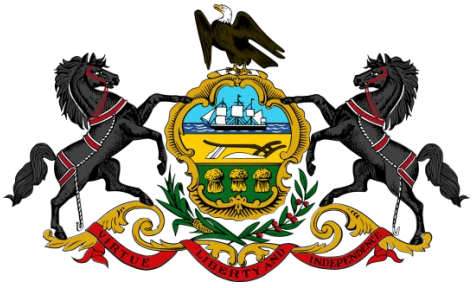
Environmental Hearing Board

Adjudications and Opinions



2013
VOLUME I

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

JUDGES

OF THE

ENVIRONMENTAL HEARING BOARD

2013

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

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FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2013.

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

ADJUDICATIONS

OPINIONS

2013

ENVIRONMENTAL HEARING BOARD

SUBJECT MATTER INDEX – 2013 EHB DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNIVERSITY AREA JOINT AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2012-131-L**
	:	**(Consolidated with 2012-174-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 8, 2013**

OPINION AND ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies motions for partial summary judgment seeking a ruling regarding the extent of the Department's authority to set certain effluent limits in a Part I/NPDES permit because it is not clear whether such a ruling would have any practical significance if the Department has the authority to set the limits in question in the appellant's Part II/water quality management permit, which is also being appealed, and the parties have not addressed the Department's authority with respect to the Part II permit.

OPINION

The University Area Joint Authority owns and operates publicly owned treatment works ("POTW") on Spring Valley Road in State College. The Authority treats sewage at the POTW and discharges the treated effluent to Spring Creek pursuant to NPDES Permit No. PA0026239. The NPDES permit is also known as a Part I permit because, in order to operate a POTW, a party must have both a Part I permit, which sets discharge limits, and a Part II permit (also known as a

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water quality management permit), which describes how those discharge limits will be met. *See generally, Grimaud v. DEP*, 638 A.2d 299 (Pa. Cmwlth. 1994). In December 2000, the Authority filed an application for a Part II permit with the Department of Environmental Protection for improvements and additions to the POTW. The 2000 permit application included, among other things, a proposed project to highly treat the wastewater in a new facility to be known as the advanced water treatment facility, which would also be located on Spring Valley Road. The Authority's advanced water treatment facility will include microfiltration and reverse osmosis. The advanced treatment goes beyond the treatment that is normally applied by a POTW to sewage. In fact, it is expected that the water going into the advanced treatment will already have attained the minimum level of water quality attained by secondary treatment. The project is intended to highly treat and ultimately provide up to three million gallons per day of secondary clarifier wastewater effluent for reuse within the community (e.g. car wash, golf course maintenance, etc.), and discharge the remaining highly treated water to create new wetlands and replenish headwater streams. This was referred to as the beneficial reuse project.

On November 29, 2001, the Department issued WQM Permit No. 1400408 approving the "construction and operation of... Phases I, II and III of a Beneficial Reuse Project consisting of Advanced Water Treatment... with Storage and Transport of Reclaimed Effluent." The permit included a special condition stating that "[p]rior to the construction of Phases[s] II and III of the Beneficial Reuse reclaimed water transport, storage, and streamflow augmentation discharge wetlands, the permittee shall submit to the Department, and obtain approval of, detailed plans and specifications for those facilities." As authorized by the water quality management permit, the Authority proceeded to construct the advanced water treatment facility and the distribution pipeline denoted in the 2000 permit application as Phase I.

In 2006, the Authority submitted an application for approval of an extension of the existing Phase I reclaimed water distribution line to the Centre Hills Country Club and interconnection of the line with the Centre Hills Country Club golf course irrigation system. On September 19, 2006, the Department issued WQM Permit No. 1406406 authorizing "the construction and operation of sewage facilities consisting of: Transmission Main, Centre Hills Booster Station and Spray Irrigation Centre Hills Country Club." The Authority proceeded to construct the line and the interconnection authorized by the permit.

In August 2010, the Authority submitted another application providing design details and specifications associated with the proposed construction of Phase II of the beneficial reuse project—the addition of a pipeline to convey the highly treated water from the advanced water treatment facility to a proposed discharge point at wetlands to be constructed at a later date, and a discharge tap at the Colonial Court development.

On July 1, 2012, the Department issued NPDES Permit No. 00234028, which authorized the discharge from the advanced water treatment facility. The permit includes effluent limits more stringent than those associated with secondary treatment. The parties disagree about the extent to which those limits were derived from water-quality criteria as opposed to the fact that some of the water is to be reused for purposes that may involve human contact, such as in a car wash. The Authority's appeal from that permit is docketed at EHB Docket No. 2012-131-L. On September 17, 2012, the Department issued WQM Permit No. 1410403 to the Authority. The water quality management includes the same effluent limits as those set forth in the NPDES permit. The Authority's appeal from the Part II permit is docketed at EHB Docket No. 2012-174-L. We have consolidated the two appeals.

The Authority's appeals from both of its permits seek to vacate and remand the stringent effluent limitations contained therein for several parameters that were in its view imposed by the Department based upon the Department's Reuse Guidance rather than the secondary-treatment standards or any more stringent water quality-based effluent limitations associated with the discharges. The Reuse Guidance is a policy document released by the Department that sets detailed criteria to be applied in permits to reuse water. The document purports to guide rather than bind permit writers, but the limits in the Authority's permit mirror the criteria set forth in the Guidance. The Authority argues that the Department acted unlawfully for numerous reasons including the following: (1) POTWs, such as the Authority's, already have duly promulgated technology-based regulations known as secondary treatment, (2) the Department ignored its own (and EPA's) secondary treatment regulations in issuing the permit, (3) the Department ignored its comprehensive NPDES permitting regulations identifying how permit limits are to be developed, and (4) the Reuse Guidance, which the Department treated as binding, has never been subject to the rulemaking procedures set forth in the Commonwealth Documents Law, 45 P.S. § 1102 *et seq.*

The Authority has filed a motion for partial summary judgment. The gravamen of the Authority's motion is that the Department lacks the legal authority to set the challenged limits based upon reuse considerations *in a Part I permit.* The Department responded by filing its own motion for partial summary judgment asking the Board to rule that the Department does have the necessary authority to set the limits *in the Part I permit.*

A regulatory agency such as the Department is a creature of its enabling statutes. *Dep't of Transportation v. Beam*, 788 A.2d 357 (Pa. 2002). That is to say, its authority to act is constrained either directly by the statutes that confer that authority or indirectly by regulations

which are in turn founded upon those statutes. Where an appellant challenges the Department's authority to act, we will reject that challenge so long as the agency's action in question is authorized by at least one provision of at least one statute or valid regulation. *Milco Industries v. DEP*, 2002 EHB 723, 724-25. Once the necessary basis of the Department's authority to have taken the action in question is established by at least one statute or valid regulation, there will generally be no need to engage in an academic exercise with no apparent practical purpose of assessing whether the Department also had the authority to act under other statutes and regulations. *Id.*, 2002 EHB at 725.[1]

Speaking of academic exercises, both the Authority and Department ask us in their motions for partial summary judgment to define the extent of the Department's authority to impose effluent limits in the Authority's Part I permit based upon the reuse of the effluent without addressing the Department's authority to impose the very same limits in the Authority's Part II permit.[2] **If** the Department has the authority to impose such limits in the Part II permit, the parties have not explained why it is more than an academic exercise for us to delineate the limits of the Department's authority regarding the Part I permit in response to their motions at this time.

In *Perkasie Borough Authority v. DEP*, 2002 EHB 764, we explained the continuum of the three interrelated, and under certain circumstances such as those presented in this case,

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[1] It is perhaps worth noting at this juncture that the Department's authority may *not* be based entirely upon a policy statement, guidance document, or the like. *See Dauphin Meadows v. DEP*, 2000 EHB 521, 523.

[2] The Authority specifically tells us that it is not asking the Board to decide at this time whether the effluent limits are appropriately the subject of the Part II permit. (*See, e.g.* Response Memorandum at 16.) The Department in its papers says that the challenged effluent limits in the Part I permit are "based on" the same limits in the Part II permit, and that the Part II permit "was issued under the authority of Chapter 91 of the Department's rules and regulations, 25 Pa. Code Ch. 91, among other authority." (Memorandum at 13-14.) Although the Authority does not address this point in its reply (beyond saying that we need not address it now), the Department's oblique statement is not enough to support a ruling in its favor.

overlapping, prerequisites to operating a POTW, which are Act 537 planning, NPDES/Part I permitting, and water quality management/Part II permitting:

> To describe the process mechanically, when a project, as here, involves the construction of a new sewage treatment plant three things have to happen. First, the new facility is presented as part of a Sewage Facilities Act Section 537 Plan. Second, the proponent of the facility applies for and secures a National Pollutant Discharge Elimination System (Part I/NPDES) permit under § 202 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law or CSL), 35 P.S. §6981.202. The focal point of the NPDES or Part I permit is that it establishes the location(s) of the discharge point(s) and sets the effluent limitations for the discharge into the receiving waters. Finally, in step three, the facility proponent applies for and secures a water quality management (WQM/Part II) permit, which authorized construction and operation of the sewage facility pursuant to § 207 of the Clean Streams Law. 35 P.S. §691.207. The essence of the Part II permit is that it authorizes construction and operation of the proposed treatment permit pursuant to construction plans which are submitted for review by the Department.

2002 EHB at 771-72. Where, as here, a party's Part I and Part II permits overlap, it is obviously important that both parts are consistent with each other. In the absence of any explanation from the parties why it matters whether the challenged effluent limits are in Part I or Part II, so long as there is authority to include the limits in either part of the permitting continuum, the Department's legal authority to incorporate the limits into the other part of the permitting continuum would seem to follow. In any event, under the unique circumstances of the Authority's consolidated appeals from both permits, we see no point to analyzing the Department's authority in a piecemeal fashion.

Accordingly, we issue the order that follows:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNIVERSITY AREA JOINT AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2012-131-L**
	:	**(Consolidated with 2012-174-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 8th day of January, 2013, it is hereby ordered that the parties' motions for partial summary judgment are **denied**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: January 8, 2013

c: **DEP, Bureau of Litigation:**
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CLEAN AIR COUNCIL	:	
	:	
v.	:	
	:	**EHB Docket No. 2011-072-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM & RESOURCES LLC	:	**Issued: January 11, 2013**

OPINION AND ORDER ON MOTION FOR A PROTECTIVE ORDER

By: Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Pennsylvania Environmental Hearing Board denies a Motion for a Protective Order to prohibit the deposition of Appellant's Chief Counsel and lead trial attorney because the individual is also its Executive Director and appears to be the only person with knowledge of several areas of discoverable information. Although Clean Air Council made a *prima facie* showing of good cause under Rule 4012 of the Pennsylvania Rules of Civil Procedure, after balancing the competing interests of the parties and the dual employment status of the deponent the reasons enunciated by the Permittee convince the Board to allow a limited deposition to go forward.

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OPINION

Presently before the Pennsylvania Environmental Hearing Board is Appellant Clean Air Council's Motion for a Protective Order Prohibiting the Deposition of Joseph Otis Minott (Motion for a Protective Order). Attorney Minott is Clean Air Council's Chief Counsel and is listed as its lead attorney in this litigation. In addition, Attorney Minott is the Appellant's Executive Director. Clean Air Council vigorously opposes the deposition and claims that the deposition should be prohibited by the Pennsylvania Environmental Hearing Board because to allow the deposition is unreasonable, annoying, oppressive, expensive and burdensome pursuant to Pennsylvania Rule of Civil Procedure 4012. It argues that much of Attorney Minott's testimony is protected by the attorney-client privilege or attorney work product. *See* 42 Pa. C.S.A. Section 5928. Permittee MarkWest Liberty Midstream (MarkWest) argues just as strenuously that Attorney Minott should be deposed since he is Clean Air Council's Executive Director, has extensive knowledge which is discoverable, and MarkWest's efforts to obtain this information through other means have been unproductive. Counsel for MarkWest contends that a deposition would yield much discoverable information without violating the attorney-client privilege.

We have extensively reviewed the numerous filings consisting of hundreds of pages of exhibits and discovery responses including the entire depositions of Aimee

Erickson, Raina Rippel, and Eric Cheung (who was offered as a corporate designee by Clean Air Council). Ms. Erickson and Ms. Rippel are "acting as representative members in the Appeal at issue" and would presumably testify as to how MarkWest's operations have impacted them for standing purposes. Clean Air Council's Reply to MarkWest's Response, Paragraph 18 a. Attorney Cheung is an attorney employed in-house by Clean Air Council who was designated by Appellant to testify on various requested matters.

Discovery before the Pennsylvania Environmental Hearing Board is governed both by our Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure. *See* 25 Pa. Code Section 1021.102(a). *McGinnis v. Commonwealth of Pennsylvania, Department of Environmental Protection and Eighty-Four Mining, Inc.*, 2010 EHB 489, 493. It is the Board's duty to monitor and regulate discovery in the cases before us. *Clean Air Council v. Commonwealth of Pennsylvania, Department of Environmental Protection and MarkWest Liberty Midstream & Resources, LLC*, 2011 EHB 832, 833; *Cappelli v. Commonwealth of Pennsylvania, Department of Environmental Protection and Maple Creek Mining, Inc.*, 2006 EHB 426, 427. The main purposes of discovery are so all sides can accumulate information and evidence, develop the facts necessary to support their legal contentions, plan trial strategy, and ascertain the strong points and weaknesses of their respective positions. *McGinnis*, at

493; *Commonwealth of Pennsylvania, Department of Environmental Protection v. Neville Chemical Company*, 2004 EHB 744, 746.

We now turn to Rule 4012 of the Pennsylvania Rules of Civil Procedure which provides the Board with broad authority to enter Protective Orders to protect a party from unreasonable discovery.

> (a) Upon motion by a party or by the person from whom discovery or deposition is sought, and for **good cause shown**, the court may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense, ...

Rule 4012 of the Pa. R. Civ. P. (emphasis added).

Our case law is clear that we will rarely allow a party to depose opposing counsel. *PA Waste, LLC v. Commonwealth of Pennsylvania, Department of Environmental Protection and Clearfield County,* 2009 EHB 317. Indeed, we have said that deposing attorneys is usually a "terrible idea." *Kiskadden v. Commonwealth of Pennsylvania, Department of Environmental Protection and Range Resources-Appalachia, LLC,* EHB Docket No. 2011-149-R (Slip Opinion and Order issued on May 17, 2012, at page 6). Attorney Minott is identified by Clean Air Council as its Chief Counsel and its lead trial attorney in this case. Based on these facts alone we are extremely hesitant to allow such a deposition to take place and we find that Appellant has made a prima facie showing of good cause which could support our granting of a

Protective Order prohibiting his deposition. Our rationale is clearly explained as follows:

> It is not that attorneys enjoy some princely status. Rather, it is that 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 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...Most internal communications between an attorney and his or her client will, of course, be privileged...The attorney work product doctrine is very broad and protects from discovery the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes, summaries, research and legal theories....

Pa. Waste, 2009 EHB 317-318.

We are hard pressed to imagine much of what trial counsel might say that would not implicate his or her mental impressions. *Groce v. Commonwealth of Pennsylvania, Department of Environmental Protection and Wellington Development, WDYT, LLC,* 2005 EHB 951, 953. Moreover, an attorney's personal opinions on the merits of the Department's action under appeal or the policies involved are irrelevant. We are also cognizant of the fact that deposing opposing counsel could be used as a litigation tactic to try to intimidate the opposing party and add a whole layer of unnecessary expenses and costs to the litigation process before the Board without any corresponding benefit to any party. The Board would also likely be drawn into even more discovery disputes

spawned by such depositions, many likely involving attorney-client privilege and attorney work product which would result in numerous motions, responses, and rulings.

Although we are not prejudging any issues that may be raised, following our review of the briefs, even MarkWest seems to recognize that Clean Air Council likely has standing in this Appeal pursuant to the provisions of the Air Pollution Control Act. As MarkWest states in its Memorandum of Law filed in opposition to Clean Air Council's Motion for a Protective Order:

> MarkWest is mindful that the Pennsylvania Air Pollution Control Act, 35 P.S. Section 4000.1 *et. seq.* ("APCA") would appear to afford the Appellant standing to bring this action simply because it commented on the permit in question, MarkWest's fourth plan approval for its Houston Gas Plant. 35 P.S. Section 4010.2. Nevertheless, the issue of whether there are constitutional limits to the standing otherwise broadly afforded to any and all "commenters" under the APCA is a legal question of first impression for the Board, and one that cries out for adjudication given the facts revealed thus far concerning the Appellant's lack of connection to Washington County and the facility permit at issue. The Appellant asks this Board to deny any further discovery on this important question, to not even allow MarkWest to discover facts concerning the Appellant's standing to bring and maintain this appeal.
>
> MarkWest submits that further discovery is not only permissible, it is desirable, lest these kind of tactics continue to result in questionable and burdensome appeals by public interest law firms like the Appellant, with no connection to the permits or facilities being challenged, and who broadly claim privilege from the bright light of permissible discovery because they have chosen to have their chief executives also serve as in-house counsel and counsel of record. MarkWest suggests that allowing such tactics to continue so as to shield appellants from otherwise

> permissible discovery of their standing to challenge permits is, to quote the Appellant [who was quoting the Board], "a terrible idea."

MarkWest's Memorandum of Law in Opposition to Appellant Clean Air Council's Motion for a Protective Order Prohibiting the Deposition of Joseph Otis Minott, at page 4. In addition, Clean Air Council will presumably call Ms. Erickson and Ms. Rippel to establish another basis to support its standing position.

Some of the other issues MarkWest evidently wants to explore with Attorney Minott such as Appellant's contacts and interactions with other environmental groups seem to be mostly in the nature of legal versions of "fishing expeditions." These areas of inquiry might uncover interesting information to MarkWest (and maybe even information that could help MarkWest in other cases and jurisdictions)[1] but hardly seem aimed at discovering information "relevant to the subject matter involved in the pending action" and "reasonably calculated to lead to the discovery of admissible evidence." *See* Pa. R.Civ.P. 4003.1(a) & (b).

That said, the fact that Chief Counsel and lead trial attorney Minott is also Executive Director Minott certainly clouds the issue. Indeed, Attorney Minott has personally verified thirty-nine of the Council's responses to MarkWest's discovery requests. Clean Air Council's Reply to MarkWest's Response, Paragraph 22. Full

[1] Ironically, MarkWest earlier argued in this case that Discovery is a private proceeding between the parties and should be strictly limited to evidence relevant to the issues involved in the current proceeding.

disclosure of a party's case underlies the discovery process before the Board. *Pennsylvania Trout v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 2003 EHB 652, 657. We tend to agree with MarkWest that Executive Director Minott likely would have detailed knowledge about the Council's operations, membership, basis for standing, and contacts with other environmental organizations. After reviewing the deposition testimony of Attorney Cheung we believe there are still areas of relevant, non-privileged information that MarkWest may explore and for which it evidently has no alternative source other than Executive Director Minott for obtaining this information.

Finally, in balancing the competing interests of the parties we are persuaded that MarkWest should be afforded a reasonable opportunity to develop the facts in support of its legal contentions. This is especially true regarding its relatively novel constitutional position underpinning its standing argument. Discovery to determine whether Clean Air Council has standing to appeal a permit decision of the Pennsylvania Department of Environmental Protection, in our view, fits squarely within the broad scope of permissible discovery afforded all parties before the Pennsylvania Environmental Hearing Board. We hasten to add that MarkWest, to the extent that it wishes to explore other areas with Mr. Minott, must fish with a hook rather than a net. We will therefore craft an Order "which justice requires" that

although allowing MarkWest ample opportunity to discover the facts supporting its legal contentions will provide definite limits and parameters to the Deposition.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL	:	
	:	
v.	:	
	:	**EHB Docket No. 2011-072-R**
COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT OF	:	
ENVIRONMENTAL PROTECTION	:	
and MARKWEST LIBERTY	:	
MIDSTREAM & RESOURCES LLC	:	

ORDER

AND NOW, this 11th day of January, 2013, after review of Clean Air Council's Motion for Protective Order and the Responses of Range Resources, it is ordered as follows:

1) Clean Air Council's Motion for a Protective Order is **denied.**

2) MarkWest may depose Mr. Joseph Otis Minott and ask questions related to his position as Executive Director relevant to the subject matter involved in this Appeal and reasonably calculated to lead to the discovery of admissible evidence.

3) The deponent shall not be required to reveal privileged information or information covered by the attorney-work product doctrine.

4) MarkWest shall file its Notice of Deposition with the Board.

5) The direct examination of the deponent shall not exceed **three hours.**

6) MarkWest can ask as many follow up questions on redirect examination as are asked by counsel for Clean Air Council and the Department of Environmental Protection.

7) Any examination by the Department of Environmental Protection shall not exceed **15 minutes.**

ENVIRONMENTAL HEARING BOARD

Thomas W. Renwand

THOMAS W. RENWAND
Chief Judge and Chairman

DATED: January 11, 2013

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES-APPALACHIA, LLC, Permittee	:	**Issued: January 16, 2013**

OPINION AND ORDER ON MOTION FOR ORDER AUTHORIZING ENTRY UPON PROPERTY OF APPELLANT

By: Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Pennsylvania Environmental Hearing Board partially grants Permittee's Motion requesting entry upon the property of the Appellant. The Board will allow Permittee to perform limited soil sampling, photography, water tests and metal detection because such tests may lead to the discovery of admissible evidence.

Background

Appellant, Loren Kiskadden (Appellant or Mr. Kiskadden), filed a timely appeal of the Pennsylvania Department of Environmental Protection's (Department or DEP) denial of his claim that his well water was contaminated by the Marcellus Shale gas operations of Permittee, Range Resources – Appalachia, LLC (Permittee or Range Resources). Mr. Kiskadden resides south of Pittsburgh in Amwell Township, Washington County, Pennsylvania. His property is down-gradient of the Yeager Impoundment which is owned and operated by Range Resources. Mr. Kiskadden

contends that prior to the installation of the Yeager Impoundment he had enjoyed the use of his water without problem over a period of decades. Following the construction of the Yeager Impoundment, according to Appellant, his water turned gray and foamed. Mr. Kiskadden, pursuant to the provisions of the Pennsylvania Oil and Gas Act, notified the Department of his claim. Following an investigation required by the Oil and Gas Act, the Department denied the claim and refused to order Range Resources to provide Mr. Kiskadden with an alternative water source.

As part of the discovery process, Range Resources in October 2012, requested permission from Mr. Kiskadden to enter his property to conduct various tests of his air, soil, water and septic system, involving both visual observations and more invasive methods, including drilling. Mr. Kiskadden filed timely Objections to Range Resources' Request for Entry Upon the Property. On December 7, 2012 Range Resources filed a Motion for Order Authorizing Entry Upon Property of Appellant (Motion for Entry). Mr. Kiskadden filed a response on December 19, 2012. In addition, and pursuant to the Board's Rules of Practice and Procedure, Counsel for the Appellant and Permittee met on December 14, 2012 to discuss Range Resources' Motion for Entry.

At the meeting, the parties were able to agree to the following:

a. To enter into a Stipulation that the air on or surrounding Appellant's property and/or the Yeager Site is not at issue in this Appeal such that Range will withdraw its Request to inspect, in any way, the interior of Appellant's home other than for the limited purpose of collecting a water sample from Appellant's inside water sources;

b. To enter into a Stipulation that Appellant's health, quality of life and/or damage to Appellant's property are not at issue in this Appeal such that Range will withdraw its Request to inspect, in any way, the interior of Appellant's home other than for the limited purpose of collecting a water sample from Appellant's inside water sources;

c. That Appellant will agree to allow Range to collect water sampling from Appellant's property, including Appellant's water well and inside water sources, if necessary, as long as Appellant is permitted to conduct a split sample, the Parties agree to the date and time for such sampling, no communications occur with Appellant other than to direct Range's experts to the water sources and that a copy of the report following the water sampling be provided to Appellant, with QA/QC data;

d. That the "junkyard" referenced in the September 9th Determination Letter is not part of Appellant's property and therefore Appellant is unable to grant Range access to that junkyard for the purpose of any testing;

e. That Appellant will agree to allow Range to conduct a visual inspection around the outside areas of Appellant's property so long as it does not include the drilling of any holes, inspection into the interior of any structures or any soil samples.

(Appellant's Response to Permittee's Motion for Entry)

On December 20, 2012, the Environmental Hearing Board held oral argument its Pittsburgh Courtroom on the Motion for Entry. During the oral argument, the parties further narrowed the issues involved in the Motion for Entry.

Discussion

It is the Pennsylvania Environmental Hearing Board's duty and responsibility to regulate and effectively monitor the discovery process. *Clean Air Council v. Commonwealth of Pennsylvania, Department of Environmental Protection and MarkWest Liberty Midstream & Resources, LLC*, EHB Docket No. 2011-072-R (Opinion and Order issued July 13, 2012), *slip op.* at p. 7. Discovery before the Board is governed by both the Pennsylvania Rules of Civil Procedure and the Board's own Rules of Practice and Procedure. *Clean Air Council, supra*, 2011 EHB 832, 833. As set forth in

Pennsylvania Rule of Civil Procedure 4003.1, discovery is permitted of "any matter not privileged which is relevant to the subject matter in the present action."

Full disclosure of a party's case underlies the discovery process before the Board. *Pennsylvania Trout v. Commonwealth of Pennsylvania, Department of Environmental Protection*, 2003 EHB 652, 657. The main purposes of discovery are so all sides can accumulate information and evidence, develop the facts necessary to support their legal contentions, plan trial strategy and ascertain the strong points and weaknesses of their respective positions. *Clean Air Council, supra*, (Opinion and Order issued January 11, 2013), *slip op.* at p. 3.

Cases before the Pennsylvania Environmental Hearing Board are heard *de novo*. In the seminal case of *Smedley v. Commonwealth of Pennsylvania, Department of Environmental Protection*, 2001 EHB 131, former Chief Judge Krancer succinctly explained what this means:

> The Board conducts its trials *de novo*. We must fully consider the case anew and we are not bound by prior determinations made by DEP. Indeed, we are charged to redecide the case based on our *de novo scope* of review. The Commonwealth Court has stated that "*de novo* review involves full consideration of the case anew. The EHB, as reviewing body, is substituted for the prior decision maker, the Department, and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, 2001 EHB 19, 32. Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

2001 EHB at 156.

We are not dependent on a record developed by the Department or the documents it reviewed prior to reaching its decision on the action appealed. *Clean Air Council, supra*, 2011 EHB at 834.

Most importantly, we are not limited to the information the Department reviewed to reach its decision. *S.H.C. Inc. v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 2010 EHB 619, 664. Instead we can consider all relevant and admissible evidence duly presented and admitted at a hearing before the Board.

The due process guarantees set forth under Pennsylvania law are not triggered until an appeal to a Department of Environmental Protection action is taken. The Pennsylvania Environmental Hearing Board Act provides that no action of the Department of Environmental Protection that is appealed to the Environmental Hearing Board is final until the Board decides the objections raised by the appellant. 35 P.S. § 7514. Due process is provided by the Pennsylvania Environmental Hearing Board, not the Department of Environmental Protection which is a party in the case. See *Einsig v. Pennsylvania Mines Corp.*, 452 A.2d 558 (Pa. Cmwlth. 1982).

With these important principles firmly in mind, we turn now to the issues unresolved in Range Resources' Motion for Entry. Range Resources wishes to conduct extensive testing on Appellant's property including soil sampling of up to twenty feet deep, radar detection tests, septic system testing, water well testing, water samples and visual observations. These tests and examinations would be conducted pursuant to the broad mandates set forth in the Pennsylvania Rules of Civil Procedure. *See* Pennsylvania Rules of Civil Procedure 4009.31, 4009.32, and 4009.33. As we noted earlier in this case, "these Rules provide ample opportunity for a party to conduct extensive investigation at a site including inspecting, photographing, and testing." *Kiskadden v. Commonwealth of Pennsylvania, Department of Environmental Protection and Range Resources – Appalachia, LLC*, EHB Docket No. 2011-149-R (Opinion and Order issued November 6, 2012), *slip*

op. at p. 4.

Appellant initially argues that the request for entry should be denied because Range Resources should have made its request much earlier in the litigation. Range Resources points out that discovery is ongoing and it is seeking to discover evidence very relevant to its defenses and the Appellant's claims. Indeed, Range Resources is seeking evidence to counter arguments raised in the extensive discovery conducted by counsel for Mr. Kiskadden. Although we empathize with Mr. Kiskadden's argument that to allow such discovery at this point in time may have the practical effect of "moving the goalposts" and requiring Mr. Kiskadden to address new arguments and evidence, we have various tools for monitoring and overseeing discovery to assure that no party's due process rights are violated.[1]

Likewise, we reject Mr. Kiskadden's argument that the site view that was conducted by the Environmental Hearing Board on October 19, 2012 limited the parties as to what they could request in discovery concerning entry onto a property. We have not so limited Mr. Kiskadden in his discovery concerning the Yeager Impoundment, nor will we so limit Range Resources based on our site view which also included Mr. Kiskadden's property. Indeed in our Opinion of November 6, 2012 we specifically said:

> We emphasize that a site view conducted by the Board pursuant to 25 Pa. Code § 1021.115 is separate and distinct from a party's discovery rights pursuant to the Pennsylvania Rules of Civil Procedure.

Kiskadden, supra (Opinion and Order issued November 6, 2012), *slip op.* at p. 4.

The Board saw no need to enter Mr. Kiskadden's dwelling and our initial Order denied Range

[1] For example, upon motion, and after responses if opposed, we could consider re-opening discovery in limited areas so that new facts and evidence revealed through no fault of any party could be addressed. One of the principle purposes of discovery is to avoid "trial by ambush."

Resources' request that we view the inside of Appellant's home during the Board's site view. However, at the site view Mr. Kiskadden specifically requested that the Board enter his home and "smell the water" coming from the faucet in his bathtub. We granted his request. Our initial denial of Range Resources' request for the Board to view the inside of Mr. Kiskadden's home does not limit its discovery rights. Range Resources has set forth valid reasons as to why the taking of split water samples taken from inside the Kiskadden residence may lead to the discovery of admissible evidence.

We do not believe that extensive invasive testing and dismantling of Mr. Kiskadden's septic system will lead to the discovery of admissible evidence. Indeed, we think a Protective Order pursuant to Rule 4012 of the Pennsylvania Rules of Civil Procedure is called for in order to limit any testing in this regard. We will allow split water samples of the septic system and limited other testing as more fully set forth in our accompanying Order.

Range Resources is entitled investigate the Kiskadden property using radar or metal detection. Such testing is minimally invasive and may lead to the discovery of admissible evidence. Range Resources may also conduct tests of Mr. Kiskadden's water well including collecting water samples, camera testing or other non-invasive testing and examination in order to ascertain relevant information, such as the depth of the well, depth of the casing, condition of the well and other related information. We believe that these tests can be performed with little annoyance or hardship to Appellant.

After careful consideration of the parties' arguments, we will allow Range Resources to conduct limited soil testing. These tests shall be limited in scope and in number and shall not exceed

a depth of twenty feet. Range Resources, as represented by its Counsel, will repair or replace any damage to Mr. Kiskadden's property caused by its testing. We shall issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ORDER

AND NOW, this 16th day of January 2013, after review of Permittee Range Resources' Motion for Order Authorizing Entry Upon Property of Appellant (Motion for Entry), Appellant Loren Kiskadden's Response, and following oral argument, it is ordered as follows:

1. The Motion for Entry is **granted in part** and **denied in part.**

2. Split samples of any water testing and soil sampling permitted by this Order shall be provided to Mr. Kiskadden, the Pennsylvania Department of Environmental Protection and, if so requested, the United States Environmental Protection Agency.

3. The Stipulation agreed to by counsel for Mr. Kiskadden and Range Resources and set forth in Paragraph 5 of Mr. Kiskadden's Response to Range Resources' Motion for Entry filed on December 19, 2012 are adopted as if more fully set forth.

4. Permittee's request to dig up Appellant's septic system or otherwise conduct any invasive testing of the septic system is **denied.**

5. Permittee is **granted permission** to take samples from the septic system as long as it can do so without damaging or disassembling Appellant's septic system.

6. Permittee is **granted permission** to take water samples from the Appellant's water well, kitchen and bathroom.

7. Permittee is **granted permission** to investigate the characteristics of the Appellant's water well, including its depth, casing depth, construction and current condition if such testing may be done by camera and/or other procedure that does not damage the water well.

8. Permittee is **granted permission** to conduct radar and/or metal detection examination on Mr. Kiskadden's property.

9. Permittee is **granted permission** to take soil samples from Appellant's property as follows:

a. Range Resources may take up to **three samples** by **hand-pushing** as described on pages 16 and 30 of the transcript of the oral argument before the Pennsylvania Environmental Hearing Board conducted on December 20, 2012.

b. Range Resources may take up to **three samples** up to five or six feet in depth by **hand-augering** as described on page 30 of the transcript of the oral argument.

c. Range Resources may take up to **three samples** by a **mechanized drill** to a depth of twenty feet as described on pages 16 and 30 of the transcript of the oral argument.

10. The entry set forth above shall be conducted over a period not to exceed one day (unless agreed to by counsel for Mr. Kiskadden) and shall be performed on or before **February 8, 2013.**

11. Counsel for all parties shall consult within the next **three days** and use their best efforts as Officers of the Court to agree to a mutually convenient day to conduct the entry.

12. Counsel shall so advise the Board on or before the end of the day on **January 18, 2013** as to the date selected for the entry onto Appellant's property.

