. 2014) (citing *In re Sale of Real Estate by Lackawanna County Tax Claim Bureau*, 22 A.3d 308, 314 (Pa. Cmwlth. 2011); *see also, Department of Transportation, Bureau of Driver Licensing v. Claypool*, 618 A.2d 1231, 1232 (Pa. Cmwlth. 1992)). One indication of whether a timeframe in a statute was intended to be mandatory is whether the statute specifies some consequence of failure to follow it or indicates that time is of the essence. Here, the statute specifies no consequence of failing to issue

a determination within 45 days. While we recognize that directory provisions of the legislature, just like mandatory provisions, are meant to be followed, a failure to strictly adhere to the timeframe set forth in a directory provision of a statute does not invalidate the action involved. *JPay, supra.*

Second Complaint

Mr. Kiskadden asserts that the Department failed to issue a determination on a second complaint filed by him in January 2012 and that this failure has deprived Mr. Kiskadden of the right to notice of the Department's findings and the right to be heard. The record contains very little information on this second complaint, or whether a complaint was, in fact, lodged. According to the record, Mr. Kiskadden's counsel placed a telephone call to the Department which resulted in additional sampling of Mr. Kiskadden's water on January 26, 2012. Whether this telephone call reached the level of a complaint is unclear. The Department asserts that the issue is nonetheless waived because Mr. Kiskadden did not include it in his prehearing memorandum. 25 Pa. Code § 1021.104; *Borough of St. Clair v. DEP*, EHB Docket No. 2013-118-L (Adjudication issued May 20, 2015), *slip op*. at 18.

Even if the January 2012 telephone call by Mr. Kiskadden's counsel to the Department served as a complaint, we reject his argument that the Department's inaction on the second complaint deprived him of the opportunity to appeal the Department's determination and be heard on it. The results of the Department's January 26, 2012 sampling were introduced in this proceeding and have been considered by the Board. Mr. Kiskadden has not shown us that his second complaint involves anything that was not addressed in this proceeding.

To comport with due process, states must provide persons with a meaningful opportunity to be heard before depriving them of life, liberty, or property. *Brockway, supra* at 26 (*citing,*

Jake v. DEP, 2014 EHB 38, 50). A hearing before this Board provides Mr. Kiskadden that opportunity. *Kiskadden v. DEP*, 2013 EHB 21, 25. The Appellant had the opportunity to conduct discovery, and, in fact, conducted robust discovery. His counsel extensively deposed Department witnesses, presented the Appellant's objections to this Board, and cross-examined the Department and Range's witnesses. His right to due process has clearly been satisfied. *Brockway*, *supra* at 27; *Kiskadden v. DEP*, 2014 EHB 642, 643-44. Therefore, we reject Mr. Kiskadden's argument that his due process rights have been violated by the Department's alleged failure to act on his second complaint.

Conclusion

We are aware of the fact that this is the first case to proceed to hearing involving a claim that unconventional gas drilling operations contaminated a homeowner's water well. As set forth in our Adjudication, after a careful review of all the evidence we find that the Appellant did not prove his case by a preponderance of the evidence. This case was extremely hard fought. Counsel represented their clients zealously at trial and we are appreciative of their efforts

In the end, the Appellant's case was hurt by several factors. First, he had no predrilling samples to show the quality of his water prior to Range's drilling operations. This, in and of itself, is not necessarily fatal, but the absence of such water samples made his case more difficult to prove. Second, the Appellant simply did not introduce the necessary factual testimony, lab results, or expert testimony to carry his burden of proof and prove his case by a preponderance of the evidence. Candidly, Appellant did not help his case by his own testimony. His memory was poor and his testimony was thin.

The physical facts showed that his water well was located adjacent to a salvage yard with numerous automobiles and other solid waste product on the grounds over the years. The

Appellant never performed any maintenance on his water well or on his septic system. When the water pump inside his well stopped working and was removed, the Appellant's own testimony describing the water pump vividly highlights this lack of maintenance. Pictures of his water well show a well open to the elements and not properly maintained.

The Appellant's hydrogeology expert testified in a conclusory manner and his "shotgun" approach to what caused the contamination was not persuasive based on the evidence he relied on. The scores of lab results introduced into evidence by the Appellant did not support the theory that his well was contaminated by Range's operations. As we explained, high chloride readings can be a good indicator that drilling operations have contaminated a water source. For example, it is undisputed that the Yeager Springs were contaminated by Range's drilling operations, and the chloride readings in the samples taken from the Yeager Springs were in the thousands. In contrast, the chlorides in Mr. Kiskadden's water well never exceeded 44 mg/l.

Although the Pennsylvania Department of Environmental Protection's investigation was not perfect, it was robust. The Department took multiple samples and conducted a thorough investigation. Its professional staff presented strong testimony setting forth what they did and how their opinions were formed.

Simply because there are problems on a drilling site, and there certainly were many problems on this site as we have set forth in our Adjudication, it does not mean that a water well located approximately one half mile away was impacted by those drilling operations. The homeowner must show by a preponderance of the evidence that any pollution to his water well is caused by the drilling operations, and the Appellant failed to do that here.

CONCLUSIONS OF LAW

1. Section 208 of the 1984 Oil and Gas Act and Section 3218 of the current Oil and Gas Act charge the Department with investigating claims of pollution to water supplies by oil and gas activities. 58 P.S. § 601.208 (superseded by 58 Pa. C.S. § 3218).

2. When the Department conducts an investigation of a water supply complaint pursuant to the provisions of Pennsylvania's Oil and Gas Act and makes a determination that the oil and gas company's activities have not affected a water supply, that determination is a final action of the Department which is appealable to the Pennsylvania Environmental Hearing Board (Board). Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7511 *et seq.*

3. The Appellant bears the burden of proving by a preponderance of the evidence that the Department erred in determining that Range's operations had not contaminated his water supply. 25 Pa. Code § 1021.122(a); *Kiskadden v. DEP*, 2014 EHB 667.

4. The Board's review is *de novo*. *Warren Sand & Gravel, supra; O'Reilly, supra; Smedley, supra.* This means that the Board is not limited to information that may have been available to the Department at the time it reached its determination. *Smedley v. DEP*, 2001 EHB at 156.

5. Since we are deciding this matter on the merits, we need not address Range's motion for directed adjudication. *Winner v. DEP*, 2014 EHB at 1024; *Krushinski*, 2008 EHB at 581.

6. Because no appealed action of the Department is final until it has been ruled on by the Board any evidence generated up until the time of trial is potentially relevant. *Rail Road Action*, 2009 EHB at 476.

7. Although Section 208 of the 1984 Oil and Gas Act (and Section 3218(b) of the current Act) require the Department to make a determination on a water supply contamination complaint within 45 days of being notified of the complaint, neither the statute nor the regulations provide for deemed approval should the Department fail to act within 45 days. 58 P.S. § 601.208(b); 25 Pa. Code § 78.51(c).

8. "Generally, a statute requiring a public official to take action within a specific time frame is directory unless the statute indicates it is mandatory or time is of the essence for the action that the statute requires." *JPay, supra*, 89 A.3d at 763.

