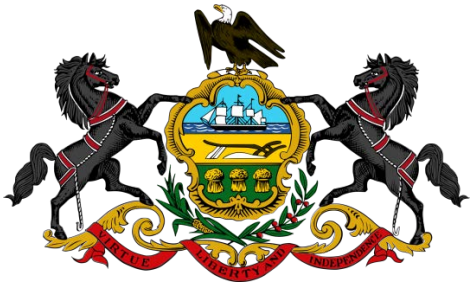
Environmental Hearing Board

# Adjudications and Opinions



**2017**
**VOLUME I**

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

# 2017

# JUDGES OF THE

# ENVIRONMENTAL HEARING BOARD

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| 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 | Christine A. Walker |

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2017 EHB 1

## FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2017.

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 – 2017 EHB DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB** | : | |
| **v.** | : | **EHB Docket No. 2016-155-B** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee** | : | **Issued: January 9, 2017** |

**OPINION AND ORDER ON**
**MOTION TO DISMISS PETITION FOR SUPERSEDEAS**

**By Steven C. Beckman, Judge**

**Synopsis**

The Board grants in part and denies in part Permittee's Motion to Dismiss Petition for Supersedeas. The Petition for Supersedeas is moot as to Polen Run because the action that the Petition for Supersedeas seeks to prevent, the undermining of Polen Run, has already occurred. Therefore, the Board dismisses any claims under the Petition for Supersedeas that address the undermining of Polen Run. As to the remaining portions of the Petition for Supersedeas, the Board finds that the Petition for Supersedeas is ripe as to Kent Run and that proceeding with the Supersedeas hearing is appropriate under these circumstances.

**O P I N I O N**

**Introduction**

On December 19, 2016, the Center for Coalfield Justice and the Sierra Club ("CCJ/SC") filed a Notice of Appeal ("NOA") with the Board challenging the Department of Environmental Protection's ("DEP" or the "Department") decision to issue Permit Revision No. 204 to CMAP

No. 30841316 to Consol Pennsylvania Coal Company, LLC ("Consol"). Permit Revision No. 204 allows full extraction mining beneath Polen Run and Kent Run in the 3L Panel of the Bailey Mine located in Greene County, Pennsylvania. Permit Revision No. 204 includes a special condition identified as Special Condition No. 97 that states that Consol may not conduct longwall mining beneath and adjacent to Kent Run until the Pennsylvania Department of Conservation and Natural Resources ("DCNR") grants written access to Consol to perform stream mitigation work authorized by the Department in Module 15 of Permit Revision Nos. 180 and 204. On the afternoon of December 21, 2016, CCJ/SC filed a Petition for Supersedeas ("Petition")[1]. The Board held a conference call with all of the parties on the morning of December 22, 2016 to address the Petition. At the start of the conference call, the Board asked counsel for Consol about the current status of the mining in the 3L Panel and was informed that, as of that morning, the longwall face in the 3L Panel had advanced beyond Polen Run. Based on that representation, and following further discussion, the Board issued an order on December 23, 2016 that, among other things, scheduled a hearing on the Petition beginning on January 9, 2017. On January 3, 2017, Consol filed its response to the Petition and included the Motion to Dismiss Petition for Supersedeas ("Motion") that is the subject of this Opinion and Order. On January 5, 2017, the Department filed a letter with the Board stating that it would not be filing a response to the Motion and CCJ/SC filed Appellants' Response to Permittee's Motion to Dismiss Petition for Supersedeas ("Response") requesting that the Board deny the Motion.

**Standard of Review**

A motion to dismiss is appropriate where a party objects to the Board hearing an appeal because of lack of jurisdiction, an issue of justiciability, or another preliminary concern. *Consol*

[1] CCJ/SC also filed a Petition for Temporary Supersedeas on the same day. The Petition for Temporary Supersedeas as requested was denied by the Board's Order dated December 23, 2016.

*Pennsylvania Coal Company, LLC v. DEP*, 2015 EHB 48, 54. 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. *Id*., See also *Bernardi v. DEP*, EHB Docket No. 2016-090-B, slip op. at 2, (Opinion and Order, August 29, 2016); *West Buffalo Township Concerned Citizens v. DEP*, 2015 EHB 780, 781; *Boinovych v. DEP*, 2015 EHB 566, 567; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. 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. *Id*.; *Ehmann v. DEP*, 2008 EHB 386, 390.

**Analysis**

In its Motion, Consol asserts that the Petition should be dismissed and the hearing on the Petition canceled because 1) the Petition is moot as to Polen Run because longwall mining was completed under Polen Run on December 22, 2016; 2) the Petition is not ripe as to Kent Run because Consol is not currently authorized to longwall mine under Kent Run because it has not satisfied Special Condition No. 97; and 3) as matter of law CCJ/SC cannot make a showing that they are likely to succeed on the merit of their appeal of Permit Revision No. 204 and have not identified irreparable harm per se or to themselves.

We agree that the Petition is moot as to the undermining of Polen Run. Based on counsel for Consol's representation to the Board during the December 22, 2016 conference call, Polen Run was completely undermined less than 24 hours after the filing of the Petition and prior to the Board holding the conference call with the parties. A portion of the Petition seeks to prevent the undermining of Polen Run, a goal that cannot be accomplished at this point and, therefore, that part of the Petition addressing the undermining of Polen Run is moot. CCJ/SC appear to concede this point in their Response and accompanying memorandum. In the wherefore clause

of the Response, CCJ/SC request that the Board "hold a hearing on Appellants' Petition for Supersedeas **as it relates to Kent Run.**" (Appellants' Response to Permittee's Motion to Dismiss Petition for Supersedeas, p. 5) (emphasis added). We will therefore grant in part the Motion as to any issues involving the undermining of Polen Run in the 3L Panel.

We find that the Petition is ripe as to Kent Run. We reject Consol's claim that because Special Condition No. 97 has not been complied with at this time, the portion of the Petition that seeks to prevent the undermining of Kent Run while CCJ/SC challenge the Department's decision to issue Permit Revision No. 204 is not ripe for review by the Board. Ripeness is a prudential limitation related to justiciability, not jurisdiction. *Tilden Township v. DEP*, 2009 EHB 452, 454. As such, ripeness is focused on the question of whether there is a concrete context, such as a final agency action, so that the courts can properly exercise their function. *Monroe County Municipal Waste Management Authority v. DEP*, 2010 EHB 819, 823 citing *Gardner v. DER*, 658 A.2d 440 (Pa. Cmwlth. 1995). Put another way, when determining an issue of ripeness, the Board considers whether the issues are adequately developed for judicial review and what hardship the parties will suffer if review is delayed. *Potratz v. DEP*, 2005 EHB 186, 193, aff'd 897 A.2d 16 (Pa. Cmwlth. 2006).

None of the cases we could find or that were identified by the parties deal with the issue of ripeness in the context of a petition for supersedeas which adds a wrinkle to the issue. We think that the place to start is to see whether the underlying challenge to the Department action that is the subject of the supersedeas is ripe. If it is ripe, a petition to preserve the status quo and prevent the alleged harm that would result from that action occurring prior to the Board being able to decide the challenge would logically also be ripe. In this case, we find that Special Condition No. 97 does not prevent CCJ/SC's challenge to the Department's decision to issue

Permit Revision No. 204 from being ripe for review by the Board. The issuance of the permit revision by the Department is clearly a final action and the issues surrounding that decision are sufficiently developed to allow the Board to properly review that decision. The plain language of Special Condition No. 97 makes clear that satisfaction of the condition is not dependent on any further action of the Department but only on the actions of Consol and DCNR. Consol is not even required by the specific language of Special Condition No. 97 to inform DEP when it has satisfied the condition or provide DEP with a copy of the written grant of access from DCNR required under the condition. As a practical matter, we trust that the Department will be closely monitoring the status of the access agreement but that does not change our conclusion that the Department's permitting action in this case is complete and final and ripe for Board review.

Turning to the issue of what hardships the parties may suffer if review is delayed, we think that, as a general matter, any delay in reviewing the Department's action is likely to create greater hardship for all of the parties and the Board. Based on the representation from Consol's counsel that the longwall mining in the 3L Panel will not reach Kent Run until mid-February, we think that holding the hearing soon will allow the parties to present their case and the Board to properly consider and rule on the Petition without the possibility that Kent Run will be undermined prior to CCJ/SC being able to be heard on the issue and also will limit the likelihood that Consol will run up against the current mining restriction without the Board ruling on the issues in the Petition. We acknowledge that Consol may never receive the required access from DCNR and therefore, may not be able to longwall mine under Kent Run regardless of any decision we reach in this matter. We also understand from Consol's perspective that it would prefer to delay any hearing and associated costs until after the permit condition has been satisfied. On balance, however, we are more concerned that delaying the hearing creates the very

real risk that all of the parties and the Board will be required to act on short notice on the issues raised by CCJ/SC if Special Condition No. 97 is satisfied just as the longwall face approaches the current mining limitation. We would not welcome such a truncated process and we do not believe a delay is in the best interests of the Board, the parties or the public. Because the underlying Department action is ripe for review, we find that the Petition is ripe as well and that going forward with the Petition hearing on the issue of the undermining of Kent Run is the proper course of action in this matter. Therefore, we deny the Motion on this issue.

Consol's final argument is that as a matter of law CCJ/SC cannot meet two portions of the three part test that the Board applies to the question of whether to grant a supersedeas. Specifically, Consol asserts that CCJ/SC cannot show that they are likely to succeed on the merits and cannot demonstrate irreparable harm. First, we think that such a claim is premature and without merit at this point in this proceeding. As the parties are aware, the Board held a multi-day hearing in August 2016 on earlier permit revisions issued by the Department to Consol for longwall mining in the same area and affecting the same streams that are at issue in this latest appeal. The parties have filed their post-hearing briefs and the Board is in the process of reaching a decision in the earlier appeals. The pending decision in the earlier appeals will clearly be relevant to a resolution of this current appeal and we are not ready to say yet that, as a matter of law, CCJ/SC will not be successful in the earlier appeals or that they are unlikely to be successful in this latest appeal. In fact, there appears to be additional factual issues in this latest appeal, such as the fact asserted by CCJ/SC that the alleged impact on Kent Run will take place inside the boundaries of Ryerson Station State Park, that go beyond the issues in the earlier appeals. We do not know how, or if at all, the Department considered that issue in reaching its permit decision but we are not prepared to say that CCJ/SC are so clearly unlikely to be

successful in their appeal such that we should dismiss the Petition without at least hearing testimony regarding the latest permit revision.

Similarly, we think that the filings by CCJ/SC sufficiently address the question of irreparable harm. First, CCJ/SC assert that there is irreparable harm per se because the Department's issuance of Permit Revision No. 204 was contrary to pertinent law and regulations. As we just discussed, the issue of whether the undermining of streams and the subsequent mitigation efforts by Consol in the Bailey Mine area are contrary to law and regulations is currently awaiting decision from the Board in the pending appeals and, having not yet reached a decision, it would clearly be improper to say that, as a matter of law, CCJ/SC will not suffer irreparable harm per se if the Petition is dismissed. Further, CCJ/SC assert that undermining Kent Run will change the stream and impact its aquatic life, recreational and water supply uses causing irreparable harm. Consol argues that any impacts will be adequately mitigated which CCJ/SC disputes. We are required to accept the facts alleged by CCJ/SC as true at this point in the proceeding. Doing so, we cannot see how we can find that, as a matter of law, there is no possibility that CCJ/SC will suffer irreparable harm such that Consol is entitled to have the Petition dismissed without first hearing testimony.

Therefore, the Board orders as follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB** | : | |
| **v.** | : | **EHB Docket No. 2016-155-B** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee** | : | |

**O R D E R**

AND NOW, this 9th day of January, 2017, it is hereby ordered as follows:

1) The Motion To Dismiss Petition For Supersedeas is **granted in part** and **denied in part.** The portion of the Petition for Supersedeas that raises claims intended to prevent the undermining of Polen Run is **dismissed** as moot.

2) The remainder of the Motion to Dismiss Petition For Supersedeas is **denied**. Specifically, the portions of the Petition for Supersedeas that raises claims intended to prevent the undermining of Kent Run may proceed and will be the subject of the scheduled supersedeas hearing.

**ENVIRONMENTAL HEARING BOARD**

s/ Steven C. Beckman
**STEVEN C. BECKMAN**
**Judge**

**DATED: January 9, 2017**

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

**For the Commonwealth of PA, DEP:**
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Michael J. Heilman, Esquire
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**For Appellants:**
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**Permittee:**
Robert Burns, Esquire
Megan S. Haines, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **BENNER TOWNSHIP WATER AUTHORITY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-042-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOROUGH OF BELLEFONTE** | : | **Issued: January 10, 2017** |

**OPINION AND ORDER ON**
**MOTION TO COMPEL**

**By: Judge Richard P. Mather, Sr.**

**Synopsis**

The Board denies Appellant's Motion to Compel the Department to make available one of its employees for an informal meeting because informal meetings are not governed by the discovery rules. The Board further denies Appellant's request that the Department employee in question be represented by separate counsel. This type of relief is also not available under the Board's rules, nor is such relief appropriate.

**O P I N I O N**

On April 1, 2016, Benner Township Water Authority ("Appellant") filed an appeal of the Department's March 2016 issuance of a permit to the Borough of Bellefonte that would allow Bellefonte to apply biosolids to land in Benner Township. Appellant's concern is that sludge and contaminants from the biosolids will migrate into Appellant's well recharge area and its supplying aquifer. This worry is primarily based on the alleged presence of fractured bedrock, lack of overlying soil, and land gradient.

In 2015, the Department contracted with SSM Group to prepare source water protection plans for small water systems under an annual budget; two systems belonged to Appellant. In 2016, a Draft Plan for Appellant's systems was created and funded through the Department's Small System Water Protection Program. Its costs were covered jointly by the United States Environmental Protection Agency and the Commonwealth of Pennsylvania. The Draft Plan has not yet been submitted by Appellant to the Department for review and approval. During this time, the Department approved the Borough of Bellefonte's permit application to apply biosolids to land in Benner Township.

In August 2016, Appellant had contact with one of the Department's employees who communicated to Appellant that he would conduct a "fracture trace analysis" and include the results in the Draft Plan. Shortly thereafter, according to the Appellant, communication between Appellant and the Department employee ceased and the Draft Plan was given to Appellant without a fracture trace analysis. Appellant believes that the Department instructed its employee not to do the analysis because it would show a high risk to the public water supply resulting from the approval of Bellefonte Borough's plan to dispose biosolids in Benner Township. Appellant believes this information is critical to its appeal in the above-captioned matter and contends that the Department is preventing it from having contact with the employee. Appellant wanted to meet with this employee to discuss matters relevant to this appeal.

Appellant also requested that the Department provide this employee with representation other than the current counsel representing the Department in this appeal. Additionally, Appellant asked that the Board direct that counsel are "not to discuss among themselves any conversation or other communication that occur between [the employee] and counsel for Appellant." The latter request is based upon the allegation that there is a dispute between the

Department programs and the current Department counsel is biased and only representing the view of one of the programs.

The Department disagrees with Appellant's assertion and contends that its employee was merely told that it would be inappropriate for him to perform a fracture trace analysis on a plan he would later review. The Department further points out that if Appellant believes that the employee has information critical to its case, it should have issued formal discovery requests seeking this information or noticed the deposition of the employee. However, Appellant did neither. The Department has refused to provide an opportunity for Appellant to meet and discuss informally with the employee, but Appellant's ability to depose the employee has not been raised.

The Pennsylvania Rules of Civil Procedure largely govern discovery before the Board. 25 Pa. Code §1021.102(a). Specifically, the Rules state "a party may obtain discovery regarding any matter, not privileged, which 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. 4003.1(a). Relevancy, for the purpose of discovery, is broadly construed. *Blose v. DEP*, 2001 EHB 1018, see also *Tri-Realty v. DEP*, 2015 EHB 552, 555-56. ("[T]he Board has been 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 the contentions raised in the appeal."). However, the scope of discovery is not limitless. The Board "is charged with overseeing ongoing discovery between 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.

Here, the dispute between the Parties is not the relevance of the requested information, but the form of the request. It appears that the information Appellant seeks from the Department employee is relevant or reasonably calculated to lead to the discovery of admissible evidence, and is discoverable. However, it appears relatively clear that the Appellant could seek the information it wants through usual discovery routes – whether through requests for production of documents or through noticing the employee's deposition. The Appellant has done neither, despite having noticed depositions for other Department employees. Compelling the employee in question to meet informally with Appellant when Appellant could simply depose him is not a remedy the Board can provide. The Board can find neither rule nor precedent that suggests it may order an informal meeting between a litigant's employee and the opposing party. While its Rules allow the Board to grant subpoenas, no such need exists here. 25 Pa. Code. § 1021.103. Appellant may simply depose the employee and call him to the stand during the hearing, should one take place.

Finally, the Board sees no reason to have new counsel assigned to represent the Department's employee subject to the Appellant's Motion. The action that the Appellant is appealing is the Department's decision to grant a permit. It is odd to say that counsel for the Department is biased when an alleged "conflict" exists between the Department and one of its employees or between two different Department programs. The attorneys representing the Department do not represent individual programs or the views of individual employees. The attorneys for the Department represent the entire agency and its decisions. In this instance, the Department determined that issuing a permit to Bellefonte was the appropriate decision.

For these reasons, we deny Appellant's Motion to Compel. Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **BENNER TOWNSHIP WATER AUTHORITY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-042-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOROUGH OF BELLEFONTE** | : | |

## O R D E R

AND NOW, this 10th day of January, 2017, in consideration of Appellant's Motion to Compel, it is hereby ordered that the Motion is **denied.**

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: January 10, 2017**

**c:** **For DEP, General Law Division:**
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(*via electronic mail*)

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**For Permittee**
Jeffrey W. Stover, Esquire
Scott Wyland, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **GERALD E. AND JOYCE E. BUSER** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-145-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: January 17, 2017** |

**OPINION AND ORDER**
**ON SANCTIONS**

**By: Judge Richard P. Mather, Sr.**

**Synopsis**

Under 25 Pa. Code § 1021.61, the Pennsylvania Environmental Hearing Board dismisses Appellants' Appeal as a sanction for failing to perfect its Appeal pursuant to an Order to Perfect and a Rule to Show Cause. Appellants' conduct demonstrates a disinterest in prosecuting their appeal and therefore dismissal of this appeal is an appropriate sanction.

**O P I N I O N**

On November 4, 2016, Gerald E. and Joyce E. Buser ("Appellants") filed their Notice of Appeal. However, Appellants failed to complete the Proof of Service page of the Notice to Appeal form and include a copy of the Department action. On November 7, 2016, the Board issued Pre-Hearing Order Number 1 along with an Order directing the Appellants to perfect their Appeal in accordance with 25 Pa. Code § 1021.51 by filing with the Board: (1) A copy of the Department action being appealed, and (2) Proof of service that the proper officials at the Department were served with the Notice of Appeal. The Appellants ignored this first Order and, in response, the Board issued a Rule to Show Cause, dated December 1, 2016, directing Appellants to show cause by December 15, 2016 why their appeal should not be dismissed as a

sanction for failing to comply with the Board's Orders and the Board's Rules of Practice and Procedure. The Rule to Show Cause also warned the Appellants that "failure to comply as ordered may result in dismissal of the appeal." Appellants did not respond to this, either.

Caselaw and the Board's Rules provide that it may impose sanctions upon a Party for ignoring Board Orders. *Mon View Mining Corp. v. DEP*, 2005 EHB 937 (where Appellant's Appeal was dismissed after it ignored two Orders to Perfect issued by the Board, despite the Board's warnings that the Appellant stood to have its Appeal dismissed). The Rule is clear:

> 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 against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including these permitted under Pa. R.C.P. § 4019 (relating to sanctions regarding discovery matters).

25 Pa. Code § 1021.161.

In this case, in order to abide by the Board's Order to Perfect, the Appellants had only to mail the Board a copy of the Department action they were appealing, and provide proof of service that the correct Department officials were served with the Notice of Appeal. Nothing else was required of Appellants for them to comply. The Appellants ignored the Board's Failure to Perfect order and its Rule to Show Cause. The Board gave them two opportunities to perfect their Appeal and the Appellants responded to neither. The Appellants have also never contacted the Board to explain their failures to comply with the Board's directions.

Although dismissing an appeal is a drastic sanction, the Board has often held that it is an appropriate sanction where a party's conduct evinces an intention to no longer continue with the appeal. See, e.g. *L.A.G. Wrecking, Inc. v. DEP*, 2015 EHB 338, 341; *Casey v. DEP*, 2014 EHB 908, 910-11. The Appellants' lack of response to the Board's orders is a classic example of the

failure to properly prosecute the appeal and demonstrates a clear lack of intent to continue with the appeal. *Id*. For this reason, dismissal under these circumstances is appropriate.

Because the Appellants have failed to perfect their Appeal and have ignored the Board's two directives to do so, their Appeal is dismissed as a sanction pursuant to 25 Pa. Code § 1021.161. Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **GERALD E. AND JOYCE E. BUSER** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-145-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 17th day of January, 2017, upon consideration that the Appellants failed to comply with the Board's Orders of November 7, 2016 and December 1, 2016, which required the Appellants to perfect the above appeal and show cause as to why their appeal should not be dismissed as sanctions for failing to perfect their appeal, it is hereby ordered that the appeal is dismissed pursuant to 25 Pa. Code § 1021.161 as a sanction for failure to comply with 25 Pa. Code § 1021.51 and the Board's Orders.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: January 17, 2017**

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

**For the Commonwealth of PA, DEP:**
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York, PA 17406

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **GEORGE MACZACZYJ** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-125-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and J.M. DELULLO STONE SALES, INC., Permittee** | : | **Issued: January 18, 2017** |

**OPINION AND ORDER ON**
**PERMITTEE'S MOTION TO DISMISS APPEAL**

**By: Judge Richard P. Mather, Sr.**

**Synopsis**

The Board grants the Permittee's Motion to Dismiss Appeal, because the record reflects that Appellant's Notice of Appeal ("NOA") was filed outside of the 30-day appeal period mandated by 25 Pa. Code § 1021.52(a)(1). The Appellant's filing of the appeal was untimely, and the Board lacks jurisdiction over the appeal. Although the Permittee also raised the issue of whether the subject of the Appellant's appeal was an appealable action, the Board does not need to resolve this issue at this time because the appeal itself was not timely.

**O P I N I O N**

George Maczaczyj ("Appellant") filed an appeal challenging the Department's determination that Permittee was in compliance with its mining permit. On June 4, 2013, the Department issued a permit to J.M. Delullo Stone Sales, Inc. ("Permittee"), which authorized a small, seven acre, non-coal sandstone mining operation. On July 17, 2014, in response to a complaint by the Appellant, the Department inspected the permit area. Sometime after the inspection, it gave Appellant a copy of an email summary from August 12, 2014 in which the

Director of the Department's Bureau of District Offices stated that Permittee was in compliance with its permit. Appellant filed an NOA on September 15, 2016, more than two years after receiving the August 12, 2014 email.

On December 5, 2016, the Permittee filed a Motion to Dismiss raising two bases for its Motion. First, the Permittee asserted that the appeal is untimely because the NOA was filed more than two years after the Appellant received the email from the Department documenting the results of its July 17, 2014 inspection. The Appellant received the email on August 12, 2014 and filed this appeal on September 15, 2016. Second, the Permittee asserted that the email documenting the inspection results was not an appealable action.

On December 13, 2016, the Department filed a Memorandum of Law in Support of Permittee's Motion to Dismiss as authorized by Section 1021.94(b) of the Board's Rules. 25 Pa. Code § 1021.94(b). In its Memorandum, the Department generally supported Permittee's bases for dismissal and added that the Department's inspection and subsequent email were not appealable actions because they merely described the Department's exercise of prosecutorial discretion, which is not appealable as a general rule. See *Bernardi v. DEP*, EHB Docket No. 2016-090-B, slip op. at 5-7, (Opinion and Order, August 29, 2016). On January 10, 2017, the Department also filed a Reply to the Response that the Appellant filed to Permittee's Motion in which the Department stated that Appellant failed to address either of the jurisdictional issues raised by the Permittee in its Motion to Dismiss.

On January 13, 2017, the Appellant filed an additional response in which he made a "motion not to dismiss" his appeal. Based upon its timing, it appears that this filing was made in response to the Department's January 10, 2017 Reply to Appellant's earlier Response to Permittee's Motion. The Appellant's January 13th response does not contain any new

information to establish that Appellant's appeal is timely. Rather, it further describes events in 2013 and 2014 that do not support the filing of an appeal in September, 2016.

A motion to dismiss is appropriate where a party objects to the Board hearing an appeal because of lack of jurisdiction, an issue of justiciability, or another preliminary concern. *Consol Pennsylvania Coal Company, LLC v. DEP*, 2015 EHB 48, 54. 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. *Id.*; See also *Bernardi v. DEP*, EHB Docket No. 2016-090-B, slip op. at 2, (Opinion and Order, August 29, 2016); *West Buffalo Township Concerned Citizens v. DEP*, 2015 EHB 780, 781; *Boinovych v. DEP*, 2015 EHB 566, 567; *Blue Marsh Labs, Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. For the purposes of resolving motions to dismiss, we accept the nonmoving party's version of events as true rather than combing through the parties' filings for factual disputes. *Id.*; *Ehmann v. DEP*, 2008 EHB 386, 390.

In response to the Permittee's Motion, Appellant filed 23 documents purporting to show evidence of long-term damage that has caused flooding, affected Appellant's rental property, and degraded Appellant's well. Appellant urged the Board to review these documents before making a decision regarding the dismissal of this case. Although the Appellant has submitted extensive documentation relevant to his appeal, the response does not directly address either the timeliness or appealability issues raised by the Permittee. These materials may indirectly go to whether the alleged action is an appealable action. However, because the timeliness issue is a jurisdictional issue, the Board must address it first. Upon review of the uncontested record before the Board, it

is clear that the Appellant's challenge was filed well beyond the 30-day appeal period. These uncontested facts necessitate the dismissal of this appeal.[1]

Under its rules, the Board has jurisdiction over timely appeals. *West Pike Run Township Municipal Authority v. DEP*, 2014 EHB 1071, 1071-72. Generally, an appeal must be filed within 30 days of the Appellant's receiving notice of a Department action. 25 Pa. Code § 1021.52. The start of the appeal period depends on how and to whom the Departmental action is noticed. *Id*. The person to whom the action is directed or issued has 30 days from the date on which he receives written notice of the action. Any other person who is aggrieved by an action must file their appeal within 30 days of one of the following: (1) the date on which notice of the action is published in the *Pennsylvania Bulletin*, or (2) the date on which he received actual notice of a Departmental action which was *not* noticed in the *Bulletin*. 25 Pa. Code § 1021.52(a)(2)(i)-(ii).

The Board lacks jurisdiction over appeals that are filed beyond the 30-day appeal period and has routinely dismissed such cases. *Lucey v. DEP*, EHB Docket No. 2016-134-B, slip op. at p.2 (Opinion issued December 7, 2016) citing *Mark Stash v. DEP*, EHB Docket No. 2015-125-M, slip op. at p.2 (Opinion issued July 22, 2016); *Melvin J. Steward v. DEP*, EHB Docket No. 2015-137-L, slip op. at p.3 (Opinion issued April 5, 2016); *Boinovych v. DEP*, 2015 EHB 566; *Damascus Citizens for Sustainability v. DEP*, 2010 EHB 756; *Spencer v. DEP*, 2008 EHB 573; *Weaver v. DEP*, 2002 EHB 273. It is well-established that the "limited right of appeal is jurisdictional in nature and cannot be extended as a matter of grace." *Ametek v. DEP*, 2014 EHB 65, 68. Thus, except in the rare event that the Board grants an appeal *nunc pro tunc*, the Board

[1] The Appellant did not file a formal response to the Permittee's Motion to Dismiss contesting any of the facts Permittee alleged in its Motion. Under the Board Rules, the Board may deem admitted any facts in a motion that are not denied. See 25 Pa. Code § 1021.91(e). The Appellant did not deny any of the facts in the Permittee's Motion, and therefore the Board deems these facts admitted for the purpose of deciding the Permittee's Motion.

will grant a motion to dismiss where an appeal has been filed after the deadline set by its rules. *Doctorick v. DEP*, 2012 EHB 244, 245.

A motion for *nunc pro tunc* is granted infrequently and will only be granted where there is fraud, a breakdown in the Board's operation, or some other non-negligent grounds for failing to file the appeal within the mandated appeal period. *Ametek*, 2014 EHB at 68-69. The rule is laid out in §1021.53(a):

> The Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc*; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in the Commonwealth."

*Id*. citing 25 Pa. Code § 1021.53(a). Good cause is generally held to mean either "fraud or some breakdown in the court's operation" or "unique and compelling circumstances establish[ing] a non-negligent failure to appeal." *Id. Nunc pro tunc* is "intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain *extraordinary circumstances*." *Id*. at 71 (quoting *Union Electric Corp v. Board of Property Assessments Appeals and Review*, 746 A.2d 581, 584 (Pa. 2000) (internal quotations omitted) (emphasis in original).

*Nunc pro tunc* does not apply here because there is no allegation of fraud or breakdown in the Board's operation with respect to this matter. In addition, the Appellant has not asserted any unique, compelling, or extraordinary circumstances. Further, Appellant received notice of the appealed action two years before filing his appeal. There is nothing in the record that suggests this two-year gap was due to any factor other than Appellant's own choice. Rather, this appeal is governed by the Board's general rule that Notices of Appeal must be filed within 30 days of the Appellant's receipt of notice of the action.

In this case, the 30-day appeal period started either when the Department conducted its inspection with the Appellant on July 17, 2014, or when Appellant received a copy of the summary email from the Department on or around August 12, 2014. Appellant's NOA references the July 17, 2014 date as the date of the appealed action. Based on this provided date, the Appellant should have filed his appeal by no later than August 17, 2014. Using the date of the summary email as the date of the Department action under appeal only extends the end of the jurisdictional appeal period to September 12, 2014. Appellant missed both of these dates in 2014 and instead, Appellant filed this appeal on September 15, 2016 – well over two years from the possible dates of the alleged action in question.

The Board grants Permittee's Motion to Dismiss Appeal. The Board has jurisdiction over timely appeals. Timeliness is defined by 25 Pa. Code § 1021.52 and provides generally that an appellant has 30 days from that date on which he has received notice of an action to appeal that action. Where a Notice of Appeal is filed outside of that 30-day window, the Board no longer has jurisdiction over the appeal and must dismiss the matter. Here, Appellant filed his NOA two years too late and his case does not fall into the *nunc pro tunc* exception to timeliness. Further, although he filed materials in response to the Permittee's Motion to Dismiss, the materials did not address the timeliness issue. Therefore, the Board holds that it lacks jurisdiction.

While the Board has concerns as to whether the Department's July 17, 2014 inspection and its August 12, 2014 email documenting the results of the inspection constitute an appealable action for the reasons set forth by the Permittee and the Department, the Board does not have to address this additional basis for granting Permittee's Motion to Dismiss. The record establishes that the appeal was not timely and because of this, the Board lacks jurisdiction.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **GEORGE MACZACZYJ** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-125-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and J.M. DELULLO STONE SALES, INC., Permittee** | : | |

**O R D E R**

AND NOW, this 18th day of January, 2017, in consideration of the Permittee's Motion to Dismiss Appeal, it is hereby ordered that the appeal in the above-captioned matter is dismissed**.** The docket will be marked closed and discontinued.

**ENVIRONMENTAL HEARING BOARD**

s/Thomas W. Renwand, Sr.
**THOMAS W. RENWAND, SR.**
**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 18, 2017**

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

**For the Commonwealth of PA, DEP:**
Forrest M. Smith, Esquire
Greg Venbrux, Esquire
*(via electronic filing system)*

**For Appellant (*Pro Se*):**
George Maczaczyj
*(via electronic filing system)*

**For Permittee:**
William T. Gorton, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
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| **ANTHONY LIDDICK** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-051-M** |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: January 23, 2017** |
| | : | |

**OPINION AND ORDER ON**
**MOTION FOR SANCTIONS**

**By: Judge Richard P. Mather, Sr.**

**Synopsis**

The Board grants in part and denies in part the Department's motion for discovery sanctions. The Board will preclude the Appellant from introducing as evidence at the hearing any documents other than those that have already been identified by the Appellant. In addition, the Appellant is precluded from calling any witnesses other than himself at the hearing on the merits, as a sanction for failure to identify any witnesses or other persons with knowledge of the matters at issue in response to written discovery requests and an earlier Board order directing Appellant to provide discovery responses. The Board denies the Department's request to shift the burden of proceeding from the Department to the Appellant by requiring Appellant to file his Pre-Hearing Memorandum before the Department files its Pre-Hearing Memorandum.

**O P I N I O N**

Anthony Liddick ("Appellant") filed an appeal of the Department's compliance orders requiring him to cease activity in wetlands located on his property. On or about April 27, 2016, the Department served upon Appellant its first set of interrogatories and a request for production of documents ("Department's Discovery Request"). The Appellant failed to respond, even

following several attempts on the part of the Department to request that he do so. Therefore, on October 17, 2016, the Department filed a motion to compel responses from the Appellant. In its motion, the Department sought to compel a response to the Department's Discovery Request. The Board issued an Opinion and Order on November 3, 2016 granting the Department's Motion to Compel.

On January 5, 2017, the Department filed a Motion for Sanctions that made three requests: First, that the Appellant be barred from introducing any evidence at the hearing in this matter that the Department requested in discovery; second, that the Appellant be barred from introducing an expert witness or expert testimony in this matter; and third, that the burden of proceeding be shifted from the Department to the Appellant by requiring Appellant to file his Pre-Hearing Memorandum before the Department files its Pre-Hearing Memorandum. On January 20, 2017, the Board held a conference call with the Parties to discuss both the Motion to Compel and scheduling a hearing. During the call, the Appellant made clear that he had no further evidence or documents to disclose to the Department beyond what he included in his Notice of Appeal. Additionally, Appellant stated that he had no intent to call witnesses, expert or otherwise, of his own during the hearing.

Under Section 1021.161 of the Board's Rules, sanctions may be imposed upon a party for failure to abide by a Board order or Board rule of practice and procedure, including those pertaining to discovery. 25 Pa. Code § 1021.161; *DEP v. Frank Colombo d/b/a Glenburn Services*, 2012 EHB 370; *Smith v DEP*, 2010 EHB 547; *DEP v. Tate*, 2009 EHB 295; *Swistock v. DEP*, 2006 EHB 398*; Kennedy v. DEP*, 2006 EHB 477. These sanctions may include dismissal of the appeal, entrance of adjudication against the offending party, disallowing introduction of evidence or documents not disclosed, precluding witnesses that were not identified as such, or

other appropriate sanctions, including those allowed under Rule 4019 of the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.161. Rule 4019 also authorizes the Board to impose sanctions for noncompliance with discovery rules. Specifically, Rule 4019(i) addresses the failure of a party to disclose potential witnesses, stating "a witness whose identity has not been revealed as provided in this chapter shall not be permitted to testify on behalf of the defaulting party at the trial of the action" unless the failure to disclose the witness is "the result of extenuating circumstances beyond the control of the defaulting party." Pa.R.Civ.P. 4019(i).

Here, review of the record clearly shows Appellant's failure to comply with both the Board's discovery rules and with the Board's November 3, 2016 Order. He failed to respond to the Department's Requests, prompting the Department to file a Motion to Compel. The Appellant further failed to comply with the Board's Order granting the Department's Motion and ordering the Appellant to provide a full and complete response to all of the Department's outstanding discovery requests by November 17, 2016. The Appellant has ignored the discovery rules and the Board's earlier orders and, pursuant to Section 1021.161 of the Board's Rules and Rule 4019(i) of the Pennsylvania Rules of Civil Procedure, we will preclude the Appellant from introducing as evidence any documents other than those previously identified by the Appellant and will further preclude him from calling any witnesses other than himself at the upcoming hearing. The Board will not, however, shift the burden of proceeding as the Department requested. Given the Board's conversation with the Parties during which Appellant made clear his intentions for the hearing and his status as a pro se appellant who is unfamiliar with the Board's Rules, the Board sees no reason to grant Department's request to shift the burden of proceeding.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **ANTHONY LIDDICK** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-051-M** |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## O R D E R

AND NOW, this 23rd day of January, 2017, in consideration of the Department's Motion for Sanctions and the January 20, 2017 conference call with the Parties during which Appellant stated he had no further evidence with which to supply the Department, it is hereby ordered that the Department's Motion for Sanctions is **granted in part and denied in part** as follows:

(1) Department's request that Appellant be barred from introducing any documents at the hearing in this matter other than documents already identified and provided to the Department is **GRANTED.**

(2) Department's request that Appellant be barred from calling any witnesses other than himself at the hearing in this matter is **GRANTED.**

(3) Department's request that the burden of proceeding in this matter be shifted from the Department to Appellant by requiring Appellant to file his Pre-Hearing Memorandum before the Department files its Pre-Hearing Memorandum is **DENIED.**

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: January 23, 2017**

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

**For the Commonwealth of PA, DEP:**
Curtis C. Sullivan, Esquire
Janna E. Williams, Esquire
*(via electronic filing system)*

**For Appellant (*Pro Se*):**
Anthony Liddick
1764 Old Trail Road
Liverpool, PA 17045

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| **CHARLES LITTLE AND JOYCE LITTLE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-105-M** |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: January 30, 2017** |

**OPINION AND ORDER ON**
**DEPARTMENT'S MOTION TO DISMISS APPEAL**

**By: Judge Richard P. Mather, Sr.**

**Synopsis**

The Board grants the Department's Motion to Dismiss Appeal because the record reflects that Appellants' Notice of Appeal ("NOA") was filed at least seven (7) days outside of the 30-day appeal period mandated by 25 Pa. Code § 1021.52(a)(1). The Appellants' filing of the appeal was untimely and the Board lacks jurisdiction over the appeal.

**O P I N I O N**

Charles and Joyce Little (Appellants) filed an appeal of the Department's Administrative Order ("Order") dated June 1, 2016 addressing violations of the Solid Waste Management Act. According to the Department, Department employees hand delivered the Order to Lance Little at 208 Carpenter Street on June 1, 2016, and therefore the Appellants received the Order no later than June 2, 2016. Following receipt of the Order, the Appellants filed their NOA on July 12, 2016, forty-two days after they received notice of the Order.

On December 21, 2016, the Department filed a Motion to Dismiss asserting that the Board lacked jurisdiction because the Appellants filed their appeal beyond the 30-day appeal

period. The Appellants were required to file a response to the Department's Motion within 30 days of receiving it. 25 Pa. Code § 1021.94(c). To date, Appellants have not responded to the Department's Motion, nor have they requested to extend the time period to respond. Under the Board's Rules, failure to file a response to a motion allows the Board to deem all properly-pleaded facts in the motion as admissions for the purposes of deciding the motion. *See* 25 Pa. Code § 1029.91(e) and (f). Because the Appellants did not file a response to the Department's Motion, the Board accepts all properly-pleaded facts in Department's Motion as admissions.

Although the Appellants did not file a response to the Department's Motion to Dismiss, they did discuss when they received the Order from the Department in their NOA. They also discussed when they believed "the last day for timely filing would" be. NOA at p. 3. According to the Appellants, they received the Order on June 2, 2016, the appeal period began on June 3, 2016, and the last day for filing their appeal was July 5, 2016 after the Fourth of July Holiday. The Appellants placed their NOA in the United States Mail on July 5, 2016, by certified mail. According to them, their appeal was timely under these facts even though the Board did not receive and docket their appeal until July 12, 2016.

Under its rules, the Board has jurisdiction over timely appeals. *West Pike Run Township Municipal Authority v. DEP*, 2014 EHB 1071, 1071-72. With few exceptions, an appeal must be filed within 30 days of the Appellant receiving notice of the Department action at issue. 25 Pa. Code § 1021.52. The start of this appeal period depends on how and to whom the Departmental action is noticed. *Id.* The person to whom the action is directed or issued has 30 days from the date on which he receives written notice of the action. Any other person who is aggrieved by an action must file their appeal within 30 days of one of the following: (1) the date on which notice of the action is published in the *Pennsylvania Bulletin*, or (2) the date on which he received

actual notice of a Departmental action which was *not* noticed in the *Bulletin*. 25 Pa. Code § 1021.52(a)(2)(i)-(ii). In this case, the Appellants had 30 days from June 2, 2016 to file an NOA.

The Board lacks jurisdiction over appeals that are filed beyond the 30-day appeal period and has routinely dismissed such cases. *Lucey v. DEP*, EHB Docket No. 2016-134-B, slip op. at p.2, citing *Mark Stash v. DEP*, EHB Docket No. 2015-125-M, slip op. at p.2 (Opinion issued July 22, 2016); *Melvin J. Steward v. DEP*, EHB Docket No. 2015-137-L, slip op. at p.3 (Opinion issued April 5, 2016); *Boinovych v. DEP*, 2015 EHB 566; *Damascus Citizens for Sustainability v. DEP*, 2010 EHB 756; *Spencer v. DEP*, 2008 EHB 573; *Weaver v. DEP*, 2002 EHB 273. It is well-established that the "limited right of appeal is jurisdictional in nature and cannot be extended as a matter of grace." *Ametek v. DEP*, 2014 EHB 65, 68. Because the rules governing the Board are regulations that have been promulgated pursuant to statute, they have the force of binding law. *Rostosky v. Dep't of Envtl. Res.*, 364 A.2d 761, 763 (Pa. Cmwlth, 1976).

Appellants made a fatal flaw in their calculation of the appeal period in their NOA. NOA at p. 3. In this case, the 30-day appeal period started when Appellants received a copy of the Order on June 2, 2016. Appellants' NOA references the June 2, 2016 date as the date of the appealed action. Based on this provided date, the Appellants should have filed their appeal by no later than July 5, 2016.[1] Instead, Appellants filed their appeal on July 12, 2016 – seven days past the appeals period.

Appellants argue that because they deposited their NOA in the United States Postal Service within the appeals period, their appeal is timely. However, when the Appellants mailed their NOA to the Board on July 5, 2016 by certified mail, their appeal was not filed with the Board. The Board must receive an appeal within the 30-day period; the appeal may not merely

[1] July 2, 2016 was a Saturday and because the Fourth of July Holiday was Monday, the end of the 30-day appeal period was Tuesday, July 5, 2016.

be mailed within that period. *Edwardson v. DEP*, 2015 EHB 833, 837, citing *Burnside Township v. DEP*, 2002 EHB 700, 702. The "deposit of [an] appeal in the United States Postal Service is not sufficient to constitute timely filing of [the] appeal" under 25 Pa. Code § 1021.52(a). *Id*. The Appellants NOA was not filed with the Board until July 12, 2016, the date on which the Board received it. Their appeal is therefore untimely.

The Board grants the Department's Motion to Dismiss Appeal. The Board has jurisdiction over timely appeals. Timeliness is defined by 25 Pa. Code § 1021.52 and provides generally that an appellant has 30 days from that date on which he has received notice of an action to appeal that action. Where a Notice of Appeal is filed outside of that 30-day window, the Board no longer has jurisdiction over the appeal and must dismiss the matter. Here, Appellants filed their NOA over a week late. Therefore, the Board lacks jurisdiction.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CHARLES LITTLE AND JOYCE LITTLE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-105-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**O R D E R**

AND NOW, this 30th day of January, 2017, in consideration of the Department's Motion to Dismiss Appeal, it is hereby ordered that the appeal in the above-captioned matter is dismissed. The docket will be marked closed and discontinued.

**ENVIRONMENTAL HEARING BOARD**

s/Thomas W. Renwand, Sr.
**THOMAS W. RENWAND, SR.**
**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 30, 2017**

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

**For the Commonwealth of PA, DEP:**
Jeana A. Longo, Esquire
*(via electronic filing system)*

**For Appellants, *Pro Se*:**
Charles Little and Joyce Little
208 Carpenter Street
Muncy, PA 17756

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB** | : | |
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| **v.** | : | **EHB Docket No. 2016-155-B** |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee** | : | **Issued: February 1, 2017** |

**OPINION IN SUPPORT OF ORDER**
**GRANTING PETITION FOR SUPERSEDEAS IN PART**

**By Steven C. Beckman, Judge**

**Synopsis**

The Board granted in part a Petition for Supersedeas of the issuance of a permit revision by the Department that allows longwall mining by Consol under Kent Run over the 3L panel. The Board now issues an Opinion in support of its earlier Order. The Board finds that the Petitioners, the Center for Coalfield Justice and Sierra Club, have shown that they are likely to succeed in their claim on the merits because the Department's permit application review process was arbitrary, capricious, inappropriate and unreasonable. As such, the Board finds that there was irreparable harm per se along with the potential for actual irreparable harm. Finally, the Board concluded that the harm claimed by Consol was speculative because the permit that granted Consol the right to longwall mine beneath Kent Run was conditional and the condition had not been satisfied at the time of the Board's Order granting the Petition for Supersedeas in part.

## O P I N I O N

### Background

The Bailey Mine complex is a large underground coal mine complex located in Greene and Washington Counties, Pennsylvania. Consol Pennsylvania Coal Company, LLC ("Consol"), has conducted development and longwall mining activities at the Bailey Mine since 1985 under CMAP No. 30841316. In 2007, Consol sought a permit revision to CMAP No. 30841316 to conduct development and longwall mining in the area known as the Bailey Mine Eastern Expansion Area ("BMEEA"). BMEEA is located adjacent to and partially underlies Ryerson Station State Park. In general, as proposed by Consol, BMEEA consists of five longwall panels approximately 1,500 feet wide by 12,000 feet long with the longer dimension running largely in an east-west direction. The five panels start with the 1L panel on the northern boundary of BMEEA through the 5L panel on the southern edge of BMEEA.

On March 29, 2012, the Pennsylvania Department of Environmental Protection ("the Department" or "DEP"), issued Permit Revision No. 158 allowing development mining for BMEEA. On May 1, 2014, the Department issued Permit Revision No. 180 which authorized longwall mining in panels 1L through 5L of BMEEA, but did not authorize longwall mining beneath two streams, Polen Run and Kent Run. These streams are generally located in the western half of BMEEA and flow north–south perpendicular to the panels. On February 26, 2015, the Department issued Permit Revision No. 189 authorizing longwall mining under Polen Run in the 1L and 2L panels. Consol's application that led to Permit Revision No. 189 did not seek permission to mine under Kent Run. The Center for Coalfield Justice and the Sierra Club ("CCJ/SC"), appealed the issuance of Permit Revision Nos. 180 and 189 and those appeals are

consolidated at EHB Docket No. 2014-072-B ("Consolidated Appeal"). A multi-day hearing was held on the Consolidated Appeal in August 2016 and the filing of post hearing briefs was concluded on December 6, 2016. The Consolidated Appeal is awaiting adjudication by this Board.

On February 22, 2016, Consol submitted an application seeking authorization to conduct longwall mining beneath Polen Run and Kent Run in the 3L panel. On July 29, 2016, the Department determined that the application was administratively complete. On December 13, 2016, the Department issued Permit Revision No. 204 authorizing longwall mining beneath both Polen Run and Kent Run in the 3L panel. Permit Revision No. 204 requires Consol to implement an approved stream restoration plan to address any impacts to the streams from Consol's longwall mining. Permit Revision No. 204 also includes Special Condition 97 that states that Consol may not conduct longwall mining beneath or adjacent to Kent Run until the Pennsylvania Department of Conservation and Natural Resources ("DCNR") grants written access to Consol to allow them to perform stream mitigation work authorized by the Department.[1] CCJ/SC appealed the issuance of Permit Revision No. 204 on December 19, 2016.

On the afternoon of December 21, 2016, CCJ/SC filed a Petition for Supersedeas ("Petition") with this Board, seeking to halt longwall mining under Polen Run and Kent Run. On December 22, 2016, the Board held a conference call with all parties to discuss how to proceed on the Petition and requested a status update from counsel for Consol about mining in the 3L panel. The Board was informed that, as of that morning, the longwall face in the 3L panel had advanced beyond Polen Run. Following the conference call, the Board issued an Order on December 23, 2016, scheduling a hearing on CCJ/SC's Petition to begin on January 10, 2017.

[1] Consol has appealed the inclusion of Special Condition 97 in Permit Revision No. 204 to the Board. It is docketed at 2017-002-R.

The Order required Consol to file notification if it received the grant of written access from DCNR pursuant to Special Condition 97 or otherwise resolved the Special Condition[2] and also prohibited longwall mining within 500 feet of any portion of Kent Run that overlies the 3L panel pending a ruling on the Petition.

Consol filed its response to the Petition on January 3, 2017, and included with it a Motion to Dismiss Petition for Supersedeas ("Motion"). On January 9, 2017, an Opinion and Order on the Motion was issued granting in part and denying in part Consol's Motion. The Board found that the Petition was moot as to Polen Run because the action the Petition sought to prevent, the undermining of Polen Run, had already occurred. The Board dismissed any claims under the Petition that addressed Polen Run but ruled that the Petition was ripe as to Kent Run. A hearing on CCJ/SC's Petition was held in Pittsburgh from January 10 – 12, 2017. On January 18, 2017, the parties submitted briefs and memorandums of law addressing the issues raised in the hearing. On January 24, 2017, the Board issued an Order granting the Petition in part, preventing Consol from conducting longwall mining within 100 feet of any portion of Kent Run and stated that an opinion in support of the Order would follow. This opinion is issued in support of the Board's January 24, 2017 Order.[3]

**Supersedeas Standard**

As the Board has recently stated in *Delaware Riverkeeper Network v. DEP*, EHB Docket No. 2014-142, Opinion in Support of Order Denying Supersedeas, slip op. at p. 3 (Feb. 4, 2016), a supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of

[2] As of the date of the Board's Order granting in part CCJ/SC's Petition, the Board had not received notice from Consol that it had satisfied Special Condition 97.

[3] The Board issued the Order without waiting for this Opinion to be completed to provide Consol with as much time as possible to adjust its longwall mining plans in the 3L panel prior to reaching the 100 foot restriction at Kent Run provided in the Order.

need. *See Weaver v. DEP*, 2013 EHB 486; *Global Eco-Logical Servs., Inc. v. DEP*, 2000 EHB 829. The petitioner bears the burden to prove that a supersedeas should be issued. *Tinicum Twp. v. DEP*, 2008 EHB 123, 126. The standard for granting or denying a petition for supersedeas is set forth in the Environmental Hearing Board Act, and by the regulations promulgated thereunder. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63. In ruling on a supersedeas request, the Board is guided by relevant judicial precedent and its own precedent, and among the factors to be considered are: 1) irreparable harm to the petitioner; 2) likelihood of the petitioner's success on the merits; and 3) likelihood of injury to the public or other parties, such as the permittee in third party appeals. *Id.* A supersedeas will 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).

In order for the Board to grant a supersedeas, a successful petitioner generally must make a credible showing on each of the three regulatory factors, with a strong showing of a likelihood of success on the merits. *Hudson v DEP*, 2015 EHB 719, 726, (citing *Mountain Watershed Ass'n v. DEP*, 2011 EHB 689, 690-91; *Neubert v. DEP*, 2005 EHB 598, 601; *Lower Providence Twp. v. DER*, 1986 EHB 395, 397). If the petitioner fails to carry its burden on any one of the regulatory factors, the Board need not consider the remaining requirements for supersedeas relief. *M.C. Resource Development v. DEP*, 2015 EHB 261, 265, (citing *Dickinson Twp. v. DEP*, 2002 EHB 267, 268; *Oley Twp. v. DEP*, 1996 EHB 1359, 1369). In order to be successful, the petitioner's chance of success on the merits must be more than speculative; however, it need not establish the claim absolutely. *Global*, 2000 EHB 829, 831-32. It is important to remember that a ruling on a supersedeas is merely a prediction, based on the limited record before the Board and the shortened timeframe for consideration, of who is likely to prevail following a final

disposition of the appeal. *Weaver*, 2013 EHB 486, 489; *Tinicum*, 2008 EHB 123, 127. In the final analysis, the issuance of a supersedeas is committed to the Board's sound discretion based upon a balancing of all the above criteria. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797.

**Likelihood of Success on the Merits**

CCJ/SC must make a strong showing that they are likely to be successful on the merits of their claim. This matter involves a third party appeal of a permit revision issued by the Department. In a third party permit appeal, in order to be successful, the party challenging the Department's permit decision must show, by a preponderance of the evidence, that in issuing the permit, the Department decision was not appropriate, did not conform with the applicable law or was unreasonable. *United Refining Company v. DEP*, EHB Docket No. 2014-174-R (Adjudication issued July 7, 2016). Stated in another way, an appellant must show that the decision to issue the permit was arbitrary, capricious or contrary to law. *Teska and Mannarino v. DEP*, EHB Docket No. 2016-096-B (Opinion On Appellants' Petition For Supersedeas issued August 3, 2016). See also *Shuey v. DEP*, 2005 EHB 657, 691 (citing *Zlomsowitch v. DEP*, 2004 EHB 756, 780); *Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot*., 131 A.3d 578, 587 (Pa. Commw. Ct. 2016) (In order to prevail, appellants must show that the Department acted unreasonably and in violation of the laws of the Commonwealth in issuing the permit). We find that based on the evidence and testimony presented at the Petition hearing,[4] CCJ/SC is likely to be successful on their claim that the Department's decision to issue Permit Revision No. 204 was arbitrary, capricious, unreasonable and not appropriate.

The Department called two witnesses on direct at the Petition hearing to testify about the Department's application review process and the decision to issue Permit Revision No. 204.

[4] All parties agreed that the record of the Petition hearing includes by reference the testimony and evidence from the August hearing in the Consolidated Appeal.

Jeffrey Thomas, a licensed professional geologist employed by the Department, was admitted as an expert on geology and hydrogeology and testified regarding his role in the review of the permit application and the decision to issue the permit revision. The Department's other witness was Michael Bodnar, a licensed engineer also employed by the Department. Mr. Bodnar testified extensively in the Consolidated Appeal hearing in August and was admitted as an expert in civil engineering in that hearing and in the Petition hearing. CCJ/SC also called Mr. Bodnar on direct during the Petition hearing. Mr. Bodnar's testimony was focused on his role in the permit application review process and the decision to issue Permit Revision No. 204. We did not hear any testimony in the Petition hearing from Joel Koricich, the Department's District Mining Manager, who signed this latest permit revision on behalf of the Department (Stipulated Ex. D). Mr. Koricich supplied extensive testimony during the Consolidated Appeal hearing.

We found Mr. Thomas' testimony regarding his application review efforts concerning, particularly in light of the testimony of Mr. Koricich in the Consolidated Appeal hearing. In his August testimony, Mr. Koricich stated that when the Department issued Permit Revision No. 180, it denied Consol's request to mine under both Polen Run and Kent Run (CAT. 1589).[5] We note that this decision followed a review period that covered approximately seven years from the time of the submittal of the initial permit application by Consol. When the Department subsequently issued Permit Revision No. 189, it permitted longwall mining under Polen Run in the 1L and 2L panels but Consol did not seek permission to longwall mine under Kent Run. The Board questioned Mr. Koricich about the basis for the Department's initial decision to put Kent Run and Polen Run off limits to longwall mining and its eventual decision to allow longwall mining under Polen Run in the 1L and 2L panels. He testified that the initial decision was based

[5] We will cite to testimony from the August 2016 Consolidated Appeal hearing with the designation "CA". We will cite to testimony from the January 2017 Petition hearing with the designation "P".

on the Department's review of the hydrologic variables for Kent Run and Polen Run found in Module 8, including the hydrogeologic variables found in Table 8.5 of Module 8.[6] The Department compared the variables for Kent Run and Polen Run with the variables from various nearby streams, including a group of streams immediately west of Kent Run that had not satisfactorily recovered from the impacts resulting from prior longwall mining conducted beneath those streams by Consol. Mr. Koricich identified the specific streams to the west of Kent Run that were of concern as Polly Hollow, Kim Jones, Crow's Nest and an unnamed tributary of the North Fork. (CAT. 1593). Mr. Koricich testified that when the Department was considering the risk to Kent Run, it specifically considered the fact that Polly Hollow had not recovered post-mining. (CAT. 1620). Speaking about Kent Run over the 1L and 2L panels, Mr. Koricich stated that the Department did not believe that Kent Run could be mined and restored because "we think that the hydrologic variables are enough of an indicator to us that they can't do it successfully." (CAT. 1591).

Mr. Koricich provided further testimony explaining the Department's later decision to permit the undermining of Polen Run. In that testimony, he identified Kent Run as being at greater risk than Polen Run for "permanent adverse effects" from longwall mining. (CAT. 1607-8). He identified two specific hydrogeologic variables that supported this conclusion, depth of cover and previous longwall mining in the headwaters of Kent Run. (CAT. 1608-12). He stated that the depth of cover at Kent Run was less on average by 200 feet than it is in Polen Run and that this was significant. (CAT. 1611). He noted that the headwaters of Polen Run had not been previously undermined in contrast to the fact that upper portions of the Kent Run watershed, including the headwaters, had been previously undermined and in fact had

[6] Module 8 is one of the modules that make up a longwall mining permit application. Module 8 is labeled "Hydrology" and includes a chart listing numerous streams and their associated hydrogeologic variables at Table 8.5.

experienced some flow loss. (CAT. 1609-11, 1618). Mr. Koricich's testimony on these issues and the Department's overall approach was consistent with similar testimony offered by other witnesses at the Consolidated Appeal hearing.

Mr. Koricich's testimony regarding the Department's concerns about the potential impacts of longwall mining on Kent Run and how the Department viewed the hydrologic variables as of the Consolidated Appeal hearing are in marked contrast to Mr. Thomas' testimony five months later at the Petition hearing. We first note that it appears that no new hydrogeologic data relevant to the issues that concern the Board was submitted by Consol as part of the application for Permit Revision No. 204. In fact, Table 8.5 of Module 8 that summarizes the hydrogeologic variables, and that Mr. Thomas testified he used in reaching his conclusions, bears a stamped received date by the Department of April 28, 2011. (Department's Ex. C-6). Mr. Thomas opined that Kent Run may experience temporary flow loss following mining and subsidence in the 3L panel and that Kent Run will not experience a permanent flow loss over the 3L panel. (PT. 526, 531). When asked for the basis of his opinion, referencing Table 8.5, he testified that he had identified four significant factors including depth of cover, percentage of soft rock in the upper 50 feet of the permit area, the stream gradient in Kent Run and the amount of Kent Run's watershed that will not be undermined. (PT. 526-528).

The Board understands that the prediction of subsidence impacts on streams is not an exact science and that different professionals reviewing the same information can arrive at different conclusions. Our concern with Mr. Thomas' conclusion is that, based on his testimony, he failed to consider the issues that had apparently troubled the Department and Mr. Koricich in the prior decisions regarding Kent Run. He was asked whether he was aware of the Department's prior concerns about Kent Run and stated "I was not." (PT. 536-37). Mr. Thomas

testified that he was not familiar with Mr. Koricich's testimony in the Consolidated Appeal hearing or Mr. Koricich's assessment of Kent Run. (PT. 549-550). He further testified that he had only passing conversations with Mr. Koricich regarding the earlier permit revisions and had not spoken with Mr. Koricich about Mr. Koricich's assessment that Kent Run was at risk for permanent adverse impacts. (PT. 537). Mr. Thomas was asked whether he had reviewed any of the deficiency letters or correspondence between the Department and Consol regarding Polen Run and Kent Run and his answer was no. (PT. 556). In addition, he stated that he did not have any discussions with anyone about the two streams, Polly Hollow and Kim Jones, that Mr. Koricich testified played a significant role in the Department's concerns about the potential impacts to Kent Run and he testified that he had not considered Polly Hollow in any way in reaching his decision. (PT. 537-38, 549). Mr. Thomas testified that he alone was responsible for the hydrogeologic conclusions that supported the issuance of Permit Revision No. 204 and that his supervisor, Jeff Cost, did not contribute any factual or scientific interpretation to the decision. (PT. 571).

Our overall impression is that Mr. Thomas made his determination that Kent Run was not at risk of a permanent impact in something of a vacuum and completely devoid of any review or consideration of the significant concerns that the Department had expressed about Kent Run previously. No new hydrogeologic variable information was submitted that could account for the new conclusions. It does not appear from his testimony that Mr. Thomas looked at the table of hydrogeologic variables in the permit application and made any comparison of the variables for Kent Run with those of the two streams, Polly Hollow and Kim Jones, that had played a significant role in the Department's previous determinations not to allow undermining of Kent Run. While a fresh set of eyes to review an application may be appropriate at times, the failure

to conduct that review with full knowledge of the underlying issues or to discuss your conclusion with staff who had previously reviewed the information and reached a different conclusion strikes us as arbitrary, capricious, inappropriate and unreasonable.

Our concerns are further compounded by the source of the scientific data that formed the basis of Mr. Thomas' conclusion. Prior to joining the Department in July 2015, Mr. Thomas worked for a consulting firm for approximately 11 years. (Department Ex. C-5). He testified that a portion of his consulting work was on behalf of Consol and specifically involved the Bailey Mine. During his direct testimony, Mr. Thomas said that information he collected on behalf of Consol was incorporated into Consol's permit application for BMEEA. (PT. 519-521). He stated "I did a lot of stream characterization work for that permit in developing data for the hydrogeologic variables that are used to assess or predict potential impacts from mining to streambeds." (PT. 519). More specifically, Mr. Thomas testified that work he had done in the field was included in Table 8.5 of Module 8 of Consol's application for Permit Revision No. 204. (PT. 520-521). Mr. Thomas later testified that Table 8.5 and the hydrogeologic variables listed there formed the basis for his conclusions regarding the impact to Kent Run. (PT. 526). In essence, Mr. Thomas' conclusions regarding Kent Run on which the Department relied in issuing Permit Revision No. 204 were based, at least in part, on a review of data and information he had collected while working for the permit applicant, Consol. It is inherently difficult to be fully objective in reviewing data that you collected on behalf of a permit applicant and we question the wisdom of assigning a Department employee to review his own data collected on behalf of a permit applicant as part of the process of determining whether to issue a permit.[7]

[7] We do not intend this discussion to in anyway impugn Mr. Thomas' integrity or professionalism. We simply find it extremely surprising that he was put in this position by his management particularly in light of the fact that the Department must have been aware that regardless of what decision it reached on the permit application, its decision would be controversial and likely to be challenged in front of the Board.

The fact that this is exactly what occurred here further raises our concerns that the decision here was inappropriate and unreasonable.

We also have some concerns of a more technical nature with the decision reached by the Department that Consol can adequately restore Kent Run following any impact from its undermining by Consol. The Department's other witness at the Petition hearing, Mr. Bodnar, testified extensively during the Consolidated Appeal hearing. During the August hearing, he provided testimony consistent with Mr. Koricich's testimony discussed above about the Department's concerns with the difficulty of restoring Kent Run. At the Petition hearing, the Board questioned Mr. Bodnar about the basis for the Department's revised conclusion that Kent Run could be adequately restored by Consol. He testified that the Department's conclusion that Consol's mitigation plans for restoring Kent Run over the 3L panel were adequate for approval of the permit application was based on two interrelated principal points: Consol's proposal to conduct progressive mitigation and the apparent success of channel lining in restoring Polen Run over the 1L and 2L panels. (PT. 595).

Our understanding of the first point is that it has to do with the difference between what Consol submitted as part of its application for Permit Revision No. 180 and what it submitted in the Permit Revision No. 204 application. In the earlier Permit Revision No. 180 application, Consol never proposed to go beyond grouting as a repair technique for Kent Run. (PT. 595-596). Because of the Department's concerns regarding the impact on Kent Run and whether grouting would be effective, when reviewing the Permit Revision No. 180 application, the Department concluded that it could not be assured that Kent Run would be adequately restored. As part of the Permit Revision No. 204 application, Consol proposed that it would first attempt to restore Kent Run through grouting if necessary and, if that was unsuccessful, Consol proposed

to rely on channel lining similar to what it had conducted in Polen Run over the 1L and 2L panels. This stepwise approach to addressing any impacts to Kent Run starting with augmentation, progressing to grouting and finally to channel lining if necessary apparently satisfied the Department's earlier concerns regarding Consol's approach to restoring Kent Run.

Mr. Bodnar also testified that the impacts to Polen Run over the 1L and 2L panels from Consol's longwall mining were less than the Department had anticipated, and that this provided a basis for concluding that the impacts to Kent Run would be less than previously anticipated and therefore increased the likelihood that the restoration efforts would be successful. (PT. 12). On further questioning, Mr. Bodnar testified that the Department was not entirely convinced that grouting alone would be successful and that is the reason the Department required channel lining as a further restoration technique in Kent Run above the 3L panel. (PT. 13). Taking all of Mr. Bodnar's testimony into consideration, it is clear to the Board that the Department's decision to issue Permit Revision No. 204 to allow Kent Run to be undermined in the 3L panel relies in a significant way on Mr. Bodnar's second principal point, the apparent success of the channel lining system in restoring Polen Run over the 1L and 2L panels.

The Board heard extensive testimony about the channel lining in Polen Run above the 1L and 2L panels in the Consolidated Appeal hearing and in the Petition hearing. The installation of the channel lining on Polen Run was completed over the 1L panel in December 2015 and over the 2L panel in August 2016. Permit Revision No. 189 contained a six-month post liner installation monitoring period to determine whether Polen Run had been successfully restored. According to Mr. Bodnar, the six-month monitoring period was proposed by Consol to expedite the monitoring so that the Department could use that information to consider Consol's request to mine beneath Polen Run and Kent Run in the 3L and 4L panels. (PT. 40). Under the terms of

the permit, success of the liner is determined by considering the conveyance of flow over the lined section of the stream consistent with an amount established in the permit and the status of the biological community as measured at designated monitoring stations. We have some reservations about the Department's conclusion that the success of the liner system in Polen Run provides sufficient evidence to conclude that Consol can restore Kent Run over the 3L panel based on the adequacy of the data that was used to demonstrate that the success criteria were satisfied, along with the nature of Polen Run over the 1L panel as compared to the nature of Kent Run over the 3L panel.[8]

Our principal concern is with the length of the monitoring period, six months, and whether success over that time frame is adequate to draw the conclusion that the liner installation in Polen Run over the 1L panel was successful. Biological success is determined using total biological scores ("TBS") calculated in accordance with the Department's technical guidance document titled "Surface Water Protection – Underground Bituminous Coal Mining Operations." (Stipulated Ex. G). Consol submitted a biological performance assessment for the Polen Run 1L liner restoration project dated February 3, 2016. (CA hearing Joint Stipulated Ex. Q). The mean pre-mining TBS score was 47.1 and the mean post-restoration TBS score was 67.6. Consol stated, and the Department agreed, that these scores satisfied the biological performance requirement in Permit Revision No. 189 since the post-restoration TBS score is more than 88% of the pre-mining TBS score. However, the biological data for the assessment was not collected over the restored portion of Polen Run in the 1L panel but instead was collected in a biological monitoring site (BSW06) over the 2L panel prior to BSW06 being undermined. BSW06 is

[8] Mr. Bodnar testified that the six-month monitoring period was not completed for the liner system installed in Polen Run over the 2L panel at the time the Department issued Permit Revision No. 204 so it does not appear that the Department considered the success status of the liner over the 2L panel in reaching its permit decision regarding undermining Kent Run in the 3L panel. (PT. 40).

located downstream of the channel lining installed in Polen Run in the 1L panel. This was done to allow calculation of a TBS score since a TBS score could not be calculated for Polen Run above the 1L panel because TBS scores only apply to biologically diverse streams and Polen Run above the 1L panel does not qualify as a biologically diverse stream. (PT. 495-96).

The six month monitoring period and the acceptance of biological performance data from a location other than Polen Run over the 1L panel was done principally to accommodate Consol's mining schedule. We question whether this approach can be relied on as a good indication of success in restoring the biological community in the 1L panel. Dr. Nuttle, an expert witness for Consol on ecology, who oversaw the biological monitoring effort, testified about the biological monitoring in both the Consolidated Appeal hearing and the Petition hearing. At the Petition hearing, he presented testimony about the length of time it takes for streams with watersheds similar in size to Kent Run and Polen Run to recover biologically following restoration by grouting, a less intrusive method than installation of a channel liner. He testified that on average the length of time from completion of grouting to biological recovery is 1.6 years based on the recovery criteria being met when the second biological sample was collected and confirmed the initial sample data. (PT. 491-92). He further testified that if you assumed recovery had actually occurred when the initial sample data was collected, restoration occurred on average within one year. (PT. 492). Dr. Nuttle was specifically asked about what the biological performance data collected at BSW06 over the 2L panel tells him about the success of the liner in Polen Run over the 1L panel. In response, he testified "[S]o the data shows that the lining of the 1L panel upstream contributes to, and at the very minimum, does not negatively affect biology and, in fact, it actually suggests it enhances the performance of the biological community **on the 2L panel**." (PT. 493) (emphasis added). This statement confirms our understanding from

the testimony in August, that an increased post-restoration TBS score at BSW06 tells us something about the re-establishment and maintenance of flow in Polen Run across the 1L panel but does not necessarily tell us much about the recovery of the biological community in Polen Run over the 1L panel. Dr. Nuttle did testify that he observed fish and quite a few different macroinvertebrate taxa on a June 2016 visit to Polen Run over the 1L panel (PT. 498). Our overall impression of the biological data presented for Polen Run over the 1L panel is that it points to the likelihood that Polen Run will recover biologically; however, we think it was premature to reach that conclusion based on six months of data collected in a location other than within the 1L panel itself. We certainly have reservations about relying on that data as a demonstration of sufficient success to support the issuance of a permit to undermine Kent Run in the 3L panel.

Our reservations are further raised by the obvious differences in the nature and settings of Polen Run over the 1L panel and Kent Run over the 3L panel. [See for instance CA Ex. A-3, A-5 and CP-19 (Polen Run) and P Ex. CP-8 (Kent Run)]. Kent Run over the 3L panel appears to be generally a wider stream and located in a wooded setting within Ryerson Station State Park. In contrast, Polen Run over the 1L panel is generally a narrower stream and located in an agricultural setting with cleared fields. When questioned about those differences, Mr. Bodnar testified that while he did not think the stream profiles were that different, Polen Run is a narrower stream with a steeper gradient than Kent Run. (PT. 597). It is clear from testimony from both Mr. Bodnar and Dr. Nuttle that the Kent Run watershed is larger than the Polen Run watershed particularly when looking at the size of the watershed above Polen Run at the 1L panel as compared to Kent Run at the 3L panel. The bankfull width of Polen Run over the 1L panel ranges from 10 feet to 14 feet according to information in Module 15 of the permit

application (Stipulated Ex. C), although at some points it appears to be significantly less than that. Mr. Benson, a witness for Consol in both the August hearing and the Petition hearing, testified that the width of Kent Run bank to bank is 32 feet. (TP. 463). This is consistent with the bankfull width of Kent Run over the 3L panel identified in Module 15 as ranging from 22 feet to 37 feet. (Stipulated Ex. C). Mr. Bodnar was asked by the Board whether there are any segments where the liner in Polen Run has been used successfully in a stream that looks like the pictures of Kent Run shown at the Petition hearing. Mr. Bodnar answered "Not Polen Run, but Consol did have a project over a stream known as Crafts Creek where a … a coated geosynthetic clay liner was installed. Now, the protective cover material in that situation was different, but that project was successful. Crafts Creek is a larger watershed, probably more similar to Kent Run." (PT. 596-97). We were not provided any information specifically concerning the project at Crafts Creek or any indication that the Department had considered that site in reaching its permit decision on Permit Revision No. 204. Ultimately, the different physical nature and setting of Kent Run and Polen Run gives us some concerns about whether success at Polen Run is necessarily a good indicator that installation of a channel liner at Kent Run will be successful.

Looking at all of the issues and questions regarding the Department's decision to issue Permit Revision No. 204 raised by Mr. Thomas' testimony and Mr. Bodnar's testimony, we conclude that CCJ/SC are likely to be successful on the merits of their claim that the Department should not have issued this permit revision. It is not often that the Board concludes that the Department's review procedures were of sufficient concern to support a finding that they were inappropriate, unreasonable, arbitrary or capricious in the absence of a clear failure to follow a specific statutory or regulatory requirement. We would first note that our conclusion here is in the context of a supersedeas petition and, therefore, the evidence presented may not fully reflect

all of the actions taken by the Department but we can only rule based on the evidence presented. Further, the facts of this matter are unusual in that the permitting decision in question is part of an ongoing piecemeal permitting process for Consol's longwall mining of BMEEA. Piecemeal permitting is often fraught with factual and process issues in our experience. Finally, it is unusual to have held a full hearing on aspects of the issues that are subsequently presented for consideration in a petition for supersedeas and certainly the information garnered in that multi-day hearing has played a role in our decision.

**Irreparable Harm To Petitioners**

The central purpose of a supersedeas is to prevent an appellant from suffering irreparable harm while the Board considers the appeal. This Petition requires the Board to consider whether CCJ/SC will suffer irreparable harm as a result of Consol's longwall mining of Kent Run in the 3L panel within Ryerson Station State Park. CCJ/SC argue that they will incur both irreparable harm per se as well as actual harm as a result of the Department's decision to issue Permit Revision No. 204. The issue of whether there is irreparable harm per se is directly related to the first factor, the likelihood of Petitioners' success on the merits. In *Hudson v. DEP* (2015 EHB 719) the Board stated that where the petitioner has made a strong showing that the Department acted unlawfully in approving a permit, such action constitutes irreparable harm per se. The reason for this is because it is presumed that such an action by the Department is injurious to the public and the interests that the regulations are in place to protect. While *Hudson* relied on a clear violation of the regulations governing permit issuance in reaching that conclusion, we see no reason that its reasoning would not apply in a case like this where the determination was not based on the violation of a specific regulation but involved the permit review process as conducted by DEP. Clearly a permit review process that is arbitrary, capricious, unreasonable or

inappropriate is injurious to the public, including CCJ/SC and their members, and inconsistent with the interests that the permitting process is designed to protect. We find that given the likelihood that CCJ/SC will be successful on the merits of their claim, they have suffered irreparable harm per se.

We also think there is a strong, although not conclusive, argument that Kent Run in the 3L panel may suffer actual irreparable harm as a result of longwall mining and that CCJ/SC, their members and the general public will suffer irreparable harm as a result. In many of the matters that come in front of the Board, the central issue in considering this question is whether the nature and probability of the harm that is of concern to the Petitioners is adequately supported in the record or appears to be remote and/or speculative. This situation is fundamentally different in that there appears to be only limited debate among the parties about whether Consol's undermining of Kent Run will have an impact on the stream. The testimony at both the Consolidated Appeal hearing and the Petition hearing support the conclusion that Kent Run is likely to suffer subsidence and at least some flow loss as a result of being undermined by Consol. Instead of focusing on the issue of whether there will be any harm, Consol and the Department's principal argument is that any negative impacts will be temporary and, if necessary, the impacts will be satisfactorily addressed by Consol through progressive mitigation. Therefore, they argue that any harms to Kent Run will be repaired and as a result there cannot be a finding of irreparable harm.

This argument of course depends on whether we are convinced that Kent Run can and will be satisfactorily repaired by the progressive mitigation required by the permit. As should be evident from our prior discussions, we are not convinced of that fact. Even Consol acknowledges a success rate of less than 100% in restoring streams within the Bailey Mine

complex,[9] and it is not clear that Consol's calculation takes into account some of the unrecovered streams such as Polly Hollow and Kim Jones that are in close proximity to Kent Run. We cannot say at this point that Consol and the Department are correct that any harms to Kent Run will definitely be repaired.

Further, there is no question that any necessary repair work will irrevocably alter Kent Run from its current natural state. Cutting out heaves from the streambed and grouting of fractures will alter Kent Run. If channel lining is required, the alteration of Kent Run will be even more significant. Full implementation of the approved channel lining plan would result in the length of Kent Run over the 3L panel being reduced by 13% because several meanders would be removed to improve stream stability. (PT. 432). The approved channel lining plan also acknowledges that groundwater recharge to Kent Run would be impacted and provides for a piping system to collect and re-introduce that groundwater back into the stream.

Finally, we note that Kent Run over the 3L panel is located entirely within Ryerson Station State Park and therefore, it can be accessed by the public for public recreation. We received testimony about public use from Ms. Veronica Fike, a member of both CCJ and the Sierra Club, at both the Consolidated Appeal hearing and the Petition hearing. There is no question that the public use of Kent Run will, at a minimum, be impacted during any repair work on Kent Run. Longer term, if the repairs are not successful, the public use of Kent Run, along with its environmental value, will be harmed. In the context of a petition for supersedeas, such as this, we think that there is a strong argument that Kent Run may suffer actual irreparable harm and that such harm would affect CCJ/SC, their members and the general public.

[9] Grouting is 90% effective for restoring streams. (PT. 411-12); somewhere between 90 and 95 percent of the watershed's area is showing return to the baseline conditions for both hydrologic and biologic data (CAT. 1080).

**Likelihood of Injury to the Public or Other Parties, Including the Permittee, Consol**

This factor is really the flip side of the prior factor about harm to the Petitioners if the supersedeas is denied and asks the Board to consider the nature of the harm that will occur if the Board grants the supersedeas petition. There is no real question that granting the supersedeas prevents the likelihood of injury to the general public by minimizing the potential for longwall mining to impact Kent Run within Ryerson Station State Park. The main issue for the Board concerning this factor is the likelihood of injury to Consol. Consol provided testimony during the Petition hearing about the impact a supersedeas would have on its operations and financial situation and set out in detail in its posthearing brief the harm it contends it would suffer if the supersedeas request was granted.

The initial problem with Consol's position is that any harms it now claims are speculative since the permit issued by the Department to mine under Kent Run was conditioned on Consol satisfying Special Condition 97. The Board ordered Consol to inform us if the condition was satisfied. At the time of the Board's Order granting in part the Petition, Consol had not filed the required notice that the condition had been satisfied and has not done so to date. The fact that the condition in the permit was not satisfied at the time of our Order makes any harms claimed by Consol speculative since it could not longwall mine under Kent Run without satisfying that condition under the specific terms of Permit Revision No. 204. Consol in fact argued that the Board should not hear the Petition because it was not ripe based on an argument that it was a conditional permit and the condition was not satisfied. We rejected that argument and further reject Consol's argument that if we did not grant the motion to dismiss on the ripeness issue, we should ignore the fact that a claim for harm would be speculative if the condition was not satisfied. We do not think we are required to do so because the issue of ripeness requires a

different analysis than the one posed by our consideration of the issue of harm in balancing concerns in a supersedeas decision.

In an effort to fully address the issue, however, we will go beyond the speculative nature of Consol's harm claim and look further at Consol's concerns. In doing so, we conclude that the harm asserted by Consol is less than it claims and is at least in part the result of operational choices that Consol made on its own. When Consol undertook development mining for the 3L panel, it designed the full length of the panel to be mined by longwall mining even though it lacked permission from DEP to longwall mine underneath both Polen Run and Kent Run. The permit status was still the same when Consol began longwall mining in the 3L panel. In fact, Permit Revision No. 204 was not issued until just prior to Consol reaching Polen Run. Consol claims that it will be harmed by the supersedeas because it will be required to revise its ventilation and roof control plans and it will be more difficult for it to remove the longwall mining machinery short of the end of the panel. These harms are directly the result of Consol proceeding with the planning and development of the 3L panel as if it had Permit Revision No. 204 in hand even though it did not and even though the testimony at the Consolidated Appeal hearing was that Consol had no guarantee from DEP that it would receive the required permit.

Experts for both Consol and CCJ/SC[10] agreed that if Consol was prevented from longwall mining under Kent Run, Consol would likely move the longwall mining machinery out

[10] CCJ/SC presented expert testimony on the operations and economics of longwall mining from Art Sullivan, a mining consultant, whom the Board admitted as an expert on mine safety and underground coal mining. Consol presented expert and factual testimony from Charles Shaynak, Senior Vice President of Consol's Pennsylvania operations, whom the Board admitted as an expert on longwall and underground bituminous coal mining and operations. Mr. Shaynak was also admitted as an expert at the Consolidated Appeal hearing.

of the 3L panel and that the coal remaining in the 3L panel would not be mined in the future.[11] The experts, however, appear to disagree on exactly how much coal will be left unmined. The Board's Order granting the supersedeas modified its prior order and adjusted the buffer from no longwall mining within 500 feet of Kent Run to no longwall mining within 100 feet of Kent Run.[12] Consol's expert, Mr. Shaynak, testified that this would result in 1,000 feet of coal left in place but did not demonstrate to the Board directly how he determined that number. He testified that he had redone the math that morning. (PT. 353). CCJ/SC's expert, Mr. Sullivan, presented testimony suggesting a smaller number. Using a map showing the 3L panel and a line 500 foot from Kent Run, (Stipulated Ex. L), the Board observed Mr. Sullivan measuring the distance from the 500 foot line to the end of the 3L panel as 3.9 inches. (PT. 262). The map scale was 1"=300 feet. Therefore, the distance from the 500 foot line to the end of the panel is 1,170 feet.[13] At the 100 foot line, the amount of remaining coal in the 3L panel would be 770 feet. Both experts testified that Consol's production rate is 360 tons per foot. Consol asserts in its post-hearing brief that being required to stop at the 100 foot barrier would result in 360,000 tons of coal being left unmined but, based on the calculations above, we find that this amount is a smaller number, 277,200 tons. Mr. Shaynak's uncontradicted testimony was that Consol's most recent average sales price for its coal is $42.60 per ton. (PT. 353). Using the 277,200 ton figure, the revenue

[11] While we accept the experts' testimony that the coal will be left unmined, we note that Consol retains a permit to mine the coal at the end of the 3L panel just not by longwall mining. Presumably, it is the economics of recovering it in some other fashion that makes it unlikely to be mined.

[12] The Board made this adjustment because 1) it addressed some of the safety issues raised by Consol, 2) it was consistent with the barrier left in place to protect Kent Run in the 1L and 2L panels and there was no evidence that the 100 foot barrier was inadequate to protect Kent Run in the 1L and 2L panels, and 3) there was no substantive evidence that a similar 100 foot barrier would not be adequate in the case of the 3L panel.

[13] In his testimony, Mr. Sullivan rounded this number to 1,100 feet. (PT. 262).

value of the coal left unmined is approximately $11.8 million. This number is less than the $15.3 million that Consol claims in its post-hearing brief but is still a loss of revenue.

Revenue is not, however, the only way to look at the issue of economic harm. Looking at only revenue does not account for the costs that Consol would incur to produce that 277,220 tons of coal. Mr. Shaynak acknowledged that revenue is different than profits. (PT. 387). Mr. Sullivan testified that the real value of the coal is the profit and stated that "nobody is making more than a couple of bucks after taxes." (PT. 313). CCJ/SC's counsel asked Mr. Shaynak about Consol's costs but Consol's counsel objected to the question. (PT. 387). The Board returned to this issue and asked Mr. Shaynak about Mr. Sullivan's testimony that the profit is in the range of $2 per ton and gave him the opportunity to provide a different number. (PT. 391-92). Mr. Shaynak testified that $2 per ton was "very inaccurate" but was unwilling to provide the Board with a more accurate number. (PT. 392). As a result, the only number the Board has to work from is the $2 per ton. The profit on the unmined coal is therefore in the range of $544,400. Even if Mr. Sullivan's number is off on both the amount of coal that is left in place and the amount of profit per ton, we conclude that the actual economic harm is still significantly less than the $15.3 million revenue loss claimed by Consol.[14]

Consol also raised the issue that entry of the supersedeas would potentially be disruptive to its ongoing mining operations and could create layoffs. The major source of a potential disruption was identified as the fact that Consol had not yet completed development mining at the receiving end of the 4L panel and, therefore, would have no place to move the longwall equipment that would be idled in the 3L panel. (PT. 356). However, based on Mr. Shaynak's testimony, we are not sure this would have been an issue with the 500 foot barrier at Kent Run

[14] We would also note that under the Board's Order preventing the undermining of Kent Run, it is likely that Consol will avoid certain costs to monitor and restore Kent Run.

and, these concerns are further addressed by the Board's decision to reduce the no longwall mining zone to 100 feet from Kent Run. On January 11, 2017, Mr. Shaynak testified at the Petition hearing that Consol was about three weeks out on having the 4L panel ready to mine and that it would be ready "by the end of January, beginning of February." (PT. 374.). On January 18, 2017, Consol stated in a filing with the Board that it anticipated that the longwall face would reach the 500 foot barrier on January 30 or January 31. Given the additional 400 feet of coal that Consol is allowed to mine under the Board's Order, along with a rate of mining that was identified as 70 feet per day, our understanding of the evidence is that Consol will likely have to stop longwall mining in the 3L panel on or around the end of the first week of February 2017. Development in the 4L panel will be complete by that point according to Mr. Shaynak and Consol will be able to move its longwall mining equipment to the start of the 4L development without any disruption resulting from the status of the 4L development mining. Concerns about timing and safety are further mitigated by the fact that Consol earlier developed cross-cuts at the 100 foot barrier distance in case it was required to stop at that point. Admittedly, it will be more difficult to remove the longwall machinery at the 100 foot barrier location than at the end of the 3L panel, but as discussed above, that difficulty is in large part a result of Consol's decision to proceed in a certain fashion even though it lacked the permits to do so at the time. Based on all of the testimony, the Board's decision to set a 100 foot barrier was an attempt to balance Consol's safety and timing concerns with adequately protecting Kent Run.

Overall, we acknowledge that if we put aside the issue of the conditional nature of Permit Revision No. 204, the testimony supports the likelihood that Consol will suffer some economic harm as a result of our supersedeas decision. However, we see no need to put aside the speculative nature of Consol's harm. Additionally, we determined the harm to be less than the

harm claimed by Consol and find that any remaining harm to Consol must be balanced against the likely harm to Kent Run. The Board has done what it can to mitigate any potential harm to Consol by striking a balance between allowing the mining to proceed towards Kent Run to within 100 feet and minimizing the likelihood of harm to CCJ/SC, their members and the general public's interest in maintaining Kent Run in its natural state within Ryerson Station State Park.

**Conclusion**

In the end, the determination of whether or not to grant a petition for supersedeas is at the discretion of the Board based on a balancing of the factors it considers in reaching that decision. In this case, the Board was faced with a difficult decision involving the need to balance impacts to a stream located entirely within a state park, concerns regarding mine safety and access by Consol to a valuable natural resource, a complicated permit review process and the right to a meaningful review of the permit decision made by the Commonwealth. All of this was underpinned by a pending full Board adjudication addressing similar issues in a challenge to earlier permit revisions involving all of the same parties. We find that the proper balancing of the factors presented leads us to the conclusion that the Petition for Supersedeas should be granted in part and Consol should be prevented from longwall mining under Kent Run in the 3L panel in accordance with the terms of our Order until such time as the Board can hold a full hearing on CCJ/SC's appeal of Permit Revision No. 204. A copy of our previously issued Order is attached.

**ENVIRONMENTAL HEARING BOARD**

s/ Steven C. Beckman
**STEVEN C. BECKMAN**
**Judge**

**DATED: February 1, 2017**

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

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Megan S. Haines, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-155-B** |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee** | : | |

**ORDER GRANTING APPELLANTS' PETITION FOR SUPERSEDEAS IN PART**

AND NOW, this 24th day of January, 2017, following a hearing on Appellants' Petition for Supersedeas, and review of the parties' Post Hearing Filings, the Board Orders as follows:

1. The Petition for Supersedeas as requested is **granted in part.**
2. The Permittee may continue to longwall mine under the terms of its current permit, including Permit Revision No. 204, but may not conduct longwall mining within 100 feet of any portion of Kent Run in the 3L Panel.
3. The Appellants shall not be required to file a bond or other security.
4. An opinion in support of this Order Granting Appellants' Petition for Supersedeas In Part shall follow.

**ENVIRONMENTAL HEARING BOARD**

s/ Steven C. Beckman
**STEVEN C. BECKMAN**
**Judge**

**DATED: January 24, 2017**

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **SIERRA CLUB** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2015-093-R** |
| | : | **(Consolidated with 2015-159-R)** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **DEPARTMENT OF ENVIRONMENTAL** | : | **Issued: February 1, 2017** |
| **PROTECTION and FIRSTENERGY** | : | |
| **GENERATION, LLC, Permittee** | : | |

**OPINION AND ORDER ON**
**MOTION TO COMPEL**

**By Thomas W. Renwand, Chief Judge and Chairman**

**Synopsis:**

The Appellant's Motion to Compel is denied. To the extent that the Permittee has agreed to supplement its answers, we find that the information to be produced by the Permittee adequately responds to the Appellant's discovery requests regarding sites other than the permit site. Discovery is permitted that relates directly to the contentions raised in the appeal or is likely to lead to admissible evidence.

**O P I N I O N**

This matter involves consolidated appeals filed by Sierra Club pertaining to the Hatfield Ferry Coal Combustion Byproducts Landfill (Hatfield Landfill or Landfill) operated by FirstEnergy Generation, LLC (FirstEnergy). On July 6, 2015, Sierra Club filed a Notice of Appeal objecting to the renewal and reissuance of a residual waste landfill permit issued by the Pennsylvania Department of Environmental Protection to FirstEnergy. Sierra Club filed an amended Notice of Appeal as of right on July 27, 2015. On October 22, 2015, Sierra Club filed a second Notice of Appeal, objecting to the Department's approval of a minor modification

which permitted FirstEnergy to begin receiving coal ash waste from the Bruce Mansfield Power Plant beginning in January 2017. Sierra Club filed an amended Notice of Appeal as of right on November 12, 2015. The Notices of Appeal were consolidated at EHB Docket No. 2015-093-R on October 29, 2015. Sierra Club has filed a number of objections to the modified permit, including its claim that FirstEnergy's plan to ship coal ash waste by barge fails to demonstrate compliance with Pennsylvania's regulations on transportation of coal ash.

On January 11, 2017, Sierra Club filed a Motion to Compel Discovery Responses from FirstEnergy, arguing that FirstEnergy improperly failed to respond to Sierra Club's discovery based on claims of relevance and confidentiality. FirstEnergy filed a response to the motion on January 26, 2017, in which it claims that, despite its objections on grounds of relevance and confidentiality, it has agreed to respond to the vast majority of Sierra Club's discovery requests and, therefore, the motion is unwarranted at this time. FirstEnergy states that it has conferred with Sierra Club since the filing of the motion and has agreed to produce much, but not all, of the information requested. We examine Sierra Club's motion and FirstEnergy's response in more detail below:

**Shipping information regarding sites other than Hatfield**

Sierra Club has requested information regarding contractors and shipping methods that FirstEnergy intends to employ at sites other than Hatfield, stating that this information will assist in its analysis of the potential for environmental risk during shipment to the Landfill. FirstEnergy argues that shipping information pertaining to sites other than Hatfield Landfill is not relevant. It argues that transportation and disposal requirements are specific to each site and, therefore, any permit requirements and transportation methods employed at other sites are neither instructive nor relevant to the transport and disposal of material at the Hatfield Landfill

site. We agree with FirstEnergy. Nonetheless, FirstEnergy states that since conferring with Sierra Club it has agreed to provide shipping information and documents, to the extent that any documents exist, for two additional sites: the Hollow Rock Site in Ohio and the Marshall County Coal Company's Ireland Mine Refuse Site (Mine Refuse Site) in Moundsville, West Virginia. FirstEnergy has also agreed to provide additional information related to both potential and actual shipments of flue gas desulfurization material to the Hatfield Landfill.

Discovery before the Environmental Hearing Board is governed by 25 Pa. Code section 1021.102 and the Pennsylvania Rules of Civil Procedure. *Tri-Realty Co. v. DEP*, 2015 EHB 552. Pa. R.C.P. 4003.1 instructs that "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery. . . ." Relevancy for purposes of discovery is to be broadly construed. *Blose v. DEP*, 2001 EHB 1018; *Valley Creek Coalition*, 2000 EHB 971. As we held in *Tri-Realty*, "[a]s a general rule, the Board has been 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 the contentions raised in the appeal." *Tri-Realty, supra* at 555-56. However, the scope of discovery is not limitless. *Benner Twp. Water Authority v. DEP*, EHB Docket No. 2016-042-M (Opinion and Order issued January 10, 2017), *slip op.* at 3. The Board "is charged with overseeing ongoing discovery between 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." *Id.* (quoting *Northampton Twp. v. DEP*, 2009 EHB 202, 205).

Here, Sierra Club has requested extensive information about sites other than Hatfield Landfill because "[l]earning about the contractors and shipping methods that FirstEnergy intends

to employ elsewhere will inform Sierra Club's analysis of the potential for environmental risk during shipment to the Landfill." Sierra Club's rationale for seeking shipping information pertaining to all of FirstEnergy's sites seems to us less a focused effort on gathering information relevant to its case and more of a fishing expedition. As we held in *Foundation Coal v. DEP*, 2007 EHB 46, fishing expeditions are frowned upon, but even in those cases "where tolerated, we require counsel to fish with a hook and not a net." *Id.* at 50, n. 1. Given the scope of this appeal and the attenuated relevance of Sierra Club's rationale for seeking this information, we find that FirstEnergy's offer to produce information regarding the Hollow Rock Site in Ohio and the Mine Refuse Site in West Virginia sufficiently responds to this discovery request, and we see no reason at this time to order a broader response.

**Information regarding Bruce Mansfield site**

Sierra Club also requests information regarding "the quantity of coal ash waste being produced at Bruce Mansfield Power Plant – and the possible location(s) to which the coal ash waste might be sent." (Motion to Compel, para. 28) In support of this request, Sierra Club states that it is "likely to lead to the discovery of admissible evidence on the actual quantity of waste to be shipped to the Landfill." (*Id*.) This request seems to be a circuitous route to obtaining information that could be obtained more directly by simply asking for the actual quantity of waste to be shipped to the Landfill. In its response, FirstEnergy states that it has accounted for the disposal location and method for 100% of the dewatered flue gas desulfurization material produced at Bruce Mansfield. We find that FirstEnergy's response adequately addresses the purpose put forth by Sierra Club for seeking this information.

**Confidentiality**

Sierra Club asserts that FirstEnergy has made "vague statements of confidentiality for 19 of 21 interrogatories, and for four of Sierra Club's five requests for the production of documents." (Motion to Compel, para. 29) In response, FirstEnergy claims that it has limited its objections based on confidentiality grounds and has "designated a mere nine documents as 'confidential.'" (Memorandum in Response, p. 17) Although the record is not entirely clear, we assume that some of the information previously designated by FirstEnergy as confidential now falls into the category of information that FirstEnergy has agreed to produce after conferring with Sierra Club. To the extent that FirstEnergy seeks to designate any material as confidential, it must clearly demonstrate the factors set forth by the Commonwealth Court in *MarkWest Liberty Midstream & Resources, LLC v. Clean Air Council*, 71 A.3d 337 (Pa. Cmwlth. 2013), and obtain a protective order from the Board.

**David Hoone Deposition**

On November 3, 2016, counsel for Sierra Club conducted a deposition of Mr. David Hoone, an employee of FirstEnergy. At the deposition, Sierra Club sought information about Mr. Hoone's involvement in selecting alternative locations to which the waste from Bruce Mansfield Power Plant might be shipped. According to Sierra Club's motion, and our review of the parts of the deposition testimony attached to its motion, counsel for FirstEnergy instructed Mr. Hoone not to answer questions about other locations that might receive waste from the Bruce Mansfield Power Plant or the methods by which the transfer of coal ash would take place. Counsel for FirstEnergy objected that Mr. Hoone's answers would reveal confidential business information and that the inquiries were not relevant to this appeal. Sierra Club now asks the Board to instruct Mr. Hoone to provide written answers to the questions that were not answered

at his deposition. FirstEnergy counters that Mr. Hoone should not be required to provide written responses to the questions because the questions have been answered by FirstEnergy in its responses to the discovery requests, which Mr. Hoone verified.

It is unclear to us whether the questions posed to Mr. Hoone have been answered in the supplemental responses provided by FirstEnergy following the filing of Sierra Club's Motion to Compel, or whether FirstEnergy feels that its responses to Sierra Club, which prompted the filing of the Motion to Compel, were adequate in the first place. To the extent that FirstEnergy feels that any such information qualifies as confidential business information, it must follow the process set forth in *MarkWest, supra*.

The Motion to Compel is denied. We do not believe that plans that FirstEnergy may or may not have regarding other potential sites are relevant to the permits under appeal, nor do we believe that the discovery of such information will lead to admissible evidence in these appeals.

We enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **SIERRA CLUB** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2015-093-R** |
| | : | **(Consolidated with 2015-159-R)** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **DEPARTMENT OF ENVIRONMENTAL** | : | |
| **PROTECTION and FIRSTENERGY** | : | |
| **GENERATION, LLC, Permittee** | : | |

## O R D E R

AND NOW, this 1st day of February, 2017, it is hereby ordered as follows:

1. Sierra Club's motion is denied to the extent that it seeks additional responses from First Energy regarding shipping methods and contractors employed at other sites, except to the extent that FirstEnergy has provided such information regarding the Hollow Rock Site in Ohio and the Mine Refuse Site in West Virginia.
2. Sierra Club's motion is denied with regard to its request for more information regarding the quantity of coal ash at the Bruce Mansfield Site as set forth in this Opinion.
3. Sierra Club's motion is denied with regard to the questions posed to David Hoone to the extent that information has not been provided by FirstEnergy in its supplemental responses to Sierra Club's discovery requests.
4. FirstEnergy has produced information and documents which they claim to be confidential business information evidently pursuant to an agreement between the parties. Counsel are reminded that going forward if the parties foresee using this information in any filings or at hearing then FirstEnergy shall first file an

appropriate motion asking the Board to designate such information or documents as confidential business information.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: February 1, 2017**

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **IVAN AND KATHLEEN DUBRASKY** | : | |
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| **v.** | : | **EHB Docket No. 2016-102-R** |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HILCORP ENERGY CO., Permittee** | : | **Issued: February 2, 2017** |

**OPINION AND ORDER ON**
**MOTION TO COMPEL SUPPLEMENTAL RESPONSES**

**By Thomas W. Renwand, Chief Judge and Chairman**

**Synopsis**

The Permittee's second Motion to Compel responses to discovery is granted in part. Contention interrogatories are permissible where used to target claims, defenses or contentions that may be the subject of early dismissal or to identify or narrow the scope of claims, defenses and contentions where the scope is unclear.

**O P I N I O N**

**Introduction**

This matter involves a notice of appeal filed by Ivan and Kathleen Dubrasky (Appellants) with the Environmental Hearing Board (Board), challenging the issuance of a permit by the Pennsylvania Department of Environmental Protection (Department) to Hilcorp Energy Company (Hilcorp) for the Chrastina 8H well in Pulaski Township, Lawrence County. On September 23, 2016, Hilcorp served the Appellants with its First Set of Interrogatories, consisting of 10 interrogatories which requested the Appellants to identify, among other things, "the specific permit language, inadequacies and harms that form the basis of their claims." (2nd

Motion to Compel, para. 5) Responses to the interrogatories were due on October 24, 2016, and the Appellants did not respond. On November 3, 2016, Hilcorp sent a letter to counsel for the Appellants notifying him that responses had not been received. (2nd Motion to Compel, para. 8) Hilcorp received no response to its letter. (2nd Motion to Compel, para. 9) On November 8, 2016, Hilcorp filed a Motion to Compel, to which the Appellants filed no response. Therefore, on November 29, 2016, the Board granted the motion and ordered the Appellants to respond to Hilcorp's First Set of Interrogatories by December 19, 2016. On December 15, 2016, the Appellants served their responses to interrogatories. (2nd Motion to Compel, para. 14) On December 20, counsel for Hilcorp sent a letter to Appellants' counsel asserting that the Appellants' objections to the interrogatories were improper and the responses were insufficient and further requesting the Appellants to supplement their answers. (2nd Motion to Compel, para. 16) Again, Appellants did not respond to Hilcorp's letter. (2nd Motion to Compel, para. 17) Hilcorp has now filed a Motion to Compel Supplemental Responses to Permittee's First Set of Interrogatories (2nd Motion to Compel). The Appellants have filed no response to the motion.

As we stated in *American Iron Oxide Co. v. DEP*, 2005 EHB 779, 782-83 (footnotes omitted):

> [T]he discovery process is not a game. Parties and counsel are obligated by the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure to provide all discoverable information within thirty days. If their answers are not complete a party is required to set forth information then available to it. Discovery before this Board is not a process where discoverable information is released in dribs and drabs, following heavy negotiations between attorneys.

Counsel for the Appellants has ignored the discovery process throughout this appeal, first by refusing to respond to Hilcorp's initial request for discovery, as required by the Board's rules and the Pennsylvania Rules of Civil Procedure, then further ignoring Hilcorp's requests to confer

about discovery, as required by Section 1021.93(b) of the Board's rules, and by failing to respond to Hilcorp's motions to compel, as required by Section 1021.93(c) of the Board's rules. 25 Pa. Code §§ 1021.93(b) and (c). When Appellants filed their notice of appeal they began a legal process that involves discovery, the filing of legal documents with the Board, and following the Rules of Practice and Procedure at 25 Pa. Code, Chapter 1021. Litigation is not without effort, and if the Appellants wish to continue their appeal and not suffer sanctions, they must abide by the Board's Rules of Practice and Procedure. This requires answering discovery and responding to motions. Although we could simply grant Hilcorp's motion based on the Appellants' failure to respond, 25 Pa. Code § 1021.91(f) and Pa. R.C.P. 4019, we will examine the merits of the motion.

The Appellants object to every interrogatory as follows: "Appellants object to this interrogatory as it seeks a legal statement and analysis from Appellants, not factual information, the purpose of interrogatories." (2nd Motion to Compel, Ex. B)[1] Pa. R.C.P. 4003.1 discusses the scope of discovery generally, including opinions and contentions. Note 1 to the rule reads as follows:

> Interrogatories that generally require the responding party to state the basis of particular claims, defenses or contentions made in pleadings or other documents should be used sparingly and, if used, should be designed to target claims, defenses or contentions that the propounding attorney reasonably suspects may be the proper subjects of early dismissal or resolution or, alternatively, to identify and to narrow the scope of claims, defenses and contentions made where the scope is unclear.

Hilcorp acknowledges that it has propounded several so-called "contention interrogatories" in an effort to "narrow the scope of the claims and to identify the bases thereof."

[1] Appellants actually make this objection to 9 of the 10 interrogatories propounded by Hilcorp. They provide no response or objection to Interrogatory no. 8. (2nd Motion to Compel, Ex. B)

(2nd Motion to Compel, para. 22) Hilcorp argues that its contention interrogatories are proper because "Appellants have raised numerous broad allegations that the permit does not contain required information and that its issuance creates environmental harm in violation of both the United States and Pennsylvania Constitutions," but "have not identified any specific language within the permit that is deficient, any specific harm that will arise, or any specific laws that require additional language in the permit." (2nd Motion to Compel, para. 21)

The Board has recognized the importance of contention interrogatories in obtaining discoverable information about the decision-making that occurs during the permit review process when such interrogatories are served on the Department. *See, e.g., Brush Wellman, Inc. v. DEP*, 1999 EHB 596, 597-98. We further recognize the importance and usefulness of contention interrogatories in obtaining discoverable information about a third-party appellant's grounds for challenging the issuance of a permit where such interrogatories are aimed at targeting claims or contentions that may be the subject of a motion to dismiss or motion for summary judgment or where the interrogatories help to identify or narrow the scope of the claims or contentions. Here, because counsel for the Appellants has elected not to respond to either of Hilcorp's motions to compel, we have no argument in support of the Appellants' objection to Hilcorp's interrogatories and we can only speculate as to the basis for their objection.

In addition to their objection, the Appellants have also provided responses to Interrogatories no. 1-7, which Hilcorp asserts do not fully respond to the questions. They provide only the aforesaid objection to Interrogatories no. 9-10, and no response or objection to Interrogatory no. 8. We examine each of the interrogatories and responses in more detail below:

Interrogatory no. 1 asks the Appellants to identify the language in the permit that supports the claim in their notice of appeal that the permit "allows workers of the oil and gas

operator immediate access to the property of the Appellants," as alleged in paragraph 5 of the notice of appeal. The response to this interrogatory points to "the plain language of the permit on pages 1 and 2 of the Well Permit" as well as to a newspaper article in the June 9, 2015 issue of the *New Castle News*. We order the Appellants to specify which language on pages 1 and 2 of the permit that they rely on in support of their claim.

Interrogatory no. 2 asks why the provision in the permit that the angular deviation survey is to be filed with the Department within 30 days after drilling is completed "does not require the operator to provide information relevant to the angular deviation survey" as alleged in paragraph 10 of the notice of appeal. The Appellants responded that there is "no requirement in the permit that any nearby landowners, including the Appellants, will be provided with any evidence of the performance of the survey, including a copy thereof." We find that this answer adequately responds to the interrogatory.

Interrogatory no. 3 asks the Appellants to identify the specific inadequacies of the water testing provisions of the permit which they allege in paragraph 11 of the notice of appeal. In response, the Appellants supply five reasons why they believe the water testing procedure is inadequate. We find that this answer adequately responds to the interrogatory.

Interrogatory no. 4 asks the Appellants to identify the specific inadequacies of the permit to protect the Appellants' health, safety and welfare as alleged in paragraph 12 of the notice of appeal. In response the Appellants state they incorporate "their entire 'Notice of Appeal.'" They also state as follows:

> . . .having industrial development so close to their home has already shown in numerous water tests to have negatively affected their water quality by the increase in methane and other substances, has facilitated the destruction of their rural agricultural community, has caused a reduction in real property values, emitted

> dangerous air pollutants and particulate matter, and caused noxious natural gas odors permeating their home.

(2nd Motion to Compel, Ex. B)

Similarly, Interrogatory no. 5 asks the Appellants to identify the specific environmental harm that will result from the permit, as alleged in paragraph 14 of the notice of appeal. The Appellants provide the same response as to Interrogatory no. 4 but also add "excessive noise, dust and lighting, and other negative environmental impacts."

Additionally, Interrogatory no. 6 asks the Appellants to identify the specific deterioration of environmental quality as alleged in paragraph 18 of the notice of appeal. The Appellants provide the same response as to Interrogatory no. 4 but also add "excessive noise, excessive dust and nuisance lighting, potential further and [sic] dangerous well contamination, future pipeline leaking possibilities, and other negative environmental impacts."

Although the responses to Interrogatories no. 4, 5 and 6 are very general they appear to answer the questions. If Hilcorp feels it is entitled to more specific information, it can follow up with additional interrogatories.[2]

Interrogatory no. 7 asks the Appellants to identify the specific actions required of the Department of Environmental Protection to protect the environment, as alleged in paragraph 19 of the notice of appeal. The response references the notice of appeal which it says "outlines relevant Pennsylvania law and the Pennsylvania constitution detailing the department's environmental trustee duties and obligations." (2nd Motion to Compel, Ex. B) The notice of appeal discusses Article I, Section 27 of the Pennsylvania Constitution, as well as case law. The notice of appeal and the response further refer to a statutory and regulatory provision dealing

[2] By order dated January 10, 2017, discovery in this matter was extended to June 15, 2017.

with setback requirements. We find that the Appellants' answer adequately responds to Interrogatory no. 7.

The Appellants provided no response or objection to Interrogatory no. 8 and, therefore, they are ordered to respond to it.

Interrogatory no. 9 asks whether the Appellants contend that the issuance of the permit would create waste and, if so, Interrogatory no. 10 asks the Appellants to identify the grounds for their contentions, persons with information or knowledge supporting their contention and documents related to their contention. The Appellants objected to Interrogatories no. 9 and 10 as asking for a legal statement not factual information. As we held earlier, contention interrogatories are appropriate to identify and narrow the scope of claims, defenses and contentions. Therefore, we order the Appellants to respond to Interrogatories no. 9 and 10.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **IVAN AND KATHLEEN DUBRASKY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-102-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HILCORP ENERGY CO., Permittee** | : | |

**O R D E R**

AND NOW, this 2nd day of February, 2017, on or before **February 22, 2017**, the Appellants are ordered to respond to Interrogatories no. 8, 9 and 10 and to provide a more specific response to Interrogatory no. 1, as set forth in this Opinion.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: February 2, 2017**

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

**For the Commonwealth of PA, DEP:**
Michael A. Braymer, Esquire
Katherine Knickelbein, Esquire
*(via electronic filing system)*

**For Appellants:**
Angelo A. Papa, Esquire
*(via electronic filing system)*

**For Permittee:**
Kathy Condo, Esquire
Joseph Reinhart, Esquire
Shannon DeHarde, Esquire
(*via electronic filing system*)

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| **NORTHAMPTON BUCKS COUNTY MUNICIPAL AUTHORITY** | : | |
| **v.** | : | **EHB Docket No. 2016-106-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BUCKS COUNTY WATER AND SEWER AUTHORITY, Intervenor** | : | **Issued: February 15, 2017** |

**OPINION AND ORDER ON**
**MOTION TO DISMISS**

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis**

The Board grants in part and denies in part a motion to dismiss an appeal of two Department letters for lack of jurisdiction. The Board denies the motion with respect to the first letter because it is not entirely free from doubt that the letter is not a final, appealable action. The Board grants the motion with respect to the second letter because it is an interlocutory decision of the Department.

**O P I N I O N**

Northampton Bucks County Municipal Authority ("Northampton Bucks") is appealing two letters from the Department of Environmental Protection (the "Department"), one dated June 14, 2016, and one dated July 1, 2016. The letters relate to the conveyance and treatment of sewage in the Neshaminy Interceptor sewer line. The Department has moved to dismiss the appeal with respect to both letters on the grounds that the letters do not constitute final, appealable actions, and thus the Department contends that the Board does not have jurisdiction.

Northampton Bucks opposes the Department's motion. Bucks County Water and Sewer Authority ("Bucks County Authority") has not weighed in on the motion.

The Board evaluates motions to dismiss in the light most favorable to the nonmoving party, and we will only grant such a motion when the moving party is clearly entitled to judgment as a matter of law. *Diehl v. DEP*, 2016 EHB 853, 855; *Snyder v. DEP*, 2015 EHB 857, 860; *Brockley v. DEP*, 2015 EHB 198, 198; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925. Rather than comb through the parties' filings for factual disputes, for purposes of resolving motions to dismiss, we accept the nonmoving party's version of events as true. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 48, 54, *recon. denied*, 2015 EHB 117, *aff'd*, 129 A.3d 28 (Pa. Cmwlth. 2015); *Ehmann v. DEP*, 2008 EHB 386, 390. Thus, "[a]s 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 nonmoving party states is true, can—or should—the Board hear the appeal?" *Consol*, *supra*, 2015 EHB 48, 55. *See also South v. DEP*, 2015 EHB 203, 206. Motions to dismiss will be granted only when a matter is free from doubt. *Merck Sharp & Dohme Corp. v. DEP*, 2015 EHB 543, 544; *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 only has jurisdiction over final Department actions affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations. 35 P.S. § 7514(a); 25 Pa. Code § 1021.2 (definition of "action"); *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747, 750; *Kennedy*, 2007 EHB 511, 511-12. With respect to Departmental communications, there is no bright line rule for what constitutes a final, appealable action. *Chesapeake Appalachia, LLC v. Dep't of Envtl. Prot.*, 89 A.3d 724, 726 (Pa. Cmwlth. 2014); *HJH, LLC v. Dep't of Envtl. Prot.*,

949 A.2d 350, 353 (Pa. Cmwlth. 2008); *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121. The appealability of Department decisions needs to be assessed on a case-by-case basis. *Dobbin v. DEP*, 2010 EHB 852, 858; *Kutztown*, 2001 EHB 1115, 1121. In determining whether a Departmental letter constitutes a final, appealable action, we generally consider: the wording of the letter; its substance, meaning, purpose, and intent; its practical impact; the regulatory and statutory context; the apparent finality of the letter; what relief, if any, the Board can provide; and any other indicia of the impact upon the recipient's personal or property rights. *Merck*, 2015 EHB 543, 545-46; *Teska v. DEP*, 2012 EHB 447, 454; *Dobbin*, 2010 EHB 852, 858-59; *Kutztown*, 2001 EHB at 1121. In short, we ask whether a Department decision adversely affects a person. 35 P.S. § 7514(a) and (c); 25 Pa. Code § 1021.2.

Bucks County Authority and Northampton Bucks have a long history regarding the conveyance of sewage in the Neshaminy Interceptor line. Northampton Bucks presents the following facts, which, as the nonmoving party, we accept as true for the purposes of resolving the motion to dismiss. Bucks County Authority and Northampton Bucks entered into an agreement in 1965 for the conveyance of wastewater to Philadelphia through Bucks County Authority's system via the Neshaminy Interceptor, which is owned and operated by Bucks County Authority. The agreement was amended in 1988. Northampton Bucks is one of 13 municipal entities that connect to the interceptor line. In 2012, based on Bucks County Authority's Chapter 94 annual report, the Department determined that there was a projected hydraulic overload in portions of the Neshaminy Interceptor, and an existing hydraulic overload at the Totem Road Pump Station, which receives flows from the Neshaminy Interceptor. One month later, the Department changed its determination regarding the Totem Road Pump Station from existing overload to projected overload. The Department required Bucks County Authority

to submit a corrective action plan (CAP) and a connection management plan (CMP) to address the projected overloads in the Neshaminy Interceptor and the Totem Road Pump Station. *See* 25 Pa. Code § 94.22 (relating to projected overload). Bucks County Authority appealed both of those determinations to the Board. *See Bucks Cnty. Water & Sewer Auth. v. DEP*, EHB Docket No. 2012-138-L; *Bucks Cnty. Water & Sewer Auth. v. DEP*, EHB Docket No. 2012-152-L. Northampton Bucks only appealed the letter reiterating that the Neshaminy Interceptor was in a state of projected overload and changing the status of the Totem Road Pump Station from existing to projected overload. *See Northampton Bucks Cnty. Mun. Auth. v. DEP*, EHB Docket No. 2012-155-L.

