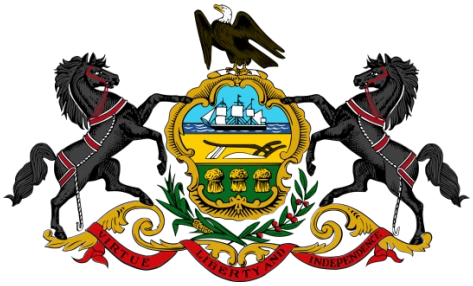
Environmental Hearing Board

Adjudications and Opinions



2021
VOLUME I

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

2021

JUDGES OF THE

ENVIRONMENTAL HEARING BOARD

Chief Judge and Chairman	Thomas W. Renwand
Judge	Michelle A. Coleman
Judge	Bernard A. Labuskes, Jr.
Judge	Steven C. Beckman
Secretary	Christine A. Walker

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2021 EHB 1

FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2021.

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.

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES-APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 13, 2021**
	:	

OPINION AND ORDER ON
RANGE'S MOTION FOR EXTENSION OF THE DISCOVERY AND EXPERT REPORT SCHEDULE

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The parties have pursued discovery with due diligence in a complex case. They have shown good cause to warrant an extension of the prehearing deadlines. Consequently, the Board grants an extension to the discovery deadline and provides more time for the parties to exchange expert reports. The Board further adjusts the prehearing schedule so that all expert reports are produced before the close of discovery.

O P I N I O N

Presently before the Pennsylvania Environmental Hearing Board (Board) is Range Resources-Appalachia, LLC's (Range) Motion for Extension of the Discovery and Expert Report Schedule (Motion for Extension) and the Pennsylvania Department of Environmental Protection's (Department) Response. Both parties have filed Legal Memoranda[1] which the Board acknowledges and appreciates.

[1] Range frequently cites Board Opinions and Adjudications (decisions) in their slip opinion format. Rather than citing to the slip opinion, if the decision is available in the Board's reporters Range should cite to the proper Board citation, ____EHB___, with the first space containing the year and the second the page number, e.g., 2019 EHB 1. These decisions can easily be found on the Board's website by going to

Range requests approximately a five-week extension to the current discovery and expert report deadlines. These deadlines originate from dates the Board originally adopted from the proposed joint case management order requested by Counsel. Range contends that this extension is needed so that it can complete its discovery which it contends it has pursued diligently. Range further argues that the Department has taken much too long to produce documents and respond to discovery.

Unsurprisingly, the Department counters that it has diligently responded to Range's discovery requests. In addition, the Department points out that it has been open to the extensions requested by Range and indeed believes that the discovery deadline should be extended into May 2021 as the five-week extension requested by Range would not be sufficient time for the parties to complete discovery. What has prevented the parties from easily reaching an agreement regarding discovery and an expert report production schedule are their contrasting views as to whether the expert reports should be produced during or after the conclusion of discovery. Under the schedule proposed by Range, the Department's initial expert reports would be produced before the end of discovery, but Range's expert reports and the Department's rebuttal reports would not be produced until after discovery was over. The Department has no objection to extending the deadlines for the production of expert reports but insists that the best practice would be to have all of the expert reports produced before discovery ends.

Range argues that if it has to produce its expert reports before the end of discovery that its experts would have to form their opinions on less than a complete factual record (although Range does not seem to be bothered by the fact that under its proposed order the Department's expert reports would be produced on "less than a complete factual record"). We would be much

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the menu and clicking the Rules, Decisions, and Resources and then going to the Opinion and Adjudication Volumes. Full text PDF versions of our yearly compilation of Opinions and Adjudications from 1972-2019 are available. The 2020 full text PDF versions will be available later this year.

more empathetic to Range's argument if it was early in discovery. However, discovery has already been extended and we will be extending it again. Range's experts will have the benefit of the robust discovery it has already conducted plus the extensive discovery that will take place prior to the expert report deadlines. Indeed, we are giving Range more time to produce its expert reports than they have requested.

We agree that this dispute should have been easily resolved by Counsel. In the vast majority of cases these are the types of disagreements in discovery that never reach the Board. Nevertheless, now that the issue is before us, we have no hesitancy in deciding it. It is our duty and responsibility to oversee discovery pursuant to our Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure applicable to the discovery process. *DEP v. Neville Chemical Co.,* 2004 EHB 744, 746.

The production and exchange of expert reports is an important step in the process and many times will narrow the issues, set forth the strengths and weaknesses in the parties' respective positions, and facilitate settlement. The parties tell us that this case will hinge on expert testimony, so the exchange of expert reports appears to be especially critical here.

It is clear to us that the parties need additional time to conduct and complete their discovery. We have also found in our experience that it is beneficial to all sides and the process in general if the exchange of expert reports takes place during the discovery period. The parties can then address in discovery any additional factual issues raised in the expert reports. Moreover, we certainly have mechanisms in our Rules and as set forth in the Pennsylvania Rules of Civil Procedure that allow for the supplementation and revision of expert reports under the proper circumstances.

As the parties are aware, we are still in the middle of a pandemic that is unfortunately growing worse by the day and is unprecedented in our lifetimes. Although the Board has timely administered its caseload and has held video hearings in several cases, this case seems to us to be one that if possible, would be best held in person. This is due to not only the complexity of the issues but the number of exhibits and witnesses including expert witnesses. Nevertheless, we are not sure at this time as to when the Board will be able to safely conduct such a hearing. It is hoped that an in-person hearing might be held in the fall, but we may be overly optimistic. In any event, that is also likely the earliest the parties will be ready for a hearing whether in-person or video.

We will issue an Order in accordance with this Opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES-APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 13th day of January, 2021, after review of Range's Motion for Extension and the Department's Response, it is ordered as follows:

1. The Department shall serve expert reports containing the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion, for all testifying experts it intends to call as witnesses at trial on or before **March 31, 2021**.
2. Range shall serve any responsive expert reports containing the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion, for all testifying experts it intends to call as witnesses at trial on or before **May 5, 2021**.
3. The Department shall serve any rebuttal expert reports on or before **May 27, 2021**. Each rebuttal report shall contain the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.
4. All discovery in this matter shall be completed by **July 15, 2021**.
5. The conference call with the Board and Counsel currently scheduled on **April 8, 2021** at **10:00 a.m.** for the purposes of scheduling deadlines for pre-hearing memoranda,

motions *in limine*, and an evidentiary hearing in the matter is **postponed**. The Board will reschedule the conference call at a mutually convenient date and time.

ENVIRONMENTAL HEARING BOARD

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

DATED: January 13, 2021

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA GENERAL ENERGY COMPANY, LLC	:	
v.	:	**EHB Docket No. 2020-046-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 15, 2021**

OPINION AND ORDER ON
GRANT TOWNSHIP'S PETITION TO INTERVENE

By Thomas W. Renwand, Chief Judge

Synopsis

The Board grants a host municipality's petition to intervene in an appeal of the Department of Environmental Protection's rescission of a permit authorizing the injection of oil and gas waste fluids. The municipality is an interested party under Section 4 of the Environmental Hearing Board Act and is entitled to intervene.

O P I N I O N

Introduction

This matter involves an appeal filed with the Pennsylvania Environmental Hearing Board (Board) by Pennsylvania General Energy Company, LLC (Pennsylvania General Energy). The appeal challenges a letter issued by the Department of Environmental Protection (Department) on March 19, 2020[1] rescinding Pennsylvania General Energy's permit for the operation of an oil and gas waste fluid injection well known as the "Yanity well" in Grant Township, Indiana County.

[1] The letter was dated March 19, 2018, but there is no dispute that the letter was incorrectly dated and was, in fact, issued on March 19, 2020.

The permit authorized the disposal injection of fluids produced in oil and gas operations. The basis for the Department's rescission of the permit was its determination that the permit would violate Section 301 of Grant Township's Home Rule Charter that bans the injection of oil and gas waste fluids. The matter now before the Board is a petition to intervene filed by Grant Township.

According to Grant Township's petition, it is a "small rural township of approximately 700 people, located in Indiana County, Pennsylvania." (Petition, para. 1.) It states:

> In June 2014, Grant Township passed an ordinance to protect public health and the environment from the threat of fracking waste disposal in close proximity to residents' homes and to the Little Mahoning watershed, Township residents' sole source of drinking water.

Id.

Grant Township's petition sets forth a detailed and comprehensive history of this matter as follows.[2] In August 2014 Pennsylvania General Energy sued Grant Township in the U.S. District Court for the Western District of Pennsylvania to invalidate its ordinance banning the disposal of oil and gas waste fluids. In March 2015 Pennsylvania General Energy applied to the Department for a permit to convert an existing natural gas well located in Grant Township to an underground injection well for the disposal of oil and gas waste fluids. In August 2015 the Department suspended its review of Pennsylvania General Energy's application pending the outcome of the federal litigation. In October 2015 the District Court ruled that several of the ordinance's provisions violated the Second Class Township Code and were unlawfully exclusionary. On November 3, 2015, the residents of Grant Township voted to adopt a Home Rule Charter that changed the form of government in the Township from a Second Class Township to a Home Rule

[2] For a full history of the litigation of this matter, please review Grant Township's petition and Pennsylvania General Energy's response on the Board's electronic docket at: https://ehb.courtapps.com/public/document_shower_pub.php?csNameID=5877.

Municipality. The charter prohibits any corporation or government from depositing waste from oil and gas extraction.

On March 27, 2017 the Department issued a permit to Pennsylvania General Energy authorizing a change-in-use of the Yanity well to a well for the disposal of waste from oil and gas extraction.[3] On that same date, the Department sued Grant Township in Commonwealth Court seeking declaratory relief that its Home Rule Charter was preempted by the Oil and Gas Act and the Solid Waste Management Act. Grant Township filed an Answer that included a counterclaim invoking the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution. In December 2018 the Department filed an Application for Summary Relief to Dismiss Grant Township's Constitutional Claims. The Department's Application was denied by the Commonwealth Court on March 2, 2020, and on March 19, 2020 the Department rescinded the permit for the Yanity well. On December 9, 2020 Pennsylvania General Energy sued Grant Township in the U.S. District Court for the Western District of Pennsylvania, seeking to invalidate the Home Rule Charter. That litigation is pending. (Petition to Intervene, para. 2-23.)

According to Grant Township, the Department does not oppose its petition to intervene (Petition to Intervene, para. 35) and, indeed, the Department has filed no response in opposition to the petition. Pennsylvania General Energy opposes intervention and has filed a response to the petition.

[3] Several residents of Grant Township (residents) appealed the permit, as did Pennsylvania General Energy. The appeals were consolidated at EHB Docket No. 2017-032-R. Pennsylvania General Energy's appeal was resolved, and the Department issued an amended permit on April 3, 2018. The amended permit was appealed by the residents at EHB Docket No. 2018-045-R, and that appeal was consolidated with their earlier appeal. That consolidated appeal has been stayed pending a disposition in the current appeal.

Discussion

Section 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §§ 7511-7516, at § 7514(e), states that "[a]ny interested party may intervene in any matter pending before the [B]oard." *Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226, 231 (Pa. Cmwlth. 1992), *petition for allowance of appeal denied*, 608 A.2d 32 (Pa. 1992); *Coyne v. DEP*, EHB Docket No. 2019-153-B (Opinion and Order issued April 6, 2020); *University Area Joint Authority v. DEP*, 2019 EHB 750; *Lawson v. DEP*, 2018 EHB 265. "Interested party" means "any person or entity interested, i.e., concerned, in the proceedings before the Board." *Clean Air Council v. DEP*, 2017 EHB 184, 191 (citing *Browing Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991). The Board has held that the right to intervene in a pending appeal should be comparable to the right to file an appeal and, therefore, an intervenor must have standing. *Coyne, slip op.* at 2 (citing *Logan v. DEP*, 2016 EHB 531, 533; *Wilson v. DEP*, 2014 EHB 1, 2; *Pileggi v. DEP*, 2010 EHB 433, 434); *University Area Joint Authority,* 2019 EHB at 751-52; *Lawson,* 2018 EHB at 267. This is demonstrated by a 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 disposition." *Clean Air Council,* 2017 EHB at 191 (quoting, *inter alia*, *Jefferson County v. Department of Environmental Protection,* 703 A.2d 1063, 1065, n. 2 (Pa. Cmwlth. 1997)). In other words, a person or entity seeking to intervene in a Board proceeding to challenge a Department action "must show a direct and substantial interest" and "must show a sufficiently close causal connection between the challenged action and the asserted injury to qualify the interest as "immediate" rather than "remote." *Borough of Glendon*, 603 A.2d at 231 (quoting *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 286 (Pa. 1975) (emphasis omitted).

Grant Township argues that it and its citizens have an interest in the subject of this appeal such as to convey standing to intervene. It points out that if the Board were to find in favor of Pennsylvania General Energy and reinstate the permit for the Yanity well, it would be in violation of the Township's Home Rule Charter. Additionally, the Township argues that allowing the disposal of fracking waste within its borders would place its residents at risk since there is no public water system and each of its residents maintains a well or spring as the source of their drinking water. Likewise, the Township argues that the trucking of fracking waste throughout the Township and injecting it into a well that is in close proximity to residents and the Township's watershed that is the sole source of drinking water poses a serious threat. Finally, the Township notes that this case is in the early stages of litigation and the Township's intervention will result in no delay or prejudice to the parties.

Pennsylvania General Energy opposes the petition and argues that Grant Township does not meet the standard for intervention. It argues that even if Grant Township's allegation of a threat to its drinking water is true there is no threat to the Township or its citizens at this time since the permit is rescinded. Pennsylvania General Energy asserts that this case differs from the typical case in which a municipality is granted intervention status since in those cases the appeal involved a permit that was in effect, citing *Borough of Glendon, supra*; *Longenecker v. DEP*, 2016 EHB 552. It argues that Grant Township's arguments for intervention are not ripe and are more appropriately made if the Board sustains the appeal and the Department reinstates the injection well permit. Finally, Pennsylvania General Energy points out that one of the appellants in the related appeal at EHB Docket No. 2017-032-R is a Grant Township supervisor who can adequately protect the Township's interests.

We find that Grant Township meets the standard for intervening in this appeal. As Judge Mather explained in *PA Waste, LLC v. DEP*, 2015 EHB 350, 351, n. 1:

> [Section 4(e) of the Environmental Hearing Board Act] establishes a low burden for intervention in Board proceedings. *Barnside Farm Composting Facility v. DEP*, 2011 EHB 165, 166 ("[I]t does not take much to be able to intervene in Board proceedings." (quoting *TJS Mining v. DEP*, 2003 EHB 507, 508)); *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 602, 606 ("The Board's governing statute and rules do not make it difficult to intervene in a pending matter.")

Grant Township clearly has a substantial, direct and immediate interest in the question of whether the injection well permit is reinstated. We disagree with Pennsylvania General Energy's assertion that the Board has allowed intervention by a local government entity only in cases where a permit has been issued and is in effect. In *PA Waste*, the Board granted a county's petition to intervene in an appeal of a denial of a landfill permit. The permit applicant, who had appealed the denial, argued that the county should not be permitted to intervene because the county was not aggrieved by the denial of the permit. The Board disagreed with the permit applicant's argument and granted intervention. In reaching this conclusion, the Board noted that a person may intervene in an appeal of a Department action that it supports, citing several Board decisions including *Connors v. State Conservation Commission*, 1999 EHB 669 (citizens group allowed to intervene in support of nutrient management plan disapproval); *Multilee, Inc. v. DER*, 1994 EHB 989 (host township permitted to intervene in support of permit denial); and *Tri-County Landfill v. DER*, 2014 EHB 132 (private citizens allowed to intervene in support of permit denial). Notably, the Board held:

> Even if the County did not have special status as the host county for the proposed municipal waste landfill, which independently supports the County's standing, the Board would not support PA Waste's broad argument that no person who supports a Department action has standing to intervene and participate in an appeal of that action by another party…The fact that a particular person supports a Department decision to either issue or deny a permit does not automatically prevent that person from intervening in an

> appeal…Here the County has standing to support its intervention in this appeal of the Department's decision to deny PA Waste's permit application for a municipal waste landfill proposed to be sited in the County.

2015 EHB at 356.

Likewise, in the present appeal, as the host municipality, Grant Township has standing to intervene in this appeal of the Department's decision to rescind the permit. It is irrelevant whether the appeal concerns a permit that is in effect or one that has been rescinded. If the Board rules in favor of the Department and the permit is not reinstated, Grant Township will clearly "gain…by direct operation of the Board's ultimate determination." *PA Waste,* 2015 EHB at 355. If, on the other hand, the Board rules in favor of Pennsylvania General Energy and the permit is reinstated, it is true that Grant Township may challenge the permit reinstatement at that time or seek to intervene in another challenge to the permit; however, while such appeal is pending the permit will be in effect and disposal of oil and gas waste fluids will be occurring. In that scenario, Grant Township clearly will have been negatively impacted by the Board's ruling in this appeal. As the Pennsylvania Supreme Court held in *Franklin Township v. Department of Environmental Resources*, 452 A.2d 718, 722 (Pa. 1982):

> The direct and substantial interest of local government in the environment, and in the quality of life of its citizenry cannot be characterized as remote. We need not wait until an ecological emergency arises in order to find that the interest of the municipality and county faced with such a disaster is immediate.

As the Court further held in *Robinson Township v. Commonwealth*, 83 A.3d 901, 920 (Pa. 2013):

> Political subdivisions, the Court has recognized, are legal persons, which have the right and indeed the duty to seek judicial relief, and, more importantly, they are "place[s] populated by people" [citing *Franklin Township*, 452 A.2d at 720]. The protection of environmental and esthetic interests is an essential aspect of

> Pennsylvanians' quality of life and a key part of local government's role. Local government, therefore, has a substantial and direct interest in the outcome of litigation premised upon changes, or serious and imminent risk of changes, which would alter the physical nature of the political subdivision and of various components of the environment. Moreover, the same interest in the environment and in the citizenry's quality of life cannot be characterized as remote… [*Id*. at 720-22].

In conclusion, we find that Grant Township is entitled to intervene in this appeal and we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA GENERAL ENERGY COMPANY, LLC	:	
v.	:	**EHB Docket No. 2020-046-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 15th day of January, 2021, it is hereby ordered:

1) Grant Township's Petition to Intervene is *granted.*

2) Counsel for Grant Township shall register for electronic filing.

3) Henceforth the caption in this appeal shall read as follows:

PENNSYLVANIA GENERAL ENERGY COMPANY, LLC	:	
v.	:	**EHB Docket No. 2020-046-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GRANT TOWNSHIP, Intervenor	:	

ENVIRONMENTAL HEARING BOARD

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

DATED: January 15, 2021

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNENVIRONMENT, EARTHWORKS, and ENVIRONMENTAL INTEGRITY PROJECT	:	
v.	:	**EHB Docket No. 2020-002-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM AND RESOURCES, LLC, Permittee	:	**Issued: January 19, 2021**

OPINION AND ORDER ON PERMITTEE'S
MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge

Synopsis

Where an appellant receives actual notice from the Department of Environmental Protection of the issuance of an operating permit under the Air Pollution Control Act prior to publication of notice in the *Pennsylvania Bulletin*, the 30-day appeal period begins to run on the date of actual notice pursuant to Section 10.2 of the Act. Where a staff attorney for one of the appellants, Environmental Integrity Project, submitted comments on behalf of all of the appellants, it is not clear that notice to the attorney of the permit issuance served as notice to the other appellants. Therefore, the appeal period for those appellants did not begin to run until publication of the permit issuance in the *Pennsylvania Bulletin*.

Opinion of the Board by Judge Renwand, joined by Judge Coleman and Judge Beckman. Opinion Concurring in Part and Concurring in the Result in Part by Judge Labuskes.

O P I N I O N

Introduction

This matter involves an appeal filed with the Pennsylvania Environmental Hearing Board (Board) by PennEnvironment, Earthworks, and Environmental Integrity Project (Appellants). The appeal challenges the Department of Environmental Protection's (Department) issuance of State-Only Operating Permit No. 63-00968 (permit) to MarkWest Liberty Midstream and Resources, LLC (MarkWest) for the continued operation of its Smith Compressor Station, an existing natural gas compressor station in Smith Township, Washington, previously permitted under a general permit, GP-5, and plan approval PA 63-00968A. The matter currently before the Board is MarkWest's motion for summary judgment contending that the appeal is untimely.

The Appellants jointly submitted comments on the proposed permit in a letter dated September 16, 2019 (comment letter), which is attached to the Notice of Appeal. The comments were submitted through Environmental Integrity Project staff attorney, Adam Kron. Following the comment period, Attorney Kron received notice of the permit issuance from the Department by U.S. mail on December 10, 2019. Notice of the permit issuance was published in the *Pennsylvania Bulletin* on December 14, 2019. 49 Pa. B. 7302 (December 14, 2019). On January 13, 2020, the Appellants jointly filed this appeal. MarkWest contends that the Appellants were notified of the permit issuance on December 10, 2019 when Attorney Kron received the Department's notification by U.S. mail, and therefore, the appeal, filed 34 days later on January 13, 2020, is untimely.[1]

[1] MarkWest previously raised the issue of timeliness in a motion to compel filed on July 24, 2020. The Board held that the issue of timeliness was more appropriately addressed in a dispositive motion. See *PennEnvironment et al. v. DEP*, EHB Docket No. 2020-002-R, slip op. at 8-11 (Opinion and Order on Motion to Compel issued August 26, 2020).

Discussion

Mark West's motion presents two issues:

1) When did the appeal period begin running – on the date that Attorney Kron received notice of the permit issuance by U.S. mail or the date of publication in the *Pennsylvania Bulletin*?

2) Does notice to Attorney Kron constitute notice to all three Appellants?

When did the appeal period begin running?

The Board lacks jurisdiction over untimely filed appeals. 25 Pa. Code § 1021.52(a); *Feudale v. DEP*, 2016 EHB 774, 775 (citing *Rostosky v. Department of Environmental Protection*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976). Normally we turn to Section 1021.52(a) of the Board's Rules of Practice and Procedure to address the timeliness of appeals. That rule states as follows:

> **§ 1021.52. Timeliness of appeal.**
>
> (a) Except as specifically provided in § 1021.53 (relating to amendments to appeal or complaint), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner as follows, *unless a different time is provided by statute*:
>
> (1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.
>
> (2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within one of the following:
>
> (i) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin*.
>
> (ii) Thirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin*.

25 Pa. Code § 1021.52 (emphasis added).

The Board's rules distinguish between two categories of potential appellants: those who are the direct recipients of the action being appealed and anyone else who may be aggrieved by

the action. In the case of the former, the appeal period begins to run on the date actual notice is received. In the case of the latter, the appeal period begins to run on the date of publication in the *Pennsylvania Bulletin*. The Board has interpreted subsection (a)(2) to mean that even when the aggrieved person receives actual notice of the action prior to publication in the *Pennsylvania Bulletin*, his or her appeal period does not begin to run until notice appears in the *Bulletin*. *Pennsylvania Fish & Boat Commission v. DEP*, 2004 EHB 491, 493-94; *Middleport Materials, Inc. v. DEP*, 1997 EHB 78, 81. Where notice is not published in the *Pennsylvania Bulletin*, the appeal period begins to run when the aggrieved person obtains actual notice of the action.

However, as set forth in subsection 1021.52(a), when a different time period for appealing is provided by statute, the language of the statute is controlling. The Air Pollution Control Act, Act of 1959-787, P.L. 2119, as amended, 35 P.S. §§ 4001-4015, is such a statute containing its own notice and appeal provision. *McCarthy v. DEP*, 2019 EHB 406, 407. Section 10.2 of the Act provides as follows with regard to the timing of appeals:

> Any person aggrieved by an order or other administrative action of the department issued pursuant to this act or any person who participated in the public comment process for a plan approval or permit shall have the right, *within thirty (30) days from actual or constructive notice of the action,* to appeal the action to the hearing board in accordance with the act of July 13, 1988 (P.L. 530, No. 94), known as the Environmental Hearing Board Act, and 2 Pa.C.S. Ch. 5 Subch. A (relating to practice and procedure of Commonwealth agencies).

35 P.S. § 4010.2 (emphasis added). Section 10.2 makes no distinction between different categories of appellants with regard to the timing of filing appeals. Appeals must be filed within 30 days of "actual or constructive notice of the action" being appealed. The crux of MarkWest's motion depends on the interpretation of this statutory language.

MarkWest reads Section 10.2 as stating that the clock starts running on the date on which a potential appellant first receives notice of the Department's action, whether actual or constructive. In other words, if a potential appellant has actual notice of a permit issuance prior to the publication of notice in the *Pennsylvania Bulletin*, the clock begins running on the earlier of the two dates. Since Attorney Kron received notice of the permit issuance by U.S. mail on December 10, 2019, MarkWest asserts that the clock began running on that date and, therefore, the filing of the appeal on January 13, 2020, more than 30 days after actual notice, was untimely.

In contrast, the Appellants argue that "or" should be read as allowing a person to appeal the issuance of a permit within 30 days of *either* actual notice or publication in the *Pennsylvania Bulletin*. The Department does not address this issue in its response to the motion.[2] However, in response to MarkWest's motion to compel, the Department disagreed with MarkWest's interpretation of Section 10.2 and argued in favor of a broader reading of Section 10.2.

We believe the interpretation of this language is a matter of first impression since the parties have not pointed us to a case that is directly on point, nor have we discovered any in our research. In reviewing the language of a statute we utilize the rules of statutory construction to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S.A. § 1921(a). When a statute is clear and unambiguous on its face, there is no need to engage in statutory interpretation, and the plain meaning of the statute must prevail. *Id*. at § 1921(b). However, when the words of a statute are not explicit, we may ascertain the intent of the General Assembly by considering various factors such as the following:

1) The occasion and necessity for the statute.

[2] The Department asserts that the Board need not reach this issue because there are material facts in dispute which prevent the granting of the motion.

2) The circumstances under which it was enacted.

3) The mischief to be remedied.

4) The object to be attained.

5) The former law, if any, including other statutes upon the same or similar subjects.

6) The consequences of a particular interpretation.

7) The contemporaneous legislative history.

8) Legislative and administrative interpretations of such statute.

1 Pa.C.S.A. § 1921(c); *Limerick Partners I, L.P. v. DEP*, 2013 EHB 502, 510. The factors we find most helpful in examining the issue before us are: the object to be attained by Section 10.2 of the Act, the consequences of a particular interpretation, and the administrative interpretations of Section 10.2. Clearly the object to be attained by Section 10.2 is to ensure that those who are aggrieved by the issuance of an operating permit and those who have participated in the comment process have an opportunity to file an appeal with the Environmental Hearing Board and to do so in a timely manner. As we have stated above, MarkWest interprets the language of Section 10.2 as requiring a potential appellant to file its appeal within 30 days after receiving actual or constructive notice, whichever occurs *first.* The Appellants and the Department interpret Section 10.2 as allowing a potential appellant to appeal within 30 days of *either* actual or constructive notice. Based upon our examination of case law discussing the timeliness of appeals, and our consideration of the consequences of each party's interpretation, we find MarkWest's argument to be persuasive.

In *McCarthy* we considered the appeal language of Section 10.2. However, that case presented a set of facts the reverse of what is alleged here. In *McCarthy* the appellant received actual notice of the Department's action *after* notice appeared in the *Pennsylvania Bulletin*. The

appellant, Ms. McCarthy, submitted comments on an application for plan approval under the Air Pollution Control Act. Issuance of the plan approval was published in the *Pennsylvania Bulletin* on May 4, 2019. Subsequent to publication of notice in the *Pennsylvania Bulletin*, the Department sent Ms. McCarthy actual notice of the plan approval which she received on May 11, 2019. She filed her appeal on June 5, 2019. The Department moved to dismiss the appeal as untimely since it was filed more than 30 days after publication of notice in the *Pennsylvania Bulletin.* The Board denied the motion, holding that Ms. McCarthy was entitled to receive actual notice as someone who took part in the comment process, and, as such, her appeal period did not begin with publication in the *Pennsylvania Bulletin* but, rather, on the date she received actual notice. *Id*. at 407-08.[3] In other words, *McCarthy* held that when an appellant is entitled to receive actual notice of a plan approval or permit issuance under the Air Pollution Control Act, even if that notice comes after notice has been published in the *Pennsylvania Bulletin*, the appeal period does not begin to run until the actual notice occurs. [4] Applying that logic to the case at hand, if the Appellants, as participants in the comment review process, were provided with actual notice of the permit

[3] Contrast *Livingston v. DEP*, 1999 EHB 173, 174 (Dismissal of third-party appeal filed more than 30 days after notice in the *Pennsylvania Bulletin*. "Under these circumstances, it is irrelevant if and when [the appellant] received actual notice."); *Stevens v. DEP*, 1996 EHB 430, 432 (Dismissal of third-party appeal filed within 30 days of actual notice but more than 30 days after notice in the *Pennsylvania Bulletin*. "There is no requirement that such interested persons, known as third parties, receive personal notice other than constructive notice.")

[4] MarkWest disputes that commenters are entitled to actual notice under the Air Pollution Control Act. This issue was not briefed by the parties. There appears to be no provision in the Air Pollution Control Act requiring that commenters receive actual notice. However, we read the Department's regulations at 25 Pa. Code §§127.426 and 127.431 as requiring the Department to provide actual notice of the issuance of an operating permit to anyone who submits comments pursuant to § 127.426. Specifically, § 127.431(b) states, "Each protestant who has submitted a comment within the time period in § 127.426 (relating to filing protests) will be notified personally or by mailing a copy of the plan approval disposition to the address set forth in the protest." Although "protest" is not defined, § 127.426 states that it shall consist of "a concise statement of the objections to the permit issuance and the relevant facts upon which the objections are based." Similar requirements pertaining to plan approvals are found at 25 Pa. Code §§ 127.46 and 127.51.

issuance prior to publication in the *Pennsylvania Bulletin*, their appeal period began to run on the date they received actual notice.

Ideally, every person interested in appealing an action of the Department would receive actual notice of the action. However, that is neither practical nor realistic. As the Board held in *Citizens Opposing Sewage Treatment Systems v. DER*, 1983 EHB 612:

> To place upon DER the burden of notifying directly all persons who may be adversely affected by its final action would be unreasonable and unworkable. However, in order to serve notice of appeal rights to such members of the public as might be adversely affected by the final actions of DER, and in order to meet the requirements of due process, the framers of the regulation 25 Pa. Code § 21.52(a) [a predecessor to § 1021.52(a], properly provided for publication in the *Pennsylvania Bulletin* of the fact of DER final actions which have the potential of adverse effect upon the public.

1983 EHB at 614-15 (quoted in *Green Thornbury Committee v. DER*, 1995 EHB 294, 297). As Judge Coleman explained in *Stevens*, 1996 EHB at 432, where a statute does not require personal notice, constructive notice in the *Pennsylvania Bulletin* is "adequate notice." In other words, actual notice is the gold standard, but for those situations where actual notice is not practical or feasible, courts and the Board have deemed that publication in the *Pennsylvania Bulletin* shall serve as an adequate form of notice.

The language of Section 10.2 recognizes that some potential appellants may not receive actual notice of a Department action. For those individuals or organizations, notice is deemed to occur when it is published in the *Pennsylvania Bulletin*, i.e., constructive notice. However, for those individuals or groups who receive actual notice, it does not necessarily follow that they can sit back and wait for notice to appear in the *Pennsylvania Bulletin* before appealing. The critical question is "did the potential appellant receive actual notice of the permit issuance?" If the answer is yes, that starts the 30-day appeal period. If the answer is no, then he or she is deemed to have

received notice when it appears in the *Pennsylvania Bulletin*. In our opinion, this is the only reasonable outcome. We have previously held that notice to a potential appellant must "be reasonably calculated to inform interested parties of the action taken and provide the information necessary to provide an opportunity to…appeal to the Board." *Solebury Township v. DEP*, 2003 EHB 208, 213. Where actual notice provides the necessary information, there is no reason to allow an appellant to wait until notice appears in the *Pennsylvania Bulletin.*

We recognize that the Board's rules have been interpreted as allowing such a result. Board case law has interpreted Rule 1021.52(a)(2) as allowing a third-party appellant to appeal within 30 days of when notice appears in the *Pennsylvania Bulletin* even when that appellant has received actual notice of the action prior to the *Bulletin* notice. See *Pennsylvania Fish and Boat Commission, supra; Middleport Materials, supra.* However, Board Rule 1021.52(a) differentiates between the person to whom the action is directed and third-party appellants in determining the timeframe for appealing. Section 10.2 of the Air Pollution Control Act makes no such distinction. Both aggrieved permit recipients and commenters are treated equally under Section 10.2. Under the Appellants' interpretation of Section 10.2, even the recipient of a permit who receives direct notice of the permit issuance could wait until notice appears in the *Pennsylvania Bulletin* to challenge the terms and conditions of its permit. Moreover, if a commenter is entitled to actual notice of a permit issuance pursuant to Section 127.431(b) of the Department's regulations, 25 Pa. Code § 127.431(b), as discussed in footnote 4, it makes no sense to require actual notice to the commenter but then allow that person to wait until notice appears in the *Pennsylvania Bulletin* before the appeal period begins. In that case, what is the point of requiring actual notice?

We disagree with the Appellants' reliance on *Lower Allen Citizens Group, Inc. v. Department of Environmental Resources*, 538 A.2d 130, confirmed on reconsideration, 546 A.2d

1330 (Pa. Cmwlth. 1988).[5] That case involved a mine drainage permit issued to Hempt Brothers, Inc. While the application was pending, Lower Allen Citizens Group (the citizens group) filed objections to the permit application with the Department of Environmental Resources (the predecessor to the current Department of Environmental Protection). On March 18, 1986, the Department approved the permit application and on March 20, 1986 sent a letter to the citizens group's attorney stating that any appeal from the permit application must be filed within 30 days of receipt of the letter. The citizens group did not appeal within 30 days of receiving the letter, but, rather, appealed within 30 days after notice appeared in the *Pennsylvania Bulletin*. The Board dismissed the appeal as untimely. On appeal, the Commonwealth Court reversed, finding that the appeal was timely. In reaching this conclusion, the court relied on two prior Board rules at 25 Pa. Code § 21.36 and § 21.52. Section 21.52 stated that jurisdiction of the Board did not attach unless an appeal was in writing and filed with the Board "within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the *Pennsylvania Bulletin*." (underlining in original.) Section 21.36 stated that publication of a notice of action in the *Pennsylvania Bulletin* "shall constitute notice to or service upon persons, *except a party*." (emphasis added.) The Board interpreted Section 21.52 to mean that the 30-day filing period commenced on the earlier of the two events, either written notice *or* notice in the *Pennsylvania Bulletin*. The Commonwealth Court disagreed with the Board's analysis. Based on the definition of "party" in the Board's rules, the court found that the citizens group was not a "party appellant" within the meaning of Section 21.52 but, rather, merely an "interested person" subject to the appeal period of Section 21.36.[6] On reconsideration, the court

[5] The Department also relies on *Lower Allen* in its response to MarkWest's motion to compel.

[6] In *Fontaine v. DEP*, 1996 EHB 1333, the Board also relied on the language of prior rule § 21.52 to find the appellant's appeal to be timely when he appealed within 30 days of notice in the *Pennsylvania Bulletin*

recognized the inherent inconsistency in the Board's rules. Specifically, once an interested person files an appeal, he becomes a "party;" however the court recognized that by that juncture, the appeal period applicable to "parties," set forth in former Section 21.52, may have already expired. Recognizing that the Board's rules were ambiguous, the court chose to err on the side of allowing the citizens group the opportunity to appeal.

Former Board rules, §§ 21.36 and 21.52, have been replaced by § 1021.52, which clearly distinguishes between direct recipients of an action and "everyone else." There is no longer a distinction between a "party" and "interested person." Rather, § 1021.52 makes a distinction between "the person to whom the action is directed" and "any other interested person." The court's decision in *Lower Allen* relied heavily on the distinction made in the Board's rules between the two categories of potential appellants and the type of notice designated for each one. As we have previously stated, the language of Section 10.2 of the Air Pollution Control Act makes no such distinction.

The Appellants rely on *Lower Allen* as standing for the proposition that third party appellants should be allowed a more liberal standard for filing an appeal. In contrast, we read the Commonwealth Court's decision as erring on the side of allowing a citizen group's appeal to be heard when the regulation or statute governing the timing of the appeal is ambiguous.

The Appellants further rely on the Commonwealth Court's decision in *Soil Remediation Systems, Inc. v. Department of Environmental Protection*, 703 A.2d 1081 (Pa. Cmwlth. 1997), in support of their position supporting a more liberal appeal standard. In *Soil Remediation*, the appellant requested an extension of its plan approval under the Air Pollution Control Act. On

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despite having received actual notice on an earlier date. The Board found that the appellant was not a "party" within the meaning of § 21.52 but rather an "interested person" under § 21.36.

December 6, 1996, the Department sent by facsimile a copy of a letter purporting to deny the extension request. The cover sheet was marked "advance copy." Also on December 6, 1996 the Department sent the original copy of the letter by certified mail. The appellant received the faxed advance copy on December 6, 1996 and the original copy sent by certified mail on December 9, 1996. Its appeal was filed with the Board on January 7, 1997. The Board dismissed the appeal as untimely under Section 10.2 of the Air Pollution Control Act, finding that it had been filed more than 30 days after the appellant had received "actual notice," i.e., the advance copy of the letter sent by facsimile. On appeal, the Commonwealth Court reversed. It did not discuss the language of Section 10.2 other than to discuss whether the faxed "advance copy" constituted "actual notice." It determined that the advance copy did not constitute the final action of the Department and, therefore, did not serve as notice of the Department's action. We read the Commonwealth Court's decision as not addressing whether an appeal filed under the Air Pollution Control Act must be filed within 30 days of either actual or constructive notice, or the earlier of the two. Rather, its decision centered on whether the advance copy of the letter constituted a final action of the Department.

The Appellants have provided us with no legal basis for allowing a third-party appellant with actual notice of a permit action to be treated differently than the direct recipient of the permit action other than to argue that public policy demands that citizens groups have a right to be heard. While we agree with that sentiment, we also recognize that the appeal period cannot be open-ended and there must be some bright-line establishing when an appellant – whether third-party or permittee – must file its appeal with the Board. "[W]e cannot extend the time for taking an appeal as a matter of grace or indulgence." *Feudale,* 2016 EHB at 776 (citing *Ametek, Inc. v. DEP*, 2014 EHB 65, 68, and *Rostosky*, 364 A.2d at 763). We see no basis for reading more into Section 10.2

of the Air Pollution Control Act than the language set forth by the General Assembly. As we pointed out earlier, if we were to adopt the Appellants' interpretation of Section 10.2, a permit recipient who may be unhappy with the terms of the permit could wait until notice appears in the *Pennsylvania Bulletin* before appealing even though he or she may have received actual notice from the Department weeks earlier. Section 10.2 does not distinguish between permit recipients and third-party appellants regarding the timing of filing an appeal. As we read the Department's regulations, 25 Pa. Code § 127.431(c) requires the Department to publish notice of the issuance of an operating permit but does not specify when that notice must be published. By adopting the viewpoint espoused by the Appellants, appeals would not need to be filed until notice appears in the *Pennsylvania Bulletin* even though a potential appellant may have received actual notice of the permit issuance weeks or even months earlier.

The Appellants argue that this interpretation of Section 10.2 of the Air Pollution Control Act could result in a commenter who received actual notice of a permit issuance having an earlier appeal deadline than one who learned of the permit issuance in the *Pennsylvania Bulletin*. We see no problem with this. As MarkWest correctly points out, "notice is individual to each potential appellant." (Reply Brief, p. 7.) The important question is: when did a potential appellant receive notice? Every potential appellant has 30 days to appeal from the date they received notice, or, if they did not receive actual notice, from the date notice appears in the *Pennsylvania Bulletin*. This seems to us to be a fairer result than establishing different types of notice for different categories of appellants.

Thus, we conclude that a potential appellant under the Air Pollution Control Act has 30 days from actual notice to file his or her appeal, or, if no actual notice was received, then 30 days from when notice appears in the *Pennsylvania Bulletin*.

When did the Appellants receive actual notice?

During the public comment period, the Appellants, along with Clean Air Council and several individuals, jointly submitted comments on the draft permit through Environmental Integrity Project's staff attorney, Adam Kron. (Attachment to Notice of Appeal.) On December 10, 2019, Attorney Kron received notice of the permit issuance by U.S. Mail. Notice appeared in the *Pennsylvania Bulletin* on December 14, 2019. On January 13, 2020, Attorney Kron filed an appeal on behalf of all three Appellants.

There is no question that Environmental Integrity Project received notice of the permit issuance on December 10, 2019 when its staff attorney, Adam Kron, received notice. This fact is not disputed. (Exhibit D to MarkWest's Motion for Summary Judgment, Answer to Question 10.) Therefore, the appeal of Environmental Integrity Project is untimely.

The question then is whether notice to Attorney Kron served as notice to the other two Appellants, PennEnvironment and Earthworks. The Appellants assert that Attorney Kron's legal representation of PennEnvironment and Earthworks had not commenced on the date on which Attorney Kron received notice of the permit issuance and, therefore, notice to Attorney Kron cannot be imputed to PennEnvironment and Earthworks. The Department agrees, arguing that the summary judgment record shows only that PennEnvironment and Earthworks authorized Environmental Integrity Project to submit comments on their behalf not that he was authorized to act on their behalf or accept notice on their behalf prior to commencing the appeal. The Appellants and the Department argue that these disputed material facts prevent the Board from granting summary judgment.

The Board may grant a motion for summary judgment if the record indicates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

Spencer v. DEP, EHB Docket No. 2019-121-B, slip op. at 3 (Opinion and Order on Motion for Summary Judgment issued November 16, 2020). In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party and draws all reasonable inferences in favor of the nonmoving party. *Id.*

The Appellants and Department argue that there are questions of material fact as to whether Attorney Kron was acting as the legal representative of PennEnvironment and Earthworks on December 10, 2019 when he received notice of the permit issuance. According to the Appellants, Attorney Kron's legal representation of PennEnvironment and Earthworks did not begin until January 6, 2020 and January 10, 2020, respectively. (Exhibits 1 and 2 to Appellants' Response to Motion for Summary Judgment.) MarkWest responds as follows:

> Appellants' argument that Mr. Kron had not yet commenced his "legal" representation of Appellants Earthworks and PennEnvironment on December 10, 2019 is a red herring. What matters, and what has been admitted, is that Mr. Kron was acting on behalf of **all** Appellants during the comment process. Irrespective of whether or not he was acting as their attorney Mr. Kron was acting as the representative of all Appellants when he submitted comments on their behalf.

(MarkWest Reply Brief, p. 2) (emphasis in original).

The question, then, is whether notice to Attorney Kron served as notice to PennEnvironment and Earthworks based on his submission of comments on their behalf. The comment letter states that the comments were being submitted "on behalf of" each of the organizations and individuals named therein.[7] The signatory to the letter is Adam Kron and clearly states that he is staff attorney for Environmental Integrity Project. The letter states that the comments are being submitted "On behalf of the following organizations and individuals" and

[7] Earthworks was not named in the comment letter but was added via email sent by Attorney Kron.

then lists each organization and individual, their address and telephone number, the name of one or more contacts for each organization and, in some cases, an email address. (Attachment to Notice of Appeal: p. 11 of comment letter and p. 1 of email chain from Adam Kron to Bradley Spayd, Air Quality Engineer, Department of Environmental Protection.)

As we have stated, summary judgment may only be granted when the issue is free from all doubt. It is not clear to us that notice to Attorney Kron on December 10, 2019 was sufficient to serve as actual notice to PennEnvironment and Earthworks. As noted earlier, PennEnvironment is listed in the comment letter along with the name of its Executive Director and address. The same is true for Earthworks in the follow up email sent by Attorney Kron to the Department. It is not clear to us that Attorney Kron was acting as the representative of all the commenters or merely as the signatory to the letter, i.e., the conduit by which the comments were submitted by each of the individuals and entities listed therein to the Department. We cannot hold with certainty that notice to Attorney Kron served as notice to PennEnvironment and Earthworks or, for that matter, Clean Air Council and the individuals listed in the comment letter. Where an important fact supporting dismissal of an appeal is in doubt, we follow the lead of the Commonwealth Court in *Lower Allen* and err on the side of allowing the appeal to proceed. Therefore, the motion for summary judgment against PennEnvironment and Earthworks must be denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNENVIRONMENT, EARTHWORKS, and ENVIRONMENTAL INTEGRITY PROJECT	:	
v.	:	**EHB Docket No. 2020-002-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM AND RESOURCES, LLC, Permittee	:	

O R D E R

AND NOW, this 19th day of January 2021, it is hereby ordered as follows:

1) The Motion for Summary Judgment is granted in part and denied in part.

2) The motion is granted with respect to the question of when the appeal period begins to run under Section 10.2 of the Air Pollution Control Act: Where actual notice is received prior to publication of notice in the *Pennsylvania Bulletin*, the appeal period begins to run on the date of actual notice.

3) The motion is granted with respect to the appeal of Environmental Integrity Project. Because Environmental Integrity Project's appeal was filed more than 30 days after actual notice of the permit issuance, it is untimely

4) The motion is denied with respect to the appeals of PennEnvironment and Earthworks.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

*** Judge Labuskes files an Opinion Concurring in Part and Concurring in the Result in Part, which is attached.**

DATED: January 19, 2021

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

For the Commonwealth of PA, DEP:
Michael J. Heilman, Esquire
Brian Leland Greenert, Esquire
(via electronic filing system)

For Appellants:
Lisa Widawsky Hallowell, Esquire
Adam M. Kron, Esquire
(via electronic filing system)

For Permittee:
Christopher R. Nestor, Esquire
David Overstreet, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNENVIRONMENT, EARTHWORKS, and ENVIRONMENTAL INTEGRITY PROJECT	:	
v.	:	**EHB Docket No. 2020-002-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM AND RESOURCES, LLC, Permittee	:	

OPINION BY JUDGE BERNARD A. LABUSKES, JR.
CONCURRING IN PART AND CONCURRING IN THE RESULT IN PART

By Bernard A. Labuskes, Jr., Judge

I fully concur in the Majority's Opinion and Order denying MarkWest's motion for summary judgment with respect to Appellants PennEnvironment and Earthworks. I concur with the Majority's Order dismissing Environmental Integrity Project's appeal but for somewhat different reasons than those articulated in their Opinion.

In my view, the ambiguity in Section 10.2 of the Air Pollution Control Act, 35 P.S. § 4010.2, dissipates when read in conjunction with 25 Pa. Code § 127.431. That regulation addresses the notice requirements for a Department permitting decision and it reads as follows:

> **§ 127.431. Operating permit disposition.**
>
> (a) After reviewing a protest or record of a conference or hearing, the Department may take action authorized by this chapter.
>
> (b) A notice of denial or an operating permit will be issued to the applicant. Each protestant who has submitted a comment within the time period in § 127.426 (relating to filing protests) will be notified personally or by mailing a copy of the plan approval disposition to the address set forth in the protest.
>
> (c) The Department will also publish notice of its action in the *Pennsylvania Bulletin* which will be deemed to be sufficient notice to others.

25 Pa. Code § 127.431. Thus, for applicants and commenters who are entitled to receive personal notice by mail under 25 Pa. Code § 127.431(b), until the regulatorily required notice is given, the appeal obligation does not kick in. Constructive notice in the *Pennsylvania Bulletin* is irrelevant. *See McCarthy v. DEP*, 2019 EHB 406. Conversely, *Pennsylvania Bulletin* notice only applies to "others," i.e. aggrieved persons who are neither the applicant nor the commenters. For those "others," actual notice is irrelevant. Section 10.2 of the Air Pollution Control Act neither adds to nor deletes from the notice requirements set forth in Section 127.431.[1]

Having established here that Environmental Integrity Project as a commenter was entitled to actual notice *under Section 127.431(b)* (not Section 10.2) and that as a matter of uncontested fact it received such notice, its appeal obligation kicked in pursuant to Section 10.2 when it received that notice. Constructive notice is irrelevant. Accordingly, its appeal, which was filed more than 30 days thereafter, was untimely. The other Appellants in this appeal, as commenters, were also entitled to actual notice under Section 127.431(b), but it is not clear as a matter of undisputed fact whether or when they received that notice, as the Majority in my view correctly concludes. *Pennsylvania Bulletin* notice is also irrelevant with respect to them. For all of the Appellants in this particular appeal, there is no need to decide whether actual or constructive notice was earlier.

ENVIRONMENTAL HEARING BOARD

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

DATED: January 19, 2021

[1] Section 127.431 adds a wrinkle to our rule regarding timeliness of appeals, 25 Pa. Code § 1021.52, by putting commenters in the same stead as persons to whom the Department's action is directed such that appeals must be filed within 30 days of actual notice.

RANGE RESOURCES-APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 27, 2021**
	:	

OPINION AND ORDER ON
RANGE'S MOTION TO DEPOSE

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Board denies Range's Motion to Depose witnesses who have been designated as expert witnesses. Expert witnesses may not be deposed absent an agreement of counsel or an order of the Board. The Board will rarely grant such a motion prior to the production of expert reports. Since expert reports have not yet been produced the Board denies the Motion to Depose without prejudice.

D I S C U S S I O N

Presently before the Pennsylvania Environmental Hearing Board (Board) is Range Resources-Appalachia LLC's (Range) Motion to Depose three individuals who are employees or former employees of the Pennsylvania Department of Environmental Protection (Department). The Department opposes the Motion to Depose. Range seeks to take the depositions of Bruce Jankura, William Kosmer and Bryce McKee. Motion to Depose, paragraph 1. The Department has identified all three individuals as expert witnesses and has provided summaries of their testimony pursuant to an agreement of counsel. It has not yet produced their expert reports as the Board has recently extended those dates, among others, for all expert witnesses identified by the

parties. We ordered the Department to serve its expert reports on March 31, 2021 with Range to serve its responsive expert reports on May 5, 2021. Any rebuttal expert reports of the Department need to be served on or before May 27, 2021. Finally, we extended discovery until July 15, 2021. Order, Docket No. 46, January 13, 2021.

Range contends that it does not seek to depose these three witnesses regarding their anticipated expert opinions or the grounds and bases of their expert opinions. Instead it seeks to depose them as it would any other fact witness pursuant to Pennsylvania Rule of Civil Procedure 4003.1. Motion to Depose, paragraph 4. The Department refused to produce the three individuals unless Range agreed to restrict its examination to "factual knowledge that does not otherwise form the basis of [their] respective opinions." Motion to Depose, paragraph 2. Range refused to limit its questioning accordingly. Motion to Depose, paragraph 3.

The Department points out that "expert discovery before the Board has never been a simple matter and while the Board generally subscribes to the Pennsylvania Rules of Civil Procedure in discovery matters, those rules, geared for civil proceedings between private parties, are not always a good fit to the unique quasi-judicial administrative proceedings before the Board. *Solebury Township v. DEP,* 2007 EHB 244, 246. This is especially true in matters of expert witness discovery. *Id."* Department's Memorandum of Law, page 3. As the Department states in its memorandum of law, "Accordingly, practice before the Board has evolved over the past 50 years, and throughout this history, the Board has established certain general rules to ensure clarity for all litigants on Board Rules and practices regarding expert witness discovery." Department's Memorandum of Law, page 3. We agree.

We look first for guidance to Pennsylvania Rule of Civil Procedure 4003.5. This Rule governs the discovery of expert testimony. The Rule covers various areas of expert testimony

including the identification of the expert and importantly the "discovery of facts known and opinions held by an expert...." Rule 4003.5 (a). We have generally followed the provisions of the Rule but have modified it to recognize the unique circumstances of practice before the Board. For example, the circumstances as to how the expert acquired her knowledge, both factual and opinion, have been less important to the Board in its application of Rule 4003.5.

> As a result of this evolution, any individual who will be called as an expert witness in any hearing on the merits before the Board, including Department employees, are subject to both the requirements and the protections afforded by Pennsylvania Rule of Civil Procedure 4003.5…*Borough of Edinboro v. DEP*, 2003 EHB 725, 771-772. *Solebury*, 2007 EHB at 248; *Primrose Creek Watershed v. DEP*, 2013 EHB 196, 200…Because a Department employee who is properly identified as an expert witness is required to provide expert discovery under Rule 4003.5, that Department employee is also protected from a deposition absent an agreement of the parties or by Board order. *Solebury*, 2007 EHB at 248; *Primrose Creek*, 2013 EHB at 200; *Groce v. DEP*, 2005 EHB 951, 955.
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> Department's Memorandum of Law, pages 3-4.

Rule 4003.5 recognizes that much of the information the expert possesses may overlap with information that would be readily discoverable under the scope of permissible discovery set forth in Pennsylvania Rule of Civil Procedure 4003.1. Importantly, the Rule not only applies to the opinions of the proposed expert but also to her factual knowledge. *Groce v. DEP*, 2005 EHB 951, 955. Many times, there is a tension between the additional requirements governing expert testimony and general factual discovery. That tension is evident here. Over a period of many years the Board has overseen a practice that requires any individual who is identified as an expert to adhere to the requirements set forth in Rule 4003.5 regarding expert testimony. Therefore, a proposed expert must either answer expert interrogatories or in the alternative serve a detailed expert report.

In *Primrose Creek Watershed Assoc. v. DEP*, 2013 EHB 196, the Board was faced with a similar issue. Appellants moved to compel the depositions of two individuals who the Permittee had designated as experts who possessed extensive factual knowledge that they acquired independent of the litigation. The Board denied the motion to compel the depositions without prejudice.

> As we said in *Dauphin Meadows*, the purported distinction between past work (ostensibly not protected) and the facts known and opinions held by an expert that will be the subject of his trial testimony (protected under Rule 4003.5) is largely illusory. 1999 EHB at 832…Allowing partial depositions strikes us as something of an end run around the rule that is designed to defeat its purpose. It is inefficient, duplicative, and it allows an opposing party to discover what is in reality expert work-product for free. Holding that a particular individual is governed only in part by Rule 4003.5 also causes unnecessary complications.
>
> 2013 EHB at 199.

Although the Board has allowed partial depositions as the circumstances warranted in the past we continue to believe that such depositions should be the exception rather than the rule. 2013 EHB at 200; *Groce v. DEP*, 2005 EHB at 955. Therefore, we will continue to apply Rule 4003.5's procedures and requirements to requests to depose a witness who has been designated as an expert whether or not that person is also an employee of a party or not. We believe that such requests in most cases should be decided after the exchange of expert reports "upon cause shown." Pa. R. Civ. P. 4003.5 (a)(2).

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES-APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 27th day of January, 2021, after consideration of Range's Motion to Depose witnesses and the Department's Response, it is ordered as follows:

1. All three of the witnesses Range seeks to depose have been designated as experts. The witnesses have not yet prepared and produced their respective expert reports.

2. Expert witnesses may not be deposed absent an agreement of counsel or an Order of the Board.

3. In most instances, it is premature for the Board to consider and decide such motions to compel prior to the production of the expert reports.

4. Range's Motion to Depose witnesses is therefore **denied at this time without prejudice.**

ENVIRONMENTAL HEARING BOARD

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

DATED: January 27, 2021

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SUNOCO PIPELINE, L.P.	:	
	:	
v.	:	**EHB Docket No. 2019-119-B**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 4, 2021**

OPINION AND ORDER ON SUNOCO PIPELINE L.P.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

By Steven C. Beckman, Judge

Synopsis

Appellant's motion for partial summary judgment is denied where the Appellant failed, as a matter of law, to demonstrate that the Department lacked legal authority under the Clean Streams Law to issue an order requiring the Appellant to bury certain exposed pipelines located in upland locations. Further, the record evidence was sufficient to allow the Department to make a *prima facie* case that the exposed upland pipelines create a danger of pollution under the Clean Streams Law.

O P I N I O N

Background

On September 11, 2019, the Department of Environmental Protection ("the Department") issued an Administrative Order ("the Order") to Sunoco Pipeline L.P. ("Sunoco") requiring Sunoco to address sections of exposed pipeline across Pennsylvania. According to the Order, Sunoco provided the Department with a Pipe Exposure Table ("July Table") on July 23, 2019,

that identified 47 sections of exposed pipelines. On August 20, 2019, Sunoco provided an updated Table ("August Table") that included two additional locations with exposed pipeline. The August Table stated that Sunoco had remedied five sections of the pipeline identified in the July Table, plus one additional location, bringing the number of exposed pipeline locations to 43 at the time of the Order. Sunoco appealed the Department's Order on October 11, 2019, then later amended its Notice of Appeal on October 13, 2019. The discovery period in this case ran for approximately one year with the parties first jointly requesting a 90-day extension of discovery and then the Board issuing its COVID-19 General Order which further extended the discovery period in this matter until October 13, 2020.

On November 9, 2020, Sunoco filed a Motion for Partial Summary Judgment ("the Motion"). In its Motion, Sunoco argues that the Department lacks legal authority to order Sunoco to bury exposed pipelines in upland areas and that the Department has failed to make a *prima facie* case that the upland pipelines create a danger of pollution. Along with its Motion, Sunoco also filed a Statement of Undisputed Material Facts and its Brief in Support of Motion for Partial Summary Judgment ("Sunoco's Brief"). The Department filed a Concise Statement in Response to Sunoco's Motion ("the Department's Response") and its Brief in Opposition to Sunoco's Motion for Partial Summary Judgment ("the Department's Brief") on December 16, 2020. Sunoco filed a Reply to Department's Response to Statement of Undisputed Material Facts and Additional Facts ("Sunoco's Reply") and a Reply Brief in Support of Motion for Partial Summary Judgement ("Reply Brief") on January 7, 2021. The Board is now prepared to rule on the Motion.

Standard

The Board grants summary judgment in only the clearest of cases where the right to summary judgment is clear and free from doubt. 25 Pa. Code § 1021.94a(b); Pa.R.C.P. 1035.2; *Tri-Realty v. DEP*, 2016 EHB 214, 217; *PDG Land Development, Inc. v. DEP*, 2009 EHB 268, 271. "Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law." *Williams v. DEP,* 2019 EHB 764, 765-66; *See* 25 Pa. Code Section 1021.94a; Pa.R.C.P. 1035.1-1035.2; *Holbert v. DEP,* 2000 EHB 796, 807-08. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the non-moving party. *Stedge v. DEP,* 2015 EHB 31, 33. The Board has also held that in cases involving complex issues of fact and law, summary judgment may not be appropriate. We believe such matters should be decided on a fully developed record at a merits hearing. *Center for Coalfield Justice v. DEP*, 2016 EHB 341-47; *Clean Air Council v. DEP*, 2013 EHB 404, 410-11.

Analysis

The Department's Order requires Sunoco to address 43 locations where sections of Sunoco's pipelines transporting refined petroleum products or natural gas liquids became exposed over time. These exposed pipeline sections were identified by Sunoco and presented to the Department in an updated table identified in the Order as the August Table. Sunoco's Motion requests a partial summary judgment covering just four of the pipeline segments (PA_E_3, PA_E_14, PA_E_15 and PA_E_40[1]) listed in the August Table. Sunoco collectively

[1] The Department stated in its Response that the pipeline segment identified as PA_E_40 is not subject to the Order because it had already been remediated prior to the issuance of the Order. Sunoco admits in its Reply that PA_E_40 was listed as remediated on the tables presented to the Department at the meetings listed in the Order but does not address the Department's contention that PA_E_40 was not subject to the

refers to these four pipeline segments as the "Upland Pipelines" and we will do the same. The actual physical location of these four pipeline segments in upland areas is the underlying factual basis for Sunoco's position that it should receive a partial summary judgment.

In its Motion, Sunoco sets forth two lines of argument in support of its claim for partial summary judgment. Its first argument is that the Department lacked necessary legal authority to issue the Order. Specifically, Sunoco alleged that the "Department lacked authority under the Clean Streams Law to issue the Administrative Order to Sunoco based on a general finding that exposed pipelines in upland areas create a danger of pollution without regulations governing this general activity. The Department also unlawfully applied a regulation relating to pipelines under stream beds to pipelines in upland areas." (Motion at 1). Sunoco asserts that there is a second independent basis for summary judgment in that "the Department, which bears the burden of proof in this matter, lacks sufficient evidence of facts necessary to establish even a *prima facie* case that the exposed pipeline segments located in upland areas create a danger of pollution under the Clean Streams Law." (Motion at 2). In its Response, the Department states that Sunoco is not entitled to partial summary judgment. The Department asserts that Sunoco has failed to satisfy the standards for summary judgment because "Sunoco's arguments in support of their Motion are dependent on questions of disputed fact and the interpretation and application of law with respect to disputed facts." (Response at 1). After reviewing the detailed filings of the parties, we agree with the Department and hold that Sunoco is not entitled to the partial summary judgment it requests in this case.

Order. The Order itself does not provide enough detail for the Board to make a determination of the status of PA_E_40 under the Order since the Order does not list the covered pipeline segments or include the August Table on which the Order is based as an attachment. Therefore, we are making no determination whether PA_E_40 is subject to the Order and its unresolved status further supports our decision to not grant a partial summary judgment as requested by Sunoco Pipeline.

In issuing the Order to Sunoco, the Department states that its Order is "pursuant to Section 20 of the Dam Safety and Encroachments Act, 32 P.S § 693.20; Sections 5, 402, and 610 of The Clean Streams Law, 35 P.S. §691.5, 691.402, 691.610; and Section 1917-A of the Administrative Code, 71 P.S.§ 510-17." Sunoco's first argument is that as a matter of law, the Department lacked authority under Section 402(a) of the Clean Streams Law to issue the Order requiring Sunoco to address the Upland Pipelines[2]. In Sunoco's Brief, it summarizes the Department's authority by stating "Section 402(a) makes clear that when a ***general activity*** creates a danger of pollution, the Department has authority to ***adopt rules and regulations*** regulating that general activity, and when a person's ***particular activity*** creates a danger of pollution, the Department may ***issue an order*** to that person regulating that particular activity." (Sunoco's Brief at 8, emphasis in original). Sunoco asserts that the Department has not adopted rules and regulations governing the general activity it identifies as the danger of pollution posed by exposed pipelines in upland locations. Sunoco contrasts this lack of specific rules and regulations governing the danger of pollution from upland pipelines with the Department regulations governing pipelines in and along streams, citing to 25 Pa. Code §§ 105.313 and 105.314. The Department argues that Sunoco's claim that the Department lacks the authority to require Sunoco to address the exposed upland pipelines relies on "a contrived interpretation of Section 402(a)" that is not supported by a plain reading of the section. (Department's Brief at 6).

[2] In its Brief, the Department states that even if the Board were to rule in Sunoco's favor on the issue of Section 402(a) authority, Sunoco did not challenge the Department's authority under the other sections of the Clean Streams Law and the Administrative Code set forth in the Order. Citing the Board's decision in *Milco Industries, Inc. v. DEP,* 2002 EHB 723, the Department argues that there would be no practical consequence in the Board reviewing this case since the litigation would continue under these other sections and, therefore, we should deny the request for partial summary judgment. Sunoco argues in its Reply Brief that these additional sources of law are of no effect and that the Department's position on this issue is contradicted by the Department's discovery responses. Because we conclude that the Department had authority to issue the Order under Section 402(a), we need not address the issue of what other authority it may have had under these other sections cited in the Order.

The Department asserts that it is not required to go through the lengthy regulatory process before issuing an order to address an activity that poses a danger of pollution. The Department points to the language in Section 402(a) that states, "Whenever the department finds that any activity, … creates a danger of pollution of the waters of the Commonwealth …, the department may issue an order to a person … regulating a particular activity."

In its Motion, Sunoco asks that we find that it is entitled to partial summary judgment because the Department lacked, as a matter of law, authority under Section 402(a) to issue the Order requiring Sunoco to address the Upland Pipelines. We reject Sunoco's position and find that, under Section 402(a) of the Clean Streams Law, the Department had sufficient statutory authority to issue the Order and require Sunoco to remediate the Upland Pipelines. In arguing for partial summary judgment, Sunoco primarily relies on its reading of the requirements in Section 402(a) that address what Sunoco terms a "general activity."[3] By Sunoco's reasoning, the act of burying exposed pipelines in upland areas constitutes a "general activity" and would require the Department to pass rules and regulations to establish the requisite authority to direct the covering of such pipelines. Sunoco states that the Department has not passed the necessary rules and regulations requiring the burial of exposed pipelines in upland locations and that the Department improperly relies on 25 Pa. Code §105.313[4] that requires three feet of cover for

[3] The terms "general activity" and "particular activity" do not appear in the text of Section 402(a) but are used by Sunoco in its partial summary judgment filings. Because we find the terms useful in addressing Sunoco's request, we use them in our opinion but want to make clear that those terms are not part of the statutory text.