9. To comport with due process, states must provide persons with a meaningful opportunity to be heard before depriving them of life, liberty, or property. *Brockway, supra* at 26. A hearing before the Environmental Hearing Board, in which the Appellant was able to present evidence not only pertaining to the Department's September 9, 2011 determination letter but also to the Appellant's alleged second complaint in January 2012, provides the Appellant with due process to be heard on his claims. *Kiskadden v. DEP*, 2013 EHB at 25.

10. Mr. Kiskadden did not demonstrate by a preponderance of the evidence that a hydrogeological connection exists between his water well and Range's operations at the Yeager site.

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	:	

O R D E R

AND NOW, this 12th day of June, 2015, it is hereby **ORDERED** that the Appeal filed by Mr. Loren Kiskadden at EHB Docket No. 2011-149-R 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: June 12, 2015

c: DEP, General Law Division:
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(via electronic mail)

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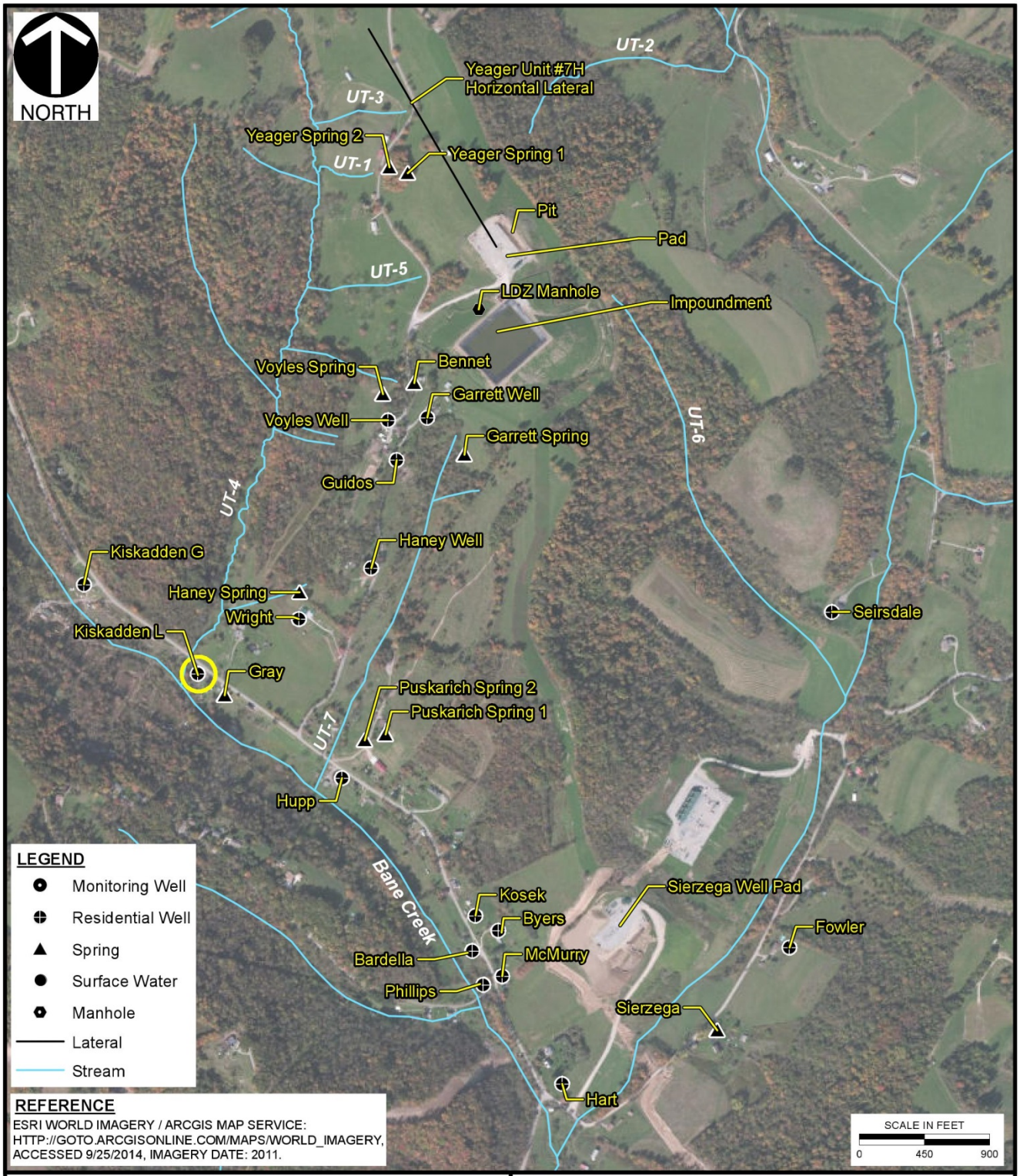

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RANGE RESOURCES-APPALACHIA, LLC.
WATER QUALITY MONITORING LOCATIONS
AMWELL TOWNSHIP, WASHINGTON COUNTY, PA

YEAGER DRILL SITE AND SURROUNDING AREAS

DRAWN BY:	CLC	CHECKED BY:	CBM	APPROVED BY: * Hand signature on file	JP*	FIGURE NO:	1
DATE:	9/24/2014	SCALE:	1 " = 900 '	PROJECT NO:	132-858.0001		

Exhibit RR-222

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LANA AND WILLIAM BOYER and DAVID AND JUDITH BADGER	:	
v.	:	**EHB Docket No. 2014-111-B (Consolidated with 2015-004-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and SWEPI, LP, Permittee, and RE GAS DEVELOPMENT, LLC, Intervenor	:	**Issued: June 18, 2015**

OPINION AND ORDER ON
INTERVENOR'S MOTION TO DISMISS

By Steven C. Beckman, Judge

Synopsis

The Board grants the Intervenor's motion to dismiss where the permit being appealed has been cancelled, thereby rendering the appeal moot.

O P I N I O N

This matter concerns the consolidated appeals of Lana and William Boyer and David and Judith Badger (collectively, "Appellants") of the Department of Environmental Protection's ("Department's") issuance of Well Permit Number 37-073-20402 ("the Permit") to SWEPI, LP on July 8, 2014. Currently pending before the Commonwealth of Pennsylvania Environmental Hearing Board ("Board") is a motion to dismiss by R.E. Gas Development, LLC ("R.E. Gas" or "Intervenor"), grounded on the argument that the Department's cancellation of the Permit renders the appeals moot. For the reasons discussed below, we agree with Intervenor and dismiss the consolidated appeals for mootness.

A summary of the timeline relevant to these appeals is as follows: Lana and William Boyer initiated their *pro se* appeal of the Permit on August 14, 2014. On December 17, 2014,

the Department filed a status report stating that the Permit had been transferred from SWEPI to R.E. Gas as of October 29, 2014. On January 12, 2015, we issued a letter to both SWEPI and R.E. Gas, notifying each of their opportunity to participate in the appeal as an interested party. On January 15, 2015, David and Judith Badger, *pro se*, filed a notice of appeal (docketed at EHB Docket No. 2015-004-B) as well as a request to intervene in the Boyers' appeal. The next day, January 16, 2015, R.E. Gas filed a petition to intervene. We granted R.E. Gas and the Badgers intervention on January 29 and 30, 2015, respectively. Upon a motion by the Department, we consolidated the Badgers' and Boyers' appeals on February 13, 2015. On May 1, 2015, R.E. Gas requested that the Department cancel the Permit, noting that the subject well was never drilled. The Department confirmed to R.E. Gas that the Permit was cancelled by letter dated May 6, 2015. Thereafter, on May 14, 2015, R.E. Gas filed the present motion to dismiss.[1] The Department joined in the motion without additional comment on May 29, 2015. Finally, the Appellants filed a joint response to R.E. Gas's motion on May 30, 2015. No reply to the Appellants' response was filed by the Intervenor or the Department.