In 2014, the Department "accepted" the CAP and CMP Bucks County Authority had submitted. Shortly thereafter, Bucks County Authority withdrew its appeals at Docket Nos. 2012-138-L and 2012-152-L. Northampton Bucks appealed the Department's "acceptance" of the plans at EHB Docket No. 2014-140-L. Thereafter, Northampton Bucks withdrew both the 2014 appeal and its earlier appeal at Docket No. 2012-155-L pursuant to a stipulation of settlement.[1]

CAPs and CMPs generally appear to go hand-in-hand to address overload situations. *See* 25 Pa. Code § 94.22(1) and (2). We are told that Bucks County Authority's CAP and CMP detail how connections to the Neshaminy Interceptor will be released to Northampton Bucks and the other municipal entities through at least the year 2018. Northampton Bucks says that the terms of the CAP and CMP condition the release of connections for 2016 on the execution of

[1] The parties asked the Board to include the following language in our Order closing out the appeals:

> The appeals of Northampton Bucks County Municipal Authority docketed at Nos. 2012-155-L and 2014-040-L are hereby DISMISSED without prejudice to the right of NBCMA and the Department to raise any and all factual and legal issues raised in these appeals in any future Board proceedings between NBCMA and the Department.

supplemental agreements between Bucks County Authority and the municipalities and authorities connecting to the Neshaminy Interceptor.[2] Northampton Bucks tells us that Bucks County Authority subsequently made several revisions to the CMP without Northampton Bucks' knowledge, and that Northampton Bucks only became aware of these revisions upon receipt of the Department's June 14, 2016 letter "accepting" the revisions. This is one of the letters that Northampton Bucks has now appealed. The letter is addressed to John Butler of Bucks County Authority. The letter provides in pertinent part as follows, with emphasis supplied in bold:

> The Department of Environmental Protection (DEP) received submissions on September 11, 2014, December 5, 2014, May 1, 2015, October 5, 2015, and January 29, 2016, from Mr. John Swenson of Carroll Engineering Corporation on behalf of the Bucks County Water and Sewer Authority (BCWSA). The information provided by Mr. Swenson includes proposed revisions to BCWSA's Neshaminy Interceptor Connection Management Plan (NICMP) (collectively, "the revision"). The NICAP [Neshaminy Interceptor Corrective Action Plan] and NICMP were submitted to fulfill BCWSA's obligations under 25 Pa. Code § 94.22, to address the projected hydraulic overload within portions of the Neshaminy Interceptor, as discussed in the DEP's letters of June 26, 2012 and July 25, 2012, to BCWSA.
>
> On April 28, 2016, DEP requested that BCWSA submit one complete revised submission with all municipal listings having the same revision date. We received this revised submission via an April 29, 2016, e-mail correspondence from Mr. Swenson.
>
> **DEP has reviewed the proposed NICMP revisions and hereby accepts the revisions proposed in the most current NICMP, dated January 22, 2016.**
>
> The March 10, 2014, Settlement Agreement between DEP and BCWSA provided for the release of the 2014 connections upon acceptance of the NICAP. Your NICAP was accepted on March 10, 2014, and fully allocated your proposed 2014 connections equating to a total flow of 334,750 gallons of sewage per day (gpd).
>
> According to your NICMP, the 2015 connections may be released to those municipalities that have complied with the submission of the Act 537 Plans of Study (POS) and the submission of the public sewer capacity needs analyses that was due by September 30, 2014. Our records show that all tributary municipalities have complied with the submission of Act 537 POSs for the Neshaminy service areas of their municipalities to DEP. BCWSA has confirmed that all tributary

[2] We are told that these agreements address average annual, maximum daily, and instantaneous peak flow limits, and establish a timetable to achieve these limits through repair, maintenance, and other infiltration and inflow improvements.

> municipalities have complied with the submission of the public sewer capacity needs analyses and has therefore released the 2015 connections to all municipalities.
>
> **According to your NICMP, the 2016 connections may be released to those municipalities that have complied with the execution of the supplementary agreement with BCWSA and have submitted completed and adopted plans to DEP no later than October 1, 2015. A completed Act 537 plan contains executed supplemental agreements as identified in the NICAP and NICMP, as well as incorporates BCWSA's Neshaminy Interceptor Alternative Analysis. Most Act 537 plans previously submitted to DEP do not contain the supporting supplemental agreement, nor the Neshaminy Interceptor Alternative Analysis. Therefore, these submissions are incomplete and do not qualify for the release of 2016 connections.** Each municipality is advised by copy of this letter to contact Ms. Kelly Boettlin at 484.250.5184 to discuss the status of their Act 537 plan update as necessary.
>
> According to Mr. Swenson's April 29, 2016 email, BCWSA will be submitting another revised NICMP version in their next quarterly report, due June 2016. As BCWSA is currently updating their NICMP, we would like to reiterate the following recommendations and requests…

The letter then goes on to list six numbered paragraphs of "recommendations and requests."

The July 1, 2016 letter, which is the other letter that Northampton Bucks has appealed, is addressed to Northampton Township Manager Robert Pellegrino and relates to a planning module the Township submitted to the Department for the Russell Tract Subdivision, the flows from which would be conveyed by the Neshaminy Interceptor. The July letter provides as follows, with emphasis supplied in bold:

> The Department of Environmental Protection (DEP) received the referenced project on June 20, 2016. We reviewed the project for completeness and determined on June 30, 2016, that the submittal is administratively and technically incomplete.
>
> Please provide responses to the following comments:
>
> 1. The appropriate boxes in Section (i) of the Transmittal Letter must be checked to indicate the municipality's approval of the planning module and adoption of this revision to their Official Sewage Facilities Plan. Specifically, the box for Section (i) and the boxes prior to "revision" and "adopted" must be checked in Section (i).

2. Please submit a copy of the signed returned certified mail receipt transmitting the Cultural Resources Notice for this project to the Pennsylvania Historic and Museum Commission (PHMC).

3. By letter dated July 25, 2012, the Department determined that pursuant to 25 Pa. Code § 94.22 the existing receiving collection, and conveyance system had a projected hydraulic overload. **As required by Section J of the Component 3, please provide a letter from Bucks County Water and Sewer Authority (BCWSA) granting allocations to this project consistent with their Connection Management Plan (NICMP) for Neshaminy Interceptor.** Please also provide a copy of Northampton Township's portion of the NICMP that lists this project.

We note that this project is currently listed on the Township's portion of BCWSA's NICMP for a 2016 connection. Please be advised that BCWSA has not yet released 2016 connections on their NICMP for the Township.

BCWSA noted on their attached flows table that increased capacity will be provided to the 33-inch and 36-inch portions of the Neshaminy Interceptor from the future Interceptor Lining Project. Please be advised that this lining project does not currently have Act 537 planning approval, nor have permits been issued for this project.

Please note that the DEP review period of 60 days does not start until a complete submission is received. All resubmissions must be submitted by the municipality, and all deficiency items must be submitted together. A cover letter signed by the municipal secretary will be accepted by the DEP as documentation that the municipality has determined the resubmission to be consistent with Act 537 sewage planning requirements. Please provide responses to all of the comments above by September 1, 2016.

According to Northampton Bucks, the letter from Bucks County Authority granting allocations cannot be obtained until it enters into the supplemental agreement referenced in the June letter. Northampton Bucks contends that the supplemental agreement, which is required in order to have the 2016 connections released, is contrary to the terms of the original agreement Northampton Bucks entered into with Bucks County Authority in 1965. If the connections are not released, Northampton Bucks' ability to service the Township's new developments is jeopardized, including the Russell Tract Subdivision, which Northampton Bucks says is listed in the CMP for five sewage connections.

Beginning with the June letter, the Department contests its appealability because it argues that the letter merely acknowledges receipt of Bucks County Authority's revisions to the CMP and does nothing more. The Department asserts that it has no approval authority regarding CAPs or CMPs under the Chapter 94 regulations for projected overloads. The Department contrasts Section 94.21 (relating to existing overloads) with Section 94.22 (relating to projected overloads). The Department points to language in Section 94.21 that requires a sewerage facilities permittee, in response to a determination of an existing overload, to submit a CAP to the regional office "for review and approval of the Department." 25 Pa. Code § 94.21(a)(3). The CAP must also include a program for controlling new connections to the system, which we presume to be a CMP. *Id.* The Department notes that the "review and approval" language is absent from the requirements in Section 94.22 for projected overloads.[3]

However, simply because the projected overload regulation does not specify that the Department must approve a CAP and its associated CMP does not necessarily mean that the Department lacks all authority or discretion to approve CAPs and CMPs in the context of a projected overload. Section 94.22 requires a permittee's CAP to address the steps to be taken to prevent sewerage facilities from actually becoming overloaded, and it mandates that, if the steps include "planning, design, financing, construction and operation of sewerage facilities, the facilities shall be consistent" with an approved official plan and with the requirements of the

[3] We note, however, that at one point in the Chapter 94 regulations there is reference to an "approved CAP" that does not distinguish between Sections 94.21 and 94.22:

> A sewer extension may not be constructed if the additional flows contributed to the sewerage facilities from the extension will cause the plant, pump stations or other portions of the sewer system to become overloaded or if the flows will add to an existing overload **unless the extension is in accordance with an approved CAP submitted under § 94.21 or § 94.22** (relating to existing overload; and projected overload) or unless the extension is approved under § 94.54 (relating to sewer line extension).

25 Pa. Code § 94.11(a) (relating to sewer extensions) (emphasis added).

Department and the federal government. 25 Pa. Code § 94.22(1). The Department does not tell us what happens if a permittee submits a CAP that does not satisfy these requirements. Pursuant to the Department's position, it seems that the Department would likewise have no authority to *disapprove* a CAP or CMP.

Indeed, the Department asserts in its motion that it is "bound by" Bucks County Authority's decisions on how to rectify the state of projected overload at the Neshaminy Interceptor, which is a somewhat curious position to take given the broad authority the Department has to regulate sewage facilities under the Sewage Facilities Act, 35 P.S. §§ 750.1 – 750.20. *See* 35 P.S. § 750.10 (powers and duties of the Department). Under the Department's conception, it would appear that the Department has no power to take any action other than offering mere hints and suggestions on a CAP until there is an existing overload. Presumably, even if the measures outlined by a permittee in a CAP and CMP in response to a projected overload are obviously insufficient to correct the problem, the Department is without recourse until things get worse and a facility becomes actively overloaded. To take this approach to its ultimate conclusion, one could theoretically submit almost anything in response to a projected overload and the Department would "accept" it.

We are not convinced that the Department is without authority to approve or disapprove projected overload CAPs and CMPs, and we are not completely convinced that what the Department calls an "acceptance" of Bucks County Authority's CMP revisions is not in reality an "approval." Notably, despite the Department's arguments in its motion to the contrary, the Department's own letter from 2012 advising of the projected overloads in the Neshaminy

Interceptor and Totem Road Pump Station and requesting a CAP and CMP stated that the CAP must undergo the "review and written approval of the Department."[4]

If the Department does review and approve CAPs and CMPs for projected overloads, then it would seem to follow that subsequent revisions to those plans would also undergo a certain level of review and approval. Although the Department insists in its motion that it did not undertake any substantive review of the CMP revisions at issue here, it appears from the June letter that the revisions did undergo at least some level of review since there are six detailed recommendations for what should be included in a future revision. All of this goes to show that it is far from clear that the Department did not take a final, appealable action adversely affecting Northampton Bucks in the June letter. If the Department did in fact approve the revisions to the CMP, then the basic question we are presented with in this appeal is whether it should have approved the revisions. If the Department did not approve the revisions, then we expect that to become clearer as we move forward and the record is further developed.

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[4] This letter provides in part:

> [T]he Department's review of information included in the 94 Reports for the Neshaminy Interceptor Service Areas Tributary to the Northeast Philadelphia Water Pollution Control Plant, flow projections for the tributary municipalities, as well as additional information submitted by Mr. Swenson, establishes that, at a minimum, a projected hydraulic overload exists in portions of the Neshaminy Interceptor and at the TRPS [Totem Road Pump Station].
>
> Therefore, BCWSA must, as the permittee, comply with 25 Pa. Code § 94.22 as follows:
>
> 1. Submit to the Regional Office not later than September 21, 2012, **for the review and written approval of the Department**, a written Corrective Action Plan (CAP) setting forth steps to be taken by the permittee to prevent the sewerage facilities (TRPS and the Neshaminy Interceptor) from becoming hydraulically overloaded.…
> 2. BCWSA must also, not later than September 21, 2012, submit a Connection Management Plan (CMP) in writing to the Department. This CMP will enable BCWSA to limit new connections to and extensions of the sewerage facilities based upon remaining available capacity under a plan submitted in accordance with this section.

(DEP Ex. D) (emphasis added).

In contrast, the appealability of the July letter is more clear cut, and we find that it does not constitute a final, appealable action. According to Northampton Bucks, the June and July letters are entwined. The July letter in its third comment requires Northampton Township to include with its resubmitted planning module a letter from Bucks County Authority granting allocations consistent with the now-revised CMP. Northampton Bucks argues that acquiring this letter necessitates its execution of the supplemental agreement referenced in the June letter that it opposes. Therefore, according to Northampton Bucks, the Department has conditioned the completeness of the Township's planning module for the Russell Tract Subdivision on obtaining a letter from Bucks County Authority granting sewage allocations consistent with the CMP, which is in turn contingent upon Northampton Bucks entering into the supplemental agreement. Phrased more simply, in Northampton Bucks' view the Department in its July letter is in effect mandating that Northampton Bucks execute the supplemental agreement before the Township's planning module will be considered complete.

The Department contends that the July letter simply notifies Northampton Township of administrative and technical deficiencies in its submitted planning module that prevent the module from being considered complete. The Department asserts that it is an intermediate step in the review process that provides the Township an opportunity to correct the module and supply the missing information, and that the letter does not deny the planning module. The Department argues that the July letter is interlocutory, and thus not a final, appealable action. The Department says that any allegedly aggrieved party—whether the Township, Northampton Bucks, or anyone else—must await the Department's final decision on the module before filing an appeal. We agree with the Department.

We dealt with a very similar situation in *Bucks County Water & Sewer Authority v. DEP*, 2013 EHB 659, which once again involved the Neshaminy Interceptor and Totem Road Pump Station. In *Bucks County*, Newtown Township submitted a planning module and, like here, the Department issued a letter stating that the module was "administratively and technically incomplete." The Department's letter identified seven items that needed to be addressed before the module would be considered complete.[5] We determined that the letter was not a final action of the Department because it was nothing more than one intermediary step in the sometimes long and extensive review process that always involves a certain amount of interplay between the Department and the applicant. *Bucks County*, 2013 EHB 659, 662 (quoting *Central Blair Cnty. Sanitary Auth. v. DEP*, 1998 EHB 643, 646).

We likened the Act 537 planning process to the process of pursuing a permit, and concluded that there was nothing intrinsically different about the Act 537 process than what we had held were interlocutory decisions in the permitting context:

> Like a permit application, an Act 537 Plan revision must meet statutory and regulatory requirements, contain all necessary components, and satisfy one or more reviews by the Department before it can be approved and the municipality can undertake the actions encompassed by the plan revision. If the Department finds during the review process that one or more of the statutory or regulatory requirements are not met, or that the submission is incomplete, the Department sends a letter, much like the letter at issue, informing the municipality of the deficiency and providing an opportunity to correct it. *See* 35 P.S. § 750.10(19).
>
> The component decisions are analogous to the many subsidiary decisions the Department makes along the way in the course of reviewing a permit application. The Department's letter informing Newtown Township that its proposed revision was administratively and technically incomplete is essentially only "one small

[5] As an aside pertaining to our discussion above, the letter at issue in *Bucks County* mentioned the projected hydraulic overload at the Neshaminy Interceptor and Totem Road Pump Station and then stated that Bucks County Authority "has submitted a CAP to DEP, and it is under review. **Until the review is complete and the submission is deemed consistent with 25 Pa. Code Section 94.22**, we cannot consider the proposal to be consistent with 25 Pa. Code Section 71.21(a)(5)(i)(B) and the project will remain administratively incomplete." *Bucks County*, 2013 EHB 659, 660 (emphasis added). It again appears that the Department has in the past expressed a position that it does in fact review and weigh in on CAPs submitted in response to projected overloads.

> part of a much more complex review." *HJH, LLC v. DEP*, 949 A.2d 350, 353 (Pa. Commw. Ct. 2008). Therefore, in keeping with our well-established precedent, we require the prospective appellant to wait until the Department makes a final decision, in this case on an Act 537 Plan revision, before filing an appeal. *Lower Salford Twp. Auth. v. DEP*, 2011 EHB 333, 338. This is true not only for the recipient of the letter but for any third party allegedly affected by the letter as well.

*Bucks County*, 2013 EHB at 662-63.

Northampton Bucks has offered little argument distinguishing *Bucks County* from the situation before us now, and we do not see any reason to distinguish the two cases. Apart from the module-specific comments and deficiencies, the July letter and the letter in *Bucks County* follow the same format. Both letters request responses to the comments from the municipality submitting the planning module without making a final decision on the merits of the module. The letters specify that the Department's substantive review of a planning module does not begin until a complete submission is received.

It is also important to note that the Department's letter here was addressed to Northampton Township, not the Northampton Bucks County Municipal Authority. The Township did not appeal the July letter, and it has not participated in this appeal. We must assume that the Township's planning process is still underway, and that it will eventually culminate in a final action of the Department. Until that time an appeal is premature. Nevertheless, to the extent that Northampton Bucks is aggrieved by the Department's requirement of entering into the supplemental agreement before securing the release of connections for 2016, the rights of Northampton Bucks seem to be preserved in the appeal of the June letter.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **NORTHAMPTON BUCKS COUNTY MUNICIPAL AUTHORITY** | : | |
| **v.** | : | **EHB Docket No. 2016-106-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BUCKS COUNTY WATER AND SEWER AUTHORITY, Intervenor** | : | |

**O R D E R**

AND NOW, this 15th day of February, 2017, it is hereby ordered that the Department's motion to dismiss is **granted in part and denied in part**. Northampton Bucks County Municipal Authority's appeal with respect to the July 1, 2016 letter 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: February 15, 2017**

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **PREMIER TECH AQUA and ANUA INTERNATIONAL, LLC** | : | |
| **v.** | : | **EHB Docket No. 2016-007-M** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NORWECO, INC., Permittee** | : | **Issued: February 17, 2017** |

**OPINION AND ORDER ON**
**APPELLANTS' MOTION FOR SUMMARY JUDGMENT**

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Board denies the Appellants' Motion for Summary Judgment in this third-party appeal. Genuine issues of material fact exist, and there are factual issues subject to competing expert analysis. A hearing is needed to resolve the issues of material fact and disputes among the expert witnesses.

**O P I N I O N**

The above captioned appeal was filed by Orenco Systems, Inc., Eljen Corporation, Premier Tech Aqua and Anua International, LLC ("Appellants") challenging a Department decision to list an onlot alternative technology of Norweco, Inc. ("Norweco") as an approved alternative onlot sewage disposal technology. Orenco Systems, Inc. and Eljen Corporation have both withdrawn their appeals.

On December 10, 2015, the Department's Bureau of Point and Non-Point Source Management issued Norweco, Inc. an "Alternate Technology" classification for its Norweco Singulair 960 & Hydro-Kinetic Bio-Film Reactor. Appellants appealed the classification. They

allege that the Department "operates an extra-regulatory *ad hoc* program wherein it pre-approves Alternate Systems submitted by manufacturers" that has resulted in dissimilar treatment between the Appellants and Norweco. Appellants state that they expended significant resources to obtain approvals for their systems while Norweco, a competitor, had its system approved for an "Alternate Technologies" classification without having to undergo lengthy and expensive field testing. Further, Appellants allege that to the best of their knowledge, Norweco did not submit an application to the Department for an approval under its program, nor did it submit testing data and other information as required of other On-Lot Disposal Systems (OLDS) manufacturers. They argue that the Norweco system would not have been approved for statewide use had the Department reviewed field operating data and required Norweco to meet the requirements of the Department's Experimental Onlot Wastewater Technology Verification Program ("TVP"). Appellants also suggest that because it has never been proven in the field, Norweco's system may result in pollution of water of the Commonwealth. Ultimately, Appellants argue that the Department's classification of Norweco's system was arbitrary and disparate treatment, arbitrary and capricious, and abuse of discretion, and contrary to law.

Norweco and the Department filed a Joint Motion to Dismiss on March 9, 2016 in which they identified two reasons to grant the Joint Motion. First, they asserted that the Appellants lack standing to challenge the Department's decision because the Appellants are "merely economic competitors" of Norweco and economic competitors lack standing to challenge Department decisions where they only allege competitive disadvantage or harm to their economic interests. Second, Norweco and the Department contended that the Board lacks jurisdiction over the listing decision because the decision is not a final action of the Department that is appealable to the Board. They argued that the listing does not affect a person's rights, privileges or immunity,

duties, liabilities or obligations, and therefore the Board lacks jurisdiction for the appeal under 35 P.S. § 7514(c) and 25 Pa. code § 1021.2(a).

The Appellants filed a Response to the Joint Motion to Dismiss on March 17, 2016 in which they disagreed with both arguments in the Joint Motion. On the issue of lack of standing, the Appellants asserted that a motion to dismiss is not the proper vehicle to challenge an appellant's standing. According to the Appellants, issues about standing cannot be resolved at the initial pleading stage of an appeal in the context of a motion to dismiss. On the issue of the nature of the Department's listing action, the Appellants argued that it was a final action affecting their rights, privileges and immunities and that, therefore, the Board has jurisdiction over a challenge to the listing under 35 P.S. § 7514(c).

On the issue of standing, the Board agreed with Appellants that at a preliminary stage of litigation, a motion to dismiss is not the appropriate vehicle to raise a standing challenge. *See Orenco Systems, Inc. et. al. v. DEP*, EHB Docket No. 2016-007-M, Slip Op. at 3 (Opinion and Order, Jul. 6, 2016), citing *Robert B. Mayer v. DEP*, 2015 EHB 400, 401. On the jurisdictional issue, the Board found that without a better understanding of the regulatory context of the Department's action to approve and list Norweco's Singulair system, it was unable to grant the Permittee's Motion to Dismiss based upon lack of jurisdiction.[1] The Board further found that the limited record before it did not allow the Board to determine whether the approval and listing are sufficiently general permit-like to allow the Board to resolve the jurisdiction issue that Norweco has raised in its motion to dismiss. Without a better understanding of the regulatory context of the challenged decision, the Board denied the Joint Motion to Dismiss.

[1] Under the regulatory language at 25 Pa. Code § 73.72(b), the "Department will determine if classification as an alternative system is appropriate and will provide review comments to the sewage enforcement officer." If an A-OLDS is preapproved and listed, then it appears that the Department's role under this regulation will be curtailed.

On November 23, 2016, the Appellants and the Department filed Cross-Motions for Summary Judgment. In its Motion, Appellants argues that the Department has violated the Sewage Facilities Act ("SFA"), 35 P.S. §§ 750.1-750.20, and has abused its discretion or acted arbitrarily in its classification of Norweco's system as an "advanced" alternate sewage disposal system. Both the alleged violation of the SFA and the alleged abuse of discretion and arbitrary action resulted in Appellants' due process rights being violated and, as a result, Norweco received an economic windfall.

First, Appellants argue that DEP has created a second, extra-regulatory *ad hoc* classification process which generates a blanket classification of a particular technology and publishes a statewide standard consisting of the approved design, construction, installation, and operational criteria for the product. Appellants assert that once a technology meets the criteria in the standard, it can be approved for use by a local Sewage Enforcement Office ("SEO") without any further action or review by the Department. The Appellants' argument is that this procedure confers a substantial benefit onto the manufacturer of the technology because the Department's general classification eliminates the case-by-case Department review anticipated by the regulations. 25 Pa. Code § 73.72.

Appellants contend that the SFA requires the Department to notify the Sewage Advisory Committee ("SAC") of all "proposed rules, regulations, standards, and procedures . . . of the Department pursuant to this Act." 35 P.S. § 750.4(b). According to the Appellants, the classification process formerly included the notification of SAC of the proposed new standards as required under the SFA. However, beginning in 2014, Department staff began to publish final standards without giving the SAC notice. The Appellants contend that Norweco's Singulair

technology was classified without the statutorily required notice. Appellants assert that this action was unlawful and a violation of the SFA.

Second, Appellants argue that the Department is operating its standard-setting process without sufficient written procedures. Appellants assert that because the criteria for Alternate OLDS classification are regulatory, the Department's process must include consideration of all of the required elements for such classification. It is the Appellants' position that the Department has not done so here. Rather, the Department classified Norweco's technology without fully understanding it.

Appellants also assert that the Norweco system is the first of its kind that the Department has approved. It lacks a final effluent filter, something which the Department initially required and then later decided not to require in the final approved classification. Appellants contend that the Department engineer who reviewed Norweco's design self-admittedly lacked knowledge regarding the principles of solid settling or generation and that no testing was done on the unit to demonstrate how solids accumulation is addressed. The Appellants conclude that because effluent total suspended solids ("TSS") control and solids storage are criteria required to be considered by the regulations, the Department's review of the technology without consideration of these issues was an abuse of discretion.

Third, Appellants argue that the Department failed to follow its own policy when it made a procedural error in its decision to publish the standard. Appellants allege that the Department knew that multiple published studies demonstrated that Norweco's limited testing results were inconclusive with respect to how the technology operated when installed and operational for extended periods of time. Appellants further assert that the NSF-40 testing that was done was inapplicable to "Advanced" treatment systems like Norweco's. Appellants also point out that the

Department's only policy document includes a specific provision that requires field testing in situations where any question exists about the validity of standardized testing. Therefore, the Appellants argue, because the Department has refused to approve similar aerobic treatments systems in the past, and because studies demonstrate that this technology and Singulair systems in particular have exhibited performance problems, the Department should have followed its published policy before publishing approved standards. Appellants contend that this oversight was especially problematic because the Department required expensive field testing of the Appellants' more conventional technology in the past. Therefore, in addition to there being a technical failure to properly review the design technology, and a procedural failure to evaluate reports of field malfunctions, the Department also failed to administer the program in a fair, uniform, and rational manner.

On December 22, 2016, the Department filed its Response to Appellants' Motion for Summary Judgment in which it argues that it adhered to proper regulation and to its guidance document when classifying Norweco's treatment technology. The Department further claims that Appellants have failed to include a basis and citations for their allegations and that there are numerous, complicated disputed issues of material fact, making summary judgment inappropriate.

First, the Department argues that its classification system is guided by the regulations at 25 Pa. Code § 73.72, which directs the Department to "determine if classification as an alternate system is appropriate and provide review comments to the sewage enforcement officer." The regulation provides the Department with a list of criteria to consider and the SEO "shall consider the comments of the Department" before issuing a permit for an alternative sewage system. The Department argues that it provides its comments in the form of a generic classification and it has

done so for decades. It further asserts that it follows the Department's TVP, which is the current guidance document and has been in place since 2004. The Department claims that prior to the TVP, it has used other methods for evaluating technology and that its procedures have evolved as it has learned from experience and science, and as testing protocols have improved. It contends that its decision to classify Norweco's system was made after it looked at necessary factors and followed the TVP.

Second, the Department argues that Appellants are lacking in citations for their list of 148 undisputed facts and their exhibits but, lack of factual basis aside, the Appellants' allegations involve substantive technical issues that involve disputed issues of material fact and a "battle of the experts." The Department contends that the disputed issues, involving technical issues, are inappropriate for resolution in a motion for summary judgment.

Third, the Department takes issue with the Appellants' interpretation of the word "standard," and asserts that they incorrectly use it to argue that the SFA requires the Department to submit to the SAC every classification decision that it makes. The Department's position is that the standards are a general guide and that each individual alternative onlot classification is not, in and of itself, a "standard" that requires SAC review. The Department contends that although it has made the decision to solicit comments from the SAC in the past at the classification level, such an action is not statutorily required.

Fourth, the Department denies the validity of the Appellants' claims regarding procedural errors. The Department again draws attention to a lack of citation or basis for these claims and suggests that the alleged errors can be put down to Appellants' disagreement with the Department or their displeasure that the process they went through for classification was different than what Norweco went through. The Department asserts that Appellants make

incorrect assumptions about the classification process and fail to mention that one of their systems was classified as an alternate system in the same manner as was Norweco's system – by relying upon test center data.

Finally, the Department again argues that summary judgment is inappropriate because there are numerous issues in the case that rely on facts disputed by the parties and will require expert testimony. The Department points out that where "volumes of exhibits and export reports" are required in support of a motion for summary judgment, summary judgment is inappropriate. It asks that the Board therefore deny Appellants' Motion for Summary judgment. For the reasons set forth below, the Board agrees with the Department and denies Appellants' Motion.

The Board is empowered to grant summary judgment in appropriate cases. 25 Pa. Code § 1021.94(a); *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B, slip op. at 3 (Opinion and Order, June 6, 2016). The standard for considering summary judgment motions is set forth at 25 Pa. Code § 1035.2, which the Board has incorporated into its own rules. 25 Pa. Code § 1021.94(a)(a). There are two ways to obtain summary judgment. First, summary judgment may be available if the record shows that there are no genuine issues of any material fact as to a necessary element of the cause of action or defense and the movant is entitled to prevail as a matter of law. 25 Pa. Code § 1035.2(1). Second, summary judgment may be available

> [i]f after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

25 Pa. Code § 1035.2(2). Under the first scenario, the record must show that the material facts are undisputed. Under the second scenario, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a *prima facie* case. *See* Note to Pa.R.C.P. No. 1035.2.

In this appeal, Summary Judgment will be "proper where the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Global Eco-Logical Service, Inc. v. DEP*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001). When deciding summary judgment motions, we view the record in the light most favorable to the nonmoving party, and we resolve all doubts as to the existence of a genuine issue of fact against the moving party. *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 893. Summary judgment usually only makes sense when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *PQ Corporation v. DEP*, EHB Docket No. 2015-198-L, slip op. at 4 (Opinion and Order, Nov. 17, 2016); *Friends of Lackawanna v. DEP and Keystone Sanitary Landfill, Inc., Permittee*, EHB Docket No. 2015-063-L, slip op. at 2 (Opinion and Order, Sept. 2, 2016); *Citizen Advocates United to Safeguard the Env't, Inc. ("CAUSE") v. DEP*, 2007 EHB 101, 106. Additionally, we have held that summary judgment is rarely appropriate for resolving issues that are the subject of competing expert analyses. *Sludge Free UMBT v. DEP*, 2015 EHB 469, 493.

Here, the Board finds that there are significant genuine issues of material fact in dispute and some of the disputed issues are subject to competing expert witness analysis. The Appellants and the Department disagree on the characterization of the alternate systems classification process. The Appellants assert that there are no regulations that give the

Department the authority to give blanket approval of Alternate OLDS for use throughout the Commonwealth without an individual review of each system. They suggest that the procedure in place is *ad hoc* and enables the Department to unilaterally approve applications for Alternate OLDS systems. The Department contradicts this and states that 25 Pa. Code § 73.3(c) gives them the requisite authority and that the system is not *ad hoc*. Rather, it follows a 2004 guidance document and following classification, the SEO must grant a permit before the technology can be installed and used. Appellants argue that the Department is flouting procedure by not submitting every classification to the SEO for review. The Department says that there is no requirement that it do so. The Appellants and the Department also disagree about the amount of money expended by Appellants in order to satisfy the Department's field testing requirement. The Appellants state that Premier Tech Aqua spent approximately $125,000 and Anua spent approximately $432,000. The Department argues that Premier Tech Aqua is missing documentation to support its claim that it spent $125,000 on field testing. It further alleges that the documentation that Appellants do have shows that much of what Premier Tech Aqua spent was spent on data collected prior to the Department's involvement. The Department also contradicts Appellants' allegation that Anua spent $432,000. The Department contends that it does not and did not ever require field testing from out of state and Anua's expense was due to conducting field testing outside the boundaries of Pennsylvania.

The Board also agrees with the Department that summary judgment is not appropriate where issues subject to competing expert analysis exist and that such a situation exists here. The Appellants make arguments regarding the technological capabilities of Norweco's classified system, asserting that the Department failed to understand that the system generates solids, has no filter to remove those solids but rather relies on settling, and that because of this failure to

account for solids, the Department did not consider the accumulation of them over time, something that could result in system failure. The Appellants also assert that the Department had knowledge regarding reported deficiencies in units like Norweco's, but chose to ignore those reports and not require field testing of Norweco's system. The Department denies these allegations and states that it considered solids generation and accumulation and concluded that solids generation would be minimal. These are all technical issues which may require expert witness testimony and, as such, the Board finds that summary judgment is inappropriate here.

Accordingly, because there are genuine issues of material fact and because there are issues subject to competing expert witness opinions, the Board issues the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **ORENCO SYSTEMS, INC., ELJEN CORPORATION, PREMIER TECH AQUA, AND ANUA INTERNATIONAL, LLC** | : | |
| **v.** | : | **EHB Docket No. 2016-007-M** |
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**O R D E R**

AND NOW, this 17th day of February, 2017, upon consideration of Appellants' Motion for Summary Judgment and the Department's Response, it is hereby ordered that the motion for summary judgment is **denied.**

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: February 17, 2017**

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

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**OPINION AND ORDER ON**
**DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT**

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Board denies the Department's Motion for Summary Judgment in this third-party appeal. Issues of material fact exist here and the Department has not met its burden to support its assertion that Appellants do not have standing. At this stage of litigation, the Board refrains from determining whether Appellants have standing because there are issues of material fact that prevent the Board from granting the Department's Motion.

**O P I N I O N**

The above captioned appeal was filed by Orenco Systems, Inc., Eljen Corporation, Premier Tech Aqua and Anua International, LLC ("Appellants") challenging a Department decision to list an onlot alternative technology of Norweco, Inc. ("Norweco") as an approved alternative onlot sewage disposal technology. Orenco Systems, Inc. and Eljen Corporation have both withdrawn their appeals.

On December 10, 2015, the Department's Bureau of Point and Non-Point Source Management issued Norweco, Inc. an "Alternate Technology" classification for its Norweco

Singulair 960 & Hydro-Kinetic Bio-Film Reactor. Appellants appealed the classification. They allege that the Department "operates an extra-regulatory *ad hoc* program wherein it pre-approves alternate systems submitted by manufacturers" that has resulted in dissimilar treatment between the Appellants and Norweco. Appellants state that they expended significant resources to obtain approvals for their approved systems while Norweco, a competitor, had its system approved for an "Alternate Technology" classification without having to undergo lengthy and expensive field testing. Further, Appellants allege that to the best of their knowledge, Norweco did not submit an application to the Department for an approval under its program, nor did it submit testing data and other information as required of other On-Lot Disposal Systems (OLDS) manufacturers. They argue that the Norweco system would not have been approved for statewide use had the Department reviewed field operating data and required Norweco to meet the requirements of its Experimental Onlot Wastewater Technology Verification Program ("TVP"). Appellants also suggest that because it has never been proven in the field, Norweco's system may result in pollution of water of the Commonwealth. Ultimately, Appellants argue that the Department's classification of Norweco's system arbitrary and capricious, an abuse of discretion, and contrary to law.

Norweco and the Department filed a Joint Motion to Dismiss on March 9, 2016 in which they identified two reasons to grant the Joint Motion. First, they asserted that the Appellants lack standing to challenge the Department's decision because the Appellants are "merely economic competitors" of Norweco and economic competitors lack standing to challenge Department decisions where they only allege competitive disadvantage or harm to their economic interests. Second, Norweco and the Department contended that the Board lacks jurisdiction over the listing decision because the decision is not a final action of the Department that is appealable to the

Board. They argued that the listing does not affect a person's rights, privileges or immunity, duties, liabilities or obligations, and therefore the Board lacks jurisdiction for the appeal under 35 P.S. § 7514(c) and 25 Pa. code § 1021.2(a).

The Appellants filed a Response to the Joint Motion to Dismiss on March 17, 2016 in which they disagreed with both arguments in the Joint Motion. On the issue of lack of standing, the Appellants asserted that a motion to dismiss is not the proper vehicle to challenge an appellant's standing. According to the Appellants, issues about standing cannot be resolved at the initial pleading stage of an appeal in the context of a motion to dismiss. On the issue of the nature of the Department's listing action, the Appellants argued that it was a final action affecting their rights, privileges and immunities and that, therefore, the Board has jurisdiction over a challenge to the listing under 35 P.S. § 7514(c).

On the issue of standing, the Board agreed with Appellants that at a preliminary stage of litigation, a motion to dismiss is not the appropriate vehicle to raise a standing challenge. *See Orenco Systems, Inc. et. al. v. DEP*, EHB Docket No. 2016-007-M, Slip Op. at 3 (Opinion and Order, Jul. 6, 2016), citing *Robert B. Mayer v. DEP*, 2015 EHB 400, 401. On the jurisdictional issue, the Board found that without a better understanding of the regulatory context of the Department's action to approve and list Norweco's Singulair system, it was unable to grant the Permittee's Motion to Dismiss based upon lack of jurisdiction.[1] The Board further found that the limited record before it did not allow the Board to determine whether the approval and listing are sufficiently permit-like to allow the Board to resolve the jurisdiction issue that Norweco has

[1] Under the regulatory language at 25 Pa. Code § 73.72(b), the "Department will determine if classification as an alternative system is appropriate and will provide review comments to the sewage enforcement officer." If an A-OLDS is preapproved and listed, then it appears that the Department's role to review systems on a case-by-case basis under this regulation will be curtailed.

raised in its motion to dismiss. Without a better understanding of the regulatory context of the challenged decision, the Board denied the Joint Motion to Dismiss.

On November 23, 2016, the Appellants and the Department filed Cross-Motions for Summary Judgment. In its Motion, echoing the Joint Motion to Dismiss, the Department argues that the Appellants have no standing to bring their case and again emphasizes that its classification is not "ad hoc" and is allowed under the regulations. The Department states that Appellants have provided insufficient evidence of any sort of harm to them stemming from the Department's classification of their competitor Norweco, Inc.'s Singulair 960 & Hydro-Kinetic Bio-Film Reactor as an alternate sewage system under 25 Pa. Code § 73.72.

In its Motion the Department argues that the Appellants have no substantial, direct, or immediate interest in the Department's action to support their standing. First, it argues that the Appellants' alleged financial harms are speculative and lacking in evidentiary basis. To support this contention, the Department points to what it characterizes as "speculative and vague economic harms," stating that such allegations "must be capable of proof at trial." The Department analogizes the economic issues in the instant appeal to those in *Matthews Int'l Corp. v. DEP*, 2011 EHB 402, where the Board found that an appellant's claim that it would "sustain financial harm and a competitive disadvantage" was insufficient and did not fall under the "zone of interest" of the Air Pollution Control Act. In *Matthews Int'l Corp.*, the Board determined that the appellant did not have standing because of its generalized allegations of economic harm and the Air Pollution Control Act's lack of protection of economic interests. The Department draws a parallel between the vague economic allegations in *Matthews Int'l Corp.* and no statutory protection of economic interests, and what it argues are the Appellants' vague economic harms here and the lack of protection for economic interests provided by the Sewage Facility Act.

Second, the Department argues that the Appellants' interest is not substantial because it fails to exceed the interests of the public. To this end, the Department cites *William Penn Parking Garage, Inc. v. City of Pittsburgh*, which defined "substantial interest" as an interest that has "substance – there must be some discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). The Department's position is that Appellants have neither shown that Norweco's system would be permitted while their own products would not be, nor provided evidence that they suffered any particularized harm because of the Department's classification of Norweco's system. The Department's view is that Appellants' interest in the case is the same as that of their fellow citizens, who have a generalized interest in the alternate systems classifications providing a list of effective technologies available for permitting.

Third, the Department argues that Appellants' interest is not immediate because their alleged harm is based on hypothetical future events. The Department asserts that the Appellant's interest cannot be immediate because their concerns around economic competition are based on future events that may never occur. Relying on *Strasburg Association v. Newlin Township*, 415 A.2d 1014 (Pa. Cmwlth. 1980), a Commonwealth Court case that overturned a Board decision, the Department draws a parallel between the Appellants and Newlin Township. The court in *Strasburg* determined that it would not extend the principles of standing to speculation in order to encompass the Township's interest in the results of hypothetical poor management or insufficient financial commitment from landfill ownership. The Department's position is that Appellants' concerns in this appeal are similarly remote and hypothetical and are therefore not immediate.

Fourth, the Department argues that the Appellants' interest is not direct. Here, the Department points to a lack of causal connection between the Appeal and the Appellants' alleged economic harm as the basis for this argument. The Department contends that even if the Appellants could prove actual evidence of the expense undertaken for field testing, they still have been unable to demonstrate a causal connection between Norweco's classification and the money they spent on field testing. Further, the Department asserts that money spent on field testing out of the state is not causally connected to Norweco's classification in Pennsylvania. The Department's position is that the lack of causal connection precludes the Appellants from having a direct interest.

Fifth, the Department wishes the Board to dismiss Anua from the Appeal because Anua never performed field testing in Pennsylvania. The Department asserts that it does not require that field testing be performed outside of the state because it is unable to verify the conditions under which that data was collected, or may need to evaluate how certain technologies function in Pennsylvania's climate, geology, and soil types. The Department argues that because Anua performed field testing outside of the state, it truly has no harm – even speculative – and should be dismissed for lack of standing.

Finally, the Department argues that Appellants must show their standing before they can make arguments regarding due process and disparate treatment. The Department asserts that this is because any due process would be through the Board and "without concrete proof of economic harm, Appellants cannot bootstrap their way to standing based on allegations of disparate treatment and due process." The Department's position is that Appellants have not shown that they have standing and therefore may not put forth arguments of disparate treatment.

On December 8, 2016, Norweco filed a Memorandum of Law in Support of Department's Motion for Summary Judgment. Norweco's argument is that Appellants lack any genuine interest in the Department's listing of Norweco's technology other than to block Norweco from the Pennsylvania market for Appellants' benefit. Further, Norweco asserts that there is no evidence of disparate treatment between Appellants and Norweco and that this Appeal "is about trying to stifle market competition by erecting an economic 'moat' and keeping out the competition.'"

First, Norweco argues that Appellants have submitted only general allegations of financial harm and competitive disadvantage that are inadequate to confer standing on an economic competitor. Norweco asserts that Appellants do not have a direct and substantial interest in the subject of the litigation or a sufficiently close causal connection between the challenged action and the asserted injury for the interest to be immediate. The apparent crux of Norweco's argument is that Appellants' allegations of expending "substantial sums of money" to obtain the Department's classification of their system is too general to confer standing under even under *Pennsylvania Waste Industries Association v. DEP*, EHB Docket no. 2014-175-M, Slip Op. (Aug. 31, 2016). In making this argument, Norweco relied on the same analysis as did the Department in its Motion for Summary Judgment, focusing heavily on the lack of documentary evidence supporting Appellants' claim of financial interest and harm.

Second, Norweco, argues that there is no statutory or regulatory requirement that entities seeking to gain access to Pennsylvania's market for on-lot disposal systems incur identical cost to do so. Norweco's position is that the Appellents' purported desire to have all manufacturers entering the marketplace spend the same amount to obtain a listing from the Department is not only untenable, but also not mandated by either the Sewage Facilities Act or the attendant

regulations. Norweco also points to the fact that technologies and standards constantly evolve as support for why the Board should not be swayed by Appellants' argument of disparate treatment.

Third, and finally, Norweco argues that there are no statutory or regulatory requirements that applications for listing be submitted to and reviewed by the Department's Sewage Advisory Committee ("SAC"), resulting in the Appellants' having no substantial interest in the appeal. According to Norweco, Appellants argument that the submission of a proposed advanced technology to the SAC is a legal requirement for the listing of alternate on-lot disposal systems is not supported by the law. Norweco asserts that Appellants' interest in having all entities comply with the alleged legal requirements of the *ad hoc* approval program and SAC submissions is no different than the abstract interest of all citizens in having others comply with the law. Further, Norweco argues, SAC review is not a legal mandate. The Sewage Facilities Act, 35 P.S. § 750.4(b), states that the SAC shall have the opportunity to review rules, regulations, standards, and procedures, but says nothing about the Department's decisions to classify a particular technology as an alternate technology. Norweco submits that because there is no legal basis of law for the allegation that the Department's classification of Norweco's system is defective because the SAC did not review it, the Board should ignore this argument from the Appellants.

On December 14, 2016, the Appellants' submitted their Reply Brief in Opposition to the Department's Motion for Summary Judgment. The Appellants maintain that they do have standing in this matter. First, Appellants argue that the underlying cause of their appeal is not their competition with Norweco, but rather the "established fact" that they were required to undertake expensive field testing to obtain the substantial benefits of a Department "classification," while Norweco was not. The Appellants' contend that their interests are as Applicants seeking DEP action and that they are appealing an arbitrary action taken by the

Department which imposed substantially different criteria and costs on them than on Norweco, which was similarly situated and requesting the same action.

Appellants distinguish themselves from the appellant in *Matthews Int'l Corp.*, stating that they are not complaining that the Department is allowing a competitor into the marketplace. Instead, Appellants say that they are objecting to a disparate process that imposed costs onto them while imposing no such costs onto another applicant.

Appellants draw a parallel between their case that that addressed in *Pennsylvania Waste Industries Association* where the Department allowed one entity to accept and beneficially use drill cuttings without a permit, but required that Pennsylvania Waste Industries Association ("PWIA") or its member companies be subject to detailed regulatory requirements before they would be allowed to accept drill cuttings for disposal. Appellants argue that this is directly comparable to their situation where they were allegedly subjected to "onerous requirements" but Norweco was not.

Second, Appellants' argue that their interests are substantial and surpass the common interests of all citizens in procuring obedience to the law. Their reasoning rests largely on the Board's decision in *Pennsylvania Waste Industries* that PWIA and its members had a substantial interest because they had "an interest in the outcome of the challenge to the approval that surpasses the common interest of the public. PWIA members . . . have an interest in the fair and non-disparate implementation of [the regulatory program] requirements." *Pennsylvania Waste Industries Association v. DEP*, EHB Docket no. 2014-175-M, Slip Op. at 26 (Aug. 31, 2016). Appellants assert that while they expended hundreds of thousands of dollars to obtain the necessary field data demanded by the Department before the Department would list their products, Norweco expended nothing and achieved the same result according to the Appellants.

The Appellants refute the Department's claim that the Appellants did not suffer harm. Appellants point out that the Department does not dispute that the Appellants submitted extensive field testing, but rather argues that data obtained from out of state was either not required or not considered in issuing the classification. Additionally, the Appellants direct the Board's attention to an official document in which the Department states that it classified both of the Appellants' systems based on the field testing data that they submitted. The Appellants further argue that the Department's request to have Anua dismissed from the case because it did not submit field testing from Pennsylvania flies in the face of both the facts presented and the law, as the evidence demonstrates that the Department relied on the field data Anua obtained and submitted. Further, when Anua submitted its data, there was no policy in place that required all field data be from Pennsylvania, and the Department admitted that the program has evolved over time – the standards imposed on Appellants differ from those currently in use. Appellants further assert that because the TVP is a policy statement, not a regulation, there is no requirement that an applicant must strictly adhere to it and that such a claim "must fail as a matter of law."

The Appellants also emphasize that the case is not about monetary damages but about disparate treatment. The Department complains that the Appellants have failed to provide detailed and documented accounting of their costs and concludes that this lack of specificity should result in the Board's finding that Appellants have no standing in this matter. Appellants contend that the exact amount of money they expended is immaterial; what is material is that they complied with required field testing, and that data was submitted and relied upon by the Department. Appellants argue that whether the "cost of testing was $50,000 or $400,000" has no bearing on whether they suffered disparate treatment resulting in financial detriment. Appellants state that their interests are substantial "because [they] have an interest in the outcome of the

challenge to Norweco's approval that surpasses the common interest of the public." *PWIA*, *supra*, slip op. at 26.

Third, Appellants argue that their interests are direct because they have already spent money; thus, the harm has already occurred. In *Pennsylvania Waste Industries*, PWIA had a direct interest because its members expended considerable resources to comply with Department waste regulations. The Department's alleged failure to hold the permittee in that appeal to the same standards provided an unfair advantage. The Appellants assert that the analysis used in *Pennsylvania Waste Industries*, is the same as here.

Fourth, Appellants argue that their interests are immediate. They suggest that the Department has mischaracterized the appeal as being based solely upon unfair competition in the marketplace. Appellants argue that even if this were true, there would still be a disputed issue of material fact and under the summary judgment standard, all disputes of this nature must be resolved in favor of the non-moving party. Therefore, Appellants argue that the Department may not meet its burden on the disputed record before the Board. Additionally, Appellants assert that Department also mistakenly states that harm will only occur to the Appellants if Singulair successfully competes in the marketplace and sells its product. Appellants repeat that they have already suffered a harm, in the form of spending money for required field testing and either having the cost of their product go up or suffering reduced profits.

On December 29, 2016, the Department filed a Reply Brief in Support of Motion for Summary Judgment. In it, the Department again emphasized that the Appellants failed to come forward with evidence that demonstrates their interest in this case is substantial, direct or immediate. First, the Department revisits its argument that the Appellants failed to demonstrate a substantial interest. It dismisses Appellants' affidavit from former employees as insufficient

and not presenting a disputed issue of material fact sufficient to prevent the imposition of summary judgment in the Department's favor. The Department then argues that although the Appellants characterize themselves as Applicants seeking DEP action, the Appellants are not "applicants" for the purpose of this appeal. Norweco is the only applicant in this matter and complaints regarding the Appellants' path to classification in 2003 are not the issues in this case.

Additionally, the Department asserts that the inequity Appellants allegedly faced is inaccurate because it has classified many other technologies without requiring field testing. The Department also points out that neither Appellant expended resources to generate test center reports for their classification, but Norweco did. Finally, the Department asserts that Appellants' procedural due process argument do not provide their argument with additional clarity and, further, are lacking citations to applicable caselaw. Taken together, the Department argues that Appellants have not shown that they have a substantial interest.

Then, the Department argues that the fact that Appellants performed field testing, generally, also does not provide them with a substantial interest. Department contends that Appellants' disparate treatment argument makes no sense because if they are arguing that Norweco should conduct field testing under the TVP, their own field testing would not conform to the current guidance. The Department agrees that the TVP is a guidance document only and to that end the Department followed its regulations when Appellants' technologies were classified and it followed its regulations when Norweco's technology was classified. Therefore, the Department argues, Appellants do not have a substantial interest.

The Department's second argument is that Appellants failed to demonstrate in their Response that their interest is either direct or immediate. The Department argues that Appellants' expenditures were incurred, if at all, prior to 2003 and that those expenses "hardly

qualify as a direct interest in the Department's decision to classify Norweco's technology in 2015." Further, the Department argues that Appellants' concern about harm is premature at this stage because Appellants appealed a process that precedes permitting. The Department asserts that the classification does not, in and of itself, mean that any Norweco system will be permitted and installed and, therefore, "Appellants' interest is not immediate, but instead is at best on step removed."

The Department's final argument in its Reply Brief is that Appellants do not have standing under *PWIA*. It is the Department's view that the Board's decision in *PWIA* does not support Appellants' case. The Department argues that the PWIA made more specific claims in that the permitting process to which its members needed to adhere was "time consuming, expensive and burdensome." PWIA alleged that its competitor was allowed to accept and beneficially use drill cuttings without a permit – in violation of the Solid Waste Management Act. The Department draws a distinction between the Board finding that PWIA suffered disparate treatment and Appellants' case because PWIA presented far more specific evidence of its treatment and was actively required to obtain a permit when another entity was not. The Department argues that the Appellants have not provided either specifics about field testing or associated costs. They further point out that there is no regulatory requirement to do field testing. As such, the Appellants would need to provide a great deal more specificity as to how any law or regulation was inequitably applied in order to demonstrate standing. The Department's position is that they have not done so.

Finally, Norweco also filed its Reply Brief to Appellants' Brief in Opposition to Department's Motion for Summary Judgment on December 29, 2016. Norweco argues that both the applicable legal standards and Appellants' admissions confirm that Appellants lack standing

as economic competitors to bring this appeal under *McCutcheon v. DER*, 1995 EHB 6, and *Matthews Int'l Corp. v. DEP*, 2011 EHB 402. Norweco draws parallels between the Board finding that the appellants in each case lacked direct and immediate interest as economic competitors because the scope of economic harm was unsubstantiated and required speculation that included speculation as to whether the competing product at issue would ever be used in the market. Norweco expands its argument to include the holding of *PWIA*, which Norweco argues confirms the continued validity of *McCutcheon* and *Matthews Int'l Corp*. as well as supports its position that standing as an economic competitor requires more than general allegations of financial harm or competitive injury.

In sum, the Department and Norweco argue that the Board should grant the Department's Motion for Summary Judgment because (1) Appellants are appealing as competitors and, as such, do not have standing under *McCutcheon*, *Matthews Int'l Corp*., or *PWIA* because such economic interests are too speculative, lack in specificity, and are not direct, immediate, or substantial; and (2) even if Appellants are *not* appealing as competitors, their interest does not rise above that of the general public.

Appellants argue that the Board should deny the Department's Motion for Summary Judgment because they are not appealing as competitors but are appealing the Department's inconsistent execution of its classification system that resulted in Appellants' expenditure of significant resources, while Norweco expended no such resources. Appellants maintain that they are not looking for economic damages and are appealing procedural due process issues and, as such, *PWIA* supports their position For the reasons that follow, the Board agrees with the Appellants that there are outstanding issues of material fact and denies the Department's Motion for Summary Judgment.

The Board is empowered to grant summary judgment in appropriate cases. 25 Pa. Code § 1021.94(a); *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B, slip op. at 3 (Opinion and Order, June 6, 2016). The standard for considering summary judgment motions is set forth at 25 Pa. Code § 1035.2, which the Board has incorporated into its own rules. 25 Pa. Code § 1021.94(a)(a). There are two ways to obtain summary judgment. First, summary judgment may be available if the record shows that there are no genuine issues of any material fact as to a necessary element of the cause of action or defense and the movant is entitled to prevail as a matter of law. 25 Pa. Code § 1035.2(1). Second, summary judgment may be available

> [i]f after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

25 Pa. Code § 1035.2(2). The Appellants have the burden so both ways are applicable here. Under the first scenario, the record must show that the material facts are undisputed. Under the second scenario, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a *prima facie* case. *See* Note to Pa.R.C.P. No. 1035.2.

When deciding summary judgment motions, we view the record in the light most favorable to the nonmoving party, and we resolve all doubts as to the existence of a genuine issue of fact against the moving party. *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 893. Summary judgment usually only makes sense when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *PQ Corporation v. DEP*, EHB Docket No. 2015-198-L, slip op. at 4 (Opinion and Order, Nov. 17, 2016); *Friends of Lackawanna v. DEP and Keystone Sanitary Landfill, Inc., Permittee*, EHB Docket No. 2015-

063-L, slip op. at 2 (Opinion and Order, Sept. 2, 2016); *Citizen Advocates United to Safeguard the Env't, Inc. ("CAUSE") v. DEP*, 2007 EHB 101, 106. If an appellant's standing has been challenged, the appellant must come forward with evidence that supports its standing. *Pennsylvania Waste Industries Association v. DEP*, EHB Docket no. 2014-175-M, Slip Op. at 15 (Aug. 31, 2016). In evaluating a motion for summary judgment that raises standing, the Board looks to whether there are genuine issues of fact surrounding standing. *Id*. at 5.

Standing is not a jurisdictional matter under Pennsylvania law, unlike standing under federal law. *Id.* at 12. A person has standing if that person has a substantial, direct and immediate interest in the outcome of the appeal. *Tri-County Landfill, Inc. v. DEP*, 2014 EHB 128, 129 *citing Robinson Twp. v. Cmwlth. of Pa.*, 83 A.3d 901 (Pa. 2013) and *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009). To have a substantial interest, the concern in the outcome of the litigation must surpass "the common interests of all citizens in procuring obedience to the law." *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) *citing In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003). A direct interest requires a showing that the matter complained of caused harm to the party's interest. *Id.* An interest is immediate if the causal connection between the harm and interest is not remote or speculative. *Id*.

The Board has explained these principles as follows:

> In order to establish standing, the appellants must prove that (1) the action being appealed has had – or there is an objectively reasonable threat that it will have – adverse effects, and (2) the appellants are among those who have been – or are likely to be – adversely affected in a substantial, direct and immediate way [citations omitted]….The second question cannot be answered affirmatively unless the harm suffered by the appellants is greater than the population at large (i.e. "substantial") and there is a direct and immediate connection between the action under appeal and the appellant's harm (i.e. causation in fact and proximate cause)…

*Matthews Int'l Corp. v. DEP*, 2011 EHB 402, 405 *citing Pennsylvania Trout Unlimited v. DEP*, 2003 EHB 622, 625, and *Giordano v. DEP*, 2000 EHB 1184, 1185. Appellants are not required to prove their case on the merits in order to have a right to appeal, but they must show that they have more than subjective apprehensions. *Greenfield Good Neighbors v. DEP*, 2003 EHB 555, 566; *Giordano,* 200 EHB at 1186.

The Board's evaluation of a challenge to a party's standing varies depending upon when the challenge is presented. *Tri-County Landfill, Inc.*, 2014 EHB at 131. If standing is challenged in an appropriately timed motion for summary judgment, as is the case in this appeal, we look to whether there are genuine issues of fact regarding the issue of standing. *Id.* Once an appellant's standing has been adequately challenged, the appellant must come forward with evidence which supports their standing. *Borough of Roaring Springs v. DEP*, 2004 EHB 889; *Valley Creek Coalition v. DEP*, 1999 EHB 935. (Where a party moves for summary judgment alleging appellant lacks standing, the appellant must produce facts supporting its standing in response to the motion). In its Motion for Summary Judgment, the Department has adequately challenged Appellants' standing, and Appellants are required to come forward with facts to support their standing.

The Board finds that its decision in *Pennsylvania Waste Industries Association v. DEP* weighs more in favor of Appellants than it does the Department and Norweco. Like the appellant in *PWIA*, Appellants here have asserted specific competitive or financial interests, and like the appellants in *PWIA*, they have provided the Board with specific allegations to identify these specific competitive or financial interests. *Pennsylvania Waste Industries Association v. DEP*, EHB Docket no. 2014-175-M, Slip Op. at 25 (Aug. 31, 2016). The Appellants have witness affidavits regarding the expense undertaken to meet the Department's field testing

requirements. They allege that they were required to do field testing to receive the desired classification while Norweco was not.

Genuine issues of fact regarding the Appellants' standing exist. The Board disagrees with the Department's and Norweco's arguments and analysis because it appears that much of the Department's argument that Appellants lack standing is predicated on its insistence that Appellants' lack *enough* evidence of their alleged financial harms. This argument strikes the Board as something of a red herring. Appellant Premier Tech Aqua states that it spent approximately $125,000 to meet the Department's requirements to submit field testing data; Appellant Anua estimates that it spent approximately $432,000 to meet the Department's requirements. Appellants present witnesses and affidavits to support their estimations. Both estimates are admissible in a hearing, where the credibility of each would be gauged. The lack of documentation to support these assertions may affect the credibility of the witnesses' testimony, but at this stage of the appeal, there are disputed issues of material fact

The Department also argues that such harms are not within the "zone of interest," but under *PWIA*, we disagree. The "zone of interest" test is not an absolute rule. *Id*. at 23. As we wrote in *PWIA*, "[t]he standing inquiry is not, in all cases, limited to the "zone of interests" protected by statute." *Id*. As such, the Board recognizes that competitive or financial interests may support standing beyond that found in the narrow "zone of interest." *Id*. Here, as in *PWIA*, "Appellants may rely upon competitive or financial interests and harm to those interests to demonstrate standing, even if these interests are not within the 'zone of interest.'" *Id*. This is true as long as such interests demonstrate a substantial, immediate, and direct interest in the outcome of the appeal. *Id*.

Additionally, the Board disagrees that the Appellants interest is not greater than that of the general public. The Appellants have a more focused interest than the public at large, members of which have not spent money on an application process. The Appellants allege that they have spent a considerable sum of money seeking classifications from the Department, and Norweco did not. Appellants allege that the Department has behaved arbitrarily and has not consistently applied its guidance. The Department states that the guidance has changed and it is not required to demand exactly the same process from each applicant. This, too, presents a factual dispute between the Parties.

In its Motion and its Reply, the Department makes the argument that Appellants' interest is not immediate because it is permitting, not classification, that would hypothetically result in an immediate interest, and Norweco has not been granted a permit for its technology. The Board thinks that this focus is irrelevant because the issue *is* the classification itself, not SEO permitting down the line. The upfront classification system appears to give a clear benefit to any applicant whose technology is added to the list, both in terms of timeliness of Department review and any related cost savings. A technology is either on the list or not on the list, and there is no case-by-case review for a technology on the list. The Appellants believe that the Department abused its discretion, acted unreasonably, and acted unlawfully when it added Norweco's product to the list. That alleged harm is immediate.

The Department makes much of its claim that it has never required field testing to be conducted outside of the state of Pennsylvania. However, this is the wrong question: was field testing from outside of the state allowed to support the Department's earlier classification decisions? Or did the Department refuse to accept testing done outside of the state's borders? Under the current guidance document, field testing is now required. Given the record before the

Board, it appears that Appellants expended significant resources completing field testing that the Appellants assert was required. That the testing was done outside of Pennsylvania is unimportant for purposes of addressing the Department's classification system. The relevant issue – and the one over which factual dispute exists – is whether requiring field testing of one applicant but not the other occurred and, if it did, whether this resulted in harm to Appellants.

The Board denies the Department's Motion for Summary judgment because genuine issues of fact exist regarding Appellants' standing in this matter. Accordingly the Board issues the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **PREMIER TECH AQUA and ANUA INTERNATIONAL, LLC** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-007-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NORWECO, INC., Permittee** | : | |

**O R D E R**

AND NOW, this 17th day of February, 2017, upon consideration of the Department's Motion for Summary Judgment, Norweco's Memorandum in Support of the Motion, and Appellants' Response, it is hereby ordered that the motion is **denied.**

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: February 17, 2017**

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

**For the Commonwealth of PA, DEP:**
William Gelles, Esquire
Aviva Horrow Reinfeld, Esquire
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**For Permittee:**
Scott Wyland, Esquire
Douglas B. Schnee, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CLEAN AIR COUNCIL, THE DELAWARE RIVERKEEPER NETWORK, AND MOUNTAIN WATERSHED ASSOCIATION, INC.** | : | |
| **v.** | : | **EHB Docket No. 2017-009-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee** | : | **Issued: February 23, 2017** |

**OPINION AND ORDER ON**
**MOTION FOR EXPEDITED HEARING AND FOR RECONSIDERATION**

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis**

The Board denies Appellants' motion for expedited hearing and for reconsideration of the Board's Order denying Appellants' application for temporary supersedeas. The Appellants' request to expedite the hearing on the merits to next month is denied because there is no agreement on appropriate prehearing procedure, and the Appellants have not shown that such expedition will not unduly prejudice the Department and Permittee. The request for reconsideration is denied because the Board is unable to grant the relief requested by the Appellants, and they have not presented any information not previously considered by the Board that constitutes extraordinary circumstances justifying reconsideration. The currently scheduled hearing on the Appellants' petition for supersedeas will adequately address their concerns.

**O P I N I O N**

Clean Air Council, the Delaware Riverkeeper Network, and the Mountain Watershed Association (hereinafter "Appellants") have appealed 20 permits issued by the Department of

Environmental Protection (the "Department") to Sunoco Pipeline, L.P. ("Sunoco") for earth-moving work associated with the construction of two parallel natural gas liquids pipelines known as the Mariner East 2 project. Mariner East 2 will span the southern half of the Commonwealth, running more than 300 miles and terminating at the Marcus Hook Industrial Complex in Delaware County. Three of the permits are erosion and sediment control individual permits regulated under Chapter 102 of the Department's regulations, 25 Pa. Code Chapter 102, with a permit issued from each of the three regional offices of the Department where Mariner East 2 will pass through. Seventeen of the permits are water obstruction and encroachment permits regulated under Chapter 105 of the regulations, 25 Pa. Code Chapter 105, with a permit issued for each of the 17 counties through which the project will pass.[1]

The Appellants filed their appeal covering all 20 permits on February 13, 2017, the same day that the permits were issued. The following day they filed a petition for supersedeas and an application for a temporary supersedeas seeking an immediate halt to construction activity begun under the permits. The Board held an in-person conference with the parties on February 16, 2017 and also heard oral argument on the application for temporary supersedeas. During the conference the parties discussed, among other things, scheduling the evidentiary hearing on the overarching petition for supersedeas and the possibility of somewhat expedited proceedings for the appeal as a whole. At oral argument, in addition to hearing robust argument from all parties, we also heard from Sunoco what work it had already commenced and the work that it anticipated doing up until the supersedeas hearing could be held. On February 17, 2017, we issued an Order denying the application for temporary supersedeas. Our Order also directed the parties to submit

[1] The project will pass through the following counties: Allegheny, Berks, Blair, Cambria, Chester, Cumberland, Dauphin, Delaware, Huntingdon, Indiana, Juniata, Lancaster, Lebanon, Perry, Washington, Westmoreland, and York.

a joint proposed case management order by February 24, 2017, and we scheduled the evidentiary hearing on the Appellants' supersedeas petition to begin on March 1, 2017.

Late in the day on February 17, the Appellants filed the instant motion requesting (1) that the Board expedite the full hearing on the merits to begin on March 13, 2017, and (2) that the Board reconsider its denial of the application for temporary supersedeas. The Appellants say that the speed of work being done by Sunoco justifies expedited proceedings, and that new information warrants reconsideration of the temporary supersedeas. We ordered responses to the Appellants' motion to be filed by 5:00 p.m. on February 21, 2017. Sunoco and the Department oppose both of the Appellants' requests. They say that they will be prejudiced by the strict timetable proposed by the Appellants, and they argue that reconsideration is not appropriate because there is no new information. For the reasons set forth below, we deny the Appellants' motion.

**Expedited Hearing**

Our rule governing motions for an expedited hearing outlines a nonexclusive list of factors to be considered in ruling on such a motion:

> (1) Whether pollution or injury to the public health, safety or welfare exists or is threatened during the period ordinarily required to complete the proceedings.
>
> (2) Severity of prejudice to any party during the time period ordinarily required to complete the proceedings.
>
> (3) The status of discovery and the realistic need of the parties for extended discovery and for time to prepare for a hearing.
>
> (4) Whether the issuance of such an order would promote judicial economy or would otherwise be in the public interest.
>
> (5) The effect of expedited proceedings on the nonrequesting party.

25 Pa. Code § 1021.96a(c). In deciding whether or not to grant an expedited hearing, the Board will balance the interests of the parties while considering the practical benefits and difficulties of

expedited proceedings. *Perano v. DEP*, 2010 EHB 91, 94; *Groce v. DEP*, 2005 EHB 880, 886. *See also Pa. Trout v. DEP*, 2002 EHB 968, 972-73. Balancing interests is, by its nature, unique to the facts and exigencies of each case and thus must proceed on a case-by-case basis. *McPherson v. DEP*, 2014 EHB 460, 462. "In the final analysis, although the Board is receptive to expedited hearings, the burden is upon the party requesting such proceedings to show that expedition is appropriate when the request is opposed by the other party." *Perano*, 2010 EHB 91, 96.

The Appellants assert that, in order to quickly halt construction of the Mariner East 2 project, it is necessary to present their full case to the Board for consideration. They argue that the vehicle for doing this is a full hearing on the merits because they believe that their case would in some respects need to be truncated for the purposes of the already-scheduled supersedeas hearing. The Appellants say that, if the hearing on the merits is expedited to March 13, they will not seek to continue with the hearing on their petition for supersedeas scheduled for March 1. The Appellants hold the very legitimate concern that waiting too long until a hearing on the merits can be held will render much of the case moot as Sunoco continues to move forward with its construction. They propose to hold the merits hearing from March 13-17, 2017, approximately a month from the permits being issued. They also propose that by March 8 all discovery be completed, expert reports be served, and witness lists be provided to the other parties, and that any motions in limine be presented at the hearing on the merits.

In support of their position, the Appellants assert that little discovery is necessary in this matter, given the fact that many of the documents have been made public and are already in the parties' possession. They attach to their motion a set of six discovery requests—a mix of interrogatories and document requests—that they intend to serve on the Department. The

Appellants say that they have focused their requests and that responses should not take long. The Appellants tell us that they do not anticipate serving discovery requests on Sunoco, and they do not believe that much discovery would be required from them. The Appellants contend that if any party would be prejudiced by moving up the hearing on the merits to March 13, it is the Appellants and not Sunoco or the Department. The Appellants argue that Sunoco and the Department are the most familiar with the appealed permits, given the fact that Sunoco prepared the permit applications and the Department spent 20,000 hours of time across 40 staff members reviewing the applications. The Appellants also contend that Sunoco and the Department should already be familiar with the issues raised in the Appellants' notice of appeal because those same issues were raised in comments submitted last year by the Appellants.

The Department and Sunoco's essential objection is that the Appellants' proposal moves too fast and they will be prejudiced by the compressed timeframe to prepare for a hearing on the merits. The Department, however, is generally open to some form of an expedited hearing so long as the parties are able to agree to limited discovery, prompt exchange of witnesses, and a prohibition on dispositive and/or other prehearing motions. Sunoco strongly opposes proceeding so quickly. Sunoco raises the possibility that the hearing in this matter would commence before the period for other timely appeals of the permits will have expired. *See* 25 Pa. Code § 1021.52 (timeliness of appeals). Sunoco says it could be put in a position of having to defend the permits multiple times without being able to seek consolidation of the various appeals. Sunoco says it is willing to consider an expedited hearing on the merits in July 2017 in lieu of the currently scheduled hearing on the petition for supersedeas, provided that the Appellants limit the issues they intend to pursue, and the parties reach an agreement on discovery, expert reports, and filing

appropriate prehearing motions. No agreement on prehearing procedure has been reached at this point for a hearing on the merits.

Regarding the need for discovery, the Department objects to the Appellants' proposed discovery requests, arguing that they are overbroad and burdensome in the context of an expedited hearing. The Department asserts that it would take a great deal of time to provide proper responses to the requests since the 20 permits involved 40 staff members and 17 different conservation districts. The Department argues that devoting this amount of time to responding to discovery would prejudice its ability to prepare its case for an expedited hearing. While this is not the occasion to get into the merits of the potential discovery requests, we can appreciate how producing the documents in less than two weeks could be burdensome. The Department also counters the Appellants' statement regarding its staff's familiarity with the project by asserting that participating in the review of the permits is not coextensive with preparing to testify at an evidentiary hearing, and that this will also take time.

Sunoco argues that the Appellants' proposal essentially forecloses its ability to seek any discovery from the Appellants, and to depose any witnesses from the Appellants or the Department. Sunoco contends that its ability to adequately prepare for the hearing and defend against the challenges to the permits will be hampered by the proposed expedition. It argues it will be prejudiced by having to produce expert reports within three weeks, by not having enough time to prepare motions, and by compressing the full hearing into only five days.

While the Board is generally very receptive to requests to expedite proceedings when there is agreement among all the parties, when such requests are opposed by one or more parties, as is the case here, we must carefully evaluate the competing interests and respective burdens involved in expedition. Although at the in-person conference we expressed openness to

expedited proceedings in this matter, it appears that the parties were unable to come to an agreement on the terms and dates for an expedited hearing. Absent agreement among all parties we will ordinarily be disinclined to grant the request, particularly when it seeks to expedite proceedings as quickly as asked for here. *See Pa. Trout, supra*, 2002 EHB 968, 970. There is no agreement on appropriate prehearing procedures among the parties. There is no agreement on conducting discovery, producing expert reports, prehearing motions practice, or filing prehearing memoranda. Therefore, we must revert to our standard practice, which here includes proceeding with the scheduled supersedeas hearing.

To be sure, moving at the pace suggested by the Appellants would be a significant undertaking on all sides. While we understand why the Appellants want to move with such forthright speed, we cannot ignore the resulting prejudice to Sunoco and the Department. This is undoubtedly an important matter for all parties. And while it may be in the interest of all involved to move more quickly than what is typical for a case before the Board, it is also in the interest of the parties, and this Board, to have a thoughtful and coherent presentation of evidence at the hearing on the merits, which necessitates a certain amount of time for preparation. Although we are denying the Appellants' request to expedite, we still remain receptive to somewhat expedited proceedings and we look forward to the parties' proposal in the joint case management order.

Importantly, we nevertheless have scheduled the supersedeas hearing to begin on March 1, and this proceeding affords the Appellants the opportunity to seek immediate relief from the work being done under the permits. "The central purpose of a supersedeas is to prevent an appellant from suffering irreparable harm while the Board considers the appeal." *Ctr. for Coalfield Justice v. DEP*, EHB Docket No. 2016-155-B, slip op. at 18 (Opinion in Support of

Order, Feb. 1, 2017). It is this proceeding as contemplated under our normal rules that addresses the Appellants' concerns and provides them the venue to demonstrate their claims of irreparable harm at an evidentiary hearing. Notably, they have that opportunity under our current schedule more expeditiously than under their proposal.

**Reconsideration**

Turning to the request for reconsideration, the standard for reconsideration of interlocutory orders, such as the order at issue here denying a temporary supersedeas, is even higher than that for final orders. *New Hope Crushed Stone & Lime Co. v. DEP*, 2016 EHB 741, 743; *Kiskadden v. DEP*, 2014 EHB 737, 738 (quoting *Rural Area Concerned Citizens (RACC) v. DEP*, 2013 EHB 374, 375). A party seeking reconsideration of an interlocutory order must meet the criteria established under 25 Pa. Code § 1021.152 for final orders and also demonstrate "extraordinary circumstances." *Associated Wholesalers, Inc. v. DEP*, 1998 EHB 23, 26-27. *See also DEP v. Danfelt*, 2012 EHB 519, 520 (quoting *Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 577, 578-79 ("Reconsideration of an interlocutory order must not only be based upon 'compelling and persuasive reasons,' it must also be clear that 'extraordinary circumstances' require the Board to reconsider the matter immediately, despite the fact that it is merely an interlocutory ruling.")). Our rule on reconsideration of final orders provides in part:

> Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons. These reasons may include the following:
>
> (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). A motion or petition for reconsideration of an interlocutory order "must demonstrate that extraordinary circumstances justify consideration of the matter by the Board." 25 Pa. Code § 1021.151(a). The comment to this rule states that "[r]econsideration is an extraordinary remedy and is inappropriate for the vast majority of the rulings issued by the Board."

The Appellants argue that Sunoco did not reveal at the oral argument the full scope of the work that it intends to undertake in short order. Sunoco at that time represented that its immediate work between the time of the argument and the beginning of the supersedeas hearing involved (1) felling trees in certain areas that serve as habitat for the Indiana Bat, (2) horizontal directional drilling (HDD) and associated work at Raystown Lake in Huntingdon County, and (3) HDD and associated work at certain sites in Chester and Delaware Counties. In support of the Appellants' contention that the work involves much more than this, they point to an affidavit from Matthew Gordon, who serves as Sunoco's principal engineer for the Mariner East 2 project, which Sunoco presented as an exhibit during oral argument. The Appellants highlight Paragraph 33 of this affidavit, which reads as follows:

> In addition to the specific HDDs at the critical locations outlined above, [Sunoco] intends to begin other pipeline construction activities in compliance with the three Chapter 102 permits issued by the Department within the next 21 days. These additional activities include clearing, grubbing, [erosion control device] installation and trenching for the installation of the pipeline in several locations in Berks County, and site preparation, tree clearing, installation of [erosion control devices], and mobilization of drilling equipment in various locations throughout the entire Project area.

The Appellants characterize this as new information showing that the irreparable harm to the environment will be much greater than what was previously disclosed. The Appellants argue

that this presents extraordinary circumstances justifying reconsideration of the denial of the temporary supersedeas.

The Appellants also argue that reconsideration is warranted because Sunoco is doing work that is expressly prohibited by the Chapter 105 permits. They point to language in the cover letters for the Chapter 105 permits that generally states, "Please be advised that you do not have Federal authorizations for this project and such authorization is required prior to starting your project."[2] We are told that these authorizations primarily pertain to the U.S. Army Corps of Engineers. The Appellants contend that as of February 16 Sunoco did not possess the necessary Army Corps permits.

Sunoco argues that it did not misrepresent the scope of work. It contends that the discussion of work at the oral argument on the temporary supersedeas was confined to the 12 days from the date of the argument to the hearing on the overarching petition, and that Gordon's affidavit, prepared in advance of the argument, details the expected work over 21 days, extending beyond the March 1 supersedeas hearing. Sunoco further asserts that the work being done after March 1 will be of the same type as the work done leading up to March 1; it will simply occur in a few additional areas. Sunoco attaches to its response another affidavit from Gordon that states that the remaining activity identified in Paragraph 33 of the earlier affidavit will not come before March 3.

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[2] The Chapter 105 permits themselves also provide:

> This permit does not give any property rights, either in real estate or material, nor any exclusive privileges, nor shall it be construed to grant or confer any right, title, easement, or interest in, to, or over any land belonging to the Commonwealth of Pennsylvania; neither does it authorize any injury to private property or invasion of private rights, **nor any infringement of Federal, State, or Local laws or regulations; nor does it obviate the necessity of obtaining Federal assent when necessary**.

(Emphasis added).

Regarding the alleged violations of the Chapter 105 permits, Sunoco and the Department argue that not all of the work authorized by the 105 permits is contingent upon the receipt of federal permits. They assert that there is work that is authorized solely under the province of Chapter 105 and irrespective of any federal authorization. For instance, Sunoco says that a permit from the Army Corps is not needed for work done in a floodway, only dredging and filling in waterways and wetlands. Sunoco says it does not anticipate any construction work in waterways and wetlands in the 21-day period discussed in the Gordon affidavit because it does not anticipate having the Army Corps permits within that time.

The Appellants' motion is clear that they seek both expedited proceedings and reconsideration of our February 17 Order. Their requests for relief are not framed in the alternative. A letter they filed on February 21 underscores that they do not intend to pursue both the scheduled supersedeas hearing and seek a hearing on the merits in March. The Appellants, therefore, appear to be asking us to do something with respect to reconsideration that is not available under our rules—impose a temporary supersedeas until a full hearing on the merits can be held. The purpose of a temporary supersedeas is to provide an avenue for immediate relief pending a hearing on a petition for supersedeas. It is only available for this limited window of time. This is made clear by our rules: "An application for temporary supersedeas may be filed when a party may suffer immediate and irreparable injury before the Board can conduct a hearing on a petition for supersedeas." 25 Pa. Code § 1021.64(a). *See also* 25 Pa. Code § 1021.64(e)(1) (regarding factors to consider in granting temporary supersedeas) ("[t]he immediate and irreparable injury the applicant will suffer before a supersedeas hearing can be held"); *Id.* at 1021.64(e)(3) ("[t]he length of time required before the Board can hold a hearing on the petition for supersedeas").

Under our rules, if there is no hearing on the supersedeas there can be no temporary supersedeas. A temporary supersedeas cannot be imposed pending a hearing on the merits. If a party wants to supersede an action of the Department pending a hearing on the merits, then the proper channel for doing so is to file a petition for supersedeas, which can only be granted following an evidentiary hearing with fact and frequently expert witness testimony from the parties. 25 Pa. Code § 1021.61(b) ("[t]he Board will not issue a supersedeas without a hearing…"). The Appellants have taken this step and filed a petition for supersedeas, and allowing this process to play out as contemplated by our rules already affords them the opportunity to obtain prompt relief.

Although the request for reconsideration is denied on the above basis alone, we also deny the request for reconsideration on the merits of the Appellants' request. The affidavit of Matthew Gordon, although not discussed in every detail during oral argument, was available to the Board and fully considered before issuing our Order. It is not new information as the Appellants allege. Further, our inquiry during oral argument on the temporary supersedeas was, consistent with our rules, focused on the discrete period of time until a hearing on the petition could be held—from February 16 to March 1, 2017. Gordon's affidavit addresses a longer period of time so it makes sense that it would reflect additional work. In addition, it is not clear that any work done will be in violation of the Chapter 105 permits. It is not clear what binding effect, if any, the cover letters enclosing the permits have on Sunoco. The Appellants also have not articulated precisely what work being done violates which federal authority, or provided a discussion of the interaction of the Chapter 105 permits with any federal permitting scheme. In short, the Appellants have not presented us with extraordinary circumstances justifying reconsideration of our denial of the temporary supersedeas.

As mentioned above, we are still amenable to proceeding more quickly than our normal time frame and we look forward to the submission of the parties' case management order. In the meantime, the supersedeas hearing set for March 1, 2017 will proceed as scheduled, and the Appellants will have the opportunity to demonstrate why they believe any irreparable harm resulting from the Mariner East 2 project warrants the immediate superseding of the issued permits.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CLEAN AIR COUNCIL, THE DELAWARE RIVERKEEPER NETWORK, AND MOUNTAIN WATERSHED ASSOCIATION, INC.** | : | |
| **v.** | : | **EHB Docket No. 2017-009-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee** | : | |

**O R D E R**

AND NOW, this 23rd day of February, 2017, it is hereby ordered that the Appellants' motion for expedited hearing and for reconsideration of the Board's February 17, 2017 Order denying the Appellants' application for temporary supersedeas is **denied**.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: February 23, 2017**

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

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Margaret O. Murphy, Esquire
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Terry R. Bossert, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **DAVID GINTOFF AND PAMELA GINTOFF** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2015-084-C** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: March 1, 2017** |
| | : | |

**OPINION AND ORDER ON**
**MOTION IN LIMINE**

**By Michelle A. Coleman, Judge**

**Synopsis**

The Board grants in part a motion in limine filed by the Department precluding the Appellants from calling certain witnesses at the hearing on the merits who were not previously identified in accordance with the Pennsylvania Rules of Civil Procedure and preventing the Appellants from calling Department witnesses as the Appellants' experts in their case-in-chief.

**O P I N I O N**

David and Pamela Gintoff (hereinafter collectively "Gintoff") have appealed a May 15, 2015 order of the Department of Environmental Protection (the "Department") alleging a release of heating oil from an above ground storage tank on the Gintoff property in Spring Brook Township, Lackawanna County. The release of heating oil allegedly ran off of the Gintoff property and onto a neighboring property, potentially endangering the water supply well of the neighbor. In the order under appeal the Department alleges violations of the Solid Waste Management Act, 35 P.S. §§ 6018.101 – 6018.1003, and the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001.

The hearing on the merits in this matter is scheduled to begin on March 7, 2017. On February 16, 2017, the Department filed a motion seeking to preclude Gintoff from soliciting testimony from previously unidentified fact and expert witnesses and to exclude exhibits that Gintoff did not file with his prehearing memorandum on December 30, 2016.[1] The Department's motion is styled as a motion in limine that also seeks sanctions pursuant to 25 Pa. Code §§ 1021.104(b) and 1021.161. The Department supported its motion with a memorandum of law. Gintoff promptly responded to the motion on February 20, 2017, but did not file a responsive memorandum of law.

The Department served its first set of interrogatories on Gintoff in October 2015. Relevant to the instant motion, the interrogatories sought, among other things, the identity of all persons with knowledge of the matters set forth in the notice of appeal, the identity of each expert witness expected to be called to testify at the hearing at the hearing on the merits, and the identity of each non-expert witness expected to be called to testify. Gintoff responded to these interrogatories six months later in April 2016. As persons with knowledge of the matters related to the appeal, Gintoff identified themselves, Donald Meredick, and unspecified Department employees. In response to the interrogatory seeking the identity of expert witnesses, Gintoff responded, "Unknown at this time as discovery continues." Gintoff responded to the interrogatory seeking the identity of non-expert witnesses with, "Unknown at this time as discovery continues. Appellants reserve the right to supplement this response upon due notice." The Department tells us that Gintoff never supplemented his discovery responses.

When Gintoff filed his prehearing memorandum, he listed the following people as anticipated witnesses: David Gintoff, Eric Rooney, David Gromelski, Esquire, Scott Bene, Susan

[1] The hearing on the merits was originally scheduled to begin on January 24, 2017, but was continued at the request of Gintoff due to a scheduling conflict.

Thomas, Thomas Coar, William Craft, and an unidentified representative of the Department. We are told that other than David Gintoff and David Gromelski, all of these people are Department employees. The Department's prehearing memorandum, for its part, reflects four of these same witnesses: Scott Bene, Susan Thomas, Thomas Coar, and William Craft. Gintoff identifies all four of these people as expert witnesses in his prehearing memorandum, as well as Martin Gilgallon. Thomas Coar and William Craft are also listed as expert witnesses in the Department's prehearing memorandum, and expert reports from them were filed as exhibits in conjunction with the prehearing memorandum.

The Department also complains that Gintoff did not attach any of his exhibits to his prehearing memorandum as required by our rules and now seeks to preclude Gintoff from introducing any exhibits at the hearing. Counsel for the Department emailed counsel for Gintoff in early January requesting that he be sent the exhibits. Department counsel stated that he believed he already had all of the documents identified as potential exhibits, but he wanted to make sure what was listed matched up with what he thought was being identified. More than two weeks later, having not received a response from Gintoff's counsel, Department counsel sent another email again requesting the exhibits and stating that he may have to file a motion with the Board. Counsel for Gintoff responded promptly this time saying he would send the exhibits in the next few days. The Department had still not received the exhibits at the time it filed its motion in limine on February 16, 2017. The following day, Gintoff filed with the Board five of his thirteen exhibits. Three days after that Gintoff filed three more exhibits. The Department also specifically highlights two exhibits that originate from a related matter in Common Pleas Court it wishes to preclude on the basis of relevance.

The purpose of a motion in limine is to provide the Board with an opportunity to consider potentially prejudicial and harmful evidence and rule on the admissibility of such evidence before it is referenced or offered at trial. *Kiskadden v. DEP*, 2014 EHB 634, 635; *Angela Cres Trust v. DEP*, 2007 EHB 595, 596; *RESCUE Wyoming v. DER*, 1994 EHB 1324, 1325-26. A motion in limine should generally only be used to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. *Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235, 237. When considering whether to impose sanctions precluding evidence or testimony on the basis of discovery violations, we assess the respective prejudices to the parties. *Wetzel v. DEP*, 2016 EHB 230, 232. Discovery sanctions may be appropriate absent a motion to compel as long as a sanction is reasonable given the severity of the violation. *DEP v. Colombo*, 2012 EHB 370, 371-72 (citing *Kochems v. DEP*, 1997 EHB 422, 424, *aff'd*, 701 A.2d 281 (Pa. Cmwlth. 1997)).

**Fact Witnesses**

The Rules of Civil Procedure are clear that a party is entitled to discover the identity of persons having knowledge of any discoverable matter. Pa.R.C.P. No. 4003.1(a). The Rules also create a duty for parties to seasonably supplement certain responses to discovery. Pa.R.C.P. No. 4007.4. While the obligation to seasonably supplement is not categorical in scope, it is automatic and it does encompass persons with knowledge of discoverable information and persons expected to be called as expert witnesses. Pa.R.C.P. No. 4007.4(1); Pa.R.C.P. No. 4007.4, Explanatory Comment—1978. The Rules are equally clear that any witness whose identity has not been revealed in accordance with the Rules shall not be permitted to testify on behalf of the defaulting party, unless the failure to disclose is the result of extenuating circumstances. Pa.R.C.P. No. 4019(i). Courts and this Board, however, have not been

unequivocal in the application of barring witness testimony. *See generally Feingold v. SEPTA*, 517 A.2d 1270 (Pa. 1986); *Borough of Edinboro v. DEP*, 2003 EHB 725.

There is no question that Gintoff was obligated to identify the people he lists as witnesses in his prehearing memorandum in his answers to the Department's interrogatories. *McGinnis v. DEP*, 2010 EHB 489, 493-94; *Rhodes v. DEP*, 2009 EHB 237, 244. Presumably the witnesses listed in Gintoff's prehearing memorandum are individuals possessing personal knowledge of discoverable matter, *see* Pa.R.E. 602, which means Gintoff also had an obligation to timely supplement his answers to add persons with discoverable information. As we have held before, including new information in one's prehearing memorandum is not a proper way to supplement discovery responses. *DEP v. EQT*, 2016 EHB 489, 492; *Envtl. & Recycling Servs., Inc. v. DEP*, 2001 EHB 824, 829. *See also Daddona v. Thind*, 891 A.2d 786, 813 (Pa. Cmwlth. 2006). While it may be difficult to foresee everyone who will be called to testify when interrogatories are served early in the discovery process, the Department waited four months to serve its interrogatories and Gintoff did not respond until nearly a year after the appeal was filed following two joint requests for extensions of discovery. Gintoff offers no explanation why he failed to identify any witnesses during discovery and he does not describe any extenuating circumstances.

While Gintoff's behavior is certainly troubling, at the same time, we must be mindful of the guidance offered by the Pennsylvania Supreme Court on when witnesses should be excluded. The Court has instructed that consideration be given to the following factors: (1) the prejudice or surprise to the party against whom the excluded witnesses would testify; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case; and (4) bad faith or willfulness

in failing to comply with an order of the court. *Feingold v. SEPTA*, 517 A.2d 1270, 1273 (Pa. 1986) (quoting *Feingold v. SEPTA*, 488 A.2d 284, 288 (Pa. Super. 1985)). *See also Miller v. Brass Rail Tavern*, 664 A.2d 525, 532 n.5 (Pa. 1995) (same). On this last factor we are also cognizant of the Board's line of cases holding that we should be cautious in excluding crucial portions of a party's case absent a motion to compel and failure to comply with an order of the Board. *See Wetzel v. DEP*, 2016 EHB 230 (and cases cited therein). No motion to compel was filed at any time in this appeal.

We detect little prejudice to the Department from the two fact witnesses who are listed in both of the parties' prehearing memoranda—Department employees Scott Bene and Susan Thomas. Presumably the Department generally knows what their testimony will be regarding the case. Further, as these are party witnesses in a civil matter, an adverse party is not limited on cross-examination to the areas covered in direct testimony. Pa.R.E. 611(b). If the Department calls Bene and Thomas, Gintoff can generally ask any relevant question not otherwise precluded by the Rules of Evidence. This also compliments our preference of limiting the number of witnesses that need to be called in multiple parties' cases-in-chief. However, in the event the Department does not call Bene and Thomas in its case, Gintoff may call them as part of his case.[2]

The remaining fact witnesses are David Gintoff, Eric Rooney and David Gromelski, Esquire. David Gintoff was identified in discovery as a person with knowledge of the matters alleged in the notice of appeal. He is also one of the appellants in this matter, and we would be reluctant to prevent him from testifying in an appeal of a Department order issued to a private citizen. We do not believe that the Department will be prejudiced by his testimony.

[2] We note that the Department has the burden of proof in this case and will be putting on its case before Gintoff. 25 Pa. Code § 1021.122(b)(4).

We are told in Gintoff's prehearing memorandum that Eric Rooney is a Department employee who is Gintoff's neighbor and allegedly reported the release of heating oil. Rooney and Gintoff were involved in a related matter in the Court of Common Pleas of Lackawanna County. *Rooney v. Gintoff*, No. 15-CV-2057 (C.C.P. Lackawanna). We will provisionally allow the testimony of Rooney at this juncture subject to an offer of proof by Gintoff at the hearing on the merits.

David Gromelski appears to be the attorney that represented Rooney in the Court of Common Pleas matter. We suspect that Gromelski would be appearing pursuant to a subpoena. Gintoff has offered no explanation as to why Gromelski would possess testimony that is relevant to this matter and how that testimony would not potentially run afoul of considerations such as attorney-client privilege or the Rules of Professional Conduct relating to duties to current and former clients. As noted, Gintoff failed to file a memorandum of law in response to the Department's motion so we have very little to go on in terms of why this witness should not be precluded from testifying. Therefore, we will preclude the testimony of Attorney Gromelski in this hearing.

**Expert Witnesses**

Expert testimony is usually critically important in Board cases. The Rules of Civil Procedure are explicit regarding parties' responsibilities in conducting expert discovery. In response to expert interrogatories a party must identify expert witnesses expected to be called at trial and disclose the substance of the facts and opinions of the expert's anticipated testimony, or the responding party may provide an expert report in lieu of answering expert interrogatories. Pa.R.C.P. No. 4003.5(a)(1). The duty to supplement discovery responses extends to identifying experts. Pa.R.C.P. No. 4007.4(1). The consequence for failing to disclose an expert and provide

the substance of the expert's testimony is essentially the same as that with respect to any other witness—the expert shall not be permitted to testify on behalf of the defaulting party absent extenuating circumstances. Pa.R.C.P. No. 4003.5(b).

All but one of the five expert witnesses Gintoff has identified in his prehearing memorandum is an employee of the Department, Martin Gilgallon being the only non-Department employee. Two are listed as experts for the Department. As mentioned above, Gintoff did not file a responsive memorandum of law to the Department's motion. We have his paragraph-by-paragraph response to the motion, but we do not have any further explanation or argument to support his position. Gintoff says in his response, without elaboration, that the Department has been aware for some time of the experts retained by Gintoff. Gintoff does not provide any legal support for his position that he be permitted to call Department employees as his own experts.

It is widely accepted that a party cannot call an opposing party's expert in its own case-in-chief. *See Evans v. Otis Elevator Co.*, 168 A.2d 573 (Pa. 1961) (defendant not allowed to call plaintiff's expert as its own witness); *Dolan v. Fissell*, 973 A.2d 1009, 1013 (Pa. Super. 2009) ("No one can compel an expert to give his testimony for the side that did not employ him."); *Boucher v. Pa. Hosp.*, 831 A.2d 623, 632 (Pa. Super. 2003) ("We are mindful of the rule expressed and applied by the courts of this Commonwealth that one party may not compel an expert for the opposing party to divulge his expert opinion. Thus, one party may not subpoena the testimony of an expert for another party.") "It is equally clear under Pennsylvania law that a court has no power to compel expert testimony because a private litigant has no right to compel a citizen to give up the product of his brain anymore than he has a right to compel the giving up

material things." *Columbia Gas Transmission Corp. v. Piper*, 615 A.2d 979, 982 (Pa. Cmwlth. 1992). *See also Casey v. DEP*, 2012 EHB 461; *Weiss v. DEP*, 1997 EHB 39.[3]

Therefore, Gintoff will not be permitted to compel Department employees to testify as his experts as part of his case-in-chief. Nevertheless, Gintoff may still cross-examine the Department's experts, Coar and Craft, during the Department's case-in-chief. He may also question Department employees on their factual involvement in the case, including Coar and Craft, since the Department has indicated in its prehearing memorandum that Coar and Craft will provide both fact and expert testimony. We do not believe that the Department will be prejudiced by any factual testimony solicited by Gintoff.

Regarding Martin Gilgallon, it appears that Gintoff did not comply with the applicable Rules of Civil Procedure regarding expert witness identification and responding to the Department's expert interrogatories. Gintoff has also not offered any explanation of extenuating circumstances for why Gilgallon should be allowed to testify on his behalf. Gintoff also did not comply with our rules on expert witnesses and prehearing memoranda, which requires that a party include in its memorandum for each expert witness a party intends to call at the hearing, "answers to expert interrogatories and a copy of any expert report provided under § 1021.101(a)(2) (relating to prehearing procedure)," or in the absence of "answers to the expert interrogatories or an expert report, a summary of the testimony of each expert witness." 25 Pa.

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[3] Of course, not every employee of the Department who testifies is an expert. *Borough of Edinboro v. DEP*, 2003 EHB at 770-72. Department employees frequently testify about their factual involvement with a matter on appeal without necessarily providing expert opinions—what they did, what they observed, inspection reports they authored, etc. *Compare DEP v. Angino*, 2006 EHB 278, 283:

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

Code § 1021.104(a)(5). Gintoff's prehearing memorandum alludes to a July 8, 2015 email from Gilgallon and a March 12, 2015 proposal, but there is nothing that would qualify as a report that expresses expert opinions. We question whether he will in fact offer any expert opinions during his testimony. *See DEP v. Angino, supra*. If he does, we are hesitant to preclude Gintoff's only potential expert witness on the eve of trial. We will allow the testimony of Gilgallon without prejudice to the Department re-raising an objection at the hearing.

**Exhibits**

Gintoff in his response to the motion argues that he has cured any alleged defect by filing his exhibits with the Board, slightly more than two weeks before we are scheduled to commence the hearing on the merits in this matter. This is despite the fact that he has filed only eight of his thirteen exhibits. While we are not convinced that Gintoff has adequately resolved any prejudice to the Department by his tardy filing of his exhibits, we are not prepared at this point to grant the wholesale exclusion of Gintoff's exhibits. The Board must approach with caution the exclusion of integral evidence as a sanction for discovery violations, particularly where no motion to compel was filed and no Board Orders have been violated. *Wetzel v. DEP*, 2016 EHB 230, 233; *Bucks Cnty. Water & Sewer Auth. v. DEP*, 2014 EHB 143, 151. Department's counsel noted in his correspondence with Gintoff's counsel that he believed he had all of the exhibits Gintoff identified, but he wanted to confirm this. While we do not believe the Department will be prejudiced, the Department may raise objections to specific exhibits as they may come up at the hearing on the merits.[4] Gintoff is directed to file the remainder of his exhibits for his case-in-chief.

[4] We also note that, although the Board's rules require parties to attach their exhibits to their prehearing memoranda, 25 Pa. Code § 1021.104(a)(7), the prehearing memorandum requirements only apply to parties' cases-in-chief, 25 Pa. Code § 1021.104(c). There is nothing precluding Gintoff from identifying exhibits through appropriate witnesses during cross-examination.

The Department also asks that we preclude Gintoff from using as exhibits the transcript and order from a Lackawanna County Court of Common Pleas hearing that the Department admits arises from the same factual background as the appeal before the Board. *Rooney v. Gintoff*, No. 15-CV-2057 (C.C.P. Lackawanna). The Department says that these exhibits are irrelevant. We do not have enough information to grant the Department's motion in this respect. For instance, we have no idea for what purpose these exhibits may be offered. We are told that at least some Department witnesses testified at the hearing. Although we do not need to detail all the ways that these exhibits may be used, it appears that the transcript could potentially be used for impeachment purposes as a witness's prior inconsistent statement under Pa.R.E. 613. The Department's motion is denied on this point without prejudice to its ability to raise an objection to these exhibits at the appropriate time at the hearing on the merits.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **DAVID GINTOFF AND PAMELA GINTOFF** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2015-084-C** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**O R D E R**

AND NOW, this 1st day of March, 2017, it is hereby ordered as follows:

1. The Department's motion in limine is **granted in part and denied in part**.
2. The Appellants will not be permitted to call David Gromelski, Esquire to testify in this matter.
3. The Appellants will not be permitted to compel Department employees to testify as their own experts during their case-in-chief.
4. The Appellants shall file the remainder of their hearing exhibits with the Board on or before **March 3, 2017**.
5. The motion is in all other respects denied in accordance with this Opinion.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: March 1, 2017**

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(*via electronic mail*)

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**For Appellants:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **WHITEHALL TOWNSHIP** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2015-109-M** |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COPLAY AGGREGATES, INC., Permittee** | : | **Issued: March 1, 2017** |

**OPINION AND ORDER ON DEPARTMENT AND PERMITTEE'S JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT**

**By: Richard P. Mather, Sr., Judge**

**Synopsis**

The Board denies the Joint Motion for Partial Summary Judgment. There are genuine issues of material fact which prevent the Board from granting the Joint Motion at this time.

**O P I N I O N**

The Department of Environmental Protection ("Department") issued Coplay Aggregates, Inc. ("Coplay" or "Permittee") an approval for coverage under the Department's General Permit No. WMGR096 on July 2, 2015. The approval authorized Coplay to use regulated fill as a construction material in conjunction with the development of two subdivided lots.

Whitehall Township ("Township" or "Appellant") filed an appeal challenging the Department's decision to allow Coplay to use regulated fill as a construction material under the General Permit No. WMGR096. In its Notice of Appeal ("NOA"), the Township listed twenty-seven (27) objections in support of its appeal.

On December 13, 2016, the Department and Coplay filed a Joint Motion for Partial Summary Judgment in which they asserted that they were entitled to partial summary judgment on a number of the objections raised by the Township.[1] Several of the objections overlap, and the Joint Motion identified three general areas where they assert they are entitled to judgment as a matter of law and there are no disputed issues of material fact:

1) All prior municipal approvals, laws, ordinances, or regulations of the Township did not regulate or otherwise address the issue of the type of fill material to be used;
2) The Township did not fully participate in the permit process; and
3) There is evidence that the challenged approval was the product of deceit, misrepresentation or improper influence.

Joint Motion for Partial Summary Judgment at page 1. Objections 3(1), 3(2) and 3(3) related to the type of fill material to be used and its connection to the local approvals. Objections 3(5) and 3(10) related to the Township's participation in the permitting process. Objections 3(9) and 3(20) related to whether the approval was the product of deceit, misrepresentation or improper influence.

The Township filed a Response in Opposition to the Joint Motion for Partial Summary Judgment. The Township asserts that the Department and Coplay are not entitled to partial summary judgment on any of the three general issues set forth above because, at a minimum, "there exist genuine issues of material fact, supported in the record, as to the allegations which are the subject of the Joint Motion for Partial Summary Judgment." Response to Joint Motion for Partial Summary Judgment at page 2. For the reasons set forth below, the Board agrees with

[1] Specifically, the Department and Coplay identified seven (7) of the listed objections in their Joint Motion for Summary Judgment (Objections 3(1), 3(2), 3(3), 3(5), 3(9), 3(10) and 3(20).

the Township that there are genuine issues of material fact that prevent the Board from granting the Joint Motion for Partial Summary Judgment.

**Standard of Review**

The Board may grant a motion for summary judgment if the record indicates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lexington Land Developers Corp. v. DEP*, 2014 EHB 741, 742. Summary judgment, including partial summary judgment, may only be granted in cases where the right to summary judgment is clear and free from doubt. *Clean Air Council v. DEP* and *MarkWest Liberty Midstream and Resources, LLC*, 2013 EHB 346, 352. In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party. *Perkasie Borough Authority v. DEP*, 2002 EHB 75, 79. The record on which the Board decides a summary judgment motion consists of any pleadings, as well as discovery responses, depositions, affidavits, and other documents accompanying the motion or response labeled as exhibits. *See* 25 Pa. Code § 1021.94a(a), (h); Pa.R.C.P. 1035.1.

The standard for considering summary judgment motions is set forth at Pa.R.C.P. No. 1035.2, which the Board has incorporated into its own rules. 25 Pa. Code § 1021.94a(a); *Donald E. Longenecker v. DEP*, EHB Docket No. 2015-163-L, slip op. at 2-4 (Opinion and Order, August 9, 2016). There are two ways to obtain summary judgment on the substance of the motion. First, summary judgment may be available if the record shows that there are no genuine issues of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery or expert report, and the movant is entitled to prevail as a matter of law. Pa.R.C.P. No. 1035.2(1). *Id.* Second, summary judgment may be available:

> [I]f after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2(2). *Id.* Under the first scenario, the record must show that the material facts are undisputed. Under the second scenario, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a *prima facie* case. *See* Note to Pa.R.C.P. No. 1035.2. *Id.*

In this appeal the Township has the burden of proof under Section 1021.122(c)(3) as a third party challenging a general permit issued to Coplay. In reviewing the Department's and Coplay's Joint Motion, the Board will need to consider both ways for obtaining summary judgment.[2] As previously mentioned, the Joint Motion addresses seven identified objections in the Township's NOA that are grouped together in three general areas. The Board agrees with these general grouping of related objections, and it will evaluate each of the three general groupings of objections separately.

The Board agrees with the Joint Motion's description that, in paragraphs 3(1), 3(2) and 3(3), the Township contends that the Department did not adequately or properly consider all prior municipal approval, rules, regulations or ordinances of the Township when it granted the approval of Coplay. Specifically, the Township believes that Coplay testified at a subdivision hearing that it would only use clean fill on the lots associated with the subdivision approval. The Township asserts that Coplay's assertion that it would only use clean fill somehow attached to the subdivision approval and the Department's approval under appeal is inconsistent with

[2] The Department and Coplay do not argue that they are entitled to summary judgment under the second scenario. The Board has nevertheless evaluated the Joint Motion for Partial Summary Judgment and the Township Response under both scenarios and finds that the Township has made out a *prima facie* case as set forth in this Opinion.

Coplay's prior statements. Coplay disagrees with the Township and argues that its statement only addressed what Coplay had done in the past and was not a binding commitment regarding future plans. The factual dispute between the Parties regarding what was actually said is an issue of material fact that, at a minimum, precludes granting the motion for partial summary judgment. There are also the related issues regarding whether Coplay should have directly informed the Department regarding the disputed statement and whether or how the Department should have considered the disputed statement when granting Coplay the approval. In evaluating the Joint Motion, the Board views the record in the light most favorable to the Township drawing all reasonable inferences in favor of the Township. *Perkasie Borough Authority.*

There are also questions regarding the Department's decision to consider an approved subdivision plan as an approved "construction plan" under the guidance it considered when it issue the approval. Under the related guidance and GIF form submitted by Coplay:

> The Department will not approve an application where fill placement extends beyond one year or construction is not proposed to start within the one-year time limit.

Respondent's Exhibit R-5. There are unanswered questions regarding nature of the subdivision approval and whether it constitutes a "construction plan"; the duration of the placement of fill operations; and the schedule of any subsequent construction after the placement of the fill. The Board has concerns with the Department's apparent position that its form is "in error" and that the one year placement of fill standard and the requirement to begin construction within one year are not really applicable regardless of the clear unambiguous statement in the Department's form. It is not clear whether the Department now views the placement of fill operation as the construction activity satisfying the one year placement of fill requirement, which the Department

now apparently wishes to ignore as an error. These disputes alone provide a basis to deny the Joint Motion.

The second major grouping of objections in the Joint Motion, which the Township's raised in its NOA, focused on the Township's participation during the Department's permitting process. The Township contends that the Department denied it standing to participate in the Department's permitting procedures and deprived it of a meaningful opportunity to participate in these procedures. Because the Township was denied a meaningful opportunity to participate, the Township believes its due process rights were violated.

The Board agrees with the Township that there are disputed issues of material fact regarding the Township's opportunity to participate in the Department's permitting procedures. The Township asserts that it was denied an opportunity to fully participate in a meaningful way. The Department and Coplay disagree and assert that the Township was able to fully participate.

The Township also raised related concerns regarding its "standing" to participated in the Department's permitting procedures and the violation of the Township's due process rights. The Board does not believe that the issues regarding the Township's "standing" before the Department is an issue for the Board to address beyond a review of whether the Township was allowed an opportunity to meaningfully participate in the Department's permitting procedures. In addition, the appeal before the Board and the Board's *de novo* review will address any of the Township's lingering due process concerns. *See, e.g., Warren Sand and Gravel v. DER,* 341 A.2d 556 (Pa. Cmwlth. 1975); *Morecoal Company v. DER,* 459 A.2d 1303 (Pa. Cmwlth. 1983); *Smedley v. DEP,* 2001 EHB 131, 156-157. The disputed issue of material fact regarding the Township's level of participation in the Department's permitting procedures prevents the Board from resolving this issue in the context of a motion for partial summary judgment.

The final major grouping of objections focused on the Township's claim that the approval under challenge was the produce or deceit, misrepresentation or improper influence. The Township identifies three places where it has identified a basis to support these claims. First, there are the questions, previously discussed, about the notes of testimony of the Zoning Hearing Board where Coplay testified before the Zoning Hearing Board that it only used clean fill or, as the township contends, would only use clean fill in the future. The Township asserts that the testimony of Coplay's representative that discussed the use of clean fill only was at best misleading. Coplay suggests that the testimony of its representative only addressed what was used in the past and did not address what could be used in the future. Second, there are conflicting positions regarding the statements on the Department's form that the Department will not approve an application for an approval where fill placement extends beyond one year and construction is not proposed to start within one year. Finally, there are allegations that several former Department employees played a role in the preparation of the request for approval or during the appeal process which constituted improper influence.

The Department and Coplay vigorously dispute the Township's assertion of deceit, misrepresentation and improper influence. A motion for partial summary judgment is, however, not the proper vehicle to resolve these disputes where there are numerous contested issues of material fact.

The Board therefore denies the Joint Motion for Partial Summary Judgment and issues the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **WHITEHALL TOWNSHIP** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2015-109-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COPLAY AGGREGATES, INC., Permittee** | : | |

**O R D E R**

AND NOW, this 1st day of March, 2017, it is hereby ordered that the Joint Motion for Partial Summary Judgment is **denied.**

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: March 1, 2017**

**c:** **For DEP, General Law Division:**
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(*via electronic mail*)

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**For Permittee:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CLEAN AIR COUNCIL, THE DELAWARE RIVERKEEPER NETWORK, and MOUNTAIN WATERSHED ASSOCIATION, INC.** | : | |
| **v.** | : | **EHB Docket No. 2017-009-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee** | : | **Issued: March 3, 2017** |

**OPINION IN SUPPORT OF RULING DENYING PERMITTEE'S MOTION TO LIMIT EVIDENCE AT SUPERSEDEAS HEARING**

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis**

The Board denied the Permittee's motion to limit the testimony of two of the Appellants' experts at a supersedeas hearing because expert affidavits in support of a petition for supersedeas do not serve the same function as expert reports at a hearing on the merits.

**O P I N I O N**

This matter involves an appeal by Clean Air Council, the Delaware Riverkeeper Network and the Mountain Watershed Association ("Appellants") challenging permits issued by the Department of Environmental Protection ("Department") to Sunoco Pipeline, L.P. ("Sunoco"). The permits authorize earthmoving work associated with the construction of two natural gas liquids pipelines known as the Mariner East 2 project. A more detailed history of this matter may be found at *Clean Air Council v. DEP and Sunoco Pipeline, L.P.*, EHB Docket No. 2017-009-L (Opinion and Order on Motion for Expedited Hearing and for Reconsideration issued February 23, 2017).

On February 14, 2017, the Appellants filed a petition for supersedeas and an application for temporary supersedeas seeking an immediate halt to construction activity begun under the permits. The Board held an in-person conference with the parties on February 16, 2017 and heard oral argument on the application for temporary supersedeas. On February 17, 2017, the Board issued an Order denying the application for temporary supersedeas and scheduled an evidentiary hearing on the supersedeas petition to begin on March 1, 2017.

On February 28, 2017, Sunoco filed a Motion to Limit Evidence at Supersedeas Hearing to Facts Set Forth in Affidavits of Michele C. Adams, P.E. and James A. Schmid, Ph.D. Ms. Adams and Dr. Schmid were identified as experts who would be testifying for the Appellants at the supersedeas hearing, and their affidavits were among the 17 affidavits submitted in support of the petition for supersedeas. In its motion, Sunoco asserted among other things that the Adams and Schmid affidavits pre-date the Department's issuance of the permits at issue in this appeal and, as a result, "contain several deficiencies and inaccuracies, and in some instances are contrary to the plain language of the permits issued to Sunoco." The motion also asserts that the affidavits do not address many of the allegations made in the petition for supersedeas. Sunoco says that the affidavits and report are insufficient to establish the Appellants' burden of demonstrating the necessary elements of a supersedeas.

According to Sunoco's motion, during a conference call held among the parties on February 23, 2017, Sunoco asked counsel for the Appellants whether they intended to amend the Adams and Schmid affidavits prior to the hearing, and counsel for the Appellants declined to say whether they would do so. Sunoco argued that if the Board allowed Ms. Adams and Dr. Schmid to testify about facts and opinions outside the scope of their affidavits it would be prejudicial to both Sunoco and the Department because neither party will have an opportunity to prepare

adequate cross examination. Sunoco argues that, because the Appellants have not corrected the alleged deficiencies in the affidavits, the testimony of Ms. Adams and Dr. Schmid must be limited to only those facts and opinions contained within their affidavits.

The supersedeas hearing commenced as scheduled on March 1. Near the beginning of the hearing we advised the parties that we would rule on this and other motions in limine filed by Sunoco in the context of the experts' testimony. The Department indicated that it joined in Sunoco's motion. Early on in Dr. Schmid's testimony both Sunoco and the Department raised objections consistent with the motion complaining that Schmid's testimony went beyond the four corners of his affidavit. We overruled those objections and denied Sunoco's motion in limine in a ruling from the bench. This Opinion is issued in support of those rulings.

**Discussion**

The Board's rules governing petitions for supersedeas state in pertinent part as follows:

> (a) A petition for supersedeas shall plead facts with particularity and shall be supported by one of the following:
>
> (1) Affidavits. . .setting forth facts upon which issuance of the supersedeas may depend.
>
> (2) An explanation of why affidavits have not accompanied the petition if no supporting affidavits are submitted with the petition for supersedeas. . . .