[4] Sunoco argues that the Department improperly applied the requirements of this regulation to the remediation of the exposed Upland Pipelines because the regulation only governs pipelines found in stream beds. The Department seems to correctly acknowledge that 25 Pa. Code §105.313 does not apply to the Upland Pipelines but does appear to apply the requirement of three feet of cover over pipelines in stream beds found in the regulation to the remediation of the Upland Pipelines. It is unclear to us whether Sunoco believes that the application of this regulation would be a third independent basis for granting a partial summary judgment or offered it as evidence that the Department lacked regulatory authority required to regulate a "general activity." To the extent it was intended to be an independent basis for a

pipelines located in stream beds. Therefore, absent the necessary rules and regulations governing this "general activity," Sunoco asserts that the Department lacks the authority to issue the Order. The problem with Sunoco's partial summary judgment argument is that Section 402(a) provides additional authority to the Department, permitting it to issue orders to address a "particular activity" that creates a danger of pollution. This "particular activity" provision allows the Department to address conditions that create a danger of pollution and is the Section 402(a) authority that the Department states that it relied on in issuing the Order. A plain reading of this Section 402(a) language persuades us that the Department can order Sunoco to address the exposed Upland Pipelines. Sunoco's arguments set forth in its Motion and Brief failed to directly address the authority that the Department has under the "particular activity" language in Section 402(a). Sunoco set forth a limited argument that the Department could not rely on this section because it lacked evidence that there was a danger of pollution. (Sunoco's Reply at 2). Whether the exposed Upland Pipelines posed a danger of pollution is really a factual issue which Sunoco acknowledges and addresses more directly under its second line of argument dealing with whether the Department can establish its *prima facie* case. In the end, we conclude that Sunoco has failed to demonstrate that, as a matter of law, the Department lacked statutory authority under Section 402(a) to issue the Order requiring Sunoco to address the Upland Pipelines.

Sunoco's second line of argument is that the record evidence shows that the Department cannot establish a *prima facie* case that the exposure of the Upland Pipelines creates a danger of pollution and, therefore, cannot rely on the "particular activity" authority for the Order. Sunoco asserts that the Department failed to conduct any site-specific fact finding regarding the Upland

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partial summary judgment, we find that there are issues of fact related to the Department's actions that would preclude us from granting partial summary judgment on that basis.

Pipelines and therefore lacks a factual basis for finding that they pose a danger of pollution under Section 402(a) of the Clean Streams Law. Sunoco further argues that the Department's discovery responses make clear that the only evidence that the Department has concerning the danger of pollution is Sunoco's acknowledgement in the August Table that these sections of the Upland Pipelines have been exposed. As a result, Sunoco concludes that the Department is "speculating on a multi-link chain of potential events that could theoretically cause pollution without producing any site-specific evidence supporting those allegations." (Sunoco's Brief at 13).

The Department states that it has established a *prima facie* case for the issuance of the Order. It argues that the danger of pollution posed by the exposed pipelines arises from the "lack of adequate cover which increases the susceptibility of the pipelines to damage from external forces." (Department's Brief at 13). The Department notes that Sunoco had investigated the condition of the pipelines and presented the Department with a thorough table, documenting the results of that investigation and providing a date by which Sunoco planned to address the conditions identified at the locations of the Upland Pipelines. The Department also states that at the August 2019 meeting, Sunoco indicated that the Upland Pipelines were exposed by erosion. The only issue, according to the Department, was the timing for Sunoco to undertake remediation of the exposed Upland Pipelines. The Department wanted that work completed sooner than the dates provided by Sunoco on its August Table. The Department argued that there was no reason to delay the safety issue created by the exposed Upland Pipelines and that it was not required to wait for an accident to occur before issuing the Order.

The issue of whether the Department can establish its *prima facie* case rests on whether the record evidence is sufficient for the Department to show that the activity in question, the

movement of petroleum products through the Upland Pipelines after their exposure by erosion, constitutes a danger of pollution. Citing the Board's decision in *ADK Development Corp. v. DEP*, 2009 EHB 251, Sunoco correctly points out that determining whether a "particular activity" constitutes a danger of pollution requires a factual analysis conducted on a case-by-case basis. (Sunoco's Brief at 12). In *Milco,* 2002 EHB at 725, the Board discussed what constituted a "danger of water pollution." The Board carefully reasoned that the appropriate definition of "danger of pollution" lies somewhere between the two extremes of "something less than actual proven pollution" and every conceivable circumstance that could theoretically cause pollution. *Id.* There is no evidence in the record of actual proven pollution from the Upland Pipelines. Sunoco argues that the record in this case is closer to the "every conceivable circumstance" extreme because the Department's finding that there is a danger of pollution from the Upland Pipelines relies on speculation by the Department about a chain of potential events that could theoretically cause pollution.

Sunoco's challenge as to whether the record is sufficient for the Department to establish its *prima facie* case has some initial appeal. The Department's case would certainly be stronger if it had conducted an on-site investigation of the Upland Pipelines, but when we view the record in the light most favorable to the Department, as we are required to do when ruling on a summary judgment request, we find that there is sufficient record evidence from which the Department can establish its *prima facie* case that the Upland Pipelines pose a danger of pollution of the waters of the Commonwealth. In a motion for summary judgment challenging whether there is sufficient *prima facie* evidence, the Board will not gauge the quality of the evidence but will simply determine whether there is enough evidence to form a *prima facie* case.

Diehl v. DEP and Angelina Gathering Company, *LLC*, 2018 EHB 18, 24. In this case, we conclude that there is enough evidence.

The facts of record support a showing that the Upland Pipelines are exposed, and that this exposure is the result of erosion. In its answers to interrogatories, the Department stated that representatives of Sunoco confirmed that the exposed pipelines on the August Table could be seen by visual observation and that there was no soil cover. (Sunoco's Brief, Exhibit B, Int. 9 to Exhibit 3, Affidavit of Suzanne Ilene Schiller). In an affidavit attached to the Department's Response, Domenic Rocco, the Director of the DEP's Regional Permit Coordination Office, affirms that exposed pipelines are susceptible to damage due to the lack of adequate cover. (Department's Response, Exhibit 3, Para. 34). Further, the Department stated that Sunoco had represented to the Public Utility Commission ("PUC") that the exposed pipelines were identified as "risky" in Sunoco's integrity management plan and that the PUC represented to the Department that it considered the exposed pipelines to be a safety issue. (Sunoco's Brief, Exhibit A, Int. 20 to Exhibit 3, Affidavit of Suzanne Ilene Schiller). Based on these facts, it is not a significant leap in logic for the Department to conclude that the Upland Pipelines pose a danger of pollution to the waters of the Commonwealth. The forces that eroded the material formerly covering the Upland Pipelines could continue to act on the now exposed pipelines and potentially result in a discharge of the petroleum products being transported by the Upland Pipelines. A discharge from the Upland Pipelines would more likely than not lead to pollution of the waters of the Commonwealth either through groundwater contamination or surface runoff into a water body. Contrary to the position argued by Sunoco, we do not find that the Department's determination that the exposed Upland Pipelines pose a danger of pollution requires unreasonable speculation about a multi-link chain of events, nor does it reflect the

Department stretching the facts to concoct a scenario where there was a danger of pollution. In every circumstance where the Department's action is based on the danger of pollution as opposed to actual pollution, there will always be some degree of speculation about future events which may or may not come to pass. Where the Department can muster sufficient facts to demonstrate that the danger of pollution is not purely theoretical or that an implausible series of events is not required to reach that conclusion, it will likely be able to establish a *prima facie* case when challenged in the context of a summary judgment motion. We can envision a set of facts where the danger of pollution to the water of the Commonwealth from a given activity is sufficiently remote that the Department could not establish a *prima facie* case and would lack authority to act under the Clean Streams Law. However, this is not such a case. The record evidence is sufficient for the Department to establish a prima facie case for issuance of the Order and Sunoco is not entitled to the partial summary judgment it requested on this issue.

For the reasons set forth above, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SUNOCO PIPELINE, L.P.	:	
	:	
v.	:	**EHB Docket No. 2019-119-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 4th day of February, 2021, it is hereby ORDERED that Appellant's motion for partial summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: February 4, 2021

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

PENNENVIRONMENT, EARTHWORKS, and ENVIRONMENTAL INTEGRITY PROJECT	:	
v.	:	**EHB Docket No. 2020-002-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM AND RESOURCES, LLC, Permittee	:	**Issued: February 8, 2021**

OPINION AND ORDER ON PERMITTEE'S
MOTION TO AMEND INTERLOCUTORY ORDER

By Thomas W. Renwand, Chief Judge

Synopsis

The Board denies a motion to amend its prior Opinion and Order to certify an issue for immediate appeal where there is not a controlling question of law, but, rather, the issue for appeal involves mixed questions of law and fact.

O P I N I O N

Introduction

This matter originated as an appeal filed jointly by PennEnvironment, Earthworks, and Environmental Integrity Project (Appellants), challenging the Department of Environmental Protection's (Department) issuance of State-Only Operating Permit No. 63-00968 (permit) to MarkWest Liberty Midstream and Resources, LLC (MarkWest). The permit authorizes the continued operation of MarkWest's Smith Compressor Station, an existing natural gas compressor station in Smith Township, Washington, previously permitted under a general permit, GP-5.

On October 20, 2020, MarkWest filed a motion for summary judgment on the grounds that the Appellants' appeal was untimely. MarkWest argued, first, that pursuant to the Air Pollution Control Act, Act of 1959-787, P.L. 2119, *as amended*, 35 P.S. §§ 4001-4015, the Appellants were required to file their appeal within 30 days of actual or constructive notice of the permit issuance, whichever occurred first. Second, it argued that notice to Environmental Integrity Project's staff attorney, Adam Kron, constituted notice to all three Appellants since Attorney Kron had submitted comments on behalf of all the Appellants during the permit review process. Additionally, Attorney Kron filed the present appeal on behalf of all three Appellants.

The Board granted summary judgment in part and denied it in part. As to the question of when an appeal must be filed under the Air Pollution Control Act, the Board agreed with MarkWest that, pursuant to the language of Section 10.2 of the Act, 35 P.S. § 4010.2, if a would-be appellant receives actual notice of a permit issuance prior to notice appearing in the *Pennsylvania Bulletin*, the 30-day clock for filing an appeal starts ticking on the date of actual notice. Because there was no dispute that notice of the permit issuance had been received by Attorney Kron by U.S. mail on December 10, 2019, 34 days prior to the filing of the appeal, the Board granted summary judgment to MarkWest on this issue and dismissed the appeal of Environmental Integrity Project as untimely.

As to the second question, whether notice to Attorney Kron served as notice to the other two Appellants, PennEnvironment and Earthworks, the Appellants asserted that Attorney Kron's legal representation of PennEnvironment and Earthworks did not commence until well after submission of the comments and within 30 days of filing the appeal. MarkWest, on the other hand, argued that because Attorney Kron had been authorized to submit comments on behalf of all the Appellants, he was authorized to receive notice on their behalf regardless of whether legal

representation had commenced. The Board denied summary judgment on the grounds that there were disputed issues of material fact as to whether notice to Attorney Kron constituted notice to PennEnvironment and Earthworks. *PennEnvironment v. DEP*, EHB Docket No. 2020-002-R (Opinion and Order on Motion for Summary Judgment issued January 19, 2021) (January 19, 2021 Opinion and Order). On January 25, 2021, MarkWest filed a motion asking the Board to certify this matter for immediate appeal.

Discussion

That portion of our January 19, 2021 Opinion and Order denying summary judgment is an interlocutory order that may only be appealed by permission of the appellate court. *Clean Air Council v. DEP*, 2018 EHB 120, 121. As explained in *Becker v. DEP*, 2016 EHB 65, 69, "Interlocutory orders are an intermediate step in the ultimate resolution of a cause of action. Since they are not final, they are not immediately appealable, except in remarkable circumstances." Interlocutory appeals by permission are governed by Chapter 13 of the Pennsylvania Rules of Appellate Procedure. Pa.R.A.P. 312; *Erie Coke Corporation v. DEP*, 2019 EHB 574, 575. Rule 1311(a) states that an interlocutory appeal may be taken by permission pursuant to 42 Pa.C.S. § 702(b). Section 702(b) provides:

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

42 Pa.C.S. § 702(b). As further explained in *Becker*, "To be appealable, an interlocutory order must first contain the pertinent language of 42 Pa.C.S. § 702(b) before a party may petition the

appellate court for review. Pa.R.A.P. 1311(b). If the order does not contain the requisite language, a party must submit to the lower court or government unit an application to amend the order to include the language of Section 702(b)." 2016 EHB at 70. The procedure for seeking amendment of an interlocutory order is found in the Board's rules at 25 Pa. Code § 1021.153.

In determining whether to amend an interlocutory order for immediate appeal, "the Board is called on to offer an honest appraisal whether it believes an immediate appeal to the Commonwealth Court would be worthwhile." *Erie Coke*, 2019 EHB at 576 (citing *Clean Air Council v. DEP*, 2018 EHB at 122. See also *UMCO Energy, Inc. v. DEP*, 2004 EHB 832, 836 ("These provisions essentially create a duty on our part that we owe to the Commonwealth Court to give an honest appraisal of whether we think an immediate appeal would be worthwhile.") In making this determination, we must assess whether the necessary standards are present: 1) the order involves a controlling question of law; 2) there is substantial ground for difference of opinion on that controlling question of law; and 3) an immediate appeal from the interlocutory order may materially advance the ultimate termination of the matter. *Erie Coke*, 2019 EHB at 576 (citing *Rausch Creek v. DEP*, 2013 EHB 851, 855 and *UMCO,* 2004 EHB at 836). The Board's decision whether to amend an interlocutory order is discretionary. *Id.* (citing *CNG Transmission Corp. v. DEP*, 1998 EHB 548, 550, and *Mercy Hospital of Pittsburgh v. Pa. Human Relations Commission*, 451 A.2d 1357 (Pa. 1982)).

MarkWest asserts that the controlling question of law presented here is whether notice to Attorney Kron of the permit issuance served as notice to PennEnvironment and Earthworks. A controlling question is "controlling of the actual issue at the heart of the case." *Erie Coke*, 2019 EHB at 582. While we agree with MarkWest that the question it presents may be controlling as to whether the appeal moves forward, we disagree that it is purely a question of law. As we explained

in *Rausch Creek*, 2013 EHB at 858, a "pure question of law" is one that "can be discussed without reference to the facts of the case at hand." Here, we find that the question of whether notice to Attorney Kron served as notice to all Appellants is a mixed question of law and fact. As we explained in the January 19, 2021 Opinion and Order:

> [S]ummary judgment may only be granted when the issue is free from all doubt. It is not clear to us that notice to Attorney Kron on December 10, 2019 was sufficient to serve as actual notice to PennEnvironment and Earthworks. As noted earlier, PennEnvironment is listed in the comment letter along with the name of its Executive Director and address. The same is true for Earthworks in the follow up email sent by Attorney Kron to the Department. It is not clear to us that Attorney Kron was acting as the representative of all the commenters or merely as the signatory to the letter, i.e., the conduit by which the comments were submitted by each of the individuals and entities listed therein to the Department. We cannot hold with certainty that notice to Attorney Kron served as notice to PennEnvironment and Earthworks or, for that matter, Clean Air Council and the individuals listed in the comment letter. **Where an important fact supporting dismissal of an appeal is in doubt, we follow the lead of the Commonwealth Court in *Lower Allen* and err on the side of allowing the appeal to proceed.** Therefore, the motion for summary judgment against PennEnvironment and Earthworks must be denied.

Slip op. at 16 (emphasis added).

We find this matter to be similar to other instances where the Board has declined a request to amend an order for interlocutory appeal due to the issue involving questions of fact. In *Clean Air Council*, we considered a motion to amend an order for interlocutory appeal. That matter also involved the denial of a motion for summary judgment. In denying the motion to certify the order for appeal, the Board noted, "What the [appellant] is really attempting to do is seek appellate review of mixed questions of fact and law." 2018 EHB at 125. In our opinion, that is exactly the situation here. We believe there will be very few instances where the denial of a motion for

summary judgment will meet the criteria for interlocutory appeal since, in most instances, summary judgment motions are denied due to the existence of disputed material facts.

MarkWest further argues as follows:

> If the single comment letter submitted by Mr. Kron "on behalf of" **all** Appellants establishes **each** Appellant's standing to appeal, then the Department's single response to that comment letter, and Mr. Kron's receipt of it on December 10, 2019, must have the same legal effect for purposes of establishing notice to **each** Appellant on whose behalf the single comment letter was submitted. Should the Board conclude otherwise, then it must also conclude that the only entity that had standing to appeal based upon the single comment letter submitted by Mr. Kron "on behalf of" all Appellants was now-dismissed Appellant Environmental Integrity Project. Appellants simply cannot have it both ways. They cannot claim the single comment letter for purposes of establishing standing for each Appellant and disclaim the Department's single response to that letter for purposes of notice.

(MarkWest's Memorandum of Law, p. 4-5) (emphasis in original).

After much review, we find that we agree with the Department and Appellants that this argument conflates the concepts of standing and notice under the Air Pollution Control Act. As the Department states in its response:

> "Standing" under the [Air Pollution Control Act] may be based on whether a person "participated in the public comment process." Section 10.2 of the [Air Pollution Control Act], 35 P.S. § 4010.2. PennEnvironment and Earthworks each "participated in the public comment process," whether they submitted comments themselves or comments were submitted on their behalf. "Notice," on the other hand, is knowledge of an action that a party gains directly or is legally attributed to it by notice to another party. For a party that **already has standing**, "notice" establishes the start of its time to appeal. The circumstances giving rise to PennEnvironment's and Earthworks' standing to appeal this action has no bearing on PennEnvironment's and Earthworks' entitlement to notice of the action. Accordingly, whether notice to Mr. Kron constitutes notice to PennEnvironment and Earthworks is a mixed question of law and fact and does not satisfy the first requirement of 42 Pa.C.S. § 702(b).

(Department's Response, p. 2-3) (emphasis in original).

Because we find that the first factor under 42 Pa.C.S. § 702(b) has not been met, i.e., the matter does not involve a controlling question of law, there is no need to evaluate the other criteria for interlocutory appeal. *Clean Air Council*, 2018 EHB at 122 (citing *Rausch Creek*, 2013 EHB at 858). Therefore, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNENVIRONMENT, EARTHWORKS, and ENVIRONMENTAL INTEGRITY PROJECT	:	
v.	:	**EHB Docket No. 2020-002-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM AND RESOURCES, LLC, Permittee	:	

O R D E R

AND NOW, this 8th day of February 2021, it is ordered that the Permittee's Motion to Amend Interlocutory Order to certify it for immediate appeal is *denied.*

ENVIRONMENTAL HEARING BOARD

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

DATED: February 8, 2021

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

For the Commonwealth of PA, DEP:
Michael J. Heilman, Esquire
Brian Leland Greenert, Esquire
(via electronic filing system)

For Appellants:
Lisa Widawsky Hallowell, Esquire
Adam M. Kron, Esquire
(via electronic filing system)

For Permittee:
Christopher R. Nestor, Esquire
David Overstreet, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY SCHATZ GARAGE LLC	:	
	:	
v.	:	**EHB Docket No. 2020-021-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, LANCASTER COUNTY CONSERVATION DISTRICT and BOROUGH OF MOUNT JOY, Permittee	:	**Issued: March 2, 2021**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion for summary judgment where the movant has failed to show based upon undisputed facts as a matter of law that there is any actual or possible defect in a permittee's post construction stormwater management plan for a project that is limited to the enlargement of a preexisting stormwater basin.

O P I N I O N

Introduction

The Appellant, Gary Schatz Garage LLC ("Schatz Garage") operates an automobile repair garage at 1090 West Main Street in Mount Joy, Pennsylvania. There is a stormwater detention basin on the property owned by the Borough of Mount Joy next to and upslope from the garage. The Borough would like to enlarge and improve the basin to help mitigate downslope flooding. Schatz Garage has suffered from that flooding in the past. The Borough has obtained funding for this flood mitigation project from the Commonwealth Financing Agency. The project site for the

Borough's detention basin modification project will consist of 3.9 acres with a total disturbed area of 1.85 acres. The project will increase the basin's capacity by at least 147,000 cubic feet while creating no new impervious surfaces. All of the work relates to the basin itself; it does not involve any new upslope development. The Borough plans to restore the basin's vegetative surface back to its preexisting condition, except for the removal of a couple of trees necessitated by the enlargement. There is no dispute that the project will *not* result in any increase in stormwater runoff volume. Nor is there any indication in the record at this juncture that the project will change stormwater flowing into it in any way.

In order to carry out the project the Borough applied for coverage under the NPDES General Permit for Discharges of Stormwater Associated with Construction Activities ("PAG-02"). The Lancaster County Conservation District, as delegatee of the Department of Environmental Protection (the "Department"), reviewed the Borough's Notice of Intent (NOI) to obtain coverage and approved coverage. The Conservation District determined that the basin project constituted "site restoration" of "utility infrastructure." The regulation codified at 25 Pa. Code § 102.8 ordinarily requires a person proposing a new earth disturbance activity at a "project site" that requires permit coverage to prepare a post construction stormwater management (PCSM) plan describing best management practices (BMPs) that will be used to manage changes in stormwater runoff volume, rate, and water quality after earth disturbance activities have ended and the project site is permanently stabilized. 25 Pa. Code § 102.8.[1] However, the PCSM plan requirements set forth in 25 Pa. Code § 102.8 that would otherwise apply are substantially relaxed for "restoration or reclamation" activities. Subsection 102.8(n) in particular reads as follows:

[1] A "project site" is somewhat confusingly defined at 25 Pa. Code § 102.1 as "[t]he entire area of activity, development, lease, or sale including: (i) the area of an earth disturbance activity; (ii) the area planned for an earth disturbance activity; (iii) other areas which are not subject to an earth disturbance activity." 25 Pa. Code § 102.1.

> *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 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).

Schatz Garage is apparently not satisfied with the project and wants the Borough to do more to further ensure that past flooding of its business will not reoccur. It asked the Department to hold an informal hearing regarding the Conservation District's coverage approval. The Department held the hearing, at which it heard comments from Schatz Garage's consultant. After the hearing, the Department affirmed the Conservation District's decision to approve coverage under PAG-02. The Department endorsed the "restoration" finding. Schatz Garage filed this appeal from the District's and the Department's approvals.

Schatz Garage has now moved for summary judgment.[2] Its primary argument in support of its motion is that the Conservation District and the Department committed an error of law by treating the Borough's project as "site restoration" of "utility infrastructure." Schatz Garage says that the Borough's enlargement of the existing stormwater basin is not the sort of project that is contemplated by the restoration-activities exemption. It asks us to grant summary judgment in its

[2] Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. Pa.R.C.P. No. 1035.1-1035.2; *Williams v. DEP*, 2019 EHB 764, 766-67. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the non-moving party. *Stedge v. DEP*, 2015 EHB 31, 33. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Eighty Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406). Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217.

favor, rule that the basin project does not qualify for the "site restoration" exemption, revoke the coverage approval, and remand the matter to the Conservation District with instructions that the Borough must provide acceptable stormwater analysis for rate, volume, and water quality. The Borough and the Department have filed briefs and supporting documents opposing summary judgment but not asking for summary judgment in their favor.

Schatz Garage raises an interesting issue but we are hesitant to address it in the context of its motion for summary judgment because it has failed to explain why it could make any difference in the ultimate resolution of this appeal. We are not anxious to engage in a purely academic exercise. *Clean Air Council v. DEP*, 2018 EHB 245, 257; *Milco Indus. v. DEP*, 2002 EHB 723, 725. The Garage fails to explain how further analysis under Section 102.8 would, or could even possibly, result in any changes in the PCSM for the project, even if we assume *arguendo* that the basin project does not qualify as a restoration activity. In other words, even if the Conservation District and the Department used the wrong analysis, Schatz Garage has provided us with nothing to suggest that they arrived at the wrong result given the lack of any change in stormwater flow resulting from the project.

Unlike a typical project site where a new development of some kind resulting in new impervious surfaces requires stormwater management controls to manage that new development, the Borough's project is limited to improving a long preexisting stormwater control. There is no other development included in the project the impacts of which must be managed. The basin at issue is not ancillary to or part of a larger development. The "project site" in this case does not appear to go beyond the immediate location of the basin itself.

Thus, for example, while Section 102.8(a)(3) requires a PCSM plan to minimize any **increase** in stormwater volume, it appears to be undisputed that the Borough's project will not in

and of itself result in **any** increase in stormwater runoff volume. Nor is there any claim or suggestion in the record at this point that there will be **any** increase in the rate, or decrease in the water quality, of stormwater runoff from the project. A PCSM plan must manage "**changes** in stormwater runoff volume, rate, and water quality," 25 Pa. Code §§ 102.1, 102.8 (emphasis added), but here the Garage has not alleged that there will be any such changes. Permittees are required to manage changes in the rate, volume, and water quality of stormwater resulting from increased impervious surfaces associated with the earth disturbance activity compared to the conditions of the site prior to the earth disturbance activities, and there are no increases in impervious surfaces or any changes in the rate, volume, or water quality of stormwater from increased impervious surfaces in this case.

In support of its motion, the Garage contends that there is no evidence to show that the PCSM plan is adequate to account for all of the upslope development that has occurred over the years.[3] The Garage has failed to point to any regulatory obligation on the part of the Borough to address or account for the preexisting development in the basin's drainage area that is neither related to nor a part of the basin modification project itself in its PCSM plan. It would seem that the *construction* in the post *construction* plan is the basin work itself, not all of the antediluvian development work that occurred over decades upstream of the basin. The Garage seems to be approaching this project as if it were the construction of a new basin to address ancillary development that will change stormwater flow, but none of that appears to be the case here. Of course, the Borough must account for and manage the construction and rehabilitation work on the

[3] Although it is true that a party can sometimes prevail in an appeal based on a lack of proper analysis, it is usually likely to fair much better if it shows us there is in fact a real problem. *Sludge Free UMBT v. DEP*, 2015 EHB 469, 484; *Kiskadden v. DEP*, 2015 EHB 377, 410; *O'Reilly v. DEP*, 2001 EHB 19, 45.

basin itself, but Schatz Garage fails to explain how the Borough's plan as incorporated into its coverage approval falls short in that narrow respect.

To the extent Schatz Garage is trying to translate the Borough's obligation to develop a PCSM plan that manages changes in stormwater rate, flow, or water quality resulting from the project itself into a more comprehensive obligation to build a larger basin that better manages all upstream flow that is not a part or result of the project, it fails to provide a regulatory basis for that contention.[4] It does not explain how any alleged defects in the PCSM plan could possibly translate into a regulatory requirement that the Borough must build a larger basin. Furthermore, even though the Garage wants the Borough to build a larger basin, it acknowledges the enlargement is designed to accommodate a 100-year storm. (Schatz Statement of Undisputed Facts ¶ 17.) The Garage has not pointed to any regulatory requirement that it needs to be bigger than that.

Schatz Garage briefly mentions a couple of other arguments but none of them entitle it to summary judgment. It cites 25 Pa. Code § 102.4(b)(5) for the proposition that a project's PCSM and erosion and sedimentation (E & S) control plans must be consistent but it does not clearly point to any examples of where its E & S plan says one thing but its PCSM plan says another. The Garage complains about the methods used by the Borough's engineer to calculate runoff amounts, but since, as noted above, the project will not result in any increased runoff, it is not clear why those calculations were regulatorily required in the first place.

The Borough is obviously trying to do a good thing. It has obtained a substantial grant to assist it in alleviating flooding problems. It has submitted affidavits averring that, if those grant monies are lost due to delays in this appeal, the work simply will not get done. Schatz Garage can

[4] If the basin work was part of a larger development, the permittee might very well be required to account for not only the changes wrought by the new development but the other conditions within the basin's drainage basin as well, but that is not the case here.

only benefit from the improvements. It is worth noting that we are not aware that the Borough has a regulatory obligation to do anything with the basin. We agree with the Department's statement in its brief that "it is not particularly clear what Appellant seeks to achieve with this appeal." Although Schatz Garage may be able to explain its case further as the appeal proceeds to hearing, for now it is enough to say that it has failed to provide a sufficient legal basis for concluding that it is entitled to judgment as a matter of law.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY SCHATZ GARAGE LLC	:	
	:	
v.	:	**EHB Docket No. 2020-021-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, LANCASTER COUNTY CONSERVATION DISTRICT and BOROUGH OF MOUNT JOY, Permittee	:	

O R D E R

AND NOW, this 2nd day of March, 2021, it is hereby ordered that the Appellant's Motion for Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 2, 2021

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

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(*via electronic filing system*)

For Appellant:
William J. Cluck, Esquire
(*via electronic filing system*)

For Permittee:
Josele Cleary, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENN TOWNSHIP MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2019-152-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 8, 2021**

OPINION AND ORDER ON
APPELLANT'S MOTION IN LIMINE

By Michelle A. Coleman, Judge

Synopsis

The Board grants in part and denies in part the Appellant's Motion in Limine. The Department is precluded from introducing the testimony and reports of expert witnesses that it failed to disclose in discovery and produced for the first time in its prehearing memorandum. Where expert discovery has been directed to a party, interrogatories concerning the expert's opinion must be answered or an expert report must be provided if the expert is to be called as a witness. The motion in limine is also granted with respect to deposition transcripts where the Department has provided no grounds under Pa.R.C.P. 4020 for providing depositions in lieu of live testimony. The motion in limine is denied with respect to exhibits predating and postdating the period of time referenced in the Department's Administrative Order. The Board's scope of review is *de novo,* and, as such, it may consider evidence that was not considered by the Department in taking the action on appeal. The motion in limine is also denied with respect to customer complaints where the purpose for which the Department intends to introduce the exhibits falls within an exception to the hearsay rule.

O P I N I O N

Introduction

This matter involves an appeal filed by Penn Township Municipal Authority (the Authority) from an Administrative Order (order) issued by the Department of Environmental Protection (Department) alleging violations under the Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, *as amended*, 35 P.S. §§ 721.1-721.17, including failure to meet the secondary Maximum Contaminant Level (MCL) for manganese. The case has been scheduled for hearing on March 16-18, 2021 before The Honorable Michelle A. Coleman. On February 2, 2021, the Department filed its prehearing memorandum identifying 10 expert witnesses, 13 fact witnesses and 164 exhibits. The Authority filed its prehearing memorandum on February 23, 2021. The matter currently before the Board is a motion in limine filed by the Authority, seeking to preclude certain testimony and exhibits by the Department.

The purpose of a motion in limine is to provide the Board with an opportunity to consider potentially prejudicial evidence and rule on the admissibility of such evidence before it is referenced or offered at trial. *Gintoff v. DEP*, 2017 EHB 147, 150 (citing *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). We address each of the Authority's arguments below.

Expert Testimony and Expert Reports

The Authority asks the Board to exclude the Department's expert reports and to preclude the Department from presenting expert testimony at the hearing due to its failure to provide this information in discovery. In accordance with Prehearing Order No. 1 and additional extensions issued by the Board, the parties engaged in discovery until November 2, 2020 when the discovery period closed. During discovery, the Authority served expert interrogatories on the Department seeking the identity of its experts and their opinions. In response to Interrogatory No. 4, asking

the Department to identify each expert witness it intended to call at the hearing, the Department objected on the basis that it imposed "a duty upon the Department beyond that required by the Board's Rules of Procedure, 25 Pa. Code § 1021.101(a)(2), or Pa. R.C.P. No. 4003.5, regarding discovery of expert testimony." (Attachment to Authority's Brief – Department's Responses to Interrogatories No. 4-8.) Although the Department provided the names of eleven individuals it "reasonably anticipate[d] that it may call as expert witnesses," it nonetheless stated that it had not yet determined the expert witnesses it intended to call or whether it would call *any* expert witnesses at the hearing. (Department's Responses to Interrogatories No. 4 and 8.) In response to Interrogatories No. 5 and 6, asking for the substance of the facts and opinions to which its expert witnesses would testify and a summary of the grounds for each opinion, the Department objected, again stating that it was under no duty to provide this information. At no point during the discovery period or after did the Department supplement its responses.

Now, with the filing of its prehearing memorandum, the Department has identified ten expert witnesses it intends to call at the hearing. The witness list includes eight individuals identified as potential witnesses in response to Interrogatory No. 4, as well as two individuals identified for the first time in its prehearing memorandum.[1] The prehearing memorandum includes expert reports for the ten individuals and lists the reports as exhibits that the Department intends to introduce at the hearing. As noted earlier, none of this information was provided in discovery. The Authority cries foul and asserts that the Department should be precluded from presenting the

[1] The individuals identified in discovery as individuals that the Department "reasonably anticipates that it may call as expert witnesses" were the following: Lynne Scheetz, David Mittner, Kristine Metzger, David Linton, Darin Horst, Shawn Cable, Joseph Matucci, Rodney Nesmith, Christina Bohensky, Michael Hess and Andrea Stewart. (Department Response to Interrogatory No. 4.) Of those 11 individuals, the Department named the first eight as expert witnesses in its prehearing memorandum. It also added two new individuals as expert witnesses in its prehearing memorandum: Lisa Daniels and Scott Koman. At no point during discovery did the Department provide a summary of testimony for any of the named individuals.

expert testimony and expert reports at the hearing due to its failure to provide this information when requested in discovery. For the reasons set forth below, we agree.

Discovery before the Board is governed by the Pennsylvania Rules of Civil Procedure except as otherwise provided in the Board's Rules of Practice and Procedure or by order of the Board. 25 Pa. Code § 1021.102(a); *Angino v. DEP*, 2006 EHB 278, 281 (citing *Warren County Quality of Life Coalition v. DEP*, 2004 EHB 423, 424) (the Board follows its own rules regarding discovery in addition to the Pennsylvania Rules of Civil Procedure). Pa.R.C.P. 4003.5 governs the discovery of expert testimony and provides in relevant part:

> (a)(1) A party may through interrogatories require
>
> (A) any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and
>
> (B) subject to the provisions of subdivision (a)(4) [relating to privileged communications], the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert.

Pa.R.C.P. 4003.5(a)(1). The rule further provides:

> (b) An expert witness whose identity is not disclosed in compliance with subdivision (a)(1) of this rule shall not be permitted to testify on behalf of the defaulting party at the trial of the action…

Pa.R.C.P. 4003.5(b).

The Board has been quite clear in enunciating the duty of all parties – including the Department – in responding to expert discovery. In *Borough of Edinboro v. DEP*, 2003 EHB 725, *aff'd,* 2696 C.D. 2003 (June 23, 2004), the Board set forth bright line rules regarding expert witnesses:

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

2003 EHB at 772 (emphasis added). As we further explained in *Angino:*

> [T]he Board, in interpreting and applying its own Rules of Practice and Procedure, has unanimously and unambiguously ordered that, assuming discovery has been directed to a party, interrogatories concerning an expert's opinion must be answered or an expert report must be provided for *all* proposed expert witnesses.

2006 EHB at 282 (footnote omitted) (emphasis in original).

We again addressed the issue in *Rural Area Concerned Citizens v. DEP*, 2010 EHB 337, 342, where we expressed concern that "[t]he Board still sees a number of cases where parties believe that they do not have to provide answers to expert discovery until the filing of the pre-hearing memorandum." The Board emphasized that waiting to provide expert information until the filing of one's prehearing memorandum is a violation of the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure: "[T]his Board has consistently held that expert witnesses, along with their qualifications, opinions and bases for the opinions, *must* be provided in response to discovery inquiries." *Id.* at 339 (emphasis added) (citing *Midway Sewerage Authority v. DER*, 1991 EHB 1445, and *Chernicky Coal Co. v. DER*, 1985 EHB 360).

We reiterated the obligations of all parties in conducting expert discovery in *DEP v. EQT Production Co*., 2016 EHB 489:

> 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 discussed…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).

Id. at 493.

Should there be any doubt, we again addressed the issue most recently in *Clean Air Council v. DEP,* 2019 EHB 685:

> Let us be perfectly clear. Answers to expert discovery, which may include expert reports or answers to expert interrogatories, are due 30 days after service of the discovery request unless extended by the Board. *Waiting to provide this information until the filing of the pre-hearing memorandum is a violation of the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure on discovery.*

Id. at 699 (emphasis added) (quoting *Rural Area Concerned Citizen v. DEP*, 2010 EHB at 341-43).

Let us yet again be perfectly clear: Where expert discovery has been directed to a party, including the Department, not only must the expert be identified but interrogatories concerning the expert's opinion must be answered or an expert report must be provided. Contrary to the Department's assertion, it is not acceptable to wait until the prehearing memorandum to provide this information. *See CMV Sewage Co. v. DEP,* 2010 EHB 725, 729 ("Identification of expert witnesses at such a late stage defeats the purpose of discovery.")

The Authority asserts that we should preclude the Department from presenting any expert testimony or expert reports at the hearing due to the Department's failure to provide the names and summary of testimony of its experts in discovery. The Department raises several objections in

response. First, it argues that the Authority only sought the exclusion of the Department's expert reports in its motion and proposed order and failed to specifically request the exclusion of the Department's expert testimony. The Department asserts that the Authority made only a "fleeting reference" to the exclusion of expert testimony in its brief. We disagree that the Authority made only a fleeting reference to this subject. In the "Issues Presented" section of its brief in support of its motion, the Authority lists Issue No. 1 as "Should the Judge exclude reports and testimony by Department's expert witnesses as untimely, improper and irrelevant?" Section No. 1 of its Argument sets forth why the Authority believes the Board should preclude the Department from presenting expert testimony. We agree that the Authority could have done a better job of crafting its motion, but we do not agree that this is a basis for dismissing its argument. As we have stated many times, "practice before the Board is not a giant game of 'gotcha.'" *Concilus v. DEP*, 2012 EHB 60, 62 (citing *Consol Pennsylvania Coal Co. v. D*EP, 2011 EHB 571, 576). Therefore, we will consider the Authority's argument for excluding the expert testimony of the Department's witnesses.

The Department rather disingenuously tries to blame the Authority for its failure to respond to the Authority's expert interrogatories. The Department argues that if the Authority had wanted this information earlier it should have filed a motion to compel, and in the absence of such a motion, the Authority acquiesced in the Department's decision to wait until its prehearing memorandum to provide its expert information. We are not persuaded by the Department's argument. First of all, in response to the Authority's interrogatories, the Department stated at one point that it had "not yet determined *whether* it will call expert witnesses." (Department Response to Interrogatory No. 8) (emphasis added). The Authority could not compel something that it did not know existed. Second, the Department provides no support for its argument that the

Authority's failure to file a motion to compel excuses the Department from fulfilling its discovery obligations.[2] A party cannot unilaterally skirt its responsibilities under the Board's rules and the Pennsylvania Rules of Civil Procedure and then sit back and wait for its opponent to file a motion compelling its compliance. The Board has made it very clear that a party cannot wait until the filing of its prehearing memorandum to produce the names of its experts and the substance of their testimony when asked for this information in discovery. The reason for this is to avoid the very situation in which we now find ourselves, where one week before the hearing we are asked to rule on the admissibility of expert testimony that should have been disclosed early in the prehearing process.

Finally, the Department contends that it did comply with the Authority's expert discovery request by providing the names of eleven individuals that it "reasonably anticipate[d] that it may call as expert witnesses" (Department's Response to Interrogatory No. 4) and by providing a "chart that described matters about which those witnesses had knowledge." (Department Brief in Support of Response, p. 4.) As noted earlier, in addition to naming the eleven potential witnesses, the Department also stated that it did not know who it would call as expert witnesses or whether it would call any expert witnesses. (Response to Interrogatory Nos. 4 and 8.) More importantly, the Department provided no summary of testimony for the "potential experts." With regard to the "chart that described matters about which those witnesses had knowledge," the information consisted of very little in the way of describing what expert testimony, if any, those individuals would provide. For example, the "information" for David Mittner stated simply as follows: "Worked on the Department's manganese treatment policies." (Exhibit 38 to the Authority's

[2] The Board has excluded expert testimony in other cases where the late-filed information was not the subject of a motion to compel. *Clean Air Council, supra; CMV Sewage, supra.*

Prehearing Memorandum.) For Michael Hess, it stated "Involved with discussions concerning permitting and financing for the upgrades to the Penn Township public water system." (*Id*.) This hardly constitutes the "substance of the facts and opinions to which each expert is expected to testify" requested by the Authority in its interrogatories. The Department also states that the Authority deposed one of the individuals that the Department "reasonably anticipate[d] that it may call as [an] expert witness," Lynne Scheetz. However, it appears from the Department's explanation that Ms. Scheetz was also listed as, and deposed as, a fact witness. (Department's Brief in Support of Response, p. 4.)

Since matters before the Board are often heavily dependent on expert testimony, the failure to disclose one's experts and/or the substance of their testimony places one's opponent at a clear disadvantage. The Board has recognized that "[d]isclosure of witnesses is arguably the most important obligation that arises in the course of discovery." *CMV Sewage*, 2010 EHB at 729. In *Morrison v. DEP*, EHB Docket No. 2019-053-C (Opinion and Order on Motion in Limine issued November 3, 2020), we recently addressed the importance of expert testimony in Board proceedings, stating, "Expert testimony is usually critically important in Board cases. The Rules of Civil Procedure are explicit regarding parties' responsibilities in conducting expert discovery." *Id.* at 6 (quoting *EQT Production*, 2016 EHB at 493).

Although preclusion of an expert's testimony does not automatically follow from a violation of the prehearing disclosure requirements, it is generally employed when allowing the testimony would be prejudicial to the party who has followed the Board's rules and disclosed his or her expert witnesses and summary of their testimony in a timely manner. *Morrison, supra; Clean Air Council, supra. See also CMV Sewage,* 2010 EHB at 733-34 (the Board recognized that exclusion of expert testimony is a serious step, but was equally mindful of the need to enforce the

discovery rules and ensure that all litigants are treated fairly); *McGinnis v. DEP*, 2010 EHB 489, 494 (appellants' failure to disclose experts and expert reports during discovery made "a mockery of the discovery process.") When considering whether to impose sanctions precluding evidence or testimony on the basis of discovery violations, we assess the respective prejudices to the parties. As we stated in *Edinboro*:

> [T]he tribunal must undertake a balancing test between the facts and circumstances of each case to determine the prejudice to each party. *Feingold v. Southeastern Pennsylvania Transportation Authority*, 517 A.2d 1270, 1273 (Pa. 1986). The basic considerations the tribunal should review are:
>
> "(1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (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 or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the court's order."

2003 EHB at 770 (quoting *Miller v. Brass Rail Tavern, Inc*., 664 A.2d 525, 532, n. 5).

The Authority asserts that it has been placed at an unfair disadvantage because, until receiving the Department's prehearing memorandum, it did not know whether the Department intended to call *any* expert witnesses or the substance of their proposed testimony. Now it is faced with the testimony of ten experts one week before the hearing. In *Edinboro*, even though the Board concluded that the Department had violated the Board's rules of prehearing disclosure we did not exclude the testimony of the witnesses. We determined that the appellant had suffered no prejudice because the individuals in question were not surprise witnesses. Here, in contrast, we find that the Authority has been severely prejudiced by the Department's failure to disclose *any* information regarding its expert witnesses prior to the filing of its prehearing memorandum. The Department failed to comply with the applicable Rules of Civil Procedure and Board rules not just for one of its witnesses, but for *all* of its ten expert witnesses. Even though the Department disclosed the

names of some of its potential expert witnesses in response to Interrogatory No. 4, it refused to provide any further information regarding those potential experts including, crucially, the substance of their testimony. The Department waited until its prehearing memorandum to provide information that should have been made available to the Authority months ago in discovery. As we held in *Rural Area Concerned Citizens*, parties should not have to guess or predict at who might testify at trial or what that testimony might entail. 2010 EHB at 340. By waiting until the eleventh hour to produce all of its expert information, long after the discovery period has closed and immediately before the hearing on this matter, the Department has deprived the Authority of any meaningful ability to prepare a successful rebuttal to the Department's case.

The Department argues that it will be the one who is prejudiced if the Board excludes its expert testimony. Any prejudice that the Department may suffer is of its own making and pales in comparison to the prejudice to the Authority if we allow the Department to go forward with the testimony of its ten expert witnesses produced at the eleventh hour. As we held in *CMV Sewage*:

> While we are mindful that the exclusion of these expert witnesses' testimony is a serious step, we are equally mindful of the need to enforce our discovery rules and our orders and ensure that all litigants before the Board are treated fairly. To that end, the Board has previously excluded proposed expert witnesses where the identity and nature of the proposed experts was not revealed until very late in the process or the opposing party was otherwise prejudiced by the late disclosure of such experts.

Id. at 733-34.

We find this matter to be analogous to *McGinnis v. DEP*, 2010 EHB 489, and *Clean Air Council v. DEP*, 2019 EHB 685. In *McGinnis*, the Appellants first identified five expert witnesses and 21 fact witnesses in their prehearing memorandum. The Board excluded four of the five experts and all of the newly identified fact witnesses. With regard to the expert witnesses, the Board stated, "It is unacceptable to allow a litigant to present an expert witness whose identity and

opinions have not been properly disclosed during discovery." 2010 EHB at 496. To emphasize the seriousness of the Appellants' violation, the Board further stated:

> If we would do what Appellants suggest and force the [permittee] and the Department to spend the final days before trial deposing witnesses and searching for their own witnesses to respond to their new theories we will be telling not only Appellants but all litigants that our deadlines do not have to be followed and it does not matter what information you present in discovery as you can radically change everything at the eleventh hour and the Board will endorse this flagrant violation of our Rules and the Pennsylvania Rules of Civil Procedure and allow you to proceed. This we will not do.

Id. at 495.

In *Clean Air Council*, the Appellants responded to expert interrogatories propounded by the permittee by stating that they "ha[d] not yet identified any witnesses." 2019 EHB at 691. When the discovery period closed, the Appellants still had not identified any expert witnesses or otherwise amended their answers to discovery. Several months after the close of discovery, the Appellants revealed that they intended to rely on expert testimony and identified an expert witness for the first time. One week before their prehearing memorandum was due they provided the expert's report to the Department and permittee and filed it as an exhibit to their prehearing memorandum. The Board noted that "[t]he Appellants for the first time proposed to fight in a battle of the experts never having told their opponents there would be such a battle" and recognized that the Appellants' late revelation of its expert testimony had "not merely changed how the Appellants intended to prove up the existing issues" but had "on several key points changed the issues themselves." *Id*. at 692. The Board excluded the Appellants' expert from testifying at the hearing and reaffirmed that holding on reconsideration.

Likewise, we find that by waiting until its prehearing memorandum to reveal the ten expert witnesses it intends to call at trial and the substance of their testimony, the Department has

fundamentally changed not only how it intends to prove its case but the key issues of the case. There is no opportunity for the Authority to take further discovery or to develop its case in response to the proposed testimony of the Department's experts. Moreover, as we held in *Clean Air Council,* simply naming individuals in discovery that *may* testify as experts is not enough: "[I]t is the substance of an expert's testimony that is arguably of much greater importance to opposing parties than the mere identity of the expert." *Id.* at 696.

As we explained:

> A fundamental purpose of the discovery rules is to prevent surprise and allow a fair hearing on the merits. *Maddock v. DEP*, 2001 EHB 834, 835. *See also Midway Sewerage Auth. v. DER*, 1990 EHB 1554, 1560 ("It is a universally endorsed concept that justice in our trial courts is not served where lawyers use tactics designed for trial by ambush and unfair surprise.") To that end, "[i]dentification of expert witnesses at such a late stage defeats the purpose of discovery which is to prevent surprise and unfairness and to allow a fair hearing on the merits." *CMV Sewage*, 2010 EHB at 729. "It is unacceptable to allow a litigant to present an expert witness whose identity and opinions have not been properly disclosed during discovery." *McGinnis v. DEP*, 2010 EHB 489, 496.

Id. at 697.

Thus, we find that factors 1-3 of the *Edinboro* test weigh heavily in favor of the Authority. In considering factor no. 4 set forth in *Edinboro*, the amount of bad faith or willfulness in failing to comply with the Board's discovery rules, we find that the Department's failure to comply was willful since it stated in its answers to interrogatories that it had no duty to comply. As we held in *Kiskadden v. DEP*, 2014 EHB 626, 628, "we have no difficulty here in holding that such a course of action constitutes not only unfair surprise and prejudice to the Appellant, but also a textbook case of 'trial by ambush.'" As in *Kiskadden*, we find "manifest prejudice" to the Authority by the Department's late-filing of its expert reports and late-identification of its experts. *Id.* Based on its

failure to follow the rules of prehearing discovery, the Department shall be precluded from presenting the testimony and reports of its expert witnesses at the hearing.[3]

The Department states that many of its expert witnesses are also fact witnesses. Since the Authority's motion and supporting brief do not address the presentation of fact testimony by the Department, the Department's witnesses will be permitted to provide factual testimony. However, they are prohibited from presenting any testimony that is expert in nature.

Finally, on page 2 of its response and page 3 of its brief, the Department discusses the use of expert reports for purposes of examining a witness. We wish to emphasize that, based on our holding herein, the Department is precluded from using its expert reports for any purpose at hearing, including the examination of a witness.

Exhibits that Precede and Postdate the Relevant Time Period Set Forth in the Order

According to the Department's Administrative Order, the Authority failed to comply with the secondary MCL for manganese for a span of approximately 2 ½ years beginning on November 15, 2016. The Department's order was issued on November 1, 2019. The Authority argues that exhibits listed by the Department predating November 15, 2016 and postdating November 1, 2019 are irrelevant and should be excluded. The exhibits in question are listed in paragraphs 4 and 5 of the Authority's motion.

As explained in *O'Reilly v. DEP*, 2001 EHB 19, the Board's scope of review is *de novo:* "*De novo* review involves full consideration of the case anew. The [Board], as a reviewing body, is substituted for the prior decisionmaker, [the Department], and redecides the case." *Id.* at 32

[3] The Authority also raises other arguments for excluding the testimony of the Department's experts, including relevance and redundancy. Because we have determined that the Department's expert testimony should be excluded due to its failure to present this information in discovery, we need not address the Authority's other arguments.

(quoting *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991)). As such, we may consider evidence that was not reviewed by the Department when taking the action in question. As former Judge Mather explained in *Wetzel v. DEP*, 2017 EHB 548:

> 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.

Id. at 563 (citing *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004)). The Board makes its own factual findings based solely on the evidence of record in the case before it. *Id.* (citing *Smedley v. DEP*, 2001 EHB 131, 156). Thus, simply because the exhibits in question predate the period of non-compliance or postdate the Department's order, that, by itself, is not a basis for excluding them. If the Authority has further objections to the exhibits based on relevance, those objections can be addressed at the hearing.

News Articles

Department exhibits 29, 34, 54, 61, 64, 67 and 137 are newspaper articles that the Authority asserts should be excluded as hearsay. The Department acknowledges that the news articles do not fall within a cognizable exception to the rule against hearsay, but states that it does not intend to use the articles as direct evidence of the truth of the matters asserted therein. However, the Department goes on to state that "Department staff pay attention to news reports of poor water quality and other concerns at public water systems" and the news articles "contain additional information about the water quality concerns at the [Authority's] water system." (Department Response, p. 13, para. 6.) Based on this explanation it is unclear to us whether the Department does, in fact, intend to introduce the news articles for the truth of the matters set forth in the articles.

Although we tend to agree with the Authority that these exhibits should be excluded as hearsay, we will reserve ruling until the hearing.

Exhibits that the Authority Asserts are Hearsay or Irrelevant

The Authority objects to a number of the Department's exhibits on grounds of hearsay or relevance or both. These include the following:

Exhibits 31 and 50 are complaints from customers. The Authority objects on the basis of hearsay since the declarants are not listed as witnesses. The Department states that it intends to introduce this information simply to establish a prior history of complaints, not to prove the validity of the individual complaints. On that basis, the Authority's motion is denied. The Board will rule on the admissibility of this information if it is moved into evidence at the hearing.

Exhibit 41 is a construction cost estimate. The Authority objects on the basis of relevance. The Department states that this exhibit will be used during the testimony of Scott Korman. Mr. Korman has been precluded from testifying as an expert witness. To the extent the Department intended to use this document in support of Mr. Korman's expert testimony, it is excluded.

Exhibit 120 is a document that the Department describes as setting forth "the methodology for ranking projects for PennVest financing." The Authority objects on the basis of hearsay and relevance. The Department argues that Exhibit 120 is a public record and thus falls within the exceptions to hearsay set forth in Pennsylvania Rules of Evidence 803(6) and 803(8). Because we do not have sufficient information at this time to make a determination on the admissibility of this document, we will withhold ruling until the hearing.

Exhibits 123 to 127 contain information about water rates of entities that are not involved in the proceeding. The Authority does not specify its objection but it appears to be one of relevance. The Department states that these documents will be used during the testimony of Scott

Korman, who has been precluded from testifying as an expert witness. To the extent the Department intended to use these documents in support of Mr. Korman's expert testimony they are excluded.

Exhibits 129, 148, 149, 157, 158, 162, 163 and 164 are "articles, policies and scientific information" that the Authority objects to as being hearsay and irrelevant. To the extent the Department intended to use these exhibits in support of expert testimony they are excluded.

Deposition Transcripts

In its prehearing memorandum the Department lists the deposition transcripts of James Kocher and John Zervanos as exhibits to be introduced at trial. The Authority objects, asserting that the depositions were taken for the purpose of discovery. The Authority does not object to the use of the transcripts for purposes of attacking the credibility of the witnesses but does object to them being used in lieu of live testimony. In response, the Department states that it has issued subpoenas to the deponents, but "due to the Covid pandemic, the Department is unable to predict if either or both of these witnesses will actually be available to testify at the hearing." (Department Brief in Support of Response, p. 18.) The hearing is being held by video on WebEx, and the Department has not alleged any of the grounds set forth in Pa.R.C.P. 4020 that would allow the use of a deposition in lieu of live testimony. Because the Department has presented no legally valid reason for the use of the deposition testimony of Mr. Kocher and Mr. Zervanos, Exhibits 131 and 132 are excluded.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENN TOWNSHIP MUNICIPAL AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2019-152-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 8th day of March, 2021, it is hereby ordered that the Authority's Motion in Limine is granted in part and denied in part as follows:

1) The Department is precluded from presenting expert testimony at the hearing.
2) The Department is precluded from introducing its expert reports into evidence or using the reports during the examination of witnesses.
3) The Department is precluded from introducing the deposition transcripts of James Kocher and John Zervanos, Exhibits 131 and 132, in lieu of live testimony.
4) To the extent the following exhibits are intended to be used in support of expert testimony, the Department is precluded from introducing them at the hearing: Exhibits 41, 123-27, 129, 148-49, 157-58, 162-64.
5) The Authority's motion is denied with respect to Exhibits 31 and 50.
6) The Board withholds ruling on the remaining exhibits addressed in the Authority's motion.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: March 8, 2021

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

For the Commonwealth of PA, DEP:
Erika Furlong, Esquire
(via electronic filing system)

For Appellant:
Dennis Shatto, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THE PRODUCTION COMPANY, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-053-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 18, 2021**
	:	

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion to dismiss where an appellant limited liability company has failed to obtain counsel and has not responded to the motion or to the Board's Rule to Show Cause.

O P I N I O N

The Production Company, LLC has appealed a letter dated April 16, 2020 sent by the Department of Environmental Protection (the "Department"), which declares forfeit Production Company's Bond No. 13535 pursuant to Section 3225(c) of the Oil and Gas Act, 58 Pa.C.S. § 3225(c) and the Department's regulations at 25 Pa. Code § 78.312. According to Production Company's notice of appeal, the bond forfeiture pertains to its P. Nutt #1 Gas Well in Jefferson Township, Fayette County. Production Company contends in its appeal that it intended to plug the gas well but the Covid-19 pandemic hampered those efforts. Production Company said it still intended to plug the well but needed more time and wanted the Department to hold off on forfeiting the bond. The notice of appeal was filed without counsel and Production Company has not obtained counsel at any point since.

The Department has moved to dismiss Production Company's appeal. First, the Department argues that this appeal should be dismissed because Production Company has failed to obtain counsel as is required of limited liability companies in legal proceedings. Second, the Department says the appeal should be dismissed because the Department takes issue with the content of Production Company's notice of appeal, which the Department argues does not contain appropriate legal or factual objections to the bond forfeiture.

Production Company has not responded to the Department's motion, which was filed on January 25, 2021. Non-moving parties have 30 days from service of the motion to respond to a motion to dismiss. 25 Pa. Code § 1021.94(c). Because Production Company is not registered for electronic filing and it was unclear based on the certificate of service accompanying the Department's motion how the motion was served, we gave Production Company the benefit of the doubt and allowed it the three extra days provided under our rules for documents served by mail, 25 Pa. Code § 1021.35(b)(3). On March 3, 2021, having received no response to the Department's motion, we issued a Rule to Show Cause for Production Company to show cause why its appeal should not be dismissed. We gave Production Company until March 15, 2021 to respond to the motion to dismiss, which would constitute a discharge of the Rule to Show Cause. We served the Rule to Show Cause on Production Company by e-mail and regular mail. To date, Production Company has not responded to the motion to dismiss or the Rule to Show Cause. Although we could grant the motion to dismiss on the basis of Production Company's failure to respond alone, 25 Pa. Code § 1021.94(f) (failure to adequately respond to a dispositive motion may result in the Board granting the motion), we will nonetheless briefly address the merits of the motion.

Under the Board's rules, "Parties, except individuals appearing on their own behalf, shall be represented by an attorney in good standing at all stages of the proceedings subsequent to the

filing of the notice of appeal or complaint." 25 Pa. Code § 1021.21(a). As a limited liability company, Production Company is not an individual appearing on its own behalf. Indeed, we have previously dismissed appeals of other LLCs for failing to obtain counsel. *See*, *e.g.*, *Earth First Recycling, LLC v. DEP*, 2018 EHB 819; *KH Real Estate, LLC v. DEP*, 2012 EHB 155. Additionally, Production Company has not demonstrated any interest in prosecuting its appeal. It has not responded to the motion to dismiss, it has not responded to the Rule to Show Cause, and it previously failed to respond to a motion to compel discovery responses filed by the Department. In such circumstances, where an appellant has shown a clear disinterest in proceeding with its appeal, dismissal is appropriate. *Blackwood v. DEP*, EHB Docket No. 2020-097-B (Opinion and Order, Dec. 29, 2020); *Citizens Advocating a Clean Healthy Environment v. DEP*, 2017 EHB 1077; *Nitzschke v. DEP*, 2013 EHB 861.

We issue the Order that follows.[1]

[1] Because we are granting the motion to dismiss on the basis of Production Company's failure to obtain counsel and its failure to prosecute its appeal, we do not need to address the Department's argument complaining about the quality of the objections in Production Company's notice of appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THE PRODUCTION COMPANY, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-053-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 18th day of March, 2021, it is hereby ordered that the Department's Motion to Dismiss is **granted** and 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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 18, 2021

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

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

For Appellant:
The Production Company, LLC
Attn: Stewart Burkland
203 State Route 271
Ligonier, PA 15658
(*via U.S. Mail and electronic mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NICHOLAS MEAT, LLC	:	
	:	
v.	:	**EHB Docket No. 2021-009-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 30, 2021**

OPINION AND ORDER ON
PETITION FOR SUPERSEDEAS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a petition for supersedeas of a Department order preventing an appellant from applying food processing residual waste on snow-covered farm fields where there is no apparent extant need for a supersedeas in light of the snow since having melted and application of the waste to farm fields having resumed. The denial of the petition is without prejudice to the appellant showing the requisite need if circumstances change while this appeal proceeds to adjudication on an expedited basis.

O P I N I O N

Nicholas Meat, LLC operates a beef processing plant in Loganton, Clinton County. The plant purchases cattle from farmers and slaughters and processes the cattle for distribution to companies who do further processing and turn the meat into consumer goods. (Supersedeas Hearing Transcript, Feb. 18, 2021, Page No. ("T1.") 26.) The Nicholas Meat facility processes approximately 600 head of cattle per day. (T1. 31.) As a byproduct of the slaughtering and processing operations, Nicholas Meat generates approximately 150,000 gallons of wastewater per day. (T1. 32.) This wastewater is referred to as food processing residual ("FPR"). The FPR

generated by the plant generally consists of a mixture of cow manure and water from washing down the slaughterhouse floor. (T1. 31-32.) Nicholas Meat stores its FPR in three tanks with a total combined capacity of around three million gallons. (T1. 33.) In order to dispose of its FPR and maintain sufficient capacity in its tanks to keep up with its wastewater generation, Nicholas Meat regularly applies its FPR to certain farm fields as a nutrient fertilizer. (T1. 32.) Nicholas Meat does this year-round, including in the winter, when Nicholas Meat applies 6,200 gallons of FPR per field acre. (T1. 44, 120, 131-32.)

On February 9, 2021, the Department of Environmental Protection (the "Department") issued a compliance order to Nicholas Meat with a single directive requiring Nicholas Meat to "immediately cease land application of FPR to snow covered fields." (Department Exhibit No. ("DEP Ex.") 7.) Nicholas Meat appealed that order to the Board on February 11, 2021 and concurrently filed a petition for supersedeas and an application for temporary supersedeas. Nicholas Meat argued in its petition that it stood to suffer immediate and irreparable harm because, without the ability to apply its FPR to snow-covered fields, it would soon run out of storage capacity for the FPR and have to cease its cattle processing operations. We held a conference call with the parties on February 12 to discuss the procedures going forward on the petition for supersedeas and to hear argument on the application for temporary supersedeas. On February 16, we issued an Order denying the application for temporary supersedeas without prejudice to reconsidering our ruling at the supersedeas hearing, which was held on February 18 and February 19. Nicholas Meat renewed its request for temporary supersedeas at the conclusion of the hearing. We denied the request from the bench, reasoning that the evidence presented by Nicholas Meat at the hearing did not meet the high burden for the issuance of a temporary supersedeas. (*See* Supersedeas Hearing Transcript, Feb. 19, 2021, Page No. ("T2.") 202-10.)

The parties proposed to brief the supersedeas petition with expedited transcripts. (T2. 213.) Transcripts were received a week after the conclusion of the hearing. The parties had agreed to submit simultaneous briefs a week after receiving the transcripts but then jointly requested a one-week extension, which we granted. The parties submitted their briefs on March 15, 2021.[1] On March 16, we issued an Order *sua sponte* for this appeal to proceed on an expedited basis pursuant to our rule on expedited hearings at 25 Pa. Code § 1021.96a. We stated in the Order our goal to have an Adjudication issued by the end of the calendar year and ordered the parties to submit, by March 23, a mutually acceptable schedule for completing discovery, filing pre-hearing memoranda, and conducting the hearing. The parties submitted a joint proposed schedule, which included completing discovery by July 23, 2021 and conducting the hearing on the merits in early October. We issued an Order on March 23 consistent with the proposed schedule and scheduled the hearing to begin on October 5, 2021.

The Environmental Hearing Board Act of 1988, 35 P.S. §§ 7511 – 7514, provides adversely affected parties with the right to file an appeal from a Department action. No appeal acts as an automatic supersedeas, but the Board may grant a supersedeas upon cause shown. 35 P.S. § 7514(d)(1). The grant or denial of a supersedeas is 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); *Erie Coke Corp. v. DEP*, 2019 EHB 481, 485. In order for the Board to grant a supersedeas, a petitioner generally must make a credible showing on each of the three

[1] On March, 12, 2021 Nicholas Meat filed a petition to supplement the supersedeas record with an affidavit purporting to reflect Nicholas Meat's efforts to find alternatives to land-applying its FPR. The Department responded in opposition on March 16. Consistent with our discussion below, this request will be held in abeyance.

statutory 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); *Lower Providence Twp. v. DER*, 1986 EHB 395, 397.

In considering Nicholas Meat's supersedeas petition, it is important to emphasize up front the narrowness of the issue presented, regardless of the parties' tendency at times to try to broaden its scope. This case is not about spreading manure on fields; it is about spreading FPR. It is not about whether storing and applying FPR is a "normal agricultural operation" under Pennsylvania's Right to Farm Act, 3 P.S. §§ 951 – 957. It is not about anyone other than Nicholas Meat spreading FPR. Nor is it about Nicholas Meat's compliance history. Instead, this case is about the Department's February 9, 2021 compliance order. That compliance order does not order Nicholas Meat to shut down or to stop processing cattle at its plant. The order does not prevent Nicholas Meat from applying its FPR to farm fields. The order does not even categorically prevent Nicholas Meat from applying FPR to fields during the winter or during cold temperatures. The order simply and only restricts Nicholas Meat from applying FPR to fields that are covered with snow.[2] (DEP Ex. 7. *See also* T2. 157.)