In brief, R.E. Gas argues that, because the Department cancelled the Permit, there exists no case or controversy for the Board to decide, and that there is no relief that the Board could provide the Appellants. They further argue that no unusual circumstances exist to justify the Board retaining jurisdiction over the appeal—that in ruling on this matter, the Board could only offer an advisory opinion on the validity of some hypothetical future permit, and that cancellation of the Permit gave Appellants the only relief that could be offered by the Board.

Appellants, in response to the motion to dismiss, request that the Board deny the motion and that the Board impose a settlement on the Parties before R.E. Gas would be allowed to

[1] SWEPI, LP, despite being notified by the Board numerous times that its rights and interests were implicated in these appeals, never filed a notice of appearance in these matters.

reapply for a well permit pertaining to the subject properties.[2] As they previously asserted in their respective notices of appeal, the Boyers and Badgers argue that the underlying oil and gas leases were fraudulently obtained, and thus the permit never should have been issued (or subsequently transferred).[3] The Appellants point out that the leases are currently being challenged in a class action suit before the Court of Common Pleas of Lawrence County. The Appellants also argue that dismissal is not warranted because the Department, SWEPI, and R.E. Gas have "violated many aspects of the [Board's] process."

As we have stated previously:

> A motion to dismiss is typically appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, some issue of justiciability, or another preliminary concern. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *E.g.*, *Burrows v. DEP*, 2009 EHB 20, 22. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving motions to dismiss, we accept the nonmoving party's version of events as true. *Ehmann v. DEP*, 2008 EHB 386, 390.
>
> . . . .
>
> "Mootness is a prudential limitation related to justiciability," and, thus generally is an issue properly resolved by a motion to dismiss. *M & M Stone Co. v. DEP*, 2009 EHB 495, 500. "A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome." *Horsehead Res. Dev. Co. v. DEP*, 1998 EHB 1101, 1103.

[2] The Board is empowered and obligated to "hold hearings and issue adjudications." 35 P.S. § 7514. While parties to Board proceedings often attempt settlement and the Board may permit the parties "to utilize voluntary mediation services" to resolve a dispute, the Board's implementing statute does not contemplate the power to "impose a settlement" on an unwilling party as the Appellants seem to request.

[3] Appellants cite no authority for their contention that the Department must deny a permit application or a request to transfer a permit where the validity of an underlying oil and gas lease is in dispute.

Consol Pa. Coal Co. v. DEP, EHB Docket No. 2014-027-B, slip op. at 8–9 (Opinion issued Feb. 12, 2015) ("*Consol*"); *see also South v. DEP*, EHB Docket No. 2014-082-L, slip op. at 4 (Opinion issued Apr. 16, 2015).

The Board has routinely found that, absent unusual circumstances, the Department's rescission of an action under appeal renders the appeal moot. *See, e.g.*, *Gardner v. DEP*, 2008 EHB 110; *Blue Marsh Laboratories v. DEP*, 2007 EHB 777. For example, in *Butler v. DEP*, Butler appealed the issuance of a well permit based upon the existence of an unresolved complaint regarding his water supply. 2008 EHB 118, 119. Exotic Oil & Gas, LLC notified the Department that it no longer intended to drill the subject well and sought cancellation of the permit. *Id.* Just as in this case, the Department cancelled the permit and informed the company that it would need to apply for a new permit if it subsequently intended to drill in that location. We noted that Butler's response "does not explain why or how his contention regarding his water supply would somehow prevent this appeal from being moot once the permit was cancelled." *Id.*

Similarly, in the present case, we fail to see how Appellants' appeal of the issuance and transfer of the Permit is not moot, now that the Permit has been cancelled. Neither SWEPI, nor R.E. Gas, nor anyone else for that matter, may drill on the subject properties prior to obtaining a new permit from the Department. While we do not take lightly the Appellants' allegations that the Department and R.E. Gas were obstinate or unresponsive to the Appellants' discovery requests, that fact, if true, is not a basis for the Board to retain jurisdiction over an otherwise moot appeal. *See Consol*, slip op. at 13–14 ("Nonexclusive examples of exceptional circumstances include cases where the disputed conduct is of a recurring nature yet likely repeatedly to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision.") (quoting *Ehmann v. DEP*, 2008 EHB 386, 389). Accordingly, we find the present appeal moot and issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LANA AND WILLIAM BOYER and DAVID AND JUDITH BADGER	:	
	:	
v.	:	**EHB Docket No. 2014-111-B**
	:	**(Consolidated with 2015-004-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and SWEPI, LP, Permittee, and RE GAS DEVELOPMENT, LLC, Intervenor	:	

O R D E R

AND NOW, this 18th day of June, 2015, it is hereby ordered that R.E. Gas Development, LLC's motion to dismiss is granted and this appeal is dismissed as moot.

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: June 18, 2015

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

For the Commonwealth of PA, DEP:
Michael Braymer, Esquire
Hope Campbell, Esquire
(*via electronic filing system*)

For Appellants, *Pro Se:*
Lana and William Boyer
David and Judith Badger
(*via electronic filing system*)

For Permittee:
SWEPI LP
2100 Georgetown Drive
Suite 400
Sewickley, PA 14143

For Intervenor, R.E. Gas Development, LLC:
Kevin L. Colosimo, Esquire
Kevin L. Barley, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANDREW LESTER	:	
	:	
v.	:	**EHB Docket No. 2014-025-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 24, 2015**

A D J U D I C A T I O N

By Steven C. Beckman, Judge

Synopsis

The Board dismisses the appeal of an administrative order directing the Appellant to permanently close underground storage tanks. Both operators and owners are subject to the closure requirements of the Storage Tank and Spill Prevention Act. The Department reasonably determined that the Appellant was an "Operator" under the Act and regulations where the Appellant identified himself as the operator on various forms and took actions consistent with exercising control over and responsibility for the tanks.

Background

This matter involves the appeal of Andrew Lester ("the Appellant") of a February 19, 2014 administrative order by the Department of Environmental Protection ("the Department") directing the Appellant and his father, Kenneth D. Lester, (collectively, "the Lesters") to permanently close four underground storage tanks on property owned by Kenneth Lester, pursuant to the Storage Tank and Spill Prevention Act. Kenneth Lester did not appeal the Department's order. The Board held a one-day hearing in this matter on January 15, 2015 at the Board's Northwest Office and Court Facility in Erie, Pennsylvania. That same day, the Parties

signed a joint stipulation of facts which was later filed on the case docket. The Appellant filed his posthearing brief on February 27, 2015. The Department filed its posthearing brief on April 17, 2015. The Appellant did not file a reply brief, and the matter is now ripe for decision.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended,* P.S. §§ 6021.101–6021.2104 ("Storage Tank Act"); Section 1917-A of 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 both of those statutes. (Joint Stip. Facts ("Stip.") ¶ 1.)