13. Range Resources' Motion for Entry is **denied** in all other respects.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chief Judge and Chairman

DATED: January 16, 2013

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Glenda Davidson, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CAROLYNE FRYCKE	:	
	:	
v.	:	**EHB Docket No. 2012-125-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, ROSTRAVER TOWNSHIP, Permittee and ROSTRAVER TOWNSHIP SEWAGE AUTHORITY, Intervenor	:	**Issued: January 17, 2013**

OPINION AND ORDER ON MOTIONS IN LIMINE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal from the Department's denial of a private request because a private request is not an appropriate vehicle for challenging anything in the underlying official sewage plan other than the allegedly inadequate application of that plan to the private requestor's individual sewage needs.

OPINION

Carolyne Frycke resides at a property located in Rostraver Township, Westmoreland County. The Rostraver Township Sewage Authority, the Intervenor, serves the sewage needs of the Township. The Department of Environmental Protection approved the Township's official sewage plan update approximately seven years ago, in 2005. The 2005 official plan update concluded that the best alternative going forward for the treatment of sewage from the area of the Township where Frycke lives was to pump the sewage via a public sewage system to the Pollock Run Water Pollution Control Plant. Construction of the public sewage system project was

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http://ehb.courtapps.com

completed in 2009. In furtherance of the official plan, the Township also promulgated an ordinance which requires the owner of each property accessible to and whose principal building is within 200 feet of the sewer system to connect to the system. The property where Frycke resides is such a property. Frycke has resisted connection to the sewer system, to the point that the Authority is pursuing a private criminal complaint in magistrate district court against her. Frycke would prefer to continue to rely on the existing septic system on the property.

In her quest to avoid connection to the public sewer, Frycke filed a private request under the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.1 *et seq.*, asking the Department to order the Township to allow her to continue using her septic system rather than being forced to connect to the sewer line. The Department denied the request. This appeal followed. Currently before us are motions in limine filed by the Department, the Township, and the Authority asking us to preclude Frycke from raising any of the issues raised in her appeal because they all go well beyond the scope of relevant inquiry in an appeal from the denial of a private request. Frycke, of course, opposes the motions.

As a preliminary matter, Frycke makes what would ordinarily be a compelling point that the motions of the Department, Township, and Authority are dispositive motions masquerading as motions in limine. It is true that the motions seek to effectively dispose of Frycke's entire case. Motions in limine are generally best suited to challenging the admissibility of evidence on a certain point, not teeing up whether the point itself is a valid one. *M&M Stone v. DEP*, 2009 EHB 213, 220; *Dauphin Meadows v. DEP*, 2002 EHB 235, 237. There are, however, a couple of reasons why we will not consider the motions to be procedurally defective under the unique circumstances of this case. First, the Board on its own initiative expedited proceedings in this appeal pursuant to 25 Pa. Code § 1021.96a. There arguably was no prior opportunity to raise the

challenges set forth in the motions under the accelerated schedule set by the Board. Secondly, we held a pre-hearing conference on November 7, 2012, a few days prior to the day scheduled for the hearing on the merits. Counsel for the Department, Township, and Authority raised the concern that certain relevancy objections they intended to make at the hearing could have a dramatic impact on the scope of the hearing. Counsel for all parties, including Frycke, agreed that it would be more efficient to postpone the hearing and present the issues in motions in limine. We agreed and issued an appropriate order.

Turning to the merits of the motions, every municipality in the Commonwealth is required to have an officially adopted plan for sewage services for the area within its jurisdiction 35 P.S. § 750.5(a). Any person who is a resident or legal or equitable property owner in a municipality may file a private request with the Department requesting that the Department order the municipality to revise its official plan if the resident or property owner can show one of two things: (1) the official plan is not being implemented; or (2) the official plan is inadequate to meet the person's sewage disposal needs. 35 P.S. § 750.5(b). There appears to be enough misunderstanding about the appropriate scope of private requests that the point is worth repeating: A private request is only available if the municipality is not implementing its official plan or if that plan is not adequate to meet the requestor's sewage disposal needs. *Pequea Twp. v. Herr*, 716 A.2d 678, 687 (Pa. Cmwlth. 1998). Thus, we have repeatedly held that a private request is not an appropriate vehicle for challenging anything in a preexisting official plan other than the allegedly inadequate application of that plan to the requestor's individual sewage disposal needs. *Krushinski v. DEP*, 2008 EHB 579, *aff'd*, 2207 C.D. 2008 (Pa. Cmwlth. 2009);[1]

[1] The Commonwealth Court's decision in *Krushinski* is also noteworthy in that, in addition to affirming the Board's order rejecting an appeal from the Department's denial of a private request, the Court directed the appellant to reimburse the Township for the attorneys' fees and costs that the Township incurred in defending the appeal to the Commonwealth Court due to the frivolous nature of the appeal.

Gilmore v. DEP, 2006 EHB 679; *Yoskowitz v. DEP*, 2006 RHB 342; *Scott Township Env. Pres. Alliance v. DEP*, 2001 EHB 90. *Cf. Carrol Twp. v. DER*, 409 A.2d 1378, 1381 (Pa. Cmwlth. 1980) and *Northampton Twp. v. DEP*, 2008 EHB 473, 475 (official plan may not be challenged in an appeal from an order requiring its implementation); *Winegardner v. DEP*, 2002 EHB 764 (unchanged aspects of an official plan are not open to broad attack in an appeal from the latest update to the plan).

We have carefully reviewed Frycke's notice of appeal and pre-hearing memorandum. She, of course, has not claimed that the Township is failing to implement its plan. Indeed, the fact that the Township is actively implementing its plan is what has given rise to this appeal. That leaves the possible argument that the plan is inadequate to meet her needs. The vast majority of Frycke's challenges, however, all relate to alleged deficiencies of the 2005 official plan or other extraneous matters. Frycke argues, for example, that the official plan was approved in 2005 without proper notice and opportunity to comment. She says she did not understand at the time that the plan would interfere with her ability to keep her septic system. She says that there was an insufficient consideration of alternatives to public sewage such as the continued use of septic systems if they work. These claims all relate to the original plan, not the private request. Frycke also added a few extraneous claims, such as that installation of the public sewer line harmed trees and some survey markers, but those matters do not provide a basis for finding any error on the part of the Department in denying the private request.

There is nothing in Frycke's filing to support a claim that the public sewer line adjacent to her house would be inadequate to meet her sewage disposal needs. That Frycke would have preferred to avoid the expense of connecting to the public system by continuing to use her septic system is an entirely inappropriate basis for a private request. *Force v. DEP*, 1998 EHB 179.

Frycke makes much of the fact that her 67 year old septic system works fine. Although the parties dispute that claim, we view it as irrelevant. So long as the sewage provided for in the official plan is adequate, it does not matter whether the requestor's existing system is also adequate for purposes of a private request. A private request does not provide an opportunity to compare the relative merits of an existing system versus a system mandated in the official plan. The focus in a private request is not on a private requestor's existing sewer system if there is one. The focus is on the sewage disposal method provided for in the official plan. If *that* method is adequate, the private request must be rejected.

Frycke's says that connection to the sewer line is an unnecessary cost. This is merely a variant of the argument that allowing her to continue to use her septic system is the better alternative, which as we have discussed is out of place in this setting. Frycke has not asserted that connection is technologically or economically infeasible. In any event, "[t]he question of the allocation of costs for the connection to the public sewer system is a local government issue over which the Department has no power under the Sewage Facilities Act." *Force*, 1998 EHB at 188.

To the extent Frycke has challenged the validity or constitutionality of the Township's mandatory connection ordinance, this Board has no jurisdiction to review such direct challenges to an ordinance. *Force*, 1998 EHB at 188-90. We are empowered to review actions of the Department, not the actions of municipalities in promulgating ordinances. 35 P.S. § 7514. *See PA Waste v. DEP*, 2010 EHB 98, 104; *Angela Cres Trust v. DEP*, 2009 EHB 342, 363; *Douglass Township v. DEP*, 2009 EHB 173, 198.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CAROLYNE FRYCKE	:	
	:	
v.	:	**EHB Docket No. 2012-125-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, ROSTRAVER TOWNSHIP, Permittee and ROSTRAVER TOWNSHIP SEWAGE AUTHORITY, Intervenor	:	

ORDER

AND NOW, this 17th day of January, 2013, it is hereby ordered that the Department, the Permittee, and the Intervenor's motions in limine are **granted**. Because there are no remaining legal or factual objections in this appeal, the appeal is **dismissed**.

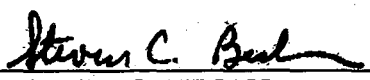
ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chief Judge and Chairman

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge



STEVEN C. BECKMAN
Judge

DATED: January 17, 2013

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL AND DEBBIE BARRON	:	
	:	
v.	:	**EHB Docket No. 2011-142-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 29, 2013**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal from an order that was issued by the Department pursuant to Section 512 and 1102 of the Hazardous Sites Cleanup Act ("HSCA"), 35 P.S. §§ 6020.512, 6020.1102 to owners of a residential property located within a HSCA site. The order imposed institutional controls and activity use limitations relating to groundwater contaminated with TCE that is being used as a water supply at the property. The Board rejects the appellants' challenges that (1) a Section 512 order may not be issued after completion of an interim response action, (2) the order is unnecessary because there are separate obligations and duties regarding the disclosure of material defects under the Real Estate Seller Disclosure Law, 68 Pa.C.S. § 7301 *et seq.*, and (3) the level of TCE in the appellants' drinking water does not justify issuance of the order.

FINDINGS OF FACT

1. Michael and Debbie Barron are owners of a residential property located at 738 N. Route 313, Perkasie, PA 18944 in Hilltown Township, Bucks County, also identified as Bucks

County Tax Assessor's Parcel Number 15-021-016-001 (the "Property"). (Joint Stipulation of the Parties No. ("Stip.")1.)

2. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Hazardous Sites Cleanup Act, 35 § 6020.101 *et seq.* ("HSCA"); Section 917-A of the Administrative Code of 1929, 71 P.S. § 510-17; and the rules and regulations promulgated under those statutes. (Stip. 2.)

3. In 1986, the Bucks County Health Department first identified trichloroethylene ("TCE") in the aquifer underlying the area of the Barrons' home after testing a few private drinking water wells at properties along Route 313. (Stip. 12.)

4. TCE is a known carcinogen in animals, a suspected human carcinogen, and is believed to cause liver and kidney disease when consumed. (Notes of Transcript page ("T.") 30-31, 48-49; Appellants Exhibit No. ("A. Ex.") B2, B3.)

5. Pennsylvania has a statewide health standard of 5 parts per billion (ppb) for TCE in public drinking water supplies. (Stip. 18; T. 49, 88; Commonwealth's Exhibit No. ("C. Ex.") 29.) *See* 25 Pa. Code §109.202(a) (incorporating by reference the primary maximum contaminant level ("MCL") set forth in the National Primary Drinking Water Regulations at 40 C.F.R. Part 141.)

6. The drinking water for the Property was one of the first wells sampled by the Bucks County Health Department in 1986. (Stip. 13.)

7. On or about July 1986, the Bucks County Health Department sampled the drinking water from the well on the Property (unfiltered) and determined that there were 126 ppb of TCE in the water. (Stip. 14.)

8. On or about 1992, the U.S. Environmental Protection Agency sampled the drinking water from the well on the Property (unfiltered) and determined that there were 40.6 ppb of TCE in the water. (Stip. 15.)

9. On or about August 10, 2000, the Bucks County Health Department sampled the drinking water from the well on the Property (unfiltered) and determined that there were 51.1 ppb of TCE in the water. It notified the Department of the water sampling results. (Stip. 16.)

10. In 2000, the Bucks County Health Department identified 12 additional properties in the same area as the Property with drinking water contaminated by TCE, and it notified the owners of those properties of the contamination. (Stip. 17.)

11. By letter dated September 13, 2000, the Bucks County Health Department informed June Hill, the prior owner of the Property, that the level of TCE in the drinking water for the Property was 51.1 ppb, which was well above the maximum contaminant level of 5 ppb. (Stip. 18.)

12. In 2001, the Bucks County Health Department turned the investigation of the TCE groundwater plume over to the Department. The area of the plume came to be known as the Morris Run TCE Site (the "Site"). (Stip. 19, 27.)

13. Although the primary contaminant of concern at the Morris Run TCE Site is TCE, other synthetic hazardous compounds such as carbon disulfide, 1,1-DCE, cis-1,2DCE, 1-1-1 TCA, methylene chloride, and toluene are also present in the drinking water at the Site. (A. Ex. A4; C. Ex. 29.)

14. Prior to the Barrons' purchase of the Property, June Hill and her now-deceased husband Robert Hill had a carbon filtration system installed at the Property for the purpose of removing TCE contamination from the drinking water. (Stip. 20.)

15. The Barrons knew that drinking water for the Property was contaminated with TCE prior to purchasing the Property. (Stip. 21, 23, 25.)

16. The Barrons also knew that the Hills had installed a carbon filtration system in the house for the purpose of removing TCE from the drinking water. (Stip. 22.)

17. The Barrons purchased the Property from June Hill on January 10, 2002. (Stip. 26.)

18. There are approximately 37 properties, including the Barrons' Property, that are impacted at the Morris Run TCE Site. Most of the properties are residential. (Stip. 27.)

19. On February 28, 2002, the Department assigned its contractor, Michael Baker Jr., Inc., to further investigate the Site and to supply bottled water to owners of private water supplies that had site-related contamination exceeding drinking water standards. (Stip. 28.)

20. DEP sampled the drinking water at the Property again on March 21, 2002 and found that the level of TCE in the drinking water sampled before carbon filtration was 58 ppb and after carbon filtration was 0.7 ppb. (Stip. 29.)

21. On May 8, 2002, the Department notified the Barrons of the results of its March 21, 2002 results. (Stip. 31.)

22. Baker thereafter conducted further investigation of the groundwater at the Site. (Stip. 32-35.)

23. Between 2001 and 2010, the Department conducted an investigation of the TCE contamination at the Morris Run Site, determined that 37 properties were affected by TCE, including 14 with levels above the MCL, provided bottled water to residents with TCE above the MCL, analyzed response action alternatives, notified the public, convened a public hearing, and selected its response action. (Stip. 27-47; C. Ex. 29.)

24. On April 2, 2010, Baker conducted samples of the drinking water at the Property, which revealed TCE levels of 47.1 ppb before the carbon filtration system and 59.8 ppb TCE after the carbon filtration system. (Stip. 36.)

25. Between January 10, 2002 and October 20, 2011, the Barrons never changed the filters or rebedded the carbon in their carbon filtration system. (Stip. 37.)

26. A carbon filtration system that is ill-maintained or not maintained can result in a higher load concentration of a hazardous substance in the drinking water supply than having no carbon filtration system at all. (Stip. 38.)

27. The Department determined that it needed to abate the immediate and ongoing threat posed by the ingestion of TCE in drinking water at the Site. In order to achieve that objective, the Department considered four alternatives: (1) no action; (2) delivery of bottled water; (3) installation of whole house carbon filtration systems together with execution of environmental covenants setting forth various obligations to be imposed on the impacted property owners; and (4) installation of a public water supply waterline together with execution of environmental covenants. (Stip. 39-42.)

28. After considering public comments, the Department selected the third alternative. Under Alternative 3, the Department decided to use money in the Hazardous Sites Cleanup Fund to provide carbon filtration systems free of charge to all the properties in the site area that relied on private wells that had TCE levels near or above the statewide health standard. Each property owner that accepted the Department's interim response would be required to execute environmental covenants that would require the property owner to refrain from using groundwater without using a carbon filtration system, operate and maintain the filtration system, sample the water annually after an initial two-year period in which the Department would

conduct the sampling, and disclose the interim response when conveying any interest in the property. The environmental covenants would be required to be recorded with the Bucks County Recorder of Deeds. (Stip. 43-53.)

29. On July 12, 2010, the Department signed and issued the "Statement of Decision for the Morris Run TCE HSCA Site ("SOD"), as required by Section 506(e) of HSCA, 35 P.S. § 6020.506(e). (Stip. 49.)

30. The Department selected the installation of carbon filtration systems and environmental covenants because that response is more protective of human health than no action or supplying bottled water, installing a public water supply line is much more expensive than carbon filtration systems and may not be implementable in the foreseeable future, the installation of carbon filtration systems complies with safe drinking water standards, it effectively mitigates threats to public health, and it is cost-effective. (Stip. 53.)

31. Of the seventeen property owners that accepted the interim response, eight of them owned properties at the Site that had drinking water contaminated with TCE levels above the MCL. (Stip. 54.)

32. On April 19, 2010, the Department notified the Barrons of its intent to select carbon filtration systems and environmental covenants as the proposed interim response action for the Site. (Stip. 39-43; C. Ex. 15, 16.) The Department also published notice in the Pennsylvania Bulletin on March 20, 2010 and the Intelligencer of Doylestown, Bucks County on March 21, 2010. (Stip. 39-43; T. 74-77; C. Ex. 15-16.)

33. On May 5, 2010, the Department held a public hearing and explained its proposed response action. (T. 78-79, 112; C. Ex. 22.)

34. In the fall of 2010, the Department began implementing its response action. (Stip. 54; T. 81-82.)

35. By letters dated September 13 and September 14, 2010, the Department informed each of the affected property owners at the Site of the selected response action, the issuance of the SOD, the process to execute and record the environmental covenants, and that each property owner needed to record an executed environmental covenant before the Department would install a carbon filtration system at their property. (T. 31-32, 81-82.) The Department sent such a letter to the Barrons on September 13, 2010. (C. Ex. 31.)

36. By letters dated between December 3, 2010 and December 13, 2010, the Department informed each of the affected property owners that the Department would arrange for notarizing and recording of each environmental covenant at no cost to the property owners. (C. Ex. 32.) The Department sent such a letter to the Barrons on December 10, 2010. (C. Ex. 32.)

37. By letters dated May 11, 2011, the Department informed 24 of the affected property owners who had not yet executed and returned an environment covenant that they needed to return a covenant or risk not receiving a carbon filtration system. (C. Ex. 33.) The Department sent such a letter to the Barrons. (C. Ex. 33; T. 32-33, 84.)

38. The Department also informed the Barrons in its May 11, 2011 letter that if the Barrons did not execute an environmental covenant, the Department intended to use its authority to issue an order to them that would be recorded against the deed of the Property to warn prospective purchasers of the TCE contamination. (C. Ex. 33.)

39. After the series of letters and meetings urging the affected homeowners (including the Barrons) to accept the filtration systems in exchange for the execution of environmental

covenants, and the Barrons' refusal accept that offer, the Department issued an administrative order to the Barrons and the Bucks County Recorder of Deeds on or about September 2, 2011. That order is the subject of this appeal.

40. The Department is not requiring the Barrons to replace their existing carbon filtration system or execute an environmental covenant. (Stip. 57, 58.)

41. The primary purpose and effect of the order is to ensure that future prospective purchasers of the Property and other interested persons are made aware of the contamination and the institutional controls on the Property. (T. 74, 88, 109, 128, 144-45.)

42. The Order lists the institutional controls as follows:

> 1. The then current owner shall not use the groundwater at the Property for any reason without the installation of a Department provided carbon filtration system or an equivalent system.
>
> 2. The then current owner shall not use, maintain, or install any groundwater well at the property unless it supplies drinking water through a Department provided and installed carbon filtration system or an equivalent system.
>
> 3. After the Department's Initial Monitoring and Maintenance Period, the then current owner shall conduct sampling of the property's drinking water for all of the TCE at least annually at a location before and after the carbon filtration system. The Department recommends that the sampling be performed by a qualified technician and that a laboratory, certified by the Commonwealth, conducts the sampling analysis.
>
> 4. If any post-filter sampling of the property's drinking water indicates that any of the TCE exceeds the then current safe drinking standard promulgated by the Department, the then current owner should replace all of the carbon filters on the whole house carbon filtration system. Even if post-filter sampling of drinking water does not indicate an exceedance of a safe drinking standard for any of the TCE, the then current owner should replace the carbon filters on the whole house carbon filtration system, at a minimum, every five years from the date of the last filter installation and/or replacement.
>
> 5. The then owner of the Property should maintain the whole house carbon filtration system in accordance with the manufacturer's specifications to assure proper treatment of drinking water. The Department recommends that a qualified

technician evaluate the system for any necessary maintenance, at a minimum, every five years.

The order goes on to require the following:

> 1. The owner of the Property, his or her agents or assigns, or interest holders in the Property shall not, from the date of this Administrative Order, put the Property, the Morris Run TCE Site, or any portion thereof, to any use that would disturb or be inconsistent with the interim response implemented by the Department, as set forth under Paragraph E and the Statement of Decision, and the owner of the Property, his or her agents or assigns, or interest holders in the Property shall not violate any of the Institutional Controls identified in Paragraph E, herein, or within the Statement of Decision.
>
> 2. This Administrative Order shall be binding upon all subsequent purchasers of the Property and interest holders of the Property once it has been recorded.
>
> 3. The Recorder of Deeds for the County of Bucks shall within forty (40) days of the date of this Administrative Order record this Administrative Order in a manner that will assure its disclosure in the ordinary course of a title search of the Property.
>
> 4. The owner of the Property, its agents or assigns, or any subsequent holder of title to the Property shall provide the Department's Southeast Regional Environmental Cleanup Program Manager with written notice of any conveyance, transfer, or assignment of title to the Property, or any portion thereof, within 20 days of such transfer.

43. The Bucks County Recorder of Deeds did not appeal the order, and the order has now been recorded. (Stip. 61, 64, 65; T. 61, 87; C. Ex. 37.)

44. The Department did not issue the order to the Barrons until after it had informed the Barrons of its sampling results on multiple occasions, sent multiple letters explaining the selected response action, explained the process for executing and recording the environmental covenants, and offered to arrange for notarizing and recording the covenants at no cost to the Barrons. (T. 31-33, 84; C. Ex. 15, 16, 31, 32, 33.)

45. Prior to recording of the order on the deed of the Property on February 14, 2012, there were no deed notices relating to the Property that would inform prospective buyers of the

Property of TCE contamination in the drinking water at the Property, the existence of the response action selected by the Department, or of the need to use and maintain the existing or equivalent carbon filtration system to reduce the exposure of unsafe levels of TCE at the Property. (Stip. 65; T. 88.)

DISCUSSION

The only objection in the notice of appeal that the Barrons filed in this matter was that the Department should have selected the fourth alternative in the SOD (installation of a public waterline) instead of the third alternative (installation of carbon filtration systems). They argued that installation of a public waterline would have been a better choice because it would not have resulted in a reduction in the value of their home, would have better reduced the dangers of TCE exposure, and would have "eliminated the financial and regulatory burdens" associated with installation of carbon filtration systems. The notice of appeal prompted the Department to file a motion in limine arguing that the Barrons' sole objection related to the SOD itself as opposed to the order, and it was inappropriate to debate the merits of the SOD in this proceeding. We found ourselves in agreement with the Department. We held that, although the recipient of an order issued pursuant to Sections 512 and/or 1102 of HSCA has a right to appeal that order to the Board, a challenge to the merits of a response action that underlies that order is not within the scope of our review of the order. Section 508 of HSCA describes the exclusive method for challenging a response action.[1] Since the Barron's only challenge – choice of a remedy as

[1] Section 508 reads as follows:

> **(a) General rule.**—*Notwithstanding any other provision of law*, the provisions of this section shall provide the *exclusive* method of challenging either the administrative record developed under section 506 or a decision of the department based upon the administrative record.

described in the SOD – went to the response action rather than anything specific to the Section 512 order itself, we granted the Department's motion in limine.

Although granting the Department's motion in limine would have seemed to resolve the case in its entirety, the Department had stated that it was "willing to accept some late modifications by the Appellants of the issues they are raising on appeal, provided that such changes do not prejudice the Department's defense of the appeal and that the Board clarifies that the issues related only to the Order and not some other action." The Department also said that we "should confine [the Barrons'] arguments as they relate to the Order and only in context of the reasonableness of the Department's issuance of the Order, since that is the action under appeal."

> **(b) Timing of review.**—Neither the [EHB] nor a court shall have jurisdiction to review a response action taken by the department or ordered by the department under section 505 until the department files an action to enforce the order or to collect a penalty for violation of such order or to recover its response costs or in an action for contribution under section 705....
>
> **(c) Grounds.**—A challenge to the selection and adequacy of a remedial action shall be limited to the administrative record developed under section 506...
>
> **(d) Procedural errors.**—Procedural errors in the development of the administrative record shall not be a basis for challenging a response action unless the errors were so serious and related to matters of such central relevance to the response action that the action would have been significantly changed had the errors not been made....
>
> **(e) Remand.**—When a response action is demonstrated to be arbitrary and capricious on the basis of the administrative record developed under section 506, or when a procedural error occurred in the development of the administrative record which (error) would have significantly changed the response action, the following apply:
>
> (1) When additional information could affect the outcome of the case, the matter shall be remanded to the department for reopening the administrative record.
>
> (2) When additional information could not affect the outcome of the case the department's enforcement of its order or its recovery of response action found to be arbitrary and capricious or the result of a procedural error which would have significantly changed the action.

35 P.S. § 6020.508 (emphasis added).

Given those concessions, we proceeded to a hearing on the merits and the submission of post-hearing briefs.

The Barrons in their post-hearing brief raise a series of objections to the evidence taken at the hearing. In addition, they for the first time list the following three challenges to the Department's action:

1) The Department cannot issue the order because it failed to complete a response action prior to issuing the order;

2) The Real Estate Sellers Disclosure Law, 68 Pa.C.S. § 7301 *et seq.*, and the seller's property disclosure statement used pursuant to that law ensure that purchasers of a residential property will be made aware of all hazardous substances and environmental issues, and they provide an adequate legal remedy, making the order unnecessary; and

3) The Department failed to demonstrate that adverse health effects are linked to the level of TCE in the groundwater at the Morris Run Site.

Turning first to the Barrons' evidentiary objections, the Barrons in their post-hearing brief listed several questions and answers drawn from the testimony taken at the hearing on the merits. They contend that the testimony is hearsay, or is inconsistent with Mr. Barron's testimony, or is based on inaccurate facts and contradictory statements. To the extent the Barrons are arguing about the facts in the form of "objections," we have considered their position in entering our findings of fact above. To the extent the Barrons are attempting to make actual evidentiary objections, they did not raise the objections at the hearing. The failure to do so constitutes a waiver of the objections. *PUSH v. DEP*, 1999 EHB 457, 520; *Al Hamilton Contracting Co. v. DER*, 1992 EHB 1122. In other words, an objection to evidence taken at the hearing may not be raised for the first time in a post-hearing brief. Otherwise, there is no opportunity for a cure. Furthermore, even if an evidentiary objection is properly preserved, a party must provide us with some legal support for the objection. *Davailus v. DEP*, 2003 EHB

101, 156; *Riddle v. DEP*, 2002 EHB 283, 311 n. 45; *PUSH, supra.* The Barrons failed to do so. In any event, we have not relied on any of the purportedly objectionable testimony cited by the Barrons.

Failure to complete response action

The Barrons' first substantive challenge seems to be that the Department erred by issuing the order before completing the response action at the Site. We say "seems to be" because the Barrons' brief does not explain the basis for this objection, or any of their other objections for that matter. Instead, they simply reprint selected statutory provisions and/or other documents with no attempt to explain their relevance or how they support their position. Although this makes it difficult for us to understand their position, we think the Barrons are arguing that the Department may not issue an order under Section 512(a) of HSCA until a response action has been completed, apparently in the sense that the ongoing release of the hazardous substances giving rise to the action has been minimized or eliminated.

Section 512(a) reads as follows:

> **After closure and conveyance of property**
>
> (a) General rule.—A site at which hazardous substances remain after completion of a response action shall not be put to a use which would disturb or be inconsistent with the response action implemented. The Department shall have the authority to issue an order precluding or requiring cessation of activity at a facility which the Department finds would disturb or be inconsistent with the response action implemented. A person adversely affected by the order may file an appeal with the board. The Department shall require the recorder of deeds to record an order under this subsection in a manner which will assure its disclosure in the ordinary course of a title search of the subject property. An order under this subsection, when recorded, shall be binding upon subsequent purchasers.

35 P.S. § 6020.512(a). The Barrons appear to be referring to the language in the first sentence that says "[a] site at which hazardous substances remain *after completion of a response action* shall not be put to a use which would disturb or be inconsistent with the response action implemented." (Emphasis added.)

We believe the Barrons may be placing too much weight on the phrase "after completion of a response action," but putting that aside, the response action in this case was in fact completed. HSCA is the Commonwealth's superfund law. It created an independent, state-run cleanup program designed to promptly and comprehensively address the problem of hazardous substance releases in the Commonwealth, whether or not the sites where those releases occur qualify for cleanup under the federal superfund law (42 U.S.C. § 9601 *et seq.*). *See* 35 P.S. § 6020.102. The Department is authorized under HSCA to undertake certain "response actions" such as the action that was taken in this case in order to address the release of hazardous substances or contaminants such as TCE into the environment. 35 P.S. § 6020.505. Response actions must be based upon an administrative record. 35 P.S. § 6020.506.

Under HSCA, there are basically two types of response actions: interim responses and remedial responses. An interim response is a response that does not exceed 12 months in duration or $2,000,000 in cost, with certain defined exceptions. 35 P.S. § 6020.103. It is usually designed to address an immediate need for action. Any response that is not an interim response is a remedial response. *Id.* A remedial response addresses the longer term or final cleanup of a site.

The response at issue here was an interim response. *That* response action has in fact been completed. The interim response was not designed to be a final cleanup of the site. Indeed, the source of the contamination has yet to pinpointed, and a plume of groundwater with elevated

levels of TCE remains. Otherwise, there would have been no need for the order that is the subject of this appeal. Although the Department claims further investigation is in store (T. 94, 114), that does not mean that the interim response is incomplete. To the extent Section 512 contains a prerequisite that a response action be completed, that prerequisite has been met. The response action "completed" and "implemented" may be an interim response action. Issuance of a Section 512 order need not await completion of a remedial response action.

We would add that the order issued to the Barrons was also issued pursuant to Section 1102 of HSCA, 35 P.S. § 6020.1102. That provision gives the Department the authority to issue such orders as it deems necessary to aid in the enforcement of the act. The Barrons' arguments do not appear to directly challenge the Department's authority to have issued the order under Section 1102, but to the extent they do, they have not given any basis for concluding that the Department unreasonably determined that the order was necessary to aid in enforcement of the act. We note that the Department issued the order only after several fruitless attempts to obtain the Barrons' cooperation. The levels of TCE in the water are unsafe, treatment systems need to be maintained, and *future* owners of the Property need to be aware of those facts regardless of the Barron's personal decision not to accept the Department's offer. The order reasonably takes the place of a voluntarily executed environmental covenant that normally would have been entered consistent with the requirements of the Uniform Environmental Covenants Act, 27 Pa.C.S. § 6501 *et seq*. The order is a reasonable component of the remedy selected as a result of the interim response action taken at the Site and thus aids in enforcement of the Act.

Sellers Disclosure Law

As we understand it, the Barrons' next contention is that the Section 512 order was not necessary because, if the Barrons ever sell their property, they will need to disclose the presence

of TCE in the water to any potential buyer pursuant to the Real Estate Seller Disclosure Law, 68 Pa.C.S. § 7301 *et seq*. That statute, among other things, provides that any seller who intends to transfer any interest in real property shall disclose to the buyer any material defects with the property known to the seller by completing all applicable items in a disclosure form. 68 Pa.C.S. § 7303.

We will assume for purposes of discussion that the Disclosure Law could subject a seller to damages if he did not disclose the elevated levels of TCE to a buyer. The Department argues that this provides an insufficient guarantee that all future purchasers of the property will know that the water used at the Property is contaminated with TCE. We agree. The Disclosure Law merely creates a cause of action for actual damages suffered as a result of a seller's willful or negligent failure to disclose, with a statute of limitations of two years after final settlement. 68 P.S. § 7311. On the other hand, the Section 512 order which has been recorded is available upon review of the recorder of deeds' records. It does not depend on the *seller's* actions. The order is recorded in the public records and is available for review independent of any action on the part of the seller. The order, in effect, runs with the land; a disclosure statement would not. Furthermore, the order on its face goes beyond what would likely be disclosed on a seller's disclosure form under the Disclosure Law. The order describes not only the contamination, but the need for treatment, the need for maintenance of the treatment system, and the need for notice to the Department of any transfer of the property so the Department can monitor activity at the site. It also reveals that the Property is part of a superfund site. Finally, to the extent that there is any duplication, we see nothing wrong with two statutes with distinct legal roles providing multiple ways to ensure that potential buyers are made aware of the TCE contamination at the Property.

TCE is not a health hazard at the Site

The Barrons' contention that the order must be overturned because the Department has failed to demonstrate that adverse health effects are linked to the level of TCE found at the Site also has no merit. It is worth noting that this is almost the exact opposite of what the Barrons said in their notice of appeal. There, they said that TCE is hazardous and, therefore, the Department should have chosen the installation of a public water line as the interim response of choice. In any event, the maximum contaminant level for TCE is 5 parts per billion. The maximum contaminant level goal is zero. Consuming TCE above the MCL may cause liver and kidney disease and cancer. (T. 47-48.) TCE is ranked as number 16 out of 275 substances on the 2011 Priority List of Hazardous Substances, as required by Section 104 of the CERCLA, 42 U.S.C. 9604.[2]

The levels detected in Barron's water have measured as high as 59.8 ppb, an order of magnitude above the MCL. Although the Barrons may be entitled to disregard the risk of ingesting this water, the Department acted reasonably by ensuring that future owners of the Property are at least made aware of that risk. The Barrons say that the Department's apparent lack of urgency at the Site demonstrates that TCE must not be that dangerous. The relaxed pace of the Department's response may be unfortunate, but we do not take it as proof that TCE is not hazardous.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this appeal. 35 P.S. § 7514; 35 P.S. §§ 6020.512(a) and 6020.1102.