Even there, the Department signaled flexibility on what constitutes "snow covered." Patrick Brennan, the Department's regional program manager for the waste management program, testified at the supersedeas hearing that the Department has "always tried to be somewhat understanding that there is [sic] times you can have snow on the ground, such as one inch, two inch, maybe a dusting of snow, and we would not – we would not look at that as snow covered

[2] The Department views application of FPR to snow-covered fields to pose a risk of environmental harm because, generally, it says one cannot tell what the ground is like underneath the snow—for instance, whether the FPR is being absorbed into the soil, whether the ground is saturated or frozen, or whether there is adequate crop cover. (T2. 14-15, 16, 26-27, 131.) If the FPR is not being absorbed by the soil then the Department says it could run off when the snow melts and reach nearby waterways. (T2. 15, 26-27.)

ground…." (T2. 16. *See also* T1. 238, 240, 262-63; T2. 17, 54.) However, Brennan noted that the Department does consider fields as snow-covered when there are six to eight inches of snow on the ground, (T2. 16, 26), as was the case at the time the Department conducted the inspection that preceded the issuance of its order. (T1. 240.) Accordingly, the Department's order is entirely limited to situations with significant, sustained snow on the ground, a situation that appears to be somewhat unusual for this area of Central Pennsylvania. As multiple witnesses testified, this winter in the area of the Nicholas Meat facility has been remarkable in two respects: increased snowfall and prolonged temperatures below freezing. (T1. 80, 88; T2. 145-46, 180.) This has caused the snow to pile up several inches and not fully melt. At the hearing there was testimony of there being as much as a foot of snow on the ground at the time. (T2. 26.) Previous winters had less cumulative snowfall and more melting days in between. As the Department's Regional Director, Marcus Kohl, testified, this winter has been the first in a few years where substantial snowpack has lasted for more than a few days. (T2. 180.)

Nevertheless, snow accumulation is often temporal, as has been proven here. The Department acknowledges that, at the time of filing its brief, the fields that receive Nicholas Meat's FPR had not been snow covered for several days and that "it appears unlikely that the conditions giving rise to the Department's order will recur any time soon." (DEP Brief at 18 n.5.) Nicholas Meat likewise concedes that "significant additional snowfall during this crop year is somewhat unlikely…." (NM Brief at 20.) Thus, as the parties both point out in their briefs, the situation prompting the issuance of the Department's order has, quite literally, melted away, and it seems unlikely to repeat in the near term.

We are reminded that our supersedeas jurisprudence repeatedly holds that a supersedeas is an extraordinary remedy that "will not be granted absent a **clear demonstration of need**." *Erie*

Coke Corp., 2019 EHB 481, 484 (emphasis added). *See also Ctr. for Coalfield Justice v. DEP*, 2017 EHB 38, 41-42; *Del. Riverkeeper Network v. DEP*, 2016 EHB 41, 43; *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802. In *Erie Coke*, for instance, the need to supersede the Department's denial of a facility's Title V operating permit arose because shutting down the facility's 58 coke ovens would have resulted in their permanent destruction from cooling down and rendered the facility inoperable without obtaining new ovens. 2019 EHB at 492. Here, we do not have a commensurate need.

According to the Nicholas Meat's brief, warmer temperatures meant it was back to spreading FPR within six calendar days of pausing operations at the plant. (NM Brief at 11.) Despite Nicholas Meat's claim of irreparable catastrophe from not being able to spread FPR, (Supersedeas Petition at 13), this six-day pause appears to have been the only disruption of operations at the plant. Despite Nicholas Meat's claims that its 350 employees would be forever lost to other jobs, (T1. 64-65, 99-100), Nicholas Meat says that it continued to pay its employees during the brief interruption, (NM Brief at 11 n.6). The immediate exigency that prompted the supersedeas appears to have fully dissipated for the time being. We have not been advised of any crisis now that the snow has melted, and Nicholas Meat appears to have returned to its normal operations. Without any snow on the ground for weeks, with Nicholas Meat having fully resumed operations, and as we press into the spring season, we struggle to see the requisite need that justifies the extraordinary relief of issuing a supersedeas. Put simply, there is no extraordinary need because Nicholas Meat is not suffering any actual, or realistic threat of, immediate or ongoing harm.

With that being said, the parties both express the legitimate concern that snow could return and the issue could once again come to a head. Nicholas Meat worries that it "will find itself in

the same situation later this year, while this appeal remains pending…." (NM Brief at 20.) The Department likewise believes that the circumstances are "clearly capable of repetition…." (DEP Brief at 18 n.5.) We are cognizant of the concern that, while the current warm weather renders the Department's order all but moot, an appeal period that drags on could see snow cover return to the fields toward the end of the year. This is precisely why we issued our Order *sua sponte* for this appeal to proceed on an expedited basis. In doing so, we strive to have the merits of this appeal adjudicated before any significant, sustained snowfall reoccurs. In the event that we do receive a snowfall of sufficient amount that does not soon after melt, we will treat Nicholas Meat's petition for supersedeas as a continuing request. The parties are welcome to bring an urgent need to our attention as we move forward. Until then, there is no reason to dwell further on the supersedeas considerations of Nicholas Meat's likelihood of success on the merits and a balancing of harms.

We issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NICHOLAS MEAT, LLC	:	
	:	
v.	:	**EHB Docket No. 2021-009-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 30th day of March, 2021, it is hereby ordered that the Appellant's petition for supersedeas is denied without prejudice based upon a showing of need. The Appellant's petition to supplement the supersedeas record is held in abeyance.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 30, 2021

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

For the Commonwealth of PA, DEP:
Geoff J. Ayers, Esquire
Robert Cronin, Esquire
(*via electronic filing system*)

For Appellant:
James Clark, Esquire
Caroline K. McGlynn, Esquire
Robert J. Schena, Esquire
Jeremy R. Lacks, Esquire
John J. Haggerty, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PBS COALS, INC.,	:	
	:	
v.	:	**EHB Docket No. 2021-006-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 30, 2021**
	:	

OPINION AND ORDER ON
PETITION FOR SUPERSEDEAS

Synopsis

The Board denies the Petition for Supersedeas where the Appellant has failed to demonstrate that it is likely to succeed on the merits of its appeal. The Appellant has failed to show that the Department's Order was unreasonable, contrary to the law, not supported by the facts and/or an abuse of the Department's discretion.

O P I N I O N

Introduction

PBS Coals, Inc. ("PBS") operates the Job 12 Expansion Coal Refuse Disposal Facility ("Job 12 Facility") located in Shade Township, Somerset County, Pennsylvania to dispose of coal refuse generated from its adjacent Shade Coal Preparation Plant. PBS's activities at the Job 12 Facility are, in part, authorized pursuant to Coal Mine Activity Permit No. 56900701 (the "Permit") that was first issued in 1991 and was most recently revised and reissued in December 2020. In 2001, the Pennsylvania Department of Environmental Protection ("the Department") amended the Permit, authorizing PBS to inject treatment sludge from the Job 12 Facility into the abandoned underground Reitz Mine via a borehole. PBS has combined the sludge with treated

leachate and other water from the Job 12 Facility ("sludge/slurry") and injected it into the Reitz Mine on a continuous basis since that time. The Reitz Mine is a partially flooded Lower Kittanning coal seam mine that has a discharge point known as MD-31. Dark Shade Creek is the receiving stream for the MD-31 discharge. The Permit requires PBS to monitor the discharge at MD-31 and requires the discharge to meet certain effluent limits, including the iron loading limits at issue in this appeal.

On January 20, 2021, the Department issued a Compliance Order No. 213001 ("the Order") that alleged that PBS had violated the terms of the Permit and certain provisions of the Pennsylvania Code. The description of the violations in the Order stated that PBS had "failed to abate pollution, adversely affected the hydrologic balance and exceeded effluent limits or water quality standards by injecting sludge/slurry into an underground mine." The Order directed PBS to cease all sludge/slurry injection activities by June 30, 2021 and incorporated a sludge bed construction schedule previously submitted by PBS. On January 24, 2021, PBS filed a Notice of Appeal of the Order to this Board, and the next day, filed a Petition for Supersedeas (the "Petition"). On January 29, 2021, the Board held a conference call with the parties to discuss how to proceed on the Petition. The Department filed its response to the Petition on February 2, 2021. A hearing on PBS's Petition was held virtually via Webex from February 16, 2021, through February 19, 2021. The Board heard testimony from fact and expert witnesses called by both PBS and the Department and admitted numerous exhibits presented by the parties. On March 10, 2021, the parties submitted post-hearing briefs following receipt of the hearing transcript. The Board has reviewed the testimony, exhibits and briefs and is now ready to rule on the Petition.

Standard

The Environmental Hearing Board Act of 1988, 35 P.S. §§ 7511 - 7514, provides aggrieved parties with the right to file an appeal from a final Department action. No appeal automatically stays a Department action, however, the Board may grant a supersedeas upon cause shown. 35 P.S. § 7514(d)(1). A supersedeas is defined in the Board's rules as the "suspension of the effect of an action of the Department pending proceedings before the Board." 25 Pa. Code § 1021.2. As the Board has previously stated "a Board ruling on a petition for supersedeas is a limited decision that addresses the status of the Department's action during the time interval between the filing of the appeal and the full Board's final ruling on the merits of the appeal. It is not, nor is it intended to be, the final word on the legality of the Department's action." *Erie Coke Corp. v. DEP*, 2019 EHB 481, 484. In general, a supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need. *Delaware Riverkeeper Network, v. DEP*, 2016 EHB, 41, 43; *See also 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. *Id; see also, Delaware Riverkeeper Network*, 2016 EHB at 43. 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. *Erie Coke,* 2019 EHB at 485. "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." *Center for Coalfield Justice v. DEP*, 2017 EHB 38, 42; 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). For the petitioner to prevail on its request for a supersedeas, it must demonstrate that its chance of success on the merits is more than speculative, however, it need not establish the claim absolutely. *Erie Coke,* 2019 EHB at 485 (citing *Center for Coalfield Justice*, 2017 EHB at 42). A ruling on a supersedeas is merely a prediction, that is calculated 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. *Id*. 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. *Center for Coalfield Justice*, 2017 EHB at 44 (citing *UMCO Energy, Inc. v. DEP*, 2004 EHB 797).

Background

An understanding of the coal refuse disposal treatment system operated by PBS at the Job 12 Facility, as well as the Permit's terms and conditions governing those activities, is required to understand the nature of the dispute in this appeal. It is also important to understand the sequence of correspondence and events that led up to the Department's issuance of the Order and PBS's

appeal. We will start with a brief review of the treatment system. The treatment system is shown on Joint Exhibits 23, 24 and 26 and was described in the testimony of Department witness, Troy Williams. (Transcript ("T.") at 476-498). The coal refuse piles at the Job 12 Facility are uncovered and generate leachate that is collected in underdrains below the refuse piles. The leachate is directed to the raw water sump. The leachate is highly acidic and contains metals, including iron. Iron concentrations in the leachate at this step in the treatment process ranged from 2,500 to 2,735 milligrams per liter in 2019 sampling. (T. 487). The quantity of leachate generated is related to the amount of precipitation that falls on the piles and ranges from 15 to 250 gallons per minute. (Joint Ex. 28). The leachate moves from the raw water sump into a mixing trough where lime is added before the leachate is sent to two electric mixing tanks to aerate the leachate. After the mixing tanks, the leachate is sent to the primary collection basin. The Permit allows the leachate collected in the primary collection basin to be sent to treatment ponds for further treatment. Alternatively, the leachate/treated water can be mixed with other water collected at the Job 12 Facility, and the sludge created during the treatment to form a sludge/slurry may be pumped through a borehole into the Reitz Mine. Since 2001, PBS has made very little use of the treatment ponds and nearly all of the leachate/treated water and sludge generated by the coal refuse pile has been disposed of into the Reitz Mine through a series of boreholes. (T. 499).

The disposal of the sludge/slurry generated at the Job 12 Facility into the Reitz Mine is authorized under the Permit. However, the Permit provides that continued disposal into the Reitz Mine "may be ceased at the discretion of the Department's McMurray District Mining Office." (Joint Ex. 1, Special Condition 20 at 6). With some minor exceptions not relevant for this appeal, the Permit does not directly limit the volume or composition of the sludge/slurry sent into the Reitz Mine by PBS. The relevant limits are indirect, and exceedances of these limits are determined by

monitoring the discharge for the mine pool in the Reitz Mine at a point designated MD-31. The two parameters monitored at MD-31 that are central to this appeal are the iron concentration and the flow of the discharge. These parameters are used to determine the iron loading for comparison to the iron loading limits found in the Permit. The iron loading limits in the Permit for the MD-31 discharge were established under the Department's Subchapter F process (25 Pa. Code Chapter 90, Subchapter F) because the MD-31 discharge was already polluted at the time that PBS sought permission to dispose of the sludge/slurry into the Reitz Mine. It is our understanding that the Subchapter F process is intended to prevent the discharger, PBS in this case, from being liable for the conditions of the discharge in existence prior to the commencement of its operations.

PBS's Permit contains two limits for iron loading at MD-31 developed through the Subchapter F process.[1] The first limits, the Critical Values limits, are found in Table D1 of the Permit at Special Condition 22. (Joint Ex. 1 at 7). The Critical Value for iron loading is 1,623 lbs. per day and it is determined each time a sample is collected at MD-31. The iron loading value for comparison to the Critical Value is determined using a formula set forth in the Permit that multiplies the flow measurement at MD-31 times the iron concentration in a water sample collected at the same time. The second iron loading limit in the Permit is based on a statistical analysis of the Critical Values for the iron loading values determined at MD-31 over a water year (October 1 through September 30). The annual water year iron loading value is compared to the median pollution load at the approximate 95% confidence level established for the pre-existing discharge at MD-31. The annual upper iron loading limit of 924 lbs. per day is set forth in Table

[1] The iron loading limits in the Permit were developed from baseline data for MD-31 for the years 1997-2001 submitted by PBS as part of the 2001 Permit amendment process. The iron loading limits set forth in the Permit when it was amended to allow disposal into the Reitz Mine in 2001 are administratively final. PBS acknowledged that these limits are final but argues that the Board should still consider how they were established and that they are non-representative of the conditions in the Reitz Mine over time in viewing the Department's actions in this case.

D2. (Joint Ex. 1 at 8). Under the terms of the Permit, if monitoring demonstrates degradation of the water quality at MD-31, as evidenced by iron loading exceedances of either the Critical Value of 1,623 lbs. per day or the annual limit of 924 lbs. per day, the Department can require additional monitoring and, ultimately, treatment to reduce the iron loading. After being notified of the need to commence treatment, the terms of the Permit provide PBS an opportunity to refute that requirement if it can "affirmatively demonstrate to the satisfaction of the Department … that the increase in the pollution load has been caused by factors not attributable to the coal refuse disposal operation." (Joint Ex. 1, Special Conditions 24 and 25 at 7-8).

Now that we have reviewed the treatment system and the relevant terms in the Permit, we turn our attention to the events that led to the issuance of the Order and PBS's appeal. Monitoring data collected at MD-31 has routinely exceeded the iron loading limits found in Tables D1 and D2 of the Permit. According to the Department, the Critical Value iron loading limit of 1,623 lbs. per day was exceeded over 140 times since PBS began injecting sludge/slurry into the Reitz Mine in 2001. The total number is somewhat inflated by the fact that the monitoring frequency increased from August 2017 through June 2020 but the increased monitoring was triggered by seven straight monthly exceedances from January 2017 through July 2017. (DEP Ex. 20). The annual water year iron loading limit of 924 lbs. per day from Table D2 has been exceeded in all but one year since 2001. (PBS Ex. 3). PBS does not appear to dispute the fact that there were exceedances but asserts that it is not responsible for them.

In March 2018, an email was sent from the Department to Mr. Rob Bottegal ("Mr. Bottegal"), the top engineer for PBS. (Joint Ex. 4). Mr. Bottegal testified that this e-mail was the first knowledge he had that there was a problem with the injection of the sludge/slurry into the

Reitz Mine. (T. 179). PBS hired US Environmental Research /John Foreman[2] ("Mr. Foreman") to evaluate the issue. PBS and the Department met in April 2018 to discuss the situation and the report that PBS proposed to have completed by Mr. Foreman to characterize the discharge. The report (Joint Ex. 21)(hereinafter the "Foreman Report") was submitted to the Department at a January 2019 meeting. (T. 180-83). Mr. Bottegal left that meeting with the impression that the Department agreed with the conclusion presented in the Foreman Report that the discharge at MD-31 was not impacted by the sludge/slurry injection. (T. 183). Discussions between PBS and the Department concerning the MD-31 discharge appear to have continued throughout 2019. (Joint Ex. 10). In a series of emails between the Department's Mr. Troy Williams ("Mr. Williams") and Mr. Bottegal in September and October 2019, Mr. Williams, on behalf of the Department, requested an alternate plan for handling sludge. PBS proposed constructing sludge drying beds as an alternative to injecting the sludge/slurry into the Reitz Mine. In the same e-mail exchange, Mr. Bottegal requested that the Department consider the Foreman Report and its determination that the iron loading exceedances were due to excessive precipitation, or other types of high flow events. In a letter dated February 7, 2020, the Department reviewed the ongoing discussions and noted that it had completed a full review of the Foreman Report before stating its conclusion that "iron loading has increased due to the injection of the Job 12 sludge." (Joint Ex. 10). The Department further stated that a violation of 25 Pa. Code §§ 90.119, 89.60, 90.307 and the Permit conditions had occurred, which required implementation of the abatement plan and the collection and treatment of the discharge at MD-31. The letter concluded with a statement that the Department would be in touch with PBS to arrange a meeting. After further correspondence and discussions in 2020, the Department issued a Compliance Order dated December 17, 2020 that was appealed

[2] Mr. Foreman testified that he is the sole proprietor and only individual working at US Environmental Research. He also testified that he did not subcontract out any of the work on the PBS project. (T. 246).

to the Board by PBS (2021-002-B). The December 2020 Compliance Order was withdrawn by the Department and replaced by the Order that is the subject of this appeal by PBS (2021-006-B). The Notice of Appeal in this case was followed the next day by the Petition for Supesedeas.

Supersedeas Analysis

The Board has broad discretion in deciding a supersedeas petition and can consider various factors including the three factors enumerated in the statute and regulations. Our resolution of this Petition turns on the determination of the likelihood of PBS being successful on the merits of its appeal. The issuance of the Order by the Department rests on its finding that the iron loading limits at MD-31 were exceeded, resulting in the identified violations and that PBS's operations at the Job 12 Facility caused those violations. In this supersedeas hearing, PBS has the burden to demonstrate to the Board that it is likely to succeed on the merits of its appeal. In order to be successful in its appeal of the Order, PBS must show that the Department's issuance of the Order was unreasonable, contrary to the law, not supported by the facts and/or constituted an abuse of the Department's discretion. PBS has failed to meet its burden of proof and has not demonstrated that the Department's Order was unreasonable, contrary to the law, not supported by the facts and/or an abuse of the Department's discretion in order to prevail on the merits of its appeal. Therefore, its Petition is denied.

In Petitioner's Post-Hearing Brief in Support of Petition for Supersedeas ("PBS's Brief"), PBS states that it "is likely to prevail on the merits because (i) the evidence shows that the Department has pursued enforcement action against PBS as a pretext so that the Department's Bureau of Abandoned Mine Reclamation ("BAMR") can obtain federal funding to improve the Dark Shade Creek and Coal Run watersheds; and (ii) PBS has shown by reliable data that any issues at MD-31 (defined below) are not related to PBS's sludge injections." (PBS's Brief at 2).

The Department, of course, argues that PBS is unlikely to prevail on the merits. It asserts that the suggestion that there was an improper motive for the Department's actions is "unsupported conjecture and a red-herring" that the Board should disregard. (Department of Environmental Protection's Post Supersedeas Hearing Brief ("DEP's Brief") at 43). The Department further states that the factual and expert evidence "showed that PBS Coals' injection of partially oxidized soluble iron-laden sludge and slurry into the acidic Reitz Mine has added iron to the mine pool" and that this "additional iron, in turn, has increased iron concentrations and iron loadings at the mine's outlet, MD-31." (DEP's Brief at 10). The Department contends that it properly exercised its discretion in issuing the Order since the regulatory and permit requirements cited in the Order are supported by the record in this case. *Id*.

We will first address PBS's argument that it is likely to succeed in its appeal because the Department's action was a pretext to obtain federal funding to improve the Dark Shade Creek and Coal Run watersheds. The record reflects that Department personnel, including staff from BAMR, were concerned about the conditions in Dark Shade Creek and the impact that the MD-31 discharge had on Dark Shade Creek and surrounding watersheds. (T. 69-74, 562, 731-736; Joint Exs. 4, 5 and 6). The record also shows that organizations outside of the Department, namely the federal Office of Surface Mining (OSM) and an environmental group, the Stoneycreek-Conemaugh River Improvement Association, were also looking at this issue and communicating their concerns to the Department. PBS's specific allegation is that BAMR wanted to construct a treatment plant to address the MD-31 discharge but that OSM would not permit federal funds to be used for the construction and operation of a treatment plant because of PBS's injection of sludge into the Reitz Mine and its impact on the MD-31 discharge. PBS asserts that OSM and BAMR pressured the Department's District Mining Office into acting against PBS to clear a path for federal funding.

The Department witnesses denied that they had discussed the funding issue with anyone at OSM and/or BAMR or that they were pressured to act against PBS because of the funding issue. (T. 563-64, 733-34).

We agree with the Department that the issue of motive raised by PBS does not support a finding that PBS is likely to succeed in its challenge to the Department's Order. Even if we accept, for the sake of argument, that the Department's enforcement action was motivated in large part by its desire to obtain funding for a treatment plant to address the MD-31 discharge, we do not see how that demonstrates that the Order was unreasonable, unlawful, unsupported by the facts or an abuse of the Department's discretion. The record is clear, and PBS does not appear to dispute that the iron loading limits in the Permit were routinely exceeded. The only real issue in this case is which party is correct on the question of whether the injection of the sludge/slurry into the Reitz Mine is the cause of the iron loading exceedances at MD-31. If PBS is correct and other factors besides the sludge injection are the cause, then the Department's Order is unreasonable, contrary to the law, not supported by the facts and an abuse of discretion. If the Department is correct and the injection of the sludge/slurry is the cause of the exceedances at MD-31, the Department properly acted to address that issue. The fact that doing so may also clear the way to funding a system to treat the discharge and restore the waters of Dark Shade Creek and the surrounding watersheds that have been impacted by acid mine drainage does not strike us as a problem. In fact, it is the exact opposite of a problem; it is clearly part of the Department's mission. That does not mean that the Department may pursue that goal at all costs, but it is part of its responsibilities as the Commonwealth agency charged with protecting and restoring the environment to evaluate what is causing an impact to a waterbody and to take reasonable and appropriate actions to address the impact. A permit such as the one issued to PBS to allow the sludge/slurry injection into the

Reitz Mine grants, as the Board has stated "permission to pollute" but that permission is not unfettered. It is subject to the terms of the permit and subject to change as part of the permit review and enforcement process. The motive issue raised by PBS cannot support a ruling in its favor unless it can also show that the Department was incorrect when it rejected PBS's argument that factors other than the injection of the sludge/slurry into the Reitz Mine are responsible for the iron loading exceedances. We turn our attention then to the key issue in this case.

PBS asserts that the testimony and evidence presented at the supersedeas hearing demonstrated that the iron loading at MD-31 has not increased due to PBS's sludge/slurry injection into the Reitz Mine. PBS contends that its evidentiary showing at the hearing was consistent with the Permit language insofar that it "affirmatively demonstrated" that the increase in pollution load was caused by factors not attributable to the coal refuse disposal operation. PBS argues that the Department "unreasonably and arbitrarily ignored and/or rejected PBS's showing that factors unrelated to its coal refuse disposal operation caused the Fe exceedances at MD-31." (PBS's Post-Hearing Brief at 18). PBS's affirmative argument relied principally on the testimony of its expert, Mr. Foreman. He offered his expert opinion that the exceedances of the iron loading limits are "principally related to precipitation and slugging events." (T. 321). He stated that secondary factors that also contributed to iron loading exceedances included additional water entering the Reitz Mine as a result of significant surface mining and the diversion of the Huskin Run mine discharge into the Reitz Mine. (T. 321). In its Post-Hearing Brief, PBS points to what it describes as "five distinct, but related, points of proof" that support its position and undercut the proof presented by the Department. (PBS's Post-Hearing Brief at 12, 18).

A key issue in this case, and one of the five points of proof cited by PBS, is the trend in the iron concentration data collected at MD-31. Iron concentration is one of the two main components

in calculating the iron loading levels. (T. 336-37). In general, assuming a steady flow number, an increase in the iron concentration levels will increase the iron loading levels calculated for the discharge at MD-31. PBS contends that the iron concentration at MD-31 is flat over time while the Department contends that it decreased prior to 2001 and has increased since PBS began injecting the sludge/slurry into the Reitz Mine. We find that a close examination of the data presented by both parties supports the Department's position that the iron concentration levels at MD-31 have increased since PBS began injecting the sludge/slurry into the Reitz Mine. In addition, the Department provided a sound explanation why the injection of the sludge/slurry into the Reitz Mine results in increasing iron concentration levels at MD-31.

The Department's information on the iron concentrations at MD-31 was presented through the testimony of its two experts. Mr. Jay Winter ("Mr. Winter") presented a series of graphs on which he plotted iron concentration data collected at MD-31 on the y-axis, and the date the sample was collected on the x-axis. (DEP Exs. D-4A, D-4B and D-4C). The iron concentration data presented in the series of Department graphs begin in 1984 and continue into 2020. The Department's graphs show iron concentrations trending downward until 2001 when the sludge/slurry disposal into the Reitz Mine began and then trending up after that date. PBS criticized the data and graphs addressing iron concentration at MD-31 offered by the Department. PBS's main argument is that the Department did not include all the available iron concentration data in developing its graphs and presenting its testimony and, therefore, the information provided by the Department is not reliable. PBS contrasts what it alleges is the Department's unprofessional methodology with what it contends is the more reliable information and graphs presented by Mr. Foreman. We reject the suggestion that Mr. Winter's actions in selecting the data set that he used was intended to bias the outcome, mislead the Board, or was otherwise unprofessional. The data

set he used was robust and contained a large number of data points from samples collected both before and after the sludge/slurry injection took place. He testified that he used data that was collected by or on behalf of PBS and reported to the Department pursuant to the Permit so that it would not be challenged. (T. 740-42). He also selected data points that had information on both flow and iron concentrations so that he could be consistent and calculate the iron loading parameter. (T. 680). The other criticism leveled by PBS is that in graphing the data and presenting trend lines on the graphs, the Department did not present a trend line on the complete data set (1984-2020) graphed on DEP Ex. D-4A. PBS argues that if the Department had done so, the trend line for iron concentration at MD-31 would have been flat. Mr. Winter acknowledged that it was possible that if he added Mr. Foreman's data to his data set and created a trend line that covered the entire time period from 1982 through 2020, it would show up as an "approximately straight line." (T. 690, 718-19). However, no graph was presented by the Department that demonstrated this assumption and, as we discuss below, it is not clear to us that this assumption is accurate.

We agree that Mr. Foreman used a broader set of iron concentration data in his analysis. In addition to the data used by the Department, Mr. Foreman included data from other sources including OSM and the United States Geologic Survey (T. 264-65). Mr. Foreman testified that after he compared the iron concentration data used by the Department with the data he used, he created PBS Exhibit 10 which identified data that was not included in Mr. Winter's analysis.[3] (T.

[3] PBS Exhibit 10 was created by Mr. Foreman during the latter part of the hearing. Because of the remote nature of the hearing, a copy of PBS Exhibit 10 was not immediately available to the Board or the Department. We allowed limited testimony from Mr. Foreman related to the exhibit and, following discussion with the parties, we conditionally admitted PBS Exhibit 10 subject to the Department reviewing the exhibit and setting forth any objections it may have to the exhibit. (T. 815-20). The Department conveyed its objections to the Board via e-mail on March 10, 2021 and PBS responded to those objections via e-mail later that day. The Department's second objection to an inaccurate statement in PBS Exhibit 10 concerning the use of certain data that was acknowledged as inaccurate by PBS is sustained. The remaining objections are overruled, and the remaining portions of PBS Exhibit 10 are admitted to the record consistent with this ruling.

815-20). Our review of PBS Exhibit 10 (as admitted) suggests that Mr. Foreman included approximately 120 additional iron concentration data points in his analysis. The problem with PBS's argument is that even with the broader data set used by Mr. Foreman, a close examination of the evidence shows that the iron concentration measurements at MD-31 are consistent with the data and trend pattern presented and relied on by the Department. A review of the additional data identified by Mr. Foreman in PBS Exhibit 10 shows limited instances where these iron concentration measurements vary significantly with iron concentration measurements used by the Department from the same approximate time period.[4] The only exception is early data from 1982 and 1983 that was totally excluded from the Department's data set. The majority of the data collected in the 1980s recorded iron concentrations above 100 mg/l ranging all the way up to a high of 225 mg/l in a sample collected in October 1982. (PBS Ex. 10 at 1-2). Starting in 1991, the iron concentrations drop below 100 mg/l and, except for a single reading that appears to be an outlier (255 mg/l on 4/27/00), the next iron concentration above 100 mg/l is not recorded until October 2004. In the years right before and after the Permit was amended to allow sludge/slurry disposal into the Reitz Mine (2000 through 2002 excluding the October 2000 outlier discussed above), the iron concentration ranges from 28.7 mg/l to 92 mg/l with the higher measurements largely occurring in 2002. The iron concentration measurements periodically exceed 100 mg/l starting in 2006 and, once again, consistently exceed 100 mg/l starting in 2015. The majority of measurements from 2015 through 2020 exceed 100 mg/l with a range of 66.95 mg/l to 153.47mg/l. (PBS Ex. 10).

[4] For instance, in 2002, the range of the iron concentration data (12 measurements) used by both parties is 46.0 mg/l to 92.0 mg/l and the range of the additional data (8 measurements) that Mr. Foreman included is 42.6 mg/l to 78.3 mg/l. (PBS Ex. 10)

Mr. Foreman graphed his iron concentration data and presented it as part of his main exhibit, the Updated Time Series Graph (the "Time Graph"). (PBS Ex. 2). Unfortunately, the scale of the y-axis (iron concentration measurements expressed in mg/l) used on the Time Graph makes it difficult to evaluate whether the trend of the plotted data is flat as described by Mr. Foreman. We find that a graph of iron concentration v. time contained in the Foreman Report (Joint Ex. 21 at 13-03) better allows the determination of the iron concentration trend when all the available iron concentrations data is plotted. Although the y-axis scale on this graph is also somewhat expanded,[5] the trend lines displayed on the two graphs created by Mr. Foreman show decreasing iron concentrations from the early 1980's to approximately 2000 followed by increasing iron concentrations after that time up until the data ends in approximately 2019. This is consistent with our general observation of the data found in PBS Ex. 10 as discussed above, the Department's data set found at DEP Ex. D-19 and the Department graphs at DEP D-4B and D-4C. We find that the graphs presented by the Department, specifically DEP D-4B and D-4C, accurately portray the data and trends of the iron concentration as measured at MD-31. We disagree with PBS's contention that the iron concentration data at MD-31 is a point of proof that supports its position that the sludge/slurry disposal is not causing the iron loading exceedances that resulted in the violations addressed in the Order.

The Department also offered testimony that the decreasing iron concentrations measured at MD-31 prior to 2001 was consistent with the expected outcome. Mr. Winter testified that his work experience, the peer-reviewed articles that he has read, and the seminars he has attended, all support that, water quality in abandoned mines will improve over time. (T. 602-04). He stated

[5] If the scale on the y-axis of the graphs on page 13-03 of Joint Ex. 21 were revised to better reflect the range of actual measured values (0 to 300) instead of the scale used in the graph (0 to 1000), we have little doubt that the trend we identify, decreasing until approximately 2000 and then increasing until 2019, would be even more readily observed.

that iron levels, along with other metals in acid mine drainage, decrease over time. He referenced a specific article entitled *Estimating Water Quality Trends in Abandoned Coal Mine Pools* by Eric Perry and Henry Rauch (DEP Ex. D-36) as one of the articles discussing this trend in abandoned mines. PBS criticized Mr. Winter's interpretation and reliance on this one article, but we find that criticism unconvincing in light of our review of the article and the other testimony Mr. Winter provided on this topic. Most importantly, the relevant iron concentration data, as discussed above, is consistent with the testimony provided by Mr. Winter.[6]

The Department also presented testimony explaining the mechanism by which PBS's disposal of the sludge/slurry into the Reitz Mine causes an increase in the iron concentration in the discharge measured at MD-31. Mr. Williams testified extensively on the leachate treatment and sludge/slurry disposal process operated by PBS. The iron concentrate in the leachate draining off the refuse pile and collected in the underdrains, starts at a high level prior to any treatment (T. 487). PBS's treatment fails to fully oxidize the leachate resulting in the presence of ferrous hydroxide in the sludge/slurry injected into the Reitz Mine (Joint Ex. 35; T. 491-93). Ferrous hydroxide has a characteristic blue-green color and was observed in the mixing channel in the treatment system. PBS's chief engineer, Mr. Bottegal, stated he had also observed the blue-green color in the water in the mixing channels and that this indicated the presence of iron in the form of ferrous hydroxide. (T. 212-13). The presence of ferrous hydroxide in the Reitz Mine was also

[6] This evidence also convinces us that two other points of proof cited by PBS do not definitively support its position. PBS argues that its sludge/slurry disposal activities are not a factor in the iron loading exceedance since the data shows that the highest loadings exceedances for both Table D1 and D2 limits occurred before injection of the sludge/slurry began in 2001. (PBS's Brief at 12-14). The iron concentration data and the recognized trend (decreasing before 2001 and increasing after 2001) are not in conflict with those observations. Since iron concentration is a main component of the calculation of iron loading, the higher concentrations identified in the pre-2001 data are entirely consistent with the higher iron loading readings during that time period and do not necessarily rule out a finding that sludge/slurry disposal after 2001 is the cause of the post-2001 exceedances.

identified in a 2019 sample collected from a monitoring point within the mine between the injection borehole and the MD-31 discharge. The sample was described in the Department inspector's report as blue-green in color and resembling the treated water being pumped down the borehole by PBS. (T. 640-42; Joint Ex. 40; DEP Ex. D-24B). Ferrous hydroxide is more soluble than ferric hydroxide and, therefore, it more readily releases iron in the acidic environment in the Reitz Mine. (T. 212-13, T. 511). We are satisfied that the evidence supports that iron present in the sludge/slurry injected by PBS is released into the mine pool in the Reitz Mine and explains the increased iron concentrations observed in the data collected at MD-31.

PBS's main argument focuses on the other part of the iron loading formula, the amount of flow measured at MD-31. The mine pool in the Reitz Mine is at a steady state controlled by the elevation of the MD-31 discharge. (T. 594-95). Therefore, as a general rule, inflow into the mine pool equals the outflow of water discharged at MD-31. (T. 599). PBS asserts that the iron loading exceedances have been caused by increased inflow into the mine pool due to periods of high precipitation that necessarily results in greater outflows at MD-31. Assuming for the sake of discussion that iron concentration stayed steady, PBS is correct that a higher volume of water flowing through the discharge point at MD-31, will result in higher iron loading values. On his Time Graph, Mr. Foreman charted the monthly precipitation totals from 1982 to 2020 along with the available discharge volumes in gallons per minute as measured at MD-31. Mr. Foreman then identified periods of higher than average discharge that he called slug events. Mr. Foreman next compared the timing of these slug events to the monthly precipitation records which led him to conclude that the slug events took place one to three months after periods of higher precipitation. (T. 306-07). According to Mr. Foreman, the delay between the precipitation and the slug events is the result of the time it took for the water to infiltrate through the strata overlying the Reitz Mine.

(T. 306-07). Mr. Foreman concluded that when you take into account the time delay necessary for the infiltration to occur, there is as correlation between the slug events and an increase in iron loading values at MD-31. (T. 306). However, as Mr. Foreman stated, correlation does not equate to causation and our review of the testimony and evidence lead us to disagree with Mr. Foreman's opinion that the "exceedances are principally related to precipitation and slugging events." (T. 321).

First, and foremost, our review of the Time Graphs leads us to conclude that they do not support Mr. Foreman's determination that the high discharge that led to increased iron loading are the result of high precipitation events. The data is too inconsistent to support that conclusion in our opinion. There are periods of time where high precipitation does not appear to result in higher discharge volumes at MD-31 or conversely where higher discharges are not readily connected to above average rainfall. See for instance the data on the Time Graph for much of 1994 through 1997, late 1999 through 2000, 2008 and 2009 and 2014 through 2016. Mr. Foreman does not identify any slug events during these times and yet precipitation levels fluctuate from below average to well above average and the discharge data during those time periods also show a great deal of variability. If the system worked the way Mr. Foreman described in his testimony, we would have anticipated that the relationship between precipitation levels and the discharge volumes at MD-31 would have been more closely correlated. We do not think that it is surprising this is not the case given the path that precipitation falling on the surface is required to take to reach the mine pool in the Reitz Mine. Mr. Foreman discussed several surface mines and other mining activity that he contended would increase the rate of infiltration above the Reitz Mine. Mr. Foreman acknowledged that evidence of subsidence above the Reitz Mine is limited and the Department testified that the recent surface mining in the area had been properly reclaimed which

would limit the scope and rate of infiltration in those areas. The Department presented a stratigraphic cross-section showing the multiple layers of rock formations that the water is required to pass through to reach the Reitz Mine mine pool. (DEP Ex. D-3). There are a number of pathways shown on the cross-section that would prevent precipitation from reaching the mine pool. Mr. Foreman did not present any data regarding infiltration rates and stated that collecting such data was beyond the scope of his investigation. (T. 413, 420-23). In the end, the data presented in the Time Graph simply appears too inconsistent to support the conclusion that precipitation levels are the principal cause of the high iron loading values at MD-31.

In addition to our concerns about the inconsistent data linking precipitation levels to the discharge volumes, we also lacked any testimony or evidence from PBS addressing the volume of the sludge/slurry that was injected into the Reitz Mine and its relative contribution to the volume of the discharge at MD-31. The sludge/slurry is injected upgradient from the mine pool and it contains a large percentage of liquid. (T. 530-32, 638-641). It has a much more direct pathway to reach the mine pool than surface precipitation. According to data presented by the Department, PBS injects millions of gallons of the sludge/slurry mixture into the Reitz Mine each month. (DEP Ex. D-19). Mr. Bottegal testified that in 2020 the volume of sludge/slurry injected into the Reitz Mine was in excess of 110 million gallons per year. The Department presented a chart that depicted the volume of the sludge/slurry injected into the Reitz Mine as a percentage of the overall discharge volume at MD-31. (DEP Ex. D-4D). The chart shows that from 2004 to early 2017, the volume of injected sludge/slurry rose relative to the overall volume of the MD-31 discharge peaking at approximately 60% in late 2016-early 2017. After that time, the percentage fell but generally stayed within a range of 15% to 40%. It is not clear to us from the Department's testimony and exhibit that all of the liquids injected by PBS make it to the mine pool and contribute

directly to the overall discharge at MD-31. However, the volumes involved appear sufficiently large and variable that they would likely account for a portion of the total discharge and thereby have a significant impact on the iron loading calculation. Mr. Foreman did not explain to us how he accounted for the variable volumes of sludge/slurry injected by PBS into the Reitz Mine in his Time Graphs or in his conclusion that high precipitation is what caused the increased discharge at MD-31. In the end, while we respect Mr. Foreman and his knowledge and experience, we are not persuaded that the evidence supports his conclusion that high precipitation on the surface resulted in slug events that increased the flow rate of MD-31 and led to the exceedances of the iron loading limits in the Permit.

PBS raised two other points that we want to quickly address. There have not been any exceedances of the Critical Value iron loading limit found in Table D1 since June 2020, a period of seven months. PBS argues that this is evidence that the injection of the sludge/slurry is not the cause of the exceedances. The Department argues that there have been periods in the past where the limit has been met for months only to have the limit exceeded again. (DEP's Post-Hearing Brief at 40). We would first note that meeting the Table D1 limits for a period of time does not address the Table D2 violations that are part of the basis for the Order. We also did not receive enough evidence explaining this argument to change our opinion on the overall cause of the exceedances. It is our understanding that PBS started to send at least a portion of the leachate into the treatment ponds in 2020 rather than injecting it into the Reitz Mine. (DEP Ex. D-14; T. 505). This appears at least as plausible an explanation for the lack of exceedances since June 2020 as any other presented and is consistent with our determination about the impact of PBS's sludge/slurry injection. Regardless, we do not think that the current situation is sufficiently clear

to change our opinion that PBS has failed to demonstrate that it is likely to be successful on the merits of its appeal.

The second point concerns a PBS mining project near the Job 12 Facility known as the Huskin Mine. PBS entered into a Consent Order and Agreement with the Department in 2005 that allowed it to proceed with the construction and mining of the surface Huskin Mine. (PBS Ex. 6; hereinafter the "2005 COA"). As part of the 2005 COA, PBS was authorized to collect an existing orphan acid mine discharge identified as SP-1 and pipe it into the Reitz Mine. PBS argues that this is a factor in the increase in the iron loading values because it introduced an additional source of iron and flow into the Reitz Mine. However, we agree with the Department that the Huskin Mine discharge is likely to have limited impact on the iron loading values at MD-31 when compared to the sludge/slurry injected by PBS given its volume, chemical makeup and location. PBS also argues that the terms of the 2005 COA involving the Huskin Mine "immunizes PBS from liability for MD-31". (PBS's Brief at 26). We disagree with PBS's reading of the language of the 2005 COA on this point. The 2005 COA states that the Department will not require PBS to treat the MD-31 discharge "because of the diversion of SP-1 into the" Reitz Mine. (PBS Ex. 6 at 4). We find that the remedy required by the Order is not "because" of the diversion of SP-1. Therefore, the alleged liability protection PBS claims it is entitled to under the 2005 COA by PBS does not apply.

Conclusion

A ruling on a supersedeas petition is by nature a preliminary ruling based on a record that is necessarily limited as a result of the supersedeas hearing taking place early in a case, usually prior to any meaningful discovery by the parties. It is not a final decision following a full hearing on the merits. At this early point in the case, PBS has not demonstrated to the Board's satisfaction

that it is likely to succeed on the merits of its appeal and, therefore, we find that it is not entitled to a supersedeas of the Department's Order.[7] PBS failed to show that the Department's Order, that identify violations of the regulations and Permit, was unreasonable, contrary to the law, not supported by the facts and/or an abuse of the Department's discretion. PBS's basic argument is that factors other than its coal refuse disposal activities were the cause of the iron loading exceedances that are the focus of this case. We find that the evidence presented at the supersedeas hearing supports the Department's rejection of PBS's argument and its determination that PBS's injection of sludge/slurry into the Reitz Mine resulted in exceedances of the Permit limits for iron loading at MD-31. The Department acted lawfully and reasonably and did not abuse its discretion by ordering PBS to implement the approved remedy. The Petition is denied, and we issue the following Order:

[7] Further, while our decision in this case rests on our determination that PBS has failed to demonstrate that it is likely to succeed on the merits of its appeal, and we are not required to address any of the other factors, we want to state briefly that we are not convinced the remedy required by the Department, ceasing the injection of the sludge/slurry into the Reitz Mine and construction of drying beds, causes PBS irreparable harm. It also appears based on our understanding of the hearing record that continuing the injection of sludge/slurry into the Reitz Mine will continue to negatively impact the water quality in Dark Shade Creek and the surrounding watersheds. Our determinations on these factors further support our decision to deny the Petition.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PBS COALS, INC.,	:	
	:	
v.	:	**EHB Docket No. 2021-006-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	

AND NOW, this 30th day of March 2021, following a hearing on Appellant's Petition for Supersedeas and a careful review of the transcripts, exhibits, and the parties' briefs, it is hereby ORDERED that Appellant's Petition for Supersedeas is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 30, 2021

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

For the Commonwealth of PA, DEP:
Brian Greenert, Esquire
Michael Heilman, Esquire
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Gregg Rosen, Esquire
Wendy Parker, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNENVIRONMENT, EARTHWORKS, and ENVIRONMENTAL INTEGRITY PROJECT	:	
v.	:	**EHB Docket No. 2020-002-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM AND RESOURCES, LLC, Permittee	:	**Issued: March 31, 2021**

OPINION AND ORDER ON
MOTION TO COMPEL COMPLIANCE WITH AUGUST 26, 2020 ORDER

By Thomas W. Renwand, Chief Judge

Synopsis

A motion to compel is denied where there has been no compliance with 25 Pa. Code § 1021.93(b), requiring the parties to confer before filing a discovery motion. Additionally, the motion is denied where there is no basis for overturning the Appellants' claim of privilege.

O P I N I O N

Introduction

This matter involves an appeal filed with the Pennsylvania Environmental Hearing Board (Board) by PennEnvironment, Earthworks, and Environmental Integrity Project. The appeal challenges the Department of Environmental Protection's (Department) issuance of State-Only Operating Permit No. 63-00968 (permit) to MarkWest Liberty Midstream and Resources, LLC (MarkWest) for the continued operation of its Smith Compressor Station, an existing natural gas compressor station previously permitted under a general permit, GP-5, and plan approval PA 63-00968A.

The relevant history of this matter is as follows: On August 26, 2020, the Board issued an Opinion and Order granting in part and denying in part a Motion to Compel filed by MarkWest. The Opinion and Order directed PennEnvironment, Earthworks and Environmental Integrity Project to answer certain interrogatories and requests for production of documents. *PennEnvironment et al. v. DEP and MarkWest Liberty Midstream and Resources, LLC*, EHB Docket No. 2020-002-R (Opinion and Order on Motion to Compel issued August 26, 2020) ("August 26, 2020 Opinion and Order"). On October 20, 2020, MarkWest filed a Motion for Summary Judgment seeking to dismiss the appeal on the grounds of untimeliness. On January 19, 2021, the Board issued an Opinion and Order granting MarkWest's motion in part. The Board determined that the appeal filed by Environmental Integrity Project was untimely and dismissed its appeal. With regard to the timeliness of the appeals filed by PennEnvironment and Earthworks, the Board found there were mixed questions of law and fact that precluded a grant of summary judgment.[1] *PennEnvironment et al. v. DEP and MarkWest Liberty Midstream and Resources, LLC*, EHB Docket No. 2020-002-R (Opinion and Order on Motion for Summary Judgment issued January 19, 2021).

The matter currently before the Board is a second motion to compel filed by MarkWest, entitled Motion to Compel Appellants' Compliance with the Board's August 26, 2020 Order. Appellants filed both a response and memorandum of law in opposition to the motion on March 18, 2021.[2]

[1] Because Environmental Integrity Project is no longer an appellant in the matter before the Board, when this Opinion uses the term "Appellants" it is referring to PennEnvironment and Earthworks.

[2] Even though the Board's discovery rule, at 25 Pa. Code § 1021.93(d), does not require the filing of a memorandum of law in support of a discovery motion or response, going forward in this matter the parties are strongly encouraged to file memoranda of law in support of their discovery motions and responses. As we stated in *American Iron Oxide Co. v. DEP*, 2005 EHB 779, 781, n. 2, "[I]t is always helpful when these

Discussion

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a); *Protect PT v. DEP*, EHB Docket No. 2018-080-R (Opinion and Order on Motion to Reopen Discovery issued August 4, 2020); *Hickory Hill Group, LLC v. DEP*, 2019 EHB 377. Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa. R.C.P. 4003.1; *Protect PT*, slip op. at 8. Full disclosure of a party's case underlies the discovery process before the Board. *Pennsylvania Trout v. DEP*, 2003 EHB 652, 657. Nevertheless, "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 Township v. DEP*, 2009 EHB 202, 205.

In our August 26, 2020 Order, the Board directed Appellants to respond to interrogatories and requests for production regarding internal communications and communications with third parties pertaining to (1) the objections set forth in the notice of appeal, (2) the permit and (3) the comment letter submitted on behalf of Appellants and third parties but limited the Appellants' response to a defined period from August 1, 2019 through January 13, 2020. The Board further stated that "any communications protected by attorney-client privilege, work product privilege or any other applicable privilege are not discoverable." August 26, 2020 Opinion and Order, slip op. at 5.

[discovery] disputes arise for the Board to have the benefit of briefs setting forth the parties' legal positions."

Appellants contend that they have complied with the Board's August 26, 2020 Opinion and Order by "producing all responsive, non-privileged communications and documents" within the date range set by the Board. For those communications not produced, Appellants provided a privilege log in which they identified their claims of privilege. It is the privilege log that is at the heart of MarkWest's motion. MarkWest asserts that the privilege log fails to provide sufficient information about the withheld documents. It further disputes that the withheld documents are, in fact, protected by attorney-client or work product privilege, and requests that the Board either direct Appellants to produce the documents or, in the alternative, produce them for *in camera* review.

The Board's rules require parties to confer in an attempt to resolve discovery disputes prior to filing a motion with the Board. Specifically, 25 Pa. Code § 1021.93(b) states in relevant part as follows:

> (b) A discovery motion may not be filed unless it contains a certification that the movant has in good faith conferred or attempted to confer with the party against whom the motion is directed in an effort to secure the requested discovery without Board action.

MarkWest's motion contains no such certification. According to Appellants, MarkWest never contacted them with a request for additional information before filing its motion. Additionally, Appellants point out that the Joint Electronically Stored Information Plan (Joint ESI Plan) agreed to by the parties and adopted by the Board on April 22, 2020, defines the specific information that is to be provided in a privilege log and requires the responding party to provide further explanation "[i]f so requested." (Joint ESI Plan, para. 10(a)(iv)(4).[3] Appellants state:

[3] Paragraph 10(a) of the Joint ESI Plan outlines the information to be provided in a privilege log. It states as follows:

> The privilege log shall include the following information concerning the ESI withheld: (1) an identification, with reasonable particularity, of the

> The issue here is that MarkWest has never made such a requrest. This Motion is the first time in which Appellants learned that MarkWest believed the privilege log to be insufficient – many months since Appellants provided it to MarkWest. Rather than simply asking Appellants for clarification or additional detail, MarkWest has opted to jump the gun and engage in another round of motions practice.

(Appellants' Memorandum of Law, p. 5.)

The importance of conferring before seeking Board involvement in a discovery dispute was recently discussed in *Range Resources – Appalachia, LLC v. DEP*, EHB Docket No. 2020-014-R, slip op. at 3-4 (Opinion and Order on Motion to Compel Discovery and for Expedited Relief issued August 20, 2020). There the Board held, "[I]n all cases, before filing a discovery motion with the Board, Counsel must first focus on resolving the issues..." *Id.* at 4. If the parties "are at an impasse on a particular issue, despite their best efforts and after genuine attempts at compromise by both sides, only then should they seek the Board's involvement." *Id*. at 3-4. *See also Sludge Free UMBT et al. v. DEP and Synagro a.k.a. Synagro Mid-Atlantic, Inc.,* 2014 EHB 939, 941 ("As a precursor to filing a discovery motion, our rules require that the parties make a good-faith effort to confer about the resolution of discovery disputes.") Here, there appears to have been no attempt by MarkWest to resolve this matter with Appellants before filing its motion; there has been no compliance with 25 Pa. Code § 1021.93(b). On this basis alone, the motion may be denied.

> ESI (including, to the extent applicable, the date and time when the ESI was sent or last modified, the author, and all recipients and persons copied on the ESI); and (2) the privilege which justifies withholding the ESI.

Environmental Hearing Board Electronic Docket 2020-002-R, Docket Entries No. 15-16 (April 22, 2020).

Nonetheless, we shall address MarkWest's argument that the withheld documents are not protected by attorney-client privilege. MarkWest argues that "[a] party cannot simply allege privilege without attempting to show why the privilege protects otherwise discoverable information," quoting the Board in *American Iron Oxide*, 2005 EHB at 782, and *Wheeling-Pittsburgh Steel Corp. v. DEP*, 2005 EHB 788, 791. (MarkWest's Motion, para. 14.) In *American Iron Oxide* and *Wheeling-Pittsburgh*, the appellants responded to nearly every interrogatory and request for production with generalized objections and/or claims of privilege with little or no supporting information, including the lack of a privilege log. The appellants refused to provide any information beyond what was stated in their notice of appeal. Here, in contrast, the Appellants contend that they have provided the information requested by MarkWest, including 13 nonprivileged email chains between the Appellants and third-parties, and, where they have not produced communications due to a claim of privilege, they have provided a privilege log containing the information agreed to by the parties in their Joint ESI Plan.

MarkWest argues that the Board should compel the production of the communications and documents even if they are privileged on the grounds that they may contain discoverable facts. MarkWest cites *Friends of Lackawanna v. DEP*, 2015 EHB 772, in support of its argument. In *Friends of Lackawanna*, the appellant objected to a number of interrogatories, including one asking it to identify persons believed to have knowledge of certain facts related to the matter on appeal. It objected on a number of grounds, including that the information sought was contained in a privileged communication. In ordering the appellant to answer the interrogatory, the Board stated:

> [T]o the extend that Friends of Lackawanna objects to this interrogatory on the basis of attorney-client privilege, as the Supreme Court has instructed, there is a difference between communications between counsel and a client and the facts contained within those communications:

> "[T]he protection of the privilege extends only to communications and not to the facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."

2015 EHB at 776-77, n. 2 (quoting *Upjohn Co. v. United States*, 101 S. Ct. 667, 685-86) (1981)).

Here, unlike *Friends of Lackawanna*, what MarkWest is seeking are the communications themselves. The interrogatories and production requests ask the Appellants to identify and produce communications related to the subject matter of the appeal, the permit and the comment letter. Where such communications are privileged, the Appellants cannot be compelled to produce them.

Finally, the Appellants argue that this motion is part of a pattern of abusive discovery. We decline to address this argument at this time. However, it appears that at least some of the issues set forth in the motion, such as MarkWest's request for more specificity in the privilege log, could have been addressed without the need to file a motion. As we stated in *Range*, only after genuine attempts to resolve these disputes should a discovery motion be filed.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNENVIRONMENT, EARTHWORKS, and ENVIRONMENTAL INTEGRITY PROJECT	:	
v.	:	**EHB Docket No. 2020-002-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM AND RESOURCES, LLC, Permittee	:	

O R D E R

AND NOW, this 31st day of March 2021, it is hereby ordered that the Motion to Compel Appellants' Compliance with the Board's August 26, 2020 Order is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: March 31, 2021

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

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For Permittee:
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(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-039-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 4, 2021**
	:	

OPINION AND ORDER ON
MOTION FOR LEAVE TO DEPOSE DEPARTMENT WITNESS

By Thomas W. Renwand, Chief Judge

Synopsis

An Appellant's motion to depose a Department witness is granted where it is clear that the Appellant's failure to depose the witness during the discovery period was based on an understanding that the Department employee would not be called as a witness in the Department's case, including as a rebuttal witness. There is no prejudice to the Department in allowing this deposition since the hearing in this matter has not yet been scheduled.

O P I N I O N

Introduction

This matter involves a notice of appeal filed with the Environmental Hearing Board (Board) by Range Resources – Appalachia, LLC (Range), challenging a March 10, 2020 letter by the Department of Environmental Protection (Department) regarding impacts to a water supply in Independence Township, Washington County. The letter was signed by Daniel Counahan, District Oil and Gas Manager for the Department's Southwest District Oil and Gas Operations. The letter concludes that Range failed to rebut the legal presumption that its operations had caused the

alleged water pollution and directed Range to take a number of actions, including providing a plan to restore or replace the water supply.

The matter now before the Board is a Motion for Leave to Depose Mr. Counahan filed by Range on April 21, 2021. The Department filed a response opposing the motion on April 30, 2021.[1] According to the parties' filings, on September 2, 2020 Range served interrogatories on the Department seeking identification of all individuals who were involved in the Department's investigation of the water supply complaint. The Department responded on October 2, 2020, identifying five individuals, including Mr. Counahan. In response to Interrogatory No. 5 asking the Department to identify each "non-expert witness" it intends to call in a hearing in this matter, the Department identified the same individuals, including Mr. Counahan. (Exhibit 1 to Motion, Response to Interrogatory No. 5.)

On January 19, 2021, counsel for Range emailed counsel for the Department stating as follows:

> As you know, in your discovery responses, you have identified Dan Counahan as someone with knowledge of this matter. If you intend to call him as a witness at the hearing, we will, of course, need to request his deposition. If, however, you are in a position to stipulate that you will not call him as a witness, we will not require his deposition. Please let us know. If you are going to call him as a witness, please provide dates on which he is available for deposition.

(Exhibit 2 to Motion.) According to Range's motion, "[g]iven Mr. Counahan's high-level position at the Department, Range was willing to make this concession as a courtesy." (Motion, para. 6.) The Department responded to Range's email by suggesting a telephone call. (Exhibit 1 to Response.) On the following day, January 20, 2021, counsel for Range and the Department

[1] On April 22, 2021, Range filed a certification that the parties conferred in good faith in an attempt to resolve this matter without Board intervention, in accordance with 25 Pa. Code § 1021.93(b), but were unable to do so.

conversed by telephone. The parties disagree as to what was agreed during this call. Range contends that the Department stated it did not intend to call Mr. Counahan as a witness at the hearing and "would stipulate to this in any form that Range felt necessary." (Motion, para. 7.) The Department does not dispute that it stated during the call that it did not intend to call Mr. Counahan as a witness but disagrees with Range's contention that it "would stipulate to this in any form that Range felt necessary." (Response, para. 7.)

Range states that it relied on what it believed was its agreement with the Department that Mr. Counahan would not be called as a witness, and while it deposed all of the other witnesses identified by the Department in its response to interrogatories, it did not depose Mr. Counahan. On March 31, 2021, Range emailed the Department a draft stipulation stating that Range would not depose Mr. Counahan if the Department did not call him as a witness at the hearing. On April 6, 2021, the last day of the discovery period, the Department returned the draft stipulation with revisions, including the statement that the Department reserved the right to call Mr. Counahan as a rebuttal witness.

The Department states that it still does not intend to call Mr. Counahan as a witness in its case-in-chief, but it simply does not want to forego the ability to call him as a rebuttal witness should it be necessary. The Department disputes that there was an agreement between the parties regarding the deposition of Mr. Counahan and his status as a witness. It is the Department's contention that if Range wished to depose Mr. Counahan, it should have done so during the discovery period. The Department asserts that allowing Mr. Counahan's deposition now would be prejudicial to the Department since it would divert attention and resources away from preparing for the hearing.

Discussion

Pursuant to Pennsylvania Rule of Civil Procedure 4003.1, "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action…" Clearly, as someone identified by the Department as having knowledge of the water supply investigation and as the author of the letter that is the subject matter of the appeal, Mr. Counahan is an individual with knowledge relevant to this matter. As such, he is subject to deposition by Range. The Department does not dispute that Mr. Counahan is subject to being deposed but contends that it should have been done during the discovery period. The Department contends that if it was Range's understanding that Mr. Counahan would not be called as a rebuttal witness, it should have memorialized the January 20, 2021 call at that time rather than waiting until one week before the end of discovery. For its part, Range states that if the Department had any intention of calling Mr. Counahan as a rebuttal witness, it should have revealed this information during the January 20 call. Range states that it was quite open about its intention not to depose Mr. Counahan only if the Department were not planning to call him as a witness. It points to its email of January 19, 2021 as further evidence of its intentions. We note that in the Department's response to Range's motion, it does not deny stating during the January 20 call that it would not call Mr. Counahan as a witness.

We believe that there was no meeting of the minds during the January 20, 2021 call. It was Range's belief that the Department did not intend to call Mr. Counahan as a witness in any form – whether in its case-in-chief or in rebuttal. It was the Department's belief that, while it agreed that Mr. Counahan would not be called in its case-in-chief, it made no promises with regard to calling him in rebuttal if necessary. Nonetheless, the Department should have been aware during the January 20 call that Range's basis for not deposing Mr. Counahan was its belief that he would not

be called as a witness in any form. This is evident in the email from Range's counsel on January 19, 2021.

The Department is correct that "discovery is not a game played between counsel," citing our decision in *Rural Area Concerned Citizens v. DEP and Bullskin Stone and Lime, LLC*, 2015 EHB 146, 150. In our opinion, a number of discovery disputes could be avoided if the parties simply put their cards on the table face up. Hiding cards or providing answers that are meant to evade usually leads to unnecessary discovery disputes down the road. We reiterate and expand on our holding in *Rural Area Concerned Citizens*: Discovery should not be played as a game where the ball is hidden. Rather, discovery should be conducted as it was intended – a process whereby parties can obtain information about each other's case as efficiently and economically as possible in order to gauge the strength and weakness of their own case and that of their opponents. This process operates more effectively and proceeds more efficiently when parties are forthcoming in identifying all witnesses and documents relevant to a case.

Turning to the matter at hand, we do not believe the Department intentionally led Range to believe that Mr. Counahan would not be called as a potential rebuttal witness. However, we believe the Department should have been aware that this was Range's understanding. In reading Range's interrogatories and emails, we believe Range made it quite clear that it was agreeing not to depose Mr. Counahan *solely* on the basis of his not being called as a witness. We believe that Range acted in good faith when it agreed to forego the deposition of Mr. Counahan based on its understanding that he would not appear as a witness in any form – whether in the Department's case-in-chief or in rebuttal.

Since the hearing has not yet been scheduled there is no prejudice to the Department in allowing the deposition of Mr. Counahan at this stage of the proceeding. The Department argues

that, rather than allowing the deposition of Mr. Counahan at this time, the Board should wait until the Department files its prehearing memorandum and allow Range to address the issue in a motion in limine if Mr. Counahan is listed as a witness. The problem with this approach is that allowing the deposition of Mr. Counahan at that late stage of the proceeding could be prejudicial to both the Department and Range since the parties' prehearing memoranda are filed only a short time before the hearing. Since no hearing has been scheduled, it seems to be a more prudent approach to allow Mr. Counahan's deposition at this time.

We encourage the parties to work out an agreement regarding the time and manner of deposing Mr. Counahan. If they are unable to do so, the Board is willing to schedule a conference call for this purpose.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-039-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 4th day of May, 2021, it is hereby ordered that Range's Motion for Leave to Depose Daniel Counahan is *granted.*

ENVIRONMENTAL HEARING BOARD

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

DATED: May 4, 2021

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

CLEARFIELD COUNTY	:	
	:	
v.	:	**EHB Docket No. 2020-016-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PA WASTE, LLC, Permittee	:	**Issued: June 10, 2021**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants an Appellant's motion for summary judgment in an appeal of a solid waste permit for a new landfill where the Permittee did not provide any information in its permit application on the geographic origin of the waste it will be accepting, as unequivocally required by the regulations. In addition, the Permittee and the Department failed to properly consider alternative locations for the new landfill, and the Department failed to properly publish a justification for overriding the host county's recommendation that the permit be denied. The Board vacates the permit and remands it back to the Department for further consideration.

O P I N I O N

Clearfield County has appealed the issuance of Solid Waste Permit No. 101719 issued by the Department of Environmental Protection (the "Department") to PA Waste, LLC for the construction and operation of a new municipal waste landfill to be called the Camp Hope Run Landfill, located in Boggs Township, Clearfield County. The road to the issuance of this permit has been long. PA Waste initially submitted a permit application for the Camp Hope Run Landfill

to the Department back in 2006. That application was eventually denied by the Department in 2008, and PA Waste appealed that denial to the Board. Following a hearing on the merits in 2010, we sustained PA Waste's appeal, rescinded the permit denial, and remanded the application back to the Department, finding that the Department improperly based its denial on a repealed regulation that had previously required a *separate* site suitability analysis beyond the typical environmental assessment. *PA Waste, LLC v. DEP*, 2010 EHB 874. Following the remand, the Department again denied PA Waste's application in 2015. *See PA Waste v. DEP*, EHB Docket No. 2015-056-M. PA Waste then submitted another permit application to the Department in 2017 (Clearfield Ex. 2), which the Department approved and which is the subject of this appeal.