2. The Appellant, Andrew Lester, is an adult individual with a mailing address of 10417 Route 6, Clarendon, Pennsylvania 16313. (Stip. ¶ 3.)

3. Kenneth D. Lester is an adult individual with a mailing address of 892 Lance Street, Sebastian, Florida 32958. (Stip. ¶ 2.)

4. Kenneth D. Lester owns property located at 10417 State Route 6 in Mead Township, Warren County, Pennsylvania, which formerly operated as a retail petroleum fueling station and automotive repair service known as "Ken's Keystone" (the "Property"). (Stip. ¶ 4.)

5. Ken's Keystone was a full-service gas station consisting of a garage, convenience store and gas pumps. (Notes of Transcript ("T.") 115.)

6. The following four underground storage tanks (collectively the "Tanks") are located at the Property:

Tank Number	Date of Installation	Contents	Capacity (gallons)
005	Unknown	Diesel	1,000
006	3/9/1999	Diesel	10,000

007	3/9/1999	Gasoline	8,000
008	3/9/1999	Gasoline	4,000

(Stip. ¶ 5.)

7. The Tanks are registered with the Department as Facility ID Number 62-91246. (Stip. ¶ 6.)

8. The Tanks are "underground storage tanks" as that term is defined in Section 103 of the Storage Tank Act, 35 P.S. § 6021.103. (Stip. ¶ 8.)

9. Kenneth D. Lester is the "owner" of the Tanks as that term is defined by Section 103 of the Storage Tank Act, 35 P.S. § 6021.103. (Stip. ¶ 9.)

10. The Tanks generally meet the performance requirements of 25 Pa. Code § 245.421. (Stip. ¶ 10.)

11. On November 5, 2009, Certified Inspector Daniel Galvin inspected the Tanks ("November 2009 Inspection") and found all four tanks to be noncompliant with respect to Tank Construction and Corrosion Protection, Tank Release Detection, and Piping Release Detection. (Dep't Ex. G.)

12. The November 2009 Inspection also reported Tank No. 008 to be noncompliant with respect to Piping Construction and Corrosion Protection and Tank Nos. 007 and 008 to be noncompliant with respect to Overfill Prevention. (Dep't Ex. G.)

13. On February 19, 2010, Andrew Lester, but not Kenneth Lester, attended a meeting with Phil Smith, Arthur Meade, and Dan Peterson of the Department's Environmental Cleanup Program to discuss "each of the violations and what it would take to resolve or abate the violations" regarding the Tanks. (T. 210–11; Dep't Ex. N.)

14. On June 28, 2010, Andrew Lester submitted a registration form to the Department, registering the Tanks temporarily out-of-service as of June 23, 2010. (Stip. ¶ 11.)

15. Andrew Lester signed the registration form and checked the box for "facility operator." (Stip. ¶ 12; Dep't Ex. A.)

16. The Tanks have been temporarily out-of-service since June 23, 2010, and have not been operated. (Stip. ¶ 24.)

17. The Tanks were required to be permanently closed if they were not put back into service by June 23, 2013. (T. 37.)

18. On May 16, 2011, the Department issued an Administrative Order ("2011 Order") to the Lesters revoking the permit-by-rule for operation of the Tanks and ordering the Lesters to, among other things, empty and cease operations of the Tanks until the Department reinstated the permit-by-rule. (Stip. ¶ 13; Dep't Ex. B.)

19. On September 15, 2011, the Court of Common Pleas of Warren County granted the Department's petition to enforce the 2011 Order. (Stip. ¶ 21; Dep't Ex. F.)

20. On August 20, 2013, the Department inspected the Property and observed that the Tanks were not permanently closed. (Stip. ¶ 27.)

21. On September 6, 2013, the Department sent a Notice of Violation addressed to Kenneth D. Lester at the mailing address of the Property, informing him that the Tanks had not been closed, the registration fees were not paid and the USTIF fees were not paid. (Stip. ¶ 28; Dep't Ex. L.)

22. Andrew Lester received the September 6, 2013 Notice of Violation. (Stip. ¶ 29.)

23. On November 15, 2013, Certified Inspector Wray DeLarme inspected the Tanks ("November 2013 Inspection") and found that none of the Tanks were compliant with respect to Overfill Prevention or Registration Certificate Display. (Dep't Ex. H.)

24. On February 19, 2014, the Department issued an administrative order ("the Closure Order") to Kenneth D. Lester and Andrew Lester requiring:

a. Kenneth Lester to pay $400 in registration fees to the Department for the Tanks within 30 days after the date of the Order;

b. Kenneth Lester and Andrew Lester to pay the total of $280.95 to USTIF for fees owed on Tanks 005 and 006 and simultaneously provide proof of payment of the fees to the Department within 30 days after the date of the Order;

c. Kenneth Lester and Andrew Lester to submit a completed Underground Storage Tank System Installation/Closure Notification Form to the Department in accordance with 25 Pa. Code § 245.452, within 30 days after the date of the Order;

d. Kenneth Lester and Andrew Lester to permanently close the Tanks in accordance with 25 Pa. Code §§ 245.452–453, within 90 days after the date of the Order;

e. Kenneth Lester and Andrew Lester to measure for the presence of a release of a regulated substance by sampling in a manner consistent with the Department technical document entitled "Closure Requirements for Underground Storage Tank Systems" and as required by 25 Pa. Code § 245.453(a), before permanent closure is completed;

f. Kenneth Lester and Andrew Lester to begin corrective action in accordance with 25 Pa. Code, Subchapter D, and as required by 25 Pa. Code § 245.453(b), if contaminated soils, contaminated groundwater or free product as a liquid or vapor is discovered; and,

g. Kenneth Lester and Andrew Lester to submit to the Department a copy of a properly completed closure report in accordance with the Department technical document

entitled "Closure Requirements for Underground Storage Tank Systems," and as required by 25 Pa. Code § 245.452(f), within 45 days after permanent closure of the Tanks.

(Stip. ¶ 31.)

25. On March 21, 2014, Andrew Lester filed a notice of appeal with the Board. (Stip. ¶ 33.)

26. Kenneth Lester never appealed the Closure Order.

27. On March 20, 2014, the 2013 and 2014 registration fees were paid. (Stip. ¶ 34.)

28. On March 21, 2014, the USTIF fees were paid. (Stip. ¶ 35.)

DISCUSSION

This appeal concerns a Department administrative order requiring Appellant Andrew Lester and Kenneth Lester ("the Lesters"), jointly and severally, to take certain actions directed towards permanently closing the four underground storage tanks located on the Ken's Keystone property in Mead Township, Warren County, Pennsylvania.[1] The Department bears the burden of proof to demonstrate that its issuance of an administrative order is supported by a preponderance of evidence, is authorized by statute, and is a proper exercise of its authority. 25 Pa. Code § 1021.122; *Natiello v. DEP*, 2008 EHB 640, 647. The Board's review is *de novo*: we are not limited to considering the facts that were available to the Department at the time that it issued its order. *Natiello*, 2008 EHB at 647; *see also Warren Sand & Gravel v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

[1] As the Board noted in our January 15, 2015 order in this matter, "Kenneth Lester did not file an appeal with the Board. The failure of a person to file a timely appeal of an order or other administrative action of the Department deprives the Board of jurisdiction to hear an appeal with respect to that person. 35 P.S. § 6021.1313; 25 Pa. Code § 1021.52(a)(1)." *Lester v. DEP*, EHB Docket No. 2014-025-B, slip op. at 3 (Opinion issued Jan. 15, 2015).