[2] Section 104 requires the federal authorities to prepare a list, in order of priority, of hazardous substances that are most commonly found at facilities on the National Priorities List and which are determined to pose the most significant potential threat to human health due to their known or suspected toxicity and potential for human exposure. The 2011 Priority List of Hazardous Substances is available at www.atsdr.cdc.gov/spl. *See* 76 Fed. Reg. 68193 (Nov. 3, 2011).

2. The Department bears the burden of proof because this is an appeal from an order. 25 Pa. Code § 1021.122(b)(4).

3. The Board reviews the Department's action to ensure that it constitutes a lawful and reasonable exercise of the Department's discretion that is supported by the facts. *Perano v. DEP*, 2011 EHB 453, 515; *Wilson v. DEP*, 2010 EHB 827, 833.

4. The Board limits its review of the Department's action to issues properly raised and thereafter preserved in the notice of appeal and amendments thereto, the prehearing memorandum, and the post-hearing brief. 25 Pa. Code § 1021.131(c); *Berks County v. DEP*, EHB Docket No. 2010-166-L (Opinion and Order, March 16, 2012); *GSP Management Company v. DEP*, 2011 EHB 203, 207; *Thebes v. DEP*, 2010 EHB 370, 371.

5. The Department's burden of proving that its order was lawful, reasonable, and supported by the facts is limited to addressing the objections properly raised and preserved by the appellant. *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, 290.

6. The Department may issue an order pursuant to Section 512 of HSCA, 35 P.S. § 6020.512, after completion of an interim response action.

7. The fact that the Real Estate Seller Disclosure Law, 68 Pa.C.S. § 7301 *et seq.*, creates a cause of action for damages if a seller willfully or negligently fails to disclose a material defect does not render issuance of an order under Section 512 of HSCA unnecessary.

8. The Department's issuance of the order to the Barrons constituted a lawful and reasonable exercise of its discretion that is supported by the facts.

9. The Department reasonably deemed issuance of the order necessary to aid in enforcement of HSCA. 35 P.S. § 6020.1102.

10. An objection to the admission of evidence must be raised at the hearing on the merits or it will be deemed to have been waived. *Al Hamilton Contracting Co. v. DER*, 1992 EHB 1122.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL AND DEBBIE BARRON	:	
	:	
v.	:	**EHB Docket No. 2011-142-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 29th day of January, 2013, it is hereby ordered that this appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chief Judge and Chairman

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

STEVEN C. BECKMAN
Judge

DATED: January 29, 2013

c: **DEP, Bureau of Litigation:**
Attention: Glenda Davidson

For the Commonwealth of PA, DEP:
Adam N. Bram, Esquire
Office of Chief Counsel – Southeast Region

For Appellants, *Pro Se*:
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER NETWORK, MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER AND RESPONSIBLE DRILLING ALLIANCE	:	**EHB Docket No. 2012-196-M (Consolidated with 2012-197-M and 2012-198-M)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TENNESSEE GAS PIPELINE COMPANY, Permittee	:	**Issued: February 1, 2013**

OPINION ON
PETITION FOR SUPERSEDEAS

By Richard P. Mather, Sr., Judge

Synopsis

The Pennsylvania Environmental Hearing Board denies the Appellants' Petition for Supersedeas because Appellants failed to show that they were likely to succeed on the merits or that they would suffer irreparable harm.

OPINION

The Delaware Riverkeeper Network (DRN), Maya Van Rossum (who is the Delaware Riverkeeper) and Responsible Drilling Alliance (RDA) (the "Appellants") filed three appeals of Department actions to issue three permits to Tennessee Gas Pipeline Company, LLC ("Tennessee Gas") associated with Tennessee Gas's plans to construct its Northeast Upgrade Project (NEUP) across portions of northeastern Pennsylvania and adjoining areas in northern New Jersey. NEUP consists of constructing approximately 40 miles of 30-inch diameter pipeline, consisting of five separate pipeline loop segments, as well as existing compressor and meter stations in Pennsylvania and New Jersey. Of the approximately 40 mile total,

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approximately 22 miles of pipeline will be in Bradford, Susquehanna, Wayne and Pike Counties in Pennsylvania and the remainder will be in New Jersey. Construction of the pipeline in Pennsylvania will occur on or along the existing right-of-way for an existing 24-inch pipeline except for approximately 3.4 miles in Pike County (Loop 323) that will be located on a new right-of-way that will be constructed to avoid the Delaware Water Gap National Recreational Area under the jurisdiction of the National Park Service.

The three state permits that Appellants have challenged are the authorization for Tennessee Gas to use the Department's Erosion and Sedimentation Control General Permit for Earth Disturbance Associated with Oil and Gas Exploration, Production, Processing or Treatment Operations or Transmission Facilities (ESCGP-1) (authorization number ESCGP-02-00-11-80); and two water obstruction and encroachments permits under 25 Pa. Code Chapter 105 for activities in Wayne and Pike Counties (Permit number E64-290 for Wayne County and Permit number E52-231 for Pike County). The ESCGP-1 authorization covers the entire length of the NEUP in Pennsylvania. Permit number E64-290 for Wayne County authorizes 27 wetland and 16 stream crossings associated with Loop 321 in Wayne County, and Permit number E52-231 authorized 58 wetland and 31 stream crossings associated with Loops 321 and 323 in Pike County. The permits cover a large area and authorize numerous activities along the approximately 22 miles of pipeline right-of-way in Pennsylvania.

The three permits were issued on or about November 21, 2012 and the Appellants filed their appeals on December 19, 2012.[1] The Board consolidated the three appeals in response to the request of the Appellants.

[1] The three appeals are docketed at: 1) 2012-196 – appeal of ESCGP-1 authorization number ESCGP-02-00-11-80; 2) 2012-197 – appeal of Chapter 105 permit number E64-290 for Pike County; and 3) 2012-198 – appeal of Chapter 105 permit number E52-231 for Wayne County. The consolidated appeals are docketed at 2012-196.

On the same day that the appeals were filed, the Appellants filed a Petition for Temporary Supersedeas and a Petition for Supersedeas. The Board scheduled a conference call with the Parties' counsel on December 20, 2012 to discuss the two pending petitions. After hearing argument from the Parties, the Board denied the Appellants' Petition for a Temporary Supersedeas. The Board also scheduled a three day hearing on the remaining Petition for Supersedeas for January 14 through January 16, 2013 and directed the Department's counsel and Tennessee Gas' counsel to respond to Appellants' Petition on or before January 7, 2013.

The Department filed its Response to the Appellants' Petition for Supersedeas on January 7, 2013. Tennessee Gas also filed its Response to the Appellants' Petition along with a Motion to Dismiss the consolidated appeals asserting the Board lacked jurisdiction as a result of federal preemption.[2]

The Supersedeas Hearing in this consolidated appeal was held on January 14, 2013 through January 16, 2013 in Harrisburg, Pennsylvania. On January 17, 2013, the Board issued an order denying the Appellants' Petition for Supersedeas indicating that an opinion regarding the order would follow. This opinion is issued to support the Board's order denying the Petition for Supersedeas.

Standards for Evaluating Petition for Supersedeas

A supersedeas is an extraordinary remedy that will not be granted absent a clear demonstration of appropriate need. *Rausch Creek Land LP v. DEP and Porter Associates, Inc.*, 2011 EHB 708, 709. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802; *Tinicum Township v.*

[2] At the request of Tennessee Gas, the Board scheduled a conference call with the Parties. During the call, Tennessee Gas indicated that it had or would soon file an action against the Board and the Appellants in the Middle District seeking declaratory and injunctive relief to enjoin the board from conducting the Supersedeas hearing and a declaration that the appeal process before the Board was preempted. The action for declaratory and injunction relief was filed in the United States District Court for the Middle District of Pennsylvania and is docketed at Docket No. 3:13 – CV-00046-RDM.

DEP, 2002 EHB 822, 827; *Global Eco-Logical Services v. DEP*, 1999 EHB 649, 651; *Oley Township v. DEP,* 1996 EHB 1359, 1361-1362. Our rules provide that the granting or denying of a supersedeas will be guided by relevant judicial precedent and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a). Among the factors to be considered are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a)(1)-(3); *Neubert v. DEP,* 2005 EHB 598, 601. The issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *UMCO Energy, Inc.,* 2004 EHB at 802; *Global Eco-Logical Services, supra; Svonavec, Inc. v. DEP*, 1998 EHB 417, 420. *See also Pennsylvania PUC v. Process Gas Consumers Group,* 467 A.2d 805, 808-809 (Pa. 1983). In order for the Board to grant a supersedeas, a petitioner must make a credible showing on each of the three regulatory criteria. *Neubert v. DEP,* 2005 EHB 598, 601; *Pennsylvania Mines Corporation,* 1996 EHB 808, 810; *Lower Providence Township v. DER,* 1986 EHB 395, 397. Where unlawful activity is occurring or is threatened or there is a violation of express statutory or regulatory provisions, there is irreparable harm *per se. Pleasant Hills Construction Co. v. Public Auditorium Authority of Pittsburgh*, 782 A.2d 68, 79 (Pa. Cmwlth. 2001); *Council 13, A.F.S.C.M.E., AFL-CIO v. Casey*, 595 A.2d 670 (Pa. Cmwlth. 1991); *Tinicum Twp. v. DEP*, 2002 EHB 822, 826; *Harriman Coal Corp. v. DEP*, 2001 EHB 234, 252. If any petitioner fails to carry their burden on any one of the factors under 25 Pa. Code § 1021.63(a), the Board "need not consider the remaining requirements for supersedeas relief." *Oley Township v. DEP*, 1996 EHB 1359, 1369.

Petition for Supersedeas

Appellants have requested that the Board grant its Petition for Supersedeas and thereby suspend all three of the permits under appeal. In support of their request, Appellants raise three general objections. First, the Appellants allege that the Department issued the ESCGP-1 authorization in the face of the expert analysis from Pike County Conservation District (Pike County) which identified serious technical deficiencies with Tennessee Gas's application and plans. Second, the Appellants assert that all three permit applications failed to meet the legal requirements of Chapters 102 and 105. Finally, the Appellants assert that Tennessee Gas's ongoing environmental violations (at an earlier pipeline project referred to as the 300 Line Project) establish a basis to deny the permit application for compliance history. To a large extent, the first two objections overlap because the alleged violations of Chapters 102 and 105 are based upon letters that Pike County submitted to the Department during the review of the three permit applications.

In their petition, the Appellants raised specific objections to each permit under each general category of objection. Appellants' objections to the ESCGP-1 authorization include:

1. Failure to meet Anti-degradation requirements in Chapters 93 and 102.
2. Failure to identify and mitigate for thermal impacts from clearing of mature trees.
3. Failure to protect or replace riparian buffers.
4. Failure to provide information related to duration of earth disturbance.
5. Failure to minimize potential for accelerated erosion and sedimentation.
6. Failure to minimize soil compaction.
7. Failure to require adequate practice for crossing at West Falls Creek.

In its letters to the Department, the Pike County submitted more comments on the application for the ESCGP-1 authorization, and the Appellants have likewise raised more objections to the ESCGP-1 authorization. Appellants also asserted that the Department failed to require a detailed Post Construction Stormwater Management ("PCSM") analysis as part of the ESCGP-1 application that is required by the regulations in Chapter 102.[3]

In their petition, the Appellants' objections to the two Chapter 105 permits include:

1. Permit applications failed to meet requirements for exceptional value (EV) wetlands.
2. Department's no adverse impact finding for EV wetlands was not supported.
3. Application failed to demonstrate compliance with 25 Pa. Code § 105.18a(a)(s) (project will not cause or contribute to pollution of groundwater or surface water resources or diminutions of resources sufficient to interfere with their uses).
4. Department failed to consider cumulative effect of NEUP and other projects on EV wetland under 25 Pa. Code § 105.18a(a)(6) and 105.14(b)(14).
5. Department failed to consider or require replacement of EV wetlands destroyed by project under 25 Pa. Code § 105.18a(a)(7).

[3] Pike County's comments regarding Tennessee Gas's approved PCSM plan were prepared during a time period when Pike County did not have authority to review PCSM plans because Pike County did not have a professional engineer on staff. T.T. at pages 107-108.

Pike County Conservation District's Role in Reviewing the Applications for the Permits under Appeal

Before discussing the Appellants' specific claims about failures to comply with applicable requirements in Chapters 102 and 105, it is useful to briefly describe Pike County's role in reviewing Tennessee Gas's permit applications. This description will provide context for the letters that Pike County sent to the Department during the review of the permit applications raising technical concerns.

At the hearing, the Department explained that it retained the permitting role for ESCGP-1 because the NEUP crossed four counties (Bradford, Susquehanna, Wayne and Pike) and it wanted to coordinate the review of the application among the affected counties. The Department nevertheless, requested that the County Conservation Districts from the affected counties review the application to assist the Department with its review and ultimate permit decisions. The Department received comments from each of the County Conservation Districts and the Department included their comments in the first technical review letter that the Department sent to Tennessee Gas. The Department received 68 comments from Pike County. T.T. at page 96. Tennessee Gas responded to this letter and amended its application. Pike County conducted a second technical review and submitted additional comments to the Department. Pike County's second technical review letter contained 20 comments. T.T. at page 100. The Department prepared a second Technical Review letter for Tennessee Gas which include most, but not all of Pike County's comments.[4]

On October 18, 2012, Pike County sent a letter to the Department to identify those Pike County comments which the Department failed to include in its second Technical Review letter.

[4] According to Susan Beecher, Pike County spoke to the Department on a regular basis during the review of the permit applications. T.T. at page 57. The Department and Pike County had regular meetings with the Tennessee Gas as well. T.T. at pages 57-58. Thus, Pike County was an active participant during the entire permit applications review process.

Appellants' Exhibit A-3. After Tennessee Gas responded to the Department's second technical review letter, Pike County conducted a third technical review of Tennessee Gas's amended application, and it sent a letter to the Department in which Pike County identified 4 additional technical deficiencies with the application for authorization under ESCGP-1. Appellants' Exhibit A-7. The Department issued the authorization to Tennessee Gas for ESCGP-1 on the day it received the latest Pike County comments, but only after the Department staff reviewed Pike County's November 21, 2012 letter. T.T. at pages 674-675.

The Department did not request that Pike County comment on the permit application for the individual Chapter 105 permit in Pike County. This application was under Department review because it was an application for an individual permit and the Department planned to take action on the permit application. T.T. at pages 456-457. Pike County, nevertheless, reviewed the permit application and submitted comments to the Department in which Pike County identified 10 comments. Appellants' Exhibit A-1 (email dated 3-15-12 from Ellen Ensler to Kevin White). The Department sent Tennessee Gas a technical deficiency letter dated April 20, 2012 in which it raised 8 comments and requested that Tennessee Gas respond to the listed comments.

The Appellants assert that the Department acted arbitrarily by ignoring deficiencies identified by Pike County during Pike County's technical reviews of Tennessee Gas's permit applications.[5] The record before the Board does not support this assertion. The Department did not ignore Pike County or its comments. The vast majority of Pike County comments were incorporated into the Department's review letters. There were a few Pike County comments

[5] The Appellants have appealed three permits issued to Tennessee Gas, but Pike County only commented on two permit applications, excluding the Chapter 105 permit application for Wayne County. Because Appellants' appeal and request for supersedeas is based on Pike County's comments, there is no basis to grant supersedeas of the Chapter 105 permit issued for activity in Wayne County.

raising technical deficiencies at the end of the review process that the Department did not accept because the Department disagreed with the comments. The Department, nevertheless, considered all of Pike County comments even though it disagreed with a few of Pike County's comments raising technical deficiencies. The Board is convinced that the Department did not ignore any of the technical deficiencies identified by Pike County even though after review and consideration by the Department, the Department ultimately disagreed with Pike County about a few comments.

The Board does not find fault with the procedures that the Department used to consider and address Pike County's comments on the permit applications. The Department did not cut Pike County out of the process that the Department used to review the permit applications. Pike County played an important role in the Department's permitting decision even though the Department ultimately disagreed with some of Pike County's technical concerns.

It is worth noting that Pike County was the only County Conservation District that reviewed the ESCGP-1 permit application of Tennessee Gas that continued to have technical concerns about the application. T.T. at pages 454-455. The Department testified at the hearing that the other three County Conservation Districts (Bradford, Susquehanna, and Wayne) were satisfied with the application at the time the Department issued the authorization to Tennessee Gas. T.T. at pages 674-675. In fairness to Pike County, the NEUP followed the existing right-of-way in these other counties. In Pike County a 3-mile portion of the NEUP was on a new right-of-way to avoid the Delaware Water Gap National Recreational Area under the jurisdiction of the National Park Service. Virtually, all of Pike County's outstanding comments relate to this 3-mile portion.[6]

[6] At the hearing, Susan Beecher indicated that Pike County had concerns beyond the 3-mile portion of the new right-of-way, but the main thrust of its comments related to this segment. T.T. at page 127.

Because the Appellants rely upon Pike County's letters to the Department commenting on the applications and identifying alleged technical deficiencies, the Board will now turn to a review of the merits or substance of these alleged deficiencies. This review will decide whether the Appellants have met their burden to demonstrate a likelihood of success on the merits of their consolidated appeals.

Likelihood of Success on the Merits

To sustain their burden to demonstrate a likelihood of success on the merits, Appellants assert that the permit applications failed to meet applicable requirements in Chapters 93, 102 and Chapter 105.[7] To support their claims Appellants rely upon letters or other communications from Pike County to the Department that identified alleged technical deficiencies.[8] In addition, the Appellants called three witnesses at the hearing to support their claim that the Department should not have issued the permits because the applications failed to meet the requirements of Chapters 102 and 105 respectfully.

Susan Beecher was the first witness that Appellants called. Susan Beecher was the Executive Director of Pike County at the time Pike County reviewed the applications and provided comments to the Department. She was also involved in the various meetings that the Department had with Pike County and Tennessee Gas to address the concerns that Pike County identified during its technical reviews of the applications. In addition, she was involved in Pike County's efforts to identify violations in the form of notices of violation and inspection reports issued to Tennessee Gas related to the earlier 300-Line Project.

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[7] If established, these allegations could also help to establish irreparable harm because where there is a violation of express statutory or regulatory provisions there is irreparable harm *per se*. *Pleasant Hills Construction Company, supra.*

[8] The letters or communications containing the alleged technical deficiencies alleged by Pike County are: Pike County's letter to the Department dated October 18, 2012 (Appellants' Exhibit No. 3) and Pike County's letter to the Department dated November 21, 2010 (Appellants' Exhibit No. 7).

The Appellants also called two expert witnesses to support their position of likelihood of success on the merits: Michelle Adams P.E., who primarily addressed the alleged technical deficiencies with the application for authorization under ESCGP-1, and Peter Demicco, P.G., who addressed the alleged deficiencies with the authorization under ESCGP-1 and the Chapter 105 permit for stream and wetland crossings in Pike County.

Alleged Technical Deficiency Related to Anti-degradation Analysis

In its October 18, 2012 letter to the Department, in which Pike County asked the Department for reconsideration of the Department's decision to not include all of Pike County's technical deficiencies from its September 5, 2012 letter, Pike County again raised concerns regarding Tennessee Gas's Anti-degradation analysis. The Anti-degradation analysis was part of the ESCGP-1 application. Pike County raised three issues about non-discharge alternatives and Anti-degradation Best Available Combination of Technologies (ABACT) requirements. First, Pike County wanted to know what non-discharge alternatives were considered for the new right-of-way segment and how did Tennessee Gas propose to minimize environmental impact and prevent further segmenting of undisturbed habitat and riparian buffers. Second, Pike County wanted additional analysis to support Tennessee Gas's plan not to reduce right-of-way width in some areas for a variety of constructability reasons. Finally, Pike County questioned whether Tennessee Gas had demonstrated that its construction methods would protect and maintain existing water quality in the Special Protection waters in the project area. Pike County's comments requested additional information and analysis, rather than identifying specific concerns. In the context of deciding Appellants' petition for supersedeas the Board finds that they have not met their burden to demonstrate likelihood of success on the merits.

The Department testified that it reviewed the comments from the Pike County identifying technical deficiencies with Tennessee Gas's Anti-degradation analysis and disagreed with Pike County's conclusions. T.T. at pages 696-704. The Department concluded that Tennessee Gas's analysis was adequate, and it demonstrated that Tennessee Gas would maintain water quality during construction and during post-construction.

The Board finds the Department's testimony more credible. The Department testified that it considered non-discharge alternatives and imposed appropriate ABACT requirements. T.T. at pages 697-699. The Department further testified that it relied upon Tennessee's Gas's plans to restore the right-of-way in the new 3-mile section and that restoration was a key part of the approval Anti-degradation analysis. *Id.* The Appellants challenge the Department's decision regarding restoration of the site, but the Board does not agree that there is a basis to sustain Appellants' challenge to the Department's interpretation of the term restoration and its application. *See* pages 17-19 of this Opinion. In addition, Pike County's comments and Appellants' challenge are general in nature and ask for additional analyses which do not necessarily help to sustain its burden where the Department conducted a specific assessment of the non-discharge alternatives and ABACT requirements that Tennessee Gas proposed and the Department approved. The Department's testimony was more specific and addressed how the Department applied the non-discharge and ABACT requirements.

Alleged Technical Deficiency Related to Thermal Impacts Analysis and Riparian Buffer Requirements

The Appellants allege that the Department failed to address the thermal impacts associated with the construction of the new right-of-way from the loss of mature riparian trees. Because this concern related to Pike County's comments, Appellants relied upon the testimony of Susan Beecher to raise this concern. T.T. at pages 63-64. In addition, Pike County had

comments regarding a "Riparian Zone Tree Planting Plan" that Tennessee Gas prepared in response to earlier comments from the Department and Pike County. Appellants Exhibit A-7 ¶ 4. In the context of deciding Appellants petition for supersedeas, the Board finds that Appellants have not met their burden to demonstrate a likelihood of success on the merits on this alleged technical deficiency.

The Department and Tennessee Gas disagree with Appellants assessment and assert that thermal impacts associated with the construction of the new three mile right-of-way were properly considered. A Thermal Impacts Analysis was prepared by Tennessee Gas that was reviewed and approved by the Department. T.T. at pages 641-643. The Department's witnesses testified that restoration of the site following construction is designed to address thermal impacts. T.T. at pages 705-706, 794. Mr. Murin testified that restoration of a project provides an opportunity for the stormwater to be slowed down, absorbed into the soil mantel, and infiltrated, which provides shading of those stormwater flows. T.T. at page 794. Tennessee Gas's expert witness Matthew Long testified that the design of the slope breakers would promote restoration of the site and prevent an increase in stormwater runoff both in volume and rate. T.T. at pages 828-830.

The Board agrees with the Department and Tennessee Gas. One aspect of the Appellants concern about thermal impacts is the loss of shade from the mature trees within the riparian buffer that will be cut down to construct the pipeline across the stream. To reduce riparian buffer impacts, Tennessee Gas has reduced the width of the right-of-way from 150 feet to 75 feet. T.T. at pages 700-701.[9] The NEUP is also placed perpendicular to stream crossings to limit the impact to the riparian buffers.

[9] The Department testified that pipelines are allowed within riparian buffers to cross a particular stream. T.T. at pages 679-700. *See* 25 Pa. Code § 102.14. The Department does not generally allow activity

To address Pike County's concerns about Thermal Impacts from the cutting of mature trees within riparian buffers, the Department requested that Tennessee Gas prepare a "Riparian Zone Tree Planting Plan" which was prepared. While Pike County continued to have comments about the Plan that Tennessee Gas prepared, the comments primarily requested additional detail that Pike County wanted in the Plan. Appellants' concerns, relying on Pike County's comments, are general in nature that again often request more detailed plans or analysis. The concerns do not identify any regulatory requirements that the issued permits or authorization, including their approved plans, violate.

Alleged Technical Deficiency Related to Duration of Earth Disturbances

Appellants relied upon the testimony of Susan Beecher regarding the Pike County comments to assert that the Tennessee Gas plans were defective because the plans did not specify a target timeframe between trenching and backfilling. T.T. at pages 64-65. The Department and Tennessee Gas did not necessarily object to the substance of this comment, but they disagreed with the Appellants and Susan Beecher that the applicable plans failed to specify such a particular timeframe. In the context of deciding Appellants' petition for supersedeas, the Board finds that the Appellants have not met their burden to demonstrate a likelihood of success on the merits on this alleged technical deficiency.

The Tennessee Gas testified that the environmental construction plan specifies a 10-day timeframe between trenching and backfilling. T.T. at page 582. The fact that the Appellants and Susan Beecher were unaware that the applicable plans already contained such a timeframe is an indication that they were not always familiar with what was in Tennessee Gas's approved permits and associated plans. Ms. Beecher testified that she was unaware that the contractor

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parallel to a stream that can impact larger areas of riparian buffers, but a pipeline needs to cross the riparian buffer perpendicular to the stream to limit the impact. T.T. at pages 699-700.

detail in the approved environmental construction plan narrowed the timeframe between trenching and backfilling to 10 days. T.T. at page 124. This lack of knowledge about what was actually in different approved plans undercut Appellants' overall argument that many of the plans were not specific enough. In this one example the plan was specific enough, but Appellants were unaware that it was.

Alleged Technical Deficiency Related to Use of 6-inch Sideboards[10]

The Appellants relied upon the testimony of Susan Beecher and Pike County's letter to allege that the use of 6-inch sideboards was insufficient to minimize the potential for accelerated erosion and sedimentation in violation of 25 Pa. Code § 102.11 (a)(1). T.T. at page 69. The Department and Tennessee Gas dispute this assertion and argue that the use of the 6-inch sideboards is appropriate when this BMP is properly maintained and operated. T.T. at pages 562 and 708-709. In addition, this BMP is one of several approved BMPs to control erosion and sedimentation that the Department asserts are sufficient to meet the requirements in Section 102.11(a)(1). In the context of deciding Appellants petition for supersedeas, the Board finds that Appellants have not met their burden to demonstrate a likelihood of success on the merits on this alleged technical deficiency. Ms. Beecher acknowledged that 6-inch sideboards were not used on the earlier 300-Line Project and that the approved plans for the NEUP also required the use of double silt fencing (described as a silt fence and a silt saver) which was also not used on the earlier 300-Line Project. T.T. at pages 132-133. The Board did not give great weight to Ms. Beecher's testimony on the 6-inch sideboard technical concern identified in the Pike County's earlier letter because it did not include consideration of the other BMPs in the approved plan.

[10] In its Petition, Appellants describe this technical deficiency in more general terms as a "Failure to Minimize the Potential for Accelerated Erosion and Sedimentation". The testimony at the hearing focused on the use of 6-inch sideboards as a BMP to minimize accelerated erosion.

The Board finds that the Department properly evaluated the use of the 6-inch sideboard within the context of all BMPs designed to control erosion in the approved plans.

Alleged Technical Deficiency Related to Soil Compaction and Segregation of Topsoil

The Appellants relied upon the testimony of Susan Beecher, Peter Dimicco and Michelle Adams to raise these particular technical deficiencies. The related concerns of soil compacting and segregation of topsoil are related to the broader concern about restoration of the disturbed areas and associated stormwater concerns. The Appellants were aware that Tennessee Gas was required to mitigate impacts, but Mr. Demicco testified it was not clear that mitigation was required throughout the entire construction area or just in limited sections. T.T. at pages 345-347.

The Department and Tennessee Gas assert that the Department addressed these concerns during its review of the applications and that the approved plans contain language to identify and mitigate soil compaction throughout the entire construction site. Sara Hayes testified that the environmental construction plan contains soils information. T.T. at page 583. The plan identifies soil types and discusses potential limitations of the soils including the potential for severe compaction. T.T. at page 584. Soils with severe compaction potential are identified as part of the alignment sheet drawings for the entire project. T.T. at page 585. The Post Construction Stormwater Management (the "PCSM") plan for the pipeline portion of the project requires restoration which includes a requirement that all severely compacted areas will be plowed and tilled in all areas, not just residential or agricultural areas. T.T. at pages 586-587. The Board finds that the approved plans contain sufficient detail to allow mitigation of soil compaction. Appellant have therefore not met their burden to demonstrate a likelihood of success on this concern.

In its comments on topsoil segregation, Pike County indicated that if topsoil cannot be segregated in all areas, then the plan should include additional provisions to require compaction testing and surface roughening/scarification in all areas of the right-of-way. *See* Appellants' Exhibit A-3 ¶ 5. Ms. Hays testified that it was not possible to segregate topsoil along the entire length of the right-of-way and to also minimize the width of the right-of-way to reduce overall impacts. T.T. at pages 633-634. The approval plans, as set forth above, do require soil compaction identification and mitigation along the entire length of the right-of-way. The approved plans do address soil compaction concerns along the entire right-of-way. The plans do, therefore, adequately respond to Pike County's concerns about topsoil segregation as set forth in its October 18, 2012 letter to the Department.

Department's Decision not to Require a Detailed Post-Construction Stormwater Management (PCSM) Analysis

The regulation of post-construction stormwater is a component of the Department's regulatory efforts to ensure Anti-degradation protection of Special Protection waters in the Commonwealth. *See* 25 Pa. Code § 102.8. (PCSM requirements). A PCSM plan is a site specific plan consisting of both drawings and a narrative 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. 25 Pa. Code § 102.1.

There is general agreement among the Parties about the legal requirements to conduct a more detailed post-construction stormwater analysis, including calculations of pre-and post-construction stormwater runoff volumes as part of the PCSM stormwater analysis. 25 Pa. Code § 102.8(g)(2). The more detailed analysis is required unless an exception to this requirement is applicable. 25 Pa. Code § 102.8(g) and (n). The Parties agree that a more detailed analysis was not performed, and the Appellants assert that it was required because the exceptions to the

requirement under Section 102.8(g) and (n) did not apply. Under the regulations, the more detailed post-construction stormwater management analysis is required except for regulated activities that require restoration or reclamation.[11] 25 Pa. Code § 102.8(g) and (n). The parties disagree about the applicability of this exception and whether Tennessee Gas will restore the disturbed area within the 3-mile segment where the new right-of-way will be constructed. For the purpose of deciding Appellants' petition for supersedeas the Board finds that Appellants have not met their burden to demonstrate a likelihood of success on the merits on this point.

The Appellants relied primarily upon the testimony of Michelle Adams to assert that the exception did not apply. T.T. at pages 198-204. Ms. Adams testified that her calculations show a big difference between stormwater runoff from a forest in good condition and compacted bare dirt. T.T. at pages 202-204. The problem with Ms. Adams' testimony and calculation is that compacted bare dirt is not the restoration the approved plans require. The approved plans require restoration of the disturbed areas in the new right-of-way to a meadow in good condition. While the runoff coefficient for a forest in good condition is very different than the coefficient (or curve numbers) for compacted bare dirt, the runoff coefficient for a meadow in good condition is nearly the same as that for a forest in good condition. T.T. at pages 241-242, 620, 633, 684-685. The Board agrees that all pervious surfaces are not the same, but a forest in good condition is nearly the same as a meadow in good condition from a runoff coefficient perspective and this comparison supports the Department's view that Tennessee Gas is required under its approved plan to restore the disturbed areas thereby triggering the exception in Section 102.8(g) and (n).

The Appellants' witnesses and the Department disagree about the meaning of the term restoration in the Department's regulations that create the exception from the requirement to

[11] Section 102.8(g) and (n) also contains an exception for small earth disturbance activities, but this exception is not at issue here.

conduct more detailed calculations as part of a PCSM plan. *See* 25 Pa. Code § 102.8(g) and (n). Michelle Adams testified that restoration of a site is determined by looking at the natural landscape before any development activity. T.T. at pages 239-241. She used the term "pre-Columbian for any disturbance by settlement" to describe the standard for comparison to see if the BMPs achieve restoration. Mr. Heatley had a somewhat different perspective, but he testified that it would take decades or longer to restore the mature forest to the condition it was before the mature trees in the new right-of-way were cut down. T.T. at page 289.

The Department had a different interpretation of the term restoration. Ken Murin testified regarding the Department's interpretation of the terms "restoration and reclamation" as they are used in Section 102.8(g) and (n).[12] T.T. at pages 784-788. According to Mr. Murin restoration is looking at the project as it would occur in natural conditions, looking at stormwater runoff and stormwater characteristics as it relates to the site conditions and natural conditions. T.T. at pages 787-788. Mr. Murin further testified that natural conditions are those that existed prior to the construction activities and restoration is being able to establish or mimic what existed at a particular site. T.T. at page 795. The Board agrees with Mr. Murins's interpretation of the terms "restoration and reclamation" as they appear in Section 102.8 (g) and (n). In addition to the need to give deference to Department reasonable interpretations of its regulations, *DEP v. N. Am. Refractories Co.*, 791 A.2d 461, 466, (Pa. Cmwlth. 2002) (*DEP v. NARCO*), the Board finds that the Department's interpretation applies these terms in a reasonable manner to regulate post-

[12] The Department attempted to qualify Mr. Murin as an expert in the Department's interpretation of Chapter 102. The Board expressed some hesitation with offering Mr. Murin as an "expert" in the interpretation of the Department's regulations. The Board does not believe a Department representative needs to be qualified as an expert witness to testify about a particular Department interpretation of a particular regulation. If a Department representative testifies about a particular interpretation that interpretation will either be considered by the Board under the rules for adopting or rejecting Department interpretations of regulations without regard to whether the Department witness is qualified as an expert witness. *See DEP v. NARCO, supra.*

construction stormwater from a water quality perspective looking at stormwater runoff characteristics prior to construction and after construction. If pre and post construction stormwater conditions mimic each other, then the site is restored according to the Department's interpretation. T.T. at pages 683, 699, 787-788. To compare pre and post construction stormwater flows, the regulations do not require a comparison to stormwater flows pre-Columbian, before any settlement activity of European settlers in colonial Pennsylvania as Ms. Adams testified. This appears to the Board to be an extreme and unsupportable view.