Clearfield County has opposed the Camp Hope Run Landfill all along, as is most recently evidenced by this appeal, and it has now moved for summary judgment. Clearfield has objected to the landfill permit on multitudinous grounds in the appeal, but for purposes of summary judgment it argues that the Department erred in issuing the permit in the absence of necessary information in the application regarding the origin of the waste that will be accepted by the Camp Hope Run Landfill. Notably, the waste will not be coming from within the host county of Clearfield. Clearfield asserts that knowing the origin of the waste is fundamental to rational waste planning and landfill siting. It says that the lack of specific information about origin creates something of a cascading effect, whereby the Department cannot adequately assess the harms and benefits of the proposed landfill in the environmental assessment. Clearfield argues that PA Waste also provided no information in its application on whether the location of the landfill is at least as suitable as other potential locations, and that the Department conducted a flawed analysis regarding the location of the landfill more generally. In addition, Clearfield contends that the landfill will interfere with its county-wide waste management plan, which the Camp Hope Run

Landfill is not a part of, and it takes issue with the notice the Department published in the *Pennsylvania Bulletin* when the permit was issued.

The Department and PA Waste, of course, dispute these points. They argue that the information regarding the origin of the waste is not really necessary or required, that the landfill's locational suitability depends on a comparison with other landfills sprinkled throughout the state, that the landfill will not interfere with Clearfield's waste management plan, and that the published notice of the permit issuance was adequate. They oppose summary judgment more generally, arguing that there are issues of material fact that preclude summary judgment, and that issues related to the environmental assessment are complex and ill-suited for summary judgment. The Department adds that any potential deficiencies in PA Waste's application, regardless of their significance, can be resolved through the Board's *de novo* review.

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. Pa.R.C.P. No. 1035.1-1035.2; *Camp Rattlesnake v. DEP*, 2020 EHB 375, 376. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the non-moving party. *Stedge v. DEP*, 2015 EHB 31, 33. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Eighty Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406). Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217.

Municipal Waste Planning, Recycling and Waste Reduction Act

Before getting into the issues raised in Clearfield's motion, it is necessary to have some context on the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. §§ 4000.101 – 4000.1904 ("Act 101"), and a host county's role in waste planning. At the risk of oversimplification, the Solid Waste Management Act, 35 P.S. §§ 6018.101 – 6018.1003, generally covers the nuts and bolts of how a landfill is designed and operated, and the environmental standards governing the receipt, handling, and disposal of waste, while Act 101 addresses the planning and siting of landfills, and the orderly flow of waste to those landfills. An applicant needs to satisfy the provisions of *both* statutes in order to be issued a permit by the Department. *See* 53 P.S. § 4000.507.

One of the fundamental aspects of Act 101 is its elevation of the role of the county in the planning and development of municipal waste facilities in the Commonwealth. The prominence of a county's role in waste planning is laid out up front in the Act's legislative findings:

> (a) Legislative findings.—The Legislature hereby determines, declares and finds that:
> ….
>
> (5) It is necessary to give counties the primary responsibility to plan for the processing and disposal of municipal waste generated within their boundaries to insure the timely development of needed processing and disposal facilities.
>
> (6) Proper and adequate processing and disposal of municipal waste generated within a county requires the generating county to give first choice to new processing and disposal sites located within that county.
>
> (7) It is appropriate to provide those living near municipal waste processing and disposal facilities with additional guarantees of the proper operation of such facilities and to provide incentives for municipalities to host such facilities.
>
> ….
>
> (10) Authorizing counties to control the flow of municipal waste is necessary, among other reasons, to guarantee the long-term economic viability of resource recovery facilities and municipal waste landfills, to ensure that such facilities and landfills can be financed, to moderate the cost of such facilities and landfills over the long term, to protect existing capacity, and to assist in the development

> of markets for recyclable materials by guaranteeing a steady flow of such materials.

53 P.S. § 4000.102(a). To effectuate those goals, the Act contains extensive provisions governing the development and submission of municipal waste management plans by counties. *See* 53 P.S. §§ 4000.501 – 4000.513. These plans are at the core of Act 101. Among other things, the plans are required to address recycling programs, and ensure adequate capacity for the processing and disposal of waste at least ten years out. 53 P.S. §§ 4000.502, 4000.505. The Department reviews and approves county plans. *Id.*

As we previously recognized in *Jefferson County Commissioners v. DEP*, 2002 EHB 132:

> Act 101 clearly expresses the Legislature's preference for a planning relationship between a county's waste generation and the available capacity of disposal facilities located within the waste-generating county. Consequently, Act 101 created an explicit relationship between county waste management planning and the permits for municipal waste landfills issued pursuant to the SWMA [Solid Waste Management Act]….

2002 EHB at 198 (internal citation omitted). To that end, Act 101 contains a plain limitation on the Department's issuance of a permit for a new landfill under the Solid Waste Management Act. This provision again underscores the significance of the county in waste planning and the general need for landfills to fit in and be consistent with a county's waste management plan:

> (a) Limitation on permit issuance.— After the date of submission to the department of all executed ordinances, contracts or other requirements under section 513, **the department shall not issue any permit**, or any permit that results in additional capacity, for a municipal waste landfill or resource recovery facility under the Solid Waste Management Act, **in the county unless the applicant demonstrates to the department's satisfaction that the proposed facility**:
>
> (1) is provided for in the plan for the county; or
>
> (2) meets all of the following requirements:
>
> (i) The proposed facility will not interfere with implementation of the approved plan.
>
> (ii) The proposed facility will not interfere with municipal waste collection, storage, transportation, processing or disposal in the host county.

> (iii) The proposed location of the facility is at least as suitable as alternative locations giving consideration to environmental and economic factors.
>
> (iv) The governing body of the proposed host county has received written notice of the proposed facility from the applicant pursuant to section 504 of the Solid Waste Management Act and, within 60 days from such notification, the governing body of the proposed host county has not provided the department with written objections to the proposed facility. Should the governing body of the proposed host county file timely objections to the department, the department shall not approve the permit application, unless the department determines the proposed facility complies with the appropriate environmental, public health and safety requirements and is in compliance with this paragraph.

53 P.S. § 4000.507(a) (emphasis added). In sum, Section 507 restricts the Department from issuing a waste management permit unless (1) a landfill is accounted for in the host county's municipal waste management plan, or (2) if a landfill is not in the county's plan, the applicant demonstrates that the landfill will not interfere with the plan or its municipal waste operations, that the proposed landfill location is at least as suitable as other locations, and that the county be given an opportunity to object to the landfill. Clearfield County has not provided for the Camp Hope Run Landfill in its county plan, and Clearfield submitted comments to the Department objecting to the landfill.

Origin of Waste

The crux of Clearfield's motion concerns the origin of the waste for the Camp Hope Run Landfill, since the landfill will not be taking any waste from within Clearfield County. Under the regulations for municipal waste landfills, an application for a landfill permit needs to contain a facility plan that describes where the waste will come from, what it will consist of, and how much of it there will be:

> An application to operate a municipal waste landfill shall contain a narrative describing the following:
>
> (1) The general operational concept for the proposed facility, **including the origin, composition and weight or volume of solid waste that is proposed to be disposed of at the facility**, the type of liner system, the proposed capacity of the facility, the expected life of the facility and the size, sequence and timing of solid waste disposal operations at the facility.

25 Pa. Code § 273.112 (emphasis added).[1] Consistent with this regulation, the Department's permit application forms specifically require the applicant to describe the origin of its proposed waste stream. (Clearfield Ex. 21 at PAWaste0009286-87.) Clearfield says that PA Waste has not provided any information whatsoever on where the waste will be coming from, in contradiction of this requirement. PA Waste says that it has satisfied the regulation, and the Department obviously accepted its description.

The portion of PA Waste's application speaking to this requirement, which PA Waste highlights to push back on Clearfield's argument, states in its entirety:

> **The origin, weight, and composition of the (projected) solid waste quantities to be disposed at the proposed Camp Hope Run Landfill facility are not known at the time of this application.** In general, **waste will be delivered from surrounding jurisdictions, as well as from sources outside of Pennsylvania** and will include municipal solid waste, construction/demolition waste, and other approved residual and special wastes.

(Clearfield Ex. 21 at PAWaste0003467 (emphasis added).) Rather surprisingly, in the first sentence PA Waste freely admits that it has no idea where the waste will come from, how much of it there will be, and what it will be composed of. With respect to origin it then vaguely says that the waste will come from "surrounding jurisdictions" and "sources outside of Pennsylvania." In other words, the waste will come from *someplace*, inside or maybe outside of Pennsylvania.

[1] This requirement is not so different from the one imposed on counties in the development of their waste management plans:

> Description of waste.—The **plan shall describe and explain the origin, content and weight or volume of municipal waste** currently generated within the county's boundaries, and the origin, content and weight or volume of municipal waste that will be generated within the county's boundaries during the next ten years.

53 P.S. § 4000.502(b) (emphasis added).

The Department has endorsed PA Waste's apparent view that, if we build it, they will come.[2] In the case of the field of dreams that is the Camp Hope Run Landfill, imaginary customers currently unknown, and in PA Waste's view unknowable, will emerge from the mists to dip themselves in the magic waters. In its comment response document accompanying the issuance of the permit, and specifically in response to Clearfield's comments opposing the landfill, the Department stated, "The regulations do not require that the applicant produce waste contracts or provide justification of its waste stream. Nor do the regulations require an applicant prove need." (Clearfield Ex. 16 at 86.) In its response to interrogatories, the Department said, "The Department interprets the term 'origin' in [Section] 273.112…meaning a description of the types of waste to be disposed at the proposed landfill, and not the specific geographic location of the waste to be disposed at the landfill." (Clearfield Ex. 5 at 20.) In her deposition, the Department's chief permit reviewer stated the origin of waste is identified in the application by "the general statement in there saying that they won't come from Clearfield County, but could come from anywhere else." (Clearfield Ex. 5 at 23.) When asked if this meant that PA Waste stated the origin of its waste as "anywhere but Clearfield County," the permit reviewer replied, "I believe so." (*Id.*) The Department accepted that as a sufficient answer.[3]

---

[2] Kevin Costner's character, Ray Kinsella, in the 1989 classic *Field of Dreams*, hears Shoeless Joe say, "If you build it, he will come." James Earle Jones's character, Terence Mann, tells Ray:

> People will come, Ray. They'll come to Iowa for reasons they can't even fathom. They'll turn up your driveway not knowing for sure why they're doing it. They'll arrive at your door, as innocent as children, longing for the past….They'll pass over the money without even thinking about it, for it is money they have and peace they lack. And they'll walk out to the bleachers, sit in shirtsleeves on a perfect afternoon. They'll find they have reserved seats somewhere along one of the baselines, where they sat when they were children and cheered their heroes. And they'll watch the game and it'll be as if they dipped themselves in magic waters. The memories will be so thick they'll have to brush them away from their faces.

[3] As Clearfield points out in its reply brief, the regulations require an operating landfill to document the geographic origin of the waste being accepted in its daily and quarterly operational records, *see* 25 Pa. Code

PA Waste and the Department's statements leave no disputed facts or doubt regarding the issue at hand: PA Waste did not and will not describe the origin of its waste stream and the Department believes that is acceptable. This is precisely the sort of issue that is suitable for resolution on summary judgment. *See Sludge Free UMBT v. DEP*, 2015 EHB 469, 470-71 (summary judgment usually only granted in cases where a limited set of material facts are truly undisputed and a clear and concise question of law is presented); *Citizen Advocates United to Safeguard the Env't v. DEP*, 2007 EHB 101, 106 (same).

The Department is not entitled to any deference on this issue. For one thing, the Department has not only tweaked its interpretation of "origin" throughout this litigation, its position here is inconsistent with its position as expressed in the context of its earlier permit review and appeal regarding the Camp Hope Run Landfill. *See Joseph J. Brunner, Inc. v. DEP*, 2004 EHB 684, 688 ("where the Department has failed to adopt a consistent position or it has changed its interpretation over time, the reasons for deferral tend to evaporate."). *See also Tri-State Transfer Co. v. Dep't of Envtl. Prot.*, 722 A.2d 1129, 1134 (Pa. Cmwlth. 1999). In fact, when the Department denied PA Waste's application in 2008, its denial letter explained that the Department interpreted Act 101 to require the identification of sources of waste:

> As you are aware, because of PA Waste's proposed facility is not included in the host county's Act 101 plan, according to Section 507(a) of Act 101, DEP shall not issue any permit for a municipal waste landfill unless PA Waste demonstrates to DEP's satisfaction that the proposed facility meets all of the requirements in Section 507(a)(2) of Act 101. 35 P.S. § 4000.507(a)(2). These requirements include a demonstration by PA Waste that the "proposed location of the facility is at least as suitable as alternative locations giving consideration to environmental and economic factors." Briefly stated, **DEP interprets this statutory provision as requiring an applicant to identify the sources and quantity of waste expected to be disposed at its facility, and to identify the current disposal locations for this expected waste**.

§§ 273.311(b)(2) and 273.312(b)(2), so the Department clearly cares where the waste is coming from at least after a landfill begins operating.

PA Waste, 2010 EHB 880-81. It is unlikely that one could identify the current disposal location of expected waste without knowing where it came from. In 2008, the Department clearly believed that Section 507 of Act 101 required an applicant to identify where the waste was coming from. We are not entirely sure what has changed for the Department in the interim since the language of Section 507 has not been amended.

Part of the Department's rationale for its shifting interpretation of the waste origin requirement appears to come from a misplaced reliance on our earlier Adjudication from 2010. *PA Waste, supra*, 2010 EHB 874. In the Department's comment response document accompanying the issuance of the current permit, the Department discusses what was once known as the site suitability analysis and references our earlier Adjudication:

> **The site suitability test used by the DEP when the permit was first denied in 2010 included an analysis of the sources of waste expected to be disposed at the facility** and an examination of alternative disposal facilities. **This criterion was deleted from the regulations and the Environmental Hearing Board pointed out that the change in the regulations eliminated the use of a separate siting analysis, and that the Department was wrong in applying the substantive criteria of a repealed regulation**. The site suitability test as required by the Act was conducted by the DEP. The criterion used was the same as is dictated by the harms/benefit analysis and compared the site to other landfill sites in Pennsylvania.

(Clearfield Ex. 16 at 86 (emphasis added).)

However, the Department is only half-right on its reading of our decision. In *PA Waste*, our ruling was simply that the Department erred in denying PA Waste's application because that denial was based on requiring a *separate* site suitability analysis that was found in a regulation that was repealed in 2000, 25 Pa Code § 273.139(c).[4] 30 Pa.B. 6685 (Dec. 23, 2000). But we explicitly

[4] The now-repealed Subsection (c) previously provided:

> (c) If the application is for a facility that is not expressly provided for in the host county plan, an application for a proposed facility or a reasonable expansion of an existing facility shall contain an environmental siting analysis for each county generating municipal waste that will be disposed at the facility, demonstrating that the proposed location is at least as suitable as alternative locations within the generating county, giving consideration to

deferred on the issue of whether the Department could still apply *the substantive criteria* of the repealed regulation as part of its overall assessment. Indeed, in the earlier case, "PA Waste also argue[d] that the Department erred by applying the substantive criteria of Section 273.139(c) (repealed) as if they still existed." *PA Waste*, 2010 EHB at 885. We addressed the point by saying that,

> The question going forward, then, is whether it is appropriate for the Department to use criteria that seem to be based upon the Board's interpretation of a repealed regulation in the Department's review of the suitability component of the environmental assessment to be performed under Phase I of the permit review.

Id. at 886. We opined that the substantive criteria of the suitability analysis may well be covered by the Department's environmental assessment under 25 Pa. Code § 271.127.[5] However, we

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> environmental and economic factors. The environmental siting analysis shall include a discussion and analysis of each of the following:
>
> (1) Transportation distances and associated impacts.
>
> (2) The environmental assessment criteria in § 271.127(a) (relating to environmental assessment).
>
> (3) The siting criteria and technical standards of 40 CFR Part 257 (relating to classification of solid waste disposal facilities) and 40 CFR Part 258 (relating to municipal solid waste landfills).

28 Pa.B. 4382-83 (Aug. 29, 1998).

[5] That regulation provides in relevant part:

> **§ 271.127. Environmental assessment.**
>
> (a) *Impacts.* Each environmental assessment in a permit application shall include at a minimum a detailed analysis of the potential impact of the proposed facility on the environment, public health and public safety, including traffic, aesthetics, air quality, water quality, stream flow, fish and wildlife, plants, aquatic habitat, threatened or endangered species, water uses, land use and municipal waste plans. The applicant shall consider features such as scenic rivers, recreational river corridors, local parks, State and Federal forests and parks, the Appalachian Trail, historic and archaeological sites, National wildlife refuges, State natural areas, National landmarks, farmland, wetland, special protection watersheds designated under Chapter 93 (relating to water quality standards), airports, public water supplies and other features deemed appropriate by the Department or the applicant. The permit application shall also include all correspondence received by the applicant from any State or Federal agency contacted as part of the environmental assessment.

concluded that "[r]esolving these questions at this stage would be premature. We will leave it to the Department on remand to formulate an appropriate analysis in the first instance." *Id.* at 887.

In the preamble to its proposed rulemaking when Subsection (c) was repealed, the Department said, "Subsections (c)—(f) are proposed to be deleted. Under the proposed regulations, the suitability analysis will be satisfied by the environmental assessment performed under §§ 271.127 and 271.201(a)(4)." 28 Pa.B. 4333 (Aug. 29, 1998). This is exactly consistent with what we said in our Adjudication. Nowhere did we say that the Department was wrong in applying the substantive criteria of the suitability analysis. Instead, we clearly left it up to the Department to decide on remand whether to utilize the criteria as part of its overall environmental assessment. Perhaps the Department decided it did not need the suitability criteria, but any decision in that regard is one of its own making and not due to anything we decided in the narrow ruling of our earlier Adjudication.

> (b) *Harms.* The environmental assessment shall describe the known and potential environmental harms of the proposed project. The applicant shall provide the Department with a written mitigation plan which explains how the applicant plans to mitigate each known or potential environmental harm identified and which describes any known and potential environmental harms not mitigated. The Department will review the assessment and mitigation plans to determine whether there are additional harms and whether all known and potential environmental harms will be mitigated. In conducting its review, the Department will evaluate each mitigation measure and will collectively review mitigation measures to ensure that individually and collectively they adequately protect the environment and the public health, safety and welfare.
>
> (c) *Municipal waste landfills, construction/demolition waste landfills and resource recovery facilities.* If the application is for the proposed operation of a municipal waste landfill, construction/demolition waste landfill or resource recovery facility, the applicant shall demonstrate that the benefits of the project to the public clearly outweigh the known and potential environmental harms. In making this demonstration, the applicant shall consider harms and mitigation measures described in subsection (b). The applicant shall describe in detail the benefits relied upon. The benefits of the project shall consist of social and economic benefits that remain after taking into consideration the known and potential social and economic harms of the project and shall also consist of the environmental benefits of the project, if any.

25 Pa. Code § 271.127(a)-(c).

Importantly, contrary to what the Department claims in the comment response document, the repealed Section 273.139(c) never explicitly addressed origin or sources of waste, meaning its repeal has little bearing on the question. *See* note 4, *supra*. PA Waste seems to be under the same misapprehension, stating that "after the decision in PA Waste, DEP recognized that the current version of section 273.139(c) no longer requires that an applicant provide information regarding the specific location of origin and current source of waste." (PA Waste Brief at 8.) Putting aside that there is no Subsection (c) to Section 273.139 anymore, again, Subsection (c) never explicitly required that information to begin with. The changes to Section 273.139 did not directly affect the consideration of origin in a landfill application, and neither did our earlier Adjudication. Any claim to the contrary by PA Waste and the Department is simply not accurate.

We also do not detect any ambiguity in the term "origin" that requires creative interpretation. Only when the words of a statute are not explicit, may we resort to various factors to ascertain the intent of the General Assembly.[6] Otherwise,

> the starting point for all statutory interpretation is the statutory language and the object of all interpretation and construction of statutes is to ascertain and effectuate the intent of the General Assembly. 1 Pa. C.S.A. § 1921(a). In addition, every statute shall be construed, if possible, to give effect to all of its provisions. *Id.* Under the rules of statutory construction, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S.A. § 1921(b).

Limerick Partners I, LP v. DEP, 2013 EHB 502, 510. *See also PennEnvironment v. DEP*, EHB Docket No. 2020-002-R, slip op. at 5 (Opinion and Order, Jan. 19, 2021). "Words and phrases shall be construed according to rules of grammar and according to their common and approved

[6] These factors include: (1) the occasion and necessity for the statute; (2) the circumstances under which it was enacted; (3) the mischief to be remedied; (4) the object to be attained; (5) the former law, if any, including other statutes upon the same or similar subjects; (6) The consequences of a particular interpretation; (7) the contemporaneous legislative history; (8) legislative and administrative interpretations of such statute. 1 Pa.C.S. § 1921(c).

usage…." 1 Pa.C.S. § 1903(a). The tenets of the Statutory Construction Act of 1972 likewise apply to regulations. 1 Pa.C.S. § 1502(a)(1)(ii); 1 Pa. Code § 1.7. Thus, we interpret "origin" according to its common meaning as "that in which something has its beginning; source; root; cause." *Webster's New Twentieth Century Dictionary, Unabridged* 1261 (2d ed. 1966).

The Department's view expressed in its discovery responses that "origin" means the same thing as "types of waste" is simply not rational. In any event, the regulation itself distinguishes the "origin" from "composition" of waste. If the two words were synonymous as the Department suggests, there would be no need to include them both in the regulation.[7] *Joseph J. Brunner, supra*, 2004 EHB at 697 ("Writing words out of a statute or treating them as surplusage violates the rules of statutory construction." (citing 1 Pa.C.S. §§ 1921(a), 1922(2); *Cmwlth. v. Gilmour Mfg.*, 822 A.2d 676, 679 (Pa. 2003)); *City of Harrisburg v. DER*, 1994 EHB 1309, 1318 (analyzing Section 902(a) of Act 101 and finding, "The General Assembly's use of the phrase 'development and implementation' clearly indicates it intended these terms to have different meanings. Otherwise, one or the other would be mere surplusage, in violation of a fundamental rule of statutory construction."). The Department's alternative view that the origin requirement is satisfied by saying "anywhere but Clearfield County" does not do justice to the regulatory requirement.

Clearfield argues that the origin requirement is not some immaterial regulatory platitude to be essentially ignored, and we agree. While the origin of waste may not have much to do with the design of the landfill, it has everything to do with sound waste flow planning and management. Can it really be said that the location of the Camp Hope Run Landfill is "at least as suitable as alternative locations" if the waste is coming from Greene County in the southwest corner of

[7] We note that PA Waste does not give any specifics on type of waste either, merely stating the obvious that waste streams may include municipal, construction and demolition, and approved residual wastes coming from, well, somewhere.

Pennsylvania, or Hawaii for that matter? Planning for waste flow by definition requires information on where the waste is flowing from and where it is flowing to.

Clearfield adds that, without knowing where the waste is coming from, it is impossible to properly conduct the environmental assessment's harms/benefits analysis. As an example, Clearfield points out that the Department assigned a benefit of more than $168,000,000 for the fees generated by the landfill over the 21-year life of the facility.[8] Clearfield argues that, if the Camp Hope Run Landfill is merely diverting waste that is already being serviced by other landfills in the area, then the purported benefit actually comes at the expense of previously counted benefits for the other facilities—a robbing Peter to pay Paul scenario. Clearfield rightfully asserts that any claimed monetary benefit is therefore speculative in the absence of known waste origin, and the Department only counts actual, not speculative, benefits in its analysis (as opposed to known and potential harms). Frankly, we have no idea whether PA Waste will siphon off waste from other landfills in the area. But that is precisely the point: no one does. If PA Waste is drawing from at least some of the same waste streams, and if there is adequate capacity in the other landfills without any existing or anticipated environmental issues, then why would a new landfill at this location be appropriate? Why does it make sense from a planning perspective to develop this landfill here? It does not appear anyone has a good answer to this.

We also note that the environmental assessment regulation explicitly calls out the need for a proposed facility:

> (f) *Need.* The description required by subsections (c) and (d) may include an explanation of the need for the facility, if any.

[8] The $168 million is comprised of: $54 million in host municipal benefit fees at $2.00 per ton; $6.75 million in Environmental Stewardship fees at $.25 per ton; and $108 million in disposal fees at $4.00 per ton. (Clearfield Ex. 8 at 13-14.)

25 Pa. Code § 271.127(f). While the language does not condition permit approval on a demonstration of need, it is undeniably an important consideration.[9] Indeed, the Department actually evaluated the purported need for the Camp Hope Run Landfill in its environmental assessment and, to its credit, rejected need as a benefit of the landfill:

> **Evaluation of Need**
>
> **Description:**
>
> The Applicant states that a need for this site is established by the future need of the citizens of Pennsylvania for safe, cost effective waste disposal sites that are situated on environmentally suitable sites in locations that generate minimal impacts to the public health and safety of the surrounding communities. The Applicant attempts to support this by detailing the time needed to permit and construct a landfill site, the regulations involved, and current waste trends in PA.
>
> **Department Determination:**
>
> **Any benefit as a result of the construction of this landfill is speculative. It is not known where the waste disposed of at this site would be generated.** The Applicant will not be accepting waste from within the County and therefore does not address specific needs of the local area.

(Clearfield Ex. 8 at 15 (emphasis outside of headings added).) Yet, nevertheless, even though the Department viewed the need for a landfill as speculative, and admitted that it had no idea where the waste would be coming from, it approved the project. If nothing else, this shows that origin is inextricably tied with need, among other things.[10]

[9] A prior version of the regulation did require an affirmative demonstration of need as part of the environmental assessment. *See* 30 Pa.B. 6692 (Dec. 23, 2000).

[10] Clearfield says a proper Traffic Impact Study cannot be performed without knowing where the waste comes from, pointing out that whether local roads can handle the traffic is not the only consideration. The Department acknowledges that the environmental and safety effects associated with hauling distances are a pertinent harm. The Department's guidance document on the environmental assessment process says that "traffic, road and bridge conditions, vehicle weight, other vehicle and driver-related safety concerns, vehicle-related environmental violations and environmental harms such as odor, noise, fumes and dust" should all be evaluated. (Clearfield Ex. 17 at 5.) Yet, it seems to suggest at one point that only "local" harms and benefits matter. (DEP Houser Aff. at ¶¶ 23, 24.) Without engaging further in a debate regarding the proper scope and limitations of an environmental assessment, it seems clear that knowledge of the origin of waste going to a proposed facility is important if not critical.

PA Waste brushes off the importance of the regulatory requirement by saying it is "a regulation that only requires a narrative about the 'general operational concept' of its facility." (PA Waste Brief at 9.) We cannot ignore the regulatory requirement merely because it is contained in a regulation regarding operations. PA Waste's dismissal of the origin requirement is belied by the much more detailed information it provided regarding the liner system, which is required as part of the same regulation, as well as the comparatively detailed two-page description it offers to address "the sequence and timing of solid waste disposal operations." (Clearfield Ex. 21 at PAWaste0003468-70.)

PA Waste complains that the permitting of a new waste landfill takes years and it is unreasonable to demand that it secure contracts for the disposal of waste before the landfill is permitted, or otherwise predict where its waste will come from. It says that it is caught in a sort of Catch-22: it cannot get contracts without a permit and it cannot get a permit without contracts. These sound like policy arguments for the Legislature or the Environmental Quality Board (EQB), not us, but putting that aside, the regulatory decision that there be contracts in place or some awareness of where the waste will come from does not strike us as irrational or illogical. We wonder whether a pipeline company, for example, would construct a pipeline without any commitments from companies to ship product through the line. Outside of Hollywood, the Legislature and the EQB understandably might conclude no one would build a baseball field if there was not going to be a team or league that would play on it, and that the same is true here for a landfill. A landfill provides a service to waste haulers and transporters for the disposal of waste under relatively predictable conditions and requiring a description in the permit application of those conditions is hardly irrational from a planning perspective. Not only might the EQB believe that the counties of Pennsylvania need this information if Act 101 is to be honored, it might also

rationally believe that the Department should have some sense of what is going on in the Commonwealth as a whole when it reviews county plans. *See* 53 P.S. §§ 4000.301(5) (duty of the Department to regulate municipal waste planning through the development and implementation of county plans); 4000.503(c) (proposed plans to be submitted to the Department for review and comment); 4000.505(a) (complete plans received by the Department shall be approved, conditionally approved, or disapproved). The question is not whether this is good policy or whether it is a sound business strategy to build a landfill without any known customers. The question in this appeal is whether Act 101 and the regulations promulgated thereunder allow such an approach. Unambiguously, they do not.

Alternative Locations

As noted above, Act 101 requires that an applicant for a landfill not provided for in a county plan demonstrate that "[t]he proposed location of the facility is at least as suitable as alternative locations giving consideration to environmental and economic factors." 53 P.S. § 4000.507(a)(2)(iii). Clearfield argues that neither PA Waste nor the Department actually made that demonstration.

Without much explanation, the Department concluded in its environmental assessment:

> Since the proposed project is not identified in the county plan, the Department has performed an assessment to determine if the proposed site is at least as suitable as other sites as required by Section 507 of Act 101 and 25 Pa. Code §§ 271.126 and 271.127. **The Department has concluded that the site is at least as suitable as previously approved municipal waste landfills**.

(Clearfield Ex. 8 at 21 (emphasis added).) The Department's view appears to be that the analysis of alternative **locations** requires it to essentially compare the harms and benefits of a proposed landfill to previously evaluated harms and benefits of **other permitted landfills**, and as long as the proposed landfill does not score worse than the existing landfills, the new landfill is okay. The

Department's site suitability review memo does exactly that, juxtaposing the Camp Hope Run Landfill to three other landfills in a three-page spreadsheet assessing things like air quality, distance to local parks, and impacts to fish, plants, wildlife, and waters of the Commonwealth, among several others. (Clearfield Ex. 10.) One of the landfills is in Bucks County. In an affidavit attached to the Department's response, the Department's permit review supervisor stated that the Department "used data from existing landfills to represent comparable impacts from possible alternate locations for the landfill." (DEP Houser Aff. at ¶7.) The Department admits in its Response to Clearfield's Statement of Undisputed Material Facts that it did not evaluate any other potential locations for the Camp Hope Run Landfill: "To the extent that the phrase 'alternative locations' means alternative greenfield properties, the Department admits that the alternative analysis that it performed did not compare the location of the proposed facility to other greenfield properties in Pennsylvania." (DEP Resp. to Facts at ¶16.)[11]

Once again, we are presented with a discrete legal issue that can be decided based upon undisputed facts, which makes it appropriate for resolution on summary judgment. Neither PA Waste nor the Department presented potential alternate **locations** for a new landfill to determine whether the chosen location was at least as suitable as other locations given the origin of the waste involved and other factors. Instead, without explanation, the Department compared the harms and benefits of the Camp Hope Run Landfill with the harms and benefits of other landfills. It is clear as a matter of law that the Department failed to comply with the applicable statutory requirement.

Once again, the Department is entitled to no deference. First, we detect no ambiguity in the requirement to compare possible locations. Even if there were ambiguity, we cannot imagine

[11] The Department is imposing an artificial limitation of evaluating greenfield sites. Nothing in Act 101 limits the alternative locations analysis to greenfield sites. Indeed, a portion of the proposed site for the Camp Hope Run Landfill is a reclaimed surface coal mine, hardly what can be considered a greenfield site.

how language requiring a comparison of alternative locations could somehow be reasonably "interpreted" to require a comparison of harms and benefits with other existing landfills. Furthermore, the Department had a significantly different interpretation of Act 101 back in 2008 when it first denied PA Waste's application:

> The applicant must then demonstrate that its proposed landfill location is at least as suitable, environmentally and economically, as the current disposal locations for this expected waste. The applicant must also examine available alternative disposal facilities located between the source of the expected waste and the applicant's proposed facility, and demonstrate that the proposed facility is at least as suitable, environmentally and economically, as the available disposal locations.

PA Waste, 2010 EHB 880-81. At that time, the Department viewed the alternative locations analysis as requiring the applicant and the Department to look at the other available disposal locations for the waste that would be accepted at the new facility, evaluating whether, considering the source(s)/origin of the waste, it made more sense to dispose the waste at an existing facility.

Section 507(a)(2)(iii) of Act 101 requires the applicant and the Department to compare possible alternative **locations**. They did not do that here. PA Waste does not appear to have done anything that would qualify.[12] The Department says that it did not require PA Waste to provide alternative locations because the Department "wanted to minimize the potential that the applicant would predetermine the outcome of the evaluation by choosing poorly situated comparable locations." (*Id.*) I.e., applicants are not to be trusted. The applicant is statutorily required to select and evaluate alternative locations and we assume the Department will review those locations and decide whether they are good alternatives or not. Presumably if the Department does not agree it can send out a technical deficiency letter and ask for different, more suitable locations for

[12] PA Waste says that Clearfield "asks the Board to ignore DEP's deletion of the prior requirement to compare a proposed facility to alternative locations from the regulations." (PA Waste Brief at 10.) But again, the requirement to compare alternative locations is clearly and unambiguously contained in Section 507 of Act 101, 53 P.S. § 4000.507(a)(2)(iii). That requirement did not magically disappear due to any regulatory change.

comparison. The outcome is only "predetermined" if the Department blindly accepts an applicant's submission.

The Department, for its part, compared harms and benefits.[13] The alternative locations used by the Department, if we can call them that, would only make sense if the Camp Hope Run Landfill were plopped down inside the perimeter of the comparison landfills, say, in Bucks County. We discern no possible alternative **locations** in the record before us for this facility. There is nothing like, "We looked at another site down the road at X, but it is not suitable because Y." There is nothing approaching the alternatives analysis that we have been accustomed to seeing in other regulatory settings. *See, e.g., Pennsylvania Trout v. DEP*, 2004 EHB 310, 370 (an applicant for a water obstruction and encroachment permit conducted "an exhaustive search for other practicable alternatives" under the alternatives analysis for avoiding permitting in wetlands under 25 Pa. Code § 105.18a(b) and "performed a detailed analysis" of 30 parcels of land). A locations analysis requires a list of potential sites and an explanation of why the site chosen is at least as suitable as the other sites. That was not done here.

We are missing how it follows from the fact that the harms and benefits of a landfill in Bucks County shows that the location of the Camp Hope Run Landfill is at least as suitable as other locations for this landfill. We do not even understand how the location of a Bucks County landfill informs the decision whether the proposed location of the Camp Hope Run Landfill is at least as suitable as alternative locations.

In *Jefferson County Commissioners, supra*, the applicant and the Department considered both the Department's now-abandoned interpretation of Act 101's alternative locations

[13] Query whether the Department now intends to perform environmental assessments by comparing landfills. Again, we need not get into that any further here, other than to observe that the implications of what the Department has done here might go well beyond this case.

requirement, and the one Clearfield advances here. The applicant and the Department evaluated other potential facilities that could receive the waste from New York City that was to be accepted at the proposed facility, *and* they evaluated other suitable parcels of land for the development of a landfill (concluding that there were none). 2002 EHB 132, 211-13. The Department's current, novel interpretation was not in the picture. In *Jefferson County*, we found the information contained in the permit application to be inadequate to properly evaluate alternative locations, either other facilities to receive the waste, or other locations to develop the landfill.[14] Yet, the "paucity of information" contained in the application in *Jefferson County* was still more than the lack of *any* information provided by PA Waste in its application. *Id.* at 212. In sum, the Department has not justified its current approach, and it does not comport with the statutory language.

Publication in the *Pennsylvania Bulletin*

Clearfield also argues that the Department did not comply with the requirements for publication of notice in the *Pennsylvania Bulletin*. Under Section 504 of the Solid Waste Management Act, a county has the right to review a permit application and make a recommendation to the Department. 35 P.S. § 6018.504. The Department is then required to publish its justification if it does not follow the county's recommendation:

> Applications for a permit shall be reviewed by the appropriate county, county planning agency or county health department where they exist and the host municipality, and they may recommend to the department conditions upon, revisions to, or disapproval of the permit only if specific cause is identified. **In such case the department shall be required to publish in the Pennsylvania Bulletin its justification for overriding the county's recommendations.** If the department does not receive comments within 60 days, the county shall be deemed to have waived its right to review.

[14] Although our analysis was based in part on the repealed regulation at 25 Pa. Code § 273.139(c), we also made our determination based on a lack of compliance with Section 507(a)(2)(iii) of Act 101. *Id.* at 213 n.18.

Id. (emphasis added). A similar requirement exists in the regulations. *See* 25 Pa. Code § 271.142(a)(4) (Department must publish "[j]ustification for overriding county or host municipality recommendations regarding an application for a new permit, permit reissuance, permit renewal or major permit modification under section 504 of the act (35 P.S. § 6018.504)."). Clearfield contends that the Department did not publish any justification for overriding Clearfield's recommendation to disapprove.

Here, the Department provided a copy of the permit application to Clearfield on July 25, 2017. (DEP Brief at 14.) Clearfield sent a nine-page letter to the Department on September 21, 2017 in which it recommended that the Department disapprove PA Waste's permit.[15] (Clearfield Ex. 11.) The Department published notice in the *Pennsylvania Bulletin* on February 8, 2020 when it issued the permit. The *Bulletin* notice in its entirety provided:

> **Permit No. 101719**. PA Waste, LLC, 175 Bustleton Pike, Feasterville, PA 19053, Boggs Township, **Clearfield County**. This permit is for the construction and operation of the 845-acre Camp Hope Run municipal waste landfill, of which 217 acres are permitted for waste disposal. This permit allows for the collection and treatment of leachate up to an average and maximum daily waste disposal volume of 5,000 tons. The permit was issued by the Northcentral Regional Office on January 28, 2020.
>
> The Department held a public hearing on July 23, 2018 at the Florian Banquet Center in Boggs Township, Clearfield County. The comment and response document developed from that meeting can be found on the Department's web site, under Regional Resources, Northcentral Regional Office, Community Information, Waste Management—Camp Hope.
>
> Persons interested in reviewing the permit may contact Lisa D. Houser, P.E., Environmental Engineer Manager, Williamsport Regional Office, 208 West Third Street, Suite 101, Williamsport, PA 17701, or call 570-327-3752. TDD users may contact the Department through the Pennsylvania AT&T Relay Service, (800) 654-5984.

50 Pa.B. 857 (Feb. 8, 2020) (emphasis in original).

[15] Clearfield also submitted additional comments on July 30, 2018 (Clearfield Ex. 12), which were outside of the 60-day review window afforded to counties in 35 P.S. § 6018.504.

Despite the clear statutory and regulatory requirement, it is readily apparent that the Department did not "publish in the Pennsylvania Bulletin its justification for overriding the county's recommendations." 35 P.S. § 6018.504; 25 Pa. Code § 271.142(a)(4). Instead, the Department and PA Waste say that the notice is good enough because it refers to the Department's comment response document and within *that* document the Department responds to the comments lodged by Clearfield. (*See* Clearfield Ex. 16 at 85-86.) They argue that this satisfies the statutory and regulatory requirements.

The obvious problem is that the *Pennsylvania Bulletin* notice gives zero indication that the comment response document contains a justification for overriding Clearfield's recommendations. Indeed, no one reading the notice would have any idea that Clearfield objected to the permit at all, let alone the Department's justification for overriding the county's recommendations. The Department and PA Waste's argument might have been stronger if the notice had said something like, "Clearfield County has recommended against issuance of the permit. The Department's justification for overriding that recommendation is set forth in the comment and response document." Exactly what would have sufficed is not a line we need to draw because the notice published by the Department in this case gives no notice whatsoever. At a minimum, there needs to be some acknowledgement in the *Pennsylvania Bulletin* notice of the County's recommendation and the Department's decision to override it.

Not only has the Department failed to comply with the letter of the law, it has not fully honored its spirit. Act 101 and the Solid Waste Management Act make it clear that the county is not to be treated as just another commenter. The county is afforded an important role in the planning and permitting process, and it deserves a concomitant amount of respect. The statute and regulation do not say the Department should respond to the county's specific comments buried

within an 86-page response document along with hundreds of other comments. Rather, they say the Department must **justify** its decision to **override** the county's recommendation that the permit be denied. There is no such language in the response document.

On that note, we think it is important to understand that, while transparency through public notice is important, inherent in the publication requirement is a duty on the part of the Department to take a hard look at why a county recommends against issuance and satisfy itself that its recommendation must be rejected. Having reviewed the comment and response document, we are not entirely confident that the Department did so. (*See, e.g.*, Clearfield Ex. 16 at 84-85.) In the absence of a demonstration that the notice shortcomings prejudiced Clearfield, the perfunctory response and the improper notice by the Department may not justify a remand, but in light of the other problems with the Department's action that we discuss in this Opinion, a remand on the publication issue as well is appropriate.

Interference with County Plan

Section 507 of Act 101 requires an applicant not provided for in a county plan to demonstrate that its facility will not interfere with the implementation of a county's approved plan, and that it will not interfere with waste collection, storage, transportation, processing, or disposal within the county. 53 P.S. § 4000.507(a)(2)(i)-(ii). *See also* 25 Pa. Code §§ 271.201(7)-(8) and 273.139(b)(2). Clearfield argues that PA Waste did not adequately explain how it would not interfere with Clearfield's plan. Clearfield also asserts in a very conclusory fashion that the Camp Hope Run Landfill will interfere with its waste management plan, but it never explains in its motion how that will happen. In the comments Clearfield submitted to the Department in September 2017, it makes some allegations that excess capacity created by the landfill will harm its recycling efforts, (Clearfield Ex. 11), but no additional detail is provided in its motion.

Clearfield seems to think it is obvious how the Camp Hope Run Landfill would interfere with the county plan. But since the landfill is not provided for in the plan and the landfill will not be accepting any waste from within Clearfield County, it is not obvious to us. At least for purposes of summary judgment, Clearfield has not carried its burden on this issue.

***De Novo* Review**

Having decided that Clearfield County's arguments must be sustained, it remains for us to determine what happens next. Ordinarily this would not merit any additional discussion and the permit would be remanded for further consideration consistent with our ruling forthwith. However, the Department has raised an additional argument that requires our consideration.

In a nutshell, the Department argues that none of its errors matter, even if they occurred, because the Board can fix them all itself after the merits hearing. It does not matter if PA Waste failed to submit required information in its application, such as information on alternative locations or waste origin (or on anything else, we guess), because the Board's *de novo* review allows PA Waste and the Department the opportunity to cure any deficiencies by way of the record created before the Board. To borrow another film reference, the Department essentially says, "we can fix it in post." In our current context, the Department's argument more or less boils down to an assertion that the Board can never grant summary judgment in a third-party permit appeal, no matter how woefully deficient an application or permit may be, because it can always be fixed by the Board after the merits hearing. The Department makes the remarkable assertion in its brief that "[t]he Board will need to perform the Environmental Assessment anew with evidence submitted to it at hearing…." (DEP Brief at 13.)[16]

[16] By extension, the Department's argument would seem to mean that a remand to the Department for further consideration is never appropriate following a merits hearing because the Board can and should conduct all missing analyses and correct all errors at the hearing stage.

An initial problem with the Department's argument is that it does not square well with the publication requirement. We are not in a position to publish the Department's notices for it. Secondly, this is not a case where critical information exists but was not included in the analysis, and that missing information can be made a part of the record here. Both PA Waste and the Department have taken the firm position that information regarding the origin of the waste to be accepted at the landfill does not exist. Indeed, PA Waste contends that it is unknowable. There is nothing to suggest PA Waste or the Department have any intention of supplying such information in this appeal. Instead, they steadfastly argue that the information is not available or forthcoming because it is not required as a matter of law. Therefore, we could not perform the proper analysis even if it were appropriate for us to do so.

It is perhaps theoretically possible that we could rule at this stage that evidence regarding origin and alternative locations is necessary and PA Waste and/or the Department will be given an opportunity to present it for the first time at a hearing. In other words, summary judgment is granted on those issues but we still proceed to a hearing. Such an odd, unheard of approach strikes us as unfair to Clearfield and the public, in addition to being just plain ill-advised. A remand to the Department which allows PA Waste to correct its application in accordance with normal permitting procedures and the Department to perform the proper analysis based on heretofore unavailable yet critical information in the first instance is by far the better choice.

At a more fundamental level, the Department takes things too far when it argues that the fact that the Board conducts a *de novo* review as a practical matter means that summary judgment should never be granted in a third-party permit appeal. It is true that the Board has the authority in an appropriate case to substitute its own discretion for that of the Department and conduct its own analysis based on information supplied in the context of our *de novo* review. *Warren Sand &*

Gravel Co. v. Dep't of Envtl. Res., 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *Pequea Twp. v. Herr*, 716 A.2d 678, 686-87 (Pa. Cmwlth. 1998); *Carey v. DEP*, 2019 EHB 722, 729-30. For example, in *City of Harrisburg v. DER*, 1996 EHB 709, we considered an appeal by the City of the Department's denial of a Clean Water Act Section 401 water quality certification the City sought for a hydroelectric dam. In that case we agreed with the City that the evidence it presented at the hearing adequately addressed certain aspects of the project relating to the dam's gates and various flood mitigation measures that the Department had found deficient when it denied the water quality certification. Although the Department argued that the City's appeal should be dismissed and the City should submit a whole new permit application, we found that the technical deficiencies were adequately resolved at the merits hearing.

However, there are obviously limits to what can be remedied by the Board. For instance, in *Blue Mountain Preservation Association v. DEP*, 2006 EHB 589, we found that an applicant for an NPDES permit failed to perform, and the Department failed to require the applicant to perform, the antidegradation analysis required by the regulations for the stormwater discharge from its road construction project to special protection waters.

> Based on the foregoing, we must overturn the Department's granting of this NPDES permit. Alpine did not undertake the required analyses or make the requisite showings under the antidegradation regulations. Likewise, the Department failed in its duty to assure that the permit be issued only upon the applicant's performance of the required analyses and its making of the requisite showings under the antidegradation regulations. **Whether the permit would be the same after appropriate antidegradation analysis we cannot know and is not a question we can deal with or answer at the Board**. For this case, **the antidegradation analyses need to take place at the time of the application, before a permit is issued, to be considered by the Department in its review of the application before granting the permit**. None of that took place here with respect to this permit.

Id. at 621 (emphasis added). Thus, there are instances where a crucial, required analysis is absent and the applicant and/or the Department must perform that analysis in the first instance. *See Clean*

Air Council v. DEP, 2019 EHB 56 (remanding an air quality plan approval back to the Department for it to aggregate the emissions from several related plan approvals and determine if Prevention of Significant Deterioration requirements applied).

In *Dauphin Meadows, Inc. v. DEP*, 2000 EHB 521, we granted summary judgment and remanded back to the Department a permit application for a landfill expansion the Department had denied while relying on a harms/benefits balancing test in a Department guidance document in lieu of the balancing test that existed at that time in the regulations. In doing so, we recognized the panoply of possible scenarios that could play out during a proper evaluation conducted by the Department:

> We have no way of knowing whether the Department would have made the same decision in this case had it not relied upon the Guidance Document. The Department does not argue that it would have reached the same conclusion even without the Guidance Document, and even if it had, the current record does not allow for anything more than speculation on that point. We are unable to proceed any further in the appeal without a remand to determine how the Department would have acted had it only relied upon proper authorities.
>
> Dauphin Meadows asks us to remand for a technical review that bypasses any further balancing analysis. That relief does not necessarily follow from our ruling. As only a sample of the scenarios that might follow our ruling, the Department may decide to shepherd a balancing test through appropriate regulatory procedures. The Department must still conduct an environmental assessment, 25 Pa. Code §§ 271.126 and 271.127, that considers the need for the expansion, 25 Pa. Code § 271.201(a)(3). The Department may believe that other authorities independently justify the use of a harms-versus-benefits balancing test without the interposition of the Guidance Document. We do not care to hazard a guess what other actions may follow our holding and whether those actions will be consistent with the law. Our only holding at this stage is that the Department's future actions may not rely upon the Guidance Document balancing test.

Id. at 533-34. Whether insurmountable deficiencies are apparent after the merits hearing as in *Blue Mountain Preservation*, or at the summary judgment stage as in *Dauphin Meadows*, the onus should be placed on the Department, not the Board, to conduct the proper analysis to correct those

deficiencies in most cases. We would think most permittees and the Department would prefer it that way.

The caselaw shows that there is a spectrum of what can be cured before the Board. In our view, this case is much closer to *Blue Mountain Preservation* and *Dauphin Meadows*, where foundational aspects of the application analysis are completely absent or based on incorrect authority, and that analysis cannot be adequately replicated in a hearing before the Board. The Board's *de novo* review should not be seen as a license to ignore statutory and regulatory requirements during the permitting process. Only on remand, armed with the appropriate information on waste origin and alternative locations, can the Department fully evaluate the landfill and ensure that permitting it at this location makes sense from both an environmental and a rational planning perspective.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEARFIELD COUNTY	:	
	:	
v.	:	**EHB Docket No. 2020-016-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PA WASTE, LLC, Permittee	:	

O R D E R

AND NOW, this 10th day of June, 2021, it is hereby ordered that the Appellant's motion for summary judgment is **granted**. Solid Waste Permit No. 101719 is **vacated and remanded** to the Department for further evaluation consistent with the foregoing Opinion.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 10, 2021

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TONYA STANLEY, BONNIE DIBBLE, AND JEFFREY DIBBLE	:	
v.	:	**EHB Docket No. 2021-013-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CABOT OIL AND GAS CORPORATION, Intervenor	:	**Issued: June 11, 2021**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion for summary judgment filed by Appellants where there has been no discovery conducted by any party and there are outstanding disputes over material facts that preclude summary judgment.

O P I N I O N

Tonya Stanley, Bonnie Dibble, and Jeffrey Dibble (the "Appellants") have appealed a letter from the Department of Environmental Protection (the "Department") dated January 15, 2021 in which the Department determined that issues of turbidity and sediment in the Appellants' water supply were not caused by oil and gas operations conducted by Cabot Oil and Gas Corporation ("Cabot") at its nearby Abbott D and M wells in Bridgewater Township, Susquehanna County. The letter came in response to a complaint filed by the Appellants on January 7, 2020. The Appellants assert that Cabot is responsible for contamination of their water supply and that the Department's determination was made in error.

The Appellants have now moved for summary judgment, arguing that undisputed material facts show that Cabot contaminated the Appellants' water supply with a substance known as triethylene glycol, which the parties refer to as TEG. The Appellants say their independent sampling detected TEG in their private drinking water well, and they claim that the Department has since admitted that Cabot was using TEG during its operations at the nearby well sites. Both Cabot and the Department oppose summary judgment. They both generally argue that the record is undeveloped because no discovery has been conducted and that there are numerous disputed material facts. Cabot also denies using TEG at the Abbott wells, and the Department denies saying that Cabot has used TEG at the wells.

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. Pa.R.C.P. No. 1035.1-1035.2; *Camp Rattlesnake v. DEP*, 2020 EHB 375, 376. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the non-moving party. *Stedge v. DEP*, 2015 EHB 31, 33. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Eighty Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406). Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217. For the reasons discussed below, we find that the record has not been adequately developed and we deny the Appellants' motion for summary judgment.

The motion for summary judgment boils down to a dispute over whether TEG was detected in the Appellants' water supply. The Appellants say that samples from their independent

laboratory show that TEG was detected during two different sampling events.[1] The Department says its own samples did not detect TEG. Cabot, for its part, maintains that it has never used TEG in its operations at the Abbott wells, and it points to search results from a voluntary chemical disclosure registry for hydraulic fracturing companies known as FracFocus.[2] (Cabot Ex. D.) There is also a dispute among the parties regarding the validity of the Appellants' sample results, with the Department and Cabot asserting that the Appellants' lab is not accredited in Pennsylvania for analyzing TEG, and that the positive TEG results are from lab or instrument contamination. The Appellants dispute this and say the lab is in fact accredited in Pennsylvania.

Nothing in the parties' filings definitively resolves any of these disputes one way or the other. No party has come forward with any real analysis of the sample results in their briefs. We cannot simply credit the sample results from one lab over another without more from the parties. Nor do we know for sure whether Cabot even used TEG at the Abbott wells.

Much of the problem is related to the fact that no discovery has been conducted yet by any party and we are working with a record in need of further development. This is generally a hallmark indication that summary judgment is premature, particularly in a case like this where there are contested and competing water sampling results. As we said in *Kazmierczak v. DEP*, 2016 EHB 124, 129, "[I]t is often difficult to grant summary judgment when presented with an incomplete record due to thin discovery and when outstanding doubts remain about one or more issues in a case." *See also Lycoming Supply, Inc. v. DER*, 1992 EHB 115. In *Brawand v. DEP*,

[1] The Appellants have not attached the sample results to their motion.

[2] The Appellants point to an email from counsel for the Department sent on April 2, 2021, in which the Appellants say the Department confirmed that TEG was used by Cabot. (App. Ex. D.) The Department says that it has not made any determination regarding whether Cabot used TEG at the Abbott well sites, and that its email was merely expressing that, even if it were assumed for the sake of argument that TEG was used at the well sites, there still remains the issue that the Department did not detect TEG in its sampling. (DEP Brief at 6-7.) We find the Department's email to be more equivocal than determinative, certainly here for purposes of summary judgment.

2013 EHB 865, an appellant appealed an order from the Department finding that the appellant was presumptively liable for the pollution of a private drinking water supply near two of the appellant's oil and gas wells. In its appeal, the appellant argued that the pollution was caused by something other than its oil and gas activities. We denied a motion for summary judgment filed by the Department because there had been no discovery conducted in the appeal and the summary judgment record consisted merely of competing affidavits from the parties that did not resolve the disputed material facts. Although we have slightly more of a summary judgment record here, the disputes remain over the presence or absence of TEG in the Appellants water supply and whether Cabot is responsible for it. We look forward to the development of the record as this appeal moves forward.

Accordingly, we issue the Order that follows.[3]

[3] Cabot has filed a motion to strike portions of the Appellants' reply brief, or in the alternative, leave to file a sur-reply. The Appellants have responded in opposition to Cabot's motion. Because we are denying the motion for summary judgment, we will deny Cabot's motion as moot.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TONYA STANLEY, BONNIE DIBBLE, AND JEFFREY DIBBLE	:	
v.	:	**EHB Docket No. 2021-013-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CABOT OIL AND GAS CORPORATION, Intervenor	:	

O R D E R

AND NOW, this 11th day of June, 2021, it is hereby ordered that the Appellants' motion for summary judgment is **denied**. Cabot's motion to strike portions of the Appellants' reply brief or for leave to file a sur-reply is **denied as moot**.

ENVIRONMENTAL HEARING BOARD

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

DATED: June 11, 2021

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

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 17, 2021**
	:	

OPINION AND ORDER ON
RANGE RESOURCES' SECOND MOTION TO DEPOSE

By Thomas W. Renwand, Chief Judge

Synopsis

The Board denies the Appellant's Motion to Depose four witnesses the Department has designated as expert witnesses. Appellant failed to show good cause pursuant to Pennsylvania Rule of Civil Procedure 4003.5 as to why such depositions are necessary. Pursuant to Pa.R.C.P. 4003.5(a)(1)(B) and (a)(2), a showing of good cause is necessary in order for the Board to exercise its discretion to order "further discovery by other means" where the expert witnesses have provided expert reports stating the facts and opinions to which they are expected to testify and a summary of the grounds for each opinion.

O P I N I O N

Background

On February 4, 2020, Range Resources – Appalachia, LLC (Range) filed a Notice of Appeal with the Pennsylvania Environmental Hearing Board (Board) challenging an Order issued on January 13, 2020 by the Pennsylvania Department of Environmental Protection (Department). Range disputes the allegations in the Order which contend that natural gas leaked from Range's Harman – Lewis Unit 1H gas well (the Gas Well), affecting ground water and certain surface water

in Lycoming County, Pennsylvania. The Order directs Range to take a number of actions, including the restoration and replacement of affected water supplies, investigation of the migration of natural gas from the Gas Well, and submission of a remedial investigation plan and well plugging plan. Range strongly disagrees with the Department's action and has mounted a vigorous defense. The Gas Well was drilled in 2011 so this dispute between the Department and Range is a decade old.

The parties have conducted robust discovery. Counsel agreed to a joint proposed case management order that has been modified. The parties also reached agreement regarding a comprehensive Protective Order that was substantially adopted by the Board.

Discovery, however, has not been without some issues which, despite the best efforts of experienced counsel, have made their way to the Board for resolution. On July 15, 2020, Range filed a Motion to Compel. The Board denied the Motion, partly because the Department produced numerous documents following the filing. We discussed various discovery issues the parties were encountering and provided guidance going forward that we hope has enabled the parties to resolve at least some of their disputes amicably and without Board intervention. *Range Resources – Appalachia, LLC v. DEP,* 2020 EHB 341, 346. Following that Opinion, we denied Range's Motion to Strike and Exclude DEP's Expert Opinion of Mr. Bryce McKee. *Range Resources – Appalachia, LLC v. DEP*, 2020 EHB 364, 372-73.

On November 27, 2020, Range filed a Motion to Depose Bruce Jankura, William Kosmer and Bryce McKee, current and former employees of the Department that have been named as expert witnesses in this matter (First Motion to Depose). The Department opposed the depositions, relying on Pennsylvania Rule of Civil Procedure 4003.5 (Discovery and Expert Testimony.) Upon reviewing the Motion and the Department's Response, we agreed with the Department's summary

of the applicable law. Although we denied Range's Motion, we did so without prejudice, holding "we believe that such requests in most cases should be decided after the exchange of expert reports 'upon cause shown.'" *Range Resources – Appalachia, LLC v. DEP*, EHB Docket No. 2020-014-R, slip op. at 4 (Opinion and Order on Range's Motion to Depose issued January 27, 2021) ("*Range I*") (citing to Pa.R.C.P. 4003.5(a)(2).

By email dated March 10, 2021, three weeks before the scheduled production of the Department's expert reports, Range again requested that the Department make Mr. Jankura, Mr. Kosmer and Mr. McKee available for deposition in April. Range also requested to depose a fourth Department expert, Mr. Seth Pelepko. The Department responded on March 15, 2021 asking Range to set forth justification that would support deposing its expert witnesses. Range immediately responded on March 16, 2021, stating that the aforesaid expert witnesses should be deposed because of the factual knowledge they possess. The Department rejected Range's request to make the expert witnesses available for deposition based on the Board's Opinion in *Range I.* On March 31, 2021, the Department served Range with expert reports of the six witnesses it has designated as experts.

On April 30, 2021, Range filed its second Motion to Depose, seeking to depose the aforenamed individuals (Second Motion to Depose). The Department filed a Response opposing the Motion on May 17, 2021. This matter is now before the Board.

Discussion

The issue before us is whether Range has shown cause to take the depositions of four individuals the Department has designated as experts. In *Range I* we set out the steps that must be met in order to convince us to allow the depositions of expert witnesses. First, the parties should wait until after expert interrogatories have been answered or expert reports have been exchanged.

Second, they should fashion their argument as to why cause is shown so that the Board, in its discretion, "may order further discovery by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate." Pa.R.C.P. 4003.5(a)(2)(A).

The important trigger in most instances, as we said in our earlier Opinion, is, first, the exchange of expert reports. However, the mere exchange of reports is not the deciding factor. Instead, it is both a substantive and procedural hurdle. Stated another way, only after the expert states "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion" is the other side potentially entitled to "further discovery by other means." Pa. R.C.P. 4003.5(a)(1)(B) and 4003.5(a)(2). The analysis is focused on what is set forth in the expert reports and whether those reports comply with Rule 4003.5.

Range filed its Second Motion to Depose Department expert witnesses, not after the full exchange of expert reports as recommended in *Range I*, but after the service of the Department's initial expert reports. Although Range provided us with numerous pages from depositions taken in the case, it did not provide us with any of the expert reports served by the Department. Range advised us that "[t]he Department's expert reports, figures, and appendices are voluminous, comprising hundreds of pages" and Range did "not wish to burden the Board by submitting the complete expert record with this motion." (Second Motion to Depose, para. 6, n. 1.) As the Department correctly points out, "Range remarkably asks this Board to determine that the Department's expert reports were inadequate while at the same time stating that the reports themselves were too detailed to provide to the Board." (Department's Memorandum of Law, p. 10.) The Department, in its filings, provided the expert reports to us. The Department argues that Range's Second Motion to Depose should be denied because it relies on arguments that have

already been considered and rejected by the Board in *Range I.* The Department also asserts that this second motion, like the first, is premature because at the time of the motion the parties had not finished exchanging expert reports.[1]

Range's Second Motion to Depose does not analyze the initial expert reports filed by the Department. Instead, Range doubles down on the same arguments that we declined to adopt in its First Motion to Depose. The factual knowledge and opinions possessed by an expert witness are discoverable pursuant to Rule 4003.5 which provides for this information to be provided either in an expert report or by answers to expert interrogatories. "Discovery by other means," including depositions, is not permissible absent an agreement of counsel or in the Board's sound discretion after a showing of cause that the information set forth in the expert reports is not sufficient. By not providing us with the expert record including the reports, let alone an analysis of why the reports are inadequate, Range has given us nothing to conclude that additional discovery, including depositions of Department experts, is warranted.

The Department not only provided us with its expert reports but also an analysis of why the expert reports satisfied the requirements of Rule 4003.5. The Department makes a strong argument that its initial expert reports extensively set forth each expert witness' detailed factual knowledge and how those facts serve as the basis of the respective expert's opinions. Indeed, our review leads us to conclude that "further discovery by other means" is not warranted. However, we will not spend additional time discussing the reports that Range chose not to address, analyze, or even attach to its Second Motion.

[1] Range's Second Motion to Depose was filed on April 30, 2021. Pursuant to the Board's Order of April 13, 2021, Range's expert reports were not due until May 21, 2021, and the Department's rebuttal reports, if any, were not due until June 14, 2021.

The Department points to a large number of documents that it has produced in discovery, including what it claims is the production of all non-privileged emails and attachments to and from the witnesses designated as experts that relate not only to the gas migration involved in this appeal but to other unrelated investigations. In addition, in May 2020 the Department produced an internal determination memorandum written by Mr. Kosmer with input from Mr. Jankura that the Department claims set forth detailed facts supporting the Department's determination that twelve private water supplies were impacted by oil and gas activity.

The Department further contends that the fact discovery in this case has been both thorough and extensive. The Department has responded to three sets of interrogatories, three sets of requests for production of documents and a request for admissions and has produced over 43,000 records. In addition, Range has deposed twelve Department employees, including Oil and Gas District Manager Jennifer Means, who made the decision to issue the Administrative Order that is the subject of this appeal, and Oil and Gas Bureau Director John Ryder. None of the depositions lasted less than several hours and some lasted over eleven hours and took two days to complete.

The two main cases that Range cites for the proposition that it should be allowed to depose the Department's experts are not controlling. Both *New Hanover Township v. DEP*, 1991 EHB 975, and *Solebury Township v. DEP*, 2007 EHB 244, were one-judge opinions where the presiding judges allowed limited questioning of expert witnesses under tight constraints. Neither of those cases reflect the modern practice and evolving case law that has developed over the past 17 years which we discussed in *Range I.*

Range's reliance on an explanatory comment to Pa.R.C.P. 4003.5 is also misplaced. The comment, which is not clearly drafted and is from 1978, stands for the proposition that a party cannot shield an employee who may have factual information about a case by deciding not to call

the employee to testify at trial. That situation is not the one before us. The employees or former employees of the Department will testify at trial as expert witnesses and have provided expert reports pursuant to Rule 4003.5. Thus, the comment is not applicable.

Range raises the argument that the Department could designate all of its witnesses as experts and thus shield them from discovery. First, the Department has not done so here. Moreover, Range does not cite any case where this has taken place. Second, the Board has the responsibility and authority to prevent any discovery abuses such as the extreme case that Range raises. Third, the Department has produced detailed expert reports in this case in accordance with Rule 4003.5 which is what the Pennsylvania Rules of Civil Procedure require. Fourth, the fact that twelve Department witnesses have already been deposed by Range negates this argument that the Department might somehow shield all of its witnesses. Thus, this argument has no more merit now than it did when Range raised it in its First Motion. We thoroughly addressed this argument in our Opinion in *Primrose Creek Watershed Assn. v. DEP*, 2013 EHB 196, 199 (quoting *Dauphin Meadows v. DEP*, 1999 EHB 829, 833):

> Dauphin Meadows suggests that allowing a party to denominate a person as an expert gives the party too much power and creates a potential for abuse by "shielding" that person from discovery. First, this Board always retains authority to control bad faith or unreasonable conduct. We see no evidence of that here. Secondly, Dauphin Meadows is not being deprived of the right to conduct full and complete discovery. No information is being "shielded." The issue raised by the Department's motion is more one of timing than of substance. Even though Dauphin Meadows cannot conduct an immediate deposition, it is entitled to receive detailed expert interrogatory responses and/or a report.