25 Pa. Code § 1021.62(a). A petition may be denied for "an inadequately explained failure to support factual allegations by affidavits." *Id*. at § 1021.62(c)(3); *Mellinger v. DEP*, 2013 EHB 322; *Hopewell Twp. Bd. of Supervisors v. DEP*, 2011 EHB 732; *Timber River Development Corp. v. DEP*, 2008 EHB 635.

Sunoco cites two cases, neither of which directly deals with the issue raised in its motion. In *Goodman Group, Ltd. v. DEP*, 1997 EHB 697, the Board denied a petition for supersedeas

based on the appellant's failure to provide any affidavits with its petition, nor an explanation of why affidavits were not provided. Although the appellant in *Goodman* eventually filed an affidavit with the Board, it was not filed until nearly three weeks after the petition and after the Board had canceled the supersedeas hearing. In denying the request for supersedeas, the Board cautioned:

> A supersedeas request to this Board is placed on a fast track because it seeks an extraordinary result – the suspension of a DEP action. The hearing is to be held as soon as possible after the request is filed, within two weeks if feasible. 25 Pa. Code § 1021.76(c) [now at § 1021.61(c)]. Hearings are limited, generally confined to one day, and decisions are issued promptly thereafter. Appellants are expected to file an adequate request complying with our rules in the first instance. If they fail to do so, they must be prepared to correct the deficiencies within a matter of days because the request is proceeding rapidly to hearing, and this Board and other parties must be assured that the request is not frivolous or dilatory in nature.

*Id.* at 700.

In sharp contrast to the facts in *Goodman*, here the Appellants have provided 17 affidavits in support of their petition, including those of Ms. Adams and Dr. Schmid. Dr. Schmid's affidavit consists of 58 paragraphs totaling 17 pages. Ms. Adam's affidavit attaches and incorporates an expert report totaling over 20 pages.

Sunoco also relies on the Board's decision in *CMV Sewage Co. v. DEP*, 2010 EHB 725. Sunoco cites *CMV* for the proposition that the Board may preclude or limit testimony based on the submission of an incomplete expert report. It should be noted that the appellant's expert in *CMV* was not named during discovery, but was identified for the first time in the appellant's prehearing memorandum. Moreover, as Sunoco acknowledges, *CMV* involved expert testimony to be presented at a hearing on the merits, which involves a very different process than that of a supersedeas hearing. Before parties reach a hearing on the merits, they have often engaged in

months of discovery and have exchanged expert reports and/or expert interrogatories; they are well aware of the deadlines facing them by virtue of the prehearing order that the Board issues at the start of a case. In contrast, a supersedeas hearing, by its very nature, involves a truncated process in which the parties are subject to very tight time constraints in gathering their evidence and preparing their case. As we held in *The Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, 162, "we are cognizant of the fact that a supersedeas hearing involves expedited preparation by the parties and a limited record for consideration." *CMV* is not on point.

The purpose of affidavits in support of a petition for supersedeas, including expert affidavits, is to get the petitioners in the door. They show the Board that the petitioners have legitimate, nonfrivolous concerns that at least arguably require immediate attention. They provide notice to the opposing parties as to the basic basis for the petitioner's case; they are not intended to serve the same purpose as expert reports at a hearing on the merits.

We have never held and decline to hold now that the affidavits circumscribe the limits of the petitioners' presentation at the evidentiary hearing on the petition for supersedeas. Indeed, our rules do not require expert affidavits in support of a petition, although such affidavits obviously help. We would have allowed Schmid and Adams to testify in this case even if they had not supplied any affidavits, just as we have allowed the Department and Sunoco to provide expert testimony in opposition to the supersedeas without having served expert affidavits or reports.

Sunoco argues that it will suffer prejudice if its motion is not granted because it will be deprived of the opportunity to adequately prepare cross-examination or responsive testimony. To some extent, all parties involved in a supersedeas are at a disadvantage since, due to its

urgency, there is little opportunity to gather information about the other's case. As we have explained in ruling on numerous petitions for supersedeas:

> 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.

*Global Eco-Logical Servs, Inc. v. DEP*, 1999 EHB 649, 651 (cited by *Hudson v. DEP*, 2015 EHB 719, 726 and *Prizm Asset Management Co. v. DEP*, 2005 EHB 819, 826).

There are some cases where conditions are not so urgent that by agreement and/or Board order there can be a limited period of discovery, document exchange, responsive pleadings, or the like in connection with a petition for supersedeas. In this case, however, all parties have made it clear that the Board's most urgent attention is required. In a case such as this, we are particularly disinclined to hold that the petitioners' expert testimony is in any way constrained by the affidavits submitted in support of their petition.

We suspect that the Appellants' affidavits were supplied at least in part to support their application for a *temporary* supersedeas. The affidavits play a critical role in our consideration of an application for *temporary* supersedeas. Indeed, other than the application itself, the affidavits, and argument of counsel--which has no evidentiary value--we often have little else to go on in ruling on an emergency application. That consideration wanes dramatically once we have an opportunity to consider live testimony given under oath subject to cross-examination at an evidentiary hearing. Indeed, at the evidentiary hearing on the petition for supersedeas itself,

affidavits are hearsay and generally not admitted absent agreement of the parties. (There was no such agreement in this case.) A supersedeas petitioner's case on the merits would not be circumscribed by affidavits directed at obtaining a temporary supersedeas, and we see no need to constrict a party's supersedeas presentation to the four corners of those affidavits either.

Finally, in our search for the correct result on the merits of any controversy, we are generally disinclined to limit the testimony of a party's expert without some compelling basis for doing so. *Kiskadden v. DEP*, 2014 EHB 626, 630. In ruling on any motion to limit testimony, the Board considers the prejudice caused to each party by allowing or excluding the testimony and the extent to which the prejudice can be cured. *Rhodes and Valley Run Water Co. v. DEP*, 2009 EHB 237; *DEP v. Angino*, 2006 EHB 278). Here, Sunoco has demonstrated no such basis for granting its motion, nor has it demonstrated that it will suffer any more prejudice than the other parties who are also required to put on their case without the benefit of discovery or completed expert reports. Sunoco and the Department had an unconstrained opportunity to cross-examine Ms. Adams and Dr. Schmid on their opinions as expressed at the supersedeas hearing.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: March 3, 2017**

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CITY OF ALLENTOWN** | : | |
| **v.** | : | **EHB Docket No. 2016-144-M** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: March 9, 2017** |

## OPINION AND ORDER ON DEPARTMENT'S MOTION TO STAY DISCOVERY

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Board previously issued an order on February 10, 2017 in which the Board granted in part and denied in part the Department's Motion to Stay Discovery because some of the discovery sought bears on the fact-specific jurisdictional arguments the Department makes in its Motion to Dismiss[1]. This opinion supports the prior issuance of the Board's February 10th Order. All discovery which is not related to the jurisdictional issue raised by the Department in its Motion to Dismiss is stayed. The Board granted limited discovery on those matters which are agreed upon by both parties to be related to the jurisdictional issue, and that discovery should proceed.

## O P I N I O N

The above captioned appeal was filed by the City of Allentown ("Appellant") on October 21, 2016 in response to a letter from the United States Environmental Protection Agency Region III ("EPA") that referenced a statement made during a meeting with Appellant, Department employees, and EPA representatives.

[1] The Department filed a Motion to Dismiss for Lack of Jurisdiction on January 31, 2017, just prior to filing its Motion to Stay Discovery. The Board has not yet issued an Opinion on the Motion to Dismiss.

On or around September 28, 2007, EPA issued a Findings of Violation, Order for Compliance and Request for Information ("First EPA AO") to the Appellant. The First EPA AO ordered Appellant to submit plans to eliminate discharges from the Outfall #003 bypass and to eliminate sanitary sewer overflow ("SSOs"). On or around September 28, 2009, EPA issued a Findings of Violation, Order for Compliance and Request for Information ("Second EPA AO") to the Appellant and thirteen other municipal Respondents. he thirteen Respondents all own or operate sewage collection systems that either directly convey wastewater to the Allentown wastewater treatment plant or the wastewater is conveyed to the treatment plant after passing through the sewage collection system operated by another municipality. This Second EPA AO ordered Respondents to eliminate discharge from the SSOs by December 31, 2016, and asserted that Appellant's Outfall #003 is an SSO, not a bypass. On or around February 10, 2016, EPA issued a Findings of Violation, Order for Compliance and Request for Information ("Third EPA AO") which provided an extension of the December 31, 2014 deadline in the Second EPA AO to December 31, 2017.

Throughout this period of time, the Appellant has had NPDES permit no. PA002600, which the Department issued on March 20, 2003. It was set to expire on September 30, 2007, but has been administratively extended for 10 years, through October 1, 2017. The Appellant believes that the Department has not reissued its permit due to wet weather issues associated with peak flows at its Kline Island Wastewater Treatment Plant and the issue of blending. On or around April 17, 2013, Appellant, EPA, and the Department had a meeting to discuss wet weather issues and planned actions to comply with EPA's AOs. Appellant also raised the issue of whether blending was allowed, as the Eighth Circuit decided *Iowa League of Cities v. Environmental Protection Agency*, 711 F.3d 814 (8th Cir. 2013) on March 25, 2013 and vacated

EPA's prohibition on blending. Following this meeting, Appellant, EPA and DEP corresponded twice before meeting on June 14, 2016. At this meeting, Appellant again raised the issue of blending in light of the Eighth Circuit decision because three years had passed and neither EPA nor DEP had given Appellant an answer.

On September 12, 2016, representatives from Appellant City, the Lehigh County Authority, EPA, and DEP met to discuss the proposed plan to eliminate overflows. At the meeting, the Appellant asserts that a Department employee stated that his understanding was that State regulation prohibited blending. This statement was later repeated in a summary letter EPA sent, which declared "that according to state regulation, all flows from a sanitary system need to receive biological treatment, and therefore blending would be inappropriate." It is this statement in the EPA letter that Appellants appeal.

On January 31, 2017, the Department filed a Motion to Dismiss and a Motion to Stay Discovery Pending Disposition of the Department's Motion to Dismiss. In its Motion to Stay Discovery, the Department argues that Appellant's discovery is premised on the disputed contention that the Department made a final decision that is subject to review. It is the Department's position that it did not make a final decision subject to review and that it is in the interest of judicial economy to address this dispute through the pending motion to dismiss rather than through discovery motions. The Department further contends that Appellant's discovery requests are burdensome because they go well beyond the alleged action at issue. Therefore, the Department requests that the Board stay discovery until the Board issues a ruling on the Department's pending Motion to Dismiss.

On February 8, 2017, the Appellant filed its Response in Opposition to the Department's Motion to Stay Discovery and argued that "it is well-settled that discovery should not be stayed

pending a motion to dismiss for lack of jurisdiction when the discovery sought bears directly on fact-specific jurisdictional arguments raised in the motion to dismiss." Appellant's Response at 1. The Appellant contends that its discovery requests are aimed at addressing the fact-specific issues relevant to whether the Department has rendered an appealable action. The Appellant's position is that because the determination of whether a Department action is appealable is highly fact-specific, it needs to be able to conduct discovery into the factual issues related to the jurisdictional issue raised by the Department. The Board agrees.

The Board has often allowed discovery related to jurisdictional issues in advance of a motion to dismiss based on jurisdiction. For example, in *Borough of West Chester and West Goshen Sewer Authority v. DEP*, Docket no. 2008-272-MG, the Department filed a motion for a jurisdictional hearing and a motion to stay discovery on March 2, 2009. *Id*., Department's Motion for Jurisdictional Hearing and to Stay Discovery (Mar. 2, 2009). The Board scheduled a hearing on jurisdictional issues but refused to stay discovery. *Id.* Order Concerning Jurisdictional Hearing and Further Discovery (Mar. 20, 2009). In *Teleford Borough Authority, et al. v. DEP*, 2009 EHB 434, the Board denied in part a motion to compel discovery when that discovery exceeded the Board's prior limitation of discovery to jurisdictional matters. The Board stated it "[had] authorized discovery limited to the jurisdictional issue and has specifically designated issues on which discovery may not be conducted[…]." *Teleford Borough Authority, et al.*, 2009 EHB at 435. In *Stern v. DEP*, 2001 EHB 628, the Board denied the Department's Motion to Dismiss for Lack of Jurisdiction. Both parties in that case "engaged in extensive discovery on the jurisdictional issue[…]." *Stern*, 2001 EHB at 638. In *Sunoco Logistics Partners, LP v. DEP*, 2010 EHB 314, 318, the Board ordered discovery to proceed before it would address a motion

for summary judgment. The Board has therefore often allowed limited discovery to proceed when it is related to the jurisdictional issues raised by a pending dispositive motion.

The Board is further guided by the Pennsylvania Superior Court, which has found it appropriate to resolve jurisdictional issues without discovery only if there are no factual issues raised regarding jurisdiction. *Deyarmin v. CONRAIL*, 931 A.2d 1, 14 (Pa. Super. 2007). In *Deyarmin*, the Superior Court stated: "A trial court may appropriately resolve preliminary objections to venue (or jurisdiction) without discovery in cases where 'no factual issues were raised which necessitated the reception of evidence.'" *Id.* at 14, quoting *Hamre v. Resnick*, 486 A.2d 510 (Pa. Super. 1984).

Here, the Appellant asserts there are factual issues regarding the jurisdictional issues raised by the Department with respect to whether the joint letter from EPA constitutes a final appealable action of the Department. The Appellant asserts that some of its discovery bears directly on the fact-specific jurisdictional issues raised in the Department's Motion to Dismiss and the Board would be benefitted by allowing jurisdictional discovery to proceed. The Board agrees and allows limited discovery related to the jurisdictional issue raised by the Department. The Board also recognizes the burden caused by allowing all discovery to proceed while a pending Motion to Dismiss exists, and determines that all discovery not related to the jurisdictional issues the Department raises shall be stayed.

**Discovery Related to Jurisdictional Issues**

The Board held a conference call with the Parties on February 27, 2017 to discuss, among other things, potential disputes relating to which pending discovery requests were jurisdictional in nature. During the call, the Board learned that although the Parties had reached partial agreement, a total of thirty-two (32) specific discovery requests were still disputed. Accordingly,

the Board issued an Order on February 28, 2017 directing Parties to file a Statement of Position with the Board by March 7, 2017. The Statements were to outline each Party's position on whether each of the outstanding thirty-two discovery requests were or were not related to the jurisdictional issue raised by the Department in its pending Motion to Dismiss. The Parties filed their Statements of Position on March 7, 2017 as directed.

The Board has now reviewed the Parties' Statements of Position and finds that only Request for Admission #12 is jurisdictional in nature. The additional discovery requests identify information that may be relevant to the merits of the underlying appeal, but this additional information is not necessary to resolve the jurisdictional issue raised by the Department in its Motion to Dismiss. The Department should therefore respond to all discovery related to the jurisdictional issue, including Appellant's Request for Admission #12, consistent with the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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|---|---|---|
| **CITY OF ALLENTOWN** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-144-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**O R D E R**

AND NOW, this 9th day of March, 2017, in consideration of Department's Motion to Stay Discovery, the City of Allentown's Response, and the City of Allentown's Motion for a Time Extension and the Parties Statements of Position, it is hereby ordered that the motions are granted in part and denied in part as follows:

(1) All discovery which is not related to the jurisdictional issue raised by the Department in its Motion to Dismiss is **STAYED.**

(2) All discovery which is related to the jurisdictional issue raised by the Department in its Motion to Dismiss shall be answered no later than **March 22, 2017**.

(3) The City of Allentown's Response to the Department's Motion to Dismiss shall be filed no later than **April 24, 2017**.

(4) The Department's Reply to the City of Allentown's Response shall be filed by no later than **May 9, 2017**.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: March 9, 2017**

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

**For the Commonwealth of PA, DEP:**
Joseph S. Cigan, Esquire
*(via electronic filing system)*

**For Appellant:**
Frances A. Fruhwirth, Esquire
Gary B. Cohen, Esquire
John C. Hall, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **CLEAN AIR COUNCIL AND ENVIRONMENTAL INTEGRITY PROJECT** | : | |
| **v.** | : | **EHB Docket No. 2015-111-R** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SHELL CHEMICAL APPALACHIA, LLC, Permittee** | : | **Issued: March 10, 2017** |

**OPINION AND ORDER**
**GRANTING PETITIONS TO INTERVENE**

**By Thomas W. Renwand, Chief Judge and Chairman**

**Synopsis**

The Board grants the Petitions to Intervene of Univation Technologies, LLC; Linde Engineering North America, Inc.; INEOS Sales (UK) Limited; and John Zink Company, LLC for the limited purpose of protecting their confidential business information and trade secrets. The Board finds that the Petitioners have satisfied the legal requirements to warrant the granting of their Petitions to Intervene under the Board's Rules. The Board finds that the Petitions are timely, the Petitioners' interest in protecting alleged confidential business information sets forth a sufficient interest in the litigation, and a Board Adjudication or Order could affect the Petitioners' interest. Whether Shell Chemical adequately represents the interests of any of the four parties is not relevant on this issue.

**O P I N I O N**

**Background**

Presently before the Pennsylvania Environmental Hearing Board (Board) is a matter of first impression. Four Petitions to Intervene have been filed in the above-captioned matter

submitted by third parties Univation Technologies, LLC; Linde Engineering North America, Inc.; INEOS Sales (UK) Limited; and John Zink Company, LLC ("Petitioners"). Petitioners seek to intervene in this matter to protect alleged confidential business information and trade secrets that are the subject of discovery requests propounded to Shell Chemical by Appellants Clean Air Council and Environmental Integrity Project. Permittee, Shell Chemical, has plans to construct a chemical plant that will use the ethane from the Marcellus Shale play to produce ethylene and polyethylene. According to Shell, this facility will be the first major project of its type outside the Gulf Coast in twenty years and is expected to employ thousands of workers in the construction phase and up to 600 employees during operation. The two Appellants, Clean Air Council and Environmental Integrity Project, are appealing the Pennsylvania Department of Environmental Protection's (DEP or Department) issuance of an Air Quality Plan Approval for the project. In furtherance of their appeal, Appellants have requested information and documents that Shell Chemical argues include trade secrets and proprietary information belonging to third party vendors, including the Petitioners. Although the first of these discovery requests were served on Shell on May 20, 2016, Shell Chemical did not advise the vendors of the Appellants' discovery requests until December 13, 2016 through January 31, 2017. Petitioners filed Petitions to Intervene with the Board in order to protect their information and documents. Appellants Clean Air Council and Environmental Integrity Project filed a Response opposing each of the Petitions to Intervene.

Following the receipt of the initial Petitions to Intervene and Responses, the Board ordered additional briefing by the Parties so that this novel and important issue regarding intervention would be fully briefed. The briefing was concluded on February 17, 2017. We will

review the individual Petitions to Intervene and the Responses, followed by a discussion of the relevant regulations and case law.

**A. Univation Technologies, LLC**

On December 27, 2016, pursuant to 25 Pa. Code § 1021.81, Univation Technologies, LLC ("Univation") filed a Petition to Intervene for the limited purpose of "want[ing] a voice as to how any of its confidential information is disclosed in litigation to which it is not a party—avoiding becoming a victim through abstention." Univation Motion to Intervene, p. 2. Univation is a leading technology licensor in the polyethylene industry and has developed a proprietary process for producing a range of polyethylene resins. *Id*. at para. 1-6. According to Univision, the process took 45 years to develop and cost millions of dollars. *Id*. at para. 5. Univation contends that the documents surrounding this "are confidential and proprietary and contain trade secret information." *Id*. at 6.

Univation argues that any disclosure of confidential business or technical information regarding its proprietary process would threaten its business by allowing potential customers to bypass Univation and design their own plants. *Id*. at para. 9. Once disclosed, Univation asserts that it would have no remedy and would be faced with significant monetary loss. *Id*. at para. 10-11. Univation states that all of the information about the process is kept in a highly secure environment, and the technology is shared only with licensees who have paid a significant sum of money for the license and have signed a comprehensive non-disclosure agreement. *Id*. at para. 14-17. Permittee Shell Chemical is a licensee, and the licensing agreement requires Shell to "hold Univation's confidential and trade secret information in confidence" and further requires "that Shell will not use such information or disclose such information to others . . ." *Id*. at para. 19.

Univation argues that it should be allowed to intervene for the limited purpose of protecting its confidential business information because it holds an interest that is "unique to Univation, and as such, is greater than that of the general public." *Id*. at para. 40. It contends that a Board Order requiring the production of certain information in discovery, without proper safeguards, could drastically impair Univation's interest because if its confidential and proprietary information is released, its business may be harmed substantially. *Id*. at para. 41.

**B. Linde Engineering North America, Inc.**

On December 30, 2016, pursuant to 25 Pa. Code § 1021.81, Linde Engineering North America, Inc. ("Linde") filed a Petition to Intervene for the "limited purpose of seeking an extension of time so that Linde can either appropriately assist Shell in complying with its obligation to protect Linde's confidential documentation, or directly seek a protective order to protect Linde's confidential documentation." Linde Motion to Intervene, para. 45. Linde describes itself as a single-source technology, engineering, procurement and construction firm focused on giving its customers innovative solutions. *Id*. at para. 2. The company's areas of expertise include "gas processing, refining, liquefied natural gas, deep cryogenics, synthesis gas, air separation, and petrochemical plants as well as fired process equipment." *Id*.

Linde characterizes itself as having been a "pioneer in the ethylene industry" since the 1950s. *Id*. at para. 5. According to Linde, it owns and has the exclusive right to license its steam cracker technology in addition to some associated technology. *Id*. Its investment in its technology has given it a competitive advantage in large projects and it takes substantial steps to keep its confidential information out of the hands of its competitors and the general public. *Id*. at para. 7-9. Pursuant to a license agreement, Linde provided certain confidential technical information to Shell. *Id*. at para. 17. As part of this licensing agreement, Shell Chemical agreed

to "hold in strict confidence all Linde Confidential Information and shall use the same only for the purpose of designing, engineering, construction, commissioning, maintaining and operating the Licensed Unit, for which [Shell Chemical] has been granted the operation license hereunder." *Id*. at para. 18.

Linde contends that it should be allowed to intervene in this litigation for the limited purpose of "protecting against the disclosure of Linde Confidential Technical Information." *Id*. at para. 51. Linde states that it is without question that its interest is greater than that of the general public, and is substantial, direct, and immediate. According to Linde, because the technology is exclusively owned by it, no other party is able to sufficiently address and protect Linde's interests. It further argues that a ruling by the Board allowing disclosure of its confidential information "would expose Linde to substantial harm which it can only fully protect through intervention in this matter." *Id*. at para. 50.

**C. Ineos Sales (UK) Limited**

On January 4, 2017, pursuant to 25 Pa. Code § 1021.81, INEOS Sales (UK) Limited ("INEOS") filed a Petition to Intervene for the "limited purpose of defending the confidential treatment of INEOS's trade secret and confidential business information." INEOS Petition to Intervene, p. 1. INEOS is "a developer and exploiter of leading technology in the high-density polyethylene industry" with a strong interest in protecting its intellectual property. *Id*. at para. 9. INEOS asserts that its technology is the result of the substantial investment of hundreds of millions of dollars. *Id*.

Shell Chemical licensed INEOS's "proprietary Innovene high-density polyethylene manufacturing technology" and the information it received purportedly included detailed specifications and drawings of the process, which involves the use of proprietary systems. *Id*. at

para. 1. INEOS states that it has a "substantial, direct and immediate interest in the appeal because it is the licensor and . . . owner of trade secrets and confidential business information that may be publicly disclosed as a result of rulings by the Board." *Id*. at para. 8.

INEOS desires to intervene to protect its property rights from being potentially affected by a ruling by the Board. *Id*. at para. 13. It claims that its interest in "protecting its trade secrets and confidential business information outweighs any public interest in the disclosure of this proprietary information." *Id*. at para. 12. Finally, INEOS contends that it is only interested in offering legal argument with respect to the treatment and protection of its trade secrets and confidential business information, and will not address other issues in the appeal.

**D. John Zink Company, LLC**

On February 8, 2017 John Zink Company, LLC ("John Zink") filed its Petition to Intervene. According to John Zink, it first learned about this litigation and the discovery requests on February 1, 2017 after reading a letter it received from Shell Chemical dated January 31, 2017. John Zink was founded in 1929 and "designs and manufactures emissions-control and clean air combustion systems" for customers throughout the world. John Zink Petition to Intervene, para. 2. Among the devices it manufactures are "flares...and vapor combustion and recovery products." *Id*. The company operates Research and Development Centers in Oklahoma and Europe "which are among the largest and most advanced complexes of their kind." *Id*. at para. 4. John Zink explains that it has developed highly confidential and proprietary processes and materials which it goes to great lengths to protect and keep secret. *Id*. at para. 5-6. It argues that as the global leader in this field it would suffer great harm if this confidential business information became public.

**E. Appellant – Clean Air Council**

On January 13, 2017, Appellants Clean Air Council and Environmental Integrity Project filed responses opposing the Petitions to Intervene filed by Univation, Linde and INEOS. Appellants have four primary concerns that lead to their opposition: (1) Appellants filed their appeal on August 3, 2015 and made the first of the discovery requests at issue on May 20, 2016, yet none of the third-parties filed a Petition to Intervene before December 27, 2016; (2) Shell Chemical caused significant prejudicial delay in producing discovery, and allowing intervention at this point would cause additional delay; (3) Shell knew since June 22, 2016 that the third-parties' confidential documents were potentially among those sought by Appellants, as it noted as much in its responses to Appellants' first discovery requests; and (4) the Petitioners' interests are adequately represented by Shell Chemical and none has standing to intervene because each lacks a direct, substantial, or immediate interest in the central dispute in the case. Appellant's Answer in Opposition to Linde, p. 1; Appellant's Answer in Opposition to INEOS, p. 1; Appellant's Answer in Opposition to Univation, p. 1.

On February 17, 2017, Appellants filed a response opposing the Petition to Intervene filed by John Zink. Appellants raised similar objections to John Zink's Petition to Intervene that they had raised to the earlier Petitions. Appellants contend that John Zink has no interest in the dispute besides the ancillary matter of protection of their information which they argue can be adequately and fully protected by Shell Chemical. Appellants' Answer in Opposition to John Zink, paragraph 28. Appellants further argue that "John Zink's intervention will cause unnecessary delay, expend Appellants' and the Board's resources, and will directly impede on the Board's decision." *Id.* at paragraph 41.

Shell Chemical supports the relief requested in the Petitions to Intervene while the Department does not oppose it.

## DISCUSSION

The Pennsylvania Rules of Civil Procedure together with the Board's Rules of Practice and Procedure govern intervention before the Board. Section 4 of the Environmental Hearing Board Act states "[a]ny interested party may intervene in any matter pending before the Board." 35 P.S. § 7514(e). "Interested party" 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 intervenor must have standing. *Pileggi v. DEP*, 2010 EHB 433, 434. This is demonstrated by the party having "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. DEP*, 703 A.2d 1063, 1065 n. 2 (Pa. Cmwlth. 1997); *Wheelabrator Pottstown, Inc. v. DER*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *Hostetter v. DEP*, 2012 EHB 386, 388; *Pagnotti Enterprises, Inc. v. DER*, 1992 EHB 433, 436. *See also, William Penn Parking Garage, Inc. v. City of Pittsburgh,* 346 A.2d 269, 286 (Pa. 1975).

Under the Board's Rules, a petition to intervene must include 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.

Although the Board has determined that an interest in property held by a third party is sufficient for intervention, it has not dealt with an interest in protecting Confidential Business

Information ("CBI") or related economic interests. *See, e.g., Hostetter v. DEP*, 2012 EHB 386 (owners of property in affected subdivision); *Pileggi v. DEP*, 2010 EHB 433 (co-owner of property subject to the appeal). This is a question of first impression for the Board and in rendering this Opinion it has looked to caselaw not only from Pennsylvania but also federal cases and cases from other states.

In *Haney v. Range Resources--Appalachia, Inc.,* 121 A.3d 1132, 2015 Pa. Super Unpublished. LEXIS 951 (Pa. Super. 2015) the Pennsylvania Superior Court, in ruling on an appeal from a discovery decision by the Court of Common Pleas of Washington County, denied the driller's appeal of a Common Pleas Court ruling seeking to protect the confidentiality of trade secret formulas of chemicals used by Range Resources. The court held, "Range Resources does not have a recognizable interest in the proprietary information it seeks to protect. To the extent the proprietary, chemical ingredients of products used at the Yeager drill site are entitled to protection, the right to assert such protection is held by the manufacturers of these products, not Range Resources." *Haney,* 2015 Pa. Super Unpub. LEXIS 951, at *6.

As we will further discuss below, caselaw from the Third Circuit holds that a nonparty concerned about the publication of proprietary information may successfully petition for intervention even when the case's subject matter does not directly relate to that confidential information. Intervention is appropriate for ancillary issues unrelated to the legal theory raised in the main action and does not require the same nexus between the intervenor's claim and the original legal theory.

The standards for both Intervention of Right and Permissive Intervention are found in Rule 24 of the Federal Rules of Civil Procedure. A nonparty may intervene as of right, on a timely motion, if: (1) the party is given an unconditional right to intervene by federal statute, or

(2) the party claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest. Fed. R. Civ. P. 24(a)(1)-(2). Permissive intervention is possible when, on a timely motion: (1) the party is given a conditional right to intervene by federal statute, or (2) has a claim or defense that shares with the main action a common question of law or fact. Fed. R. Civ. P. 24(b)(1)-(2).

The Third Circuit Court of Appeals has held that under Rule 24 a nonparty may intervene only if: (1) The application for intervention is timely; (2) The applicant has a sufficient interest in the litigation; (3) The interest may be affected or impaired as a practical matter by the disposition of the action; and (4) The interest is not adequately represented by an existing party in the litigation. That is, the court asks whether the interest is significantly protectable. *Mt. Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 365-66, 68-69 (3d Cir. 1995), citing *Harris v. Pernsley*, 820 F.2d 592, 597 (3d Cir. 1987).

In this matter, Petitioners have two primary concerns: economic and the protection of the confidential information and trade secrets. Generally, economic interests are not sufficient to support a motion to intervene; however, courts may find an exception if those interests are specific. In *Mountain Top Condominium Association*, *supra*, the owners of condominiums ("Owners") filed to intervene in a case between the condominium association ("Association") and contractors in order to protect funds that had been set aside for use in repairs following a hurricane. The district court held that the Owners had no interest at stake in the litigation and no standing to become involved in it. 72 F.3d at 363. The Court of Appeals disagreed and reversed.

In *Mountain Top*, at issue was $250,000 set aside to cover the cost of repairing the condominiums after a hurricane. *Id*. at 367. The money was held in trust under the supervision of the Insurance Trustee, and the court determined that, like all beneficiaries of an express trust, the Owners had an interest in seeing that the assets of the trust were not diverted in a manner that would defeat the trust's purpose. *Id*.

After applying Fed. R. Civ. P. 24, the court concluded that although an economic interest in the outcome of the litigation is generally not enough to support a motion to intervene, an intervenor's interest in a specific fund is sufficient to entitle intervention in a case that affects that fund. *Id*. at 366. Further, proposed intervenors do not need to have an interest in all aspects of the litigation; they are entitled to intervene with respect to specific issues as long as their interest in those issues is significantly protectable. *Id*.

In defining the contours of a "significantly protectable" legal interest under the Rule, the court has held "the interest must be a legal interest as distinguished from interests of a general and indefinite character." *Id*. In order to intervene, the applicant must show that there is a tangible threat to a legally cognizable interest. Additionally, that interest may not be adequately represented by other parties involved in the litigation. The Court stated:

> The most important factor in determining adequacy of representation is how the interest of the absentee compares with the interest of the present parties. If the interest of the absentee is not represented at all, or if all existing parties are adverse to him, then he is not adequately represented. If his interest is identical to that of one of the present parties, or if there is a party charged by law with representing his interest, then a compelling showing should be required to demonstrate why this representation is not adequate.

*Id*. at 368-69.

With regard to having a significantly protectable legal interest, the Owners had an interest in the property over which the court took jurisdiction. *Id*. at 368. While they may not have had an

interest in the merits of the claims pending between the Association and contractors, "clearly they have an interest in being heard with respect to the disposition of [the $250,000]." *Id*. The court held that "such an interest is sufficient to support an applicant's intervention as of right." *Id*.

Therefore, a very specific economic interest (in a particular fund, for example) that is significantly protectable – i.e. not already adequately represented by other parties – is likely sufficient for a court to allow a third-party's intervention. However, given that a specific fund or amount of money is not at issue here, only the hypothetical loss of it, we turn our attention to the more relevant issue of an interest in protecting information.

Intervention for the purpose of challenging a protective order or confidentiality agreement is appropriate and does not require that an intervenor's claim have the same legal theory raised in the main action. The Court of Appeals has sided with the forming federal consensus that "the procedural device of permissive intervention is appropriately used to enable a litigant who was not an original party to an action to challenge protective or confidentiality orders entered in that action." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994), citing *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 473-74 (9th Cir.), *cert. denied*, 113 S. Ct. 197 (1992); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990), *cert. denied*, 498 U.S. 1073, 111 S. Ct. 799 (1991); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783-87 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989); *Meyer Goldberg, Inc., of Lorain v. Fisher Foods, Inc.*, 823 F.2d 159, 161-64 (6th Cir. 1987); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979); *In re Beef Indus. Antitrust Litig.*, 589 F.2d 786, 788-89 (5th Cir. 1979); *City of Hartford v. Chase*, 733 F. Supp. 533, 534 (D. Conn. 1990), *rev'd on other grounds*, 942 F.2d 130 (2d Cir.

1991); *In re Franklin Nat'l Bank Sec. Litig.*, 92 F.R.D. 468, 470-71 (E.D.N.Y. 1981), *aff'd sub nom. Federal Deposit Ins. Corp. v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982).

The decision in *Pansy*, issued the year before *Mountain Top*, laid the groundwork for future cases that would find a significantly protectable legal interest in confidential business information. *Pansy v. Borough of Stroudsburg*, *supra*, addressed a petitioner's ability to intervene in order to challenge an order of confidentiality pertaining to settlement agreements. In *Pansy*, newspapers moved for permissive intervention under Fed. R. Civ. P. 24(b)(2) in order to access a settlement agreement between a government entity and a former employee. The district court denied the motion for intervention for two reasons: (1) The motion for intervention was untimely because the case had been settled for at least six months; and (2) The newspapers failed to demonstrate that their interest in the case had anything in common with a question of law or fact in the main action, thus failing to meet the requirements of Fed. R. Civ. P. 24(b)(2). *Pansy*, 23 F.3d at 777-78. The Court of Appeals disagreed with the district court's decision and reversed.

The requirement of a nexus between an intervenor's claim and the legal issue at the heart of the main action is relaxed. The court cited the Ninth Circuit, holding "[t]here is no reason to require the same nexus of fact or law [between the intervenor's claim and the legal theory raised in the main action] when a party seeks to intervene only for the purpose of modifying a protective order." *Id*. (internal quotations omitted) (quoting *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992)). The usual nexus is not required because an intervenor's litigation of an ancillary issue minimizes the possibility of prejudice caused by the delay of intervention. *Id*. at 779. Further, timeliness was not an issue because in cases dealing with access to information third parties often have no idea as to when a confidentiality agreement

is granted. *Id*. at 780. Thus, precluding a third party from challenging a confidentiality agreement once a case has been settled "would often make it impossible for third parties to have their day in court to contest the scope or need for confidentiality." *Id.*

Similarly, the United States District Court of Delaware has found that a nonparty could successfully intervene where it wished to file a protective order to prevent a plaintiff from releasing confidential information it had given to the plaintiff as part of a Civil Investigation Demand. *United States v. Dentsply Int'l, Inc.*, 187 F.R.D. 152 (D. Del. 1999). In *Dentsply*, the United States Department of Justice ("DOJ") filed an antitrust action against Dentsply International, Inc. ("Dentsply"). The investigation leading to the action involved interviews of 184 witnesses and Civil Investigative Demands on a number of companies, which allowed DOJ access to confidential and proprietary information. Dentsply filed a motion to compel DOJ to answer an interrogatory requesting facts learned by DOJ during its interviews. *Id*. at 155. Schein, a third-party distributor and competitor of Dentsply, moved both to intervene and for a protective order in order to protect itself and other third-parties that responded to the Civil Investigation Demand. *Id*.

The court granted Schein's motion to intervene largely due to its reliance on *Pansy*, *supra*, which "relax[ed] the requirement of a common question of law or fact when the intervenors are not seeking to become parties to the litigation." *Id*. at 157. Although *Pansy* addressed litigants interested in challenging an already existent protective order, the court in *Dentsply* extended its holding to litigants interested, generally, in protective orders. *Id*. at 158, quoting *Pansy*, 23 F.3d 772, 778 ("[I]ntervention is appropriate 'to enable a litigant who was not an original party to an action to challenge protective or confidentiality orders entered in that action.'") It found that because no protective or confidentiality order had been entered in the case

due to a lack of agreement between the parties, Schein would be permitted to intervene for the limited purpose of "bringing the Court's attention to its view with respect to what should be contained in the protective order." *Id*.

Another helpful case arose in the Federal District Court of New Jersey addressing the issue of whether a defendant must produce, in accessible form, proprietary software owned by a third-party that the defendant licensed for its use. *Opperman v. Allstate N.J. Ins. Co.*, 2008 U.S. Dist. LEXIS 95738, 2008 WL 5071044 (D. N. J. 2008). Though heavily involved with the case, the third-party software company did not move to intervene. *Id*. at 4, n. 1. However, the court hinted that had the third-party moved to intervene, it would have granted such a motion:

> Although MS/B is not a party, the Court has nevertheless considered all of its numerous written submissions opposing the plaintiffs' discovery request. MS/B has also attended and actively participated in several court hearings that addressed the present discovery dispute. Shortly after the Court received plaintiffs' objection to MS/B's participation in the case without formal entry of appearance, the Court advised MS/B that it would no longer entertain its submissions unless it formally entered its appearance. The Court advised MS/B that if it were to intervene for the limited purpose of protecting its confidential information, the motion would be promptly addressed. To date, MS/B has chosen not to intervene. Nevertheless, MS/B has already had a full, fair and complete opportunity to air its objections to plaintiffs' discovery request. In connection with this Opinion and Order the Court has considered and evaluated all of MS/B's submissions and arguments."

*Id*. at n. 1. As the court's discussion makes clear, moving to intervene for the limited purpose of protecting confidential information is an appropriate action for a third-party to take.

In the case of *Armour of America v. United States*, 70 Fed. Cl. 240 (2006), the United States entered into a contract with Armour of America to design and manufacture a lightweight armor replacement system. The government terminated the contract when it determined that Armour of America failed to meet certain requirements, and subsequently awarded the contract

to ArmorWorks. Armour of America sued the government for breach of contract, and in the ensuing litigation, the government inadvertently released proprietary information of ArmorWorks to Armour of America. ArmorWorks sought to intervene in the litigation, arguing that it should be permitted to intervene to prevent the further release of proprietary information and to obtain relief for the disclosures already made.

The United States Court of Federal Claims, in granting the petition, stated the standard for intervention as follow: The petitioner's "interest must be more than just an economic interest; it must be 'one which the *substantive* law recognizes as belonging to or being owned by the applicant.'" *Id*. at 243 (citing *Am. Mar. Transp. Inc.*, 870 F.2d 1559, 1561 (quoting *New Orleans Public Serv. v. United Gas Pipe Line Co.*, 732 F.2d 452, 464 (5th Cir. 1984) (emphasis in original)). Given that ArmorWorks was a direct competitor of Armour of America, it stood to suffer significant harm and, hence, its interest was not indirect or contingent.

The court went on to say that although the Federal Circuit had not clarified the meaning of the term "action," other courts had expanded the definition to encompass collateral issues in a suit. Specifically, it referred to the decision of the United States Court of Appeals for the D.C. Circuit in *American Telephone & Telegraph Co*. in which the Circuit Court found that "to bar intervention for collateral discovery issues merely because they do not concern the subject matter of the overall action would defeat the general purpose of intervention." *Id*. at 244, citing *American Telephone & Telegraph Co*., 642 F.2d 1285, 1292 (D.C. Cir. 1980).

In the *Armour* case, the court found that ArmorWorks had made an adequate showing of impairment of its ability to protect its interest if it were not a party to the litigation and that the best way for ArmorWorks to protect its interest was by ensuring that the protective order issued by the court adequately served that purpose. Although ArmorWorks had already been given an

active role in the preparation of the proposed protective order, the court held that "Federal courts have generally agreed that the correct procedural route for a nonparty to challenge a protective order is by Rule 24 intervention." 70 Fed. Cl. at 245. The court held that the burden was on those opposing intervention to show that the existing parties adequately represented the petitioning party's interest.

Following the holdings and dicta of the decisions cited herein, the Board will grant the Petitions to Intervene. While an argument might be made for protecting economic interests under *Mountain Top*, the Board finds that this is a much weaker rationale than that present in those cases that discuss the protection of confidential business information. Under the holdings of *Pansy* and *Dentsply*, and following the dicta of *Opperman*, the third-party intervenors qualify for intervention.

Further, the Board finds that timeliness – as raised by the Appellants in their Responses – is not an issue because, as under *Pansy*, protection of confidential information is ancillary and unlikely to cause prejudice due to delay. Further, although this case has not settled as in *Pansy*, precluding the third parties from intervening to protect their information simply because their Petitions arrived at the close of discovery would make it impossible for them to have their day in court. As the court in *Pansy* points out, third parties do not necessarily know when their information is threatened and should be able to take steps to protect it when they learn it is at risk. All of the Petitioners filed their Petitions to Intervene soon after learning that their confidential business information was the subject of discovery in this case. Moreover, here the alleged confidential business information has not yet been produced so the intervenors could play a key role in the fashioning of a narrow protective order that would adequately protect their business interest, yet still provide the Appellants with the discovery to which they are entitled.

In addition, although the Board has granted the joint motions extending numerous discovery deadlines, the parties appear to have spent over a year trying to settle the case during which they did little if any discovery. We are not being critical but merely pointing out that discovery is still in its early stages. Evidently when they began discovery in earnest last summer, which we believe only involved interrogatories and requests for protection, the discovery disputes and the failure of counsel to resolve them have stopped discovery in its tracks. Indeed, a Joint Request was filed on March 1, 2017 to extend discovery and other prehearing deadlines and reschedule the hearing. We granted the Joint Request on March 7, 2017. Thus, allowing intervention at this point is akin to allowing intervention at the beginning of any meaningful discovery period, rather than at the end of discovery.

With respect to the question of whether the petitioners have sufficient interest in the litigation, the court in *Dentsply*, through its reading of *Pansy*, makes clear that this second consideration is relaxed in cases where the protection of information is at issue. Here, the Petitioners' request to intervene for the purpose of bringing the Board's attention to issues of confidentiality and trade secrets, is a direct parallel to the intervenor in *Dentsply*. All four movants have, in similar language, requested to intervene for the limited purpose of protecting their confidential information and trade secrets. None is interested in pursuing issues beyond those.

Additionally, the Board thinks that it is fair to say that the disclosure of any of the four Petitioners' confidential information would have an impact on that Petitioner. All have confidentiality agreements in place with Shell Chemical and all have, according to their petitions, invested a great deal of money and time into their respective technologies. That each has something at stake in these proceedings is apparent. All have argued that should their

protected information be publicly disclosed they would stand to lose both money and market share in their industry. The fact that what might impact them might be a Board decision on a discovery issue rather than a Board Adjudication on the merits of the underlying Appeal is of no consequence in determining that Petitioners have the necessary standing to intervene in this case to protect vital interests that could be negatively impacted by a Board Order. Their interest in the matter is certainly much more than a general interest in the proceedings.

Since *Pileggi*, the question of whether Petitioners' interests are adequately represented by Shell Chemical does not seem to be necessary in determining whether Petitioners should be permitted to intervene. In their Response, Appellants argue that Shell Chemical's interests in protecting confidential information are one and the same with those of the movants. Given that Shell Chemical has entered into confidentiality agreements with each of the Petitioners that include consequences should Shell break the agreement, Shell certainly has some interest in making an effort to protect the information. However, as Linde argued in its Petition, each of the Petitioners is the exclusive owner of its proprietary technology and, as such, has a strong and unique property interest that is not shared by Shell Chemical. Indeed, evidently none of the Petitioners were given timely notice of the discovery requests for their alleged confidential business information. In fact, it does not appear that they were even advised of the litigation until December 2016 and in the case of John Zink, February 2017. All of the Petitioners are concerned that their confidential business information will not be adequately protected if they are denied intervenor status. Due to the extreme importance of this issue to the individual petitioners, we find that whether Shell would adequately represent and protect those interests is not relevant to our decision. "Considerations concerning whether the intervenor's rights will be adequately protected by existing parties and whether the intervenor will add anything new to the

proceedings are irrelevant." *Conners v. State Conservation Commission*, 1999 EHB 669; *see also, Pagnotti Enterprises, Inc. v. DER*, 1992 EHB 433.

We do share some of the Appellants' concern that since the Petitioners profess to have no interest in the merits of the litigation their involvement as parties may "impede the Board" and hinder and delay the development of the case. Nevertheless, due process requires at a minimum that an entity be afforded the right to intervene in a case where its most important confidential business information including trade secrets and highly proprietary information may be disclosed to third parties and potentially nonparties and the public with potentially disastrous effects on its business and economic interests. We will take the Petitioners at their word (and we will so order) that their involvement will be limited to protecting their confidential business information. Petitioners have also argued that, rather than hinder and obstruct discovery, they will be able to help the existing parties resolve these discovery disputes which despite their diligent efforts they have not been able to resolve on their own. The Petitioners' knowledge of their businesses and related documents and information, in their view, should help resolve the discovery disputes and unravel the Gordian Knot currently holding up the discovery process. Counsel and the parties should prepare to work quickly in this regard.

The Petitioners have demonstrated the necessary standing to intervene. Their petitions are timely. They are intervening for a limited purpose of alerting the Board to confidentiality issues. Petitioners would be impacted by the publication of their confidential materials; and, according to them, such publication could be very damaging to their respective businesses, employees, and shareholders. The Board grants the Petitions to Intervene for the limited purpose of protecting their confidential business information.

We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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|---|---|---|
| **CLEAN AIR COUNCIL AND ENVIRONMENTAL INTEGRITY PROJECT** | : | |
| **v.** | : | **EHB Docket No. 2015-111-R** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SHELL CHEMICAL APPALACHIA, LLC, Permittee** | : | |

**O R D E R**

AND NOW, this 10th day of March, 2017, following review of the Petitions to Intervene, and Appellants' opposing response, it is ordered that the Petitions to Intervene are **granted** and that Petitioners may intervene for the limited purpose of protecting their confidential information and trade secrets. Counsel for the Petitioners shall enter their appearance in this matter and register for electronic filing on the Board's website at: http://ehb.courtapps.com/content/efiling.php

Henceforth the caption of this appeal shall read as follows:

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| **CLEAN AIR COUNCIL AND ENVIRONMENTAL INTEGRITY PROJECT** | : | |
| **v.** | : | **EHB Docket No. 2015-111-R** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SHELL CHEMICAL APPALACHIA, LLC, Permittee, and UNIVATION TECHNOLOGIES, LLC, LINDE ENGINEERING NORTH AMERICA, INC., INEOS SALES (UK) LIMITED, and JOHN ZINK COMPANY, LLC, Intervenors** | : | |

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: March 10, 2017**

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **GARY ROHANNA** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-148-B** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMERALD CONTURA, LLC** | : | **Issued: March 14, 2017** |

**OPINION AND ORDER ON**
**MOTION TO DISMISS OR LIMIT ISSUES**

**By Steven C. Beckman, Judge**

**Synopsis**

The Board denies Permittee Emerald Contura, LLC's Motion to Dismiss and grants the Motion to Limit Issues. The Board denies the Motion to Dismiss because it cannot conclude based on the information before it that Contura is clearly entitled to judgment as a matter of law. The Board has jurisdiction to review Department actions; accordingly, the appeal will be limited to issues raised in the 2016 subsidence claim.

**O P I N I O N**

**Background**

On August 31, 2016, Gary Rohanna filed Claim No. SA2006 ("2016 Claim") with the Department of Environmental Protection ("Department") alleging damage to an in-ground pool liner and cracking of concrete around the pool due to mine subsidence from mining conducted by Emerald Contura, LLC ("Contura"). By letter dated October 17, 2016, the Department denied the 2016 Claim ("2016 Denial"). Mr. Rohanna appealed the 2016 Denial to the Board on November 18, 2016. On February 6, 2017, Contura filed a Motion to Dismiss or Limit Issues ("Motion") and

the Department filed a letter in support of the Motion on February 21, 2017. Rohanna's Response to the Motion was filed with the Board on March 8, 2017. Contura filed its Reply to Rohanna's Response to the Motion on March 13, 2017. The Motion is now ready for the Board to decide.

**Standard of Review**

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. *Teska v. DEP*, 2016 EHB 513, 515. *See Burrows v. DEP*, 2009 EHB 20, 22. When considering a motion to dismiss, we accept the nonmoving party's version of events as true. *Consol Pa. Coal Co. LLC v. DEP*, 2015 EHB 48, 54, *recon. denied*, 2015 EHB 117, *aff'd*, 129 A.3d 28 (Pa. Cmwlth. 2015).

**Discussion**

Contura has raised jurisdictional issues in its Motion and contends that because Rohanna did not appeal the Department's denial of the subsidence claims in 2013 and 2015, the 2016 Claim is not properly before the Board. Contura views this appeal as "another bite at the apple" and alleges that there were no new issues presented by Rohanna in the 2016 Claim (Contura Brief, pg. 1). The doctrine of administrative finality is a statutory construct as it applies to appeals to the Board. *Chesapeake Appalachia, LLC. v. DEP*, 2015 EHB 447, 458. Section 4(c) of the Environmental Hearing Board Act states that, "[i]f a person has not perfected an appeal in accordance with the regulations of the Board, the Department's action shall be final as to the person." 35 P.S. § 7514(c). *Id.* Rohanna agrees that he did not appeal either the 2013 or the 2015 subsidence claim denial. (Rohanna Brief, pg. 1). Therefore the only question is whether the damages alleged in the 2016 Claim are different from damages alleged in the 2013 and 2015 claims. The Board has not been given the opportunity to review any of the subsidence claims

submitted to the Department by Rohanna and must rely on the facts presented in the parties' filings to date.

Contura maintains that the damages alleged in the 2016 Claim are not new, that they are the same claims raised in 2013 and 2015. Rohanna counters that the damages alleged in the 2016 Claim are new. He avers that sometime around August 12, 2016, his pool liner cracked, and the "concrete around the pool had cracked more than was identified in the 2013 claim." (Rohanna Brief, pg. 1-2). In the October 6, 2016 report accompanying the 2016 Denial letter, the Department acknowledged damage to the pool liner and cracks present in the concrete around the pool. Based on the facts as presented by Rohanna, the damages set forth in the 2016 Claim are asserted to be different from those reported in the 2013 and 2015 claims. The Board concludes that the appeal of the Department's 2016 Denial is properly before the Board and within its jurisdiction and therefore, the Motion to Dismiss is denied.

Contura also argues that certain issues raised in the Notice of Appeal were not included in the 2016 Claim (such as a buckled gas line, sunken porch, and tilted pool), and therefore are outside the scope of the Board's jurisdiction. Rohanna concedes that the issues before the Board for review are limited solely to the two damage claims raised in his 2016 Claim and the Department's 2016 Denial. (Rohanna Response, pg. 4-5). Rohanna states that items identified in the notice of appeal, that Contura asserts were not part of the 2016 Claim, are purely evidential and offered to support his position that subsidence "has occurred to the Rohanna property resulting in two new damage claims filed in 2016." (Rohanna Brief, pg. 5). It is well established that the Board cannot consider issues outside the scope of the Department's action that is being appealed. 35 P.S. § 7514. Rohanna has not filed a subsidence claim on the four additional damages noted in the Notice of Appeal and the Department did not review or make a determination on whether mine subsidence

is the cause of these damages as part of the Department's 2016 Denial. It is clear that the four additional damages noted in the Notice of Appeal are not properly part of the matter under appeal in this case. Therefore, the Motion to Limit issues is granted as to those damages.

The Board orders as follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **GARY ROHANNA** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-148-B** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMERALD CONTURA, LLC** | : | |

**O R D E R**

AND NOW, this 14th day of March, 2017, it is hereby ordered as follows:

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

2) The Motion to Limit Issues is **granted.**

**ENVIRONMENTAL HEARING BOARD**

s/ Steven C. Beckman
**STEVEN C. BECKMAN**
**Judge**

**DATED: March 14, 2017**

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB** | : | |
| **v.** | : | **EHB Docket No. 2016-155-B** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee** | : | **Issued: March 22, 2017** |

**OPINION AND ORDER ON**
**MOTION FOR EXPEDITED HEARING**

**By Steven C. Beckman, Judge**

**Synopsis**

The Board denies Consol Pennsylvania Coal Company, LLC's Motion for Expedited Hearing. The Board is not opposed to an expedited hearing in this matter but denies the specific Motion filed by Consol. The balance of factors that the Board considers in deciding a request for an expedited hearing weigh against the Motion primarily because the proposed schedule is unworkable and would negatively impact both the parties opposing the Motion and the proper function of the Board.

**O P I N I O N**

**Background**

Consol Pennsylvania Coal Company, LLC ("Consol"), has conducted development and longwall mining activities at the Bailey Mine since 1985 under CMAP No. 30841316. The Board, in a case docketed at 2014-142-B, has a pending adjudication involving a challenge to Permit Revision Nos. 180 and 189 brought by the Center for Coalfield Justice and Sierra Club

("CCJ/SC"). On December 13, 2016, the Department issued a further permit revision, Permit Revision No. 204, authorizing longwall mining beneath both Polen Run and Kent Run in the 3L panel. CCJ/SC appealed the issuance of Permit Revision No. 204 on December 19, 2016. On December 21, 2016, CCJ/SC filed a Petition for Supersedeas ("Petition") with this Board, seeking to halt longwall mining under Polen Run and Kent Run. A hearing on CCJ/SC's Petition was held in Pittsburgh from January 10 – 12, 2017. On January 24, 2017, the Board issued an Order granting the Petition in part, preventing Consol from conducting longwall mining within 100 feet of any portion of Kent Run and followed with an Opinion in support of the Order on February 1, 2017. Prior to the issuance of the Opinion, Consol filed a Petition for Review of the Order in Commonwealth Court. On February 15, 2017, the Commonwealth Court ordered the Board to certify the record and stated that certification of the record would not prevent the Board from proceeding with the permit revision appeal pending in front of the Board. In furtherance of its Commonwealth Court appeal, Consol filed an Application to Expedite Briefing and Resolution of Amended Petition for Review in Commonwealth Court that was granted on March 2, 2017. The Commonwealth Court set a schedule calling for briefing to be complete by April 12, 2017, and provided that the Petition for Review would be submitted for decision on the briefs, without oral argument, on an expedited basis.

On March 1, 2017, the Department and CCJ/SC filed a Joint Motion for Stay of Board Deadlines ("Joint Motion") in the permit revision appeal in front of the Board. The Joint Motion was opposed by Consol and on March 10, 2017, Consol filed the Motion for Expedited Hearing ("Motion"). On March 15, 2017, both the Department and CCJ/SC filed individual Responses in opposition to the Motion. On March 21, 2017, the Board denied the Joint Motion for Stay of Board Deadlines. The Motion for Expedited Hearing is now ready for resolution.

**Standard of Review**

The rule governing a motion for expedited hearing before the Board is found at 25 Pa. Code § 1021.96a. It provides that the Board may issue an order for an expedited hearing notwithstanding the time requirements contained in a previous Board order, Board Rules or the rules of civil procedure relating to discovery. 25 Pa. Code § 1021.96a(b). It further states that the Board will be guided by relevant judicial and Board precedent and provides a non-exclusive list of factors to be considered in deciding a motion for expedited hearing. 25 Pa. Code § 1021.96a(c). Among the relevant factors in this matter are the severity of the prejudice to the parties during the normal time period required for the Board's proceedings, status of discovery and needs of the parties for discovery and time to prepare for a hearing, and the effect of the expedited hearing on the nonrequesting party. In applying the rule, the Board has previously stated that:

> In deciding whether or not to grant an expedited hearing, the Board will balance the interests of the parties while considering the practical benefits and difficulties of expedited proceedings. Balancing interests is, by its nature, unique to the facts and exigencies of each case and thus must proceed on a case by case basis.

*Perano v. DEP*, 2010 EHB 91, 94 (citations omitted). "[T]he burden is upon the party requesting such proceedings to show that expedition is appropriate when the request is opposed by the other party." *Id.* at 96. The Board is ordinarily disinclined to grant a request for an expedited hearing, "particularly when it seeks to expedite proceedings as quickly as asked for here." *See Clean Air Council v. DEP*, EHB Docket No. 2017-009-L, slip op. at 7 (February 23, 2017) (citing *Pa. Trout v. DEP*, 2002 EHB 968, 970).

Consol's primary argument in favor of its Motion is that it will suffer severe prejudice if the hearing is not held on an expedited basis. Consol contends that unless an adjudication is issued in or around early June 2017, Consol's "legal right to mine certain coal that it owns will be lost"

as a result of the Supersedeas Order previously issued by the Board (Consol Motion, at pg. 1). We understand Consol's claim but we are not convinced of its merit. Contrary to what Consol alleges, the Board's Supersedeas Order does not prohibit Consol from accessing and mining the coal beyond a 100 foot buffer around Kent Run; it only prohibits it from conducting longwall mining within that 100 foot buffer. Consol may longwall mine in the remaining 3L panel beyond that buffer and retains the development mining permit that covers that portion of its mine facility within the 100 foot buffer. Further, as both the Department and CCJ/SC point out, Consol's stated plans to return to the coal in the 3L panel are in direct opposition to the sworn testimony provided during the January 2017 Supersedeas Hearing where Mr. Shaynak testified that Consol would never go back and mine the coal and it would be effectively lost. (Supersedeas Transcript, at 355; CCJ/SC Response, at pg. 1; Department Response, at pg. 3). The Board also notes that the Commonwealth Court granted Consol its request to expedite its appeal of the Supersedeas Order and, if it is successful in that appeal, it will be able to return to longwall mine the remainder of the 3L panel.[1]

Our main concern, however, goes beyond the merits of Consol's claim of severe prejudice and lies with the impact of the schedule that would be necessary to meet Consol's request that the Board render a decision in this matter by early June 2017. More specifically, Consol's Proposed Order accompanying the Motion sets out a schedule calling for the completion of discovery by April 14, 2017, filing of Appellants' Prehearing Memorandum by April 28, 2017, and the filing of the Department's and Consol's Prehearing Memorandum by May 5, 2017. (Motion, at pg. 8). After the abbreviated pre-hearing schedule, Consol's Proposed Order left open the date for a

[1] The Commonwealth Court is clearly in a better position than the Board to grant an expedited hearing since it can render its decision on briefs submitted by the parties without holding an oral argument. The Board's Rules governing expedited hearings state that nothing in the rule shall limit the rights of the parties to a full hearing before the Board with full rights of cross-examination of witnesses. 25 Pa. Code § 1021.96d(a).

hearing but asserts that it would need a decision from the Board by early June 2017. The proposed timetable leaves approximately one month for the Board and the parties to do the following: 1) hold a hearing, 2) receive the hearing transcripts, 3) file post-hearing briefs, 4) consider the briefs and 5) draft, circulate and issue an Adjudication by the Board resolving the appeal by CCJ/SC. The Department and CCJ/SC both oppose this Motion primarily due to the extremely abbreviated timeframe requested by Consol. Among the many concerns, CCJ/SC contend that the Motion's proposed schedule would leave them with less than a month to complete discovery, no opportunity to take depositions of Department or Consol witnesses, no opportunity to conduct independent sampling, and unable to review Consol's proposed revised mining plan. (CCJ/SC Response, at pg. 3). Both CCJ/SC and the Department assert that the proposed schedule would provide insufficient time to prepare pre-hearing memoranda and *in limine* motions. (CCJ/SC Response, at pg. 3; Department Response, at pg. 5).

The Board is not opposed to an expedited hearing schedule in this matter. However, when we consider the extremely aggressive schedule proposed by Consol and balance Consol's claim of severe prejudice against the stated concerns of the Department and CCJ/SC, including the lack of time for discovery and hearing preparation the proposed schedule would require, and further consider the effect such a schedule would have on the Department and CCJ/SC, the nonrequesting parties, and the Board, we must deny Consol's Motion. The past history of similar litigation between the parties makes it likely that discovery can be reduced in scope and the need for certain testimony during the hearing may be limited; however, even with limited discovery and scope the proposed timeframe is simply unworkable and would severely prejudice the nonrequesting parties. We find that there is no reasonable way to allow all parties to fairly present their case and for the Board to play its proper role in reviewing and deciding the case under such a truncated schedule.

The Board remains open to a different expedited schedule than the one presented here but it would need to provide adequate time for the parties to conduct limited discovery and prepare their respective cases and for the Board to hold a proper hearing and render its decision.

The Board orders as follows:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB** | : | |
| **v.** | : | **EHB Docket No. 2016-155-B** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee** | : | |

**O R D E R**

AND NOW, this 22nd day of March, 2017, it is hereby ordered that the Motion for Expedited Hearing is **denied.**

**ENVIRONMENTAL HEARING BOARD**

s/ Steven C. Beckman
**STEVEN C. BECKMAN**
**Judge**

**DATED: March 22, 2017**

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **IVAN AND KATHLEEN DUBRASKY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-102-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HILCORP ENERGY CO., Permittee** | : | **Issued: March 24, 2017** |

## OPINION AND ORDER ON MOTION FOR SANCTIONS

**By Thomas W. Renwand, Chief Judge and Chairman**

**Synopsis**

Where the Appellants have made an attempt to answer a Permittee's interrogatories, even though the answers do not contain the amount of detail sought by the Permittee, we deny the Permittee's Motion for Sanctions seeking dismissal of the appeal. We find that dismissal of the appeal is too harsh a sanction. The Appellants shall be bound by their answers at the hearing. As to the Appellants' allegation regarding the Municipal Code, by twice failing to answer the interrogatory seeking specific information about this allegation, we find that the Appellants have abandoned this allegation in their appeal.

## O P I N I O N

**Introduction**

This matter involves a notice of appeal filed by Ivan and Kathleen Dubrasky (Appellants) with the Environmental Hearing Board (Board), challenging the issuance of a permit by the Pennsylvania Department of Environmental Protection (Department) to Hilcorp Energy Company (Hilcorp) for the Chrastina 8H well in Pulaski Township, Lawrence County. On

September 23, 2016 Hilcorp served the Appellants with its First Set of Interrogatories, consisting of 10 interrogatories which requested the Appellants to identify, among other things, "the specific permit language, inadequacies and harms that form the basis of their claims." (2nd Motion to Compel, para. 5) Responses to the interrogatories were due on October 24, 2016, and the Appellants did not respond. On November 3, 2016, Hilcorp sent a letter to counsel for the Appellants notifying him that responses had not been received. (2nd Motion to Compel, para. 8) Hilcorp received no response to its letter. (2nd Motion to Compel, para. 9) On November 8, 2016 Hilcorp filed a Motion to Compel, to which the Appellants filed no response. Therefore, on November 29, 2016 the Board granted the motion and ordered the Appellants to respond to Hilcorp's First Set of Interrogatories by December 19, 2016. On December 15, 2016 the Appellants served their responses to interrogatories. (2nd Motion to Compel, para. 14) On December 20, counsel for Hilcorp sent a letter to Appellants' counsel asserting that the Appellants' objections to the interrogatories were improper and the responses were insufficient and further requesting the Appellants to supplement their answers. (2nd Motion to Compel, para. 16) Again, Appellants did not respond to Hilcorp's letter. (2nd Motion to Compel, para. 17) Hilcorp then filed a Motion to Compel Supplemental Responses to Permittee's First Set of Interrogatories (2nd Motion to Compel), which we granted in part after receiving no response from the Appellants. *Dubrasky v. DEP and Hilcorp Energy Co*., EHB Docket No. 2016-102-R (Opinion and Order on Motion to Compel issued February 2, 2017).

In that Opinion and Order, we directed the Appellants to answer Interrogatory no. 8 which Appellants had failed to answer in their initial discovery response and to provide more complete answers to Interrogatories no. 1, 9 and 10. The Board ordered the Appellants to provide their answers by February 22, 2017. When the Appellants failed to comply with the

Board's order, Hilcorp filed a Motion for Sanctions. The following day, the Appellants responded, requesting the Board's indulgence and assuring the Board that supplemental answers were being provided to Hilcorp that very day.

The matter now before us is Hilcorp's Supplement in Support of its Motion for Sanctions, filed on March 2, 2017, in which Hilcorp asserts that the supplemental answers provided by the Appellants continue to be deficient. Hilcorp renews its Motion for Sanctions and seeks dismissal of the appeal. The Appellants filed no response to the Supplement.

**Discussion**

As we held in *Borough of Catasauqua v. DER*, 1991 EHB 1537, "It is well established that the discovery rules are designed to provide generous access to all relevant information." *Id.* at 1539, citing *Corco v. DER*, 1990 EHB 1376. Where answers to interrogatories are vague and nonspecific we may compel more complete answers. *Id.* at 1539-40. Additionally, where a party fails to comply with an order to compel, the Board may impose sanctions pursuant to 25 Pa. Code § 1021.161.

We examine each of the Appellants' answers and Hilcorp's allegations of deficiency below.

**Interrogatory 1**

Interrogatory no. 1 asks the Appellants to identify the language in the permit that supports the claim in their notice of appeal that the permit "allows workers of the oil and gas operator immediate access to the property of the Appellants," as alleged in paragraph 5 of the notice of appeal. The Appellants' initial response to this interrogatory was "the plain language of the permit on pages 1 and 2 of the Well Permit." It also referred to a newspaper article in the June 9, 2015 issue of the *New Castle News*. We ordered the Appellants to reference the specific

language on pages 1 and 2 of the permit that they rely on in support of their allegation. In their supplemental answer, the Appellants state as follows:

> We believe our current Answer is sufficient as a reasonable person interpreting and inferring from the Permit and media coverage would not be prevented from going upon the property. There is no more information available for us on this issue.

(Exhibit A to Hilcorp Supplement in Support of Motion for Sanctions)

As we held in *Township of Paradise v. DEP*, 2001 EHB 1005, "Whether or not to impose sanctions is wholly within the Board's discretion and must be appropriate given the magnitude of the violation." *Id*. at 1007, citing *Environmental & Recycling Services v. DEP*, 2001 EHB 824. Although we can sympathize with Hilcorp's frustration at not receiving a more specific answer, we find that dismissal of the appeal is too harsh a sanction. The Appellants did make some attempt to answer, and they are bound by their answer at the hearing in this matter.

**Interrogatory no. 8**

Interrogatory no. 8 asks the Appellants to identify the specific section(s) of the Municipal Planning Code that the Appellants contend the Department should have considered before granting the permit, as alleged in paragraph 24 of the notice of appeal. The Appellants did not provide an answer to Interrogatory no. 8 in their initial response, nor do they answer it in their supplemental response. Since the Appellants have not answered this interrogatory after two requests to do so, we consider this allegation to be abandoned, and we will not allow any evidence or testimony on this issue at the hearing.

**Interrogatories no. 9 and 10**

Interrogatories no. 9 and 10 ask the Appellants whether they are contending "that the permit creates waste or otherwise impacts the appellants' correlative rights and, if so, to identify the grounds for such claims." (Hilcorp Supplement in Support of Motion for Sanctions, para. 7)

In their initial response, the Appellants objected to the interrogatories as improperly seeking a legal conclusion. In its Motion to Compel, Hilcorp argued that Interrogatories no. 9 and 10 were proper contention interrogatories. The Board agreed and ordered the Appellants to provide a response. The response the Appellants provide in their supplemental answer is as follows:

> We begin by indicating that the flawed Permit and its processes have a cause and effect relationship to waste and damages and do in fact impair the rights of the Appellants. This is an application of logic, a proper and reasonable inference, and no further information is available.

(Exhibit A to Hilcorp Supplement in Support of Motion for Sanctions)

Again, the Appellants' answer is vague and nonspecific. However, as stated earlier, we do not think that dismissal of the appeal is an appropriate sanction under the circumstances. Ordinarily, the Board is reluctant to impose discovery sanctions unless a party defies an order compelling discovery. *Kochems v. DEP*, 1997 EHB 422, 424, citing *Griffin v. Tedesco*, 513 A.2d 1020, 1024 (Pa. Super. 1986); *DER v. Chapin & Chapin*, 1992 EHB 751; *Eastern Consolidation & Distribution Services v. DEP*, 1996 EHB 1093. Here, the Appellants have made some attempt, albeit a feeble one, at answering the question, and they are bound by that answer at the hearing. If further information becomes available, they have a duty to supplement their answers in a timely manner.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **IVAN AND KATHLEEN DUBRASKY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-102-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HILCORP ENERGY CO., Permittee** | : | |

## O R D E R

AND NOW, this 24th day of March, 2017, it is ordered as follows:

1) Hilcorp Energy's Motion for Sanctions is **denied**.

2) By failing to answer Interrogatory no. 8, the Appellants are deemed to have abandoned their allegation that the permit is defective because sections of the Municipal Code were not identified; therefore, we will not allow any evidence or testimony on this issue at the hearing

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: March 24, 2017**

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

**For the Commonwealth of PA, DEP:**
Michael A. Braymer, Esquire
Katherine Knickelbein, Esquire
*(via electronic filing system)*

**For Appellant:**
Angelo A. Papa, Esquire
*(via electronic filing system)*

**For Permittee:**
Kathy Condo, Esquire
Joseph Reinhart, Esquire
Shannon DeHarde, Esquire
(*via electronic filing system)*

| | | |
|---|---|---|
| **HEYWOOD BECKER** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-038-C** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: April 10, 2017** |

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

**By Michelle A. Coleman, Judge**

**Synopsis**

The Board dismisses an appeal of a Department order requiring an Appellant to, among other things, restore a stream channel that the Appellant had relocated without a permit and without implementing and maintaining erosion and sediment controls, and to stabilize the disturbed areas of the site resulting from the stream channel relocation.

## FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001; the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 – 693.27; 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 appellant, Heywood Becker, is the sole trustee of the Center Bridge Trust, an unregistered trust that maintains a mailing address of P.O. Box 180, Carversville, PA 18913. (Notes of Transcript page ("T.") 520, 547, 553; Department Exhibit Number ("DEP Ex.") 10.)

3. Center Bridge Trust was the owner of the property designated as Tax Parcel # 41-019-003, located at 7072 Upper York Road in Solebury Township, Bucks County, Pennsylvania until the property was forfeited in an upset tax sale on December 11, 2012. (T. 533, 534, 597; Heywood Becker Exhibit Number ("HB Ex.") 7.)

4. The site is located at the intersection of River Road and Upper York Road, or Pennsylvania Route 263, which eventually runs across the Delaware River to Stockton, New Jersey. (T. 29-30.)

5. Heywood Becker managed the site during the period of Center Bridge Trust's ownership. (T. 520.)

6. The site is less than an acre in size and consists of an uninhabited house with a gravel driveway and a stream channel that traverses the property. (T. 283; DEP Ex. 9A(1)-9A(12), 9B(1)-9B(6), 12.)

7. The stream channel running across Becker's property eventually flows to the Delaware Canal and then to the Delaware River. (T. 296, 303-04, 309, 401, 407.)

8. The drainage area of the stream channel on the site—the area where water from a rainfall event on the site would be collected by the stream and discharged—is more than 250 acres. (T. 315, 366.)

9. Permits are required for water obstructions and encroachments in streams with drainage areas exceeding 100 acres under 25 Pa. Code § 105.12(a)(2). (T. 315, 327-28.)

10. The Department and/or the Bucks County Conservation District (the "Conservation District") conducted inspections of the site in 2011, 2012, 2013, and 2014. (T. 36, 56, 88, 258-59, 296-97, 344; DEP Ex. 2, 2A, 2B, 2C.)

11. The Conservation District, pursuant to a delegation agreement with the Department, has Level 3 enforcement authority and can issue NPDES permits, review erosion and sedimentation control plans, conduct inspections, manage enforcement matters, and collect civil penalties. (T. 27-29, 222-23.)

**June 29, 2011 Inspection**

12. On June 29, 2011, Lisa Dziuban, an environmental protection specialist with the Conservation District since 1985, inspected the site. (T. 22, 24-25, 36; DEP Ex. 2A.)

13. Dziuban observed evidence of earth disturbance during the inspection including earth moving and grading around the back and to the side of the house, installation of a new driveway, and gravel piled within 50 feet of the bank of the stream channel. (T. 36, 54; DEP Ex. 2A, 12.)

14. Gravel or fill material placed within 50 feet of a stream bank presents the danger of being washed into the stream channel during a rain event and then carried downstream. (T. 54-55.)

15. There were no erosion and sedimentation controls in place. (T. 55; DEP Ex. 2A.)

16. There was no approved erosion and sediment control plan for the earth disturbance work on the site. (T. 54-55; DEP Ex. 2A.)

17. An erosion and sediment control plan includes a depiction of a site prior to earth disturbance activity and shows the proposed earth moving or grading activities, as well as the specific erosion and sedimentation controls that will be implemented during the earth moving activity. (T. 39.)

18. The purpose of an erosion and sediment control plan is to prevent undue sediment pollution to the waters of the Commonwealth. (T. 41.)

19. Compliance with the Department's Chapter 102 regulations regarding erosion and sediment control is a requirement for approval of an erosion and sediment control plan. (T. 40.)

20. The stream channel on the site had a defined bed and banks during the June 2011 inspection. (T. 53; DEP Ex. 12.)

21. Becker admits to placing the gravel near the stream channel as part of his efforts to re-stone the driveway at the site. (T. 539-41.)

**April 23, 2012 Inspection**

22. On April 23, 2012, Dziuban conducted another inspection of the site in response to several complaints about the presence of heavy equipment on the property. (T. 57; DEP Ex. 2B.)

23. She was accompanied by Officer Brendan Ryan, a Waterways Conservation Officer with the Pennsylvania Fish and Boat Commission since 2006. (T. 57-58, 388-89.)

24. Officer Ryan works with the Department and Conservation Districts in many areas of the state on a day-to-day basis with respect to water pollution and waterway and wetlands encroachments. (T. 391-92, 396-97.)

25. During the inspection, Dziuban and Ryan noted that the stream channel had been recently moved, within the last week, with heavy equipment. (T. 62-63, 66, 71, 402; DEP Ex. 2B, 9A(1), 9A(2), 9A(6), 9A(9).)

26. Earth moving equipment had been on the site and in the stream channel as evidenced by the presence of large tire tracks. (T. 61, 62-63, 161-62, 396, 397, 422; DEP Ex. 9A(2).)

27. The site was extremely unstable, with mud and loose soil prevalent throughout the property, loose sediment and turbid water present in the stream channel, eroded banks, and

sediment leaving the site via water, presenting a danger of pollution to waters of the Commonwealth. (T. 61-66, 71-73, 74, 397, 402, 407; DEP Ex. 2B, 9A(1), 9A(2), 9A(5), 9A(6), 9A(7), 9A(8), 9A(10), 9A(11).)

28. Apart from an unmaintained silt fence wrapped around a tree, there were no erosion and sedimentation controls or best management practices (BMPs) in place at the time of the inspection. (T. 61, 63, 65, 67, 73-74, 400-01, DEP Ex. 9A(2), 9A(5), 9A(7), 9A(12).)

29. There was ample water flowing in the rerouted stream channel with a defined bed and bank on the site during the April 2012 inspection. (T. 66, 74, 398, 402; DEP Ex. 9A(3), 9A(4), 9A(5), 9A(7), 9A(8), 9A(9), 9A(10).)

30. Water flowing on the adjacent property in the connected stream channel 25 to 30 yards upstream was not cloudy, turbid, or otherwise impacted by sediment pollution. (T. 407, 439.)

31. At the time of the inspection no permit had been issued for relocating or rechanneling the stream and no plan was in place to control erosion and sediment. (T. 74, 397, 403; DEP Ex. 2B.)

32. Officer Ryan returned to the site the following day with a biologist from the Department. (T. 396.)

**Erosion and Sediment Control Plan and Enforcement Conference**

33. On May 3, 2012, Becker submitted an erosion and sediment control plan application to the Conservation District for a project named “Becker Drainage Swale Improvement.” (T. 77, 79; DEP Ex. 10.)

34. The purpose of the plan application was to address the violations at the site—an after-the-fact plan for the disturbance that had been conducted then documented during the inspections. (T. 80.)

35. No erosion and sediment controls were contained in Becker's application—i.e. silt fence, construction entrance, sediment basin, sediment traps, seeding and mulching—and there was no information on how any controls would be maintained or how the site would be stabilized. (T. 80-82; DEP Ex. 10.)

36. On May 18, 2012, the Conservation District issued a letter disapproving Becker's application because it lacked any proposed erosion and sediment controls and it did not provide information such as a location map, the construction sequence, existing and proposed grades, the limits of disturbance, and descriptions of the types of soils; the letter listed the 13 necessary elements of an approvable plan. (T. 80-84; DEP Ex. 11.)

37. An administrative enforcement conference was held on May 24, 2012 with Becker, the Department, the Conservation District, and the Fish and Boat Commission. (T. 85, 233, 409; DEP Ex, 4, 6.)

38. An administrative enforcement conference is held with all interested parties regarding a site that has had prior violations in order to discuss the violations, how the site will be remediated to achieve compliance, and any potential civil penalties. (T. 27, 85, 226, 409-11.)

39. At the enforcement conference on May 24, 2012 the parties discussed the lack of stabilization of the site, the unpermitted relocation of the stream channel, and what was needed for the site to come back into compliance. (T. 231, 235, 239, 409-11.)

40. Following the conference, Becker was to submit an application and plans for the stabilization of the site and the restoration of the stream channel, and otherwise bring the site into

compliance with the applicable statutory and regulatory requirements. (T. 87, 91, 231, 240, 410-11, 427, 446-47.)

41. The Conservation District never received an application or any plans from Becker following the May 24, 2012 enforcement conference. (T. 87, 91, 242.)

**November 2, 2012 Inspection**

42. On November 2, 2012, after the Conservation District failed to receive an erosion and sediment control plan from Becker, Lisa Dziuban conducted another inspection of the site. (T. 88, 91; DEP Ex. 2C.)

43. The inspection was conducted within a week after Hurricane Sandy affected the area. (T. 88, 89; DEP Ex. 2C.)

44. The site was still highly unstable—there was loose soil throughout the site, silt and sediment loading in the channel, very muddy conditions, no erosion and sediment controls, and the silt fence first observed during the April 2012 inspection was still wrapped around the same tree. (T. 90, 92-94, 181; DEP Ex. 2C, 9B(1), 9B(2), 9B(4), 9B(5), 9B(6).)

45. On February 23, 2013, the Department, in order to compel the remediation of the site, issued the compliance order that is the subject of Becker's appeal. (T. 242; DEP Ex. 1.)

**Subsequent Inspections**

46. On March 19, 2013, Frank Defrancesco, a Compliance Specialist in the Department's Waterways and Wetlands program for 21 years and a participant in the May 2012 enforcement conference, inspected the site to see if Becker had complied with the Department's order. (T. 217, 231, 232-33, 261; DEP Ex. 2, 6.)

47. The site was generally in a disturbed state; no erosion and sediment controls or BMPs were in place to stabilize the banks of the stream channel. (T. 271-74, 285; DEP Ex. 2, 9C(2).)

48. Unstabilized banks will erode and cause sediment to flow downstream to the Delaware Canal and the Delaware River. (T. 303-04, 309.)

49. The relocated stream channel contained water at the time of the inspection. (DEP Ex. 9C(4), 9C(6).)

50. Water was undercutting the bank of the stream channel causing erosion. (T. 274, 286-87, 290; DEP Ex. 9C(6), 9C(11).)

51. In some areas the water appeared to be following the path of the original channel instead of the path of the relocated channel. (T. 271, 286-88, 289-90; DEP Ex. 9C(5), 9C(7), 9C(9), 9C910).)

52. Defrancesco conducted another inspection of the site on April 9, 2014. (T. 296-97.)

53. There had been some stabilization on the site but it was inadequate. (T. 298.)

54. The site was generally unstable; all stream channel embankments were undercut from water hitting the base of the unstabilized stream channel, causing erosion. (T. 301-02; DEP Ex. 16.)

55. The relocated stream channel was being recut by water flowing in the path of the original stream channel. (T. 300, 302; DEP Ex. 15, 17.)

**Additional Findings of Fact**

56. The stream on the site is a channel of conveyance of surface water with defined bed and banks and intermittent flow. (T. 53, 66, 74, 274, 286-88, 289-90, 300, 302, 398, 402;

DEP Ex. 9A(3), 9A(4), 9A(5), 9A(7), 9A(8), 9A(9), 9A(10), 9C(4), 9C(5), 9C(6), 9C(7), 9C(9), 9C(10), 9C(11), 12, 15, 17.)

57. A permit is required for relocating a stream channel regardless of the size of the disturbance or the drainage area of the stream. (T. 240, 274-75, 316-17, 327-28.)

58. Becker rerouted the existing stream channel on the site without a permit by hiring an excavation contractor who used a backhoe on the site. (T. 61, 62-63, 66, 71, 74, 161-62, 396, 397, 402, 403, 422, 491, 499, 502, 510, 540; DEP Ex. 2B, 9A(1), 9A(2), 9A(6), 9A(9).)

59. Becker intended to eliminate certain bends in the existing stream channel and straighten its course when digging the new stream channel. (T. 489, 502; HB Ex. 2, 3, 4.)

60. Becker did not implement or maintain adequate erosion and sediment control BMPs while conducting earth disturbance activities and rerouting the stream channel. (T. 55, 61, 63, 65, 67, 73-74, 90, 92-94, 181, 271-74, 285, 400-01; DEP Ex. 2, 2A, 2B, 2C, 9A(2), 9A(5), 9A(7), 9A(12), 9B(1), 9B(2), 9B(4), 9B(5), 9B(6), 9C(2).)

61. Becker caused sediment pollution to waters of the Commonwealth. (T. 61-66, 71-73, 74, 90, 92-94, 181, 274, 286-87, 290, 301-02, 303-04, 309, 397, 402, 407; DEP Ex. 2B, 2C, 9A(1), 9A(2), 9A(5), 9A(6), 9A(7), 9A(8), 9A(10), 9A(11), 9B(1), 9B(2), 9B(4), 9B(5), 9B(6), 9C(6), 9C(11), 16.)

## DISCUSSION

This matter involves the 2013 appeal of Heywood Becker, proceeding *pro se*, of an order of the Department of Environmental Protection (the "Department") based on inspections beginning in 2011 by the Department and the Bucks County Conservation District ("Conservation District") alleging, among other things, that Becker and the Center Bridge Trust, rerouted a stream channel without a permit and without implementing erosion and sediment

controls, which caused sediment pollution to waters of the Commonwealth in violation of the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, and various regulations in Chapters 102 and 105 of Pennsylvania Code Title 25. The February 23, 2013 order was issued to both the Center Bridge Trust and Heywood Becker as sole trustee of the Trust. The site that is the subject of the order, and this appeal, is located along Upper York Road in Solebury Township, Bucks County. The Department's order requires Center Bridge Trust and Becker as trustee to do the following things: (1) stabilize all disturbed areas of the site with seed and mulch; (2) implement effective erosion and sediment control best management practices (BMPs); (3) submit a joint permit application to restore the stream channel to its original course; (4) submit an erosion and sedimentation control plan for the stream restoration work; (5) implement stream restoration; and (6) permanently stabilize the site.

Heywood Becker's appeal contains four objections: (1) Center Bridge Trust is not the owner of the site; (2) Center Bridge Trust did not reroute the existing stream channel on the site; (3) there is not a stream channel on the site, only a dry swale leading to the Delaware Canal; and (4) the dry swale was washed away by Hurricane Irene and a contractor was hired to dig a replacement swale that more closely followed the natural topography of the site than the swale that existed before Hurricane Irene. Becker appealed the order in his individual capacity. The Center Bridge Trust did not file an appeal. To the extent that the Center Bridge Trust is or at one time was the owner and responsible party for the site, the Department's order is now final with respect to the Center Bridge Trust because the Trust did not appeal the order. 35 P.S. § 7514(c) ("If a person has not perfected an appeal in accordance with the regulations of the board, the department's action shall be final as to the person."). *See also Russell v. DEP*, 2015 EHB 360 (holding that a civil penalty assessment issued jointly to two individuals was final as to the

individual who did not appeal the assessment); 25 Pa. Code § 1021.52(a) (appeal must be filed within 30 days of notice of the action).

**Procedural Background**

The Board conducted a hearing on Becker's appeal that spanned three nonconsecutive days in 2014—April 14, April 22, and May 8. After receiving all of the transcripts from the hearing, the Board issued an Order setting a schedule for the filing of post-hearing briefs. Days before the Department's brief was due, the Department filed a motion requesting a 30-day extension of the briefing schedule. The Department represented that it was in discussions with the current owner of the site at issue, Peter Edwardson, who earlier in 2014 had also filed an appeal with the Board. *See Edwardson v. DEP*, EHB Docket No. 2014-029-M. The Department said that these discussions might open a path to settlement of both Becker's appeal and Edwardson's appeal. Becker, who forfeited the property in an upset tax sale at the end of 2012, concurred with the motion for an extension and we granted it.

The Department filed another uncontested motion for a 30-day extension on July 29, 2014, in which it represented that settlement negotiations between Becker, Edwardson, and the Department were ongoing, and we granted that extension. In late August, the Department, Becker, and Edwardson filed a joint request for a conference call to be held in both matters. Judge Coleman and Judge Mather, the presiding judge in Edwardson's appeal, conducted a joint conference call on August 26, 2014 with the Department, Becker, and Edwardson, and agreed to stay both matters for 90 days while all parties continued to work to resolve the appeals. The Department stated in its 90-day status report that the parties needed more time to resolve the matters. This process continued for a prolonged period of time, with the Department continually

representing that progress was being made on a settlement that would resolve both of the appeals, but the long-promised settlement never materialized.

On December 7, 2015, the Board dismissed Edwardson's appeal upon motion by the Department arguing that the appeal was untimely filed. *See Edwardson v. DEP*, 2015 EHB 833. Soon after, we lifted the stay in Becker's appeal and we once again set a schedule for the filing of post-hearing briefs. The Department filed its brief on January 13, 2016.

The day prior, on January 12, 2016, Becker filed a motion to reopen the record to introduce what he argued was newly discovered evidence that would moot the allegations in the Department's order under appeal. Becker claimed that Edwardson had told him that a staff person of the Department had been on the site recently, and had stated to Edwardson that the stream channel at issue had been stabilized and there appeared to have been no man-made changes to the channel. Becker had scant details on the identity of this Department staff person. The Department responded shortly thereafter and stated that it had made an inquiry of all Department staff who had been on the site with Edwardson and none of them had made the alleged statements. On January 21, 2016, we issued an Order denying Becker's motion to reopen the record because it did not meet the requirements of our rule on reopening a record prior to adjudication. *See* 25 Pa. Code § 1021.133.

On January 27, 2016, Becker filed a motion for reconsideration of our Order denying his motion to reopen the record. In his request for reconsideration Becker identified the alleged Department employee as Pravin Patel, P.E. Becker argued that he had now satisfied the requirements of 25 Pa. Code § 1021.133, and that the Board should reopen the record so that Becker could question Mr. Patel because Patel's statements would establish new material facts that would "exonerate" Becker. The Department responded that Pravin Patel had never spoken

to Edwardson or Becker, that he had never been to the site involved in the appeal, and that he had never discussed any aspect of the appeal with anyone in the Department's Waterways and Wetlands section or at the Bucks County Conservation District. The Department's response was accompanied by a verification executed by Patel attesting to the accuracy of the statements made in the Department's response. On February 3, 2016, we issued an Order denying the request for reconsideration because Becker had not demonstrated any extraordinary circumstances as required under 25 Pa. Code § 1021.151(a) (relating to reconsideration of interlocutory orders), which would have justified reconsideration of our prior Order.

On February 11, 2016, Becker filed a request to certify those two Orders for interlocutory appeal with Commonwealth Court, and he also requested a continuance for filing his post-hearing brief. The Department opposed both requests. On February 16, 2016, we issued an Order denying the requests, which was followed on February 19, 2016 by an Opinion in support of that Order. *Becker v. DEP*, 2016 EHB 65. In our Opinion we noted that, crucially, Becker's request for certification did not identify the controlling question of law for which he sought review, one of the elements required by 42 Pa.C.S. § 702(b) (governing interlocutory appeals by permission), which was fatal to his request. In a letter dated February 11, 2016, filed February 16, Becker informed the Board that he had filed a petition for review in Commonwealth Court of our Order denying his request to reopen the record. He also requested an extension of time to file his post-hearing brief, which we denied. Becker filed his proposed findings of fact on February 26, and he filed the remainder of his brief on February 29.[1] Commonwealth Court quashed Becker's petition for review on December 19, 2016, finding that the petition for review

[1] Becker's proposed findings of fact do not contain any citation to the record, neither exhibits nor transcript pages, as required by 25 Pa. Code § 1021.131(a), which has reduced the utility of his brief as an aid in the Board's preparation of this Adjudication. *Jake v. DEP*, 2014 EHB 38, 46 n.2; *DEP v. Colombo*, 2013 EHB 635, 643 n.1; *Rausch Creek Land, LP v. DEP*, 2013 EHB 587, 599 n.1.

was not of a final, appealable order, and that Becker did not satisfy the requirements for an appealable collateral order. *Becker v. Dep't of Envtl. Prot.*, No. 401 C.D. 2016, 2016 Pa. Commw. Unpub. LEXIS 859 (Pa. Cmwlth. Dec. 19, 2016). The Board received the certified record back from Commonwealth Court on February 22, 2017. This matter is now ripe for adjudication.

**Standard of Review**

The Department bears the burden of proof in cases where it issues an order. 25 Pa. Code § 1021.122(b)(4). The Department must prove by a preponderance of the evidence that its issuance of the order to Becker constituted a lawful and reasonable exercise of its discretion and that the order is supported by the facts. *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251; *Dirian v. DEP*, 2013 EHB 224, 231; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Management Co. v. DEP*, 2010 EHB 456, 474-75. Becker, however, bears the burden of proof on any affirmative defenses he raises to the Department's order. *Robinson Coal*, 2015 EHB 130, 154; *Carroll Twp. v. DEP*, 2009 EHB 401, 409 n.3. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *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).

**Existence of a Stream on the Site**

The primary disagreement between the parties in this matter is whether or not a regulated stream exists on the site—or existed before the site became destabilized—as the term "stream" is defined under Pennsylvania law. The Department argues that an intermittent stream existed on the property, that Becker rerouted the stream without an appropriate permit and without

implementing adequate erosion and sediment controls and BMPs, and that an intermittent stream still exists on the property despite having been rerouted. Becker first contends that there is no stream on the property, only a dry swale or storm channel. He argues in the alternative that, if there is a stream on the property, it is not intermittent or perennial but an ephemeral stream, and thus not a feature that is regulated by the Department. There is no dispute that the channel that traverses the site extends both upgradient and downgradient on the adjacent properties. There is also no dispute that the channel eventually connects downgradient to the Delaware Canal, which in turn connects to the Delaware River.[2] (Finding of Fact ("FOF") 7.)

The Clean Streams Law contains an expansive definition of waters of the Commonwealth that incorporates channels of conveyance as small as a ditch regardless of whether they are natural or artificially constructed. "Waters of the Commonwealth" is defined as "includ[ing] any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth." 35 P.S. § 691.1. *See also* 25 Pa. Code § 102.1 (definition of "waters of this Commonwealth") (nearly the same). The Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 – 693.27, which provides statutory authority for the Department's Chapter 105 regulations governing water obstructions and encroachments, defines a "watercourse" or "stream" as "[a]ny channel of conveyance of surface water having a defined bed and banks, whether natural or artificial, with perennial or intermittent flow." 32 P.S. § 693.3. *See also* 25 Pa. Code § 105.1 (definition of "watercourse") (same). These are the foundational statutory precepts that provide the contours for whether or not a water feature is regulated under the laws of the

[2] Although Becker acknowledges that the channel connects to the Delaware Canal, he contends that the Canal has been dry for several years. (See Notice of Appeal at ¶ 3.)

Commonwealth, and thus by the Department. Although the Dam Safety and Encroachments Act contains language that a watercourse or stream must possess perennial or intermittent flow, the Clean Streams Law contains no such provision for waters of the Commonwealth.

Becker vigorously contends in his post-hearing brief that the channel on his property is at most an ephemeral stream. He argues that unless a stream is intermittent or perennial it is not regulated by the Department. To Becker, this means that there must be observable water in the channel for certain threshold numbers of days per year. Becker has not offered any legal argument on the ways in which ephemeral streams differ from intermittent or any other streams under Pennsylvania law. Instead, he cites to various pieces of scientific literature and offers that ephemeral streams flow even more infrequently than intermittent streams—having "measurable discharges" less than 10% of the time. Those features possessing measurable discharges 10% to 80% of the time are intermittent streams, according to Becker, and those possessing measurable discharges more than 80% of the time are perennial.

After viewing the evidence presented at the hearing on the merits, we agree with the Department that an intermittent stream regulated under the laws of this Commonwealth exists on the site. Evidence derived from the Department and Conservation District inspections, including photographs and the testimony of the inspectors, shows a channel of conveyance of surface water with a defined bed and banks and intermittent flow. (FOF 56.)

Lisa Dziuban of the Conservation District observed a channel with defined bed and banks, albeit without flow, during her June 2011 inspection before the site was disturbed. (DEP Ex. 2A, 12.) Subsequent inspections reveal observable water flowing in the stream channel on April 23, 2012, March 19, 2013, and April 9, 2014. During the April 23, 2012 inspection, both Dziuban and Officer Brendan Ryan of the Fish and Boat Commission observed ample water

flowing in a channel with a defined bed and bank on the site. (T. 66, 74, 398, 402; DEP Ex. 9A(3), 9A(4), 9A(5), 9A(7), 9A(8), 9A(9), 9A(10).) In addition, there was water flowing in the connected stream channel 25 to 30 yards upstream on the adjacent property. (T. 407, 439.) There was also evidence of water having flowed in the stream channel at the time of the November 2, 2012 inspection due to the presence of sediment load in the channel and overall muddy conditions. (DEP Ex. 9B(4); T. 93-94.) There was also ample water flowing in the defined bed and banks of the stream channel during the Department's inspection on March 19, 2013. (DEP Ex. 2, 9C(4), 9C(6).) Water was undercutting the banks of the relocated channel causing erosion. (T. 274, 286-87, 290; DEP Ex. 9C(6), 9C(11).) The water in some areas appeared to be following the path of the original stream channel instead of the path of the relocated channel. (T. 271, 286-88, 289-90; DEP Ex. 9C(5), 9C(7), 9C(9), 9C910).) Water can also be observed in the defined stream channel during the Department's April 9, 2014 inspection and there was also evidence at that time of water having recut the channel. (T. 300, 302; DEP Ex. 15, 16, 18, 17.)

Becker asserts that the Department and Conservation District just happened by coincidence to observe the channel soon after rain events. Becker counters that he observed the property continuously in 2013 to document the days on which the channel had water flowing in it. He presented a calendar at the hearing that he maintained during 2013 where he has indicated the days on which he observed flow. (HB Ex. 5.) He testified that the channel had water flowing in it only six days in 2013. (T. 543, 550.) However, when pressed on cross-examination Becker conceded that he did not visit the site every single day. (T. 570.) He stated he visited the site every Saturday, Sunday, and Wednesday, as well as "most other days," and any day that it was raining. (T. 569-70.) However, we are not convinced of the calendar's accuracy. For instance, photos taken during the Department's inspection on March 19, 2013 show water flowing in a

defined channel on the property. (DEP Ex. 9C(3), 9C(4), 9C(6), 9C(8).) Notably, Becker's calendar does not reflect water being observed on this date, although it does reflect observed water on the following day, March 20. Accordingly, we cannot view Becker's calendar as an accurate representation of when water was present in the channel during 2013.

Based on the evidence presented, we conclude that the channel at issue on Becker's property satisfies the definitions of a regulated stream under the Clean Streams Law and the Dam Safety and Encroachments Act. The stream on Becker's property is a channel of conveyance of surface water with defined bed and banks and intermittent flow. 35 P.S. § 691.1; 32 P.S. § 693.3.

**Unlawful Activity**

Having determined that the stream channel on Becker's property falls under the purview of the Clean Streams Law and the Dam Safety and Encroachments Act, we must now assess Becker's actions and whether they violated the laws of this Commonwealth as outlined in the Department's order. The order alleges that Becker (1) deposited gravel in the stream bank; (2) rerouted the existing stream channel without first obtaining a permit or an approved erosion and sediment control plan and without implementing erosion and sediment control BMPs to stabilize the site; and (3) caused sediment pollution to the stream.

Earth disturbance work done in and along waters of the Commonwealth is regulated by both the Dam Safety and Encroachments Act and the Clean Streams Law, as well as the regulations in Chapters 102 and 105 of Pennsylvania Code Title 25. Section 6(a) of the Dam Safety and Encroachments Act imposes a permit requirement upon persons wishing to undertake any obstruction or encroachment activity within watercourses, floodways, or bodies of water: "No person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the department." 32 P.S. §

693.6(a). *See also* 25 Pa. Code § 105.11(a).[3] The Act defines an "encroachment" as "[a]ny structure or activity which in any manner changes, expands or diminishes the course, current or cross-section of any watercourse, floodway or body of water." 32 P.S. § 693.3.

While the Dam Safety and Encroachments Act regulates the encroachment activity itself, the Clean Streams Law and Chapter 102 regulate the potential pollution resulting from the earth disturbance work associated with the encroachment, primarily in the form of sediment pollution to any nearby waters.[4] Section 401 of the Clean Streams Law makes it unlawful for any person "to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined." 35 P.S. § 691.401. The Clean Streams Law contains a broad definition of pollution:

> [C]ontamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid or other substances into such waters.

35 P.S. § 691.1. Pollution under the Clean Streams Law includes sediment pollution. *Leeward Constr. v. Dep't of Envtl. Prot.*, 821 A.2d 145, 147 (Pa. Cmwlth. 2003) ("Sediment-laden runoff is defined as pollution in Section 1 of The Clean Streams Law..."). *See also Cmty. Coll. of Delaware Cnty. v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975); *Leeward Constr., Inc. v. DEP*, 2000

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

[4] *See O'Reilly v. DEP*, 2001 EHB 19, 33: "When disturbed earthen materials are exposed to the elements without the protection normally afforded by vegetative cover or pavement, they are prone to wash away, or erode, at a much greater rate than they would when protected. Unless precautions are taken, these eroded earthen materials can then end up as sediment in the waters of the Commonwealth. This excess sedimentation has a deleterious effect on Pennsylvania's streams."

EHB 742, 757-58; *DEP v. Carbro Constr. Corp.*, 1997 EHB 1204, 1229; *Power Operating Co., Inc. v. DEP*, 1997 EHB 1186, 1193; *DEP v. Silberstein*, 1996 EHB 619, 635. The Chapter 102 regulations are designed to address pollution from erosion and sedimentation arising out of earth disturbance work.[5]

When applying for a water obstruction and encroachment permit under the Dam Safety and Encroachments Act, one must also submit a plan to the Department that complies with Chapter 102 for controlling erosion and sedimentation during earth moving activities. 25 Pa. Code § 105.13(g).[6] An erosion and sediment control plan consists of a "site-specific plan consisting of both drawings and a narrative that identifies BMPs to minimize accelerated erosion and sedimentation before, during and after earth disturbance activities." 25 Pa. Code § 102.1. Earth disturbance activity is defined as

> construction or other human activity which disturbs the surface of the land, including land clearing and grubbing, grading, excavations, embankments, land development, agricultural plowing or tilling, operation of animal heavy use areas, timber harvesting activities, road maintenance activities, oil and gas activities, well drilling, mineral extraction, and the moving, depositing, stockpiling, or storing of soil, rock or earth materials.

[5] *See* 25 Pa. Code § 102.2 (scope and purpose):

> (a) This chapter requires persons proposing or conducting earth disturbance activities to develop, implement and maintain BMPs to minimize the potential for accelerated erosion and sedimentation and to manage post construction stormwater.
>
> (b) The BMPs shall be undertaken to protect, maintain, reclaim and restore water quality and the existing and designated uses of waters of this Commonwealth.

[6] "Except for small projects, an application for a permit under this chapter shall be accompanied by proof of an application for an Earth Disturbance Permit or an erosion and sedimentation control plan for activities in the stream and earthmoving activities. The plan must conform to requirements in Chapter 102 (relating to erosion and sediment control) and must include a copy of a letter from the conservation district in the county where the project is located indicating that the district has reviewed the erosion and sediment control plan of the applicant and considered it to be satisfactory, if applicable. Earthmoving activities, including small projects, shall be conducted pursuant to an earth disturbance plan." 25 Pa. Code § 105.13(g).

*Id.* Persons proposing or conducting earth disturbance activity must develop, implement, and maintain BMPs. 25 Pa. Code § 102.2.[7] These BMPs are required regardless of the size of the earth disturbance. 25 Pa. Code § 102.4(b)(1); *DEP v. Angino*, 2007 EHB 175, 199. In addition, measures must be undertaken to stabilize the site once earth disturbance activity is completed, or when it temporarily ceases. 25 Pa. Code § 102.22. This involves the restoration or replacement of topsoil, or the implementation of other measures to amend, seed, or mulch the soil to protect it from accelerated erosion and sedimentation. *Id.*

The first allegation in the Department's order regarding the placement of gravel within 50 feet of the stream bank is undisputed. The first inspection of the site, on June 29, 2011, shows stone and gravel very near the location of the stream before it was rerouted. (DEP 12.) Becker acknowledges that he placed the gravel near the stream channel. He states in his post-hearing brief that he was merely conducting routine maintenance to re-stone his gravel driveway. He also admitted during his testimony that he placed the gravel near the stream channel. (T. 539-41.) Depositing, stockpiling, or storing gravel is an earth disturbance activity. There were no erosion and sedimentation controls or BMPs installed to prevent the gravel from washing into the stream channel as required by 25 Pa. Code § 102.4(b). (T. 54-55; DEP Ex. 2A, 12.)

Turning to the second and third allegations in the Department's order, there is significant evidence from the inspections, and testimony from the individuals conducting the inspections, that Becker rerouted the stream, did not implement erosion and sediment control BMPs, and caused sediment pollution to waters of the Commonwealth from the unstabilized site. Site inspections were conducted by Lisa Dziuban, Officer Brendan Ryan, and Frank Defrancesco of

[7] BMPs are defined as "[a]ctivities, facilities, measures, planning or procedures used to minimize accelerated erosion and sedimentation and manage stormwater to protect, maintain, reclaim, and restore the quality of waters and the existing and designated uses of waters within this Commonwealth before, during, and after earth disturbance activities." 25 Pa. Code § 102.1.

the Department. All of these people have significant experience inspecting sites for compliance with the Chapter 102 and 105 regulations.

Beginning with the rerouting of the stream channel, we do not need to look much further than Becker's own admissions to conclude that he rerouted the stream. Although Becker argues that the Department has no evidence of any attempted rerouting of the stream channel and no evidence that Becker ordered or supervised the work, there is a significant amount of evidence from Becker himself about his intention to relocate the channel and his work executing that plan. Indeed, on several occasions Becker admitted during his testimony that he engaged a contractor in 2011 to re-route the stream channel. During his case-in-chief he testified:

> After Hurricane Irene in August of – 27 of 2011 [sic], **I had an excavation contractor come on to the property to dig a new storm channel** because I knew that, when more rains came now that the defined channel that had been there historically, this stone-laid channel that made these two right bends was gone, that water would go anywhere seeking its own course.

(T. 491) (emphasis added). He touched on this again a short time later:

> I was still back in September 10th, 2011, **when my contractor began to dig the channel to connect up those two upper and lower reaches of the channel**. And, as he was working that morning a police car arrived and a policeman approached him and told him to stop; and the contractor called me on his cell phone. And I talked to the police officer.

(T. 510) (emphasis added). He reiterated this statement while he was being cross-examined: "[T]he only time…I had any piece of what might be called machinery on the site was on September 10th when **I had an ordinary sized backhoe begin to dig a channel**." (T. 540) (emphasis added). There are also several other points where Becker acknowledges rerouting the stream.[8] Thus, Becker flatly admits hiring a contractor who began to dig a new stream channel with a backhoe.

[8] *See* Becker's testimony at T. 499 ("As soon as I could, on September the 8th I hired a contractor, an excavation contractor who had a backhoe who wasn't doing something else."); at T. 502 ("When I had the

In addition, all three of the inspectors—Dziuban, Ryan, and Defrancesco—testified that it was evident from the conditions of the site that heavy equipment had been present and that the stream channel had been rerouted. Dziuban was present on the site in June 2011 before Becker's work and again in April 2012 and noticed that a new stream channel had been created. Dziuban and Ryan observed the presence of large tire tracks on the site. (FOF 26.) This work was done without a permit and without the implementation of any erosion and sediment controls. Defrancesco testified that it appeared that, despite the efforts to relocate the channel, the water was "eat[ing] its way back into the channel it had been in[,]" which was undercutting the new banks and causing erosion. (T. 217, 274; DEP Ex. 2.) He also testified that, for the segment of the channel on Becker's site, the streambed did not have the same consistency as it did above and below on the adjacent properties—there were fewer boulders and stones and more fine material on Becker's site. (T. 270-71.)

Dziuban, Ryan, and Defrancesco have substantial experience inspecting sites. Dziuban has over 30 years of experience conducting inspections related to earth disturbance as an environmental specialist with the Conservation District. (T. 24-26, 161-62.) Officer Ryan has been a Waterways Conservation Officer with the Fish and Boat Commission since 2006 and has been trained in the Department's Chapter 102 and 105 regulations. (T. 389, 392-93.) Defrancesco has worked in the Department's waterways and wetlands program for more than 20

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contractor begin working to dig the proposed channel, the channel he was meant to dig, under a thousand square feet of disturbed earth connecting the two reaches of this ravine, I wanted to do it in the most direct way as possible and eliminate this right angle (indicating) which had been a heartache for me, a heartache for Mr. Elliott down below, and a bad design, one that had a reason in history having nothing to do with the present use of the properties."); his assertion in his Notice of Appeal at ¶4 ("…Heywood Becker hired a contractor to dig a replacement swale following the natural topographic contours of the land allowing for the best flow of rain waters on the Site."); and HB Ex. 2, 3, and 4 (showing Becker's plans to straighten the stream channel).

years. (T. 217-19.) We credit their experience in conducting inspections and their abilities to discern when a stream has been rerouted.

We have little difficulty concluding that Becker relocated the stream channel without a permit. Becker's rerouting of the stream channel is clearly an encroachment in that it has changed, expanded, or diminished the course, current, or cross-section of the watercourse. *See* 32 P.S. § 693.3. It is unlawful to relocate a watercourse without a permit under Section 6(a) of the Dam Safety and Encroachments Act and Section 11(a) of the Chapter 105 regulations. 32 P.S. § 693.6(a); 25 Pa. Code § 105.11(a); *Strubinger v. DEP*, 2003 EHB 247, 250.

It is almost axiomatic that rerouting a stream channel will result in erosion and sedimentation in the absence of appropriately designed and implemented controls.[9] The site was highly unstable during the inspections of April 2012, November 2012, March 2013, and April 2014. The photographs from those inspections depict a site that has been scoured, with pervasive loose soils, sparse vegetation, and few if any erosion and sediment controls. Although there is some evidence of minimal seeding and mulching, none of it was sufficient to stabilize the site. (T. 170-71, 182-83.) There is a silt fence wrapped around a tree that remained that way for months. (T. 92; DEP Ex. 9A(12), 9B(2).) Dziuban and Ryan credibly testified that the unstable conditions were the result of heavy equipment on site and as a result of the attempted rerouting of the stream channel. (FOF 25-28.) Neither Dziuban, Ryan, nor Defrancesco observed erosion and sediment controls or BMPs that were adequate to prevent sediment pollution to the stream on the site and the stream as it exists downgradient, eventually connecting

[9] *See S & F Builders, Inc.*, 1972 EHB 144, 154 (the Board and its first Chair, Michael Malin, recognizing under an earlier version of the Dam Safety and Encroachments Act (the Water Obstructions Act of June 25, 1913, P.L. 555), and before the promulgation of any regulations in this arena, that considerations such as soil erosion and the deposition of silt and debris are important to account for when changing the channel of a stream).

to the Delaware Canal and Delaware River. This constitutes violations of 25 Pa. Code §§ 105.13(g), 102.4(b), 102.22, and Section 401 of the Clean Streams Law.

Becker spends a good deal of time pointing to causes or sources of the unstable conditions of the site rather than to his activities. He credits Hurricane Irene and Tropical Storm Lee in August and September 2011, and later Hurricane Sandy in October 2012, as wreaking widespread devastation across southeastern Pennsylvania. He argues that the 2011 storms caused the destruction of the stone walls that once lined the stream channel and led to the greater destabilization of the site. Becker also contends that the storms uprooted trees and that the root balls from these trees are the source of the sediment pollution on the site. (See HB Ex. 6.)

Lisa Dziuban acknowledges that some of the conditions she observed during her April 2012 inspection were consistent with a storm event, such as the silt fence wrapped around a tree, and that there were trees uprooted across the region from the storms. (T. 156, 168-70.) However, even if a storm was in part the cause of the unstable conditions, Becker's efforts to remedy the unstable conditions on the site still needed to comply with the law. If the storms did destroy the stream channel, then Becker still needed to obtain the proper permits to construct a new stream channel. 32 P.S. § 693.6(a); 25 Pa. Code § 105.11(a). He still needed to develop an erosion and sediment control plan and implement and maintain appropriate BMPs. 25 Pa. Code §§ 105.13(g), 102.2, and 102.4(b)(1). He still needed to stabilize the site. 25 Pa. Code § 102.22. Yet he did not take any of these measures.

As it was, Becker's activities undoubtedly made the situation worse and the unstable conditions persisted on the site for months. The first storms occurred in the late summer of 2011, but the site was still highly unstable in April of 2012, with mud and loose soil prevalent throughout the property, loose sediment in the stream channel, eroded banks, and sediment

leaving the site via the turbid water in the stream channel. Further, the occurrence of the storms does not overcome or negate the significant evidence discussed above of heavy equipment disturbing the site and rerouting the stream. (FOF 25-28.) Officer Ryan testified that in April 2012 the site had been *freshly disturbed*, and the stream had been *recently diverted*. (T. 400, 402.) He testified that the site had been disturbed just days earlier, within the preceding week. (T. 423, 427.) Becker does not claim that any other serious storm close in time to the April 2012 inspection impacted the site. As of the Department's April 2014 inspection the site still remained largely unstable. (T. 298-302; DEP Ex. 16.)

With respect to the root balls, even if we accept that the root balls played a role in the sediment washing down into the stream channel, it is clearly not the exclusive source of sediment. The pervasive unstable conditions throughout the site from Becker's activities are the overwhelming source of sediment pollution to the stream channel. Even if some portion of the silt came from the root balls that Becker identified, a factor that Becker did not conclusively establish or quantify, he still fails to provide an explanation of how the disturbance from the heavy equipment did not cause sediment pollution to the stream.

While we do not necessarily doubt that the storms had some impact on the site, it does not absolve Becker of the responsibility to remediate the site and to adhere to the applicable legal requirements in doing so. By the time of the April 2012 inspection, Becker had had more than seven months to secure the proper approvals from the Department and Conservation District and remediate the site if it had in fact been impacted by the late summer storms of 2011 and left unstable.[10] Becker committed to remediating the site at the May 2012 enforcement conference

[10] Becker asserted in his testimony that the storms should be considered in assessing the reasonableness of his actions. (T. 472, 474, 494, 508, 509, 582.) However, the reasonableness we are tasked with assessing under our standard of review is the reasonableness of the Department's order. Becker's statements in this

but he never followed through. We find ample evidence to support the allegations in the Department's order that Becker rerouted the stream channel on the site without a permit and without erosion and sedimentation controls, which resulted in sediment pollution to the waters of the Commonwealth.

**Ownership of the Site**

Becker next argues that the Department was too late in issuing its order because by the time the Department issued the order in February 2013 the Center Bridge Trust no longer owned the site. Becker asserts that the property was lost in an upset tax sale on December 11, 2012. He asserts that the Department has no authority to compel him to take remedial actions on property he no longer owns or controls. The Department argues that the upset tax sale did not become final until November 2013, and points to a document from the Bucks County Court of Common Pleas regarding the distribution of monies from the proceeds garnered during certain tax sales in 2012. (HB Ex. 7.) The Department does not provide any explanation, argument, or legal support for why it believes a tax sale is not final until the distribution of all proceeds from the sale has been completed. Nevertheless, we find that the Department maintains the authority to order an individual who is responsible for causing a statutory nuisance under the Clean Streams Law to remedy the nuisance even if that person no longer owns the property where the nuisance condition is located.