Likewise, restoration of a mature forest is different than restoration of a site from a stormwater perspective, and the PCSM regulations are directed at restoration of stormwater conditions not the restoration of mature forests. The Department's interpretation applies the terms restoration and reclamation from a stormwater perspective, and not from the broader historical or forest perspectives set forth by the Appellants' witnesses.

In addition, as Mr. Murin explained, the Department's interpretation that he offered is consistent with the Comment and Response document that was prepared when Section 102.8 was adopted in 2010, and it is consistent with the various permitting documents that have been prepared to implement these requirements including the permitting documents that were used here. T.T. at pages 787-795; Commonwealth's Exhibits C-17, C-18 and C-19. According to his testimony, the Department has consistently applied these terms since they were promulgated.

In closing arguments at the supersedeas hearing, counsel for the Appellants argued that the Department's testimony regarding its Chapter 102 regulatory program in this appeal was remarkably similar to the Department's position in the *Blue Mountain Preservation Association, Inc. v. DEP*, 2006 EHB 589. In the Board's *Blue Mountain* adjudication, by Chief Judge Michael L. Krancer, the Board rejected the Department's argument that compliance with the

special protection Chapter 102 Best Management Practices to control erosion and sedimentation pollution did not, in and of itself constitute compliance with the anti-degradation regulations in Chapter 93. In the 2006 adjudication, the Board reviewed a 2002 permit decision that applied the Department's regulations in effect at that time. The Department's Chapter 102 regulatory program has been changed since 2002 (or even since 2006). One of the Appellants' expert witnesses was a contractor for the Department on one major component of the programmatic changes.[13] In light of the major regulatory changes to the Department's Chapter 102 regulatory program since the Board's *Blue Mountain* adjudication, including the issuance of ESCGP-1 under appeal, the *Blue Mountain* adjudication may be of limited assistance in resolving the issue presented by this appeal. Moreover, it is not clear at this stage whether Appellants are challenging either the proper application of the applicable standards or the adequacy of the standards, which were applied by the Department, or both. The Board therefore will defer consideration of these matters until a later date.

Technical Deficiency Related Use of Push/Pull Method to Cross West Fall Creek

In its November 21, 2012 letter to the Department, Pike County expressed its concern with the push/pull method to cross West Fall Creek. At the hearing, Susan Beecher testified about her concern, and indicated that she believed that a dry crossing that kept the water out of the trench would be a better alternative that the push/pull method. T.T. at pages 39-41.

Sara Hayes testified at the hearing about the decision to select the push/pull method to cross West Fall Creek. T.T. at pages 557-58. Ms. Hayes stated that Tennessee Gas examined

[13] Michelle Adams testified that she was one of the primary authors of the Department's Pennsylvania Stormwater Best Management Practices Manual that was issued on December 30, 2006 after the *Blue Mountain* decision. The manual lists various BMPs which are acceptable in Pennsylvania and when properly applied, implemented and maintained are intended to meet the requirements in Chapter 93. This manual is referenced in the Departments regulations under discussion here. *See* 25 Pa. Code § 102.8(h)(3). T.T. at pages 778-779.

the possibility of a dry stream crossing, but it determined that it was not feasible because of the presence of a beaver dam and associated flooding. T.T. at page 559. Due to the extent of the flooding, Ms. Hayes testified that it was not practical to isolate the stream flow and do a dry crossing in this area. *Id.* In addition, Ms. Hayes explained that the push/pull method had the benefit of allowing quicker construction than the dry crossing methods which would require activities in the wetland and stream for a much longer time period. The Board finds that Ms. Hayes testimony on this issue is more credible. Because the push/pull method for crossing West Fall Creek was selected by Tennessee Gas and approved by the Department only after an evaluation of alternatives identified by Pike County, the Board finds that the Appellant's have not met their burden to show a likelihood of success on the merits on this alleged technical deficiency.

General Concern about Lack of Specificity in Approved Plan

The Appellants base their petition for supersedeas entirely on the alleged technical deficiencies identified by Pike County in its review of Tennessee Gas's permit applications and upon the expert testimony of witnesses who used Pike County's technical deficiencies as a starting point for their testimony. Many of Pike County's technical comments concluded with a request for additional analysis, testing or detail. The Appellants' expert witnesses also testified about the lack of testing, detail and analysis and the need for more. Thus, the technical concerns were about the adequacy of the Department's review and not about whether any review was conducted. In the context of a supersedeas hearing where the Appellants' have the burden to show a likelihood of success on the merits, the burden is quite high when attempting to challenge the adequacy of the Department's review rather than just challenging whether a required review was undertaken. In addition, the general nature of Pike County's technical concerns and the

testimony of Appellants' expert witnesses does not readily lend itself to demonstrating a likelihood of success on the merits where there is a challenge to the adequacy of the Department's technical review. Other than the concerns about the crossing at West Fall Creek, the comments were general in nature and not tied to a particular area or specific concern.

The Board did not give great weight to Michelle Adams' testimony that Tennessee Gas's permit application lacked the documentation, specifications or calculations necessary to provide enough guidance for contractors to restore the site to pre-existing conditions for several reasons. First, it did not appear that she was fully aware of what plans were in the permit application. For example, she testified that it was not possible to properly restore the land surface using a typical USGS topographic map that use 10 or 20 foot contour lines. She testified that you needed one or two foot contour lines to properly prepare plans to restore the land surface. Tennessee Gas submitted evidence that the alignment sheets for the project used two foot contours which Ms. Adams testified was needed to prepare plans to restore the land surface. The alignment sheets are part of the approved plans. The approved plans contained the detail she stated was needed, but Ms. Adams was not aware that the approved plans contained such detail.

Technical Deficiencies Regarding Chapter 105 Permit for Pike County

Pike County identified a number of concerns with Tennessee Gas's Chapter 105 permit application in its March 15, 2012 email from Ellen Enslin to Kevin White. Appellants' Exhibit A-1. The Appellants raised many of these concerns in its Petition for Supersedeas. *See*, Petition for Supersedeas ¶147-194. At the hearing, the Appellants focused their attention on the authorization for ESCGP-1 and Pike County's more recent comments raising technical

deficiencies in Pike County's October 18, 2012 and November 21, 2012 letter.[14] There are however a few concerns that the Appellants raised at the hearing that deserve attention.

The main concern regarding wetlands that the Appellants raised at the hearing was the impacts related to the changes in stormwater run-off that Appellants' witnesses expected. T.T. at page 341. Mr. Demicco also testified that construction of the trench for the pipeline will exacerbate the problem with decreasing baseflow by intercepting shallow groundwater and allowing it to be drained in the summertime. T.T. at pages 342-343. Ms. Adams testified that she expected to see adverse stormwater impacts because the approved plans lack the proper design documentation and construction practices to support the Departments' decision that there wouldn't be any change between stormwater conditions before and after construction for a two-year storm event. T.T. at pages 192-93. Mr. Demicco also testified along the same lines that the detail was lacking in the approved construction plans to prevent or mitigate changes in stormwater runoff that would adversely affect water resources including wetlands. T.T. at page 440. According to Mr. Demicco, soil compaction leads to increased stormwater runoff, decreased infiltration of stormwater leading to decreased baseflow to waterbodies including wetlands. T.T. at pages 340-343. Decreases in baseflow can make wetlands shrink, and the construction of the trench would exacerbate the problem with decreasing baseflow and the impacts to wetlands in the summertime or other low flow periods. T.T. at pages 864-866. This concern is therefore tied to the issue of restoration that was previously addressed.

As previously discussed, the Department disagreed with the Appellants' assessment of the impact to post-construction stormwater runoff resulting from soil compaction. *See* pages 15-16 of this Opinion. The Department and Tennessee Gas assert that the approved plans

[14] The Pike County's most recent comments and Appellants' related challenges did identify the crossing at West Fall Creek. This concern related to the ESCGP-1 authorization and the Chapter 105 permit. This concern was previously addressed in this Opinion.

adequately address the concern about soil compaction and require the mitigation of soil compaction and the restoration of the construction site to the condition of a meadow in good condition.

On the concern that Mr. Demicco raised about the construction of the trench exacerbating the problem with decreasing baseflow, Tennessee Gas relied upon the testimony of Peter Robelen who was qualified as an expert witness in the area of hydrogeology. T.T. at pages 860-866. Mr. Robelen testified that he disagreed with Mr. Demicco's testimony. He testified that he did not expect to see any net change in baseflow to wetlands or streams as a result of the trenching. *Id.*

In the battle of the experts on the trenching concern, the Board finds that Mr. Robelen's testimony is more credible. Mr. Demicco acknowledged that the adverse effects to groundwater baseflow could be mitigated and that Tennessee Gas had proposed some BMPs to mitigate these concerns. T.T. at page 397. Mr. Demicco agreed that Tennessee Gas had developed BMPs to mitigate the adverse effects "to some extent", but he did not think it was enough. T.T. at page 397. He did not identify what was enough, and he repeated Appellants' claim that generally more was needed without specifics. Mr. Robelen explained that the trench would only intercept shallow groundwater in low areas, and here the groundwater would reestablish after restoration using the BMPs in the approval plans. T.T. at pages 864-866. The Board finds that Appellants have not met their burden to demonstrate a likelihood of success on the merits on their remaining Chapter 105 concerns.

Preemption of the Board's Jurisdiction

Tennessee Gas has asserted that the Appellants will be unable to establish the necessary criteria that they have a likelihood of success on the merits in this consolidated appeal because

the Board lacks jurisdiction to hear the appeal as a result of broad federal preemption of state law under the National Gas Act. Tennessee Gas, however, needs the Department's permits under appeal because the Federal Energy Regulatory Commission directed that Tennessee Gas secure these permits. Tennessee Gas, therefore, argues that the Department's permits under appeal are *not* preempted, but only the state appeal procedures before the Board are preempted. Tennessee Gas has also filed a motion to dismiss with the Board raising the same jurisdictional issue.[15] Because Tennessee Gas has raised the federal preemption issue in its Response to the Petition for Supersedeas and at the Supersedeas Hearing, the Board believes it is useful to briefly describe why this argument played no role in the Board's decision to deny Appellants' Petition for Supersedeas. The Board will provide a more detailed response to Tennessee Gas's federal preemption argument in the Board's opinion that addresses Tennessee Gas's Motion to Dismiss upon review of the responses to this motion from the Appellants and the Department.[16]

The Board does not agree with Tennessee Gas that the Board lacks jurisdiction to hear this appeal as a result of broad federal preemption of state regulatory activities. It is correct that the Federal Energy Regulatory Commission (FERC) has issued a Certificate of Public Necessity for the NEUP under the Natural Gas Act following a lengthy review process. FERC order issuing certificate and approving abandonment, *Tennessee Gas Pipeline Company, L.L.C.*, 2012 WL 1934728 (FERC), 139 FERC ¶ 61, 161, at ¶ 5 (May 29, 2012) (FERC Certificate Order). And while it is also correct that there is generally broad federal preemption of state regulatory jurisdiction, including state environmental requirements, the Board does not believe that the caselaw Tennessee Gas cites is applicable in the situation that is before the Board where FERC

[15] This issue is also before the United States District Court for the Middle District of Pennsylvania. See footnote 2 on page 2 of this Opinion.

[16] The Board here requested that these responses to Tennessee Gas's motion to dismiss be provided to the Board no later than the close of business on Tuesday, January 22, 2013.

directed Tennessee Gas to secure state environmental permit and approvals, including the three state permits under appeal. The Third Circuit Court of Appeals noted, in a similar situation, that FERC's direction to an entity it regulates to secure state permits and comply with state regulation changed the federal preemption analysis from a field preemption analysis to a conflict preemption analysis. *NE HUB Partners, L.P. CNG Transmission Corporation*, 239 F.3d 333, 346 n. 13. The court pointed out "that even within an occupied field federal regulation may tolerate or authorize exercises of state authority." *Id.* The Board believes this is one of those situations. Even if Tennessee Gas is correct that there is generally broad federal preemption for FERC regulated matters,[17] FERC's Certificate Order to Tennessee Gas in this matter changed the federal preemption analysis when it directed Tennessee Gas to secure applicable state environmental permits for NEUP, including the three under appeal here.[18]

Tennessee Gas seems to accept that it needed to secure the three state environmental permits under appeal from the Department, but Tennessee Gas wants to sever the Department's permitting function from the Board's statutory role in the Department's permitting function. *See* 35 P. S. § 7514(c). Section 7514(c) provides in part that "... no action of the Department adversely affecting a person shall be final as to that person until the person has had an opportunity to appeal the action the Board..." *Id.* Moreover, the Pennsylvania Courts have long recognized that an appeal to the Board protects important constitutional due process right of appellants. *See, e.g., Morcoal Company v. Dep't of Envlt. Resources*, 459 A.2d 1303 (Pa. Cmwlth. 1983). The Board protects due process rights of appellants by conducting a *de novo*

[17] The open question from the Boards perspective on the breadth of federal preemption in this area is the Department's claim that state authority to issue and condition Section 401 Water Quality Certification under the CWA is not preempted. The Board will examine this question in its later opinion.

[18] The Board recognizes that FERC placed limitations on its direction to secure state environmental permits including the three under appeal. In summary, FERC indicated that the state requirements could not conflict with FERC's CPN or cause unreasonable delay. Tennessee Gas has not addressed these considerations, so we will leave consideration of them to another day.

hearing which provides appellants with a due process hearing that may having been lacking before the Department took its action under appeal. *Id.*

The Board does not believe that federal preemption allows federal agencies such as FERC to highjack state permitting procedures or to rewrite state laws as Tennessee Gas has suggested. To separate the Department's permitting decision from the Board's appeals procedures violates the longstanding state statutory requirements, ignores longstanding due process safeguards and allows the Department to act in a manner that is beyond review under state law. If FERC directed Tennessee Gas to secure permits from the Department, *that FERC direction* included the necessary state procedures established under state law that involve the Board.

Compliance History

As previously stated, one of the Appellants' bases for their appeal, which is also one of the bases for their Petition for Supersedeas, is Appellants' assertion that Tennessee Gas's compliance history makes DEP's decision to issue each of the three permits capricious and arbitrary and unreasonable under Section 609 of the Clean Streams Law.[19] *See* 35 P.S. § 691.609. The Department and Tennessee Gas both responded that the Appellant's are not likely to succeed on the merits in challenging the issuance of the permits on compliance history grounds under the Boards compliance history caselaw and the facts of this case. The Board agrees.

At the Supersedeas Hearing, the Appellants introduced evidence regarding notices of violation and inspection reports that Tennessee Gas received as a result of Tennessee Gas's

[19] Appellants have not questioned whether the Department conducted *any* compliance history review. *See Belitkus v. DEP*, 1997 EHB 939. (DEP is required to conduct compliance history review under Section 609). Rather, Appellants disagree with the Department's decision to issue the permits in question after the Department conducted a compliance history review of Tennessee Gas.

earlier activities associated with a similar and related 300-Line Upgrade Project. Appellants' Exhibits Nos. A-13 to A-31. The Appellants rely upon these documents to support its claim that the Department acted arbitrarily in issuing the permits under appeal to Tennessee Gas.[20]

At the Supersedeas Hearing, the Department testified that it was fully aware of the compliance concerns raised by the NOV's and inspection reports associated with the 300-Line Upgrade Project. To address these concerns, the Department conducted an investigation, visited the 300-Line Upgrade Project site numerous times and met with Tennessee Gas and the Pike County Conservation District to discuss the nature of the violations and the status of efforts to correct the violations. T.T. at pages 477-82, 486-89. As a result of these efforts, the Department concluded that Tennessee Gas's compliance problems on the 300-Line Upgrade Project were not a compliance history bar to the issuance of the permits under Section 609 of the Clean Streams Law. 35 P.S. § 691.609. According to the Department, the violations noted in the NOV's and inspection reports and considered during its investigation had either been corrected or were being corrected. The Department determined that there were no ongoing or unaddressed violations.

Since the record before the Board establishes that the Department conducted a review of the Tennessee Gas's compliance history, the Appellants are in effect questioning the adequacy of the Department's review. The Board has addressed appellant's claims regarding the adequacy of the Department's review and stated that:

> ***a remand for further review of a compliance history will almost never be appropriate***, particularly where the Department has conducted some investigation but that investigation is alleged to have been inadequate. ***Any party who rests on the fact of an inadequate investigation alone does so at its almost certain peril.***

[20] The Appellants also contacted the Department during its review of the permit applications to raise the same concerns about Tennessee Gas's compliance history on the 300-Line Upgrade Project and to request that the Department deny the permits for this reason.

O'Reilly v. DEP, 2001 EHB 19, 45 (emphasis added). Under *O'Reilly*, the Appellants are not likely to succeed on the merits of their challenge to the permits under appeal on their compliance history argument.

Irreparable Harm to Appellants

As discussed above, the Appellants have not sustained their burden to show a likelihood of success on the merits based upon their allegations that permit applications failed to comply with applicable requirements of Chapters 102 and 105. While this Board finding eliminates a basis to establish irreparable harm, the Appellants also called Kevin Heatley as an expert witness to offer his expert testimony on the issue of irreparable harm to the Appellants.

The Board qualified Mr. Heatley as an expert in the field of restoration ecology. Mr. Heatley testified that this field looks at the restoration of the ecological values and functions of plant and animal communities that existed on a site before an activity occurred.

The Board did not give much weight to Mr. Heatley's expert testimony on the question of irreparable harm to the Appellants for two reasons. First, Mr. Heatley's testimony was based upon assumptions that the technical concerns of the Pike County in its October 18th and November 21st letter were not addressed. As discussed above the Appellants were not able to establish likelihood of success on the merits to sustain these technical concerns. The lack of success on the merits undercuts the weight given to the testimony regarding the hypothetical questions answered by Mr. Heatley which were based on Pike County's alleged technical deficiencies.

Finally, the Board finds that Mr. Heatley's testimony is biased based upon his involvement in the litigation as a member of the Responsible Drilling Alliance that is one of the parties in this appeal. Mr. Heatley testified as a party actively opposed to the issuance of the

permits and his testimony lacked sufficient objectivity to be given great weight by the Board in this appeal.

Likelihood of Injury to the Public or Other Parties such as Tennessee Gas

One of the factors that the Board considers in deciding to grant or deny a supersedeas is:

(3) The likelihood of injury to the public or others, such as the permittee in third party appeals.

25 Pa. Code § 1021.63(a)(3). The Board has already decided that Appellants have not met their burden to establish either of the first two factors at 25 Pa. Code § 1021.63(a)(1) and (2);[21] the Board will decline to resolve this third factor. *Oley Township v. DEP*, 1996 EHB 1359, 1369. At the hearing, Tennessee Gas introduced evidence regarding economic harm and other related harms it would suffer if the Board granted supersedeas. T.T. at pages 645-658. Tennessee Gas also presented evidence on the economic harms the public would suffer if the supersedeas was granted. Permittee's Exhibit P-13. In response, the Appellants questioned whether Tennessee Gas was somehow responsible for harms related to the delay of the project as a result of the timing of the submissions of permit applications and application amendments. This is an appropriate consideration under this factor. *See UMCO v. DEP*, 2004 EHB at 818-822. (Board will not grant supersedeas where irreparable harm petitioner is suffering results in significant part from petitioner's decisions and conduct). Because the Board has already concluded that Appellants are not entitled to supersedeas based on its evaluation of the first two factors, the Board need not resolve the dispute regarding the third factor at this time. *Oley Township v. DEP*, *supra*.

[21] Under the facts of this appeal and the Appellants arguments in support of their Petition for Supersedeas, the Board had to address both of the first two factors because they are interrelated. *See Pleasant Hills Construction Co. v. Public Auditorium Authority of Pittsburgh*, *supra*. (Violation of express regulatory provisions can constitute irreparable harm).

The Board previously issued the order dated January 17, 2013 denying Appellants' Petition for Supersedeas because Appellants failed to meet their burden under 25 Pa. Code § 1021.63(a)(1) and (2). This is the Board's opinion that supports that order that was previously issued. A copy of our January 17, 2013 Order denying the petition is attached.

ENVIRONMENTAL HEARING BOARD

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: February 1, 2013

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER NETWORK, MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER AND RESPONSIBLE DRILLING ALLIANCE	:	
v.	:	**EHB Docket No. 2012-196-M (Consolidated with 2012-197-M and 2012-198-M)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TENNESSEE GAS PIPELINE COMPANY, Permittee	:	

ORDER

AND NOW, this 17th day of January, 2013, following the hearing to consider the Appellants' petition for supersedeas, the Board **denies** the petition for the following reasons:

1. The Appellants' have failed to meet their burden, under 25 Pa. Code § 1021.63(a)(1), to demonstrate that there will be irreparable harm if the Board does not grant its petition for supersedeas.

2. The Appellants' have failed to meet their burden, under 25 Pa. Code § 1021.63(a)(2), to establish that they are likely to prevail on the merits in this appeal.

An opinion in support of this order will follow.

ENVIRONMENTAL HEARING BOARD

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: January 17, 2013

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS (RACC)	:	
v.	:	**EHB Docket No. 2012-072-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE AND LIME, LLC, Permittee	:	**Issued: February 8, 2013**

OPINION AND ORDER ON APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

By Richard P. Mather, Sr., Judge

Synopsis

The Board denies a motion for partial summary judgment where the moving party has failed to establish the necessary undisputed material facts that would demonstrate that it is clearly entitled to judgment as a matter of law.

OPINION

Rural Area Concerned Citizens ("RACC") is a group of citizens who have filed an appeal of a non-coal surface mining permit to Bullskin Stone & Lime by the Department of Environmental Protection (the "Department"). RACC's notice of appeal contends, *inter alia*, that the permit as issued fails to demonstrate that Mounts Creek, Green Lick Run, nearby wetlands and unnamed tributaries will be adequately protected by the terms of the Department's permit from deleterious effects caused by Bullskin's mining. On November 8, 2012, RACC filed a motion for partial summary judgment on the basis that wetlands located in Mounts Creek's flood plain were exceptional value wetlands, and had not been given the appropriate

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consideration during the permitting process. The Department and Bullskin have had the opportunity to respond to RACC's motion, and the issue is now ripe for our consideration.[1]

RACC's five page motion for partial summary judgment sets out a narrative arguing that Mounts Creek was not considered as a wild trout stream by Bullskin or the Department during the permitting process. RACC points to actions taken by the Pennsylvania Fish and Boat commission as evidence that a portion of Mounts Creek relevant to this appeal is classified as a wild trout stream. As a consequence, RACC argues that wetlands located near Mounts Creek should be designated as exceptional value wetlands because 25 Pa. Code § 105.17 "defines 'exceptional value wetlands' as including wetlands that are included in or along the floodplain or reach of a wild trout stream." RACC's motion for partial summary judgment, ¶ 4. RACC asserts that the permit Module 6.2 map shows that there are wetlands within the flood plain of unnamed tributary C1 to Mounts Creek ("tributary C1"). Nevertheless, RACC indicates that neither the Department, nor Bullskin, addressed wetlands located near Mounts Creek as exceptional value during the permitting process, and that failure should constitute sufficient grounds for the Board to conclude that consideration of exceptional value wetlands should have been part of the permitting process.

In response, the Department admits that it began its consideration of Bullskin's permit application without the knowledge that Mounts Creek had been recently designated by the Fish and Boat Commission as a wild trout stream. However, the Department produced an affidavit setting out that it subsequently became aware of that designation before it issued the permit, and its approval was subject to its investigation of whether the wild trout stream designation affected the permit's requirements, including whether there were any resulting wetlands entitled to

[1] Under our summary judgment rule, 25 Pa. Code § 1021.94a, RACC had the opportunity to file a reply to answer the contentions of the Department and Bullskin's responses, but it has declined to do so.

Exceptional Value protection under the Department's regulations. Responding to RACC's specific contention that the Module 6.2 map clearly demonstrates that there are wetlands within the floodplain of tributary C1, the Department denies that "three partial sections of the Module 6.2 map are a complete and accurate representation of the permit area" and that they are of limited value because they are difficult to read as they are presented in RACC's motion. Department's Response to Appellant's Statement of Undisputed Material Facts, ¶ 18. Moreover, the Department's affidavit directly places into contention any assertion that there is a wetland within the floodplain of tributary C1.

Bullskin's response to RACC's motion joins in the Department's response and also specifically denies the underlying factual contentions made by RACC to demonstrate that there is a wetland within the floodplain of tributary C1 that should be entitled to Exceptional Value protection. Further, Bullskin argues that RACC's failure to file its motion for partial summary judgment in compliance with our rules provides an additional, independent basis for the Board to deny RACC's motion.[2] *See* 25 Pa. Code § 1021.94a(d).

A motion for summary judgment may be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *New Hanover Twp. v. DEP*, EHB Docket No. 2010-185-M (Opinion and Order issued March 26, 2012); *Ehmann v. DEP*, 2008 EHB 325, 326; *Bertothy v. DEP*, 2007 EHB 254, 255. The Board has found that it will grant summary judgment where a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *Bertothy v. DEP*, 2007 EHB at 254-255; *CAUSE v. DEP*, 2007 EHB 101, 106. When deciding summary judgment motions, the Board must view

[2] Bullskin accurately asserts that RACC's failure to limit its Motion for Partial Summary Judgment to two pages and failure to include a statement of undisputed material facts constitutes a procedural defect which, on its own, provides an adequate, independent basis for the Board to deny RACC's motion. *See, e.g., Foundation Coal Resources v. DEP*, 2007 EHB 237. However, we decline to do so in this appeal where there is another basis to deny the motion.

the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of fact against the moving party. *Bethenergy Mines, Inc. v. Dept. of Environmental Protection*, 676 A.2d 711, 714 n.7 (Pa. Cmwlth.), *appeal denied*, 546 Pa. 668 (1996); *see also, e.g., Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162.

The issues brought before the Board by RACC are clearly not appropriate for summary judgment at this stage of litigation because there are material issues of fact which must be resolved in order to arrive at a conclusion as a matter of law. RACC rests its contention that the Department has failed to identify exceptional value wetlands on the accuracy of the Module 6.2 map and its contention of how to interpret the map in the context of meeting the standards of 25 Pa. Code § 105.17. At minimum, the Department's response has called RACC's assertions into significant dispute, which we are unable to resolve absent a full consideration of the facts in a hearing on the merits.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS (RACC)	:	
v.	:	**EHB Docket No. 2012-072-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE AND LIME, LLC, Permittee	:	

ORDER

AND NOW, this 8th day of February, 2013, it is hereby ordered that the Appellant's motion for partial summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: February 8, 2013

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NOLEN SCOTT ELY, et al.	:	
	:	
v.	:	**EHB Docket No. 2011-003-L**
	:	**(Consolidated with 2011-165-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CABOT OIL & GAS CORPORATION, Permittee	:	**Issued: February 8, 2013**

OPINION AND ORDER
ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion filed by Cabot Oil & Gas Corporation to dismiss appeals that had been reinstated after the Board was informed that the Appellants' former attorneys had withdrawn the appeals without the appellants' knowledge or consent and contrary to their specific instructions. The Board holds that the Appellants are not precluded from pursuing their appeals because they accepted escrow payments as third-party beneficiaries of a consent order and settlement agreement entered into between Cabot and the Department. Among other things, Cabot had previously represented to this Board that it would not assert that the Appellants waived their rights by accepting the payments. Acceptance of the payments would not have prevented the Appellants from pursuing this appeal in any event because the equitable acceptance-of-benefits doctrine upon which Cabot relies does not bar an aggrieved party from pursing an appeal from a Departmental action. The Board also rejects Cabot's argument that the appeals of three of the Appellants were reinstated based upon an untimely request.

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OPINION

On December 15, 2010, the Department of Environmental Protection (the "Department") entered into a consent order and settlement agreement ("COSA") with Cabot Oil & Gas Corporation ("Cabot") that addressed certain issues that had arisen in connection with Cabot's drilling of gas wells in Dimock and Springville Townships, Susquehanna County. Among other things, the Department determined that Cabot's activities adversely affected eighteen drinking water supplies that serve nineteen homes in an area designated as the "Dimock/Carter Road Area," including the supplies of Nolen Scott Ely, Monica L. Marta-Ely, Ray Hubert, and Victoria Hubert, the Appellants. Paragraph 6 of the COSA, reads in part as follows:

> 6. ***Settlement of Restoration/Replacement Obligation.*** The claims by the Department regarding Cabot's obligations under Section 208 of the Oil and Gas Act, 58 P.S. § 601.208, and 25 Pa. Code § 78.51, including any obligation of Cabot to pay for or restore and/or replace the Water Supplies, or to provide for ongoing operating or maintenance expense shall be satisfied, as follows:
>
> a. Escrow Fund.
>
> i. Within thirty (30) days after the date of this Consent Order and Settlement Agreement, Cabot shall establish nineteen (19) Escrow Funds and each Escrow Fund shall hold an amount equal to, whichever is greater: $50,000; or two times the assessed value by the Susquehanna County Tax Assessor of the property(ies) owned by the Property Owners within the Dimock/Carter Road Area. Such assessed values for each property owned by the Property Owners are listed in chart attached as Exhibit D;
>
> ii. Within ten (10) days after Cabot has established and funded the nineteen (19) Escrow Funds in accordance within Paragraph 6.a.i., above, Cabot shall notify each Property Owner, in writing, of the existence of the funds in the Escrow Fund for that Property Owner, the procedure by which the Property Owner can obtain his/her/their payment from the Escrow Fund.
>
> iii. Cabot shall pay all fees and costs associated with each of the Escrow Funds. The funds in the Escrow Funds shall be

paid to Property Owners, their duly authorized attorney or representative or the heirs of the Property Owners in accordance with this Paragraph 6 and the Escrow Agreement attached hereto as Exhibit E. Exhibit E shall be the model of the Escrow Agreement that Cabot shall use for each of the Escrow Funds established under Paragraph 6.a.i., above, and is incorporated herein; and

iv. If the Escrow Agent and Cabot have not received the executed and notarized Receipt provided for in the Escrow Agreement from the Property Owner on or prior to the 45th day after the date that the Property owner has received written notice of the Escrow Fund in accordance with this Consent Order and Settlement Agreement, the Escrow Agent shall continue to hold the Escrow Fund until December 31, 2012. During such time period the Escrow Agent shall deliver all proceeds from the Escrow Fund to the Property Owner if and only if the Escrow Agent receives unqualified and unconditional written instruction to do so from a duly authorized representative of the Department and from a duly authorized representative of Cabot. If as of December 31, 2012, the Property Owner has not claimed and received the Escrow Fund, the Escrow Agent shall deliver all proceeds from the Escrow Fund to Cabot on January 2, 2013, together with all interest and/or earnings attributable to the Escrow Fund.

b. Effect of Notification to Department. After the time has passed for the Escrow Fund to be funded in accordance with Paragraph 6.a.i., above, and upon completion of the restoration activities described below, the Department's claims regarding Cabot's obligations under Section 208 of the Oil and Gas Act, 58 P.S. § 601.208, and 25 Pa. Code § 78.51, to restore and/or replace a Water Supply that serves the property owned by a Property Owner shall be satisfied upon the Department's receipt of information from Cabot that verifies that: the nineteen (19) Escrow Funds have been established and fully funded in accordance with Paragraph 6.a.i., above; each of the Property Owners have received written notice from Cabot of the Escrow Fund and of the procedure by which the Property Owner can obtain his/her/their payment from such Escrow Fund; and each of the Property Owners have received written notice from Cabot that it will install a whole house gas mitigation device at the property as provided for below.

c. For each Property Owner, Cabot shall continue to provide and maintain temporary potable water and, as applicable, shall continue to maintain gas mitigation devices that it had previously installed until Cabot receives written notice from the Department that it has complied with all of the requirements of Paragraph 6.a.-6.b., above, for that Property Owner.

d. As long as Cabot provides temporary water to the Property Owners under Paragraph 6.c., above, from a water purveyor and/or water hauler, Cabot shall assure that the water purveyor/hauler has all licenses, permits, and/or other authorizations required under Pennsylvania law and Regulations, and that the Property Owners receive water in amounts sufficient to continually satisfy water usage needs until Cabot receives written notice from the Department that it has complied with all of the requirements of paragraphs 6.a.-6.b, above, for that Property Owner.

e. As of the date of this Consent Order and Settlement Agreement, Cabot has purchased whole house gas mitigation devices for residential water supplies within the Dimock/Carter Road Area and it has drilled new drinking water wells to serve other residences within the Dimock/Carter Road Area. Within 30 days of the date of this Consent Order and Settlement Agreement, Cabot shall notify each Property Owner, in writing, that Cabot will install, at Cabot's sole expense, a whole house gas mitigation device at the Property Owner's residence.

f. If the Property Owner notifies Cabot, in writing, within sixty (60) days from the date that the Property Owner received the written notice in accordance with Paragraph 6.e., above, that he/she/they agree(s) to Cabot installing a whole house gas mitigation device at his/her/their residence, Cabot shall complete such action at the residence within ninety (90) days from the date that the Property owner notified Cabot, in writing, of his/her/their agreement.

Twelve of the homeowners filed an appeal from the COSA on January 11, 2011. The appeal was docketed at EHB Docket No. 2011-003-L. The homeowners objected to the COSA for several reasons. Among other things, they alleged that the Department erred by substituting treatment devices and monetary payments based on the value of their homes for a previously approved plan to install a pipeline to connect the homes to public water, or some other mechanism for permanently restoring or replacing the water supplies. They also objected that the Department entered into the COSA without considering the fact that the homeowners' water is alleged to be contaminated with toxic constituents in addition to methane. (The COSA only requires Cabot to offer to install treatment systems to address methane.)