Finally, Range argues that if it is not permitted to depose the Department's expert witnesses it will be denied due process. Specifically, it alleges that procedural due process guarantees a party the right to depose expert witnesses as to their underlying factual knowledge. We note that Range

cites no case law in support of this specific proposition. Nor does it allege that the Department's expert reports fail to disclose the expert witnesses' factual knowledge. The detailed and extensive discovery that has been conducted by Range in this case refutes any argument that it has been denied due process. Stated simply, Range has not demonstrated good cause to take additional discovery of the Department expert witnesses.

Range's citation to *DEP v. Neville Chemical Corp.*, 2004 EHB 744, 748-49, n. 1, is taken out of context. In that case, the Department filed a complaint seeking $17,500,000 in civil penalties against Neville Chemical. Neville Chemical sought to depose the DEP Secretary. The Department opposed the request and, after briefing and oral argument, the Board entered a protective order prohibiting the deposition. At the oral argument the Department represented that it would not call the Secretary as a witness at the hearing much less as an expert witness. Thus, the quote from *Neville Chemical* has no relevance to the issue in this case. In most cases, the expert witnesses are not deposed unless counsel voluntarily agree to such depositions or the Board so orders the depositions after a showing of good cause. The fact that expert witness discovery does not normally include expert witness depositions is not a violation of due process because of the requirements of Pa.R.C.P. 4003.5.

After carefully reviewing Range's Second Motion, the Department's Response, and the Memoranda of Law filed by the parties, we find that Range has not demonstrated the necessary cause to depose the four expert witnesses.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 17th day of June, 2021, it is ordered that Range's Second Motion to Depose Department's Expert Witnesses is **denied** because of the failure to show good cause for the taking of further discovery by other means pursuant to Rule 4003.5(a)(2) of the Pennsylvania Rules of Civil Procedure.

ENVIRONMENTAL HEARING BOARD

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

DATED: June 17, 2021

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

For the Commonwealth of PA, DEP:
Michael A. Braymer, Esquire
Kayla A. Despenes, Esquire
Douglas G. Moorhead, Esquire
(via electronic filing system)

For Appellant:
Kimberly A. Brown, Esquire
Craig P. Wilson, Esquire
Benjamin T. Verney, Esquire
Leon DeJulius, Esquire
Eric P. Stephens, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRIAN TELEGRAPHIS	:	
	:	
v.	:	**EHB Docket No. 2020-012-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 19, 2021**

OPINION AND ORDER ON
MOTION TO SCHEDULE CONFERENCE

By Steven C. Beckman, Judge

Synopsis

The Board denies Appellant's motion to exclude testimony and evidence from the record based on an alleged appearance of impropriety by the Department and one of its employees where a reasonable person viewing the facts of the matter would find no appearance of impropriety. The Board dismisses Appellant's due process claim where Appellant identifies no legal obligation owed and there is no evidence in the record that suggests his due process rights were violated.

O P I N I O N

Introduction

This matter involves an appeal filed by Brian Telegraphis ("Mr. Telegraphis") challenging the Department of Environmental Protection's ("the Department's") denial of Mr. Telegraphis' mine subsidence claim for a commercial structure he owns. The Department determined that the structure did not fall within the scope of coverage under the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, *as amended*, 52 P.S. §§ 1406.1 – 1406.21

("Mine Subsidence Act") and 25 Pa. Code § 89.142a. A hearing on this matter was held April 19, 2021, via video conference. Mr. Telegraphis filed his post-hearing brief on June 7, 2021. On June 24, 2021, Mr. Telegraphis filed a Motion to Schedule Conference ("the Motion"). The Motion, contrary to its title, sought more than the scheduling of a conference call. In the Motion, Mr. Telegraphis asserts that new information raises an appearance of impropriety in this case and, as a result, certain evidence and testimony presented at the hearing should be stricken.[1] The Department filed its Response in Opposition to the Motion on July 1, 2021, including a Memorandum of Law and Affidavit of Department employee Carl Massini, P.E. The Board issued an Order on July 2, 2021, ordering a conference call and staying the remaining post-hearing briefs until the Motion was resolved. The Board held the conference call with the parties on July 6, 2021. On the same day as the conference call, Mr. Telegraphis filed a verification for his Motion. The Board is now ready to rule on the Motion.

In his Motion, Mr. Telegraphis alleges there is an appearance of impropriety concerning Department employee Carl Massini, who is employed as a Mining Engineer Consultant for the Department's Bureau of District Mining Operations. *Massini Aff., at ¶ 3*. In that role, Mr. Massini aided in the investigation of Mr. Telegraphis' mine subsidence claim and co-authored with another Department employee, Michael Bodnar, P.E., a report denying the claim. *Id. at ¶¶ 8–10*. According to Mr. Telegraphis' Motion, he recently learned that during the relevant period of mining in 1999, Carl Massini's brother was employed by the company that conducted the mining operations that Mr. Telegraphis alleges caused his subsidence. *Motion at ¶ 9*. Mr. Telegraphis alleges that the family relationship between the Massini brothers and their respective roles in this

[1] Procedurally, this issue should have been raised in a petition to reopen the record pursuant to Rule 133 of the Board's Rules, but we will nonetheless address the substance of Mr. Telegraphis' arguments. *See* 25 Pa. Code § 1021.133.

matter creates an appearance of impropriety that he asserts warrants striking certain evidence presented at the hearing.

Standard

There is no clear legal standard, nor a standard established by Board case law, regarding claims of an "appearance of impropriety" due to the actions or motives of a Department employee. In their filings and during the recent conference call, neither party identified an applicable legal standard. Mr. Telegraphis does not support his claim with any case law or legal theory justifying the relief he seeks, nor has the Board found any case law directly on point.[2] Mr. Telegraphis refers us to the Pennsylvania Public Official and Employee Ethics Act ("Ethics Act"), Act of Oct. 4, 1978, P.L. 883, *as reenacted and amended*, 65 Pa.C.S. §§ 1101 – 1113, that defines and prohibits conflicts of interest of public employees. *See* 65 Pa.C.S. §§ 1102, 1103(a). However, he concedes that the Ethics Act does not apply under the facts set forth in his Motion.

Mr. Telegraphis may have borrowed his "appearance of impropriety" language from the Code of Judicial Conduct, that requires that judges "shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the *appearance of impropriety*." CODE OF JUDICIAL CONDUCT Canon 1 r. 1.2 (2014) (emphasis added).[3] However, this strict standard for judicial conduct does not apply to Department employees. In the absence of an applicable legal standard, the Board will apply a "reasonable person" standard to the facts of this case. This standard asks whether a reasonable person would perceive an appearance of impropriety based on the facts presented.

[2] While the Board has considered whether a Department employee's links to the private sector created a conflict of interest, these cases are not directly on point with the facts presented. *See Ctr. For Coalfield Just. v. DEP*, 2017 EHB 38; *T.R.A.S.H., Ltd. v. DER*, 1989 EHB 487; *Newlin Twp. v. DER*, 1979 EHB 33.

[3] Throughout the Code of Judicial Conduct, a reasonable person standard applies, requiring judges to avoid behavior which to a reasonable person would "call into question the judge's integrity and impartiality." CODE OF JUDICIAL CONDUCT Canon 3 r. 3.1 cmt. 3 (2014).

Discussion

Appearance of Impropriety

We first acknowledge the distinction between the appearance of impropriety and an actual conflict of interest. Avoiding even the appearance of impropriety is an ethical practice designed to maintain public confidence in an organization or office by keeping its actions above suspicion. A conflict of interest, on the other hand, is defined by the Ethics Act as the "[u]se by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated." 65 Pa.C.S. § 1102. For a public employee, avoiding the appearance of impropriety is an ongoing practice in disclosure, transparency, and accountability, while avoiding a conflict of interest is a mandatory public duty.

Mr. Telegraphis argues the Department created an appearance of impropriety by allowing Carl Massini to participate in the investigation of his claim and then failing to disclose information about Carl Massini's relationship to his brother who was employed by Maple Creek Mining, Inc. ("MCMI"). *Motion, at ¶¶ 8–13*. According to the parties' filings, in 1999 MCMI, a subsidiary of Murray Energy, operated an underground coal mine near Mr. Telegraphis' commercial property. During that time, Nicholas Massini worked for Murray Energy as Manager of Coal Processing overseeing "all coal processing activities for all Murray Energy mining operations, which existed in several states." *Massini Aff., at ¶ 11*. Nicholas Massini left Murray Energy in 2008. *Id. at ¶ 13*. Nicholas Massini is the brother of Carl Massini. *Id. at ¶ 4*. In February 2019, Mr. Telegraphis filed a subsidence claim alleging that MCMI's 1999 mining activities caused damages to his commercial property. *Motion, at ¶ 2*. Carl Massini investigated the claim by personally inspecting

Mr. Telegraphis' commercial structure in February and April of 2019. *Massini Aff., at ¶¶ 4–5, 8–9*. The results of Carl Massini's inspections, along with data and input from supervisor Michael Bodnar, P.E., and mining engineer J.D. Floris, P.E., formed the basis of the Department's investigation report ("Investigation Report"). *Department's Memorandum of Law in Support of Response to Appellant's Motion to Schedule Conference ("DEP Memorandum"), at 2*. The Investigation Report in turn formed the basis for the Department's denial of Mr. Telegraphis' subsidence claim. *Id*.

Mr. Telegraphis argues that the connection between Nicholas and Carl Massini creates an appearance of impropriety, and he asks the Board to strike Mr. Bodnar's hearing testimony and the Investigation Report. *Motion, at ¶ 18*. However, key facts in the record do not support a finding of an appearance of impropriety. For the reasons set forth below, we find that a reasonable person looking at the facts of this case would not conclude that the actions of Carl Massini or the Department give rise to the appearance of impropriety in the Department's handling of this matter.

The parties agree that Nicholas Massini stopped working for MCMI/Murray Energy more than 10 years before the Department's investigation of Mr. Telegraphis' subsidence claim. *Motion, at ¶ 11, Massini Aff., at ¶ 13*. Nicholas Massini has no ongoing financial or direct interest in Murray Energy, and has not for over a decade. *Massini Aff., at ¶ 13*. There is no support in the record for a conclusion that either Massini brother has any financial or other direct interest in the outcome of the Department's investigation of Mr. Telegraphis' subsidence claim. Neither would Nicholas Massini's role at Murray Energy in 1999 give a reasonable person pause about the intentions of his brother 20 years later. Mr. Telegraphis argues that Nicholas Massini was the Plant Supervisor of the mine near his commercial property. *Motion, at ¶ 9*. According to his brother's affidavit, however, Nicholas Massini was not in a direct supervisory role over the mine

but instead oversaw Murray Energy's coal processing operations in multiple states. *Massini Aff., at ¶ 11*. The Board gives weight to Carl Massini's affidavit, which is based on personal knowledge and is not contradicted by any record evidence. In contrast, Mr. Telegraphis' claims are based on the statements of unnamed "former miners" and are unsupported by affidavit. *Motion, at ¶ 10.*

Mr. Telegraphis also raises unsupported concerns that the Massini brothers may have shared confidential or useful information regarding his commercial property, MCMI's mining practices, or the present appeal. *Motion, at ¶ 13.* Carl Massini's affidavit directly contradicts these allegations. Carl Massini explicitly states that he never "discussed with Nicholas any of the matters relating to Mr. Telegraphis' allegations of damages to his commercial structure or his residence." *Massini Aff., at ¶ 14*. Carl Massini further states he never discussed any substantive matters or received any information about Mr. Telegraphis' claim from his brother. *Id. at ¶¶ 15–16.* Mr. Telegraphis' claims are unsubstantiated and have no support in the record. Without more, we are satisfied by Carl Massini's sworn statements.

At the heart of any claim of impropriety or conflict of interest is the implication that the decision-maker's actions were influenced by improper motives, such as bias or personal interest. We find it significant that Carl Massini has a record of supporting claims against Murray Energy in past investigations of subsidence claims. Carl Massini estimates that of the 1,500 mine subsidence investigations he has conducted for the Department, approximately 35 were against Murray Energy. *Id. at ¶ 7.* He estimates that he "supported structure owners' claims for approximately 30 of those 35 claims." *Id*. Carl Massini also investigated a recent subsidence claim from Mr. Telegraphis involving his residence and the exact same MCMI mine and mining activity involved in this case. There, he "recommended supporting Mr. Telegraphis' mine subsidence insurance claim for his residence." *Id. at ¶ 9.* In our opinion, a reasonable person

looking at Carl Massini's track record investigating subsidence claims would not conclude that he was operating with bias in favor of Murray Energy.

Considering the gap in time between Nicholas Massini's employment at Murray Energy and the Department's investigation, Carl Massini's sworn statement that no confidential information about the claim was shared with his brother, and Carl Massini's track record investigating claims against Murray Energy, we find that a reasonable person would not conclude that the actions in this case create an appearance of impropriety by the Department or Carl Massini.

Due Process

Mr. Telegraphis also argues that the Department's failure to disclose Carl Massini's connection to MCMI prior to the hearing violated his due process rights.[4] The Board has long recognized that "procedural due process has as its essential element notice and an opportunity to be heard and defend in an orderly proceeding before an impartial tribunal of competent jurisdiction." *Grand Cent. Sanitary Landfill, Inc. v. DEP*, 1993 EHB 357, 376. In addition to these constitutional protections, parties appearing before the Board are guaranteed the protection of the procedures found in the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511 – 7516, and the Administrative Agency Law, Act of June 4, 1945, P.L. 1388, *as amended*, 2 Pa.C.S. §§ 501 – 508, 701 – 704. Here, Mr. Telegraphis has been a fully participating party in the Board's appeal process, which includes an independent, *de novo* review of the Department's actions. In response to Mr. Telegraphis' appeal of the Department's denial of his mine subsidence claim, the Board held a "full adjudicatory hearing where one can present a

[4] Mr. Telegraphis does not specify whether his due process challenge is substantive or procedural. The bar for a substantive due process claim is high. Executive branch actions must "shock the conscience" of the court to violate an individual's substantive due process rights. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) ("The substantive component of the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense."). The facts alleged here fail to satisfy this standard.

full case in open court with the rights to subpoena witnesses, examine and cross-examine witnesses and present oral and documentary evidence." *PA Trout v. DEP*, 2004 EHB 310, 360 (quoting *Smedley v. DEP,* 2001 EHB 131, 156–7). The Board will fully and fairly adjudicate Mr. Telegraphis' appeal once all of the post-hearing briefing has concluded. For these reasons as well as those that follow, the Board finds that Mr. Telegraphis' due process claim is without merit.

Mr. Telegraphis argues that the Department's failure to disclose denied him the ability to investigate the relationship between Carl Massini and MCMI, as well as the Department's enforcement decisions regarding MCMI. *Motion, at ¶ 14.* The information Mr. Telegraphis seeks was always discoverable and has been addressed in part by Carl Massini's affidavit. Discovery in this appeal extended from February 5 to December 2, 2020. *Pre-Hearing Ord. No. 1, at 3; Amended Ord. Extending Prehearing Deadlines, at ¶ 1*. Mr. Telegraphis does not claim that he was not free to inquire about the background of the Department's investigators, including Carl Massini. Mr. Telegraphis listed Carl Massini as a witness in his own Pre-Hearing Memorandum. *Appellant's Pre-Hearing Memorandum, at 3*. To the extent Mr. Telegraphis failed to inquire into Carl Massini's background during discovery, he could have called him as a witness during the hearing. The Department had no obligation to call Carl Massini as a witness. Instead, both parties called Mr. Bodnar as their primary witness for testimony on the Department's investigation. Mr. Telegraphis had ample time and multiple opportunities to discover facts relating to Carl Massini's background and the Department's enforcement record with MCMI.

Mr. Telegraphis has identified no legal obligation of the Department requiring disclosure of the Massini brothers' relationship in this circumstance.[5] As detailed above, neither the

[5] While the Department was not legally obligated to notify Mr. Telegraphis of the Massini brothers relationship nor do we conclude that under the facts of this case that the failure to do so created the appearance of impropriety, the Board believes that the avoidance of potential conflicts or impropriety is important and should be a consideration by the Department in its actions. Where it is not possible to avoid

Department's nor Carl Massini's actions created the appearance of impropriety. Mr. Telegraphis' Motion lacks any citations to case law regarding due process guarantees and we found no evidence in the record which suggests his procedural or substantive due process rights were violated. Accordingly, we find Mr. Telegraphis' due process claim has no merit.

Remedy

Finally, the remedy Mr. Telegraphis requests is not adequately connected to his allegations against Carl Massini to be warranted. Mr. Telegraphis asks the Board to strike from the record Mr. Bodnar's hearing testimony as well as the Investigation Report relied on in denying his subsidence claim. *Motion, at ¶ 18*. Neither remedy is justified. We believe Carl Massini's participation in the investigation was not problematic and did not create the appearance of impropriety. Consequently, there are no grounds for striking Carl Massini's contributions to the record.

Yet Mr. Telegraphis asks the Board to go further and to strike evidence gathered independent of Carl Massini. Multiple Department staff investigated Mr. Telegraphis' claim. J.D. Floris and Mr. Bodnar participated in the investigation, and Mr. Bodnar and Carl Massini co-authored the Investigation Report. *DEP Memorandum, at 2, 10 n.6*. Mr. Telegraphis asks us to strike the testimony of Mr. Bodnar, "against whom [he] makes no accusation of bias or impropriety, and who has independent knowledge of the Commercial Structure and area from inspections." *DEP Memorandum, at 10 n.6*. Mr. Telegraphis requests this despite his own reliance on Mr. Bodnar's testimony during his case in chief. Even if the Board found Carl Massini's actions questionable, striking Mr. Bodnar's testimony and the Investigation Report would be overbroad. Mr. Telegraphis offers no evidence connecting the alleged appearance of impropriety to the work

potential conflicts or the appearance of impropriety, disclosure of those issues is a good practice for all parties involved in potential litigation in front of the Board.

of the other Department employees involved in investigating his claim or to the evidence presented at the hearing including Mr. Bodnar's testimony.

Conclusion

After reviewing the record from the vantage point of a reasonable person, the Board finds that there is no appearance of impropriety based on the actions of the Department or Carl Massini. We also find no merit in Mr. Telegraphis' unsupported due process claim. Ultimately, Mr. Telegraphis failed to provide any legal or factual support for his serious allegations. Mr. Telegraphis' requested remedy is therefore unwarranted and overbroad. Accordingly, we deny Mr. Telegraphis' Motion and issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRIAN TELEGRAPHIS	:	
	:	
v.	:	**EHB Docket No. 2020-012-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 19th day of July, 2021, the Appellant's motion is **denied.**

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 19, 2021

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

For the Commonwealth of PA, DEP:
Brian Greenert, Esquire
Michael Heilman, Esquire
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TONYA STANLEY, BONNIE DIBBLE, AND JEFFREY DIBBLE	:	
v.	:	**EHB Docket No. 2021-013-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CABOT OIL AND GAS CORPORATION, Intervenor	:	**Issued: July 21, 2021**

OPINION AND ORDER ON
MOTION TO QUASH SUBPOENAS AND FOR PROTECTIVE ORDER

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants an intervenor's motion to quash and for the issuance of a protective order where the subject of the motion is two subpoenas filed by appellants seeking the deposition of counsel for the intervenor and the intervenor's president and chief executive officer. The intervenor has demonstrated good cause for quashing the subpoenas and for the issuance of a protective order. The appellants have not shown circumstances warranting the deposition of counsel or that the intervenor's chief executive officer is in likely possession of relevant information concerning this appeal.

O P I N I O N

Tonya Stanley, Bonnie Dibble, and Jeffrey Dibble (the "Appellants") have appealed a letter from the Department of Environmental Protection (the "Department") dated January 15, 2021 in which the Department determined that issues of turbidity and sediment in the Appellants' water supply were not caused by oil and gas operations conducted by Cabot Oil and Gas Corporation ("Cabot") at its nearby Abbott D and M wells in Bridgewater Township, Susquehanna County.

The letter came in response to a complaint filed by the Appellants on January 7, 2020. The Appellants assert that Cabot is responsible for contamination of their water supply and that the Department's determination was made in error.

On June 22, 2021, the Appellants filed subpoenas with the Board that were directed to, among others, one of the attorneys representing Cabot in this matter, Amy L. Barrette, Esquire, and Cabot's President and Chief Executive Officer, Dan O. Dinges. The subpoenas sought to depose Attorney Barrette and Mr. Dinges by videoconference on June 29, 2021. On June 24, Cabot filed an emergency motion to stay compliance with the subpoenas, wherein Cabot sought a stay in order to have time to prepare a motion to quash the subpoenas. On the same day we ordered the Appellants to respond to the motion by close of business on June 25. After considering the motion and the response, we granted Cabot's emergency motion on June 25 and ordered Cabot to file its motion to quash by July 9. Cabot filed the instant motion on July 1, seeking an order quashing the subpoenas and a protective order prohibiting the Appellants from deposing Attorney Barrette and Mr. Dinges. The Appellants have responded in opposition, and the motion is ripe for disposition.[1]

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a); *Hickory Hill Group, LLC v. DEP*, 2019 EHB 377, 381. Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.Civ.P. 4003.1; *Protect PT v. DEP*, 2020 EHB 326, 333. "The Board

[1] On July 21, 2021, Cabot filed what it called a "Response to Appellants' Recent Non-Motion Filings and Reply to Appellants' Answer in Opposition to Intervenor Cabot Oil & Gas Corporation's Motion to Quash Subpoenas and for Protective Order." Under our Rules, a "moving party may not file a reply to a response to procedural, discovery or miscellaneous motions, unless the Board orders otherwise." 25 Pa. Code § 1021.91(g). On the same day, the Appellants filed a motion to strike Cabot's filing. We have not considered Cabot's filing in drafting this Opinion. The Appellants' motion to strike will be denied as moot.

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." *PennEnvironment v. DEP*, EHB Docket No. 2020-002-R, slip op. at 3 (Opinion and Order, Mar. 31, 2021) (quoting *Northampton Twp. v. DEP*, 2009 EHB 202, 205). Pursuant to Rule 4012 of the Pennsylvania Rules of Civil Procedure, the Board is empowered to issue a protective order upon good cause shown to protect a person from unreasonable annoyance, embarrassment, oppression, burden, or expense. Pa.R.Civ.P. 4012(a); *Tri-Realty Co. v. DEP*, 2015 EHB 517, 524.

Beginning with the subpoena directed to Attorney Amy Barrette,[2] Cabot argues that deposing Attorney Barrette violates attorney-client privilege and that the Appellants have not met their burden to demonstrate why deposing Cabot's counsel is necessary. In response, the Appellants do not necessarily contest that deposing Attorney Barrette involves attorney-client privilege. Instead, they argue that Cabot has committed criminal violations of the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, that Attorney Barrette is implicated in those crimes, and that Attorney Barrette can be deposed by reason of the crime-fraud exception to attorney-client privilege.[3] In support of their assertion that Cabot may have committed crimes, the Appellants

[2] The subpoena directed to Attorney Barrette notes that it is being made pursuant to Rule 3.7 of the Pennsylvania Rules of Professional Conduct, which provides:

> **Rule 3.7. Lawyer as Witness.**
>
> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

[3] The crime-fraud exception generally holds that attorney-client communications are not privileged if the advice of counsel is sought in furtherance of the commission of criminal or fraudulent activity:

point to alleged environmental violations at the Abbott wells documented by Department inspectors in December 2018. (App. Ex. A.)

In addition to its long-standing roots in common law, *Commonwealth v. Maguigan*, 511 A.2d 1327, 1333 (Pa. 1986), Pennsylvania has codified the attorney-client privilege in statute: "In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client." 42 Pa.C.S. § 5928. The Rules of Civil Procedure lend further protection in the discovery context, providing that "discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Pa.R.Civ.P. 4003.3.

Mindful of attorney-client privilege and the attorney work product doctrine, the Board "will rarely allow a party to depose or otherwise interrogate another party's attorney. Although there is no absolute prohibition against such a practice, the burden is upon the party who would depose opposing counsel to explain why we should allow such an unusual event to occur." *PA Waste, LLC v. DEP*, 2009 EHB 317, 319. We have reasoned this because

> so much of the information an attorney might conceivably provide under interrogation is privileged, protected from disclosure by the work product doctrine, available from less problematic sources, or irrelevant that what little evidence is

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> Such communications are not protected because it cannot be an attorney's legitimate business to further any criminal object or to contrive a fraud. *In re Thirty-Third Statewide Investigating Grand Jury*, [86 A.3d 204, 217 (Pa. 2014)]; *Nadler v. Warner Co.*, 184 A. 3 (Pa. 1936). In order for the crime-fraud exception to apply, the party wishing to invoke the exception must make a prima facie showing that the attorney was used to promote intended or continuing fraudulent or criminal activity. *Brennan v. Brennan*, 422 A.2d 510, 515 (Pa. Super. 1980). There must be a prima facie showing that a crime or fraud was intended or has been committed, *Id.* at 517, and Commonwealth Court seems to have suggested that a "true crime," such as one involving potential imprisonment, as opposed to a "regulatory violation" with likely lighter penalties, must be involved. *Heintzelman v. Dep't. of Cmty. & Econ. Dev.*, 2014 Pa. Commw. Unpub. LEXIS 644, at *11 (Pa. Cmwlth. 2014). *See also, Commw. v. Koczwara*, 155 A.2d 825, 827-28 (Pa. 1959).

Big Spring Watershed Ass'n v. DEP, 2015 EHB 83, 86.

> left to be extracted does not justify the time, burden, and expense of compelling attendance at what is surely bound to be a deposition with little or no incremental value.

Id. See also Kiskadden v. DEP, 2012 EHB 181, 186-87 (noting that deposing attorneys acting as counsel in a case is usually a bad idea and it introduces "an element of unhealthy gamesmanship to cases").

Attorney Barrette avers in an affidavit attached to Cabot's motion that she has no personal or independent knowledge of the facts related to the Appellants' appeal or water supply complaint, and her knowledge of this case has come solely by way of her representation of Cabot as counsel. (Cabot Ex. D at ¶¶ 5, 6.) Thus, it appears that Attorney Barrette's entire relation to the current appeal, and the preceding investigation of the Appellants' water supply contamination claim, has been in her professional capacity as counsel employed by Cabot. The Appellants have not shown why deposing Attorney Barrette is necessary, or what non-privileged information she might have that would bear on the ultimate question in this appeal—whether Cabot's oil and gas operations at the Abbott wells caused the contamination of the Appellants' water supply. Nor have the Appellants made a prima facie showing as to why Attorney Barrette has been part of any fraudulent or criminal scheme within the ambit of the crime-fraud exception to the attorney-client privilege.

Turning to the subpoena for Dan Dinges, Cabot argues that Mr. Dinges is Cabot's highest-ranking officer and he possesses no first-hand information related to this appeal. Cabot also contends that the Appellants have not attempted to obtain the information they seek through less intrusive means. In response, the Appellants assert that they are confident Mr. Dinges is aware of this matter and that his knowledge is crucial to their appeal.

The Appellants do not say what relevant knowledge they believe Mr. Dinges possesses. It is not clear how Mr. Dinges's testimony might help the Board resolve the water supply

contamination issue. We think it is likely that there are other employees or officials at Cabot who are more closely involved with the operations at the Abbott wells and the subsequent investigation of the Appellants' water well. If the Appellants are interested in the chemicals used by Cabot in fracking the Abbott wells, we have not been provided with enough reason why Cabot's Chief Executive Officer is the person in the best position to possess that information. The Appellants argue that Mr. Dinges's testimony is important for public health and safety. We do not disagree that Cabot may be in possession of information that is important to the Appellants, but we are not convinced that Mr. Dinges is the person best suited to provide that information.

The Rules of Civil Procedure provide a mechanism for deposing a corporate official who has knowledge about matters sought by an opposing party:

> A party may in the notice and in a subpoena, if issued, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters to be inquired into and the materials to be produced. In that event, the organization so named shall serve a designation of one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which each person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The person or persons so designated shall testify as to matters known or reasonably available to the organization….

Pa.R.Civ.P. 4007.1(e). We think this process is more likely to result in one or more corporate officials from Cabot who are more closely familiar with the matters into which the Appellants wish to inquire.

In sum, Cabot has demonstrated good cause for quashing both of the subpoenas and issuing a protective order preventing the deposition of Attorney Barrette and Mr. Dinges.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TONYA STANLEY, BONNIE DIBBLE, AND JEFFREY DIBBLE	:	
v.	:	**EHB Docket No. 2021-013-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CABOT OIL AND GAS CORPORATION, Intervenor	:	

O R D E R

AND NOW, this 21st day of July, 2021, it is hereby ordered that Cabot's Motion to Quash Subpoenas and for a Protective Order is **granted**. The Appellants' subpoenas for the depositions of Amy L. Barrette, Esquire and Dan O. Dinges are quashed and the Appellants are prohibited from deposing Attorney Barrette and Mr. Dinges in this matter. Cabot's Response to Appellants' Recent Non-Motion Filings and Reply to Appellants' Answer in Opposition to Intervenor Cabot Oil & Gas Corporation's Motion to Quash Subpoenas and for Protective Order has not been considered in drafting this Opinion. *See* 25 Pa. Code § 1021.91(g). The Appellants' Motion to Strike Cabot's filing is **denied as moot**.

ENVIRONMENTAL HEARING BOARD

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

DATED: July 21, 2021

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GLENN J. MORRISON, M.D.	:	
	:	
v.	:	**EHB Docket No. 2019-053-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and INSURANCE AUTO AUCTIONS, INC., Permittee	:	**Issued: September 13, 2021**

ADJUDICATION

By Michelle A. Coleman, Judge

Synopsis

In an appeal brought by an appellant landowner, the Board upholds the Department's approval of three design plan amendments of the permittee's coverage under PAG-02 General Permit. Any error the Department may have committed during the amendment review process or of alleged deficiencies in the processing of the Amendments are immaterial and have no continuing relevance. In addition, the appellant abandoned his other technical objections to the amendments by failing to present expert testimony and not pursuing those claims in his post-hearing brief. Lastly, the appellant's easement claim is barred by the doctrine of administrative finality.

Background

This appeal derives from the Department of Environmental Protection's ("the Department's") approval of three amendments to Insurance Auto Auction Inc's ("the Permittee's") PAG-02 Coverage. The Permittee is an automobile auction operation that sells total loss vehicles. The Permittee operates its auctions at 10 Auction Dr., York Springs, Adams County Pennsylvania ("the Site"). Appellant, Glenn J. Morrision, M.D. ("Dr. Morrison") lives at 221 Bonners Hill Rd.,

York Springs, Adams County Pennsylvania. Dr. Morrison's property is adjacent to the Permittee's Site.

On December 9, 2015, the Adams County Conservation District ("ACCD"), the entity that has the designated authority to review Notices of Intent ("NOIs") for coverage under PAG-02, approved the Permittee for coverage under Chapter 102 National Pollutant Discharge Elimination System Permit ("the Permit") for Stormwater Discharges Associated with Construction Activities PAG-02. The Permit allows the Permittee to discharge, from the Site, its stormwater, associated with construction activities, to surface waters of the Commonwealth. In 2019, the Permittee submitted three proposed amendments ("the Amendments") to its Permit drawings. To address public safety concerns for drivers on Bonners Hill Road, the Permittee proposed an extension of an 18-inch culvert pipe and to embed the pipe in riprap. The ACCD approved the first Amendment on February 6, 2019. In May 2019, the Permittee proposed two additional Amendments. Both Amendments sought to incorporate riprap downchutes in order to address erosion that occurred at the Site during construction. The ACCD approved the second Amendment on May 7, 2019, and the third Amendment on May 9, 2019.

After Dr. Morrison observed the work that had been performed under the first Amendment, he requested an informal hearing with the Department on April 23, 2019. On May 10, 2019, the Department emailed Dr. Morrison information and plans pertaining to Amendment 1. The next day, the Department sent Dr. Morrison an additional email that included the plans and approvals for Amendments 2 and 3. On May 16, 2019, an informal hearing was held where Dr. Morrison provided testimony to the Department regarding his concerns for the Amendments. The Department issued a letter to Dr. Morrison and the Permittee on May 23, 2019, informing them that it found the ACCD's authorization of the Amendments appropriate. On June 13, 2019, Dr.

Morrison filed the present appeal with the Environmental Hearing Board ("the Board") of the Department's decisional letter. In his Notice of Appeal, Dr. Morrison states four objections: (1) that the Permittee violated his property rights by not obtaining an easement over his property; (2) that Amendments 1 through 3 should have been reviewed as a major, rather than minor, amendment; (3) that the plans submitted in connection with Amendments 1 through 3 were vague; and (4) that the underground storage system included in the original NPDES permit plan does not function properly.

The Permittee filed a Motion for Partial Summary Judgment on January 10, 2020. The Board granted in part the Permittee's Motion and dismissed Dr. Morrison's first objection in his Appeal regarding his property rights and easement issues. *Morrison v. DEP*, 2020 EHB 220. The Board reasoned that Dr. Morrison was barred from raising this objection by the doctrine of administrative finality because in a previous appeal filed by Dr. Morrison in 2016, he had raised essentially the same objection but ultimately abandoned his claim. *Id.* at 224. As such, this Board reasoned he could not reassert this claim in his current appeal. Dr. Morrison filed a Motion for Reconsideration of the Board's May 13, 2020 decision, which was denied. *Morrison v. DEP*, 2020 EHB 287. On October 12, 2020, the Permittee filed a Motion in Limine where it requested this Board to preclude testimony regarding the easement issue and to preclude expert testimony by Dr. Morrison where Dr. Morrison had failed to identify any expert witnesses in his prehearing memorandum. The Board granted the Permittee's motion in an Opinion and Order issued on November 3, 2020. *Morrison v. DEP*, 2020 EHB 404. A video hearing was held in this matter on November 17 through 18, 2020, via Webex. The Parties have filed their Post-Hearing Briefs and we are now prepared to rule on this matter.

FINDINGS OF FACT

1. The Appellant is Glenn J. Morrison, M.D. ("Dr. Morrison") residing at 221 Bonners Hill Road, York Springs, Adams County, Pennsylvania.

2. The Department of Environmental Protection is the agency charged with enforcing the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *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, and the rules and regulations promulgated thereunder.

3. The Permittee is Insurance Auto Auctions Inc., that operates an automobile auction for totaled vehicles at 10 Auction Drive, York Springs, Adams County, Pennsylvania.

4. The Adams County Conservation District ("ACCD") maintains a delegation agreement with the Department where the Department delegates portions of its administrative authority to the ACCD to carry out certain elements of Pennsylvania's Chapter 102 erosion and sediment control and stormwater management program, including the review of NOIs for coverage under PAG-02.

5. On December 9, 2015, the Department, through the ACCD, approved the Permittee for coverage under the General NPDES Permit for Stormwater Discharges Associated with Construction Activities PAG-02, with the assigned coverage Number PAG-02-0001-13-25.

6. The Department published the ACCD's authorization of the Permittee's PAG-02 Coverage in the *Pennsylvania Bulletin* on December 26, 2015.

7. Dr. Morrison filed two appeals objecting to the Permittee's PAG-02 Coverage, which were consolidated. *See* EHB Docket No. 2016-009-L.

8. On October 4, 2016, the Board issued an Opinion and Order partially granting and

partially denying the Department's and the Permittee's motions for summary judgment. *Morrison v. DEP*, 2016 EHB 717, 721, 728.

9. The Board's Opinion and Order granted summary judgment with respect to a property rights issue Dr. Morrison raised in his Notice of Appeal. *Id.* at 721.

10. Dr. Morrison withdrew his appeal on February 9, 2017. *See* EHB Docket No. 2016-009-L.

11. In 2019, Latimore Township expressed public safety concerns for drivers on Bonners Hill Road. T. at 67.

12. In response to the public safety concerns, the Permittee, through its engineer, Daniel Long, P.E. ("Mr. Long"), sought limited revisions to the original design to its NPDES permit drawings. Ex. 6; T. at 64-67.

13. The proposed revisions would extend an 18-inch culvert pipe and embed the pipe in riprap to road level. T. at 67; Ex. 6.

14. The modifications in Amendment 1 that were proposed by Mr. Long, are reflected in a red-line revision to the original NPDES permit drawings. T. at 73-74; Exs. 7 and 8.

15. The ACCD approved Amendment 1 on February 6, 2019. Ex. 6.

16. On May 6, 2019, the Permittee, through Mr. Long, requested a second modification to its NPDES permit drawings by adding two riprap downchutes to the original design. Ex. 9.

17. On May 7, 2019, the Permittee, through Mr. Long, submitted a third modification to its NPDES permit drawings to incorporate a third riprap downchute. Ex. 9.

18. Amendments 2 and 3 served to provide a more stable path for waterflow to address erosion that occurred on the Permittee's Site during construction. T. at 81; 88.

19. The Permittee reflected Amendments 2 and 3 in red-line drawings displaying the

modifications to the original NPDES permit drawings. T. at 80-81; Ex. 10.

20. The ACCD approved Amendment 2 on May 7, 2019. Ex. 9.

21. The ACCD approved Amendment 3 on May 9, 2019. Ex. 9.

22. The Department published the Amendments in the *Pennsylvania Bulletin* on November 7, 2020. T. at 188.

23. Following the publication of the Amendments, no person or entity filed an appeal of any of the Amendments.

24. The Amendments do not affect how the Permittee manages the stormwater at the site. T. at 144.

25. The Amendments do not affect the underground storage approved under the original NPDES permit. T. at 145.

26. The Amendments do not increase earth disturbance under the original NPDES permit. T. at 149.

27. There are two types of NPDES Permits, individual permits and general permits. *See generally*, 25 Pa. Code § 92a.54; T. at 140, 231.

28. The Department conducts the same technical review of a minor amendment as it does for a major amendment. T. at 152.

29. The approval of a major amendment requires the Department to publish the major amendment in the *Pennsylvania Bulletin*. T. at 152.

30. Minor amendments approved by the Department do not require publication in the *Pennsylvania Bulletin*. *Id.*

31. The red-line drawings related to the Amendments that the Permittee provided to the Department contained sufficient detail for the Department to conduct its review. T. at 147.

32. The Department determined that the Amendments were field changes because they did not increase earth disturbance and did not change the manner in which stormwater would be managed. T. at 149-150.

33. Dr. Morrison observed the work that had been done under the Amendments. T. at 50.

34. Dr. Morrison requested an informal hearing with the Department in relation to the Amendments on April 23, 2019. Ex. 17; T. at 181-82.

35. On May 10, 2019, the Department emailed Dr. Morrison information pertaining to Amendment 1, including plans and plan detail sheets. Ex. 18; T. at 28; 183.

36. On May 15, 2019, the Department emailed Dr. Morrison with information pertaining to Amendments 2 and 3 including plans and approvals. Ex. 19; T. at 184-85.

37. The Department held an informal hearing with Dr. Morrison regarding the Permittee's PAG-02 Coverage and the relative Amendments on May 16, 2019. Ex. 20.

38. All three Amendments were discussed at the informal hearing. T. 50; 57.

39. Dr. Morrison provided testimony regarding the Amendments at the informal hearing. Ex. 20; T. at 50; 57.

40. In a decision letter dated May 23, 2019, sent to Dr. Morrison and the Permittee, the Department determined that after considering the written and verbal comments, the authorization of the Amendments was appropriate. Ex. 20.

41. On June 13, 2019, Dr. Morrison appealed the Department's decision letter to the Environmental Hearing Board ("the Board"). T. at 51; Dkt. 2.

42. Dr. Morrison did not proffer any expert testimony or technical evidence regarding the Amendments during the hearing before the Board.

43. During the hearing, Dr. Morrison stated he was not challenging the technical aspects of the Amendments' design. T. at 44; 45.

DISCUSSION

Legal Standard

This matter involves a third party appeal by Dr. Morrison of permit amendments that the Department approved at the request of the Permittee. To prevail in a third-party permit amendment appeal, the party challenging the Department's permit decision must show by a preponderance of the evidence that the Department acted unreasonably or in violation of the Commonwealth's laws or the Pennsylvania Constitution in issuing the permit revisions. *Gadinski, et al. v. DEP*, 2013 EHB 246, 269; 25 Pa. Code § 1021.122(c)(2). In order to succeed in his appeal, Dr. Morrison must meet his burden of proof by showing that the evidence in favor of his proposition is greater than that opposed to it. "It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established." *Delaware Riverkeepers v. DEP*, 2018 EHB 447, 473. In other words, Dr. Morrison's evidence must be greater than the evidence that would show the approval of the Amendments was appropriate or in accordance with applicable law. The Board's standard of review in reviewing Department final actions is *de novo* and we can admit and consider evidence that was not before the Department when it made its initial decision, including evidence developed since the filing of the appeal. *United Refining Company v. DEP*, 2016 EHB 442, 449; *see also Smedley v. DEP*, 2001 EHB 131; *Warren Sand & Gravel v. Dep't of Envtl. Res*., 341 A.2d 556 (Pa. Cmwlth. 1975). The Board reviews the Department action in question to determine whether that action was lawful and reasonable. *Wilson v. DEP*, 2010 EHB 827, 833. If the Board finds that the Department's actions were contrary to law or were otherwise unreasonable,

the Board may substitute its judgment for that of the Department. *Jefferson County Commissioners, et al. v. DEP*, 2002 EHB 132, 179.

Dismissed and Waived Issues

Dr. Morrison outlined four objections in his Notice of Appeal: 1) his property rights were violated because an easement was not obtained; 2) the approved Amendments should have been classified as major rather than minor amendments; 3) the plans submitted by the Permittee are vague and the design will result in erosion and stream destruction, and finally; 4) the design results in excess water entering his property and not enough entering the swale and the underground storage system. In his post-hearing brief, Dr. Morrison adds a fifth objection, asserting that "the DEP violated [his] right to equal protection under the law, the right to due process of the law, and [his] right to private property." Dr. Morrison's Post-hearing Brief at 1.

Dr. Morrison's arguments over the course of this appeal have not always been clear or consistent, but we have endeavored to give appropriate consideration to his arguments as we understand them. Nevertheless, we will only address the issues as they have been raised in his Notice of Appeal. Because Dr. Morrison failed to raise the equal protection/due process claim in his Notice of Appeal, it is deemed waived. "Issues not raised by an appellant in its notice of appeal are deemed waived unless the appellant shows good cause for raising them later." *Thomas v. DEP,* 1998 EHB 93, 100. While this Board on occasion has provided leeway to the interpretation of claims that appellants raise in their notices of appeals, such latitude is not called for in this instance. *See e.g.*, *New Hanover Twp. v. DEP*, 2011 EHB 645, 671; *Ainjar Trust v. DEP*, 2001 EHB 59, 65-66. Here, Dr. Morrison has failed in any meaningful way to raise due process or equal protection claims in his Notice of Appeal. We therefore deem these claims waived and will not indulge Dr. Morrison in these new issues that were not included in his Notice of Appeal.

While Dr. Morrison raised the issue of a violation of his property rights in his Notice of Appeal, he is precluded from pursuing this claim because of the doctrine of administrative finality. The doctrine of administrative finality limits what a party may appeal by generally requiring that a party appeal an action close to the time an action actually occurs in order to prevent an appeal from being used as a vehicle for reviewing or collaterally attacking the appropriateness of an earlier Department action. *Love v. DEP*, 2010 EHB 523, 525. Dr. Morrison raised the issue of the easement in a previous appeal filed in 2016. The Board found that because Dr. Morrison had failed to sufficiently respond to a motion for summary judgment filed by the Permittee, he had abandoned his claim regarding the easement, and, therefore, summary judgment was entered against him on this issue. *Morrison v. DEP*, 2016 EHB 717, 721. In the present appeal, Dr. Morrison again raised the issue of the easement and the Board has determined in three separate Opinions and Orders that Dr. Morrison cannot pursue this claim. First, the Board determined that the issue was barred by the doctrine of administrative finality due to the Board's earlier ruling and entered summary judgment against Dr. Morrison on this issue. *Morrison v. DEP*, 2020 EHB 220, 224. Dr. Morrison sought reconsideration of the Board's May 13, 2020 decision which was denied. *Morrison v. DEP*, 2020 EHB 287. Finally, the Board ruled again in an Opinion and Order on Permittee's Motion in Limine that Dr. Morrison was precluded from providing testimony regarding the easement issue. *Morrison v. DEP*, 2020 EHB 404. We hold steady with the same decision made several times over and deem the easement issue waived.

We now turn to Dr. Morrison's third and fourth objections which raise concerns regarding technical aspects of the Amendments. In these objections, Dr. Morrison asserts that the designs related to the Amendments are vague and will result in erosion and stream destruction, and that the design results in excess water entering his property and not enough entering the swale and the

underground storage system. However, Dr. Morrison failed to present any expert testimony to support these assertions and further failed to preserve these issues in his post-hearing brief.

When an appellant raises a technical allegation, he must come forward with technical evidence to prove such an allegation by a preponderance of the evidence. *PRIZM Asset Mgmt. Co. v. DEP,* 2005 EHB 819, 844; *Shuey v. DEP,* 2005 EHB 657, 711. Objections that challenge the vagueness of the Amendments, functionality of the designs, and stream erosion are all the type of assertions that require scientific, technical or specialized knowledge to assist the trier of fact in making an informed determination surrounding such issues. Pa. R. E. 702; 25 Pa. Code § 1021.123(a). Dr. Morrison failed to call any expert witnesses at the hearing to aid in his argument that his technical objections are valid ones. In fact, Dr. Morrison's own testimony works against his technical claims. Dr. Morrison testified, "I'm not here to debate whether or not the amended plans are appropriate or adequate or functional. I have no expert witnesses…I do not argue that the changes they made are wrong…I'm not arguing about engineering." T. at 44-45. Dr. Morrison went on to state during an objection that "I'm not sure that this appeal has anything to do with the design of the project." T. at 66. Based on Dr. Morrison's failure to provide any expert witnesses to support his technical objections, and considering the words of Dr. Morrison's own testimony, it appears to the Board that Dr. Morrison has abandoned his technical objections of the Amendments.

Furthermore, Dr. Morrison failed to preserve these objections in his post-hearing brief. Our rules provide that "an issue which is not argued in a post-hearing brief may be waived." 25 Pa. Code § 1021.131(c). This Board has not hesitated in past matters to find that appellants had waived objections that initially appeared in their notice of appeal when they fail to address those objections in their post-hearing briefs. *See, e.g. Benner Twp. Water Auth. v. DEP*, 2019 EHB 594, 635; *New Hope Crushed Stone & Lime Co. v. DEP,* 2017 EHB 1005, 1021. Seeing no arguments

within Dr. Morrison's post-hearing brief addressing his technical objections to the plan modifications and considering his lack of testimony in pursuing these technical objections, we hold these claims waived.

Amendment Review

The only issue that remains is the question of whether the Department's designation of the Amendments as minor field change amendments was lawful and reasonable. Dr. Morrison argues that the Amendments at issue should have been classified as major amendments, and the Department therefore acted contrary to law when it determined the Amendments were minor field change amendments. Dr. Morrison contends that by improperly treating the Amendments as minor modifications in the review process, the Department deprived him of his right to due process. He asserts that had the modifications been treated as major amendments, the law would require that the Amendments be published in the *Pennsylvania Bulletin* and allow for a 30 day comment period from the public. *See* 25 Pa. Code § 92a.82. On the contrary, the Department asserts that the regulations pertaining to major and minor amendments are not applicable to scenarios involving coverage under general permits, such as here, but rather, only apply to changes in individual permits. However, in this instance, it is not necessary to rule on the question as to whether the Amendments were properly or improperly classified as minor modifications because that ruling would not change the ultimate outcome of this case.

On November 19, 2020, the Department did in fact publish the Amendments in the *Pennsylvania Bulletin* for good measure. This publication of the Amendments in the *Pennsylvania Bulletin* did not trigger any new appeals from Dr. Morrison or from any other person or entity. It appears Dr. Morrison takes issue with the fact that the Department ultimately published the Amendments, pointing out that the publication took place "8 months after the permit was issued

and construction completed." Dr. Morrison's Reply Brief at 6. However, Dr. Morrison undermines this point in asserting that he "seeks relief [in] the form of a major amendment, which will then set in place public notice and the appellant's rights to appeal the amended permit should he so desire." Dr. Morrison's Post Hearing Brief at 8. In other words, the remedy Dr. Morrison requests is a second publication of the Amendments in the *Pennsylvania Bulletin*. On the one hand, Dr. Morrison takes issue with the fact that the Department published the Amendments in the *Pennsylvania Bulletin* in November 2020, which he considers too little too late. But, on the other hand, he also asks that the Amendments be published *again* in the *Pennsylvania Bulletin*, over two years since their approval, because, according to Dr. Morrison, this publication will somehow cure the deprivation in due process he has suffered.

In *Kleissler v. DEP*, 2002 EHB 737, the appellant similarly asked the Board for relief by requesting that a permit application, which had already been published in the *Pennsylvania Bulletin*, be republished for a second time. In that case, the application materials for the permit were changed and updated after the close of public comments. The appellant argued that the first publication was insufficient because the permit application was incomplete, imprecise, and inaccurate, and, therefore, the appellant argued, deprived him of a meaningful opportunity to provide input concerning the permit at issue. *Kleissler*, 2002 EHB at 749. The appellant wished for the permit to be republished, accept new comments, and for the Department to consider those comments in order to decide whether the permit should be revoked. *Id.* at 751. The Board was wary of granting such a remedy and opined that "[o]ther than vindicating the principle of public involvement, we question whether such relief would have any practical value at this stage…" *Id*. The Board holds the same concern in the present appeal.

Dr. Morrison vaguely argues that the November 2020 publication was deficient but does not articulate how it is deficient. He only offers a meager speculation that if the Amendments are republished as draft major modifications, they may not be identical to the first publication. *See* Dr. Morrison's Reply Brief at 9. Dr. Morrison neither argues that the Department's decision to approve the Amendments would have been different had the modifications been classified as major, nor does he assert that his renewed public input would inform the Department in a way that would lead it to come to a different decision by revoking the Amendments. Instead, Dr. Morrison simply argues repeatedly that the Department failed to follow the law. In fact, after arguing many times throughout his Post-hearing Brief and Reply Brief that the failure of public notice caused him harm, he then goes on to state "[t]he problem is not a deficient notice in the *Pennsylvania [B]ulletin*, but the failure of the DEP to follow the law…" Dr. Morrison's Reply Brief at 10. It is clear to the Board that Dr. Morrison's main grievance is the Department's alleged side stepping over the established regulations of the amendment review processes. While we understand the potential frustration that comes from feeling a person or entity has not strictly adhered to the law, we must stress that any errors that occur during the application review process do not necessarily or automatically warrant relief.

Similar to Dr. Morrison's contentions, the crux of the appellant's argument in *Kleissler* was that "rules and regulations are there for a reason and every applicant must follow them to the letter…" *Kleissler*, 2002 EHB at 749-50. In response to this argument made by the appellant in *Kleissler*, the Board explained that "[a]n inconsequential error or an error that this Board can do little to correct given the realities of a situation is not likely to result in a permit suspension or revocation, and even a remand may be a waste of time and effort." *Id.* at 752. In the same vein, this Board has also stated that "[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 19, 51. Hence, in keeping consistent with our own precedent, even if the Department committed errors in the review of the Amendments in this case, Dr. Morrison failed to make any showing as to how such errors were material or remain relevant.

We fail to understand how a duplicate publication of the Amendments at this time would be materially different than the public notice provided in November 2020. Dr. Morrison has only provided us with a speculation that the publication may look different than the first but fails to explain how or to what extent the publications would differ from one another. A second publication in the *Pennsylvania Bulletin* would not offer Dr. Morrison any greater or unique opportunity to be heard than did the first publication or for that matter, than this current appeal does. If Dr. Morrison wished to appeal the Amendments in the context of their publication in the *Pennsylvania Bulletin*, he had that opportunity and failed to do so. Under law, Dr. Morrison is not afforded an opportunity to get a second bite at the apple merely because he wishes that bite to be offered upon his terms or his requests. Dr. Morrison has not offered us a reason to believe that republishing the Amendments in the *Pennsylvania Bulletin* would be materially different to the first publication or alter the final analysis of the Department's approval decision. Therefore, we find that ordering the Department to republish the Amendments would be a wholly redundant and hollow exercise that serves no practical purpose.

Notice/Due Process

Moreover, even if we determined that the Department incorrectly classified the Amendments and should have treated them as major, thus requiring publication in the *Pennsylvania Bulletin,* its failure to do so would merely be harmless error in this case. While we need not address the due process claim since Dr. Morrison failed to preserve the issue in his Notice

of Appeal, we will briefly discuss it. Dr. Morrison claims that the failure of the Department to publish the Amendments in the *Pennsylvania Bulletin*, in accordance with the notice requirements for a major amendment, deprived him of due process. What Dr. Morrison fails to appreciate, however, is that he received actual notice of the Amendments, and such notice in this case cures any perceived deficiencies in due process.

The Board has issued a number of decisions involving due process concerns stemming from an alleged defective notice. *Clancy v. DEP*, 2013 EHB 544, 579; *Gadinski v. DEP*, 2013 EHB 246, 276; *Paul Lynch Investments, Inc. v. DEP*, 2012 EHB 191, 209 n.14; *Riddle v. DEP*, 2002 EHB 283, 317; *New Hanover Township v. DER*, 1991 EHB 1234, 1246-47. The Board has repeatedly upheld Department actions in the face of due process challenges where the appellant had actual notice of the proposed or final action, and, thus, the Department's failure to strictly adhere to its regulatory notice requirements was deemed harmless error. *Gadinski*, 2013 EHB at 276 (holding that Department's admitted failure to provide appellant with timely notice of its decision to approve permit revision was harmless error because appellant through his own diligence learned of Department's permit decision and was not prevented from pursuing his appeal); *Paul Lynch Investments,* 2012 EHB at 209, n.14 (finding that Department's misaddressed Notice of Violation ("NOV") was harmless error where prior owner of appellant's property was also sole officer of appellant, thereby implicating full knowledge to appellant of Department's issuance of NOV at the time it was issued); *Riddle*, 2002 EHB at 317 ("Since other landowners of Bond Release Area No. 1 received actual notice of the application for bond release, the failure to provide written notice was harmless error."). Thus, the Board has excused a defective notice that fails to meet regulatory requirements where the Board has found evidence of actual notice by other means. Under these circumstances, the defective notice is viewed as harmless error.

In a recent decision, the Board dubbed actual notice "the gold standard" for notice and recognized that if we lived in an ideal world, every person interested in appealing a Department action would receive actual notice. *PennEnvironment, et. al., v. DEP*, EHB Docket No. 2020-002-R, slip op at 8 (Opinion issued Jan. 19, 2021). Chief Judge Renwand explained that "for those individuals or groups who receive actual notice, it does not necessarily follow that they can sit back and wait for notice to appear in the *Pennsylvania Bulletin* before appealing. The critical question is 'did the potential appellant receive actual notice…?' If the answer is yes, that starts the 30-day appeal period." *Id*.

Dr. Morrison claims that "the DEP's failure to require a major amendment has stripped the appellant of his right to notice and appeal, depriving him under the 5th and 14th amendments … and stripped him of his right to due process." Morrison Post-hearing Brief at 8. He goes on to argue that he "seeks relief in the form of a major amendment, which then will set in place public notice and the appellant's right to appeal the amended permit should he so desire." *Id*. We find no merit in Dr. Morrison's claims that he was stripped of his right to due process. The record before us is clear that Dr. Morrison had actual knowledge of the NPDES permit amendments. Dr. Morrison conceded during the hearing that he had actual knowledge of the modifications when he observed work that had been performed and further when he received information and plans related to the amendments through email correspondence with the Department prior to the informal hearing. T. at 50; 58. Furthermore, Dr. Morrison had an informal hearing with the Department regarding the Amendments, appealed the Department's determination letter to this Board after that informal hearing, and participated in a two-day hearing before us to argue his case and air his grievances. Still, he contends due process has not been satisfied. We are perplexed as to what more due process might demand for any litigant. We find that Dr. Morrison suffered no

deprivation in due process, as he received actual notice of the Amendments, and had a full and fair opportunity to be heard by this Board. Under the circumstances of this case, coupled with the fact the Department already published public notice, granting the requested relief would be nothing more than duplicative and there is no further remedy we can offer.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 7514

2. As a third-party appellant appealing the Department's approval of amendments to permit coverage, Dr. Morrison bears the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Gadinski, et al. v. DEP*, 2013 EHB 246, 269; *Gerhart v. DEP*, 2019 EHB 534, 546-47; *Joshi v. DEP*, 2019 EHB 356, 364; *Jake v. DEP*, 2014 EHB 38, 47.

3. Dr. Morrison must prove by a preponderance of the evidence that the Department's decision to approve the Amendments was not reasonable, appropriate, supported by the facts, or in accordance with the applicable law. *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 473; *United Refining Co. v. DEP*, 2016 EHB 442, 448, *aff'd*, 163 A.3d 1125 (Pa. Cmwlth. 2017); *Shuey v. DEP*, 2005 EHB 657, 691 (citing *Zlomsowitch v. DEP*, 2004 EHB 756, 780).

4. Dr. Morrison did not meet his burden to show that the Department acted unlawfully, unreasonably, or that its decision to approve the amendments was not supported by the facts. *See generally, Joshi v. DEP*, 2019 EHB 356.

5. Even if the Amendments were major, the failure of the Department to publish them in the *Pennsylvania Bulletin* was harmless error where Dr. Morrison had actual notice of the proposed or final action. *Gadinski*, 2013 EHB 246, 276; *Riddle v. DEP*, 2002 EHB 283, 317; *New Hanover Township v. DER*, 1991 EHB 1234, 1246-47.

6. Issues not preserved and argued in a party's post-hearing brief are waived. 25 Pa.

Code § 1021.131(c); *Wilson v. DEP*, 2015 EHB 644, 682.

7. Issues not raised by an appellant in its notice of appeal are deemed waived unless the appellant shows good cause for raising them later. *Thomas v. DEP,* 1998 EHB 93, 100.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GLENN J. MORRISON, M.D.	:	
	:	
v.	:	**EHB Docket No. 2019-053-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and INSURANCE AUTO AUCTIONS, INC., Permittee	:	

O R D E R

AND NOW, this 13th day of September, 2021, it is hereby ORDERED that the above-captioned appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 13, 2021

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(via electronic mail)

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LYNDA WILLIAMS	:	
	:	
v.	:	**EHB Docket No. 2018-067-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ESTATE OF HARRY SIMON, Permittee	:	**Issued: September 17, 2021**

ADJUDICATION

By Michelle A. Coleman, Judge

Synopsis

In an appeal of an individual NPDES permit issued for stormwater discharges associated with construction activities for an eight-lot housing development, the Board remands the permit back to the Department. The permittee and the Department did not appropriately consider or apply the riparian forest buffer requirements in the regulations with respect to a stream within 150 feet of the project site, and they did not identify a stream on the project site that is also subject to the buffer requirements. The Department and permittee also made no evaluation of whether alternative best management practices provide substantially equivalent protection to the protection afforded by a riparian forest buffer.

FINDINGS OF FACT

1. The Commonwealth of Pennsylvania, Department of Environmental Protection (the "Department") is the administrative agency vested with the authority and responsibility to administer and enforce the requirements of the 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, and the rules and regulations promulgated thereunder. (Joint Stipulation of the Parties No. ("Stip.") 1.)

2. The Appellant, Lynda Williams, resides at 1239 Grove Road, West Chester, PA 19380. (Stip. 2.)

3. Permittee Estate of Harry Simon (the "Estate") owns a parcel of land at 1364 Grove Road, West Chester, PA 19380. (Stip. 3.)

4. On July 21, 2017, the Estate submitted to the Chester County Conservation District (the "Conservation District") an application for an individual National Pollutant Discharge Elimination System ("NPDES") permit for stormwater discharges associated with construction activities in connection with its subdivision and land development project to subdivide its 13.76 acres of land (the "Estate property"). (Stip. 4, 25; Parties' Joint Exhibit No. ("Joint Ex.") 1.)

5. The Estate's project subdivides the Estate's three residential lots into eight residential lots, removes an existing partially paved access road and builds a new driveway, installs stormwater management facilities including three underground stormwater management beds, and installs water and sanitary sewer public utilities. (Stip. 9; Hearing Transcript Page No. ("T.") 128, 158, 212, 435; Joint Ex. 15.)

6. The Estate's proposed project involves 5.8 acres of earth disturbance activity. (Stip. 15.)

7. The "project site" as that term is used in the regulations, 25 Pa. Code § 102.1, is the entire 13.76-acre Estate property. (T. 434-35, 476; Joint Ex. 1 (at 2), 11 (at 1).)

8. On June 13, 2018, the Department issued NPDES Permit PAD150046 ("the Permit") to the Estate. (Stip. 42; Joint Ex. 12.)

9. Access to the Estate property is from Grove Road, Pennsylvania State Route 3069, which bounds the Estate property on its eastern side. (Stip. 5.)

10. Lynda Williams's home and property are located on Grove Road approximately one-half mile from the driveway entrance to the Estate property on the opposite side of Grove Road. (T. 156; Estate Exhibit No. ("Estate Ex.") 1.)

11. Ms. Williams currently experiences flooding and stormwater runoff on her property. (T. 18-19, 41-43; Joint Ex. 32 (at ¶¶ 5, 6).)

12. Ms. Williams has observed stormwater coming off the Estate property and flooding Grove Road, which she drives on daily. (T. 25, 35; Joint Ex. 32 (at 5-8).)

13. Ms. Williams is concerned that the Estate's subdivision project will exacerbate stormwater and flooding from the Estate property onto Grove Road and onto her property that occurs during rain events. (T. 20-21, 26-27, 35, 47.)

14. Rain events carry dirt, gravel, and silt from the Estate property through a stream running along Grove Road and past Ms. Williams's property, occasionally plugging piping culverts in the stream channel. (T. 27, 32-33; Estate Ex. 29-36.)

15. There is a wetland complex approximately 240 feet in length located in the northeast corner of the Estate property along Grove Road but separated by an embankment on the property. (Stip. 16; T. 66, 169, 251; Joint Ex. 16, 17, 18, 23 (at Photo 8, 9); Estate Ex. 2, 8.)

16. The Estate correctly measured and delineated the wetlands complex on the property. (T. 78-79, 251, 262, 265; Joint Ex. 39.)

17. The embankment area is approximately 40 feet wide consisting of trees and a berm in an upland area between the wetland complex and Grove Road that is in the Pennsylvania Department of Transportation ("PennDOT") right of way. (Stip. 18; T. 143-46; Joint Ex. 20.)

18. The Estate's PennDOT Highway Occupancy Permit requires it to trim and excavate approximately 85 feet of the southern part of the embankment area within the Grove Road right of way to improve the sight lines for persons exiting the Estate driveway. (Stip. 19; T. 94, 141-142, 169; Joint Ex. 20.)

19. The depth of soil to be removed from the embankment will range from a few inches to a maximum of two feet. (T. 179; Joint Ex. 20.)

20. Several of the white pine trees on top of the berm might be removed as a result of the berm excavation. (T. 147, 168, 170-72; Estate Ex. 11, 12, 13.)

21. There is a perennial or intermittent headwater stream with defined bed and banks in a portion of the wetlands complex on the Estate property. (T. 69-72, 101; Joint Ex. 23 (at Photo 7), 24 (at Fig. 7).)

22. The stream begins where spring seeps discharge groundwater from a pipe onto the surface just north of the Estate's northern property boundary. (T. 68-69, 75-77, 99, 254; Joint Ex. 23 (at Photo 6).)

23. The Estate did not identify this stream during the permit application and review process. (T. 254-56, 266-67.)

24. The stream channel does not continue all the way through the wetlands. (Joint Ex. 23 (at Photo 11), 24 (at Figs. 5, 6, 8, 9); Estate Ex. 8.)

25. Where the stream channel does exist in the wetlands, the channel or bed of the stream is composed primarily of substrates associated with flowing water. (T. 71-72; Joint Ex. 24 (at Fig. 7).)

26. The fact that an area is a wetland does not exclude the possibility that there is a stream flowing through a portion of the wetland. (T. 83-84.)

27. There is no perennial or intermittent stream in the riprap channel at the foot of the wetlands. (T. 263-64, 268-69; Estate Ex. 4-8.)