In *Ryan v. Department of Environmental Resources*, Commonwealth Court considered whether the Department had the authority to order a former tenant of a property to abate a nuisance condition that the tenant had caused when he resided on the property. 373 A.2d 475 (Pa. Cmwlth. 1977). In that case, John Ryan leased property from 1964 to 1975 for purposes of

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vein appear more geared toward a civil penalty proceeding that is not currently before us. *See* discussion *infra*.

operating a sanitary landfill. Department inspections from 1971 through 1975 revealed violations of regulations governing waste disposal and water pollution, among others. Ryan's lease terminated in January 1975 and he ceased operating the landfill. Subsequent inspections revealed continuing violations, including waste lacking proper cover and landfill leachate entering groundwater. The Department issued an order to Ryan in July 1975 requiring him to, among other things, implement a vector control program, construct and manage a surface water diversion system, and place vegetative cover on the site. The Department had negotiated a consent order with the owner of the property to allow Ryan to enter the property and perform this work.

Ryan appealed the order to this Board and argued that he no longer had any control over or access to the property, and that the Department had no authority to require him to take the actions in the order. The Board held that the Department did have the necessary authority under the Solid Waste Management Act and the Administrative Code. *Ryan v. DER*, 1976 EHB 228. We recognized that under Section 1917-A of the Administrative Code, the Department is instilled with broad powers to handle the abatement of nuisances. This section of the Administrative Code provides:

> The Department of Environmental [Protection] shall have the power and its duty shall be:
>
> (1) To protect the people of this Commonwealth from unsanitary conditions and other nuisances, including any condition which is declared to be a nuisance by any law administered by the department;
>
> (2) To cause examination to be made of nuisances, or questions affecting the security of life and health, in any locality, and, for that purpose, without fee or hindrance, to enter, examine and survey all grounds, vehicles, apartments, buildings, and places, within the Commonwealth, and all persons, authorized by the department to enter, examine and survey such grounds, vehicles, apartments, buildings and places, shall have the powers and authority conferred by law upon constables;

(3) To order such nuisances including those detrimental to the public health to be abated and removed;

(4) If the owner or occupant of any premises, whereon any such nuisance fails to comply with any order of the department for the abatement or removal thereof, to enter upon the premises, to which such order relates, and abate or remove such nuisance;

(5) For the purpose of collecting or recovering the expense of the abatement or removal of a nuisance, to file a claim, or maintain an action, in such manner as may now or hereafter be provided by law, against the owner or occupant of the premises upon or from which such nuisance shall have been abated or removed by the department;

(6) In making examinations as authorized by this section, the Department of Environmental Resources shall cooperate with the Department of Health, for the purpose of avoiding any duplication of inspection or overlapping of functions.

71 P.S. § 510-17.

In affirming the Board, Commonwealth Court specifically highlighted Section 1917-A(3) of the Administrative Code, 71 P.S. § 510-17(3), and held that the Department "has express, unconditional authority to protect the health of the citizens of this Commonwealth by ordering the abatement of nuisances. Within this context, the term, 'nuisance' includes unsanitary conditions and conditions declared to be a nuisance by *any* law administered by [the Department]." *Ryan*, 373 A.2d 475, 477 (Pa. Cmwlth. 1977) (footnote omitted) (emphasis in original). The Court viewed the unpermitted discharge of leachate to groundwater as a nuisance under Section 401 of the Clean Streams Law. The Court went on to find that "where there is statutory authority to order abatement of a nuisance, the fact that the nuisance is on the land of a stranger is no reason for not abating it." *Ryan*, 373 A.2d at 478 (citing *Delaware Division Canal Co. v. Cmwlth.*, 60 Pa. 367, 374 (Pa. 1869)). *See also Phila. Elec. Co. v. Hercules, Inc.*, 587 F. Supp. 144, 152 (E.D. Pa. 1984) ("As a general rule, one who creates a nuisance is liable for the resulting damages and ordinarily his liability continues for as long as the nuisance continues." (citing *Ryan, supra,* 373 A.2d 475; *Smith v. Elliot*, 9 Pa. 345 (1848))).

This Board previously looked to the Commonwealth Court's decision in *Ryan* in the context of denying a petition for supersedeas in *Tenth Street Building Corp. v. DER*, 1985 EHB 829. In *Tenth Street Building*, we considered whether an appellant's subsequent transfer of property alleviated its responsibility to take remedial action ordered by the Department to prevent a former landfill site from continuing to pollute groundwater. Tenth Street bought property in 1965 and leased the property to Pasquale Pontillo for the operation of a landfill. In 1970 Tenth Street terminated the lease and landfill operations ceased. Tenth Street continued to own the property and in the spring of 1983 the Department informed Tenth Street that the Department believed the site was causing pollution to groundwater. The Department and Tenth Street engaged in discussions over the next few months. In November 1984 Tenth Street sold the site to Pontillo, the former leasee, for $1,000. On February 2, 1985, the Department issued an order to Tenth Street requiring it to remediate the site pursuant to Section 401 of the Clean Streams Law and Section 1917-A of the Administrative Code. We followed the reasoning in *Ryan* in affirming the Department's authority under the Administrative Code to issue the order and found that "[i]t would be absurd to hold that Tenth Street, after being informed by [the Department] in 1983 that there was a pollutional discharge from the site, could relieve itself of any responsibility for the discharge by selling the property in 1984 to Mr. Pontillo." *Tenth Street Building*, 1985 EHB 829, 842.

We adopt this same reasoning here. Although *Ryan* and *Tenth Street Building* both involved landfills, there is nothing fundamentally different about those situations from the one before us here that would in any way temper the Department's authority under the Administrative Code to order responsible parties to abate nuisance conditions. The Department's order declares that Becker's conduct constitutes a statutory nuisance under Section

601 of the Clean Streams Law. 35 P.S. § 691.601. (DEP Ex. 1 at ¶ W.) Section 401 of the Clean Streams Law declares an unpermitted pollutional discharge to the waters of the Commonwealth to be a public nuisance. 35 P.S. § 691.401. Based on the violations found above, we have no difficulty concluding that Becker created a statutory nuisance on the site by causing sediment pollution to waters of the Commonwealth as a result of rerouting the stream. The Department has the authority to order him to abate the nuisance regardless of his current relationship to the property.

Becker was fully aware that the Department had been inspecting the site and he was copied on all of the inspection reports drafted by the Department and the Conservation District. He participated in an enforcement conference to discuss how to bring the site back into compliance. In fact, Becker testified that he forfeited the site precisely because he did not want to expend the time, money, and effort to remediate it to the Department's satisfaction.[11] Allowing Becker to avoid liability after he willingly forfeited his property in an upset tax sale after being engaged in enforcement proceedings with the Department and the Conservation District would create incentives for landowners to shirk responsibility for remediating pollutional conditions of their own creation and would frustrate the purpose of the environmental laws of this Commonwealth and the Department's role in enforcing those laws.

**Warrantless Searches**

Becker preserves in his post-hearing brief his argument that we should exclude as the product of warrantless searches any photographs obtained from the Department and

[11] "All of that and then [Hurricane] Sandy and I gave up. I didn't pay the taxes that were due; and, on December 11th, 2012, the property was sold at an offset tax sale and I lost title. I waved goodbye to the property. I had had enough. I had been beaten. I had two big floods. I had no more resources of this Department. I had Solebury Township. I had their police trying to arrest my contractor and me…. It just wasn't worth it anymore….I had spent so many thousands of dollars and the property wasn't worth it at their best, and so I walked away from it. And then I lost title to it." (T. 519-20.)

Conservation District inspections on his property when it was under his control. We addressed this issue following the second day of hearing in this matter because the issue continually arose during testimony, and the persistent argument between Becker and Department counsel began to impede the orderly conduct of the hearing. *Becker v. DEP*, 2014 EHB 329. In our Opinion on the issue we held that, not only did Becker not enjoy a reasonable expectation of privacy in the open area surrounding the dwelling, which abuts a well-traveled state route, but more fundamentally, even if unlawful searches were conducted, there is nothing that compels the exclusion of the evidence obtained from those searches in a civil administrative proceeding such as this one:

> Furthermore, even if we did find that the photographs were taken in violation of the Fourth Amendment, the exclusionary rule does not compel us to keep them out of evidence. The U.S. Supreme Court has consistently held that the exclusionary rule is not itself a constitutional right of the Fourth Amendment, but rather a judicially-created doctrine that has been held to be applicable only when the deterrence benefits outweigh the substantial social costs. In *Pennsylvania Board of Probation and Parole v. Scott*, 118 S. Ct. 2014, 2019 (1998), the U.S. Supreme Court noted that their holdings have repeatedly emphasized that "the State's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution."
>
> Additionally, there is a substantial amount of case law that holds that the exclusionary rule is generally only applicable in criminal cases, not civil proceedings. In *Scott, supra*, the U.S. Supreme Court addressed whether the exclusionary rule applied to parole revocation proceedings. Reviewing prior cases where the Court held that the exclusionary rule did not apply to civil tax proceedings or civil deportation proceedings, the Court once again declined to "extend the operation of the exclusionary rule beyond the criminal trial context." 118 S. Ct. at 2020.
>
> The Pennsylvania Supreme Court has also interpreted the exclusionary rule to only apply to criminal trials. In *Kerr v. Pennsylvania State Board of Dentistry*, 960 A.2d 427 (Pa. 2008), the Pennsylvania Supreme Court addressed the issue for the first time. The Pennsylvania Supreme Court recognized the longstanding consistency in the U.S. Supreme Court to not extend the exclusionary rule beyond criminal trials. 960 A.2d 427, 433. The Pennsylvania Supreme Court looked to the balancing test outlined by the U.S. Supreme Court in *United States v. Janis*, 96 S. Ct. 3021 (1976), to determine whether the deterrence benefit outweighed the social cost. The Court in *Kerr* held, "Because applying the federal exclusionary rule in criminal trials already serves to deter unlawful evidence-gathering by

police, the marginal deterrent value of applying the rule to civil proceedings is minimal. Accordingly, we decline to apply the rule in the civil context as Appellant requests." 960 A.2d at 434 (internal citation omitted).

The Court in *Kerr* also points us to numerous instances where the Commonwealth Court has held that the exclusionary rule does not apply in civil cases. *See Kyte v. Pa. Bd. of Probation & Parole*, 680 A.2d 14 (Pa. Cmwlth. 1996) (parole revocation hearing); *Sertik v. School District of Pittsburgh*, 584 A.2d 390 (Pa. Cmwlth. 1990) (school board termination hearing); *Pa. Social Services Union v. Pa. Bd. of Probation & Parole*, 508 A.2d 360 (Pa. Cmwlth. 1986) (labor arbitration); *DeShields v. Chester Upland School District*, 505 A.2d 1080 (Pa. Cmwlth. 1986) (school board termination hearing); *Kleschick v. Civil Service Commission of Philadelphia*, 365 A.2d 700 (Pa. Cmwlth. 1976) (claim for back pay).

Although Mr. Becker argues that the prospective criminal provisions of the Clean Streams Law renders this proceeding "a full-on criminal proceeding in the guise of an administrative hearing[,]" that is not the case. Mr. Becker initiated this proceeding by filing an appeal with us. The Board is not empowered to render a judgment that involves the imposition of jail time. All the Board is empowered to do in this case is to say whether or not the Department's order was reasonable, lawful, and supported by the facts. *See Dirian v. DEP*, 2013 EHB 224, 231 ("In an appeal from an order, the Department bears the burden of proving that its order was lawful, reasonable, and supported by the facts.") Any potential criminal proceeding that would arise out of one's non-payment of a civil penalty would be conducted in a different forum.

All of the case law is consistent with how this Board has interpreted claims of warrantless searches and arguments for the application of the exclusionary rule. In *Goetz v. DEP*, 2000 EHB 840, 874-76, a proceeding under the Noncoal Surface Mining Act, we analyzed *Scott* and the cases cited therein and concluded, "[T]he exclusionary rule would not preclude us from considering the evidence obtained as a result of the Department's inspections—even assuming the investigations were unlawful because they were done without a warrant." 2000 EHB at 876. Furthermore, in undertaking the balancing test outlined in *Janis*, and consistent with our prior holding in *Goetz*, we conclude that "the deterrent effect of the exclusionary rule in this setting would be minimal because the use of the exclusionary rule in criminal trials already deters illegal searches regarding alleged violations" of the Clean Streams Law and Dam Safety and Encroachments Act. *Id.*

Accordingly, even if we did find that the Department and the Bucks County Conservation District conducted a warrantless search of the subject property, there still would be no basis for the exclusion of the photographs taken during that search of the property.

*Becker*, 2014 EHB 329, 333-36. In his post-hearing brief Becker presents no argument on why we should deviate from our earlier ruling. He does not address the abundant case law instructing

that the exclusionary rule does not apply to a civil administrative proceeding such as the one now before this Board. We maintain our prior ruling.

Finally, Becker asserts at the end of his brief that, if we do not sustain his appeal, any fines imposed should be *de minimis*. However, this is not a penalty proceeding. The purpose of this appeal is to assess the sufficiency of the allegations in the Department's order. Any potential penalties the Department wishes to seek arising out of Becker's actions here would have to be pursued in a separate proceeding. *See, e.g., DEP v. Strubinger*, 2006 EHB 740 (assessing civil penalties under the Dam Safety and Encroachments Act and Clean Streams Law in a proceeding subsequent to the Board's adjudication of the underlying compliance order at *Strubinger v. DEP*, 2003 EHB 247); *DEP v. Leeward Constr., Inc.*, 2001 EHB 870 (assessing civil penalties in a subsequent complaint proceeding covering many of the violations established by an earlier adjudication of an appeal of Department orders at *Leeward Constr., Inc. v. DEP*, 2000 EHB 742). *Cf. Kent Coal Mining Co. v. Dep't of Envtl. Res.*, 550 A.2d 279, 283 (Pa. Cmwlth. 1988) (recognizing that collateral estoppel would preclude a person from challenging the fact of a violation in a subsequent civil penalty proceeding).

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 32 P.S. § 693.24; 35 P.S. § 691.7; 35 P.S. § 7514.

2. The Department bears the burden of proof in cases where it issues an order. 25 Pa. Code § 1021.122(b)(4).

3. The Department must prove by a preponderance of the evidence that its issuance of the order to Becker constituted a lawful and reasonable exercise of its discretion and the order is supported by the facts. *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014

EHB 219, 251; *Dirian v. DEP*, 2013 EHB 224, 231; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Management Co. v. DEP*, 2010 EHB 456, 474-75.

4. Becker bears the burden of proof on any affirmative defenses he raises to the Department's order. *Robinson Coal*, 2015 EHB 130, 154; *Carroll Twp. v. DEP*, 2009 EHB 401, 409 n.3.

5. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *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).

6. The Department's order is final as to the Center Bridge Trust because the Trust did not file an appeal of the order. 35 P.S. 7514(c); *Russell v. DEP*, 2015 EHB 360. *See also* 25 Pa. Code § 1021.52(a) (appeal must be filed within 30 days of notice of the action).

7. The stream on the site in this matter is a channel of conveyance of surface water with a defined bed and banks and intermittent flow. 35 P.S. § 691.1; 32 P.S. § 693.3.

8. Becker's rerouting of the stream channel constitutes an encroachment under the Dam Safety and Encroachments Act. 32 P.S. § 693.3.

9. Becker unlawfully rerouted an existing stream channel without a permit. 32 P.S. § 693.3; 32 P.S. § 693.6(a); 25 Pa. Code § 105.11(a); *Strubinger v. DEP*, 2003 EHB 247, 250.

10. Becker did not develop, implement, or maintain appropriate erosion and sediment control best management practices while conducting earth disturbance activities. 25 Pa. Code § 102.2; 25 Pa. Code § 102.4(b); 25 Pa. Code § 105.13(g).

11. Becker's earth disturbance activities caused sediment pollution to waters of the Commonwealth in violation of the law. 35 P.S. 691.1 (definition of pollution); 35 P.S. § 691.401. *See also Leeward Constr. v. Dep't of Envtl. Prot.*, 821 A.2d 145, 147 (Pa. Cmwlth. 2003); *Cmty. Coll. of Delaware Cnty. v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975).

12. Becker's pollution of the waters of the Commonwealth is a statutory public nuisance under the Clean Streams Law. 35 P.S. § 691.401.

13. The Department has the authority under the Administrative Code to require individuals who created a statutory public nuisance to abate the nuisance condition even if they no longer own or control the site of the subject nuisance. 71 P.S. § 510-17; *Ryan v. Dep't of Envtl. Res.*, 373 A.2d 475 (Pa. Cmwlth. 1977); *Tenth Street Building Corp. v. DER*, 1985 EHB 829, 842; *Ryan v. DER*, 1976 EHB 228. *See also Phila. Elec. Co. v. Hercules, Inc.*, 587 F. Supp. 144, 152 (E.D. Pa. 1984).

14. Photographs taken while on the site during inspections are not to be excluded from admission into evidence as the product of warrantless searches because the exclusionary rule does not apply to civil administrative proceedings. *Pa. Board of Probation and Parole v. Scott*, 118 S. Ct. 2014, 2019 (1998); *United States v. Janis*, 96 S. Ct. 3021 (1976); *Kerr v. Pa. State Board of Dentistry*, 960 A.2d 427, 434 (Pa. 2008); *Becker v. DEP*, 2014 EHB 329, 333-36; *Goetz v. DEP*, 2000 EHB 840, 874-76.

15. The Department's order was a lawful and reasonable exercise of its discretion that is supported by the facts and evidence in this case.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **HEYWOOD BECKER** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-038-C** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**O R D E R**

AND NOW, this 10th day of April, 2017, it is hereby ordered that Heywood Becker's 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 10, 2017**

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

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|---|---|---|
| **BENNINGTON INVESTMENT GROUP, LLC** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2015-190-M** |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DILLSBURG AREA AUTHORITY, Intervenor** | : | **Issued: April 17, 2017** |

**OPINION AND ORDER ON**
**APPELLANT'S MOTION FOR SUMMARY JUDGMENT**

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Board denies the Appellant's Motion for Summary Judgment in this appeal. Genuine issues of material fact exist regarding whether the Department conducted the appropriate review of Appellant's Private Request to Revise Official Plan and the adequacy of the Franklin Township Act 537 Official Plan to meet Appellant's needs. A hearing is needed to resolve these issues of material fact.

**O P I N I O N**

**Background**

The above captioned appeal was filed by Bennington Investment Group, LLC ("Appellant") to challenge the Department's decision to deny its Private Request to Revise Official Plan ("Private Request"). The Appellant filed its appeal with the Board on December 9, 2015 following the receipt of the Department's denial letter on November 13, 2015.

Appellant is a development company that proposes to develop a 344-unit residential subdivision on 62.58 acres in Franklin Township, York County. The subdivision would be

served by a 144,000 gpd private package treatment plant with discharge to an unnamed tributary to the North Branch of Bermudian Creek. The plan also includes eight lots for stormwater management, open space/recreation, sewage facilities, and non-building. The Franklin Township Official Act 537 Plan requires the Appellant to submit at Sewer Feasibility Report ("SFR"). The Dillsburg Area Authority ("DAA"), which handles sewage matters for Franklin Township, only provides an SFR after an applicant pays to reserve sewage and water capacity. The DAA's reservation agreements require payments of nonrefundable and nontransferable quarterly fees of $37.31 per EDU per quarter for wastewater and $23.00 per quarter for water. Appellant submitted a private request for a sewage module approval through its consultant on June 12, 2015.

The Department denied Appellant's Request to Revise the Official Plan for two reasons. First, the Department found that Appellant had not documented that the Official Plan of Franklin Township was not being implemented or was inadequate to meet the property's sewage disposal needs. Second, the Department determined that Franklin Township's Official Act 537 Plan designated the area as one served by the DAA, an exclusive agent of the Township. The Department asserts that sewage service is available for Appellant's proposed development. The Appellant then filed this appeal in which it argued that the Department's denial violated the Appellant's rights and was an abuse of the Department's discretion.

Both the Appellant and the Department have filed cross motions for summary judgment. The Board will address each one in its own Opinion. The Appellant filed its Motion for Summary Judgment on February 17, 2017. In it, the Appellant alleged that the request was improperly declined because the Department deferred to the Township's Act 537 Plan without analyzing the procedures. The Appellant contends that these procedures act to bar large-scale

developments through cost prohibitive practices. Further, according to the Appellant, the Department dismissed this concern as a mere unwillingness to pay fees.

The Appellant relies on *Gilmore v. DEP*, 2006 EHB 679 to support its argument. Appellant argues that the Board in *Gilmore* found that the Department could not refuse to review contentions that a municipality's plan is illegal or unreasonable based on those contentions being rooted in nonsubstantive provisions like submission requirements or fees. The Appellant points us to our statement in *Gilmore* that "[a] municipality can just as easily fail to adequately provide for its residents' sewage disposal needs by creating illegal or unreasonable procedural hurdles as it can by creating illegal or unreasonable substantive limitations" and its further discussion regarding hypothetical occurrences in which a municipality might impose five-year waiting periods on applications or million dollar application fees as ways to fail to provide feasible sewage disposal that the Department would need to review. *Gilmore*, 2006 EHB at 686. The Appellant's position is that the Department's dismissal of the Appellant's concern as being an unwillingness to pay fees is in direct violation to the holding of *Gilmore*.

Appellant alleges that the reservation fees for its planned development of 344 units would be $82,986.56 annually prior to the submittal of a preliminary plan. The Appellant contends that if it had started paying these fees when it first submitted its plan in March of 2005, it would have paid $995,838.72 to date. The Appellant believes that these fees rise to the level of the illegal or unreasonable hurdles or limitations alluded to in *Gilmore.* Therefore, the Appellant argues, the Board should either enter summary judgment in its favor and grant the private request, or remand the private request back to the Department for consideration.

On March 24, 2017, the Department filed its Brief in Opposition to Bennington Investment Group, LLC's Motion for Summary Judgment. In it, the Department makes three

arguments: (1) the Appellant incorrectly argues that the reservation fees require the Department to order Franklin Township to revise its Act 537 Plan; (2) the Appellant raises an issue that is legally flawed; and (3) the Appellant's argument that the Franklin Township Act 537 is inadequate because their costs are infeasible lacks merit.

The Department first argues that there is no Department guidance document, rule, or regulation that either states or implies that reservation fees are unlawful or that a municipality that requires such fees is inadequately serving the sewage disposal needs of the community. The Department construes the Appellant's argument as boiling down to a matter of money, and contends that the Appellant is attempting to manipulate the "cost of doing business" issue into a reason for the Department to approve its Private Request. The Department asserts that the issue of capacity is not one that needs to involve the Department at all, and is rather a dispute between the Appellant and the DAA.

Further, according to the Department, Franklin Township's Act 537 Plan is being implemented: it requires that the Appellant connect its subdivision to available municipal sewer lines and a sewer line is available immediately adjacent to the proposed development. Because the Appellant has refused to pay the reservation fee, capacity is as of yet unaddressed. The Department argues that the Appellant's failure to provide information is not evidence that the Township and the DAA are not implementing the Act 537 Plan. The Department asserts that it is not within its authority to order a municipality to amend its sewage facilities plan simply because someone opposes the municipal ordinances.

Second, the Department argues that there is no law requiring the Department to provide an opportunity to discuss a Private Request. Therefore, the Appellant's allegation that it did not have an opportunity to discuss its Private Request is legally flawed. Thus, according to the

Department, its denial of a private request cannot be overturned because it failed to accord the requesting person an opportunity to discuss the private request.

Third, the Department asserts that Appellant's argument that the township's Act 537 Plan is inadequate because the costs are infeasible lacks merit. The Department distinguishes the facts of *Gilmore* from those in this matter and argues that the case does not apply. The Department points out that in *Gilmore,* the Board ruled that it would need to hear scientific evidence from the Township as to the necessity of the hydrogeologic study and evidence from Gilmore as to why the plan was inadequate for his needs, but the case never went to hearing.

The Department draws the Board's attention to the fact that Gilmore was not in the development business and sought to develop two tracts of land in comparison to the Appellant's plan to build a 344-unit development in Franklin Township. The Department argues that the financial burden on Gilmore, an individual, caused by the requirement of conducting further study on two tracts of land is entirely different than the typical, expected costs of doing business with which Appellant is faced. The Department calls Appellant's allegation of potentially having to pay as much as $995,838.72 in fees a "misdirection" because the figure is speculative at best.

The Department observes that no one is forcing the Appellant to develop 344 EDUs or to develop them all at once. While the reservation fee is $37.31 per EDU per quarter, the ultimate cost to the Appellant is an open question. The Department argues that Appellant is ultimately responsible for this type of cost because it chooses to proceed with a large-scale development. Further, the Department asserts that the figure is reasonable and relative to the size of the project, particularly when the Appellant's potential profit is also factored in. Ultimately, the Department contends that the reservation fee is a municipal issue and not under the purview of the Sewage

Facilities Act. It asserts that neither the reservation fees nor future tap fees play any role in sewage facilities planning within the context of a private request.

It is also the Department's position that under *Gilmore*, an appellant has the burden to produce evidence that the alternatives available under an official plan are infeasible and must convince the Board that he has been deprived of any feasible means for addressing his sewage disposal needs. The Department argues that the Appellant has failed to do this. Additionally, in the Department's opinion, it is not either their or the Board's function to pick among reasonable choices – a plan need only be adequate with respect to a particular resident's sewage needs and the resident need only have feasible disposal alternatives.

On March 24, 2017, the DAA submitted a Brief in Opposition to Petitioner Bennington Investment Group, LLC's Motion for Summary Judgment. In it, like the Department, the DAA argues that Appellant fell short of meeting its burden. The DAA asserts that the Township's Act 537 Plan adequately meets the Appellant's sewage disposal needs and is being properly implemented.

**Standard of Review**

The Board is empowered to grant summary judgment in appropriate cases. 25 Pa. Code § 1021.94(a); *Center for Coalfield Justice v. DEP*, 2016 EHB 341, 343. The standard for considering summary judgment motions is set forth at 25 Pa. Code § 1035.2, which the Board has incorporated into its own rules. 25 Pa. Code § 1021.94(a)(a). There are two ways to obtain summary judgment. First, summary judgment may be available if the record shows that there are no genuine issues of any material fact as to a necessary element of the cause of action or defense and the movant is entitled to prevail as a matter of law. 25 Pa. Code § 1035.2(1). Second, summary judgment may be available

> [i]f after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

25 Pa. Code § 1035.2(2). Under the first scenario, the record must show that the material facts are undisputed. Under the second scenario, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a *prima facie* case. *See* Note to Pa.R.C.P. No. 1035.2.

In this appeal, summary judgment is "proper where the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Global Eco-Logical Service, Inc. v. DEP*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001). When deciding summary judgment motions, we view the record in the light most favorable to the nonmoving party, and we resolve all doubts as to the existence of a genuine issue of fact against the moving party. *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 893. Summary judgment usually only makes sense when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *PQ Corporation v. DEP*, EHB Docket No. 2015-198-L, slip op. at 4 (Opinion and Order, Nov. 17, 2016); *Friends of Lackawanna v. DEP and Keystone Sanitary Landfill, Inc., Permittee*, EHB Docket No. 2015-063-L, slip op. at 2 (Opinion and Order, Sept. 2, 2016); *Citizen Advocates United to Safeguard the Env't, Inc. ("CAUSE") v. DEP*, 2007 EHB 101, 106.

Additionally, because the Appellant will have the burden of proof at trial, following discovery, a motion for summary judgment may be granted to the Department if Appellant has failed to produce enough evidence to make its *prima facie* case – that is, to demonstrate that the

Department failed to conduct a proper review of its Private Request and that the Private Request should have been granted due to Franklin Township's Act 537 Plan's inadequacy as it pertains to Appellant.

**Discussion**

Here, the Board finds that there are significant genuine issues of material fact in dispute. The Appellant and the Department disagree on the whether the Department conducted a proper review of Appellant's Private Request and the reasonableness of the capacity reservation fee imposed by the DAA through Franklin Township's Act 537 Plan.

The Department will approve a private request for two reasons: (1) the applicant demonstrates that the municipality's plan is not being implemented; or (2) the applicant demonstrates that the existing plan in inadequate to meet a resident's sewage disposal needs. *Gilmore v. DEP*, 2006 EHB 679, 685. The Department has discretion to choose whether to act on a private request. *Pequea Township v. Herr*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998). On appeal, the Board will review the Department's decision to determine whether it is reasonable, supported by the facts, and in accordance with the law and it is the appellant's burden to demonstrate that the decision was an error. *See Colbert v. DEP*, 2006 EHB 90, 105-06; *Yoskowitz v. DEP*, 2006 EHB 342, 350. In *Gilmore*, the Board stated,

> The Department's decision whether to issue an order in response to a private request is discretionary. Accordingly, this Board reviews the Department's decision to ensure that it is reasonable, supported by the facts, and in accordance with the law. Gilmore as the burden of proving that it was not. If Gilmore is successful in proving that the Department erred, we may substitute our discretion for that of the Department and order appropriate relief, which may include an order modifying the Department's action and directing the Department in what is the proper action to be taken."

*Gilmore v. DEP*, 2007 EHB 679, 685 (internal citations omitted). While an appellant may not use a private request to "launch broad-based attacks against the official plan itself," an appellant can "challenge the application of that plan to his individual circumstances." *Id*.

In *Gilmore*, the Department argued that a private request could not be used to challenge a "nonsubstantive" provision of an Act 537 Plan, like a fee. *Id.* at 686. The Board disagreed and said that a municipality could "just as easily fail to adequately provide for its residents' sewage disposal needs by creating illegal or unreasonable procedural hurdles as it [could] by creating illegal or unreasonable substantive limitations." *Id*. The Board then presented hypothetical examples of what might be considered illegal or unreasonable limitations, including a one-million-dollar application fee before any module is processed or a five-year waiting period for all applications. *Id*. at 686-87. The Appellant has raised similar concerns in this appeal.

The Board determined in *Gilmore* that the Department had failed to duly consider Gilmore's request and had conducted an insufficient review of whether Pike Township's requirement of a hydrogeological evaluation for a two-lot subdivision was reasonable. *Id*. at 684. The Department argued that Gilmore failed to exhaust administrative remedies and that he should have gone to court, not filed a private request. *Id*. at 689. However, the Board found that the filing of a private request was the only course available for an individual caught in his predicament and that Gilmore had done the only thing he could have done. *Id.* The Board concluded that the Department was remiss in its lack of consideration of Gilmore's private request. *Id*. at 690.

Appellant argues that the Department conducted an improper review of its Private Request and that the capacity reservation fee imposed by the DAA is an unreasonable limitation in the context of Appellant's proposed 344-unit subdivision. The Department argues that it

conducted a proper review and determined that there was nothing unusual about the DAA's reservation fee requirements. We think that genuine issues of material fact exist regarding the level of the Department's review and nature and scope of the burden imposed by the reservation fee requirement.

The Board finds that Appellant, at this point, has not demonstrated that the Department's decision to deny its Private Request was unreasonable, not supported by the facts, and not in accordance with the law. Requiring a capacity reservation fee is a standard practice as alleged by the Department and not necessarily analogous to a one million dollar application fee. Further, without out any data to which to compare it, a reservation fee of $37.31 per EDU per quarter does not readily seem exorbitant. The Department claims that it is quite usual. Appellant, however, asserts that the fee is wholly unreasonable. Appellant is planning a 344-unit development, which is not a small undertaking. Certainly, expense will be involved. While *Gilmore* applies to all individuals and entities who submit private requests to the Department to be reviewed and does not differentiate between individuals (like Gilmore) and companies (like Appellant here), each request should be individually reviewed.

A hearing is necessary to determine whether the Department conducted a proper review to deny Appellant's Private Request. Accordingly, because there are genuine issues of material fact and because there are issues subject to competing expert witness opinions, the Board issues the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **BENNINGTON INVESTMENT GROUP, LLC** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2015-190-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DILLSBURG AREA AUTHORITY, Intervenor** | : | |

**O R D E R**

AND NOW, this 17th day of April, 2017, upon consideration of Appellant's Motion for Summary Judgment and the Department's Response, it is hereby ordered that the motion for summary judgment is **denied.**

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: April 17, 2017**

**c:** **DEP, General Law Division:**
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**For Intervenor:**
Steven A. Hann, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **BENNINGTON INVESTMENT GROUP, LLC** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2015-190-M** |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DILLSBURG AREA AUTHORITY, Intervenor** | : | **Issued: April 17, 2017** |

**OPINION AND ORDER ON**
**DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT**

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Board denies the Department's Motion for Summary Judgment in this appeal. Genuine issues of material fact exist regarding whether the Department conducted the appropriate review of Appellant's Private Request to Revise Official Plan to evaluate the adequacy of the current Franklin Township Act 537 Official Plan to meet the Appellant's needs. A hearing is needed to resolve these issues of material fact.

**O P I N I O N**

**Background**

The above captioned appeal was filed by Bennington Investment Group, LLC ("Appellant") to challenge the Department's decision to deny its Private Request to Revise Official Plan ("Private Request"). The Appellant filed its appeal with the Board on December 9, 2015 following the receipt of the Department's denial letter on November 13, 2015.

Appellant is a development company that proposes to develop a 344-unit residential subdivision on 62.58 acres in Franklin Township, York County. The subdivision would be

served by a 144,000 gpd private package treatment plant with discharge to an unnamed tributary to the North Branch of Bermudian Creek. The plan also includes eight lots for stormwater management, open space/recreation, sewage facilities, and non-building. The Franklin Township Official Act 537 Plan requires the Appellant to submit at Sewer Feasibility Report ("SFR"). The Dillsburg Area Authority ("DAA"), which handles sewage matters for Franklin Township, only provides an SFR after an applicant pays to reserve sewage and water capacity. The DAA's reservation agreements require payments of nonrefundable and nontransferable quarterly fees of $37.31 per EDU per quarter for wastewater and $23.00 per quarter for water. Appellant submitted a private request for a sewage module approval through its consultant on June 12, 2015.

The Department denied Appellant's Request to Revise the Official Plan for two reasons. First, the Department found that Appellant had not documented that the Official Plan of Franklin Township was not being implemented or was inadequate to meet the property's sewage disposal needs. Second, the Department determined that Franklin Township's Official Act 537 Plan designated the area as one served by the DAA, an exclusive agent of the Township. The Department asserts that sewage service is available for Appellant's proposed development. The Appellant then filed this appeal in which it argued that the Department's denial violated the Appellant's rights and was an abuse of the Department's discretion.

Both the Appellant and the Department have filed cross motions for summary judgment. The Board will address each one in its own Opinion. The Department filed its Motion for Summary Judgment on February 17, 2017. In it, the Department alleged that Appellant's Private Request failed to demonstrate that the Franklin Township Act 537 Plan was either not being implemented or was inadequate to meet the sewage disposal needs of Appellant's property. The

Department argues that the Appellant has failed to meet its burden to show by a preponderance of the evidence that the Department abused its discretion by failing to approve Bennington's Private Request pursuant to the Sewage Facilities Act and the regulations thereunder. According to the Department, facts are not in dispute: sewage service is available to the property; the Township is implementing its Act 537 Plan and the Plan is adequate to meet the needs of the property. Therefore, the Department asserts that it is entitled to summary judgment.

The Department first argues that Appellant raises issues over which the Board lacks subject matter jurisdiction. Appellant raises a series of issues that address the cost of tying into the local municipal line for sewer services and the fact that the municipality will not give Appellant a letter confirming capacity until Appellant has paid the requisite capacity fee. The Appellant also accuses the Township and DAA of colluding to prevent Appellant from developing its property and to force it to pay exorbitant reservation fees. The Department contends that this dispute is one between Appellant and the DAA, and that the Department's denial of Appellant's Private Request has no bearing on Appellant's allegations against the municipality. According to the Department, the Board has long held that questions of cost allocation for sewer connections is "a local government issue over which the Department has no power under the Sewage Facilities Act." The Department contends that it has no authority to order a municipality to amend its sewage facilities plan purely because someone is unhappy with the Plan's requirements.

Second, the Department argues that the Appellant has failed to demonstrate that the Department's denial of its Private Request was improper. The Department suggests that the Appellant's primary argument in its Private Request centers on its not wanting to pay the capacity reservation fee prior to receiving a capacity letter from the DAA. The Department

highlights that Appellant's argument is not that capacity for its development doesn't exist, but that the fee it is required to pay in order to receive a capacity report is exorbitant. It is the Department's position that Appellant has failed to establish both that the DAA is not implementing the Act 537 Plan and that the Act 537 Plan is inadequate to meet the needs of Appellant's property. The Department contends that the costs associated with reserving capacity are not an issue over which it has any control, thus there is no basis for the Department to grant the Private Request and order the Township to revise its Plan. In addition, the Department asserts that the costs are reasonable and appropriate.

The Department's final argument is that it denied Appellant's Private Request within the timeframe set by 25 Pa. Code § 71.14(e), despite Appellant's allegation to the contrary. The regulation requires the Department to render a decision and inform the requesting party and appropriate municipality within 120 days after either the receipt of the comments permitted by this section or 120 days after the expiration of the 45-day comment period when no comments have been received. The Department avers that it received Appellant's Private Request on June 16, 2015, after which it received comments from the DAA on July 29, 2015 and from Franklin Township on August 1, 2015. Under the regulations, the 45-day comment period expired on July 30, 2015 and the Department had until November 28, 2015 to render a decision. The Departments rendered its decision on November 13, 2015. Therefore, according to the Department, Appellant's claim that the Department failed to act within the mandated timeframe is legally and factually incorrect.

On, March 23, 2017, the Appellant filed its Brief in Opposition to the Department of Environmental Protection's Motion for Summary Judgment. In their Brief, Appellants argue that the Department's Motion should be denied because the Department failed to give any

consideration to the preclusive impact that Franklin Township's and the DAA's policies have on the development of Appellant's property.

The Appellant contends that it is unable to get any information regarding capacity from the DAA without paying the established reservation fees. Appellant asserts that if it had begun paying reservation fees in March 2005, when its preliminary plan was submitted, it would have paid $995,838.72 at the time of filing its Brief. The DAA refuses to do as much as indicate what its capacity currently is, without a guarantee of a reservation, according to the Appellant. It is the Appellant's position that because the DAA will not disclose capacity, the Appellant is entitled to proceed with a Private Request and to have its Private Request approved. The Appellant argues that it has met its burden and shown, with sufficient evidence, that the Township's Act 537 Plan is inadequate due to the Township's and the DAA's procedural impediments. The Appellant also argues that the Department did not give it the opportunity to discuss its Private Request with the Department and, further, the Department did not analyze the DAA's refusal to provide reliable information about capacity without first obtaining reservation fees.

The Appellant relies on *Gilmore v. DEP*, 2006 EHB 679, to support its argument. The Appellant contends, as did Gilmore in *Gilmore*, that the Township and the DAA have "effectively prevented all development in certain areas of the township by creating illegal, unreasonable procedural burdens for any person who would attempt to develop in those areas." *Gilmore*, 2006 EHB at 686. Appellant argues that the Township's and the DAA's policies have imposed significant expenditures upon the Appellant. The Appellant's view is that such fees, when imposed on large scale developments, cannot be profitably borne by a developer and thus act to prevent development. Appellant further argues that its Private Request was improperly

denied because the Department chose to merely defer to the Act 537 Official Plan without analyzing the imposition of the capacity reservation fees, and characterized Appellant's concern as a mere "unwillingness" to pay fees.

According to the Appellant, the Department misunderstands Appellant's appeal. The Appellant is not asking the Department to interfere with the Township's planning choices. Instead, the Appellant is arguing that the application of the Township's plan to its own large scale, 344-EDU development creates an unlawful burden on the development of Appellant's property. The Appellant believes it may make such an argument under *Gilmore*. While the Township's policy may not impede smaller scale developments, the Appellant contends that it has a profound impact on large-scale developments, given the duration of the approval process and associated obstacles. The Appellant believes that the Board should therefore deny the Department's Motion.

**Standard of Review**

The Board is empowered to grant summary judgment in appropriate cases. 25 Pa. Code § 1021.94(a); *Center for Coalfield Justice v. DEP*, 2016 EHB 341, 343. The standard for considering summary judgment motions is set forth at 25 Pa. Code § 1035.2, which the Board has incorporated into its own rules. 25 Pa. Code § 1021.94(a)(a). There are two ways to obtain summary judgment. First, summary judgment may be available if the record shows that there are no genuine issues of any material fact as to a necessary element of the cause of action or defense and the movant is entitled to prevail as a matter of law. 25 Pa. Code § 1035.2(1). Second, summary judgment may be available

> [i]f after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence

> of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

25 Pa. Code § 1035.2(2). Under the first scenario, the record must show that the material facts are undisputed. Under the second scenario, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a *prima facie* case. *See* Note to Pa.R.C.P. No. 1035.2.

In this appeal, summary judgment is "proper where the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Global Eco-Logical Service, Inc. v. DEP*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001). When deciding summary judgment motions, we view the record in the light most favorable to the nonmoving party, and we resolve all doubts as to the existence of a genuine issue of fact against the moving party. *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 893. Summary judgment usually only makes sense when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *PQ Corporation v. DEP*, EHB Docket No. 2015-198-L, slip op. at 4 (Opinion and Order, Nov. 17, 2016); *Friends of Lackawanna v. DEP and Keystone Sanitary Landfill, Inc., Permittee*, EHB Docket No. 2015-063-L, slip op. at 2 (Opinion and Order, Sept. 2, 2016); *Citizen Advocates United to Safeguard the Env't, Inc. ("CAUSE") v. DEP*, 2007 EHB 101, 106.

Additionally, because the Appellant has the burden of proof in this matter, following discovery, a motion for summary judgment may be granted to the Department if Appellant has failed to produce enough evidence to make its *prima facie* case – that is, to demonstrate that the Department failed to conduct a proper review of its Private Request and that the Private Request

should have been granted due to Franklin Township's Act 537 Plan's inadequacy as it pertains to Appellant.

**Discussion**

Here, the Board finds that there are significant genuine issues of material fact in dispute. The Appellant and the Department disagree on the whether the Department conducted a proper review of Appellant's Private Request and the reasonableness of the capacity reservation fee imposed by the DAA through Franklin Township's Act 537 Plan.

The Department may approve a private request for two reasons: (1) the applicant demonstrates that the municipality's plan is not being implemented; or (2) the applicant demonstrates that the existing plan in inadequate to meet a resident's sewage disposal needs. *Gilmore v. DEP*, 2006 EHB 679, 685. The Department has discretion to choose whether to act on a private request. *Pequea Township v. Herr*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998). On appeal, the Board will review the Department's decision to determine whether it is reasonable, supported by the facts, and in accordance with the law and it is the appellant's burden to demonstrate that the decision was an error. *See Colbert v. DEP*, 2006 EHB 90, 105-06; *Yoskowitz v. DEP*, 2006 EHB 342, 350. In *Gilmore*, the Board stated,

> The Department's decision whether to issue an order in response to a private request is discretionary. Accordingly, this Board reviews the Department's decision to ensure that it is reasonable, supported by the facts, and in accordance with the law. Gilmore as the burden of proving that it was not. If Gilmore is successful in proving that the Department erred, we may substitute our discretion for that of the Department and order appropriate relief, which may include an order modifying the Department's action and directing the Department in what is the proper action to be taken."

*Gilmore v. DEP*, 2007 EHB 679, 685 (internal citations omitted). While an appellant may not use a private request to "launch broad-based attacks against the official plan itself," an appellant can "challenge the application of that plan to his individual circumstances." *Id*.

In *Gilmore*, the Department argued that a private request could not be used to challenge a "nonsubstantive" provision of an Act 537 Plan, like a fee. *Id.* at 686. The Board disagreed and said that a municipality could "just as easily fail to adequately provide for its residents' sewage disposal needs by creating illegal or unreasonable procedural hurdles as it [could] by creating illegal or unreasonable substantive limitations." *Id*. The Board then presented hypothetical examples of what might be considered illegal or unreasonable limitations, including a one-million-dollar application fee before any module is processed or a five-year waiting period for all applications. *Id*. at 686-87. The Appellant has raised similar concerns in this appeal.

The Board determined in *Gilmore* that the Department had failed to duly consider Gilmore's request and had conducted an insufficient review of whether Pike Township's requirement of a hydrogeological evaluation for a two-lot subdivision was reasonable. *Id*. at 684. The Department argued that Gilmore failed to exhaust administrative remedies and that he should have gone to court, not filed a private request. *Id*. at 689. However, the Board found that the filing of a private request was the only course available for an individual caught in his predicament and that Gilmore had done the only thing he could have done. *Id.* The Department was remiss in its lack of consideration of Gilmore's private request. *Id*. at 690.

The Department argues that it does not have the authority to get involved with disputes that are between municipalities and those subject to their policies and that this is the case here. Its position is that the fee falls into the category of "cost allocation for sewer connections" and, as such, is outside of the Department's review. The Appellant argues that, under *Gilmore*, the Department has a clear duty to consider whether the Plan imposes illegal or unreasonable burdens, as evidenced by the inability of the Appellant to reserve any available capacity without first paying the DAA's reservation fees. Further, according to the Appellant, the reservation fee

is exorbitant and is representative of the type of occurrence described by the Board in *Gilmore*, which would require some action on the part of the Department.

We find that there are significant issues of material fact that require a hearing to evaluate whether the fees are customary and reasonable as the Department alleges, or too excessive as to be unreasonable as the Appellant alleges.[1] The Board agrees that it is able to consider the issue regarding the reasonableness of the reservation fees. The Department also has limited authority to conduct an evaluation. Certainly if the implementation of the fee is preventing the implementation of the Township's Act 537 Plan, the Board thinks it might warrant a second look or more detailed analysis under a private request. It is unclear whether the Department conducted an appropriate review of Appellant's Private Request as it asserts that it did, or whether it dismissed the Request as being indicative of a mere unwillingness to pay a fee, as the Appellant argues. The Board recognizes that capacity reservation fees are not uncommon, but it lacks information regarding what fees are customary and whether the fees in the current appeal are unreasonable and excessive. Therefore, it not clear at this juncture whether the DAA is acting reasonably or whether it has imposed a burden in the form of exorbitant fees on the Appellant. For these reasons, we deny the Department's Motion for Summary Judgment and issue the following order accordingly.

[1] The Appellant has the burden in this appeal. 25 Pa. Code § 1021.122(c)(1). Under Rule 1035.2(2), the Appellant has identified disputed issues of fact essential to its appeal that require a hearing to resolve as set forth in this Opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **BENNINGTON INVESTMENT GROUP, LLC** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2015-190-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DILLSBURG AREA AUTHORITY, Intervenor** | : | |

**O R D E R**

AND NOW, this 17th day of April, 2017, upon consideration of Department's Motion for Summary Judgment and the Appellant's Response, it is hereby ordered that the motion for summary judgment is **denied.**

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: April 17, 2017**

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

**For the Commonwealth of PA, DEP:**
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**For Intervenor:**
Steven A. Hann, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **GARY ROHANNA** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-148-B** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMERALD CONTURA, LLC** | : | **Issued: April 25, 2017** |

**OPINION AND ORDER ON**
**MOTION TO DISMISS**

**By Steven C. Beckman, Judge**

**Synopsis**

The Board denies the Department's Motion to Dismiss where there are genuine issues of fact surrounding the timeliness of the appeal. The Board cannot conclude based on the information before it that the Department is clearly entitled to judgment as a matter of law.

**O P I N I O N**

**Background**

On August 31, 2016, Gary Rohanna filed Claim No. SA2006 ("2016 Claim") with the Department of Environmental Protection ("Department") alleging damage to an in-ground pool liner and cracking of concrete around the pool due to mine subsidence from mining conducted by Emerald Contura, LLC ("Contura"). By letter dated October 17, 2016, the Department denied the 2016 Claim ("2016 Denial") and Mr. Rohanna appealed the 2016 Denial to the Board on November 18, 2016. On February 6, 2017, Contura filed a Motion to Dismiss or Limit Issues ("Contura Motion") and the Department filed a letter in support of the Motion on February 21, 2017. On March 14, 2017, the Board issued an Opinion and Order on the Motion to Dismiss or

Limit Issues denying the Motion to Dismiss and granting the Motion to Limit Issues ("March 14 Opinion and Order"). Shortly after the Board issued its decision on Contura's Motion, the Department filed a Motion to Dismiss ("Department Motion"). No responses to the Department's Motion were filed and the matter is now ready to be decided.

**Standard of Review**

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. *Teska v. DEP*, 2016 EHB 513, 515; *Burrows v. DEP*, 2009 EHB 20, 22. When considering a motion to dismiss, we accept the nonmoving party's version of events as true. *Consol Pa. Coal Co. LLC v. DEP*, 2015 EHB 48, 54, *recon. denied*, 2015 EHB 117, *aff'd*, 129 A.3d 28 (Pa. Cmwlth. 2015). Motions to dismiss should only be granted where the matter is free from doubt. *Rakoci v. DEP*, 2002 EHB 590, 591. The failure to file a timely appeal is a jurisdictional defect which may result in the dismissal of the appeal. *Peckham v. DEP*, 2011 EHB 697; *Schwab v. DEP*, 2011 EHB 397-398; *Spencer v. DEP*, 2008 EHB 573, 575; *Greenwood Twp. v. DEP*, 2002 EHB 706,708.

**Discussion**

The Department Motion raises numerous issues already addressed and decided in the Board's March 14 Opinion and Order. The parties should refer to that document for resolution of those matters. The only new matter raised by the Department Motion is the claim that the Board lacks jurisdiction to hear the appeal of the 2016 Denial because the appeal was not filed in a timely manner. Under the Board's rules the recipient of a Department action has 30 days to file an appeal with the Board. 25 Pa. Code § 1021.52(a)(1). The Department contends that Mary Kay Rohanna, Mr. Rohanna's wife, signed the certified mail slip acknowledging receipt on

October 18, 2016, and that Mr. Rohanna appealed the 2016 Denial thirty-one days later on November 18, 2016. (Department Motion, ¶ 16 – 17, Department Exhibit E). Upon review of Department Exhibit E, a photo copy of certified mailing documents, we find inconsistencies with the Department's allegations. Specifically, the certified slip signed by Mary Kay Rohanna, does not include a date. The Department's exhibit also includes a certified mail receipt stamped by the United States Postal Service ("USPS") dated October 18, 2016. We are not clear what this receipt represents as it appears to be stamped with the date of arrival at the USPS, and not the date of delivery. Additionally, the Notice of Appeal Form filed by Mr. Rohanna states that he received notice of the 2016 Denial on October 19, 2016. Thus, there is a factual dispute as to the timeliness of the appeal and when Mr. Rohanna actually received notice of the 2016 Denial.

This jurisdictional issue was not raised by the Contura Motion and consequently was not addressed in the response by Mr. Rohanna; for reasons unknown Mr. Rohanna did not respond to the Department's Motion. Both the rules of the Board and Board precedent allow judicial discretion in determining the outcome of an uncontested motion. The Board's rule on dispositive motions at 25 Pa. Code § 1021.94(f) states that, "[i]f the adverse party fails to adequately respond, the dispositive motion *may* be granted against the adverse party." (emphasis added).

Board precedent supports the use of discretion in such matters and emphasizes that Board decisions should be made on the merits and not based on procedural nuances. In *Burnside Township v. DEP*, the Board granted the Department's motion to dismiss where the appeal was untimely filed and the appellant failed to respond to the Department's motion, but not before evaluating the full record and noting that the appellant's notice of appeal did not contain any evidence disputing the date the appellant received notice of the Department action. *Burnside Township v. DEP*, 2002 EHB 700, 703; *See also, Kresge v. DEP*, 2001 EHB 1169; *Neville*

*Chemical Co. v. DEP*, 2003 EHB 530. The Board has also declined to grant a motion to dismiss where the appellant did not respond to the motion but after viewing the facts in the light most favorable to the appellant, the Board found that the permittee had not met its burden of demonstrating that the appeal should be dismissed. *Rakoci v. DEP*, 2002 EHB 590, 591, *citing Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995).

The Board may exercise its discretion to dismiss appeals and deem a party's failure to respond to be an admission of all facts, but where there is a genuine issue of fact a motion to dismiss should not be granted. The question of jurisdiction is an issue which may be raised at any time. At this juncture the Board does not believe the facts presented warrant the dismissal of this case based on lack of jurisdiction where there is a genuine issue of fact surrounding the date Mr. Rohanna received notice of the 2016 Denial.

The Board orders as follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **GARY ROHANNA** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-148-B** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMERALD CONTURA, LLC** | : | |

**O R D E R**

AND NOW, this 25th day of April, 2017, it is hereby ordered that the Motion to Dismiss is **denied.**

**ENVIRONMENTAL HEARING BOARD**

s/ Steven C. Beckman
**STEVEN C. BECKMAN**
**Judge**

**DATED: April 25, 2017**

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

**For the Commonwealth of PA, DEP:**
Nicole M. Rodrigues, Esquire
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**For Permittee:**
Nicole V. Schmitt, Esquire
Kevin K. Douglass, Esquire
(*via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **TIMOTHY A. KECK** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2015-186-B** |
| | : | **(Consolidated with 2015-143-B)** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **DEPARTMENT OF ENVIRONMENTAL** | : | **Issued: April 28, 2017** |
| **PROTECTION** | : | |

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

**By Steven C. Beckman, Judge**

## Synopsis

The Board finds that an administrative order issued by the Department is reasonable, authorized by statute and supported by a preponderance of evidence. The Department met its burden of proof to demonstrate by a preponderance of the evidence that a spill of oil and brine that contaminated the soils and waters of the Commonwealth was from a well and tank owned and operated by Mr. Keck. The Department's order requiring Mr. Keck to investigate the contamination and remediate it if appropriate was reasonable and consistent with the law.

## Background

This matter involves the consolidated appeal of Timothy A. Keck of an August 24, 2015, administrative order ("August 2015 Order") and an October 26, 2015, administrative order ("October 2015 Order") by the Department of Environmental Protection ("DEP or Department") alleging violations of the Clean Streams Law, the Oil and Gas Act and the Solid Waste Management Act, and requiring Mr. Keck to investigate and remediate the unpermitted discharges stemming from a June 2, 2014, oil and brine release ("June 2014 Spill"). The Department sent an initial order on August 24, 2015, and Mr. Keck filed a timely appeal on

September 24, 2015. The Department issued a replacement order in October 2015 that Mr. Keck appealed on November 24, 2015. The Board issued a *sua sponte* Consolidation Order on November 25, 2015, consolidating the appeal of the August 2015 Order and October 2015 Order into one case docketed at 2015-186-B. A two-day hearing was held in this matter on October 4-5, 2016, at the Board's Northwest Office and Court Facility in Erie, Pennsylvania. The Department acknowledged that the August 2015 Order was null and void at the hearing and the parties agreed that the only matter for the Board's consideration was the appeal of the October 2015 Order. Following the hearing, the Department filed a post hearing brief on December 7, 2016, Mr. Keck filed his post hearing brief on January 6, 2017, and the Department followed with its reply brief on January 23, 2017. The matter is now ripe for decision.

**FINDINGS OF FACT**

1. The Department is the agency with the duty and authority to administer the Land Recycling and Environmental Remediation Standards Act, 35 P.S. §§ 6026.101-6026.908 ("Land Recycling Act"); and to administer and enforce the Oil and Gas Act, Act of February 14, 2012, P.L. 87 No. 13, 58 Pa. C.S. §§3201-3271 ("2012 Oil and Gas Act"); the Solid Waste Management Act, Act of May 1, 1984, P.L. 206, *as amended* 35 P.S. §§6018.101-6018.1003 ("Solid Waste Management Act"); The Clean Streams Law, Act of June 22, 1937, P.L. 187, *as amended*, 35 P.S. §§691.1-691.1001 ("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"). (Stipulated Fact ("Stip.") 1).

2. Timothy A. Keck is an adult individual who was engaged in oil and gas exploration activities in Pennsylvania until December 31, 2014 ("Mr. Keck"). (Stip. 2).

3. On March 15, 2005, the Department issued oil and gas drilling well permit No. 031-24056 to Mr. Keck for the Rodney N. Klepfer 10 1 well ("Well") located in Limestone Township, Clarion County. (Stip. 3).

4. Beginning on November 1, 2005, Mr. Keck drilled, and then subsequently began operating the Well. (Stip. 4).

5. The Well is located on property owned by Rodney N. Klepfer ("Property"). (Stip. 5).

6. The Well is a natural gas well. (Transcript "T." 237).[1]

7. The Well is served by a 100 barrel tank at the Property that stores both crude oil and brine produced from the Well ("Tank"). (Stip. 6).

8. From November 1, 2005, through December 31, 2014, Mr. Keck was the "owner" and "operator" as those terms are defined in Section 3203 of the 2012 Oil and Gas Act, 58 Pa. C.S. §3203, of the Well and the Tank. (Stip. 7).

9. The Well was not operated consistently between 2009 and 2014. (T. 237)

10. Mr. Keck resumed operations at the Well again about two weeks prior to the June 2014 Spill by pumping the Well to remove oil and other liquids from the Well. (T. 238-239).

11. Even though it is a natural gas well, when Mr. Keck resumed operating the Well during the two weeks prior to the June 2014 Spill, the Well produced significant crude oil that Mr. Keck pumped in to 55 gallon drums/barrels and used for his own equipment at a strip mine operation. (T. 239-240).

12. During the two weeks prior to the June 2014 Spill, Mr. Keck estimated that 15 to 18 barrels of brine mixed with oil was accumulated in the Tank. (T. 241-244).

[1] T refers to a page in the transcript from the hearing on the merits of the consolidated appeals held on October 4-5, 2016, at the Board's Northwest Office and Court Facility in Erie, Pennsylvania.

13. Mr. Keck was at the Well several times on June 2, 2014, and filled and transported approximately 8 barrels of oil from the Well. (T. 245-246).

14. Mr. Keck was last at the Well/Tank around 5 pm on June 2, 2014 and testified that everything was fine when he left that evening. (T. 247-248).

15. On the night of June 2, 2014, Matthew Reinsel, a Limestone Township Fire Department fireman, responded to a 911 call concerning the smell of gas at a residence located near the intersection of Piney Creek and Curl Road in Limestone Township, Clarion County, and discovered a "rainbow sheen kind of slick" on the waters of Piney Creek. (T. 101).

16. Mr. Reinsel, along with other firemen, tracked the oil sheen upstream on Piney Creek and eventually tracked it up Sloan Run, a tributary of Piney Creek, where he found oil pooling on the bench below the embankment immediately adjacent to Sloan Run. (T. 102-103).

17. After being told there was a well site on the hillside above the bench where he observed the oil pooling, Mr. Reinsel, and the other firemen, walked up the hill a little bit and then drove to the Well. (T. 103-104).

18. Mr. Reinsel followed the oil up the hill from the bench and embankment along Sloan Run a distance of 10 to 12 feet. (T. 104).

19. When he arrived at the Well, Mr. Reinsel tracked oil down the hill from the Well towards Sloan Run but not all the way to the stream. (T. 104).

20. Mr. Reinsel did not observe an ongoing flow of oil down the hill from the Well but saw where oil had flowed down that way and observed various areas on the hillside where it had pooled. (T. 105-106).

21. On June 2, 2014, the Department received a complaint of an oil spill that had entered Sloan Run and continued on into Piney Creek in Limestone Township, Clarion County. (Stip. 8).

22. Responding to the complaint, Travis Walker, a member of the Department's Emergency Response Team, met at approximately midnight with individuals from the Limestone Township Fire Department near a bridge on East Reedsburg Road that crosses Piney Creek, where booms were being placed to collect the oil. (Stip. 9; DEP Ex. A; T. 57).

23. Mr. Walker was told that the firemen had been up Piney Creek and had turned around because they "lost the oil" and they had then started up Sloan Run. (T. 60).

24. After speaking with the firemen and emergency response team members, Mr. Walker drove around the area searching for the source of the spill including checking at two well sites. (T. 59-60, 64).

25. Mr. Walker was unable to find any evidence of an oil or brine discharge at the well sites he investigated during his search. (T. 72).

26. Mr. Walker did not investigate all of the well sites in the vicinity of the spill. (T. 64).

27. Mr. Walker eventually traveled to the Well, where he encountered the firemen who had tracked the oil slick and spill on foot. (T. 61).

28. Mr. Walker smelled a very distinct odor of crude oil at the Well and stated that the odor could be smelled the whole way through the valley. (T. 61).

29. The Department conducted inspections related to the June 2014 Spill on June 3, June 4, June 5, June 17, and September 25, 2014. (T. 74, 111, 114, DEP Exs. B, C, D, E, F).

30. On June 3, 2014, Department Oil and Gas Water Quality Specialist, Ruth Taylor conducted an inspection and observed oil in Sloan Run and along the bench and embankment adjacent to Sloan Run and observed spots of oil on the ground on the hillside below the Well/Tank and above Sloan Run. (T. 82-84).

31. On June 4, 2014, the Department took conductivity meter readings of soil on Mr. Keck's well pad that indicated that there was no major spill on the well pad itself. (T. 86-87).

32. Ms. Taylor met Mr. Keck at the Well during the inspection on June 4, 2014, and discussed different possibilities of how the oil and brine could have entered the stream including the possibility that someone had run a hose from the Tank down to the stream. (T. 87).

33. On June 5, 2014, the Department took conductivity meter readings from the soil on the bench and embankment near Sloan Run where crude oil had pooled and from the patches of oil on the hillside below the Well. (T. 87).

34. Conductivity readings taken by the Department on June 5, 2014, showed highly conductive soil and water that is indicative of a release of brine. (T. 92-96; DEP Ex. D).

35. In two separate areas of soil where oil had pooled, conductivity readings were so high that the meter could not read the level of conductivity. (T. 93-94; DEP Ex. D).

36. Department personnel also collected a soil sample from the bench and embankment area along Sloan Run and a water sample from Sloan Run on June 5, 2014. (T. 97-98; DEP Ex. D).

37. Testing of the soil sample showed high total chloride and sodium results that are indicative of a brine release. Testing of the water sample resulted in evidence of a brine and oil release to the stream. (T. 21-24; DEP Ex. J).

38. During the June 5, 2014 inspection, Ms. Taylor noted that someone had burned off the oil on the bench and embankment along Sloan Run and the oil spots on the hillside in order to get rid of the oil. (T. 88-89).

39. On June 17, 2014, Ms. Taylor conducted an inspection and noted that booms and pads used to contain and clean up the oil and brine spill had been removed and there was no visible contamination in Sloan Run and Piney Creek. (T. 112-114).

40. The Department did not receive manifests from Mr. Keck detailing the disposal of booms and pads used in the clean-up of the spill. (T. 113).

41. On September 25, 2014, Ms. Taylor conducted a follow-up inspection and walked the area upstream and uphill from the area on Sloan Run where the oil spill occurred looking for anything besides the Well/Tank that may have released the oil and brine and did not locate any potential sources of the spill. (T. 114-115).

42. Chad Meyer, a Water Quality Specialist Supervisor in the Department's Oil and Gas Program, determined that the Tank was located at an elevation on the hillside 60 to 80 feet above and 248 feet from the where the oil was observed pooled on the bench adjacent to Sloan Run during the June 2014 Spill. (T. 155-156).

43. Mr. Meyer concluded that based on his experience, research of the area, knowledge of the spill, and computer modeling of other potential sources in the area, there were no other possible sources that could have caused the June 2014 Spill. (T. 165; DEP Ex. H).

44. On June 11 or 12, 2014, Mr. Keck met with Jason Kronenwetter, an EnviroTrac principal geologist, at the Property to investigate the spill and discuss options. (T. 203-204).

45. Mr. Kronenwetter observed elevated conductivity meter readings at the benched area/embankment adjacent to Sloan Run, burnt vegetation, and an odor of petroleum. (T. 204-205).

46. On July 2, 2014, EnviroTrac conducted screening and sampling activities. (Stip. 12).

47. Analysis of EnviroTrac's July 2, 2014, samples of soil from the embankment near Sloan Run showed constituents of both oil and brine. (T. 213; DEP Ex. J).

48. At an unidentified date prior to July 16, 2015, Mr. Keck excavated and regraded the area of the embankment along Sloan Run where the oil had pooled at the time of the spill on June 2, 2014. (T. 289-290; DEP Ex. L).

49. Mr. Keck has not provided any information, documentation or report to the Department addressing the investigation or remediation of the June 2014 Spill including the work he completed excavating and regrading the embankment. (T. 116).

50. Mr. Keck was invoiced for and paid costs associated with the emergency response activities resulting from the June 2014 Spill. (T. 271-275; Appellant's Ex. 3).

51. On March 6, 2015, the Department approved the transfer of the permit for the Well from Mr. Keck to Howard Drilling, Inc. (Stip. 13).

52. On August 24, 2015, the Department issued an administrative order to Mr. Keck who filed a timely appeal on September 24, 2015. (Stip. 14).

53. On October 26, 2015, the Department issued an administrative order to Mr. Keck that replaced the August 2015 Order and identified further facts regarding the Well, Tank, Property, Well ownership, and the spill site. Mr. Keck appealed the October 2015 Order, and the appeals were consolidated. (Stip. 16).

54. Mr. Keck does not have, nor has he had, a permit or authorization from the Department to discharge industrial wastes or residual wastes onto the ground or into the waters of the Commonwealth. (Stip. 17).

## DISCUSSION

### Standard of Review

This appeal concerns the Department's October 2015 Order requiring Mr. Keck to investigate and remediate the contaminated soil and waters of the Commonwealth at the site of the June 2014 Spill. 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. A preponderance of the evidence means that the evidence in favor of the proposition must be greater than the evidence opposed to it. *United Refining v. DEP*, 2016 EHB 442, 449; *Perano v. DEP*, 2011 EHB 623, 633. The Board's scope of 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 Smedley v. DEP*, 201 EHB 131; *Warren Sand and Gravel v. DEP*, 341 A.2d 556 (Pa. Cmwlth. 1975).

### Analysis

The Department's October 2015 Order is based on stated findings that Mr. Keck was responsible for an unpermitted discharge of oil and brine from the Well/Tank that contaminated the soil and waters of the Commonwealth. The October 2015 Order states that the unpermitted discharge violates the Clean Streams Law, the Oil and Gas Act and the Solid Waste Management Act and orders Mr. Keck to investigate, remediate and submit documentation of his remediation efforts to the Department. In its post-hearing brief, the Department asserts that it has demonstrated by a preponderance of evidence that Mr. Keck's Well/Tank are the source of the

June 2014 Spill. (Department's Post-hearing Brief, p. 11-14). The Department next argues that Mr. Keck did not contest that the October 2015 Order was lawful, reasonable and appropriate and therefore that argument is waived. (Department's Post-hearing Brief, p. 14-15). Finally, the Department asserts that if the Board rejects the waiver argument, it is still entitled to a ruling in its favor because the Department's Order was issued in accordance with the law and is reasonable and appropriate. (Department's Post-hearing Brief, p. 15-17).

Mr. Keck opposes the Department's positions and raises two main issues in his challenge to the Department's October 2015 Order. In his first argument, Mr. Keck alleges that the Department conducted an inadequate investigation and the Well and/or Tank are not the source of the oil and brine contamination and therefore, he is not responsible for the spill and any resulting cleanup. (Keck Post-hearing Brief pg. 2, 7, 18). His second argument is that any necessary cleanup and remediation is complete and there is no contamination remaining at the site and the Department's October 2015 Order requiring him to undertake various cleanup activities is not reasonable and appropriate. (Keck Post-hearing Brief, pg. 26-27).

**Source of the June 2014 Spill**

The first issue for the Board to decide is whether the evidence supports the Department's determination in the October 2015 Order that Mr. Keck is responsible for the June 2014 Spill. Mr. Keck argues that there is no direct evidence that the June 2014 Spill originated from his Well/Tank and that the Department advanced a number of different theories of how the oil and brine moved from the Well/Tank and ended up in Sloan Run. Mr. Keck also points to the correspondence he received from Mr. Kronenwetter that he contends raises an issue about whether the fluid in the Tank matches the fluid that was spilled. Finally, Mr. Keck offers other possible sources for the oil and brine besides the Well/Tank. He contends that looking at all this

information, the Department has failed to demonstrate by a preponderance of the evidence that he is responsible for the June 2014 Spill.

The Department, of course, challenges Mr. Keck's assertions and offers its own evidence in support of its determination that Mr. Keck is responsible for the June 2014 Spill. The Department cites to the initial investigations on the night of the spill by both Mr. Reinsel, his fellow first responders and the Department's representative, Mr. Walker, as support for a finding that Mr. Keck's Well/Tank is the source. The Department further points out that no other likely sources were identified in its follow-up investigations and that the chemical signature evidence offered by Mr. Keck is disputed. As we discuss in more detail below, we find that the evidence in favor of the conclusion that Mr. Keck's Well/Tank is the source of the June 2014 Spill is greater than the evidence opposing that conclusion. Therefore, we hold that the Department has demonstrated by a preponderance of the evidence that the Well/Tank owned and operated by Mr. Keck is the source of the oil and brine that resulted in the June 2014 Spill.

In many spill cases, the source is obvious because someone witnesses the actual spill taking place, the release is ongoing at the time of the investigation, and/or the connection between the source and the spilled contaminants is readily observed or can routinely be determined by subsequent testing. However, none of that is true in this case. The Department's evidence that leads to the conclusion that the Well/Tank is the source of the June 2014 Spill is largely circumstantial. While a circumstantial case may be more difficult to resolve, that is not fatal to the Department's position in this case. The Board has previously relied on circumstantial evidence to conclude that a party has proven its case and has also held that an eye-witness to the discharge is not necessary to meet the Department's burden of proof. *See, e.g., UMCO Energy,*

*Inc. v. DEP*, 2004 EHB 797, 805-806; *Concerned Citizens of Earl Twp. v. DER*, 1994 EHB 1525, 1603; *ELG Metals Inc. v. DEP*, 2013 EHB 091, 627, 628.

Turning to the evidence presented at the hearing, we first note that the Well had been idle for a period of time until about two weeks prior to the June 2014 Spill. In that two week period, Mr. Keck testified that the Well was producing a substantial quantity of oil despite being a natural gas well. Mr. Keck was on the Property and collecting and transporting oil on the day of the spill but testified that everything appeared fine at the Property when he was last at the Well/Tank just hours before the spill was discovered. There was no testimony that any of the initial spill investigators observed an ongoing release of oil and brine from the Well/Tank in quantities that were consistent with the scope of the June 2014 Spill. Further, neither Mr. Reinsel nor Mr. Walker testified that they identified a continuous path of oil and brine that directly connected the Well/Tank to the accumulation of oil on the bench and embankment on Sloan Run and the oil slick on Sloan Run and Piney Creek. However, on the night of the initial spill investigation, Mr. Reinsel and the accompanying firemen, and Mr. Walker linked the observed oil slick to Mr. Keck's Well/Tank. No oil was observed upstream on Sloan Run beyond where it was discovered on the bench and embankment downhill from the Well/Tank. Mr. Reinsel testified that he followed the oil 10 to 12 feet up the hill from the bench before making his way by vehicle to the Well/Tank where he visually tracked the oil down the hill "not quite to the creek but pretty far down, pretty far down the hill." (T. 105). Based on his conversations with the first responders, Mr. Walker began his investigation aware that the oil slick appeared to originate on Sloan Run. He investigated the area around Sloan Run including visiting two well sites and did not find any evidence of a spill at those two well sites. He testified that when he arrived at the Well/Tank, he met the firemen who had traced the oil to that

location and he smelled a very distinct odor of crude oil. (T. 61). Based on his investigation during the night of June 2-3, Mr. Walker concluded that the oil and brine had gone underground at a point near the Well/Tank before re-emerging further down the hill.

After the initial emergency response to the June 2014 Spill, Ruth Taylor, a Department Oil and Gas Water Quality Specialist, conducted subsequent inspections and investigations on June 3, June 4, June 5, June 17, and September 25, 2014. (T. 74, 111, 114). During her June 3rd inspection, she observed oil accumulated on the bench and embankment and oil spots on the hillside below the Well/Tank. In her initial inspection report, Ms. Taylor seemed to agree with Mr. Walker's initial assessment that oil leaked from the Tank and traveled underground to pool near Piney Creek and Sloan Run. (T. 126). On June 4, she met with Mr. Keck at the Property and based on their investigative work, she concluded that there had not been a significant release at the Tank. Mr. Walker and Ms. Taylor testified that after their initial investigation, based on further evidence, they both concluded that a hose had been run down the hill from the Tank causing the June 2014 Spill. (T. 63,126). The same hose theory was reached by the Department's Water Quality Specialist Supervisor Chad Meyer who testified that he reached this conclusion based on his research, experience, spill knowledge, and computer modeling of other potential sources. (T. 165).

Mr. Keck attempts to make much of the lack of a direct and continuous path of oil and brine from the Well/Tank and the Department's evolving explanation for how the oil and brine got from the Well/Tank to Sloan Run. While it certainly would be easier to identify Mr. Keck's Well/Tank as the source of the June 2014 Spill if there was better direct evidence than we have in this case, including a clear and consistent transport mechanism, we think that the circumstantial evidence is strong in support of the Department's conclusion. The initial

investigation on the night of the release strongly points to Mr. Keck's Well/Tank as the likely source of the June 2014 Spill. The Department's revised theories of how the oil and brine reached Sloan Run reflect the development of the facts in an ongoing investigation. The Department's theories sought to account for the non-continuous oil and brine spots on the hillside. When the initial explanation that the oil and brine released at the Well/Tank must have gone underground and re-emerged at points further down the slope was undercut by the investigation at the Well/Tank which showed that there was not a significant release into the ground at those locations, the Department arrived at the idea that someone possibly ran a hose down the hill and that the isolated oil/brine spots were the result of releases from the hose as it was dragged up the hill. We are not convinced that the Department is correct about the hose theory but it is at least a plausible explanation of the known facts. Because no one observed the actual release, we may never know the exact mechanism but we find that the lack of certainty is not fatal to the Department's determination.

Further circumstantial evidence supporting the Department's determination is the lack of any other viable source for the June 2014 Spill. The Keck Well/Tank was the closest source to the spill site and was located topographically uphill in a relatively direct line from where the oil collected on the bench and embankment next to Sloan Run. The Department on different occasions investigated the area for other possible sources of the oil and brine. Those efforts did not identify any other plausible sources other than the Keck Well/Tank. Mr. Keck suggested other potential sources including the Smathers well, located about 500 feet away from the spill site, and an underground pipeline that reportedly ran through the contaminated embankment area to the Smathers well. Mr. Keck asserted that the Department failed to investigate the Smathers well and the pipeline. However, Ms. Taylor testified that while she did not check the Smathers

well, she did walk the hillside below the Smathers well and there was no testimony to suggest that she saw evidence of a spill from the Smathers well. (T. 139). Mr. Myers testified on behalf of the Department that if there was a release from the Smathers well, the release would flow away from Sloan Run based on the topography. (T. 165). He also testified that pipelines in this spill area carry natural gas and not brine and oil constituents, meaning that the underground pipeline was not a likely source. (T. 305). Mr. Keck offered no evidence that either the Smathers well or the pipeline was the source of the spill. Instead he simply speculated that they were possible sources that he alleges that the Department failed to fully investigate. We do not think that his speculation about the Smathers well, the pipeline and other speculative alternative sources discussed in the post-hearing brief (vandals, kids riding 4-wheelers, people dumping waste in to the stream or an odor of crude coming from the northwest) is sufficient to overcome the circumstantial evidence set forth by the Department.

The last issue set forth by Mr. Keck in his effort to dispute the Department's determination that his Well/Tank was the source of the June 2014 Spill is based on sampling data collected by Mr. Kronenwetter, an EnviroTrac employee, retained by Mr. Keck to investigate, evaluate, and conduct sampling shortly after the June 2014 Spill. On July 2, 2014, Mr. Kronenwetter, sampled the benched area along Sloan Run, various points up the hill, upstream and downstream points in the stream, and fluids from the Tank. (T. 209-210; DEP EX. J). Mr. Keck alleges that Mr. Kronenwetter stated that the contamination from the June 2014 Spill could not have come from Mr. Keck's Tank based on this sampling, that had Ruth Taylor conducted similar sampling she would likely reach the same conclusion, and that the Department's decision not to test the Tank fluids made the inspection ineffectual. (Keck Post-hearing Brief, pg. 22-23). In fact, this assertion in not supported by the record; in actuality Mr. Kronenwetter specifically

declined to testify that he told Mr. Keck his Tank could not be the source of the June 2014 Spill, even after being asked to make numerous assumptions about unknown facts. (T. 223-227). Further, after review of the sampling data and a cursory review of the spill site and well site Mr. Kronenwetter was asked during the hearing if he thought the Well/Tank was the source of the oil and brine spill, and he responded:

> I would say it would be the most plausible, the easiest source. There was a component of brine and crude at the bottom of that slope and his tank at the top of that slope was the nearest potential source. (T. 217).

Mr. Kronenwetter further opined that sampling conducted on smaller patches up the hill contained elevated conductivity and would lead him to believe the possibility that a hose was used from the Tank causing the June 2014 Spill. (T. 218). Ultimately Mr. Kronenwetter came to the same conclusion as the Department, "the actual source appeared to come from the top of the hill. Whether it was that well or not, it appeared to have come from the top of that hill." (T. 219). Mr. Kronenwetter's testimony does not support the position asserted by Mr. Keck that his Well/Tank is not the source of the June 2014 Spill.

**October 2015 Order**

The Department presents a very limited argument that Mr. Keck waived any claim to challenge the lawfulness or reasonableness of the Department's October 2015 Order. The Board is generally liberal in interpreting whether a party has sufficiently raised and maintained an argument in its proceedings in front of the Board. See *Whiting v. DEP*, 2015 EHB 799; *GSP Mgmt. Co. v. DEP*, 2011 EHB 203. We agree with the Department that the objections set forth in the Notice of Appeal as well as the testimony at the hearing were largely directed to the factual argument about whether Mr. Keck's Well/Tank was the source of the June 2014 Spill. However, we think that Mr. Keck sufficiently raised his concerns with the cleanup requirements

in various ways in this case. In response to the waiver argument, Mr. Keck points to objection "z." in the Notice of Appeal which states in part that "there is no contamination for Appellant to cleanup." (Notice of Appeal, p. 4). In addition, Mr. Keck references his Prehearing Memorandum where he discusses the cleanup efforts he undertook in response to the June 2014 Spill and concludes with the following statement: "[T]he Department has not and cannot specify any existing contamination in need of further clean up." (Appellant's Prehearing Memorandum, p. 5). During the hearing, Mr. Keck offered his own testimony about the cleanup status as well as soliciting testimony from Department witnesses about cleanup issues. We find that the issue of whether the October 2015 Order was lawful and reasonable in requiring Mr. Keck to perform certain investigation and remediation activities was not waived.

There is no dispute that the June 2014 Spill resulted in oil and brine contamination of the soil and water at the time of the initial investigation by the Department. There is ample testimony about the visible evidence of crude oil in the water and saturating the soils. Conductivity testing conducted by the Department provided clear evidence of the presence of brine constituents in the soil. Mr. Hegburg, a DEP professional geologist, and Mr. Kronenwetter testified that soil and water samples collected at the spill site confirmed the presence of oil and brine in the soil and water (T. 17, 213; DEP Ex. J). Mr. Keck does not meaningfully dispute this evidence. Instead, Mr. Keck asserts that at both the date of the October 2015 Order issuance and the date of the hearing there "was no evidence that Mr. Keck's cleanup efforts were insufficient or that current contamination exists[,]" (Keck Post-hearing Brief, pg. 25-26).

The October 2015 Order required Mr. Keck to take a number of steps starting with investigating the release, then presenting the Department with a remediation plan and once that plan was approved, proceeding with any necessary remediation. Given the undisputed evidence

of the contamination initially documented at the site, we think it is clear that it was lawful for the Department to issue an order requiring that the responsible party investigate the contamination resulting from the spill and proceed with any required remediation. Mr. Keck does not directly challenge the lawfulness of the October 2015 Order but his argument is really directed at whether, given the post-spill activities at the site and the passage of time between the spill and the issuance of the October 2015 Order, its issuance by the Department was reasonable under the facts and circumstances of this case. We find that it was reasonable.

Mr. Keck asserts that his cleanup efforts were sufficient. Based on the testimony, those efforts appear to have consisted of burning off the spilled oil on or around June 5, 2015, and the excavation and regrading of the area of the bench and embankment along Sloan Run sometime prior to July 2015. While it may have eliminated some of the oil visible on the surface, there is no evidence that burning off the oil addressed the soil contamination. In fact, the testimony and testing conducted by both the Department and EnviroTrac demonstrate the presence of oil and brine contamination in the soils after the burning of the oil on the surface. Ms. Taylor testified that burning the oil would only remove it from the surface and would have no impact on the oil and brine that had soaked into the soil (T. 89-90). This was demonstrated by the presentation of photographs that showed conductivity tests taken by the Department in areas that had been burned that showed high conductivity readings indicating the presence of brine contamination. (T. 34-35; T. 91-96; DEP Ex. D). The Department also collected soil and water samples on June 5, 2014, that demonstrated contamination of both the soil and water by constituents of oil and brine. (T.16; 22-24; DEP Ex. J). EnviroTrac soil samples collected on July 2, 2014, also provided evidence of continued soil contamination approximately one month after the burning of the surface oil took place. (T. 27-32; DEP Ex. J). In fact, the EnviroTrac sampling detected soil

samples with certain contaminants related to the release of oil that exceeded the statewide health standards established under Act 2, the Pennsylvania Land Recycling and Environmental Remediation Standard Act. (T. 33; DEP Ex. J). The EnviroTrac sampling also showed a chloride level related to the brine release above an action level. (T. 33; DEP Ex. J). It is therefore clear that the burning of the oil on the surface did not eliminate the soil contamination caused by the oil and brine release.

The exact nature and scope of the other cleanup effort apparently conducted by Mr. Keck is not clear. The Department presented a picture dated July 16, 2015 showing that the benched area/embankment along Sloan Run where the oil had collected at the time of the spill had been regraded sometime after the June 2014 Spill. (DEP Ex. L). Mr. Keck points to this picture and notes that the regraded area appears to have revegetated from which he draws the conclusion that no contamination exists today. Mr. Keck testified that he used an excavator to regrade that area stating "[w]ell, we tried to pull that up and slope it in as Mr. Hegburg had suggested I do." (T. 290). Mr. Keck further testified he did not bring in any topsoil or clean fill as part of that work and it is unclear whether he removed any soils. (T. 290). When asked about removing soils, he stated "I attempted to take some soil out of there. Most of it was rock and vegetation that was coming across the top." (T. 290). At a minimum, there was no testimony or evidence of the testing or proper disposal of any removed soils as part of this work. The evidence provided by Mr. Keck regarding his cleanup efforts does not convince the Board that the contamination has been sufficiently addressed. At the time of the October 2015 Order, and at the time of our hearing, the last available data was from samples collected in July 2014. This data showed contamination of the soil with constituents of oil and brine at levels of concern. The fact that vegetation has grown in the regraded area is not sufficient evidence that the contamination has

been addressed. In light of the lack of any new data contradicting the last available data and demonstrating that the contamination had been satisfactorily addressed, we find that the Department's October 2015 Order requiring Mr. Keck to investigate and remediate the release of oil and brine was lawful and reasonable.

We find that the Department's issuance of the October 2015 Order under appeal in this case is supported by a preponderance of evidence, is authorized by statute, and is a reasonable and proper exercise of its authority Therefore, we dismiss the consolidated appeals filed by Mr. Keck.

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and the subject matter of this proceeding. 35 P.S. § 6021.1313

2. The Department is the agency with the duty and authority to administer the Land Recycling and Environmental Remediation Standards Act, 35 P.S. §§6026.101-6026.908 ("Land Recycling Act"); and to administer and enforce the Oil and Gas Act, Act of February 14, 2012, P.L. 87 No. 13, 58 Pa. C.S. §§3201-3271 ("2012 Oil and Gas Act"); the Solid Waste Management Act, Act of May 1, 1984, P.L. 206, *as amended* 35 P.S. §§6018.101-6018.1003 ("Solid Waste Management Act"); The Clean Streams Law, Act of June 22, 1937, P.L. 187, *as amended*, 35 P.S. §§691.1-691.1001 ("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"). The Department bears the burden of proof when it issues an administrative order. 25 Pa. Code §1021.122(b).

3. The Department's burden is to demonstrate by a preponderance of the evidence presented and admitted before the Board that its action was reasonable and lawful. 25 Pa. Code §1021.22(a).

4. The Department met its burden and demonstrated by a preponderance of the evidence of record that the June 2014 Spill originated from the Well/Tank owned and operated by Mr. Keck.

5. The release of oil and brine to the soil and waters of the Commonwealth from the Well/Tank without a permit violated the Oil and Gas Act, the Solid Waste Management Act, and the Clean Streams Law.

6. The Oil and Gas Act, the Solid Waste Management Act, and the Clean Streams Law authorize the Department to issue an order as is necessary to enforce the provisions of the statutes. 58 Pa. C.S. §3253, 35 P.S. §6018.602, and 35 P.S. 691.610.

7. Mr. Keck failed to demonstrate that the limited cleanup efforts he undertook following the June 2014 Spill adequately addressed the contamination of the soil and waters of the Commonwealth resulting from the oil and brine release.

8. It was lawful and reasonable for the Department to issue the October 2015 Order requiring Mr. Keck to investigate and remediate the release of the oil and brine to the soil and waters of the Commonwealth.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **TIMOTHY A. KECK** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2015-186-B** |
| | : | **(Consolidated with 2015-143-B)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## O R D E R

AND NOW, this 28th day of April, 2017, it is hereby ordered that the consolidated appeals docketed at 2015-186-B are **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 28, 2017**

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

**For the Commonwealth of PA, DEP:**
Katherine Knickelbein, Esquire
Michael A. Braymer, Esquire
*(via electronic filing system)*

**For Appellant:**
Zachary Shekell, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **CITY OF ALLENTOWN** | : | |
| **v.** | : | **EHB Docket No. 2016-144-M** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: May 2, 2017** |

**OPINION AND ORDER ON**
**APPELLANT'S MOTION TO COMPEL**

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Board denies Appellant's Motion to Compel because the Department has answered Appellant's Interrogatories satisfactorily and within the scope of the Board's March 9, 2017 Order, which allowed only limited discovery, and because the Appellant has presented no reason as to why the redacted sentence in an email between Department counsel and staff is not a privileged communication under Pa.R.C.P. Rule 4003.1.

**O P I N I O N**

The above captioned appeal was filed by the City of Allentown ("Appellant") on October 21, 2016 in response to a letter from the United States Environmental Protection Agency Region III ("EPA") that referenced a statement made during a meeting with Appellant, Department employees, and EPA representatives.

On or around September 28, 2007, EPA issued a Findings of Violation, Order for Compliance and Request for Information ("First EPA AO") to the Appellant. The First EPA AO ordered Appellant to submit plans to eliminate discharges from the Outfall #003 bypass and to

eliminate sanitary sewer overflow ("SSOs"). On or around September 28, 2009, EPA issued a Findings of Violation, Order for Compliance and Request for Information ("Second EPA AO") to the Appellant and thirteen other municipal Respondents. The thirteen Respondents all own or operate sewage collection systems that either directly convey wastewater to the Allentown wastewater treatment plant or convey the wastewater to the treatment plant after passing through the sewage collection system operated by another municipality. This Second EPA AO ordered Respondents to eliminate discharge from the SSOs by December 31, 2016, and asserted that Appellant's Outfall #003 is an SSO, not a bypass. On or around February 10, 2016, EPA issued a Findings of Violation, Order for Compliance and Request for Information ("Third EPA AO") which provided an extension of the December 31, 2014 deadline in the Second EPA AO to December 31, 2017.

Throughout this period, the Appellant has had NPDES permit no. PA002600, which the Department issued on March 20, 2003. It was set to expire on September 30, 2007, but has been administratively extended for 10 years, through October 1, 2017. The Appellant believes that the Department has not reissued its permit due to wet weather issues associated with peak flows at its Kline Island Wastewater Treatment Plant and the issue of blending. On or around April 17, 2013, Appellant, EPA, and the Department had a meeting to discuss wet weather issues and planned actions to comply with EPA's AOs. Appellant also raised the issue of whether blending was allowed, as the Eighth Circuit decided *Iowa League of Cities v. Environmental Protection Agency*, 711 F.3d 844 (8th Cir. 2013) on March 25, 2013 and vacated EPA's blending rule that prohibited blending.[1] Following this meeting, Appellant, EPA and DEP corresponded twice

[1] In *Iowa League of Cities v. Environmental Protection Agency*, the Court of Appeals for the Eighth Circuit addressed the EPA's rule on blending. The Court determined that the EPA failed to go through notice and comment as mandated by the Administrative Procedure Act and vacated the rule, which had been set forth in a letter, because it was "without observance of procedure required by law." *Iowa League of Cities*, 711 F.3d at 876. Additionally, the

before meeting again on June 14, 2016. At this meeting, Appellant again raised the issue of blending in light of the Eighth Circuit decision because three years had passed and neither EPA nor DEP had given the Appellant an answer.

On September 12, 2016, representatives from Appellant City, the Lehigh County Authority, EPA, and DEP met to discuss the proposed plan to eliminate overflows. At the meeting, the Appellant asserts that a Department employee stated that his understanding was that State regulation prohibited blending. This statement was later repeated in a summary letter EPA sent, which declared "that according to state regulation, all flows from a sanitary system need to receive biological treatment, and therefore blending would be inappropriate." The Appellant appealed this statement in the letter the EPA sent to the Appellant following the meeting.

On January 31, 2017, the Department filed a Motion to Dismiss and a Motion to Stay Discovery Pending Disposition of the Department's Motion to Dismiss. In its Motion to Stay Discovery, the Department argued that Appellant's discovery was premised on the disputed contention that the Department made a final decision that is subject to review. It was the Department's position in its Motion that the Department did not make a final decision subject to review and that it would be in the interest of judicial economy to address this dispute through the pending motion to dismiss rather than through discovery motions. The Department further contended that Appellant's discovery requests were burdensome because they went well beyond the alleged action at issue. Therefore, the Department requested that the Board stay discovery until the Board issued a ruling on the Department's pending Motion to Dismiss.

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Court found that the EPA's blending rule "clearly exceed[ed] the EPA's statutory authority and little would be gained by postponing a decision on the merits." *Id*. at 877. The Court found that, while the EPA is authorized to administer more stringent "water quality related effluent limitations,' the object of such limitations is the "discharges of pollutants from a point source." *Id*. Therefore EPA is not authorized to regulate the pollutant levels in a facility's internal waste stream and "insofar as the blending rule imposes secondary treatment regulations on flows within facilities, we vacate it as exceeding the EPA's statutory authority." *Id*. at 877-78.

On February 8, 2017, the Appellant filed its Response in Opposition to the Department's Motion to Stay Discovery and argued that "it is well-settled that discovery should not be stayed pending a motion to dismiss for lack of jurisdiction when the discovery sought bears directly on fact-specific jurisdictional arguments raised in the motion to dismiss." Appellant's Response at 1. The Appellant contended that its discovery requests were aimed at addressing the fact-specific issues relevant to whether the Department had rendered an appealable action. The Appellant's position was that because the determination of whether a Department action is appealable is highly fact-specific, the Appellant needed to be able to conduct discovery into the factual issues related to the jurisdictional issue raised by the Department.

In an Order dated March 9, 2017, the Board granted in part and in denied in part the Department's Motion to Stay. All discovery that was not related to the jurisdictional issue raised by the Department in its Motion to Dismiss was stayed. However, the Board also ordered that all discovery that was related to the jurisdictional issue raised by the Department should be answered by March 22, 2017. Additionally, the Order directed that the Appellant file its Response to the Department's Motion to Dismiss by no later than April 24, 2017 and that the Department file its Reply by no later than May 9, 2017.

On April 4, 2017, Appellant filed a Motion to Compel Appellee Department of Environmental Protection's Response to Discovery Requests. In its Motion, Appellant argues that the Department failed to give a clear answer to Appellant's requests to ascertain the Department's position on blending. The Appellant also asserts that the Department's failure to produce documents due to alleged attorney-client privilege was improper, as attorney-client privilege did not apply to the documents the Appellant sought.

Appellant alleges that Department failed to adequately answer Interrogatory No. 6(c)-(f). Appellant's Interrogatory No. 6(c) requested that the Department "identify each Pennsylvania Bulletin preamble discussion, DEP response to comments, DEP guidance, memorandum, and other DEP communications" which address whether 25 Pa. Code § 92a.2 and 25 Pa. Code § 92a.47(a) were intended to prohibit blending. Appellant's Motion to Compel ("Motion to Compel") at 4, ¶ 15. Appellant's Interrogatory No. 6(d) requested that the Department "identify each correspondence between DEP personnel (e.g. DEP central and the Regional Office) or with any other 'person' as to whether the regulation is intended to address blending" with respect to 25 Pa. Code § 92a.2 and 25 Pa. Code § 92a.47(a). *Id*. at 5, ¶ 18. Appellant's Interrogatory No. 6(e) requested that, for 25 Pa. Code § 92a.2 and 25 Pa. Code § 92a.47(a), the Department "identify the date upon which DEP first determined that such regulation prohibits blending when wastewater is received in a sanitary system." *Id*. ¶ 21. Finally, Appellant's Interrogatory No. 6(f) asked that the Department "identify the public notice that informed the public that DEP was intending to restrict blending under the identified rule" for 25 Pa. Code § 92a.2 and 25 Pa. Code § 92a.47(a). *Id*. at 6, ¶ 24.

The Department's answer to each of these Interrogatories was identical. The Department "incorporate[ed] its response to request for admission number 12 by reference as if fully set forth herein. Further, the Department object[ed] to this subsection of this interrogatory because it goes beyond the scope of jurisdictional discovery as sanctioned by the Board." Motion to Compel at 4, ¶ 16; 5 ¶¶ 19, 22; 6 ¶ 25. The Appellant's position is that the Department failed to adequately respond to the requests because the Department did not identify any of the documents, correspondence, persons, dates, or public notice as the Interrogatories requested.

The Appellant also alleges that the Department is improperly shielding itself behind attorney-client privilege as the reason for its refusal to produce the documents requested by Interrogatory No. 8(a) and (8)(b). Appellant's Interrogatory No. 8 asked the Department to "identify each and every DEP personnel (including Regional Office and Central Office managers and other personnel) that Mr. Patel contacted or otherwise communicated with prior to the September 12, 2016 meeting [between DEP, EPA, the City of Allentown and LCA, and Mr. Patel] to determine whether State regulation precluded blending . . . ." *Id*. at 6-7, ¶ 30. In response, the Department stated that it "incorporates its response to request for admission number 12 by reference as if fully set forth herein. The only person Mr. Patel spoke to concerning 25 Pa. Code § 92a.47(a) in anticipation of the September 12, 2016 meeting was Joseph S. Cigan III, Assistant Counsel." *Id*. at 7, ¶ 31.

Interrogatory No. 8(a) requested that the Department provide "the substance of the facts and opinions each such person had regarding the extent to which state regulation precludes blending" for each person identified in Interrogatory No. 8. *Id*., ¶ 32. Following this, Interrogatory No. 8(b) requested that the Department identify "any document(s) or other communication(s) reflecting each such person's opinion or upon which such person relied upon in setting forth his/her opinion" for each person identified in Interrogatory No. 8. *Id*., ¶ 35. The Department's response to both was the same, "The Department objects to this interrogatory to the extent it seeks the disclosure of information protected by the attorney/client privilege." *Id*., ¶¶ 33, 36.

Appellant disagrees with the Department's response and draws the Board's attention to the Department's answers to Interrogatory No. 4, which requested documents previously identified. *Id*. at 8, ¶ 38. The Department turned over documents with the exception of two

emails from September 26, 2016 – one sent from Mr. Patrick Musinski, the Monitoring and Compliance Manager, to Mr. Patel, and one sent from Mr. Patel to Mr. Musinski – which were redacted to prevent information protected by the attorney-client privilege from being revealed. *Id*., ¶ 39. The Appellant wishes to have access to a sentence regarding Department counsel's opinion.

According to Appellant, the redacted information from the Department's email should not be considered privileged. First, the Appellant argues that the Department has the burden of showing, either by affidavit or record evidence, "that precise facts exist to bring the communication at issue within the narrow confines of privilege." *Id*., at 9, ¶ 41. Second, the Appellant contends that the information in the September 26, 2016 emails does not fall within the attorney-client privilege because the communication is from attorney to client, not from client to attorney, and the privilege is meant to protect the substance of the client's disclosures, not that of the attorney's. *Id*., ¶ 42. Third, the Appellant relies on a Board case from 1990 to argue that communications involving lawyers employed by the Department are not subject to attorney-client privilege. *Id*. at ¶¶ 44-45.

On April 17, 2017, the Department filed its Response to Allentown's Motion to Compel Response to Discovery Requests. The Department denied that it failed to provide a full response to Interrogatory No. 6. Department's Response ("Response") at 2, ¶ 13. The Department maintains that the statement in the EPA's September 30, 2016 letter is "not a statement of DEP's conclusion that state regulation would preclude blending." *Id*. Rather, according the Department, the sentence in question concerns only a draft alternative being contemplated by Allentown and does not relate to circumstances beyond those which concern Allentown. *Id*. The Department

contends that Appellant's Interrogatory No. 6 is based on a misinterpretation of the sentence in the EPA letter, and that there is no further information that the Department need provide. *Id*.

Similarly, the Department argues that the Appellant mischaracterizes the Department's response to Interrogatory 6(b). The Department contests the Appellant's assumption that the Department "has allegedly concluded that state regulation would preclude blending." *Id*. at 3, ¶ 14. The Department states that it considered 25 Pa. Code § 92a.47(a) in making its advisory statements, but the Department contends that it need not go further than this with respect to identifying "every state regulation upon which DEP relied in reaching its conclusion that state regulation would preclude blending" because this characterization of the Department's position is incorrect. *Id*.

In addition, the Department does not contest the contents of its responses to Interrogatories 6(a)-(f). The Department's rationale for its responses is two-fold: (1) the Interrogatories go beyond the scope of the Board's Order on discovery because the information requested is not related to the jurisdictional issues raised in the Department's Motion to Dismiss; and (2) Appellant has mischaracterized and made false assumptions regarding the sentence in EPA's September 30, 2016 letter, therefore there is no further information that the Department was required to provide. *Id*. at 4-6, ¶¶ 17-26.

The Department disputes Appellant's argument that the Department communications between Mr. Patel and Department counsel are not protected by attorney-client privilege with respect to Interrogatory 8. The Department presents a series of Pennsylvania cases to support its position that the email communications contain protected privileged information. *Id*. at 9-10, ¶¶ 41-45. According to the Department, the burden of proof in a dispute over attorney-client privilege is on the party asserting that disclosure would not be tantamount to a violation. *Id*. at 9,

¶ 41. Additionally, attorney-client privilege operates in a two-way fashion and protects both client-to-attorney and attorney-to-client communications that are made for the purpose of obtaining or providing legal advice. *Id*, ¶ 42. The Department specifically contradicts Appellant's argument that communications between Department attorneys and employees are not covered by the privilege, citing to a 1994 Pennsylvania Commonwealth Court Case. *Id*. ¶ 44. The case in question states "there is no exception to the attorney-client privilege for advice given by an attorney as part of the adjudicatory decision making process." *Id*. quoting *Sedat, Inc. v. Dep't of Envtl. Res.*, 641 A.2d 1243, 1245 (Pa. Cmmw. Ct. 1994). The Department further supports its argument that its communications are privileged by directing the Board's attention to one of the Board's previous cases in which we stated "it is well settled in Pennsylvania law that the attorney-client privilege applies to governmental agencies and their lawyers who are acting in their professional capacities." *Id*. at 10, ¶ 45. The Board agrees with the Department and denies the Appellant's Motion to Compel for the reasons that follow.

**Standard of Review**

The Pennsylvania Rules of Civil Procedure largely govern discovery before the Board. 25 Pa. Code §1021.102(a). Specifically, the Rules state "a party may obtain discovery regarding any matter, not privileged, which 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. 4003.1(a). Relevancy, for the purpose of discovery, is broadly construed. *Blose v. DEP*, 2001 EHB 1018, see also *Tri-Realty v. DEP*, 2015 EHB 552, 555-56. ("[T]he Board has been 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 the contentions raised in the appeal.").

Because it is often difficult to tell early on in a case what is relevant in a matter, we tend to interpret the relevancy requirement broadly at the discovery stage, and we will generally allow discovery into an area so long as there is a reasonable potential that it will ultimately prove to be relevant. *Cabot Oil & Gas Corp. v. DEP*, EHB Docket No. 2015-131-L, slip op. at 5 (Opinion, Feb. 3, 2016); *Borough of St. Clair v. DEP*, 2013 EHB 177, 179 (*citing T. W. Phillips Oil & Gas Co. v. DEP*, 1997 EHB 608, 610); *Parks v. DEP*, 2007 EHB 57. We do not need to get into whether the material will ultimately be determined to be admissible at this point, Pa.R.C.P. No. 4003.1(b), but we do need to make an assessment of relevancy, Pa.R.C.P. No. 4003.1(a). 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.

However, the scope of discovery is not limitless. The Board "is charged with overseeing ongoing discovery between 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. It is also necessary to keep in mind that discovery is governed by a proportionality standard, and discovery obligations must be "consistent with the just, speedy and inexpensive determination and resolution of litigation disputes." 2012 Explanatory Comment Prec. Rule 4009.1, Part B. *See also Friends of Lackawanna v. DEP*, 2015 EHB 785; *Tri-Realty Co. v. DEP*, 2015 EHB 517.

In this appeal, the Department sought to limit discovery while the Board evaluates its pending Motion to Dismiss. The Board agreed with the Department in part, and stayed all discovery not related to the jurisdiction issue raised by the Department in its Motion. There is

therefore a further limitation on discovery at this stage of the appeal while the Board reviews the Department's Motion and the Appellant's yet-to-be-filed Response.

**Discussion**

Here, the Department has identified its positions on the two areas of dispute, and we are inclined to agree. The Department has appropriately answered Appellant's Interrogatories within the limited scope of discovery and has also accurately laid out caselaw governing the attorney-client privilege. In our March 9, 2017 Order, we stayed all discovery that was not related to the jurisdictional issue raised by the Department in its Motion to Dismiss. Specifically, the jurisdictional issue is whether the Board is able to consider the appeal of a description of a statement made by a Department employee at a meeting as it appears in correspondence issued by a third party who was also at the meeting (the September 30, 2016 EPA letter).

While the scope of discovery is generally broad and leaves accessible all manner of documents and topics that are relevant to the subject matter involved in the pending action and appear to be reasonably calculated to lead to the discovery of admissible evidence, as discussed above, the Board may take appropriate measures to insure adequate discovery while at the same time limiting discovery when it is required. We have limited discovery in this matter and we agree with the Department's position that it has answered Appellant's Interrogatories to the extent required to address the jurisdictional issue raised by the Department in its Motion. Appellant may not like the Department's answers, but Appellant's dislike is an insufficient reason to compel further information or a different answer. The Department has been clear in its answers that it is speaking only to the September 30, 2016 EPA letter and surrounding context. Because this is the sole subject of the jurisdictional question to which discovery has been limited, the Department's answers suffice.

We then turn to the matter of attorney-client privilege. Appellant relies on outdated, no longer applicable, caselaw to defend its position that the Department may not claim attorney-client privilege for the redacted information in the emails between Mr. Patel, Mr. Musinski, and counsel. The Department relies on more recent law to defend its position that the redacted sentence is privileged information.

The Appellant makes three primary claims related to attorney-client privilege under Pa.R.C.P. Rule 4003.1. First, the Appellant argues that the Department, as the party asserting privilege, has the burden of demonstrating that the communication at issue falls within the narrow confines of privilege, and that the Department has not done so. Second, the Appellant argues that the email communication in question is not protected by attorney-client privilege because it contains communication from attorney to client, and attorney to client communications are not protected under Rule 4003.1. Third, the Appellant argues interagency communication between a lawyer employed by the agency and an employee of the agency is exempt from Rule 4003.1. We disagree with all three arguments limiting the attorney-client privilege rule in this appeal.

As the Department points out, the record makes clear that the email communication in question was one between Department a counsel and the Department staff. This is not in dispute. Under current Pennsylvania caselaw, the burden of proof is upon the party who is asserting that the disclosure of information would not violate attorney-client privilege. *In re: Investigating Grand Jury of Philadelphia County, No. 88-00-35-3*, 593 A.2d 402, 406 (Pa. 1991); *Gould v. City of Aliquippa,* 750 A.2d 934, 937 (Pa. Cmmw. Ct. 2000). Here, the Appellant has not presented more than an incorrect explanation of the burden in a dispute over privileged information to demonstrate why the Department's email communication is not privileged.

In addition, the Appellant's presentation of attorney-client privilege as a one-way street is also incorrect. The privilege granted under Pa.R.C.P. Rule 4003.1 operates "in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice." *Gillard v. AIG Insurance Company et al.*, 15 A.3d 44, 59 (Pa. 2011). Whether the communication at issue here originated with the Department staff or with the Department counsel has no bearing on its status as attorney-client privileged information.

Finally, Pennsylvania recognizes the applicability of Rule 4003.1 to attorneys employed by government agencies. There is no exception carved out for attorney-client communications that happen within a government agency. "The existence of the attorney-client privilege and work product doctrine when attorneys act in their professional capacity for governmental agencies is well established." *Sedat, Inc. v. Dep't of Envtl. Res.*, 641 A.2d 1243, 1244 (Pa. Commw. Ct. 1994). Further, "legal advice given by an attorney in his professional capacity in response to a client inquiry is immune from discovery on the basis of the attorney-client privilege pursuant to Rule 4003.1," and no exception exists for advice that is given by an attorney as part of an adjudicatory decision making process. *Id*. at 1245. Communications between Department attorneys and staff are unequivocally and equally protected under Rule 4003.1.

Therefore, the Board denies Appellant's Motion to Compel because the Department has answered Appellant's Interrogatories satisfactorily and within the scope of the Board's limitation of discovery per its March 9, 2017 Order, and because the Appellant has presented no reason as to why the redacted sentence in an email between Department counsel and staff is not a

privileged communication under Pa.R.C.P. Rule 4003.1. Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CITY OF ALLENTOWN** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2016-144-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**O R D E R**

AND NOW, this 2nd day of May, 2017, in consideration of the Appellant's Motion to Compel and the Department's Response, it is hereby ordered that the motion is **denied.**

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: May 2, 2017**

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

**For the Commonwealth of PA, DEP:**
Joseph S. Cigan, Esquire
*(via electronic filing system)*

**For Appellant:**
Frances A. Fruhwirth, Esquire
Gary B. Cohen, Esquire
John C. Hall, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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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 2, 2017** |

**OPINION AND ORDER ON**
**MOTION FOR LIMITED DISCOVERY**

**By Michelle A. Coleman, Judge**

**Synopsis**

The Board denies an appellant's motion to conduct limited discovery following a period of settlement discussions where the appellant has not demonstrated any good cause for reopening discovery or articulated any prejudice that would result from being denied another opportunity to conduct discovery in an appeal that was filed more than two years ago and was previously scheduled for a hearing.

**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 No. 1 ("Pine Valley Spring") as a bulk water hauling system located in East Brunswick Township, Schuylkill County. The permit was revoked because, according to the Department, MCRD no longer met the definition of a public water system under the Pennsylvania Safe Drinking Water Act, 35 P.S. §§ 721.1 – 721.17.

MCRD's Pine Valley Spring consists of two groundwater well sources and a small infrastructure network of pipelines, water treatment instruments, and distribution buildings. MCRD uses Pine Valley Spring for harvesting spring water for sale to bottled water plants. MCRD sells raw water to its customers, which provide further treatment to produce water for human consumption that is then bottled and sold. In addition to selling water harvested from Pine Valley Spring, MCRD also purchases water from several other sources and resells it to its bottled water customers.

On March 10, 2015, MCRD filed a petition for supersedeas and an application for temporary supersedeas. Following a hearing on the petition for supersedeas, we granted a supersedeas on the condition that MCRD continue to comply with its permit and all permit conditions. *M.C. Res. Dev. v. DEP*, 2015 EHB 261. We found at that point there was no evidence on the record of environmental harm that would result from allowing MCRD to continue to operate under its permit, and there was a demonstration of economic harm to MCRD and its customers. After granting two requests to extend the deadlines for completing discovery and filing dispositive motions, which pushed the initial discovery deadline from August 31, 2015 to January 28, 2016, we denied a third request to extend the dispositive motion deadline. We found that there was a lack of justification from the parties for an additional extension, and we noted the extraordinary nature of a supersedeas and the importance the Commonwealth places in ensuring safe drinking water. *M.C. Res. Dev. v. DEP*, 2016 EHB 76. *See also* 35 P.S. § 721.2 (declaring safe drinking water essential to the health, safety, and welfare of the Commonwealth).

On May 9, 2016, we issued an Opinion and Order denying a motion for summary judgment filed by MCRD and a cross-motion for summary judgment filed by the Department. *M.C. Res. Dev. v. DEP*, 2016 EHB 260. We then issued our Prehearing Order No. 2 scheduling

a hearing on the merits for September 19, 2016. We subsequently granted the Department's unopposed request to change the start date of the hearing from September 19 to September 21. Both the Department and MCRD filed their prehearing memoranda in August 2016. During our prehearing conference call less than a week before the scheduled hearing, the parties expressed their willingness to participate in a settlement conference in lieu of the hearing on the merits. We held an in-person settlement conference with the parties on September 21. The parties then engaged in settlement discussions over the next several months with regular status reports filed with the Board. At the end of March of this year the parties filed a joint status report indicating that they were unable to reach a settlement and requesting that the matter be rescheduled for a hearing in June.

On the same day, MCRD filed the instant motion to allow for additional discovery. MCRD argues that it has learned new information since the September settlement conference and it believes limited discovery is necessary before the hearing on the merits. MCRD seeks (1) a report authored by Godfrey Maduka that apparently may have been at issue in the cases of *John O. Drummond v. DEP and MC Resource Development, Inc.*, EHB Docket No. 2001-074-K, and *Sarah Curran Smith v. DEP and MC Resource Development, Inc.*, EHB Docket No. 2002-067-K; (2) all files in the Department's possession that relate to those two earlier cases; (3) all attendance lists, notices of meetings, memos, emails, and correspondence with all similarly situated permittees since the current litigation began; and (4) all attendance lists, notices of meetings, memos, emails, and correspondence between the Department of Environmental Protection and the Department of Agriculture where MCRD's ongoing operations and license status were discussed. MCRD contends that these are not onerous requests and that it will be prejudiced if it is not able to obtain this information.

The Department opposes the motion. The Department argues that MCRD has not demonstrated good cause for reopening discovery. The Department tells us that during the initial discovery period it produced thousands of pages of documents from three different offices. The Department notes that MCRD never indicated that the Department's responses were deficient and MCRD never filed a motion to compel. On the individual requests, the Department asserts that it does not know what the Godfrey Maduka report is or when it was authored, although the Department assumes it must in some way relate to Pine Valley Spring. Regarding the files from the *Drummond* and *Smith* cases, the Department attaches an affidavit to its response averring that a search for the files reveals that they may have already been destroyed after their archival and retention period at the State Records Center expired. In any event, the Department contends that any information pertaining to these old cases should be equally available to MCRD as it was a party to those matters. On the third and fourth requests, the Department argues that the information sought by MCRD regarding these meetings is not relevant to this appeal.

When assessing a motion to reopen discovery we typically look at the justification provided by the moving party and whether there is a demonstration of good cause for further discovery. *See Kiskadden v. DEP*, 2013 EHB 154; *Energy Res. Inc. v. DEP*, 2006 EHB 431; *Shenango Inc. v. DEP*, 2005 EHB 941. Our main issue with MCRD's motion is that it fails to justify its request or demonstrate that good cause exists for reopening discovery. MCRD never explains what it hopes to gain from this information, or why it believes it to be crucial to its case. MCRD broadly alleges that it will be prejudiced without access to this information but it never explains precisely how it will be prejudiced.

Turning to the requests themselves, MCRD does not tell us what the Godfrey Maduka report is or what information MCRD believes it contains that would prove necessary to its case.

With respect to the documents related to the *Drummond* and *Smith* cases, we are not sure why they would be helpful, or even if they did yield some marginally useful information, why MCRD never thought to seek out these documents at any time in the last two years or during the 11 months of the initial discovery period. More fundamentally we are not interested in having cases relitigated after having been terminated nearly 15 years ago. We are also not sure of the relevance of the Department's meetings with other "similarly situated" permittees or with the Department of Agriculture. MCRD has not taken the time to explain the potential relevance of these meetings and why it warrants reopening discovery. Typically, we are uninterested in the Department's interactions with entities who are not parties to the instant appeal. We also note that we are not sure what "similarly situated" means here. Seeking information about every permitted entity in the Safe Drinking Water program appears to undercut MCRD's assertions that its discovery requests are limited and not burdensome on the Department. Without any justification for why this discovery is needed now, we must deny the motion.

The notion of perfect discovery is perhaps always illusory. At some point discovery must come to an end and a case needs to be tried. *See Shenango Inc. v. DEP*, 2005 EHB 941, 947 ("[A]bsolutely perfect discovery is about as attainable as the pot of gold at the end of a rainbow. At some point you simply need to go to a hearing."); *City of Harrisburg v. DER*, 1991 EHB 94, 96 ("In a complex case such as this one, a party can always think of more information that it would like to have regarding the opposition's case. And yet, discovery must end at some point if a hearing is to be held.") *See also M & M Stone Co. v. DEP*, 2008 EHB 24, 67 ("[T]here is no such thing as a perfect case.") After more than two years, it is time for this appeal to move to a hearing.