The Department observes that, under the Board's rules, any issues not argued in the posthearing briefs may be waived and contends that the Appellant raises but a single issue in his posthearing brief. We agree that one issue for resolution by the Board in this matter is whether the Appellant is an "operator" under the Storage Tank Act and its regulations, but otherwise decline to construe the Appellant's posthearing brief so narrowly. To be sure, the Appellant took the term "brief" quite literally, but he nevertheless raises additional issues such as whether Department staff directed or misled him to improperly characterize himself as an operator and whether he can be held liable for closure of the Tanks when he has no ownership interest in them.

The Department, for its part, argues that it properly determined Andrew Lester to be an operator of the Tanks. The term "operator" is defined under the Storage Tank Act and the Department regulations as "[a]ny person who manages, supervises, alters, controls or has responsibility for the operation of a storage tank." 35 P.S. § 6021.103; *cf.* 25 Pa. Code § 245.1. The Department relies on two different lines of argument in support of its determination. First, it argues that the 2011 order of the Court of Common Pleas of Warren County ("the Court Order") collaterally estops the Appellant from denying that he is an operator of the Tanks before this Board. Second, the Department asserts that, in 2009, 2010, and 2013, the Appellant specifically identified himself as the Tanks' manager or operator on various Department forms. The Department argues further that his actions throughout 2009–2014, including, but not limited to the submittal of the aforementioned forms, were sufficient to constitute the management, supervision of and/or demonstrate responsibility for the operation of the Tanks. Finally, while maintaining that the Appellant has waived any challenge to the Department's authority to issue the Closure Order, or reasonableness thereof, the Department avers that it reasonably interprets the Storage Tank Act's regulations governing tank closure to apply equally to both owners and

operators. Accordingly, the Department believes, the Board should show deference to that interpretation.

Appellant Is Not Collaterally Estopped from Disputing His Status as "Operator"

The Board declines to find the Appellant is collaterally estopped from claiming he is not the operator of the Tanks on the Ken's Keystone property. As the Department points out, the doctrine of issue preclusion applies when:

> 1. The issue decided in the prior action is identical to the one presented in the action in which the doctrine is asserted;
>
> 2. The prior action resulted in a final judgment on the merits;
>
> 3. The party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action;
>
> 4. The party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action; and
>
> 5. The determination in the prior proceeding was essential to the judgment.

Kuzemchak v. DEP, 2010 EHB 564, 566. The Department asserts that the Appellant may not challenge its determination that he is an operator based upon the Court Order in 2011. But Andrew Lester's status as an operator at the time of the 2011 orders of the Department and the Court is not the issue in front of the Board today. Rather, it is whether the Appellant was an operator when the Department issued the Closure Order. If the Board were to accept the Department's argument, a person's status as an operator under the Storage Tank Act would be static—that is, once a person becomes an operator, that person is thereafter always an operator. We are not prepared to find that is the case. Furthermore, we think that neglecting to evaluate whether circumstances arising *after* the Court Order result in a change in Andrew Lester's status

not only abdicates the Board's duty to review cases *de novo*, but would also fall short of the first and fourth criteria of the doctrine of collateral estoppel.

Appellant Andrew Lester Is an Operator of the Tanks at Ken's Keystone

After careful consideration, we find that Andrew Lester is an operator of the Tanks at Ken's Keystone under the Storage Tank Act. While no single piece of evidence or action taken by the Appellant is dispositive, in the aggregate, we find the Department met its burden of demonstrating that the Appellant "manages, supervises, alters, controls or has responsibility for the operation" of the Tanks. 35 P.S. § 6021.103. The Board is sympathetic to the difficulties Andrew Lester encountered trying to reopen or sell Ken's Keystone—whether for his own benefit or that of his father, Kenneth Lester. Nevertheless, we found the testimony of the Department's witnesses to be credible and that the weight of evidence is against the Appellant.

Forms/Written Communication

The Department relies heavily upon various forms signed by the Appellant to support its belief that Andrew Lester meets the definition of an operator of the Tanks under the Storage Tank Act and regulations. In November 2009, a third party inspection of the Tanks was completed. On the Department form documenting the November 2009 Inspection, Andrew Lester is listed as the representative present during the inspection. Andrew Lester checked the box on the form identifying himself as "Operator" instead of the other possible choices of "Owner," "Employee," or "None." On the signature line of the same inspection form, Andrew Lester listed his title as "Manager." In June 2010, after being contacted by Arthur Meade, a Water Quality Specialist for the Department, about violations related to the Tanks, the Appellant submitted a Storage Tank Registration Amendment Form, on which he checked two boxes identifying himself as "Facility Operator" rather than "Facility Owner," "Responsible Official," or "Property Owner." Finally, in November 2013, another third party inspection took place. On

the November 2013 Inspection form, the Appellant again marked the box identifying himself as an "Operator" rather than "Owner," "Employee," or "None." On the November 2013 Inspection form, however, the Appellant listed his title as "Operator" on the form's signature line as opposed to "Manager"—the designation he used on the November 2009 Inspection form.

It is not clear to the Board that the Appellant truly understood the nature of the forms or that his designation on the forms would impose legal obligations upon him. Andrew Lester testified that both the Department and the third-party inspectors induced him to, or at least suggested that he, mark his status as "Operator." However, Appellant's explanations of why he identified himself as an "Operator" or "Manager" when he believed himself to merely be an employee were not convincing. The Board notes that the record demonstrates that Arthur Meade highlighted a box for Andrew Lester to check that would designate him as the "facility operator" on the Registration Amendment Form from June, 2010. Nevertheless, the Appellant had already represented himself as the "Operator" on the Operations Inspection form completed approximately seven months prior in November 2009. The Board does not find the various forms entered into the record indicating the Appellant to be "Manager" or "Operator" of the Tanks to be dispositive, but on the whole, the evidence from these forms weighs in favor of the Department.

In addition to the above referenced forms, there were several pieces of written communication by the Department over a several-year time-period involving the Tanks at Ken's Keystone that were introduced as exhibits during the hearing. A review of these communications shows that the Department was not consistent in how it communicated with Andrew Lester about issues with the Tanks. In December 2009, the Department sent a Notice of Violation ("NOV") relating to the November 2009 Inspection. The NOV was addressed to

Kenneth Lester only and was not clearly directed to the Appellant. Andrew Lester, despite having executed the November 2009 Inspection form as the facility operator, was only copied on the December 2009 NOV. A follow-up NOV, however, issued in February 2010, was addressed to both Kenneth Lester and Andrew Lester. The failure to fully comply with these two NOVs lead to the Department issuing the unappealed 2011 Order in which the Department identified Andrew Lester as the operator of the Tanks.