28. There is a buried pipe underneath the riprap that drains water from the wetlands into a concrete headwall that carries water underneath and across Grove Road, some of which emerges at an endwall on the other side of Grove Road. (T. 164-65, 260-61; Estate Ex. 5.)

29. There is a perennial stream approximately 125 feet long with a defined bed and banks, substrates, and a top of streambank emanating from the endwall across Grove Road from the Estate property and flowing southward and downstream to Ms. Williams's property (the "Grove Road stream"). (Stip. 17; T. 65, 227-28; Estate Ex. 20, 23, 25-28, 31, 35, 36.)

30. The concrete endwall that begins the flow of the Grove Road stream is connected to a storm sewer pipe that conveys some of the water drained from the wetlands on the Estate property. (T. 135-36; Joint Ex. 39; Estate Ex. 20.)

31. The Grove Road stream is separated from the Estate property by the pavement and shoulder of Grove Road and the lawn of the neighboring properties, and is approximately 65 feet from the Estate's property line. (T. 136-37, 161-62, 413; Estate Ex. 3, 18.)

32. The Grove Road stream flows through a series of swales and pipes through the front yards of the residences on the east side of Grove Road. (T. 32-33, 192-93; Estate Ex. 20, 23-26, 28.)

33. The Grove Road stream has "bank" and "top of streambank" from the northern endwall to the culvert under a driveway as those terms are used in the Chapter 102 regulations, 25 Pa. Code § 102.1. (T. 460; Estate Ex. 20.)

34. The Grove Road stream is an unnamed tributary to Broad Run of the East Branch of Brandywine Creek, a High Quality ("HQ") water of the state, and is identified in the Estate's

permit application as a water of the Commonwealth to which the project discharges or has the potential to discharge. (Stip. 29; T. 432-34; Joint Ex. 1 (at 3).)

35. At the time the Estate submitted its permit application, Broad Run was classified as impaired according to Category 4 and Category 5 of the Pennsylvania Integrated Water Quality Monitoring and Assessment Report. (Stip. 30; T. 432-34; Joint Ex. 1 (at 3), 11 (at 1).)

36. The Estate's permit application included an Erosion and Sediment Control Plan ("E&S Plan"), a Post-Construction Stormwater Management Report and Plan ("PCSM Plan"), associated worksheets and calculations, plan sheets, and other information about the proposed project. (Stip. 26.)

37. Post-construction stormwater from the eastern half of the property will flow into a storm sewer system located in Grove Road south of the project site that conveys stormwater to Broad Run. (Stip. 21; T. 197-98.)

38. Post-construction stormwater management is achieved at the site through two underground infiltration beds, one underground detention bed, additional water quality inlets, and connection to the storm sewer system. (Stip. 22; Joint Ex. 19.)

39. As part of the project, the Estate proposes to extend two utility lines (water and sanitary sewer) within the Grove Road roadway cross-section to its subdivision in the southeast corner of the project site. The utility work will be entirely within the Grove Road roadway cross-section. (Stip. 23; Joint Ex. 19.)

40. The existing driveway on the Estate property is located approximately 13 to 14 feet from the southern property line until it curves northward as it gets closer to Grove Road. (T. 132-33; Joint Ex. 39.)

41. As part of the project, the Estate proposes to remove the existing gravel driveway access road and build a new driveway approximately 20 feet to the north of the existing driveway. (Stip. 24; Joint Ex. 39.)

42. The proposed new driveway will be located approximately 60 feet north of the Estate's southern property line. (T. 137-138; Joint Ex. 18, 39.)

43. Part of the Estate's proposed stormwater management system involves a 36-inch Underground Detention Pipe Storage No. 1 basin located in the southeast corner of the project site near Grove Road. (T. 139-40; Joint Ex. 18.)

44. The 36-inch Underground Detention Pipe Storage No. 1 basin is located approximately 100 feet from the Grove Road stream, and construction of the basin will involve digging up the ground at its intended location. (T. 140-41, 430; Joint Ex. 18, 19.)

45. Under the regulations, existing, converted, or newly established riparian forest buffers are to be managed in accordance with a riparian forest buffer management plan that is a part of a permittee's PCSM plan. 25 Pa. Code §§ 102.14(b)(3), 102.14(b)(4).

46. The regulation governing riparian buffers in impaired watersheds such as Broad Run provides:

> Except as in accordance with subsection (d), persons proposing or conducting earth disturbance activities when the activity requires a permit under this chapter where the project site is located in an Exceptional Value or High Quality watershed where there are waters failing to attain one or more designated uses as listed in Category 4 or 5 on Pennsylvania's Integrated Water Quality Monitoring and Assessment report, as amended and updated, at the time of the application, and the project site contains, is along or within 150 feet of a perennial or intermittent river, stream, or creek, lake, pond or reservoir shall, in accordance with the requirements of this section do one of the following:
>
> (i) Protect an existing riparian forest buffer.
> (ii) Convert an existing riparian buffer to a riparian forest buffer.
> (iii) Establish a new riparian forest buffer.

25 Pa. Code § 102.14(a)(2).

47. The Estate's PCSM Plan does not include a riparian forest buffer management plan and it does not contain any provisions or plans similar to those listed in 25 Pa. Code § 102.14(b)(4) for the management of existing, converted, or new riparian forest buffers. The Estate and the Department do not believe that there is any earth disturbance associated with the project that is subject to the riparian buffer requirements of Section 102.14(a)(2). (Stip. 32; Joint Ex. 10.)

48. There is no existing riparian forest buffer between the Estate property and the Grove Road stream, and the Estate did not establish a new riparian forest buffer. (T. 161-62, 211, 241-42; Estate Ex. 3, 18.)

49. However, the Estate, in consultation with the Department and Conservation District, did establish a partial, unforested riparian buffer for the Grove Road stream, with a northern leg drawn perpendicularly from the top of the concrete endwall that begins the stream, and the southern leg drawn perpendicularly from the top of a culvert leading under a driveway at the southernmost extent of the stream segment. (T. 138-39, 208, 227-28, 236-37, 239-40, 453; Joint Ex. 18.)

50. Because of a slight curve in the stream, the two perpendicularly-drawn legs eventually intersect, forming a rough triangle, with the northern leg longer than the southern leg. (T. 227-28, 453-54; Joint Ex. 18, 19.)

51. The appropriate regulatory distance or dimension for a riparian forest buffer in a special protection watershed like the Broad Run is 150 feet measured horizontally and perpendicularly from the top of streambank with an average minimum width that follows the natural streambank, 25 Pa. Code §§ 102.14(b)(2)(ii), 102.41(b)(2)(iii), 102.14(c)(3). (T. 241, 387-88, 456.)

52. In drawing its riparian buffer triangle, the Estate only measured from two points, at the emergence of the stream from the endwall, and at the entrance of the stream into the culvert, and it did not measure any perpendicular lines along the streambank between those two points. (T. 138-39, 227-28, 234-37; Joint Ex. 18, 19.)

53. The Estate's riparian buffer triangle does not maintain an average minimum width that follows the natural streambank of the Grove Road stream, 25 Pa. Code § 102.14(b)(2)(iii). (T. 138-39, 227-28, 234-39; Joint Ex. 17, 18, 19.)

54. In the Estate's permit application, in response to a section regarding riparian buffers, the Estate stated, "No earth disturbance is occurring within the 150' buffer with exception of the utility connections within Grove Road. Temporary impacts for proposed activities are allowable per Section 102.14(f)(2)(i)." (Stip. 27; Joint Ex. 1 (at 8).)

55. According to the application form, answering "No" in this section allows the applicant to skip the following questions relating to riparian buffers and riparian forest buffers. (Stip. 28; T. 431; Joint Ex. 1 (at 8).)

56. Although the permit application asks if there will be earth disturbance within 150 feet of a river, stream, creek, lake, pond, or reservoir, the Estate instead answered whether there would be earth disturbance in its riparian buffer triangle, and the Conservation District accepted this response. (T. 341-42, 430; Joint Ex. 1 (at 8).)

57. The Estate did not fill out the portion of Section D of the permit application pertaining to best management practices that are functionally equivalent to a riparian forest buffer and it did not attach an equivalency demonstration as required by the application. (Joint Ex. 1 (at 8).)

58. The Estate did not fill out the portion of Section E of the permit application pertaining to best management practices that are substantially equivalent in effectiveness to a riparian forest buffer or otherwise demonstrate that its selected best management practices are substantially equivalent to a riparian forest buffer. (Joint Ex. 1 (at 9-10).)

59. In connection with the issuance of the permit, the Department and the Conservation District prepared a Record of Decision recommending issuance of the Permit. (Stip. 43; Joint Ex. 11; T. 370-71.)

60. In the Record of Decision, under the heading "Riparian Buffers," in response to the form's query "Address protection, conversion or establishment of Riparian Buffer or Riparian Forest Buffer," the Department and Conservation District checked the "N/A" box. (Stip. 44; T. 435; Joint Ex. 11 (at 1).)

61. In the Record of Decision, under the heading "Riparian Buffers," in response to the form's query "Acknowledgement of Waiver, Equivalency, Offsetting, Allowable Activities (check all that apply)," the Department and Conservation District checked the "N/A" box. (Stip. 45; T. 435; Joint Ex. 11 (at 2).)

DISCUSSION

On June 13, 2018, the Department of Environmental Protection (the "Department") issued NPDES Permit No. PAD150046 to the Estate of Harry Simon (the "Estate") to discharge stormwater and conduct earth disturbance activities at its property at 1364 Grove Road in West Whiteland Township, Chester County. (Joint Ex. 12.) The permit was sought in connection with a project to subdivide three residential lots into eight residential lots, remove an existing driveway and build a new one, and construct associated utilities and stormwater management structures. The utility line extensions will come from Grove Road into the property. In

connection with the driveway construction, an embankment will be graded to improve the line of sight for drivers accessing the development from Grove Road and trees will likely be cleared as part of that grading. The embankment grading will be in close proximity to a wetland complex on the Estate property.

The wetlands are in the northeast corner of the Estate, close to Grove Road. At the foot of the wetlands is a riprap channel that leads into a headwall. Water from the wetlands drains into a pipe underneath the riprap channel, enters the headwall, goes underneath Grove Road, and emerges at an endwall on the other side of Grove Road where it serves as the beginning point for a perennial stream (the "Grove Road stream"). The Grove Road stream is an unnamed tributary to Broad Run, a High Quality stream. It generally runs along Grove Road and in front of the homes that are across the road from the Estate property, flowing through culverts that underly the homes' driveways, and it eventually flows into Broad Run. One of those homes, about one-half mile down the road from the Estate, is the home of the Appellant, Lynda Williams.

Ms. Williams is concerned that the subdivision development will cause more stormwater runoff that will flood Grove Road and potentially her property. Ms. Williams contends that the Estate failed to establish a riparian forest buffer for the Grove Road stream, and that the Estate likewise failed to develop a riparian forest buffer management plan as required by the Chapter 102 regulations, which she says could alleviate stormwater runoff and flooding. She also asserts that the Estate, the Department, and the Chester County Conservation District (the "Conservation District") failed to identify a stream located on the property that runs through the wetlands, which would also be subject to the riparian forest buffer provisions. Ms. Williams asks us to remand the permit back to the Department so that the Estate and the Department comply with the applicable riparian forest buffer requirements.

The Estate and the Department contend that a riparian forest buffer is not feasible for the Grove Road stream and that a riparian forest buffer plan is not needed due to that fact and because of various exceptions and allowances contained in the regulations governing riparian buffers, as well as a provision in Section 402 of the Clean Streams Law, 35 P.S. § 691.402.[1] The Estate and the Department also dispute the stream identified by Ms. Williams on the Estate property and argue it is merely a drainage pattern within the wetlands. They also maintain that the stormwater controls that will be installed as part of the subdivision development will lessen flooding in the area even without a riparian forest buffer.[2]

Standing

Before getting into the merits of this appeal, we must first address Lynda Williams's standing. Issues such as standing are threshold matters that generally should be resolved before addressing the merits of the parties' dispute. *Borough of St. Clair v. DEP*, 2015 EHB 290, 300 (citing *Robinson Twp. v. Cmwlth.*, 83 A.3d 901, 917 (Pa. 2013); *Borough of Roaring Spring v. DEP*, 2004 EHB 889). The Department, but not the Estate, has challenged Ms. Williams's standing in its post-hearing brief. Interestingly, it was the Estate, but not the Department, that

[1] The Estate's post-hearing brief contains proposed findings of fact and conclusions of law, but no argument section. *See* 25 Pa. Code § 1021.131(a) ("The initial posthearing brief of each party shall contain proposed findings of fact (with references to the appropriate exhibit or page of the transcript), an argument with citation to supporting legal authority, and proposed conclusions of law.") Although the Estate's proposed conclusions of law are rather extensive, they are not an adequate substitute for a narrative argument that incorporates legal citations and evidentiary support. In the absence at times of specific arguments from the Estate, we will assume that the Estate is aligned with the arguments of the Department unless otherwise noted.

[2] The Environmental Hearing Board's role in the administrative process is to determine whether the Department's action was lawful, reasonable, and supported by our *de novo* review of the facts. *Logan v. DEP*, 2018 EHB 71, 90; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156. In order to be lawful, the Department must have acted in accordance with all applicable statutes, regulations, and case law, and acted in accordance with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution. *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 822; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016). As a third party appealing the issuance of the Estate's permit, Ms. Williams bears the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Gerhart v. DEP*, 2019 EHB 534, 546-47; *Joshi v. DEP*, 2019 EHB 356, 364; *Jake v. DEP*, 2014 EHB 38, 47.

challenged her standing at the summary judgment phase, where we found Ms. Williams had sufficiently demonstrated her standing to defeat the Estate's motion for summary judgment.[3] *Williams v. DEP*, 2019 EHB 764, 776-78.

When standing is challenged in a post-hearing brief, an appellant such as Ms. Williams must demonstrate by a preponderance of the evidence at the hearing on the merits that she has standing even where a motion for summary judgment by opposing parties on the issue has been denied. *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1147; *Stedge v. DEP*, 2015 EHB 577, 594; *Pa. Trout v. DEP*, 2004 EHB 310, 355; *Greenfield Good Neighbors Group., Inc. v. DEP*, 2003 EHB 555, 564. In *Giordano v. DEP*, 2000 EHB 1184, we explained the accretive showing a party must make on standing depending on the point in the proceedings when it is contested:

> The appropriate evidentiary standard of review in evaluating a standing challenge depends upon when standing is challenged. In that respect, the standing issue is really no different than any other issue in the case. Although it is not necessary to plead standing, it is the appellants who are ultimately required to prove that they have standing if the question is put at issue. If the question is raised in a motion to dismiss early in the case, we essentially accept all of the appellant's allegations as true and decide whether the opposing party is nevertheless entitled to judgment as a matter of law. If the question is raised at or near the conclusion of discovery in the context of a summary judgment motion, we will only rule on the issue if there are no genuine issues of material fact and it is clear that the appellant does or does not have standing as a matter of law. If the question is still contested after the evidentiary hearing, we determine whether the appellants have carried their burden of proving that they have standing by a preponderance of the evidence.

[3] One could argue that the Department has waived the ability to challenge standing by not including anything about standing in its pre-hearing memorandum. Our Pre-Hearing Order No. 2, which we issued in this case, says, "A party may be deemed to have abandoned all contentions of law or fact not set forth in its pre-hearing memorandum." (PHO-2 at ¶4.) *See also* 25 Pa. Code § 1021.104(a)(2) (a prehearing memorandum shall contain "[a] statement of the legal issues in dispute, including citations to statutes, regulations and caselaw supporting the party's position."). *But see People United to Save Homes v. DEP*, 2000 EHB 1309, 1320-21 (allowing a permittee to contest standing for the first time in its post-hearing brief where an appellant put a witness on the stand solely for purposes of demonstrating standing at the hearing). Ms. Williams, for her part, asserted standing in her pre-hearing memorandum and maintains in her post-hearing brief and reply brief that she has demonstrated her standing at the merits hearing.

Id. at 1187 (internal citations omitted). Here, we have no difficulty concluding that Ms. Williams has proved her standing by a preponderance of the evidence.

An individual has standing if they have a substantial, direct, and immediate interest in the outcome of the appeal. *Robinson Twp.*, 83 A.3d at 917. An interest is substantial as long as it surpasses the common interest of all persons in procuring obedience to the law. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). In other words, there must be "some discernable adverse effect" to a person's interest other than simply ensuring compliance with the law. *Drummond v. DEP*, 2002 EHB 413, 423 (quoting *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975)). An interest is direct where there is a causal connection between the matter complained of and the harm alleged. *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009). Finally, an interest is immediate where the causal connection is sufficiently close so as not to be remote or speculative. *Id.*

In the context of third-party appeals from the issuance of permits, this Board has held that individuals have standing if they (1) use the area potentially affected by the permitted activity (i.e. their interest is substantial), and (2) there is an objectively reasonable threat that the permitted activity may affect that use (i.e. their interest is direct and immediate). *Citizens for Pennsylvania's Future v. DEP*, 2015 EHB 750, 753; *Citizen Advocates United to Safeguard the Environment, Inc. ("CAUSE") v. DEP*, 2007 EHB 632, 673.

Ms. Williams currently experiences flooding on her property. (T. 18-19, 41-43; Joint Ex. 32 (at ¶¶ 5-6).) She testified that stormwater has always been an issue in the area, and she is concerned that the new development on the Estate's property will result in more surface water runoff coming onto Grove Road and onto her property. (T. 20-21.) She testified that, currently, "on an average rainy day, you will see water coming from the Simon [Estate] property all the

way down to my property on the surface of Grove Road. You can hardly see the street. We have huge surface water now." (T. 35.) Ms. Williams also introduced photos of standing water on Grove Road, which she drives on every day. (T. 19; Joint Ex. 32 (at 5-8).) She testified that the stormwater carries dirt, gravel, and silt through the Grove Road stream, which sometimes plugs the piping culverts that underlie the driveways for the homes along Grove Road. (T. 27, 32-33; Estate Ex. 29-36.) She believes that the density of the eight-house development, which is located on a hill, could exacerbate flooding on her property. (T. 25-27, 47.) Ms. Williams also believes that, without a riparian forest buffer and corresponding management plan, the stormwater from the Estate will not be adequately mitigated and the flooding will continue or become worse. (Joint Ex. 32 (at ¶¶ 5-6).)

The Department's attacks on Ms. Williams's standing almost all get into the merits of her claims, but "[a]n analysis of the merits has no place in the inquiry regarding standing beyond the requirement that the threat of harm must amount to more than pure speculation." *CAUSE*, 2007 EHB at 674. The Department during its cross-examination of Ms. Williams, asked her if she was aware that the Estate proposed to construct a stormwater management system that would purportedly improve the drainage as it relates to her property. (T. 36.) The Department asked if Ms. Williams knew that the Estate proposed to direct stormwater into an underground stormwater management pipe that goes directly to Broad Run and not to the Grove Road stream. (T. 44-45.) In its brief, the Department asserts that any stormwater coming off the Estate property that is not infiltrated will flow into a storm sewer that outlets downstream of Ms. Williams's property, and that the project will alleviate flooding. (DEP Brief at 39-40.) These are precisely the types of questions that get to the merits of the Estate's stormwater controls, not

one's standing to challenge the permit authorizing those controls. As we said in *Food & Water Watch v. DEP*, 2020 EHB 229,

> A third-party appellant's standing is not based on the merits of its objections but on whether it has a substantial, direct and immediate interest in the action which has been appealed. Once an appellant has been determined to have standing, only then may it proceed to argue the merits of its claims. Standing is what gets the appellant in the door; once in, it is up to the appellant to prove its case by a preponderance of the evidence. The Department and [Permittee] would have us find the reverse, i.e., that an appellant's claims must have merit before it can be found to have standing. This argument conflates the notion of burden of proof with that of standing.

Id. at 245.

The proximity of Ms. Williams's home to the Estate property establishes a substantial interest that surpasses that of normal citizens. Despite the Department's claims that the half-mile distance between the properties is too attenuated to establish standing, there is a direct connection between water on the Estate property and water that does and could continue to impact Ms. Williams. Ms. Williams has shown a direct interest in the causal connection between the stormwater coming off of the Estate property and the stormwater runoff she receives at her home. Stormwater flows onto Grove Road and into the adjacent Grove Road stream, which continues through Ms. Williams's property until it joins with Broad Run. (T. 160, 195-200; Estate Ex. 1, 2, 29, 31-36.) Her interest is immediate because there is nothing remote or speculative about her stormwater concerns. One of the main points of a stormwater management permit is to attempt to mitigate the increase in impervious surface from the development (in this case, homes, roofs, driveways, etc.) so that the rate and volume of stormwater is the same post-development. *See* 25 Pa. Code § 102.8(b) (listing the overarching objectives for post-construction stormwater planning and design). There is an objectively reasonable threat that the development authorized by the Estate's NPDES permit could impact Ms. Williams at her home

and as she drives along Grove Road. She has without question demonstrated her standing by a preponderance of the evidence at the hearing on the merits.

Riparian Buffer Requirements

The heart of the parties' dispute relates to the riparian buffer and riparian forest buffer requirements in the Chapter 102 erosion and sediment control regulations, specifically 25 Pa. Code § 102.14, which contains extensive provisions for the establishment, management, and protection of riparian buffers.[4] The requirements generally apply to earth disturbance activities conducted in the vicinity of a perennial or intermittent river, stream, or creek, or lake, pond, or reservoir in exceptional value or high quality watersheds. The regulation differentiates between earth disturbance occurring in watersheds attaining their designated use, 25 Pa. Code § 102.14(a)(1), and earth disturbance in watersheds not attaining their designated use, 25 Pa. Code § 102.14(a)(2).[5]

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[4] The Estate appears to take issue with Ms. Williams making arguments about riparian forest buffers since they were not included in her original notice of appeal, which was filed before she had the representation of counsel. (Estate Brief at 16-17, 19.) On May 28, 2020, we granted a motion permitting Ms. Williams to amend her appeal to include arguments about riparian forest buffers, finding that the parties had notice early on in the litigation that Ms. Williams intended to raise arguments about riparian buffers, and that the issue had been argued and briefed in earlier summary judgment filings. *Williams v. DEP*, 2020 EHB 277.

[5] For an explanation of the uses of water bodies in Pennsylvania, *see Monroe Cnty. Clean Streams Coal. v. DEP*, 2018 EHB 798, 800-01 ("Pennsylvania's program is concerned with maintaining and protecting (1) existing uses and (2) designated uses. 25 Pa. Code §§ 93.4a(b), 93.9(a), 96.3(a). Existing uses are defined as '[t]hose uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.' 25 Pa. Code § 93.1. Designated uses are defined as '[t]hose uses specified in §§ 93.4(a) and 93.9a – 93.9z for each water body or segment whether or not they are being attained.' *Id.* Section 93.4(a) sets forth statewide water use types related to aquatic life, water supplies, and recreation. Section 93.3 sets forth protected water use types, which include all of the uses contained in Section 93.4(a), as well as additional aquatic uses such as cold water fishes (CWF) and trout stocking (TSF), and the special protection uses of HQ and EV waters. Designated uses of streams are promulgated by formal rulemaking by the Environmental Quality Board and are listed as regulations in the Pennsylvania Code. *See* 25 Pa. Code §§ 93.9a-93.9z."); *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 845 ("Water quality standards for the surface waters in Pennsylvania are set forth in Chapter 93 of the Department's regulations. Each surface water has a designated water use which shall be protected. 25 Pa. Code § 93.3. The antidegradation requirements found at 25 Pa. Code § 93.4a(b) require that existing instream water uses, along with the level of water quality necessary to protect those uses, must be maintained and protected. A surface water is said to be impaired if it does not meet its designated water

There is no dispute among the parties that the Estate's development is located in an impaired high quality watershed that is not attaining its designated use. (Stip. 29, 30.) Therefore, this appeal implicates the regulation at Section 102.14(a)(2), which provides:

> Except as in accordance with subsection (d), persons proposing or conducting earth disturbance activities when the activity requires a permit under this chapter where the project site is located in an Exceptional Value or High Quality watershed where there are waters failing to attain one or more designated uses as listed in Category 4 or 5 on Pennsylvania's Integrated Water Quality Monitoring and Assessment report, as amended and updated, at the time of the application, and **the project site contains, is along or within 150 feet of a perennial or intermittent river, stream, or creek, lake, pond or reservoir shall, in accordance with the requirements of this section do one of the following**:
>
> **(i) Protect an existing riparian forest buffer.**
> **(ii) Convert an existing riparian buffer to a riparian forest buffer.**
> **(iii) Establish a new riparian forest buffer.**

25 Pa. Code § 102.14(a)(2) (emphasis added).

"Project site" is broadly defined as "[t]he entire area of activity, development, lease or sale including: (i) The area of an earth disturbance activity. (ii) The area planned for an earth disturbance activity. (iii) Other areas which are not subject to an earth disturbance activity." 25 Pa. Code § 102.1. Over the course of this appeal, there has been some disagreement among the parties regarding what actually constitutes the "project site" of the Estate's development—whether it is the entire 13.8-acre piece of land or only the portion where earth disturbance is occurring, which is 5.8 acres. Ms. Williams asserts that it is the entire property. The Department has insisted that it is only where earth disturbance is occurring. However, both the Estate in its permit application, and the Department and Conservation District in their Record of Decision recommending that the permit be issued to the Estate, define the "total project site" as 13.8 acres, and the "total disturbed area" as 5.8 acres. (T. 434-35, 476; Joint Ex. 1 (at 2), 11 (at 1).) Further,

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use. It is clear that the intent of these water quality regulations is to protect the water quality in the streams to ensure that the water uses are also protected.").

the Department's permit reviewer testified that, when conducting the antidegradation analysis for the permit, the Department reviews the entire project site, not just where the earth disturbance occurs. (T. 533; Joint Ex. 1 (at 9).) We conclude that the project site here is the Estate's entire 13.8-acre property, which is consistent with the regulatory definition.[6]

It is important to establish upfront the perennial or intermittent rivers, streams, creeks, lakes, ponds, or reservoirs that are subject to the riparian forest buffer provisions—those within 150 feet of the Estate's project site. It is undisputed that one of these is the Grove Road stream, the unnamed tributary to Broad Run that runs along Grove Road, which is approximately 65 feet from the Estate's property line. (T. 136-37.) However, Ms. Williams asserts that there is also a stream within the wetlands on the northeast portion of the property that the Estate, the Department, and the Conservation District failed to identify. She argues that the stream begins with a spring near the northern boundary of the site and flows into the wetland complex, cutting a defined bed and banks, and continues to flow through a riprap channel and into a headwall that carries it under Grove Road and eventually to the endwall that begins the Grove Road stream. The Department and the Estate assert that the stream identified by Ms. Williams is merely a "drainage pattern" in the wetlands with no defined bed and banks that would qualify it as a stream.

In support of her argument, Ms. Williams presented the expert testimony of Dr. James Schmid. The Department and the Estate rely on the Estate's expert, Wesley Wolf, for their

[6] Notably, Subsection 102.14(a)(1) applying to unimpaired watersheds, unlike Subsection (a)(2), speaks in terms of the proximity of a project's *earth disturbance* to a surface water, not the proximity of the *project site*: "persons…may not conduct **earth disturbance activities within 150 feet** of a perennial or intermittent river, stream, or creek, or lake, pond or reservoir when the project site is located in an exceptional value or high quality watershed attaining its designated use." 25 Pa. Code § 102.14(a)(1) (emphasis added). The fact that the regulations differentiate the 150-foot measurement based on whether the activity is occurring within a watershed attaining or not attaining its designated use suggests that it is no accident that impaired watersheds are measured from the project site instead of from the earth disturbance and are thus afforded greater protection.

drainage pattern argument. Rather surprisingly, the Department presented no properly qualified expert testimony of its own. The Department failed to designate any experts in its pre-hearing memorandum, yet during the hearing it attempted to offer its first witness, wetland scientist Donald Knorr, as an expert in aquatic resources and their identification. (T. 285.) We precluded the Department from presenting expert testimony due to its failure to identify any experts in its pre-hearing memorandum. After Mr. Knorr, the Department did not seek to qualify its other two witnesses as experts.

The Department does not directly challenge our ruling at the hearing precluding Mr. Knorr from being classified as an expert witness, but the Department does devote nearly twenty of its proposed findings of fact to explaining Mr. Knorr's experience, asserting that Ms. Williams had notice of what Mr. Knorr would testify to in the Department's pre-hearing memorandum, and noting that the Board did not accept Mr. Knorr as an expert. (DEP Brief at 30-32.) The Department also cites to Mr. Knorr's testimony for the proposition that what Dr. Schmid calls a stream is not a stream, which is clearly an expert opinion, as well as statements regarding the size and classification of the wetlands on the property. (DEP Brief at 48, 50-52, 54-55.) Since the proper procedures for identifying and qualifying experts seem to be a perennial issue before the Board, we feel compelled to take the digression to address it here fully.

At the hearing, the Department complained that Ms. Williams did not conduct any expert discovery, and therefore, the Department was under no obligation to disclose any expert witnesses in discovery. (*See also* DEP Brief at 32.) That may be true enough on its own, *Angino v. DEP*, 2006 EHB 278, 281 ("*assuming discovery has been directed to a party*, interrogatories concerning an expert's opinion must be answered or an expert report must be provided for all proposed expert witnesses" (emphasis added)), but it is only half of the issue. Because not only

must a party comply with any discovery obligations, but it must also follow the Board's Rules and orders. Eighteen years ago, in *Borough of Edinboro v. DEP*, 2003 EHB 725, *aff'd*, 2696 C.D. 2003 (Pa. Cmwlth. June 23, 2004), we made this very clear:

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

Id. at 2003 EHB 725, 772 (emphasis added).

To that end, our Rules require that a party's pre-hearing memorandum contain, among other things,

> (4) A list of expert witnesses whose qualifications will not be challenged and which may be entered into the record as an unchallenged exhibit.
>
> (5) 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). In the absence of answers to the expert interrogatories or an expert report, a summary of the testimony of each expert witness.

25 Pa. Code § 1021.104(a). Our Pre-Hearing Order No. 2 issued in this case largely mirrors the requirements of our Rules in terms of what is to be contained in a pre-hearing memorandum, requiring a party to provide "a list of all expert witnesses and indicate whether their qualifications will be challenged" and include "a summary of the testimony of each expert witness or a report of the expert as an attachment." (PHO-2 at ¶¶ 1.D, 1.E.)

Thus, the lack of any expert discovery conducted by one party does not obviate the need for the opposing party to nevertheless identify its experts in its pre-hearing memorandum and provide a summary of their testimony. *Cf. Penn Twp. Mun. Auth. v. DEP*, EHB Docket No. 2019-152-C, slip op. at 8 (Opinion and Order, Mar. 8, 2021) (discussing a different aspect of the

expert issue: "A party cannot unilaterally skirt its responsibilities under the Board's rules and the Pennsylvania Rules of Civil Procedure and then sit back and wait for its opponent to file a motion compelling its compliance."). The Department failed to identify any experts at all. In Paragraph 160 of its pre-hearing memorandum, under the heading "Expert Witnesses Expected to be Called," the Department pointedly states, "None." The Department then lists its "Fact Witnesses Expected to be Called" and identifies Donald Knorr as a fact witness in Paragraph 164 and says, "Mr. Knorr will testify on his observations of the site, including aquatic resources in the vicinity of the Project and their classifications and locations, specifically wetlands." Despite the Department's repeated insistence to the contrary, this provides absolutely no indication that Mr. Knorr would testify as an expert witness or offer expert opinions. All indications in the pre-hearing memorandum point in the opposite direction—that the Department did not intend to call *any* expert witnesses and that Mr. Knorr would be a fact witness, nothing more.[7] While we do not doubt that Mr. Knorr likely would be qualified to offer expert opinions as a general matter, we cannot allow the Department to sandbag Ms. Williams at the hearing with expert testimony having not followed our Rules and orders.

Identifying one's experts in a pre-hearing memorandum and summarizing their testimony is by no means an onerous requirement, but it is an important one. It ensures that all parties are playing fairly, without surprise or subterfuge. *Cf. Range Resources – Appalachia, LLC v. DEP*, 2020 EHB 364, 371 ("The Pennsylvania Rules of Civil Procedure, the Board's Rules of Practice and Procedure and relevant Board case law require parties to place their cards face up on the table…."). It is not mere form over substance. Parties rely on what opposing parties say or do not say in their pre-hearing memoranda and prepare accordingly. Preparing cross-examination

[7] The testimony revealed that Mr. Knorr had no role in reviewing the permit application and only visited the site in June 2019, a year after the permit was issued, so his utility as a fact witness is also limited.

for an expert witness is much different than preparing cross for a fact witness. The small burden placed on a party to fully follow the rules does not compare to the significant disadvantage the other party faces in confronting an expert on the fly at a hearing. Allowing a party to flout our Rules and still present expert testimony threatens to undermine the integrity of our proceedings, and we must be adamant in preventing such tactics.

Turning back to the experts who were properly qualified, we have competing expert opinions from Dr. Schmid and Mr. Wolf that we must weigh in order to determine whether there is a stream running through the wetlands on the Estate property, or whether it is something that does not qualify as a stream. Weighing competing expert testimony is one of the Board's core functions. *Gerhart v. DEP*, 2019 EHB 534, 558. *See also DEP v. EQT*, 2017 EHB 439, 497, *aff'd*, 193 A.3d 1137 (Pa. Cmwlth. 2018). 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." *EQT*, 2017 EHB at 497. "Resolution of evidentiary conflict, witness credibility, and evidentiary weight are matters committed to the discretion of the Board." *EQT Prod. Co. v. Dep't of Envtl. Prot.*, 193 A.3d 1137, 1149 (Pa. Cmwlth. 2018) (citing *Kiskadden v. Dep't of Envtl. Prot.*, 149 A.3d 380, 387 (Pa. Cmwlth. 2016)).

Dr. Schmid is a certified wetland scientist and certified ecologist with more than 40 years of experience assessing wetlands and water resources. (T. 54-57; Joint Ex. 25.) He has considerable experience in the field identifying small headwater streams in Pennsylvania that are

often omitted from state and federal maps documenting larger streams. (T. 57-58.) Dr. Schmid visited the site twice, in November 2018 and in February 2019. (T. 61.) On the other side, Mr. Wolf is a biologist and wetland scientist with more than 35 years of experience. (T. 248.) Mr. Wolf, on behalf of the Estate, evaluated the site for the presence of wetlands and other aquatic resources in advance of the permit application being prepared and submitted. (T. 250-51, 253.)

Although we found both Dr. Schmid and Mr. Wolf generally qualified and credible, having fully considered the evidence, we agree with Ms. Williams and Dr. Schmid, but only to a point. It appears that there is a defined stream channel that flows through a portion of the wetlands. (Joint Ex. 24 (at Fig. 5-9); Estate Ex. 8, 14.) We cannot say, as Ms. Williams and Dr. Schmid do, that the stream continues all the way through the wetlands and encompasses the riprap channel at the foot of the wetlands. (T. 64-65.) The stream begins at a spring near the northern boundary of the site. (T. 65, 75, 99; Joint Ex. 23 (at Photo 6).) Mr. Wolf agreed that "headwater flow" was discharging at the northern property boundary. (T. 254.) Dr. Schmid's photograph at Figure 7 clearly and unambiguously shows a channel with defined bed and banks and ample water flowing through it. (Joint Ex. 24 (at Fig. 7).) Dr. Schmid testified that the stream had considerable flow, and that he was not on the site immediately following a rain event, which led him to conclude that the stream had groundwater-supplied flow. (T. 70-71.)

Mr. Wolf opined that the vegetation in and around the water in the channel meant it could not be a stream. (T. 267.) But there is a marked difference in the vegetation, with tall grass on the sides of the channel that does not exist within the stream channel. (Joint Ex. 24 (at Fig. 7).) Dr. Schmid credibly testified that there was no visible vegetation rooted in the bottom of the stream channel. (T. 71, 101.) In addition, the undisputed stream across from Grove Road at points appears much more vegetated in the Estate's own photographs, (T. 191-92; Estate Ex. 23,

25), than the stream channel photographed by Dr. Schmid on the Estate property, (Joint Ex. 24 (at Fig. 7)). Mr. Wolf disagrees with Dr. Schmid's opinion that the stream channel has substrates associated with flowing water, but Mr. Wolf based those comments on the photograph and his existing knowledge of the site. (T. 266-67.) Although he was present during Dr. Schmid's site inspection, Mr. Wolf did not follow Dr. Schmid around and inspect the stream channel at that time. (T. 270-71, 273.)

Notably, one of Mr. Wolf's own photographs shows the same meandering channel that is in Dr. Schmid's Figure 7. (T. 273; Joint Ex. 23 (at Photo 7).) What is remarkable is that the photos were taken nearly three years apart, with Wolf's taken in March 2016, and Schmid's taken in February 2019. If it were merely a "drainage pattern," as the Estate suggests, it appears to be an unusually consistent pattern that has cut a defined channel with water flowing in it.

On the other hand, we do not have enough evidence to support Ms. Williams's contention that the stream continues all the way through the wetlands. Dr. Schmid's Figures 5, 6, 8, and 9 show much more diffused flow south of the defined channel, with something more closely resembling pooled or standing water. (Joint Ex. 24 (at Fig. 5, 6, 8, 9).) We do not see a defined channel or defined banks in these photographs. (Estate Ex. 8.) It is even less apparent in Mr. Wolf's Photo 11 from March of 2016. Although Mr. Wolf testified that the photo was taken following a fairly significant rain event, the photograph shows a wide pool of standing water south of the stream channel. (T. 264; Joint Ex. 23 (at Photo 11).) The precise point where the stream ends is unclear to us and will need to be determined by the Department and Conservation District on remand. It is enough that there is a stream with at least intermittent flow beginning

with a spring near the Estate's northern property boundary and continuing some distance south that needs to be accounted for and evaluated in terms of the riparian forest buffer requirements.[8]

We also cannot conclude that there is a stream in the riprap channel immediately to the south of the wetlands. Dr. Schmid testified that, although it was difficult to see, there was water flowing across the surface of the riprap. (T. 80-81.) However, both Mr. Wolf and the Estate's expert engineer, David Gibbons, P.E., testified that there is a pipe underneath the riprap that drains water from the wetlands into the headwall that carries flow to the Grove Road stream. (T. 164-65, 260-61; Estate Ex. 5.) Mr. Wolf credibly testified that during his site visit he did not observe any flow in the riprap channel itself even after a few days of rain. (T. 263-64, 268-69.) The photos taken by Mr. Gibbons show water ponding at the end of the pipe coming out of the riprap before entering the headwall, (Estate Ex. 5, 6, 7), but we do not have any clear evidence of water flowing in the riprap on top of the pipe, (Estate Ex. 4, 8). The balance of the evidence leads us to conclude that there is no perennial or intermittent stream in the riprap channel.

Having established that there is a stream on the project site in addition to the Grove Road stream, we turn our attention back to the riparian buffer requirements. Ms. Williams's chief argument is that, since the streams on site and across Grove Road are on or within 150 feet of the project site, pursuant to the regulation at Section 102.14(a)(2) the Estate is required to either (1) protect an existing riparian forest buffer, (2) convert an existing riparian buffer to a riparian forest buffer, or (3) establish a new riparian forest buffer.[9] The Estate did none of these things.

[8] An "intermittent stream" is defined in the regulations as "[a] body of water flowing in a channel or bed composed primarily of substrates associated with flowing water, which, during periods of the year, is below the local water table and obtains its flow from both surface runoff and groundwater discharges." 25 Pa. Code § 102.1.

[9] As is often the case in environmental law, there is a web of regulatory definitions that gets us to understanding what a riparian forest buffer is. First, a "riparian buffer" is defined as "[a] BMP that is an area of permanent vegetation along surface waters." 25 Pa. Code § 102.1. BMPs, or best management practices, are "[a]ctivities, facilities, measures, planning or procedures used to minimize accelerated

And since there is no existing riparian buffer or riparian forest buffer, Ms. Williams asserts that the Estate must establish a new riparian forest buffer for the Grove Road stream and the on-site stream.

In addition, Ms. Williams argues that the Estate is required to develop a riparian forest buffer management plan. Under the regulations, "Existing, converted and newly established riparian forest buffers shall be managed in accordance with a riparian forest buffer management plan…." 25 Pa. Code § 102.14(b)(3). The riparian forest buffer management plan is to be part of a permittee's post-construction stormwater management (PCSM) plan. *Id.*, § 102.14(b)(4).[10]

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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." *Id.* A riparian forest buffer, then, is "[a] type of riparian buffer that consists of permanent vegetation that is predominantly native trees, shrubs and forbs along surface waters that is maintained in a natural state or sustainably managed to protect and enhance water quality, stabilize stream channels and banks, and separate land use activities from surface waters." *Id. See also* 25 Pa. Code § 102.14(b)(1). In short, a riparian forest buffer is a strip of vegetation along a surface water made up of native trees and shrubs that helps to reduce erosion and manage stormwater that might enter the surface water.

[10] The riparian forest buffer management plan requirements provide in full:

> (4) *Management plan.* The riparian forest buffer management plan shall be a part of the PCSM Plan and include, at a minimum, the following:
>
> > (i) A planting plan for converted or newly established riparian forest buffers that identifies the number, density and species of native trees and shrubs appropriate to geographic location that will achieve 60% uniform canopy cover.
> >
> > (ii) A maintenance schedule and measures for converted or newly established riparian forest buffers to ensure survival and growth of plantings and protection from competing plants and animals including noxious weeds and invasive species over a 5-year establishment period including activities or practices used to maintain the riparian forest buffer including the disturbance of existing vegetation, tree removal, shrub removal, clearing, mowing, burning or spraying in accordance with long-term operation and maintenance.
> >
> > (iii) An inspection schedule and measures to ensure long-term maintenance and proper functioning of riparian forest buffers meeting the requirements in paragraph (1), including measures to repair damage to the buffer from storm events greater than the 2-year/24-hour storm.

25 Pa. Code § 102.14(b)(4).

There is no dispute that the Estate did not develop a riparian forest buffer management plan. (Stip. 32.)

Of course, having not identified the stream within a portion of the wetlands on the project site, there is no riparian forest buffer for that stream. However, the Estate nevertheless established a buffer for the wetlands and maintained a wooded area to the west of the wetland buffer. (Joint Ex. 16, 39.) Whether this or other measures are needed to satisfy the riparian forest buffer requirements for this stream will need to be evaluated on remand.

For the Grove Road stream, the Estate also did not create a new riparian *forest* buffer, but it does propose to establish a small, unforested riparian buffer on its property, what the parties refer to as the "riparian buffer triangle" due to its general geometric shape. The Grove Road stream is separated from the Estate property by 65 feet, including the two-lane state route of Grove Road, and it runs through properties that are not owned by the Estate. Therefore, only a small portion of the Estate's riparian buffer triangle falls on the Estate's property, with the majority of the triangle west of Grove Road falling onto an adjacent property to the south of the Estate property line. (Joint Ex. 17.) The Department and the Estate assert that it is just not practical to establish a riparian forest buffer for the Grove Road stream, and that certain statutory and regulatory provisions allow the project to go forward without a riparian forest buffer.

Ms. Williams not only takes issue with the lack of a forested riparian buffer for the Grove Road stream, but she also disagrees with the way the triangular riparian buffer was drawn by the Estate. Under the regulations, a newly established riparian forest buffer for a special protection water is to be measured out 150 feet from the streambank horizontally and perpendicularly, with 50 feet of undisturbed native trees and 100 feet of managed native trees or shrubs. 25 Pa. Code §§ 102.14(b)(2)(ii), 102.14(c)(3). The Estate established its buffer by measuring out 150 feet

from two points: (1) where the stream emerges from the endwall across Grove Road, and (2) where the stream enters a culvert that carries it underneath a neighbor's driveway. (Joint Ex. 17.) Because of a slight concave curve in the stream, the two perpendicularly-drawn lines eventually intersect, forming a triangle with the stream, with the upper line appearing shorter than the lower line.

Ms. Williams argues that the regulations require multiple points to be drawn along the streambank so that the riparian buffer forms a strip of land that reflects the bends and curves of the stream, and not just the two points used by the Estate. Ms. Williams relies in part on the following regulatory provision: "*Measurements.* Riparian buffers must be measured **horizontally and perpendicularly** to the bank with no more than a 10% variation below the minimum width from the normal pool elevation for lake, pond or reservoir and from top of streambank." 25 Pa. Code § 102.14(c)(3) (emphasis added). She asserts that "horizontally and perpendicularly" means that the 150-foot measurements need to be taken all along the streambank, or at least at a frequency that fairly captures the contour of the stream. The Department and the Estate do not really push back on Ms. Williams's interpretation of the regulation. Instead they argue that the Grove Road stream was a very unique and complicated situation that required the utilization of engineering judgment to draw the buffer.

We agree with Ms. Williams. Under 25 Pa. Code § 102.14(a)(2)(iii), the Estate is required to establish a riparian *forest* buffer for the Grove Road stream. For purposes of drawing a riparian forest buffer, the only thing that may be somewhat unique about the Grove Road stream is that it is a discrete 125-foot segment, with a beginning point at an endwall and an ending point at a culvert. The slight bend in the stream does not strike us as unusually complicated. It is a far cry from some vexing, overly crenulated path. (*See* Estate Ex. 20.)

Nothing in the regulations limits the points to be drawn to two, one at the beginning of a stream and one at the end. (*See* T. 461-62.) Instead, we interpret "horizontally and perpendicularly" to be things that occur concurrently throughout the measurements along the streambank. Measuring two points might be adequate for a straight stream segment, but not for one that has any topographic curvature.

The permit reviewer for the Conservation District, Molly Deger, P.E., acknowledged during redirect examination that there are many times where multiple measurements are taken along a streambank for purposes of determining the riparian buffer:

> **Q. And do you have to draw buffer lines from more than one location from the top of streambank?**
>
> A. Certainly. In many permit applications that I've reviewed, you do have some slight meandering, in which case you would measure at various places along, parallel to the watercourse, along the top of the streambank and measure an average riparian buffer wi[d]th, based on those multiple measurements.

(T. 489.) Yet, Ms. Deger maintained that it was "not practical" to do that here because of the slightly concave shape of the short stream segment relative to the project site and it "would not have been realistic" to take multiple measurements in this case. (T. 490.)

We disagree. With the sophistication of geolocation technology we do not believe it imposes a significant burden to take multiple measurements that capture the bends of a reach of stream. Further, the methodology employed here by the Estate could easily lead to absurd results for a more concave stream. Consider an oxbow meander in a stream shaped similarly to the uppercase Greek letter Omega (Ω), emerging from and terminating at endwalls: two perpendicular lines could be drawn from the base of the curve to go nearly straight up, leaving a gap at the top of the meander with no riparian buffer. The Department and Estate's approach to drawing a riparian buffer, by simply extending out two perpendicular lines and seeing where they meet, does not work here and it does not conform to the plain language of the regulations.

We find support for our interpretation in 25 Pa. Code § 102.14(b)(2)(iii), dealing with the average minimum widths for riparian forest buffers:

> *Average riparian forest buffer width.* The average riparian forest buffer width shall be calculated based upon the entire length of streambank or shoreline that is located within or along the boundaries of the project site. **When calculating the buffer length the natural streambank or shoreline shall be followed**.

Id. (emphasis added). Following the "natural streambank or shoreline" suggests that the buffer should be calculated so as to account for the frequent variation in the bends of a streambank, with multiple points along the bank measured out horizontally. With respect to the riparian buffer measured from the Grove Road stream, it appears that this measuring approach may result in more of a buffer falling on the Estate property than the current triangle, with lines drawn perpendicularly from points south of the beginning of the Grove Road stream crossing and extending out past the Estate's upper leg line of the triangle. (*See* Joint Ex. 18.) For instance, it appears that lines drawn south of the top line of the Estate's triangle would extend into the area of the proposed driveway, the existing driveway removal, and into the Underground Detention Pipe Storage No. 1 basin. (Joint Ex. 39.) The Estate's engineer, David Gibbons, views the upper leg of the riparian buffer triangle, drawn from where the stream emerges from the endwall, as a boundary line that cannot be crossed. (T. 238, 243-44.) Ms. Deger agreed. (T. 489.) In their view, even if subsequent lines drawn farther downstream would cross the beginning line due to a perpendicular measurement from a curve in the stream, the beginning line cannot be exceeded. We have not been shown any support for this view in the regulations. The Estate's triangle does not produce a buffer with a consistent width that follows the natural streambank. On remand, any riparian forest buffers established for the Grove Road stream and the stream on site will need to be measured in accordance with the above.

Although there is nothing unique about the shape of the Grove Road stream, what is unique is the fact that the stream is separated by a two-lane road and flows on properties not owned or controlled by the Estate. The riparian buffer regulations do not appear to provide any caveats to account for something like this situation, where a riparian forest buffer cannot begin at or near the streambank. However, the Department points us to Section 402(c) of the Clean Streams Law, 35 P.S. § 691.402(c).

The Department argues that Section 402(c) provides an avenue for a permittee to propose other BMPs in lieu of a riparian forest buffer and so it does not matter that the Estate did not create a riparian forest buffer or develop a riparian forest buffer management plan. Section 402(c), added in an amendment to the Clean Stream Law in 2014, provides in relevant part:

> (1) For persons proposing or conducting earth disturbance activities when the activity requires a National Pollutant Discharge Elimination System permit for storm water discharge under 25 Pa. Code Ch. 102 (relating to erosion and sediment control), the person may use or install either:
>
> (i) a riparian buffer or riparian forest buffer; or
>
> (ii) **another option or options among available best management practices, design standards and alternatives that collectively are substantially equivalent to a riparian buffer or riparian forest buffer in effectiveness**, to minimize the potential for accelerated erosion and sedimentation and to protect, maintain, reclaim and restore water quality and for existing and designated uses of a perennial or intermittent river, stream or creek or lake, pond or reservoir of this Commonwealth to ensure compliance with 25 Pa. Code Ch.93 (relating to water quality standards).

35 P.S. § 691.402(c)(1) (emphasis added). The Department asserts that the Estate has provided BMPs that are "substantially equivalent" in effectiveness to a riparian forest buffer.

However, this appears to be a belated justification on the Department's part.[11] In arguing that the various BMPs proposed by the Estate are "substantially equivalent" to a riparian forest

[11] There is a solitary reference to the argument in the Department's pre-hearing memorandum under the section of legal issues in dispute. (DEP Memo. at ¶ 133 ("Assuming, *arguendo*, that the stream across

buffer, the Department relies on the testimony of Anahid Damerau, an environmental engineer with the Department who worked on the permit review with the Conservation District. (T. 556.) Ms. Damerau testified that the Estate satisfied the equivalency demonstration in Section E of its NPDES permit application, and by its calculations showing how its selected BMPs would control the rate, volume, and quality of stormwater. (T. 549-53.) But the Estate did not fill out the portion of Section E regarding substantially equivalent BMPs. The application asks an applicant to,

> **Identify any and all best management practices, design standards and alternatives that collectively are substantially equivalent to a riparian buffer or riparian forest buffer in effectiveness**, to minimize the potential for accelerated erosion and sedimentation and to protect, maintain, reclaim and restore water quality and for existing and designated uses of a perennial or intermittent river, stream or creek or lake, pond or reservoir of this Commonwealth to ensure compliance with 25 Pa. Code Chapter 93 (relating to water quality standards).

(Joint Ex. 1 (at 9-10) (emphasis added).) The box next to this paragraph is left unchecked and there is no apparent demonstration that the selected BMPs are substantially equivalent to the protection afforded by a riparian forest buffer. Presumably, a permittee's use of substantially equivalent BMPs needs to go through some sort of evaluative process under the Department's supervision before they can be used to excuse compliance with the riparian forest buffer requirements.

The Estate also did not fill out a portion of the application pertaining to "functionally equivalent" BMPs. The application at Section D, No. 7.C. Riparian Buffers asks:

> What BMPs will you be using that will be functionally equivalent to that of either a riparian buffer or a riparian forest buffer whatever is applicable to the project? Please attach an equivalency demonstration.

Grove Road is within 150 feet of the Project Site, are the Estate's proposed activities permissible under Section 402(c) of the Clean Streams Law, 35 P.S. §691.402(c)? (Suggested Answer: Yes); *Id.*").)

> An equivalency demonstration must be completed, including worksheets 12-15 and a narrative that shows that the alternative BMPs implemented will be functionally equivalent to that of either a riparian buffer or a riparian forest buffer, whichever is applicable to the project according to 102.14(a)(1) and (2).

(Joint Ex. 1 (at 8).)[12] There is no evidence of the Estate attaching an equivalency demonstration to its application. There is no evidence of the Estate including Worksheets 12-15 or a narrative description showing that the alternative BMPs are functionally equivalent to a riparian forest buffer as required by the application.

In addition, in the Record of Decision prepared by the Department and the Conservation District authorizing issuance of the permit, under the heading of Riparian Buffers, at "Address protection, conversion or establishment of Riparian Buffer or, Riparian Forest Buffer" the box "N/A" was checked (among the choices of yes, no, and n/a). (Stip. 44; T. 435; Joint Ex. 11.) Immediately below, at "Acknowledgement of Waiver, **Equivalency**, Offsetting, Allowable Activities (choose all that apply)" "N/A" was again checked in lieu of the boxes next to Waiver, Equivalency, Offsetting, or Allowable Activities. (Emphasis added.) (Stip. 45; T. 435; Joint Ex. 11.) Thus, it appears that there was no equivalency demonstration made by the Estate and no equivalency consideration undertaken by the Department or the Conservation District during the permit review.

There also does not appear to have been any appropriate equivalency analysis following the issuance of the permit. An additional problem for the Department in this regard is that Ms. Damerau was not qualified as an expert witness (nor could she have been since she was not

[12] Although this portion of the application employs the term "functionally equivalent" instead of "substantially equivalent," we do not know why the Department would be asking about functionally equivalent BMPs unless it were to satisfy Section 402. The question immediately following the quoted text asks whether the project involves any earth disturbance within 100 feet of a surface water, and if the answer is yes, the applicant "shall provide an offset riparian forest buffer at a ratio of one to one for the disturbed area." (*Id.*) The buffer offset is consistent with the requirement in Section 402(c)(2) of the Clean Streams Law, 35 P.S. § 691.402(c)(2).

identified as an expert in the Department's pre-hearing memorandum), and since every indication suggests that this determination was not made during her review of the permit application, her opining on the matter for the first time during her testimony that the Estate's BMPs are "substantially equivalent" amounts to expert opinion.[13]

The Estate's BMPs might meet the substantially equivalent threshold, but there is no evidence of that demonstration having occurred by the Estate during the application process, and there was no sufficient demonstration offered at the merits hearing. This is precisely the sort of analysis that needs to occur during the permit application and review process. *See Clearfield County v. DEP*, EHB Docket No. 2020-016-L, *slip op.* at 28 (Opinion and Order, June 10, 2021) ("Thus, there are instances where a crucial, required analysis is absent and the applicant and/or the Department must perform that analysis in the first instance."); *Blue Mtn. Pres. Ass'n v. DEP*, 2006 EHB 589, 621. It may be that the Estate does not need a riparian forest buffer for the stream across Grove Road, and that the currently proposed stormwater controls alone or in combination with other, additional controls would satisfy the substantial equivalence standard. We simply do not know, nor do we have any indication that anyone else knows at this point either.

Indeed, a riparian forest buffer may not really make sense for the Grove Road stream since the stream is not located on the Estate's property and is separated by 65 feet of pavement and other properties. Although Ms. Williams asserts that some amount of riparian forest buffer is better than none at all, the effectiveness of such a buffer is arguably diminished when it cannot begin at the streambank. Although admittedly not qualified as an expert, we tend to agree with Ms. Damerau that the value of a riparian buffer or riparian forest buffer is in the vegetation that

[13] There is no mention of substantial equivalence or Section 402 of the Clean Streams Law in Ms. Damerau's affidavit prepared in September 2019 that was originally submitted during briefing on the parties' competing motions for summary judgment and was a joint exhibit at the hearing. (Joint Ex. 28.)

goes up to the streambank, providing erosion protection, water quality filtration, evapotranspiration, and shade. (T. 538-40, 561-63.) This may be an ideal case where alternative BMPs are better suited. But the problem is the Estate has not made that showing of substantial equivalence, and neither has the Department or Conservation District. We are not sure how one measures the effectiveness of a riparian forest buffer in order to determine the substantial equivalence of alternative BMPs, but we presume the Department and Conservation District have the experience to determine this on remand if the Estate decides to pursue this route in lieu of establishing riparian forest buffers for the Grove Road stream and/or the on-site stream in the wetlands.

Riparian Buffer Exemptions and Allowances

The Department also argues that the Estate's project is subject to a number of exceptions and allowances in the riparian buffer regulations that remove the project from the riparian forest buffer requirements altogether with respect to the Grove Road stream. Under 25 Pa. Code § 102.14(d)(1), certain activities are listed that are excepted from the requirements of 25 Pa. Code § 102.14(a). The activities listed in 25 Pa. Code § 102.14(f)(2) on the other hand are allowable in a riparian buffer when authorized by the Department. The Department goes to great lengths to try to explain away why it did not require a riparian forest buffer or corresponding management plan because of these provisions. Ms. Williams argues that the provisions do not exclude all earth disturbance occurring on the site, and that none of the provisions eliminate the need for a riparian forest buffer or management plan.

The Department's list of claimed exceptions and allowances, (DEP Brief at 64-72), only touches on three activities: (1) extending utility lines into Grove Road; (2) grading the embankment near the wetlands; and (3) removing the existing driveway on the site and building

a new one. As Ms. Williams points out, however, the Department appears to ignore the fact that there are plenty of other earth disturbance activities occurring on the project site that are not subject to exceptions or allowances, like, for instance, constructing the underground infiltration and detention basins and other stormwater controls, or preparing the site for building the eight new homes. All of this activity is earth disturbance that triggers the riparian forest buffer requirements, but the Department's brief is silent on it. In other words, even if all of these exceptions and allowances applied, the riparian forest buffer provisions still need to be followed because of the other earth disturbance on the project site.

We think the Department focuses on these three activities because it is under the misapprehension that the only earth disturbance activities that matter are (1) those within 150 feet of the Grove Road stream, or (2) those occurring within the Estate's incorrectly-drawn riparian buffer triangle. The Department argues that "25 Pa. Code § 102.14(d)(1)(i) specifies that the provisions of 25 Pa. Code § 102.14(a) do not apply to earth disturbance activities that are 'greater than 150 feet from a river, stream, creek, lake, pond or reservoir.'" (DEP Brief at 72. *See also* DEP Brief at 69.) But the Department's highly selective quoting of the regulation leaves out the crucial fact that, once again, the regulation does not speak about the proximity of earth disturbance to an applicable surface water, but rather the proximity *of the project site*:

> (d) *Exceptions.*
>
> (1) Subsection (a) does not apply for earth disturbance activities associated with the following:
>
> (i) **A project site located greater than 150 feet** (45.7 meters) from a river, stream, creek, lake, pond or reservoir.

25 Pa. Code § 102.14(d)(1)(i) (emphasis added). This is completely consistent with Section 102.14(a)(2), discussed above, that speaks in terms of the "project site." The Department cannot simply will the regulation to say what it would like or wish it said. Even Ms. Deger

acknowledged that, according to the language of the regulation, the Section 102.14(d)(1)(i) exception only applies if the Estate property (the project site) is greater than 150 feet from a river, stream, creek, lake, pond, or reservoir. (T. 475-77.) Not only is the project site within 150 feet of the Grove Road stream, as we have now established there is also a stream on the site itself. The Department's contention that the riparian buffer requirements do not apply because the embankment grading and driveway relocation are greater than 150 feet from the Grove Road stream is not credible.

Even under the Department's faulty premise that the earth disturbance itself needs to be occurring within 150 feet of a river, stream, creek, lake, pond, or reservoir, we have that here. The Underground Detention Pipe Storage No. 1 basin will be located approximately 100 feet from the Grove Road stream. (T. 140-41, 430; Joint Ex. 19.) In addition, contrary to the Department's claim, removing the existing driveway and replacing it with a new driveway will be within 150 feet of the Grove Road stream. (T. 132-38; Joint Ex. 18, 39.) The embankment grading near the wetlands may also very well be within 150 feet of the newly identified stream. (*See* T. 94-95.)

With respect to the Department's claim that the embankment grading and driveway relocation are excepted from the riparian buffer requirements because they are outside the Estate's riparian buffer triangle, (DEP Brief at 72), again, this is just not at all what the regulation says. The riparian buffer requirements are not solely focused on the activities that might occur within a riparian buffer, or even within 150 feet of a surface water. They are focused holistically on the earth disturbance occurring on a project site within an impaired watershed. The point of a riparian forest buffer is to protect a water resource from not only the earth disturbance that accompanies the construction project, but also the stormwater runoff that

occurs long after the construction is finished.[14] This is why riparian buffers "must be protected in perpetuity through deed restriction, conservation easement, local ordinance, permit conditions or any other mechanisms that ensure the long-term functioning and integrity of the riparian buffer." 25 Pa. Code § 102.14(g)(1). To the extent the Department and Conservation District have interpreted 25 Pa. Code § 102.14 to only apply when earth disturbance occurs within an established riparian buffer, (T. 400-01, 435), they are incorrect.

We will briefly touch on the Department's other arguments on the exceptions and allowances because a proper understanding of them may be useful on remand. The Department focuses on 25 Pa. Code § 102.14(f)(2)(i) and (iii), which provide: "The following practices and activities are allowable in the riparian buffer when authorized by the Department: (i) Construction or placement of roads, bridges, trails, storm drainage, utilities or other structures….(iii) Restoration projects." The Department says that the driveway relocation and utility line extensions the Estate intends to make from the development to the utility lines in Grove Road fit into the first allowable activity. The Department also asserts that utility extensions are considered a restoration project because "it is temporary earth disturbance in the roadway that will be restored back to existing conditions." (DEP Brief at 66.)

With respect to the to the first allowance, Section 102.14(f)(2) identifies activities that are "allowable in the riparian buffer." The regulation does not say that any of these activities allows a permittee to skip having a riparian forest buffer or management plan altogether. We are told

[14] The Department insists that only earth disturbance activities are regulated, (T. 377, 439-40, 479, 480-81) and anything that is not earth disturbance is not regulated or covered by the permit. But this perspective is really only half of it. The individual NPDES permit is concerned not only with earth disturbance, but also with stormwater. *See* 25 Pa. Code § 102.2 (defining the scope and purpose of the Chapter 102 regulations as minimizing the potential for accelerated erosion and sedimentation *and* managing post-construction stormwater). We presume that this is precisely why the permit requires a post-construction stormwater management plan that "identifies BMPs to manage changes in stormwater runoff volume, rate, and water quality after earth disturbance activities have ended and the project site is permanently stabilized." (Joint Ex. 12 (at 3).)

that the utility extensions are entirely within the Grove Road roadway, (Stip. 23), and Ms. Williams does not dispute that a riparian forest buffer cannot be created in the middle of Grove Road, so we are not sure why this is an issue. The proposed driveway relocation does not now but might occur within a buffer properly drawn by the Estate (to the extent a private driveway can be fairly considered a "road"), but it does not appear that it would take up the entire buffer so as to completely exclude a riparian forest buffer. And in any event, we would think the preference would be to design a project so that it can accommodate a riparian forest buffer to the extent practicable.

The Department also says that the utility line extensions and the embankment grading are road maintenance activities within the exception of 25 Pa. Code § 102.14(d)(1)(v) ("Subsection (a) does not apply for earth disturbance activities associated with…Road maintenance activities so long as any existing riparian buffer is undisturbed to the extent practicable").[15] The embankment grading, of course, now takes on new significance after we have determined that there is a stream on the property just to the west of the embankment. Whether the embankment grading would take place within the 150-foot riparian forest buffer that needs to be established for that stream is something that will have to be determined on remand. This may be the only

[15] "Road maintenance activities" are defined in the regulations as:

> (i) Earth disturbance activities within the existing road cross-section or railroad right-of-way including the following:
>
> > (A) Shaping or restabilizing unpaved roads. (B) Shoulder grading. (C) Slope stabilization. (D) Cutting of existing cut slopes. (E) Inlet and endwall cleaning. (F) Reshaping and cleaning drainage ditches and swales. (G) Pipe cleaning. (H) Pipe replacement. (I) Support activities incidental to resurfacing activities such as minor vertical adjustment to meet grade of resurfaced area. (J) Ballast cleaning. (K) Laying additional ballast. (L) Replacing ballast, ties and rails. (M) Other similar activities.
>
> (ii) The existing road cross-section consists of the original graded area between the existing toes of fill slopes and tops of cut slopes on either side of the road and any associated drainage features.