Unbeknownst to the Department, Cabot sent a letter to the homeowners on December 15, 2010, which said that Cabot was making a settlement offer to pay the amount called for in the COSA. The letter said, "[i]n exchange for signing the enclosed Release of All Claims ("Release"), [the property owner] will receive a check in the amount of [ ] as full compensation for the Release." The "Release of All Claims" that Cabot attached set forth an unequivocal, categorical release of every conceivable past, present, or future claim against Cabot. The homeowners, in affidavits submitted later to the Board, confirmed that Cabot had told them that they could not accept the escrow funds unless they waived all rights to any past, present, or future claims against Cabot.

On May 9, 2011, the Department in a letter to Cabot stated the following:

> As of the date of this letter, the Department has received sufficient information to show that Cabot has now completed the following actions:
>
> > Established the 19 Escrow Funds;
> >
> > Provided each of the 19 families that are served by the 18 Affected Water Supplies with written notice of the Escrow Funds and the procedure by which each of the families can obtain payment. The families of Ed and Becky Burke, Frederick and Jessica Hein, Michael and Suzanne Johnson, Timothy and Deborah Maye, Loren Salsman, Richard and Wendy Seymour, and Richard Stover have accepted payment from their respective Escrow funds. To date, the appellants have not yet accepted payment from their respective Escrow Funds; and
> >
> > Provided each of the 19 families that are served by the 18 Affected Water supplies with written notice that Cabot will install, at its sole expense, a whole house gas mitigation device for each of the 18 Affected Water Supplies. Cabot has installed or will soon install such devices at the seven Affected Water Supplies that serve the families of Ed and Becky Burke, Frederick and Jessica Hein, Michael and Suzanne Johnson, Timothy and Deborah Maye, Loren Salsman, Richard and Wendy Seymour, and Richard

> Stover. To date, the Appellants have not agreed to the installation of any such devices by Cabot.
>
> Cabot's completion of the actions identified above satisfies the requirements under Paragraphs 6.b. through 6.f. of the 2010 Agreement.

The Department provided counsel for the Appellants with a copy of the May 9, 2011 letter.

On October 18, 2011, the Department sent Cabot a letter, which read in part as follows:

> The Department has determined that Cabot has satisfied the terms and conditions of paragraph 6 of the COSA and therefore grants Cabot's request to discontinue providing temporary potable water to the remaining property owners subject to the December COSA. Cabot shall do so under the conditions proposed in its October 17, 2011 letter.[1]

The homeowners (including the Appellants) filed the appeal docketed at EHB Docket No. 2011-165-L from the Department's October 18 letter.

On November 23, 2011, the homeowners filed a petition for temporary supersedeas and a petition for supersedeas in their appeal from the October 18 letter. (A petition for supersedeas had not previously been filed in their appeal from the COSA.) The urgency giving rise to the supersedeas petitions was brought about because the Department gave its OK to Cabot to immediately stop delivering temporary water to the homeowners. Following a conference call on November 29, we issued an order denying the petition for temporary supersedeas. On or about December 1, 2011, Cabot stopped delivering temporary water.

During our conference call on the temporary supersedeas we invited the parties to submit briefs on or before December 7 in support of or in opposition to a longer term supersedeas pending a hearing on the merits. The parties did so. The homeowners also filed a motion to

[1] Cabot stated in the October 17 letter that it remained willing to install whole house methane mitigation water treatment devices. It had offered to pay for a professional plumber to reconnect water well supplies as well as install the methane treatment systems. It committed to continue to provide temporary water while this plumbing work was being completed to any property owner that requested the work before November 30.

consolidate their appeal from the COSA with their appeal from the October 18 letter, and asked that their petition for a supersedeas be treated as relating to both appeals.

On December 8, 2011, we held oral argument on the Appellants' petition for supersedeas. The oral argument was transcribed. The undersigned presiding judge opened the discussion as follows:

> And my first question is, I'm a little confused about an issue of fact from the record and the record that I have so far from these exhibits. And the issue that I'm concerned about – and it's a very important issue to me – is whether or not the appellants, the petitioners, are required to waive all of their rights in order to accept the escrow account payments that are provided for in the consent order and agreement.
>
> The reason why I'm a little confused, more than I usually am, is I have an Exhibit G to the appellants' papers, which is a letter dated December 15, 2010, and that's a letter from Amy Barrette to Tate Kunkle and others. And it basically says, in order for Cabot to pay the settlement amount, the recipients, the property owners, in this case, Fiorentino, would need to execute the release of all claims which is attached to that letter. That's September – that's December 15, 2010, letter. So I have that.
>
> But then when I look at Cabot's exhibits, I have – of course I have the consent order, and then I have the escrow agreement that is attached to the consent order, incorporated into the consent order, which talks about a model receipt, with a capital R. And if I look at the receipt, the receipt says: The unsigned hereby acknowledge receipt, et certera, et cetera, constituting payment in full of all amounts payable by Cabot to the undersigned, pursuant to paragraph 6 of the consent order and agreement.
>
> And I have a letter from K and L Gates, dated March 21, 2011, again from Amy Barrette, again to parties. And this letter refers to the enclosed receipt, which is the receipt that I just mentioned that was attached to the escrow agreement.
>
> So I guess my question is, what exactly are the petitioners being required to sign here in order to accept the payments under the escrow agreement?

We had considerable difficulty obtaining a clear answer from Cabot to our question. In order to put Cabot's current motion in its proper context, extended excerpts from the oral argument are excerpted here:

> MR. KOMOROSKI [Counsel for Cabot]: Your Honor, this is Ken Komoroski, from Fulbright, on behalf of Cabot.
>
> And the – and I'll refer to it in pieces so I can do my best to, hopefully, answer Your Honor's questions and to eliminate any confusion. And you can let me know, of course, how I do.
>
> The December 15th letter [the letter demanding a release] was sent before the escrow accounts were established. And so that letter was not – that letter was sent, again, before those escrow accounts were established and was a set of circumstances that existed – and was sent to all property owners, a set of circumstances that existed before the escrow accounts were established.
>
> Thereafter, once the escrow accounts were established, in accordance with the consent order and settlement agreement, then all that was requested back – all that was requested back was a receipt of acknowledgement of receipt of escrow funds.
>
> JUDGE LABUSKES: What – whatever happened with that December 15 letter?
>
> MR. KOMOROSKI: Fundamentally, Your Honor, it terminated – this is Ken Komoroski, again.
>
> Fundamentally, it terminated, effective when the escrow accounts were established and was no longer a – a condition, for lack of a better way to put it, once – so that Cabot was properly fulfilling the terms of paragraph 6 of the consent order and settlement agreement.
>
> JUDGE LABUSKES: Okay. So – I just want to be clear on this then. Cabot is not insisting that the petitioners execute the release that was attached to that December 15, 2010, letter, as a condition for accepting payment under the escrow agreements. Is that correct?
>
> MR. KOMOROSKI: At the point, Your Honor, there was a period of time, under the consent order and settlement agreement,

where the property owners were entitled to accept the escrow payments without condition. And so that – the escrow amounts were established, and those escrow amounts were made available during that period as set forth precisely and exactly in the consent order and settlement agreement without condition.

JUDGE LABUSKES: Okay. But as of today – I need to deal with the supersedeas petition today. What is it that, in terms of a waiver release, receipt, that the petitioners would need to do to – if they chose to accept those moneys? Or are you saying those moneys are no longer available?

MR. KOMOROSKI: Well, Your Honor – Ken Komoroski, again, for the benefit of the report – court reporter.

I'm trying to be as precise and authentic to the conditions. The terms of the consent order and settlement agreement themselves identified a period of time that – where the escrow amounts were available to the property owners. And the, that – that period ended. And now we are into a different period, under the terms of the consent order and settlement agreement.

There was recently a request made by some property owners for their escrow moneys, and those requests are being considered by Cabot at the present time.

We don't have a particular answer to Your Honor's question, except to say that – that we are -- it is – it is crystal clear that Cabot is still in compliance with the terms of the consent order and settlement agreement.

MR. BERMAN: Your Honor, this is Steve Berman, on behalf of the plaintiffs.

Neither our clients nor we ever received any written communication of any kind from Cabot or their counsel advising that a release did not have to be executed. As far as I know, it was still a condition precedent, and that's why we put it in our petition.

I believe it's a lot of back peddling at this point in time, because some of the officials from Cabot actually called our clients and advised them about the release and what was required, and – again, they also now have to forfeit a third of the money for taxes, but that's a separate issue.

Here – I don't know anything about them not having to sign a release. They've never been notified of that fact, and as far as I know, that's still what's out there. And whether our clients did not contact and ask for – for advice if they wanted to accept the money, some of the petitioners contacted the escrow agent and simply asked for information, because it – it's one thing one day, it's one thing, apparently, another.

MR. KOMOROSKI: Your Honor, this is Ken Komoroski, for Cabot.

Two things. One is, we did send, on behalf of Cabot, and while we were at K and L Gates, a letter explaining the escrow money. Again, this was required by the consent order and settlement agreement, and we complied with that element.

We did send a letter to all the property owners identified, and that is the letter that we've included that says we ask only for a receipt. And there are owners who did accept that escrow money with only execution of a receipt per – well, indicating receipt of the moneys and with no release.

MR. BERMAN: That's because – this is Steve Berman, again – they're not plaintiffs in the companion litigation in federal court.

MR. KOMOROSKI: I think – again, Ken Komoroski. I think that was – the question was whether there was notice, and the notice was the letter that was sent pursuant to the terms of the consent order and settlement agreement, saying that the funds were available and only attached a receipt.

JUDGE LABUSKES: Then I guess I'm not hearing a clear answer from you, Mr. Komoroski, as to what the story is today. To me, it makes all the difference in the world. I denied the temporary supersedeas because, the way I read the agreements – well, there are two reasons, the first of which we can talk about later. And it deals with the fact that there was only an appeal from the letter as opposed to the consent order. But, as to the irreparable harm, I couldn't really understand why the petitioners would be irreparably harmed if they could simply get this money and take advantage of these treatment systems without any waiver of their rights or whatever rights that they may have above and beyond the consent order or even to litigate the case in the future.

If these moneys are available to them, I just don't see that there's any irreparable harm for purposes of the temporary supersedeas or a supersedeas. But if you're telling me today that those moneys are not available, I think that changes everything.

I don't think that the consent order and agreement authorizes a release that goes beyond what the DEP does, which is enforce statutes. I'd be real interested to hear if the Department had any knowledge or intent to require release that the Federal lawsuit be dropped and that all other damages – past, present, or future – be waived as a condition for complying with this consent order.

MS. DUFFY: Your Honor, I can speak to that. This is Donna Duffy.

JUDGE LABUSKES: Go ahead.

MS. DUFFY: As far as the Department, the consent order and agreement and the attachment exhibit, the escrow agreement, speak for themselves, as we stated in our brief. The Plaintiffs – plaintiffs/appellants, at December 16, 2010, and now, have the ability to ask the escrow agent for their funds and they're – as far as the Department's concerned, there are no strings attached, of what's stated in the agreement, except for that receipt that's right in the agreement.

However, since December of 2010, the federal court has issued an order concerning attorney's fees that has embargoed some of the escrow amount for a separate action. But that is not anything to do with the consent order, agreement.

As far as the Department's concerned, there's no strings. And we're not really sure that Mr. Komoroski was speaking of later in his discussion.

JUDGE LABUSKES: Well, yeah. Not only that , if that's the case, there was also an October 17 letter from Cabot, which I read to say that all these options were still open. The October 18, letter from the Department, which is under one of the appeals, specifically incorporated the terms that were set forth in the October 17 letter, regardless of what the dates were in the consent order and agreement itself.

I may be misreading that, too. I'm trying to do all this relatively quickly, but my understanding was, when I issued the

temporary supersedeas, that these options were still available to the petitioners. I'm hearing today that they may not be.

MS. DUFFY: As far as the Department's concerned, Your Honor – this is Donna Duffy – the options are available. The escrow agent has asked the Department for – for its notice that's required under this consent order and agreement, and we are getting prepared to respond to the escrow agent, because he has received requests from appellants, at least some of them.

***

JUDGE LABUSKES: Well, I guess it's back to you, Mr. Komoroski. I really feel like I need an answer to this question, because I think it makes a big difference in terms of where we go from here.

MR. KOMOROSKI: And again, I apologize for breaking it into pieces, but I just – I went to – and hopefully this will answer the question Donna was asking as well. The – the terms of the consent order and settlement agreement were that there was a period of time where the property owners could access the escrow account and no approval was required. Then that period of time lapsed, and we're into a different phase where unqualified, unconditional consent has to be granted in order for petitioners to receive – well, yeah, petitioner or property owners to receive the money.

As we understood it, the – Your Honor's directions last week, it was whether or not the terms of the consent order and settlement agreement were being complied with, in particular paragraph 6. So I'm not trying to avoid the question, but I'm just trying to build up to it, that – that under the terms of the consent order and settlement agreement, I – I'm not aware of anyone asserting how Cabot has not complied with the terms, and I understood the Department's in agreement that it has met those terms.

JUDGE LABUSKES: Okay. I'm going to accept that as your answer. I'm going to tell you, it's very unacceptable.

***

MR. KOMOROSKI: I'm sorry. Ken Komoroski, for Cabot.

On the earlier issue, I would ask if the Board would grant us a brief period of time to confer with our clients to find out if we have an answer to Your Honor's question.

JUDGE LABUSKES: That would be great. Actually, I was intending on doing that anyway, rather than put you on the spot here.

MR. KOMOROSKI: Well, I don't mind being put on the spot, Your Honor, but I just don't have an answer to that question.

We – again, the way we were proceeding was that we had complied with the terms of the consent order. And so I understand Your Honor's question, and we'd like to -- again, appreciate if the board would grant us some opportunity to confer with the client and give a – better response.

JUDGE LABUSKES: That will be fine. Let me just lay it out for you, so you know what you're dealing with. In my view – there may be other complications here, but just with respect to this particular issue, in my view, if this money is no longer available or the money is attached to a release that goes beyond what's in the agreement itself, along the lines of the release that was in the December 15 letter, then this money is not available and the petitioners are being required to pay for a water supply in the interim, and I have a feeling that that may constitute irreparable harm to them.

On the other hand, if this money is available, like it always has been, I thought it was, and it comes without any strings attached, as Ms. Duffy said, although, you know, this all gets sorted out later on the merits and they might have to pay some back or something like that, but if this money is immediately available to them, then I can't understand why there would be any irreparable harm here. So to me it's almost a dispositive issue.

So how about you get back to us by 4 o'clock today?

MS. DUFFY: Your Honor, this is Donna Duffy.

Because since Cabot – I just want to make it clear that that is the Department's position. And it's in our brief that the appellants have access to these funds with no strings attached.

JUDGE LABUSKES: So, if I could take that to its logical conclusion, if that's not the case, then the October 18 letter is

wrong, and Cabot has not complied with the agreement, in the Department's view, and I don't have to issue a supersedeas; the Department can withdraw its letter.

MS. DUFFY: We certainly would be reconsidering our letter if Cabot comes back from that.

JUDGE LABUSKES: Okay.

***

MR. BERMAN: Your Honor, this is Steve Berman, again, on behalf of the plaintiffs.

When the phrase "no strings attached" is used, does that also indicate and require that Cabot is stipulating that they will not use the receipt of the moneys or the availability of the system in any way to offset claims for damages in the litigation, because if they do, then there are strings attached.

JUDGE LABUSKES: Well, I'll answer it for them. My view is, I think that this particular – the use of those funds should be neutral at this point. In other words, Cabot doesn't have to say that we won't use it, and – but they also don't have to say they will use it. It's not a release but it's not the other a hundred eighty degrees from that either, in my view. I mean, that might not be totally acceptable to petitioners, but that's sort of my thinking on it.

And this money, in my view – again, Miss Duffy can chime in here – but, in my view, this money is not intended as compensation for any loss of property value. This money is strictly intended to compensate for water loss under the applicable statutes. In my –

MS. DUFFY: Your Honor, that's correct.

This is Donna Duffy.

The Department doesn't have the authority to grant people compensatory damages. What they're seeking in the federal lawsuit, which plaintiffs – and some of the plaintiffs are not appellants, so the plaintiffs and the appellants filed their federal litigation before we entered into the 2010 agreement. We knew about that litigation. Nothing in the agreement refers – impairs their litigation or anybody's defenses or claims under the federal litigation.

JUDGE LABUSKES: Okay. Thank you for that, because that's exactly the way I read it, and I don't think that the Department or this board – you know, we know that. We've been doing that for a long time. We don't get into those kind of issues. That's not our world. And so that could not possibly be the subject of this agreement in terms of a release, in terms of – it doesn't deal with it one way or the other. And that's the way I'd like to keep it.

***

JUDGE LABUSKES: Well, that's where the escrow payments come in. If a particular petitioner is not happy with the quality of the water, even with the methane treatment, and Cabot is willing to make those funds available without any kind of waiver on the part of the petitioners, then they can do whatever they want with the money.

And I understand your earlier point, but, in the meantime, they have as much as four hundred thousand dollars to spend on the Culligan Man or a new well or water deliveries or moving or however they want to spend it if they're not satisfied with the job that's being performed by the methane treatment.

That's, in my view – again, I'm interpreting what I think the Department did here – but, in my view, that's what that money is supposed to pay for. Because they don't need it for the methane because that's a separate item in the consent order that Cabot's paying for separately.

MS. DUFFY: Your Honor, this is Donna Duffy.

But to expand on that, because the appellants' counsel continues to argue about those – the lack of the remedy that was fashioned in the consent order agreement, and they're really going to their appeal of the consent order agreement, and just to say that the consent order agreement includes more than paragraph 6. And we will get to that, if we have an underlying hearing on the merits. But the consent order agreement has a lot of things that Cabot has to do. And those combined were what the Department determined qualified – satisfied the law.

And you are absolutely right. The escrow agreement was designed for the appellants as well as the other seven families, under the agreement, who have taken the escrow to use that money as they see fit.

***

JUDGE LABUSKES: ... So I guess, where we are, at this point, is we need to hear from Cabot on exactly what its position is in terms of whether this relief is immediately available to the petitioners without strings attached. And, I guess, then, if Cabot says it's not, then, I guess, it maybe goes to the Department to tell me whether they still think the October 18 letter is accurate, which may mean – if it's not accurate, may not even require supersedeas.

And if, if this – if this relief is not available, then we have to talk about what to do next. If it is not available, then I'm very concerned about the fact that these people aren't – don't have water, and I really begin to think at that point, it really is not a harm of their own making, so we need to decide whether we have a hearing and whether we do that relatively quickly. I – I'm prepared to go as early as Monday, if we need a hearing on that.

The alternative is, if this – if this relief is available and Cabot makes that clear, I don't see that we need a supersedeas here. I'll probably deny the supersedeas, because I think that the – appellants should be required to at least try these things. They can take the money without waiving any rights, and they'll have a nice bank account that they can use to supply them until we can get this thing to a hearing, which really isn't all that far away, frankly. March is pretty quick as these things go.

***

JUDGE LABUSKES: Okay. If there's a – I think maybe the bottom line is, if the petitioners are willing to cooperate, without waiver, and Cabot is willing to do the things that I said, we don't need a supersedeas here.

On December 8, Cabot sent us a letter, which read as follows:

Dear Honorable Labuskes:

Please accept the following as Cabot Oil & Gas Corporation's ("Cabot") formal position in connection with today's discussion regarding the above-captioned proceeding:

Cabot agrees to provide an instruction to the Escrow Agent for release of the escrow funds to the Appellants, unqualifiedly and

> unconditionally, as available in the Escrow Account for each Appellant.
>
> Cabot continues to offer the whole house treatment system which it believes is an effective method of remediation.

On December 9, Cabot sent a letter to the escrow agent giving him "unqualified and unconditional" instructions to release requested escrow funds to the property owners.

We denied the petition for supersedeas in an Opinion and Order on December 9, 2011. We explained:

> The *raison d'etre* of a supersedeas is to prevent a party from suffering irreparable harm during the litigation process. *Jefferson County Commissioners, et. al v. DEP*, 2000 EHB 394, 402-403. Paragraph 6 of the COSA, as amplified by the correspondence of October 17, October 18, and December 8, provides that Cabot will immediately resume deliveries of temporary water to the Petitioners if they simply agree to allow Cabot to install a whole-house gas mitigation device in each of their homes, all expenses paid by Cabot. In addition, all that each Petitioner needs to do is ask and Cabot will immediately pay each property owner the amounts listed in Exhibit D to the COSA with no strings attached.
>
> ***
>
> No release or waiver of any kind is required from the Petitioners other than a receipt acknowledging payment of the funds. Cabot will pay the Petitioners without prejudice to their past, existing, or future rights in this appeal or in any other litigation. Although this reservation of the Petitioners' rights would have been clear as a matter of law even without Cabot's December 8 letter in our view, that letter removes all doubt. This is only appropriate because, although done for the benefit of the Petitioners, the COSA is only designed to resolve the *Department's* claim against Cabot. The Department did not and could not have bargained away the Petitioners' individual rights, whatever they may be.

Carter v. DEP, 2011 EHB 845, 852-53.

Thereafter, we stayed the proceedings before us for an extended period of time at the request of all of the parties. The parties told us that settlement discussions were taking place

under the auspices of the federal court in the federal lawsuit that the homeowners had brought against Cabot. We were told that the EHB appeals would almost certainly be resolved if the parties could work out a settlement of the homeowners' federal lawsuit.

After numerous extensions of the stay that we entered at the parties' request, we received a letter on October 1, 2012 from Tate Kunkle, Esquire of Napoli Bern Ripka Shkolnik, LLP, former counsel for the homeowners, withdrawing the appeals of most of the homeowners. We received a second letter from Kunkle on October 18, 2012 withdrawing the remaining appeals. The second letter included the appeals of the Appellants now before us. We issued a perfunctory Order closing all of the appeals on October 18, 2012.

On October 26, 2012, we docketed the following letter:

> Dear Judge Labuskes
>
> RE: Carter, et al. v. PADEP, et al. EHB Docket 2011-003-L (consolidated with 2011-165-L)
>
> It has come to my attention that my appeal to the Environmental Hearing Board, which has been pending since January 11, 2011, was withdrawn yesterday by my attorneys, Napoli Bern Ripka Shkolnick, LLP.
>
> I learned this information not from my attorneys, but from a journalist who contacted me this morning for a comment regarding this development. She provided me the Order of the court dismissing my appeal and the Letter from my attorney, Tate Kunkle, stating to the court that I was "voluntarily" withdrawing my appeal. I never agreed or authorized my attorneys to take any such action. I have not withdrawn my appeal. I contacted the law firm today and attempted to speak with Tate Kunkle and Paul Napoli without success.
>
> I respectfully ask that the Court take notice of this action by my attorneys, as it is not only in direct contradiction to my request that my appeal be heard and determined on the merits, but also fraudulent in that my authorization was never given. Indeed, I have written several e-mails to counsel and participated in multiple conversations wherein I clearly stated that I would Not be

> withdrawing my appeal under any circumstances. Any argument or evidence offered by counsel to the contrary would be completely manufactured.
>
> I respectfully request that my appeal be immediately re-instated so that I may avail myself of my right to obtain a ruling from the EHB. I have completely lost faith that my attorneys are acting in my best interests or advising me of action taken on my behalf at critical junctures of this matter.
>
> Respectfully,
>
> /s/
> Nolan Scott Ely
> P.O. Box 39
> Dimock, PA 18816
>
> Ray and Victoria Hubert
> P.O. Box 111
> Dimock, PA 18816

The letter was signed by Nolan Scott Ely.

On October 26, 2012, we issued an order directing the parties to provide the Board with a report setting forth a recommended course of action in response to Ely's letter. Kunkle of the Napoli firm responded as follows:

> Since September 2010, our office has represented the appellants in their federal case against respondent Cabot Oil & Gas Corporation ("Cabot") for the contamination of their water supplies and related damages. When Cabot and the Pennsylvania Department of Environmental Protection ("PADEP") entered into the December 15, 2012 (sic) Consent Order and Settlement Agreement ("COSA"), our office represented appellants in their administrative appeal regarding the validity and propriety of the COSA (EHB Docket No. 2011-003-L). [ ] The COSA required that Cabot, *inter alia*, establish escrow funds for the appellants with the greater of $50,000 or two times the assessed value of their properties as compensation for the restoration or repair of their water supplies (COSA ¶ 6). Appellants argued that those COSA terms regarding Cabot's obligations to pay for or restore and/or replace water supplies were unjust and unfair.

> On August 30, 2012, Appellants Scott and Monica Ely advised the escrow agent appointed pursuant to the COSA that they accepted and desired to receive the settlement funds at issue, as did Ray and Victoria Hubert on September 15, 2012. ...Thus, the appellants accepted the COSA settlement funds that were the subject of these very appeals and we believed and continued to believe that it was our professional obligation to dismiss the appeals. The appellants and whoever may be legally assisting them in their communications with the Board apparently disagree.
>
> We are not going to respond to the substantive merits of the issues raised in the telephone call[2] and correspondence submitted to the Board by Mr. Ely at this time. We will also not respond to the baseless allegations lodged against my firm and certain attorneys, except to dispute their validity and to assure the Board that we have, at all times, conducted ourselves in accord with the highest professional obligations and standards.
>
> Should Mr. Ely and Mr. Hubert desire to continue their appeal we have no objection. We however will not be representing them.

Pointedly, Kunkle did not deny that he withdrew his clients' appeals without their consent.

The Department in its submission pursuant to our Order did not speak to whether Ely's appeal had been withdrawn without consent, but it noted that Ely had not agreed to a settlement with Cabot in the federal litigation, which is consistent with the representations in Ely's letter. Cabot's submission did not speak to the question of withdrawal without consent but, stated that it "reserves its right to respond based on any facts or information provided that establish a basis for reopening these appeals."

On November 7, 2012, it appearing that there was no dispute that the Napoli firm had acted outside of its authority, we issued an Order reinstating Nolen Scott Ely's appeal. The Order also advised Kunkle that his submission would not serve as a withdrawal of appearance

[2] Board footnote: This reference to a telephone call refers to a call from Ely to the Board's staff inquiring about the proper procedure for making his concerns known to the Board. Staff advised Ely that he should put any concerns that he may have in writing.

notwithstanding his statement that he would not be continuing his representation. The Order directed the parties to submit a proposed joint case management order.

Thereafter, we received letters from two additional former appellants. The letters are nearly identical and read in part as follows:

> I am very distressed to learn that we were not given the information we needed to make fully informed and agreeable decisions regarding the Consent Order entered into between the Commonwealth and Cabot. We were warned and threatened by our attorney to NOT TAKE THE CONSENT ORDER MONEY that was in an account created by the State and Cabot. We were not told that it was in our interest to take the money because it would destroy our litigation and that it did not fully compensate us for a number of issues. We were warned not to take it or we would be thrown out of the case and that it would end our lawsuit. We were told we would be giving up all claims against Cabot forever. They told us the consent order was a deception.
>
> Others and myself had patiently waited for the Consent Order Hearing. We thought this would be the place to voice our concerns and find out what was the truth. I personally wanted to hear from a Judge or legal authority what was going on and if indeed it were true that the consent order had "strings" attached. We even engaged more legal aid, a friend and advocate, NRDC offered to help. Apparently, our attorney(s) did not think we needed the help and threatened us to not have any contact with them.
>
> Although we, the litigants had started out as a group, meeting and trying to help each other, we were now warned not to discuss anything with each other.
>
> When we were presented with a final settlement between Cabot and us-final, without any explanation or options, we had lost any opportunity of a hearing or going in front of the Judge. We had lost any chance of obtaining the consent order money and we now had to agree to a long list of "agreements" to things I never dreamed I would have to agree to. The consent order money had been bundled into a new deal, the only deal, and this time it wasn't "strings attached". We were roped into a transaction that effectively gave our attorneys their third of the consent order money that we believe was not created for lawyers, but for the folks who were part of the "affected area" and in need of drinking water. Our attorney had repeatedly told us that they were not

> interested in our consent order money. In fact, we believed the consent order was not a settlement obtained by any attorney. Our lawyers in fact, proclaimed they had not participated in the terms of any of the negotiations. Hence they or previous counsel had no right to the escrow account.

On November 30, 2012, we received the following letter:

> Your Honor, I (we) apologize for not clearly specifying by earlier letter what parties were requesting reinstatement of their appeals which were withdrawn by Tate Kunkle and his firm.
>
> There are four titled landowners seeking reinstatement of their appeals: Nolen Scott Ely, Monica L. Marta-Ely, Ray Hubert and Victoria Hubert.
>
> We respectfully ask the court to instate the appeal for all of us. Thank you.
>
> Respectfully,
>
> Nolen Scott Ely
> /s/
> Monica L. Marta-Ely
> /s/
> Ray Hubert
> /s/
> Victoria Hubert
> /s/

We reinstated the additional appeals by Order dated December 3, 2012. Messrs. Kunkle and Berman of the Napoli firm withdrew as counsel in accordance with the Board's rules on December 5, 2012.

Acceptance of benefits

Cabot has filed a motion to dismiss this appeal. Cabot has not contradicted the Appellants' contention that their appeals were withdrawn contrary to their instruction that the appeals were *not* to be withdrawn. Instead, Cabot presents two arguments in support of its motion. First, it argues that, because the Appellants accepted the escrow funds, they are

precluded from further pursuing this appeal. Secondly, it characterizes the November 30 letter from the Elys and the Huberts as a request for reconsideration and argues that it was untimely. The Appellants, of course, oppose the motion. The Department, perhaps wisely, has remained silent.

Cabot's first argument has no merit. As discussed above, Cabot very clearly and only after much questioning by this Board committed that it would not take a position that the Appellants' acceptance of the escrow funds constituted a waiver of any of their rights or any past, present, or future claims against Cabot, including their right to continue on with their appeals. Somewhat remarkably, it has now taken that very position in its motion.

Based upon the lengthy discussions and representations outlined above, Cabot gave this Board the unmistakable impression – albeit only after much dodgery – that the Appellants could accept the escrow payments without jeopardizing their position in their appeals. We expressly incorporated that understanding in our Opinion denying the supersedeas petition: "Cabot will pay the Petitioners without prejudice to their past, present, or future rights *in this appeal or in any other litigation.*" (Emphasis added.) In its reply brief Cabot selectively quotes statements of the presiding judge during oral argument in support of its current position. For example, it is true that the judge recognized during oral argument that the escrow payments might act as some sort of equitable set-off against future recoveries, but we also repeatedly said we would rule in Cabot's favor on the supersedeas petition because, among other things, the Appellants would continue to retain the ability to proceed to a hearing on the merits of their appeal even after accepting the escrow payments and/or the methane treatment systems. (*See, e.g.* Transcript pp. 23, 31, 35.) We are not persuaded that Cabot could have reasonably misunderstood our intent.

Cabot's motion is inconsistent with both the letter and the spirit of its past representations to this Board, and it is inconsistent with the Board's prior Order. As convincingly argued by the Appellants,

> Cabot was – for the time being – successful in its opposition to the Petition for Supersedeas based upon the representations it made; it cannot now play "fast and loose" with this Board by wholly reversing its position. *In re Adoption of S.A.J.*, 575 Pa. 624, 631-32 (2003) (quoting *Trowbridge v. Scranton Artificial Limb Company*, 560 Pa. 640, 644 (2000) ("As a general rule, a party to an action is estopped from assuming a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained."); *Tops Apparel Mfg. Co. v. Rothman*, 430 Pa. 583, n. 8 (1968) (quoting *Wills v. Kane*, 2 Grant 60, 63 (Pa. 1853) ("When a man alleges a fact in a court of justice, for his advantage, he shall not be allowed to contradict it afterwards. It is against good morals to permit such double dealing in the administration of justice.").

Putting Cabot's past representations aside, Cabot has not convinced us that the "equitable" "common law" acceptance-of-benefits doctrine upon which it relies has any place in a Board proceeding. The parties argue about whether the doctrine applies to third-party beneficiaries of someone else's agreement based upon cases addressing the law of contracts, some of which go back to 1934. However, Cabot has not referred us to any decision of this Board dismissing an appeal because an appellant accepted the benefits of the Department's agreement with another party. Indeed, we would have been quite surprised had it been able to show that the doctrine applies in our administrative proceedings. The role of this Board is to assess whether the Department's actions are lawful, reasonable, and supported by the facts. *Barron v. DEP*, EHB Docket No. 2011-142 (Adjudication, January 28, 2013). We do not see why a person aggrieved by a Departmental action should be held to have forfeited its right to due process review of that action by accepting some of the benefits that may flow from that action. For example, permittees frequently appeal from certain terms in their permits while operating

pursuant to the permit. *See, e.g., Shenango v. DEP*, 2006 EHB 783. *Cf. Jones v. DEP*, 2009 EHB 509, *rev'd on other grounds*, Docket No. 1326 C.D. 2010 (April 5, 2011) (beneficiary of water loss investigation challenged scope of replacement required); *City of Philadelphia v. DEP*, 1996 EHB 47 (recipient of grant money can challenge amount of award). Much more to the point, the beneficiary of a water replacement consent order between the Department and a mining company can accept, for example, a partial repair of the water supply that was damaged without waiving the ability to purse its appeal from the consent order. *See, Lang v. DEP*, 2006 EHB 7. So long as a party is aggrieved by a Departmental action, it may pursue an appeal, even if its receipt of some benefits make it less aggrieved than it otherwise might have been.

At the risk of stating the obvious, a consent order and agreement has no preclusive effect with respect to nonparties to that agreement with respect to their appeal rights. *City of Chester v. PUC*, 773 A.2d 1280, 1286 (Pa. Cmwlth. 2006); *Lang, supra.* If the COA itself has no preclusive effect, it logically follows that any payments made pursuant to the COA also have no preclusive effect. Somewhat implicit in Cabot's argument is an unwarranted assumption that the escrow payments made pursuant to the COSA are valid. Deferring to the COSA as Cabot would essentially have us do would violate the due process rights of those who were not a party to the settlement. *City of Chester, supra.*

Timeliness of reinstatement

We also reject Cabot's argument that the appeals of Monica L. Marta-Ely, Ray Hubert, and Victoria Hubert were improperly reinstated based upon what Cabot has characterized as an untimely motion for reconsideration. Initially, we take Ely at his word that his original letter, submitted on October 26, was written on behalf of all four Appellants. The letter can easily be

interpreted that way. In fact, Kunkle, Cabot, and the Department all recognized that ambiguity in their submissions to the Board suggesting how we should proceed in light of the letter.