We are also again mindful of the ongoing supersedeas we imposed in this matter, and the need to reach a final decision on the merits based on a full evidentiary record. While we always encourage settlement, and we do not doubt that the parties engaged in sincere attempts to settle this matter, had it not been for the Board's indulgence in the parties' settlement discussions this case would have been tried and adjudicated already. We were prepared to go to trial in September of last year and presumably the parties were prepared to do the same. We attempted to provide guidance to the parties now nearly a year ago in our Opinion on the summary judgment motions about what we saw were unanswered questions that need to be addressed in this case at the hearing on the merits—primarily the operation of the Safe Drinking Water program, how the various iterations of public water supplies are treated under the Act, and how that relates to MCRD's operations. We encourage the parties to focus on those issues as they prepare for trial, which, as requested, will be held in June on the dates proposed by the parties.

We issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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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** | : | |

**O R D E R**

AND NOW, this 2nd day of May, 2017, it is hereby ordered that the Appellant's motion for limited discovery is **denied**. A separate Order will be issued addressing the rescheduling of the hearing on the merits.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: May 2, 2017**

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

**For the Commonwealth of PA, DEP:**
Lance H. Zeyher, Esquire
David Stull, Esquire
(*via electronic filing system*)

**For Appellant:**
Brett A. Datto, Esquire
Lauren Schwimmer, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **PENN COAL LAND, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2014-157-M** |
| | : | **(Consolidated with 2014-158-M,** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **2014-159-M)** |
| | : | **Issued: May 2, 2017** |

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

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Pennsylvania Environmental Hearing Board dismisses three appeals of NPDES permit renewals for discharges from three passive treatment systems. The Department has the authority under 25 Pa. Code § 87.102(f) to revise or impose additional effluent limitations beyond those set forth in Section 87.102(e) to address new or revised treatment obligations that are required as a result of the development and approval of a TMDL.

## BACKGROUND

The Appellant, Penn Coal Land, Inc., ("PCL" or the "Appellant") maintains and operates three active post-mining passive water treatment systems on three properties located in Summit Township, Somerset County.[1] Each of these post-mining passive water treatment systems is authorized by an NPDES permit. The NPDES Permit Number for the Tract 911 Job is PA0248860. The NPDES Number for the Menser Strip Job 8 is PA0248894. The NPDES Permit Number for the Moser Strip Job Number 4 is PA0248886. When the three passive water

[1] Tract 911 Job, Menser Strip Job 8, and Moser Strip Job 4.

treatment systems were designed and constructed in 2003 and 2004, they were designed to meet the design criteria and technology-based effluent limitations in 25 Pa. Code § 87.101(e).

In 2006, the NPDES permits for these treatment systems were renewed and these prior permits expired in 2011. In 2011, PCL filed requests for renewal of its existing three NPDES permits. The Department renewed the three NPDES permits for PCL's three passive treatment system discharges on October 14, 2014. The Department revised the effluent limitations in the three renewed NPDES permits and added new limits that were not in the prior permits issued in 2006. The Department included new manganese and aluminum limits for the Moser Strip Job 4 and Menser Strip Job 8 and a new aluminum limit for the Tract 911 Job.

The Department included new limits in PCL's three NPDES permits following the Department's development of the Final Casselman River Watershed Total Maximum Daily Load for Mine Drainage Affected Segments in Somerset and Fayette Counties, Pennsylvania ("Casselman River TMDL") and the Final Coxes Creek Watershed Total Maximum Daily Load for Abandoned Mine Drainage Affected Segments ("Coxes Creek TMDL"). The Department submitted the Casselman River and Coxes Creek TMDLs to the United States Environmental Protection Agency ("EPA") for review and approval. EPA approved both TMDLs and, following EPA's approval, the Department renewed and revised the NPDES permits for the passive post-mining water treatment systems to be consistent with the Casselman River and Coxes Creek TMDLs.[2]

PCL's major objection to the Department's action to renew and revise its effluent limitations for the discharges from its three passive post-mining water treatment systems is that the Department is not legally entitled to impose additional effluent limitations beyond those set

[2] The Tract 911 Job and the Moser Strip Job 4 are subject to the Casselman River TMDL, and the Menser Strip Job 8 is subject to the Coxes Creek TMDL. The discharges from the three passive post-mining water treatment systems are specifically addressed in respective TMDLs.

forth in 25 Pa. Code § 87.102(e)(3). Section 87.102(e)(3) provides that a passive treatment system shall include effluent requirements for just iron and alkalinity. Specifically, PCL argues that the Department has no authority to impose additional effluent limitations for manganese and aluminum for passive treatment systems subject to Section 87.102(e).

The Department disagrees with PCL that it lacks the legal authority to impose additional effluent limitations. Under 25 Pa. Code § 87.102(f), which requires that discharges from areas disturbed by mining shall also comply with all applicable requirements in Title 25 specifically referencing Chapters 91-93, 95, 97 and 102, the Department asserts that the Department is authorized to include additional effluent limitations in PCL's three NPDES renewal permits as a result of the Casselman River and Coxes Creek TMDLs.

## FINDINGS OF FACT

**The Parties**

1. The Appellant, PCL, is a corporation and licensed mining company maintaining a mailing address of P.O. Box 68, Boswell, PA 15531. (Department Exhibits ("DEP Ex.") 6, 7, and 8.)

2. The Commonwealth of Pennsylvania Department of Environmental Protection ("Department") is the 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*, 52 P.S. § 1396.1 *et seq*. ("Surface Mining Act"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 *et seq*.; the Bituminous Mine Subsidence and Land Conservation Act, Act of June 22, 1994, P.L. 357, *as amended*, 52 P.S. §§ 1406.1—1406.21; the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, *as amended*, 52 P.S. §§ 30.51 *et seq*. ("Coal Refuse Act"); the regulations promulgated pursuant to the Surface Mining Act, found at 25 Pa. Code, Chapter 88; 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.

**The NPDES Permits**

3. The Appellant maintains an active post-mining passive water treatment system on property located in Summit Township, Somerset County, known by the Operation Name of "Tract 911 Job," which discharges to an unnamed tributary to the Casselman River. The NPDES Permit Number for this operation is PA0248860, and the Mining Permit Number is 4075SM12. On October 14, 2014, the Department renewed the NPDES Permit for this site. (DEP Ex. 6.)

4. The Appellant also maintains an active post-mining passive water treatment system on property located in Somerset Township, Somerset County, known by the Operation Name of "Menser Strip Job 8," which discharges to an unnamed tributary to Kimberly Run. The NPDES Permit Number for this operation is PA0248894, and the Mining Permit Number is 4072SM22. On October 14, 2014, the Department renewed the NPDES Permit for this site. (DEP Ex. 7.)

5. The Appellant also maintains an active post-mining passive water treatment system on property located in Summit Township, Somerset County, known by the Operation Name of "Moser Strip Job 4," which discharges to an unnamed tributary to Miller Run. The NPDES Permit Number for this operation is PA0248886, and the Mining Permit Number is 4072SM11. On October 14, 2014, the Department renewed the NPDES Permit for this site. (DEP Ex. 8.)

6. The Appellant followed the design criteria in 25 Pa Code § 87.102(e) to establish the passive treatment systems. (Notes of Transcript ("N.T.") 59-61.)

7. The Appellant was provided with a letter from the Department in 2004 that stated that when the treatment facility at the Tract 911 Site was converted to a passive system, the standards in § 87.102(e)(3) would apply. (N.T. 60 and PCL Ex. 6.)

8. Both the Parties acknowledge and agree that in order to properly design and construct a post mining passive water treatment system, the quality of the waters entering the proposed system and the expected quality of the waters to exit the proposed system must be known. (N.T. 25-61.)

9. Post-mining passive water treatment systems are to be designed to operate passively for a period of Fifteen (15) to Twenty-five (25) years. (N.T. 25, 61*;* 25 Pa. Code § 87.102(e)(4)(vi).)

10. An additional design criteria set forth in Section 87.102(e) includes instructions to design the passive system to avoid potential physical damage to the system from wildlife or vandalism. (N.T. 62*;* 25 Pa. Code § 87.102(e)(4)(v).)

11. The Appellant filed requests for renewal of its NPDES Permits for all three identified sites. PCL Ex. 3 at 3-013, 3-030, 3-046 and Department's NPDES written findings contained within DEP Exhibit 6 at 15; DEP Ex. 7 at 14; and DEP Ex. 8 at 15.

12. The Department renewed the Appellant's NPDES Permits for each of the Appellant's passive treatment sites on October 14, 2014. *See,* NPDES Permits contained with DEP Ex. 6 at 3*;* DEP Ex. 7 at 3*;* and DEP Ex. 8 at 3. The Department imposed new manganese and aluminum criteria for Moser Strip Job 4 and Menser Strip Job 8 within the renewed NPDES Permits, and an aluminum criteria within the renewed permit for Job 911. These standards were not included in Appellant's previously issued NPDES Permits. *See,* PCL Ex. 3 at 3-001, 3-018 and 3- 035 and DEP Ex. 6 at 4; 7 at 4; and DEP Ex. 8 at 4.

13. The Department identified letters dated April 9, 2009 and June 9, 2009, from the EPA as support for their imposition of the additional effluent limitations on the renewed NPDES permits of PCL. (N.T. 18-19, 102, 124-125; DEP Ex. 2 and 4.) These letters specifically provide, in part, as follows, "as you know, any new or revised National Pollution Discharge Elimination System Permits must be consistent with the TMDLs wasteload allocation pursuant to 40 C.F.R. § 122.44(D)(1)(VII)(B). (DEP Ex. 2 and 4.)

14. PCL filed an appeal with the Board from the October 14, 2014 renewal of the NPDES Permit for the Tract 911 Job site, which was initially docketed as Docket No. 2014-157-M.

15. PCL filed an appeal with the Board from the October 14, 2014 renewal of the NPDES Permit for the Menser Strip Job 8 site, which was initially docketed as Docket No. 2014-158-M.

16. PCL filed an appeal with the Board from the October 14, 2014 renewal of the NPDES Permit for the Moser Strip Job 4 site, which was initially docketed as Docket No. 2014-159-M.

17. PCL's three appeals were consolidated and docketed as Docket No. 2014-157-M (Consolidated with Docket No. 2014-158-M & 2014-159-M).

**Casselman River and Coxes Creek TMDLs**

18. In a document dated May 26, 2009, the Department submitted to the Environmental Protection Agency ("EPA") the Final Casselman River Watershed Total Maximum Daily Load ("TMDL"), Somerset and Fayette Counties, Pennsylvania, for Mine Drainage Affected Segments ("Casselman TMDL"). (DEP Ex. 1; N.T. 97- 99.) *See also* the full

Casselman TMDL as posted on EPA's "Mid-Atlantic Water" website, http://www.epa.gov/reg3wapd/tmdl/pa_tmdl/CaselmanRiver/CasselmanRiverReport.pdf.

19. A TMDL is a calculation of the amount of a pollutant or group of pollutants that a water body can tolerate and still attain its designated water quality criteria and use. (N.T. 17-18.)

20. The Casselman TMDL was established and submitted in accordance with Sections 303(d)(1)(c) and 303(d)(2) of the Clean Water Act, 33 U.S.C. § 1313(d)(1)(c), (d)(2), and was established to address impairment of water quality as identified in Pennsylvania's 1996 Section 303(d) List of impaired waters requiring TMDLs for metals associated with abandoned mine drainage. (DEP Ex. 2; N.T. 99.)

21. On June 4, 2009, the EPA received the Casselman TMDL for its review and approval. (DEP Exhibit 2.) Also on June 9, 2009, the EPA approved the Department's Casselman TMDL. (DEP Ex. 2.) S*ee also* the EPA approval of and decision rationale regarding the Casselman TMDL as posted on EPA's "Mid-Atlantic Water" website, http://www.epa.gov/reg3wapd/tmdl/pa_tmdl/CaselmanRiver/CasselmanRiverAL_DR.pdf

22. As the EPA stated in its June 6, 2009 Casselman TMDL approval, any new or revised NPDES permits must be consistent with the TMDL's wasteload allocation pursuant to 40 CFR § 122.44(d)(1)(vii)(B). (DEP Ex. 2; N.T. 99-100.)

23. The EPA determined that the Casselman TMDL, in accordance with Federal regulations at 40 CFR § 130.7, is designed to meet and complies with the following requirements: (1) attain and maintain the applicable water quality standards; (2) include a total allowable loading and, as appropriate, wasteload allocations for point sources and load allocations for nonpoint sources; (3) consider the impacts of background pollutant contributions; (4) take critical stream conditions into account (the conditions when water quality is most likely

to be violated); (5) consider seasonal variations; (6) include a margin of safety (which accounts for uncertainties in the relationship between pollutant loads and instream water quality); and (7) be subject to public participation. (DEP Ex. 2; N.T. 99-101.)

24. No public comments were received regarding the Casselman TMDL. (N.T. 101.)

25. In a document dated February 23, 2009, the Department submitted to the EPA the Final Coxes Creek Watershed TMDL, Somerset County, Pennsylvania, for Abandoned Mine Drainage Affected Segments ("Coxes Creek TMDL"). (DEP Ex. 3; N.T. 101-102.) *See also* the Coxes Creek TMDL as posted on EPA's Mid-AtlanticWater" website, http://www3.epa.gov/reg3wapd/tmdl/pa_tmdl/CoxesCreek/CoxesCreekReport.pdf.

26. As with the Casselman TMDL, the Coxes Creek TMDL was established and submitted in accordance with Sections 303(d)(1)(c) and 303(d)(2) of the Clean Water Act, 42 U.S.C. § 1313, and was established to address impairment of water quality as identified in Pennsylvania's 1996 Section 303(d) List of impaired waters requiring TMDLs for metals associated with abandoned mine drainage. (DEP Ex. 4; N.T. 99-100, 102.)

27. On April 2, 2009, the EPA received the Coxes Creek TMDL for its review and approval. (DEP Ex. 4.)

28. On April 9, 2009, the EPA approved the Department's Coxes Creek TMDL. (DEP Ex. 4.) *See also* the EPA approval of and decision rationale regarding the Coxes Creek TMDL as posted on EPA's "Mid-Atlantic Water" website,

http://www3.epa.gov/reg3wapd/tmdl/pa_tmdl/CoxesCreek/CoxesCreekAL_DR.pdf

29. As the EPA stated in its April 9, 2009 Coxes Creek TMDL approval, any new or revised NPDES permits must be consistent with the TMDL's wasteload allocation pursuant to 40 CFR § 122.44(d)(1)(vii)(B). (DEP Ex. 4; N.T. 99, 102.)

30. The EPA determined that the Coxes Creek TMDL, in accordance with Federal regulations at 40 CFR § 130.7, is designed to meet and complies with the following requirements: (1) attain and maintain the applicable water quality standards; (2) include a total allowable loading and, as appropriate, wasteload allocations for point sources and load allocations for nonpoint sources; (3) consider the impacts of background pollutant contributions; (4) take critical stream conditions into account (the conditions when water quality is most likely to be violated); (5) consider seasonal variations; (6) include a margin of safety (which accounts for uncertainties in the relationship between pollutant loads and instream water quality); and (7) be subject to public participation. (DEP Ex. 4; N.T. 99-101, 102.)

31. No public comment was received regarding the Coxes Creek TMDL. (N.T. 102-103.)

**NPDES Permitting as applied to Mining**

32. William S. Allen, Jr., is employed by the Department as its Chief of the Division of Permitting and Compliance, Bureau of Mining Programs, and has been working in the Department's Mining Program since 1983. (N.T. 75.) As Chief of this Division, his duties include policy and regulation development, providing support for district mining offices, and interaction with the federal Office of Surface Mining. (N.T. 75-76.)

33. Mr. Allen has considerable familiarity with NPDES permitting as it applies to mining and, in fact, was responsible for putting together the DEP guidance document on NPDES and mining permitting, "Developing National Pollutant Discharge Elimination System (NPDES) Permit for Mining Activities," Document Number 563-2112-115, June 22,2013. (N.T. 76, 78; DEP Ex. 5.) The guidance document was put together in the aftermath of revising the Title 25 Chapter 92 NPDES regulations to create the new Chapter 92a. (N.T. 76, 79-80.)

34. Although a revised guidance document was published on December 5, 2015 (ten days before the hearing in the current matter), the language of the two documents is exactly the same except for changes in Appendix A of the new guidance document. (N.T. 78-79.) The revised guidance document is available on the Department's website. (N.T. 79.)

35. Mr. Allen also created templates for the fact sheet that is used for the review of the NPDES mining permits, worked on the application form for the NPDES permits, and supervised the development of the permit template document to ensure that all federal requirements are covered in the permit. (N.T. 76-77.)

36. As it applies to mining issues, NPDES permitting involves a review for mining permits and includes a reasonable potential analysis of pollutants of concern to determine whether a discharge could lead to violation of water quality standards. (N.T. 77, 88; DEP Ex. 5 at 5.) One of the elements of reasonable potential analysis is an overburden analysis to evaluate pollutants coming from mining sites. (N.T. 77-78; DEP Ex. 5 at 7.) When reviewing an application for an NPDES permit, limitations must be ratcheted down to prevent pollution from occurring if there is a reasonable potential for that pollution. (N.T. 88.)

37. Because NPDES permitting involves many different chapters of both state and federal regulations, and because the new Chapter 92a of the Pennsylvania regulations incorporates several of the federal regulations, the guidance document provides a "road map" for reviewers and the regulated community. (N.T. 79-80; DEP Ex. 5 at 1.) Among other things, the guidance document provides a list of the regulations that are applied in the course of evaluating applications for NPDES permits for mining activities. (DEP Ex. 5 at 1.)

38. Department technical staff utilize the guidance document, sometimes referred to as a "TGD" ("technical guidance document"), when reviewing mining NPDES permits, and did

so when reviewing the NPDES permits that were issued to PCL and are the subject of the present appeals. (N.T. 142.) In addition to using the guidance document, technical staff evaluating NPDES permits evaluate the regulatory requirements cited in the guidance, as well as any TMDL report. (N.T. 142-143.)

39. In evaluating NPDES permitting, one begins by looking at water quality criteria, which are standards that must be met across the Commonwealth. (N.T. 80; DEP Ex. 5 at 1.) Water quality criteria are laid out in Chapter 93 of the Pennsylvania NPDES regulations; implementation of these criteria is specified in Chapter 96. (N.T. 81; DEP Ex. 5 at 1-2.) NPDES permits must comply with both numeric and narrative water quality criteria designed to protect receiving stream uses and quality. (N.T. 80; DEP Ex. 5 at 1-2.) There also are technology-based effluent requirements, which are based on the framework in 40 CFR 434. (DEP Ex. 5 at 2; N.T. 80-81, 81-82, 85-86.) *See* 25 Pa. Code § 87.102.

40. The Department incorporates the more stringent of these limitations or any limits required to implement the state water quality criteria into the NPDES permits. (DEP Ex. 5 at 2, 5-6; N.T. 105-106.) Streams that do not meet the criteria, whether numeric or narrative, are described as being impaired. (N.T. 83-84; DEP Ex. 5 at 6.)

41. If a stream is impaired, it is necessary to calculate a TMDL to address that impairment. The TMDL then establishes an allocation of pollutants within the watershed to manage the impairment in such a way that the stream is restored over time, ultimately resolving the impairment. (N.T. 83-84.)

42. Effluent limits that are established to meet the water quality criteria are called water quality-based effluent limits, also known as "WQBELs." (DEP Ex. 5 at 1, 5-6; N.T. 86-87.) *See* 25 Pa. Code §§ 92a.2, 96.1, 96.4. WQBELs are utilized in addition to the technology-

based limitations. (N.T. 87.) The regulations require the more stringent of the limits (technology-based and WQBELs) to be applied. 25 Pa. Code § 92a.12(a).

43. Once impairment occurs and a TMDL report is done, the report establishes the "ground rules" within that watershed. The TMDL calculates loads on a segment-by-segment basis, which is the amount of pollution in pounds that the stream can assimilate. (N.T. 89.)

44. If there are existing permits when the TMDL is done, the TMDL report generally includes them with allocations; in most cases involving existing permits, the TMDL, when possible, is done to accommodate the existing pollutant. (N.T. 89.) If, however, there is an impairment that will continue if the limits remain what they are, then those limits must be reduced. This is expressed as the wasteload allocation in the TMDL report. (N.T. 89.) Stated another way, the TMDL is an expression for the implementation of a WQBEL. (N.T. 89- 90; DEP Ex. 5 at 8.)

45. The underlying principle of the regulatory framework for NPDES permitting is the generation of a permit that is protective of the environment. Sometimes this can be done solely with technology-based limits, but other cases may require WQBELs – whether they are from a TMDL or not – to be protective. (N.T. 91; *see* 25 Pa. Code § 96.4(b).)

46. For post-mining discharges, such as presented in these appeals, the review of the water monitoring data of the receiving stream should inform the decision as to whether WQBELs are needed. (DEP Ex. 5 at 11; N.T. 91; *see* 25 Pa. Code § 96.4.) The Pennsylvania-specific PENTOXSD water-quality-based model is one of the tools available to the Department to calculate WQBELs. (N.T. 92; DEP Ex. 5 at 11.) The WQBEL evaluation is particularly important for manganese because the applicable effluent limit guidelines do not include manganese. (DEP Ex. 5 at 11.)

47. All draft NPDES permits require a fact sheet, which must document the methodology used in determining effluent limits plus any specific permit conditions. (DEP Ex. 5 at 11; N.T. 94; see 25 Pa. Code § 92a.53.)

48. Together, Chapters 93 and 96 of the Pennsylvania NPDES regulations require that a permit be consistent with a TMDL. Additionally, those chapters incorporate by reference applicable federal regulatory sections, the overall purpose of which is to implement federal regulatory requirements under the Clean Water Act. (N.T. 103-105; *see* 25 Pa. Code §§ 92a.1(a), 92a.2, 92a.3, 92a.11, 92a.12, 92a.41, 92a.42-92a.45.)

49. During the pendency of this appeal, the Department announced its current position that Section 87.102(e)(3) is not currently in effect. (N.T. 107, 113 and 134).

50. Section 87.102(f) specifically provides that "In addition to the requirements of subsections (a) — (e), the discharge of water from areas disturbed by mining activities shall comply with this title, including Chapters 91- 93, 95, 97 (reserved) and 102." 25 Pa. Code § 87.102(f). As interpreted by the Department, subsection 87.102(f) recognizes that applicants must meet the other water quality regulations beyond just Section 87.102. (N.T. 52, 114-115.)

51. Chapter 96 of the Department's regulations is Water Quality Standards Implementation. 25 Pa. Code § 96.1-96.8. While Chapter 96 of the regulations is not specifically referenced in Section 87.102(f), Chapter 96 nevertheless applies under the rules of statutory and regulatory construction. (N.T. 115.) When Section 87.102 was drafted, Chapter 96 did not exist. Chapter 96 is included within Chapter 93 Water Quality Standards. (N.T. 115; *see* 25 Pa Code § 93.7.)

52. The Appellant introduced a March 10, 2004 letter from the Department's Cambria District Mining Office regarding water treatment activities at three sites, one of which was the

Tract 911 Site that is the subject of one of the current appeals. (PCL-6.) For the Tract 911 Site, the letter states "When the treatment facility at this site has been converted to a passive system, the standards in 87.102(e)(3) will apply. The Department will monitor the Casselman River upstream and downstream of the operation to determine compliance with the instream standards." (PCL Ex. 6.) The March 10, 2004 letter was sent before the existence of the TMDL for the Casselman River was approved in 2009. (N.T. 123; DEP Ex. 1, 2.)

53. The Section 87.102(e) criteria are technology-based effluent limits that do not necessarily meet the water quality-based requirements. The technology standards are the minimum treatment standards, but where there remains any impairment, the additional limits would apply. (N.T. 117-118.) This is evident in Section 96.4(b), which specifically provides that WQBELs will be developed where the requirements of Section 96.3 are or would be violated even after the imposition of applicable technology-based limitations. (25 Pa. Code § 96.4(b); N.T. 119.) Such revisions to existing permits are further contemplated in Section 96.4(h). (N.T. 120; 25 Pa. Code § 96.4(h).)

**DEP NPDES Permitting Procedures**

54. Michael Schirato is a Licensed Professional Geologist working in the Department's Cambria District Mining Office. (N.T. 16.) As part of his duties, he reviews and analyzes data associated with issuance of NPDES permits, and did so for the permits at issue in these appeals. (N.T. 16, 141.) Mr. Schirato was the Acting Chief of the Technical Services Station at the time that the draft NPDES permits at issue in this appeal were prepared, and was tasked with overseeing the work of others on these permits, in addition to working on them himself. (N.T. 141, 179-180.)

55. Once the Department receives an application for an NPDES permit renewal, it is assigned to the lead Department reviewer. (N.T. 34, 143.) In order to determine the appropriate effluent limits for the renewal, the lead reviewer first looks at the current assigned effluent limits and reviews the Discharge Monitoring Reports (DMRs) for violations of permit effluent limits. The reviewer then reviews the Module 8.1A data for the receiving stream to determine if the discharge is causing or contributing to a water quality violation. (N.T. 35-36, 143-144; DEP Ex. 5 at 2-3.)

56. If no stream degradation is noted in the monitoring data, no other pollutants of concern are identified, and the effluent limits are consistent with the TMDL, then the existing effluent limits are retained. (N.T. 37-39, 144.)

57. When stream degradation is noted, effluent limits are inconsistent with an approved TMDL, or other parameters of concern are identified other than those already limited, then a reasonable potential analysis must be performed for each parameter of concern to determine the need for effluent limits or determine whether the existing effluent limits are protective of the applicable instream water quality standards. (N.T. 144-145.) The reasonable potential analysis is done for each parameter, as expressed in the guidance document. (N.T. 144-145; DEP Ex. 5 at 2-3, 5.)

58. In the present permit appeals, the prior effluent limits in the prior permits were not completely consistent with the TMDLs. (N.T. 39, 182, 186, 192.)

59. For determining parameters requiring an effluent limit, the procedure first includes identifying applicable effluent limitations through review of Best Available Technology (BAT) effluent guidelines for coal mining, found in 40 CFR Part 434 and 25 Pa. Code Section 87.102(a), which include iron, manganese, and total suspended solids ("TSS"). Then the

procedure includes a review of WQBELs based on applicable water quality criteria found in Chapter 93; and Wasteload Allocations ("WLA") included in a TMDL report. (N.T. 145-146; DEP Ex. 5 at 2, 5, 8.)

60. The reviewer would next identify pollutants of concern, which are: any pollutant with an applicable BAT (for Coal Surface Mining Permits pollutants include iron, manganese, and total suspended solids); any pollutant with a WLA from a TMDL; any pollutant identified as needing a WQBEL in the previous permit; and any pollutant identified as present in the effluent through monitoring or otherwise expected to be present in the discharge. (N.T. 146.) Any parameter included in a TMDL would be considered a pollutant of concern. (N.T. 191.)

61. The reviewer next evaluates the reasonable potential for each pollutant of concern; effluent limits are required for any pollutant that will cause, or has reasonable potential to cause or contribute to, an excursion above the state water quality standard. (N.T. 146; DEP Ex. 5 at 5.) Typically, the Department uses a mass balance calculation with the average discharge flow and concentration and average stream flow and baseline stream concentration. (N.T. 146; DEP Ex. 5 at 6-7.)

62. When the calculated downstream concentration exceeds the water quality criteria and there is reasonable potential to cause or contribute to a water quality violation, an effluent limit is required. (DEP Ex. 5 at 5; N.T. 146.) In addition, where a stream is identified as having an established TMDL for a parameter, there is reasonable potential for these parameters to contribute to a water quality excursion if present in the discharge. (N.T. 146-147; DEP Ex. 5 at 5-6.)

63. To calculate WQBELs, two methods can be used: Pennsylvania Single-Discharge Wasteload Allocation Program for Toxics ("PENTOXSD"); and Water Quality Spread Sheet ("WQSS"). (N.T. 147; DEP Ex. 5 at 10, 11.)

64. The WQSS was not used in review of the three NPDES permits at issue in these appeals because it is generally more suited to active surface mines; the assumption in the calculation is that the discharge flow is comparable to the stream flow, as most discharges from active surface mines would be intermittent discharges. (N.T. 147.)

65. The PENTOXSD program was used in evaluating the three permits at issue in these appeals. (N.T. 148.) PENTOXSD is a water quality-based program model designed for Department staff to produce effluent limits. (N.T. 92.) Input parameters include the receiving stream code (tied to the Chapter 93 water quality designations), upstream and downstream river mile nodes, and baseline premining water quality. (N.T. 148.)

66. In order to select effluent limits for the NPDES permits, BAT limits, WLAs from the TMDL, and calculated WQBELs from PENTOXSD are compared and the most stringent effluent limit is selected as the applicable final effluent limit document (TGD). (N.T. 149; DEP Ex. 5 at 2.)

67. If one looks at the effluent numbers in the TMDL and compares them to the effluent numbers in the resulting NPDES permit conditions, the numbers do not match because the wasteload allocation must be converted to a concentration limit. (N.T. 152.)

68. Although WLAs in the TMDL are expressed in pounds per day, effluent limits are set in milligrams per liter ("mg/l"). (N.T.149, 152.) Because of this difference in expression, wasteloads in the TMDL can be converted to the equivalent concentration in mg/l using a specific formula for the conversion that converts the pounds to milligrams and then converts the

flow from gallons per minute to milligrams. (N.T. 150-152.) The formula is a simple calculation and involves no application of judgment. (N.T. 151-152, 168.)

**The Tract 911 Job, SMP No. 4075SM12**

69. Turning to the procedures used to determine final effluent limits for the PCL permits at issue in this appeal, the previous NPDES permit from 2006 for the PCL Tract 911 Job, SMP No. 4075SM12, had effluent limits for iron, manganese, total suspended solids, pH and alkalinity. (N.T. 44-45, 47, 152-153; DEP Ex. 6 at 18; PCL Ex. 3-001-004.)

70. For all NPDES permit renewals, including this one, while the applications are for a renewal, the Department evaluates them and actually reissues them because they expire at five-year intervals. (N.T. 165; 25 Pa. Code § 92a.7.)

71. The Casselman TMDL at page 60 specifically pertains to the PCL Tract 911 Job, and includes a wasteload allocation for two outfalls at BAT limits for iron and manganese, and assigned an aluminum limit at instream criteria.[3] (N.T. 153-154; DEP Ex. 1 at 60.)

72. The assigned wasteload allocation for the Tract 911 Job is based on a combined average discharge flow rate of 140.5 gallons per minute and the current combined five-year average flow for the discharges is 114.62 gallons per minute. (N.T. 153; DEP Ex. 6 at 22.) The TMDL allows for reassigned or transferring wasteload allocations within the same endpoint; as such, there is sufficient wasteload included in the TMDL to account for the discharge at current iron and manganese effluent limits. (DEP Ex. 6 at 22.)

73. The discharge contains aluminum above the instream criteria and the watershed is impaired for aluminum. (DEP Ex. 6 at 22; N.T. 163-164; DEP Ex. 1 at 60.) Because the NPDES permit for the Tract 911 Job did not previously contain an aluminum effluent limit, a

[3] This section of the Casselman TMDL refers to Penn Pocahontas Coal Company, which later was transferred to Penn Coal Land, Inc. *Id.*

water quality-based effluent limit was calculated using PENTOXSD and compared to the wasteload allocation assigned in the TMDL. (N.T. 163; DEP Ex. 6 at 22, 27-33; PCL Ex. 3.) The calculated water quality-based effluent limits exceed the wasteload allocation assigned in the TMDL; therefore, the effluent limits were assigned based on the assigned wasteload allocation and five-year average discharge flow rate. (N.T. 164, 167-168; DEP Ex. 6 at 22, 27-33.) The wasteload allocated in pounds per day was simply converted to an allowable concentration using the actual discharge flow. (N.T 64.)

74. The resulting effluent limits for the Tract 911 Job were BAT limits for iron and manganese and a water quality-based aluminum effluent limit of 0.92 mg/l; the aluminum limit of 0.92 mg/l is above the instream criteria limit of 0.75 mg/l because the discharge flow is less than the flow assumed in the TMDL for the wasteload allocation calculation; the upper effluent limits for iron and manganese are controlled by the BAT limit found at Section 87.102(a) rather than the available wasteload allocation. (N.T. 164; DEP Ex. 6 at 18-22.)

75. Other than a comment from EPA regarding clarification of the number of outfalls from the site, EPA had no substantive comments or objections to the resulting effluent limits set forth in the Tract 911 Job NPDES permit. (N.T. 167; DEP Ex. 6 at 16, 42-45.)

**The Moser Strip Job 4, SMP No. 4072SM11**

76. For the PCL Moser Strip Job 4, SMP No. 4072SM11, the previous permit contained an effluent limit for iron and total suspended solids at BAT limits and pH and alkalinity. (N.T. 47-48, 169; DEP Ex. 7 at 17; PCL-3-035.)

77. The Casselman TMDL at pages 47-48 also specifically pertains to the PCL Moser Strip Job 4, and includes a wasteload allocation at BAT limits for iron and manganese, and assigned an aluminum limit at instream criteria. (DEP Ex. 1 at 47-48; N.T. 169.)

78. The wasteload allocation for the PCL Moser Strip Job 4 NPDES permit was assigned based on an average discharge flow of 31.25 gallons per minute; the average discharge flow during the previous permit term was 46 gallons per minute; the watershed is impaired for iron, manganese, and aluminum and the stream segment receiving the discharge requires a reduction in iron, manganese and aluminum in the TMDL report in order to meet the water quality standards. (DEP Ex. 7 at 14-15, 17-21; N.T. 172.)

79. The previous NPDES permit for PCL Moser Strip Job 4 did not contain effluent limits for manganese and aluminum. (PCL-3-035; DEP Ex. 7 at 17.) The discharge contains manganese and aluminum; therefore, there is reasonable potential to contribute to a water quality violation, and effluent limits must be assigned for manganese and aluminum. (DEP Ex. 7 at 17.)

80. As the previous PCL Moser Strip Job 4 NPDES permit did not contain manganese and aluminum effluent limits, a water quality-based effluent limit was calculated using PENTOXSD and compared to the wasteload allocation assigned in the TMDL; the resulting water quality- based effluent limits were BAT for iron and manganese and 0.67 mg/l for aluminum. (DEP Ex. 7 at 17-19.)

81. For the PCL Moser Strip Job 4 NPDES permit, the water quality-based effluent limits for iron and manganese exceed the available wasteload allocation assigned in the TMDL based on the actual discharge flow rate and, therefore, iron and manganese effluent limits were set at the assigned wasteload allocation. (DEP Ex. 7 at 17-21.) The wasteload allocated in pounds per day was simply converted to the allowable concentration using the actual discharge flow, and this resulted in reduction in the iron effluent limit from a 30-day average of 3.0 mg/l to 2.0 mg/l and a manganese effluent limit of 1.3 mg/l. (DEP Ex. 7 at 17-21.) The calculated

aluminum effluent limit was more stringent than the instream water quality criteria; therefore, the aluminum effluent limit was set at the instream criteria of 0.75 mg/l. (DEP Ex. 7 at 19.)

82. The Moser Strip Job 4 NPDES permit was submitted to EPA for review as required, but EPA provided no comments. (DEP Ex. 7 at 15, 17.)

**The Menser Strip Job 8, SMP No. 4072SM22**

83. For the PCL Menser Strip Job 8, SMP No. 4072SM22, the previous NPDES permit contained an effluent limit for iron and suspended solids at BAT limits and pH and alkalinity. (N.T. 50, 174; PCL-3-018; DEP Ex. 8 at 18.)

84. The Coxes Creek TMDL at pages 36-37 specifically pertains to the PCL Menser Strip Job 8, and assigned a wasteload allocation for iron at BAT limits; the watershed is impaired for iron, manganese and aluminum; however, the stream segment receiving the discharges is meeting the water quality standards and no reductions are required in the TMDL. (N.T. 51, 174, 184; DEP Ex. 3 at 36-37.)

85. Although the TMDL assigns only a wasteload allocation for iron, this does not mean that it is the only effluent limit that is required; there are other water quality requirements that must be satisfied because the stream is impaired for manganese and aluminum. (N.T. 184-186, 190-191.) Any parameter that is included in a TMDL is considered a pollutant of concern. (N.T. 191.)

86. The PCL Menser Strip Job 8 discharge contains manganese and aluminum; therefore, there is reasonable potential to cause or contribute to a water quality violation. (N.T. 175-176, 184, 186; DEP Ex. 8 at 18-20.) Because the prior NPDES permit was not assigned a wasteload allocation for manganese and aluminum, and the receiving stream is attaining the water quality standards, water quality-based effluent limits for manganese and aluminum were

calculated using PENTOXSD; the resulting effluent limits were BAT for iron and manganese and a water quality-based effluent limit of 2 mg/l for aluminum. (N.T 175-176; DEP Ex. 8 at 18-22.)

87. As the PCL Menser Strip Job 8 discharge was present when the TMDL was developed, the water quality at the TMDL end point would be reflective of the discharge and these effluent limits would be sufficient to maintain the water quality standards in Kimberly Run; therefore, the PENTOXSD-recommended effluent limits were assigned to the permit and are consistent with the TMDL. (N.T 176; DEP-8 at 18-19.)

88. The Menser Strip Job 8 NPDES permit was submitted to EPA for review as required, but EPA provided no comments. (DEP Ex. 8 at 16, 18.)

89. Although Mr. Schirato did not himself conduct the analysis of the monitoring data for the Menser Strip Job 8 application, he reviewed some of the data and supervised and assisted the staff person who conducted the analysis to determine, among other things, whether the effluent limits were consistent with the TMDL. (N.T. 141, 179-180, 182.)

**PCL's Rebuttal Testimony and PCL Exhibit 9**

90. On rebuttal, PCL provided testimony and an exhibit for the purposes of demonstrating that for each of the three NPDES permits, the existing effluent limits were consistent with the respective TMDLs. The data in the exhibit was characterized as "simply the input data that would be given from every sample that was given ... for the last five years." (N.T. 197; PCL Ex. 9.) The witness further described the data as being from the Module 8.1A monitoring reports that had been submitted to the Department for a period of five years prior to issuance of the NPDES permits. (N.T. 199; PCL Ex. 9.)

91. As described by the PCL witness, the three charts were "created as a result of averaging of the data for the respective TMDL requirements." (N.T. 200.) The witness later reiterated that to tally the wasteload allocations, he "placed together an average of the metals that were contained over a period of five years," and "came up with an average of a value in milligrams per liter." (N.T. 204-205.) Other than the witness' general description of his averaging technique, and the unsupported and unspecified conclusion that the effluent limits are better than the TMDL standards, he offered nothing more to substantiate PCL's claim. (N.T. 199-200, 204-205.)

92. The methodology employed by PCL's witness to calculate the wasteload allocations is not the type of analysis the Department conducts for such calculations. (N.T. 206.) If the Department had this data (PCL Ex. 9) in this particular form when reviewing the NPDES permit applications, it would not have been useful in any way. (N.T. 210.) The Department would look at the actual flow of a discharge for a given sample on a given date and calculate the pounds per day for the individual sample dates. (N.T. 206-207.) Stated another way, the Department would use the actual daily flow to calculate whether there is a violation of the standards. (N.T. 208.) The Department would then average the result with the monthly average effluent limit, and compare that to the wasteload allocation. (N.T. 206-207.)

93. The problem of using the methodology employed by PCL's witness is that it averages the data over a set of five years as opposed to an individual sample basis; the practical effect of this is it potentially would not account for violations of the wasteload allocation. (N.T. 207.) Further, PCL-9 does not indicate what flow was utilized. (N.T. 207.) The end result is that there could be violations that are not indicated in the provided rebuttal exhibit. (N.T. 208.)

94. PCL's Exhibit 9 does not support PCL's claim that the existing effluent limits in the prior permit are consistent with and comply with the two TMDLs without revisions. (N.T. 206-210.)

**Additional Findings of Fact Concerning Prior NPDES Permits**

95. The NPDES permit for the Tract 911 Job was initially issued on August 25, 1975. It was renewed on February 20, 2001 and again on January 27, 2006. The January 27, 2006 renewal had an expiration date of February 20, 2011. (DEP Ex. 6 at 18; PCL's Exhibit 3, Page 001.) The January 27, 2006 renewal for the Tract 911 Job included discharge limitations for iron manganese, TSS, pH and alkalinity. Except for alkalinity, these discharge limitations are different than or in addition to the limits in 25 Pa. Code §87.102(e)(3) which only include iron and alkalinity limits. *Id.*

96. The January 27, 2006 NPDES renewal for the Tract 911 Job did not contain the discharge limits in 25 Pa. Code §87.102(e)(3), and no others. *Id.*

97. The NPDES permit for the Menser Strip Job 8 was initially issued on March 30, 1973. It was renewed on February 27, 2001 and again on January 27, 2006. The January 27, 2006 renewal had an expiration date of February 27, 2011. (PCL's Ex. 3 at page 018.)

98. The January 27, 2006 renewal for the Menser Strip Job 8 included discharge limitations for iron, TSS, pH and alkalinity. Except for alkalinity, these discharge limitations are different than or in addition to the limits in 25 Pa. Code § 87.102(e)(3), which only included iron and alkalinity limits. *Id.*

99. The January 27, 2006 renewal for the Menser Strip Job 8 did not contain the discharge limits in 25 Pa. Code § 87.102(e)(3), and no others. *Id.*

100. The NPDES permit for the Moser Strip Job 4 was initially issued on August 31, 1972. It was renewed on February 27, 2001 and again on January 27, 2006. The January 27, 2006 renewal had an expiration date of February 27, 2011. (PCL's Ex. 3, page 035.)

101. The January 27, 2006 renewal for the Moser Strip Job 4 included discharge limitations for iron, TSS, pH and alkalinity. Except for alkalinity, these discharge limitations are different than or in addition to the limits in 25 Pa. Code § 87.102(e)(b) which only includes iron and alkalinity. *Id.*

102. The January 27, 2006 renewal for the Moser Strip Job 4 did not contain the discharge limits in 25 Pa. Code § 87.102(e)(3), and no others. *Id.*

**Department's March 10, 2004 Letter Concerning PCL's Tract 911 Job**

103. The March 10, 2004 letter from the Department to PCL is not misleading regarding the applicability of Section 87.102(e)(3) to its Tract 911 Job. (PCL's Ex. 6.)

104. The March 10, 2004 letter from the Department to PCL regarding its Tract 911 Job is consistent with the Department's position that it has the legal authority to impose new or revised effluent limits on a discharge from a passive treatment system under Section 87.102(f). *Id.*

105. The second sentence in the March 10, 2004 letter from the Department to PCL under the heading MDP 40755M12 Tract 911 Site states: "The Department will monitor the Casselman River upstream and downstream of the operations to determine compliance with the instream standards." The "instream standards" referenced in the letter are the State's water quality standards. *Id.*

106. After the Department sent the March 10, 2004 letter, the Department prepared the Casselman River TMDL in 2009, which documents impairment or violations of the water quality standards for the Casselman River.

107. The Department added new or revised effluent limitation to the NPDES permit renewal for the Tract 911 Job under appeal as a result of the Casselman River TMDL. The addition of new or revised effluent limits in the NPDES permit renewal for the Tract 911 Job is consistent with the March 10, 2004 letter to PCL regarding the Tract 911 Mine.

## DISCUSSION

This consolidated appeal of three NPDES permit renewals filed by the Appellant, PCL, challenges the Department's decision to modify or add effluent limitations to the three NPDES permit renewals. The Department modified or added effluent limitations following the development and approval of the Casselman River and Coxes Creek TMDLs in 2009. The three NPDES permit renewals contained modified or additional effluent limitations that were not in the prior versions of the three NPDES permits, which were issued in 2006 and which expired in 2011. PCL asserts that the Department lacks the legal authority to modify the effluent limitations in the three NPDES permit renewals issued in 2014 because these discharges are only subject to the limits in Section 87.102(e).

Before addressing the primary dispute between the Parties regarding the Department's authority to modify effluent limitation in NPDES permit renewals under the facts of this appeal, there are several preliminary issues that the Board must address. These include which Party has the burden of proof and whether PCL waived its right to raise several issues in the Post-Hearing Brief that the Department alleges were not properly preserved when PCL filed its Notices of Appeal or Prehearing Memorandum.

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

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

*Smedley*, 2001 EHB at 156. The Board is also entitled to consider evidence that the Department did not consider when it made the decision under appeal. *Pennsylvania Trout v. Dep't of Envlt. Prot.*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004.)

**Burden of Proof and Waiver**

Unlike most appeals, in which there is no dispute about the burden of proof, the Board must first address which party has the burden of proof in this appeal.[4] The Appellant asserted in its Post-Hearing Brief and at the start of the hearing on the merits that the Department has the burden of proof because the three NPDES permits contained compliance schedules. In the

[4] The Department argues that PCL waived the burden of proof issue because the issue was not identified in PCL's Prehearing Memorandum, and it was only raised by PCL at the start of the hearing. The Department's argument has merit. See 25 Pa. Code § 1021.122(c)(3) and Board's Prehearing Order No. 2, Paragraph 4 ("A party may be deemed to have abandoned all contentions of law on facts not set forth in its Prehearing memorandum."). In support of our ruling on this issue at the hearing, the Board will nevertheless address the merits of PCL's argument that a compliance schedule in an NPDES permit should be viewed as a compliance order that shifts the burden from the permittee challenging the permit to the Department under the Board's Rules at 25 Pa. Code § 1021.122(b)(4) and (c)(3).

Appellant's view, the compliance schedules in the NPDES permits operate as Department orders, and therefore under the Board's Rules the burden of proof shifts to the Department to defend its compliance orders. *See* 25 Pa. Code § 1021.122(b)(4) and (c)(3). The Department disagrees, asserting that compliance schedules contained within the three permits are not the functional equivalent of a Department order. The Department explained that it uses compliance schedules as a vehicle within the NPDES permit to grant the permittee deferred relief for compliance with the additional limits imposed by the permit itself. At the hearing, the Board ruled that the Appellant had the burden of proof pursuant to 25 Pa. Code § 1021.122(c)(3). Upon review of the Parties' Post-Hearing Briefs, the Board is still of the opinion that the Appellant has the burden of proof in this appeal for the reasons set forth below.

PCL raises a legal issue of first impression for the Board by asserting that the Department's insertion of a compliance schedule in an NPDES permit changes the status of the permit under Section 1021.122 of the Board's Rules. Compare 25 Pa. Code § 1021.122(b)(4) and (c)(3). Under Section 1021.122(c)(3), a party bears the burden of proof and burden of proceeding "when [the] party to whom a permit approval is issued protests one or more aspects of its issuance or modification." 25 Pa. Code §1021.122(c)(3). The Department issued the revised NPDES permits to PCL, and PCL challenges the modified effluent limitations in the renewed NPDES permits. Upon an initial reading, it appears PCL has the burden under this provision. PCL, however, believes the compliance schedule in the NPDES permit should be construed as a compliance order issued by the Department. Under a different provision in Section 1021.122, the Department has the burden of proof when it issues an order. 25 Pa. Code § 1021.122(b)(4). PCL wants the Board to decide that a compliance schedule in a permit is the functional equivalent of a compliance order.

The Board rejects PCL's legal argument that the inclusion of a compliance schedule in a permit transforms the permit into an order for purposes of assigning the burden of proof under Section 1021.122 (b)(4) and (c)(3) for two reasons. First, PCL's position is at odds with the plain meaning of Section 1021.122, which clearly distinguishes between Department issued permits and Department issued orders. All Parties agree that the Department's action under appeal is the renewal of three NPDES permits issued to PCL. The Department NPDES permitting regulations are found in Subchapter C, Permits and Permit Conditions. 25 Pa. Code 92a.41-92a.55. Section 92a.51 authorizes the Department to include schedules of compliance in NPDES permits as a regular part of an NPDES permit. 25 Pa. Code § 92a.51. The compliance schedule is part of the NPDES permit and under the Board's Rules at Section 1021.122(c)(3), PCL has the burden of proof when it challenges any aspect of the NPDES permits that the Department issued.

In support of its position, PCL relies upon the Board's earlier decision in *Bucks County Water & Sewer Authority v. DEP*, 2014 EHB 143. In *Bucks County*, the Board decided that a Department letter requiring certain actions by the appellant was the functional equivalent of a Department order. The Board decided that the Department had the burden of proof under Section 1021.122(b)(4) where the Department sent a letter to the appellant that required certain actions. Under these circumstances the Board decided that the letter functioned as an order and imposed the burden on the Department under 25 Pa. Code §1021.122(b)(4). *Bucks County*, 2014 EHB at 147-148. This situation is distinguishable from the appeal before the Board. There is no letter in this appeal for the Board to examine to determine whether it is the equivalent of a compliance order. *See Teska v. DEP*, 2012 EHB 447, 453-54. There is only a permit and a schedule of compliance, which is a part of the permit. The Board's decision in *Bucks County*

does not apply here in an appeal involving a Department issued NPDES permit containing a compliance schedule specifically authorized by the NPDES permitting regulations. The actions under appeal are the three NPDES permit renewals, and Section 1021.122(c)(3) applies here by its express terms to impose the burden on PCL.

Second, even if the Board were willing to entertain PCL's new legal theory that a compliance schedule in a permit should be viewed as a compliance order for purposes of assigning the burden of proof under Section 1021.122, there is no factual support for PCL's position. PCL did not raise any legal or factual issues regarding the compliance schedule in the challenged NPDES permit. PCL did not introduce any evidence at the hearing challenging the compliance schedules in the permits. PCL did not address any concerns with the compliance schedules in any manner in its Post-Hearing Briefs. There is no basis in the record before the Board to adopt PCL's new legal argument other than the uncontested fact that the three renewed NPDES permits contained compliance schedules which the NPDES permitting regulation specifically allows. 25 Pa. Code § 92a.51. This uncontested fact alone is insufficient to shift the burden. PCL therefore has the burden of proof under the Board's Rules, and to prevail, PCL must establish by a preponderance of the evidence that the Department's action to reissue the three NPDES permits to PCL under appeal with the revised effluent limitations was an abuse of discretion, arbitrary, capricious or contrary to law. *See Pequea Twp. v. Herr*, 716 A.2d 678, 687 (Pa. Cmwlth. 1998).

**Waiver of Issues**

The Department and PCL disagree about the number of issues that PCL is entitled to raise in its Post-Hearing Briefs. The Department asserts that PCL is only entitled to challenge whether the Department has the legal authority to revise PCL's effluent limits in its three

NPDES permits. In its Post-Hearing Brief, the Department asserts that PCL waived the following issues:

1. Presence of Compliance Schedule
2. Department's responsibility for revisions to PCL's treatment system
3. DEP estopped from revising NPDES permit limits;
4. Purported expert testimony of DEP witness; and
5. Quantitative aspects of revised effluent limitations

Department's Post-Hearing Brief at 26-29. In support of its arguments, the Department cited Paragraph 4 of the Board's Prehearing Order No. 2 which provides:

> A party may be deemed to have abandoned all contentions of law or fact not set forth in its prehearing memorandum.

*Id.* In addition, the Department asserts that PCL only raised a single issue in its Notices of Appeal regarding the Department's authority to revise the effluent limits in the three NPDES permits under appeal. By failing to raise the above listed issues in either its Notices of Appeal or its Prehearing Memorandum, the Department asserts that PCL waived these issues and is not entitled to raise them for the first time in its Post-Hearing Briefs.

PCL disagrees that it has waived any of the issues listed by the Department. According to PCL, the Board must broadly construe the objections set forth in an appellant's notice of appeal, and PCL asserts that its Notices of Appeal preserved all "legally improper actions" including those listed above by the Department as waived.

The Board agrees that it should broadly construe an appellant's objections raised in its notice of appeal. *Thomas v. DEP*, 1998 EHB 93, 106. However, there are limits and an appellant runs a risk that it might suffer waiver of issues if it fails to specify its objections in its notice of appeal. *Rhodes v. DEP*, 2009 EHB 325, 327-328 (It is a longstanding rule that

allegations not raised in the notice of appeal are waived). However, in *Rhodes*, the Board concluded that:

> However, given the strict requirement to file a notice of appeal within 30 days of receiving notice of the Department's action and our general distaste for trap-door litigation, we have been relatively indulgent when it comes to interpreting less than precise notices of appeal. So long as an issue falls within the scope of a broadly worded objection found in the notice of appeal, or the "genre of the issue" in question was contained in the notice of appeal, we will not readily conclude that there has been a waiver. *Angela Cres Trust v. DEP*, 2007 EHB 595, 600-01; *Ainjar Trust v. DEP*, 2001 EHB 59, 66, *aff'd*, 806 A.2d 402 (Pa. Cmwlth. 2002); *Jefferson County Board of Commissioners v. DEP*, 1996 EHB 997, 1005. *See also Croner, Inc. v. DER*, 598 A.2d 1183, 1187 (Pa. Cmwlth. 1991).

*Id* at 327. The Board will not readily find waiver if there are broadly worded objections in the notice of appeal and the challenged issue falls within the "genre of the issue."

A review of the three Notices of Appeal leads the Board to conclude that there are no "broadly worded" objections or any basis to assert the "genre of the issue" argument to allow the additional issues that PCL now wants to pursue. In each Notice of Appeal, PCL focused on a single objection in five similar paragraphs that described that the Department lacked the legal authority to impose manganese, aluminum and TSS effluent limits when it renewed an NPDES permit subject to Section 87.102(e)(3).[5] Because PCL did not include any additional broadly worded objections in its Notices of Appeal and only included a single issue, the Board finds that PCL waived the additional issues it attempted to raise in its Post-Hearing Briefs with the exception of the purported expert testimony of the Department's witnesses at the hearing.[6]

[5] This was the narrow legal issue PCL pursued in its Motion for Judgment on the Pleadings, asserting that "the Department is not legally entitled to impose the additional effluent limitations." PCL's Motion for Judgment on the Pleadings, Paragraph 5.

[6] The issue about the purported expert testimony of the Department's technical witnesses who testified at the hearing only arose at the hearing when the witnesses testified. PCL could not have identified this

In addition, prehearing procedures operate as a "winnowing process" to narrow and refine the issues for hearing. *Wood v. DER*, 1993 EHB at 302. It is in the prehearing memorandum that the theories a party may raise at hearing are finalized. *Midway Sewerage Authority v. DER*, 1991 EHB 1445, 1473. The failure to include a factual or legal contention in the prehearing memorandum may result in a waiver of that contention. *See DEP v. Seligman*, 2014 EHB 755; *Maddock v. DEP*, 2002 EHB 1; *Smedley v. DEP*, 2000 EHB 90[7].

The Board also agrees with the Department that PCL failed to include several of the additional issues in its Prehearing Memorandum. In its Prehearing Memorandum, PCL only raised two legal issues. The first legal issue is the question of whether the Department may impose effluent limits beyond those established by Section 87.102(e)(3) under the facts of this appeal. The second issue is whether PCL and the Department had a written agreement that only the effluent limits in Section 87.102(e)(3) would apply to PCL's discharges from its three passive postmining treatment systems associated with the three renewed NPDES permits under appeal. PCL's Prehearing Memorandum did not mention most of the additional issues it included in its Post-Hearing Brief concerning the burden of proof, estoppel, and calculation or quantitative aspects of revised effluent limits.[8] Accordingly, these issues are also deemed waived because PCL failed to identify them in its Prehearing Memorandum. *DEP v. Seligman*,

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issue in its Notices of Appeal or when it filed its Prehearing Memorandum because it relates to testimony provided at the hearing. The Board will address this objection separately.

[7] The Board's Prehearing Order No. 2 also states that a party may be deemed to have abandoned all contentions of law or facts not set forth in its Prehearing Memorandum.

[8] PCL included a brief mention of its position that the Department "should be held legally responsible to implement and operate any Treatment System modifications needed to achieve" more stringent effluent limits required by TMDL because requiring PCL to meet the more stringent limits would violate the "parties' Agreement", PCL Prehearing Memorandum at 4, Statement of Legal Issues. Having raised the issue of the existence of a written agreement between the Department and PCL preventing the Department from modifying the effluent limits in its permits under appeal, PCL offered no evidence of a written agreement at the hearing and did not raise the issue in its Post-Hearing Briefs other than a brief mention in its Proposed Findings of Facts. *See* PCL's Proposed Finding of Fact, Paragraphs 44-45.

2014 EHB 755, 779; *Citizen Advocates United to Safeguard the Environment, Inc. v. DEP*, 2007 EHB 632, 677; *UMCO Energy, Inc. v. DEP*, 2006 EHB 489, 573.

At the Hearing, the Appellant frequently objected to the Department's fact witness testimony on the grounds that the fact witness was actually providing expert testimony. The Board disagreed and overruled the objections. The Department asserts that PCL waived this issue.[9] PCL's objections at the Hearing to the testimony of the Department's fact witnesses, who testified about what they did, was premised upon a reoccurring misapprehension of the nature of the testimony that the Department's technical employees provide at the Board hearings. PCL believes that when a Department employee who performs a technical job provides testimony about the technical tasks he or she performed, that Department witness must be qualified as an expert witness to testify about the tasks that were actually performed.

The Board disagrees. Department witnesses, who are fact witnesses testifying about technical tasks they performed during the course of their employment with the Department, need not be qualified as expert witnesses before they can testify about what they did. While the Department may also decide to seek to qualify these witnesses as expert witnesses to provide expert opinion testimony regarding the subject of their factual testimony, the Department is not required to do so. Department employees need not be qualified as expert witnesses before they can testify about their positions with the Department and tasks they actually performed as part of their employment. If the Department decides not to have its witnesses qualified as expert witnesses, the witnesses' testimony will be limited and may not go beyond the facts of their positions and the tasks they actually perform as part of their employment with the Department. In

[9] PCL did not mention the issue in its main Brief, but it did briefly identify it when it challenged several of the Department's Proposed Findings of Fact by asserting that the Department has failed to identify its witnesses as expert witnesses in its Pre-Hearing Memorandum. PCL Reply Brief at 4, 5 and 9. The Board will address the merits of PCL's objections because it is not clear that PCL waived the issue by not raising it in its main brief. See 25 Pa. Code § 1021.131(c); *DEP v. Seligman*, 2014 EHB 755.

this appeal, the Department did not seek to have its witnesses, who performed technical tasks, qualified as expert witnesses at the Hearing. In light of the Department's decision, the witnesses' testimony is limited to fact witness testimony regarding their positions with the Department and the tasks they actually performed for the Department in connection with the review and issuance of the three revised NPDES permits under appeal.[10]

Next, the Board agrees with the Department that the Appellant has waived any issues regarding how the Department calculated the new effluent limits. We agree with the Department that nothing in the Appellant's Notices of Appeal contested the Department's methodology of determining the effluent limits or the manner in which the Department arrived at those limits. The Appellant's Notices of Appeal generally assert a narrow legal issue that pursuant to 25 Pa. Code § 87.102(e), the Department did not have the legal authority to reissue the NPDES permits with additional effluent limitations beyond the two limits in Section 87.102(e)(3). A review of the Appellant's Prehearing Memorandum also shows that the Appellant did not contest the way in which the Department calculated the effluent limits. While it is true that the Board must broadly construe objections raised in notices of appeal, *Thomas v. DEP*, 1998 EHB at 106, neither the Notices of Appeal nor the Appellant's Prehearing Memorandum contain specific language objecting to the resulting effluent limits quantitatively or any language objecting to the manner in which the Department determined the effluent limits.

Finally, the Department asserts that the Appellant has waived the issue of estoppel because the Appellant did not raise the issue in its Notices of Appeal or Prehearing

[10] The Board will not consider expert testimony from any party, including the Department unless the party fully follows "both the Pennsylvania Rules of Civil Procedure and the Board's Rules and orders and identify its proposed experts, answer expert interrogatories and/or provide expert reports and identify the expert and summarize his or her testimony in its pre-hearing memorandum. If any party, including the Department does not follow these requirements, it may be precluded from offering such witnesses at trial in accord with applicable law." *Borough of Edinboro v. DEP*, 2003 EHB 725, 771-72.

Memorandum. The Appellant disagrees, asserting that although the Notices of Appeal did not include the word "estoppel," the issue has still been preserved because the Appellant's Notices of Appeal request that the Department actions be *suspended* and revised. According to the Appellant, among the meanings of the root word "estop" is "to halt, stop or suspend." The Appellant points our attention to the Board's *Ainjar Trust* decision, in which the Board concluded that although a notice of appeal did not contain a recitation of the issues in exactly the same words as set forth in a motion for summary judgment, the particular genre of issue was fairly raised in the notice of appeal. *Ainjair Trust v. DEP*, 2001 EHB 927.

The Board finds that the Appellant has waived the issue of estoppel because estoppel was not mentioned in the Notices of Appeal or Prehearing Memorandum. *Ainjar Trust* does not support the Appellant's position. In *Ainjar Trust*, the Board explained that the Appellant did, in fact, raise the issue of the non-existence of a township's sewage facilities plan in its notice of appeal by addressing a section of the Sewage Facilities Act that delineated what each municipality in the Commonwealth must do to obtain or revise an official sewage facilities plan. *Id*. Unlike the Appellant in *Ainjar Trust*, the Appellant in the present appeal has not referenced estoppel in any clear or meaningful way in its Notices of Appeal or Prehearing Memorandum. The Appellant's strained and overly broad reading of the words "suspend" and "estoppel" are not persuasive. Even if we chose to decipher root words in the Appellant's Notices of Appeal and Prehearing Memorandum, the word "suspension" arises in the context of requested relief, not in the context of a legal issue for the Board to address. The Appellant therefore failed to preserve estoppel as a legal issue for the Board to consider.

Even if the Board concluded that the Appellant properly raised and preserved estoppel as an issue, the Appellant would not succeed on the merits in proving estoppel. The Appellant

asserts that the Department has misrepresented material facts by way of a March 10, 2004 Department letter which noted that § 87.102(e) would apply when the treatment system for the Tract 911 Job was converted to a passive system. The Appellant claims to have justifiably relied on this letter to the detriment of $800,000, which the Appellant spent on the design and construction of the passive treatment systems. According to the Appellant, the Department was aware that the Appellant was relying on representations in the letter that § 87.102(e) was the only controlling regulation. The Department counters that the Appellant has not presented any evidence proving that the Department intentionally or negligently misrepresented material facts in the letter.

The doctrine of equitable estoppel applies when an agency of the Commonwealth (1) intentionally or negligently misrepresented a material fact; (2) knows or has reason to know that another person would justifiably rely on that misrepresentation; (3) or where the other person has been induced to act to her detriment because she justifiably relied on the misrepresentation. *Natiello v. DEP*, 990 A.2d 1196, 1203 (Pa. Cmwlth. 2010). In order to establish estoppel, the party asserting the claim must show (1) misleading words, conduct, or silence by the agency; (2) unambiguous proof that the asserting party reasonably relied upon the agency's misrepresentation; and (3) the lack of a duty to inquire on the part of asserting party. *Baehler v. DEP*, 863 A.2d 57, 60 (Pa. Cmwlth. 2004); *Baldwin Health Ctr. v. DPW*, 755 A.2d 86 (Pa. Cmwlth. 2000).

The Appellant has not proven that the Department letter constitutes an intentional or negligent misrepresentation of a material fact.[11] At the hearing, the Appellant's witness

[11] For the reasons set forth in this Adjudication elsewhere, the Board finds the March 10, 2004 letter is not misleading and it is consistent with the Department's position regarding Section 87.102. See Adjudication at 41-44.

testimony did not address how the letter misled the Appellant into believing that the only applicable regulation at issue was § 87.102(e)(3). A review of the letter itself does not show any apparent Department misrepresentations. The alleged misrepresentation in the Department letter states "when the treatment facility at this site has been converted to a passive system, the standards in § 87.102(e)(3) will apply. The Department will monitor the Casselman River upstream and downstream of the operation to determine compliance with the stream standards." Appellant Ex. 6. While it may have been reasonable for the Appellant to rely on the letter in 2004, there is no language in the letter indicating that no later Department action could potentially be taken or that no regulations other than § 87.102(e)(3) might also apply. Without clear evidence of negligent misrepresentation by the Department, it follows that the Appellant could not justifiably rely on any such misrepresentation and PCL has not met its burden to establish estoppel.

**Department's authority to revise effluent limitations subject to Section 87.102(e)[12]**

There is one issue in this appeal upon which the Parties do agree. PCL's main objection focuses on the regulatory requirements in Section 87.102(e). PCL recognizes that this provision is "at the heart of its appeals," while the Department would add that PCL consistently and narrowly presented the appeal issue as being solely a question of the Department's authority to impose additional effluent limitations beyond those specified in Section 87.102(e). As previously discussed the Parties disagree whether PCL raises a single issue or a broad range of related issues, but on this point there is no dispute. As articulated by PCL, PCL's main objection

[12] The Department testified that Section 87.102(e) is not currently in effect because the Department forgot to submit it to OSM for approval. (N.T. 103-105) This is surprising because this provision was first added to the Department's regulations in 1997 and it remains in the Pennsylvania Code without any indication that it is no longer in effect. To resolve this appeal, the Board does not have to decide whether this provision remains in effect today. This provision is only part of the requirements applicable to PCL's NPDES permit renewals and the permit renewals are consistent with the regulatory requirements set forth in the entirety of Section 87.102.

at the heart of its appeal is whether the Department has authority to add additional effluent limitations beyond those listed in Section 87.102(e)(3) to an NPDES permit that qualifies for coverage under Section 87.102(e)(3). The Board will now address this important issue to examine whether the Department has the authority to modify the effluent limitations for an NPDES permit for a post-mining pollution discharge subject to Section 87.102(e).

Section 87.102 regulates discharges from bituminous surface coal mines including postmining pollutant discharges. 25 Pa. Code § 87.102. If a postmining pollutional discharge occurs, the discharger must immediately provide interim treatment and take measures to abate the discharge. 25 Pa. Code § 87.102(e)(1). If the discharge continues after abatement measures, the discharger must make provisions to provide for long term treatment. 25 Pa. Code § 87.102(e)(2). If the discharge can be treated using passive treatment, the discharger may seek approval to use passive treatment measures. 25 Pa. Code § 87.102(e)(2)-(5). Under Section 87.102(e)(3), the only technology based effluent requirements for passive systems are iron and net alkalinity. 25 Pa. Code § 87.102(e)(3).

PCL asserts that the Department issued the NPDES permits and previously renewed these permits with no changes to the effluent standards contained in Section 87.102(e)(3). PCL Brief at 16. The record before the Board does not support this statement. The record before the Board provides that the Department issued the prior NPDES permits to PCL in 2006 and those permits, which PCL did not appeal, contained some effluent limitations beyond those in Section 87.102(e)(3).

The record before the Board does not clearly provide the Board with a factual basis to address the issue that PCL wishes to raise. The three NPDES permits that were renewed did not just contain the two effluent limits in Section 87.102(e)(3) (iron and net alkalinity). The prior

permits for the Menser Strip Job 8 and Moser Strip Job 4 contained TSS limits. The prior permits for the Tract 911 Mine also contained a manganese limit as well as a TSS limit. In addition, the iron limit in all three prior permits that were last renewed in 2006 did not resemble the iron limit in Section 87.102(e)(3), but the iron limit resembled the iron limit in Section 87.102(a).[13]

The record before the Board does not address whether the three NPDES permits under appeal ever contained only the limits in Section 87.102(e)(3)(i) and (ii), but the record does establish that the three NPDES permits contained limits beyond those limits in the immediately prior NPDES permits that were issued in 2006.[14] Those permits expired in 2011 and were the permits that were renewed in 2014 and are the subject of the consolidated appeal before the Board today. The three renewals included effluent limits beyond those in the immediately prior permits, which already included limits in addition to or different than the effluent limits in (e)(3). The issue PCL wants to raise is therefore not squarely before the Board under the facts of this appeal. The three prior NPDES permits that were last renewed in 2006 already contained effluent limits beyond those in Section 87.102(e)(3).

The Board can nevertheless address the general issue PCL wishes to raise as part of a broader issue regarding the Department's authority to revise effluent limits in NPDES permits to comply with a TMDL. The Department did add new limits to the prior permits as part of the three permit renewals under appeal. For the reasons set forth below, the Board finds that the Department has the authority under Section 87.102 to revise effluent limits in existing NPDES

[13] The iron limit in subsection 87.102(e)(3) is tied to the iron limit in subsection 87.102(a) but they are not the same in all cases. The alkalinity limit in subsection 87.102(e)(3) is the same as the limit in subsection 87.102(a).

[14] The NPDES permits were initially issued in the mid-1970s. They were renewed in 2001 and again in 2006. PCL Exhibit 3 at 001, 018 and 035. The passive treatment systems were constructed in the 2003-04 timeframe and there is nothing in the record to suggest the 2001 NPDES permits were modified after the systems were constructed.

permits as a result of a TMDL including those permits subject to Section 87.102(e)(3). The Board reaches this conclusion upon a plain reading of all of the requirements in Section 87.102, including subsection 87.102(f).

Under the express terms of subsection 87.102(f), a discharge subject to Section 87.102(e) is also subject to all of the requirements in Title 25 of the Pennsylvania Code including the various Chapters in Article II entitled Water Resources. The Department asserts that the Board should read and apply Section 87.102 in its entirety and that Section 87.102(f) imposes the NPDES permitting requirements for post-mining discharges in TMDL watersheds. *See* 25 Pa. Code Chapters 92a, 93 and 96. According to the Department, it revised the three NPDES permit renewals under appeal specifically as a result of the Department's development and EPA's approval of the Casselman River and Coxes Creek TMDLs.[15] The Board agrees that the Department had the authority to revise the effluent limitations for the three NPDES permits under appeal in response to the development and approval of the two TMDLs. The Department's authority under Section 87.102(f) includes the authority to modify effluent limitations for discharges subject to Section 87.102(e)(3).

[15] In its Post-Hearing Reply Brief, PCL objects to the Department's reference to EPA's "Mid-Atlantic Water" website where EPA has posted the complete Casselman River and Coxes Creek TMDLs. PCL's Reply Brief at 2. Although the Board is not bound by the technical rules of evidence, the Board generally applies the Pennsylvania Rules of Evidence. 25 Pa. Code §1021.123(a). Rule 201 of the Pennsylvania Rules of Evidence allows courts to take judicial notice of facts. Pa.R.E. § 201 (Judicial Notice of Facts.) Under Rule 201, Commonwealth Court has taken judicial notice of information on the Department of Corrections website. *Nieves v. Board of Probation and Parole*, 983 A.2d 236, 239 (Pa. Cmwlth. 2009) citing *Figueroa v. Board of Probation and Parole*, 900 A.2d 949 (Pa. Cmwlth. 2006) See also *Binder on Pennsylvania Evidence*, 8th Edition, § 201, 31. (However, courts are more disposed to take judicial notice of information that is published on governmental websites.) The Board also has a Rule that allows the Board to take official notice of facts. 25 Pa. Code §1021.125. Under the Rule, the Board may take official notice of "Matters which may be judicially noticed by the courts of the Commonwealth." 25 Pa. Code §1021.125 (a)(1). The Board is therefore entitled to take official notice of EPA's "Mid-Atlantic Water" website where EPA has posted the complete Casselman River and Coxes Creek TMDL.

PCL relies upon a letter dated March 10, 2004 from the Department to PCL to support its claim that the Department has no legal authority to impose effluent limits on passive water treatment systems subject to Section 87.102(e)(3) beyond those specifically listed in the regulation. *See* PCL's Ex. 6. PCL argues that this letter contains a prior Department interpretation that is inconsistent with the interpretation the Department followed when it revised PCL's three NPDES permit. The March 10, 2004 letter is also central to PCL's estoppel argument. Finally, PCL half-heartedly asserts that the March 10, 2004 letter is evidence of a letter agreement between the Department and PCL that prevents the Department from ever revising PCL's effluent limitations in PCL's three NPDES permits under appeal.

The Department disagrees with PCL's arguments concerning its March 10, 2004 letter to PCL. The Department does not view the letter as evidence of an inconsistent interpretation of Section 87.102. Contrary to PCL's assertion, the March 10, 2004 letter states, in part, that:

> When the treatment facility at this site has been converted to a passive system, the standards in 87.102(e)(3) will apply. The Department will monitor the Casselman River upstream and downstream of the operation to determine compliance with the in stream standards.

PCL's Ex. 6 at 001. The letter also highlights the ongoing need to monitor the stream to ensure compliance with "instream" standards.

The Board agrees with the Department that its March 10, 2004 letter to PCL is not evidence of an inconsistent interpretation of Section 87.102(e)(3). This letter was written in 2004 before the TMDL for the Casselman River was prepared. At the time it was written, the letter correctly references the technology based effluent` limits in Section 87.102(e)(3) that were applicable to the discharge from the converted passive treatment at that time.

The letter does not state that these effluent limits in Section 87.102(e)(3) will be the only effluent limits that will ever be applied to the Tract 911 Site discharge. The Department believes that the language about monitoring the Casselman River upstream and downstream of PCL's discharge to determine compliance with instream (water quality standards) "clearly" in the Department's view implies the requirements of Section 87.102(f), and therefore the letter is evidence of a consistent interpretation over the years. Department's Post-Hearing Brief at 40. The Board agrees.

To resolve the disagreement, it is necessary to examine the letter in some detail. The letter was written by the Department Monitoring and Compliance Manager for the Ebensburg District Mining Office and sent to PCL in 2004 to summarize recent discussions and agreement regarding water treatment activities at three specifically listed sites. One of the listed sites is the Tract 911 Job which is one of the three permitted sites in this appeal. The Menser Strip Job 8 and the Moser Strip Job 4 sites are the other two sites in this appeal, but they are not specifically mentioned in the March 10, 2004 letter. The letter regarding the Tract 911 Job states that the Department will monitor the Casselman River to determine compliance with the instream standards. The Board agrees with the Department that these instream standards are otherwise known as water quality standards. See 25 Pa. Code Chapter 93. The March 10, 2004 letter specifically discusses the need to monitor the Casselman River in the future to ensure compliance with these instream standards. The letter is not misleading, and the reference to further monitoring to determine compliance with instream standards, otherwise known as water quality standards, clearly anticipates the possibility of revisions to the effluent limitations in Section 87.102(e)(3) to ensure compliance with instream standards.[16]

[16] PCL apparently relies upon the Department's March 10, 2004 letter to PCL concerning its Tract 111 Job as evidence of an agreement with the Department. Because the Board finds that this March 10, 2004

The Casselman River TMDL and the requirements to revise the effluent limits in the Tract 911 Job NPDES permit to protect instream water quality standards are fully consistent with the Department's March 10, 2004 letter to PCL. The letter specifically described the need to monitor the Casselman River upstream and downstream of the site to ensure compliance with applicable instream water quality standards. When the TMDL identified impairment in the Casselman River and directed the establishment of a wasteload allocation to address the impairment, the Department had the duty and the authority under Section 87.102(f) to modify the effluent limits in the NPDES permits to ensure compliance with instream water quality standards. That is exactly what the Department did. The March 10, 2004 letter does not support PCL's claims, and a careful reading of the letter supports the Department's views that it has clear authority under Section 87.102(f) to impose new or revised effluent limits in an NPDES permit to address new requirements in a TMDL to protect instream water quality standards.

The Department asserts that the requirements imposed by Section 87.102(f) on discharges subject to Section 87.102(e) include the requirements in Chapter 96 which was promulgated in 2000. This followed the promulgation of subsection (f) in 1997. The Board agrees. The rules of statutory construction apply to regulations as well as statutes. *Wheeling-Pittsburgh Steel v. DEP*, 979 A.2d 931, 937 (Pa. Cmwlth. 2009); *Bayada Nurses, Inc. v. Dep't of Labor & Indus.*, 958 A.2d 1050, 1055 (Pa. Cmwlth. 2008); 1 Pa. Code § 1.7 (Statutory Construction Act of 1972 applicable). Section 1937(a) of the Statutory Construction Act provides:

> a) A reference in a statute to a statute or to a regulation issued by a public body or public officer includes the statute or regulation with all amendments and supplements thereto and any new statute or regulation substituted for such statute or regulation, as in force at the time of application of the provision of the statute in which such reference is made, unless the specific

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letter is consistent with the action under appeal it does not in any manner support PCL's agreement with the Department argument.

> language or the context of the reference in the provision clearly includes only the statute or regulation as in force on the effective date of the statute in which such reference is made.

1 Pa. C.S.A. § 1937(a). Under this provision, the reference in Section 87.102(f) to "this title, including Chapters 91-93, 95, 97 (reserved) and 102" includes the adoption by reference of Chapter 96 by operation of the rules of statutory construction. Section 1937 provides that a reference to a regulation issued by a public body includes that regulation with all amendments and supplements thereto and any new regulation substituted for such regulation. Chapter 96 is clearly an amendment to Title 25 and it supplements the state water quality standard in Chapter 93. Chapter 96 is therefore included in the reference to "this title, including Chapters 91-93, 95, 97 (reserved) and 102" in Section 87.102(f), and the Department had the authority and obligation to apply these requirements when it renewed PCL's three NPDES permits in 2014.

Chapter 96 of Title 25 of the Pennsylvania Code was promulgated in 2000 and became effective on November 18, 2000. 30 Pa. B. 6055 (November 18, 2000). The same rulemaking that added Chapter 96, deleted Chapter 97. *Id*. The current regulatory language in 25 Pa. Code § 87.102(e) was added in 1997. 27 Pa. B. 6041 (November 15, 1997). When Section 87.102(e) was promulgated in 1997, Chapter 96 did not exist, and Chapter 97, not yet in reserved status, contained actual regulations.

Chapter 96, as its title states, contains regulatory requirements for the implementation of water quality standards. 25 Pa. Code Chapter 96. The State's water quality standards are found in Chapter 93 of Title 25. 25 Pa. Code Chapter 93. Section 96.4 sets forth the requirements to protect water quality standards when the Department identifies impaired surface waters or portions thereof that require the development of TMDLs. 25 Pa. Code § 96.4. As the Department testified at length at the Hearing, the Department applied these requirements after

the development and EPA approval of the Casselman River and Coxes Creek TMDLs. (Finding of Fact Nos. 18-48.) Under the requirements in Chapters 93 and 96 and Section 87.102(f), the Department had clear regulatory authority and the duty to revise the NPDES permit limits in the three renewals under appeal.

The Board understands PCL's concern with the additional treatment standards in the permit renewals. PCL was told in 2004 that if it constructed a passive post-mining treatment system for its post-mining discharges from its Tract 911 Job, the treatment standards in Section 87.102(e)(3) would apply. The same standards would have been applicable for discharges from passive systems on the Moser Strip Job 4 Site and the Menser Strip Job 8 Site. In 2003 and 2004, based upon PCL's understanding of its treatment obligations under Section 87.102(e)(3), PCL decided to seek the Department's approval to design and implement passive water treatment systems to treat post-mining discharges from PCL's three mining sites. PCL testified that after the Department approved PCL's plans, it expended approximately eight hundred thousand dollars ($800,000) for construction of the three passive treatment systems.

Approximately five years after PCL constructed the three passive post-mining water systems, EPA approved the Casselman River and Coxes Creek TMDLs that are the basis for the Department's revisions to PCL's three NPDES permits for the discharges from the three passive treatment systems. Approximately five years after EPA approved the two TMDLs, the Department revised PCL's NPDES permits for the discharges from the three passive systems to include additional treatment limits. The revised NPDES permits impose new treatment obligations on PCL that will, in all likelihood, require PCL to modify its treatment systems to meet the additional treatment obligations. PCL did not, however, provide the Board with any

evidence at the Hearing regarding its plans to meet its new treatment obligations, including anticipated costs of additional treatment.

PCL assumed that the costs of the existing passive treatments systems would be entirely wasted if it had to provide additional treatment. There is no evidence to support this assumption and it is more likely that the additional treatment will occur after the passive treatment occurs and will only address the new or revised effluent limitations that the Department imposed as a result of the TMDLs. The passive treatment systems may still treat PCL's underlying and pre-existing treatment obligations and PCL will have to prepare and implement a plan to address its new treatment obligations resulting from the two TMDLs.

The Board appreciates PCL's concern, however, the Board has also read the Department's March 10, 2004 letter in its entirety and understands that the letter included a requirement to monitor and protect instream water quality standards in the future. The letter clearly referenced that the possibility of new or revised effluent limitations was always present under the Department's regulations. Section 87.102(f) authorizes such changes. After the TMDLs were developed, the possibility became the reality, and PCL is ultimately responsible for treating its post-mining pollutional discharges to a level necessary to protect and maintain instream water quality standards as the revised NPDES permit renewals provide.

PCL makes an additional argument in its Post-Hearing Brief that the Department exceeds its authority to modify effluent limits when it renews an NPDES permit because the TMDL requirements only apply to new or revised NPDES permits. PCL's Post-Hearing Brief at 18. The Department disagrees that it exceeded its authority when it included new effluent limits in the three renewed NPDES permits under appeal in order to address the new requirements created by the TMDL. According to the Department, an NPDES permit that is renewed is a new permit

because the old permit expired, and the Department has the authority and obligation to include new effluent limits in an NPDES permit renewal to address new TMDL related requirements. The Board agrees with the Department that it is authorized and required to address new TMDL related requirements when it renews NPDES permits. In addition, the two TMDLs associated with PCL's three NPDES permits specifically identified PCL's three permitted discharges and contained new TMDL related requirements for these specifically identified permitted discharges. There is no doubt that revisions to PCL's three NPDES permits were contemplated when the TMDL was developed and later approved by EPA. In addition, the Board agrees with the Department that a permit renewal is a new permit for the purpose of applying the new requirements of a TMDL. The prior permit expired, and the new, renewed permit has its own permit term. The language that PCL relies upon merely provides that a TMDL will not be applied during the term of an existing NPDES permit, unless it is otherwise revised, and the new TMDL requirements will be applied to the new NPDES permit upon renewal. That is exactly what happened here.

**Adequacy of Prior Permit Limits to Meet New TMDL Requirements**

As an alternative argument, PCL asserts that the prior NPDES permit limits are sufficient to meet any new TMDL requirements without any revisions should the Board agree with the Department that the TMDLs are applicable to the three NPDES permit renewals under appeal. At the hearing, PCL, over the Department's objection, introduced evidence to support its claim that the prior permit limits were adequate to meet the new TMDL requirements. (PCL Ex. 9.)

PCL asserts that its discharges are consistent with the TMDL because the Department has not identified any violations of the instream water quality standards at the point of discharge from PCL's treatment facilities. While it is true that the Department has not identified any

violations of water quality standards at the point of discharge from PCL's passive treatment facilities, this fact does not mean that the discharges do not cause or contribute to exceedances of water quality standards downstream from the point of discharge. PCL's claim of consistency is based upon a fundamental misunderstanding of the scale of a TMDL compared to that of an individual permit. As a general rule, the Department evaluates the impact of a proposed discharge on the receiving stream at or near the point of discharge when reviewing the need for water quality-based effluent limitations as part of its review of an application for an NPDES permit. On the other hand, a TMDL looks at impairment of a water body on a larger scale and evaluates the cumulative effects of multiple discharges on a segment-by-segment basis to assess the water body's ability to meet water quality standards. A discharge from an NPDES permit may not cause a violation of instream water quality standards at the point of discharge, but it may still contribute to impairment of the stream segment downstream from its discharge. The TMDL assigns treatment obligations to point and non-point discharges that contribute to impairment. The fact that PCL discharges have not caused violations of the applicable instream water quality standards at or near the point of discharge does not prevent the Department from imposing new or revised water quality-based effluent limitations on PCL to address impairment of segments of water bodies covered by the two TMDLs involved in these consolidated appeals.

The Board also rejects PCL's claim that PCL's prior effluent limits were adequate to comply with the new TMDL requirements. The Board finds that the Department's testimony regarding PCL's Exhibit 9 does not support PCL's claim that its prior permit limits were consistent with and comply with the new TMDL requirements. PCL incorrectly calculated the wasteload represented on PCL's Exhibit 9. PCL used an average of metals contained in the discharge over a five-year period rather than using actual daily flow from a particular day. The

Board agrees with the Department that PCL's Exhibit 9 does not establish that the prior NPDES permit limits are consistent with the two new TMDLs without revision.

We find that the Department had the authority under Section 87.102(f) to modify the effluent limitations in the three NPDES permit renewals under appeal. Therefore, we dismiss the consolidated appeals of PCL and issue the following order.

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 750.16(b); 35 P.S. § 7514.

2. In cases where the evaluation of effluent characterization data or permit review for a renewal or modification requires the imposition of effluent limits for toxic pollutants or more stringent limits than are already in the permit (as is so with the present appeals), a compliance schedule is appropriate to allow the applicant sufficient time to meet the new limits. (25 Pa. Code § 92a.51; DEP Ex. 5 at 12-13; N.T. 94.) The purpose of a compliance schedule is to allow time for an existing facility to improve its treatment process to meet the reduced limits brought about by a new water quality standard or as a result of the implementation of a TMDL. (N.T. 94-95; DEP Ex. 5 at 12-13.)

3. PCL bears the burden of proof in this appeal. 25 Pa. Code § 1021.122(c)(3).

4. The Appellant must show by a preponderance of the evidence that the Department acted unreasonably or contrary to law, that its challenged decision is not supported by the facts, or that it is inconsistent with the Department's obligations under the Pennsylvania Constitution. *See, e.g., Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 236; *aff'd* 131 A.3d 578 (Pa. Cmwlth. 2016); *Gadinski v. DEP*, 2013 EHB 246, 269.

5. A compliance schedule in an NPDES permit is not a Department order within the meaning of 25 Pa. Code § 1021.122(b)(4), and it does not result in the shifting of the burden of proof to the Department.

6. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before the Board. *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *Smedley v. DEP*, 2001 EHB 131, 156; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

7. The Department fully complied with 25 Pa. Code § 87.102 in its review and approval of the three NPDES permit renewals under appeal. 25 Pa. Code § 87.102.

8. The Department has the legal authority to add new or revised effluent limitations to an NPDES permit renewal to comply with new requirements to achieve or maintain Pennsylvania water quality standards imposed after the development and approval of TMDLs. *Id*; 25 Pa. Code § 96.4.

9. Chapter 96 requires that an NPDES permit renewal is subject to TMDL requirements. 25 Pa. Code § 96.4.

10. The Department acted lawfully, reasonably and did not abuse its discretion when it added new or revised effluent limitations to the three NPDES permit renewals under appeal following the development and approval of the Casselman River and Coxes Creek TMDLs.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **PENN COAL LAND, INC.** | : | |
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| **v.** | : | **EHB Docket No. 2014-157-M** |
| | : | **(Consolidated with 2014-158-M,** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **2014-159-M)** |

**O R D E R**

AND NOW, this 2nd day of May, 2017, it is hereby ordered that the Appellant's consolidated appeals are **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 2, 2017**

**c:** **DEP, General Law Division:**
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**For the Commonwealth of PA, DEP:**
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**For Appellant:**
Patrick P. Svonavec, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **LANCASTER AGAINST PIPELINES, GERALDINE NESBITT AND SIERRA CLUB** | : | |
| **v.** | : | **EHB Docket No. 2016-075-L (Consolidated with 2016-076-L and 2016-078-L)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee** | : | **Issued: May 10, 2017** |

**OPINION AND ORDER ON**
**REQUEST TO DISMISS**

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis**

The Environmental Hearing Board has jurisdiction in an appeal from the Department of Environmental Protection's issuance of a Water Quality Certification pursuant to Section 401 of the Clean Water Act.

**O P I N I O N**

On April 5, 2016, the Pennsylvania Department of Environmental Protection (the "Department") issued a Water Quality Certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a), to Transcontinental Gas Pipe Line Company, LLC ("Transco"). The Department certified among other things that the construction, operation, and maintenance of Transco's Atlantic Sunrise Pipeline Project complies with the Commonwealth's water quality standards, provided that Transco obtained and complied with some yet-to-be-issued state permits. Lancaster Against Pipelines, Geraldine Nesbitt, and the Sierra Club filed these consolidated appeals from the Department's issuance of the 401 certification. The Appellants

also filed petitions with the Court of Appeals for the Third Circuit seeking review of the same Department action. *Lancaster Against Pipelines v. Quigley*, No. 16-2212; *Nesbitt v. Quigley*, No. 16-2218; and *Sierra Club v. Quigley*, No. 16-2400. Soon thereafter, the parties asked for and received a series of stays in both our appeals and the Third Circuit cases. The parties told us that they wished to await the Third Circuit Court of Appeal's decision in a case said to involve similar issues, *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection*, 833 F.3d 360 (3d Cir. 2016).

On August 8, 2016, Transco by letter informed us that the Third Circuit had issued its Opinion in the *Delaware Riverkeeper* case. Transco requested that we dismiss the appeal. However, a petition for rehearing was thereafter filed in the *Delaware Riverkeeper* case, so the parties once again agreed to a continuing stay pending the ruling on that petition. The parties asked us to issue an Order providing that, within fourteen days of the Third Circuit's mandate in the *Delaware Riverkeeper* case, the parties could file written responses addressing this Board's authority to proceed in this matter. We agreed and issued an appropriate Order on September 13, 2016.

On March 13, 2017, the parties notified us that the Third Circuit had issued its mandate in the *Delaware Riverkeeper* case. They indicated that they would be filing their respective jurisdictional statements as contemplated in our Order, which they have now done. Transco has renewed its "request" that the Board dismiss these consolidated appeals for lack of jurisdiction. It argues that this Board cannot review the Department's issuance of the 401 certification because the Third Circuit has exclusive jurisdiction to review that action. The Department sent us a short letter indicating that it was willing to "abide by" the Third Circuit's ruling in *Delaware Riverkeeper*. The Appellants tell us that they have asked the Third Circuit to dismiss their own

petitions for review for lack of jurisdiction, arguing that the petitions are not ripe for review because this Board has not yet acted on their appeals before us. They tell the Court that, because the Board has not yet acted on the appeal of the 401 certification, there is no final state action for the Court to review. Similarly, the Appellants argue before us that we do indeed have jurisdiction, and that at a minimum we should issue another stay until the Third Circuit rules on its jurisdiction in the parallel proceedings pending there.

Although a challenge to our jurisdiction must ordinarily take the form of a motion, 25 Pa. Code §§ 1021.91 and 1021.94, we are willing to view Transco's request for dismissal together with the parties' jurisdictional statements as the functional equivalent of a motion. Transco's request is denied and the Appellant's request for a stay is granted because, in our view, until the Third Circuit holds otherwise, this Board does have jurisdiction to review the Department's action.

Ordinarily there would be no question that we have jurisdiction to review the Department's issuance of a 401 certification. *See Solebury Twp. v. DEP*, 928 A.2d 990 (Pa. 2007). The question arises here, however, because the certification at issue involves an interstate natural gas pipeline subject to regulation by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act, 15 U.S.C. §§ 717-717z. The Natural Gas Act for the most part makes the regulation of natural gas pipelines a federal function, but it carves out a limited role for states such as Pennsylvania that have primacy to implement the Clean Water Act. The state retains the right to determine whether the project complies with federal and state water quality standards. If it does, the state issues a 401 certification. The jurisdictional issue arises because Section 19(d)(1) of the Natural Gas Act provides:

> The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this

> title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

15 U.S.C. § 717r(d)(1).

We do not believe the Third Circuit's Opinion in the *Delaware Riverkeeper* case is particularly helpful. The only jurisdictional issue before the Court was whether the Department's issuance of a 401 certification was the act of a state administrative agency acting "pursuant to Federal law." *Delaware Riverkeeper*, 833 F.3d at 391. The Court held that it was, and it proceeded to address the merits. The Court was not faced with and did not address whether the state's action needed to be final and whether the Department's issuance of the certification was final. The precise question presented in our case is not whether the Department was acting pursuant to federal law; it is whether a final action is required before the Court of Appeals can act upon a petition for review, and whether a final action has taken place in this case.

There is little point in us opining on the first question. Whether a final action is required is a question of federal law that is pending before the Court in the Appellants' petitions for review in the proceedings parallel to this one. The First Circuit Court of Appeals in what we believe to be a highly persuasive decision that respects the state's administrative process recently held that a final agency decision *is* required. *Berkshire Env. Action Team, Inc. v. Tenn. Gas Pipeline, LLC*, 851 F.3d 105 (1st Cir. 2017). *See also, Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084 (9th Cir. 2014) (final action required). *Contra, Tennessee Gas Pipeline LLC v. Del. Riverkeeper Network*, 921 F.Supp. 381 (M.D. Pa. 2013) (final agency action not

required). The First Circuit said that there was ample reason to stick with the strong presumption that judicial review is only available when an agency action becomes final. *Id*., 851 F.3d at 111 (citing *Bell v. New Jersey*, 461 U.S. 773, 778 (1973)).

As to the second question, there is no doubt whatsoever that the Department's certification of Transco's project was not a final action. Pennsylvania law is very clear on this point: "[N]o action of the department [of environmental protection] adversely affecting a person shall be final as to that person until the person has had an opportunity to appeal the action to the [environmental hearing] board…" 35 P.S. § 7514(c). Pennsylvania courts have long held that a Departmental action is not final until an adversely affected party has had an opportunity to appeal the action to this Board. *Fiore v. DER*, 655 A.2d 1081, 1086 (Pa. Cmwlth. 1995); *Morcoal v. DER*, 459 A.2d 1303, 1307 (Pa. Cmwlth. 1983). Pennsylvania's procedures are nearly identical in substance to the Massachusetts procedures that the First Circuit found not to be final until the adversely affected party had an opportunity to take advantage of that state's hearing process. *Berkshire*, 851 F.3d at 111-14. Unless the Third Circuit holds that no final action is required, or that the one that is required by Pennsylvania law may simply be disregarded, the appeal before us may proceed. Accordingly, dismissal would be premature. We, therefore, issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **LANCASTER AGAINST PIPELINES, GERALDINE NESBITT AND SIERRA CLUB** | : | |
| **v.** | : | **EHB Docket No. 2016-075-L (Consolidated with 2016-076-L and 2016-078-L)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee** | : | |

**O R D E R**

AND NOW, this 10th day of May, 2017, upon consideration of the parties' responses regarding this Board's jurisdiction over the above-captioned appeal pursuant to the Board's Order of March 21, 2017, it is hereby ordered that:

1. This matter is stayed until the Third Circuit rules upon its jurisdiction over the matters docketed at *Sierra Club v. Secretary, Pennsylvania Department of Environmental Protection, et al.*, No. 16-2400, *Nesbitt v. Secretary, Pennsylvania Department of Environmental Protection, et al.*, No. 16-2218, and *Lancaster Against Pipelines v. Secretary, Pennsylvania Department of Environmental Protection, et al.*, No. 16-2212 ("the pending Third Circuit matters").
2. The parties shall promptly notify the Board upon the Third Circuit's decision on jurisdiction in the pending Third Circuit matters, or file a collective status report by **July 17, 2017**, whichever comes first.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: May 10, 2017**

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **JOSEPH W. SOKOL** | | |
| **v.** | : | **EHB Docket No. 2016-025-B** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and ROSEBUD MINING COMPANY, Permittee** | : | **Issued: May 11, 2017** |

**OPINION AND ORDER ON**
**MOTIONS TO STRIKE CROSS MOTION FOR SUMMARY JUDGMENT**

**By Steven C. Beckman, Judge**

**Synopsis**

The Board denies Motions to Strike Appellant's Cross Motion for Summary Judgment filed by the Department and Permittee where the opposing parties have been given an opportunity to respond to the Cross Motion, and there is no resulting prejudice to the parties.

**Introduction**

This matter involves an appeal of a Department of Environmental Protection ("Department") January 19, 2016 Determination Letter ("2016 Determination") that mining conducted by Rosebud Mining Company ("Rosebud") did not affect the water supply of Joseph W. Sokol. On both July 26, 2016, and November 9, 2016, the parties filed Joint Requests for an Extension of Time of Pre-hearing Deadlines. On November 10, 2016, the Board issued an Order setting deadlines for the filing of expert reports, and a deadline of February 10, 2017 for filing dispositive motions. The parties have filed a number of dispositive motions, responses, replies, and supporting documents in this matter as set forth in more detail below.

On February 10, 2017, Rosebud filed a Motion for Summary Judgment asserting the following: (1) Mr. Sokol never appealed the Department determination that his water quantity

complaint was resolved, and (2) there are no genuine issues of fact with regard to Mr. Sokol's water quality complaint and, therefore, Rosebud is entitled to judgment as a matter of law. The Department filed a Motion for Partial Summary Judgment on February 10, 2017, that asserts one of the same issue as Rosebud, namely that the Board does not have jurisdiction to hear the water quantity issue as the Department determination was never appealed. Mr. Sokol filed responses on March 13, 2017. Included in his response to the Department's Partial Summary Judgment Motion was a Cross Motion for Summary Judgment ("Sokol Cross Motion") alleging that the Department acted outside its statutory authority when it made its water quantity determination. The Department and Rosebud filed reply briefs on March 28, 2017, and additionally each filed a Motion to Strike Appellant's Cross Motion for Summary Judgment ("Department Motion to Strike" and/or "Rosebud Motion to Strike") on the basis that the Sokol Cross Motion is untimely. Mr. Sokol filed a Response to the Motion to Strike on April 12, 2017. The issue of the Motion to Strike is now ready for a decision.

**O P I N I O N**

The Department and Rosebud move to strike the Sokol Cross Motion on the grounds that it is untimely because it was filed after the February 10, 2017 deadline for dispositive motions set forth in a prior Board Order. They request dismissal[1] of the Sokol Cross Motion as a sanction under the Board's rules at 25 Pa. Code §1021.161.[2] Both Rosebud and the Department, in their respective Motions to Strike, assert that allowing the Sokol Cross Motion would

[1] The Department and Rosebud also request that if the Motion to Strike is not granted that the Sokol Cross Motion should be denied. This Opinion addresses only the motions to strike and does not address the merits of the Sokol Cross Motion.

[2] 25 Pa. Code § 1021.161 allows the Board to impose sanctions upon a party for failure to abide by a Board order or a Board rule of practice and procedure. Sanctions may include "dismissing an appeal, entering adjudication against the offending party" and other appropriate sanctions.

materially prejudice both Rosebud and the Department in that the time to respond to the Sokol Cross Motion is half of what would normally be accorded for a response to a dispositive motion.

We note initially that Mr. Sokol's Cross Motion was filed as a response to summary judgment motions filed by the Department and Rosebud and not as an independent motion for summary judgment directly subject to the limits imposed on the parties by the Board's November 10, 2016 Order. The Department and Rosebud of course argue that the fact that the Sokol Cross Motion was filed as part of a response should make no difference. Cases cited by the parties show that while the Board favors enforcing timeframes set by Board rules and orders, the Board may use discretion where no party is prejudiced and all parties will be served by the result. We think this is a proper case for exercise of our discretion and doing so is in line with prior Board precedent where a timely response to a summary judgment was filed and requested summary judgment as relief. For example, in *Quehanna-Covington-Karthaus Area Authority v. DER*, 1994 EHB 571, a Department response to a motion for summary judgment was treated as a cross motion for summary judgment even though it was not filed as one, and despite procedural issues, because it set forth specific factual averments, supported by affidavits, and requested summary judgment in its favor. *Id.* at 578. The Board explained that we may disregard procedural defects that do not affect a party's substantive rights. *Id*., *citing McCarron v. Upper Gwynedd Township*, 139 Pa. Cmwlth. 591 A.2d 1151, 1153 (1991).

While the *Quehanna* case differs from the matter before us because there was no issue of timeliness of the response, the Board has made similar determinations to exercise its discretion where a dispositive motion is not filed in a timely manner. In *Reading Anthracite Company v. DEP*, 1998 EHB 728, the Board declined to strike a motion for summary judgment even though it was filed after the deadline for dispositive motions. The Board evaluated the effect of

allowing the motion on all parties involved and determined that the motion was straightforward and potentially dispositive. The Board reasoned that failing to allow the motion would result in considerable expense for the parties and noted that the opposing parties had already filed responses and memoranda opposing the motion; taken together, the Board determined that all parties would be better served by a ruling on the motion for summary judgment. *Id.* at 736.

Neither case directly mirrors the facts at hand but their resolutions highlight the Board's use of discretion where appropriate. In this particular case, the facts highlighted by all parties support Mr. Sokol's argument that a ruling on the Department or Rosebud Motion for Summary Judgment could result in a ruling in favor of Mr. Sokol; therefore requesting such relief in his response was appropriate. Further, the facts presented by the parties are fairly straightforward, potentially dispositive, and well documented in the record by the filing of the appeal, amended appeals, motions, responses, replies, exhibits, and statements of facts. The Board believes that the facts presented by the parties, and the objections to the cross motion filed by Rosebud and the Department, will enable the Board to make a decision on the motions without requiring additional filings from the parties.

Next we turn to the issue of prejudice raised by Rosebud and the Department. Both parties aver that they are prejudiced by the short time allotted for their response to the Sokol Cross Motion. Rosebud hinges this argument on the time differences stated in the Board's rules at 25 Pa. Code §§ 1021.94a(k) and 1021.94a(g). 25 Pa. Code § 1021.94a(g) allows for thirty days for a response to a motion for summary judgment, while 25 Pa. Code § 1021.94a(k) allows fifteen days for a reply brief after a response is filed. A review of the docket shows that the Sokol Cross Motion was filed on March 13, 2017, and Rosebud's Brief in Opposition to Appellant's Cross Motion for Summary Judgment was filed on April 12, 2017, thirty days after

the Sokol Cross Motion. Additionally, wanting to ensure that all parties had ample opportunity to state their case, and seeking a fair and expeditious resolution, the Board issued an Order on April 13, 2017, stating that if any party wished to file additional documents related to Mr. Sokol's Cross Motion for Summary Judgment and responses and replies thereto, they should do so by Friday, April 21, 2017. The Department was the only party to file a response pursuant to the Board's order. All parties had adequate time to respond and have submitted statements of facts, exhibits, memoranda, motions, responses and replies and the Board believes it can reach a decision on the various pending motions in this case with the well-pled facts before it. Neither Rosebud nor the Department have demonstrated that they will suffer prejudice by our consideration of the Sokol Cross Motion.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **JOSEPH W. SOKOL** | | |
| | : | |
| **v.** | : | |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and ROSEBUD MINING COMPANY, Permittee** | : | **EHB Docket No. 2016-025-B** |

## O R D E R

AND NOW, this 11th day of May, 2017, it is hereby ordered:

1. The Department's Motion to Strike Appellant's Cross-Motion for Summary Judgment is **denied.**
2. Rosebud's Motion to Strike Appellant's Cross-Motion for Summary Judgment is **denied.**
3. Rosebud's request to accept Rosebud's Motion to Strike and the accompanying Memorandum as opposition filings to Appellant's Cross Motion in compliance with 25 Pa. Code § 1021.94a(g) is **granted.**
4. Rosebud's request to allow Rosebud thirty (30) days from the date of this Order to file complete responsive documentation in opposition to Appellant's Cross Motion is **denied.**

**ENVIRONMENTAL HEARING BOARD**

s/ Steven C. Beckman
**STEVEN C. BECKMAN**
**Judge**

**DATED: May 11, 2017**

**c:** **DEP, General Law Division:**
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*(electronic mail)*

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*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **NEW HOPE CRUSHED STONE AND LIME COMPANY** | : | |
| **v.** | : | **EHB Docket No. 2016-132-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOLEBURY SCHOOL, Intervenor** | : | **Issued: May 24, 2017** |

**OPINION AND ORDER ON**
**MOTION TO COMPEL**

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis**

The Board grants a motion to compel a quarry to respond to discovery requests in the quarry's appeal from a compliance order directing it to, among other things, meet its obligations for reclamation and abatement of a public nuisance.

**O P I N I O N**

New Hope Crushed Stone and Lime Company ("New Hope") filed this appeal from a compliance order issued to it on or about August 26, 2016 by the Department of Environmental Protection (the "Department") regarding a stone quarry it operates in Solebury Township, Bucks County. Solebury School, a private school with a campus located immediately adjacent to the quarry property, has intervened on the side of the Department. The order finds that New Hope has failed to conduct enough "reclamation and abatement" to satisfy the minimum standards outlined in a letter that the Department previously sent to New Hope dated January 29, 2016.

The January 29, 2016 letter followed on the heels of two earlier compliance orders issued by the Department to New Hope. Those earlier orders found that New Hope had failed after

multiple requests to submit a reclamation plan addressing how it would expeditiously abate the public nuisance that its mining was causing—the creation of numerous sinkholes in the vicinity of the quarry. The orders required New Hope to submit an adequate reclamation and abatement plan. New Hope appealed those orders but later withdrew the appeals after New Hope entered into a consent assessment of civil penalty with the Department wherein it admitted, among other things, that it had failed to provide an appropriate timetable for abating the public nuisance caused by the quarry's dewatering activities.

New Hope eventually submitted a reclamation and abatement plan, but the Department found it to be unacceptable. After another series of attempts to obtain an acceptable plan, the Department issued the January 29 letter. In the letter, the Department unilaterally revised New Hope's plan. The Department set specific reclamation targets (e.g. "conduct stream and reclamation work for a minimum of 160 hours per week") and limited New Hope to pumping no more than 500,000 gallons per day out of the quarry. New Hope appealed that letter and that appeal is pending at *New Hope Crushed Stone and Lime Company v. DEP*, EHB Docket No. 2016-028-L. The order in the current appeal directs New Hope to immediately conduct concurrent reclamation and abatement of the public nuisance to meet the minimum standards outlined in the January 29 letter, to submit a corrective action plan, and to begin submitting monthly reports.

In its notice of appeal, New Hope objects that the order incorrectly and unreasonably requires it to conduct concurrent reclamation and abatement of the nuisance. New Hope also challenges the reasonableness of other aspects of the order, arguing that it unreasonably requires the submittal of a detailed corrective action plan, unreasonably requires New Hope to make up the alleged reclamation deficiencies, and unreasonably requires the monthly reporting of the

number of truckloads used for placing fill and the amount of fill that was placed. New Hope also broadly asserts that the factual findings in the order are incorrect. It does not seem to be explicitly disputed that New Hope has failed to comply with the reclamation timetable established in its reclamation and abatement plan as modified by the Department's letter (although New Hope maintains that the timetable is unreasonable). It is not clear and possibly disputed whether New Hope has complied with the pumping limitation. In any event, the Department issued the compliance order that is the subject of this appeal finding that New Hope has failed to comply with its plan.

On January 30, 2017, Solebury School served its first set of interrogatories and requests for production directed to New Hope. Pursuant to the Board's rules, 25 Pa. Code § 1021.102(a), and the Rules of Civil Procedure, Pa.R.C.P. Nos. 4006 and 4009.12, New Hope was required to serve responses to the discovery requests on or before March 1, 2017. When New Hope failed to do so, Solebury School filed its first motion to compel on March 19, 2017. New Hope told us in its response to that motion that it had served answers to the School's discovery requests on March 28, 2017. We, therefore, denied Solebury School's motion to compel "without prejudice to the School's ability to submit a revised motion following its review of the discovery materials provided, if necessary."

In its discovery responses, New Hope objected to and refused to answer a number of Solebury School's requests, including Interrogatories 1, 2, 3, 9, 10, 11, 12, 13, 14, 15, and 16, and Requests for Production 3 and 4, claiming that they sought information that is not relevant in this appeal. The disputed discovery requests generally pertain to the quarry's pumping, water levels in the quarry, the rate of water infilling at the quarry, and precipitation. Despite a good faith effort, the School and New Hope were unable to resolve their dispute as to whether New

Hope needs to answer the discovery requests. Therefore, the School has now filed a second motion to compel, which is the subject of this Opinion.

The School's disputed discovery requests seek the following information:

- Interrogatory 1 – relating to the dewatering of the quarry pit
- Interrogatory 2 – relating to the measurements of the water level in the quarry pit
- Interrogatory 3 – relating to the measurements of the precipitation at the quarry pit
- Interrogatory 9 – the water levels in the quarry pit on April 15, 2016
- Interrogatory 10 – the water levels in the quarry pit on January 15, 2017
- Interrogatory 11 – the water levels in the quarry pit at the time when the interrogatory answers are served
- Interrogatory 12 – relating to the water level of the quarry pit at -85 MSL from October to December 2016
- Interrogatory 13 – relating to the mining of bench 5 and quarry consultant Lou Vittorio's testimony at the supersedeas hearing from EHB Docket No. 2016-028-L
- Interrogatory 14 – days the pumping limit was exceeded since January 29, 2016
- Interrogatory 15 – relating to water levels in the quarry pit in the third quarter of 2016
- Interrogatory 16 – relating to the quarry's remaining mineable reserves with respect to quarry infilling
- Request for Production 3 – all documents and communications relating to the dewatering of the quarry pit since January 29, 2016
- Request for Production 4 – all documents and communications relating to the water level measurements in the quarry pit since January 29, 2016

Solebury School says it is entitled to the disputed information because its discovery requests pertain to issues that are plainly relevant to the subject matter of this appeal. The School argues that the order under appeal simply enforces the requirements outlined in the Department's January 2016 letter, the ultimate goal of which was the abatement of the public nuisance of collapse sinkholes opening up on the School's campus and in the surrounding area as a result of the quarry dramatically lowering area groundwater levels. The School says that the

January 2016 letter recognizes that the nuisance will be abated when groundwater levels return to premining levels, which will only happen as the water in the quarry pit fills up. The School notes that certain reclamation obligations must be met concurrently with the quarry filling up. Thus, in the School's view, the rising water levels in the quarry and the reclamation activities occurring at the quarry are inextricably linked—they are both intermediate objectives that are to be managed concurrently in the service of the single underlying goal of abating the nuisance by expeditiously restoring groundwater levels; the January letter required those objectives to occur on a specific timetable and the order under appeal reinforces that. Therefore, the School contends that information pertaining to pumping, water levels, infilling, and precipitation is directly relevant because it goes hand-in-hand with reclamation as the quarry works to abate the nuisance.

In resisting disclosure and opposing the motion, New Hope argues that the only information that is relevant is "what reclamation took place in the second quarter of 2016 and whether the requirements of the amount of fill were proper." New Hope does not directly address the order's requirements regarding "concurrent reclamation and abatement of the nuisance." Instead, New Hope refers us to an e-mail from Nels J. Taber, Esq., the Department's counsel in this case, sent in response to communications between New Hope and the School during their attempts to resolve the discovery dispute without the Board's involvement. The e-mail reads as follows:

> Thank you for including the Department with regard to this ongoing dispute. Your letter of today prompted us to review the Compliance Order to refresh our recollection as to why it was issued last August.
>
> While you are certainly free to continue your dispute as to the adequacy of NHCS' answers to discovery, please understand that the Compliance Order was not issued due to any concerns regarding the pumping rate. The Compliance Order was issued due

> to NHCS' failure to move an adequate amount of reclamation fill and/or perform an adequate amount of stream restoration work. NHCS' pumping rate did not form a basis for the Department's issuance of the August 2016 Compliance Order.

Somewhat to our surprise, the Department also filed a response to the School's motion. The response is surprising for several reasons. First, the Department is not directly a party to the discovery dispute, so the fact that it filed any response at all is unusual. We are often presented with disputes between third-party appellants and permittees, for instance, where the Department does not respond, even when the dispute involves arguably important programmatic issues. Second, in this case, the School intervened on the side of the Department, yet the Department has gone out of its way to ask that the motion be denied. Third, the Department has stated that it "cannot concur that the information sought by the School is relevant." Not only does it seem odd that the Department would not be interested in information on the quarry's pumping, water levels, precipitation, etc., but it is curious that the Department would be opposed to the disclosure of the requested information, particularly in a case such as this, which has engendered enough public interest to prompt the Department to hold regular public meetings and maintain a special page on its website devoted to the developments at this site. Fourth, the response does nothing more than reiterate Department counsel's earlier e-mail communication, which is certainly not evidence and would undoubtedly be inadmissible for any number of reasons. No actual evidence has been provided, and no affidavits were attached to the Department's response. Fifth, the Department does not explain why its *post hoc* explanation of the *motivation* behind the issuance of its order, which we will of course review *de novo*, is relevant. Sixth, the response seems inconsistent with the order on its face, which at several points makes explicit its requirement for more expeditious reclamation *and* abatement of the nuisance.

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. "[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. Part of this oversight requires us to assess discovery in terms of a proportionality standard. *Tri-Realty Co. v. DEP*, 2015 EHB 517.

While it can be difficult to make broad proclamations about the appropriate scope of an appeal in the relative abstract of a discovery motion, we are mindful that the threshold for relevance in discovery is lower than that at a hearing on the merits. Indeed, we have previously recognized that "it will generally be enough to require information to be divulged if there is a reasonable potential that it will ultimately prove to be relevant." *Friends of Lackawanna v. DEP*, 2015 EHB 785, 789 (quoting *Borough of St. Clair v. DEP*, 2013 EHB 177, 179).

We believe there is a reasonable potential that the information sought by the School will ultimately prove to be relevant. We would think that mining, reclamation, and groundwater pumping are all functionally intertwined at almost any large quarry, and that it would not make sense to look at one of those activities without at least considering the other activities at the site. Here, for example, New Hope cannot properly reclaim the quarry if water levels rise too quickly

and submerge the areas that are to be reclaimed or otherwise impede safe reclamation. Maintaining a certain water level needs to be coordinated with reclamation obligations that must be fulfilled. We doubt that the Department would excuse a noncoal operator from completing reclamation because necessary water levels have not been maintained.