25 Pa. Code § 102.1.

exception with any relevant applicability. With respect to the utility extensions, again, we are told that they are confined to the Grove Road cross-section, which is consistent with the definition of road maintenance activities as limited to "[e]arth disturbance activities within the existing road cross-section…." To the extent the utility extensions or embankment grading necessitate work outside of the Grove Road cross-section, this exception would not apply.

Continuing with its see what sticks approach, the Department says that the embankment grading and utility extensions are also excepted from the riparian buffer requirements because, as road maintenance activities, they are "[a]ctivities when permit coverage is not required under this chapter." 25 Pa. Code § 102.14(d)(1)(iii). (DEP Brief at 67, 70-71.) The Department references the permit requirements regulation at 25 Pa. Code § 102.5, which provides in part:

> **Other than agricultural plowing or tilling activities, animal heavy use areas, timber harvesting activities or road maintenance activities**, a person proposing an earth disturbance activity that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, shall obtain an individual NPDES Permit or coverage under a general NPDES permit for Stormwater Discharges Associated With Construction Activities prior to commencing the earth disturbance activity.

25 Pa. Code § 102.5(a) (emphasis added). But all of the work has been permitted by the permit under appeal. The Department's attempt to parse out certain activities for the convenience of its argument strikes us as ignoring the forest for the trees. If all the Estate was doing was road maintenance activity, a permit may not be required, but it is doing much more than that. And at the risk of being overly repetitive, the fact that there are some road maintenance activities associated with the project does not relieve the Estate of its overall riparian forest buffer obligations for the rest of the earth disturbance on the project site.

The Department also makes an entirely spurious argument that certain activities are excepted because they are "[a]ctivities when a permit or authorization for the earth disturbance activity required under this chapter was obtained, or application submitted prior to November 19, 2010." 25 Pa. Code § 102.14(d)(1)(iv). The Department suggests that work done by PennDOT on Grove Road in 2012 means that work done by the Estate now does not need to pay attention to the riparian forest buffer requirements. Putting aside for the moment that this appears to be nothing more than an exception carved out for persons who already had permit applications in process or had just obtained permits before Section 102.14 went into effect on November 19, 2010, 40 Pa.B. 4861 (Aug. 21, 2010), the Department's own witness testified that the PennDOT permit application was submitted in 2011 and the permit was issued in 2012. (T. 599.) This exception has no applicability.

Extent of the Wetlands

Finally, Ms. Williams, relying on Dr. Schmid, argues that the Estate did not accurately delineate the full extent of the wetlands in the northeast corner of the property. There is not a significant difference between the wetland boundary drawn by Dr. Schmid, and the one drawn by Mr. Wolf. Dr. Schmid generally agreed with the boundaries flagged by Mr. Wolf. (T. 78-79.) Mr. Wolf testified that the wetland delineation flags he observed being placed by Dr. Schmid more or less followed his own. (T. 262.) The differences appear to be at the edges, with Dr. Schmid quibbling with Mr. Wolf's straight lines and asserting that the wetland boundaries are "more curvilinear." (T. 79.) Based on the preponderance of the evidence, we agree with the boundaries established by Mr. Wolf and the Estate. Wetlands are not one of the waters that trigger the riparian buffer requirements in Section 102.14(a)(2). However, wetlands located within a riparian buffer are to be protected consistent with the Chapter 105 regulations. 25 Pa.

Code § 102.14(c)(2). To the extent the Estate establishes a riparian forest buffer around the stream now identified on the site, the wetlands will need to be protected in accordance with the law.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 691.7; 35 P.S. § 7514.

2. As a third-party appellant appealing the Department's issuance of a permit, Ms. Williams bears the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Gerhart v. DEP*, 2019 EHB 534, 546-47; *Joshi v. DEP*, 2019 EHB 356, 364; *Jake v. DEP*, 2014 EHB 38, 47.

3. Appellants in third-party permit appeals have standing if they credibly aver that they use the area to be affected by a permitted activity and there is a realistic potential that their use of that area could be adversely affected by the challenged activity. *Sierra Club v. DEP*, 2017 EHB 685, 695; *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643; *Citizen Advocates United to Safeguard the Environment, Inc. v. DEP*, 2007 EHB 632, 673. *See also Funk v. Wolf*, 144 A.3d 228, 243-48 (Pa. Cmwlth. 2016).

4. When standing is challenged in a post-hearing brief, an appellant must demonstrate by a preponderance of the evidence on the record that it has standing. *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1147; *Stedge v. DEP*, 2015 EHB 577, 594; *Pa. Trout v. DEP*, 2004 EHB 310, 355; *Greenfield Good Neighbors Group, Inc. v. DEP*, 2003 EHB 555, 564; *Giordano v. DEP*, 2000 EHB 1184, 1187.

5. Lynda Williams has demonstrated by a preponderance of the evidence at the hearing on the merits that she has standing to bring and maintain this appeal.

6. A party who fails to identify its expert witnesses in its pre-hearing memorandum or provide a summary of their testimony is precluded from presenting expert testimony at the hearing on the merits. 25 Pa. Code § 1021.104(a)(4)-(5); *Borough of Edinboro v. DEP*, 2003 EHB 725, 772, *aff'd*, 2696 C.D. 2003 (Pa. Cmwlth. June 23, 2004).

7. "Resolution of evidentiary conflict, witness credibility, and evidentiary weight are matters committed to the discretion of the Board." *EQT Prod. Co. v. Dep't of Envtl. Prot.*, 193 A.3d 1137, 1149 (Pa. Cmwlth. 2018) (citing *Kiskadden v. Dep't of Envtl. Prot.*, 149 A.3d 380, 387 (Pa. Cmwlth. 2016)).

8. In impaired special protection watersheds, the riparian forest buffer requirements apply to earth disturbance activities where "the project site contains, is along or within 150 feet of a perennial or intermittent river, stream, or creek, lake, pond or reservoir…." 25 Pa. Code § 102.14(a)(2).

9. The "project site" for the Estate's subdivision project is the entire 13.8-acre property. 25 Pa. Code § 102.1 (definition of "project site").

10. The unnamed tributary to Broad Run that is across Grove Road and within 150 feet of the Estate property is subject to the riparian forest buffer requirements. 25 Pa. Code § 102.14.

11. A perennial or intermittent stream exists within the wetlands on the Estate property that is subject to the riparian forest buffer requirements. 25 Pa. Code §§ 102.1, 102.14.

12. The Department erred by not requiring the establishment of a riparian forest buffer for the stream on the project site. 25 Pa. Code § 102.14(a)(2).

13. The Department erred by not requiring a riparian forest buffer for the Grove Road stream or performing an analysis of whether the best management practices proposed by the

Estate are substantially equivalent in effectiveness to a riparian forest buffer. 35 P.S. § 691.402(c); 25 Pa. Code § 102.14(a)(2).

14. The Department erred in accepting the unforested riparian buffer drawn by the Estate that does not measure 150 feet horizontally and perpendicularly along multiple points following the natural streambank for the Grove Road stream. 25 Pa. Code §§ 102.14(b)(1), 102.14(b)(2), 102.14(c)(3).

15. The Department erred in not requiring the Estate to develop a riparian forest buffer management plan. 25 Pa. Code §§ 102.14(b)(3), 102.14(b)(4).

16. The wetlands on the Estate's project site were properly delineated by the Estate.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LYNDA WILLIAMS	:	
	:	
v.	:	**EHB Docket No. 2018-067-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ESTATE OF HARRY SIMON, Permittee	:	

O R D E R

AND NOW, this 17th day of September, 2021, it is hereby ordered that NPDES Permit No. PAD150046 is remanded to the Department for further evaluation consistent 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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 17, 2021

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

For the Commonwealth of PA, DEP:
William J. Gerlach, Esquire
(*via electronic filing system*)

For Appellant:
Kenneth T. Kristl, Esquire
(*via electronic filing system*)

For Permittee:
Michael T. Shiring, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRIAN TELEGRAPHIS	:	
	:	
v.	:	**EHB Docket No. 2020-012-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 4, 2021**
	:	

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

By Steven C. Beckman, Judge

Synopsis

The Board grants an appeal of the Department's determination that a commercial building, owned by Brian Telegraphis, was not eligible for coverage under the Bituminous Mine Subsidence and Land Conservation Act and its implementing regulations. The Department's requirement that a commercial building be in place at the time of the closest mining in order to be eligible for coverage is not supported by the statutory or regulatory language. We remand the claim to the Department to make a final determination as to whether mine subsidence caused damage to the commercial building.

Background

Brian Telegraphis ("Mr. Telegraphis") owns a commercial building in Monongahela, Pennsylvania (the "Building"). The Building is located in the general vicinity of the Maple Creek Mine, an inactive underground bituminous coal mine. On February 1, 2019, Mr. Telegraphis filed a Subsidence Damage Claim Form with the Department (the "Claim Form"). After conducting an investigation, the Department informed Mr. Telegraphis on January 6, 2020, that it had denied his

mine subsidence damage claim for the Building. Mr. Telegraphis subsequently filed his Notice of Appeal with the Environmental Hearing Board ("the Board") on February 4, 2020.

On October 2, 2020, this matter was transferred for primary handling from the Honorable Richard P. Mather, Sr. to the Honorable Steven C. Beckman. Mr. Telegraphis submitted his Pre-Hearing Memorandum on February 18, 2021. The Department submitted its Pre-Hearing Memorandum on March 5, 2021. Mr. Telegraphis filed an Amended Pre-Hearing Memorandum and a Motion in Limine on March 18, 2021. Mr. Telegraphis' Motion in Limine asked the Board to determine that a presumption existed that the Building was in place at the time of mining, preclude the Department from presenting evidence regarding the location of the underground mining between October 1999 and February 2000, and that we determine the statutes and regulations pertinent to this case do not require a subject building to be in place at the time of mining. The Department filed its own Motion in Limine on March 19, 2021, requesting this Board to preclude Mr. Telegraphis from presenting certain exhibits at hearing. The Department filed a Motion to Strike Appellant's Late-Filed Amended Pre-Hearing Memorandum on March 24, 2021 and the Board issued an Order instructing Mr. Telegraphis to respond to this motion. We denied the Department's Motion to Strike on March 30, 2021. On April 7, 2021, the Board issued two separate Orders that denied the Department's and Mr. Telegraphis' Motions in Limine.

A one-day hearing was held in this matter on April 5, 2021, via Webex video conference. On June 7, 2021, Mr. Telegraphis submitted his Post-Hearing Brief. Mr. Telegraphis next filed a Motion to Schedule Conference ("Post-Hearing Motion"). Through this Post-Hearing Motion, Mr. Telegraphis ultimately sought to strike certain evidence and testimony presented at the hearing due to concerns regarding an appearance of impropriety on the part of one of the Department's program staff. After the Department filed its Response in Opposition to the Motion, the Board scheduled a

conference call that took place on July 6, 2021. On July 19, 2021, the Board issued an Opinion and Order denying Mr. Telegraphis' Post-Hearing Motion, concluding a reasonable person viewing the facts of the matter would find no appearance of impropriety. The Department filed its Post-Hearing Brief on July 30, 2020. Mr. Telegraphis filed a Post-Hearing Reply Brief on August 16, 2021. The matter is now ripe for decision.

FINDINGS OF FACT

Parties

1. The Department of Environmental Protection is the agency charged with enforcing the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31 *as amended*, 52 P.S. §§ 1406.1 – 1406.21 ("BMSLCA" or "the Act") and the rules and regulations promulgated thereunder.

2. The Appellant, Brian Telegraphis ("Mr. Telegraphis") resides at 1570 Walters Street, Monongahela, PA 15063. (Hearing Transcript ("T.") at 64).

3. Mr. Telegraphis owns the commercial building (the "Building") located at 1616 Fourth Street, Monongahela, PA 15063. (T. at 112).

4. Mr. Telegraphis purchased the property, on which he would eventually build the Building, on August 6, 1999. (T. at 65).

5. Mr. Telegraphis runs his landscaping business out of the Building. (T. at 65).

6. Mr. Telegraphis has an office and facilities for staff in the Building and also uses it to store equipment and goods for his landscaping business. (T. at 65-66).

7. The Building and Mr. Telegraphis' house are on adjacent properties and are located 166 feet apart according to measurements taken by Mr. Telegraphis. (T. at 64, 84).

The Maple Creek Mine

8. Maple Creek Mining Inc. ("MCMI") is the permittee of the Maple Creek Mine, an underground bituminous coal mine, that operates pursuant to Coal Mining Activity Permit No. 63841302. (T. at 143-43; Exhibit D-15)[1].

9. MCMI extracted coal from the Maple Creek Mine beginning in 1995 and ending in 2003. (T. at 142-43).

10. MCMI conducted both longwall and room and pillar methods of coal extraction in the Maple Creek Mine. (T. at 142).

11. MCMI still has an active permit for the Maple Creek Mine but is not presently authorized to extract coal from the Maple Creek Mine. (T. at 143).

12. Under the active permit for the Maple Creek Mine, MCMI remains responsible for compliance obligations including surface reclamation and outstanding subsidence damages issues. *Id.*

13. A contract operator, Washington County Land Resources, also has compliance obligations in association with the Maple Creek Mine including the repair of structures damaged by mine subsidence. (T. at 143-44).

Mr. Telegraphis' Claim

14. Mr. Telegraphis' house, along with other houses on Walters Street, sustained mine subsidence damage in 2018. (T. at 64, 85).

[1] The Department's Exhibits are labeled with a D prefix.

15. On March 12, 2018, Department representatives, Stacey Malarkey and Drew Frost, went to the residences on Walters Street to provide information on mine subsidence insurance and ask if the residents wished to obtain mine subsidence insurance. (T. at 201, 207).

16. Mr. Telegraphis purchased mine subsidence insurance for his house on March 12, 2018. (T. at 202).

17. Mr. Telegraphis did not purchase mine subsidence insurance for the Building. (T. at 202-203).

18. On September 5, 2018, MCMI notified the Department through a mine operator reporting form that Mr. Telegraphis' house had been damaged. (T. at 146; Ex. D-14).

19. The mine operator reporting form submitted by MCMI did not contain any allegations of damages to the Building. (T. at 146; Ex. D-14).

20. In December 2018, the Department learned about the alleged mine subsidence damage to the Building when it received a letter from Mr. Telegraphis' attorney. (T. at 144-45; Ex. D-12).

21. Department staff, Michael T. Bodnar ("Mr. Bodnar") and Drew Frost, met with Mr. Telegraphis at his property on January 8, 2019 in response to a request from Mr. Telegraphis' attorney. (T. at 148-49).

22. The Department received a mine operator reporting form from MCMI on January 22, 2019, regarding Mr. Telegraphis' assertion of damages to the Building. (T. at 155-56; Ex. D-15).

23. On February 1, 2019, the Department received a mine damage claim form ("Claim Form") from Mr. Telegraphis describing the alleged mine subsidence damage to the Building. (T. at 113-14, 156-157; Ex. D-1).

24. On the Claim Form, Mr. Telegraphis stated that the problems were discovered in September 2018, and described the problems with the Building as cracking of drywall and ceramic tiles, doors not plumb and unable to be opened and closed properly, and the entire building being out of square. (Ex. D-1).

25. On the Claim Form, Mr. Telegraphis stated that the Building was built in 1999. (Ex. D-1).

26. The Department notified MCMI of Mr. Telegraphis' damage claim right after receiving the Claim Form. (T. at 158).

27. MCMI submitted a mine operator reporting form to the Department dated February 14, 2019, denying assistance on the basis that the Building did "not qualify for repair or compensation per reg 89.142a." and noting that the building permit was issued on November 3, 1999 and the closest mining took place in October 1999. (T. 158-59; Ex. D-16).

The Department's Investigation

28. On February 26, 2019, Department representatives, Mr. Bodnar, Carl Massini, and J.D. Floris conducted an on-site investigation of the Building. (T. at 160).

29. During the February 26, 2019 investigation, Mr. Telegraphis provided the Department with documentation relating to the construction of the Building, including a building permit, documents relating to a sewer tap-in and building material receipts. (T. at 160-61).

30. The building permit for the Building was issued by the Supervisors of Carroll Township and is dated November 3, 1999, the day it was obtained by Mr. Telegraphis. (T. at 81, 116; Joint Ex. 1).

31. The Carroll Township Authority Sewage Tap-In Fee Notice for the Building is signed by Mr. Telegraphis and is dated November 3, 1999 and includes a stamp marking it paid as of that date. (T. at 117; Joint Ex. 2; Ex. D-4).

32. The Carroll Township Authority Sewage Tap-In Fee Notice for the Building lists the inspection date for the sewer connection for the Building as September 14, 2000. (T. at 117; Ex. D-4).

33. The building material receipt for the roof trusses for the Building lists an order date of October 25, 1999, and the date delivered as October 29, 1999. (T. at 53-54, 119; Joint Ex. 3; Ex. D-6).

34. The other building material receipts for the Building are dated in August and September 1999. (Joint Ex. 4; Exs. D-7, D-8).

35. Mr. Bodnar and Carl Massini conducted a second on-site investigation of the Building on April 17, 2019. (T. at 165; Ex. D-2).

36. Mr. Bodnar contacted Mr. Telegraphis in April 2019, informing him that the Department did not believe that it had evidence to support his claim for mine subsidence damage to the Building but that the Department was willing to contact MCMI to see if MCMI was willing to negotiate a settlement with Mr. Telegraphis. (T. at 166).

37. In October 2019, the Department received a letter from Mr. Telegraphis' attorney informing the Department that settlement discussions with MCMI were not productive and asking the Department to complete its investigation. (T. at 167; Ex. D-13).

38. Following receipt of the October 2019 letter, the Department completed its investigation of Mr. Telegraphis' claim and drafted its report. (T. at 167).

39. The Department completed its investigation of the Building and on January 6, 2020, issued an investigation report that concluded the Building was not eligible for coverage because it was not in place at the end of October 1999, which was the timeframe that the nearest underground mining took place in relation to the Building. (T. at 168; Ex. D-2).

40. The Department interprets the term "in place" as meaning that a building has walls, a roof and is permanently affixed to the ground. (T. 54, 175).

41. Carl Massini and Mr. Bodnar were the drafters of the Department's investigative report. (T. at 168).

42. The Department relied on aerial images superimposed with the final mine maps for the Maple Creek Mine in conducting its investigation. (T. at 171; Exs. D-2, D-17).

43. Coal operators are required to submit final mine maps once underground mining is completed. (T. at 176-77).

44. The final mine maps must show the entirety of all underground mining and must be certified by a licensed engineer or surveyor. (T. at 177).

45. The Department used the final maps submitted by MCMI to determine the location and timing of the underground mining in the vicinity of the Building. (T. at 168-69, 176).

46. The Department located the Building on MCMI's final mine maps, printed the maps to scale, and used an engineer scale to measure the horizontal distance from the Building to the nearest mining. (T. at 45).

47. The Department's maps that superimpose the Building in relation to the underground mining is the best information available demonstrating where the Building is located in relation to the mining. (T. at 47).

48. In October 1999, MCMI conducted room and pillar mining in the Pittsburgh Coal seam situated north of the Building. (Exs. D-2, D-17).

49. All mining conducted by MCMI took place north of the Building. (Ex. D-17).

50. The Building was never undermined and is located approximately 300 feet vertically over the unmined Pittsburgh Coal seam. (Exs. D-2, D-17).

51. The mining progressed in a southeasterly direction through October 1999 and November 1999. (T. at 195; Ex. D-17).

52. In late October 1999, the mining was at the closest point to the location of the Building. (T. at 45; Ex. D-17).

53. The closest mining took place approximately 85 feet from the northernmost side of the Building. (T. at 29, 45, 171-72; Exs. D-2, D-17).

54. Coal operators are required to conduct a pre-mining survey of all structures that fall within a 30-degree angle of draw of underground mining before the mining is conducted. (T. at 25).

55. No pre-mining survey was conducted of the Building by MCMI. (T. at 25).

56. The Building is accessible to the public. (T. at 170; Ex. D-2).

57. The Department did not determine when the Building was in place. (T. at 175).

58. The Building is within the mining permit boundaries for the Maple Creek Mine. (T. at 29; Ex. D-17).

59. Multiple structures located to the east, west and north of the Building, including Mr. Telegraphis' house, were damaged by mine subsidence and at least some of that mine subsidence damage took place in 2018. (T. at 191-92, 201).

60. The Department did not make a final determination whether mine subsidence damaged the Building. (T. at 165, 195; Ex. D-2).

DISCUSSION

Legal Standard

Mr. Telegraphis appealed the Department's determination that his damage claim was not supported and asserted that the Department's conclusion that his Building was not covered by the Act was incorrect and contrary to the law. Under our rules, Mr. Telegraphis bears the burden of proof. *See* 25 Pa. Code § 1021.122(a); *Rohanna v. DEP and Emerald Contura, LLC*, 2019 EHB 193, 209. In order to prevail on his claim, Mr. Telegraphis must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that it is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Center for Coalfield Justice v. DEP*, 2017 EHB 799, 822; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269. The preponderance of the evidence standard requires that Mr. Telegraphis meet his burden of proof by showing that the evidence in favor of his proposition is greater than that opposed to it. It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established. *United Refining Company v. DEP*, 2016 EHB 442, 449. The Board's review is de novo, and we can admit and consider evidence that was not before the Department when it made its initial decision, including evidence developed since the filing of the appeal. *United Refining, supra*.; see also *Smedley v. DEP*, 2001 EHB 131; *Warren Sand & Gravel v. Dep't of Envtl. Res*. 341 A.2d 556 (Pa. Cmwlth. 1975).

Analysis

On February 1, 2019, the Department received the Claim Form from Mr. Telegraphis claiming that his Building was exhibiting mine subsidence damage. The mine operator, MCMI, filed a mine operator reporting form with the Department dated February 14, 2019, denying assistance and stating that the "Company has not investigated to determine cause of damage since this commercial structure does not qualify for repair or compensation per reg 89.142a" and further noting that "the building permit for this structure [was] issued on 11-3-99 and the closest mining by Maple Creek took place in October 1999." (Ex. D-16). On February 16, 2019, the Department conducted an on-site investigation of Mr. Telegraphis' claim. During the investigation, Mr. Telegraphis provided the Department with information and documentation relating to the construction of the Building. The Department conducted a second on-site investigation of the claim on April 17, 2019. In a letter dated January 6, 2020, (the "January 2020 Letter") the Department denied Mr. Telegraphis' damage claim and included a copy of the Department's investigative report (the "Report") detailing the investigation and summarizing the Department's findings. (Ex. D-2). The January 2020 Letter provides no details regarding the Department's basis for denying the damage claim. It simply states that the "damage claim is not supported" and that the Report "provides a more detailed explanation of the investigation and conclusions." (Ex. D-2). The Report was from Carl J. Massini, P.E., a Mining Engineer Consultant, Mine Subsidence Section to Michael Bodnar, P.E., Chief, Mine Subsidence Section. Mr. Bodnar testified that he and Mr. Massini co-authored the Report. In the Claim Summary section of the Report, under the paragraph labeled Conclusion, the box next to the statement "STRUCTURE NOT COVERED UNDER PROVISIONS OF THE BITUMINOUS MINE SUBSIDENCE & LAND CONSERVATION ACT is marked with an X. (Ex. D-2; Report at 2). The Department concluded the Report stating that "[B]ased on the information available to date, PADEP has determined that

the Telegraphis commercial structure was not in place at the end of October 1999, which is the time period when MCMI conducted underground mining near the structure. Therefore, the structure is not afforded repair or compensation coverage under the BMSLCA and 25 Pa. Code §89.142a." (Ex. D-2; Report at 6).

Eligibility of the Building for Coverage Under the Act

The central issue in this case is whether the Department erred in determining that Mr. Telegraphis' Building was not eligible for coverage under the Act. The Department denied Mr. Telegraphis' claim based on its factual determination that the Building in this case was not in place at the end of October 1999 and its legal interpretation of the Act and related regulations that a commercial structure must be in place at the time of closest mining to be eligible for coverage under the Act. Mr. Telegraphis argued before the Board that the Department's determination was wrong on the facts and as a matter of law. The majority of the testimony at the hearing addressed factual issues surrounding the timing of the construction of the Building in relation to nearby mining in the Maple Creek Mine and we will turn our attention to this issue first before addressing the Department's legal interpretation.

In order to reach its determination that the Building was not covered under the Act, the Department considered two underlying issues. First, it had to determine when the Building was in place. For a Building to be considered in place, the Department testified that the building in question needed to have walls, a roof and be permanently affixed to the ground. (T. at 54, 175).[2] Mr. Telegraphis agreed with the Department that this is what is required for a Building to be in

[2] Mr. Bodnar testified that the Department relies on the structure and intent of the Act in determining what is required for a building to be in place. According to Mr. Bodnar, the Department also looks to the regulations and guidance developed for the Department's mine subsidence insurance program to support its position that for a building to be considered "in place" it must have walls, a roof and be permanently affixed to the ground. (T. at 175-76).

place as that term is used in this case. Mr. Telegraphis asserted that the main construction on the Building began in late October 1999, and it was in place by October 31, 1999. Department personnel had no direct knowledge of the Building's construction time frame so, after receiving the mine subsidence claim from Mr. Telegraphis, they conducted an investigation to determine when the Building was in place. During its investigation, the Department gathered the available documentary evidence as well as interviewed Mr. Telegraphis and others regarding the construction of the Building. The Department concluded, based on the information it collected during its investigation, that the Building was not in place by October 31, 1999. The Department did not state a conclusion as to when it believed the Building was in place.

Our review of the testimony and evidence presented at the hearing leads us to the conclusion that Mr. Telegraphis has not established by a preponderance of the evidence that the Building was in place by October 31, 1999. The property where the Building was built was purchased in early August 1999. The Building is a pole barn structure and key construction materials for determining when it was in place include the roof trusses necessary to allow construction of a roof. A delivery receipt for the roof trusses listed an order date of October 25, 1999, and a delivery date of October 29, 1999. (Joint Ex. 3). Mr. Telegraphis stated that the trusses were installed on or around the time of delivery and that the roof was installed the next day but there was no documentary evidence presented at the hearing to support this time frame. The remaining key documents support a later construction date. The building permit was issued on November 3, 1999 (Joint Ex. 1) and the receipt for a sewer tap-in applied for and paid by Mr. Telegraphis also was dated November 3, 1999. (Joint Ex. 2).

In addition to the inconclusive documentary evidence, we also have inconclusive testimony regarding the date the Building was in place. During the hearing, Mr. Telegraphis stated

that the Building was in place prior to his receiving the building permit from Carroll Township on November 3, 1999. The Department spoke with Township staff as part of its investigation, but the Township had no further information on when the Building was constructed other than the building permit and sewer fee documents. The Washington County Tax Assessment Office informed the Department that its records showed that the Building was in place as of June 2000. (T. at 164). Mr. Bodnar stated that Mr. Telegraphis told him during a site visit in February 2019, as part of the Department's investigation, that "he did not begin construction until after he had a building permit issued." (T. at 162). Mr. Telegraphis denied making that statement. Mr. Telegraphis testified that he was confident that the Building was completed by October 31, 1999 because he distinctly recalled his son visiting the Building for the first time in his Halloween costume. Mr. Telegraphis stated that he had not allowed his son to visit the Building while it was under construction because of safety concerns so it was memorable to him that the first visit had taken place around Halloween with his son in costume. Our concern with this line of testimony is that under questioning from the Department's counsel, Mr. Telegraphis acknowledged that he had failed to mention this distinctive memory during the Department's initial investigation or during his deposition in this case. He acknowledged that he was conveying this information for the first time during the hearing. (T. at 128-29). Under further questioning by the Department's counsel, Mr. Telegraphis testified that he was absolutely certain that the Building was in place before November 7, 1999. (T. at 134). Overall, we find that the testimony is inconclusive as to the date of completion and that Mr. Telegraphis has not persuaded us that the Building was in place as of October 31, 1999.[3] We conclude that the evidence demonstrates that it is more likely than not that

[3] Even Mr. Telegraphis' attorney appears to hedge on the in place date stating in the Post-Hearing Brief that this date could have been as late as November 7, 1999. (Appellant's Post-Hearing Brief at 24, 25).

the Building was in place in early November 1999. Ultimately, as will be evident from our further discussion below, it is not necessary for our resolution of this case to determine a more exact date.

We now turn our attention to the issue of timing of the mining in the Maple Creek Mine and its impact on determining eligibility for coverage under the Act and regulations. The Department concluded that the relevant mining activity in the Maple Creek Mine took place through the end of October 1999. The Department reached this conclusion because, based on the available mining maps, active mining took place closest to the eventual location of the Building during the month of October 1999. Mr. Telegraphis questioned the Department's determination that the relevant mining was completed by the end of October 1999 and argued that the relevant mining continued through November 30, 1999. The key exhibit for addressing this issue is the Department's Exhibit 17. Exhibit 17 consists of a map that shows the location of Mr. Telegraphis' property including the Building, overlain with a copy of the final mine map for the Maple Creek Mine.[4] The Building was never undermined, and all mining remained north of the eventual location of the Building. Exhibit 17 contains dates showing the location of active mining at the end of each month but does not show day to day progress during the month. The room and pillar mining taking place in this area was located northwest of the Building's eventual location on September 30, 1999. The active mining progressed in a southeasterly direction during October and November 1999. It was located at its nearest point to the Building's eventual location prior to October 31, 1999 but the exact timing cannot be determined based on Exhibit 17. At its nearest point in late October 1999, active mining took place 85 feet from the corner of the Building's

[4] Mr. Telegraphis raised issues with the lack of six-month mining maps as well as the accuracy of Exhibit D-17. The Department provided testimony concerning the maps it relied on and its creation of Exhibit D-17. After considering the testimony and the exhibits, the Board is satisfied that Exhibit D-17 accurately shows the mining in the Maple Creek Mine and its spatial relationship to the Building.

eventual location. The Department acknowledged that it could not identify the exact location that mining was taking place on certain days in early November but as time moved forward in November 1999, the active mining progressed southeast away from the location of the Building. At the end of November 1999, the active mining was several hundred feet east of the Building. (Ex. D-17).

The Department's resolution of Mr. Telegraphis' subsidence damage claim relies on its determination that the only relevant time period was when the active mining was at its closest point in October 1999. Mr. Telegraphis argues that active mining was ongoing and was still close to the Building until at least November 30, 1999. Neither party provided clear testimony or analysis as to why the only relevant time period is constrained to the time period when the active mining was taking place adjacent to the property where the Building was located. As best we can determine from the testimony presented by the Department, it focused on this time period because it concluded that any mining that took place after October 31, 1999, was too far away to cause subsidence damage to the Building. (T. at 173). Mr. Telegraphis only differs from the Department on this issue by degree, arguing that the Department cannot rule out that mining in early November, even though farther away from the Building, could have caused subsidence damage. In this case, the Department implemented a narrow time frame under the phrase, "in place at the time of mining" and then further limited the time period, specifically, to the time when the active mining was in closest proximity to the eventual location of the Building. This approach raises a concern for the Board. As explained further below, our review of the Act and its implementing regulations do not support this approach under the specific facts of this case.

The Department's determination that the Building is not eligible for coverage relies on its interpretation of the Act and its implementing regulations. The Department supports its position

and determination by arguing that the Act's purpose, structure, and key statutory and regulatory provisions demonstrate that the repair and compensation requirement applies only to structures that are in place at the time of mining. In its brief, the Departments asserts that it has "consistently interpreted the Act and its implementing regulations to provide repair and compensation only to those qualifying structures that are in place at the time of mining." (Department's Post-Hearing Brief at 17). It cites to a regulatory preamble found at 28 Pa. Bull. at 2772 (June 13, 1998) that provides that "section 5.4(a) of BMSLCA and §89.142a(f) are to be interpreted to require an operator to repair all dwellings in place at the time of underground mining and all permanently affixed appurtenant structures in place at the time of underground mining" in support of its assertion. *Id*. The Department also relies on the overall structure of the Act and its implementing regulations as the basis for its interpretation. The Department further states that its interpretation is reasonable and consistent and, therefore, it is entitled to deference.

In order to evaluate the Department's position, we start with the language of the Act and its implementing regulations. Our interpretation of the Act and regulations is guided by the Statutory Construction Act, 1 Pa. C.S. §§1501-1991. The purpose of statutory construction is to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S.A. §§ 1901 and 1921(a); *Brunner v. DEP*, 2004 EHB 684, 693 *Commonwealth v. Gilmour Manufacturing Company*, 822 A.2d 676, 679 (Pa. 2003); *Adams Sanitation Company v. DEP*, 715 A.2d 390, 393-394 (Pa. 1998). The plain language of a statute is the best indication of legislative intent. *See*, *Gilmour Manufacturing*, 822 A.2d at 679; *Bowser v. Blom*, 807 A.2d 830, 835 (Pa. 2002). In construing statutory language, it is required that a statute be construed to give effect to all of its provisions so that no provision is treated as surplusage. *Gilmour Manufacturing*, 822 A.2d at 679. Furthermore, we are cognizant of the long established maxim of statutory construction, the doctrine of *expressio*

unius est exclusion alterius, "the inclusion of a specific matter in a statute implies the exclusion of other matters." *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020).

The parties have pointed us to two specific provisions, one in the Act and the other in the regulations, as the starting point for determining eligibility. In construing the provisions identified by the parties, we remain cognizant that the Act is remedial in nature and was created "for the protection of the health, safety and general welfare of the people of the Commonwealth" and "to provide for the restoration or replacement of or compensation for surface structures damaged by underground mining." 52 P.S. § 1406.2. The statutory language in the Act, that sets forth the eligibility requirements for coverage is as follows:

> (a) Whenever underground mining operations conducted under this act cause damage to any of the following surface buildings overlying or in the proximity of the mine:
>
> (1) any building which is accessible to the public, including, but not limited to, commercial, industrial and recreational buildings and all permanently affixed structures appurtenant thereto;
>
> […]
>
> the operator of such coal mine shall repair such damage or compensate the owner of such building for the reasonable cost of its repair or the reasonable cost of its replacement where the damage is irreparable.

52 P.S. § 1406.5d(a)

The implementing regulation, 25 Pa Code § 89.142a(f)(1) provides in relevant part:

> (1) Repair or compensation for damage to certain structures. Whenever underground mining operations conducted on or after August 21, 1994, cause damage to any of the structures listed in subparagraphs (i) -- (v), the operator responsible for extracting the coal shall promptly and fully rehabilitate, restore, replace or compensate the owner for material damage to the structures resulting from the subsidence unless the operator demonstrates to the Department's satisfaction that one of the

> provisions of § 89.144a (relating to subsidence control: relief from responsibility) relieves the operator of responsibility.

Guided by the aforementioned principles of statutory interpretation, including the Statutory Construction Act, we first note that the statutory provision (52 P.S. § 1406.5d(a)) and the regulatory provision (25 Pa Code § 89.142a(f)(1)) do not contain the phrase "in place at the time of underground mining" as part of the eligibility requirements for commercial buildings. This phrase is apparently Department shorthand for its interpretation of what the Act and its implementing regulations require for eligibility. Additionally, neither the Act nor the regulations contain any direct language that further limits eligibility to only commercial buildings that are in place at the time of the *closest* active mining. The plain language of the portion of the Act identified by the parties provides that restoration or compensation will be provided whenever underground mining operations conducted under the Act cause damage to "any building which is accessible to the public, including, but not limited to, commercial, industrial and recreational buildings..." 52 P.S. § 1406.5d(a)(1). As we read this section of the Act, the only stated requirements to be eligible for coverage for damage to a commercial building caused by mining are that 1) the mining operation take place under the Act (i.e., on or after August 21, 1994), 2) the commercial building be accessible to the public, and 3) the building is overlying or is in proximity to the mine. *See* 52 P.S. § 1406.5d. The language found in the regulation at 25 Pa Code § 89.142a(f)(1) closely tracks the language in the section of the Act requiring only that 1) the underground mining operations in question were conducted on or after August 21, 1994, and 2) the structure be of the type listed in subparagraphs (i) – (v). The Pennsylvania Supreme Court has stated in regard to statutory interpretation that "although one is admonished to listen attentively to what a statute says; one must also listen attentively to what it does not say." *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020) (citing *Kmonk-Sullivan v. State Farm Mutual*

Automobile Insurance Company, 788 A.2d 955, 962 (Pa. 2001). Here, we are attentive to the specific criteria enunciated in the Act and regulation and also equally aware that neither the Act nor the regulation makes any mention of a requirement that a commercial structure be in place at the time of closest mining.

Mr. Telegraphis' claim satisfies the stated requirements in the identified provisions of the Act and regulations. Mining activity in the Maple Creek Mine took place post-Act, from 1995 until 2003, therefore, the first eligibility requirement is satisfied. The Building is a commercial building. Commercial buildings are specifically referenced in both the Act and regulations with the only qualifier being that it must be accessible to the public. In both the Report and in the testimony at the hearing, the Department recognized that the Building was accessible to the public. Thus, the second eligibility criterion is also met in this instance. The third eligibility requirement found in the identified section of the Act is that the building must overlie or be in proximity to the mine. There is no definition in the Act or the regulations that sets forth what is meant by "overlying the mine or in proximity to the mine." Mr. Bodnar testified that he was not aware of anything in the Act that stated how many feet away a building could be located and still satisfy the requirement of proximity to the mine. (T. at 191). The Department acknowledges that the meaning of this phrase has not been previously considered by this Board or any other Pennsylvania Court. Department's Post-Hearing Brief at 22. In this case, without defining the outer limits of what building locations might be covered by the phrase "proximity to the mine," we have no problem concluding the Building which is located within the permit area of the Maple Creek Mine, and, in addition, is located 85 feet horizontally at its closest point from an area of active coal mining in the Maple Creek Mine, satisfies the requirement that it be in proximity to the mine within the meaning of the Act.

The Department did not engage in a detailed analysis of the statutory or regulatory language or identify in what way it concluded that the Building failed to meet the specific language discussed above. Instead, the Department relied on its own interpretation to arrive at its determination that the Building was not afforded coverage under the Act. Mr. Bodnar alone provided testimony regarding the Department's interpretation and application of the eligibility requirements. He testified specifically about how the eligibility requirements applied to the Building but only tangentially discussed the Department's overall interpretation of the Act and the regulations. The Department offered, at best, limited testimony supporting its assertion in its Post-Hearing Brief that it had consistently interpreted the Act and regulations to require a commercial building to be in place at the time of nearest mining to be eligible for coverage. It did not offer any evidence at the hearing to that effect, such as Department guidance documents or internal Department memos, that would support its assertion that it has consistently interpreted and applied the law in this way.

Its first legal argument for its interpretation relies on statements in the 1998 regulatory preamble to the mine subsidence regulations located in the *Pennsylvania Bulletin.* As the case law makes clear, a preamble only aids in our understanding of the Act and regulations if ambiguity exists within the relevant provisions.[5] We are not sure whether it is appropriate to consider the preamble in this case but, even if we accept that there is ambiguity in the Act and regulations that allow the consideration of the preamble, we find no support in the cited preamble for the Department's interpretation. The Department cites specific preamble language from the

[5] In cases where ambiguity exists, preambles can be a useful tool to resolve uncertainty in interpretation. *See UMCO Energy Inc., v. DEP*, 938 A.2d 530, 537 (Pa. Cmwlth. 2007). "However, preambles may not be used to create ambiguity where none exists, and in any case where a preamble is used as a tool to resolve an ambiguous law, the preamble is not controlling." *Id.* (citing, *English v. Commonwealth*, 816 A.2d 382, 387 (Pa. Cmwlth. 2003)).

Pennsylvania Bulletin that provides that "section 5.4(a) of BMSCLA and § 89.142a(f) are to be interpreted to require an operator to repair all dwellings in place at the time of underground mining and all permanently affixed appurtenant structures in place at the time of underground mining." Department's Brief at 17; 28 Pa. Bull. at 2772. On its face, the preamble language addresses the repair of subsidence damage to dwellings and appurtenant structures rather than commercial buildings like the Building. This distinction is important because, in the quoted preamble language, the Department was addressing a question concerning the eligibility language for dwellings and appurtenant structures and the statutory language in the Act applicable to dwellings is different than the statutory language involving commercial buildings.

The specific statutory language in the Act addressing commercial buildings states "any building which is accessible to the public, including but not limited to, commercial, industrial and recreational buildings and all permanently affixed structures appurtenant thereto." 52 P.S. § 1406.5d(a)(1). The specific statutory language addressing dwellings and appurtenant structures thereto, that is the subject of the interpretation offered in the Department's preamble, has additional eligibility requirements beyond those concerning commercial structures based on the timing of the mining permit and the location of the structure. It states, "dwellings used for human habitation and permanently affixed appurtenant structures or improvements in place on the effective date of this section or on the date of the first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application." 52 P.S. § 1406.5d(a)(3). The language in the Act addressing dwellings and appurtenant structures specifically sets forth the requirement that certain covered structures be "in place" at one of three specified times. The problem, in our opinion, is that the Department has taken the language from one statutory provision and applied it to a separate

provision where it does not appear. The absence of the "in place" language in the statutory provision in the Act addressing commercial structures supports our finding that the Act does not contain the specific restriction that the Department applied in our case.

In our opinion, the Department's second argument, that the overall purpose and structure of the Act and implementing regulations support its interpretation, is a stronger argument than its argument relying on the preamble. The Act and its implementing regulations attempt to strike a balance between mining interests and protecting property owners. Many of the statutory and regulatory requirements are designed to limit damage to structures resulting from mining activity by requiring mining companies to take certain actions in advance of the mining. The Department specifically references landowner notification requirements, subsidence control plans, premining surveys and the requirement that a mining company may only use a mining technique that will cause irreparable damage to a covered structure with consent of the owner or by taking measures to mitigate subsidence damages as these are types of actions required under the Act and regulations. (Department's Post-Hearing Brief at 19). The Department argues that these requirements cannot be applied to structures that do not exist at the time of mining and demonstrate that the "intent of the law is to cover only structures that are in place at the time of the mining." (Department's Post-Hearing Brief at 20).

The Department is correct that certain aspects of the statutory and regulatory requirements are most easily understood in the context of buildings that are in place at the time of mining.[6] For

[6] We are not convinced that the landowner notification regulation cited by the Department offers strong support for the Department's interpretation since the regulation provides that the required notice can be sent up to 5 years prior to mining beneath a structure. *See* 25 Pa Code § 89.155(a). We also recognize that the landowner notification and subsidence control plans are also designed to protect surface lands and water supplies and the mining company may still be required to provide notification and complete a subsidence control plan even in the absence of structures overlying the mine permit area. *See* 25 Pa Code § 89.141(d) and 25 Pa Code § 89.155(a).

instance, both the Act and the regulations, along with the Department, put a substantial emphasis on premining surveys as part of the overall scheme to protect the interests of both structure owners and the mining companies. Mining companies are required to complete a pre-mining survey on all structures listed in 25 Pa Code § 89.142a(f)(1) including commercial buildings like the Building. 25 Pa Code § 89.142a(b)(1). The premining survey must be completed prior to the time when the structure falls within a 30-degree angle of draw of the underground mining or a larger area if required by the Department. 25 Pa Code § 89.142a(b)(1)(ii). As the Department points out, a mining company cannot complete a premining survey on a building that has not yet been constructed. Further, both the Act and the regulations provide mine operators with targeted liability relief from their obligation to repair or compensate for subsidence damage related to their ability to access buildings for premining and postmining surveys. 52 P.S. § 1406.5d(c); 25 Pa Code § 89.142a(f)(1) and § 89.144a(f). All of this offers some support to the Department's interpretation limiting coverage to buildings "in place at the time of mining."

Problems arise with this approach, as it did in this case, when the construction of a structure takes place contemporaneously with ongoing mining activities. The Department has recognized this fact in its interpretation of the requirements for premining surveys. In the same *Pennsylvania Bulletin* preamble that was cited above, the Department discussed its revision of 25 Pa. Code § 89.142a(b). (28 Pa. Bull. at 2770). The Department revised this regulation to include a provision that released mine operators from the requirement of having to conduct a premining survey when the building was constructed less than 15 days prior to the date on which the structure would fall within the 30-degree angle of draw.[7] The revision was meant to apply to a situation like the one

[7] We note that this regulation uses an undefined term "constructed" rather than "in place" when discussing the issue of the timing of a building under construction in relation to ongoing mining activity. The Department presented no testimony and there was no mention in any of the documents we reviewed about whether the Department views these terms as interchangeable or interprets the term "constructed" in a

in this case where no premining survey was or could be conducted because construction and mining were occurring too close in time. The preamble specifically states that the "release of the responsibility to conduct a survey in no way releases a mine operator from the responsibility to repair the structure if it is damaged." (28 Pa. Bull. at 2770). In other words, the Department concluded that when the Act's overall objective to protect buildings from subsidence damage by requiring mining companies to take premining actions could not be met, even due to circumstances outside of the mining companies' control, the mine operator was not released from its obligation to repair a structure damaged by its mining activity. This interpretation suggests to us that the Department has not always consistently taken the position that a building must be in place so that the mining company can complete premining mitigation measures in order for coverage to be available under the Act and regulations.[8]

Taking into account the specific statutory and regulatory language identified by the parties, as well the overall purpose and structure of the Act and regulations, we find that the Department's determination that Mr. Telegraphis' claim should be denied because the Building was not in place by October 31, 1999, is too narrow a reading of the eligibility requirements and is an unreasonable application of those requirements to the facts of this case.[9] The plain language of the Act and the

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similar manner to its use of the term "in place." This further raises our concern about whether the Department's interpretation of this issue has been as consistent as it suggests in its Post-Hearing Brief.

[8] The lack of a consistent application of the interpretation offered by the Department undercuts its argument that it is owed deference in this case. As we discuss above, the Department failed to offer evidence that it routinely applies the interpretation it relied on here and we further conclude that the interpretation offered by the Department is not directly supported by the language of the Act and regulations cited by the Department. *See Commonwealth v. Gilmour Manufacturing Company.,* 822 A.2d 676, 679 (Pa. 2003) (Courts will only recognize such deference when the reviewing court is satisfied that the interpretation tracks the meaning of the statute in question.) All of this leads us to find that we do not owe deference to the interpretation applied by the Department to the facts of this case.

[9] Two recent Commonwealth Court cases involving the Underground Storage Tank Indemnification Board inform our decision. *See*, *Transportation Services, Inc. v. Underground Storage Tank Indemnification Bd.*, 67 A.3d 142, 155-56 (Pa. Cmwlth. 2013); *Shrom v. Pa. Underground Storage Tank Indemnification Bd.,*

regulations do not contain a requirement that the Building had to be in place by that date. As we discussed, the Building satisfies the basic statutory and regulatory requirements that 1) the claim involves post-Act mining, 2) be a commercial building accessible to the public, and 3) be in proximity to the mine. We agree with the Department that the overall structure of the Act and the regulations places some limits on when a building must be in place in order to be eligible for coverage under the Act and regulations. The Department has distilled its interpretation of these limits to require that the building be in place at the time of mining. There appears to be no dispute that the Building was in place at the time of mining in the Maple Creek Mine. Mining in the Maple Creek Mine took place from 1995 to 2003. We determined that the Building was, more likely than not, in place in November 1999. At the outside, the County tax records confirm that the building was in place in June 2000.

The problem in this case is that despite the Department repeatedly stating that the standard that it was applying, which was that the Building had to be in place at the time of mining, the standard that the Department actually applied was much narrower. The Department required that the Building had to be in place on or before the date of the nearest mining activity in the Maple Creek Mine. We think that there is no support for that requirement in the specific language of the Act and regulations where the claim involves a commercial building, and we do not find that the overall structure of the Act that the Department relies on is consistent with that approach. In fact, a requirement mandating that a commercial building be in place at the time of the nearest mining

__A.3d__, No. 637 C.D. 2020, 2021 LEXIS 521, (Pa. Cmwlth. August 5, 2021). In both cases, the appellants were denied their remediation claims because certain fees were not paid at the time when contamination was discovered. However, the Commonwealth Court held that in each of these matters, the Indemnification Board had imposed additional eligibility requirements that the applicable act and regulations did not provide for. The Court concluded that the Indemnification Board erred in its interpretations, as its interpretations did not track the meaning of the statute.

runs counter to the Department's own interpretation that mining operators are not necessarily relieved of responsibility for damages just because they have been unable to complete a premining survey. In our opinion, focusing only on the time period when mining is taking place closest to the location of alleged subsidence damage conflates a determination of whether there has been mine subsidence damage to a specific property with the issue of eligibility for coverage under the Act and regulations. The Department stated that it was only determining eligibility but by focusing on the timing of the closest mining and its potential for actual impact on the Building, it was essentially making a determination that no other mining in the Maple Creek Mine could have caused mine subsidence damage.[10] The Department acknowledges as much when Mr. Bodnar stated that it did not consider any of the mining conducted in November 1999 because the Department determined that this mining was too far away to cause any mine subsidence damage. The Department did not set forth this determination in the January 2020 Letter and Report, instead relying on a blanket statement that because it was not in place by the end of October 1999, the Building was not eligible for coverage under the Act. Eligibility for coverage under the Act is a separate and distinct question from whether a commercial building has suffered actual mine subsidence damage. We find the Department's decision not to complete a full investigation, particularly given that the construction of the Building was concurrent with nearby mining, was unreasonable and unlawful under these facts.

Having determined that the Building is eligible for coverage under the Act and regulations, we remand this matter to the Department to determine whether the Building did in fact suffer mine

[10] To the extent that the Department's argument in this case can be read to assert that subsidence damage can only occur at or shortly after the time that mining activity is closest to the structure, the facts presented in this hearing do not support that argument. The subsidence damage that took place at neighboring buildings, including Mr. Telegraphis' house, occurred in 2018, approximately 15 years after mining in the Maple Creek Mine ceased.

subsidence damage. The focus of this hearing was on the eligibility determination made by the Department and little to no evidence was presented on the nature and extent of the alleged mining subsidence damages to the Building. Therefore, there is insufficient evidence of record for the Board to exercise its de novo review powers and reach a decision as to whether the Building was in fact damaged as a result of subsidence caused by mining activity associated with the Maple Creek Mine. The Department stated in the Report that it did not complete its investigation of the damages claimed by Mr. Telegraphis. The proper course of action is for us to remand this matter to the Department to complete its investigation and determine whether mine subsidence damaged the Building as claimed by Mr. Telegraphis. If the Department determines that there is mine subsidence damage, it should then determine the source of the damage and any liability associated with the damage. No one should read our decision in this case to pass any judgment on the issue of whether the Building sustained mine subsidence damage, whether any alleged damages are the result of mining in the Maple Creek Mine, and whether MCMI (or any other party for that matter) is liable for any alleged damages.

CONCLUSIONS OF LAW

1. Mr. Telegraphis bears the burden of proof in this appeal. 25 Pa. Code § 1021.122(a).

2. In order to prevail on his claim, Mr. Telegraphis must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that it is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Center for Coalfield Justice v. DEP*, 2017 EHB 799, 822; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269.

3. The preponderance of the evidence standard requires that the evidence in favor of the proposition is greater than the evidence opposed to it and that the evidence is sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established. *United Refining Company v. DEP*, 2016 EHB 442, 449.

4. The Bituminous Mine Subsidence and Land Conservation Act and its implementing regulations require coal mine operators to repair mine subsidence damages or compensate owners the reasonable cost of repairs or costs of replacement where the damage is irreparable where the damaged buildings meet the eligibility requirements for coverage. 52 P.S. § 1406.5d(a).

5. In order to be eligible for coverage under the Bituminous Mine Subsidence and Land Conservation Act, the owner of a commercial building must show, at a minimum, that 1) the mining operation took place under the Act (i.e., on or after August 21, 1994), 2) the commercial building is accessible to the public, and 3) the building is overlying or is in proximity to the mine. 52 P.S. § 1406.5d.

6. The Building satisfied the minimum criteria for eligibility for coverage under the Bituminous Mine Subsidence and Land Conservation Act and its implementing regulations.

7. The Act and the regulations do not support the Department's position that, under the facts presented, a commercial building must be in place at the time of the closest mining activity.

8. The Department acted unreasonably and unlawfully in denying Mr. Telegraphis' claim for his Building on the stated basis that the Building was not eligible for coverage under Bituminous Mine Subsidence and Land Conservation Act and its implementing regulations.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRIAN TELEGRAPHIS	:	
	:	
v.	:	**EHB Docket No. 2020-012-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 4th day of November, 2021, it is hereby ORDERED that the appeal is granted and the matter is remanded to the Department for a determination of whether mine subsidence caused damage to Mr. Telegraphis' Building and, if subsidence damage has occurred, a determination of liability for the damage.

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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 4, 2021

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TONYA STANLEY, BONNIE DIBBLE, AND JEFFREY DIBBLE	:	
v.	:	**EHB Docket No. 2021-013-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COTERRA ENERGY INC. f/k/a CABOT OIL AND GAS CORPORATION, Intervenor	:	**Issued: November 10, 2021**

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

In an appeal of a Department determination on a water supply contamination complaint under the Oil and Gas Act, the Board grants summary judgment on the issue of the distance of the Appellants' water supply from a company's unconventional gas wells. The distance between the water supply and the nearest gas wells is greater than the liability presumption set forth in the Oil and Gas Act. The Board also finds that an argument advanced by the Appellants that the Department committed an unconstitutional taking is not contained in their notice of appeal. The remaining issues in the appeal involve disputed material facts and summary judgment is denied.

O P I N I O N

Tonya Stanley, Bonnie Dibble, and Jeffrey Dibble (the "Appellants") have appealed a letter from the Department of Environmental Protection (the "Department") dated January 15, 2021 in which the Department determined that issues of turbidity and sediment in the Appellants' water supply were not caused by gas drilling operations conducted by Coterra Energy Inc. f/k/a Cabot

Oil and Gas Corporation ("Coterra") at its Abbott D and M wells in Bridgewater Township, Susquehanna County.[1] The letter came in response to a complaint made by the Appellants on January 7, 2020 regarding issues they began noticing in September 2019 regarding their water quality. The Appellants generally assert that Coterra is responsible for pollution of their water supply and that the Department's determination was made in error.

All three parties have now moved for summary judgment, either in part or in full. The Department has moved for partial summary judgment on the issue of whether the Appellants' water supply is outside of the distance specified in the Oil and Gas Act, 58 Pa.C.S. §§ 3201 – 3274, for a polluted water supply to be *presumed* as being polluted from oil and gas operations. Coterra has moved for summary judgment on the same issue. Coterra also seeks summary judgment on the presence of triethylene glycol (TEG) in the Appellants' water supply, with Coterra asserting that it did not use TEG in its operations and TEG was not detected in Appellants' water supply.[2] Coterra asks the Board to enter summary judgment in its favor and dismiss this appeal. The Appellants' motion argues that the Department improperly determined that Coterra's gas operations were not the cause of the Appellants' water supply contamination, and that the Department has committed an unconstitutional taking by not diligently investigating the Appellants' complaint and leaving their water supply polluted. The Appellants oppose the motions of the Department and Coterra, and the Department and Coterra oppose the Appellants' motion. For the reasons discussed below, we grant the Department's motion, grant in part and deny in part Coterra's motion, and deny the Appellants' motion.

[1] On October 21, 2021, the Board granted an unopposed motion from the Appellants requesting that the caption of this appeal be amended to substitute Coterra Energy Inc. for Cabot Oil and Gas Corporation.

[2] Earlier in the appeal we denied a motion for summary judgment filed by the Appellants in which they asserted that Coterra contaminated their water supply with TEG. (Opinion and Order, June 11, 2021.)

The standard for considering summary judgment motions is set forth at Pa.R.Civ.P. 1035.2, which the Board has incorporated into its own rules. 25 Pa. Code § 1021.94a(a). 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.Civ.P. 1035.2(1). Second, summary judgment may be available

> if, 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.Civ.P. 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." *Longenecker v. DEP*, 2016 EHB 552, 554. *See also* Note to Pa.R.Civ.P. 1035.2. Although available, the Board does not often grant summary judgment under the second scenario on the basis of a party's failure to produce facts essential to its case. *Chester Water Auth. v. DEP*, 2016 EHB 280, 282.

In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party. *Stedge v. DEP*, 2015 EHB 31, 33. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Eighty Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406). Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217.

Unconstitutional Taking

The Appellants argue in their motion that the Department has committed an unconstitutional taking by spending more than a year before making a determination on its complaint. Coterra and the Department point out that there is no takings objection contained in the Appellants' notice of appeal. Therefore, they argue, the Appellants cannot be permitted to argue it now in the context of a summary judgment motion.

A review of the Appellants' original and amended notices of appeal indeed reveals no objection related to an unconstitutional taking. The Appellants begin their amended appeal with the statement that:

> This Amended Notice of Appeal is governed by the Article 1 of the Constitution of the Commonwealth of Pennsylvania ("**Section 1**"); Environmental Rights Amendment of the Constitution of the Commonwealth of Pennsylvania, Pa. Const. Art. I, § 27 ("**Section 27**"); Pennsylvania's Oil and Gas Act, 58 Pa.C.S.A. § 3218 ("**Oil and Gas Act**"), Pennsylvania's Clean Streams Law, 35 P.S. §§ 691.1-1001 ("**Clean Streams Law**"); Pennsylvania's Solid Waste Management Act ("**Solid Waste Management Act**"); related regulations found at 25 Pa. Code Chs. 91-96, 102, and 287; *all other related acts under the Pennsylvania Constitution and jurisdiction of the Board; and all relevant case law* (collectively, "**Applicable Laws**").

(Emphasis in bold in original; emphasis in italics added.) They also include a catch-all objection in their amended appeal: "The findings and determination described in the Determination Letter are arbitrary, capricious, unreasonable, abuses of discretion and authority, and not in accordance with Applicable Laws…." (Amended Appeal at ¶ 12.) However, these broad, general statements give no indication of a takings issue being raised.

In *Chester Water Authority v. DEP*, 2016 EHB 280, the appellant asserted for the first time in its motion for summary judgment that a permittee would not be able to comply with a certain permit limit. In their responses to the motion, the Department and the permittee complained that the issue was not identified in the appellant's notice of appeal, nor was it identified in discovery,

and they argued that the appellant should be precluded from arguing it in its summary judgment motion. We reviewed the notice of appeal and agreed, concluding, "It is simply not appropriate to spring an entirely new issue upon opposing parties in a motion for summary judgment." *Id.* at 285.

The same is true here. Although we generally broadly construe the objections contained in a notice of appeal, *Benner Twp. Water Auth. v. DEP*, 2019 EHB 594, 637, there is nothing in the Appellants' notice of appeal or amended notice of appeal that comes close to capturing the genre of the issue of a takings claim. Although the Board clearly has jurisdiction to decide takings claims, *Marshall v. DEP*, 2019 EHB 352, 354, a takings claim is a very specific and unique claim that must be clearly set forth by a party. Simply stating that the appeal is governed by the Pennsylvania Constitution is not enough and it cannot "excuse a failure to include a more specific objection." *Chester Water Auth.* at 285 (citing *Sebastianelli v. DEP*, 2016 EHB 243; *Lower Mt. Bethel Twp. v. DEP*, 2004 EHB 126, 127; *Williams v. DEP*, 1999 EHB 708, 716). "Due process requires that parties be aware of the claims or defenses which are being raised against them." *Williams*, 1999 EHB at 720. Arguing an entirely new issue for the first time in a summary judgment motion is improper and all but certainly destined for denial.

Presumptive Liability Distance

The Department and Coterra argue that it is undisputed that the Appellants' water supply is greater than 2,500 feet from any of Coterra's gas wells on the Abbott well pads, and therefore, the Appellants' water supply does not fall within the provision of the Oil and Gas Act that *presumes* an operator responsible for pollution.

This argument relates to objections in Paragraphs 5 and 6 of the Appellants' amended notice of appeal. The Appellants assert that "[a]ny reliance on the Department that interpreted the Oil and Gas Act to solely use the 'top hole' as the presumptive liability marker is in direct conflict

with the purpose of the Oil and Gas Act." (Amended Appeal at ¶ 5.) They also contend that the end of a lateral well bore, after an unconventional well is drilled down and makes its turn into the target geologic formation, is within 2,500 feet: "at a measured depth of 5619 ft. *The* [sic] *wellbore lies 1900.80 feet from the Property. At 6339 MD, the distance between the wellbore and the property decreases to only 1478.40 feet.*" (*Id.* at ¶ 6.b.v (emphasis in original).)

The statutory liability presumption in the Oil and Gas Act is contained in Section 3218 governing the protection of water supplies and it provides:

> **Presumption. —** Unless rebutted by a defense established in subsection (d), it shall be presumed that a well operator is responsible for pollution of a water supply if:
> ….
> (2) in the case of an unconventional well:
> (i) the water supply is within 2,500 feet of the unconventional **vertical well bore**; and
> (ii) the pollution occurred within 12 months of the later of completion, drilling, stimulation or alteration of the unconventional well.

58 Pa.C.S. § 3218(c) (emphasis added). Water supplies subject to the rebuttable presumption are to be provided with a temporary water supply by the operator of the gas well. *Id.* at § 3218(c.1).[3]

The Department's investigation and referral memo, attached to the affidavit of Jennifer Means (DEP Ex. D) in the Department's motion, places the Abbott M wells at approximately 3,455 feet from the Appellants' water supply, and the Abbott D wells at approximately 2,700 feet. (*Id.* at Ex. 1, 8-10.) Consistent with the Department's measurements, one of Coterra's employee's, Phillip Levasseur, took GPS coordinates of the water supply and the Abbott wells. (Coterra Ex. E.) His measurements put the Appellants' water well at 2,677.61 feet from the Abbott D wells, and 3,459.19 feet from the Abbott M wells. (*Id.* at Tab 3.)

[3] There is no definition of "water supply" in the Act (as opposed to "water source"), but the regulations define a water supply as "[a] supply of water for human consumption or use, or for agricultural, commercial, industrial or other legitimate beneficial uses." 25 Pa. Code § 78a.1.

The Appellants do not appear to disagree that their water supply is outside of the presumption distance. In the statement of facts accompanying their own motion for summary judgment, they admit that the gas wells are greater than 2,500 feet from their water supply. With respect to the Abbott M wells, they state: "Abbott M is a well pad comprising seven active wells, with two of the surface holes located 3537.60 feet from the Water Supply, with the remaining five at a distance of 3484.80 feet." (Apps. Statement of Facts at ¶ H.) With respect to the Abbott D wells, they state: "The distance between the Water Supply and four of the five well locations as reported is 2692.80 feet, with just 2745.60 feet between the Water Supply and the reported location of ABBOTT D 11." (Apps. Statement of Facts at ¶ I.) They go on to say, "**Even though the distance between this surface well bore and the Water Supply exceeds 2500 feet on the surface**, the well and its lateral bores operate within 1500 feet of Appellants' Water Supply." (*Id.* (emphasis added).)

Indeed, the Appellants try to get around the 2,500-foot presumption by claiming that the underground, horizontal well bores are only 1,500 or 1,900 feet from their water supply. (Apps. Resp. to DEP Brief at 4; Apps. Resp. to Coterra Brief at 5.) But the statute clearly speaks in terms of the distance from the "vertical well bore." Further, the Appellants cite no support in the record for their 1,500 and 1,900-foot measurements; they do not identify which wells' laterals allegedly comes within this distance; and they ignore the vertical depth of a horizontal well bore at that location, which according to Department is more than 5,000 feet below the surface. (DEP Ex. C at 36.)

The Appellants point out that the Oil and Gas Act requires a permit applicant for an unconventional gas well to notify landowners with water supplies within *3,000 feet* of the vertical well bore of the plan to drill a gas well and to send the landowners a copy of the plat of the well to

be drilled. 58 Pa.C.S. § 3211(b). The Act also requires gas operators to notify landowners of their rights under Section 3218 and "advise them of the advantages of taking their own predrilling or prealteration survey." *Id.* at § 3211(b.1). To the extent the Appellants are making arguments that the presumptive liability distance should be extended to 3,000 feet, or that the distance should be based on the distance from the horizontal well bore, these may be policy arguments to present to the Legislature, but our job is to apply the law as written and there is no ambiguity here.

"The starting point for all statutory interpretation is the statutory language and the object of all interpretation and construction of statutes is to ascertain and effectuate the intent of the General Assembly." *Limerick Partners I, LP v. DEP*, 2013 EHB 502, 510 (citing 1 Pa.C.S. § 1921(a)). When a statute is clear and unambiguous on its face, there is no need to engage in statutory interpretation to ascertain the intent of the Legislature and the plain meaning of the statute must prevail. 1 Pa.C.S. § 1921(b) & (c); *PennEnvironment v. DEP*, EHB Docket No. 2020-002-R, slip op. at 5 (Opinion and Order, Jan. 19, 2021); *Joseph J. Brunner, Inc. v. DEP*, 2004 EHB 684, 693.