Furthermore, we are not entirely convinced that it is appropriate to apply our rule regarding reconsideration (25 Pa. Code § 1021.152(a)) in this rather unique situation. A petition for *reconsideration* arguably presupposes that we *considered* the order in question in the first place. Reconsideration is appropriate where the Board made an error in its analysis. Thus, reconsideration may be appropriate if our order "rests on a legal ground or a factual finding which has not been proposed by any party", or if crucial facts set forth in the petition for reconsideration are "inconsistent with the findings of the Board." *Id.* In other words, we made a decision *that was based on* legal grounds and/or factual findings. In contrast, the October 18 Order marking the Appellants' appeals withdrawn and closing the docket was a ministerial act. It was not based upon any factual findings or in reliance on any legal grounds. Appeals before the Board may be withdrawn by praecipe or letter at any time prior to adjudication for any reason or no reason at all. 25 Pa. Code § 1021.141(a)(1). That is what occurred in this case. No Board approval was required.

As far as we are concerned, these appeals were never in fact withdrawn. It is well settled in Pennsylvania that an attorney must have express authority to settle a case on behalf of a client; apparent authority does not suffice. *Reutzel v. Douglas*, 870 A.2d 787, 789-90 (Pa. 2005); *McLaughlin v. Monaghan*, 138 A. 79 (Pa. 1927). Attorney Kunkle and the Napoli firm had no such authority in this case. The appeals were not only purportedly withdrawn without the Appellants' knowledge and consent, they were purportedly withdrawn contrary to their specific instruction *not* to withdraw the appeals. Counsel's unauthorized representation that the appeals were withdrawn was inaccurate, ineffective, and void *ab initio*.

Assuming for purposes of discussion that the standard for reconsideration applies here, we have other standards and principles that also apply. Our rules provide that we are to liberally construe them to secure a *just*, speedy, and inexpensive determination of every appeal: "The Board at any stage of an appeal or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties." 25 Pa. Code § 1021.4; *See Neville Chemical Co. v. DEP*, 2003 EHB 530, 532. Furthermore, the time prescribed for the filing of any document required or permitted under our rules (other than a notice of appeal) may be extended by the Board for good cause upon motion. 25 Pa. Code § 1021.12. Still further, *nunc pro tunc* relief is available in the event of fraud. *Falcon Oil Co. v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth, 1992); *Greenridge Reclamation v. DEP*, 2005 EHB 390, 391.

Cabot says that the Appellants are not entitled to special consideration simply because they were proceeding *pro se*. However, to characterize the Appellants as proceeding *pro se* is disingenuous. The Appellants, admittedly rather awkwardly, were attempting to preserve their right at a time that they were in fact represented, albeit by attorneys who no longer had their interests at heart. In the face of what they viewed as a betrayal of their interests, the Appellants were diligently attempting to obtain new counsel, which they eventually did. To hold the Appellants to the same standards as a party who voluntarily chooses to represent itself would be unjust and unconscionable. The circumstances presented here clearly amount to the sort of fraud that justifies *nunc pro tunc* relief.

Parties who withdraw their appeals are forfeiting a substantial legal right. *Reutzel*, 870 A.2d at 790. Board review of the Department's actions is the only due process afforded to aggrieved parties such as the Appellants under Pennsylvania's administrative scheme. *Kiskadden v. DEP*, EHB Docket No. 2011-149-R (Opinion & Order, January 16, 2013). In

comparison, we do not discern that adding Mrs. Ely and the Huberts as parties will marginally affect the substantial rights of Cabot or result in undue prejudice to the parties in light of the fact that Mr. Ely's appeal would proceed in any event.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NOLEN SCOTT ELY, et al.,	:	
	:	
v.	:	**EHB Docket No. 2011-003-L**
	:	**(Consolidated with 2011-165-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CABOT OIL & GAS	:	
CORPORATION, Permittee	:	

ORDER

AND NOW, this 8th day of February, 2013, it is hereby ordered that the Permittee's motion to dismiss is **denied.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: February 8, 2013

c: **DEP, Bureau of Litigation:**
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9th Floor, RCSOB

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANGELA CRES TRUST OF JUNE 25, 1998	:	
	:	
v.	:	**EHB Docket No. 2006-086-R**
	:	**(Consolidated with 2006-006-R)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and MILLCREEK	:	**Issued: February 22, 2013**
TOWNSHIP, Permittee	:	

OPINION AND ORDER ON APPELLANT'S APPLICATION FOR ATTORNEYS' FEES, EXPERT FEES AND COSTS

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

A challenge to the extension of a water obstruction and encroachment permit which authorized a township to widen and deepen a channel located on the appellant's property does not constitute a proceeding pursuant to the Clean Streams Law. The purpose of the project was to prevent flooding to a roadway and properties in the township. The purpose of the appeal was to prevent stormwater from entering the property of the appellant. Even if we could conclude that this matter arose under the Clean Streams Law, Section 307(b) invests the Pennsylvania Environmental Hearing Board with broad discretion in determining when it is appropriate to grant an award of attorneys' fees and costs. Under the circumstances of this case, we find that an award of fees and costs would not be appropriate.

BACKGROUND

In 2001, the Pennsylvania Department of Environmental Protection (Department) issued Water Obstruction and Encroachment Permit No. E25-602 (the permit) to Millcreek Township,

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http://ehb.courtapps.com

Erie County. The permit authorized Millcreek Township to do work on a portion of a channel for the purpose of eliminating flooding that occurs along Heidler Road in Millcreek Township. The flooding has resulted in safety concerns for travelers of Heidler Road, as well as damage to properties in the area. At the trial of this matter, area residents presented testimony regarding the extent of flooding to their properties. One area resident, Tim Fitzgerald, testified that he had experienced flooding to his home on approximately 14 occasions. Another resident, John Eller, testified that his home had experienced flooding approximately 10-20 times. On one occasion the flooding of Heidler Road resulted in a car leaving the roadway and landing in Mr. Eller's front yard.

In order to address the safety concerns and damage caused by the flooding, Millcreek Township was granted a permit by the Department to allow it to widen and deepen the channel. The permit required construction to be completed by December 31, 2003. A portion of the channel where the activity was to take place runs through property owned by the appellant, the Angela Cres Trust of June 25, 1998 (the Trust). The Trust denied the Township access to its property to conduct the work, and, therefore, in 2003 the permit was extended under Section 105.43 of the Dam Safety and Encroachment regulations[1] so that the Township could secure an easement to the Trust property. The permit was again extended in 2005, 2006 and 2008.

The Trust did not appeal the Department's issuance of the permit or the 2003 extension. It did appeal the 2005, 2006 and 2008 extensions of the permit. In October and November 2007, the Pennsylvania Environmental Hearing Board (Board) held a seven-day trial on the issue of whether the permit should have been extended. The Board's scope of review was limited to determining whether the Department had erred or abused its discretion in extending the permit in

[1] 25 Pa. Code, Chapter 105 regulations promulgated under the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27.

2005, 2006 and 2008. Matters pertaining to the question of whether the permit should have been issued in the first instance were outside the scope of the appeal. *Angela Cres Trust of June 25, 1998 v. DEP and Millcreek Township*, 2009 EHB 342.

On June 25, 2009, the Board issued an Adjudication in this matter. *Id.* A majority of the Board remanded the matter to the Department to review the evidence submitted at the trial and make a determination as to whether the project would cause additional flooding downstream at a fish hatchery and on property owned by Mr. Jim Parker, while at the same time eliminating flooding to Heidler Road and the Eller and Fitzgerald properties. Judge Labuskes filed a dissenting opinion in which he stated that because the Trust's appeal was only from the extension of the construction deadline the subject of the remand was outside the Board's scope of review. Judge Labuskes wrote, "Since our task is limited to reviewing the deadline extension, issues unrelated to the extension are irrelevant. *Winegardner,* [2002 EHB 790-793]." *Angela Cres Trust,* 2009 EHB at 375.

On remand, the Department found that the completion of the project would have no effect on flooding in the area of the fish hatchery or Parker property.

Prior to the Environmental Hearing Board action, Millcreek Township had filed a declaration of taking seeking to condemn the strip of the Trust property necessary to complete the project. Following the Board's June 25, 2009 Adjudication, on December 16, 2009, the Court of Common Pleas of Erie County sustained the Trust's preliminary objections and dismissed the condemnation action. *Township of Millcreek v. Angela Cres Trust of June 25, 1998*, Erie County Ct. of Common Pleas, No. 12295-2005. On July 15, 2011, the Pennsylvania Commonwealth Court upheld the dismissal of the Township's condemnation action. *Township of Millcreek v. Angela Cres Trust of June 25, 1998*, 25 A.3d 1288 (Pa. Cmwlth. 2011).

When the permit expired in 2011, the Department notified Millcreek Township that it would not extend the permit for an additional term since the easement issue had not yet been resolved. The Department did advise the Township, however, that if it wanted to pursue the project it could submit a new permit application once the property issues were resolved. (Dec. 30, 2011 Letter from Department to R. Morris of Millcreek Township) On May 4, 2012, after being advised by all counsel that the appeals were now moot, the Board dismissed the Trust's appeals.

On June 4, 2012, the Trust filed an application for attorneys' fees and costs under Section 307(b) of the Clean Streams Law. The Trust seeks the following in fees and costs: $907,751.38 in attorneys' fees, $134,392.87 in expert witness fees and $45,196.89 in costs, for a total of $1,087,341.14. The Trust retained two law firms to represent it in this matter. The supporting documentation includes charts showing billing by more than a dozen attorneys and legal staff, including two attorneys billing at rates of up to $630 and $535 an hour. The Department and Millcreek challenged the application for a number of reasons, including the failure to provide evidence supporting the accuracy and reasonableness of the fees requested. The Trust filed a supplemental application on July 20, 2012 containing what it contends is additional documentation in support of its application. The supplemental application includes two affidavits from lead counsel at each of the law firms retained by the Trust stating that the fees billed by their firms were reasonable. Millcreek Township and the Department have filed responses opposing the application on the grounds that the Trust's appeals were not proceedings pursuant to the Clean Streams Law; the Trust was not a prevailing party in the action before the Environmental Hearing Board; and the application, as supplemented, does not contain the necessary information by which to assess the reasonableness of the fees and costs requested.

DISCUSSION

Parties are generally required to bear their own attorneys' fees and costs of litigation and fees are not awarded absent explicit statutory authority. *Buckhannon Board and Care Home v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 602, 121 S. Ct. 1835 (2001). Here, the Trust cites Section 307(b) of the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001, as the basis for its fee petition.

Section 307(b), reads in relevant part as follows:

> The Environmental Hearing Board, upon the request of any party, *may in its discretion* order the payment of costs and attorney's fees it determines to have been *reasonably incurred* by such party in *proceedings pursuant to this act.*

35 P.S. § 691.307(b) (emphasis added).

Before the Board may consider awarding attorneys' fees and costs under Section 307(b) of the Clean Streams Law, two factors must be met: First, the attorneys' fees and costs must have been incurred in a proceeding pursuant to the Clean Streams Law and, second, the fees and costs must have been reasonably incurred. Additionally, even where these two factors are met, the Board may, in its discretion, determine that an award is not appropriate. As both the Pennsylvania Supreme Court and Commonwealth Court have held on numerous occasions, Section 307(b) provides the Board with broad discretion. *Solebury Township v. Department of Environmental Protection,* 928 A.2d 990, 1003 (Pa. 2007); *Chalfont-New Britain Joint Sewage Authority v. Department of Environmental Protection*, 24 A.3d 470, 474, n. 10 (Pa. Cmwlth. 2011); *Kwalwasser v. Department of Environmental Resources,* 569 A.2d 422, 424 (Pa. Cmwlth. 1990). The Board's exercise of that discretion will not be overturned in the absence of fraud, bad faith or a flagrant abuse of discretion. *Chalfont-New Britain*, 24 A.3d at 474, n. 10.

The fact that a party may be eligible to receive an award of fees does not mean that the Board must award them. *Hatfield Township Municipal Authority v. DEP*, 2010 EHB 571, 588, *rev'd on other grounds, Chalfont-New Britain*, 24 A.3d at 470. This is evident by the plain language of Section 307(b) which clearly states that the Board *may* award fees *in its discretion.* Where a statute is unambiguous we may not ignore its plain language, for the plain language of a statute is the best indication of legislative intent. *Colville v. Allegheny County Retirement Board*, 926 A.2d 424, 431 (Pa. 2007).

Clearly, if the Legislature had intended the award of attorneys' fees and costs to be mandatory when certain criteria are met, such as success on the merits or where a party has prevailed, it would have used the word "shall." Instead, it elected to use "may," recognizing that the Board, as the adjudicator, is in the best position to determine when fees are warranted, and where warranted, the amount of the award. Additionally, as the Pennsylvania Supreme Court recognized in *Solebury*, "the plain language of Section 307 does not specify on what basis petitions for counsel fees may be granted or denied, nor does that statute mandate that *any* such standards be created." 928 A.2d at 1003 (emphasis added). The Legislature entrusted to the Board's discretion the determination of whether fees should be awarded in an individual case.[2]

In evaluating the Trust's fee petition, we first examine whether this is a "proceeding pursuant to the Clean Streams." In making such a determination, the Board has looked at a variety of factors, including the following:

- The reason the appeal was filed; the purpose of the litigation.
- Whether the notice of appeal raised objections under the Clean Streams Law.

[2] The Board's interpretation of Section 307(b) is accorded great deference. *See*, *Colville*, 926 A.2d at 430-431 (The Supreme Court accords "great deference to the interpretation [of statutory language] rendered by the administrative agency overseeing the implementation of such legislation") (alteration in original).

- Whether Clean Streams Law objections were pursued throughout the appeal.
- Whether the regulations at the center of the controversy were promulgated pursuant to the Clean Streams Law.
- Whether the case implicates the discharge of pollutants to waters of the Commonwealth.

Wilson v. DEP, 2010 EHB 911, 914-15.

A proceeding pursuant to the Clean Streams Law is one which "plainly encompasses litigation *arising under the Clean Streams Law*." *Solebury Township*, 928 A.2d at 997, n. 8 (emphasis added). *See also, Department of Environmental Protection v. Pine Creek Valley Watershed Association,* Docket Nos. 12 & 13 C.D. 2009 (Pa. Cmwlth. March 25, 2010), *petition for allowance of appeal denied*, 5 A.3d 820 (Pa. 2010), *slip op.* at 10. The Commonwealth Court in *Pine Creek* posited the following question: Was the appellant "forced to spend its time and money to correct or undo something that was done *contrary to the Clean Streams Law or its regulations*?" *Id.* at 11, n. 7 (emphasis in original). In other words, can the appellant show that its "appeal and the litigation, hearings, briefs, depositions, were all necessary to demonstrate that the DEP did not comply with the Clean Streams Law or its regulations?" *Id.* at 11-12, n. 7.

Applying the above factors to this case leads us to the conclusion that this appeal was not a "proceeding pursuant to the Clean Streams Law." This case was brought pursuant to the Dam Safety and Encroachments Act (Dam Safety Act)[3] and the Storm Water Management Act,[4] which the Trust acknowledges do not provide for awards of attorneys' fees. The question involved in this case was very limited: Did the Department of Environmental Protection abuse its discretion in granting an *extension* of Millcreek Township's water obstruction and

[3] Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27.
[4] Act of October 4, 1978, P.L. 864, *as amended*, 32 P.S. §§ 680.1-680.17.

encroachment permit? It is important to remember that this case was not an appeal of the permit, but of the decision to extend the date by which the work authorized by the permit was to be completed.

The authority to extend the permit is contained in Section 105.43 of the Dam Safety Act regulations which reads as follows:

> § 105.43 Time limits.
>
> (a) The Department will set time limits for the commencement and completion of work under a permit issued under this chapter [Chapter 105] that it deems reasonable and appropriate to carry out the purposes of this chapter.
>
> (b) If the work is not completed on or before the dates set by the Department, *unless extended by the Department in writing*, the permit shall become void without further notification being required.

25 Pa. Code § 105.43 (emphasis added).

Additionally, the Trust raised several issues relating to the Storm Water Management Act, many of which were later held to be outside the scope of the appeal. The notices of appeal which initiated this matter – and from which this case arose – made no mention of the Clean Streams Law or issues related to water quality.

One and a half years after initiating this appeal, and less than two months before trial, the Trust amended its notice of appeal to include, among other things, a reference to the Clean Streams Law and an objection that the project will allow the discharge of pollution into waters of the Commonwealth. Although this objection was added to the notice of appeal, it did not play a key role in the trial of this matter. At trial the focus of the Trust's case was on what it perceived to be the Township's inability to comply with Pennsylvania's Storm Water Management Act and the Township's Storm Water Management Ordinance. The testimony of the Trust's expert

witness focused on ways that the Township could improve its management of stormwater, e.g., by requiring certain standards to be met in new housing developments. The bulk of the Trust's post hearing brief also focuses on what it perceived to be violations of the Storm Water Management Act and the Township's Storm Water Management Ordinance. Our Adjudication of the Trust's appeal does not mention the Clean Streams Law in the Discussion of the case because, quite simply, this case did not involve the Clean Streams Law. To quote Judge Labuskes in *Wilson*, "the Clean Streams Law did not play a supporting role in this case, let alone the lead." 2010 EHB at 915. At best, the Clean Streams Law made a cameo appearance in a case that otherwise had nothing to do with water pollution.

A large number of the issues raised by the Trust and litigated at trial were outside the scope of the appeal. As we held in our Adjudication of this matter:

> A number of the Trust's objections are with Millcreek Township's storm water management plan, or what the Trust contends is the Township's failure to develop a current, comprehensive storm water management plan for the Walnut Creek watershed. The Trust points out that Millcreek has not undertaken a comprehensive storm drainage study since the early 1970's, and that at the time of the hearing, Erie County had not updated its storm water management plan for 12 years, despite the requirement in Act 67 that such plans be updated every five years. 68 Pa. C.S.A. § 680.5(a). The Trust argues that if the Township had required developers to employ best management practices in developments constructed to the south of Heidler Road, there would be no need to widen the channel that runs along the Trust property in order to accommodate the additional surface runoff. The Trust further asserts that the channel project is an attempt by Millcreek to divert storm water runoff from the new housing developments to private property owners to the north of Heidler Road.
>
> The Township and the Department argue that these issues are beyond the scope of the Board's jurisdiction. We must agree. There is no question that the amount of storm water in the area has increased following extensive development in the vicinity of Heidler and Sterrettania Roads, particularly the construction of

> new housing developments. However, the Board's jurisdiction is limited to reviewing actions of the Department. 35 P.S. § 7514.

Angela Cres Trust, 2009 EHB at 362-363.

The Trust now argues that the Clean Streams Law was at the core of its appeals. Even applying a very liberal standard to our review of the Trust's case leads us to the conclusion that this is not a proceeding pursuant to the Clean Streams Law. The Trust's reference to the Clean Streams Law in its amended notice of appeal and post hearing brief appear to us to be unrelated to its purpose in bringing this action. As the Trust acknowledges, it cannot seek attorneys' fees under the Storm Water Management Act and the Dam Safety Act, which are clearly the focus of the appeal.

The Trust points out that the Clean Streams Law is one of the authorities cited for the promulgation of regulations under the Dam Safety Act. However, as we held in *Wilson,*

> [T]he truth of the matter is that there are hundreds of regulations that are not closely associated with water pollution but nevertheless rely at least in part on the authority to promulgate regulations granted by the Clean Streams Law. *See, e.g.*, 25 Pa. Code Chapters 77 (noncoal mining), 78 (oil and gas wells), 86 (coal mining), 270a (hazardous waste), 271 (solid waste), and 977 (storage tank indemnification fund).

2010 EHB at 916. It is a long reach to say that an appeal is a proceeding pursuant to the Clean Streams Law simply because it cites a regulation which names the Clean Streams Law as one of a number of promulgating authorities.

The Trust argues that the Clean Streams Law is necessarily implicated in any case involving the Storm Water Management Act. In particular, the Trust argues that stormwater runoff could increase the amount of sediment in the channel. First, we note that the Trust's focus in this case has not been on preserving the quality of a stream. The Trust's case centered on the fact that it did not want stormwater runoff from the new housing developments south of Heidler

Road to enter its property. Second, our Adjudication recognized that this case did not involve a discharge of pollutants to the channel. The only issue concerning sedimentation had to do with the downstream effects of sedimentation, which is a factor that the Department must take into consideration under Section 105.14(b) of the Dam Safety Act regulations. *Angela Cres Trust*, 2009 EHB at 367-69.

Our resolution of this case did not involve any section of the Clean Streams Law. The project that is the subject of the permit extension involved no discharges to a stream. As the Township correctly points out, the project involved the widening and deepening of a watercourse; it did not involve a new discharge to that watercourse.

The purpose of Section 307(b) of the Clean Streams Law is to allow an award of attorneys' fees and costs in cases that are truly brought under the Clean Streams Law. The reasoning behind this provision is the recognition that where citizens bring suit to ensure that the purposes of the Clean Streams Law are met, i.e., to prevent further pollution to the waters of Pennsylvania, it is sometimes cost prohibitive to do so. The Legislature set up a mechanism by which parties who prevail in matters aimed at preventing pollution to waters of the Commonwealth are able to recover the costs and fees of pursuing their action. That is not the case here. This case was all about Millcreek Township's desire to control flooding by widening a channel and the Trust's desire for the Township to update its stormwater management plan. As Judge Labuskes stated in *Wilson*, "To award [the appellant] fees in this case would give credence to the fear expressed by the dissent in *Pine Creek* that reading Section 307 of the Clean Streams Law too broadly could theoretically implicate 'almost every DEP approval.' *Id., slip op.* at 17 (Jubilirer, dissenting). We are convinced that the Legislature did not intend such a broad reach for taxpayer subsidized litigation." 2010 EHB at 916-17.

Even if we could find that this case is a "proceeding pursuant to" the Clean Streams Law, we exercise our discretion in this matter and elect not to award fees. As the Commonwealth Court held in *Pine Creek*, the public policy behind fee shifting provisions, such as Section 307(b) of the Clean Streams Law, is "to justly compensate the party that challenged an unjust or unlawful agency action." *Pine Creek, slip op.* at 5. Here, the action in question was the extension of a permit aimed at eliminating flooding along a heavily used roadway, which the Department granted under Section 105.43 of the Dam Safety regulations. The Trust challenged the action because it did not want additional stormwater running through the channel on its property. As we stated in our Adjudication, we sympathize with all of the parties in this case: the Trust, concerned about additional stormwater on its property, and the Township and Department, who have worked diligently to try to find a solution to the flooding problem on Heidler Road and neighboring properties. The Trust's litigation did not result in a happy ending aimed at keeping Pennsylvania's streams clean and pristine. The result is that flooding along Heidler Road continues to pose a safety threat to travelers and to cause damage to the homes of the Trust's neighbors. We do not see this as the type of challenge that the Legislature had in mind when it authorized the Board to use its discretion to award fees.

In *Solebury*, the Court adopted the public policy position of the dissent in *Buckhannon*, namely, that the purpose of the fee-shifting statute is to "prevent worthy claimants from being silenced or stifled because of a lack of legal resources." *Solebury*, 928 A.2d at 1002 (quoting from Justice Ginsburg's dissenting opinion in *Buckhannon*, 532 U.S. at 634, 121 S. Ct. at 1856). If the purpose of the fee shifting provision of Section 307(b) is to allow citizens to bring suit to prevent pollution to Pennsylvania's waters where it would otherwise be cost prohibitive to do so, that purpose has not been met here. The Trust is a well-funded appellant with easy access to

legal resources, whose challenge was aimed at keeping stormwater off its property. It would be inherently unfair to require the taxpayers of this Commonwealth or the residents of Millcreek Township to bear the cost of the Trust's litigation.

The Pennsylvania Supreme Court has recognized that "the discretion to award attorneys' fees granted to the EHB by Section 307 encompasses its ability to adopt standards by which applications for counsel fees may be decided." *Solebury*, 928 A.2d at 1004. Even if this had been a proceeding pursuant to the Clean Streams Law, which it is not, we exercise the discretion granted to us by the Legislature in Section 307(b) of the Act and find that an award of attorneys' fees and costs would not be appropriate in this matter.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANGELA CRES TRUST OF JUNE 25, 1998	:	
	:	
v.	:	**EHB Docket No. 2006-086-R**
	:	**(Consolidated with 2006-006-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MILLCREEK TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 22nd day of February, 2013, the Application for Attorneys' Fees and Costs filed by the Trust is denied.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chief Judge and Chairman

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

Judge Richard P. Mather, Sr. and Judge Steven C. Beckman are recused in this matter and did not participate in the decision.

DATED: February 22, 2013

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS (RACC)	:	
v.	:	**EHB Docket No. 2012-072-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE AND LIME, LLC, Permittee	:	**Issued: February 25, 2013**

OPINION AND ORDER ON
APPELLANT'S MOTION FOR ENLARGEMENT OF
TIME TO FILE SUPPLEMENTAL DISCOVERY RESPONSES

By Richard P. Mather, Sr., Judge

Synopsis

The Board considers a motion for enlargement of time to file supplemental discovery responses where the moving party requested an opportunity to supplement its discovery responses to identify additional factual evidence and separately expressed an interest in identifying an additional expert witness. The Board finds that the Appellant failed to demonstrate that it has good cause for a further extension of the prehearing discovery process to allow the Appellant to produce an additional expert witness, but finds that the opposing parties will not be too greatly prejudiced by the supplemental identification of limited factual evidence.

OPINION

Over the course of the pre-hearing period in Rural Area Concerned Citizens' ("RACC") appeal of a non-coal surface mining permit issued to Bullskin Stone & Lime by the Department of Environmental Protection (the "Department"), the Board has repeatedly been asked to consider discovery disputes between the parties. The resolution of these disputes, typically

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through discussions between the parties under the Board's supervision, have resulted in a nine-month extended discovery period which had been scheduled to close finally on January 18, 2013. As the originally scheduled period for discovery was approaching its conclusion, the Board responded to a motion to compel, filed by Bullskin, complaining that RACC had not complied with its discovery requests concerning experts. In a September 19, 2012 order the Board required RACC to provide a response to Bullskin's discovery requests concerning experts as follows:

> A full response shall include the identification of all experts that the Appellant intends to rely upon at the hearing and include a copy of every expert's curriculum vitae and a copy of every expert report.

(Order dated September 19, 2012). The Board subsequently extended the deadline for RACC to provide its response until December 3, 2012. (Order dated December 3, 2012).

The Board hosted a conference call between the parties to discuss the status of the appeal at the expiration of the discovery period on January 18, 2013. At that time, counsel for RACC informed the other parties and the Board that it sought permission to supplement its discovery responses to identify an additional expert witness and disclose fact evidence demonstrating that dust from the Bullskin site has been observed leaving Bullskin's operations. The Department and Bullskin indicated to the Board that they did not consent to RACC's late disclosure. Later that day, RACC filed a motion for enlargement of time to file supplemental discovery responses. The Department and Bullskin have filed responses in opposition to RACC's motion, and that motion is now ripe for the Board's consideration.

In its very short motion, RACC explains how it intends to supplement its discovery responses as follows:

***

> 4. Members of the Appellant have obtained a report from Dr. Todd Hurd involving the hydrogeology of the Bullskin Stone & Lime quarry, which they offered to provide to the other parties in a conference call held on January 18, 2013. The other parties insisted that this Motion be filed, and did not agree to Appellant providing a copy of Dr. Hurd's report.
>
> 5. In addition to Dr. Hurd's report, additional information continues to become available from discussion between members of the Appellant, and ultimately their counsel. For example, on January 15, 2013 Carter Booher notified RACC that he owns property adjoining the quarry, has made at least nine (9) complaints to the DEP and has video documentation showing dust leaving the Bullskin Stone & Lime property. During the week of January 7th Mr. Booher experienced water coming out of the ground from numerous holes on his property where water had never flowed in the past.

RACC's Motion for Enlargement of Time to File Supplemental Discovery Responses, ¶¶ 4-5. In support of its motion, RACC indicates that it is simply preparing its case on the "ground activities" being conducted by Bullskin, which RACC presumes the Department is already aware of. If RACC was not permitted present the evidence it describes in its motion, RACC simply contends that it will be "severely prejudiced." *Id* at ¶ 6.

In separate responses, the Department and Bullskin have laid out a number of reasons why they oppose RACC's extension request. For one, they believe that RACC could have produced this information sooner through diligence, and note that RACC has made no effort to demonstrate why these supplemental responses could not have been provided sooner. They also assert that, while RACC has made no effort to explain how it will be prejudiced if its motion is denied, the Department and Bullskin will be prejudiced by the delay in the proceedings if the parties were forced to reopen the discovery process again. Moreover, they ask the Board to deny RACC's request because its effort to identify an additional expert at this late point in the pre-

hearing process violates the Board's order requiring RACC to provide a "full response" to Bullskin's expert discovery requests by December 3, 2012.

The Board has significant discretion to decide how discovery will and will not be conducted. *Damascus Citizens for Sustainability, et al v. DEP*, 2011 EHB 105; *DEP v. Neville Chemical Co.*, 2005 EHB 1, 3. In order to manage our responsibility to regulate discovery and manage the pre-hearing process we must balance the need to move matters to conclusion while providing parties with enough time to prepare their cases. *Damascus, supra*; *Collier v. DEP*, 2010 EHB 867. Balancing these needs does not mean that the Board will accept significant and ongoing delays and extensions until every party is satisfied that they are ready to proceed to a hearing on the merits. By default, "[p]arties have a right to rely on our Orders and the deadlines they impose." *DEP v. Neville Chemical Co.*, 2005 at 4. The Board may, as we have previously done in this matter, extend its deadlines for good cause. However, "[a] litigant who would have us extend the deadline for conducting discovery, especially when the other parties oppose the request, must ordinarily show us either that it has prosecuted the appeal with due diligence or that there are legitimate reasons why it has failed to proceed with due diligence." *McCobin v. DEP,* 2012 EHB 225, 225-26.

While the Board always conducts *de novo* review of Department actions,[1] and it routinely allows parties to rely upon evidence that was not previously evaluated or relied upon by the Department,[2] discovery deadlines establish flexible limits on the amount of new evidence a party can introduce at trial.[3] The limits are particularly important in connection with the request to add

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[1] *Warren Sand & Gravel Co. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975).
[2] *See, e.g., Lyons v. DEP*, 2011 EHB 169, 186-87; *Leatherwood v. DEP*, 819 A.2d 604, 611 (Pa. Cmwlth. *2003).*
[3] The Board can obviously provide relief from the limits, as Appellants requested here, where there is a compelling or persuasive need to extend a discovery deadline.

an additional expert witness after discovery closes because the addition of a new expert may force opposing parties to secure their own experts to counter the newly identified expert testimony.

Regarding RACC's request to add a new expert witness at this late date, we simply do not see a reason why we ought to delay pre-hearing matters any further.[4] RACC has made no attempt to explain how the additional expert evidence it wishes to disclose relates to the objections listed in its notice of appeal. It also makes no effort to explain how it will be prejudiced if the Board denies its request. RACC has not explained why it did not or could not have pursued these issues more diligently during the previous nine months. We are not interested in seeing the discovery process drag on as long as any party might be able to develop new arguments in the future. As the Department points out, discovery is "not a game played between counsel where discovery answers are provided in dribs and drabs only after multiple requests." *Wheeling Pittsburgh Steel Corp. v. DEP*, 2005 EHB 788.

The issues with Carter Booher's factual testimony raise a more difficult question. The evidence proposed is Mr. Booher's testimony and video documentation of site conditions on Mr. Booher's property as they relate to dust leaving the mining site. Despite RACC's minimal effort to tie the proposed evidence to the objections in its notice of appeal, it is apparent that this evidence relates directly to RACC's objections to Bullskin's permit, and this merely supports RACC's previously identified evidence. Although RACC had not previously identified Booher as a witness during the discovery process when depositions were scheduled, we believe that RACC should be permitted to supplement its discovery responses with this information and include Mr. Booher as a possible witness, but only if he is made available for deposition by

[4] Although not necessarily required by 25 Pa. Code § 1021.93, RACC has chosen not to file a memorandum of law. Because it also did not include significant argument in its motion, we feel that it offered the Board very little in support of the relief requested.

opposing counsel. The Board expects that Mr. Booher will be the last last-minute addition to RACC's possible witness list. If RACC intends to present Mr. Booher as a witness in support of its case, RACC must make him available for deposition at a convenient time and location for opposing counsel within 14 days.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS (RACC)	:	
v.	:	**EHB Docket No. 2012-072-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE AND LIME, LLC, Permittee	:	

ORDER

AND NOW, this 25th day of February, 2013, it is hereby ordered that the Appellant's motion for an enlargement of time to file supplemental discovery responses is **granted in part and denied in part** as follows:

1. If the Appellant wishes to present Carter Booher as a witness at the hearing on the merits, the Appellant must make Mr. Booher available for deposition by the Department and the Permittee at a time and location convenient for the Department and Permittee on or before **March 12, 2013**.
2. RACC's motion is, in all other respects, **denied**.