Despite the fact that the Department clearly had identified Andrew Lester as the operator of the Tanks in that order, subsequent communications in 2013 about the ongoing Tank issues were addressed only to Kenneth Lester. Neither a January 2013 letter about the temporary out-of-service deadline for the Tanks nor a September 2013 NOV resulting from a compliance evaluation conducted by the Department were addressed or copied to Andrew Lester. However, when the Department issued the Closure Order in February 2014 currently under appeal, it once again asserted that Andrew Lester was the operator of the Tanks. The final piece of written correspondence from the Department, a Storage Tank Registration/Permit Invoice dated October 6, 2014 lists "Andy Lester" as the "Owner/Contact" of the Ken's Keystone facility. We find these inconsistencies in the Department's written communications regarding the Tanks troubling, given the serious consequences that can result from a determination that a party is an operator. Those persons who are potentially subject to the Department's Storage Tank Act regulations and obligations deserve clear communication from the Department regarding their status. That being said, when viewed in conjunction with the overall evidence, these inconsistencies are insufficient to outweigh other evidence supporting our decision regarding Andrew Lester's status as an operator.

Actions

The Department next identifies various actions undertaken by the Appellant after 2009 to support its contention that Andrew Lester was the operator of the Tanks. From 2009 until 2014, it appears that the Department only spoke with Kenneth Lester once; all other verbal communication about the facility was with Andrew Lester. In February 2010, the Appellant, on his own, attended a meeting with the Department at the Regional Office in Meadville to discuss resolving violations with the Tanks. In addition, there was testimony at the hearing from both Andrew Lester and Department witnesses that, on more than one occasion over the years, the Appellant attempted to get a delivery of gasoline from a wholesale fuel provider to restart gasoline sales at Ken's Keystone. He was ultimately unsuccessful in those efforts, but in the Board's opinion, it supports a determination the Andrew Lester exercised a certain level of control over, and responsibility for, the Tanks consistent with that of an operator.

There is no question that the Appellant's course of conduct is consistent with having greater control over the Tanks and facility than that of a mere employee. The main issue regarding his actions is whether Andrew Lester was acting in his own interest or for his father's interest as a representative. We generally found the Department's witnesses, David Hall and Arthur Meade, to be credible on this point. Neither recalled any statement from Andrew Lester indicating he was just acting on his father's behalf. Appellant testified to the contrary at the hearing, but there is nothing in the written record to support his contention that he was acting solely on behalf of his father. Overall, we did not find sufficient evidence to support a conclusion that Andrew Lester's actions were only undertaken as a representative for his father. Reviewing the whole record before us, the Board concludes that the Department reasonably

determined that Andrew Lester exercised sufficient control over and responsibility for the operation of the Tanks such that he meets the Act's definition of an "operator."

Operators Share Responsibility for Permanent Closure of Underground Storage Tanks

Finally, we turn to the issue of whether, as an operator, Andrew Lester is responsible for the closure of the Tanks. Appellant appears to argue that, because he has no ownership interest in the property, he cannot be held liable for the costs of closing the Tanks. To that end, the Appellant discusses two Commonwealth Court cases, including *Lehigh Gas & Oil v. Pennsylvania Department of Environmental Resources*, 671 A.2d 241 (Pa. Cmwlth. 1995). In that case, Lehigh Gas & Oil appealed to the Commonwealth Court this Board's determination that the company had not overcome the Act's statutory presumption that an owner or operator of an underground storage tank is liable for all damages, contamination, or pollution within 2,500 feet of the facility, without proof of fault, negligence, or causation. *Id.* at 245. The Court affirmed our adjudication, finding "that Lehigh failed to overcome, by clear and convincing evidence, the rebuttable presumption." *Id.* at 247. Frankly, the Board finds it difficult to determine for what purpose Appellant cites *Lehigh*—at this stage, neither damages, nor contamination, nor pollution is at issue. We are concerned with whether the Appellant is responsible for closure of the Tanks. We note that the Storage Tank Act clearly holds owners *and* operators responsible for the closure of tanks:

> Upon . . . discontinuance of the use or active operation of an underground storage tank, the owner *and operator* shall remove the tank . . . and restore the area in a manner that prevents any future release, and shall remedy any adverse impacts from any prior release in a manner deemed satisfactory to the [D]epartment.

35 P.S. § 6021.502(c) (emphasis added).[2]

[2] *See also* 35 P.S. § 6021.501(a)(6), (9), (10) (requiring the Department to adopt and implement an underground storage tank program that includes, among other things, "requirements for the closure of

Appellant also cites *Miller v. Underground Storage Tank Indemnification Board*, 965 A.2d 398 (Pa. Cmwlth. 2009), for the proposition "that the owner of the underground storage tank is presumptively the one required to register" with the Department. (Appellant's Posthearing Br. at 3.) This is hardly a controversial position—both the Act and the regulations provide that the owner of an underground storage tank is required to register the tank.[3] 35 P.S. § 6021.503(a); 25 Pa. Code § 245.41. The question in *Miller*, which is not relevant to this case, was whether a corporation would still be eligible to receive indemnification from the Underground Storage Tank Indemnification Fund after it had failed to comply with the Department's registration requirements. In contrast, this case is whether Andrew Lester can be held responsible for closing the Tanks at Ken's Keystone, with the answer turning on whether he is an "operator" under the Act and regulations. Having found that the Appellant is an "operator" of the Tanks at Ken's Keystone, he is responsible under the Act, along with his father (the owner), for their closure.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this proceeding. 35 P.S. § 6021.1313.

2. The Department bears the burden of proof when it issues an administrative order. 25 Pa. Code § 1021.122(b).

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tanks," "methods and procedures for the removal of underground storage tanks from service," and reporting requirements for intended and completed closure of tank facilities by owners and operators.

[3] In fact, only those provisions in the Act and the regulations that specifically pertain to the registration of tanks or payment of registration fees affect solely the owner; most other obligations apply to both the owner *and* operator. *Compare* 25 Pa. Code §§ 245.41–.42 ("owners shall properly register", "annual registration fees to be paid by owners") *and* 25 Pa. Code § 245.451(a) ("the owner shall complete and submit an amended registration form") *with* 25 Pa. Code §§ 245.451(b)–(h), 245.452 (providing responsibilities for owners *and operators* with respect to temporary or permanent closure of underground storage tanks) (emphasis added).

3. The 2011 order of the Court of Common Pleas of Warren County does not collaterally estop Andrew Lester from claiming he was not an operator of the Tanks.

4. Both an "owner" and an "operator" are responsible for the closure of underground storage tank facilities in conformance with the Storage Tank Act. 35 P.S. § 6021.502(c).

5. The Department has demonstrated by a preponderance of the evidence that Andrew Lester is an "operator" of the Tanks, as that term is defined in 35 P.S. Section 6021.103 and 25 Pa. Code Section 245.1.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANDREW LESTER	:	
	:	
v.	:	**EHB Docket No. 2014-025-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 24th day of June, 2015, it is hereby ordered that the Appeal of Andrew Lester 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: June 24, 2015

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

For the Commonwealth of PA, DEP:
Douglas G. Moorhead, Esquire
(via electronic filing system)

For Appellant:
Bernard J. Hessley, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BEAVER VALLEY SLAG, INC and BET-TECH INTERNATIONAL, INC.	:	
v.	:	**EHB Docket No. 2014-147-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 29, 2015**

OPINION AND ORDER ON
MOTION TO DISMISS

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Board denies the Department's Motion to Dismiss. The Department's letter rejecting the Appellants' proposals and directing Appellants to submit a plan to the Department within 60 days detailing how they intend to comply with the pH effluent limitations is an appealable final action over which the Board has jurisdiction.