At New Hope's quarry, water pumping goes to the very heart of that aspect of the compliance order that requires abatement of the nuisance as a requirement separate from the reclamation obligation. The Department itself, in responses to discovery, says that abatement of the nuisance (the continuing proliferation of sinkholes) is *the* goal of the order. Reclamation is actually secondary, in the sense that reclamation needs to be completed while it still can be, given the rising water level in the quarry, which is integral to the abatement of the nuisance.

The Department's order is premised at least in part on a finding that New Hope has failed to comply with the minimum standards for "abatement." New Hope disputes that finding. New Hope's compliance with its plan is very much at issue, and the School's inquiries go right to that issue. We are, of course, never quite sure how these issues will play out in this appeal in the long run, but for purposes of resolving the instant discovery dispute, and absent any legitimate argument or explanation to the contrary from New Hope and the Department, we have no hesitation in finding that the information sought has a reasonable potential to ultimately prove to be relevant.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **NEW HOPE CRUSHED STONE AND LIME COMPANY** | : | |
| **v.** | : | **EHB Docket No. 2016-132-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOLEBURY SCHOOL, Intervenor** | : | |

**O R D E R**

AND NOW, this 24th day of May, 2017, upon consideration of Solebury School's second motion to compel and the responses thereto, it is hereby ordered that the motion is **granted**. New Hope shall, on or before **June 5, 2017**, serve full and complete responses to Interrogatories 1, 2, 3, 9, 10, 11, 12, 13, 14, 15, and 16, and Requests for Production 3 and 4 contained in Solebury School's First Set of Interrogatories and Requests for Production.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: May 24, 2017**

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

**For the Commonwealth of PA, DEP:**
Nels J. Taber, Esquire
Alicia R. Duke, Esquire
(*via electronic filing system*)

**For Appellant:**
Philip L. Hinerman, Esquire
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**For Intervenor:**
Steven T. Miano, Esquire
Robert A. Wiygul, Esquire
Peter V. Keays, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **BRADLEY AND AMY SIMON** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2017-019-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee** | : | **Issued: May 25, 2017** |

**OPINION IN SUPPORT OF ORDER**
**GRANTING IN PART PETITION FOR SUPERSEDEAS**

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis**

The Board issues an Opinion in support of a previous Order granting in part a petition for supersedeas of an erosion and sediment control permit for earth disturbance associated with the construction and installation of two natural gas liquids pipelines. The petitioner presented evidence of significant erosion and sediment control failures on his property during an earlier pipeline project by the same permittee running along the same route. Based on these failures and the unique conditions of the petitioner's property, we superseded the permit as it pertains to the area of the petitioner's property to the limited extent that it was inconsistent with additional precautions that we imposed. The petition in all other respects was denied.

**O P I N I O N**

Bradley and Amy Simon ("Simon") have appealed the Department of Environmental Protection's (the "Department's") issuance to Sunoco Pipeline, L.P. ("Sunoco") of two permits associated with earth-moving work related to the construction and installation of two parallel natural gas liquids pipelines known as the Mariner East 2 project. The permits are an erosion

and sediment control individual permit (Permit No. ESG 0500015001) regulated under Chapter 102 of the Department's regulations, 25 Pa. Code Chapter 102, and a water obstruction and encroachment permit (Permit No. E63-674) regulated under Chapter 105 of the regulations, 25 Pa. Code Chapter 105.[1] Mariner East 2 ("ME2") will span the southern half of the Commonwealth, running more than 300 miles and terminating at the Marcus Hook Industrial Complex in Delaware County. The ME2 pipelines will generally be located adjacent to the existing Mariner East 1 ("ME1") pipeline, which was installed in 2014. Simon's appeal concerns the ME2 permits only to the extent that they authorize Sunoco to do work on his property in Nottingham Township, Washington County, which is an area spanning approximately 770 feet. The permits were issued on February 13, 2017 and Simon appealed on March 15, 2017.

Simon has roughly described his property as a topographic bowl. The Simon house sits on the north side of the bowl and Sunoco's ME1 pipeline runs along the west side of the bowl and then doglegs and runs along the south side of the bowl opposite of Simon's house. Sunoco has a 50-foot right-of-way ("ROW") for the pipeline with an additional 25-foot area for a temporary workspace. The ME2 pipelines will be installed in the existing ROW. In the bottom of the topographic bowl are two ponds that are connected by a spillway. Simon owns the pond on the eastern side of the spillway and the pond on the western side of the spillway is owned by the neighboring Minicks. The Minick pond drains into the Simon pond, which in turn drains into Mingo Creek, a High Quality stream.

[1] The Department contemporaneously issued two other Chapter 102 permits (one being issued for each of the Department's southern regions) and sixteen other Chapter 105 permits (one for each affected county) for the project. The entire project will pass through the following counties: Allegheny, Berks, Blair, Cambria, Chester, Cumberland, Dauphin, Delaware, Huntingdon, Indiana, Juniata, Lancaster, Lebanon, Perry, Washington, Westmoreland, and York. The Chapter 102 permit at issue in the supersedeas authorizes activities in Allegheny, Cambria, Indiana, Washington, and Westmoreland counties.

On April 5, 2017, Simon filed a petition for supersedeas. His petition addresses the Chapter 102 permit, but not the Chapter 105 permit. The petition describes Sunoco's construction of the ME1 pipeline and failures that occurred during that project that resulted in sediment-laden discharges to the Simon pond and to the adjacent Minick pond. Simon's petition argues that the documented failures of ME1 will be repeated during the construction of ME2, resulting in violations of the law and causing irreparable harm to Simon. We held a conference call with the parties on April 7, 2017 to discuss how to move forward on the petition. Based upon a consensus among the parties in terms of scheduling, we conducted a site view of the Simon property and portions of the Minick property on April 24, and we held a hearing on the petition on April 25 and 26 in Pittsburgh.

On April 28, 2017, we issued an Order granting in part Simon's petition for supersedeas. Recognizing the significant failures on the Simon property during the construction of ME1, we superseded E&S Permit No. ESG 0500015001 specifically with respect to the area on Sunoco's plans between Stations 695+00 and 726+00 to the extent that the permit was inconsistent with our Order.[2] Our Order required Sunoco to begin and complete all earth disturbance work with the exception of restoration activities within 30 days. We took the language contained in a Note on one of the plans, requiring either the Department or the Washington County Conservation District (the "Conservation District") to inspect the controls on the site prior to any earth disturbance, which was indirectly part of the permit because the permit incorporates by reference all of the plans, and made it an express condition of our Order. We also required all of Sunoco's inspection reports to be submitted to the Department or Conservation District within 24 hours with a copy sent to Simon. Finally, we required a licensed professional as that term is used in the permit to be present on site or immediately available during the entire 30-day construction

[2] Stations 695+00 through 726+00 cover the portion of the ME2 project that stands to affect Simon.

period. We denied Simon's petition in all other respects, which will allow the project to move forward subject to compliance with the conditions of our Order. This Opinion is issued in support of that Order.

**Supersedeas Standard**

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, with a strong showing of likelihood of success on the merits. *Hudson v. DEP*, 2015 EHB 719, 726; *Mountain Watershed Ass'n v. DEP*, 2011 EHB 689, 690-91 (citing *Pa. Mining Corp. v. DEP*, 1996 EHB 808, 810); *Neubert v. DEP*, 2005 EHB at 601; *Lower Providence Twp. v. DER*, 1986 EHB 395, 397. A supersedeas is an extraordinary remedy that will not be granted absent a clear demonstration of appropriate need. *Dougherty v. DEP*, 2014 EHB 9, 11; *Mellinger v. DEP*, 2013 EHB 322, 323; *Rausch Creek Land, LP v. DEP*, 2011 EHB 708, 709; *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802; *Tinicum Twp. v. DEP*, 2002 EHB 822, 827; *Global Eco-Logical Servs. v. DEP*, 1999 EHB 649, 651; *Oley Twp. v. DEP*, 1996 EHB 1359, 1361-1362.

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 ultimately 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 Grp.*, 467 A.2d 805, 808-09 (Pa. 1983). It is important to keep in mind that our ruling on a supersedeas petition is merely a prediction, based on a limited record and under rushed circumstances, of who is likely to prevail at the eventual hearing on the merits. *Center for Coalfield Justice v. DEP*, EHB Docket No. 2016-155-B, slip op. at 5 (Opinion in Support of Order, Feb. 1, 2017); *Tinicum Twp. v. DEP*, 2008 EHB 123, 127; *Global Eco-logical Servs., Inc. v. DEP*, 1999 EHB 649, 651.

**Likelihood of Success on the Merits**

Simon presented three main areas of critique in support of his supersedeas petition. He argued that (1) the erosion and sediment controls for ME2 will not be protective of his property during construction; (2) the project after construction will increase the rate and volume of stormwater runoff onto his property; and (3) the Department should not have issued a permit to Sunoco because of what Simon asserts is a poor history of compliance.[3] At the hearing Simon presented the testimony of three witnesses—appellant Bradley Simon, Timothy Kyper, P.E., and Marc Henderson, P.E. Bradley Simon testified about the history of the site and his experience with the construction of ME1. Timothy Kyper testified on the adequacy of the erosion and sediment controls, and Marc Henderson testified about the management of post-construction stormwater on the site.

[3] In Simon's petition he also argues that the ME2 project will run afoul of the antidegradation requirements at 25 Pa. Code §§ 102.4(b)(6) and 102.8(h) (incorporating 25 Pa. Code § 93.4c(b)). However, we heard virtually no argument or evidence from Simon on this point at the supersedeas hearing.

***Erosion and Sediment Controls***

Much of Simon's argument stems from his experience with Sunoco's 2014 ME1 pipeline project. Simon alleges that the erosion and sediment (E&S) controls that Sunoco is proposing for ME2 are nearly identical to the controls that demonstrably failed during the earth moving activity associated with ME1. Simon has very legitimate concerns in ensuring that the issues he experienced during ME1 will not be repeated during ME2. Simon presented a large number of photos that document the work done on his property in relation to ME1, and the effects that his property suffered from the ME1 project. Many of the photos depict conditions from late July through late September of 2014. Simon presented photos taken July 27, 2014 showing earth disturbance work on the property already underway. (Simon Exhibit No. ("Simon Ex.") 29a.) As of September 5, 2014, Sunoco had still not placed the ME1 pipeline in the ground. (Simon Ex. 29j.)

Photos from September 21, 2014, two months after initial earth disturbance, show a site that is still highly disturbed with exposed, loose soils not at final grade. (Simon Ex. 29k(4).) The photos show failing erosion and sediment controls, with sediment-laden water overtopping silt fences and silt socks on August 2, 2014 (Simon Ex. 29d(1), 29d(8)), and sediment-laden water running underneath silt socks on August 6, August 12, and September 21 (Simon Ex. 29f(3), 29g(2), 29k(4)). Simon showed photos of sediment pollution pouring into the Simon and Minick ponds (Simon Ex. 29d(6), 29d(10), 29f(1), 29f(8), 29f(11)), which Simon attributes as being the cause of his pond to the development of algae blooms in his pond (Simon Ex. 29n(1), 29n(2)).

Sunoco made some effort to repair or fortify the controls (Simon Ex. 29f(9)), but those efforts were apparently unsuccessful. The E&S controls continued to be overwhelmed during the construction of ME1. Nearly a year after trenching for the pipeline began, in June 2015, the

E&S controls were still failing in the same area before uniform permanent vegetation had been established. (Simon Ex. 29o(3), 29o(4).)

No party disputes that there were serious deficiencies related to the control of erosion and sediment and the management of stormwater during the construction of ME1 in the area of Simon's property. The Department and Sunoco acknowledge that Sunoco violated provisions of the Clean Streams Law and the Chapter 102 regulations during the ME1 project in 2014, including violations on the Simon and Minick properties. These violations were resolved in a June 2015 Consent Assessment of Civil Penalty (CACP) between Sunoco and the Department. (Department Exhibit No. ("DEP Ex.") 50.) We do not doubt that all parties, including Sunoco, desire to avoid having the ME1 failures occur again on the Simon property.

While the Department and Sunoco acknowledge the problems from ME1, they vigorously dispute that the controls are the same this time around. Instead, Sunoco contends that it has specifically designed improved and more robust controls for ME2 so as to avoid a repeat of the large-scale runoff and sedimentation to waters of the Commonwealth that occurred the last time with respect to the Simon property. These new controls include additional waterbars, diversion berms, and temporary slope pipes.

Christopher Antoni, P.E., Sunoco's expert erosion and sediment control permitting engineer, acknowledged that there were both design and construction flaws in the ME1 controls. For example, he said that soil was placed upslope and that the filter socks were not anchored, which concentrated flows to the Simon property, however, Antoni credibly opined that the ME2 controls will not fail like the ME1 controls did so long as there are not storm events in exceedance of a 2 year storm, which is the design standard required by the Department's Post-Construction Stormwater BMP Manual. Antoni detailed the controls that will be employed for

ME2. He said that the objective of the controls is to control water both above the limits of disturbance and within the limits of disturbance. For the water above the limits of disturbance he testified that an upslope diversion will capture water and channel it down to a level spreader, which evenly distributes water to mimic sheet flow. He said that filter socks will be placed above the limits of disturbance with erosion control blankets underneath along the slope, and that water bars and temporary slope pipes will convey water across the limits of disturbance from upslope to downslope. Eighteen-inch filter socks will be placed below the limits of disturbance to further filter the water. Within the limits of disturbance compost filter socks will be placed.

Simon did not present much evidence showing that the ME2 controls, as distinct from the failed ME1 controls, will still be insufficient or likely to fail. Simon presented the expert testimony of Timothy Kyper, P.E., an engineer with more than 30 years experience designing erosion and sediment controls. Kyper's primary critiques of the ME2 project are (1) that the plans allow for too much discretion on the part of the field contractors to choose the size of the temporary slope pipes that will be used to divert water across the ROW work area; (2) small sediment ponds should have been implemented along the stretch of work in the area of the Simon and Minick properties; and (3) there appears to be an area unprotected by E&S controls on a portion of Sunoco's ES-1.44 plan sheet (Simon Ex. 50).

On Kyper's specific points, Antoni testified that the plans only allow for contractors to choose 12-inch pipes for the temporary slope pipes; there is no discretion. Antoni also credibly testified that he did not think even the small sediment basins Kyper proposed were feasible on the site. Even if they were, those sediment basins would need to be constructed outside of the ROW and the limits of disturbance, and would require a greater intrusion on the property. Antoni also clarified the area identified by Kyper as being left unprotected. He noted that the

alleged gap on the plans has already been accounted for because the slope of that specific area will actually direct water to a water bar that is then directed to a filter sock. The plans do not indicate a control in that specific area because it would not be needed based on the natural flow.

Perhaps more crucially, Kyper did not present anything close to a serious critique of the ME2 project and its controls. Although we find his opinions to have been sincere, his relatively modest critiques of the project do not amount to the degree of concern that would warrant the outright suspension of the permit as it relates to the Simon and Minick properties. Kyper acknowledged that it was very evident from looking at Sunoco's plans that the controls that are to be installed for ME2 are significantly different from the controls for ME1. Indicative of Kyper's sincerity, on cross-examination he testified that the ME2 controls appeared to meet the regulations, and that, if the controls were constructed properly, they would be effective and they would prevent sedimentation to the Simon and Minick ponds.

Although Simon did not present evidence that the new and reworked controls for ME2 were likely to be insufficient to protect against sediment-laden runoff, the profound failures Simon experienced with ME1 give us pause. Sunoco's work on ME1 on the Simon property extended over an unnecessarily long period of time without adequate controls in place. In order to prevent this from happening again, we have required Sunoco and its contractors to begin and complete the active construction work, up to the beginning of site restoration activities, within 30 days. By completing the active construction work efficiently, the length of time that sediment has the potential to mobilize in a storm event is decreased. Sunoco agreed to this requirement at the hearing on the supersedeas petition in response to the Board's questions. It represented that it would complete the work in 30 days.

The Simon site also presents difficulties such as steep slopes that deserve careful attention. For instance, Simon complained of what he refers to as a "slip" that occurred on a steep slope south and upgradient of the Minick pond in 2014 during the construction of ME1. A slip is generally a loss of stability on a slope that results in the downward movement of soil. Simon also testified that slips occurred in the same area in 2003 or 2004. Simon stated that Sunoco has never fortified the area where the slips occurred. ME2 will follow precisely the same route as ME1. The only thing that is different in terms of the setting and construction of the pipeline are the E&S controls that Sunoco will implement. For these reasons, we have required Sunoco to have a licensed professional on-site or immediately available during the construction period, and we required all of Sunoco's inspection reports to be submitted to the Department and Conservation District and copied to Simon within 24 hours.

***Post-Construction Stormwater Management***

Regarding the post-construction stormwater management (PCSM) at the site, Simon presented the expert testimony of Marc Henderson, P.E., a civil engineer focusing on water resources engineering. Henderson performed a desktop review of the site, consisting of reviewing satellite imagery and the available permit application materials, and visited the site on a day with precipitation. Henderson noticed recent streambank erosion and incised stream channels from high flows in the UNTs on the property. He contended that there was quite a bit of erosion of stream banks downslope of the pipeline ROW, but no eroded banks upslope of the ROW. However, Henderson later conceded that he could not determine if the channel erosion was specifically a result from ME1, either during its construction or in its post-construction condition, as opposed to other features on the site and in the surrounding area that could

contribute to channel erosion. He also admitted that one of the photos in his report purporting to show an uneroded swale upslope of the pipeline was actually downslope. (Simon Ex. 38(b).)

Henderson modeled the change in land use from ME1 using a model known as MapShed. Henderson analyzed the loss in forested land that occurred from Sunoco's clearing of the ROW for the installation of ME1. Henderson determined that, as a result of the ME1 pipeline, on an annual basis there had been an increase in runoff from the ROW to the Simon and Minick ponds of approximately 700,000 gallons per year. Henderson's calculations assumed that the ROW area would function as a lawn in poor condition, not a meadow in good condition, the condition to which Sunoco will restore the site under its restoration plan. The hydrologic differences between a lawn in poor condition, a meadow in good condition, and a forest in good condition are a function of what several experts referred to as their curve numbers, which is a hydrologic metric for expressing the amount of runoff that will result from a precipitation event on different types soils and land uses. Generally, the lower the number the better the soil will infiltrate and the less runoff will occur, and the higher the number the more impervious the surface. *See Jordan v. DEP*, 2010 EHB 51, 56. A "good" performing forest in a C Group soil has a curve number of 70. (DEP Ex. 22 at 2-7.) A meadow in good condition in a C Group soil has a curve number of 71. (*Id.*) A lawn in poor condition has a curve number of 86. (*Id.* at 2-6.)

However, Henderson conceded that the MapShed model is mainly a planning model, not one that is typically used or designed for the scale of an individual site. He acknowledged that the model was not recommended for areas of less than 5 $mi^2$ and the area evaluated here was approximately 200 acres. When asked whether he would use the MapShed model if he were submitting his own Chapter 102 permit application, Henderson said he would not. Therefore, we cannot credit his projection of 700,000 gallons of additional stormwater runoff from the ROW.

Ken Murin, the Department's Division Chief for Waterways and Wetlands, helped oversee the development of the Department's Stormwater BMP Manual. (Sunoco Exhibit No. ("Sunoco Ex.") 13.) Murin credibly testified that in terms of runoff from the Mariner ROW, there would be no significant difference between a forest and a meadow in good condition. He said that it could potentially make a difference over a large area, but not at a site of this scale. Murin's testimony is consistent with what we found in an earlier supersedeas proceeding involving a pipeline project:

> The approved plans require restoration of the disturbed areas in the new right-of-way to a meadow in good condition. While the runoff coefficient for a forest in good condition is very different than the coefficient (or curve numbers) for compacted bare dirt, the runoff coefficient for a meadow in good condition is nearly the same as that for a forest in good condition. The Board agrees that all pervious surfaces are not the same, but a forest in good condition is nearly the same as a meadow in good condition from a runoff coefficient perspective…

*Delaware Riverkeeper Network v. DEP*, 2013 EHB 60, 77 (citations to the record omitted). Indeed, the appropriate curve numbers for this site as agreed to by the petitioners were 70 for forest and 71 for meadow in good condition. Although there may be a small increase in runoff from the loss of forested area, the Department considers meadow in good condition to be restoration even if the area was forested in its predevelopment condition, and Sunoco's restoration plan appears to meet that requirement. "[R]estoration of a mature forest is different than restoration of a site from a stormwater perspective, and the PCSM regulations are directed at restoration of stormwater conditions not the restoration of mature forests." *Delaware Riverkeeper Network*, 2013 EHB 60, 79.

Henderson also critiqued the plan drawings and the site restoration plan for lack of detail. He argued that the site restoration plan did not contain the information that would typically be

reflected in a PCSM plan. He said there was no adequate information on preventing an increase in runoff, and that there was nothing explaining how vegetation will survive and perform. He noted that the proposed seed mix does not necessarily reflect a native seed mix. Henderson also argued that there was not enough information on the plans regarding soil decompaction. He noted that the topsoil had already been segregated during the construction of ME1, and that this soil would have undergone a certain amount of deterioration before the construction of ME2 even started. However, on cross-examination he admitted that it would be appropriate for decisions on soil decompaction to be made in the field in response to the specific conditions that were present on the site. Henderson did not perform any soil compaction testing on the site to assess the restored ROW following ME1 construction.

Sunoco cites 25 Pa. Code § 102.8(n) and argues that under this regulation it is not required to develop a PCSM plan for a pipeline project as long as it undertakes site restoration. The regulation provides:

> *Regulated activities that require site restoration or reclamation, and small earth disturbance activities.* The portion of a site reclamation or restoration plan that identifies PCSM BMPs to manage stormwater from oil and gas activities or mining activities permitted in accordance with Chapters 78 and 86—90; timber harvesting activities; pipelines; other similar utility infrastructure; Department permitted activities involving less than 1 acre of earth disturbance; or abandoned mine land reclamation activities, that require compliance with this chapter, may be used to satisfy the requirements of this section if the PCSM, reclamation or restoration plan meets the requirements of subsections (b), (c), (e), (f), (h), (i) and (l) and, when applicable, subsection (m).

25 Pa. Code § 102.8(n). Sunoco points out that pipelines are covered by this regulation and therefore the PCSM requirements may be satisfied through a reclamation or restoration plan. Sunoco contends that the Department considers restoration to be satisfied if a site is established to a meadow in good condition after construction, even if the site was forested in its

predevelopment state. This interpretation appears to be consistent with applicable law. Sunoco's restoration plan includes restoring the entire ROW on the Simon property to a meadow in good condition.

Jacqueline Brody, P.E., the engineer at Sunoco's consultant who is the technical lead for site restoration for the ROW, temporary work space, and access roads, responded to Henderson's concerns of soil compaction. She testified regarding the site restoration and decompaction that would be done following the placement of the ME2 pipeline. The sequence would be as follows: site restoration will begin after final grades (approximate original contour) are achieved; decompaction and any necessary soil amendments will be performed in the field; the area will be scarified, backfilled, and seeded; E&S controls will be maintained until 70-percent vegetative cover is established; after removing the E&S controls Sunoco will revegetate the areas formerly covered by the controls. (Sunoco Ex. 28.) Brody credibly opined that the ROW was in a meadow in good condition at the time of her visit to the site in April of this year.

We found Mr. Henderson to be generally sincere in his opinions in his matter, and he was forthcoming when questioned on factual and analytical errors. However, his critiques of the ME2 project did not rise to the level of convincing us at this stage to prevent the project from going forward. His criticisms over the lack of detail in the plans to ensure for successful restoration, and his reliance on a model that he admitted was not well-suited for this type of application, are not the sorts of arguments that have a likelihood of succeeding on the merits.

On a final point regarding post-construction stormwater management, Simon raised in his petition an argument that Sunoco's ME2 project does not comply with the Stormwater Management Act, 32 P.S. §§ 680.1 – 680.17. Simon says that Sunoco did not provide

information regarding the ME2 project showing it will comply with Section 13 of the Act, which provides:

> Any landowner and any person engaged in the alteration or development of land which may affect storm water runoff characteristics shall implement such measures consistent with the provisions of the applicable watershed storm water plan as are reasonably necessary to prevent injury to health, safety or other property. Such measures shall include such actions as are required:
>
> (1) to assure that the maximum rate of storm water runoff is no greater after development than prior to development activities; or
>
> (2) to manage the quantity, velocity and direction of resulting storm water runoff in a manner which otherwise adequately protects health and property from possible injury.

32 P.S. § 680.13. Simon argues that Sunoco also failed to satisfy 25 Pa. Code § 105.13(e)(1)(v), which requires a permit applicant to analyze a project's impact on a county or municipality's watershed stormwater management plan and solicit comments from the county or municipality. Simon contends that Sunoco did not obtain a letter documenting consistency with the Washington County Stormwater Plan, and that the ME2 project violates that plan.

Initially, we note that while Simon appealed both the Chapter 102 and 105 permits, his petition for supersedeas plainly asks the Board for relief strictly in terms of the Chapter 102 permit. The 105 permit is not discussed in any detail in Simon's petition. Sunoco accurately points out that the there are no aspects of the county-wide 105 permit that relate to Simon's property because the path of the ME2 pipeline does not intercept any wetlands or other water features in that stretch of the route.

In addition, at the supersedeas hearing we did not hear much on the Stormwater Management Act, and what we did hear did not lead us to believe that Simon was likely to succeed on the merits of this argument. As discussed above, Simon did not show us that the ME2 controls are likely to fail. He did not demonstrate that it is likely that the ME2 project will

increase the maximum rate of stormwater runoff, or that the controls will not manage the quantity, velocity, and direction of runoff to adequately protect public health and property during a 2-year storm event. We issued a partial supersedeas so that, if the controls do not perform as designed, all parties will be aware of that and appropriate corrective measures can be taken immediately. Regarding the requirement of 25 Pa. Code § 105.13(e)(1)(v), if it even applies for our current purposes, Sunoco presented a letter from Nottingham Township confirming that Sunoco's plan conformed to the Washington County Stormwater Plan. The letter reads in part:

> The Township Engineer for Nottingham Township, Widmer Engineering Inc., has reviewed the documents provided by Tetra Tech, Inc. for the proposed Sunoco Pipeline Project through a portion of Nottingham Township, Washington County, PA. The proposed project appears to be in general conformance with the Township's Stormwater Management Ordinance and Floodplain Ordinance, provided all required PA DEP permitting is approved.

(Sunoco Ex. 20.) Marc Henderson testified that county and municipal stormwater management plans are typically incorporated into a municipality's local ordinances. Thus, it appears that Sunoco has nevertheless satisfied the requirements of the regulation despite Simon's argument to the contrary.

***Compliance History***

Simon also argues that Sunoco's compliance history should have prevented the Department from issuing the ME2 permit. Section 609 of the Clean Streams Law authorizes the Department to withhold the issuance of a permit under certain circumstances. 35 P.S. § 691.609. Under Section 609(2), the Department shall not issue a permit if

> the applicant has shown a lack of ability or intention to comply with such laws as indicated by past or continuing violations. Any person, partnership, association or corporation which has engaged in unlawful conduct as defined in section 611 or which has a partner, associate, officer, parent corporation, subsidiary corporation, contractor or subcontractor which has engaged in such

> unlawful conduct shall be denied any permit required by this act unless the permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the department.

35 P.S. § 691.609(2). Simon contends that Sunoco did not disclose its complete history of violations for the ME1 construction and thus the Department was not able to perform an effective review of Sunoco's compliance history before issuing the ME2 permit.

Ann Roda, the Department's Director of the Office of Program Integration, testified regarding her review of Sunoco's compliance history for the entire ME2 project. She requested that a report be run from the Department's eFacts system (the Department's compliance tracking system) noting all open violations associated with Sunoco's various corporate entities. Roda received a list of any open, unresolved violations and provided the list to the three southern regional offices to review and determine if there were any missing violations, or if any of the listed violations had already been resolved or were being addressed. Roda communicated to Sunoco that all of the outstanding violations needed to be resolved before the ME2 permits would be issued.

Some of Sunoco's open violations involved the Simon and Minick properties. Abbey Owoc, the Department's Southwest Regional Environmental Group Manager for the Waterways and Wetlands Program, reviewed Sunoco's compliance history for the ME2 permit for the Southwest Region. She testified that the Department entered into a Consent Order and Agreement (CO&A) with Sunoco on February 9, 2017 to address the sediment-laden discharges to the Simon and Minick ponds. (Sunoco Ex. 37.) The CO&A obligated Sunoco to either enter into agreements with Simon and Minick to compensate Simon and Minick for the work they would undertake to remove the sediment from their ponds, or submit to the Department a revised plan for Sunoco's removal of the sediment from the ponds. Owoc testified that entering into the

CO&A resolved Sunoco's violations pertaining to the Simon and Minick properties. Ann Roda testified that all of Sunoco's violations were eventually resolved to the Department's satisfaction. The Department issued the ME2 permits on February 13, 2017. Sunoco entered into agreements with Simon and the Minicks on or around March 9, 2017. (Sunoco Ex. 38, 39.) Owoc stated that these agreements satisfied Sunoco's obligations under the CO&A, and the CO&A was terminated on April 18, 2017. (Sunoco Ex. 49.)

As we have noted in the past, "a remand for further review of a compliance history will almost never be appropriate, particularly where the Department has conducted some investigation but that investigation is alleged to have been inadequate. Any party who rests on the fact of an inadequate investigation alone does so at its almost certain peril." *Delaware Riverkeeper Network, supra*, 2013 EHB at 88-89 (quoting *O'Reilly v. DEP*, 2001 EHB 19, 45). Simon did not present a strong showing of likelihood of success on the merits on this issue. He did not demonstrate that Sunoco has shown a lack of ability or intention to comply with the law. At least with respect to the issues as presented in this case thus far, the Department conducted what appears to be a thorough review of the outstanding violations of Sunoco Pipeline, its parent company, and related subsidiaries. The Department and Sunoco worked to correct those violations to the Department's satisfaction prior to the issuance of the permit, which is what is required under Section 609 of the Clean Streams Law.

Somewhat relatedly, Simon spent some time criticizing a plan that was developed by Letterle & Associates and submitted to the Conservation District in January 2016 for restoring Simon's pond. (Simon Ex. 32.) The plan contained language certifying that it had been reviewed and approved by the property owner, but Simon asserted that he was never provided with the Letterle plan and that he never gave any sort of consent to what was outlined by the plan. Simon

argued that Sunoco had submitted a plan to the Department containing a false certification. However, Simon's argument on this point bears little relevance to the current appeal and the supersedeas proceedings. Matthew Gordon, P.E., Sunoco's principal engineer and project manager for the Mariner project, testified that the restoration of Simon's pond was not part of the ME2 application or permit. Abbey Owoc also testified that the Letterle plan was not part of the ME2 permit. We also heard testimony that the Letterle plan was never formally evaluated by the Department because Simon committed to the Department that he would commission the development of his own plan to restore his pond and obtain the appropriate approvals from the Department. Therefore, we do not see why the Letterle plan would have any bearing on whether it was reasonable and lawful for the Department to issue the ME2 permit or whether the permit should be superseded.

**Irreparable Harm to Petitioner or Public**

Simon's likelihood of success on the merits regarding the failure of Sunoco's E&S controls is linked to the irreparable harm he stands to suffer. Simon presented a significant amount of evidence of controls failing during ME1 and the harm he continues to suffer from the sedimentation of his pond. The evidence suggests that there are unique topographic features on his property and the immediately surrounding properties through which ME2 will be routed that demand heightened precautions. The slopes are steep and they lead up to two ponds that are hydrologically connected to a High Quality stream. Simon also presented evidence of harm to his neighbors, the Minicks and the Thomases. The harm to the Minick pond has been discussed in detail above. The Thomas property to the east of the Simon property experienced flooding as late as June 2015 when Sunoco's controls were still in place while permanent vegetation was establishing. (Simon Ex. 29o(2).)

However, it appears that both Sunoco and the Department paid special attention to the Simon property and the immediately surrounding properties this time around. Sunoco's plan sheets for the area (ES-1.42, ES-1.43, and ES-1.44) contain a Note that reads:

> DEP and/or the Washington County Conservation District must inspect and approve E&S controls once they are in place before earth disturbance is allowed to proceed in the area of Valley View Road to the west to Minnick Road to the east.

(Sunoco Ex. 29 at ES-1.42, ES-1.43, ES-1.44.)[4] This Note is to ensure that the E&S controls are properly installed before any earth disturbance work in the area commences. We made this Note a condition of Sunoco moving forward on the appeal site in our Order granting in part the supersedeas.

The Department provided the following comment to Sunoco in January 2017:

> In the area of Washington County where construction of ME1 caused sediment pollution at the ponds owned by Mr. Simon and Mr. Minick the E&S Control Plan (Plan) shows a "temporary upslope diversion berm" (clean water) entering a "temporary slope pipe" that will discharge above the area of these affected ponds. The only detail that we could find in the Plan for the slope pipe specifies that the pipe "shall outlet to a sediment basin, trap or collection channel". It is unclear whether this is proposed in this location. The applicant should provide clarification on how the outlet of this pipe will be constructed to ensure that any discharge will not cause erosion of the area. **As this is an area where problems have occurred, a site specific design and detail should be provided.** Copies of the pertinent drawings are attached.

(DEP Ex. 61 at 20 (emphasis added).) Sunoco responded to the Department in February 2017 with a document composed by its consultant, Tetra Tech. The response to the above comment provides:

> The discharge system for the temporary slope pipe was revised to return the discharge to sheet flow. Significantly more ECDs [erosion control devices] in this area were provided with

[4] We note that it appears "Minnick Road" is actually Minick Lane.

> [Sunoco's] December submission. The area was reviewed based on ME1 concerns and additional ECDs included as needed. A note was added requiring inspection by [the Washington County Conservation District] of the ECDs when installed and prior to clearing operations. The revised sheets are posted on the Sharepoint site…

(DEP Ex. 62 at 26.) We believe that the particular attention paid to the Simon and Minick properties this time around, coupled with the Board's conditional supersedeas, will help ensure that Simon does not suffer the harm that he did during the ME1 project.

We think that Sunoco and the Department fairly acknowledge past mistakes and have made significant efforts to prevent a repeat of the failures of ME1. The extra layer of protection that we have added will hopefully ensure that the earth disturbance in the area of the Simon property is done expeditiously and with adequate oversight and response in the event that problems arise. These added protections should help further minimize the occurrence of any irreparable harm to Simon and his property.

**Irreparable Harm to Sunoco**

Due to the time constraints of the supersedeas hearing, Sunoco made an offer of proof that it would present testimony regarding the financial harm it stood to suffer due to the project being delayed, and the overall economic impact that the Commonwealth would suffer from being deprived of the tax revenue generated by the project. We heard similar testimony to this effect in a related supersedeas proceedings. *Clean Air Council, et al. v. DEP and Sunoco Pipeline, L.P.*, EHB Docket No. 2017-009-L. We have no reason to doubt that the potential economic impact to Sunoco and to certain sectors of the public are substantial if this project were to be held up. We do not believe that the modest additional precautions that we have imposed in our supersedeas order, the major portion of which was agreed to by Sunoco at the hearing, will result in any material harm to Sunoco or its project, but will provide considerable additional comfort to

Simon. The precautions will allow the project to move forward, subject to compliance with our Order pending the hearing on the merits.

A copy of our April 28, 2017 Order is attached.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: May 25, 2017**

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **BRADLEY AND AMY SIMON** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2017-019-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee** | : | |

**O R D E R**

AND NOW, this 28th day of April, 2017, following a hearing on the Appellants' petition for supersedeas, and in light of the problems the Appellants experienced on their property during the construction of Permittee's Mariner East 1 pipeline, it is hereby ordered that the Appellants' petition for supersedeas is **granted in part**. E&S Permit No. ESG 0500015001 (the "Permit") is superseded with respect to the area on Permittee's plans between Stations 695+00 and 726+00 (the "EHB Appeal Site") to the extent that the Permit is inconsistent with the following:

1. DEP and/or the Washington County Conservation District must inspect and approve E&S controls once they are in place before earth disturbance is allowed to proceed in the area of Valley View Road to the west to Minnick Road to the east.[1]

2. The permit condition at Part C, XI is revised as follows:

> The time period between the **beginning of any earth disturbance activities on the EHB Appeal Site until the disturbed areas on the EHB Appeal Site are seeded and mulched after achieving final grades as described in Section 4.0 of Permittee's Erosion and Sediment Control Plan for the Southwest Region: Spread 1 & 2 (the "Active Construction Period")** shall not exceed thirty (30) calendar days. Upon temporary cessation of any earth disturbance activity, including topsoil and soil stockpiles, for which the cessation of the earth disturbance activities will exceed four (4) calendar days, the disturbed area shall be temporarily stabilized in accordance with the E&S Plan and with 25

[1] This language already appears on the Notes to Plan Sheets ES-1.42, ES-1.43, and ES-1.44, and is hereby made a condition of the Permit.

Pa. Code § 102.22(b). Proper E&S BMPs shall be implemented and maintained throughout the entire project until permanent stabilization and Notice of Termination approval.

3. The permit condition at Part A, III. C. 4 is revised as follows:

The permittee shall document all visual inspections on an inspection report form that is provided by DEP. In addition to the information required above, the permittee shall document the date, time, name and signature of the person(s) conducting the inspection. All inspection reports shall be made available on the project site for review by DEP and an authorized conservation district. **All such inspection reports related to the EHB Appeal Site during the Active Construction Period shall, within 24 hours, be submitted for review to the Department and the Washington County Conservation District with a copy sent to the Appellants.**

4. The permit condition at Part A, III. D is revised as follows:

A licensed professional or designee shall be present on-site and responsible during critical stages of implementation of the approved PCSM Plan. The critical stages may include the installation of underground treatment or storage BMPs, structurally engineered BMPs, or other BMPs as deemed appropriate by DEP or the authorized conservation district. **In addition, a licensed professional or their designee shall also be present on-site or available for immediate consultation during the Active Construction Period on the EHB Appeal Site.**

The Appellants' petition for supersedeas is in all other respects **denied**. An Opinion in support of this Order will follow.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: April 28, 2017**

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **EHB Docket No. 2014-140-CP-L** |
| **v.** | : | **Issued: May 26, 2017** |
| **EQT PRODUCTION COMPANY** | : | |

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

**By Bernard A. Labuskes, Jr., Judge**

## Synopsis

The Board assesses a civil penalty of $1,137,295.76 against the operator of an impoundment used to store industrial waste from gas drilling operations for its violations of the Clean Streams Law and a regulation promulgated thereunder.

## Background

This matter commenced when the Department of Environmental Protection (the "Department") filed a complaint for civil penalties against EQT Production Company ("EQT") in October 2014 alleging that EQT had violated the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, when it had unpermitted releases from its impoundment at its facility in Duncan and Morris Townships, Tioga County. The Department sought in excess of $4.5 million in penalties. After we granted protracted extensions requested by the parties for completing discovery and filing prehearing motions we held a hearing on the merits over the course of ten days from July 25, 2016 to August 5, 2016. Another lengthy period for posthearing briefing requested by the parties ensued, with the final brief not being submitted until February 23, 2017. This matter is now ripe for adjudication.

## FINDINGS OF FACT

### The Parties and the Setting

1. The Department is the agency of the Commonwealth with the duty and authority to administer and enforce the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17 ("Administrative Code"), and the rules and regulations promulgated under those statutes. (Statement of Facts to which the Parties Agree No. ("Stip.") 1.)

2. EQT is a Pennsylvania corporation with its principal office and place of business in Pittsburgh. (Stip. 2.)

3. EQT obtained the right to explore, drill for, and produce oil and gas from approximately 5,857 acres in Duncan and Morris Townships, Tioga County, pursuant to a lease with Phoenix Resources, Inc. dated and effective December 30, 2009. (Stip. 46, 47.)

4. EQT owns and operates a natural gas well facility known as the Phoenix Pad S ("Pad S") on the site, which includes a well pad and, until June 2013, included a wastewater impoundment known as the S Pit. (Stip. 3, 6, 7, 29-31; Commonwealth Exhibit No. ("C. Ex.") 448.)[1]

5. Pad S is outside of EQT's core operating area and distant from its main office in Pittsburgh. (T. 1952, 1985, 2046.)

6. EQT conducts unconventional gas well drilling and produces gas at Pad S from the geological formation known as the Marcellus Shale. (Stip. 10.)

7. The site is located at the top of a partially forested, somewhat remote hill. (T. 645, 649, 1278-79, 1530, 1952; EQT Exhibit No. ("EQT Ex.") 6.)

[1] The term "Pad S" also applies to the well pad itself as opposed to the entire development site, and that is how it will primarily be used in this Adjudication. There is only one impoundment at issue and it will variously be referred to as the impoundment, the S Pit, or simply the pit.

8. Underground water migrates laterally from the recharge area on top of the ridge near and beneath the S Pit to topographically lower areas to the northwest, north, east, and south. (T. 739-40, 1676, 1678; EQT Ex. 6.)

9. Some of the underground water at and near the impoundment emerges at downgradient springs and seeps to the northwest, northeast, and southeast of the impoundment. There are five principal groundwater emergence areas of relevance in this case: the Upper West Seeps, the Lower West Seeps, the North Spring, and the Danzer 1 and Danzer 2 Seeps ("the springs and seeps"). (EQT Ex. 6.)

10. The springs and seeps flow toward Rock Run and an unnamed tributary (UNT) of Rock Run. (EQT Ex. 6.)

11. Rock Run is a perennial 3.25 mile-long tributary of Babb Creek. It is located approximately 1,500 feet east of the impoundment and flows south from its headwaters north of the site into Babb Creek, located approximately two miles south-southeast of the site. (EQT Ex. 57.)

12. Rock Run is a Class A Wild Trout stream and a High Quality (HQ) stream. The Rock Run watershed includes Exceptional Value wetlands. (Stip. 20; T. 102, 598, 788; C. Ex. 116, 121, 230; EQT Ex. 6.)

13. The UNT flows northeast, east, and southeast to the north of the ridge containing the S Pit. The stream originates at the "Sand Spring" and flows to its confluence with Rock Run at a location approximately 2,000 feet east-northeast of the pit. The UNT is a small stream that transitions along its course from above to below ground in colluvium. (T. 1278, 1338-39; EQT Ex. 6.)

14. The Upper and Lower West Seeps, the North Spring, the Danzer Seeps, the UNT, and Rock Run comprise a hydrogeologically continuous unit. (T. 717-18, 1295, 1420.)

15. Groundwater migrates away from the pit following approximate radial vectors controlled by bedrock permeability in a lateral sense generally from areas of high head potential on top of the ridge to areas of lower head potential surrounding the ridge. Groundwater simultaneously migrates downward where transmissive cross-cutting fractures are present. (T. 1289-1303; EQT Ex. 6.)

16. As would be expected on a rocky ridge top, there is a strong vertical gradient to the underground water flow near the pit. (T. 1302-03, 1537.)

**EQT Builds Its Impoundment with an Inadequate Subbase and Liner**

17. EQT submitted an application for an ESCGP-1 permit for earth disturbance on October 12, 2010 to build the impoundment. The application said that the impoundment would be used to store freshwater. (Stip. 5, 6, 53; T. 38, 54, 76, 897-98; EQT Ex. 1.)

18. The earthmoving activities associated with the construction of the impoundment were authorized by Department Permit No. ESX10-117-0223. (Stip. 5.)

19. The S Pit was approximately 265 feet by 305 feet measured at the crest of the berm, and 200 feet by 150 feet at the floor. The impoundment had an aerial extent of approximately 80,825 square feet at the crest (1.85 acres) and 30,000 square feet (.69 acres) near the bottom. The impoundment was approximately 15 to 16 feet deep and the estimated volume with two feet of freeboard was 5,242,300 gallons. The liner installed was a Poly-Flex 40-mil thick, single-sided textured, linear low density polyethylene geomembrane, placed over a Skaps GT-110 ten-ounce-per-square-yard nonwoven geotextile. (Stip. 7-9, 22; EQT Ex. 6 (at 2).)

20. Based upon the drilling and testing of four borings drilled on August 20, 2011 near the proposed impoundment, the water table depth at places was approximately 20 feet below the preconstruction ground level. (Stip. 49.)

21. Two of the borings were dry. (T. 1532, 1656; EQT Ex. 29.)

22. The synthetic liner inside the impoundment was at an elevation of about 1,835 feet above mean sea level (famsl). The liner extended upwards 15 to 16 feet or so above that level on the four sides of the pit. (EQT Ex. 6.)

23. Below the synthetic liner but still inside the pit and above the floor of the pit was the geotextile, and then below that was a constructed subbase that was supposed to have been constructed with 4 inches of clay-like material on the sidewalls and 4 inches of clay-like material plus 2 inches of screenings on the bottom of the pit. (T. 1308-09; EQT Ex. 6, 91.) In actuality, the subbase was very irregular in thickness (T. 190-91), but it nevertheless covered the bottom of the pit.

24. The subbase is considered part of the liner system in the impoundment. (T. 1085, 1133.)

25. Below the subbase and the floor of the pit was a 2-to-3-foot layer of unconsolidated material, and below that was bedrock. (T. 1305-06; EQT Ex. 6.)

26. EQT needed to blast through rock in order to construct its impoundment at the site. (T. 965, 1532; EQT Ex. 6.)

27. On November 3 and 4, 2011, laborers went around with a skid loader picking rock out of the subbase. (T. 1129, 1158; EQT Ex. 91.)

28. EQT did not screen the material used in the subbase to eliminate rocks. (T. 1129-30, 1158-59; EQT Ex. 91.)

29. The impoundment did not have a low permeability clay subbase. (T. 1104.)

30. EQT added subbase materials on top of the floor of the excavation. The subbase was inside of and part of the impoundment. 25 Pa. Code §§ 78.56(a)(4)(ii) and 78.62(a)(12). (T. 1085, 1315, 1532; EQT Ex. 9, 14, 91, 94.)

31. EQT did not construct a proper subbase beneath the synthetic liner inside of its impoundment, which is an essential practice if the liner is to be secure and protected. A "clay-like material" that was insufficient in amount, not tested, and not screened or properly compacted was used and the material was unacceptably rocky. The subbase was not as hard, smooth, uniform, and free from debris, rock, or other material that could puncture, tear, cut or otherwise cause the liner to fail as it needed to be in order to comply with 25 Pa. Code § 78.56 and good design standards. (T. 190-91, 967, 971-72, 1091, 1100-04, 1153, 1158-60, 1335-36, 1428-29; C. Ex. 29, 89, 436; EQT Ex. 10.1, 10.1(a).)

32. When the impoundment was eventually excavated, it could be seen that the subbase beneath the synthetic liner inside the impoundment consisted of a clay-like material and fine-grained limestone screenings that had been brought in during impoundment construction and had been placed under the liner. The limestone screenings were apparent towards the west side of the impoundment along the liner/subbase interface. However, it appeared that little, if any, had been applied towards the center and east side of the impoundment. (T. 190-91, 281; C. Ex. 29, 89, 436; EQT Ex. 10.1.)

33. Photos showed the subbase to have protruding rocks. (T. 971-72, 1428-29; C. Ex. 29, 436; EQT 10.1, 10.1(a).)

34. It is possible that leakage from above the liner could have caused some damage to the subbase on the *sides* of the pit (T. 1149-50), but minimal if any erosion effects were evident on the *bottom* of the pit. (T. 1336; EQT 10.1.)

35. EQT's impoundment was completed in December 2011. (Stip. 31.)

36. The unconsolidated material beneath the subbase was blast rubble and thus consisted mostly of rocks. (EQT Ex. 6.)

37. The liner that EQT used was not designed, constructed, and maintained so that the liner was resistant to physical failure during handling, installation, and use. If the liner was intended to be used with pipes, hoses, and other debris placed, thrown, dropped, and/or dragged on or along it repeatedly, it should have been constructed of more robust materials, or otherwise should have been protected in the areas where excessive wear was likely. Alternatively, EQT could have elected to operate the impoundment differently by using a fixed manifold for loading activities at all times, and installing safeguards to prevent rocks and debris from being pushed down onto the liner. (C. Ex. 436.)

38. There was no extra protection for the liner in the areas where lines and hoses entered the impoundment, which EQT knew would have reduced the risk of liner holes. (T. 1991; C. Ex. 317, 323.)

39. EQT repeatedly allowed hoses to come into contact with the liner. (T. 1988-89; C. Ex. 318-320.)

**EQT was Conscious of the High Risk it was Creating by Building the Impoundment**

40. An unconventional well pad site typically consists of a well pad, an access road, and perhaps a freshwater pond or impoundment near or adjacent to the pad. (T. 110, 112, 299.)

41. The location of EQT's impoundment deviated from the typical layout of an unconventional well site in that the impoundment was further away, approximately 1,000 feet away from the actual well pad. (T. 54, 112.)

42. Well site pits are typically immediately adjacent to the wells being drilled, which reduces problems with transporting drill cuttings or flowback fluid. (T. 485-86.)

43. The Department's inspector cautioned EQT about the need to build a safe pit with, for example, an adequate subbase. (T. 114-15.)

44. With the advent of the Marcellus Shale development, on-site impoundments became much larger and were used for much longer periods of time than the pits that had typically been used by conventional operators. (T. 111, 244, 288, 475, 511; C. Ex. 436.)

45. Pits expanded in size, depth, storage capacity, and the length of time that they were used. (T. 475.)

46. The much larger storage capacity, much larger size, and much longer period of use, plus human error, have caused many pits to leak. (T. 475-76; C. Ex. 436.)

47. Almost every impoundment at unconventional well sites in northcentral Pennsylvania has leaked at one point or another. (T. 476.)

48. In the summer of 2010, after a few high profile events, the Department's three Oil and Gas District Offices were asked to send field staff out to different areas to evaluate various gas operations and identify problems with pits. This was referred to as the "Pit Blitz." (T. 867.)

49. The Pit Blitz was undertaken because of the frequency of leaks and violations occurring at pits as a result of poor construction or poor management. (T. 112-13, 867.)

50. The Pit Blitz in 2010 was a statewide initiative undertaken in all of the areas in which oil and gas drilling activity was taking place in Pennsylvania, and it focused on the integrity and construction of pits. (T. 477.)

51. On August 20, 2010, as a result of the information gathered during the Pit Blitz inspections, Scott Perry, in his capacity at that time as the Department's Director of the Bureau of Oil and Gas Management, sent a letter explaining to all well operators, including EQT, the Department's concerns with the ongoing use of pits. (T. 478-79, 480-81, 867-68; C. Ex. 258.)

52. The letter communicated the results of the inspection effort, and the specific problems that had been identified. (T. 478-79; C. Ex. 258.)

53. The identified problems included inferior construction of subbases, the failure to install a full six inches of materials below the liner to protect against tears, the failure to ensure that the bottom of the pits were at least 20 inches above the seasonal high water table, the improper use of organic materials below liners, and the use of pits as landfills for disposal of trash and clearing and grubbing wastes. The letter urged operators to consider superior waste management containment facilities instead of pits. (T. 478-80; C. Ex. 258.)

54. Perry sent a second letter in September 2010 asking operators, including EQT, to describe their efforts to conduct their drilling and fracking operations without using pits. (T. 480.)

55. The attachments to the letter recounted for operators the various issues discovered as part of the Pit Blitz inspections. (T. 481-83.)

56. Over a hundred violations were noted at Marcellus sites in the course of the Pit Blitz. (T. 483.)

57. On the last page of the letter, an entry appears for a violation that had been found by the Department's Northeast District of the Oil and Gas Program at an EQT site. (T. 484; C. Ex. 258.)

58. Several holes had been identified in the pit at the EQT site and a new pit needed to be constructed to replace it. (T. 484; C. Ex. 258.)

59. After the Department's letter was sent, many operators have moved away from using pits and impoundments. (T. 111, 112-13, 300.)

60. The Department generally encouraged the reuse of flowback and produced water generated in the course of unconventional drilling operations in light of limited treatment/disposal options and the goal of using less freshwater. (T. 904-05.) The Department, however, at the same time never encouraged the use of very large, single-lined impoundments with no leak detection, and in fact made it known that it considered their use to be a practice fraught with risk. (T. 905, 936.)

61. The risks associated with the use of impoundments such as EQT's were well publicized. (T. 495-96, 936.)

62. By June 2012, no operator other than EQT was using an impoundment to store flowback in the Department inspector's area in Potter and Tioga counties. (T. 40, 111, 112-13, 300.)

63. As of the hearing, EQT was in the process of closing all of its impaired water pits. (T. 1939, 1994-95.)

64. EQT operates approximately 1,400 wells in Pennsylvania, the majority of which are conventional wells. (T. 1106-07; C. Ex. 436.)

65. EQT employees attended multiple training sessions held by the Department in 2011 to discuss, among other things, the need to utilize fixed manifolds on impoundments because there were a significant number of issues that involved liner damages from pipes and tubes that were not properly anchored or fixed, as well as the need to install proper subbases beneath synthetic liners that do not contain particles that exceeded ¾ of an inch. (T. 1083-86; C. Ex. 436.)

66. EQT's Best Management Practices (BMP) manual recognized that activity at or near a lined impoundment is risky due to damage to pit liners. (T. 1943-45, 1969-71; EQT Ex. 103.)

67. In April 2012, an EQT manager directed an EQT employee to "punish" a contractor for failing to tape its hoses that went into an impoundment due to the risk to the liner. (T. 1944-45; EQT Ex. 105.)

68. At annual safety meetings, EQT warned contractors to exercise caution and care in activities in and near impoundments. (T. 2043; EQT Ex. 64.)

69. EQT was conscious of the high level risk associated with the operation of impoundments. (Finding of Fact No. ("FOF") 40-68; T. 873-74, 909, 936-37, 945, 1943-44, 1982-83; C. Ex. 326.)

70. The high risk requires a high level of operator attention and care. (T. 244, 874-75, 910-12, 915-16, 936-37, 945; C. Ex. 436.)

71. EQT did not install anything at the S Pit impoundment to allow it to determine if its liner had been compromised; there was no leak detection system. (T. 1112, 1113; C. Ex. 436; EQT Ex. 119.)

72. A loss of 50,000 gallons from the impoundment would only have resulted in a drop of about 1¼ inch in the water surface, which would be extremely difficult to detect visually. (T. 1112-13; C. Ex. 436.)

73. Practically speaking, there was no way to see whether the impoundment was leaking just by looking at the water level in the impoundment. (T. 1203-04, 2048-49; C. Ex. 321, 436.)

74. Wind or atmospheric conditions could change the water level in such a large pit. (T. 1204, 2049.)

**EQT Released Industrial Waste and Pollutants from Above the Liner in the Pit that Entered into Waters of the Commonwealth**

75. EQT began storing flowback and produced water in the impoundment for use at the site on or about December 20, 2011. (Stip. 31, 33; C. Ex. 5.)[2]

76. EQT used the impoundment to hold impaired water from other drilling operations in addition to Pad S. (C. Ex. 5, 10, 329.)

77. Impaired water produced in drilling operations has several components associated with it including chloride, sodium, barium, strontium, bromine, and lithium. (T. 28-39, 662-63, 1936, 1938.)

78. EQT's impaired water constituted "industrial waste" as defined in Section 1 of the Clean Streams Law. 35 P.S. § 691.1. (Stip. 34.)

79. The Department tested the fluid in EQT's impoundment during its first inspection on December 20, 2011. The field conductivity reading of the fluid sampled in the impoundment was above 16,000 microSiemans (µS/cm). The chloride level of the fluid collected from the

[2] Distinguishing between flowback fluid, produced water, and brine is not significant in this case and we will generally refer to the material as impaired water, fluid, or industrial waste. (T. 662-63, 1936, 1938.)

impoundment was 19,858 mg/l. (T. 119; C. Ex. 5.) (One thousand microSiemans is a milliSieman. A microSieman is the same thing as a micromho.) (T. 1548.)

80. The level of conductivity in a clean, unimpaired stream in Tioga County is typically less than 50 µS/cm. (T. 119.)

81. In the environmental context, "conductivity" is usually used as a shorthand for specific conductivity. (T. 575-76.)

82. "Specific conductivity" (or "specific conductance") is a measure of the dissolved ions present in water. (T. 574.)

83. "Conductivity" and "specific conductivity" in the instant context tend to be used interchangeably. (T. 575-76.) However, specific conductivity is standardized to 77 degrees Fahrenheit and does not vary with temperature, so it is more accurate when comparing data. (T. 1540-41.) This difference is not material in this case.

84. The more dissolved ions there are in water, the higher the specific conductivity will be. High specific conductance is an accepted indication of the presence of contaminants. (T. 574; EQT Ex. 6.)

85. Specific conductance is strongly correlated to chlorides, barium, and strontium, and to a lesser extent some other ions and cations. It is reasonable to look at specific conductance as a surrogate or marker for the contaminants in EQT's release. (T. 1344, 1350.)

86. In the spring of 2012, EQT decided to build a second impoundment at the site. This impoundment would have been a centralized impoundment used to store impaired water from multiple sites. (T. 19, 30, 2044; EQT Ex. 42.)

87. EQT installed six monitoring wells (MW1-MW6) to the east of the impoundment between March 8 and 15, 2012 in a pattern that was intended to ensure that the proposed new

impoundment would be at least 20 inches above the seasonal groundwater table, and to establish upgradient and downgradient baseline conditions for the new impoundment. (The wells were not intended for use in connection with the existing impoundment.) (Stip. 50-52; T. 30-31, 33, 1534-36, 1678-80, 2044; EQT Ex. 31.)

88. The wells would then serve as monitoring wells to detect any leaks from the new impoundment. (Stip. 50-52; T. 30-31.)

89. No such wells had been drilled to monitor potential releases from EQT's existing impoundment, which was originally permitted as a freshwater impoundment. (Stip. 5, 6, 51; T. 30-31.)

90. All of the wells with the exception of MW5 produced "very, very, very low yields." (T. 1554, 1619, 1682.)

91. Water level measurements were quite variable. (EQT Ex. 32.)

92. EQT field sampled MW1-MW6 on April 30, 2012 and found that MW1 and MW5 had "exceptionally high" specific conductance (3,216 µS/cm and greater than 4,000 µS/cm, respectively), which was "extremely unusual and unanticipated." (T. 36-37, 1540-43, 1653, 1684, 2044; EQT Ex. 32, 42, 43.)

93. The field sampling of MW6 showed specific conductance of 165 µS/cm, as compared to MW2 and MW3, which had 36 and 38 µS/cm. (EQT Ex. 43.)

94. EQT ordered expedited review of the samples. (T. 43, 1542-43, 1654.)

95. EQT received the laboratory sampling results on May 3, 2012. (Stip. 55; T. 1542-43, 1546, 1654.)

96. The MW2 and MW3 results were unremarkable, but MW1 and MW5 had elevated specific conductance of 3,050 and 17,000 µS/cm, respectively, and elevated chloride concentrations of 996 and 6,640 mg/l, respectively. (Stip. 35; T. 1540-41; EQT Ex. 32.)

97. James Casselberry, P.G., EQT's consultant, reported to EQT on May 3 that the surprising results were indicative of gas well operations. (Stip. 35; EQT Ex. 42.)

98. Almost immediately, EQT personnel and consultants recognized that the anomalous results could indicate that its impoundment was leaking. (T. 927, 1198-99, 1200, 1540-44, 2044, 2048; EQT Ex. 28, 42 (at 3).)

99. Four days later, on May 7, 2012, David Allison (a Professional Geologist employed by EQT) and Casselberry telephoned William Kosmer of the Department to tell him that the water samples from MW1 and MW5 had elevated conductivity and elevated chlorides. (T. 36.)

100. There was no evidence of any surface spills near MW5. (T. 1745.)

101. Kosmer agreed that the results were extremely unusual and were indicative of gas well operations. (T. 36-38, 43.)

102. There was no other likely explanation for the high chloride results. (T. 37-38, 40.)

103. The field sampling data and monitoring well results were the first clues that the impoundment was leaking. (T. 875-76, 917.)

104. EQT's well pad was approximately 1,000 feet away and has never been identified as a possible source of the contamination. The only natural gas production feature in the immediate vicinity of the contaminated wells was the pit. (C. Ex. 448.)

105. EQT told the Department during its May 7 call that it intended to obtain a second round of samples starting the next day. (T. 36-39, 42-43, 568-71, 757, 1688-89; C. Ex. 259; EQT Ex. 45.)

106. Casselberry pumped MW5 for four hours on May 8, 2012. The field-sampled specific conductance declined from about 20,800 µS/cm to about 2,500 µS/cm. (T. 1548; EQT Ex. 28.)

107. Casselberry pumped MW5 again on May 9, 2012. The field-sampled specific conductance had returned to about 11,800 µS/cm overnight and declined again after pumping back down to about 1,800 µS/cm. (T. 1552-53; EQT Ex. 28.)

108. Casselberry concluded from the May 8 and 9, 2012 pumping test data that there was a limited source area of continuing contamination of MW1 and MW5 because the specific conductance declined rapidly with pumping. (T. 1552-53.)

109. EQT resampled the monitoring wells on May 8 and 9, 2012 and submitted the samples to a laboratory for analysis of an expanded set of parameters. (T. 1552-54, 1654, 1743; EQT Ex. 28, 33.)

110. EQT did not order expedited review of the second set of lab samples. (T. 43-44, 1654.)

111. On May 18, the Department notified EQT of its concern that the impoundment could be leaking. (T. 79-80, 919; EQT Ex. 46.)

112. Five days later, on May 23, EQT responded to the Department's May 18 letter of concern suggesting a telephone conference to discuss the matter further. (C. Ex. 43.)

113. EQT did not receive the lab results of the May 8 and 9 sampling until May 22. (T. 1563-64, 1654; EQT Ex. 28, 33.)

114. The second round of sampling confirmed the elevated specific conductance and high chloride readings. (T. 1251-53, 1563-64; EQT Ex. 33, 35.) Chloride was 450-2,490 mg/l, sodium 178-847 mg/l, barium 25.8-124.0 mg/l, and strontium 10.7-58.8 mg/l. (EQT Ex. 28.)

115. Meanwhile, an unrelated spill of approximately 300-500 gallons of impaired water occurred at the site on May 8 that was caused by an opening in an impaired-water transfer line. The parties have referred to this event as the "ATOS spill" because it was associated with work being performed by EQT's contractor, Aquatic Transfer and Oilfield Solutions (ATOS). (Stip. 11-13; C. Ex. 5.)

116. On May 10, the Department in the course of its inspection regarding the ATOS spill discovered two seeps immediately downgradient of and less than 100 feet from the impoundment, both above the bed and high on the side of a channel located along the east side of the impoundment access road where the ATOS water had flowed. (T. 136-37, 573-74, 988, 1558, 1559; C. Ex. 6, 7; EQT Ex. 119.)

117. One seep had a field conductivity reading of 7,200 µS/cm and the other had a reading of 6,640 µS/cm. (T. 136-37, 574, 1558-59; C. Ex. 7.)

118. The seeps were directly downgradient of the impoundment. (T. 136-37; C. Ex. 7.)

119. The flow rate of Seep #1 was about 2 liters per minute, which appeared high in relation to the 300-500 gallons spilled from the ATOS line. (T. 136-38, 1557-58; C. Ex. 7, 307.)

120. The Department, not EQT, discovered the seeps. (T. 136-37.)

121. In connection with addressing the ATOS spill, EQT sampled the water in the impoundment. The water had a chloride level of 35,100 mg/l and a sodium level of 12,600 mg/l. (C. Ex. 171 (at Table 1).)

122. Seeps around the perimeter of an impoundment are a signal that the impoundment may be leaking. (T. 253, 1568.)

123. On May 30, long after the ATOS spill, the Department observed a new seep downgradient of the impoundment (Seep #3) and above the bottom of the channel where the ATOS spill discharged, which had a conductivity reading of 2,950 µS/cm. (T. 146-47; C. Ex. 9.)

124. The seeps dried up after the water in the impoundment was lowered for use in well completions on Pad S. (T. 81; C. Ex. 43; EQT Ex. 46.)

125. The seeps had several elevated parameters including a chloride level in Seep #1 of 2,298 mg/l. (T. 136-37, 141; C. Ex. 7, 9, 43.)

126. EQT had excavated 1 to 1½ feet of soil in the channel where the ATOS water flowed, but the seeps were above that on the sidewall. (T. 988; C. Ex. 7, 68.)

127. Taken together, the seeps, the monitoring well results, and the absence of any other likely sources were a very strong indication that something could be seriously wrong with the impoundment. (T. 58-59, 77-81, 876, 928-29; C. Ex. 43.)

128. On May 21, EQT found six or seven holes in the northeast corner of the synthetic liner in the impoundment above the existing water line but with one of those holes being below a previous high water mark. (Stip. 14; T. 72, 144-46, 2048, 2106-07; C. Ex. 8, 321, 324.)

129. EQT believes that these holes may have been caused by ATOS. (T. 1924-25, 2107-08; C. Ex. 321.)

130. On May 21, 2012, EQT Environmental Coordinator Chris O'Connor reported: "[A]ll of the holes are at the northeast corner where pump lines are installed and where loading activities occur," one hole was below the previous water level; there also "was a hose nearby, that was not wrapped or taped, and had metal banding that could possibly have damaged the

liner," and "the water was too turbid to see if any holes are present beneath the current water level." (C. Ex. 321, 324.)

131. As of May 21, EQT acknowledged for the first time that it knew "for certain" that its impoundment had leaked. (T. 1564-65, 1983-85; C. Ex. 324-25; EQT Ex. 28 (at 3), 35.)

132. Soil collected from below the hole below the high water mark was darker and more damp than the soil collected from the other holes. (T. 145-46.)

133. EQT did not start the process of emptying the impoundment, but it did stop hauling water to the impoundment for the first time on May 21, 18 days after receiving the elevated lab results from the sampling of MW1 and MW5, and 21 days after obtaining the elevated field samples. (Stip. 39; T. 254, 927, 1968; C. Ex. 324.)

134. EQT had continued to haul impaired water to the impoundment until May 21. (T. 876-77, 927, 1965, 1968; C. Ex. 324.)

135. It was not possible to see if there were any other holes in the liner because the water was too turbid. (Stip. 15; T. 1745, 1987, 2106; C. Ex. 321, 324.)

136. EQT repaired the seven holes that it could see on May 22. (T. 2109; EQT Ex. 113.)

137. It is not clear exactly who caused the holes or how they were caused, in part because EQT often did not have any personnel supervising or observing activities on the site for several days to weeks at a time. (T. 385-87, 395-97, 911-16, 1924-25, 2076; C. Ex. 318, 322; EQT Ex. 110.12, 110.13, 110.14, 110.15, 110.16.)

138. A possible cause was hoses used for fluid transfer coming into contact with the inadequately protected liner. (T. 1988-89; C. Ex. 318-20.)

139. Chris O'Connor of EQT reported that one hole may have been related to a hose laying nearby, and "all other punctures look to have been due to debris and rocks that have been pushed during recent activity, moving pipes in and out, etc." (T. 1967-68; C. Ex. 324.) (*See also* T. 1987; C. Ex. 320, 321, 323, 405, 436 (rocks on top of the liner).)

140. On May 30, 2012, EQT was field screening its six monitoring wells when elevated conductivity was discovered for the first time in MW2. (Stip. 40; T. 149, 1572-73, 1635; C. Ex. 10.)

141. All six groundwater monitoring wells were being resampled on May 30, 2012. (T. 675-76; C. Ex. 124.)

142. On that date an employee of Casselberry went to the North Spring, a downgradient surface water discharge that Casselberry had previously become aware of, and he tasted it and found it to be salty. (T. 149, 1573, 1636.)

143. The North Spring had a specific conductance of 31,900 µS/cm. (T. 1573, 1636.)

144. The North Spring is approximately 250 feet to the northeast and downgradient of MW2. (C. Ex. 10, p. 2.)

145. Vegetation where the North Spring flowed was already stressed and turning brown by May 31. (C. Ex. 10.)

146. Casselberry put recorders in the pit on May 25, and by May 30 they showed a drop in the water level in the pit. (T. 1570-72, 1704-05.)

147. As of the morning of May 30, EQT was still not satisfied that the data was "conclusive" that the impoundment was leaking at any place other than the ATOS holes. (T. 1702-05.)

148. EQT was not convinced that it was "more likely than not" that something was "severely wrong" with the pit until high conductivity was measured in MW2 and the North Spring. (T. 1705-09.)

149. By May 30, in addition to the original monitoring results and the seeps, transducers in the impoundment showed a drop in water levels, MW2 had elevated conductivity (2,150 µS/cm), and the North Spring had "extremely" elevated conductivity (31,900 µS/cm), which is what impelled EQT to finally notify the Department of a possible leak. (T. 2050-51; EQT Ex. 28.)

150. At 9:40 p.m. on May 30, EQT notified the Department that "it was more likely than not" that the impoundment was leaking. (T. 149, 1205-06, 1207, 1242-43; EQT Ex. 2; C. Ex. 10.)

151. EQT briefly started to empty the impoundment by trucking impaired water off site on May 31, but stopped that effort when it decided to use the impaired water to complete the frac job on Pad S. (T. 226-28, 1239-40, 1911-13, 2052-53; C. Ex. 10, 364; EQT Ex. 122.)

152. EQT made no other effort to draw down the pit in the interim, from around noon on May 31 to around 6:00 p.m. on June 1 when it began the frac. (T. 226-28, 285, 1913; C. Ex. 10, 11.)

153. Near the end of the emptying process, EQT supplemented the drawdown process associated with its fracking by hauling away 61 truckloads of impaired water. (T. 2054-55, 2059-60; EQT Ex. 74.3.)

154. EQT said that a nearby road rally complicated its ability to expeditiously empty the leaking impoundment. (T. 1207, 1239, 2055, 2078.)

155. EQT contracted with a company called Enviroscan to perform a geophysical survey to assess the extent of the release at the site surrounding the impoundment. (T. 1566, 1618-19, 1703-04; EQT Ex. 36.) On or around June 18, 2012, EQT received the results of Enviroscan's survey named "Final Report, Geophysical Survey, Waste Water Pond Site, Antrim, Tioga County, PA, Enviroscan Project Number 051249a." (EQT Ex. 51 (at App. F).)

156. Enviroscan's work showed that there was migration of high specific conductance fluid radially away from virtually all sides of the impoundment. (T. 1615; EQT Ex. 51 (at App. F).)

157. Enviroscan's report led to the plan developed by EQT to install a second set of monitoring wells around the pit and then also away from the pit out along the Danzer Road to investigate the impacts of the release. (T. 1615-16.)

158. Casselberry and his assistants, with rather limited assistance from EQT personnel, conducted various activities in the field between May 8 and May 30 in an effort to confirm whether and to what extent the impoundment was leaking. (T. 228-29, 337-38, 930, 1201-02, 1564-73, 1638-40, 1997-98, 2047-49, 2076, 2110; EQT Ex. 28.)

159. EQT did not take appropriate response actions quickly enough during its initial response to its leaking impoundment. (T. 226-30, 285, 336-37, 345, 347, 376, 921-27, 929-33.)

160. EQT devoted increased, but still limited, resources of its own to the interim remedial activity (aside from fracking) between May 30 and June 22. (T. 1637-38.)

161. EQT was busy fracking the first of two wells on the well pad in early May. (T. 1907.)

162. Casselberry was instructed by EQT to stand down (stop doing any work) between May 10 and May 21. (T. 1652-53; EQT Ex. 28 (at Fig. 3).)

163. During operations, EQT personnel had a limited presence on the site, which resulted in frequently inadequate oversight and supervision of its contractors relative to the impoundment. (T. 1964, 2046-47, 2084-88, 2092-93, 2100-2103, 2105-06, 2110; EQT Ex. 101, 110.16, 111.)

164. EQT only inspected the impoundment area for a portion of the 30 to 90 minutes it inspected the Pad S site once every one or two weeks or so before the leak occurred if active well activities were not underway. (T. 385, 1923, 1964, 2016, 2083-87, 2093, 2101, 2110, 2119-21; C. Ex. 44; EQT Ex. 110.12, 110.13, 110.14, 110.15, 110.16.)

165. On May 31, the Department sent an email to EQT requesting an urgent meeting and asking EQT to submit a work plan on or before June 8 for characterizing the contamination at the site. (T. 580-84; C. Ex. 70.)

166. EQT responded that it was unwilling to meet with the Department at that time and that it would submit a work plan when it decided it was ready to do so. (T. 583, 762; C. Ex. 417.)

167. Scott Perry, in his role as the Department's Deputy Secretary for the Office of Oil and Gas Management, needed to get personally involved on June 1, 2012 to obtain additional information from EQT regarding EQT's release. (T. 471, 490-92; C. Ex. 363.)

168. The Department is unaware of any other case before or since where an operator refused the Department's invitation to meet under similar circumstances. (T. 492-94, 528, 584, 887.)

169. On June 1, in response to Scott Perry, EQT provided a list of "actions taken" and "actions planned" to the Department. EQT said that it was collecting contaminated groundwater with elevated conductivity and transferring it into a storage tank. EQT claimed that as of 11:00 a.m. that morning, dewatering of the impoundment was underway. Surface water sampling

commenced that morning to characterize the nearby streams. The letter also said EQT was developing a pit liner integrity evaluation process to be implemented once the pit was dewatered: "Note that soil samples were already taken from under the liner in the vicinity of visible holes in the north east corner of the impoundment this week. We expect results next week and will provide them to PaDEP." It said it was also developing a broader site characterization plan for soil, surface water, and groundwater. (EQT Ex. 71.)

167. EQT eventually met with the Department on June 11. (T. 1616, 1722, 1918, 2067; EQT Ex. 74.6.)

168. EQT also met with the Department on site on June 12. (T. 2064; EQT Ex. 74.6.)

169. EQT began fracking using fluid from the impoundment on June 1. (T. 1908-10, 1913.)

170. EQT needed to bring in between 80 and 100 trailer truck loads of equipment and supplies in order to frac the second well. (T. 1913.)

171. As fluid and solids were removed from above the liner in the impoundment, hundreds of holes became visible on the bottom and on the sloping north side wall of the liner. (T. 91, 309-10, 361; C. Ex. 51; EQT Ex. 6, 74.7, 77.)

172. The holes extended about halfway up the sidewall (which would have put them above any seasonal water table, even while the pit was discharging). (T. 1716; EQT Ex. 6, 10.3, 10.5.)

173. EQT removed all fluids from the impoundment above (but not below) the liner inside the impoundment by June 10. (T. 1917-18.)

174. EQT removed all sludge and solid material from above (but not below) the liner inside the impoundment by June 11. (T. 1210; C. Ex. 51; EQT Ex. 74.7.)

175. EQT started pressure washing the liner on June 11, with hundreds of holes still open at that time. (T. 359, 2114; C. Ex. 51.)

176. The Department issued EQT a Notice of Violation (NOV) on June 11 based on the holes for violating, *inter alia*, 25 Pa. Code § 91.34(a). (T. 308-09; C. Ex. 51.)

177. EQT responded to the NOV by saying that it disagreed that there was a violation and it requested rescission of the NOV. It did not propose any further action. (C. Ex. 55.)

178. Terra Services, LLC was a contractor that EQT had used to treat the industrial waste in the impoundment. (Stip. 36; T. 1959-60; EQT 67.)

179. EQT believes that the newly discovered holes found in the floor and sidewall of the liner were most likely caused by Terra Services' treatment hoses. (T. 1717-18, 2062-63; EQT Ex. 42 (Attach. 13, 14).)

180. Terra Services' process involved pulling the impounded industrial waste in through one or more lines near the fluid surface, treating it in a trailer, then discharging it back at 2,000 gallons per minute in one or more lines laid on or near the bottom of the impoundment. (Stip. 37; T. 1717-18, 1975, 2122-26; C. Ex. 2, 4; EQT Ex. 42, 101, 102-102.15.)

181. Terra Services treated the fluid in the impoundment between April 19 and April 24, 2012. (T. 2101, 2119-22.)

182. Apart from meeting with Terra Services for approximately half-an-hour on April 19, EQT's safety and environmental coordinator, who was responsible for conducting inspections for the geographic area where the Pad S site was located, did not inspect the site during Terra Services' treatment activities. (T. 2084-85, 2101-02; EQT Ex. 101, 110.15, 110.16.)

183. EQT knew or should have known that Terra Services would place hoses with high pressure water in them on or near the bottom of the impoundment. (C. Ex. 2, 3.)

184. Anytime an operator has external apparatus (e.g., ATOS, Terra Services hoses) in an impoundment, holes will frequently result. (T. 499-500, 544-46.)

185. On June 15, EQT patched the area where most of the holes were discovered in the liner. (T. 2065, 2114-15; EQT Ex. 74.10, 74.11.)

186. It is not clear to what extent the patches were tested. (T. 2115-16.)

187. On June 7, 2012, EQT engaged Texas Leak Location Services (LLS) to run leak detection tests on the impoundment. LLS arrived on site the next day. (T. 2059-60; EQT Ex. 74.3, 74.4.)

188. EQT cancelled LLS's liner integrity evaluation on June 9, 2012. (T. 2062; EQT Ex. 74.5.)

189. EQT at some point thereafter commissioned JLT Laboratories to perform a forensic analysis of the impoundment's liner. The Department requested, but never received, a copy of any report prepared by JLT, and EQT has refused to reveal the results of the analysis. (T. 1249-50, 1747, 2079, 2142; EQT Ex. 51 (at 5), 74.8, 74.10, 115.)

190. The record does not support a finding that the leaks from the impoundment were limited to the areas of the Terra Services and ATOS activities because no full investigation was conducted or at least disclosed. (T. 1747; FOF 185-89.)

191. The concentration of contaminants (e.g. barium, strontium, chloride) in pre-excavation samples of the unconsolidated material below the liner but still inside the pit did **not** correlate with the area with the highest concentration of holes. (EQT Ex. 6 (at 21-22, Fig. 7-3, Fig. 7-4, Fig. 7-5).)

192. The uppermost layer of subbase material was contaminated all across the pit. (EQT Ex. 6 (at 21-22).)

193. Fluid leaked from the S Pit for a period of time. (Stip. 41.)

194. Fluid from the impoundment flowed downward by gravity through accumulated sediment at the bottom of the pit, and then through holes in the bottom and sidewalls of the liner and geotextile, where it next encountered the subbase of the impoundment, which consisted of a layer of clay-like material on the sidewalls and clay-like material and limestone screenings on the bottom. The fluid continued to flow downward by gravity through the subbase, the highly permeable and porous blast rubble beneath, and into the underground waters of the Commonwealth. (T. 1308-10; EQT Ex. 6 (at 9).)

195. EQT's impoundment leaked enough that it created mounding in the top of the water table below the impoundment wherein the contaminated fluid within the pit comingled with underground waters. (T. 654-55, 716, 1310-11; C. Ex. 433; EQT Ex. 6.)

196. Although it is not possible to quantify it, thousands or tens of thousands of gallons of industrial waste leaked per day while the impoundment was full. (C. Ex. 436.)

**Continuing Active Releases of Pollutants Occurred from Inside the Impoundment Through At Least September 27, 2012**

197. As previously mentioned, the liner was not the bottom of the impoundment. Below the liner was a geotextile and then a subbase of variable thickness. (FOF 17-39.)

198. Beneath the impoundment was a two-to-three-foot layer of blast rubble and unconsolidated material, and below that was bedrock. (T. 1308; EQT Ex. 6.)

199. The subbase inside the impoundment was contaminated with EQT's industrial waste. (T. 684-85, 704, 1316-18, 1361, 1446, 1725; EQT Ex. 6.)

200. For example, the entire profile of material, including the subbase in the pit and the material below the pit, showed elevated concentrations of barium and chloride. (EQT Ex. 6 (at 22, Fig. 7-3, Fig. 7-4).)

201. Barium concentrations of up to 548 mg/kg (sample CK) were found in the unconsolidated material beneath the area with the highest concentration of known holes in the liner, i.e., in the northeast quadrant. (T. 1318; EQT Ex. 6.)

202. Even higher concentrations of barium were found in the northeast quadrant but outside the area with the highest concentration of known holes (sample CN, 638 mg/kg). Barium was found in the southeast quadrant (sample CJ, 164 mg/kg) and the southwest quadrant (sample CF, 350 mg/kg) as well. (EQT Ex. 6.)

203. Chloride was found as high as 4,180 mg/kg (sample CN). (EQT Ex. 6.)

204. The section of EQT's reclamation plan entitled "Flux of Principal Constituents of Concern in Remaining Soil Following Pit Reclamation" said chloride, sodium, barium, and strontium remained present in the soil in December of 2012 and would remain "available to be dissolved in infiltrating precipitation and migrate into groundwater…over the course of one year." (C. Ex. 109 (at 3).)

205. Information collected by EQT through December 2012 "indicate[d] that elevated sodium is present in soil. This condition may contribute to plant stress and may have negative impacts on soil structure. Adding amendments to the soil such that calcium ions are available to replace sodium ions in soil is a common technique to mitigate these two conditions. Although direct application of an amendment to replace sodium ions in impacted soils may be proposed, amendments to the backfill used in pit reclamation (which will dissolve and be conveyed to these discharge areas) is planned.…This same process may retard the transport of other cations such as strontium as well." (C. Ex. 109 (at 3).)

206. As long as the liner remained in place, the contaminated soil in the subbase and under the impoundment could not be removed. (T. 1254.)

207. The contaminants in the subbase continued to enter into the underground waters of the Commonwealth for the first time after June 15 in two ways. First, industrial waste itself continued to drain out, even as the highest point of underground water saturation (the water table) returned to pre-release conditions. (T. 1319; EQT Ex. 6.)

208. Contaminated water from the impoundment continued to pool in the pit and saturate portions of the subbase, which was above the receded water table, at least as late as September 13. That contaminated residual moisture slowly made its way into underground waters below the water table, so EQT's release of industrial waste from its impoundment was ongoing at least through September 27. (T. 191-92, 1320, 1323; C. Ex. 29, 433.)

209. Second, in both areas where residual moisture remained and in areas that had temporarily dried out, new underground water came into contact with the residual contamination left in the subbase (and below the subbase) after the water table receded, which then caused the contaminants to enter into previously unaffected groundwater, which would in turn mix for the first time with the previously contaminated groundwater. (T. 703-04, 743-44, 747.)

210. EQT submitted a revised excavation plan to the Department to remove the liner and excavate the contaminated soils in and beneath the impoundment on September 10, 2012. (EQT Ex. 55.)

211. On September 12, EQT initiated excavation of the impoundment below the liner. (C. Ex. 29, 89; EQT Ex. 8.) EQT removed the liner from the southern half of the impoundment on September 12 and from the northern half on September 27. (Stip. 28; T. 189, 280, 745, 1004-05, 1309-10; C. Ex. 29; EQT Ex. 6, 8, 11.)

212. To access the impoundment floor, an access road was cut through the impoundment corner, which revealed a wet area within the impoundment midway down the road. (T. 191-92.)

213. Several pockets of contaminated water were observed on the impoundment floor near the southeast corner on September 13. Standing water adjacent to that wet area had a field conductivity of 15,500 µS/cm. The water appeared to be in broken rock in the subbase and bedrock. The Department informed EQT of its findings and showed it the location. The Department recommended that a sump be dug, if possible due to the bedrock, to recover as much fluid as possible. (T. 191-92, 1004-05, 1322-23; C. Ex. 29, 89.) It is not clear whether that was done.

214. It is not practical to accurately model the precise quantity of flow from the subbase after the fluid above the liner was removed. (T. 1321-22; EQT Ex. 6.)

215. Lawrence Roach, P.G., EQT's expert, performed a rough estimate of the volume of the released industrial waste itself that could drain from the clay-like material at the bottom (not the sides) of the impoundment (before it was excavated in September 2012) by taking the area of the bottom (not including the sides) of the pit (0.69 acres) times the variable thickness (assume 0.5 feet) times the specific yield (2%) which is 0.0069 acre-feet or 2,250 gallons of contaminated water released over time into the groundwater. At a specific yield of 23%, the volume of fluid that could drain from the blast rubble beneath the impoundment was 130,000 gallons (2.5 feet times 0.69 acres times 23%). (EQT Ex. 6.) The fact of drainage is certain; the estimated amounts are largely conjectural. (T. 1321-22.)

216. Thus, between the slow draining of all of the industrial waste itself, and new underground water picking up residual contamination left in the subbase, the contaminants in

EQT's industrial waste would have been released every day from areas inside the pit and outside of the groundwater, and entered into the underground waters of the Commonwealth below the water table for the first time at least through September 27, 2012. (T. 538-39, 541, 704, 720-22, 727-31, 749, 1361; C. Ex. 433.)

217. EQT delayed removing the liner from the impoundment in part because it knew it would be involved in litigation with Terra Services, the company that EQT thought was responsible for the damage to the liner. (T. 1216-17, 1253, 2071-72.)

218. EQT assumed that no additional rainwater would get into the contaminated groundwater plume because of the liner being in place. (T. 1254, 2071-72.)

219. EQT only removed the liner after the Department brought pressure to bear on EQT to remove it. (T. 1216-17, 1254.)

220. The damaged liner was not fully removed until September 27, 2012 when an additional 1,500 tons of soil had to be excavated and a temporary liner was installed. (Stip. 28; EQT Ex. 11.)

221. Contaminated soil was excavated from inside and below the pit from September 12 through September 27. (Stip. 28; T. 1309-10; C. Ex. 29, 89; EQT Ex. 8, 11.)

222. As of September 27, the monitoring wells and surface waters were still measuring significantly elevated, albeit decreasing, levels of contaminants originating from EQT's continuing releases. (T. 694-700; C. Ex. 29, 31; EQT Ex. 6.)

223. Continued lowering of the levels of contaminants in the monitoring points is not inconsistent with lower but continuing releases from the contaminated material beneath the liner both inside and below the floor of the pit. (T. 689, 727-31; C. Ex. 433.)

224. In the complex hydrogeological system that exists at the site, with noisy and variable data, it is not possible to discern based on the monitoring results alone that no new mass is entering the system. (T. 736-37, 742, 749, 1418; C. Ex. 433.)

**Continuing Releases from *Beneath* the Impoundment into the Waters of the Commonwealth**

225. The Findings of Fact above relating to releases from the subbase apply to the unconsolidated material below the floor of the impoundment as well. (C. Ex. 433.)

226. Excavation of the impacted material under the liner in and below the impoundment after liner removal did not remove all of the contamination in the unsaturated zone. (C. Ex. 433 (at 7, 19).)

227. Constituents of the release remained in the residual unconsolidated material under the liner, and those contaminants have continued to mobilize from the residual unconsolidated material and enter into the underground waters of the Commonwealth below the water table from areas above that level. (T. 689, 704, 1361; C. Ex. 433; EQT Ex. 6.)

228. A residual mass of chloride, along with lesser amounts of barium, strontium and sodium, were calculated to remain in the soil based on the concentrations left after the pit had been excavated. Gypsum was added to try to limit the impacts of this contamination to the groundwater at a rate based on the calculations of residual mass. The purpose of the gypsum addition was to stabilize the remaining contamination that had not been removed by the excavation. (T. 638-41, 770, 1412-13; C. Ex. 123, 433 (at 8).)

229. The impoundment was fully reclaimed in June 2013. The area now has the appearance of a meadow. (T. 1412-13; EQT Ex. 6 (at 2), 20.)

**EQT's Releases Polluted the Waters of the Commonwealth**

230. In addition to the groundwater underneath the impoundment, EQT's release has polluted two High Quality streams, groundwater both underground and as expressed at the surface at the North Spring, Upper West Seeps, Lower West Seeps, Danzer 1 and Danzer 2 Seeps, and an Exceptional Value wetland. (T. 502-03, 586, 642, 680, 684-85, 687, 700, 703, 1344-45, 1366-93; C. Ex. 51-66, 220, 338-44, 433-35; EQT Ex. 6, 24.3, 28.)

231. Samples taken from monitoring wells and springs in the area of the S Pit contained barium, bromide, chloride, lithium, and strontium. (Stip. 42.)

232. The pollutants with the highest concentrations relative to statewide health standards in EQT's release or associated with its release are chloride, barium, strontium, lithium, and aluminum. (T. 1366-67.)

233. EQT polluted the underground water. For example, the maximum reported groundwater concentrations in MW1, MW2, MW5, and MW7 were 419 mg/l for barium, 6,640 mg/l for chloride, 9.12 mg/l for lithium, 0.106 mg/l for selenium, and 189 mg/l for strontium. (T. 682, 684; EQT Ex. 6; C. Ex 220.)

234. The West Seeps when first discovered had a specific conductance as high as approximately 43,051 µS/cm. Danzer 1 was 9,580 µS/cm and Danzer 2 was measured at 1,869 µS/cm. (T. 1581-83; EQT Ex. 28.)

235. Groundwater contaminant levels at many, but not all sampling locations, have declined over time. (T. 694.) For example, the initial specific conductance value in the North Spring was about 31,900 µS/cm in June but only 11,000 µS/cm in September 2012. (T. 1366-93; EQT Ex. 6.) However, the chloride concentration in MW14, the well that is the farthest from the pit, has not gone down. (T. 694-98; C. Ex. 433; EQT Ex. 6.)

236. The groundwater contamination plume was over 2,000 feet long. (EQT Ex. 6.)

237. Vegetation was stressed and turned brown in the flow paths of the surface waters from the impacts of the release. (T. 151-52, 156, 158, 805, 991-92, 1364; C. Ex. 10, 48, 73, 268.)

238. EQT's release degraded an unnamed tributary (UNT) to Rock Run, as well as Rock Run itself, and it impacted an Exceptional Value wetland as well. (T. 502-03, 586, 680, 685, 805, 1341, 1350-54, 1421, 1590-1612, 1633-34, 1664; EQT Ex. 6, 28.)

239. The concentration of chloride from the first samples collected in June 2012 was on the order of 4,000 mg/l at the Danzer 1 Seep, 20,000 mg/l at the Lower West Seep, about 8,000-9,000 mg/l at the Upper West Seep, and between 10,000 and 20,000 mg/l at the North Spring. (T. 1346-47; EQT Ex. 6.)

240. The surface waters impacted by the release showed high field conductivity and specific conductance, and were contaminated with elevated concentrations of chlorides as high as 14,006 mg/l. (T. 153-59, 312-17, 325-30, 992, 994, 1324; C. Ex. 10, 29, 48-54, 56-66, 73; EQT Ex. 28.)

241. The North Spring, which was a surface expression of the groundwater contaminated by EQT's release, was contained by May 31, 2012. (T. 188, 586, 680, 682, 684, 1572-78, 1637, 2111-13, 2116-17; C. Ex. 11; EQT Ex. 28, 42, 123.)

242. The flow of the North Spring decreased significantly once the impoundment was emptied. (T. 1325; C. Ex. 344; EQT Ex. 6.)

243. EQT's consultant found the West Seep area, which included about 10 seeps that were contaminated by the release, on June 1 (approximately one month after the initial monitoring well results), with a containment system not becoming operational until June 7. (Stip. 24; T. 161, 586, 680-86, 1585-90; EQT Ex. 28, 41.1, 41.3, 41.4, 42, 74.1, 74.2.)

244. On June 7, the Department, not EQT, found the Danzer 1 and Danzer 2 Seeps, located approximately 1,500 and 1,800 feet southeast of the impoundment, which were also expressions of the underground waters contaminated by EQT's release. (T. 161, 219, 229, 313, 331-34, 347, 586, 680, 682-86, 1341-43; C. Ex. 13, 50; EQT Ex. 6.)

245. EQT had containment systems operational for the Danzer Seeps by June 15. (T. 1721; EQT Ex. 40, 74.10.)

246. Thus, by June 15, EQT was collecting and treating the groundwater that was emerging at the five seeps and springs that have been identified. (Stip. 18, 24; T. 1721; EQT Ex. 28.)

247. EQT has collected approximately 35 million gallons of contaminated groundwater. (T. 747.)

248. EQT pumped the collected water to a centralized location and then disposed of or reused the water off-site. (Stip. 59; T. 600-01, 1415-17; C. Ex. 166, 222; EQT Ex. 24.3.)

249. EQT's containment of the seeps does not capture all of the contaminated groundwater. (T. 685-86, 691-92, 1658.)

250. EQT and the Department developed decision criteria based on antidegradation principles to determine when the seeps and springs could be allowed to flow naturally without collection. (EQT Ex. 6 (at 35-37).)

251. As of the date of the hearing, all of the seeps were allowed to flow naturally because they met the decision criteria for direct discharge, except the West Seeps, which were rerouted and released into Small Pox Creek, a nearby stream impacted by acid mine drainage. (Stip. 16, 17, 58, 59, 60; T. 628-29, 683, 716, 1415-17; C. Ex. 189; EQT Ex. 24.3 (at Fig. 1).)

252. The aquatic life criterion for aluminum in 25 Pa. Code Chapter 93 that applies to Rock Run is 0.75 mg/l. 25 Pa. Code § 93.8c.

253. Aluminum can be deleterious to fish and aquatic life. (T. 791, 815; C. Ex. 434.)

254. Although aluminum is not a constituent of flowback or produced water (Stip. 67), EQT's release of the water caused aluminum from the soil to enter into solution, which then manifested in the UNT (12.4 mg/l on 5/31/12 to 0.771 mg/l on 11/1/12), the North Spring (184 mg/l on May 31, 2012 to 1.94 mg/l on August 28, 2013), and the Danzer 1 Seep (36 mg/l on June 6, 2012 to 3.174 mg/l on August 28, 2013). (T. 843-852, 1391-92; C. Ex. 434-35.)

255. EQT's release resulted in an increase in aluminum in the UNT (T. 851-52), but it is not clear that it materially did so in Rock Run itself. (EQT Ex. 6 (at 42).)

**Contaminants Continue to be Present in the Waters of the Commonwealth**

256. Variability in the transmissiveness of fracture zones in the bedrock results in contaminants remaining in the groundwater system long after the flow through the holes in the liner ended. (EQT Ex. 6 (at 11).)

257. Contaminants associated with EQT's release remained in the groundwater and surface waters at the time of the hearing and continue to flow into Rock Run and the Rock Run UNT. (T. 700, 1664-65; EQT Ex. 6.)

**EQT Has Been Performing an Adequate Remediation of the Site**

258. EQT submitted a full copy of its first site characterization plan to the Department on June 25, 2012. (Stip. 25; T. 584-85; EQT Ex. 51.)

259. The Department responded to the site characterization plan on July 10, 2012. (Stip. 62; T. 591; C. Ex. 74.)

260. EQT submitted a revised plan on July 27, 2012. (Stip. 63; T. 592.)

261. The Department approved the revised plan, which included installing additional monitoring wells, on August 20, 2012. (Stip. 26, 27, 64; EQT Ex. 52.)

262. EQT began installing new monitoring wells MW7 through MW15 on August 21, 2012. (Stip. 27; T. 1002-03; C. Ex. 83.)

263. On September 13, 2012, EQT submitted a Notice of Intent to Remediate the S Pit pursuant to the Act 2 program (the Land Recycling and Environmental Remediation Standards Act, 35 P.S. §§ 6026.101 – 6026.908). (Stip. 65; EQT Ex. 7.)

264. EQT has demonstrated attainment of the Act 2 Statewide Health Standards for soil at the impoundment. (T. 1361; EQT Ex. 15.)

265. EQT had not submitted an Act 2 Final Report as of the date of the hearing. (T. 1060.)

266. With the exception of closing its impoundment in an untimely manner and on occasion being less than fully communicative or forthcoming with the Department (T. 170-71, 319-20, 1247-49), EQT has cooperated with the Department and conducted an adequate characterization and remediation of the site pursuant to Act 2 starting no later than June 25, 2012 when it submitted its first complete site characterization report. (T. 1357; C. Ex. 166; EQT Ex. 6, 7, 51.)

267. A Department inspection on April 1, 2013 revealed that large portions of the liner had blown off with the underlying banks exposed. (T. 219-21; C. Ex. 33.)

**Other Findings**

268. The Board conducted a view of the premises on July 15, 2016.

269. The Department incurred $112,295.76 in costs associated with its regulatory responsibilities related to EQT's release. (T. 880; C. Ex. 426.)

270. EQT placed, or permitted to be placed, or discharged or permitted to flow, or continued to discharge or permit to flow, an industrial waste into the waters of the Commonwealth. (FOF 75-229.)

271. EQT discharged or permitted the discharge of an industrial waste in any manner, directly or indirectly, into any of the waters of the Commonwealth. (FOF 75-229.)

272. EQT put or placed, or allowed or permitted to be discharged from property owned or occupied by EQT, into any of the waters of the Commonwealth substances resulting in pollution. (FOF 75-229.)

273. EQT's conduct with respect to the construction, operation, and closure of the impoundment and early remediation of the release was reckless. (T. 337, 376, 494-502, 541-45, 873-75, 909, 936-37, 945, 948-49, 1155; FOF 17-229.)

274. EQT released its industrial waste and pollutants into the waters of the Commonwealth from its impoundment from before April 30, 2012 through at least September 27, 2012. (FOF 75-229.)

275. EQT caused water pollution. (FOF 75-257.)

276. EQT did not have a permit authorizing its discharges from the impoundment.

277. EQT failed to take necessary measures to prevent polluting substances in its impoundment from directly and indirectly reaching waters of the Commonwealth. (FOF 17-257.)

278. EQT caused severe harm to the waters of the Commonwealth. (T. 230, 331, 372, 496, 502-03, 533-34, 545, 547, 870-73, 886-87, 947-48, 1621; FOF 75-257.)

279. EQT failed to comply with the performance standards set forth in 25 Pa. Code Chapter 78 that require that, regardless of design, impoundments must not leak. *See* 25 Pa. Code §§ 78.56, 78.62. (T. 1113-14, 1144, 1153-54, 1160-61.)

## DISCUSSION

EQT submitted an application to the Department on October 12, 2010 to conduct earth disturbance activity for the construction of an impoundment that it said would be used to store freshwater at its Phoenix Pad S in Duncan Township, Tioga County. Construction of the 5.2 million gallon impoundment was completed in December 2011 and EQT immediately began storing flowback and produced water in the impoundment for use with its operations at Pad S. In the spring of 2012, EQT installed six monitoring wells (MW1 – MW6) to the east of the impoundment for purposes of establishing baseline conditions for the construction of a second impoundment that would be used to store flowback and produced water from multiple sites. The monitoring wells were installed with the thought that they would remain in place and be used to indicate any leaks from the new impoundment. EQT sampled the monitoring wells in the field on April 30, 2012 and was surprised to find that two of the wells had very high specific conductance. EQT knew right away that the results were indicative of gas well operations.

Over the course of the next six weeks, EQT slowly—too slowly in our view—confirmed that its impoundment had released many thousands of gallons of impaired water into the underground waters of the Commonwealth at the site. When it finished emptying the impoundment in mid-June, it discovered hundreds of holes concentrated in one area of the synthetic liner in the impoundment. It is not clear whether these were the only holes in the liner. On June 15, EQT patched the holes in the area where known holes were concentrated, but it did not remove the contaminated subbase of the impoundment until September 27, 2012, and it did not fully reclaim the impoundment until June 2013.

There is no dispute in this case that EQT's unpermitted releases from its impoundment contaminated the soils and groundwater at the site. EQT eventually installed 26 monitoring

wells in an effort to characterize the extent of the contaminant plume caused by the release. In addition, the contaminants released from the impoundment polluted springs and seeps in the area as well as Rock Run, a Class A Wild Trout stream, one of its tributaries, and an Exceptional Value wetland. EQT has been cleaning up the site ever since.

The Department filed a complaint asking us to assess a penalty in excess of $4.5 million. The Department has the burden of proof in a case where it files a complaint for a civil penalty assessment. 25 Pa. Code § 1021.122(b)(1). The Department must show by a preponderance of the evidence that EQT violated the applicable statutes and regulations and that there is a lawful basis for the assessment of a civil penalty. *DEP v. Seligman*, 2014 EHB 755, 763; *DEP v. Simmons*, 2010 EHB 262, 276; *DEP v. Strubinger*, 2006 EHB 740, 748, *aff'd*, 2195 C.D. 2006 (Pa. Cmwlth. Jun. 13, 2007).

In a complaint for civil penalties, the Board acts completely independently in determining what, if any, penalty should be assessed. The distinction between the respective roles of the Department and the Environmental Hearing Board regarding complaints under the Clean Streams Law appears to have been all but lost in this matter. Under most statutory regimes, the Department assesses the penalty and, if there is an appeal, the Board determines whether the penalty assessed by the Department is a "reasonable fit" with respect to the violations. *See, e.g., Whiting v. DEP*, 2015 EHB 799, 805-06; *Thebes v. DEP*, 2010 EHB 370, 398; *Eureka Stone Quarry, Inc. v. DEP*, 2007 EHB 419, 449, *aff'd*, 957 A.2d 337 (Pa. Cmwlth. 2008). That is not the case with the Clean Streams Law. Under the Clean Streams Law the Department must file a complaint with the Board asking *the Board* to assess a civil penalty. The Board assesses the penalty, not the Department. We do not review a penalty set by the Department. There is nothing to "review." The Board itself actually determines exactly what the penalty should be.

Presumably, our determination may then be reviewed if there is an appeal to decide whether our assessment fits within a range of reasonableness. *Pines at W. Penn, LLC v. Dep't of Envtl. Prot.*, 24 A.3d 1065, 1070 (Pa. Cmwlth. 2011); *Leeward Constr. v. Dep't of Envtl. Prot.*, 821 A.2d 145 (Pa. Cmwlth. 2003); *Westinghouse Elec. Corp. v. Dep't of Envtl. Prot.* (*Westinghouse II*), 745 A.2d 1277 (Pa. Cmwlth. 2000).

As with any other legal complaint, when the Department files its complaint asking us to assess a penalty, it suggests an amount. Although the Department suggests to the Board a civil penalty amount, that suggestion is merely advisory. *Seligman*, 2014 EHB 755, 781; *DEP v. Colombo*, 2013 EHB 635, 649 (citing *DEP v. Leeward Constr.*, 2001 EHB 870, 885, *aff'd*, 821 A.2d 145 (Pa. Cmwlth. 2003)); *Westinghouse Elec. Corp. v. Dep't of Envtl. Prot.* (*Westinghouse I*), 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998). We may assess a higher or lower amount than that suggested by the Department. *See, e.g., Leeward Constr.*, 2001 EHB 870, *aff'd*, 821 A.2d 145 (Pa. Cmwlth. 2003). We do not necessarily follow the same process as the Department in arriving at a final penalty amount. For example, the Department relies on guidance documents to come up with a proposed penalty for purposes of a settlement or filing a complaint; the Board does not. *Colombo*, 2013 EHB 635, 651; *DEP v. Pecora*, 2008 EHB 146, 158; *DEP v. Kennedy*, 2007 EHB 15, 25.

The Department understands the difference between its role and that of the Board. Indeed, it has backed off its initial demand for at least a $4.5 million penalty and instead has simply asked us to assess a "very substantial penalty." (T. 21; DEP Posthearing Brief at 209.) EQT, on the other hand, does not seem to recognize the differing roles of the Department and the Board. Aside from pursuing a related declaratory judgment action in Commonwealth Court (discussed more fully *infra*) based on nothing more than a Department settlement offer, in its

posthearing brief EQT criticizes the Department for not having its supervisory personnel conduct enough of a review of the Department's penalty calculation. However, given the rather limited role of the Department's underlying calculations in the first place, an examination into the Department's internal review processes used to arrive at those calculations is pointless.

The Board's responsibility is to assess a penalty based upon applicable statutory criteria, any applicable regulatory criteria, and our own precedent. *DEP v. Perano*, 2011 EHB 867, 878; *DEP v. Weiszer*, 2011 EHB 358, 381; *Kennedy*, 2007 EHB 15, 25. The Clean Streams Law provides that a civil penalty shall not exceed $10,000 per day for each violation. 35 P.S. § 691.605(a). The statute goes on to outline specific factors to consider in determining the amount of a civil penalty—the willfulness of the violation, the damage or injury to the waters of the Commonwealth or their uses, the costs of restoration, and other relevant factors. *Id.* We have held that other relevant factors include the costs incurred by the Commonwealth in undertaking enforcement, the cost savings to the violator, the volume of pollution released during a violation, and the deterrent effect of the penalty. *Seligman*, 2014 EHB at 782; *Perano*, 2011 EHB 867, 878-79 (quoting *Weiszer*, 2011 EHB 358, 382); *DEP v. Angino*, 2007 EHB 175, 203-04, *aff'd*, No. 664 C.D. 2007, 2008 Pa. Commw. Unpub. LEXIS 510 (Pa. Cmwlth. Jun. 26, 2008); *Kennedy*, 2007 EHB at 25-26; *DEP v. Breslin*, 2006 EHB 130, 141-42. We have also repeatedly said that civil penalties should be no less than what it would have cost to comply with the law because it is unfair to those who do comply. *See, e.g., Perano*, 2011 EHB at 879 ("[T]he Board's civil penalty should, at a minimum, be high enough to deprive the violator of any savings or profit achieved through non-compliance with the law."); *Breslin*, 2006 EHB 130, 141 n.6 ("[I]t should *never* be cheaper to violate the law than to comply with the law. Civil penalties should, at an

absolute minimum, recoup any savings or excess profit that resulted from the choice to violate the law." (emphasis in original)); *Leeward*, 2001 EHB 870, 910 (same).

**Liability for Sections 301, 307, 401, and 611 of the Clean Streams Law**

The Department's complaint cites EQT for violations of Sections 301, 307(a), 401, and 611 of the Clean Streams Law. Section 301 reads as follows:

> No 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. Section 307(a) reads as follows:

> No person or municipality shall discharge or permit the discharge of industrial wastes in any manner, directly or indirectly, into any of the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the Department or such person or municipality has first obtained a permit from the Department. For the purposes of this section, a discharge of industrial wastes into the waters of the Commonwealth shall include a discharge of industrial wastes by a person or municipality into a sewer system or other facility owned, operated or maintained by another person or municipality and which then flows into the waters of the Commonwealth.

35 P.S. § 691.307(a). Section 401 reads as follows:

> It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance.

35 P.S. § 691.401. Section 611 reads as follows:

> It shall be unlawful to fail to comply with any rule or regulation of the Department or to fail to comply with any order or permit or license of the Department, to violate any of the provisions of this act or rules and regulations adopted hereunder, or any order or permit or license of the Department, to cause air or water pollution, or to hinder, obstruct, prevent or interfere with the Department or

> its personnel in the performance of any duty hereunder or to violate the provisions of 18 Pa.C.S. Section 4903 (relating to false swearing) or 4904 (relating to unsworn falsification to authorities). Any person or municipality engaging in such conduct shall be subject to the provisions of Sections 601, 602 and 605.

35 P.S. § 691.611.[3]

The term "pollution" as used in Sections 401 and 611 is defined as follows:

> "Pollution" shall be construed to mean contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid or other substances into such waters. The Department shall determine when a discharge constitutes pollution, as herein defined, and shall establish standards whereby and wherefrom it can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined.

35 P.S. § 691.1.

The term "discharge" as used in Sections 1, 301, 307(a), and 401 is not defined in the Clean Streams Law. The term is defined in 25 Pa. Code § 92a.2, but that regulation only applies to the Department's implementation of the federal NPDES program, which is not implicated here. 25 Pa. Code § 92a.1. The term is not defined in Chapter 91 of the Department's regulations, which applies more generally to the Clean Streams Law.

Waters of the Commonwealth "include any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof,

[3] Section 601 refers to suits to abate nuisances. Section 602 refers to criminal offenses. Section 605 authorizes this Board to impose civil penalties, as discussed above. 35 P.S. §§ 691.601, 602, 605.

whether natural or artificial, within or on the boundaries of this Commonwealth." 35 P.S. § 691.1. There is no dispute in this case that EQT is a "person." There is no dispute that the impaired water in its impoundment was "industrial waste" and contained polluting substances. EQT at no point questioned that its pit "discharged" waste and pollutants into "waters of the Commonwealth." In fact, EQT itself has regularly used the term "discharge" to refer to the releases from its impoundment. (*See, e.g.,* EQT Posthearing Brief at 79, 88, 102, 157, 160, 192, 196, and 205.) Indeed, EQT has not disputed that all of the other key terms used in the statutory provisions describe what EQT did during the time that its pit was full and leaking its impaired water into the waters of the Commonwealth. Thus, EQT has not disputed that it in fact caused pollution during that time. It does not deny that it placed or permitted to be placed industrial waste and pollutants into the waters of the Commonwealth during that time, or that it permitted its waste to flow into the waters, or that it allowed polluting substances to enter the waters while its pit was full. In fact, all the way through its posthearing brief, supplemental posthearing brief, and surreply brief, EQT concedes liability under Section 301, and in its posthearing brief itself it did not dispute liability under Sections 307, 401, or 611.

The real issue in dispute in this case with respect to liability is not whether EQT has some liability; the issue is the *duration* of that liability. The Department argues that liability started on April 30, 2012 and extended to the time of our hearing and beyond. EQT does not dispute that liability started on April 30, 2012, but it argues that its liability ended on June 10, 2012 when it removed impaired water from above the synthetic liner inside its pit.

Our resolution of this matter is complicated by the fact that EQT and the Department have been engaged in ongoing litigation in the courts involving the legality of a settlement offer that the Department presented to EQT before the Department filed its complaint for civil

penalties before us. On May 9, 2014, the Department offered to enter into a voluntary settlement with EQT for its violations at Pad S in lieu of pursuing litigation before this Board. It is worth pausing to emphasize that the Department was merely making a settlement offer, which is all that it could do under the Clean Streams Law. As discussed above, this Board, a completely independent agency, not the Department, has the exclusive authority to impose civil penalties under the Clean Streams Law.

EQT not only refused the Department's offer, it brought a declaratory judgment action before the Commonwealth Court in its original jurisdiction asking the Court to declare the Department's settlement offer to be unlawful based on the interpretation of the Clean Streams Law advanced by the Department regarding the duration of violations. The Court sustained preliminary objections that had been filed by the Department and dismissed EQT's declaratory judgment action, reasoning that the matter was not ripe because this Board had not yet made its penalty determination. *EQT Prod. Co. v. Dep't of Envtl. Prot.*, 114 A.3d 438 (Pa. Cmwlth. 2015). EQT appealed. The Pennsylvania Supreme Court reversed and remanded the matter for further proceedings. *EQT Prod. Co. v. Dep't of Envtl. Prot.*, 130 A.3d 752 (Pa. 2015). After the remand, EQT asked us to stay our proceedings, which we denied.[4] EQT then asked the Commonwealth Court to order us to stay our proceedings. The Court denied that request, but it suggested that EQT could file an application for summary relief. *EQT Prod. Co. v. Dep't of Envtl. Prot.*, No. 485 M.D. 2014, 2016 Pa. Commw. Unpub. LEXIS 894 (Pa. Cmwlth. Apr. 8, 2016).

EQT took the Court up on its offer and filed an application for summary relief. Although there was no factual record, instead of reviewing the Department's settlement offer, which was

[4] EQT's motion was actually only one of many motions for extensions and stays filed in this matter. We earlier denied a motion to stay our proceedings filed by EQT mere hours after the Department filed its complaint. *DEP v. EQT Prod. Co.*, 2014 EHB 797.

the original subject of the declaratory judgment action, the Court reviewed the Department's calculation of the civil penalty underlying the Department's complaint in this case. (The settlement offer was for a different amount that presumably involved different calculations.) The Court reviewed the Department's position as expressed in an interrogatory answer filed in our case, which read as follows:

> Penalties for continuing violations were assessed under The Clean Streams Law for the continuing pollution to groundwater. Assuming the violations began on 4/30/12 (the first date on which the Department has data showing the presence of pollution in groundwater), the continuing violations penalties began to accrue on the next day, 5/1/2012, up to and including the point at which the calculation was completed on 9/25/2014, a period of 878 days. The Department assessed continuing violations penalties at a rate of $5,000 per day (half the statutory maximum rate) for 878 days, for a total of $4,390,000. When continuing violations penalties are calculated for all five of the existing discharges at the site, at $10,000 per day, for Sections 301/307 and 401 of The Clean Streams Law, the proposed assessment through 9/25/2014 is $81,760,000.
>
> Note that while groundwater continues to be polluted, continuing violations penalties continue to accrue beyond 9/25/2014.

*EQT Prod. Co. v. Dep't of Envtl. Prot.*, 153 A.3d 424, 427-28 (Pa. Cmwlth. 2017).

The Court did not address Section 611.[5] The Court held that Sections 307(a) and 401 do not apply, even to EQT's active releases. In holding that Section 307(a) does not apply, the Court relied exclusively on the definition of "discharge" at 25 Pa. Code § 92a.2, which only applies to the Department's implementation of the federal NPDES program, not the Clean Streams Law as a whole. *Id.*, 153 A.3d 424, 433-34. In holding that Section 401 does not apply, the Court held that Article IV of the Clean Streams Law does not apply to industrial wastes, reasoning that Article III and Article IV could not both apply to industrial wastes. *Id.*, 153 A.3d at 433.

[5] It also did not address 25 Pa. Code § 91.34(a), discussed below.