ENVIRONMENTAL HEARING BOARD

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: February 25, 2013

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES-APPALACHIA, LLC, Permittee	:	**Issued: February 26, 2013**

OPINION AND ORDER ON DENYING MOTION TO REOPEN DISCOVERY

By: Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Pennsylvania Environmental Hearing Board denies a Motion to reopen discovery to further depose the Appellant and additional witnesses regarding the replacement of Appellant's water pump on his water well. Appellant's counsel provided detailed information regarding the replacement including making the old water pump available for inspection. Such a reopening of discovery is not legally warranted.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is Permittee Range Resources—Appalachia, LLC (Range Resources) Motion for Leave to Conduct

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Supplemental Depositions (Motion) which was filed on February 18, 2013. Counsel for the Appellant, Loren Kiskadden, filed his Response on February 21, 2013. Discovery in this case, except for some specific exceptions set forth in our Orders of January 24, 2013 and February 25, 2013, ended on January 22, 2013. Some of the specific additional discovery allowed is detailed testing of Mr. Kiskadden's water well and property as set forth in our earlier Orders. Counsel for Range has not yet conducted these tests.

Appellant contends his water supply was contaminated as a result of Range Resources' oil and gas operations. The Pennsylvania Department of Environmental Protection, after an investigation, denied Mr. Kiskadden's claim. (Range Resources Motion, Paragraph 1). On October 7, 2011, Mr. Kiskadden filed this Appeal with the Pennsylvania Environmental Hearing Board. (Motion, Paragraph 3). Mr. Kiskadden was deposed on January 18, 2013 and was questioned extensively, according to Counsel for Range Resources, regarding the physical characteristics and condition of his water well. (Motion, Paragraph 8).

On February 4, 2013, Mr. Kiskadden's Counsel sent an email to Counsel for Range Resources and the Pennsylvania Department of Environmental Protection advising that Mr. Kiskadden's water well pump had stopped working and was removed from Mr. Kiskadden's water well. This work was done by Appellant, his brother, and

another gentleman. Counsel exchanged numerous emails or letters and the water pump that was removed was made available to Counsel for Range and his consultant. Material removed from the old water pump was also collected and made available to the other parties. The sediment in the well has allegedly increased since the installation of the new pump (which is not brand new but was given to the Appellant by his sister). (Motion, Paragraph 15).

Counsel for Range Resources seeks an Order from the Board allowing him to depose Mr. Kiskadden, his brother, and the other gentleman regarding the alteration of the water well, water heater, and their components. Range Resources "seeks an Order from the Board prohibiting further modifications to Mr. Kiskadden's water well prior to the inspection ordered by the Board, absent agreement by the Parties." (Motion, Paragraph 18).

Counsel for Mr. Kiskadden opposes the Motion. She contends that notice was given to opposing Counsel in great detail concerning the changes to the water well and the replacement of the new pump. Access has been provided to the old pump and materials taken from his property. Counsel argues that Mr. Kiskadden is not an expert in the operation of water pumps and he has no knowledge regarding the mechanical configuration of the pumps. Moreover, Range Resources can fully explore these areas when it conducts its testing as outlined and permitted in our Order of January 16, 2013.

Counsel points out that Mr. Kiskadden was required to replace the pump because the old pump was not operational and he had been without water to his trailer for three days. Counsel contends that the depositions of the named individuals are without good cause.

We agree. Counsel for Range Resources and the Department were given prompt notice of the replacement of the water pump. Moreover, they were given access to the old pump, materials taken from Appellant's property, and a detailed explanation of what occurred. In addition, Counsel for Range Resources can conduct detailed testing on Appellant's property in accordance with our earlier Orders. We fail to see how the replacement of a water pump is anything more than, at best, slightly relevant to the Appellant's claim that his water supply was contaminated by the oil and gas operations of Range Resources. That said Range Resources has already been provided with detailed information including physical evidence to satisfy any questions it may have regarding the water pump. Appellant's Counsel is correct that no good cause has been shown to allow the further deposition of Mr. Kiskadden. In addition, there is no good cause to depose Mr. Kiskadden's brother or the gentleman who helped them install the new water pump. Moreover, we do not think an Order requiring our approval before Mr. Kiskadden can do the normal things one does such as the replacement of appliances or maintenance of a water well is warranted.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ORDER

AND NOW, this 26th day of February, 2013, following review of Permittee Range Resources' Motion for Leave to Conduct Supplemental Depositions (Motion) and the Appellant's Response, it is ordered as follows:

1) No good cause has been shown to reopen Discovery to allow for the depositions of the three individuals identified in the Motion.

2) The Motion is **denied.**

ENVIRONMENTAL HEARING BOARD

Thomas W. Renwand

THOMAS W. RENWAND
Chief Judge and Chairman

DATED: February 26, 2013

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN	:	
	:	
v.	:	**EHB Docket No. 2011-149-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES-APPALACHIA, LLC, Permittee	:	**Issued: February 26, 2013**

OPINION AND ORDER ON MOTION TO STRIKE ERRATA SHEETS

By: Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Discovery before the Pennsylvania Environmental Hearing Board is governed by the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure. Rule 4017(c) of the Pennsylvania Rules of Civil Procedure addresses the right of a witness to read, sign and make changes to the deposition transcript, and provides that a witness may make changes to the "form or substance" of the deposition. When a deposition transcript is delivered by United States Mail, "three days shall be added" to the time required in which to make changes. In light of the extensive changes made by the two deponents to their deposition transcripts and in order to assure fairness and prevent unfair surprise at trial, the Board will allow further

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examination of the witnesses.

INTRODUCTION

Presently before the Pennsylvania Environmental Hearing Board is Appellant Loren Kiskadden's (Appellant or Mr. Kiskadden) Amended Motion to Strike Errata Sheets. Mr. Kiskadden filed his Amended Motion to Strike on January 24, 2013. The Pennsylvania Department of Environmental Protection filed its Response on February 6, 2013.

On September 26, 2012, Counsel for Appellant deposed Ms. Taru Upadhyay, the Technical Director for the Pennsylvania Department of Environmental Protection Bureau of Laboratories. (Paragraph 1, Amended Motion to Strike). On October 9, 2012, Ms. Upadhyay was served with a copy of her deposition transcript. (Paragraph 2, Amended Motion to Strike). On November 13, 2012, Ms. Upadhyay signed her deposition transcript with an accompanying errata sheet. (Paragraph 3, Amended Motion to Strike). Ms. Upadhyay made numerous changes in her deposition testimony as reflected on the errata sheet.

On October 12, 18, and 24, 2012, Counsel for Mr. Kiskadden deposed Mr. John Carson, a Water Quality Specialist employed by the Pennsylvania Department of Environmental Protection's Oil and Gas Division. Mr. Carson was later served with a copy of his deposition transcript and on November 29, 2012, he signed his deposition

transcript with an accompanying errata sheet. (Paragraphs 4-6, Amended Motion to Strike).

DISCUSSION

Mr. Kiskadden's Amended Motion to Strike Errata Sheets makes several arguments. First, as to Ms. Upadhyay, Appellant argues that the changes were due on November 8, 2012 and were not signed and served until November 13, 2012. Since Pennsylvania Rule of Civil Procedure requires the deponent to sign her deposition transcript and note any changes within thirty days of its submission to the witness, Appellant argues the Board should strike these late changes. The deposition transcript was served by placing it in the United States Mail on October 9, 2012. Pursuant to the Board Rule found at 25 Pa. Code Section 1021.35, three days are added to the thirty day response period. This took the time to respond into a three day weekend. Therefore, according to the Department, Ms. Upadhyay timely signed her deposition transcript with the accompanying errata sheet on Tuesday, November 13, 2012. (Paragraph 9, Department's Response).

We believe the Department is correct. November 8, 2012 was a Thursday and that is 30 days from the day Ms. Upadhyay was sent a copy of her deposition transcript. However, since it was served through the mail, pursuant to 25 Pa. Code Section 1021.35 three days are added to the period to respond. Since November 11,

2012 was a Sunday and the following day was a State Holiday, Veteran's Day, the last day for Ms. Upadhyay to timely sign her deposition transcript and accompanying errata sheet under both our Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure was November 13, 2012. Since this indeed was the day she signed the transcript and placed it in the United States Mail, we will deny Appellant's Motion to Strike on this ground.

We turn now to Appellant's substantive arguments to strike the errata sheets of the two Department witnesses. Ms. Upadhyay and Mr. Carson made numerous and substantive changes to their deposition transcripts. Counsel contends that the vast majority of these proposed changes are to answers to straight forward questions which materially alter the testimony of the witnesses. (Paragraph 22, Amended Motion to Strike). Counsel makes a strong and compelling argument that such wholesale changes to answers given under oath "render the essential purpose and function of a deposition useless." (Paragraph 23, Amended Motion to Strike). After all, these changes were not made because the court reporter mistakenly transcribed the testimony but rather were made because the witnesses changed their answers.

Counsel for Appellant further argues that the witnesses were given numerous opportunities during their depositions to clarify or change their testimony and they chose not to do so. Appellant argues that to allow them to do so now renders much of

their testimony useless and raises questions of fact where none existed earlier.

Counsel for the Department counters that such changes are permissible under the Pennsylvania Rules of Civil Procedure and Board precedent. Counsel contends that Rule 4017(c) of the Pennsylvania Rules of Civil Procedure allows such changes. Rule 4017(c) reads as follows:

> (c) When the testimony is fully transcribed a copy of the deposition with the original signature page shall be submitted to the witness for inspection and signing and shall be read to or by the witness and shall be signed by the witness, unless the inspection, reading and signing are waived by the witness and by all parties who attended the taking of the deposition, or the witness is ill or cannot be found or refuses to sign. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the person before whom it was taken with a statement of the reasons given by the witness for making the changes. If the deposition is not signed by the witness within thirty days of its submission to the witness, the person before whom the deposition was taken shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

In *Foundation Coal Resources v. Commonwealth of Pennsylvania, Department of Environmental Protection and Penneco Oil Company, Inc.*, 2007 EHB 46, we were confronted with this very issue. In that case two Department employees made numerous changes in their deposition transcripts. Counsel for Foundation Coal cried foul. We indicated that although we "empathize with Foundation Coal Appellants'

contention that to allow a witness to make such wholesale changes has a feeling of unfairness to it... and makes it difficult to ascertain exactly what the true facts are" we concluded that Rule 4017(c) is very clear on its face that witnesses may make changes to the "form or substance" of their deposition testimony. 2007 EHB at 49.

Counsel for Appellant cites various Federal cases interpreting Federal Rule of Civil Procedure 30(e), which mirrors Pennsylvania's Rule, which have disallowed material changes to deposition testimony absent a *substantive* error by the court reporter. In *Greenway v. International Paper Company,* 144 F.R.D. 322, the Court refused to allow a deponent to alter what was stated under oath. "If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination." *Greenway* at 325. *See also Garcia v. Pueblo Country Club,* 299 F. 3d 1233, 1242 n. 5 (10th Cir. 2002)("We do not condone counsel's allowing for material changes to deposition testimony and certainly do not approve of the use of such altered testimony that is controverted by the original testimony."); *S.E.C. v. Parkersburg Wireless, L.L.C.,* 156 F.R.D. 529, 535 (D.D.C. 1994) (Court noted modern trend to not allow a party "to make any substantive change she so desires" in her deposition testimony.); and *Rios v. Bigler,* 847 F.Supp. 1538, 1546-47 (D. Kan. 1994) (Court would only consider changes which clarify the

deposition, and not those which materially alter it).

Counsel for Mr. Kiskadden contends that such wholesale changes to substantive answers renders much of the testimony meaningless, allows attorneys to "word-smith" and testify instead of the deponent, needlessly "muddies the factual waters," and hinders the quest for the truth. Indeed, Counsel for Appellant argues that the sheer volume of changes made by the Department witnesses is troubling and should not be permitted by the Board.

In response, Counsel for the Department cites the plain language of Rule 4017 which clearly says that the deponents may make changes to the form and substance of their deposition transcripts. Moreover, Counsel for the Department explains in great detail why some of the changes made by the witnesses were the results of misunderstandings or reflect changes made to correct errors and inaccuracies in the original testimony. Counsel also relies heavily on our earlier decision in *Foundation Coal Resources v. Commonwealth of Pennsylvania, Department of Environmental Protection and Penneco Oil Company, Inc.,* 2007 EHB 46. Counsel for the Department points out that these various transcripts, prior to the errata sheets being completed, were filed in the Court of Common Pleas of Washington County and were then reported and quoted in such august publications as *The New York Times* (a front page story no less) and *The Pittsburgh Post-Gazette.* Counsel for the Department

points out that it is only fair that such witnesses be allowed to correct errors and clarify answers which do not reflect their complete answers or knowledge of the facts. Rule 4017(c) provides this opportunity.

This is a close call. Appellant's Counsel's position would provide more certainty in the ability to rely on deposition testimony. The Department's position seems to condone gamesmanship and indeed does "muddy the factual waters." Nevertheless, we are not as quick to disregard the clear and unambiguous language of Rule 4017 as the Federal Judges cited above. As much as we would like to put our gloss on the Rule we feel this would not be in accordance with the Rule as written. It is our duty to supervise the discovery process and ensure that it is fair to all parties. *Clean Air Council v. Commonwealth of Pennsylvania, Department of Environmental Protection v. MarkWest Liberty Midstream & Resources, LLC*, 2012 EHB 286, 292-293. Allowing witnesses to change their deposition answers to more accurately reflect the truth is not turning the deposition into a "take home exam" but making sure that the "final answer" is both the truth and accurate.

Depositions can be stressful. Witnesses are all affected differently. A witness can answer truthfully but then later realize that he or she forgot something or that his or her answer was either not entirely accurate or complete. We assume that is why Pennsylvania Rule of Civil Procedure 4017(c) is drafted so broadly. If the Rule was

meant to only apply to allow corrections for typographical errors or mistakes in transcription, it could have been easily drafted that way. It was not. The entire litigation process is a search for the truth. It is not a game where a witness has only one chance to state his or her answer that cannot be changed. Indeed, Pennsylvania Rule of Civil Procedure 4017 specifically allows such changes.

Moreover, the original answers are not magically erased. They are still a matter of record in this case and are fair game for additional questioning and explanation. We have no doubt that if these corrections, clarifications, revisions, and additions were made during the deposition they would surely have engendered follow-up questions from Counsel for Mr. Kiskadden. Therefore, in light of the extensive changes made by the two deponents to their deposition transcripts and in order to assure fairness and prevent unfair surprise at trial, we will allow Counsel for Mr. Kiskadden to further depose Ms. Upadhyay and Mr. Carson in Pittsburgh. Such depositions should be scheduled in the Board's Court Room and each deposition should not exceed three hours per deponent.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ORDER

AND NOW, this 26th day of February, 2013, it is ordered as follows:

1) Appellant's Amended Motion to Strike Errata Sheets is **denied**.

2) The Department shall make Ms. Upadhyay and Mr. Carson available for deposition in Pittsburgh in the Court Room of the Pennsylvania Environmental Hearing Board before **April 30, 2013.** The depositions of each shall not exceed **three hours.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chief Judge and Chairman

DATED: February 26, 2013

c: **For the Commonwealth of PA,**
DEP Litigation:
Glenda Davidson, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF ST. CLAIR	:	
	:	
v.	:	**EHB Docket No. 2012-148-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLYTHE TOWNSHIP, Permittee	:	**Issued: February 28, 2013**

OPINION AND ORDER ON
MOTION TO AMEND APPEAL

By Bernard A. Labuskes, Jr., Judge

Synopsis

An amendment to a notice of appeal is allowed where the party requesting the amendment convinced the Board that no undue prejudice would result to the opposing parties.

OPINION

The Borough of St. Clair ("St. Clair") filed this appeal from the Department of Environmental Protection's (the "Department's") issuance of a solid waste permit for a construction and demolition waste landfill known as the Blythe Recycling and Demolition Site ("BRADS") located in Blythe Township, Schuylkill County. Although we have been operating under the assumption that Blythe Township is the permittee, St. Clair has filed a motion to amend its notice of appeal to add the following objection:

> 50. The permit appealed from herein was issued by DEP to "Blythe Recycling and Demolition Site," which is a name only, and not an entity recognized at law as having any legal status. Such issuance is contrary to law as the permittee is not a "person" as defined by the Pennsylvania Solid Waste Management Act (35 P.S. §6018.103), or the regulations implementing that Act, and such issuance is otherwise unreasonable and contrary to law.

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The Department and Blythe Township oppose the motion, arguing that St. Clair has failed to comply with the Board's rules regarding amendments, St. Clair has offered no excuse for its eleventh-hour amendment, and the Department and the Township will be unduly prejudiced by being tasked to defend a new supplemental objection that lacks merit. Although we tend to agree with the first two points, we will nevertheless allow the amendment because we do not discern that the opposing parties will suffer any undue prejudice by allowing the amendment.

A notice of appeal can be amended as of right within 20 days of its filing. 25 Pa. Code § 1021.53(a). After that, we may grant leave for further amendment "if no undue prejudice will result to the opposing parties." 25 Pa. Code § 1021.53(b). The burden of proving that no undue prejudice will result to the opposing parties is on the party requesting the amendment. *Id.* Our rule, with a heavy emphasis on a determination of prejudice,

> was intentionally selected as a more liberal standard to replace the Board's rigid former rule that made amendment more difficult. *Groce v. DEP*, 2006 EHB 289, 291. So long as a party is seeking to amend its grounds or objections to a timely appealed action and not seeking to extend the Board's jurisdiction, "[r]egardless of when a motion to amend is submitted, whether to allow an amendment after the period for amendments as of right is, of course, within the Board's discretion." *Robachele, Inc. v. DEP*, 2006 EHB 373, 375, 379.

Henry v. DEP, 2012 EHB 324, 325. The *Official Comment* to the Rule reads as follows:

> In addition to establishing a new standard for assessing requests for leave to amend an appeal, this rule clarifies that a nunc pro tunc standard is not the appropriate standard to be applied in determining whether to grant leave for amendment of an appeal, contrary to the apparent holding in *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986).

In assessing whether the parties opposing the amendment will suffer undue prejudice, we consider such factors as (i) the time when amendment is requested relative to other developments in the litigation (including but not limited to the hearing schedule); (ii) the scope and size of the amendment; (iii) whether the opposing party had actual notice of the issue (e.g. whether the issue was raised in other filings); (iv) the reason for the amendment; and (v) the extent to which the amendment diverges from the original appeal. *Rhodes v. DEP*, 2009 EHB 325, 328-29. *See also Upper Gwynedd Twp. v. DEP*, 2007 EHB 39, 42; *Angela Cres Trust v. DEP*, 2007 EHB 595, 601; *PennFuture v. DEP*, 2006 EHB 722, 726; *Robachele v. DEP,* 2006 EHB 373, 379; *Tapler v. DEP*, 2006 EHB 463, 465.

St. Clair's proposed amendment is relatively minimal. It raises what appears to be largely a straightforward legal issue that implicates limited pertinent facts. No additional discovery appears to be needed on the subject, and in fact the Department and the Township did not alternatively ask for the right to conduct such discovery in their opposition to the proposed amendment. Indeed, the record suggests that the parties have already been engaged in discovery and debate regarding not only the entities generally involved in this project, but this particular issue as well. The issue raised in the amendment should come as no great surprise, and it is not far afield of the other 49 objections in the notice of appeal. The hearing on the merits is months away. In short, we do not see that there will be any undue prejudice by allowing this small amendment.

The parties go on to debate the merits of St. Clair's objection. This debate is premature and out of place in the context of the motion to amend the appeal. A motion to amend does not provide an occasion for debating the underlying merits of the objections that are the subject of the proposed amendment. The merits of the new objections are not a factor in considering

whether to allow an amendment. We will address the merits of St. Clair's new objection at the appropriate time.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF ST. CLAIR	:	
	:	
v.	:	**EHB Docket No. 2012-148-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLYTHE TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 28th day of February, 2013, it is hereby ordered that the Appellant's motion to amend its appeal is hereby **granted**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: February 28, 2013

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF ST. CLAIR	:	
	:	
v.	:	**EHB Docket No. 2012-148-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLYTHE TOWNSHIP, Permittee	:	**Issued: March 18, 2013**

OPINION AND ORDER
ON DISCOVERY MOTIONS

By Bernard A. Labuskes, Jr., Judge

Synopsis

Documents related to the financial viability of a newly permitted landfill are subject to disclosure in discovery due largely to the fact that such documents may prove to be relevant in assessing the relative economic harms and benefits of the project as required by 25 Pa. Code § 271.127(c).

O P I N I O N

The Borough of St. Clair ("St. Clair") filed this appeal from the Department of Environmental Protection's (the "Department's") issuance of a solid waste permit for a construction and demolition waste landfill known as the Blythe Recycling and Demolition Site ("BRADS") located in Blythe Township, Schuylkill County. Three discovery motions have been filed that all raise essentially the same issue; namely, the extent to which St. Clair is permitted to obtain during discovery certain financial analyses and projections that have been performed

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regarding the value and future operation of the landfill.[1] Blythe Township has resisted disclosing the material.

We held a conference call on February 27, 2013 to discuss the discovery dispute. During the call St. Clair withdrew its request for further depositions and for an extension of pre-hearing deadlines. It agreed that it would be satisfied if the financial documents were turned over. It also agreed to keep on schedule for the exchange of expert reports, reserving the right to amend any expert reports relating to financial matters if we ruled in its favor on the discovery dispute. We said that we would likely look favorably upon such a request if we ruled in St. Clair's favor on the discovery issue.

The documents at issue are apparently in the possession of FKV, LLC ("FKV"). FKV is a private entity that is working with Blythe Township in connection with the BRADS Landfill. The documents are listed in the subpoena that St. Clair wishes to serve upon FKV as follows:

> All financial statements generated for FKV,LLC, all Operating Agreements for FKV,LLC, all pro forma financial statements prepared BRADS on behalf of FKV,LLC, any appraisals for the BRADS site prepared on behalf of FKV,LLC, any financial analyses prepared on behalf of FKV,LLC, for the BRADS site, any reports relied upon by FKV,LLC or Blythe Township from experts in the field of financing, municipal financing, engineers or consultants concerning the financial viability of this project.

FKV, which is not a party, has not objected to the subpoena. Blythe Township, however, has most strenuously objected to FKV being required to turn over the material.[2] Blythe argues that the information contained in the documents is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. It also argues that the information is confidential

[1] St. Clair filed a motion to compel answers to deposition questions and other discovery and to extend discovery deadlines. Blythe Township, which is participating in this appeal as the permittee, filed a motion for a protective order and objections to a subpoena.

[2] The Department has not taken a position regarding this discovery dispute.

business information (CBI) that is protected from disclosure even if it is relevant. We reject both arguments.

As a general rule, discovery proceedings before the Board are governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Under the Rules of Civil Procedure, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter of the appeal. Pa. R. Civ. P. 4003.1(a). The information may or may not ultimately prove to be admissible at the hearing on the merits, Pa. R. Civ. P. 4003.1(b), but it must be relevant in order to be discoverable. Information is relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of the appeal more probable or less probable than it would be without the evidence. *See*, Pa. R. E. 401. Although these rules require us to assess whether certain information is relevant in order to resolve a discovery dispute such as the one before us, it is usually unwise to make major pronouncements regarding the merits of the case in the context of Opinions resolving discovery disputes. Disputed issues regarding the merits are rarely adequately developed at the discovery stage of the litigation. Therefore, it will generally be enough to require information to the divulged if there is a reasonable *potential* that it will ultimately prove to be relevant. *T. W. Phillips Oil & Gas Co. v. DEP*, 1996 EHB 608, 610.

Just such a situation is presented here. Blythe Township argues that FKV's financial material regarding the BRADS Landfill is not relevant because it goes to the financial viability of the landfill, and the financial viability of the landfill is not relevant because an analysis of financial viability goes beyond the scope of the Department's authority and expertise in performing the harms-benefits analysis mandated by 25 Pa. Code § 271.127(c). St. Clair counters that the financial documents go directly to the economic harms and benefits of the

landfill, and the Department is required by 25 Pa. Code § 271.127(c) to consider those economic harms and benefits in deciding whether to grant a permit for the landfill.[3] This is the sort of issue that goes to the heart of the appeal that we are reluctant to resolve in the context of a discovery dispute. What we are willing to say at this point, however, is that the financial documents certainly have the potential to be relevant in this appeal. Therefore, they are subject to discovery.

In further support of its contention that the documents are not relevant, Blythe adds that the Department did not in fact consider the financial information before deciding to issue the permit for the BRADS Landfill. Blythe cites deposition testimony that suggests that the Department, contrary to its earlier practice, now takes the view that it should not evaluate the business plans or profit-making potential of proposed landfills. (Blythe Township Memorandum of Law, Ex. 5, 6.)

Our review, of course, is *de novo*, and we are not constrained to consider only what the Department considered. *Berks County v. DEP*, 2012 EHB 404, 427. But putting that aside, if it is true that the Department did not consider this type of information, it begs the question how the

---

[3] Section 271.127(c) reads as follows:

> 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 or the project and shall also consist of the environmental benefits of the project, if any.

25 Pa. Code § 271.127(c).

Department was able to knowledgably conclude, as it did, that the landfill will provide long term employment, tax revenue, and most critically here, a

> [b]enefit to the Blythe Township (Profits/Tipping Fee): up to 50% share of the net revenue from the operation of BRADS with a minimum of $1/per ton host fee to be provided to Blythe Township.

(Permit, Part III ¶35(a).) It appears that the Department concluded that the landfill will make a profit or at least potentially make a profit. That the Department would consider the matter would not be a surprise since the Department is required to evaluate the "social and economic benefits that remain after taking into consideration the known and potential social and economic harms of the project." 25 Pa. Code § 271.127(c). The record at this point is, at best, mixed on what the Department did and did not consider.

Blythe goes on to argue that the information should be protected from disclosure in discovery even if it is relevant because it is "a trade secret or other confidential research, development or commercial information" under Pa. R. Civ. P. 4012(a)(9). Rule 4012(a)(9) provides that the Board may issue a protective order shielding such confidential business information from disclosure even if it might otherwise be relevant and, therefore, discoverable. The Comment to the Rule says that the shielding of such CBI from disclosure is an example of the broad principle protecting against discovery causing unreasonable annoyance, embarrassment, oppression, burden or expense. A protective order may be issued to protect against the disclosure of any such information upon "good cause shown." Pa. R. Civ. P. 4012(a). It is important to note that CBI is not privileged. There is no absolute bar to the issuance of a subpoena for such documents. Rather, it is within the Board's discretion to require production,

and if it requires production, to limit the manner and terms of production. *Walker Pontiac v. Dep't of State*, 582 A.2d 410, 413 (Pa. Cmwlth. 1990).[4]

Determining whether to require production of material alleged to be CBI is a two-step process. First, the Board must decide whether the documents are fairly characterized as CBI. Second, if the documents do qualify as CBI, we must decide whether the potential relevancy and necessity of disclosing the documents outweighs the harm caused by disclosure. *Crum v. Bridgestone*, 907 A.2d 578, 585-589 (Pa. Super. 2006). In considering whether documents qualify as CBI, we consider the following nonexclusive factors: the extent to which the information is known outside of the company's business; (2) the extent to which the information is known by employees and others involved in the company's business; (3) the extent of the measures taken by the company to guard the secrecy of the information; (4) the value of the information to the company and its competitors; (5) the amount of effort or money the company spent in developing the information; and (6) the ease of difficulty with which the information could be acquired or duplicated legitimately by others. *Id.*, 907 A. 2d at 585.

We do not believe that Blythe has satisfied its initial burden of showing good cause for issuing an order protecting FKV's financial information from disclosure as CBI. At a fundamental level, any party that applies for a landfill permit in Pennsylvania must understand that information regarding economic harms and benefits is a major factor in the Department's determination of whether the project may go forward. At a minimum, there must be a reduced expectation of privacy regarding economic information due to the harms-benefits analysis mandated by law. *See*, 25 Pa. Code § 271.127(c). *See, generally, Environmental Eagle II, L.P. v. DEP*, 884 A.2d 867 (Pa. 2005) (upholding the harms-benefits test). Furthermore, information

[4] Blythe Township indicated during our conference call that it was not interested in disclosure pursuant to a confidentiality agreement. It opined that such an agreement might not be effective in keeping the information confidential in the future.

provided to third parties or governmental agencies (without a request for CBI protection) does not require protection. *T.W. Phillips Oil & Gas Co. v. DEP*, 1997 EHB 608, 612. The existing record suggests that the Department did in fact consider some of the documents at issue or other documents just like them in concluding that the landfill will potentially turn a profit. (*See* St. Clair Memorandum, Ex. 3 (deposition testimony that financial information was provided to the Department).)

Still further, Blythe Township's allegations of harm are not well supported or specific enough to justify protecting the material from disclosure. As a result of the harms-benefits test, both the Department and this Board have been thrust into the unfamiliar role of analyzing economic harms and benefits. We are not in a position to simply assume that disclosure of financial projections and analyses performed by or on behalf of FKV will interfere with Blythe Township's ability to attract investors and/or customers or otherwise put it at a competitive disadvantage in the waste disposal industry. A party who would have us protect information regarding such economics must be specific in explaining why divulging the information will cause competitive harm. General, unspecified allegations of competitive harm will normally not be sufficient. *See, e.g., Hanson Aggregates, PMS, Inc. v. DEP*, 2002 EHB 953, 955-57. Here, we have a generic verification from the Chairman of the Blythe Township Board of Supervisors and an affidavit from one of the principals of FKV that contains conclusory, unsupported averments of potential harm, neither of which is particularly helpful.

Assuming for purposes of argument that Blythe made a case for qualifying the documents as CBI, we would nevertheless require disclosure. As previously discussed, the viability and profitability of the landfill might prove to be an important issue in the case. It is certainly central to St. Clair's objection to the project. It was apparently the dispositive factor in the

Department's original decision to deny the permit. (St. Clair Memorandum, Ex. 2 (Deposition of William Tomayko).) FKV's own assessment of the project's viability and revenue potential strikes us as potentially highly relevant and, by definition, unavailable from any other source. St. Clair is entitled to discover this information.

Blythe Township has raised a series of other concerns regarding St. Clair's discovery request. These include: the lateness of the request (*see* Pre-Hearing Order No. 1 and other Orders (discovery to be completed by a date certain); the absence of a memorandum of law in support of the motion filed at the time of the motion as required by 25 Pa. Code § 1021.93(d); the unexcused absence of certification that there was a good faith effort to resolves the dispute as required by 25 Pa. Code § 1021.93(b); and the failure to include as exhibits full copies of the discovery requests in dispute, 25 Pa. Code § 1021.93(b). We have denied discovery motions for less, and we take note that St. Clair Borough seems to be developing a pattern of failing to comply with our rules that may harm its litigation position if the pattern continues. (*See* Opinion and Order, February 28, 2013 (failure to comply with rules regarding amendment of appeals.) Nevertheless, the errors have been somewhat mitigated regarding this particular matter as a result of St. Clair's scaling back its original request for additional depositions and 90 more days of discovery, and the fact that Blythe Township teed up the same issue presented in St. Clair's motion to compel in its own motion for a protective order and to quash the subpoena. Therefore, we will not deny St. Clair's motion to compel due to its procedural irregularities.

In conclusion, St. Clair may serve the subpoena at issue upon FKV. FKV's failure to produce the documents may severely limit Blythe Township's ability to rely upon the alleged economic benefits of the project at the hearing on the merits.

For the reasons set forth herein, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF ST. CLAIR	:	
	:	
v.	:	**EHB Docket No. 2012-148-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLYTHE TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 18th day of March, 2013, it is hereby ordered as follows:

1. St. Clair's Motion to Compel Answers to Deposition Questions and Other Discovery and to Extend Discovery Deadlines is granted to the limited extent that the documents listed in the subpoena addressed to FKV must be produced.

2. Blythe Township's Motion for a Protective Order is denied to the same extent.

3. St. Clair may serve the subpoena addressed to FKV, LLC.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: March 18, 2013

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PRIMROSE CREEK WATERSHED ASSOCIATION, CITIZENS FOR PENNSYLVANIA'S FUTURE AND SOLEBURY SCHOOL	:	
v.	:	**EHB Docket No. 2011-135-L (Consolidated with 2011-136-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY, Permittee	:	**Issued: March 20, 2013**

OPINION AND ORDER
ON MOTION TO COMPEL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board will not compel a Department employee who is not going to be called as a witness to render opinions during a deposition that go beyond his previous work on the project. The Board will also not compel the Department to turn over two emails that it claims are covered by the deliberative process privilege.

O P I N I O N

Solebury School and others filed this consolidated appeal from the Department of Environmental Protection's approval of a revision of New Hope Crushed Stone & Lime Company's surface mining permit, which authorized New Hope to go deeper in its quarry in Solebury Township, Bucks County, as well as the Department's reissuance of the NPDES permit for the quarry. This sort of permit revision is known as a "depth correction." Although this appeal was filed in September 2011, the parties are only now finishing up discovery.

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The School has filed a motion to compel which raises two distinct issues. First, the School asks us to compel Peter Evans, P.G., an employee of the Department, to answer certain questions that the Department's counsel objected to at Evans's deposition.[1] Second, the School asks us to order the Department to turn over two emails that the Department has characterized as privileged.

Evans is a Professional Geologist. As part of this duties for the Department, we are advised that he performed a hydrogeological review of a report entitled "Assessment of Primrose Creek and Watershed in Relation to New Hope Crushed Stone Quarry Operations" submitted by a firm named Environmental Planning Consultants to the Department. Evans also visited the site. He then prepared his own report summarizing his observations and conclusions, which he passed up his chain of command. He continued to have some involvement with the site.

The School noticed Evans's deposition. The Department made him available, but informed the School that it would not be calling him as either a fact or expert witness at the hearing on the merits. At the deposition, the School's attorney asked Evans a series of questions regarding his conclusions and opinions. The Department objected to some of the questions and instructed Evans not to answer them. That gave rise to the motion to compel that we now have before us.