O P I N I O N

Background

In 1993, Beaver Valley Slag, Inc. and Bet-Tech International, Inc. (collectively "Appellants") acquired a 200-acre area containing millions of tons of slag material produced as part of the steel-making process ("Slag Storage Area") and deposited there by previous owners LTV Steel Corporation and Jones & Laughlin Steel. The Appellants acquired the Slag Storage Area in order to redevelop it for commercial purposes and to process and produce metallics from the slag material. In 1996, the Appellants began mining the slag deposits for commercially valuable products. In 2001, the Appellants entered in to a Consent Order and Agreement

("COA") with the Department of Environmental Protection ("Department") to, among other things, continue to mine the slag. Pursuant to the COA, the Appellants posted a Non-Coal Surface Mining Conservation and Reclamation bond in the amount of $241,444.00 for the cost of the reclamation of the mined, disturbed and affected areas of the Slag Storage Area and associated water monitoring of Black's Run Creek which flows from south to north along the western border of the Slag Storage Area. The Department issued a Non-Coal Surface Mining Permit and a NPDES Permit that authorized continued slag mining operations in the Slag Storage Area.

Pursuant to both the terms of the COA and the NPDES Permit, Appellants were directed to construct a partial seep collection system ("System"). The System was intended to collect three naturally-occurring seeps into Black's Run Creek from beneath neighboring slag deposits and convey them to a sedimentation pond/treatment facility, then ultimately into a culvert where Black's Run Creek meets the Ohio River. The Appellants constructed the System which they claim has "resulted in virtually no positive environmental mitigation or improvement given the magnitude of the site and the relative insignificance of the "seeps" in comparison to the massive natural water flow otherwise occurring across the very extensive site." (Appellants Brief, 3.)

On May 23, 2013, The Department issued a Notice of Violation ("2013 NOV") to the Appellants for numerous exceedances for pH and total suspended solids (TSS) at Outfall 007 as a result of a discharge monitoring report review. The System and pond were in operation during the reviewed period. The Appellants retained RT Environmental Services, Inc. ("RTE") to address the issues identified in the 2013 NOV. On March 7, 2014, RTE submitted a report proposing the following four solutions to the exceedances:

> Alternative 1: remove and decommission the System and the collection pond;

> Alternative 2: extend the pipe and relocate the discharge point for Outfall 007 to the culvert and relocate the sample point to where Black's Run Creek meets the Ohio River;
>
> Alternative 3: introduce additional stream water from Black's Run Creek into the seep collection system in order to naturally lower the pH; and
>
> Alternative 4: adjust the maximum effluent limit set forth in the NPDES Permit from 9 standard units to 10 standard units.

See Appellants Ex. A. 8-10).

On September 22, 2014, the Department sent a letter ("Letter") to the Appellants that rejected each of the proposals submitted by RTE. The Letter went on as follows:

> It is the Department's position that BVS should investigate and install if appropriate, additional treatment technologies in order to comply with the NPDES permit effluent limitations. The Department would be willing to entertain alternative collection and treatment schemes provided that Seeps 6 and 7 and the hazardous waste cell underdrain are ultimately collected and treated to meet the NPDES permit effluent limitations. For example, BVS may want to consider treating the seeps and the underdrain separately. Any change in the current system would require a NPDES and Water Quality Management (WQM) permit amendment and modifications to the associated COAs.
>
> . . . .
>
> Please be advised that in accordance with Section 609 of the Clean Streams Law (35 P.S. § 691.1) the Department shall not renew or amend any permit if it finds the applicant has failed and continues to fail to comply with any permit or order of the Department. Due to the continual violations of the pH effluent limitations contained in the NPDES permit and the failure to properly operate and maintain the existing permitted treatment facility, the Department is unable to renew or amend the NPDES or WQM permits until these violations are addressed in an acceptable manner.
>
> Please submit a plan to the Department within 60 days of the date of this letter detailing how BVS intends to comply with the pH effluent limitations contained in the NPDES permit. The plan should include an evaluation of various potential treatment technologies to meet the pH effluent limitations.

> The letter shall not be construed, nor is it intended, to be a final action of the Department. This letter responds to the NOV Response and pH investigation. At this time, the Department will wait to take a final action until after it has reviewed additional information requested of you in this letter.

(Appellants Ex. E, 2-3.)

In response to the Letter, the Appellants filed a timely Notice of Appeal to the Board on October 22, 2014. The Department, on March 11, 2015, filed the Motion to Dismiss and Memorandum of Law in Support Thereof before us today. Appellants filed a Response to the Motion to Dismiss and Memorandum of Law in Support of Their Response on April 10, 2015, and the Department filed a Reply to Appellants' Response to the Motion to Dismiss on May 13, 2015.

Standard of Review

The standard for reviewing motions to dismiss is clear and has been further clarified in several recent opinions. In *Consol Pennsylvania Coal Company v. DEP*, EHB Docket No. 2014-027-B (Opinion and Order, Feb. 12, 2015), *recon. denied,* (Opinion and Order, Mar. 13, 2015), the Board stated:

> A motion to dismiss is typically appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, some issue of justiciability, or another preliminary concern. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *E.g.*, *Burrows v. DEP*, 2009 EHB 20, 22. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving motions to dismiss, we accept the nonmoving party's version of events as true. *Ehrmann v. DEP*, 2008 EHB 386, 390.
>
> . . . .
>
> As a practical matter, whether or not there are "factual disputes" on the record is irrelevant with respect to a motion to dismiss, because the operative question is: even assuming everything the non-

> moving party states is true, can—or should—the Board hear the appeal?

Consol, EHB Docket No. 2014-027-B, Slip op. at 8-9. *See also, South v. DEP*, EHB Docket No. 2014-082-L, slip op. at 4 (Opinion, Apr. 16, 2015) (quoting *Consol*, EHB Docket No. 2014-027-B, slip op. at 7); *L.A.G. Wrecking, Inc. v. DEP*, EHB Docket No. 2014-126-C, slip op. at 3 (Opinion, May 29, 2015). Motions to dismiss will be granted only when a matter is free from doubt. *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Res., LP v. DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511.