With respect to Section 301, the Court noted that EQT clearly had some liability:

> The General Assembly, however, also prohibited a person from "plac[ing] or permit[ting] to be placed, or…permit[ting] to flow, or continu[ing] to…permit to flow, into any of the waters of the Commonwealth" industrial waste. 35 P.S. § 691.301. Through the inclusion in Section 301 of the language "plac[ing] or permit[ting] to be placed, or…permit[ting] to flow, or continu[ing] to…permit to flow, into any of the waters of the Commonwealth," it appears that the General Assembly intended to expand Section 301's prohibition not only to discharges of industrial waste into surface waters, but also to instances where industrial waste enters into the Commonwealth's groundwater or surface waters through other means. *See id*. This interpretation would cover situations where industrial waste escapes containment and flows over land into surface waters or leaks into the soil and enters the Commonwealth's groundwater. Thus, Section 301's prohibition applies to situations such as here, where industrial waste leaked from a compromised subgrade impoundment into the subsurface beneath the impoundment, making its way to the groundwater. In fact, the parties do not disagree that Section 301 prohibits such pollution.

*Id.*, 153 A.3d at 434. In the Commonwealth Court case, as in our case, the issue in dispute regarding Section 301 was the *duration* of the violations: "The parties disagree, however, as to whether further movement of the industrial waste and its mere presence in groundwater or other bodies of water that make up the waters of the Commonwealth are also violations." *Id.*

The Court held that a violation of Section 301 "occurs when a person or municipality does what is prohibited—i.e., allows industrial waste to enter into the waters of the Commonwealth—and once it ceases that conduct, violations cease." *Id.* at 436. The Court held more specifically that Section 301 "is not a provision that authorizes the imposition of ongoing penalties for the continuing presence of an industrial waste in a waterway [sic] of the Commonwealth following its initial entry into the waterways [sic] of the Commonwealth." *Id.* at 437. In other words, the Department may not base a settlement offer or its litigation position on the theory that the mere continuing presence of the pollutants that the liable party released into

the waters of the Commonwealth constitutes a new violation every day the presence persists.[6] Civil penalties may only be imposed on days when there is an "initial active discharge or entry of industrial waste into waters of the Commonwealth." *Id.*

A release of contaminants has two components: contaminants (1) leave one place and (2) enter another place. This case illustrates that those two things do not always happen simultaneously. In our view, the more important component giving rise to legal liability under the anti-pollution provisions of the Clean Streams Law is the second component—the entry into waters of the Commonwealth. However, the Court also seemed to consider the time when industrial waste "escaped containment" as relevant. Unfortunately, the Court's holding is not clear on where the releases must come from. When it described EQT's position in the case, the Court described EQT's argument as there being a violation when "the industrial waste or substance resulting in pollution is discharged or enters from an area outside of the waters of the Commonwealth (e.g., a factory, industrial site, railcar, etc.) into a water of the Commonwealth. Once the discharge or entry stops, no additional violations occur even if the previously released regulated substance continues to be present in the water." *Id.* at 429. In the context of this case, does that mean penalties only accrue on days when EQT's industrial waste left the impoundment itself? Or do penalties also accrue on days when polluting substances entrained in soils that originated in the impoundment did not go directly into waters, but only later enter into waters of the Commonwealth? Such discharges may be thought of as indirect discharges. EQT released

[6] To the extent the Court held that the violations cease for all purposes, not just civil penalties, query whether the holding could significantly limit the Department's ability in the future to, among other things, issue orders to clean up pollution because in the Court's view there is no continuing violation. *See, e.g.*, 35 P.S. § 691.610 (authority to issue orders to cease violations of the act). The Court suggested other parts of Section 610 may remain applicable, and that Section 601 authorizes court actions to abate nuisances. Nuisances, however are defined in part as violations of the act. 35 P.S. § 691.601(a). Section 301 is arguably only penal to the extent it is incorporated into Sections 602 and 605 regarding civil and criminal penalties. Otherwise, it is a remedial statute designed to protect the Commonwealth's waters.

pollutants and waste into the soils at and near its pit. Some of those pollutants and that waste did not travel directly into waters, but instead got bound up in soils and materials outside of the pit but above groundwater in the unsaturated zone, only to be released into groundwater for the first time at a later date.

We need not resolve this issue because, for reasons other than liability, we have not imposed any penalty for the periods when EQT's only new releases were strictly from the soils outside of the pit. For purposes of creating a complete record, however, we note that new releases even from outside of the pit constitute new violations in our view, and as a matter of fact such releases occurred at EQT's site up until the time of the hearing. The waste escaped from an area that was outside of the waters of the Commonwealth and slowly but surely entered those waters for the first time on a daily basis up until the time of the hearing.

It is not clear to us why it should matter legally whether the industrial waste escaped containment so long as the waste enters waters of the Commonwealth from outside of the waters of the Commonwealth. The key determination is not when contaminants were released, but rather, when contaminants entered the waters of the Commonwealth. *Westinghouse Elec. Corp. v. DEP*, 1996 EHB 1144, 1200, *vacated in part and aff'd in all other respects*, *Westinghouse I*, 705 A.2d 1349 (Pa. Cmwlth. 1998) ("cause of action accrues for violations of these sections only when industrial waste, or a substance resulting in pollution, actually *enters* waters of the Commonwealth—not when it is first released into the environment." (emphasis in original)). The release and the entry into waters may be simultaneous, but that is not always the case. It was certainly not the case here. Some of the industrial waste only slowly drained into waters of the Commonwealth. Even as the contaminated water drained, it also left behind the contaminants of concern in soils which only *entered into* the waters of the Commonwealth after

being picked up at a later time in new, clean water serving as a vehicle to transport the contaminants into groundwater for the first time. Unfortunately, this process can take a long time, and in this case, continued until at least September 27, 2012.

If we were to analogize this situation to storage tanks, which are perhaps easier to visualize, it should not make any difference whether a delayed release into waters originates from the contaminants inside both walls of a double-walled tank or the dribs and drabs from the interstitial space in the tanks. If the goal is protection of the waters of the Commonwealth, these fine distinctions would seem to have little relevance. Unless the contaminated medium, which trapped some of the contaminants and is now serving as the source, is eliminated, the operator is still causing pollution, and it is still allowing industrial waste and polluting substances to continue to flow *into* the waters of the Commonwealth.

EQT through its experts devoted considerable effort to showing that EQT only released "a finite mass of material." This is undoubtedly true. No one has claimed that EQT continued to add new source material to its impoundment after May 21, 2012 or that new impaired water was added to the environment after June 15 or so. However, EQT is focusing on only half of the culpable event. While EQT is focused on contaminants leaving the pit, what matters is when those contaminants entered into waters. *Westinghouse, supra*, 1996 EHB 1144, 1200. Here, some of the "finite mass" that was released did not enter into waters until at least September 27, 2012.

Nevertheless, if it is ultimately determined that penalties may only be imposed on the days when releases occurred *from the pit itself*, it is obviously very important to be precise on exactly what constituted the pit. EQT repeatedly claims that it removed all of the fluids from the impoundment by June 10, 2012, so the release "from the impoundment" necessarily stopped as

of that date. In fact, it is fair to say that its entire case regarding liability is based on that premise. However, it is simply not true. We cannot say with confidence that leaks stopped from above the liner until *June 15*, but putting that minor discrepancy aside, a wastewater impoundment is defined as "[a] depression, excavation or facility situated in or upon the ground, whether natural or artificial and whether lined or unlined, used to store wastewater including sewage, animal waste or industrial waste." 25 Pa. Code § 91.1. There is no reason to arbitrarily define the bottom of the impoundment as the level at which the uppermost synthetic liner happens to be located inside an impoundment that may or may not include one or more synthetic liners. Impoundments are constructed in many different ways. Below the uppermost liner may be another liner also made of synthetic material, or there may be a composite liner, or earthen materials, or various combinations thereof. There may be multiple layers of protective materials such as geotextile, clay, a layer of fines, and/or a detection zone with or without conduits. All of those layers are part of the impoundment. *See generally* 25 Pa. Code § 78.56(a)(4)(ii) (describing materials to be placed *above the pit bottom*); 25 Pa. Code § 78.62(a)(12) (same).

EQT excavated down about 15 to 16 feet below grade to build its impoundment. Above the rock EQT installed (at least to some degree) a "clay-like material," "limestone screenings," and geotextile inside the impoundment. Although the evidence shows that these lowermost layers of impoundment were inconsistently and improperly installed, there is no dispute that they were there. These materials constituted part of the impoundment as well. Arguing that only releases that started from above the synthetic liner result in liability would be like arguing that releases from the interstitial space in a double-walled tank do not create liability. It makes no sense. It is still a release from the tank, or in this case the pit.

For the most part EQT glosses over the distinction between the liner and the bottom of the impoundment, with some exceptions. (*See, e.g.*, EQT Brief, Proposed FOF 474 (claiming that the bottom of the pit is the level of the synthetic liner); EQT Ex. 6 (same).) Although the difference is small—up to 6 inches or so on the bottom and 4 inches or so on the sides of the impoundment—it is not accurate to simply ignore it. In a pit that was .69 acres on the bottom and 1.85 acres including the sidewalls, the subbase was composed of a substantial amount of material. Releases from the pit include releases from *all* of the pit, including the subbase. Under the Commonwealth Court's holding as narrowly construed, violations only stopped when releases from all of the pit including the subbase stopped, and that did not occur for the most part until September 27, 2012, when the contaminated subbase was largely removed, and to a lesser extent June 2013 when the pit was finally closed.

EQT and the Department debate whether we are bound by the Commonwealth Court's holding. The Department has filed its appeal as of right to the Pennsylvania Supreme Court, where it remains under consideration. The Department argues that the Commonwealth Court's analysis is wrong in virtually every respect. It says we may ignore the Court's ruling because its appeal to the Supreme Court acts as a supersedeas, essentially rendering the decision null and void until the appeal is resolved. *See* Pa.R.A.P. 1736(b). EQT, of course, says we are bound by the Court's decision until the Supreme Court rules.

We do not know whether we are bound or not. The Court's decision relates to a settlement offer made by the Department, an agency of the Commonwealth separate from the Board. The Court's decision was issued pursuant to its original jurisdiction and is not the decision of a court that was acting in its appellate capacity having reviewed a decision of this Board. *Compare Germantown Cab Co. v. Phil. Parking Auth.*, 27 A.3d 280, 283 (Pa. Cmwlth.

2011) (even pending an appeal, the decision of an *appellate* court remains binding precedent until actually overturned).

We need not resolve this question. With respect to Section 301, although we conclude as a matter of fact that releases from EQT's impoundment continued until at least June 2013 when the impoundment was reclaimed and ceased to exist, for reasons other than liability we have chosen not to assess any penalties after September 27, 2012 when most of the contaminated subbase was removed. Deciding whether liability continued after that date is not necessary because, even if we assume that EQT's violations continued after September 27, we assess no penalty for those violations.[7]

We also need not decide whether we are bound by the Court's holding that Sections 307(a) and 401 do not apply. Although we disagree that Sections 307(a) and 401 do not prohibit the unpermitted discharge of industrial wastes, even if we assume that EQT is liable under Sections 307(a) and/or 401, we would not assess a separate penalty for 307(a) and/or 401 in addition to the penalty we are assessing under Section 301. As a general principle, a person may be guilty of violating multiple statutory provisions with one act, but separate penalties may not be imposed for the overlapping offenses unless one offense requires proof of a fact not required by the other. In other words, the overlap must not be complete. *Gemstar Corp. v. DEP*, 1998 EHB 53, 82; *DEP v. Silberstein*, 1996 EHB 619, 639-40. Under the so-called merger rule, the party can be penalized for one or the other, but not both.[8] EQT's unpermitted release of pollutants does not require proof of facts unique to any one of Sections 301, 307, or 401 of the

[7] This case illustrates that there can be a wide gulf between a determination that violations continue and a determination that it is reasonable and appropriate to assess continuing penalties for those violations. Lengthy violations do not necessarily justify lengthy penalties. EQT's unfounded fear of absurd consequences forgets that both the Department and this Board's actions must be both lawful and *reasonable*.

[8] The fact that the merger doctrine exists shows that it is not at all uncommon to have multiple statutory provisions (e.g. Sections 301, 307(a), 401, and 611) prohibit the same conduct.

Clean Streams Law.[9] Therefore, regardless of whether EQT violated only Section 301 as it concedes, or 301, 307, or 401, we choose not to assess a combined penalty of more than $10,000 per day for EQT's release. In other words, we would not assess a higher penalty even if it is ultimately determined that EQT also violated Sections 307 and 401. We have not increased the penalty for the unpermitted release above what we otherwise feel is appropriate.

With respect to the parties' debate about whether we are bound by the Court's holding that a penalty may not be assessed based upon nothing more than the continued presence of contaminants in the waters of the Commonwealth, we need express no opinion. This issue would only arise if we were considering the imposition of penalties after June 2013 when the active releases from the impoundment stopped, and our penalty assessment stops well before that.

As noted above, we reject EQT's premise that only releases from above the synthetic liner create liability. EQT also argues, however, that any releases from the entire pit (as well as the material aside and below the pit) after September 27 were very small, especially when compared to the massive releases that occurred before June 10. We tend to agree, but small releases nevertheless result in liability. The Clean Streams Law does not speak in terms of "insignificant" or "de minimis" releases. It would be a mistake to step onto that slippery slope. Discharge of "any" industrial waste gives rise to liability. The degree of harm associated with the continuing releases goes more to the extent of cleanup required and the amount of the penalty in a civil penalty case rather than the existence of a violation.

With respect to the Department's claim in its complaint that EQT is liable under Section 611 of the Clean Streams Law, which was not addressed by Commonwealth Court, the parties

[9] EQT's violation of 25 Pa. Code § 91.34(a) deserves a separate penalty because that violation required proof of different facts; namely inadequate design and operation of an impoundment.

vigorously dispute whether Section 611 of the Clean Streams Law is an active issue in the case that remains before the Board for consideration, with EQT contending that the issue has been waived.[10] We agree with the Department that it preserved the issue in its posthearing brief, barely. (DEP Brief at 173-175, 278-279.) EQT did not contest its liability under Section 611 in its answering posthearing brief. Therefore, the Department in its reply brief argues that EQT in fact waived the issue. Under our rules, "[a]n issue which is not argued in a posthearing brief may be waived." 25 Pa. Code § 1021.131(c). *See Seligman, supra*; *Gadinski v. DEP*, 2013 EHB 246.

Caught off guard, EQT asked for and received permission to file a surreply brief. EQT in that brief does not so much dispute that it is liable under Section 611 as it argues that it cannot be made to pay civil penalties for *both* Section 301 and Section 611. Despite the complete absence of any discussion of Section 611 in EQT's posthearing brief, we will not hold that EQT waived the issue. To some extent, EQT's belated treatment of the issue was justified by the Department's minimal reference to Section 611 in its own brief.

To the extent EQT argues that it did not violate Section 611, we disagree. That section unambiguously and distinct from its other prohibitions makes it unlawful to cause air or water pollution, which EQT concedes factually it did. Section 611 is no more or less specific on the prohibition against unpermitted pollution than the other Clean Streams Law provisions containing that prohibition. Indeed, it is quite similar to Section 401.[11] There is nothing

[10] At this point in the discussion we are focused upon the portion of Section 611 that makes it unlawful to "cause air or water pollution," not on the portion that makes it illegal to violate a regulation. EQT does not dispute that that portion of Section 611 applies to any violation of 25 Pa. Code § 91.34(a).

[11] Section 611 does not appear to be constrained by EQT's heavy reliance on the verbiage regarding pollutants entering "into" waters of the Commonwealth in Sections 301, 307, and 401 of the Clean Streams Law. It is only necessary that the party "cause" pollution, and it would seem that the violation continues as long as pollution continues to be "caused."

particularly unusual or problematic about overlapping statutory provisions proscribing the same misconduct.

Whether fines or penalties can be imposed under both statutory provisions for the exact same conduct is a different issue. On that point, we agree with EQT that the penalty we impose under Section 301 should not be increased because the exact same release also constituted a violation of Section 611. In other words, we have not increased the daily penalty because EQT's conduct violated Sections 301 *and* 611 (and perhaps 307 and 401 as well). The penalty would have been the same even if EQT had only violated any one of the statutory provisions. There is nothing to distinguish the elements needed to prove EQT caused water pollution in violation of Section 611 from the elements needed to prove EQT violated Section 301. *See Gemstar, supra*.

Having found that EQT's liability continues at least as long as active releases occurred from the impoundment, we must next determine how long those active releases continued. There is no dispute that active releases occurred from April 30 through June 10, 2012. EQT says that active releases of industrial waste originating above its synthetic liner terminated on that day, but the evidence shows that EQT did not patch the known holes in the area of the Terra Services activity until June 15. We are not confident that those (and the earlier holes discovered and patched the month prior in May) were the only holes in the liner, but assuming they were, the liner still contained sludge and debris and it was pressure washed with the holes still in it.

Far more importantly, the evidence does not support EQT's position that leaks from the impoundment ended when industrial waste was removed from above the synthetic liner. Industrial waste remained below the liner but still within the impoundment at least through September 27, 2012. On as late as September 13, actual standing contaminated water was observed to still exist in the impoundment. In addition, a large wet area needed to be cut through

to allow equipment into the bottom of the impoundment. The water in those soils would have been contaminated. Soil samples taken in September showed the continuing presence of pollutants and industrial waste in the subbase, especially in the subbase materials immediately below the synthetic liner but above the bottom of the pit. Those soils were not excavated until September 27, and even then, it does not appear that 100 percent of the subbase soils could be removed.

Second, all of the experts who testified in this case agree that at least some of the subbase,[12] especially on the bottom (as opposed to the sidewalls) of the impoundment, would have remained saturated even after the wastewater was removed from above the synthetic liner. Lawrence Roach, P.G., EQT's consultant, went on to say that all but an "insignificant" amount of that waste would have drained out in four days. We are unable to credit his conclusory testimony that only an "insignificant" amount of contaminated water remained after four days, but even if we did credit it, the important point in terms of continuing legal liability is that contaminated water still remained. This was verified when the liner was lifted and water could be seen both standing in pools and saturated into soils. More importantly, even as some of the water drained away, the contaminants themselves undeniably remained, as confirmed by the soil sampling conducted in September 2012.

Some of the contaminants entrained in the water in the subbase were released quickly as much of the water containing contaminants drained into the underground waters, but others would have been left behind and would have slowly been released both as the original industrial waste continued to drain by gravity, and as new water came into contact with the subbase by way of precipitation and the subsurface flow of new underground water and picked up those

[12] Everything that we say with respect to the subbase applies to the rocks and dirt *underneath* the impoundment as well. We distinguish between inside and outside of the pit only because of the Commonwealth Court's apparent holding that releases from inside the pit are more significant.

contaminants and transported them to underground waters below the water table for the first time. (C. Ex. 433.) These pollutants initially actively entered the waters of the Commonwealth from areas outside of the waters of the Commonwealth for the first time over many months, at least through September 2012. Just as the drip-drops from an interstitial compartment in a vessel or tank result in continuing liability, so do EQT's prolonged releases from the subbase of its impoundment. The parties disagree on the amount, nature, and consequences of the releases, but no witness for EQT claimed that there would have been zero new releases of contaminants, at least until the contaminated subbase was finally removed on September 27. Liability turns on the fact, not the amount, of the releases. The Department proved by a preponderance of the evidence, including the credible testimony of its expert, Randy Farmerie, P.G., that this occurred.

Weighing credibility and selecting among competing expert testimony is one of our most basic and important duties. *UMCO Energy, Inc. v. DEP*, 2006 EHB 489, 544-45, *aff'd*, 938 A.2d 530 (Pa. Cmwlth. 2007). The weight given an expert's opinion depends upon factors such as the expert's qualifications, presentation and demeanor, preparation, knowledge of the field in general and the facts and circumstances of the case in particular, and the quality of the expert's data and other sources. *Crum Creek Neighbors v. DEP*, 2009 EHB 548, 561. We also look to the opinion itself to assess the extent to which it is coherent, cohesive, objective, persuasive, and well grounded in the relevant facts of the case. To be clear, we believe the experts in this case agree about far more than they disagree, but to the extent EQT and the Department's experts disagreed, we find the opinions of Mr. Farmerie, the Department's expert, to have been more credible. Although Mr. Roach's qualifications are impeccable, some of his theories in this case strike us as rather contrived and more lawyerly than scientific. James Casselberry is also a prominent hydrogeologist, but he simply seemed to parrot Mr. Roach's litigation theories, none of which

manifested in his many earlier communications in the case, and none of which were fully developed in his expert report.

EQT posits some unpersuasive theories in an attempt to minimize the significance of these continuing releases from its pit. First, it says the releases would have been minor relative to the large releases that occurred before June 10. Although we reject any attempt to quantify the exact amount of the releases from the subbase material inside the pit, we do not disagree that releases would have been greatly reduced over time, but to repeat, the greatly reduced leakage may support a lower penalty or factor into the choice of an appropriate remedy, but it does not excuse EQT completely from liability. Credible expert testimony combined with the surfeit of sampling results in this case shows that it was reasonable for Mr. Farmerie to conclude that the releases occurred continuously every day. *See DEP v. Lawrence Coal*, 1988 EHB 561, 585-86, *aff'd*, No. 1891 C.D. 1988 (Pa. Cmwlth. Jul. 12, 1989).

Second, EQT says no new precipitation or groundwater would have come in contact with the industrial waste that was still in (and below) the pit after June 10. Of course, even if this were true, as just stated, the industrial waste itself had not fully drained as of at least September 13 when actual contaminated waste was observed to still be in the pit. But even if there were no industrial waste remaining, we credit the expert opinion of Randy Farmerie that new, previously unaffected water from precipitation and underground water above the water table came into contact with the waste in the subbase, picked up those contaminants, and then drained through unsaturated materials and ultimately into the waters of the Commonwealth for the first time. (T. 745-47; C. Ex. 433.) These new, active releases gave rise to continuing liability.

EQT counters that there could not have been any new water to create new releases because the liner was patched in places. This is not only inconsistent with Mr. Farmerie's

credible testimony to the contrary, it is unreasonable to assume that absolutely no other shallow underground water ever touched the contaminated subbase material for the months that it remained in place. Among other things, the water table to the immediate east of the impoundment slopes down and toward the area of the impoundment. (EQT Ex. 6.)

EQT says all the holes and/or failures in the very large, abused liner were patched, but we do not know that. EQT never performed a thorough investigation of the rather massive liner to identify all holes and failures. We heard repeated references to a forensic investigation of the liner, but the results were never revealed. In fact, EQT refused the Department's repeated requests to supply it. We do not take this as evidence that there were other, unpatched holes, but we also cannot accept EQT's representation that all holes were patched, and therefore, no new water could have come into contact with the subbase to cause continuing new releases of contaminants.

EQT did not construct a proper subbase or install a sturdy enough liner to withstand the abuse to which EQT put it. Given the photos we saw of the subbase, it is not difficult to imagine the rocky subbase caused other holes. (EQT Ex. 10.1(a); C. Ex. 29, 436.) Instead of any testimony from EQT showing how the impoundment was constructed, we were presented with contractor specifications on how it *should* have been constructed, self-serving contractor-written reports with no sponsoring testimony (EQT Ex. 91), and the oddly, highly evasive testimony of a former EQT employee involved in the construction process called only by the Department. (T. 958-74.)[13] Contaminants were found in the subbase at places as far as 100 feet away from the location of the holes attributed to Terra Services at higher levels than the contaminant levels found in the area of those holes. (T. 1315-18.) EQT retained Enviroscan to conduct a

[13] Mr. Welsh appeared pursuant to a subpoena and was represented by Michael A. Johnson, Esq., separate counsel. (T. 958.)

geophysical survey to map areas of high conductivity around the impoundment likely associated with areas of contamination from the pit. (EQT Ex. 51.) Unfortunately, conductivity was apparently not investigated in and below the pit itself, but areas of high conductivity were shown to have spread out in every direction, not just in the vicinity of the alleged Terra Services holes. Furthermore, the liner remained open to the elements and unprotected for three months. There was a disturbing history of rocks being found *on top of* the liner. Events later in April 2013 showed how exposed liners left open to the elements can be severely damaged. None of this evidence proves there were definitely other holes or failures, but it discredits EQT's counterintuitive theory that the subbase remained perfectly dry and hermetically sealed off from anything other than old industrial waste until September 27, 2012.

EQT's next theory of why its violations ended on June 10 is that the level of contaminants decreased in the downgradient wells and surface water monitoring points from June to September 27. This is undeniable, fortunate, and fully expected given the end of the large releases from the pit when it was full. However, it is not inconsistent with our finding that admittedly much smaller releases of contaminants continued to be actively released from the pit through September 27. The majority of the contaminants being monitored continued to be associated with releases that started before June 15 or so, and the noise from that contamination tends to drown out the new contamination, but it does not follow that no new contamination is occurring: It, in fact, is. (T. 736-37, 742, 749.)

In an email dated July 11, 2012, James Casselberry said, "we have captured most of the mobile contaminated groundwater with the four containments and the remaining mess is stuck in diffuse flow or in soils that are either unsaturated or near the water table interface." (C. Ex. 344.) Although the email itself is not clear on this point, Mr. Casselberry testified that this statement

refers to the soils at the seeps and springs. (T. 1643, 1657.) If that is true, we are left to wonder why contaminants would get stuck in the soils with "very, very low permeability" and only flush out with new precipitation at the seeps (T. 1646, 1651, 1658, 1662), yet the very same soils up the hill at the impoundment would not have done the same thing. Indeed, a "clay-like" material was used to construct the subbase, and there is every reason to believe as Mr. Farmerie opined that the material would have acted the same as the materials located near the seeps where "the remaining mess was stuck in diffuse flow or in soils that are either unsaturated or near the water table interface."

EQT's next attempt to minimize the significance of the active continuing releases of industrial waste from its impoundment is perhaps its least persuasive. Mr. Roach argues that the industrial waste that was left behind and continued to drain out of the impoundment (and below the impoundment) after most of the fluid was pumped out was "groundwater," and because it bears that label, there can be no continuing liability. His theory is that, when the impoundment was full and leaking heavily, the water table under the impoundment, which was rather shallow to begin with, rose up or "mounded" up to the level of the synthetic liner. Therefore, the industrial waste above the synthetic liner drained directly into "groundwater." Once that happened, no new releases occurred—it was just "groundwater" moving around, even after that "groundwater" remained above the saturated zone as the water table receded, as it slowly did.

Mr. Roach's theory does not seem to be based so much on accepted scientific precepts, but more on what appears to be an argument rooted in semantics that has been contrived to dovetail with EQT's litigation strategy. First, we do not credit the factual basis for the theory. Notably, Mr. Roach seems to simply forget that holes extended up the side of the impoundment above the postulated mounded water table. (EQT Ex. 6 (at Fig. 4.1).) Contaminants in the

subbase at that level would not have passed directly into "groundwater" even under his theory. Some of the soils in these areas would have dried out, leaving behind contaminants, and then at a later date been flushed out by previously unaffected water.

As to the bottom of the pit, there may have been some mounding, but we do not credit the theory that the water table was perfectly coincident with the entire bottom of the .69-acre liner. The groundwater regime at the site is extremely complex, with anisotropic flow almost entirely limited to preferential pathways and with a strong downward component, which makes perfect sense given the impoundment's location at the top of a rocky hill. (T. 1528; EQT Ex. 6, 28, 51.) The fracture-controlled flow has resulted in oddly shaped contamination plumes. (EQT Ex. 6.) Wells and borings near the pit either had no water or would not produce much water ("weepers" as one witness called them). The area is a relatively stagnant zone, and all of the depictions of groundwater flow are not entirely consistent, indicating somewhat variable flow. (EQT Ex. 6.) Water levels in the wells were all over the board, depending on whether they intercepted productive fractures (T. 660, 691; C. Ex. 220), which not only has us doubting Mr. Roach's projection of historical water table levels, but even if we accept the projection, doubting the conclusion of a perfect mound that one might envision in a sandbox of mixed industrial waste and groundwater below every inch of the liner. In such a setting, we are finding it impossible to accept that every square inch of EQT's liner over the entire length and breadth of its large pit bumped up perfectly against "groundwater" every day the holes were present. Even using Mr. Roach's semantic construct, there is little direct evidence to support the theory, which is instead a projection both in time and distance. The fact that high levels of contaminants were found in the subbase below parts of the liner not coincident with the alleged Terra Services holes would only be compelling evidence of 100% saturation if EQT had completed (or at least supplied) its

liner investigation eliminating other leaks. Industrial waste in *unsaturated* areas on the bottom of the pit, let alone the side of the pit, could not have instantly transmogrified into "groundwater."

Using Mr. Roach's label for a moment more for purposes of discussion, if it was "groundwater" when the pit was full, once it remained above the water table as that table receded, it no longer qualified as "groundwater." Groundwater that emerges in a seep, for example, is surface water, not groundwater. (T. 1344-45.) It is difficult to accept that water inside of EQT's pit was underground water or groundwater. The underground water that was no longer groundwater (using Mr. Roach's definition) eventually drained back into the groundwater.

The mound of water beneath the impoundment was largely EQT's industrial waste and it remained waste, albeit diluted waste, after the water table receded. It would indeed be ironic if EQT were able to escape liability because its illegal discharges were so extensive that they temporarily changed the level of the groundwater. It would be like saying a leak from an aboveground tank near a river changed the banks of "the river" during the release, so water that subsequently seeped into the ground after the "river" subsided was just river water, not new releases of industrial waste.

Mr. Roach's theory also has no legal validity. Initially, the waters of the Commonwealth include "underground water," not just groundwater as narrowly defined by Mr. Roach. 35 P.S. § 691.1. The Clean Streams Law does not use the term "groundwater." Furthermore, to be precise, the focus of the Clean Streams Law, and its prohibition on pollution to waters of the Commonwealth, is on the elements within industrial waste that, when introduced into waters of the Commonwealth, bring about contamination and "render such waters harmful, detrimental or injurious to public health, safety or welfare…." 35 P.S. § 691.1 (definition of "pollution"). It is

the contaminants flowing in the water and bound up in soils that are of relevance and concern, not the water *per se*. The fact that the impounded flowback fluid is in part composed of some amount of water is of no consequence because it also contains myriad elements that above certain levels are recognized as pollutants. EQT violated the law not because it released water but because it released, e.g., chloride, barium, strontium, and lithium. The water is merely the medium which houses the contaminants. Contaminants were deposited in the subbase and those contaminants are being continually released either as they drain out in solution or are picked up in new, previously uncontaminated water. Both of these mechanisms result in new violations.

EQT's industrial waste did not magically stop being industrial waste once it commingled with other water above or below ground. For example, the waste seen pooled in the pit on September 13 may very well have been diluted by rainwater or new formerly underground water as it was allowed to sit there for months, but that does not mean EQT was no longer responsible for ensuring that it was not released. It was not transformed into "surface water" and therefore somehow not of concern. It can readily be seen that these sorts of semantic arguments are unpersuasive.

Further, despite the fact that Mr. Roach contends that contaminants become groundwater once they enter the water table, he also repeatedly references a "contamination plume." If we accept Roach's theory at face value, it seems that it would be impossible to distinguish a contamination plume because it would all be groundwater—pollution would cease being pollution once it entered the waters of the Commonwealth. To skirt this issue, Mr. Roach refers to "affected groundwater," which presumably is groundwater that has been polluted from the release of industrial waste from EQT's impoundment. We do not accept these convenient semantic delineations. The nomenclature advanced by Mr. Roach and EQT seeks to gloss over

the fact that the impounded flowback fluid is an industrial waste as defined in the Clean Streams Law that has caused significant and widespread pollution to waters of the Commonwealth both above and below the ground.

Thus, we conclude that active releases of industrial waste continued to discharge for the first time, from both inside and below the impoundment, which were both outside the waters of the Commonwealth, and enter into the waters of the Commonwealth every day from April 30 through and including September 27. (T. 689-91, 695, 700-04, 1664-65.) We agree that only a "finite mass" of material was released from EQT's impoundment. We disagree that the entire finite mass instantly entered the waters of the Commonwealth before June 15. Most of it probably did within a few weeks, but some of it still has not entered the waters. For purposes of a complete record, although we assess no penalty for the period after September 27, releases occurred and liability continued to accrue until June 2013 when the pit was closed.[14]

The Commonwealth Court's Opinion says there must be a culpable act or omission. EQT's culpability arises from its unpermitted release of industrial waste and pollutants from its impoundment, which continued through at least September 27. Its culpability was exacerbated by allowing those releases to continue for so long by not removing the continuing source; namely, the contaminated material inside the impoundment.

Act 2 (the Land Recycling and Environmental Remediation Standards Act, 35 P.S. §§ 6026.101 – 6026.908) provides a strong incentive for liable parties such as EQT to voluntarily and cooperatively clean up their pollution. The fact that EQT is cleaning up the site pursuant to Act 2 is entitled to considerable weight in our consideration of the *amount* of the penalty. Act 2, however, does not toll EQT's liability for ongoing violations during the cleanup process.

[14] To complete our fact-finding role, after June 2013, releases would also have continued from soil and bedrock *below* the former location of the impoundment. Contaminants from EQT's release continue to be present and migrate in the waters of the Commonwealth.

**Liability for Violations of 25 Pa. Code § 91.34(a)**

Count IV of the Department's complaint is based on EQT's violation of 25 Pa. Code § 91.34(a). That section reads as follows:

> Persons engaged in an activity which includes the impoundment, production, processing, transportation, storage, use, application or disposal of pollutants shall take necessary measures to prevent the substances from directly or indirectly reaching waters of this Commonwealth, through accident, carelessness, maliciousness, hazards of weather or from another cause.

25 Pa. Code § 91.34(a).[15] Section 611 of the Clean Streams Law makes it unlawful to fail to comply with a regulation of the Department. 35 P.S. § 691.611. EQT was a person engaged in an activity which included the impoundment of pollutants. Therefore, in order to comply with Section 91.34(a), EQT needed to take necessary measures to prevent the impaired waters in its impoundment from "directly or indirectly" reaching waters of the Commonwealth from any cause. EQT failed to do that. It failed to design and operate its impoundment in a way that prevented the impaired water in its impoundment from being released into the underground waters beneath the impoundment. Its culpability under Section 91.34(a) arises from the fact that it failed to install a proper subbase, or an adequate liner given the abuse to which the liner was going to be subjected. It failed to take necessary measures to prevent pollution by failing to properly manage hoses used in the impoundment. It failed to have adequate supervision and oversight at the site. It failed to have any system in place for detecting leaks. It failed to timely conduct an adequate emergency response once there was evidence that the impoundment was leaking. It failed to close the leaky impoundment in a timely manner. These failures directly and proximately resulted in polluting substances reaching waters of the Commonwealth.

[15] Substantially the same regulation was previously codified at 25 Pa. Code § 101.3(a).

Each day that EQT failed to take necessary measures that prevented pollutants from reaching waters of the Commonwealth, directly or indirectly, constituted a separate violation. *Westinghouse, supra*, 1996 EHB at 1240-42. EQT's failure to take necessary measures to close the impoundment and minimize continuing releases continued through at least September 27, 2012 when it removed the damaged liner, excavated the contaminated soil, and installed a temporary liner, and probably through June 2013 when it finally closed the impoundment.

In defense, EQT argues that it needed to know a release was occurring before it can be held liable under Section 91.34(a). Of course, EQT knew or should have known after May when the ATOS holes were discovered, but its legal argument is incorrect in any event. The regulation requires EQT to take necessary measures to *prevent* a release in the first place, not just to stop a release after it has already started. There is nothing in the regulation to indicate that the violation begins only upon an operator becoming aware that its impoundment is leaking. EQT failed to take necessary measures when it built its substandard impoundment in 2011, and its failure started causing pollution as early as April 30, 2012.

EQT's violations of 25 Pa. Code § 91.34(a) might well have justified a severe penalty, continuing as they did for several months until the impoundment was closed. However, while the Department's proposed penalty is in no way binding on us, its complaint including its prayer for relief should fairly put the defendant on notice of the *magnitude* of the potential liability that it faces so that the defendant can mount a proportionate defense. Here, the Department sought a penalty of $10,000. Its prehearing memorandum contains minimal references to Section 91.34. We heard sparse reference to the regulation at the hearing. Most importantly, the Department does virtually nothing in its posthearing briefs to develop its contention that a substantial penalty is warranted for EQT's violation of Section 91.34(a). The section is only mentioned in a very

conclusory fashion in four proposed findings of fact, two of which merely cite the law, and one proposed conclusion of law, which again merely quotes the regulation. There is no argument, no citations to the record, and no citations to any case law. In response to EQT's arguments regarding the regulation in its posthearing brief, the Department said absolutely nothing in its reply brief. EQT complains with some justification that the Department has essentially waived the issue. While we do not agree that there has been a complete waiver, under these circumstances, it would be unfair to assess more than the $10,000 requested by the Department for EQT's violation of Section 91.34(a).

**Penalty Amount**

Section 605 of the Clean Streams Law provides, in pertinent part, "[i]n determining the amount of the civil penalty the [D]epartment shall consider the willfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors." 35 P.S. § 691.605(a). The Board's jurisprudence establishes that "other relevant factors" include cost savings to the violator, the size of the violating facility, the volume of the discharge, and deterrence. *Weiszer*, 2011 EHB 358, 382 (citing *Angino*, 2007 EHB 175, 201; *Kennedy*, 2007 EHB at 26; *Breslin*, 2006 EHB at 143). The amount of costs incurred by the Department is also a relevant factor. *Seligman*, 2014 EHB at 782. The maximum penalty is $10,000 per day per violation, but as mentioned above, under the merger doctrine, we will not assess multiple penalties if the exact same conduct happens to violate multiple statutory and regulatory provisions on the same day.

Before turning to what factors we have considered in calculating our civil penalty, we pause to list a few of the miscellaneous things that we have either *not* considered or that militate in EQT's favor. We note that EQT's release did not adversely affect any public or private

drinking water supplies. (Stip. 57; T. 273-74, 348-49, 502.) We have not considered in any way two EPA enforcement policies and an EPA Final Order that the Department attached as exhibits to its posthearing brief. Although we do not wish to discount the possibility that a defendant's financial wherewithal could play a part in some cases in devising a civil penalty with an appropriate level of deterrent effect, *see DEP v. Allegheny Enterprises*, 2014 EHB 338, we have not factored EQT's finances into our civil penalty in this case. We see no need to adjust what is otherwise an appropriate amount due to the fact that EQT is a multibillion-dollar corporation.

The record does not support a finding that EQT's release had an actual adverse effect on aquatic life. The Department called Steven R. Kepler as its expert on fisheries biology and the assessment of impacts of pollutional events on aquatic life. Kepler is well qualified and he credibly opined that the wild brook trout biomass in Rock Run declined between August 2005 (before EQT's release) and October 2012 (after EQT's release), but he never clearly and to a reasonable degree of scientific certainty opined that the decline was the result of EQT's release. (T. 781-837; C. Ex. 434.) We are not otherwise able to conclude from his testimony or the record as a whole that EQT's release had an actual adverse effect on aquatic life. No benthic macroinvertebrate studies or biological damage assessments were conducted, nor was any of the other work that would normally be necessary to conduct a cause-effect analysis in the absence of direct evidence of mortality. (T. 831-35.) Mr. Kepler's work was based on his participation in a Pennsylvania Fish and Boat Commission enforcement action that was predicated solely on assessing whether deleterious substances were introduced to waterways, which is a far more limited inquiry. (T. 817.) Mr. Kepler repeatedly conceded that he made no attempt to establish a cause-effect relationship between the introduction of deleterious substances into the streams and harm to aquatic life as part of his investigation. (T. 791-94, 796-97, 819-20, 823, 834-35.)

Although EQT's release caused some adverse impacts to vegetation in the forest adjacent to the developed site (T. 805, 852, 992, 1061-62, 1479, 1482; C. Ex. 268, 276, 435; EQT Ex. 25, 26), we have not factored the damage that EQT's release caused to vegetation into our calculation of a civil penalty. We also have not separately factored the damage that EQT's release caused to the soil itself, as distinct from the waters of the Commonwealth, into our calculation of a civil penalty.[16]

Violations occurred at the well pad itself, as distinct from the S Pit. The Department alluded to those violations in its complaint but it did not seek a civil penalty for those violations in the complaint, and its spokesperson confirmed at the hearing that the Department was not seeking a penalty for those violations. (T. 943, 947; DEP Brief, Proposed FOF 1,225.) The Department suggests that we are free to impose a penalty now, but EQT was not put on proper notice that those violations were in play. We have not factored those violations into our calculation of the civil penalty.

The first rule of any civil penalty imposed by the Board is that, subject to the statutory maximum, the penalty should be no less than the cost savings enjoyed by the violator that are directly attributable to the violation when compared to what it would have cost to comply with the law. *Perano*, 2011 EHB at 879; *Breslin*, 2006 EHB at 141 n.6; *Leeward*, 2001 EHB at 910. The violator's efforts to clean up the problem that it caused in the first place do not act as a credit. *Leeward*, 821 A.2d at 155; *Westinghouse II*, 745 A.2d at 1281. Here, EQT clearly enjoyed cost savings by, *inter alia*, building an impoundment without a proper subbase, failing to take appropriate steps to protect its liner, continuing to use the impoundment after there were

[16] Of course, EQT's release contaminated soil and that contamination in turn contributed to the pollution of the waters of the Commonwealth, but our focus in calculating a penalty in this case is on the damage to waters themselves. In other words, we have not increased the penalty due to the damage to the soil *and* the damage to the waters.

signs it was leaking not only for operations at Pad S but for operations at other pads as well, emptying the pit by using the waste to frac its well instead of also emptying it by other means, conducting a limited investigation in the early days of the release, and delaying the pit closure for months. However, the record is very limited as to the amount of savings, and what little evidence there is (e.g., Stip. 43, 44; T. 880-82, 1993-95) shows that the penalty we have imposed based upon the other statutory criteria is likely in excess of EQT's cost savings.

The Department is entitled to the reasonable costs that it incurred in connection with the investigation and remediation of EQT's release. *Seligman*, 2014 EHB at 782. The Department has documented costs of $112,295.76. (T. 65-67, 231-33, 373-74, 704-06, 888-89; C. Ex. 426.) EQT has neither challenged this amount nor the fact that those costs should be factored into the civil penalty. The costs are reasonable and indeed if anything appear to dramatically under-report the Department's actual costs. Therefore, we include the documented costs in our assessment. By doing so, we are not exceeding the statutory maximum of $10,000 per day.

**Damage to Waters**

As previously mentioned, EQT's release did not harm any water supplies, and the Department failed to prove that it caused actual harm to aquatic life. Also militating in EQT's favor, the constituents of EQT's release (e.g. barium, lithium, strontium, chloride) also occur naturally in waters throughout the Commonwealth, albeit not at the levels released by EQT. The very high concentrations of the impaired water constituents have for the most part declined over time. There was limited contamination of Rock Run itself.

However, cleanup was still ongoing at the time of our hearing four years after the leak was discovered, which shows that the harm caused by multiple contaminants was persistent and prolonged. EQT degraded a High Quality, Class A Wild Trout stream, as well as a tributary, the

underground water, and the spring and seeps in the watershed that feed that stream. *No* unpermitted degradation of such a valuable natural resource is tolerable. The release extended a considerable distance, creating a known contamination plume on the order of 2,000 feet across. The Department witnesses testified that it caused the largest aerial extent of contamination in the history of the program and affected Exceptional Value wetlands. Thirty-five million gallons of contaminated water were collected at the time of the hearing. The Department's characterization of the damage as severe is supported by the record.

The degradation that EQT has caused to waters of the Commonwealth is largely attributable to the releases that occurred before the end of June 2012. We have reduced the amount of the daily penalty in part to reflect the fact that new releases after that time would have continued to shrink such that, by September 27, they would have been quite limited. We have also reduced the penalty over time to reflect the fact that the condition of all the impacted waters continues to improve.

**Willfulness**

We have described the degrees of willfulness as follows:

> An intentional or deliberate violation of the 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. Recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law. Negligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care.

*Weiszer*, 2011 EHB at 383. *See also Whitemarsh Disposal Corp. v. DEP*, 2000 EHB 300, 349 (recklessness demonstrated by conscious disregard that conduct may result in violations).

Recklessness is marked by disregard of an obvious risk, the existence, nature, and possible consequences of which are known or about which prior warning was given.

We agree with the Department that EQT engaged in a pattern of reckless behavior that culminated in the violations in this case. Although no one aspect of EQT's conduct might in isolation have supported a finding of recklessness, taken together they evince a conscious disregard of the fact that its conduct could result in a violation of the law and harm to the environment.

We disagree with the Department's contention that merely building the type of impoundment that EQT built was by itself reckless. However, having made the decision to build such a pit, EQT was knowingly engaging in a high-risk endeavor that called for an enhanced level of attention and care throughout the life of the facility, including removal activity if things went wrong, as they almost certainly were bound to do. The S Pit presented a significantly greater risk to the environment than a typical pit used for temporary waste storage at a conventional well pad. (C. Ex. 436.) EQT knew that the multimillion-gallon impoundments being used to store impaired water were causing a lot of problems throughout the Commonwealth. EQT's specific knowledge that the use it put to its impoundment was risky goes beyond the generalized knowledge of an industry as a whole that the Commonwealth Court found to be inadequate evidence of recklessness in *Stambaugh v. Department of Environmental Protection*, 11 A.3d 30, 36-37 (Pa. Cmwlth. 2010). The impoundments almost always leaked. Exactly how they leaked varied from location to location, but they inevitably leaked. Nevertheless, EQT decided to tempt the fates. It built a pit to hold millions of gallons of impaired water from multiple well pads for long periods of time with only one liner and with no way to tell whether the pit was leaking.

EQT says it built the impoundment in conformance with all regulatory design criteria. We disagree. As discussed above, our review of the record convinces us that EQT did not install a proper subbase. It is not clear whether the poorly constructed subbase actually contributed to any leaks because EQT either did not conduct a full investigation of the liner or it did not reveal the results of the investigation if it did. Given the photographic and other evidence of record, we would not be surprised at all if the rocks caused holes, but the point here is that EQT did not comply with the regulations and it installed an improper subbase in an impoundment that would have been risky even if it had been constructed properly.

Although it does not compare to EQT's dereliction regarding the subbase, it also must be said that EQT's liner was inadequate. A liner must be of sufficient strength to maintain integrity throughout operation. 25 Pa. Code § 78.56. Although EQT complied with the minimum specified regulatory criteria regarding thickness and material requirements, those requirements presupposed that the liner would be handled with a reasonable degree of care. Furthermore, in addition to the specific criteria, the regulation more generally requires that the liner be resistant to physical failure. *Id.* If EQT wished to subject the liner to storing debris (C. Ex. 44), supporting hoses, withstanding rocks both above and below it, and leaving it open to the elements for protracted periods, among other things, it needed to use a sturdier liner system.

Even if we assume for purposes of argument that EQT complied with some of the minimum regulatory requirements, compliance with administrative regulations only relieves a party from a finding of negligence *per se*, and does not establish that due care was exercised. *Mohler v. Jeke*, 595 A.2d 1247 (Pa. Super. 1991); *Berkebile v. Brantley Helicopter Corp.*, 281 A.2d 707 (Pa. Super. 1971). Compliance does not prevent a finding of negligence where a reasonable person would have taken additional precautions. *Truax v. Roulhac*, 126 A.3d 991 (Pa.

Super. 2015); *Skalos v. Higgins*, 449 A.2d 601 (Pa. Super. 1982). A reasonable person would have taken additional precautions here, starting with careful oversight of the construction process.

The applicable design criteria are rather vaguely phrased, but they do mandate an impoundment that is safe and that works. EQT's design did not work. Compliance with *design* criteria does not excuse compliance with *performance* criteria. *Wean v. DEP*, 2014 EHB 219, 275. Furthermore, the regulation that EQT points to in support of its exoneration, 25 Pa. Code § 78.56, is purposely flexible with respect to design because any attempt to dictate specific criteria for large impoundments used at unconventional sites would have been impractical for conventional operations. (T. 1107-08.)

EQT and its contractors placed hoses directly on or near the liner, which EQT knew was a risky practice that posed a significant threat to the integrity of the impoundment. (T. 1943-44.) EQT conducted minimal oversight and supervision at the site, perhaps due in part to the fact that the S Pit was not close to the well pad, and the site as a whole was located at the far reaches of EQT's traditional territory.

Having constructed an impoundment with no leak detection system whatsoever, EQT needed to be extremely sensitive to any sign of a leak. We view EQT's initial response to the danger signs of such a leak to have been completely unacceptable. Despite the appearance of multiple seeps immediately downgradient of the impoundment and nearby monitoring well sampling results all showing an impact from gas well operations within yards of a pit filled with millions of gallons of impaired water, EQT inexplicably dragged its feet. The uphill impoundment filled with millions of gallons of impaired water was the only likely source. The pad itself was some distance away to the south. There was no sign of any surface spills of a

sufficient magnitude to explain the results. The water was not indicative of mine water because it had high chlorides and low sulfates. EQT paid inadequate heed to the alarm bells that were going off.

EQT's consultant and later expert witness testified that the seeps could have been caused by the ATOS spill. This testimony is not credible. The seeps were flowing at too high a rate to be explained by the spill. Further, the channel where the ATOS-spilled wastewater flowed was only excavated 1 to 1½ feet, discrediting his theory that the seeps, which were higher on the bank than that, were simply ATOS water. Seep #3 was not seen until May 30, long after the ATOS spill. However, the point remains that, whether or not there was "definitive proof" that the pit was leaking, the seeps added another tocsin to the mounting evidence of a compromised impoundment, to which EQT paid inadequate heed.

It should be remembered that EQT was actively fracking its well during this period. (T. 1907.) Perhaps it was more concerned with this operation than worrying about signs that a massive pit which it sorely needed for its operations might be leaking. Remarkably, EQT continued to add water to the pit from April 30, 2012, when the first anomalous field sampling results were detected, until May 21, 2012. James Casselberry almost singlehandedly worked to deal with what appeared could be a major developing problem with little obvious support from his multibillion-dollar client. Even he was told to "stand down" for a relatively extended period of time at a critical period as the crisis was evolving.

EQT sought to explain its slow reaction time by arguing that there was no scientific certainty that the pit was leaking, that it was not "conclusively" shown that it was leaking, that other causes were still "plausible." To have allowed a hazard to unfold in search of scientific certainty while it was busy fracking was inexcusable. This is not Monday morning

quarterbacking: EQT personnel and consultants conceded that they knew right away after the well samples came back that there could be a problem with the pit. EQT simply did not make addressing the problem a priority, and it bears repeating, it continued to fill the pit.

When EQT in April 2012 wished to build a second, centralized pit on the site, it expedited the samples. However, when the samples came back with, among other things, high chloride levels and the objective apparently changed from preparing to build a new pit to investigating a potentially leaking existing 5 million gallon pit, it chose not to expedite the second round of samples. As a result, many days went by while contaminated water leaked through hundreds of holes. EQT's only explanation, which we find to be disheartening, is that the Department did not tell it to expedite the samples. This, while not dispositive in itself, is emblematic of EQT's early approach to developments at the site.

EQT did not start substantially emptying the pit until June 1 when it started using the water to frac a new well. EQT did not patch the hundreds of holes that were discovered in the pit until June 15 (after pressure washing the liner with the holes in it). EQT seeks credit because, once it decided to empty the pit, it did so quickly. Yet, with the exception of a relatively small number of truckloads hauled off site, EQT used the water exclusively to frac a well on the site. Although we do not necessarily fault it for that choice, the fact remains that EQT was able to benefit from the water while the pit continued to leak. EQT needed to bring between 80 and 100 tractor trailer loads of supplies onto the site to frac the well. (T. 1913.) One wonders why it could not also employ a similar number of trucks to help expedite the emptying of the pit, particularly during the down periods that occurred during the fracking process. In any event, the fundamental reason why it took almost two weeks to empty the pit of fluids from above the liner

was EQT's decision to store millions of gallons of impaired water on site in the first place, including water that should not have been added after April 30.

Part of a reasonable operator's obligation during the initial stages of a cleanup project is to maintain open communication with the regulatory authorities. EQT at times seemed to exhibit an unhealthy disdain for the Department. While the Department sensed that a crisis was underway and asked EQT to meet and discuss the measures that were being taken to address that crisis, EQT simply refused to meet. It indicated that it would meet with the Department at some unspecified time when it was ready to do so. If the Department appeared too alarmist, EQT appeared too cavalier. Department personnel testified that no other operator in the state has snubbed the Department in this way under circumstances far less dire.

It was EQT's responsibility, not the Department's, to fully investigate its release and mitigate the ongoing harm. 25 Pa. Code §§ 78.66 and 91.33. The amount of work and cajoling that the Department was required to do in this case was simply unacceptable. Among other things, EQT should have located the Danzer Seeps, not the Department. The West Seeps should have been controlled sooner.

We are somewhat baffled by EQT's decision not to close the impoundment in a timely manner. Part of the delay seems to be attributable to the Department's slow review of EQT's remediation reports after June 22, but EQT itself clearly could have moved the process along quicker. EQT knew that the contaminated subbase remained in place and contaminants would continue to enter into the groundwater. EQT did not fully remediate this situation until June 2013. The limited explanation that we have is that EQT wanted to preserve the scene for purposes of its litigation with Terra Services. That explanation is quite unsatisfactory. It leaves one with the impression that EQT cared more about its litigation strategy than protecting the

environment. It still does not explain why it was necessary to leave the pit open for several months. It was only after the Department pestered EQT repeatedly that it finally, temporarily closed the pit in late September, and even then it did not do a complete closure until June 2013, more than a year after the leak was discovered.

**EQT's Degree of Cooperation and Response to the Problem**

Any cleanup project may be viewed as having roughly two phases: the initial removal action (or interim remedial action) designed to stop the bleeding, if you will, and the longer-term remedial action designed to heal the patient. For the reasons just discussed, EQT's efforts regarding the removal phase were not adequate. However, with respect to the long-term remediation of the site that has been going on for more than four years, with the exception of EQT's undue delay in closing out the impoundment, EQT has demonstrated an acceptable level of commitment and cooperation. (T. 2138-41; EQT Ex. 6, 51, 115.) Among other things, EQT and the Department have cooperated in developing antidegradation standards to ensure the restoration of Rock Run and its tributary. EQT has worked toward achieving attainment with statewide health standards rather than a site-specific standard. We have substantially reduced the penalty that we might otherwise have imposed in consideration of EQT's long-term remediation.

**Deterrence**

EQT concedes that the Board may consider deterrence when it calculates a civil penalty in appropriate cases. (EQT Brief at 189.) *See Pines at W. Penn, LLC, supra*, 24 A.3d 1065, 1070 (Pa. Cmwlth. 2011); *Angino*, 2007 EHB 175, 208, *aff'd*, No. 664 C.D. 2007, 2008 Pa. Commw. Unpub. LEXIS 510 (Pa. Cmwlth. Jun. 26, 2008). *See also* 35 P.S. § 691.605 (in assessing penalty Board may consider other relevant factors). The goal is not to punish but to assist in assuring future compliance.

The conduct that needs to be deterred here is not the use of multimillion gallon single-lined wastewater storage pits with no leak detection. The conduct that needs to be deterred is failing to build and operate storage facilities with great care, and failing to take necessary measures to prevent them from leaking. Building and operating must be closely supervised from start to finish, which repeatedly did not happen here. EQT simply did not exercise enough oversight, supervision, and control over the construction and operation of its impoundment. This site is to be compared to a facility that was the subject of *Stedge v. DEP and Chesapeake Appalachia, LLC*, 2015 EHB 577, where the operator of a facility with 38 watertight wastewater storage tanks ensured that the facility was staffed 24 hours a day any time water was stored at the facility. *Id*., 2015 EHB at 587.

In pits, an adequate subbase must be installed. Water should not be added or removed carelessly. If there is evidence of a leak, an operator must act with immediate dispatch. Among other things, an operator needs to search out potential avenues of release and, if needed, contain them immediately. It may be necessary to spend a few extra dollars for expedited samples. A potentially compromised pit should not continue to be filled. Operators must maintain open communication with the regulatory authorities during critical periods.

Cleaning up contamination should not be viewed as something that is no more or less part of the inevitable cost of doing business. Imposition of penalties in addition to cleanup costs adds an important additional incentive to exercise appropriate care and achieve compliance.

EQT says that the aggravation that it has endured cleaning up the site is enough of a deterrent that no penalty is warranted, but this is exactly wrong in our view. EQT has incurred great expense precisely because it caused a problem necessitating great expense to fix. EQT has incurred considerable expenses, but it has not been impeded from developing its wells or

otherwise carrying on with its production activities. Indeed, EQT was able to use the industrial waste within the pit to complete its well; emptying the pit did not merely serve environmental ends. Environmental compliance must be seen as just as important as production. *See Angino, supra*, 2007 EHB at 207-08 (quoting *Leeward*, 2001 EHB at 890).

Rather than acknowledging that mistakes were made, EQT has offered any number of poor excuses. First, virtually everything is the fault of its contractors, even though EQT knows as the permittee it bears full responsibility. *Rhodes v. DEP*, 2009 EHB 599, 620; *Angino*, 2007 EHB at 199; *Strubinger v. DEP*, 2003 EHB 247; *Silberstein*, 1996 EHB 619, 633 n.2. *See also* 35 P.S. § 691.609(2) (authorizing the Department to withhold issuing a permit to an applicant who has previously engaged a contractor that has committed unlawful activity under the Clean Streams Law). It would be inconsistent with the goals expressed in the Clean Streams Law to allow an operator such as EQT to hire contractors to perform virtually all of the activities on a site and then attempt to wash its hands of any liability by blaming everything on those contractors.

When not blaming its contractors, EQT was blaming the Department. EQT says the Department did not tell it the pit might be leaking. It says that the Department did not tell it that it should have obtained expedited samples. It says the Department did not look for other holes in the liner; the Department did not determine whether the protruding rocks in the subbase caused any holes; the Department did not acquaint itself with the details of the Terra Services work; the Department did not tell it that it would have made sense to stop adding more industrial waste to the impoundment in its initial letter of concern. EQT's arguments along these lines reveal a failure to appreciate that it is EQT, not the Department, that is responsible for operating its facilities lawfully and carefully.

EQT, a multibillion-dollar corporation, refused to meet with the Department because it said it could only devote limited resources to the cleanup and it needed to concentrate exclusively on its field activities. It said a nearby road rally interfered with its ability to empty the pit. It said it left the pit open for months to preserve its litigation position vis-à-vis Terra Services. It said it did not discover contaminated seeps because the woods were dense and difficult to walk through. It said that the impounded industrial waste or "pit water" was essentially just salty water. In the midst of the cleanup, it floated the idea of moving forward with another new impoundment on the same site that would have been used to store industrial waste from multiple well pads. (T. 71; C. Ex. 43.) It ordered Casselberry, the only individual who seemed to understand that a crisis could be unfolding, to stand down during a critical period in early May.

EQT operates well in excess of 1,000 wells. In 2015, it transported approximately 2 billion gallons of water, approximately 400 million gallons of which was impaired water. (T. 1934.) At one time it had over 40 pits in Pennsylvania, 21 of which had storage capacity of 4.2 million gallons or more. (T. 1938-39.) The added deterrence of a significant penalty is clearly needed here to help ensure that EQT exercises appropriate care in handling its impaired water going forward.

**Assessment**

In light of the foregoing, we assess a penalty of $10,000 for EQT's violation of 25 Pa. Code § 91.34(a). We assess an additional penalty of $112,295.76 for EQT's violations of the Clean Streams Law to reflect the Department's costs.

With respect to EQT's violations of Section 301 by itself or in combination with Sections 307(a), 401, and 611, the key dates are as follows:

- April 30, 2012 – samples and field monitoring results show pit is leaking
- June 15 – leaks from pit greatly reduced
- June 25 – EQT submits its first complete site characterization plan to the Department
- September 27 – EQT excavates contents of pit and installs temporary liner
- June 2013 – pit reclaimed

EQT caused severe harm to the waters of the Commonwealth and that pollution continued from and including April 30 through September 27. The severe harm resulted from EQT's reckless conduct. The consequences of its reckless conduct extended through September 27. Active releases from the pit continued but were greatly diminished as of June 15, although substantial contamination remained in place and would take years to clean up. Active new releases after September 27 would have continued but at a very low level. EQT's level of cooperation and attention to the problem increased steadily throughout the entire period. Although there are no bright lines, by June 25 when it submitted its first complete characterization report, and thereafter with respect to its remedial activities, its level of cooperation was high. In light of these factors, we assess the following penalty:

| Dates | Number of Days | Daily Penalty | Subtotal |
|---|---|---|---|
| April 30 – June 15 | 47 | $ 10,000 | $ 470,000 |
| June 16 – June 25 | 10 | $ 7,500 | $ 75,000 |
| June 26 – Sept. 27 | 94 | $ 5,000 | $ 470,000 |
| Sept. 27 – June 2013 | - | $ 0 | $ 0 |
| June 2013 – present | - | $ 0 | $ 0 |
| | | | $ 1,015,000 |

The total penalty, then, is $1,015,000 plus $10,000 for the violation of 25 Pa. Code § 91.34(a), plus $112,295.76 to reflect the Department's costs, for a total of **$1,137,295.76.**

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 691.605; 35 P.S. § 7514.

2. The Department bears the burden of proof in cases where it files a complaint for an assessment of civil penalties. 25 Pa. Code § 1021.122(b)(1).

3. The Department must show by a preponderance of the evidence that EQT violated the applicable statutes and regulations and that there is a lawful basis for the assessment of a civil penalty. *DEP v. Seligman*, 2014 EHB 755, 763; *DEP v. Simmons*, 2010 EHB 262, 276; *DEP v. Strubinger*, 2006 EHB 740, 748, *aff'd*, 2195 C.D. 2006 (Pa. Cmwlth. Jun. 13, 2007).

4. In a complaint for civil penalties, the Board acts completely independently in determining what, if any, penalty should be assessed. Although the Department suggests to the Board a civil penalty amount, that suggestion is merely advisory. *DEP v. Seligman*, 2014 EHB 755, 781; *DEP v. Colombo*, 2013 EHB 635, 649; *DEP v. Leeward Constr.*, 2001 EHB 870, 885, *aff'd*, 821 A.2d 145 (Pa. Cmwlth. 2003); *Westinghouse Elec. Corp. v. Dep't of Envtl. Prot.*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998).

5. The Board assesses a penalty based upon applicable statutory criteria, any applicable regulatory criteria, and our own precedent. *DEP v. Perano*, 2011 EHB 867, 878; *DEP v. Weiszer*, 2011 EHB 358, 381; *DEP v. Kennedy*, 2007 EHB 15, 25.

6. Under the Clean Streams Law a civil penalty shall not exceed $10,000 per day for each violation. 35 P.S. § 691.605(a).

7. The Clean Streams Law proscribes specific factors to consider in determining the amount of a civil penalty—the willfulness of the violation, the damage or injury to the waters of

the Commonwealth or their uses, the costs of restoration, and other relevant factors. 35 P.S. § 691.605(a).

8. Other relevant factors include the costs incurred by the Commonwealth in undertaking enforcement, the cost savings to the violator, the volume of pollution released during a violation, and the deterrent effect of the penalty. *DEP v. Seligman*, 2014 EHB 755, 782; *DEP v. Perano*, 2011 EHB 867, 878-79; *DEP v. Weiszer*, 2011 EHB 358, 382; *DEP v. Angino*, 2007 EHB 175, 203-04, *aff'd*, No. 664 C.D. 2007, 2008 Pa. Commw. Unpub. LEXIS 510 (Pa. Cmwlth. Jun. 26, 2008); *DEP v. Kennedy*, 2007 EHB 15, 25-26; *DEP v. Breslin*, 2006 EHB 130, 141-42.

9. Civil penalties should be no less than what it would have cost to comply with the law because it is unfair to those who do comply. *See DEP v. Perano*, 2011 EHB 867, 879; *DEP v. Breslin*, 2006 EHB 130, 141 n.6; *DEP v. Leeward Constr.*, 2001 EHB 870, 910.

10. EQT's wastewater impoundment includes the synthetic liner, the geotextile, and the limestone screenings and clay-like material that compose the subbase of the impoundment. 25 Pa. Code § 91.1; 25 Pa. Code § 78.56(a)(4)(ii); 25 Pa. Code § 78.62(a)(12).

11. EQT's impoundment was used to store "industrial waste" as that term is defined in the Clean Streams Law. 35 P.S. § 691.1.

12. EQT actively released pollution and industrial waste from its impoundment into waters of the Commonwealth beginning on April 30, 2012 and continuing through and including at least September 27, 2012 in violation of the Clean Streams Law. 35 P.S. §§ 691.301, 691.307, 691.401, and 691.611; 25 Pa. Code § 91.34(a).

13. EQT failed to take necessary measures to prevent pollutants from directly or indirectly reaching waters of the Commonwealth from its impoundment in violation of the Clean Streams Law. 35 P.S. § 691.611; 25 Pa. Code § 91.34(a).

14. Each day that EQT failed to take necessary measures that prevented pollutants from reaching waters of the Commonwealth, directly or indirectly, constituted a separate violation. *Westinghouse Elec. Corp. v. DEP*, 1996 EHB 1144, 1240-42.

15. EQT engaged in a pattern of reckless behavior that culminated in the violations in this case. *DEP v. Weiszer*, 2011 EHB 358, 383; *Whitemarsh Disposal Corp. v. DEP*, 2000 EHB 300, 349.

16. A civil penalty should reflect the reasonable costs that the Department incurred in connection with the investigation and remediation of EQT's release, $112,295.76. *DEP v. Seligman*, 2014 EHB 755, 782.

17. EQT, as the permittee, was responsible for the acts of its contractors and subcontractors. *Rhodes v. DEP*, 2009 EHB 599, 620; *DEP v. Angino*, 2007 EHB 175, 199; *Strubinger v. DEP*, 2003 EHB 247; *DEP v. Silberstein*, 1996 EHB 619, 633 n.2. *See also* 35 P.S. § 691.609(2).

18. Under the merger rule, a party cannot be penalized for multiple offenses stemming from a single act unless one offense requires proof of a fact not required by the other. *Gemstar Corp. v. DEP*, 1998 EHB 53, 82; *DEP v. Silberstein*, 1996 EHB 619, 639-40.

19. The issue of liability under Section 611 of the Clean Streams Law was not waived by either party. 25 Pa. Code § 1021.131(c); *DEP v. Seligman*, 2014 EHB 755; *Gadinski v. DEP*, 2013 EHB 246.

20. EQT placed, or permitted to be placed, or discharged or permitted to flow, or continued to discharge or permit to flow, an industrial waste into the waters of the Commonwealth. 35 P.S. § 691.301.

21. EQT discharged or permitted the discharge of an industrial waste in any manner, directly or indirectly, into any of the waters of the Commonwealth. 35 P.S. § 691.307(a).

22. EQT put or placed, or allowed or permitted to be discharged from property owned or occupied by EQT, into any of the waters of the Commonwealth substances resulting in pollution. 35 P.S. § 691.401.

23. EQT caused water pollution. 35 P.S. § 691.611.

24. The Board assesses a civil penalty in the amount of $1,137,295.76 against EQT Production Company for its violations of the Clean Streams Law.

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 26th day of May, 2017, EQT Production Company is assessed a civil penalty of $1,137,295.76 in accordance with the foregoing Adjudication.

**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**

**DATED: May 26, 2017**

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

**For the Commonwealth of PA, DEP:**
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Anne Shapiro, Esquire
Mary Martha Truschel, Esquire
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Mark K. Dausch, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

**CONCURRING IN PART AND**
**DISSENTING IN PART OPINION OF**
**JUDGE STEVEN C. BECKMAN**

**By Steven C. Beckman, Judge**

I write separately from the majority because while I agree and concur with much of what is said in the Majority Opinion, with all due respect to the majority of the Board, I find that there are decisions in the Majority Opinion that I cannot support and therefore, write to express my dissent on those decisions. Before I address my dissent, I want to lay out the key decisions on which I am in agreement with the majority. I fully concur in the majority's discussion of the role of the Board in determining the proper civil penalties in this case. Consistent with that role, I agree with the portion of the Majority Opinion that finds that EQT violated Section 301 of the Clean Streams Law from April 30 through June 15 and sets a civil penalty of $470,000 for those violations. I also agree with the decision that adds the costs of the Department in an amount of $112,295.76 to the civil penalty and with the decision and civil penalty of $10,000 for EQT's violation of 25 Pa. Code § 91.34(a). Additionally, I concur with the Board's determination that EQT violated Section 611 of the Clean Streams Law.

I agree with the majority that the Board's decision in this case is complicated by the Commonwealth Court's decision on the Application for Summary Relief filed by EQT. *EQT*

*Prod. Co. v. DEP*, 153 A.3d 424 (Pa. Cmwlth. 2017) (hereinafter "*EQT Prod*."). The Commonwealth Court decision was issued on January 11, 2017, well after the Board's hearing in this case and after post-hearing briefing by the parties. The Board allowed the parties to file additional briefs setting forth their thoughts on the impact of the Commonwealth Court decision. Not surprising given that the Commonwealth Court's decision favored EQT, the Department argued in its brief that the Board was not bound by the decision because of the Department's pending appeal to the Pennsylvania Supreme Court. EQT argued, of course, that the decision is binding precedent on the Board.

The majority states several times in the Majority Opinion that we do not have to decide whether or not we are bound by the Commonwealth Court decision in *EQT Prod*. I disagree and find that the decision of the Commonwealth Court in *EQT Prod*. is binding precedent on this Board in this case. The Department relies on Pennsylvania Rule of Appellate Procedure 1736(b) as the basis for its argument that the decision is not binding precedent. It argues that the automatic supersedeas granted pursuant to this Rule makes the Commonwealth Court's decision null and void relying on the definition of supersedeas found in Black's Law Dictionary. The Department cites no case law in support of its interpretation of the impact of 1736(b). PA. R.A.P. 1736(b) is part of a rule entitled "Exemption from Security" and is set forth among various Rules of Appellate Procedure dealing with the requirements for security and handling of disputed property when filing an appeal. See for instance Rule 1734 – Appropriate Security; Rule 1735 – Effect of Supersedeas on Execution or Distribution; Rule 1738 – Substitution of Security; Rule 1739 – Order for Sale of Perishable Property; and Rule 1740 – Order for an Accounting. Nothing in the specific language of PA. R.A.P. 1736(b), or in the context suggested by the surrounding Rules of Appellate Procedure, supports the Department's position. In

contrast, EQT cites to the Commonwealth Court decision in *Germantown Cab Co. v. Philadelphia Parking Authority*, 27 A.3d 280 (Pa. Cmwlth. 2011) in support of its position that *EQT Prod*. is binding precedent. In *Germantown Cab*, the automatic supersedeas under PA. R.A.P. 1736(b) was in place but the Commonwealth Court held that its earlier decision had a binding effect despite the supersedeas. In support of the *Germantown Cab* decision, the Commonwealth Court stated, "It is axiomatic that a decision of an appellate court remains binding precedent, even if it has been appealed, unless and until it is overturned by the Pennsylvania Supreme Court." 27 A.3d at 283. Given the clear holding in *Germantown Cab* and the unsupported and rather convoluted reading of PA. R.A.P. 1736(b) required to find for the Department on this issue, I conclude that the Board is bound by the Commonwealth Court's decision in *EQT Prod*. unless and until it is overturned by the Pennsylvania Supreme Court.

I find that when I approach the Commonwealth Court's decision as binding precedent as I believe I am required to do, I arrive at different conclusions than the majority on some of the issues in this case and that is the basis for my partial dissent. As discussed previously, the majority hedges on this issue and says that they are not sure whether they are bound or not. However, my reading of the Majority Opinion leads me to conclude that the majority approaches the issues in this case by giving selective adherence to its interpretation of some portions of the Commonwealth Court's opinion in *EQT Prod.* while wholly disregarding other portions of that opinion. The majority does this presumably because the Commonwealth Court's decision in *EQT Prod.* is problematic in a number of ways and is, in fact, inconsistent with the manner in which I believe the Department, the majority of the members of the environmental law bar and the judges of this Board have understood and implemented the relevant Clean Streams Law for

many years.[1] The majority does not hide some of its disagreement with the Commonwealth Court stating that "we disagree that Sections 307(a) and 401 do not prohibit the unpermitted discharge of industrial waste," (Majority Opinion, *Slip Op.* at 54) and by including violations of these sections in the Conclusions of Law ("COL") (COL 21 and 22, Majority Opinion at 89) despite a clear finding by the Commonwealth Court that these sections of the Clean Streams Law do not apply to this case. 153 A.3d at 433-434. Because I find that we are bound by the decision in *EQT Prod.* and the Commonwealth Court specifically found that those Sections do not apply, I dissent from Conclusions of Law 21 and 22.

The main issue in this case and the one where my position is at odds with the majority is the proper duration of the violations of Section 301 of the Clean Streams Law. The Commonwealth Court opinion in *EQT Prod*. sets forth how the Court interprets this question and the majority cites and applies portions of the opinion as part of its Majority Opinion. As noted by the majority, the Commonwealth Court states "a violation of Section 301 occurs when a person or municipality does what is prohibited – i.e., allows industrial waste to enter into the waters of the Commonwealth – and once it ceases that conduct, violations cease." *EQT Prod*., 153 A.3d at 436; Majority Opinion at 48. The Commonwealth Court also states and the majority cites that "we hold that Section 301 of The Clean Streams Law is a provision that prohibits acts or omissions resulting in initial active discharge or entry of industrial waste into the waters of the

[1] One of the major sources of the difficulty in interpreting and applying the Commonwealth Court opinion in *EQT Prod*. for myself, and I believe for the majority as well, is that the real world setting in which these issues arise is rarely as uncomplicated as the legal issue that was presented to the Court. Many situations involving a release of industrial wastes or other pollutants do not result in an instantaneous direct discharge to surface water or groundwater which is then limited to that environmental media. Often times, instead of or in addition to the direct impact to water, there is soil or other media contamination. The contamination of concern is then reintroduced into the waters of the Commonwealth as the surface water or groundwater comes into contact with the contaminated media. The entire sequence of an initial release resulting in soil and water contamination, followed by dispersion and mixing in the waters and soil and subsequent further releases from the previously contaminated media is complex and not easily sorted into discrete daily events.

Commonwealth." *Id*. at 437; Majority Opinion at 48. The majority also cites the Commonwealth Court's statement outlining EQT's arguments that a violation occurs when "the industrial waste or substance resulting in pollution is discharged or enters from an area outside of waters of the Commonwealth (e.g., a factory, industrial site, railcar, etc.) into a water of the Commonwealth. Once the discharge or entry stops, no additional violations occur even if the previously released regulated substance continues to be present in the water." *Id*. at 429, Majority Opinion at 49.

The majority, however, does not cite to and/or does not analyze or appear to apply other portions of the Commonwealth Court's opinion that I find add further context to the quoted statements relied on by the majority. The Commonwealth Court was clearly concerned that Section 301 not be interpreted in a manner to create unending liability. The Court stated, "The General Assembly did not intend for these sections to establish seemingly endless violations following a single release of industrial waste or other prohibited substance from a point source or otherwise into a water of the Commonwealth." 153 A.3d at 435-436. The Court also stated, "Had the General Assembly intended that a violation of Section 301 of The Clean Streams Law would result in a continuing violation until remediation is achieved, the General Assembly would have clearly stated such. … To rule otherwise would be tantamount to punishing a polluter indefinitely, or at least for as long as the initially-released industrial waste remains in the waters of the Commonwealth, for the same violation – i.e., the initial release. Such a ruling would vastly expand potential liability in Pennsylvania, even when a polluter is taking aggressive steps to remediate. " *Id*. at 436 (internal citations omitted). Because I find that we are bound by the Commonwealth Court opinion, I think we are obligated to apply all of these statements in analyzing the facts of this case and doing so leads me to a different result than the majority.

Let me start with what I think is the easier portion of the case on the question of duration of the violations and where I most strongly disagree with the majority. While the majority, properly in my opinion, does not assess any civil penalties for the days beyond September 27, they clearly find that there are new daily releases at the EQT site that constitute separate violations each day up until the time of the hearing.[2] Majority Opinion at 50. EQT clearly undertook remedial action during September 2012 to address the release from the impoundment. Findings of Fact ("FOF") 210, 211. As of September 27, EQT had removed the liner, the subbase and some contaminated soil from in and below the impoundment and installed a new temporary liner to prevent new infiltration of water. FOF 218, 220, 221. In light of those remedial activities, any remaining industrial waste released at the site was within the soils and bedrock below and adjacent to the impoundment, or in the previously contaminated groundwater or surface water or areas where the contaminated waters had discharged. The majority acknowledges this fact by stating that "we have not imposed any penalty for the periods when EQT's only new releases were strictly from soils outside the pit" i.e. after September 27. Majority Opinion at 50. Further, EQT submitted a Notice of Intent to Remediate the impoundment under Act 2 on September 13, 2012. FOF 263. A Notice of Intent to Remediate begins the formal Act 2 remediation process but EQT's activities to remove the liner, subbase and contaminated soil all qualify as remediation activities. Therefore, it is clear that remediation

[2] The majority at times appears to want to equivocate on whether they in fact conclude that there is liability for violations at the site continuing up until the day of the hearing saying at one point "deciding whether liability continued after (September 27) is not necessary." Majority Opinion at 54. However, I think that the language at page 50 of the Majority Opinion stating that "we note that new releases even from outside the pit constitute new violations in our view, and as a matter of fact such releases occurred at EQT's site up until the time of the hearing" makes clear that the Board contends that there is liability and violations after September 27. See also the following statements: "we conclude as a matter of fact that releases from EQT's impoundment continued until at least June 2013" Majority Opinion at 54 and "Liability turns on the fact, not the amount, of the release." Majority Opinion at 59.

activities had taken place prior to September 27 and/or were continuing to take place as of that date.

Given the conditions at the site as of September 27, the Commonwealth Court's opinion in *EQT Prod.* leads me to conclude that the Court would disagree with the majority's determination that violations continued after that date and, therefore, I dissent from that determination. As a result of the remedial activities undertaken by EQT, the situation post-September 27 clearly involves passive releases of contamination from any remaining contaminated soil and water. In my opinion, these passive releases are not the type of "initial active discharge or entry" that the Commonwealth Court finds constitute a violation of Section 301. In addition, the Commonwealth Court in *EQT Prod*. also discusses the need for there to be some culpable action or inaction on the part of the polluter in order to find a violation. 153 A.3d at 436. The majority finds that EQT had the required culpability prior to September 27 based on its unpermitted release of industrial waste and pollutants from the impoundment and that this culpability was exacerbated by EQT failing to remove the liner and subbase until September 27. Majority Opinion at 67. I find it difficult to conclude that the Commonwealth Court would find EQT culpable after September 27 under the facts of this case. As the Commonwealth Court states "the failure to remediate cannot equate to a violation of Section 301." 153 A.3d at 436. Finally, the majority's decision creates the type of endless liability and continuing violation that the Commonwealth Court states is contrary to the General Assembly's intent. It also is contrary to the Commonwealth Court's admonition that Section 301 was not intended to vastly expand potential liability in Pennsylvania, especially when a party, like EQT in this case, is taking steps to remediate. 153 A.3d at 436. I dissent from the majority's decision on continuing liability and

violations after September 27 because doing so runs counter to the Commonwealth Court's decision in *EQT Prod*.

The tougher issue and one which I believe to be a very close call is the majority's finding of violations between June 16 and September 27. I agree with the majority's determination that the impoundment is not limited to the portion of the impoundment above the liner but also includes the constructed subbase. As I understand the majority's decision, the majority concluded that there were violations during this time period because of its determination that there was a new entry of contaminants in the waters of the Commonwealth when contaminants from the industrial waste released by EQT "continued to drain by gravity" from the subbase and "as new water came into contact with the subbase by way of precipitation and the subsurface flow of new underground water and picked up those contaminants and transported them to underground waters below the water table for the first time." Majority Opinion at 58, 59. The majority finds that this constitutes the movement of industrial waste from outside the waters of the Commonwealth into the waters of the Commonwealth and, therefore, is an initial entry into the waters of the Commonwealth that occurred anew each and every day during that time period.

I have some limited concerns about whether the Department has met its burden of proof regarding the violations occurring each day during this time period. Through testimony from its expert, Mr. Farmerie, we were offered some theories regarding how this may be occurring and an inference that ongoing releases and new entry into waters are happening daily based largely on findings of continued contamination in the monitoring wells, seeps and springs on the site, but there is little direct evidence available to support this position. Putting aside those concerns,[3] the

[3] I do however want to make one minor point regarding an area of disagreement with the majority. At least one of the bases for the majority's finding of violations between June 16 and September 27 has to do with their concern that EQT did not demonstrate that all of the holes had been patched and therefore, the majority concluded that new water could come into contact with the subbase through the liner. Majority

real issue for me is whether the type of release and entry into the waters that is arguably occurring at this point satisfies the Commonwealth Court requirements for the finding of a violation. I conclude that it is not the type of initial active discharge or entry that the Commonwealth Court would find to be a violation.

As I discussed previously, I understand the Commonwealth Court to require an initial active discharge or entry to constitute a violation. The majority argues that the draining of the contaminated subbase by gravity and the movement of new waters within the hydrologic regime at the site that pick up and transport contaminants down to the groundwater below the water table constitute active releases[4] and new entries into the waters of the Commonwealth. I think that the Commonwealth Court would view these releases as passive in nature and not the type of releases that constitutes a violation of Section 301. I also question whether the Commonwealth Court would view the addition of "new water" to the hydrologic regime at the site as creating a new entry of contaminants to the waters of the Commonwealth. Because it is highly likely that the underground waters at the site are already contaminated, it is difficult to characterize this as a new entry in my opinion. My conclusion is that this is much more akin to the Department's initial position in the Application for Summary Relief that violations of the Clean Streams Law

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Opinion at 61. My disagreement arises because of my concern that this approach shifted the burden of proof from the Department to EQT without any showing of why that should be the case. While it appears that there was a dispute about a report regarding the liner that EQT commissioned and apparently refused to provide to the Department, there was no testimony that DEP was prevented from examining the liner to determine for itself whether there were any unpatched holes after June 15. EQT testified that the holes were fixed and the Department apparently provided no testimony to the contrary. Given that the Department had the burden of proof in this case, I think the majority should have accepted EQT's unchallenged statement. I am not sure that this issue would change either the majority's conclusion or mine but it does constitute one factor in my concern regarding the facts underpinning the conclusion of violations during this period.

[4] The majority suggests that the Commonwealth Court is improperly focused on the nature of the release. Majority Opinion at 50. I agree that the Commonwealth Court does focus on the nature of the release in addition to the entry into the waters. I find that given that focus and the binding nature of the *EQT Prod.* decision, it is appropriate to focus on the nature of the release as well as the entry into the waters of the Commonwealth.

result from the movement of contaminants in and between the waters and parts of the waters of the Commonwealth that was soundly rejected by the Commonwealth Court in the *EQT Prod.* decision. Further, given the passive nature of the releases and entry into the waters during this time, I would again question whether the Commonwealth Court would agree that EQT was culpable largely because it had failed to yet undertake certain remedial activities to address the contaminated subbase. As I said, I think the majority's decision to find violations of Section 301 during the time from June 16 to September 27 is a close issue. My reading of the Commonwealth Court's decision in *EQT Prod.* leads me to the conclusion that the majority is not correct in finding daily violations during that time period and that is why I respectfully dissent from the decision to assess daily civil penalties for that time period.

**ENVIRONMENTAL HEARING BOARD**

s/ Steven C. Beckman
**STEVEN C. BECKMAN**
**Judge**

**DATED: May 26, 2017**

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| **THE DELAWARE RIVERKEEPER NETWORK AND MAYA K VAN ROSSUM, THE DELAWARE RIVERKEEPER** | : | |
| **v.** | : | **EHB Docket No. 2015-060-M** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC** | : | **Issued: June 2, 2017** |

**OPINION AND ORDER ON**
**THE TERMINATION OF THE ABOVE-CAPTIONED APPEAL**

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Board agrees to terminate Appellant's appeal in the above-captioned matter in light of the Appellant's March 24, 2017 letter and following a conference call with the Parties on May 16, 2017. The Board nonetheless notes that it did not decide to terminate the appeal for lack of jurisdiction. The Board believes that it would have jurisdiction over this appeal.

**O P I N I O N**

The above captioned appeal was filed by the Delaware Riverkeeper Network and Maya K. Van Rossum, the Delaware Riverkeeper ("Appellant") on May 5, 2015 in response to the Department's grant of two 401 Water Quality Certifications – Permits No. EA 40-013 and EA 45-002 – to Transcontinental Gas Pipe Line Company, LLC ("Permittee") on April 6, 2015.

On May 21, 2015, the Parties submitted a joint request for a stay in this appeal, pending the Third Circuit Court of Appeals' review of its jurisdiction over a petition for review filed by the Delaware Riverkeeper Network. This petition for review concerns the same Department

decision as challenged here, which relates to Transco's Leidy Southeast Expansion Project.[1] The Board granted the request for an approximately two-month stay, at which point the Parties were required to submit a status report on or before July 28, 2015. As there were no new developments, the Board continued to issue orders extending the stay and requiring joint status reports. Status reports were due on October 1, 2015, November 6, 2015, February 5, 2016, April 1, 2016, June 3, 2016, and August 1, 2016.

On August 8, 2016, the Court of Appeals for the Third Circuit issued its opinion in *Delaware Riverkeeper Network v. Quigley*, in which it held that state action taken pursuant to the Clean Water Act in permitting an interstate natural gas facility pursuant to the Natural Gas Act "is subject to review exclusively in the Court of Appeals." Slip op. at 17-18. Permittee filed a letter with the Board on August 8, 2016 requesting that the Board dismiss the appeal for lack of jurisdiction, given the Court of Appeals' ruling. The Board issued an order on August 11, 2016 staying the appeal and ordering the Appellant to file a status report on or before September 12, 2016 indicating whether they have an objection to Permittee's request to dismiss the appeal.

On September 15, 2016, the Appellant filed a status report that alerted the Board to the Delaware Riverkeeper Network's request for a re-examination of a number of issues ruled upon in the Third Circuit's decision. If granted, this request, while unrelated to jurisdictional issues, would delay the Third Circuit's issuance of a mandate and could potentially modify the Third Circuit's August 8, 2016 Opinion. The Appellant therefore requested that the Board extend its stay of this appeal. On October 31, 2016, the Board granted this request and stayed the matter until the Third Circuit issued a mandate in *Delaware Riverkeeper Network v. Quigley*.

[1] *See Delaware Riverkeeper Network v. Quigley*, No. 15-2122 (3d. Cir., filed May 5, 2015). On May 8, 2015, the Court of Appeals for the Third Circuit issued an order requiring the parties to address the Court's authority over the petition within fourteen days of the order. The parties in this matter requested that the appeal pending before the Board be stayed for a reasonable duration so as to give the Court of Appeals time to consider the submissions in response to its order.

On March 24, 2017, the Appellant submitted a letter alerting the Board to the Third Circuit's issuance of an amended opinion on the same date. While the Third Circuit Court of Appeal's adopted several changes requested by the Delaware Riverkeeper, none of those changes impacted the Court's holding on jurisdiction. In light of this, the Appellant had no objection to the termination of its appeal before the Board. However, in a footnote, Appellant also drew the Board's attention to a recent ruling out of the First Circuit in which the Court dismissed a petition for review under Section 19(d)(1) of the Natural Gas Act, 15 U.S.C. § 717r(d)(1). The Court determined that it lacked subject matter jurisdiction over a Section 401 Water Quality Certificate because aggrieved parties had the right to appeal the Certificate to the state department of environmental protection before it could be appropriately reviewed by the First Circuit of Appeals.[2]

Prior to the Board addressing Appellant's March 24, 2017 letter, Judge Labuskes issued an Opinion and Order in *Lancaster Against Pipelines, Geraldine Nesbitt and Sierra Club v. DEP*, EHB Docket No. 2016-075-L (Opinion and Order, May 10, 2017). In this Opinion, Judge Labuskes determined that the Board has jurisdiction over appeals of Water Quality Certifications pursuant to Section 401 of the Clean Water Act. In light of this related matter, the Board scheduled a conference call with all parties in the instant appeal on May 16, 2017 to confirm that Appellant had no objection to the termination of its appeal before the Board. During the call, the Appellant confirmed that it did not object to the termination its appeal, and neither the Department nor Permittee were opposed. Therefore, the Board will close and discontinue this docketed appeal. The Board nonetheless feels that a brief discussion of its jurisdiction over such

[2] *See Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline Company, LLC*, 851 F.3d 105 (1st Cir. 2017).

appeals is useful because the issue may arise in later appeals and was correctly decided by Judge Labuskes in the pending related appeal.

**Discussion**

In *Lancaster Against Pipelines, Geraldine Nesbitt and Sierra Club v. DEP*, Permittee Transcontinental Gas Pipeline Company, LLC ("Permittee" or "Transco") requested that the Board dismiss the appeal regarding the Department's issuance of a Section 401 Water Quality Certificate following the ruling by the Third Circuit in *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection* 833 F.3d 360 (3d Cir. 2016). Transco argued that the Board could not review the Department's issuance of the 401 Certification because the Third Circuit has exclusive jurisdiction over that section. The Department notified the Board that it would "abide by" the Third Circuit's ruling. The Appellants, however, have asked the Third Circuit to dismiss their petitions for review for lack of jurisdiction because the Board has not yet acted on the appeals before it, thereby rendering the petitions before the Third Circuit not yet ripe for review. Appellants further argued that the Board does have jurisdiction and should issue a stay in *Lancaster Against Pipelines v. DEP* until the Third Circuit rules on whether it has jurisdiction in the pending parallel proceedings. The Board agreed with the Appellants and determined that it had jurisdiction under the Natural Gas Act, 15 U.S.C. §§ 717-717z.

Although the Natural Gas Act makes the regulation of natural gas pipelines a federal function, it leaves open a limited role for states that have primacy to implement the Clean Water Act. *Lancaster Against Pipelines, Geraldine Nesbitt and Sierra Club v. DEP*, EHB Docket No. 2016-075-L, slip op. at 3 (Opinion and Order, May 10, 2017). Pennsylvania is such a state. In these instances, the state retains the right to determine whether the project complies with federal

and state water quality standards. *Id*. If the project is in compliance, then the state will issue a 401 Certification. *Id*.

The jurisdictional issue involved here arises from Section 19(d)(1) of the Natural Gas Act:

> The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

15 U.S.C. § 717r(d)(1). As Judge Labuskes stated, "the Third Circuit's opinion in the *Delaware Riverkeeper* case is not particularly helpful" in resolving the jurisdictional issue of concern to the Board. The jurisdictional issue before the Third Circuit was both broader and more general: whether the Department's issuance of a 401 Certification was the act of a state administrative agency acting "pursuant to Federal law." *Delaware Riverkeeper*, 833 F.3d at 370. This is not the jurisdictional issue that is of concern to the Board. Rather, the Board is faced with whether a final state action is required before the Court of Appeals may act upon a petition for review under Section 19(d)(1). If a final state action is required under Section 19(d)(1), then the follow-up question is whether a final state action has occurred in a given matter.

The question of whether a final "state administrative agency" action is required under Section 19(d)(1) is a question of federal law that is already pending before the Third Circuit. Both the First and Ninth Circuits have ruled that it is required. *See Berkshire Env. Action Team, Inc. v. Tenn. Gas Pipeline, LLC*, 851 F.3d 105 (1st Cir. 2017); *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084 (9th Cir. 2014). The Middle District of Pennsylvania has ruled that

it is not required. *Contra Tennessee Gas Pipeline LLC v. Del. Riverkeeper Network*, 921 F. Supp. 381 (M.D. Pa. 2013). The Board particularly finds the First Circuit Court of Appeals' position to be highly persuasive. The First Circuit's position was that there was ample reason to continue to have the strong presumption that judicial review is available only upon a state agency action becoming final. *Berkshire Env. Action Team*, 851 F.3d at 111 (citing *Bell v. New Jersey*, 461 U.S. 773, 778 (1973)).

Whether a state agency action is final is a question of state law. As far as the Board is concerned, a Department action only becomes final following an opportunity to appeal the action to the Environmental Hearing Board. Pennsylvania law is very clear on this point: "[N]o action of the department [of environmental protection] adversely affecting a person shall be final as to that person until the person has had an opportunity to appeal the action to the [environmental hearing] board. . . ." 35 P.S. § 7514(c). Courts in Pennsylvania have long held "that a Department action is not final until an adversely affected party has had an opportunity to appeal the action to this Board." *Lancaster Against Pipelines*, EHB Docket No. 2016-075-L, slip op. at 5 (Opinion and Order, May 10, 2017), citing *Fiore v. DER*, 655 A.2d 1081, 1086 (Pa. Cmwlth. 1995); *Morcoal v. DER*, 459 A.2d 1303, 1307 (Pa. Cmwlth. 1983).

This is very much like the Massachusetts procedures that the First Circuit found were not final until the adversely affected party had the opportunity to go through the state's hearing process. *Berkshire*, 851 F.3d at 111-14. Unless the Third Circuit holds that a final action is not required, or that Pennsylvania's may be disregarded, the Board finds that it has jurisdiction over appeals such as that found in *Lancaster Against Pipelines* and the matter here. Therefore, while

we will close and terminate this appeal because Appellant have no objection, we maintain that we have jurisdiction over it.[3]

[3] Aside from the statutory construction issue arising under Section 19(d)(1) regarding the need for a *final* state agency action, I believe there is a more fundamental concern with Section 19(d)(1) that arises under the Tenth Amendment of the United States Constitution. U.S. CONST. amend. X. There is no question that Congress has the authority to preempt state regulatory authority regarding interstate pipelines subject to regulation by the Federal Energy Regulatory Commission under the Natural Gas Act. 15 U.S.C. §§ 717-717z. Section 19(d)(1) does not, however, preempt state regulatory authority, but rather expressly recognizes a limited state role for a "state administrative agency acting pursuant to federal law . . ." Section 19(d)(1) does more than simply authorize a limited state role, however. It commandeers state agency officials and compels them to violate longstanding state administrative law. Section 19(d)(1) purports to rewrite state laws by directing state agency officials to litigate the state agency's decisions before the United States Court of Appeals for the circuit in which the facility is located. It is a fundamental principle of law that Pennsylvania state agencies are entities established by Pennsylvania state law, and that they have only the authority given to them by the Pennsylvania General Assembly. *Small v. Horn*, 722 A.2d 664, 669 (Pa. 1998). Congress's attempt to commandeer the Department and its officials and to compel them to defend their actions in federal court rewrites longstanding state administrative law. 35 P.S. § 7514. I believe that this attempt violates the Tenth Amendment and its anti-commandeering principle. *See New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). Congress may not simply commandeer state officials and agencies, rewrite state laws, and direct that state agency officials defend state agency decisions in federal court in violation of state laws enacted by the Pennsylvania General Assembly. If the Third Circuit Court of Appeals decides that a final state action is required under Section 19(d)(1) then the clear conflict with longstanding Pennsylvania state law involving appeals of Department actions to the Environmental Hearing Board will be addressed. However, the Pennsylvania General Assembly has also directed that appeals from decisions of the Pennsylvania Environmental Hearing Board go to the Pennsylvania Commonwealth Court. 42 Pa. C.S.A. § 763. Therefore, such a decision from the Third Circuit confirming the necessity of a final state action could nonetheless still implicate constitutional issues of commandeering by circumventing state laws directing such appeals to the Commonwealth Court. *See generally* Josh Blackman, *Article: State Judicial Sovereignty*, 2016 U. Ill. L. Rev. 2033 (2016) (Discussing the constitutionality of exclusive federal jurisdiction as it relates both to Article III of the Constitution and the anti-commandeering principle of the Tenth Amendment).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **THE DELAWARE RIVERKEEPER NETWORK AND MAYA K VAN ROSSUM, THE DELAWARE RIVERKEEPER** | : | |
| **v.** | : | **EHB Docket No. 2015-060-M** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC** | : | |

**O R D E R**

AND NOW, this 2nd day of June, 2017, in consideration of the Permittee's request to terminate the appeal, the above-captioned matter will be marked closed and discontinued in the docket**.**

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: June 2, 2017**

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

**For the Commonwealth of PA, DEP:**
Joseph S. Cigan III, Esquire
(*via electronic filing system*)

**For Appellant:**
Aaron Stemplewicz, Esquire
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**For Permittee:**
Pamela S. Goodwin, Esquire
Andrew T. Bockis, Esquire
John F. Stoviak, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **ROGER WETZEL, WILLIAM WOLFGANG, RANDY SHADLE, KENNETH W. RICHTER, KENNETH GRAHAM, AND HARRY MAUSSER** | : | |
| **v.** | : | **EHB Docket No. 2015-071-M** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and HEGINS TOWNSHIP and HUBLEY TOWNSHIP, Permittees** | : | **Issued: June 7, 2017** |

# ADJUDICATION*

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Board sustains the appeal of the Appellants, who have challenged the Department's approval of a Joint Act 537 Plan initially submitted and initially supported by two Townships. During the pendency of the appeal, one of the two Townships switched its position regarding the Joint Plan and, at the hearing, took the lead in challenging the Department's approval of its Joint Act 537 Plan. Under the Department's regulations, a municipality must make a commitment to implement its Act 537 Plan, and the Township's change in its litigation position is a clear and unmistakable signal that it lacks the necessary municipal commitment to implement its plan as approved, which it supported at one time, but now opposes.

## FINDINGS OF FACT

1. Appellants are Roger Wetzel, William Wolfgang, Randy Shadle, Kenneth W. Richter, Kenneth Graham, and Harry Mausser. (JS para. 1.)

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

2. The Commonwealth of Pennsylvania, Department of Environmental Protection ("DEP") is the agency of the Commonwealth of Pennsylvania empowered to administer and enforce the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.1, *et seq.* and the rules and regulations promulgated thereunder. (JS para. 2).

3. The Permitees are Hegins Township and Hubley Township, municipalities within Schuylkill County, Pennsylvania. (JS para. 3).

4. On August 4, 2014, the Department received a joint official sewage facilities plan update revision for Hegins and Hubley Townships ("Joint Act 537 Plan" or "Plan"). The Plan's chosen sewage treatment alternative includes the construction of a 600,000 gallons per day wastewater treatment plant located along Fearnot Road in Hubley Township. Sewer service is proposed for the Sacramento, Spring Glen, and Fearnot areas of Hubley Township, and for the Hegins, Valley View, and Lamberson areas of Hegins Township. The collection system consists of approximately 45,000 feet of 8" gravity pipe, 7,425 feet of low pressure sewer line, 30 grinder pumps, 11,270 feet of force main, and 4 pump stations in Hubley Township; and 121,610 feet of 8" gravity pipe, 2,870 feet of force main, and 3 pump stations in Hegins Township. The Plan also recommends the implementation of an onlot sewage disposal system management program for the areas of the municipalities not within the proposed service area of the collection system. (JS para. 4).

5. On September 8, 2014, the Department issued preliminary comments to Hegins and Hubley Townships concerning the plan update revision. (JS para. 5 and Ex. DEP-3).

6. On September 23, 2014, the Department received a response from Hegins and Hubley Townships concerning its preliminary comments on the plan update revision. (JS para. 6 and Ex. DEP-4).

7. On or about March 20, 2015, DEP sent a comment letter to Hegins Township and Hubley Township outlining certain issues with the Plan and requesting a response. (JS para. 7 and Ex. DEP-5).

8. In its March 20, 2015 comment letter, the Department identified thirteen (13) specific comments. *Id*.

9. On or about April 6, 2015, Hegins and Hubley Townships responded to the comments and provided additional supplementary materials to the Plan in response to the comment letter dated March 20, 2015. (JS para. 8 and Ex. DEP-11).

10. There was no public hearing concerning the Plan after the April 6, 2015 submission. (JS para. 9).

11. On April 15, 2015, the Department received correspondence requesting that the Department deny the Plan for the reasons identified in the correspondence. (JS para. 10 and Ex. APP-7).

12. On April 17, 2015, DEP issued a written decision approving the Plan. (JS para. 11).

13. Appellants, who are property owners within the proposed planning area and subject to the plan's requirements, filed a timely appeal of DEP's approval of the Plan. (JS para. 12).

14. Hegins Township was able and committed to implement the Joint Act 537 Plan when it was approved. (Ex. APP-1, Part 2, Municipal Adoption).

15. Both Hegins and Hubley Township passed resolutions approving the Plan. (Notes of Transcript ("N.T.") at page 308).

16. The Hegins Township Resolution included information about the size of the system, the location of the treatment plant, costs, and a range of monthly user fees from $68 to $74 per month. (N.T. 308-309).

17. The proposed sewage treatment plant associated with the adopted alternative of the Joint Act 537 Plan has built-in excess treatment capacity. (N.T. 32).

18. One-third of the planned capacity of the sewage treatment plant is reserved for future growth. (N.T. 321).

19. The proposed sewage treatment plant associated with the adopted alternative has built-in excess capacity of approximately 66 EDUs. (Ex. DEP-1, p. 22)

20. Some commercial properties, such as a pizza shop, may be appropriately allocated 1 EDU. (N.T. 59).

21. The user rate of a given sewage treatment alternative is determined by dividing the cost by the number of users. (N.T. 51).

22. Three or four earlier versions of the Joint Act 537 Plan had been prepared. (N.T. 98).

23. The plant location contemplated by the chosen sewage treatment alternative in the Joint Act 537 Plan has the lowest cost of all the potential locations studied in the Plan. (N.T. 115).

24. The Sequencing Batch Reactor ("SBR") was analyzed and identified as the most cost-effective alternative. (N.T. 324).

25. The cost to address the sewage needs in the Fearnot area of Hubley Township by community on-lot disposal systems was greater than the cost to provide public sewer. (N.T. 180-181 and 324-325 and Ex. DEP-11, p. 3).

26. There are approximately 81 homes in the Fearnot study area of Hubley Township. (Ex. APP-1, p. 17).

27. The Joint Act 537 Plan contemplates serving 56 existing EDUs in the Fearnot study area of Hubley Township. (N.T. 365 and Ex. APP-1, p.21).

28. The soil types in the Fearnot study area of Hubley Township have severe limitations in regards to the viability of on-lot sewage treatment systems. (Ex. APP-1, p. 17).

29. There are significant sewage treatment needs identified in both Hegins Township and Hubley Township. (N.T. 199, 201, and 313-317).

30. There are widespread documented on-lot sewage treatment system malfunctions and documented direct discharges of untreated sewage in the Fearnot study area of Hubley Township. (N.T. 261-262, 296 and 313-318 and Ex. APP-1, pp. 14-18).

31. The on-lot survey sampling confirmed that in Hegins Township, there are 24% confirmed malfunctions, 20% suspected malfunctions, and 24% potential malfunctions of on-lot sewage systems. (N.T. 315, 16 of the Plan).

32. In Hubley Township, survey results showed 47% confirmed malfunctions, 18% suspected malfunctions, and 18% potential malfunctions. (N.T. 316, 17 and 18 of the Plan).

33. For the Fearnot area, two-thirds of the on-lot systems are either confirmed, suspected, or potential malfunctions, with 45% being confirmed malfunctions. (N.T. 318).

34. The sewage treatment needs documented in Hegins Township and Hubley Township exceed the parameters in the Department's guidance as to when a municipality must address such needs in accordance with the Sewage Facilities Act. (N.T. 315).

35. The April 6, 2015, response to the Department's technical deficiency letter did not change the nature and scope of the chosen sewage treatment alternative, and was otherwise consistent with the public notice concerning the Joint Act 537 Plan. (N.T. 248, 253, and 352).

36. The Joint Act 537 Plan was prepared in accordance with the generally accepted methodologies in the field of engineering. (N.T. 294).

37. Hegins Township and Hubley Township evaluated flow from nonresidential structures within the identified sewage service area and determined that none were major producers of sewage. (N.T. 320).

38. The Joint Act 537 Plan considered the following sewage treatment alternatives: collection, conveyance, treatment, and discharge; use of existing on-lot disposal; small flow treatment facilities; community on-lot sewage systems; holding tanks; sewage management program; non-structural planning alternatives; and no action. (Ex. App-1, pp. 23-28).

39. The Joint Act 537 Plan studied the alternative of a community on-lot disposal system for the Fearnot study area of Hubley Township. (N.T. 24-25 and Ex. DEP-11, pp. 2-3).

40. The Joint Act 537 Plan studied ten alternative treatment plan locations to address documented sewage treatment needs in Hegins Township and Hubley Township. (N.T. 325).

41. Of the ten alternatives evaluated, five of those alternatives were considered potentially viable. (N.T. 323).

42. The cost estimates in the Joint Act 537 Plan were based upon past projects and quotes from vendors. (N.T. 328).

43. The Joint Act 537 Plan accounts for costs associated for easement acquisition in the figure identified as "soft costs." (N.T. 335).

44. The Joint Act 537 Plan accounts for costs associated with rock removal in the figure identified as "contingency costs." (N.T. 337).

45. The 10% of construction costs that has been set aside as "contingency costs" is the maximum percentage allowed for a project that is seeking PennVest financing. (N.T. 342-343).

46. The financing projections contained in the Joint Act 537 Plan are based in part upon Hegins Township's and Hubley Township's discussions with representatives from PennVest. (N.T. 344.)

47. The projected delinquency rates identified in the Joint Act 537 Plan are based upon delinquency rates experienced by the water system that serves the Townships. (N.T. 345).

48. Hegins Township and Hubley Township may qualify for grants and favorable financing that would decrease the overall cost of the project. (N.T. 236).

49. The estimated project costs of the Joint Act 537 Plan are consistent with other projects reviewed by the Department. (N.T. 232).

50. The total project cost is $26,356,011 as estimated by Benesch. (N.T. 150; *see also* Benesch Report 3).

51. The total project cost is $38,605,325 as estimated by Entech. (N.T. 150; *see also* Ex. APP-12).

52. There is a 46% difference in project cost estimates between Benesch and Entech. (N.T. 150).

53. Using Benesch's total project costs, the cost projections of the chosen sewage treatment alternative of the Joint Act 537 Plan is within EPA's recommended affordability criteria. (N.T. 349).

54. Using EPA's 2% formula, the affordable rate would have been $94.50. (N.T. 349).

55. The Joint Plan included a weighted average affordability rate for Hegins and Hubley Townships of $70.90, which was calculated using 1.5% of the combined median household income for Hegins and Hubley Townships. (Ex. DEP-9, p. 30-31). The Plan also included a separate affordability rate of $73.27 for Hegins Township and $58.98 for Hubley Township. (*Id.*)

56. The estimated EDU cost per month under a possible funding scenario with a PennVest 30-year loan and a zero percent grant is $71.76. (N.T. 347).

57. The estimated EDU cost per month of $71.76 is affordable under the appropriate guidelines. *Id*.

58. The EDU cost per month of $71.76 is still within the range of costs in the original public notice of $68 to $74 per month, as identified in the Public Notice and in the Plan. (N.T. 352).

59. The Joint Act 537 Plan is able to be implemented. (N.T. 254-256, 300).

60. Both Hegins and Hubley Townships passed resolutions approving the plan before the Department approved it. (N.T. 308).

61. Neither Township provided written comments on the plan. (N.T. 309).

62. Other than its current litigation position in the present appeal, Hegins Township has not officially taken any other action to withdraw its support of the Joint Act 537 Plan. (N.T. 309).

63. The Joint Act 537 Plan is the first comprehensive revision to the Official Sewage Facilities Plans of Hegins Township and Hubley Township since 1967. (N.T. 311).

64. Mr. Richter, in addition to being a named Appellant, serves on the Board of the Hegins-Hubley Water Authority. (N.T. 12).

65. Mr. Richter is subject to the Plan, would incur user fees, and would also have to pay tap fees under the Plan as written. (N.T. 13).

66. At the April 13, 2015 Hegins Township meeting, Mr. Richter objected to the revised resolution, which was ultimately passed. (N.T. 13).

67. Two (2) days later, on April 15, 2015, Mr. Richter's counsel sent a letter to Rob Stermer, Sewage Planning Supervisor of the Department, outlining Appellants' concerns and highlighting the fact that there was not an additional comment period after Benesch resubmitted its response to the Department's Technical Review Comment Letter. (N.T. 18; *see also* Appellants' Ex. A-7).

68. In the April 15, 2015 letter, Appellants asked that the Department delay the Plan's approval. (N.T. 18-19).

69. Despite Appellants' requests, just two days later, the Department approved the Plan on April 17, 2015. (N.T. 19; *see also* Appellants' Ex. A-8; DEP Ex. 1).

70. After Benesch's April 6, 2015 reply to the DEP Technical Review Comment Letter, there was no additional public comment period and no public advertisement. (N.T. 19-20).

71. The Hegins-Hubley Water Authority would ultimately be taking over the system and charged with implementing the Plan. (N.T. 20).

72. Mr. Richter identified numerous commercial properties in the sewer service area for Hegins that were not included in the Plan, including an oil delivery facility, metal industries, Redner's Supermarket, a sports bar and restaurant, another restaurant, a dental office, a pizza

shop, a butcher shop, Veterans of Foreign War, American Legion, Top Stars Convenience and Food Store, Prima Pizza, Fortune Ocean Chinese, and Twin Valley Farmer's Exchange. (N.T. 24).

73. In this appeal, both Hegins and Hubley Townships were initially represented by Paul J. Datte, Esquire, who entered his notice of appearance on May 20, 2015. (Bd. Ex. 3).

74. Until early 2016, the Townships were represented by Attorney Datte, who filed various documents on behalf of both Townships. (Bd. Ex. 3; Bd. Ex. 41).

75. On January 13, 2016, John G. Dean, Esquire, entered an appearance on behalf of Hegins Township. On February 18, 2016, the Board held a conference call with counsel and learned that Hegins Township, one of the two Townships in the Joint Plan, was now in support of the challenge to the Joint Act 537 Plan. (Bd. Ex. 37).

76. Attorney Datte filed a motion to withdraw his appearance on behalf of Hegins Township on February 3, 2016. The Board approved the withdrawal of appearance on February 18, 2016. (Bd. Ex. 41).

77. On March 25, 2016, Hegins Township filed a Motion to Disqualify Attorney Datte, who continued to represent Hubley Township. In its Motion, the Township stated that "Hegins now supports the present Appeal." (Bd. Ex. 47: Motion to Disqualify Counsel at ¶ 7).

78. On April 4, 2016, Hubley Township filed an Answer to the Motion to Disqualify Counsel in which Hubley requested that the Board dismiss the Motion as moot in light of Attorney Datte's announced intention to withdraw with substitute counsel entering an appearance for Hubley Township. On April 5, 2016, Paul J. Bruder, Esquire, and Timothy J. Nieman, Esquire, entered an appearance on behalf of Hubley Township, and Paul J. Datte, Esquire withdrew his appearance. (Bd. Ex. 67; Bd. Ex. 69).

79. In its Pre-Hearing Memorandum, at the Hearing before the Board, and in its Post-Hearing Brief, Hegins Township took an active role in opposing the Department's decision to approve its Joint Plan and supporting the Appellants in their appeal to overturn the Department's approval of the Joint Act 537 Plan.

80. The Department witnesses testified that PennVest funding is not guaranteed. (N.T. 267).

81. The Appellants adopted by reference the Post-Hearing Brief of Permittee, Hegins Township. Appellants' Post-Hearing Brief at 1.

82. The Department's March 20, 2015 letter contained significant concerns of the Department that the Townships needed to address. (N.T. 192-94).

83. The responses and changes to the Joint Act 537 Plan contained in the Township's April 6, 2015 responses were not significant. (N.T. 267). The fact that the Department's concerns were viewed by the Department as significant does not necessarily make the Township's responses to these concerns and the related changes to the Plan significant. (N.T. 192-94, 198).

## DISCUSSION

### Background

The Legislature has declared through the Sewage Facilities Act, 35 P.S. § 750.3, that the policy of the Commonwealth is "[t]o protect the public health, safety and welfare of its citizens through the development and implementation of plans for the sanitary disposal of sewage waste." The regulation of sewage facilities in Pennsylvania involves multiple stages of Department approval. *See Estate of Charles Peters v. DER*, 1992 EHB 358, 367. The first stage requires a

municipality to develop, adopt, and approve a sewage facilities plan in accordance with the Sewage Facilities Act. *See* 35 P.S. § 750.5.

Hegins and Hubley Townships are obligated by law to revise their official sewage facilities plans because of documented widespread malfunctioning on-lot sewage treatment systems, and/or documented discharges of untreated sewage from residences to the ground surface and to the waters of the Commonwealth. *See* 25 Pa. Code 71.12(a). Hegins and Hubley Townships conducted a sewage disposal needs survey in accordance with the Department's published guidance. (N.T. 313). The results of the study found that 76% of the on-lot sewage treatment systems surveyed in Hegins Township were found to be either confirmed, suspected, or potentially malfunctioning. (Ex. App-1, p. 16). In Hubley Township, 83% of the on-lot sewage treatment systems surveyed were found to be either confirmed, suspected, or potentially malfunctioning. (Ex. APP-1, p. 18). Approximately 50% of the on-lot sewage systems that were surveyed in Hubley Township were confirmed to be malfunctioning. *Id*. In addition to 45% of the on-lot sewage treatment systems surveyed in the Fearnot study area of Hubley Township that were confirmed to be malfunctioning, direct discharges of untreated sewage were found – in that "home plumbing is sent right out to a surface or stream discharge." *Id*. and (N.T. 318).[1] While it is true that the Townships are not under a Department order to revise their respective official sewage facilities plans, the Townships are nonetheless obligated by law to revise their respective official sewage facilities plans to address the significant sewage treatment needs that have been documented, and such revisions are long overdue.