The statute here is very clear that the presumption distance is measured 2,500 feet from the "vertical well bore." 58 Pa.C.S. § 3218(c)(2)(i). "Vertical well bore" is certainly a term of art in the oil and gas industry in some respects, but the word "vertical" has not taken on a new meaning. Therefore, we interpret vertical according to its "common and approved usage," 1 Pa.C.S. § 1903(a), to mean "being in a position perpendicular to the plane of the horizon; placed or acting perpendicularly or in an upright position or direction; upright; straight up and down." *Webster's New Twentieth Century Dictionary, Unabridged* 2032 (2d ed. 1966). Thus, the distance portion of the presumption only applies if a water supply is within 2,500 feet of the "straight up and down" portion of the well bore, not the portion of the well bore after it has made its horizontal turn. Here,

it is undisputed that the Appellants' water supply is more than 2,500 feet from the vertical well bore, and therefore, the presumption does not apply.

The Appellants say that simply because the *presumption* does not apply does not mean that there was not pollution to their water supply. We agree, and so does the Department. (DEP Reply Brief at 9.) But that does not save the Appellants from an entry of summary judgment on the applicability of the presumption. It simply means that the Appellants bear the burden of proving in this appeal that their water supply was contaminated by Coterra's gas operations. *See Kiskadden v. DEP*, 2015 EHB 377.

Contamination of the Water Supply

The Department's January 15, 2021 determination letter states that the Department's samples of the Appellants' water supply found it to have levels of iron and turbidity above the pre-drill samples taken by Coterra and above the relevant statewide standards. (Coterra Ex. B at 1-2.) The Department's letter also says that "iron-related bacteria, sulfate-reducing bacteria, and slime-forming bacteria were also present in the Water Supply." (*Id.* at 3.) However, the Department concluded that any pollution of the Appellants' water supply was not due to any of Coterra's gas operations at the Abbott wells.

The real crux of this appeal is whether or not the Department correctly determined that Coterra is not responsible for any pollution of the Appellants' water supply. While both the Appellants and Coterra seek summary judgment on aspects of this issue, we find that there are still outstanding disputes over material facts that are best resolved at a hearing on the merits where we will have the benefit of live testimony and the cross-examination of relevant witnesses.[4] *Miller v. DEP*, 2018 EHB 238, 243.

[4] The Department agrees, stating in the brief in support of its motion: "The appropriateness of the Department's Determination that Appellants' Water Supply was not polluted is the primary subject of the

To the extent there are any remaining arguments in the parties' motions that we have not addressed in this Opinion, we have considered those arguments and found that they have not met the standard for granting summary judgment. The Board will schedule this matter for a hearing on the merits.

Accordingly, we issue the Order that follows.

objections set forth in Appellants' Notice of Appeal. That issue, which the Board's June 11, 2021 Opinion and Order denying Appellants' Summary Judgment Motion recognizes, implicates disputed material facts and is best resolved by the Board after an evidentiary hearing." (DEP Brief at 4.)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TONYA STANLEY, BONNIE DIBBLE, AND JEFFREY DIBBLE	:	
v.	:	**EHB Docket No. 2021-013-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COTERRA ENERGY INC. f/k/a CABOT OIL AND GAS CORPORATION, Intervenor	:	

O R D E R

AND NOW, this 10th day of November, 2021, it is hereby ordered as follows:

1. The Department's motion for partial summary judgment is **granted**.
2. The Intervenor's motion for summary judgment is **granted in part and denied in part** in accordance with the foregoing Opinion.
3. The Appellants' motion for summary judgment is **denied**.

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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 10, 2021

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROGER GLAHN AND DONNA GORENCEL	:	
	:	
v.	:	**EHB Docket No. 2021-049-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 12, 2021**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion to dismiss filed by the Department where the appellants have not appealed any action of the Department. The appellants filed their appeal before the Department has completed its investigation of, and rendered a final determination on, the appellants' water supply contamination complaint under the Oil and Gas Act. The Board does not have jurisdiction over the Department's prolonged inaction on reaching a determination on the complaint.

O P I N I O N

On May 10, 2021, Roger Glahn and Donna Gorencel (the "Appellants") filed a notice of appeal concerning possible contamination of their water supply from nearby oil and gas operations in North Branch Township, Wyoming County. The Appellants described their appeal as follows:

> Appellants seek the Board's *de novo* review of the Department's actions under Applicable Laws, specifically including the following (a) not advising Appellants of the distance between nearby well bores operated by Southwestern [SWN Production Company, LLC] and the absence of GPS coordinates in the Department's correspondence, (b) not requiring that Southwestern to provide water to Appellants under the Oil and Gas Act; (c) decision not to advise Appellants that

Opinion of the Board by Judge Labuskes, joined by Judge Coleman and Judge Beckman.
Dissenting Opinion by Chief Judge Renwand.

> Southwestern is presumptively liable under the Oil and Gas Act, (d) not testing for chemicals used by oil and gas operations, including Southwestern and Williams.

(Notice of Appeal Objections at ¶ 1.) Attached to the Appellants' notice of appeal were four exhibits: (1) a "summary and timeline" composed by the Appellants of events preceding the filing of the appeal; (2) two maps showing distances between the Leber 2H and 3H gas wells and the Appellants' spring house; (3) laboratory results of water sampling; and (4) several photographs. The Appellants did not attach to their appeal any written action of, or communication from, the Department of Environmental Protection (the "Department"). They stated in their appeal that they submitted a complaint to the Department in July 2020, requesting that the Department investigate potential pollution of their water supply. As of May of this year, at the time the appeal was filed, the Department had not issued a determination regarding the investigation of their complaint.

We should note upfront that the Oil and Gas Act, 58 Pa.C.S. §§ 3201 – 3274, contains a specific provision for landowners to file a complaint with the Department if they believe their water supply has been affected by oil and gas operations, and for the Department to investigate and make a determination on that complaint.

> **Pollution or diminution of water supply. —** A landowner or water purveyor suffering pollution or diminution of a water supply as a result of the drilling, alteration or operation of an oil or gas well may so notify the department and request that an investigation be conducted. **Within ten days of notification, the department shall investigate the claim and make a determination within 45 days following notification**. If the department finds that the pollution or diminution was caused by drilling, alteration or operation activities or if it presumes the well operator responsible for pollution under subsection (c), the department shall issue orders to the well operator necessary to assure compliance with subsection (a), including orders requiring temporary replacement of a water supply where it is determined that pollution or diminution may be of limited duration.

58 Pa.C.S. § 3218(b) (emphasis added). *See also* 25 Pa. Code § 78a.51(b)-(c) (regulation providing same). The timeframes for the Department to investigate and respond to the complaint are explicitly laid out—10 days from the complaint to begin the investigation, and 45 days from the

complaint to complete the investigation. The Appellants pointed out in their appeal that the Department far exceeded the 45-day statutory timeframe to make a determination.

On July 14, 2021, the Appellants filed a motion to amend their notice of appeal. The proposed amendment to their appeal included several additional objections and exhibits. Included in those exhibits was a June 8, 2021 letter from the Department to the Appellants informing them that the Department's investigation "indicates that oil and gas activities are presumed to be the cause of the pollution of your water supply." (Amended Appeal at Proposed Ex. G.) The letter enclosed a "Notice of Legal Presumption" the Department issued to the operator of the Leber wells, SWN Production Company, that requested SWN provide temporary water to the Appellants and submit a plan to restore or replace the water supply, or otherwise provide a rebuttal to the Department's presumption. The letter to the Appellants said that "[t]he Department will continue to pursue this matter." (*Id.*)

In response to the motion to amend, the Department filed a letter on July 28, stating that it did not oppose the additional objections in the proposed amendment, but that it did object "to the extent that Appellants seek to join Southwestern Production Company, LLC, Chesapeake Appalachia, L.L.C., and Williams Companies, d/b/a Transcontinental Gas Pipe Line Company, LLC as parties to this appeal…." On August 2, 2021, we issued an Order granting in part and denying in part the Appellants' motion to amend. Our Order granted the amendment to add the Appellants' seven new objections, but we denied the motion "if and to the extent it is intended to serve as an appeal from any Departmental actions that are different than those identified in the original notice of appeal, and the Appellants' request by way of the motion to add additional parties is also denied." *See also Hopwood v. DEP*, 2001 EHB 1254, 1258 ("It is difficult to conceive how

an amendment of an appeal can be granted to allow the Appellant to appeal a *separate final action* of the Department.").

The Department has now filed a motion to dismiss this appeal. The Department argues that the Board lacks jurisdiction over the appeal because the Appellants have not appealed any action taken by the Department and instead seek to have the Board compel the Department to take action while the Department continues to investigate the Appellants' water supply contamination claim. The Appellants oppose the motion, arguing that the Department has taken several actions that affect their rights that are subject to the Board's jurisdiction.

The Board has the authority to grant a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *Lawson v. DEP*, 2018 EHB 513, 514; *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. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party. *Ctr. for Coalfield Justice v. DEP*, 2018 EHB 758, 761; *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB 913, 915. Motions to dismiss will be granted only when a matter is free from doubt. *Bartholomew v. DEP*, 2019 EHB 515, 517; *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.

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"); *Monroe Cnty. Clean Streams Coal. v. DEP*, 2018 EHB 798, 800; *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747, 750. 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. *Hordis v. DEP*, 2020 EHB 383, 388; *Northampton Bucks Cnty. Mun. Auth. v. DEP*, 2017 EHB 84, 86; *Dobbin v. DEP*, 2010 EHB 852, 858; *Kutztown*, 2001 EHB at 1121. Part of this assessment includes reviewing Department decisions in the context of the circumstances and the applicable statutory and regulatory scheme. *Felix Dam Pres. Ass'n v. DEP*, 2000 EHB 409, 422.

In Paragraph 2 of their response to the Department's motion, the Appellants identify what they assert constitutes the Department's appealable actions, stating, "The Appellants filed this appeal in response to the following matters, which are, by their very nature, appealable actions and fall entirely within the Board's jurisdiction." (Resp. at ¶ 2.) The matters identified by the Appellants include the following:

- An unconstitutional taking: "Appellants argue that the Commonwealth committed an unconstitutional taking because, among other things, the Department failed in its obligations as trustee under PEDF III, the effects of which have placed all Pennsylvanians in harm's way from drinking polluted water to being killed by facilities used in oil and gas operations. Appellants look forward to the Board's analysis of unconstitutional takings under the Environmental Rights Amendment, specifically including a determination of when the taking occurred." (Resp. at ¶ 2(a).)
- "The Department's violations under the Oil and Gas Act." (Resp. at ¶ 2(b).)
    - The Appellants say water tests performed by the Appellants "revealed elevated and/or unsafe levels of Sulfate, Turbidity, Alkalinity, Specific Conductance, Total Dissolved Solids, Aluminum, Barium, Calcium, Magnesium, Potassium, Strontium

and Hardness, as well as Total Coliform and E. Coli. To date, the Department has not notified any other potentially affected residents of this pollution, including the existence of high levels of e. coli given Southwestern's sewage disposal tank as described in the Notice of Appeal nor has it issued violations to Southwestern, Chesapeake or Williams for any cumulative effects of their operations surrounding the Property." (Resp. at ¶ 2(b)(i).)

- "Appellants were and remain unaware of what fracking fluids to test for that have been used by Southwestern, Chesapeake and Williams and the Department did not, on any visit, test for fracking fluids or notify Appellants of the Southwestern Violations and the C Violations." (Resp. at ¶ 2(b)(ii).)
- "The Department intentionally concealed the fact that Appellants' water supply was within 2500 feet of a Southwestern well bore in concert with Southwestern, Chesapeake and Williams and proceeded to commence a fraudulent investigation to pacify and delay Appellants'." (Resp. at ¶ 2(b)(iii).)
- An April 16, 2021 letter from Department employee Casey Baldwin that the Appellants argue "does not document the Southwestern Violations, (1) omits the fact that Appellants' Water Supply was within 2500 feet of a Southwestern well-bore and were entitled to fresh water deliveries, (2) only sets forth high turbidity and no other pollutants or other elevated levels and that 'primary turbidity MCL is only applicable to regulated water sources or regulated groundwater sources under the direct influence of surface water' and (3) that, by continuing to delay the investigation, the Department confesses its ongoing violations under the Oil and Gas Act's 45 day investigation period." (Resp. at ¶ 2(b)(iv).)

- A July 7, 2021 letter from SWN Production Company to the Department that the Appellants argue "does not reflect the reality of its operations, including Southwestern Violations as well as any other undisclosed violations, and the effects those operations have had on Appellants, the Water Supply and their Property." (Resp. at ¶ 2(b)(v).)

- "**Chesapeake Violations.** The Property is subject to an oil and gas lease with Chesapeake and a portion of the Property is included in Chesapeake's 'Evelyn Unit.' See Exhibits J and K to Appellants' Notice of Appeal. Appellants have discovered that Chesapeake has accumulated multiple violations on the Evelyn well pad, of which Appellants were never notified." (Resp. at ¶ 2(c).)
- "The filings and pleadings on record demonstrate that the Department has failed to uphold its duties and obligations to the detriment of Appellants. As a result, the Department diminished and took Appellants' property and personal interests and Appellants have been harmed and continue to be harmed by the Department's actions and failures to act under applicable laws, regulations and the Environmental Rights Amendment." (Resp. at ¶ 2(d).)

The problem for the Appellants is that none of these things are appealable actions subject to the Board's jurisdiction. Beginning with what the Appellants allege are violations the Department committed under the Oil and Gas Act, the Appellants have not cited any provision of law that requires the Department to inform the Appellants about the chemicals used in the production of the nearby wells. Nor have the Appellants identified a provision requiring the Department to notify other residents of possible pollution ahead of the completion of the Department's investigation of a water supply contamination complaint. In addition, there is no

basis in the record for the claim that the Department concealed the proximity of the gas wells to the Appellants' water supply or that the Department's investigation of the Appellants' complaint has been "fraudulent." But more importantly, we can only rule on whether the Department acted unlawfully in the context of an appealable action. The Appellants have pointed to no discrete, identifiable action of the Department where the Department did or should have done any of these things.

The Appellants also have not pointed to any provision of law that requires the Department to notify the Appellants about violations it issued to Chesapeake Appalachia, LLC. Putting that aside, the Appellants attach an email to their response that purports to reflect violations issued to Chesapeake dated May 27, 2021, and September 19, 2021, both of which post-date the filing of the appeal on May 10, 2021. (Resp. at Ex. D.) Even if the violations themselves were appealable by the Appellants,[1] it is impossible that they appealed them in their notice of appeal. Similarly, the July 7, 2021 letter from SWN Production, which is clearly not an action of the Department, also occurred two months after the appeal was filed.

Further, we cannot order the Department to issue violations to "Southwestern [SWN], Chesapeake or Williams." *See Mystic Brook Dev., L.P. v. DEP*, 2009 EHB 302, 304 ("This Board has no authority to order the Department to take enforcement action against Helvetia [the permittee]."). Whether or not the Department issues a violation is a matter of its enforcement discretion, which

> derives from the notion that it is the Department, not the Board, which has the legislative authority to pursue enforcement action against violators. Accordingly, it

[1] Generally, notices of violation (NOVs) that "merely list the violations observed, advise of the possibility of future enforcement action, or inform the recipient of the procedures necessary to achieve compliance, are not appealable actions" even when appealed by the person to whom the NOV is directed. *Cnty. of Berks v. DEP*, 2003 EHB 77, 82 (quoting *Beaver v. DEP*, 2002 EHB 666, 674). *See also Kopko v. DEP*, 2019 EHB 179, 184 n.1 ("The alleged violations are reviewable at the time the Department makes the subsequent decision that is appealed to the Board.").

> is left to the Department to choose how and when to invest its enforcement resources, largely without interference from judicial action by the Board. Therefore, even if an individual is acting unlawfully and the Department chooses to tolerate the conduct by declining enforcement action, the Board will not review that decision by the Department.

Law v. DEP, 2008 EHB 213, 215 (footnotes omitted).

The closest thing to an appealable action the Appellants identify is the Department letter from Casey Baldwin to the Appellants dated April 16, 2021, which the Appellants for the first time attach as an exhibit to their response to the motion to dismiss. The letter was not included in the notice of appeal filed on May 10, nor was it included in the proposed Exhibits A-N attached to the amended notice of appeal. The body of that letter provides in its entirety:

> Dear Mr. Glahn:
>
> On March 18, 2021 the Department of Environmental Protection ("Department") collected samples from your water supply and pond. The samples were submitted to the Department's laboratory in Harrisburg for analysis. The analytical reports for the samples are included, as well as documents that will assist you with interpreting the sample results.
>
> In regard to your water supply spring sample results, they showed that turbidity was elevated above Department standards. Turbidity was detected at 3.50 nephelometric turbidity units (NTU) which exceeds the primary Maximum Contaminant Level (MCL) of 1 NTU. Primary MCLs are intended to reflect potential dangers to human health, while secondary MCLs reflect the aesthetics of the water (i.e. taste, smell, etc.). It should be noted that the primary turbidity MCL is only applicable to regulated surface water sources or regulated groundwater sources under the direct influence of surface water.
>
> Please see the enclosed table for the results of samples collected from your Water Supply by the Department with comparison to applicable standards.
>
> Upon completion, we will notify you of the results of the investigation and any further determination by the Department regarding your Water Supply.
>
> Please contact me at 570.346.5546 if you have any questions about the Department's continuing investigation of your Water Supply.

(Resp. at Ex. B.) Attached to the letter are laboratory analytical reports from the samples of the Appellants' water supply.

Even assuming that the Appellants have appealed the Baldwin letter, it does not have any of the hallmarks of an appealable action. The letter does not affect any party's rights or liabilities, or make any decision at all. It merely provides the Appellants with sample results and advises them that the Department's investigation is ongoing. If anything the letter is interlocutory, a step in the process of the Department's investigation of the Appellants' water supply complaint that has not yet culminated in a final action—the sort of "decision" that we have long held does not qualify as an appealable action. What we said in *Phoenix Resources, Inc. v. DER*, 1991 EHB 1681, with respect to the Department's lack of action on a Solid Waste Management permit has equal applicability here:

> It was never intended that the Board would have jurisdiction to review the many provisional, interlocutory 'decisions' made by [the Department] during the processing of an application. It is not that these 'decisions' can have no effect on personal or property rights, privileges, immunities, duties, liabilities or obligations; it is that they are transitory in nature, often undefined, frequently unwritten. Board review of these matters would open the door to a proliferation of appeals challenging every step of [the Department's] permit process before final action has been taken. Such appeals would bring inevitable delay to the system and involve the Board in piecemeal adjudication of complex, integrated issues. We have refused to enter that quagmire in the past, and see no sound reason for entering it now.

Id. at 1684 (internal citations omitted). *See also Bucks County Water & Sewer Auth. v. DEP*, 2013 EHB 659, 661-62 (dismissing third-party appeal of Department letter advising township that its submitted planning module was administratively and technically incomplete); *Tri-County Landfill*, 2010 EHB at 750-51 (dismissing appeal of Department letters suspending review of permit applications under Act 67/68 due to unresolved zoning conflicts); *Envtl. Neighbors United Front v. Dep't of Envtl. Res.*, 632 A.2d 1097 (Pa. Cmwlth. 1993) (Department letters informing applicants that Department had concluded its Phase I review of hazardous waste facility permits and was moving on to Phase II not appealable to the Board until Department takes final action approving or disapproving applications). It is not until the Department makes a final decision—

at the conclusion of an investigation, at the end of a permit review process—that an appealable action comes into being.

After the appeal was filed, the Department issued another letter to the Appellants dated June 8, 2021 that makes a presumption that oil and gas activities caused the contamination of their water supply. The Appellants attached this letter as proposed Exhibits G and H to their amended notice of appeal. The body of the letter provides:

> This letter is regarding your water supply located at the above address. The Department's investigation prompted by the information that you provided to the Department on July 7, 2020 indicates that oil and gas activities are presumed to be the cause of the pollution of your water supply.
>
> Please find enclosed the Department's Notice to SWN Production Company, LLC ("Notice"). As you can see, the Notice requests that certain actions take place within defined timeframes. The Department will continue to pursue this matter.
>
> Additionally, enclosed are the laboratory analytical results of samples collected by the Department from your water supply on April 26, 2021. The sample results showed multiple compounds elevated above Department standards. Turbidity was detected at 2.50 nephelometric turbidity units ("NTU"), which exceeds the primary Maximum Contaminant Level ("MCL") of 1 NTU. The sample results also showed the presence of microbiological contaminants. Total coliform bacteria were detected at 109.1 colony-forming units per 100 milliliters.
>
> Please see the enclosed table for the results of samples collected from your water supply by the Department with comparison to applicable standards. Additionally, enclosed are documents that will assist in understanding disinfection and associated information regarding private water supplies.

(Amended Appeal at Proposed Ex. G.)

The enclosed letter to SWN Production Company, which the Department calls a "Notice of Legal Presumption," says in part:

> Based on the results of samples collected from the water supply listed in Exhibit A ("Water Supply") over the course of several months, the Department is providing SWN Production Company, LLC ("SWN") this Notice of Legal Presumption ("Notice") regarding the pollution of the Water Supply associated with SWN's oil and gas activities, set forth in the table below. The legal requirements to provide temporary water and submit a plan to the Department to restore or replace the water supply are explained below. The Department requests that SWN provide temporary water **within 24 hours** of this Notice to the location of the Water Supply.

(*Id.* (emphasis in original).) The letter goes on to require SWN Production to submit to the Department within 30 days a plan to restore or replace the Appellants' water supply. It also gives SWN the option to submit a rebuttal to the Department's findings within 30 days, either in lieu of the restore and replace plan, or in addition to it.

Once again, this letter from June 8, 2021 cannot retroactively provide jurisdiction for the appeal filed on May 10, 2021. The Appellants could have potentially appealed this letter to the Board, but they chose not to. Even if we had permitted the Appellants' amended appeal to add new actions to the current appeal, it was arguably untimely as to the June letter since the July 14, 2021 motion to amend was filed 36 days after the date of the letter. 25 Pa. Code § 1021.52(a)(1) (appeal to be filed within 30 days of receipt of written notice).

Having determined that there is no true action before us in this appeal, we turn to the question of whether the Board has jurisdiction over a failure to take action by the Department. The Appellants' notice of appeal frequently frames the appeal as one of the Department's inaction—its "not advising the Appellants of the distance between nearby well bores," "not requiring Southwestern to provide water," not advising "Appellants that Southwestern is presumptively liable under the Oil and Gas Act," and "not testing for chemicals used by oil and gas operations." (Notice of Appeal Objections at ¶ 1.) All of these items appear appurtenant to the Department's failure to reach a determination on the Appellants' water supply complaint within the 45-day timeframe in the Oil and Gas Act (or at all). The Appellants all but admit in their notice of appeal that the Board does not have jurisdiction:

> Mr. Glahn requested that the Department investigate this matter in July 2020, and pursuant to Section 5218 [sic] of the Oil and Gas Act, the Department had 45 days to issue a determination. As of today's date, and using July 31, it has been 238 days since the request for an investigation, the Department has not issued a determination letter….**The Department's habit of delaying the issuance of a determination**

> **letter has the effect of delaying and denying the ability of residents to access the jurisdiction of this Board**….

(Notice of Appeal Objections at ¶ 5 (emphasis added).)

We have consistently held that the Board lacks jurisdiction over Departmental inaction. *See e.g.*, *Lower Salford Twp. Auth. v. DEP*, 2011 EHB 333, 335 ("Whether the Department could have or should have established the TMDLs, the fact of the matter is that it did not. There simply is no final Departmental action for us to review…The Board has no jurisdiction over Department inaction."); *Westvaco Corp. v. DEP*, 1997 EHB 275, 277 ("While the denial or issuance of an application for a permit revision is a final appealable action, the Department's inaction on an application is not."); *Royer v. DER*, 1992 EHB 611 (dismissing appeal of Department's failure to take action on appellants' letter requests to lift a moratorium on issuing sewage permits for a certain subdivision; rejecting the argument that the Department's inaction amounted to a denial).[2] To the extent that there was any old caselaw of the Board permitting appeals of Departmental inaction, we overruled that caselaw in *Westinghouse Electric Corp. v. DER*, 1990 EHB 515, 518.

The wrinkle in this case is that the Oil and Gas Act requires the Department to investigate a complaint and make a determination in 45 days. 58 Pa.C.S. § 3218(b). Yet even in cases similar to this one, where a statute provides a specific timeframe for the Department to act and it fails to act within that timeframe, we have not assumed jurisdiction. A somewhat analogous statutory

[2] There is, however, at least one exception where a statute makes Departmental inaction appealable to the Board. Under the Surface Mining Conservation and Reclamation Act, 52 P.S. §§ 1396.1 – 1396.19a, a person may appeal the Department's *inaction* on a permit application: "Should any person having an interest which is or may be adversely affected by any action of the department under this subsection, **or by the failure of the department to act upon an application for a permit**, he may proceed to lodge an appeal with the Environmental Hearing Board in the manner provided by law…." 52 P.S. 1396.4(c) (emphasis added). *See also Hepburnia Coal Co. v. DER*, 1985 EHB 713. The Oil and Gas Act does not contain a similar provision with respect to water supply complaints.

scheme exists in the Pennsylvania Sewage Facilities Act, 35 P.S. §§ 750.1 – 750.20a, with respect to private requests made to the Department seeking to have the Department order a municipality to revise its Act 537 plan. Section 5 of the Sewage Facilities Act, 35 P.S. § 750.5, lays out a process by which a person may submit a private request to the Department and the Department must notify the municipality and solicit comments. The Department, then, "**shall render a decision** and inform the person requesting the revision and the appropriate municipality in writing **within one hundred twenty days** after either receipt of the comments permitted by this section or the expiration of the forty-five day comment period when no comments have been received…." 35 P.S. § 750.5(b.2) (emphasis added). *See also* 25 Pa. Code § 71.14(e) (regulation providing same).[3]

In *S.A. Kele Associates v. DER*, 1991 EHB 854, we considered a motion to dismiss an appeal involving the Department's failure to act on a private request for more than a year, far longer than the 120 days set forth in the Sewage Facilities Act. We granted the motion to dismiss, concluding that the Department's "failure to act upon Kele's request does not constitute a [Department] 'action' which may be appealed to the Board." *Id.* at 857. We went on to note that while "[o]ur dismissal of this appeal should not be construed as condoning [the Department's] inaction…, the remedy for such inaction lies in the equity powers of Commonwealth Court." *Id.*

[3] In the sewage facilities planning regulations there is also a mechanism for a deemed approval if the Department does not act within 120 days of a municipality's submission of a complete official plan or plan revision:

> Upon the Department's failure to act on a complete official plan or revision within 120 days of its submission, the official plan or official plan revision will be considered approved, unless the Department informs the municipality prior to the end of 120 days that additional time is necessary to complete its review. The additional time may not exceed 60 days.

25 Pa. Code § 71.32(c). There is nothing comparable in the Oil and Gas Act or the corresponding regulations with respect to water supply complaints.

at 857 n.4. Indeed, Section 5 of the Sewage Facilities Act authorizes a person to seek a mandamus action against the Department if it does not act within the prescribed timeframe: "In the event the department fails to act within the specified time limits and the applicant takes a mandamus action against the department, the court may award costs for counsel and court costs to the prevailing party." *Id.*

Similarly, in *Dallas Area Joint Sewer Authority v. DEP*, 2000 EHB 1071, we assessed whether the Department's failure to respond to a letter sent by one municipality requesting that the Department order another municipality to revise its Act 537 plan was an appealable action. We relied on *Department of Environmental Resources v. New Enterprise Stone & Lime Co.*, 359 A.2d 845 (Pa. Cmwlth. 1976) and interpreted that case to mean that "whether the Department's failure to act is an appealable 'decision' turns on whether the Department's failure to act altered Appellant's legal rights or obligations." 2000 EHB at 1074. *See New Enterprise*, 359 A.2d at 847 ("the refusal by the [Department] to modify the outstanding agreement with New Enterprise lacks the elements which would suggest that a 'decision' had been made in the technical sense of the word because the rights and obligations of New Enterprise have not been altered."). Because "Appellant has precisely the same legal rights and obligations now that it did when it wrote the letter," we concluded that the Department's failure to act was not an appealable action and we granted a motion to dismiss the appeal. 2000 EHB at 1074.

The Appellants' takings claim also arises out of the Department's inaction, with the Appellants arguing that the Department has committed an unconstitutional taking by dragging its feet in investigating their complaint and leaving their water supply polluted. But again, while the Board may certainly entertain a takings claim, that claim needs to fall within the ambit of a discrete action. *Marshall v. DEP*, 2019 EHB 352, 354 ("It is this Board's responsibility to determine in the

first instance whether a **Departmental action** has resulted in an unconstitutional taking." (emphasis added)). In *Domiano v. Department of Environmental Resources*, 713 A.2d 713 (Pa. Cmwlth. 1998), the Commonwealth Court analyzed the Board's authority to adjudicate a takings claim. The Court found that the Board could only decide takings claims that arose out of the Department's exercise of its police powers:

> Under that authority, **EHB adjudicates the lawfulness of [Department] enforcement orders or actions that are challenged on the grounds that they are constitutionally impermissible takings without just compensation**. A record can be fully developed before the EHB, which can then determine, under a traditional analysis of the regulatory takings question, whether in fact such a taking has occurred, and whether, in appropriate cases, [the Department's] orders should be set aside.

Id. at 717 (emphasis added). The Court reinforced the notion that the Board has no jurisdiction over pre-enforcement takings claims. *Id.* at 716 (quoting *Gardner v. Dep't of Envtl. Res.*, 658 A.2d 440, 448 (Pa. Cmwlth. 1992)). *See also Machipongo Land and Coal Co. v. Dep't of Envtl. Res.*, 676 A.2d 199 (Pa. 1996) (jurisdiction over pre-enforcement review takings claims lies with the Commonwealth Court). Thus, we can evaluate a takings in the context of a Department action, but here all we have is inaction from the Department.[4]

Even though a delay in action by the Department may arguably impact a person, it does not necessarily mean that *this Board* has jurisdiction over that delay. In *Marinari v. Department of Environmental Resources*, 566 A.2d 385 (Pa. Cmwlth. 1989), an applicant for a solid waste permit filed a mandamus action in the Commonwealth Court because its permit application was pending before the Department for more than two years without any final action. The Department filed preliminary objections, one of which argued that the applicant had an administrative remedy

[4] At least one court has found that government inaction in the face of an affirmative duty to act can give rise to a taking in the form of inverse condemnation. *Litz v. Md. Dep't of the Env't*, 131 A.3d 923 (Md. 2016). We are not aware of a case in Pennsylvania with a similar holding.

available in an appeal to the Environmental Hearing Board. The Court overruled the preliminary objection, finding that the Board did not have jurisdiction over the Department's inaction on the permit application:

> The EHB is not statutorily authorized to exercise judicial powers in equity. Its power and duty are to hold hearings and issue adjudications on [the Department's] orders, permits, licenses or decisions. Because [the Department] has done none of those things, Petitioners' remedy does not lie with the EHB, contrary to its assertion.

Marinari, 566 A.2d at 387 (footnote omitted). The Court did not discount the affect on the applicant; the remedy for that harm simply did not lie with the Board:

> This case is different in that Petitioners are immediately and directly harmed by [the Department's] inaction on the application for permit modification. Here, Petitioners to their detriment have endured the artificially prolonged opportunity cost of not developing their land for a landfill or any other purpose, because of [the Department's] inaction. Until it takes a final appealable action, Petitioners will continue to be harmed economically.

Id. at 388. Thus, the Commonwealth Court viewed the mandamus as the appropriate vehicle for seeking redress and compelling the Department to act, not an appeal to the Board.

The Department's inaction on the Appellants' water supply complaint undoubtedly does real harm to the Appellants. Should the Department need a reminder, its inaction here is not merely taking its time to review a permit application and possibly delaying a project, but it is a daily deprivation of usable water to ordinary citizens of the Commonwealth. However, even though the Department's inaction has not triggered this Board's jurisdiction, this does not mean the Appellants are without legal recourse. First, there is no doubt that a complainant may appeal *the conclusion* of the Department's investigation of a water supply contamination claim under the Oil and Gas Act. *Diehl v. DEP*, 2017 EHB 1248; *Kiskadden v. DEP*, 2012 EHB 171. The Department's investigation appears to still be ongoing. *Compare Love v. DEP*, 2010 EHB 523 (denying motion to dismiss appeal of Department's "refusal to process" mine subsidence claim

because it amounted to a denial in the face of Department's statutory duty to investigate and make a determination on the claim under 52 P.S. § 1406.5e). The Department tells us in its reply brief that SWN Production has submitted a report to rebut the Department's presumption. The Department says that it will at some point make an "ultimate determination" on SWN's rebuttal report and the Appellants "will be free to appeal from that decision," whenever that may be. (Reply Brief at 3-4 n.2.)

More immediately, nothing precludes the Appellants from pursuing a private cause of action against the Department or SWN. Indeed, Subsection (f) of the water supply provision of the Oil and Gas Act states, "Nothing in this section shall prevent a landowner or water purveyor claiming pollution or diminution of a water supply from seeking any other remedy at law or in equity." 58 Pa.C.S. § 3218(f). In its papers, the Department repeatedly makes the point that the Board does not have jurisdiction over a mandamus action. *See Marinari, supra*. We are not sure if this is an invitation to the Appellants to file a mandamus action against the Department in an appropriate forum, but the avenue appears open.

We have no idea why it has taken the Department so long to investigate the Appellants' claim. The Department has provided no explanation. Nor do we know why it took the Department 11 months to issue its "Notice of Legal Presumption" to SWN Production.[5] The Oil and Gas Act specifies that, unless rebutted by a defense established in the Act, "it shall be presumed that a well operator is responsible for pollution of a water supply" if the water supply is within 2,500 feet of an unconventional well bore and the pollution occurred within 12 months of completion, drilling, stimulation, or alteration activities at the well. 58 Pa.C.S. § 3218(c)(2). It would seem all that is needed to trigger the presumption is a finding of pollution from sampling the water supply, and a

[5] Remarkably, the Department construes the 11 months it took to issue the presumption as "perceived delay" on the part of the Appellants. (Reply Brief at 5.)

look at the well records to determine the distance of the gas wells and the date of their completion. While it appears that this can be reasonably accomplished within the 45-day timeframe established in the Act, it also seems borderline inconceivable that it would take nearly an entire year to figure out.[6]

To be clear, we are in no way condoning the interminable amount of time that it has taken the Department to investigate the Appellants' water supply complaint. We suspect the entire reason there is a 45-day timeframe to make a determination under the Oil and Gas Act is so that persons with potentially affected water supplies are not left without usable water indefinitely. The Department's inexplicable abdication of a mandatory statutory obligation is more than concerning. But our disapproval of the Department's behavior on its own does not give us jurisdiction over this matter. *See Washington Twp. Concerned Citizens v. DER*, 1991 EHB 1687, 1688 ("a desire to do justice does not justify attempted excursions beyond our jurisdiction").

Accordingly, we issue the Order that follows.

[6] We also have some question about the "Notice of Legal Presumption." The statute and regulations both make clear that, "[i]f the department finds that the pollution or diminution was caused by drilling, alteration or operation activities or if it presumes the well operator responsible for pollution under subsection (c), **the department shall issue orders to the well operator necessary to assure compliance** with subsection (a)…." 58 Pa.C.S. § 3218(b) (emphasis added). *See also* 25 Pa. Code § 78a.51(c). Yet, the Department's letter to SWN claims that "[t]his Notice is neither an order nor any other final action of the Department of Environmental Protection." The letter is repeatedly phrased as a "request" to provide temporary water to Appellants, and a "request" to provide a plan to restore or replace the water supply. The Department has offered no explanation for why it has apparently ignored mandatory statutory duties to conduct a prompt investigation and issue orders upon a finding of pollution or a determination of a presumption of pollution from oil and gas activities.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROGER GLAHN AND DONNA GORENCEL	:	
	:	
v.	:	**EHB Docket No. 2021-049-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 12th day of November, 2021, it is hereby ordered that the Department's motion to dismiss is **granted** and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

*** Chief Judge and Chairman Thomas W. Renwand files a Dissenting Opinion, which is attached.**

DATED: November 12, 2021

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

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(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROGER GLAHN AND DONNA GORENCEL	:	
	:	
v.	:	**EHB Docket No. 2021-049-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

DISSENTING OPINION OF CHIEF JUDGE AND CHAIRMAN THOMAS W. RENWAND

By Thomas W. Renwand, Chief Judge and Chairman

As the majority points out, the Oil and Gas Act requires the Department to make a determination on a water supply complaint within 45 days of notification. 58 Pa.C.S. § 3218(b). Where the Department does not comply with this statutory mandate, the majority says the Board has no jurisdiction. I respectfully disagree. Where the Department fails to act in accordance with a statutory mandate, and that failure affects a citizen's personal or property rights, the decision *not* to act is an action that is appealable to this Board. I see this case as no different than previous decisions by the Board holding that where the Department has a statutory duty to act, such matters are reviewable by this Board. See *Kiskadden v. DEP*, 2012 EHB 171, 177-78 (addressing the Department's duty under Section 3218 of the Oil and Gas Act) and *Love v. DEP*, 2010 EHB 523, 527 (addressing the Department's failure to respond to a subsidence claim under the Mine Subsidence Act). As we stated in *Kiskadden*:

> In Section 3218 of the Oil and Gas Act, the General Assembly limited the Department's enforcement discretion and imposed a *mandatory duty* on the Department to take action if it determined that the water supply was affected by oil and gas operations.

2012 EHB at 177 (emphasis added). Subsection (b) of Section 3218 imposes a duty on the Department to make that determination within 45 days.

Section 7514(a) of the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7516, defines the Board's jurisdiction as follows: The Board has the power and duty to hold hearings and issue adjudications "on orders, permits, licenses or decisions of the [D]epartment." 35 P.S. § 7514(a). The Board's regulations implementing the Environmental Hearing Board Act define "action" as "an order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). I do not believe that these provisions were intended to exclude a Department decision *not* to comply with its legislative mandate. For example, in *Love*, we held that the Department's failure to respond to a subsidence claim was not immune from Board review.

The majority opinion holds that the Board does not have jurisdiction over the Department's failure to make a determination here because it is not a "final action," stating that "[t]he Board only has jurisdiction over *final* Department actions affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations," citing Section 7514(a) of the Environmental Hearing Board Act and Section 2 of the Board's rules at 25 Pa. Code § 1021.2 (emphasis added). Interestingly, neither the Environmental Hearing Board Act nor the Board's rules states that a Department action must be "final" before the Board has jurisdiction. The notion of "finality" was adopted to ensure that in appeals of permitting actions, applicants could not appeal every step of the permitting process before a final decision on the permit was made. As the Board explained in *Tri-County Landfill*, cited in the majority opinion: "[I]t was never intended that the Board would

have jurisdiction to review the many provisional, interlocutory 'decisions' made by the [the Department] during the processing of [a permit] application." 2010 EHB at 750 (citing *Central Blair County Sanitary Authority v. DEP,* 1998 EHB 643, 646 (quoting *Phoenix Resources, Inc. v. DER*, 1991 EHB 1681, 1684)). It was not meant to shield the Department when it has a statutory mandate to act, such as the case here where the statute clearly requires the Department to make a determination in 45 days. When the Department chooses *not* to make a determination, as required by the statute, and that decision affects a person's personal or property rights, it is an appealable action clearly within the Board's jurisdiction.

There is no question that the Department's failure to comply with Section 3218(b) of the Oil and Gas Act has adversely affected the Appellants' personal and property rights. This is acknowledged by the majority:

> The Department's inaction on the Appellants' water supply complaint undoubtedly does real harm to the Appellants. Should the Department need a reminder, its inaction here is not merely taking its time to review a permit application and possibly delaying a project, but it is a daily deprivation of usable water to ordinary citizens of the Commonwealth.

Majority Opinion at 17.

The majority holds that the Appellants have recourse other than an appeal to the Board. They point out that the Appellants can pursue a private cause of action against either the Department or SWN Production Company. However, the Appellants having recourse to another tribunal does not relieve the Board of our statutory duty to hold hearings and issue adjudications and otherwise provide due process to persons affected by Department actions, including the failure to comply with a statutory mandate. As the Pennsylvania Supreme Court held in *Commonwealth v. Derry Township*, 314 A.2d 606 (Pa. 1976), a party's due process rights are protected by virtue of that party's right to appeal to the Board.

The Department and the majority cite *Marinari v. Department of Environmental Resources*, 566 A.2d 385 (Pa. Cmwlth. 1989) as support for the general proposition that the Board cannot act in equity. However, the Commonwealth Court's subsequent holding in *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998), further clarifies and defines the Board's powers and duties. There, the Court made it clear that when the Board orders the Department to take an action, it is not "acting in equity" but in the scope of its authority. *Id.* at 687.

The Oil and Gas Act is clear: The Department must make a determination on a water supply complaint within 45 days of being notified of the complaint. It is within the scope of the Board's authority to hear an appeal challenging the Department's failure to act. Under the majority's interpretation, by failing to comply with the mandate of Section 3218(b), the Department deprives the Appellants of their right to be heard.[1]

I acknowledge that much of what the Appellants are seeking appears to be relief that the Board cannot grant. However, I believe that determination should not be made at this time in the context of a Motion to Dismiss based on jurisdiction but should be sorted out in properly supported motions for summary judgment.

ENVIRONMENTAL HEARING BOARD

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

DATED: November 12, 2021

[1] Likewise, SWN Production Company has no ability to challenge the Department's "Notice of Legal Presumption" which the Department characterizes as a "request" but not an order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROGER GLAHN AND DONNA GORENCEL	:	
	:	
v.	:	**EHB Docket No. 2021-049-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 9, 2021**
	:	

OPINION AND ORDER ON
PETITION FOR RECONSIDERATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a petition for reconsideration filed by appellants seeking reconsideration of an Opinion and Order granting the Department's motion to dismiss and dismissing an appeal due to a lack of jurisdiction. The appellants have not met the standard for reconsideration because they have not shown that the Board's Opinion and Order rests on a legal ground or factual finding that was not proposed by any party, that there are any crucial facts that are inconsistent with the Board's findings, or that there are otherwise compelling and persuasive reasons for reconsideration of a final order.

O P I N I O N

The appeal of Roger Glahn and Donna Gorencel (the "Appellants") involves a complaint they made to the Department of Environmental Protection (the "Department") under the Oil and Gas Act, 58 Pa.C.S. §§ 3201 – 3274, regarding potential contamination of their water supply from unconventional natural gas operations in North Branch Township, Wyoming County. The Appellants filed an appeal with this Board on May 10, 2021. In an Opinion and Order dated

November 12, 2021, a majority of the Board granted a motion to dismiss filed by the Department, and we dismissed this appeal. Chief Judge Renwand filed a Dissenting Opinion.

The crux of the majority's Opinion and Order rested on the fact that the Appellants did not identify any appealable action of the Department. Although we expressed concern in our Opinion over the protracted length of time the Department has taken to make a determination on the Appellants' complaint, we said that the Board does not have jurisdiction over the Department's *inaction*, even where the Department exceeded the 45-day timeframe established in the Oil and Gas Act for completing an investigation. *See* 58 Pa.C.S. § 3218(b). *See also Kiskadden v. DEP*, 2015 EHB 377, 426-27 (45-day time period in Section 3218(b) directory only). (Opinion and Order at 13-15.) Likewise, we found that the Appellants' constitutional takings claim needed to arise out of a Departmental action, which was not present. (*Id.* at 15-16.) We added that, although this Board did not have jurisdiction over Departmental inaction, nothing precluded the Appellants from instituting a private cause of action against the well operator, Southwestern Production Company, 58 Pa.C.S. § 3218(f), or a mandamus action against the Department in the Commonwealth Court. (Opinion and Order at 16-18.) Finally, we pointed out that the Department's investigation was still ongoing and an appeal to the Board could still occur if the Department ever concludes its investigation and makes a final determination. (*Id.* at 17-18.) Chief Judge Renwand dissented, stating that the Department's inordinate delay was essentially the equivalent of a decision not to act, which in his view was appealable under the circumstances presented here. He argued that a Board appeal, private causes of action, and mandamus actions should not be mutually exclusive remedies.

The Appellants have now filed a petition for reconsideration of our Opinion and Order.[1] The Appellants' petition contends that our Opinion and Order "is unconstitutional and improper," that "[t]he Board stalled the matter for six months on its docket and the Board's own inaction constitutes additional takings claim," and that "[t]he Board's Order is tortious as it forces Mr. Glahn and Ms. Gorencel to remain at the subject property indefinitely to continue suffering additional and real harms on a daily basis." (Petition at ¶¶ 28-30.) The Appellants' memorandum of law asserts that

> The Order establishes dangerous precedent for the Board not to perform a constitutional analysis and generally take no action in the face of the Department's abdication of its responsibilities and the Department's ongoing, intentional harms to Mr. Glahn and Ms. Gorencel. While the Board's Order is unlawful, it is an accurate portrayal of how the Board is conducting itself. The Commonwealth deserves to know about other Board decisions such as this that deprived people their rights to due process and a clean environment.

(App. Memo at 3.) The Appellants' memorandum also says: "While Mr. Glahn and Ms. Gorencel are required to request a reconsideration by the Board under 151.152(a) [sic] of its own incurious and unconstitutional Order, the Board should promptly surrender jurisdiction to the Commonwealth Court." (*Id.* at 1-2.)

The Department opposes the petition for reconsideration. The Department argues that the Appellants have not addressed, let alone met, the criteria for granting reconsideration of a final order. The Department devotes the bulk of its response to taking issue with statements we made in our Opinion and Order on the length of time it has taken the Department to investigate and make a determination on the Appellants' water supply contamination complaint.[2] (DEP Memo at 7-14.)

---

[1] On the same day the Appellants filed their petition for reconsideration, November 22, 2021, they filed with the Board a copy of their petition for review filed with the Commonwealth Court (Docket No. 1273 C.D. 2021).

[2] The Department has not sought reconsideration in its own right.

Reconsideration of final orders "is within the discretion of the Board and will be granted only for compelling and persuasive reasons." 25 Pa. Code § 1021.152(a). Those reasons may include:

> (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.

Id. Our Rule sets a high standard for reconsideration of final orders. *United Envtl. Grp., Inc. v. DEP*, 2019 EHB 283, 284 (citing *Lancaster Against Pipelines v. DEP*, 2019 EHB 163; *Rural Area Concerned Citizens v. DEP*, 2013 EHB 374). "[P]etitions for reconsideration may be appropriate when the Board misses a key legal or factual point, but are not available simply as a vehicle for arguing issues that should have been argued in the first instance." *Lancaster Against Pipelines*, 2019 EHB at 166-67 (citing *Consol Pa. Coal Co. v. DEP*, 2015 EHB 117, 118; *Solebury Twp. v. DEP*, 2008 EHB 718, 720). Mere disagreement with the Board is not a basis for reconsideration. *Consol Pa. Coal*, 2015 EHB at 118; *Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 577, 579.

None of the Appellants' arguments in their petition address the criteria for granting reconsideration laid out in our rules. The only portion of the Appellants' memorandum that cites the criteria for granting reconsideration of a final order is in the first paragraph of their conclusion section, but there is no real analysis of the criteria or an explanation of why any of the criteria have been met. Indeed, the Appellants simply assert:

> Mr. Glahn and Ms. Gorencel have submitted this Petition in a timely manner. The Board's Order failed to, among other things, apply the Pennsylvania and United States Constitution, including the Environmental Rights Amendment, failed at their statutory and mandatory obligations and deprived Mr. Glahn and Ms. Gorencel's constitutional rights and failed to protect Mr. Glahn and Ms. Gorencel from similar actions by the Department. The matter of the Board actively telling people that they

> must live on a polluted property surrounded by ongoing pollution violates any number of a laws [sic] as well as a general lack of humanity. The reasons to grant the petition appear to be limitless and the Board should act quickly to grant the petition to obtain real relief to Mr. Glahn and Ms. Gorencel.

(App. Memo at 7.) Nowhere do the Appellants assert that the Board's Opinion rests on a legal ground or a factual finding that was not proposed by either party. Indeed, despite the fact that our ruling hinged on jurisdiction or the lack thereof, the Appellants do not cite any law or otherwise even argue that this Board should have jurisdiction over Departmental inaction or that we missed some body of law that would support our jurisdiction over this appeal. Further, the Appellants do not identify any crucial facts that are inconsistent with the findings in our Opinion and Order. Nor do the Appellants' rather unfounded accusations that this Board somehow acted unconstitutionally, unlawfully, tortuously, and with a general lack of humanity rise to the level of persuasive and compelling reasons that justify reconsideration.

Instead of addressing the reconsideration standard, the Appellants contend that our Opinion and Order "did not include any analysis of the constitution, specifically including the Environmental Rights Amendment." (App. Memo at 2.) But in the Appellants' response to the Department's motion to dismiss, there are only passing references to Article I, Section 27 of the Pennsylvania Constitution or the Environmental Rights Amendment.[3] (*See* Mot. to Dismiss Resp. Memo at 5, 7-8.) Importantly, there was no analysis in the Appellants' papers on the motion to dismiss on how Article I, Section 27 impacts the Board's jurisdiction. There was no argument that

[3] Article I, Section 27 of the Pennsylvania Constitution provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.

PA. CONST. art I, § 27.

Article I, Section 27 expands the Board's jurisdiction or allows the Board to assume jurisdiction over Departmental inaction. There was no analysis of Article I, Section 27 at all.

Nor is there any argument or analysis from the Appellants now in their petition for reconsideration. The Appellants quote Article I, Section 27 and cite the seminal case of *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), but they never explain why they believe it extends or transforms our jurisdiction. The Appellants assert that "[t]he Commonwealth, including the Department and the Board, as trustees, are obligated to 'comply with the terms of the trust and with standards governing a fiduciary's conduct, including the duties of prudence, loyalty and impartiality.'" (App. Memo at 5.) But again, that does not address the issue of the bounds of our jurisdiction generally or specifically with respect to this appeal. The Appellants say that their constitutional rights cannot be waived, but that was not an issue in our Opinion and Order, and it is unclear what relevance that point has for purposes of reconsideration.

The Appellants also assert that the Board has denied the Appellants their due process rights by dismissing their appeal. However, as we have said before, an appellant's due process rights are afforded by *the opportunity* to appeal before the Board:

> The Appellants argue that they have a constitutional right to be heard. However, a party has no constitutional right to a hearing before the Environmental Hearing Board; rather, as explained by our Commonwealth Court, a party's right to due process is protected by virtue of his or her right to *appeal* an adverse determination to the Board. *Fiore v. Department of Environmental Resources*, 655 A.2d 1081, 1086 (Pa. Cmwlth. 1995) (citing *Morcoal Co. v. Department of Environmental Resources*, 459 A.2d 1303 (Pa. Cmwlth. 1983), and *Commonwealth v. Derry Township*, 314 A.2d 868 (Pa. Cmwlth. 1973), *modified in part*, 351 A.2d 606 (Pa. 1976), *overruled in part on other grounds*, *Chalkey v. Roush*, 805 A.491 (Pa. 2002)). If the appeal does not successfully survive a dispositive motion prior to reaching a hearing on the merits, there has been no violation of the appellant's right to due process. *Id.*; *Fiore v. DEP*, 1995 EHB 1298, 1304-06.

United Envtl. Grp., 2019 EHB at 285-86. Not every appeal is guaranteed a hearing, nor should the Board hold hearings on appeals where it clearly does not have jurisdiction.[4]

Accordingly, we issue the Order that follows.

[4] We reiterate what we stated in our Opinion and Order—that an appeal to the Board remains available to the Appellants at the point where the Department concludes its investigation and renders a final determination on whether a well operator has affected their water supply. Indeed, the Department again tells us in its response to the petition that "the Department's overall investigation remains ongoing as it evaluates Southwestern's Rebuttal Report." (DEP Memo at 14.)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROGER GLAHN AND DONNA GORENCEL	:	
	:	
v.	:	**EHB Docket No. 2021-049-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 9th day of December, 2021, it is hereby ordered that the Appellants' petition for reconsideration is **denied**.

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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: December 9, 2021

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

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For Appellants:
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(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TONYA STANLEY, BONNIE DIBBLE, AND JEFFREY DIBBLE	:	
v.	:	**EHB Docket No. 2021-013-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COTERRA ENERGY INC. f/k/a CABOT OIL AND GAS CORPORATION, Intervenor	:	**Issued: December 15, 2021**

OPINION AND ORDER ON
MOTION TO AMEND INTERLOCUTORY ORDER

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion to amend an interlocutory order filed by appellants seeking immediate appeal of an Opinion and Order granting in part and denying in part competing motions for summary judgment. The motion to amend fails to address how the standard for amending an interlocutory order has been met. The appellants have not presented a controlling question of law and an immediate appeal would only delay, instead of advance, the ultimate termination of this appeal, a hearing in which has been scheduled less than two months from now.

O P I N I O N

Tonya Stanley, Bonnie Dibble, and Jeffrey Dibble (the "Appellants") have appealed a letter from the Department of Environmental Protection (the "Department") dated January 15, 2021 in which the Department, responding to a complaint made by the Appellants on January 7, 2020, determined that issues of turbidity and sediment in the Appellants' water supply were not caused by gas drilling operations conducted by Coterra Energy Inc. f/k/a Cabot Oil and Gas Corporation

("Coterra") at its Abbott D and M wells in Bridgewater Township, Susquehanna County. The Appellants disagree with the Department's determination and contend in their appeal that Coterra is responsible for the pollution of their water supply.

On November 10, 2021, we issued an Opinion and Order granting in part and denying in part the motions for summary judgment filed by all three parties. Our Opinion and Order only granted summary judgment on a single issue—that the Appellants' water supply is outside of the 2,500-foot distance established in Section 3218 of the Oil and Gas Act, 58 Pa.C.S. § 3218(b), for a gas well operator to be presumed liable for pollution of a person's water supply. We determined that this did not mean Coterra is necessarily absolved of all responsibility, simply that the burden for proving Coterra's responsibility rests with the Appellants. We denied summary judgment on all remaining issues, including on the Appellants' claim that the Department committed an unconstitutional taking, because that claim was raised by the Appellants for the first time in their summary judgment motion.

We found that the remaining issues need to be resolved in the context of a factual record developed at the hearing on the merits. Chief among those issues is whether or not the Department correctly determined that Coterra is not responsible for any pollution of the Appellants' water supply, which is the heart of the dispute in this appeal. The parties attached various water sample results to their motions, but we determined that those issues are better suited to explanation from witnesses subject to cross-examination. As a general rule, that evidence will only be admitted into the record after it has been offered with a proper foundation and otherwise in accordance with the Pennsylvania Rules of Evidence. *Benner Twp. Water Auth. v. DEP*, 2017 EHB 1228, 1234 (Board generally adheres to the Rules of Evidence); 25 Pa. Code § 1021.123(a). Following the issuance of our Opinion and Order, we reached out to the parties to schedule the merits hearing, and on

November 23, 2021 we issued our Pre-Hearing Order No. 2 and scheduled the hearing to begin on February 8, 2022.

On November 19, 2021, the Appellants filed a motion to amend our Opinion and Order to certify it for immediate appeal to the Commonwealth Court. The Appellants assert in their motion that "[t]here are multiple issues of whether the Board, among other things, failed to act as trustee under the Environmental Rights Amendment in reaching its decision and whether the Board denied Appellants due process when the Board waived Appellants' constitutional rights to pursue a takings claim against the Department." (App. Mot. at 1.)[1] The Department and Coterra both oppose the motion. They say that the Appellants have failed to meet the standard for interlocutory amendment, namely, that the Appellants have not shown that there is a controlling question of law at issue or that an immediate appeal would advance the ultimate termination of this matter. Both the Department and Coterra contend that an interlocutory appeal would only delay the resolution of this appeal. For the reasons explained below, we agree with the Department and Coterra and deny the Appellants' motion.

Interlocutory appeals by permission are governed by Chapter 13 of the Pennsylvania Rules of Appellate Procedure. Pa.R.A.P. 312. Rule 1311(a)(1) states that an appeal may be taken by permission from an interlocutory order that has been certified for appeal pursuant to 42 Pa.C.S. § 702(b), which provides:

> When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that **such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter**, it shall so state in such order. The appellate court may

[1] The Appellants have again failed to comply with the Board's rules by not filing a motion that "set[s] forth in numbered paragraphs the facts in support of the motion." 25 Pa. Code § 1021.91(d) (general rule governing motions) (incorporated by 25 Pa. Code § 1021.153(a) (rule governing amendment of interlocutory orders)).

> thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

42 Pa.C.S. § 702(b) (emphasis added). If the interlocutory order does not already contain the pertinent language of Section 702(b), a party must request that the trial court or government unit amend its order to include that language and certify one or more controlling questions of law for appeal. *Rausch Creek Land, LP v. DEP*, 2013 EHB 851, 855; Pa.R.A.P. 1311(b); 25 Pa. Code § 1021.153. Permission to appeal to an appellate court may also be sought when certification under 42 Pa.C.S. § 702(b) has been denied. Pa.R.A.P. 1311(a)(1). If a government unit, such as the Board, does not act on a motion to amend within 30 days, it is deemed denied. Pa.R.A.P. 1311(b); 25 Pa. Code § 1021.153(d).

In determining whether to amend an interlocutory order "we must assess whether the necessary standards are present: 1) the order involves a controlling question of law; 2) there is substantial ground for difference of opinion on that controlling question of law; and 3) an immediate appeal from the interlocutory order may materially advance the ultimate termination of the matter." *PennEnvironment v. DEP*, EHB Docket No. 2020-002-R, slip op. at 4 (Opinion and Order, Feb. 8, 2021) (citing *Erie Coke Corp. v. DEP*, 2019 EHB 574, 576). If the party seeking amendment fails to satisfy one or more of these criteria, "their request necessarily fails." *Erie Coke*, 2019 EHB at 576. In essence, we are called upon to assess whether an immediate appeal to the Commonwealth Court would be a worthwhile use of everyone's time and resources. *UMCO Energy, Inc. v. DEP*, 2004 EHB 832, 836. The Board's decision on whether to amend an interlocutory order is discretionary. *Clean Air Council v. DEP*, 2019 EHB 685, 708; *Becker v. DEP*, 2016 EHB 65, 70.

The Department and Coterra are correct that the Appellants never address any of the factors that govern amending an interlocutory order. Our rules require that a request to amend an

interlocutory order take the form of a motion and "must be accompanied by a memorandum of law setting forth the reasons why" the three elements are present. 25 Pa. Code § 1021.153(b). The Appellants' memorandum of law cites those elements, but it never addresses how any of them are met. Instead, much of the Appellants' motion is aimed at rearguing issues in the summary judgment papers, but that is not what a motion to amend an interlocutory order is for. For instance, the Appellants claim that they "have met their burden by a preponderance of the evidence many times over." (App. Memo at 7.) They say that "it is undisputed that Appellants' water supply has been and continues to be degraded." (*Id.* at 5.) We have no properly admitted record to support that contention, but even if we did, whether or not Coterra is responsible for any pollution of the Appellants' water supply is not at all undisputed.

The Appellants never explicitly identify a question of law, let alone explain a controlling question of law that justifies immediate appeal. *See UMCO Energy*, 2004 EHB at 836 ("A party seeking certification for interlocutory appeal of a controlling question of law typically sets the question apart to avoid any confusion about the precise question at issue."). Because of this, they also never explain why there is substantial ground for difference of opinion on a controlling question of law.

However, if we can parse out an issue in the Appellants' filing, it seems it would be their assertion that "the Board waived Appellants' constitutional rights to pursue a takings claim against the Department." (Motion at 1.) This assertion appears to rest on a misconception that our Opinion and Order decided that the Appellants' had waived their ability to pursue a claim that the Department has committed an unconstitutional taking. Our Opinion and Order did not decide that issue. We merely said that the Appellants were not entitled to summary judgment on a takings issues that was nowhere to be found in their notice of appeal and was raised for the first time in

their motion for summary judgment. The Board never concluded that the issue was waived. There is no mention of waiver in our Opinion. Finding waiver was not necessary to reach our conclusion that the Appellants could not prevail on an issue raised for the first time during summary judgment. We made a similar finding in *Chester Water Authority v. DEP*, 2016 EHB 280, when an appellant sought summary judgment on issues that were not contained in its notice of appeal:

> Chester Water argues that it should be allowed to pursue its argument because the Department created unnecessary confusion regarding the issue, because the opposing parties could not possibly have been surprised by the issue and will not suffer any undue prejudice, and because the issue could not have been articulated absent revelations uncovered for the first time in discovery. However, these are arguments that relate to whether an amendment to the notice of appeal should be allowed, not whether a party may simply raise an issue for the first time in a motion for summary judgment. The proper way to go about adding a new objection is to seek permission to amend the notice of appeal. 25 Pa. Code § 1021.53. It is in that context that the various considerations such as lack of prejudice apply.

Id. at 285-86. The appellants could have moved to amend their notice of appeal, but they never did so. Whether it is too late to do so now in a proper motion was not the subject of our Opinion and Order and is beside the point of our immediate discussion. Because we made no conclusion regarding waiver of a takings claim in our Opinion and Order, there is no issue to certify for interlocutory appeal.

The Appellants also argue that the Board failed to apply Article I, Section 27 of the Pennsylvania Constitution, also known as the Environmental Rights Amendment, in our Opinion and Order.[2] Again, they do not explain why this is a controlling question of law justifying

[2] Article I, Section 27 of the Pennsylvania Constitution provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.

PA. CONST. art I, § 27.

immediate appeal. The Appellants do not say why Article I, Section 27 should lead us to a different conclusion on the only issue that our Opinion and Order decided—that their water supply is outside of the presumptive liability distance. Regardless, and to the extent that the issue has been preserved, whether the Department acted consistent with its duties and obligations under Article I, Section 27 is a matter that still needs to be assessed within a factual context on a record created at the upcoming hearing on the merits.

Indeed, the controlling question in this appeal is factual, not legal. Thus, even though the Appellants never say how an immediate appeal to the Commonwealth Court would advance the ultimate termination of this matter, it appears instead that it would do the opposite. We have scheduled the hearing on the merits to begin less than two months from now.[3] We suspect an appeal to the Commonwealth Court would not even be briefed by that time, and it still would not obviate the need for an evidentiary hearing. We see no reason why an immediate appeal to the Commonwealth Court would speed along the resolution of this appeal or facilitate the determination of the key factual issue. As we have said before, "Certification is inappropriate where factual rather than legal disputes predominate or at least play an important part." *Borough of Danville v. DEP*, 2008 EHB 399, 402. *See also Clean Air Council v. DEP*, 2018 EHB 120, 125 (same).

The Appellants' main concern appears to be not so much with what we did decide in the Opinion and Order, but what we didn't decide. As discussed above, we really only definitively decided one issue: the Appellants' water supply is greater than 2,500 feet from Coterra's gas wells,

[3] The Appellants seem to take issue with our scheduling the hearing, asserting in their memorandum of law that "the Board is requiring Appellants to participate in a hearing on the merits three months from now over 177.61 feet, yet Appellants are not provided a hearing before the Board unilaterally strips Appellants of their constitutional rights." (App. Memo at 8.) We think it is in the interest of all parties to have this matter adjudicated expeditiously.

placing the water supply outside the Oil and Gas Act's presumptive liability. The Appellants do not appear to complain about our ruling on that point. On all of the other issues raised in the three motions for partial or full summary judgment, the Appellants are disappointed that we did not rule in their favor instead of doing what we did, namely, deferring ruling on those largely factual issues until after the creation of an appropriate record. It is difficult to imagine a less appropriate case for the certification of an interlocutory appeal.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TONYA STANLEY, BONNIE DIBBLE, AND JEFFREY DIBBLE	:	
v.	:	**EHB Docket No. 2021-013-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COTERRA ENERGY INC. f/k/a CABOT OIL AND GAS CORPORATION, Intervenor	:	

O R D E R

AND NOW, this 15th day of December, 2021, it is hereby ordered that the Appellants' motion to amend the Board's November 10, 2021 Opinion and Order to certify it for immediate interlocutory appeal is **denied**.

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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: December 15, 2021

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

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