Discussion

In its memorandum supporting its motion to dismiss, the Department argues that the Letter is not an appealable action and therefore, the Board lacks jurisdiction to hear the appeal. The Department puts forth several arguments in support of its position that the Letter is, instead, a continuance of an ongoing conversation with the Appellants and a request for continued discussion. The Department initially looks at the language of the Letter and points out that it not only maintains an advisory, informative tone throughout but also specifically states it is not a final appealable action. The Letter even says "Please." The Department then argues that the Letter did not reject the proposals submitted by RTE, but only observed conditions at the Slag Storage Area, advised the Appellants of its interpretation of the law, provided recommendations to assist Appellants in abating the violations at the facility, and stated the Department's legal position. Next, the Department refutes the Appellants' contention that the Department took an enforcement action in the Letter by ordering them to submit a plan for compliance with its effluent limitations. The Department argues that this language in the Letter is simply a request for more information prior to taking official action that is not subject to Board review. Similarly, the Department contends that the Letter did not deny an NPDES permit to the

Appellants but was, instead, an interim communication within the NPDES permitting process which, again, does not constitute a Department action subject to Board review. The Department next addresses the Appellants' contention that the Letter required them to construct the System, characterizing this claim as "flat-out incorrect," as the System was constructed pursuant to the 2001 COA and as a commitment in a COA, is not appealable. Finally, the Department argues that each of the Appellants' contentions that the Letter made final reviewable decisions relate or refer to an amendment or renewal of Appellants' NPDES permit. According to the Department, this would require the Board to issue provisional decisions within the permitting process which the Board will not do. The Department cites to numerous cases in support of these arguments.[1]

In their response, the Appellants assert two major arguments against the Department's motion to dismiss. They first contend that the Department's rejection of the RTE report proposals in the Letter constitutes a final agency action under Board case law because the practical impact of the Letter's rejection of the proposals left the Appellants with few viable alternatives. The Appellants next contend that the Department's requirement that Appellants submit a new plan also constitutes a final agency action over which the Board has jurisdiction as it is a determination by the Department affecting the obligations of Appellants. The Appellants then go on to apply the factors outlined in *Borough of Kutztown v. DEP*, 2001 EHB 1115, to each argument demonstrating that the Letter is a final appealable action of the Department.[2]

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[1] *See, e.g., Sandy Creek Forest, Inc., v. Dep't Envtl.Res.*, 505 A.2d 1091 (Pa. Cmwlth. 1986); *County of Berks v DEP*, 2003 EHB 77; *Donny Beaver v. DEP*, 2002 EHB 666; *Eagle Enterprises v. DEP*, 1996 EHB 1048; *Perano v. DEP*, 2011 EHB 587; *Borough of Glendon v. DEP*, EHB Docket No. 2013-047-L (Opinion and Order issued April 4, 2014); *202 Island Car Wash, L.P. v. DEP*, 1999 EHB 10; *Corco Chemical Corp. v. DEP*, 2005 EHB 733; *Central Blair County Sanitary Authority*, 1998 EHB 643.

[2] The factors outlined in *Kutztown* are as follows: 1. The wording of the letter; 2. The substance, meaning, purpose and intent of the letter; 3. The practical impact of the letter (with an eye to what actions a reasonably prudent recipient of the letter would take in response to the letter); 4. The regulatory and statutory context of the letter; 5. The apparent finality of the letter; 6. What relief the Board can offer (i.e.

In its reply to the Appellants' response, the Department addresses both of the main arguments, characterized as 'contentions (a) and (b),' presented by the Appellants.[3] The Department focuses primarily on the Appellants' reliance on *Sayreville Seaport Associates Acquisition Company, LLC t/a Sayreville Seaport Associates, L..P. v. DEP*, 2011 EHB 1 ("Sayreville I"), which was overruled by the Commonwealth Court, and contends that the Commonwealth Court's decision in *Sayreville Seaport Associates Acquisition Company, LLC t/a Sayreville Seaport Associates, L.P. v. DEP*, 60 A.3d 867 (Pa. Cmwlth. 2012) ("Sayreville II") directly supports its argument in this case and "compels" dismissal of Appellants' appeal. *See Sayreville*, 60 A.3d at 871-72. The Department goes even further and states that even though the Appellants applied the *Kutztown* factors to the language of the Letter, the Board does not need to consider those factors due to the applicability of the Commonwealth Court's decision in *Sayreville II* to this case.

Sayreville II involved two letters written by the Department advising Sayreville that its proposal to dispose of or use contaminated soil in the Commonwealth of Pennsylvania did not comport with the law. *Id*. at 868-869. Sayreville appealed the letters, arguing that the Department's position in the letters was a denial of its proposals. The Department contended that the statement was advisory and was provided outside of the regulatory framework used in authorizing the disposal or use of the soil in question. The Board issued two opinions, both holding that the letters were appealable. The second opinion, however, went further and held that although the letters were appealable actions, Sayreville's appeal was not ripe for review

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the practical value of immediate Board review); and 7. Any other indicia of a letter's impact upon its recipient's personal or property rights.

[3] The Department contends that "Beaver Valley has waived all contentions that the letter was a final action, other than contentions (a) and (b)" citing *Envyrobale Corp. v. DER*, 1994 EHB 1714, and *Power Operating Co. v. DER*, 1992 EHB 1129, both holding that failure to raise an argument in a reply brief is a waiver of that argument.

because the letter discussions occurred outside of the formal permitting process. On appeal, the Commonwealth Court held that both letters were advisory and unappealable. The Court concluded, ". . . the Department's July and December letters do not grant or deny a pending application or permit, and *they do not direct Sayreville to take any action nor impose any obligations on the company*. Rather, the letters are best characterized as advisory opinions, expressing the Department's understanding of Pennsylvania law . . ." *Sayreville II,* 60 A.3d at 871 (*emphasis added).* When looking at this specific language of the Commonwealth Court's opinion, it is clear that *Sayreville II* does not compel the Department's desired result in the case at hand.

In this case, after the Department denied all four RTE proposals presented by the Appellants, it directed the Appellants to submit a plan within 60 days of the date of the letter. This directive specified that the plan should detail how Appellants intend to comply with the pH effluent limitations contained in the NPDES permit and should include an evaluation of various potential treatment technologies to meet the pH effluent limitations. Unlike *Sayreville,* in this case, the Department not only directed the Appellants to *take an action* but also *imposed an obligation* upon the Appellants to do so, thus creating a final action. The 60 day limitation imposed by the Department is further evidence of the finality of the Letter. *See Kutztown,* 2001 EHB at 1122.

The Board has the power and duty to hold hearings and issue adjudications on orders, permits, licenses, or decisions of the Department. 35 P.S. § 7514(a). The Environmental Hearing Board Act states that "no action of the Department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the Board . . ." 35 P.S. § 7514(c). The Board's rules define "action" as "an order, decree, decision,

determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). The Board only has jurisdiction to review final actions of the Department. *Teska v. DEP*, 2012 EHB 447, 453, *Kennedy v. DEP*, 2007 EHB 511, 512. The determination must be made on a case-by-case basis. *Kutztown* at 1121. In this case, the Department's Letter is a determination that affected the obligations of the Appellants, thus creating a final action over which the Board has jurisdiction.

As such, the Board issues the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BEAVER VALLEY SLAG, INC and BET-TECH INTERNATIONAL, INC.	:	
v.	:	**EHB Docket No. 2014-147-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 29th day of June, 2015, it is hereby ordered as follows:

1. The Department's Motion to Dismiss is **denied**;
2. The stay of discovery pending the disposition of this Motion is **lifted;**
3. All discovery in this matter shall be completed by **September 30, 2015**;
4. Dispositive motions, if any, shall be filed on or before **October 30, 2015;** and
5. A joint status report shall be filed on or before **August 25, 2015.**

ENVIRONMENTAL HEARING BOARD

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

DATED: June 29, 2015

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

For the Commonwealth of PA, DEP:
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