[1] Paragraph 118 of Hegins Township's Post-Hearing Brief claims that "Mr. Fritz did not dispute that there were only eight (8) houses in Fearnot." This is not supported by the record. When counsel asked Mr. Fritz whether he saw something different than eight houses in Fearnot, Mr. Fritz stated that he did. (N.T. 270). According to the record before the Board there are approximately 81 houses in the Fearnot study area of Hubley Township. (Ex. APP-1, p. 17). The Joint Act 537 Plan contemplates serving 56 existing EDUs in the Fearnot study area. (N.T. 365 and Ex. App-1, p. 21).

It has been nearly fifty years since Hegins Township and Hubley Township have completed an update revision to their respective official sewage facilities plans. (N.T. 311). In 2010, Hegins and Hubley Townships decided to develop a Joint Act 537 Plan to spread the costs of a sewage treatment alternative over a larger user base. (Ex. App-1, p. 3). Since 2010, Hegins and Hubley Townships have developed several draft plans that were available for public review and comment. (N.T. 97-98). In May of 2011, Hegins and Hubley Townships changed the charter of the Hegins-Hubley Water Authority to include sewage services. (Ex. App-1, pp. 35-36). In March of 2012, Hegins and Hubley Townships submitted a joint official sewage facilities plan update revision to the Department for review and approval. (Ex. APP-1, p. 3). This plan revision was withdrawn by the Townships in February of 2013. *Id*. On October 3, 2013, Hegins and Hubley Townships and the Hegins-Hubley Water Authority executed an inter-municipal agreement authorizing the Hegins-Hubley Water Authority to design, develop, finance, construct, operate, and maintain a sewage collection and treatment system that would serve the respective Townships. (Ex. APP-1, Appendix U).

On August 4, 2014, the Department received a joint official sewage plan update revision from Hegins and Hubley Townships. (Ex. DEP-2 and Ex. APP-1). The Joint Act 537 Plan's chosen sewage treatment alternative includes the construction of a 600,000 gallons per day wastewater treatment plant along Fearnot Road in Hubley Township. Sewer service is proposed for the Sacramento, Spring Glen, and Fearnot areas of Hubley Township, and for the Hegins, Valley View, and Lamberson areas of Hegins Township. The Joint Act 537 Plan also requires the implementation of an on-lot sewage disposal system management program for the areas of the municipalities not within the proposed service area of the collection system. On April 17, 2015, the Department approved Hegins and Hubley Townships' adoption of the Joint Act 537

Plan, consistent with the policies of the Pennsylvania Sewage Facilities Act "[t]o promote intermunicipal cooperation in the implementation and administration of such plans by local government." 25 Pa. Code § 750.3(2).

The background of this appeal would not be complete without briefly discussing the dramatic shift in positions of Hegins Township, which is listed in the caption of this appeal as the co-permittee with Hubley Township. On August 4, 2014, the Department received a joint official sewage facilities plan revision for Hegins and Hubley Township. The Townships received and responded to preliminary comments from the Department until September 8, 2014. At every stage of the review process the Townships worked hand-in-hand to prepare the Joint Act 537 Plan.

After the Appellants filed their appeal, the Townships continued to work hand-in-hand for a period of time to defend their approved Joint Act 537 Plan. On May 20, 2015, Paul J. Datte, Esquire, entered his appearance on behalf of both Townships in defense of the Joint Act 537 Plan. The joint efforts of the Townships continued until sometime in late 2015 or early 2016. On January 13, 2016, John G. Dean, Esquire, entered an appearance on behalf of Hegins Township. On February 3, 2016, Paul J. Datte filed a Motion to Withdraw as counsel for Hegins Township. The Board scheduled a conference call with the Parties' counsel on February 18, 2016, to discuss these developments. During the call, the Board learned that Hegins Township was now in support of the Appellants' challenge to its Joint Act 537 Plan.

On March 25, 2016, Hegins Township filed a Motion to Disqualify Counsel for Hubley Township due to a conflict of interest. Hegins Township asserted that Attorney Datte had a conflict because of his initial joint representation of both Townships and the subsequent decision of Hegins Township to switch sides in the appeal to actively support the Appellants' appeal

before the Board. Hubley Township filed an Answer to the Motion, in which it asked the Board to dismiss the Motion as moot in light of Attorney Datte's announced intention to withdraw when substitute counsel was secured for Hubley Township. On April 5, 2016, substitute counsel entered their appearance for Hubley Township and Attorney Datte withdrew his appearance.

Because Hegins Township switched sides to support the Appellants' appeal and to stop defending its Joint Act 537 Plan and the Department's decision to approve it, Hegins Township has actively supported the Appellants in their challenge. Hegins Township often took the lead at the Hearing in presenting witnesses and conducting direct and cross examinations. The Appellants filed a short Post-Hearing Brief in which they simply incorporated Hegins Township's Post-Hearing Brief in its entirety. Hegins Township, by its actions, no longer supports the Joint Act 537 Plan, and is actively seeking to have the Department's approval of the Plan disapproved by the Board.

**Burden of Proof and Standard of Review Section**

The Appellants bear the burden of proof.[2] 25 Pa. Code § 1021.122(c)(2). A third party appealing a Department permit or approval bears the burden of proving by a preponderance of the evidence that the Department abused its discretion or committed an error of law in approving the action. *County Comm'ners, Somerset County v. DER*, 1996 EHB 351. 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.

[2] While Hegins Township was able and committed to implement the Joint Act 537 Plan when it was adopted, approved, and appealed, Hegins Township no longer supports the Joint Act 537 Plan as approved. Hegins Township has neither filed an appeal nor intervened as an appellant in this matter, but rather the Township was automatically made a party in accordance with the Board's rules of practice and procedure. See 25 Pa. Code § 1021.51(i). Even if Hegins Township participated in these proceedings as an appellant, such a posture would not shift the burden of proof in this matter. *See* 25 Pa. Code § 1021.122(c)(3).

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

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

*Smedley*, 2001 EHB at 156. 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 support of the Appellants' Appeal, the Appellants and Hegins Township assert that the Joint Act 537 Plan was not properly prepared in accordance with the applicable requirements in 25 Pa. Code Chapter 71. In particular, they assert that the Plan was deficient in several areas:

1) The Plan Summary did not meet the requirements of 25 Pa. Code § 71.21(7);

2) The Plan did not meet the requirements of 25 Pa. Code § 71.21(3) and (5);

3) The cost estimates in the Plan were not complete and the Township will not be able to afford to implement or maintain the Plan as required under 25 Pa. Code § 71.32(d)(4)(5); and

4) The Townships made significant changes to the Plan in their April 6, 2015 revision that should have triggered additional public notice and comment under 25 Pa. Code § 71.31(c).

The Appellants and Hegins Township want the Board to vacate the Department's approval of the Plan in light of these alleged deficiencies or, in the alternative, to remand the Plan back to the Department for additional public comment. The Board will address each of the alleged deficiencies below.

**Adequacy of Plan Summary**

Hegins Township and the Appellants assert that the Department should have denied the Joint Act 537 Plan because the Plan Summary did not meet the requirements of 25 Pa. Code § 71.21(7). They assert that the Plan Summary is defective in the following areas:

1) Plan Summary does not include "institutional arrangements necessary to implement the chosen alternative …"
2) Plan Summary does not include "estimated construction costs or projected user fees."
3) Plan Summary does not include municipal commitments necessary to implement the Joint Act 537 Plan.

Hegins Township Brief at 26-28. In support of their concern, Mr. Ebert testified at length about the purpose and importance of the Plan Summary. (N.T. 42-48).

The Department and Hubley Township counter these challenges in two ways. They assert that the Plan Summary associated with the Joint Act 537 Plan "does meet applicable requirements." Departments Brief at 19. Section 71.21(a)(7) of the Department's regulations, which governs the contents of plan summaries, provides:

(a) …If applicable to the specific planning needs of the municipality, as determined by the Department, the completed plan submitted to the Department shall:

…

(7) Include a summary of the plan which identifies:

(i) Major problems evaluated in the plan.
(ii) Alternatives chosen to solve these problems.
(iii) Municipal commitments necessary to implement the plan.
(iv) A schedule for implementation.

25 Pa. Code § 71.21(a)(7). With respect to Hegins Township's concern about institutional arrangements, the Department asserts that the regulatory language does not expressly include institutional arrangements. The Department does not contest the fact that the Plan Summary does not address institutional arrangements, but instead the Department argues that they do not need to be included in the Plan Summary under the regulations. In addition, the Department asserts that the Joint Act 537 Plan does contain a section entitled "VII Institutional Evaluation" which describes institutional arrangement options evaluated by the Townships. (Ex. APP-1, p. 3536).

With respect to the second alleged defect with the Plan Summary that concerned the "estimated construction costs or projected user fees," the Department asserts that the estimated construction costs and user fees are not a mandatory element of the Plan Summary under the regulations. The Department also asserts that the Joint Act 537 Plan contained estimated construction costs and user fees. *See* (Ex. App-1, Part 2). In addition, the Department asserts that the public had notice of these items as a result of the public notice even if they were not included in the Plan Summary. (*Id*.)

With respect to the final alleged defect with the Plan Summary, concerning the municipal commitments, the Department does not assert that municipal commitments are not included in the regulations for obvious reasons. See 25 Pa. Code § 71.21(a)(7)(iii). Without citing any

specific authority, the Department nevertheless argues that it has the authority to waive elements of the Plan Summary.[3] The Department does not expressly state that it, in fact, waived the "municipal commitment" requirement subparagraph (iii) in this situation, but rather only mentions that it has such authority. Department's Post-Hearing Brief at 21. The Department also contends that two specific examples of municipal commitments, adoption of connection ordinances and acquisition of easements, are not expressly included in the regulatory language concerning municipal commitments. The Department's mention of its waiver authority is a weak argument as to why the Board should overlook the error in the Plan Summary concerning municipal commitments.

The Department's second approach to countering the claim that the Plan Summary is defective is to question the continuing relevance of any errors in the Plan Summary's contents committed during the application process under *O'Reilly v. DEP*, 2001 EHB 19. In *O'Reilly*, the Board recognized:

> There will be errors in virtually every permit application review of even modest complexity. If the errors have been corrected, there is no need to dwell upon them. Errors may have been rendered immaterial or moot by subsequent events or even the passage of time. A party who would challenge a permit must show us that errors committed during the application process have some continuing relevance.

*O'Reilly v. DEP*, 2001 EHB at 51; *Kleissler v. DEP*, 2002 EHB 737, 751 ("Finally, we remind the parties that it makes no sense to dwell inordinately on the permit application review process if any alleged defect are immaterial in the final analysis."); *Shippensburg Township P.L.A.N. v. DEP*, 2004 EHB 548, 550; *Harvilchuck v. DEP*, 2014 EHB 673, 691-92; *Stedge v. DEP*, 2015 EHB 577, 615. The Department appears to acknowledge that the Plan Summary may have been

[3] Apparently, the Department believes that the "as determined by the Department" language in Section 71.21(a) allows it to "waive" otherwise applicable requirements in paragraph (7) concerning the contents of a plan summary.

defective, but the Department argues that these defects with the Plan Summary have no continuing relevance to the subsequent appeal of the Department's approval of the Joint Act 537 Plan.

The Board agrees with the Department that the rule the Board described in *O'Reilly* applies to the alleged defects in the Plan Summary in this appeal. While the Plan Summary plays an important role in explaining the plan revision before it is approved, after the Department takes an action to approve the Joint Act 537 Plan, it is not apparent that the Plan Summary has continuing relevance to the Department's decision to approve the Plan. The Appellants, and later Hegins Township, have not succeeded in establishing that any of the alleged defects of the Plan Summary have any continuing relevance in resolving this appeal. Simply identifying errors in the application process is not sufficient to sustain an appeal if the errors have been rendered immaterial or moot by subsequent events or even the passage of time. Appellants who have the burden of proof need to show that the alleged errors have continuing relevance in a subsequent appeal.

The Appellants have not explained how they were adversely affected by any of the alleged deficiencies of the Plan Summary. In this appeal, the Appellants were fully aware of the contents of the Joint Act 537 Plan, including the institutional arrangements, the estimated construction costs and projected user fees, and the related municipal commitments necessary to implement the Plan, even though these items were not included in the Plan Summary. In response, the Appellants argue that the general public was not aware of these items because they were not listed in the Plan Summary, even though the Appellants were aware of these items in the Plan. The Board agrees with the Department that the absence of these items in the Plan Summary has no apparent continuing relevance to Appellants' appeal of the Department's

approval of the Plan, given that the Appellants had no problem raising their concerns in this appeal. Without an explanation of the continuing relevance of the lack of general public awareness, the alleged errors in the Plan Summary do not provide a basis to sustain the appeal.

**Compliance with Public Notice Requirements Applicable to Joint Act 537 Plan**

Hegins Township and the Appellants also assert that the Joint Act 537 Plan was not properly noticed after responses to the Department's review comments were received. They assert that the Department's review comments triggered "significant changes" to the Joint Act 537 Plan, and that these "significant changes" required an additional round of public notice and comment.

The Department and Hubley Township disagree that additional public notice was required after the Department submitted its last set of review comments on March 20, 2015, which prompted responses and revisions to the Joint Act 537 Plan by a letter dated April 6, 2015. The Department asserts that while its review comments requested "clarification from the Townships as a result of its technical review of the submission the additional information that was provided from the Townships in response did not alter or change the nature of the project that was noticed for public comment." Department's Brief at 17. The Department and Hubley assert that the Townships previously provided public notice and an opportunity for public comments, and that an additional round of public notice and comment was not required for the changes contained in the April 6, 2015 responses to the Department's March 20, 2015 review comments.

Hegins Township and the Appellants disagree and assert that the Townships' April 6, 2015 responses to the Department's review comments were significant, triggering more public notice and comment based upon the testimony of a Department employee, Mr. Robin Stermer,

Sewage Planning Specialist Supervisor. He testified that the concerns identified in the Department's March 20, 2015 letter were significant. Hegins Township and the Appellants rely upon this statement about the Department's "concerns" that Mr. Stermer characterize as "significant" to assert that the responses and changes that these concerns prompted were also "significant." While the Department and Hubley do not dispute that Mr. Stermer testified that the Department's March 20, 2015 review letter identified several significant Department concerns, the Department asserts that Mr. Stermer never testified that he thought that the Townships' responses to the review comments prompted significant changes which might prompt an additional round of public notice and comment.

The Department received Attorney Kevin Walsh's April 15, 2015 letter on behalf of the Appellants, which requested that the Department deny the plan revision because there was no public notice or opportunity for public comment on the Townships' April 6 responses. The letter asserted that those responses contained "significant" changes to the Plan. The Department testified that it conducted a review of the Townships' responses to the Department's review letter in light of Mr. Walsh's letter and found that the Townships' responses did not change the nature and scope of the proposed plan. (N.T. 247-48 and 253; Exs. DEP-11 and APP-7). The Department concluded that additional public notice was not required.

The Board agrees with the Department and Hubley Township that an additional round of public notice and an opportunity for public comments were not required as a result of the Townships' April 6, 2015 responses to the Department's March 20, 2015 review letter. The Board agrees with the Department that the responses did not change the nature or scope of the proposed plan revision and were not significant.[4] While Mr. Stermer did indicate in testimony

[4] One of the changes to the Plan was the addition of the cost of property acquisition to the cost estimates. In their April 6, 2015 response, the Townships added the cost of property acquisition, but this change

that the Department's March 20, 2015 review letter identified several significant Department concerns, the Board agrees with the Department that the Townships' responses and related clarifications and changes were not themselves significant, requiring an additional round of public notice and an opportunity for public comment.

**Compliance with Section 71.21(a)(5)(i)(E) Antidegradation Requirements**

Hegins Township and the Appellants claim that the Joint Act 537 Plan fails to comply with 25 Pa. Code § 71.21(a)(5)(i)(E). This provision provides:

> (i) Consistency between the proposed alternative and the objectives and policies of . . .
>
> > (E) Antidegradation requirements as contained in Chapters 93, 95 and 102 (relating to water quality standards; waste water treatment requirements; and erosion and sediment control) and the Clean Water Act.

25 Pa. Code § 71.21(a)(5)(i)(E). Hegins Township and the Appellants assert that the Joint Act 537 Plan is defective because it does not document how the EDU allocation of 25 lbs. per year was calculated as part of the identification of an offset for nitrogen of 40,075 lbs. per year. Hegins Township Brief at 28. The Department and Hubley Township both disagree and assert that the Joint Plan complies with 25 Pa. Code § 71.21(a)(5)(i)(E) which requires consistency with the Department's Antidegradation requirements.

The Board agrees with the Department that Hegins Township and the Appellants have failed to meet their burden to establish that the Joint Act 537 Plan fails to comply with the requirement of Section 71.21(a)(5)(i)(E). Mr. Ebert, the Appellants' expert witness, testified that he had no problems with the sufficiency of the Plan's representation and that it is an accurate and appropriate representation. (N.T. 105). He only questioned the lack of explanation or reference to the source of the 25 lbs. per year number to enable a common person to better understand it.

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only had a minor impact on the *costs per EDU* and only added approximately $0.22 to $0.24 to the user rate per month. (N.T. 248).

(N.T. 104-05). In addition, Hegins Township and the Appellants have not explained why it is important to know, for consistency's sake, how the allocation of 25 lbs. per year for existing EDUs was calculated. They have not identified how the contested statement violates the requirements in Section 71.21(a)(5)(i)(E) or the Department's applicable Antidegradation requirements.

**Economic Feasibility and Implementability of the Joint Act 537 Plan**

The Appellants and Hegins Township contend that the Joint Act 537 Plan did not include complete cost estimates and, if proper cost estimates were used, then given the alleged economic infeasibility, the Townships lacked the ability to implement the Plan. The Board views this objection as the Appellants' and Hegins Township's main objection. To support this objection, the Appellants relied upon the testimony of two expert witnesses: Mr. Ebert and Mr. Weir. Mr. Ebert, who was qualified as an expert witness,[5] raised a number of concerns with the accuracy of the construction costs included in the plan. (N.T. 53). Mr. Ebert raised a concern with the Plan's failure to specifically account for commercial and nonresidential users. (*Id*.) Mr. Ebert believed the Plan failed to account for additional EDUs and future growth, which are needed to estimate reasonable and reliable construction costs. (N.T. 67). Mr. Ebert testified that the Plan's cost estimates were not representative of or did not include all of the necessary construction costs in today's market. (N.T. 78). Mr. Ebert also questioned the estimates of the maintenance and operation costs as not being representative of the costs that the Townships would face. (N.T. 88). Finally, Mr. Ebert explained that the financial analysis in the Plan was flawed because it did not include an accurate number of users and the appropriate construction costs. (N.T. 111).

[5] The Board qualified Mr. Ebert as an expert in the areas of wastewater treatment, sanitary sewer collection, and DEP sewage facility planning and design. (N.T. 40).

Mr. Weir, who was also qualified as an expert witness, testified that his estimates of the construction costs and total costs for the project were greatly in excess of the estimates included with the Plan.[6] (N.T. 150). Mr. Weir's testimony focused on an independent cost estimate of the selected alternative in the Plan, which was alternative number 6. (N.T. 146). The scope of his work for Hegins Township was limited to just the cost estimate preparation. (*Id*.)

Mr. Weir estimated that the total cost for the project was over $38 million which was $12 million more than the Plan's estimates contained in the Plan. (N.T. 150). Using Mr. Weir's cost estimates, the estimated cost per EDU increased from $71.76 per EDU per month to approximately $122 per EDU per month. (*Id*.) According to the Appellants, the Plan's cost estimates were not accurate because the construction costs were underestimated, the user fees were underestimated, the Township's delinquency rates were underestimated, and the operating costs were underestimated.

The Appellants and Hegins Township assert that the Department should not have approved the Joint Act 537 Plan under Section 71.32 because the Plan was not capable of being implemented due to economic infeasibility. 25 Pa. Code § 71.32(d)(4)-(5). If the correct cost estimates were used, they assert that the Townships would not be able to implement the Plan as approved.

Hubley Township and the Department disagree that the Department's approval of the Joint Act 537 Plan violates Section 71.32. They assert that the Department made the correct decision under Section 71.32 because the financial analysis cost estimates and user fees estimates were accurate and reasonable. Hubley Township relied upon the testimony of Mr. Rhoades, who

[6] The Board also qualified Mr. Weir as an expert in the areas of wastewater treatment, sanitary sewer collection as well as DEP sewage facility planning and design. (N.T. 145).

the Board qualified as an expert witness.[7] Mr. Rhoades was the project manager for Alfred Benesch and Company, which prepared the Joint Act 537 Plan for the Townships. Mr. Rhoades testified he used various generally accepted sources for estimating the costs of the project, including RS Means, the ENR index, and previous design experience related to similar types and similarly sized projects. (N.T. 298). Hubley Township asserts that the cost estimates in the Joint Act 537 Plan were complete and based upon generally accepted engineering. (N.T. 294; Ex. HUB-6.)

The Parties also disagree on the level of review that the regulations require the Department to undertake. The Appellants and Hegins Township identified several regulatory provisions that require the Department to consider cost or other financial data:

1) 25 Pa. Code § 71.32(d)(4) (whether the plan is able to be implemented).

2) 25 Pa. Code § 71.32(d)(5) (whether the Plan adequately provides for continued operation and maintenance).

3) 25 Pa Code § 71(a)(5)(iv) (evaluation of all options considered including estimates for construction costs, financing and ongoing administration, operation, and maintenance).

The Appellants and Hegins Township assert that the Department did not apply every word, sentence, or paragraph of the regulations set forth above during its review. If the Department had, then the Department would have determined that the Plan is not able to be implemented "due to the astronomical financial costs to construct alone and all the costs to operate and maintain in the future." Hegins Township Brief at 32.

The Department and Hubley Township agree that the regulations listed above require the Department to consider whether the plan revision "is able to be implemented." Department Brief at 11-17; Hubley Township Brief at 22-25. The disagreement between the parties is the nature of

[7] Mr. Rhoades was qualified as an expert in wastewater treatment systems, and engineering and design, and was the project manager and environmental group manager for Benesch. (N.T. 290-93.)

the review under this regulatory language in Section 71.32(d)(4). The Department and Hubley Township assert that the "certainty of implementation is not the standard, rather capability of implementation is the standard." *Don Noll v. DEP*, 2005 EHB 505, 520; *Montgomery Township v. DER*, 1995 EHB 483, 522 (The Department need not determine that the proposed plan revision is certain of being able to be implemented, only that implementation is feasible). The Department, in particular, asserts that it is not required to determine whether the chosen sewage alternative is affordable, but only to evaluate whether the plan is "able to be implemented." Department Brief at 12; (N.T. 216, 221 and 231).

The Appellants disagree that the regulations merely require that the plan need only be able to be implemented. Appellants Reply Brief at 1-3. The Appellants assert that affordability is a consideration because the affordability of a plan impacts whether it is economically feasible and therefore implementable. The Appellants assert that they have established that the Plan is barely not affordable using the cost estimates in the approved plan, without PennVest grants, and that the plan is clearly not affordable using the cost estimates presented by the Appellants and Hegins Township at the Hearing. The Appellants assert that the Plan as approved is not affordable or economically feasible.

In its Reply Brief, Hegins Township again asserted that the Plan as approved is not able to be implemented when one considers the "true costs of implementing the Plan." Hegins Township Reply Brief at 3-4. The Appellants and Hegins Township appear to agree that certainty of implementation is not the review standard, but they reassert that the Plan, as

approved, is economically infeasible when one considers the true costs of the project, the underestimated user rates, and the proposed financing that is out of reach.[8]

The dispute between the Parties on the issue of whether the Joint Plan is able to be implemented is a difficult issue to resolve under the facts of this appeal and the regulatory requirements that guide the Department's review. Upon the review of several competing considerations, the Board ultimately finds that the Department's approval of the Joint Act 537 Plan was appropriate based upon its determination that the Plan is able to be implemented.

First, there are several regulatory requirements that apply here on the issue of whether the Plan is able to be implemented.[9] These regulatory requirements require that the Department determine that the approved plan is able to be implemented. 25 Pa. Code § 71.32. The Board recently stated:

> There are no bright line rules for what constitutes "able to be implemented" and it is committed to the Department's discretion on a case-by-case basis. Any indication of a legitimate barrier to implementation is worthy of the Department's close consideration when exercising its judgment on whether to approve a plan or plan revision, but it does not necessarily prevent the Department from approving the plan or revision that presents a reasonable likelihood of succeeding.

*Borough of Kutztown*, 2016 EHB 88, 97. The Department has discretion on a case-by-case basis to determine if a plan revision is "able to be implemented," but it is required to give close consideration to legitimate concerns or barriers to implementation.

The Department and the Appellants and Hegins Township disagree whether "affordability" is a specific consideration when evaluating whether a plan revision is "able to be

[8] At the Hearing, Mr. Ebert testified that a "reasonable degree of certainty" that a plan can be implemented is required or a plan should not be adopted and approved by DEP. (N.T. 118). The Appellants may not want absolute certainty, but they clearly want more certainty. (*Id.*)

[9] These regulatory requirements are listed on page 26 of this Adjudication. *See also* 25 Pa. Code § 71.61(d).

implemented." The Department asserts that there is no express requirement to consider affordability, even though a plan revision may include an affordability analysis based upon potential funding sources. Department Brief at 12-13. The Appellants and Hegins Township disagree that affordability is not a component of the Department's evaluation of whether a plan revision is able to be implemented. Appellant's Reply Brief at 2-6; Hegins Township's Reply Brief at 2-5. Both assert that the Plan is not economically feasible when one considers the true costs of the project, underestimated user rates, and unrealistic financing. A plan revision that is not affordable is not economically feasible, and it will not be able to be implemented.

While the Board agrees with the Department that affordability is not expressly mentioned in the Department's regulations, the Board also agrees with the Appellants and Hegins Township that economic feasibility – affordability by another name – is a consideration when evaluating whether a plan is able to be implemented. If there are legitimate concerns raised about economic feasibility then the Department needs to consider the concerns closely when exercising its authority. *Borough of Kutztown v. DEP*, 2016 EHB at 97. Here, the Appellants and Hegins Township have raised legitimate concerns about the affordability or economic feasibility of the Joint Act 537 Plan. These concerns trigger the Department's close consideration.

Second, the Joint Act 537 Plan is a planning document and planning documents, by their nature, only require that a proposal is capable of being done or is feasible. *Borough of Kutztown v. DEP*, 2016 EHB at 95-96. At the Act 537 planning stage, there is no need to prove that selected option of sewage disposal can be done to a certainty.[10] *Id.*; *Noll v. DEP*, 2005 EHB 505. At the planning stage, potential issues need to be identified and considered properly, but at

[10] The Act 537 planning stage is the first of a three stage process. (N.T. 214). After the plan is approved, a person needs to secure an NPDES permit that establishes discharge limits. *Id.* The NPDES permit stage is also known as a Part 1 permit. After the NPDES permit is approved, the applicant does the design of the project for the Water Quality Management or Part 2 permit. *Id.*

the planning stage there is no requirement for absolute certainty of implementation. *Lehigh Twp. v. DEP*, 1995 EHB 1098, 1112. The Appellants and Hegins Township seem to agree that absolute certainty of implementation is not the regulatory standard, but it is clear that they desire more detail or certainty in the Joint Act 537 Plan than it currently contains.

Third, the dispute on the issue of whether the Plan is able to be implemented involved testimony of dueling expert witnesses. Weighing credibility and selecting among competing expert testimony is one of the Board's most basic and important duties. *UMCO Energy, Inc. v. DEP*, 2006 EHB 489, 544-45, *aff'd*, 938 A.2d 530 (Pa. Cmwlth. 2007). The weight given to an expert's opinion depends upon factors such as the expert's qualifications, presentation and demeanor, preparation, knowledge of the field in general and the facts and circumstances of the case in particular, and the quality of the expert's data and other sources. *Crum Creek Neighbors v. DEP*, 2009 EHB 548, 561.

The Board heard testimony from several expert witnesses on the related issues of cost estimates and economic feasibility. Mr. Weir, the challengers' expert witness, testified about an independent cost estimate of the alternative Number 6 selected in the Plan.[11] The Appellants and Hegins Township rely upon his alternative cost estimate to argue that the Plan is not economically feasible and is not able to be implemented. The Department's reviewers and Hubley Township's expert witness disagree and assert the Plan is able to be implemented. For several reasons, the Board finds that the Appellants have not met their burden to establish that the Joint Act 537 Plan is not able to be implemented based upon inaccurate cost estimates and economic infeasibility. The Board finds the testimony of Mr. Rhoades to be more credible than that of Mr. Ebert and Mr. Weir. In particular, the Board gave less weight to Mr. Ebert's

[11] Mr. Ebert did not testify that the Plan is not able to be implemented. He merely testified that in his opinion there was enough information to make that conclusion. (N.T. 118-19).

testimony because he is a property owner in Hegins Township and his parents also live there. (N.T. 98). While Mr. Ebert is not a full-time resident, he is there often. These facts raise concerns about bias. In addition, there are questions as to whether he reviewed all of the materials in the Plan files. (N.T. 122-26).

Mr. Ebert also did not have an opinion on the issue of whether the plan is able to be implemented. He only testified that in his opinion there was not enough information in the Plan to determine whether the Plan could be implemented. He questioned the accuracy of the cost estimates and user fee calculations, but he testified that based upon a lack of accurate information, he could not provide an opinion on the issue of whether the plan is able to be implemented. (N.T. 139). Mr. Ebert further testified on cross-examination that the plan could be implemented, if the representations in the Plan regarding costs and user fees were accurate. (N.T. 142)[12]

While Mr. Weir's cost estimates were substantially higher than Mr. Rhoades' cost estimates, Mr. Rhoades testified at length at the Hearing concerning the manner in which he developed his cost estimates. Mr. Rhoades was the project manager for the Joint Act 537 Plan and he had worked with Hubley Township since 2009 and then with Hegins Township since 2011 to prepare the Joint Act 537 Plan. Mr. Rhoades had the background and experience with actual conditions in the Townships that Mr. Weir lacked because he only performed a limited task.

The Department also explained how it reviewed Mr. Rhoades' cost estimates and financing alternatives. The Department relied upon the testimony of Mr. Stermer, DEP Sewage Planning Specialist Supervisor, and James Ridgik, DEP Sewage Planning Engineer. Mr. Stermer

[12] Mr. Ebert did not believe the Plan's representations were accurate.

reviewed the entire Plan but he did not critically review the financial information. (N.T. 170-71, 177). Mr. Ridgik conducted the review of the financial, costs, and funding aspects of the Plan. (N.T. 202-205). Mr. Ridgik relied upon his experience as he reviewed the cost estimates and financing options. He concluded they were reasonable and complete.

Fourth, the facts of this appeal present a situation in which, even under the facts that support the Department's decision to approve the Joint Act 537 Plan, the decision that the Plan is economically feasible is a relatively close call. Mr. Rhoades testified that the estimated EDU cost per month under a likely funding scenario for this type of project using PennVest loans and no grants is $71.76. (N.T. 347).[13] Mr. Rhoades also states that this amount is reasonable and affordable under appropriate guidelines for this project. (*Id.*) Benesch used 1.5% multiplied by median household income to determine affordability.[14] (N.T. 349). According to the Appellants and Hegins Township, the affordability rate for the proposal using Benesch's cost estimates is $70.90, which is just slightly below the figure that Mr. Rhoades identified in his testimony as the cost per EDU per month for likely PennVest funding with no grants.[15] (N.T. 158-161). The project cost estimate per EDU is very close to the affordability rate, and this increases the importance of the concern about the accuracy of the Plan's cost estimates. Using the cost estimate proposed by Mr. Weir increases the costs per EDU per month to approximately $122.

[13] The Plan included a funding analysis for Alternative 6, which was revised on April 6, 2015. (Ex. DEP 16). The funding analysis contained several possible funding options. *Id.* A 30-year loan from PennVest, at a 1% loan rate was listed as a likely funding option. Under this funding option the combined estimated cost per EDU per month was $71.76 with no PennVest grant, $66.18 with a 10% PennVest grant, and $60.60 with a 20% PennVest grant. *Id.* The availability of PennVest grants is not guaranteed, but they are often available, and if grants were available here, then the availability of grants would make the Plan more easily affordable.

[14] Mr. Rhoades also testified that EPA recommends using 2% of median household income which if used would calculate an affordable rate of $94.50. (N.T. 349).

[15] The Joint Plan included a weighted average affordability rate for Hegins and Hubley Townships of $70.90, which was calculated using 1.5% of the combined median household income for Hegins and Hubley Townships. (Ex. DEP-9, p. 30-31). The Plan also includes a separate affordability rates of $73.27 for Hegins Township and $58.98 for Hubley Township. (*Id.*)

No Party asserts that this higher rate per EDU is consistent with the affordability rate used, even if one uses the 2% multiplier allowed by EPA rather than the 1.5% multiplier used in the Plan. The costs per EDU, using Benesch's project cost estimates is, however, within the range of costs that the Department and Hubley Township assert are reasonable and affordable. The Board agrees, but recognizes it is a close call.

Finally, all Parties agree that the Appellants have the burden of proof in this appeal. 25 Pa. Code § 1021.122(c)(2). While the Appellants and Hegins Township have identified a number of legitimate concerns regarding the implementation of the Plan as the above discussion reflects, the Board finds that the Department and Hubley Township have addressed these concerns to the extent necessary to support the Department's decision to approve the Plan under the applicable regulatory requirements. The Department has the authority and discretion to evaluate whether a plan revision is "able to be implemented" on a case-by-case basis. The Appellants and Hegins Township have not met their burden of proof to establish that the Department acted in a way that was unreasonable, contrary to law, not supported by the facts, or that was inconsistent with the Department's obligations under the Pennsylvania Constitution, when it decided that the Joint Act 537 Plan is "able to be implemented."

The Appellants and Hegins Township also raised a number of specific objections to the Joint Act 537 Plan as approved. A quick review of these specific objections does not support their challenge to the Plan or help the Appellants sustain their burden of proof.

One of the specific objections to the Plan's cost estimates is the fact that the Joint Act 537 Plan does not specifically account for commercial and non-residential EDUs. Hegins Township and the Appellants assert that the Plan's failure to specifically account for commercial and nonresidential users could directly impact the size needs of the pump stations, and that this

failure caused Mr. Ebert to question the accuracy of the construction costs included in the Plan. Hegins Township Brief at 30; (N.T. 53).

The Department and Hubley Township disagree that the Plan is flawed because it does not specifically account for commercial and nonresidential users. They assert that the Plan does evaluate the needs of existing commercial and nonresidential structures within the projected service area and determined that none of the potential customers would contribute high flows to the contemplated system requiring reservation of additional capacity. (N.T. 320 and 355-56). The Plan identified pumping stations based upon anticipated flow, including flow from nonresidential customers, and evaluated future growth needs by reviewing population trends and experiences of issuing building permits in both Townships. (N.T. 319, 340 and 354-56).

The Board agrees with the Department and Hubley Township. The Appellants and Hegins Township have the burden of proof and the fact that the Joint Act 537 Plan does not specifically identify commercial or nonresidential users does not mean the Plan is flawed. The needs of existing and future commercial and nonresidential users were, in fact, specifically considered when the Plan was developed even though the Plan uses a single EDU classification system in the Plan.[16] In addition, as the Department and Hubley Township assert, approximately one-third of the planned treatment plant capacity is reserved for future growth. There will be sufficient capacity at the Act 537 planning stage to accommodate projected customers including commercial and nonresidential customers. (N.T. 321, 355-56).

The Appellants and Hegins Township raised a specific concern that the Department merely "eyeballed" the alleged erroneous cost estimates without the required review. (N.T. 269-

[16] Mr. Rhoades testified that a single EDU classification system was used to simplify the planning process.

273). They believe that the Department's approval of the Joint Act 537 Plan was flawed because the Department simply "rubberstamped" the Plan. Hegins Brief at 32.

The Department disagrees with the assertion that it merely "eyeballed" the alleged erroneous cost estimates without any real review and that it "rubberstamped" the Plan. The Department testified that it relies, in part, upon its experience in administering the Act 537 program and in reviewing the Joint Act 537 Plan. The Department determined that the project costs were consistent with other projects reviewed by the Department. The Department had qualified and experienced staff review the cost estimates and projected financing scenarios and the Department determined that they were reasonable and consistent with similar projects reviewed by the Department. (N.T. 202-205). In addition, the Board agrees with the Department that the Department is entitled to rely upon the accuracy of the data and the competency of the professional conclusions that are submitted in support of the representation. *Leeward Construction, Inc. v. DEP*, 2001 EHB 870, 892.

The Board finds that the Department did do more than merely eyeball the cost estimates and rubberstamp the Plan. Mr. Ridgik reviewed the cost estimates and funding analysis in the Plan. He relied upon his prior experience and went through the items to make sure they were reasonable and complete. The Appellants and Hegins Township have not met their burden to establish that the Department's review of the cost estimates and financing scenarios was not appropriate under applicable regulatory requirements.

Hegins Township and the Appellants also stress the fact that PennVest funding for the project is not at this point guaranteed. The Department and Hubley Township recognize that PennVest funding is not guaranteed at this stage of the planning process, but based on its experience with PennVest funding, the Department believes it is appropriate to use PennVest as

a funding source at this planning stage of the process when evaluating financing scenarios. The Board agrees with the Department and Hubley Township that in the context of reviewing an Act 537 Plan revision, the consideration of PennVest funding is appropriate when the Department evaluates the feasibility of funding options.

Hegins Township and the Appellants assert that the Joint Act 537 Plan was defective under 25 Pa. Code § 71.21(a)(3) because it did not properly delineate and describe future growth areas and population projections. Mr. Ebert testified that Plan should be revised to include an analysis of the development and redevelopment potential with the availability of public sanitary sewer service. The lack of an analysis, in Mr. Ebert's opinion, made it impossible to determine if the Plan adequately addressed the future planning requirements at 25 Pa. Code § 71.21(3)(iii).

The Department and Hubley Township disagree. They assert that the Joint 537 Plan does address future growth and population projections. (N.T. 319 and Ex. APP-1, pp. 19-22). According to the Department and Hubley Township, a portion of the Plan evaluates the zoning districts of the respective municipalities, the historical population levels, historical development trends, and the potential for future development. (*Id*.)

The Board agrees with the Department and Hubley and rejects Hegins Township's and the Appellants' position. The Plan does address future growth areas and population trends. The fact that Mr. Ebert may have done it differently if he were to prepare these materials does not mean the Plan is defective and should not have been approved. Hegins Township and the Appellants have the burden of proof and simply identifying alternative means to perform a task does not, by itself, sustain this burden of proof.

**Hegins Township Commitment to Implement the Joint Act 537 Plan**

The Appellants and Hegins Township raised concerns about the lack of municipal commitment set forth in the Plan Summary of the Joint Act 537 Plan. The Department and Hubley Township assert that the Plan Summary met the applicable requirements or, if they were not met within the Plan Summary itself, the required municipal commitments were elsewhere in the Plan. Department Brief at 21; Hubley Township Brief at 20. (N.T. 102 and 335). While the Board previously addressed the issues regarding the adequacy of the Plan Summary earlier in this Adjudication, the Board believes there is a much larger issue concerning Hegins Township's municipal commitment to the Joint Act 537 Plan. Adjudication at 17-20; s*ee Patricia A. Wilson v. DEP*, 2010 EHB 827. Under *Wilson*, the Board with its *de novo* review is able to consider evidence that was only available after the Department took its action to approve an Act 537 Plan revision update which indicates a municipality is not committed to implementing the approved plan revision update.

Hegins Township worked with Hubley Township to prepare and submit the Joint Act 537 Plan to the Department. Hegins Township worked with Hubley Township to respond to review comments from the Department and during the public notice procedures to respond to public comments. After the Appellants filed their appeal challenging the Department's decision the two Townships retained a single counsel to represent the two Townships in the appeal. During the initial stages of litigation, the two Townships presented a joint effort to defend their Joint Act 537 Plan. But then in late 2015 or early 2016, something appears to have altered Hegins Township's position.[17]

[17] The Board does not know what, if anything, happened to trigger Hegins Township abrupt change in position.

The first time the Board had any knowledge of this shift was on January 13, 2016 when new counsel entered an appearance for Hegins Township, and later on February 3, 2016 when the initial joint counsel for both Townships withdrew as counsel for Hegins Township. The joint counsel continued to represent Hubley Township for a short time period. At a conference call on February 18, 2016 with the Board to discuss these developments, the Board learned that Hegins Township had switched its position and now supported the Appellants in their challenge of the Department's decision to approve Hegins Township's Joint Act 537 Plan that it had with Hubley Township.

On March 25, 2016, Hegins Township filed a Motion to Disqualify Counsel for Hubley Township based upon a conflict the attorney had in light of his joint representation of both Townships and Hegins Township's announced decision to switch sides in the appeal to actively support the Appellants in their challenge to the Joint Act 537 Plan. Substitute counsel for Hubley was secured and the original joint counsel withdrew.

Since it switched sides in this appeal to support the Appellants and to stop defending its Joint Act 537 Plan, Hegins Township has actively supported the Appellants in their challenge. Hegins Township often took the lead at the Hearing in presenting witnesses and conducting direct and cross examination. Hegins Township prepared the main Post-Hearing Brief that the Appellants simply incorporated by reference as their brief.

Hegins Township's actions since January 2016 when it switched sides to support the Appellants in their challenge to the Joint Act 537 Plan is a strong indication that Hegins Township no longer has the commitment to implement its Joint Act 537 Plan under Sections 71.32(d)(4) and 71.31(f). 25 Pa. Code §§ 71.31(f) and 71.32(d)(4). The Board is charged with making a *de novo* determination as to whether the Department's action is lawful, reasonable, and

supported by the facts. *Smedley v. DEP*, 2001 EHB 131, 156-60; *Wilson v. DEP*, 2010 EHB 827.

In *Wilson*, the Board faced a similar situation. Appellants challenged the Department's approval of an Act 537 plan revision, and the Board ultimately rescinded the approval based upon evidence developed by the Board at its *de novo* hearing that revealed that the municipality was not committed to implementing its plan revision as approved. The Board relied upon oral statements made by township officials at township public meetings to establish that the township lacked the necessary commitment to implement the plan revision as approved.

In *Wilson*, the Board decided that the township's oral statements were evidence that the township lacked the necessary commitment to implement the plan revision at the time the Department made its decision. The Department was unaware of the oral statements when it approved the plan, and the Board decided that its *de novo* review allowed it to consider evidence that demonstrated that the township was not committed to implementing its plan revision as approved at the time the Plan was approved. Some of the oral statements were made before the Department approved the plan revision and some were made after the Department approved the plan revision.

The situation before the Board is slightly different in that there is no evidence that Hegins Township was not committed to implementing its plan as approved when the Department took its action. To the contrary, the facts demonstrate that Hegins Township was fully committed until it changed its position in late 2015 or early 2016. In this appeal and unlike in *Wilson*, there is no question that Hegins Township was committed to implement the Joint Act 537 Plan at the time the Department approved the Plan in April 2015. Hegins Township's abrupt decision to switch sides in this appeal to support the Appellants and to oppose the Department's decision to approve

its Joint Act 537 Plan, was a clear change in circumstances that occurred after the Department took its action but before the Board decided the appeal.

The Board's *de novo* review extends to such situations to allow the Board to consider such changed circumstances even if the circumstances changed after the Department took its action under appeal. *City of Harrisburg v. DEP*, 1996 EHB 1518; *Hrivnak v. DEP*, 1993 EHB 432. In *Hrivnak,* the evidence before the Board showed changes in circumstances since the Department issued a compliance order. In *Hrivnak*, the Board stated:

> If the evidence before us in our *de novo* review shows DER's action was appropriate when taken but that circumstances have since changed, we cannot merely ignore this more recent evidence and affirm DER's [action] ...

*Hrivnak*, 1993 EHB at 438. Such information showing changed circumstances is the type of evidence the Board is allowed and required to consider under its *de novo* review. *Warren Sand and Gravel Co., Inc. v. DER*, 341 A.2d 556 (Pa. Cmwlth. 1992) cited in *Hrivnak, supra*. In *City of Harrisburg*, the Board stated: "We cannot consider DER's action in a 'snapshot' based only on the circumstances as they existed when DER took its action." *City of Harrisburg v. DEP*, 1996 EHB at 1532, *citing Hrivnak v. DER* at 437. The Board's *de novo* review allows it to consider evidence of changed circumstances, including circumstances that changed after the Department took its action.

In April 2015, when the Department took its action to approve the Joint Act 537 Plan, there was no evidence at that time that Hegins Township lacked the necessary municipal commitment to implement the Plan. The circumstances have changed since the Department approved the Plan, and the Board is authorized and required to consider these changed circumstances since the Department took its action under appeal. Through its words and actions,

Hegins Township has demonstrated that it no longer has the required municipal commitment to implement the Joint Act 537 Plan.

The evidence in this appeal is more compelling than the evidence in the *Wilson* appeal, which involved the plan of a single township. In *Wilson*, township officials made oral statements indicating that the township, which still supported the Department's approval, was no longer committed to a controversial part of its plan revision. The township did not, however, take any action to change its plan revision to reflect its decision to reconsider a controversial part of the plan revision prior to the Department's approval. The Department approved the plan revision containing that controversial part, which the township had already committed to reconsider. While many of the public statements calling into question the municipal commitment occurred after the Department approved the plan revision, some of the public statements occurred before the Department approved the plan revision. In deciding that the municipality lacked the necessary commitment to implement the plan as approved, the Board relied upon oral declarations by the township representatives at public meetings as well as subsequent actions that confirmed its stated intentions.

In this appeal the evidence is more than oral statements at public meetings and plans to revise the approved plan. There have been public declarations that Hegins Township no longer supports the Department's approval of its Joint Act 537 Plan, but these public statements have been turned into actions to actively support the Appellants in their appeal and to seek to have the Board overturn the Department's approval of the Townships' Plan. The Board's docket contains numerous filings from Hegins Township that establish that Hegins Township is now opposed to its Joint Plan and is no longer committed to implement its Joint Plan as approved. In *Wilson*, the township still defended the Department's action to approve its plan.

Hegins Township did pass a resolution that stated that it would take all steps necessary to implement the Plan. (N.T. 31). This resolution was, however, passed on April 13, 2015, which was before the dramatic turnaround in Hegins Township's litigation posture. (N.T. 185). When Hegins Township switched its position from defending the Plan to opposing the Plan and actively and fully supporting the Appellants' efforts to overturn the Department's approval of the Plan, the municipal commitment reflected in the earlier adopted Resolution was adversely affected. How can a municipality be fully committed to taking all steps necessary to implement the Plan if it is now leading the charge to have the Plan's approval overturned? If Hegins Township remained fully committed to taking all steps necessary to implement the Plan, it would not have switched its litigation position seeking to overturn the Department's approval of the Plan.

In the dissenting opinion, Judge Labuskes asserts that the Board should not decide this appeal based upon the obvious fact that Hegins Township no longer has the required municipal commitment to implement the Joint Plan. As detailed in the Adjudication, Hegins Township, which is one of two Townships in the Joint Plan, dramatically changed its position during the course of litigation before the Board. When the appeal was initially filed, Hegins Township opposed the Appellants, supported a joint defense of the Joint Plan with Hubley Township, and vigorously defended the Department's approval of its Joint Plan along with Hubley Township. During the pendency of the appeal before the Board, Hegins Township dramatically changed its position on the record before the Board and now supports the Appellants' appeal, ended its joint defense of the Joint Plan with Hubley Township, and seeks to have the Board vacate the Department's approval of its Joint Plan. There is no doubt based upon the record before the Board that Hegins Township no longer has the required municipal commitment to implement the

Joint Plan as approved by the Department. 25 Pa. Code 71.32; *Wilson*. The dissent believe that the majority relies too heavily on *Wilson* to justify its decision and lists three specific concerns. First, no party in the appeal cited *Wilson* or claimed that the plan needed to be vacated due to a lack of the required municipal commitment. Second, in *Wilson*, the Board decided that the municipality lacked the required municipal commitment to implement the plan as approved at the time the Department approved the Plan relying upon statements of municipal officials. Finally, the dissent asserts that in *Wilson*, the Municipality, whose plan being challenged, already began efforts to revise its plan.

The Majority disagrees that it relied too heavily on *Wilson* or that it solely relied upon *Wilson* to find that Hegins Township no longer has the required municipal commitment to implement its Joint Plan as approved by the Department. While it is accurate to state that no Party cited *Wilson* in its post-hearing briefs, the issue of the need for a municipal commitment to implement the Joint Plan as approved was raised in the context of the Plan Summary. More importantly, the Board is entitled to take judicial notice of facts, including those that are contained in filings on the Board's docket. 25 Pa. Code § 1021.125; *Penn Coal Land Inc. v. DEP* at EHB Docket No. 2014-157-M (consolidated with 2014-158-M & 2014-159-M), slip op. at 41, n. 15 (Adjudication, May 2, 2017).

There is no doubt based upon the record before the Board that Hegins Township is now opposed to its Joint Plan that the Department approved. The actions of Hegins Township to switch sides in this appeal and to vigorously support the Appellants' challenge to its Joint Plan establish that Hegins Township no longer has the required municipal commitment to implement its Joint Plan as approved.

The Majority agrees that the facts in *Wilson* were different on the issue of whether the township in that appeal lacked the required municipal commitment when the Department approved its plan. In *Wilson*, the Board found that the township lacked the required municipal commitment when the Department approved the township's plan. In this appeal, Hegins Township dramatically switched sides during the pendency of the appeal after the Department approved the Joint Plan. The Board's *de novo* review extends to such situations where there are changed circumstances since the Department took the action under appeal. *City of Harrisburg*; *Hrivnak*. Under these decisions, the Board is allowed to consider changed circumstances that happened since the Department took its action under its *de novo* review.

Finally, in *Wilson* the plan under appeal only involved a single township. That township, unlike Hegins Township in this appeal, was defending the Department's decision to approve its plan. The township had not changed its litigation posture as Hegins Township has in this appeal. If it had, there would have not been an appeal because there was only one township covered by the plan. In this appeal there is a Joint Plan that covers both Hegins and Hubley Townships. Hubley Township still supports the Department's decision to approve the Joint Plan. The presence of a Joint Plan and the divergent views of Hubley and Hegins Townships deter efforts to resolve concerns with the Joint Plan. In *Wilson*, the single township did not face these complications, but the township nevertheless wanted the Board to uphold the Department's approval even though it was planning to make further change. There can be no clearer indication that Hegins Township lacks the municipal commitment to implement the Joint Plan as approved than its decision to switch sides in the appeal to support the Appellants and to oppose the Department's approval of its Joint Plan.

**Conclusion**

The Parties all agree with certain facts. The Townships' current Act 537 Plans have not been updated for fifty years. The recent sewage disposal needs surveys conducted by the Townships found very high rates of malfunctioning on-lot sewage systems in many areas of the Townships. These high rates of malfunctioning systems identify a real pressing need to update the Township's plans to protect public health, safety, and welfare. The Parties disagree that the Joint Act 537 Plan is the correct approach to solve the problem. Hubley Township and the Department still believe it is the best approach. The Appellants, and later Hegins Township, believe it is not. The Board recognizes the substantial cost and effort expended to prepare the Joint Act 537 Plan under appeal, but at the end of the day, it is a Joint Plan and if one of the two parties to the Joint Plan now oppose it as Hegins Township now does, then it is probably better to begin work on a new joint plan or separate plan revisions. A joint effort will not ultimately be successful if one of the two parties in the joint effort is opposed to a continuation of the joint efforts. For the reasons set forth above, the Board sustains the Appellants' challenge to the Joint Act 537 Plan and vacates the Department's approval of the Joint Act 537 Plan.[18]

**CONCLUSIONS OF LAW**

1. Appellants as third-party appellants bear the burden of proof. 25 Pa. Code § 1021.122(c)(2).

2. The Appellants 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

[18] The Appellants often mentioned that a supervisor of Hubley Township owned the property near Fearnot that was the proposed site for the treatment facility. Other than mentioning this fact that was not disputed by any Party, the Appellants never really explained why this mattered to the Board's review. The Board did not rely upon this fact in any manner in reaching its decision.

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.

3. The Board reviews Department actions *de novo*. *Smedley v. DEP*, 2001 EHB 131, 156-160; *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).

4. At the time the Department approved the Plan, Appellants have not met their burden of demonstrating that the Department abused its discretion in approving the Joint Act 537 Plan. *See Browning-Ferris Industries, Inc. v. DEP et al*., 819 A.2d 148, 153 (Pa. Cmwlth. 2003) *citing Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998).

5. At the time the Department approved the Plan, the Department acted reasonably when it determined that the Joint Act 537 Plan satisfied all applicable laws and regulations and approved the joint plan update revision on April 17, 2015. 35 P.S. § 750.1 *et seq*., 25 Pa. Code Chapters 71-73.

6. The Department properly determined that Hegins Township and Hubley Township satisfied all applicable public notice and comment requirements in preparing its joint plan update revision. 25 Pa. Code §§ 71.31(c), 71.32(d)(2).

7. The Department properly determined that Hegins Township and Hubley Township reasonably identified, evaluated, and selected sewage disposal alternatives. 25 Pa. Code §§ 71.21(a)(6), 71.61(c).

8. The Department properly determined that the Joint Act 537 Plan is "technically, environmentally, and administratively acceptable" for the current and planned sewage disposal needs. 25 Pa. Code § 71.21(a)(6).

9. At the time the Department approved the Plan, the Department reasonably determined that Hegins and Hubley Townships were able and committed to implement their joint plan update revision when it was approved. 25 Pa. Code §§ 71.32(d)(4), 71.31(f).

10. After the Department approved the Plan, circumstances changed and Hegins Township decided to stop defending the approval of the Joint Plan, to support the Appellants in their challenge to the Department's approval of the Joint Plan, and to actively participate in the challenge to the Department's approval of its Joint Plan.

11. The Board under its *de novo* review is authorized and required to consider changed circumstances even though the Department's action was appropriate when taken. *Hrivnak v. DER*, 1993 EHB 432, 437.

12. The changed circumstances, in which Hegins Township is now challenging the approval of its Joint Plan, is compelling evidence that Hegins Township lacks the necessary commitment to implement the plan as approved. *Wilson, supra*; 25 Pa. Code §§ 71.32(d)(4), 71.31(f).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **ROGER WETZEL, WILLIAM WOLFGANG, RANDY SHADLE, KENNETH W. RICHTER, KENNETH GRAHAM, AND HARRY MAUSSER** | : | |
| **v.** | : | **EHB Docket No. 2015-071-M** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and HEGINS TOWNSHIP and HUBLEY TOWNSHIP, Permittees** | : | |

## O R D E R

AND NOW, this 7th day of June, 2017, it is hereby ordered that this appeal is sustained. The Department's April 17, 2015 approval of the Joint Act 537 Plan is hereby vacated.

**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: June 7, 2017**

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

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(*via electronic filing system*)

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**For Permittee-Hegins Township:**
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**For Permittee-Hubley Township:**
Paul J. Bruder, Jr., Esquire
Timothy J. Nieman, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **ROGER WETZEL, WILLIAM WOLFGANG, RANDY SHADLE, KENNETH W. RICHTER, KENNETH GRAHAM, AND HARRY MAUSSER** | : | |
| **v.** | : | **EHB Docket No. 2015-071-M** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and HEGINS TOWNSHIP and HUBLEY TOWNSHIP, Permittees** | : | |

**DISSENTING OPINION OF JUDGE BERNARD A. LABUSKES, JR.**
**JOINED IN BY CHIEF JUDGE THOMAS W. RENWAND**

**By Bernard A. Labuskes, Jr., Judge**

The Environmental Hearing Board's role is to review the Department of Environmental Protection's action to ensure that it is lawful, reasonable, and supported by the facts. *Gadinski v. DEP*, 2013 EHB 246, 249. The Department's approval of the joint official sewage facilities plan update for Hegins and Hubley Townships was lawful, reasonable, and supported by the facts. It is an acceptable plan that would have gone a long way toward solving the Townships' sewage problems. The Majority so finds.

However, on grounds not raised by *any* of the parties, the Majority has taken it upon itself to vacate the acceptable plan update that the Department lawfully, reasonably, and in accordance with the facts approved. No party, including the Appellants, who bear the burden of proving that the Department erred, has presented any argument or evidence to support the Majority's conclusion that Hegins is not committed to implementing the plan update.

We do not understand the benefit of unilaterally wiping out the plan update here rather than upholding the past efforts while acknowledging that the plan can certainly be subject to

further revision. We do not see how the Board's decision can be said to comport with the policies of the Sewage Facilities Act, such as protecting the public health, safety, and welfare, eliminating pollution, and promoting intermunicipal cooperation. 35 P.S. § 750.3. The Board's action is inconsistent with all of those goals.

We must now wonder whether any municipality that wants to get out of its duly promulgated plan can simply argue before the Board in the event of an appeal that the Department erred by approving the plan. We will then throw out the plan, even if there is nothing wrong with it. Merely arguing against it is apparently good enough. We have no problem with a municipality wanting to change its plan. However, the proper and transparent procedures outlined in the Sewage Facilities Act should be followed. That was not done here. Planning should not be done in the guise of a Board appeal.

The Majority relies too heavily on *Wilson v. DEP*, 2010 EHB 827, to justify its *sua sponte* action. First, the appellants in *Wilson* did in fact argue that the plan needed to be vacated due to a lack of commitment. No party in the case now before us even cited *Wilson*. Second, the Department's action in *Wilson* was not supported by the facts when it was taken because it was undisputed that the Township, even at that time, had decided not to implement the plan. Subsequent events confirmed the lack of commitment, but that lack of commitment could be traced back to the time of the Department's decision, which is what we review. That is not the case here. Third and most importantly, the Township in *Wilson*, contemporaneously with the Board proceeding, was in fact following proper procedures to further revise its plan in accordance with the Act. Indeed, the Township had already entered into a consent order and agreement with the Department, and it was actively revising its plan in accordance with the law and that COA. Again, that is not the case here.

It is for these reasons that we must respectfully dissent. We would have upheld the Department's lawful and reasonable decision.

**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: June 7, 2017**

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **ERIC ASHLEY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2017-020-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and TCCC-LANCASTER HOLDINGS, LP, Permittee** | : | **Issued: June 9, 2017** |

**OPINION AND ORDER ON**
**MOTION TO DISMISS**

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis**

The Board dismisses an appeal of a technical review memorandum because the memorandum merely embodied an interim decision made during the processing of a permit coverage application and was not a final action.

**O P I N I O N**

TCCC-Lancaster Holdings, LP ("TCCC") applied to the Lancaster County Conservation District for coverage under the Department of Environmental Protection's general permit authorizing stormwater discharges associated with construction activities (PAG-02) for TCCC's construction project in Manheim Township, Lancaster County. TCCC applied to the Conservation District (as opposed to the Department) because the Department has delegated its authority to issue such coverage approvals to the Conservation District pursuant to the Conservation District Law, 3 P.S. § 859(2)(a), and 25 Pa. Code § 102.41(a). As part of the application review process, Department personnel conducted a technical review of TCCC's post-construction stormwater management plan (PCSM plan). They found it to be sufficient, and sent

a memorandum to the Conservation District dated February 10, 2017, which concluded, "You may proceed with issuance of the permit." The Conservation District thereafter did just that.

Curiously, the Appellant, Eric Ashley, did not appeal from the coverage approval. Instead, he only filed this appeal from the Department personnel's review memorandum, which he obtained from a Right to Know Law request.[1]

TCCC has filed a motion to dismiss. The Department, by letter, has joined in the motion.[2] TCCC argues that the Department's review memo was not a final, appealable action. We agree, and find that this appeal must be dismissed.

The Board only reviews *final* actions. Interim decisions made during the processing of a permit application are not final actions. *HJH, LLC v. Dep't of Envtl. Prot.*, 949 A.2d 350, 353 (Pa. Cmwlth. 2008); *Lower Salford Twp. Auth. v. DEP*, 2011 EHB 333, 339; *Tri-County Landfill v. DEP*, 2010 EHB 747, 750; *United Refining Co. v. DEP*, 2000 EHB 132, 133; *Phoenix Resources, Inc. v. DER*, 1991 EHB 1681, 1684. *See also Quentin Haus Restaurant v. DER*, 1987 EHB 276 (recommendation of one bureau of the Department to another bureau of the Department is not a final, appealable action). The Department's technical review memo in this case is a classic example of such a nonappealable interim action. The memo merely embodies an

[1] The time for filing an appeal from the coverage approval has now passed, with no appeal having been filed.

[2] TCCC filed its motion and supporting brief on April 25, 2017. On May 9, the Department filed a one-paragraph letter indicating that it supported TCCC's motion. TCCC filed its reply brief on June 7. On that date, the Department filed a second letter spanning two pages "offer[ing] the following legal argument in support of Permittee's Motion to Dismiss." The submission of this second letter has no foundation in the Board's rules. Under 25 Pa. Code § 1021.94, a party wishing to support another party's motion to dismiss may file a memorandum of law within 15 days of service of the motion. 25 Pa. Code § 1021.94(b). The party who has filed a supporting memorandum of law in the first instance may then also file a reply memorandum of law at the time when the movant's reply is due. 25 Pa. Code § 1021.94(d). Although it is helpful to know the Department's position on TCCC's motion as expressed in its first letter, that letter does not permit the Department to come back and file legal argument, embodied in another letter, at the reply stage. If a party wishes to file supporting legal argument, it must follow the procedures outlined in our rules. To allow otherwise would be unfair to non-moving parties. Thus, we have not considered the arguments presented in the Department's June 7 letter.

interim decision that was precedent to the actual issuance of the coverage approval. Ashley needed to wait at least until the coverage approval was issued and file his appeal from that approval.[3]

In opposition to TCCC's motion, Ashley says that he could not have waited to appeal from the coverage approval (or the Department's affirmance of that approval) because such an appeal would not have allowed him to challenge the Department's determination that TCCC's PCSM plan was adequate. That is simply not true. In any appeal from the approval (or the Department's final determination), all of the Conservation District's (and the Department's) interim decisions would have been reviewable, including the adequacy of the PCSM plan.

Ashley asserts that only the Department, not the Conservation District, reviewed the PCSM plan, but even if that is true, we view it as irrelevant who within the agency or the conservation district reviewed which parts of the permit application when we assess whether a final action has been taken. In this case, the final action would ultimately be taken by the District (or the Department in affirming the District), and it does not matter for jurisdictional purposes that the final action was based in part on a recommendation by the Department's technical reviewers. There were doubtless any number of recommendations and other interlocutory decisions that made up parts of the application review process, but we will not engage in a piecemeal review of such decisions.

In order for a regulatory action to be appealable, it must affect personal or property rights, remedies, or avenues of redress. *Sayreville Seaport Assocs. v. Dep't of Envtl. Prot.*, 60

[3] We say "at least" because there is some question whether even the coverage approval would have been directly appealable to this Board. Under the applicable regulations, a person aggrieved by an action of a conservation district taken under 25 Pa. Code Chapter 102 must request an informal hearing with the Department within 30 days. The Department is then supposed to schedule the hearing and make a final determination within 30 days of the request. "Any final determination by the Department under the informal hearing may be appealed to the EHB in accordance with established administrative and judicial procedures." 25 Pa. Code § 102.32(c). We need not resolve that question here.

A.3d 867, 872 (Pa. Cmwlth. 2012). The Department's review memorandum did not authorize TCCC to do anything. Only the coverage approval could do that. Therefore, the memorandum also could not possibly in and of itself affect Ashley's rights as an allegedly aggrieved neighbor of the project. Only actions taken pursuant to the authorization granted in the coverage approval could affect his rights.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **ERIC ASHLEY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2017-020-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and TCCC-LANCASTER HOLDINGS, LP, Permittee** | : | |

**O R D E R**

AND NOW, this 9th day of June, 2017, 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 9, 2017**

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

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| **STEPHEN W. KLESIC** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2015-150-M** |
| | : | **(Consolidated with 2015-169-M)** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: June 9, 2017** |

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

**By Richard P. Mather, Sr., Judge**

## Synopsis

The Board dismisses the Appellant's appeal of the Department's civil penalty assessment of $15,000 and a waste order. The Department met its burden of demonstrating that the assessed civil penalty and the waste order were reasonable. There was no dispute over the existence of the violations at the United Environmental Group, Inc. site. Further, Appellant failed to show that either the civil penalty assessment or waste order was a result of selective or discriminatory enforcement on the part of the Department.

## FINDINGS OF FACT

***Partie***s

1. The Department is the administrative agency with the duty and authority to administer and enforce the Solid Waste Management Act, Act of July 7. 1980, P.L. 380, as amended, 35 P.S. §§ 6018.101-6018.1003 ("Solid Waste Management Act"); the Storage Tank and Spill Prevention Act, the Act of July 6, 1989, P.L. 169, as amended, 35 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 ("Administrative Code"); and regulations promulgated thereunder. (Bd. Ex. 1, JS para. 1).

2. Stephen W. Klesic ("Klesic" or "Appellant") is the President and principal shareholder of UEG. (Bd. Ex. 1, JS para. 2).

3. United Environmental Group, Inc. ("UEG") is a Pennsylvania corporation with a business address of 241 McAleer Road, Sewickly, Allegheny County, PA 15143 ("Site" or "Facility").

***Solid Waste Permits and Storage Tank Registration***

4. UEG operated a hazardous waste treatment, storage, and disposal facility at the Site under the authority of Hazardous Waste Permit Number PAD987283140 ("HW Permit"). UEG's HW Permit expired on October 31, 2013 and has not been renewed. (BD. Ex. 1, JS para. 3; DEP Ex. A).

5. UEG operated a residual waste processing and transfer facility at the Site under the authority of Residual Waste Processing and Waste Transfer Facility Permit Number 301224 ("RW Permit"). (Bd. Ex. 1, JS para. 4; DEP Ex. B).

6. UEG operated a 6,000 gallon aboveground storage tank ("Storage Tank") at the Site, which was used to store diesel fuel, a regulated substance as defined at 25 Pa. Code § 245.1. The Storage Tank is registered with the Department as Tank 001A. (Bd. Ex. 1, JS para. 5).

7. UEG ceased operations and laid off its employees as of June 2013, and has not resumed operations at the Site since then. (Bd. Ex. 1, JS para. 6).

8. Liability insurance coverage for the Site expired on July 1, 2014 and has remained not in force. (Bd. Ex. 1, JS para. 6).

***Storage Tank Management at the Site***

9. Pursuant to 25 Pa. Code § 245.616(c), UEG, as the owner and operator of an aboveground storage tank storing regulated substances with a capacity greater than 5,000 gallons, is required to have an in-service inspection of the Storage Tank conducted every ten (10) years by a DEP-certified inspector. (Bd. Ex. 1, JS para.8).

10. UEG's last in-service inspection of the Storage Tank was on or about June 8, 2004. (Bd. Ex.1, JS para 9).

11. On March 26, 2014, the Department sent UEG a courtesy letter reminding UEG of its in-service inspection obligations. (Bd. Ex. 1, JS para. 10; DEP Ex. D).

12. On September 30, 2014, the Department sent UEG a Notice of Violation for its failure to comply with its in-service inspection obligation for the Storage Tank. (Bd. Ex. 1, JS para. 11; DEP Ex. D).

13. On February 9, 2015, the Department issued an Order to UEG ("2015 Tanks Order"), directing the company to: (a) conduct an inspection of the Storage Tank within thirty (30) days of receipt of the Order; or (b) immediately empty the regulated substance from the Storage Tank; and (c) notify the Department that the Order had been complied with within 24 hours of compliance. (BD. Ex. 1, JS para. 12; DEP Ex. D).

14. The 2015 Tanks Order was served on UEG on February 9, 2015. (Bd. Ex. 1, JS para. 13; DEP Ex. D).

15. The 2015 Tanks Order was not appealed by any party, and became a final order of the Department. (Bd. Ex. 1, JS para. 14; DEP Ex. E).

16. UEG has continued to fail to comply with the requirements of 25 Pa. Code § 245.616(c) and the 2015 Tanks Order. Storage Tank 001A at the Site remains partially full of a

regulated substance, and has not been subject to a third party in-service inspection for more than 12 years. (Bd. Ex. 1, JS para. 15).

17. On September 2, 2015, the Department's Storage Tanks Program assessed a civil penalty against UEG in the amount of $15,000.00 ("Civil Penalty Assessment") for more than a year of violations of the Storage Tank Act's regulations, and approximately six months of violations of the 2015 Tanks Order. (Bd. Ex. 1, JS para. 16; DEP Ex. F).

18. By the letter date October 6, 2015, UEG filed an appeal of the Civil Penalty Assessment ("Notice of Appeal No. 1"). Paragraph 1 of the Notice of Appeal Form identifies UEG as the Appellant, with contact information for the corporation listed, including "Stephen W. Klesic, PRO SE, President/Owner of UEG."

***Solid Waste Management at the Site***

19. The HW Permit and RW Permit include numerous mandatory permit conditions. Among them are:

a. Condition 21 of the RW Permit, which requires UEG to maintain in force a commercial liability insurance policy covering third-party claims for property damage and personal injury, in the amounts of $1,000,000 per occurrence with a $1,000,000 annual aggregate, until the Department certifies that final closure of the RW Facility has been achieved. (DEP Ex. C, p. 10).

b. Condition II.J of the HW Permit, which requires UEG to close the Site by removing and properly disposing of all wastes upon cessation of business operations, as required by 40 CFR § 264.111 (incorporated by reference at 25 Pa. Code § 264a.1) and in accordance with the Closure Plan, Attachment 6 to the HW Permit. (DEP Ex. A, pp. 13-14). Condition II.J of the HW Permit,

"Time Allotted for Closure," provides that, "After receiving the final volume of hazardous waste, the Permittee shall remove from the site all hazardous waste and shall complete closure activities in accordance with the schedules specified in the Closure Plan, Attachment 6." (DEP Ex. A, p. 13).

c. The Closure Plan, Attachment 6 to the HW Permit, sets forth a detailed schedule for the performance of closure activities, as required by 40 CFR § 264.112(a)(6). This section of the Closure Plan outlines a "worst case: timetable for closure activity which describes, among other things, that from "Day 1 – 45," the "[r]emoval and disposal of all hazardous waste drums and other equipment from the storage area" will take place. (Bd. Ex. 1, JS para. 17; DEP Ex. B, sixth page in unpaginated document).

20. During inspections conducted by the Department on July 30, September 4, and October 17, 2014, UEG was not actively operating the facility. Approximately twenty-three 55-gallon drums labeled "hazardous waste" were stored along with various storage totes. Waste soil or sludge was stored on a cement storage pad covered with a tarp. (Bd. Ex. 1, JS para. 18; DEP Ex. M, p. 8; DEP Ex. O, p. 3; DEP Ex. P, p. 2).

21. On October 17, 2014, the Department issued a Notice of Violation to UEG for multiple violations of the Solid Waste Management Act at the Site. (Bd. Ex. 1, JS para. 19).

22. On July 17, 2015, the Department inspected the Site with Mr. Klesic. The waste observed during prior inspections remained at the Site. (N.T., Vol. 1, p. 2, l. 19-25). Mr. Klesic confirmed to the Department that twenty-three of the 55-gallon drums contained hazardous waste. (Bd. Ex. 1, JS para. 20, DEP Ex. R, p. 2).

23. Currently, the hazardous and residual wastes previously observed by the

Department remain on the Site, and have remained on the Site for more than one (1) year. The Site has never been issued any authorization by the Department for the storage of waste in excess of one year, nor given authorization for the disposal of hazardous or residual waste at the Site. (Bd. Ex. 1, JS para. 21; N.T., Vol. 1, p. 24, l. 2).

24. The storage of the hazardous and residual waste is in violation of the requirements of the Facility's permits and the regulations. (Bd. Ex. 1, JS para. 22).

25. To date, UEG has not implemented the hazardous waste closure and postclosure activities set forth in HW Permit Condition II.J and 4, and Attachment 6 to the HW Permit. (Bd. Ex. 1, JS para. 23; DEP Ex. R, p. 2; N.T., Vol. 1, p. 40, l. 12-15).

26. On November 3, 2015, the Department's Waste Program issued an administrative order to UEG ("Waste Order") requiring UEG to cease accepting additional waste and to perform the following closure measures at the Site: "Within thirty (30) days of receipt of this Order, UEG shall remove all solid waste located on the Site, shall have all such solid waste transported by a person authorized to transport such waste within the Commonwealth of Pennsylvania to a facility authorized to accept such waste, and shall clean the waste containment areas subsequent to waste removal;" and "Within forty-five (45) days of receipt of this Order, UEG shall provide written documentation to the Department verifying the proper transportation and disposal or recycling of all solid waste currently located on the Site." (Bd. Ex. 1, JS para. 24; DEP Ex. G, p. 4).

27. The Waste Order was served via hand-delivery on November 5, 2015. (Bd. Ex. 1, JS para. 25; DEP Ex. G).

28. By letter dated November 6, 2015, UEG filed an appeal of the Waste Order. ("Notice of Appeal No.2"). Paragraph 1 of the Notice of Appeal identifies UEG as the Appellant,

with contact information for the corporation listed, including "Stephen W. Klesic, PRO SE, President/Owner of UEG."

***Appeals to the Environmental Hearing Board***

29. By letters dated October 7, 2015 and November 10, 2015, the Board instructed UEG to obtain counsel to comply with the Board's Rules of Practice and Procedure found at 25 Pa. Code § 1021.21 or face dismissal of the appeal.

30. By letter dated November 10, 2015, UEG filed documents with the Board declaring that UEG was insolvent and financially unable to pre-pay the civil penalty assessed in the Civil Penalty Assessment, to comply with the closure requirements of the Waste Order, or to pay for an attorney. (Board Ex. 1, JS para. 26).

31. On December 7, 2015, the Board dismissed the consolidated appeals for failure to obtain counsel.

32. On December 14, 2015, UEG filed a request for reconsideration of the Board's dismissal order.

33. On December 30, 2015, the Board issued an Opinion and Order granting in part and denying in part UEG's request for reconsideration. The Board substituted UEG's president and principal shareholder, Stephen W. Klesic, in his personal capacity as the new appellant. The Board also ordered the caption of the consolidated appeals to be changed, consistent with its Opinion – UEG was removed as the Appellant, and Stephen W. Klesic was substituted as the new Appellant. *See* December 30, 2015 Order at EHB Docket No. 2015-150-M (Consolidated with 2015-169-M).

34. Following issuance of the Board's Opinion and Order on the motion for reconsideration, Mr. Klesic represented his own interests, pro se.

35. In light of UEG's self-proclaimed insolvency, the Department reconsidered the efficacy of pursuing enforcement against UEG. Rather than use the resources of the Department and the Board to seek compliance and penalties from an insolvent company or from an individual against whom the Department never intended to pursue personal liability, the Department determined to achieve Site closure through a more focused action. (N.T., Vol. 1., p. 37, l. 2-25; p. 38, l. 1; p. 39, l. 2-6).

36. On February 1, 2016[1], the Department served letters on UEG rescinding and revoking the Civil Penalty Assessment and the Waste Order. (Bd. Ex. 1, JS para. 27).

37. After rescinding the Civil Penalty Assessment and the Waste Order, the Department filed a Motion to Dismiss the consolidated appeals as moot. *See* Department's Motion to Dismiss as Moot and Memorandum of Law in Support Thereof filed on EHB Docket No. 2015-150-M (Consolidated with 2015-169-M), February 2, 2016.

38. On March 21, 2016, the Board denied the Department's Motion to Dismiss largely on the ground that the Department's withdrawn actions were capable of repetition and likely to evade review because the violations still existed. *See* Opinion and Order Denying Department's Motion to Dismiss at Moot, EHB Docket No. 2015-150-M (Consolidated with 2015-169-M), issued March 21, 2016.

39. On May 25, 2016, the Department served on UEG notice of forfeiture of its permit bonds. (Bd. Ex. 1, JS para. 28).

40. UEG is financially insolvent. (Bd. Ex. 1, JS para. 29).

41. Mr. Klesic conducted extensive discovery, including the review of hundreds of Department files relating to leaking or removed underground storage tanks. (DEP Ex. J and K;

[1] Bd. Ex. 1, JS para. 27 originally contained the erroneous date 2015 rather than 2016. This correction was made on the record at the hearing on September 21, 2016. *See* N.T., Vol. 1, p. 14, l. 23.

N.T., Vol. 1, p. 106, l. 10 – p. 108, l. 24).

42. In his Pre-Hearing Memorandum, Mr. Klesic alleged that he was treated unfairly by the Department and stated that he intended to present evidence at the hearing as to many other similarly situated parties who the Department treated differently from how it treated him.

43. The Department filed a motion in limine to limit the evidence that Mr. Klesic could present as to other parties who were treated differently. The Board ordered that Mr. Klesic limit his presentation of evidence to three other parties. (N.T., Vol. 1, p. 64, l. 4-11; p. 151, l. 3-7). The three parties were:

a. Ligionier Quick G's ("Site 1"), which had two 10,000-gallon gasoline tanks and one 10,000-gallon kerosene tank. Site 1 is lacking in disposal documents and a manifest. Instead, there is only a letter dated August 26, 2014, which indicates that the drums were picked up and waiting for profile approval to be taken to the disposal facility.

b. Pevarnik Brothers ("Site 2"), which had one 4,000-gallon gasoline tank and one 2,000-gallon diesel tank. Site 2 has records that indicate that 80 gallons of usable product was left in the tanks and mixed with rinseate produced from cleaning the tanks. The product was hauled to a facility that is permitted to take Petroleum Product for recycling and refining.

c. West Penn Power Washington Service Center ("Site 3"), which had one 8,000-gallon diesel tank and one 8,000-gallon gasoline tank. Site 3 has records that indicate remaining usable product was placed into drums – 200 gallons of gasoline and 140 gallons of diesel fuel – and sold to an allegedly unlicensed transporter.

44. The Board held a hearing presided over by the Honorable Richard P. Mather, Sr. on September 21-22, 2016.

45. At the hearing, the Department presented evidence through two witnesses and numerous exhibits, including photos, inspections reports, notices of violations, and permit documents to establish the reasonableness and lawfulness of the Civil Penalty Assessment and the Waste Order.

46. The $15,000.00 Civil Penalty Assessment was calculated using the Department's Storage Tanks Program penalty matrix. (DEP Ex. HH). Using this penalty matrix, the Department determined that there were two violations: one violation for the failure to conduct the in-service inspection of the tank, and another violation for failure to comply with the field order. These violations were considered to be a low risk of environmental consequences under the penalty matrix due to the fact that aboveground storage tanks, unlike underground tanks, can be visualized to assess damage or leaks more readily. (N.T., Vol. 1, p. 97, l. 1-19; p. 98, l. 24; p. 99, l. 1-3).

47. The Department's communications to UEG, and UEG's awareness of the inspection requirement for the tank, were also taken into account when developing the penalty amount under the penalty matrix. For the first violation, failure to conduct the in-service inspection of the tank, the willfulness was assessed at the low end of the spectrum, $400. Because the failure to inspect the tank had been continuing over the course of 15 months, the Department used the matrix to multiply the $400 willfulness penalty by 15, resulting in a total penalty for that violation of $12,000.00. (N.T., Vol. 1, p. 99, l. 11-15).

48. For the second violation, failure to comply with the field order, the Department assessed a higher penalty for recklessness, which is farther up the spectrum of willfulness, in the

amount of $2,500. This violation was considered to be a one-time event, so the $2,500 recklessness factor was not multiplied. (N.T., Vol. 1, p. 97, l. 24-25; p. 98, l. 1 and 15-19).

49. In total, the Department imposed a reasonable civil penalty in the amount of $15,000 for the violation of its unappealed order and the regulations requiring tank inspections. (N.T., Vol. 1, p. 99, l. 13-18). The penalty amount was on the lower end of the matrix, and was intended to be a first step towards achieving compliance, i.e., ensuring that the aboveground storage tank would be inspected as required. (N.T., Vol. 1, p. 95, l. 13-17; p. 96, l. 20 – p. 100, l. 10).

50. The three tank removal actions that Mr. Klesic addressed at the hearing, which were performed by unrelated parties at unrelated sites, did not show disparate treatment by the Department against UEG or Mr. Klesic. The tank removal activities at those three sites were not similar to the tank inspection and waste facility closure violations which were the subject of the Department's action against UEG. Further, the Department's regulatory oversight of the activities at those sites was neither inappropriate, nor the cause of, nor a basis for, UEG's actions and omissions. (N.T., Vol. 1, p. 64, l. 4-11; p. 151, l. 3-7).

51. There is no evidence that the Department acted improperly, unfairly, or with any malice towards Appellant. (N.T., Vol. 1, p. 41, l. 4-11; p. 185, l. 3-5).

52. The Department presented the testimony of two witnesses regarding the bases for the Department's enforcement actions against UEG. Ms. Patricia Renwick, DEP's Chief of the Storage Tanks Section for the Southwest Region, and Mr. H. Scott Swarm, DEP's Chief of the Waste Operations Section for the Southwest Region, both credibly testified that the Department's purpose in assessing the Tank Civil Penalty and issuing the Waste Order against UEG was to protect human health and the environment from the risk of improper management of

the regulated substances and waste materials located at the Facility. They further testified that the Department rescinded and revoked those actions in response to UEG's self-declared insolvency, in order to instead pursue more effective means of addressing environmental threats at the Facility.

53. The Department issued the Civil Penalty Assessment and the Waste Order, and subsequently withdrew those actions for the purpose of expeditiously protecting human health and the environment from the risk of release of the regulated substances and waste materials located at the Facility, and not out of ill will nor any improper motive against either UEG or Mr. Klesic.

54. The Department was required to devote considerable resources to the litigation of this case following the Board's denial of the Department's Motion to Dismiss as Moot. (N.T., Vol. 1, p. 39, l. 10-18; p. 105, l. 7-15; p. 106, l. 10 – p. 108, l. 24; DEP Ex. J and K).

## DISCUSSION

### Background

Mr. Stephen W. Klesic filed an appeal on behalf of United Environmental Group, Inc. ("UEG"), objecting to a Department Civil Penalty Assessment issued to UEG for alleged violations of the Storage Tank and Spill Prevention Act on UEG's property. Mr. Klesic is the principal shareholder of UEG. Mr. Klesic, again acting on behalf of UEG, filed a second appeal of a Department Waste Order issued to UEG which directed UEG to address certain violations of the Solid Waste Management Act on UEG's property. Mr. Klesic, who is not an attorney, filed timely appeals of both Department actions and attempted to represent UEG *pro se*. The Board consolidated the appeals at Docket Number 2015-150-M in a Board Order dated November 10, 2015.

The Board issued two letters to Mr. Klesic instructing UEG to obtain counsel in accordance with 25 Pa. Code § 1021.21(b), which requires corporations to be represented by an attorney authorized to practice in Pennsylvania. UEG did not obtain counsel in accordance with the Board's letters and on December 7, 2015, the Board dismissed the consolidated appeals for UEG's failure to obtain counsel. Mr. Klesic then filed a request for reconsideration of the Board's dismissal of the appeal and on December 30, 2015, the Board granted in part and denied in part Mr. Klesic's request for reconsideration. Specifically, the Board denied the request for reconsideration as it applied to the Appellant, UEG, because UEG is a corporation and as such, UEG is required to be represented by counsel. 25 Pa Code § 1021.21(b). However, the Board determined that Mr. Klesic, an individual, also filed an appeal on his own behalf and is proceeding *pro se* as allowed by the Board's rules at 25 Pa Code § 1021.21(a). The Board therefore granted Mr. Klesic's request for reconsideration to allow Mr. Klesic to proceed *pro se* to represent his individual interests, but not UEG's interests, in the appeal of the Department's civil penalty assessment and order.[2]

On February 2, 2016, the Department filed a motion to dismiss the appeal, asserting that this appeal was moot because the Department rescinded and revoked its Waste Order on January 28, 2016 and rescinded and revoked its Civil Penalty Assessment on January 29, 2016. According to the Department, there were no longer Department actions for the Board to review in this consolidated appeal, thereby making it impossible for the Board to grant effective relief. Before the Department filed its motion to dismiss, Mr. Klesic filed with the Board a motion to compel responses to interrogatories and requests for production of documents.

[2] The scope or nature of Mr. Klesic's individual interests in his appeals of the civil penalty assessment and the administrative order that the Department issued to UEG was not addressed when the Board granted reconsideration. Because the Board has decided to dismiss Mr. Klesic's appeals, after considering the merits of his objections, the Board does not have to address the nature or scope of his individual interests in his appeals of the Department action against UEG.

Mr. Klesic did not dispute that the Department rescinded and revoked its Waste Order on January 28, 2016 and rescinded and revoked its Civil Penalty Assessment on January 29, 2016. Normally, where the Department has acted to rescind its prior appealable action, the Board has generally not hesitated to dismiss such appeals as moot. *Pequea Township v. DER*, 1994 EHB 755, 758; *See Lipton, et al. v. DEP*, 2008 EHB 223; *Cromwell Township v. DEP*, 2007 EHB 8; *Borough of Edinboro v. DEP*, 2000 EHB 1167. Here, however, Mr. Klesic argued that the Department was attempting to have the Board dismiss the current appeal, but that Department would ultimately reissue new orders or assessments. In the context of deciding the Department's Motion to dismiss, the Board found that this argument had merit. Because of the facts of this appeal, the Board issued an Opinion and Order on March 21, 2016 denying the Department's Motion to Dismiss for Mootness.

The Parties submitted their Pre-Hearing Memorandums in a timely fashion, and the Department filed a Motion in Limine on September 6, 2016 to preclude evidence of (1) 100 unrelated tank removal sites and (2) unavailable relief requested by Mr. Klesic – that the Department be barred by estoppel from bringing enforcement actions against him after the Department's allegedly lax enforcement against the 100 other parties. The Board allowed Mr. Klesic to select three examples from the 100 on which to offer evidence demonstrating discriminatory enforcement. The Board decided that allowing 100 examples of alleged discriminatory enforcement was cumulative and excessive, and that three examples would provide Mr. Klesic with the opportunity to establish selective or discriminatory enforcement.

The Board held a hearing on the merits of the appeal on September 21, 2016. The issues have been briefed, and this matter is now ripe for adjudication. The issues before the Board are whether the Civil Penalty Assessment and the Waste Order issued by the Department were

lawful and reasonable exercises of the Department's discretion. The Board finds that they were. Mr. Klesic offered, as his defense, that the Department's actions amounted to selective or discriminatory prosecution. However, Mr. Klesic failed to establish this defense. In its Post-Hearing Brief, the Department also again raised arguments regarding Mr. Klesic being an improper Appellant to the action and the consolidated appeals being moot. The Board has already ruled on both issues and will not address either argument again here.[3]

In addition, the Board believes that it is unnecessary to this Adjudication to revisit these two issues regarding Mr. Klesic proceeding as a Pro Se Appellant and the exceptions to the Mootness Doctrine. The Board can address the merits of Mr. Klesic's appeals. The Board provided Mr. Klesic with an opportunity to present evidence to the Board and to make his legal arguments regarding the challenged actions.

**Burden of Proof and Standard of Review**

In hearings before the Board, the party with the burden of proof is required to have presented a prima facie case by the close of its case-in-chief. 25 Pa. Code § 1021.117(b). The Department has the burden of proof in this matter. Under the Board's rules, the Department bears the burden of proof when it assesses or files a complaint for a civil penalty assessment and when it issues an order. 25 Pa. Code § 1021.122(b)(1) and (4); *Becker v. DEP*, EHB Docket No. 2013-038-C, slip op. at 14 (Opinion and Order, April 10, 2017); *DEP v. Francis Schultz, Jr., and David Friend, d/b/a Shorty and Dave's Used Truck Parts*, 2015 EHB 1, 3. Here, the Department both assessed a civil penalty and issued an order and must show that its actions were lawful, reasonable, and supported by the facts. *Bryan Whiting and Whiting Roll-Off, LLC v. DEP*, 2015

[3] On December 30, 2015, the Board issued an Order granting Mr. Klesic's request for reconsideration to allow him to proceed in his appeal pro se. On March 21, 2016, the Board issued and Opinion and Order denying the Department's Motion to Dismiss as Moot because the Board found that a certain exception to the Mootness Doctrine existed. Specifically, the Department actions taken against Mr. Klesic were capable of repetition and likely to evade review.

EHB 799; *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251; *Dirian v. DEP*, 2013 EHB 224, 231; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Management Co. v. DEP*, 2010 EHB 456, 474-75.

The Board reviews appeals *de novo*. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32. In the seminal case of *Smedley v. DEP*, 2001 EHB 131, then Chief Judge Michael L. Krancer explained the Board's *de novo* standard of review:

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

*Smedley v. DEP*, 2001 EHB 131, 156. The Board can consider evidence that was not presented to the Department when it made the decision currently under appeal. *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004).

The appeal before the Board consists of two consolidated appeals arising from two separate Department actions taken against UEG for alleged violations at the UEG facility of the Department's storage tanks and hazardous and residual waste regulations. The first Department action was the Civil Penalty Assessment and the second was the Waste Order. The Board will address each of the challenged Department actions separately, beginning with the civil penalty.

**Whether the Civil Penalty Assessment was Lawful and a Reasonable Exercise of the Department's Discretion as Supported by the Facts**

The first issue for the Board to consider is whether the Civil Penalty Assessment issued by the Department was lawful and reasonable. The Board finds that it was. The Department has the authority to issue civil penalties under the Storage Tanks Act. 35 P.S. § 6021.1307. Further, the Department has presented evidence that establishes that UEG violated both the regulations and the earlier unappealed 2015 Tanks Order.

Under 25 Pa. Code Section 245.616(c), the owner and operator of an aboveground storage tank with a capacity of greater than 5,000 gallons that stores regulated substances is required to have an in-service inspection of the Storage Tank every ten (10) years conducted by a Department-certified inspector. 25 Pa. Code § 245.616(c). UEG was the registered owner of the Storage Tank in question. (N.T., Vol. 1, p. 105, l. 20-21; Bd. Ex. 1, JS para. 8). UEG's last in-service Storage Tank inspection was on or about June 8, 2004. The Storage Tank should have been inspected by June 8, 2014 and was two years overdue for an in-service inspection at the time of the hearing on September 21 and 22, 2016. (N.T., Vol. 1, p. 92, l. 9-11; Board Ex. 1, JS para. 15). The Department sent a reminder letter on March 26, 2014 that an in-person inspection was due by June 8, 2014. (N.T., Vol. 1, p. 92, l. 9-11; Board Ex. 1, JS para. 10; DEP Ex. D). On September 30, 2014, the Division of Storage Tanks issued a Notice of Violation ("NOV"), and on December 12, 2014, it issued a field order. (N.T., Vol. 1, p. 94, l. 6-9; Bd. Ex. 1, JS para 11; DEP Ex. D).

The Department issued the 2015 Tanks Order to UEG on February 9, 2015, which ordered the company to (a) conduct an inspection of the Storage Tank within thirty (30) days of receipt of the Order; or (b) immediately empty the regulated substance from the Storage Tank; and (c) notify the Department that the order had been complied with within 24 hours of

compliance. (Bd. Ex. 1, JS para. 12; DEP Ex. D). The Order was never appealed and became a final order with which UEG never complied. (Bd. Ex. 1, JS para. 14 and 15; DEP Ex. E). The Department then issued the Civil Penalty Assessment on September 2, 2015 for $15,000 to bring UEG into compliance. (N.T., Vol. 1, p. 95, l. 1-17). It listed two violations: (1) Failure to conduct an in-service inspection of the tank; and (2) Failure to comply with the field order of December 12, 2014. (N.T., Vol. 1, p. 96, l. 2-5). Additionally, following the issuance of the Civil Penalty Assessment, employees from the Division of Storage Tanks had conversations with Mr. Klesic about foregoing the penalty if he would have the tank at issue inspected. (N.T., Vol. 1, p. 100, l. 11-16).

The Department calculated the civil penalty using its Storage Tanks Program penalty matrix. (DEP Ex. HH). Under the matrix, the Department determined that the two violations cited in the Civil Penalty Assessment presented a low risk of environmental consequences. (N.T., Vol. 1, p. 97; 1. 1-19). This is primarily due to the fact that aboveground storage tanks can be readily examined to determine whether damage or leaks are present. (N.T., Vol. 1, p. 98, l. 24, p. 91, l. 10). Additionally, the Department considered the communication with UEG and UEG's awareness of the inspection requirement. The initial failure to conduct an inspection and then subsequent failure to conduct an in-service inspection over the next fifteen months were both considered and resulted in a penalty of $12,000. (N.T., Vol. 1, p. 99, l. 11-15). The Department then calculated a $3,000 penalty for failing to comply with its field order of December 12, 2015. (N.T., Vol. 1, p. 9, l. 16 – p. 98, l. 1). The total civil penalty assessed to UEG was $15,000. (N.T., Vol. 1, p. 99, l. 13-20). Mr. Klesic did not contest the amount of the civil penalty assessment or the manner in which it was calculated. He also did not contest the existence of the underlying violations of the regulations or the unappealed 2015 Tanks Order.

Based on the facts, the Board finds that the Department has met its burden of establishing that the $15,000 civil penalty assessment is lawful and reasonable. 25 Pa. Code § 1021.122(b)(1). It is undisputed that UEG was in violation of the Storage Tanks Act, so the Department's Civil Penalty Assessment was certainly lawful. Additionally, UEG had ample warning of its violations and ample time in which to correct them. Further, the Department communicated to UEG alternate methods of solving the violations. The Department told Mr. Klesic that if he would have the tank inspected, the Department would forego the penalty. This series of events and Mr. Klesic's lack of a challenge to the violations or the penalty calculation demonstrate that the Department behaved lawfully and reasonably.

**Whether the Waste Order was a Lawful and Reasonable Exercise of the Department's Discretion and was Supported by Evidence in the Record**

The second issue for the Board to consider is whether the Waste Order was lawful and reasonable in light of the evidence before the Board. The Board finds that it was. Under the Solid Waste Management Act, the Department has the authority to issue administrative orders to compel compliance with the Solid Waste Management Act, regulations, and permits. 35 P.S. § 6018.602. The Department has presented compelling, uncontroverted evidence that the UEG Facility violated the Solid Waste Management Act and both of the Facility's hazardous and residual waste permits. Specifically, UEG stored hazardous waste on the site for more than a year and failed to implement the hazardous waste permit's closure plan, as required by the permit. In addition, the facility was located on a slide-prone area. Finally, UEG violated the insurance requirements of both the law and its permits, and UEG allowed its hazardous waste permit to expire.

UEG was issued its hazardous waste permit on October 31, 2003. (N.T., Vol. 1, p. 17, l. 17-21). At the time of the hearing, the permit has been expired for three years. The permit

included a closure plan, which was to go into effect if the facility closed or its permit expired. (N.T., Vol. 1, p. 19, l. 12 – 21, l. 23). The closure plan could also be triggered by the facility ceasing to operate for a period of time or if the Department revoked a permit due to violations. (N.T., Vol. 1, p. 22, l. 10-16). UEG's residual waste permit was still in effect and required that insurance be maintained on the facility. (N.T., Vol. 1, p. 22, l. 17-19). UEG's insurance lapsed on July 1, 2014. (N.T., Vol. 1, p. 22, l. 17-19).

The Department conducted a series of site inspections from July 30, 2013 through July 17, 2015 during which employees confirmed that conditions on the site giving rise to violations were unchanged. (N.T., Vol. 1, p. 24, l. 20 – p. 29, l. 25). Department inspectors observed twenty-three (23) drums of hazardous waste, one drum of residual waste, and two tarped piles of contaminated soil and filter sludge from the treatment tank. (N.T., Vol. 1, p. 25, l. 10-14). Over the course of the inspections, Mr. Klesic let the Department know that due to finances, the facility had been closed for business since May 31, 2013. (N.T., Vol. 1, p. 26, l. 20-24). However, he did not think the closure plan needed to be implemented because the same system was used to treat both hazardous and residual waste and the facility's residual waste permit did not expire until 2023. (N.T., Vol. 1, p. 26, l. 20-24).

Following the final inspection on July 17, 2015, the Department issued the Waste Order on November 3, 2015, requiring corrective action. (N.T., Vol. 1, p. 34, l. 20 – p. 36, l. 4). However, once it learned that UEG was insolvent and unable to comply with closure, the Department chose to pursue the forfeiture bond. (N.T., Vol. 1, p. 36, l. 13 – p. 38, l. 1). The Department's goal was to remove the waste that is present on the site. (N.T., Vol. 1, p. 42, l. 14-18).

Given this evidence before the Board, we find that the Department has met its burden of establishing that the Department's Waste Order was lawful and reasonable. Many of UEG's violations existed in late 2013 and the Department waited until 2015 to issue its Waste Order after conducting a series of inspections and giving UEG ample time in which to correct its violations. Additionally, the Department has stated that its position is one of removing the waste and cleaning-up the site, not of targeting its owner and operator. Again, Mr. Klesic does not contest the underlying violations that support the issuance of the Waste Order. UEG had closed its facility due to its dire financial situation, and was insolvent and unable to comply with its regulatory obligations.

In summary, the Board finds that there is no dispute that UEG violated various requirements of the Department's storage tanks and waste regulatory programs. These undisputed violations are sufficient to support the Civil Penalty Assessment and the Waste Order under appeal. Mr. Klesic does not contest the existence of the underlying violations in his challenge to the Department's two related administrative actions. Rather, Mr. Klesic seeks to have the Board excuse these violations because the administrative enforcement actions against UEG amount to selective or discriminatory enforcement against UEG.

**Whether Mr. Klesic Carried His Burden of Proof to Demonstrate that the Department's Actions Amounted to Selective Enforcement.**

The third and final issue before the Board is whether Mr. Klesic met his burden to prove that the Department's actions against UEG were selective enforcement. The Board finds that he has not. Mr. Klesic does not dispute UEG's violations as alleged. Instead, he argues that the Department's decision to pursue those violations against his facility amount to selective enforcement because the Department did not pursue enforcement actions against other persons or facilities that failed to adhere to the same regulatory requirements as UEG.

An appellant has the burden of proof in a selective enforcement defense. *Max Starr v. DEP*, 2002 EHB 799, 810. The Department's motives are generally irrelevant where its actions are in accordance with applicable law with the limited exception of an allegation of intentional discriminatory enforcement or selective enforcement. *See, e.g. Tinicum Township v. DEP*, 1996 EHB 816, 828. The Board has held that objections that allege selective enforcement and a vendetta by the Department carry a heavy burden of proof. *Blue Marsh Laboratories v. DEP*, 2007 EHB 777, 784-85.

The Equal Protection Clause "prohibits differences in treatment of similarly situated persons based upon a constitutionally suspect standard" or on any other classification which is lacking in rational justification. *Commonwealth v. Stinnet*, 514 A.2d 154, 159 (Pa. Super. 1986). A conscious exercise of selective enforcement is not, in and of itself, a constitutional violation. *Oyler v. Boles*, 368 U.S. 448, 456 (1962), *see also Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358, 1364 (Pa. 1986) (quoting *Oyler*, "The Equal Protection Clause prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'"); *McKees Rocks Forging, Inc. v. DER*, 1994 EHB 220, 269 ("Proof of mere laxity of enforcement by the authorities is not sufficient to establish an impermissible exercise of discrimination in the enforcement of the law," quoting *Kroger Co. v. O'Hara Twp.*, 366 A.2d 254, 256 (Pa. Super. 1976), internal quotes omitted). More precisely, "mere inequalities in the administration of a law do not give rise to a constitutional violation. Rather, there must be an element of intentional or purposeful discrimination [. . .]." *Barsky v. Department of Public Welfare*, 464 A.2d 590, 594 (Pa. Cmwlth 1983), *aff'd*, 504 Pa. 508 (1984); *see also UMCO Energy, Inc. v. Dep't of Envtl. Prot.*, 938 A.2d 530, 540 (Pa. Cmwlth. 2007). Therefore, a claim of selective enforcement against the Department requires that the appellant

establish two factors: (1) that persons similarly situated have not been prosecuted; and (2) that the Department's decision to prosecute the appellant was made on the basis of an illegal, unjustifiable standard, such as race, religion, or some other arbitrary classification. *Max Starr*, 2002 EHB at 810-11. Mr. Klesic did not meet his burden to establish either required factor.

Mr. Klesic did not establish that persons similarly situated to UEG were not prosecuted. The Board granted Mr. Klesic leave to present evidence on three Pennsylvania facilities to demonstrate selective enforcement. However, the sites Mr. Klesic chose did not involve violations analogous to those committed at the UEG facility. Specifically, the sites presented by Mr. Klesic involved tank remediation actions in which storage tanks were allegedly emptied or removed by the tank owner or its contractor without compliance with solid waste generator requirements. (*See* Bd. Ex. 37). None of the facilities presented by Mr. Klesic involved either storage tank owners that had permitted facilities and failed to perform tank inspections, or permitted waste processing facilities that failed to complete waste closure obligations, both of which were UEG's alleged violations. Therefore, Mr. Klesic did not establish the first factor of selective enforcement.

Second, the Board finds that Mr. Klesic did not establish that the Department's decision to prosecute UEG was made on the basis of an illegal, unjustifiable standard such as race, religion, or some other arbitrary classification. As discussed previously, the Department's evidence and witness testimony establish that the Department's actions were reasonable and not based on an illegal, unjustifiable standard. Nor is there any evidence to suggest the existence of an element of intentional or purposeful discrimination. Both the Civil Penalty Assessment and the Waste Order were issued in response to UEG's ongoing violations. The Department issued warnings and had discussions with Mr. Klesic regarding UEG's violations prior to issuing the

Civil Penalty Assessment or the Waste Order. Further, Mr. Klesic does not dispute that UEG was in violation of the applicable regulations and its permits. (*See* Bd. Ex. 32, p. 16).

Rather, Mr. Klesic's argument centers on the assertion that the Department has been generally discriminatory with its enforcement, choosing to turn a blind eye to a variety of violations on the part of competitor facilities. *Id*. Specifically, Mr. Klesic refers to violations involving the misclassification of waste materials as well as mixing wastes to avoid hazardous waste regulations. (Bd. Ex. 32, p. 16-17). Mr. Klesic's position is that the Department's decision to turn a blind eye toward competing facilities resulted in the ultimate insolvency of his company and loss of livelihood due to an unlawful competitive advantage given to those competing facilities. (Bd. Ex. 32, p. 18). While the Board is sensitive to Mr. Klesic's loss and frustration, his argument does not meet the legal standard for selective enforcement.

Mr. Klesic's claim of selective or discriminatory enforcement does not fit the classic mold. While the Board provided Mr. Klesic with an opportunity to establish his claim by offering evidence on three examples, Mr. Klesic was unable to establish that there are similarly situated persons that have not been prosecuted. This is because UEG had an approach to managing hazardous and residual waste from storage tank cleanups that no other entity pursued. There are therefore no other "similarly situated" persons to UEG.

Mr. Klesic believes that UEG's approach to managing waste from storage tank cleanups is the only lawful means to manage such waste. UEG had hazardous and residual waste permits to authorize such activities, and Mr. Klesic believed that all persons managing such waste were required to have similar waste permits. Over the years, Mr. Klesic has complained to the Department and to the Underground Storage Tanks Insurance Board ("USTIB") that UEG was losing business to competitors who undercut UEG's prices to manage residual and hazardous

waste from tank cleanups. (N.T. 126-128). Mr. Klesic's complaints centered on the fact that UEG's competitors for tank closure and cleanup related business were not required to secure hazardous and residual waste permits as UEG had secured. The Department's alleged failure to require hazardous and residual waste permits, as Mr. Klesic believed the Department should have required, destroyed UEG's business and ultimately caused UEG's financial woes that caused the violations that prompted the challenged Civil Penalty Assessment and Waste Order.

As addressed earlier, inequalities in the administration of law are not, in and of themselves, evidence of selective enforcement, nor is laxity of enforcement evidence of selective enforcement. The fact that the Department issued a Civil Penalty Assessment against UEG and issued a Waste Order while allegedly not enforcing other regulations against other facilities does not rise to the level of selective enforcement. The Department has the discretion to enforce what it sees fit as long as it does not (1) pick and choose among those who are similarly situated *and* (2) make its decision based on an illegal, unjustifiable standard such as race or religion, or another arbitrary classification. Here, the Department has done neither of these things. Based on the evidence before the Board, the Department penalized UEG for well-documented and uncontested violations. Further, it was reasonable in its actions and this reasonableness is supported by the evidence presented in this matter.

Mr. Klesic's complaint against the Department's alleged failure to prosecute UEG's competitors because they did not have the same permits as UEG is not so much a claim of discriminatory enforcement as it is a claim of an abuse of the Department's prosecutorial discretion. It is well-established that the Department has prosecutorial discretion in its own matters and that such discretion is outside of the Board's review. *See, e.g., Bernardi v. Commonwealth*, 2016 EHB 580; *Starr v. DEP*, 2002 EHB 799; *Montenay Montgomery Limited*

*Partnership v. DEP*, 1998 EHB 302; *Ridenour v. DEP*, 1996 EHB 928; *McKees Rocks Forging v. DER*, 1994 EHB 220; *Washington Twp. Concerned Citizens v. DER*, 1991 EHB 205. Even if the Board agreed with Mr. Klesic that the Department and USTIB allowed others to violate hazardous and residual waste regulations, the Board lacks the authority to direct the Department to pursue enforcement action against third parties. *Dep't of Envtl. Prot. v. Schneiderwind*, 867 A.2d 724 (Pa. Cmmw. 2005).

The undisputed violations at UEG's facilities are not the same as these alleged violations at other facilities. The only connection between these alleged violations at other facilities and the undisputed violations present at UEG's facilities is Mr. Klesic's claim that the Department's failure to properly enforce its regulatory requirements against other persons gave others an unlawful competitive advantage that deprived UEG of business, and that this lack of business caused the financial ruin of UEG. In turn, this financial ruin lead UEG to violate the terms of its hazardous and residual waste permits. These allegations, even if proven, would not be sufficient to support Mr. Klesic's defense of selective enforcement against UEG.[4] Because Mr. Klesic has satisfied neither factor to support his claim of selective enforcement, the Board finds that he has not met his burden to show selective enforcement on the part of the Department.

**The Board Denies Mr. Klesic's Request for an En Banc Oral Argument**

On January 19, 2017, Mr. Klesic filed a request for an en banc oral argument before the Board, reiterating his request for the same in his Post-Hearing Brief. On the same date, the Department filed its opposition to the request. The Board denies this request.

The Board's Rule of Practice § 1021.132 provides that a party may move for oral argument at a time within five days after hearing, yet before adjudication. 25 Pa. Code §

[4] The evidence that Mr. Klesic introduced at the Hearing regarding the three examples of alleged discriminatory enforcement did not reveal that there were violations at these sites.

1021.132. The Board also has discretion to grant or deny such motion and may also grant oral argument on its own motion. 25 Pa. Code § 1021.132; *see Western Hickory Coal Company v. DER*, 1983 EHB 375; *Penn Maryland Coals, Inc. v. DER*, 1986 EHB 1110.[5]

The Board does not find that the instant case rises to the level necessitating en banc review by the Board. Mr. Klesic was given wide latitude with his examinations of witnesses and was allowed to make a lengthy testimonial statement, which is on the record and available to the full Board.[6] Adjudications are issued by the Board as a whole, and all judges review the record in a given case. The same is true here. Therefore, the Board denies Mr. Klesic's request for an en banc oral argument.

**Conclusion**

The Department has demonstrated that it acted reasonably and in accordance with the law in both its Civil Penalty Assessment and Waste Order. There is no dispute between the Parties that UEG was in violation of regulations and its permits. Further, Mr. Klesic did not meet his burden to proof to demonstrate that the Department's actions against UEG amounted to selective enforcement. Therefore, the Board upholds the Department's Civil Penalty Assessment and Waste Order.

[5] The Board renumbered its Rules in 1995 and 2002. *See* 25 Pa. B. 3823 (September 9, 1995); 31 Pa. B. 6156 (November 10, 2001); and 32 Pa. B. 3085 (June 29, 2002). Section 1021.132 was previously two separate sections, numbered as Section 21.92 and Section 21.122. Section 1021.132 was adopted on August 30, 1996, effective August 31, 1996, and amended June 28, 2002, effective June 29, 2002. *See* 26 Pa. B. 4222 (August 31, 1996) and 32 Pa. B. 3085 (June 29, 2002).

[6] Mr. Klesic was not represented by counsel and when he testified he was not examined in the traditional manner of being asked questions. Mr. Klesic testified at length without interruption and had a full and fair opportunity to provide the entire Board with a transcribed statement of his position. (N.T. at 280-301). The Department did not raise objections while Mr. Klesic testified, even though the Department believed that some of Mr. Klesic's testimony was objectionable. (N.T. at 301).

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 32 P.S. § 693.24; 35 P.S. § 691.7; 35 P.S. § 7514.

2. The Department bears the burden of proof in cases where it issues a civil penalty assessment or an order. 25 Pa. Code § 1021.122(b)(1) and (4).

3. The Department must prove by a preponderance of the evidence that its issuance of the civil penalty assessment and order to UEG constituted a lawful and reasonable exercise of its discretion and the order is supported by the facts. *Bryan Whiting and Whiting Roll-Off, LLC v. DEP*, 2015 EHB 799; *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251; *Dirian v. DEP*, 2013 EHB 224, 231; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Management Co. v. DEP*, 2010 EHB 456, 474-75.

4. Mr. Klesic bears the burden of proof on the affirmative defense of selective or discriminatory enforcement. *Max Starr v. DEP*, 2002 EHB 799, 810.

5. The Board reviews Department actions de novo, meaning we decide the case anew on the record developed before us. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *Smedley v. DEP*, 2001 EHB 131, 156; *O'Reilly v. DEP*, 2001 EHB 19, 32.

6. The Department has the authority to issue civil penalty assessments under the Storage Tanks Act. 35 P.S. § 6021.1307.

7. UEG owns storage tanks with a capacity of greater than 5,000 gallons that are used to store regulated substances and is therefore subject to 25 Pa. Code Section 245.616(c). 25 Pa. Code § 245.616(c).

8. UEG failed to obtain the requisite in-person inspection, due ever ten years. 25 Pa. Code § 245.616(c).

9. UEG failed to comply with an unappealed, lawful and reasonable, Department order, issued on February 9, 2015.

10. The Department's civil penalty assessment was a lawful and reasonable exercise of its discretion that is supposed by the facts and evidence in this case.

11. The Department has the authority to issue administrative orders to compel compliance with the Solid Waste Management Act, regulations, and permits. 35 P.S. § 6018.602.

12. UEG stored hazardous waste on the site for more than one year, thus meeting the statutory presumption of disposal of such waste without a disposal permit. 35 P.S. §§ 6018.103 and 6018.610(1).

13. UEG failed to implement the hazardous waste permit's closure plan, in violation of the Hazardous Waste Permit. 35 P.S. §§ 6018.403(a) and 6018.610(2).

14. The UEG facility is located on a slide-prone area. N.T., Vol. 1, p. 181, l. 9-15; Vol. 2; p. 32, l. 1-3; Bd. Ex.1, JS para. 3; DEP Ex. A.

15. UEG violated the insurance requirements of the law and its Hazardous Waste and Solid Waste Permits. 25 Pa. Code § 287.372; 40 C.F.R. § 264.147(a), incorporated by reference at 25 Pa. Code § 264a.1.

16. UEG allowed its Hazardous Waste Permit to expire. 25 Pa. Code § 287.372; 40 C.F.R. § 264.147(a), incorporated by reference at 25 Pa. Code § 264a.1.

17. The Department's waste order was a lawful and reasonable exercise of its discretion that is supposed by the facts and evidence in this case.

18. A claim of selective enforcement against the Department requires that two factors be established: (1) that persons similarly situated have not been prosecuted; and (2) that the Department's decision to prosecute the appellant was made on the basis of an illegal, unjustifiable standard, such as race, religion, or some other arbitrary classification. *Max Starr v. DEP*, 2002 EHB 799, 810-11.

19. Mr. Klesic did not meet his burden to demonstrate that the Department engaged in selective or discriminatory enforcement.

20. The Board's Rule of Practice 1021.132 provides that a party may move for oral argument at a time within five days after hearing, yet before adjudication. 25 Pa. Code § 1021.132.

21. The Board has the discretion to grant or deny such motion and may also grant oral argument on its own motion. 25 Pa. Code § 1021.132; *see Western Hickory Coal Company v. DER*, 1983 EHB 375; *Penn Maryland Coals, Inc. v. DER*, 1986 EHB 1110.

22. The circumstances in this appeal do not rise to the level necessitating en banc oral argument before the Board.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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|---|---|---|
| **STEPHEN W. KLESIC** | : | |
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| **v.** | : | **EHB Docket No. 2015-150-M** |
| | : | **(Consolidated with 2015-169-M)** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**O R D E R**

AND NOW, this 9th of June, 2017, 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**

**Judge Steven C. Beckman is recused and did not participate in this decision.**

**DATED: June 9, 2017**

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

**For the Commonwealth of PA, DEP:**
Marianne Mulroy, Esquire
(*via electronic filing system*)

**For Appellant, *Pro Se*:**
Stephen W. Klesic
(*via electronic filing system*)