The Department's objections are well taken. A regular employee of the Department such as Evans who is not going to be called as a witness by the Department but who collected facts, prepared reports, and rendered opinions can be compelled to testify at a deposition regarding the performance of his job duties, including opinions previously formed. He can be compelled to explain his old opinions, but he may not be compelled to render new opinions. Pa.R.Civ.P.

[1] The School also asks us to compel "similar testimony from other witnesses." Although this request is too vague for us to address directly, perhaps this Opinion regarding Evans's deposition will assist the parties with respect to the other "similar testimony."

4003.1, 4003.5; *Comment*, Pa.R.Civ.P. 4003.5; *Miller v. Brass Rail Tavern*, 664 A.2d 525 (Pa. 1995); *Columbia Gas Transmission Corp. v. Delbert Piper*, 615 A.2d 979 (Pa. Cmwlth. 1992). Although this is a distinction that only an attorney can love, it is nevertheless an important one, because no citizen should be compelled "to give up the product of his brain." *Columbia Gas*, 615 A.2d at 982.

The School's questions crossed into impermissible territory. The Department permitted the School to ask Evans about the observations, recommendations, conclusions, and opinions he included in his report. However, when the School asked Evans to render an opinion about why the cutting down of a stream at issue occurred, the Department objected. The School was seeking an opinion that was not formed during the performance of Evans's job duties or included in his reports. The School was entitled to Evans's explanation of those opinions that he previously reached and documented during the performance of his job duties, but the School was not permitted to present different, additional, or hypothetical facts and then compel Evans to express expert opinions that had not been formed prior to his deposition.

Likewise, the Department permitted the School to question Evans about the section in his report where he concluded that Primrose Creek is losing flow to groundwater. The Department, however, objected when the School introduced a hypothetical situation by asking Evans whether he would have expected to see the surface water in the creek bed if the water table had not dropped.

The Department permitted the School to question Evans about a conclusion he stated in his report, but the Department objected when the School asked Evans if he still held that conclusion today, approximately four years later. To answer that question, Evans would have

had to synthesize additional facts he may have learned during the intervening four years with what he knew at the time and create a new opinion.

Lastly, after testifying that another person had indicated to him that the dike in the quarry would serve to mitigate the cone of depression in the groundwater, Evans was asked if he agreed with that person's opinion. The Department objected. Evans had not addressed this issue in his report. He was being asked to render an opinion that he had not expressed at that time during his involvement in this matter four years ago. Thus, the Department properly objected to the questions that the School has directed our attention to and we will not compel Evans to answer them.

To be clear, the School's motion has raised the narrow issue of when a Department employee with indicia of expertise who the Department has said it will not call as either a fact or expert witness can nevertheless be *compelled* to give a new opinion as opposed to an opinion previously rendered. Where by agreement or Board Order the parties engage in full-blown depositions of each other's expert witnesses, this ruling also has no application.

The second issue raised by the School's motion to compel concerns two emails withheld by the Department under a claim of deliberative process privilege. The Department's privilege log identifies the documents as "deliberative communications between high-level Department management staff." Although the School asks us to require the Department to simply turn over the documents, there is clearly no basis for justifying such an order. The closer question is whether to grant the School's alternative request that the documents be turned over to us for *in camera* review to see if the privilege should be applied.

In camera inspection to assess whether the deliberative process privilege applies does not follow automatically simply because the School has made the request. *See Waste Management*

Disposal Services v. DEP, 2005 EHB 97, 110; *Joseph K. Brunner, Inc. v. DEP*, 2004 EHB 170, 172. To the contrary, we presume that the agency's claim of privilege is justified and made in good faith. It is up to the School to make a preliminary showing that there is reason to believe that the documents may not be privileged, such that its need to see the documents is likely to outweigh the Department's need to shield the documents from disclosure. Factors relevant to this balancing include the potential relevance of the evidence, whether the evidence is available from other sources, and the importance of the material to the discoverant's case. *See Waste Management v. DEP*, 2005 EHB 123, 144 (quoting *City of Colorado Springs v. White*, 967 P.2d 1042, 1054 (Colo. 1998)).

We recognize that the School is at a disadvantage because it has little to go on other than the Department's nebulous statement that the emails in question are "deliberative communications between high-level Department management staff." Nevertheless, we are not willing to order the Department to turn over the documents for *in camera* review. The School has not given us any reason to believe that the two emails may not be privileged, such that the School's need to see the emails outweighs the Department's need to shield them from disclosure.

Initially, the School has not directed us to any other evidence to suggest that these two emails are particularly important. It is important to put the School's request in context. The Department tells us that

> thousands of pages of documents and 1345 electronic documents have already been produced in this matter. To date, five Department witnesses have been deposed over a total of 5½ full days, with one of those witnesses, who has been subject to 1½ days of deposition, scheduled for another full day of deposition. Three more Department witnesses, including the District Mining Manager who signed the depth correction, have yet to be deposed. The Department has responded to two sets of interrogatories and requests for production of documents. The Department is in the process of responding to a request for admissions.

(DEP Memo at 13.) Discovery is a valuable tool, but at some point, enough is enough. It is highly unlikely that there is anything of substance in the emails that is unavailable from the myriad other sources that have been made available. Given this backdrop, we cannot accept the School's claim that the emails are necessary for it to discern the basis upon which the Department chose to issue the permits and whether those decisions are supportable.

The School has not explained how or why the emails might conceivably be important to its case. We cannot imagine that there is any mystery left in this case about why the Department did what it did. But even if such uncertainty were to exist, this Board's role is not to delve into the Department's motives. *Starr v. DEP*, 2002 EHB 799, 810; *Tinicum Township v. DEP*, 1996 EHB 816, 828. Our responsibility is to determine *de novo* whether the Department's final action was a lawful and a reasonable exercise of its discretion that is supported by the facts as we find them to be. *Berks County v. DEP*, 2012 EHB 404, 427. In a case primarily involving regulatory or statutory *interpretation*, the Department's institutional interpretation is a relevant fact because we are required to defer to it in some cases. In such a case, a Department document setting forth the Department's interpretation could be seen as a key fact. *See, e.g., Waste Management, supra* (Board orders Department to turn over briefing memo regarding interpretation of rule regarding airport exclusionary zone.);[2] *Brunner, supra* (Board conducts *in camera* inspection in case involving interpretation of landfill cover rules ultimately ruling that documents need not be disclosed). A case like the School's appeal, however, turns more on the *application* of statutes and regulations to a particular situation, which in turn usually turns on the so-called battle of the experts. The thoughts of high-level Department officials will not normally weigh heavily in a case of this nature, if at all. They cannot tell us, for example, whether deepening of the quarry is

[2] The Commonwealth Court stayed our Order requiring disclosure. *DEP v. Waste Management*, Docket No. 422 CD 2005 (March 11, 2005).

likely to impair the designated uses of Primrose Creek or cause sinkholes, as has been alleged. Only qualified experts can tell us that. There may be some other potential relevance or potential incremental value of the emails of which we are not aware and that we cannot imagine, but the School has not explained what that might be. Therefore, we will not order an *in camera* inspection.

For the reasons set forth above, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PRIMROSE CREEK WATERSHED ASSOCIATION, CITIZENS FOR PENNSYLVANIA'S FUTURE AND SOLEBURY SCHOOL	:	
v.	:	**EHB Docket No. 2011-135-L**
	:	**(Consolidated with 2011-136-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY, Permittee	:	

ORDER

AND NOW, this 20th day of March, 2013, it is hereby ordered that Solebury School's motion to compel deposition testimony of Peter Evans and to compel disclosure of two emails is **denied**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: March 20, 2013

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PRIMROSE CREEK WATERSHED ASSOCIATION, CITIZENS FOR PENNSYLVANIA'S FUTURE AND SOLEBURY SCHOOL	:	
v.	:	**EHB Docket No. 2011-135-L (Consolidated with 2011-136-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY, Permittee	:	**Issued: March 21, 2013**

OPINION AND ORDER ON
MOTION TO COMPEL DEPOSITIONS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion seeking to compel the depositions of two individuals who are to be called as expert witnesses because some of the facts they acquired and opinions they developed were in anticipation of litigation.

OPINION

Solebury School and others filed this consolidated appeal from the Department of Environmental Protection's approval of a revision of New Hope Crushed Stone & Lime Company's surface mining permit, which authorized New Hope to go deeper in its quarry in Solebury Township, Bucks County, as well as the Department's reissuance of the NPDES permit for the quarry. This sort of permit revision is known as a "depth correction." Although this appeal was filed in September 2011, the parties are only now finishing up discovery.

The School has moved us to compel New Hope to produce two of its environmental consultants, Louis Vittorio and William Potter, "for narrow depositions focused on Mr.

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Vittorio's and Mr. Potter's historic and factual knowledge of matters at issue in the instant Appeal." The School argues that it is entitled to take the depositions because Vittorio and Potter played a dual role. Although they have been designated as expert witnesses and the School concedes that their forthcoming expert opinions are governed by Pa.R.Civ.P. 4003.5, the School posits that they also possess extensive factual knowledge that they acquired independent of the litigation. New Hope opposes the motion, arguing that Rule 4003.5 protects the experts from being deposed absent agreement or a Board order because everything that they did in connection with New Hope's permit application was in anticipation of this appeal. Although we are not convinced that all of the experts' work is fairly characterized as work that was done in anticipation of litigation, we nevertheless deny the School's motion without prejudice to its right to request permission to depose the experts pursuant to Pa.R.Civ.P. 4003.5(a)(2).

With only limited exceptions, discovery proceedings before the Board are governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). The Rules of Civil Procedure establish as a general rule that a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter of the case. Pa.R.Civ.P. 4003.1. One limitation on that rule is set forth in Rule 4003.5, which limits the manner in which a party may discover facts known and opinions held by an expert "acquired or developed in anticipation of litigation or for trial." Pa.R.Civ.P. 4003.5(a). *If* Rule 4003.5 applies, a party need not make its expert witness available for a deposition absent agreement or a Board Order. *Id.*

The Pennsylvania Rules of Civil Procedure are quite clear about how discovery of expert testimony is to be conducted for an expert that is employed solely in anticipation of litigation or preparation for trial. If the expert is to be called as a witness, the opposing party must start with interrogatories. Pa.R.Civ.P. 4003.5(a)(1). Such an expert may only be deposed if the parties

agree or the Board orders it. If the expert is not expected to be called as a witness at trial, the opposing party's right to discover the expert's testimony is severely limited. Pa.R.Civ.P. 4003.5(a)(3). In addition, the Explanatory Comment to the rule makes it clear that the limitations of the rule do not apply and discovery is fully available regarding a regular employee of a party who may have collected facts, prepared reports, and rendered opinions as part of his or her job. Such a person may be asked about his or her past work (although he or she may not be compelled to render new opinions). *Solebury Township v. DEP*, EHB Docket No. 2011-122-L (Opinion and Order, March 20, 2013). The case law developed under the rule clarifies that even a nonemployee (such as a coroner) whose opinions were not developed with an eye toward litigation are governed by the general discovery provisions rather than Rule 4003.5. *Miller v. Brass Rail Tavern*, 664 A.2d 525, 531-32 (Pa. 1995); *Katz v. St. Mary Hospital*, 816 A.2d 1125, 1128 (Pa. Super. 2003). Again, however, such a person cannot be compelled to render new opinions. *Columbia Gas Transmission Corp. v. Delbert Piper*, 615 A.2d 979, 984 (Pa. Cmwlth. 1992).

Unfortunately, the rules are not at all clear on how discovery is to be conducted with respect to an individual who serves in multiple capacities such that he does not fall squarely into any of the boxes created pursuant to Rule 4003.5. We have held that a person who served in multiple capacities but was retained from day one with an eye toward testifying as an expert witness is covered under Rule 4003.5. *Dauphin Meadows v. DEP*, 1999 EHB 829, 833. However, where the person is not originally retained or specially employed as an expert witness but is later designated as such the law is not clear. The question comes up where, as here, an adverse party proposes to conduct a "narrow" deposition of the mixed expert that will allegedly focus solely on the person's past work.

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. The expert's past work will almost always form the basis for the opinions given at the hearing. 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. *See Borough of Edinboro v. DEP*, 2003 EHB 725, *aff'd*, 2696 C.D. 2003 (Pa. Cmwlth. June 23, 2004) (Rule 4003.5 applies to any person, including a regular employee, that a party intends to call to give an expert opinion at the hearing on the merits); *Kleissler v. DEP*, 2002 EHB 617 (same). Furthermore, as we said in *Dauphin Meadows*,

> 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 for 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. If those responses are inadequate, or even if they are not, Dauphin Meadows can petition for the right to conduct a deposition, and this Board would be hard-pressed to deny such a request assuming appropriate financial arrangements are made. (The right to conduct reciprocal depositions of each party's experts without paying fees is one common and strongly encouraged financial arrangement that would be appropriate.)

Id., 1999 EHB at 833.

Therefore, while acknowledging that we have allowed partial depositions of mixed-role experts in the past, *Solebury Township v. DEP*, 2007 EHB 244; *New Hanover Corp. v. DER*, 1989 EHB 31, and we will doubtless continue to do so in the future when circumstances warrant, we think such depositions should be the exception rather than the rule. *Groce v. DEP*, 2005 EHB 951, 955. We will enforce Rule 4003.5's procedures, requirements, and potential sanctions for any person who is to be called as a witness that will be asked to render an expert opinion at the hearing. *Edinboro, supra.*[1] This includes the need to seek the Board's permission to depose such a person absent agreement of the parties. The School has not given us any reason to depart from this general rule in this case. Vittorio's and Potter's work in connection with the permit application will undoubtedly be the very same work that supports their expert opinions at the hearing on the merits.

Accordingly, we issue the Order that follows.

[1] A party who asserts that its witness is covered by Rule 4003.5 must live with all aspects of that rule. For example, the witness will not be permitted to testify beyond the four corners of the interrogatory responses and/or expert report. Pa.R.Civ.P. 4003.5(c). Arguably, a party is less likely to suffer the effects of exclusionary ruling based on surprise if it made its witness available for deposition. *See, e.g., Edinboro, supra.* This Opinion should not be read as in any way encouraging parties to resist depositions of their experts. To the contrary, it comes with a warning.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PRIMROSE CREEK WATERSHED ASSOCIATION, CITIZENS FOR PENNSYLVANIA'S FUTURE AND SOLEBURY SCHOOL	:	
v.	:	**EHB Docket No. 2011-135-L**
	:	**(Consolidated with 2011-136-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY, Permittee	:	

ORDER

AND NOW, this 21st day of March, 2013, it is hereby ordered that Solebury School's motion to compel the depositions of Louis Vittorio and William Potter is denied without prejudice to its right to petition the Board to conduct the depositions pursuant to Pa.R.Civ.P. 4003.5(a)(2).

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: March 21, 2013

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BUCKS COUNTY WATER & SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2012-138-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
BUCKS COUNTY WATER & SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2012-152-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
NORTHAMPTON BUCKS COUNTY MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2012-155-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BUCKS COUNTY WATER AND SEWER AUTHORITY, Permittee	:	**Issued: March 27, 2013**

OPINION AND ORDER
ON MOTION TO CONSOLIDATE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board consolidates three appeals from the same Departmental actions.

2nd Floor - Rachel Carson State Office Building | 400 Market Street, P.O. Box 8457 | Harrisburg, PA 17105-8457 | 717.787.3483 | Fax 717.783.4738 | http://ehb.courtapps.com

OPINION

The Department of Environmental Protection issued a letter to the Bucks County Water and Sewer Authority ("BCWSA") on June 26, 2012 finding that there is an existing hydraulic overload at the Totem Road Pump Station, which is part of the Neshaminy Interceptor Service Area of BCWSA's sewer system. The letter imposed numerous restrictions and requirements on BCWSA. However, in a second letter to BCWSA dated July 25, 2013, the Department lifted the determination in the June 26 letter that the Totem Road Station was in *existing* hydraulic overload. Instead, it said that there was a *projected* overload. It told BCWSA that it was not required to comply with several of the requirements in the June 26 letter, but it was required to submit a corrective action plan explaining how it would prevent an overload and a connection management plan enabling BCWSA to limit new connections. BCWSA's appeal from the June 26 letter is pending at Docket No. 2012-138-L. BCWSA's appeal from the July 25 letter is pending at 2012-152-L.

The Northampton Bucks County Municipal Authority ("NBCMA") operates a public sewer system in Northampton Township. NBCMA has no treatment facilities of its own. NBCMA has an agreement with BCWSA that provides for the conveyance of wastewater through the BCWSA system to the City of Philadelphia's Northeast Water Pollution Control Plant. Claiming that it is essentially at the mercy of BCWSA and that the Department's letters, therefore, have a direct and immediate impact on it, NBCMA filed the appeal docketed at 2012-155-L from the Department's July 25 letter. BCWSA was automatically added as a party in NBCMA's appeal as the recipient of the Department action under appeal.[1]

[1] Horizon Lot 2 Associates, LLC t/a Intrepid Horizon Lot 2 Owner, L.P. also filed an appeal from the Department's June 26 and July 25 letters to BCWSA, which is docketed at Docket No. 2012-146-L. Although that appeal is not the subject of NBCMA's motion to consolidate or this Opinion, it will be

NBCMA has filed a motion to consolidate its appeal with the two BCWSA appeals. The Department informed us that it agrees to consolidation. BCWSA opposes consolidation. It argues that the issues raised by NBCMA are drastically different than the issues raised in its appeals, and it will be severely prejudiced if it is required to respond to the issues raised by NBCMA without the ability to conduct discovery.

BCWSA's concern regarding discovery is well taken. NBCMA has not offered a good explanation for why it waited until so late in the process to move for consolidation. However, BCWSA's concern can be redressed by re-opening the discovery period in the consolidated appeal to allow BCWSA (and BCWSA only) as much time as it reasonably needs to conduct discovery vis-à-vis NBCMA.

Beyond that, we see no good reason for not consolidating these appeals. Indeed, we are having difficulty imagining any case where it would not be appropriate to consolidate multiple appeals from the same Department action. Our rules provide that we may order proceedings involving common questions of law or fact to be consolidated. 25 Pa. Code § 1021.82. Consolidation promotes judicial efficiency, reduces the inconvenience of witnesses who might otherwise need to testify multiple times, eliminates both the possibility of inconsistent outcomes and future claims by the parties of issue preclusion, and promotes global settlements. *Borough of Danville v. DEP*, 2008 EHB 377, 378-79; *White Township v. DEP*, 2005 EHB 722, 723; *Columbia Gas of Pennsylvania v. DEP*, 1996 EHB 22, 23.

We do not agree with BCWSA's characterization that the issues raised in the appeals are "drastically different." It seems to us that these appeals all raise the fundamental issue of whether there is a projected overload and, if so, what should be done about it. Common

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consolidated with the other appeals from the Department's letters by the Board *sua sponte* in a separate order.

questions of law and fact will predominate. Proceeding with these appeals separately makes no sense to us.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BUCKS COUNTY WATER & SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2012-138-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
BUCKS COUNTY WATER & SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2012-152-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
NORTHAMPTON BUCKS COUNTY MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2012-155-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BUCKS COUNTY WATER AND SEWER AUTHORITY, Permittee	:	

ORDER

AND NOW, this 27th day of March, 2013, it is hereby ordered as follows:

1. NBCMA's motion to consolidate is granted. The new caption is:

BUCKS COUNTY WATER & SEWER AUTHORITY and NORTHAMPTON BUCKS COUNTY MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2012-138-L (Consolidated with 2012-152-L and 2012-155-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NORTHAMPTON BUCKS COUNTY WATER AND SEWER AUTHORITY, Permittee	:	

2. BCWSA shall on or before **April 15, 2013** submit a proposed new case management order, with the concurrence of the other parties if possible, allowing for an additional period for BCWSA to conduct discovery regarding the objections set forth in NBCMA's notice of appeal.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: March 27, 2013

c: **DEP, Bureau of Litigation:**
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9th Floor, RCSOB

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BUCKS COUNTY WATER & SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2012-138-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
BUCKS COUNTY WATER & SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2012-152-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
NORTHAMPTON BUCKS COUNTY MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2012-155-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BUCKS COUNTY WATER AND SEWER AUTHORITY, Permittee	:	**Issued: March 27, 2013**

OPINION AND ORDER
ON MOTION TO CONSOLIDATE

By Bernard A. Labuskes, Jr., Judge

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[1] Horizon Lot 2 Associates, LLC t/a Intrepid Horizon Lot 2 Owner, L.P. also filed an appeal from the Department's June 26 and July 25 letters to BCWSA, which is docketed at Docket No. 2012-146-L. Although that appeal is not the subject of NBCMA's motion to consolidate or this Opinion, it will be

NBCMA has filed a motion to consolidate its appeal with the two BCWSA appeals. The Department informed us that it agrees to consolidation. BCWSA opposes consolidation. It argues that the issues raised by NBCMA are drastically different than the issues raised in its appeals, and it will be severely prejudiced if it is required to respond to the issues raised by NBCMA without the ability to conduct discovery.

BCWSA's concern regarding discovery is well taken. NBCMA has not offered a good explanation for why it waited until so late in the process to move for consolidation. However, BCWSA's concern can be redressed by re-opening the discovery period in the consolidated appeal to allow BCWSA (and BCWSA only) as much time as it reasonably needs to conduct discovery vis-à-vis NBCMA.

Beyond that, we see no good reason for not consolidating these appeals. Indeed, we are having difficulty imagining any case where it would not be appropriate to consolidate multiple appeals from the same Department action. Our rules provide that we may order proceedings involving common questions of law or fact to be consolidated. 25 Pa. Code § 1021.82. Consolidation promotes judicial efficiency, reduces the inconvenience of witnesses who might otherwise need to testify multiple times, eliminates both the possibility of inconsistent outcomes and future claims by the parties of issue preclusion, and promotes global settlements. *Borough of Danville v. DEP*, 2008 EHB 377, 378-79; *White Township v. DEP*, 2005 EHB 722, 723; *Columbia Gas of Pennsylvania v. DEP*, 1996 EHB 22, 23.

We do not agree with BCWSA's characterization that the issues raised in the appeals are "drastically different." It seems to us that these appeals all raise the fundamental issue of whether there is a projected overload and, if so, what should be done about it. Common

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consolidated with the other appeals from the Department's letters by the Board *sua sponte* in a separate order.

questions of law and fact will predominate. Proceeding with these appeals separately makes no sense to us.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BUCKS COUNTY WATER & SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2012-138-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
BUCKS COUNTY WATER & SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2012-152-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
NORTHAMPTON BUCKS COUNTY MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2012-155-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BUCKS COUNTY WATER AND SEWER AUTHORITY, Permittee	:	

ORDER

AND NOW, this 27th day of March, 2013, it is hereby ordered as follows:

1. NBCMA's motion to consolidate is granted. The new caption is:

BUCKS COUNTY WATER & SEWER AUTHORITY and NORTHAMPTON BUCKS COUNTY MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2012-138-L (Consolidated with 2012-152-L and 2012-155-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NORTHAMPTON BUCKS COUNTY WATER AND SEWER AUTHORITY, Permittee	:	

2. BCWSA shall on or before **April 15, 2013** submit a proposed new case management order, with the concurrence of the other parties if possible, allowing for an additional period for BCWSA to conduct discovery regarding the objections set forth in NBCMA's notice of appeal.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: March 27, 2013

c: **DEP, Bureau of Litigation:**
Attention: Glenda Davidson
9th Floor, RCSOB

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BUCKS COUNTY WATER & SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2012-138-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
BUCKS COUNTY WATER & SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2012-152-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
NORTHAMPTON BUCKS COUNTY MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2012-155-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BUCKS COUNTY WATER AND SEWER AUTHORITY, Permittee	:	**Issued: March 27, 2013**

OPINION AND ORDER
ON MOTION TO CONSOLIDATE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board consolidates three appeals from the same Departmental actions.

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OPINION

The Department of Environmental Protection issued a letter to the Bucks County Water and Sewer Authority ("BCWSA") on June 26, 2012 finding that there is an existing hydraulic overload at the Totem Road Pump Station, which is part of the Neshaminy Interceptor Service Area of BCWSA's sewer system. The letter imposed numerous restrictions and requirements on BCWSA. However, in a second letter to BCWSA dated July 25, 2013, the Department lifted the determination in the June 26 letter that the Totem Road Station was in *existing* hydraulic overload. Instead, it said that there was a *projected* overload. It told BCWSA that it was not required to comply with several of the requirements in the June 26 letter, but it was required to submit a corrective action plan explaining how it would prevent an overload and a connection management plan enabling BCWSA to limit new connections. BCWSA's appeal from the June 26 letter is pending at Docket No. 2012-138-L. BCWSA's appeal from the July 25 letter is pending at 2012-152-L.

The Northampton Bucks County Municipal Authority ("NBCMA") operates a public sewer system in Northampton Township. NBCMA has no treatment facilities of its own. NBCMA has an agreement with BCWSA that provides for the conveyance of wastewater through the BCWSA system to the City of Philadelphia's Northeast Water Pollution Control Plant. Claiming that it is essentially at the mercy of BCWSA and that the Department's letters, therefore, have a direct and immediate impact on it, NBCMA filed the appeal docketed at 2012-155-L from the Department's July 25 letter. BCWSA was automatically added as a party in NBCMA's appeal as the recipient of the Department action under appeal.[1]

[1] Horizon Lot 2 Associates, LLC t/a Intrepid Horizon Lot 2 Owner, L.P. also filed an appeal from the Department's June 26 and July 25 letters to BCWSA, which is docketed at Docket No. 2012-146-L. Although that appeal is not the subject of NBCMA's motion to consolidate or this Opinion, it will be

NBCMA has filed a motion to consolidate its appeal with the two BCWSA appeals. The Department informed us that it agrees to consolidation. BCWSA opposes consolidation. It argues that the issues raised by NBCMA are drastically different than the issues raised in its appeals, and it will be severely prejudiced if it is required to respond to the issues raised by NBCMA without the ability to conduct discovery.

BCWSA's concern regarding discovery is well taken. NBCMA has not offered a good explanation for why it waited until so late in the process to move for consolidation. However, BCWSA's concern can be redressed by re-opening the discovery period in the consolidated appeal to allow BCWSA (and BCWSA only) as much time as it reasonably needs to conduct discovery vis-à-vis NBCMA.

Beyond that, we see no good reason for not consolidating these appeals. Indeed, we are having difficulty imagining any case where it would not be appropriate to consolidate multiple appeals from the same Department action. Our rules provide that we may order proceedings involving common questions of law or fact to be consolidated. 25 Pa. Code § 1021.82. Consolidation promotes judicial efficiency, reduces the inconvenience of witnesses who might otherwise need to testify multiple times, eliminates both the possibility of inconsistent outcomes and future claims by the parties of issue preclusion, and promotes global settlements. *Borough of Danville v. DEP*, 2008 EHB 377, 378-79; *White Township v. DEP*, 2005 EHB 722, 723; *Columbia Gas of Pennsylvania v. DEP*, 1996 EHB 22, 23.

We do not agree with BCWSA's characterization that the issues raised in the appeals are "drastically different." It seems to us that these appeals all raise the fundamental issue of whether there is a projected overload and, if so, what should be done about it. Common

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consolidated with the other appeals from the Department's letters by the Board *sua sponte* in a separate order.

questions of law and fact will predominate. Proceeding with these appeals separately makes no sense to us.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BUCKS COUNTY WATER & SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2012-138-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
BUCKS COUNTY WATER & SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2012-152-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
NORTHAMPTON BUCKS COUNTY MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2012-155-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BUCKS COUNTY WATER AND SEWER AUTHORITY, Permittee	:	

ORDER

AND NOW, this 27th day of March, 2013, it is hereby ordered as follows:

1. NBCMA's motion to consolidate is granted. The new caption is:

BUCKS COUNTY WATER & SEWER AUTHORITY and NORTHAMPTON BUCKS COUNTY MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2012-138-L (Consolidated with 2012-152-L and 2012-155-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NORTHAMPTON BUCKS COUNTY WATER AND SEWER AUTHORITY, Permittee	:	

2. BCWSA shall on or before **April 15, 2013** submit a proposed new case management order, with the concurrence of the other parties if possible, allowing for an additional period for BCWSA to conduct discovery regarding the objections set forth in NBCMA's notice of appeal.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: March 27, 2013

c: **DEP, Bureau of Litigation:**
Attention: Glenda Davidson
9th Floor, RCSOB

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Langhorne, PA 19047

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DEAN W. DIRIAN	:	
	:	
v.	:	**EHB Docket No. 2011-155-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 5, 2013**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal of an order issued by the Department to an owner of a residential park and supplier of water for human consumption who has been operating a community water system without a permit or treatment in violation of the Safe Drinking Water Act. The Department's regulations defining a community water system allow a system that consists of a group of facilities, even where they are not interconnected, in the same geographic location to be grouped as one single system where the entire system is part of the same enterprise.

FINDINGS OF FACT

1. The Department of Environmental Protection ("Department") is the executive agency with the duty and authority to administer and enforce the Pennsylvania Safe Drinking Water Act, 35 P.S. § 721.1 et seq. ("SDWA"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder. (Parties' Joint Stipulations, filed by the parties on November 8, 2012 ("Stip.") 1.)

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2. Appellant Dean Dirian, along with his wife, Candi Dirian, is the owner of the property commonly referred to as Spring Lake Park, located on both the east and west sides of Fox Road, in Elizabeth Township, Lancaster County, which is the subject of this appeal. (Stip. 2; Department Exhibit ("D. Ex.") G, N, O).

3. Dirian leases the Spring Lake Park property to residents of the park, several of whom own permanent, semi-permanent and mobile residential structures, without recorded interests in land. (Notes of Transcript page ("T.") 218; D. Ex. G, N, O). These structures have been assigned to "lots" in Spring Lake Park for purposes of identification by the parties.

4. At least 21 of these residential structures contain an active or inactive service connection to at least one of several facilities that provide water for human consumption in the park. (Stip. 6a, 7a; T. 53-59, 225-240).

Pool Circle

5. Dirian has owned the west side of Spring Lake Park, referred to as Pool Circle, since at least 2003. The Pool Circle area contains at least 7 cottages as well as the home owned by Dirian. (Stip. 6a, 7a; T. 22, 24, 53-55, 225-228; D. Ex. G, N, O).

6. Dirian's home, identified as Lot 0, contains four year-round residents. Lot 0 receives water service from a basement cistern and from a spring located in the park. (T. 55, 88-89, 228-229).

7. Two year-round residents who live on Lot 1 receive water service from a well located near Lot 9, which serves all of the cottages on the Pool Circle side of Spring Lake Park. (Stip. 6a, 7a; T. 53, 89, 225; D. Ex. K).

8. Lot 2 serves three year-round residents who receive water from the well located near lot 9 which serves all of the Pool Circle residents. (Stip. 6a, 7a; T. 53-54; 89, 225; D. Ex. K).

9. Lot 3 serves one part-time resident[1] who receives water from the well located near lot 9 which serves all of the Pool Circle residents. (Stip. 6a, 7a; T. 54, 89, 226; D. Ex. K).

10. Lot 4 serves two year-round residents who receive water from the well located near lot 9 which serves all of the Pool Circle residents. (Stip. 6a, 7a; T. 54, 89, 226; D. Ex. K).

11. Lot 6 serves one year-round resident who receives water from the well located near lot 9 which serves all of the Pool Circle residents. (Stip. 6a, 7a; T. 54, 89, 227; D. Ex. K).

12. Lot 8 serves one year-round resident who receives water from the well located near lot 9 which serves all of the Pool Circle Residents. (Stip. 6a, 7a; T. 54-55, 89, 228; D. Ex. K).

13. Lot 9 serves one year-round resident who receives water from the well located near lot 9 which serves all of the Pool Circle residents. (Stip. 6a, 7a; T. 55, 89, 228; D. Ex. K).

Lake Drive

14. Dirian has owned the east side of Spring Lake Park, referred to as the Lake Drive portion of the park, since April, 2011. (D. Ex. G).

15. Lot 12 is not occupied by any year-round residents, but does receive water service to the lot through the Lot 12, 15 and 16 spring. (Stip. 6b; T. 56, T. 90, 231; D. Ex. K).

16. Lot 13 serves two year-round residents through a basement cistern that is recharged by a spring on the Spring Lake Park property. (T. 56, 231-32; D. Ex. K).

[1] We will use part-time resident to describe residents who have year-round access to a Spring Lake Park residence, but appears to utilize it fewer than 60 days per year.

17. Lot 15 serves three year-round residents who receive water service from a spring that is shared by lots 12, 15 and 16. (Stip. 6b, 7b; T. 57, 90, 234; D. Ex. K).

18. Lot 16 serves two year-round residents who receive water service from a spring that is shared by lots 12, 15 and 16. (Stip. 6b, 7b; T. 57, 90, 234; D. Ex. K).

19. Lot 18 is unoccupied, but does receive water service through the well located near the residence on Lot 30 that serves Lots 18, 19 and 30. (T. 57-58, 96; D. Ex. K).

20. Lot 19 is occupied by a part-time resident, but does receive water service through the well located near the residence on Lot 30 that serves Lots 18, 19 and 30. (T. 58, 96; D. Ex. K).

21. Lot 22 serves two year-round residents who receive water service from a well located near the Lot 22 residence and is shared by Lots 22, 23, 24, 25, 26, 27 and 31. (T. 48-51, 59, 94, 237-38; D. Ex. K).

22. Lot 23 serves one year-round resident who receives water service from a well located near the Lot 22 residence and is shared by Lots 22, 23, 24, 25, 26, 27 and 31. (T. 48-51, 59, 94, 238; D. Ex. K).

23. Lot 24 serves one year-round resident who receives water service from a well located near the Lot 22 residence and is shared by Lots 22, 23, 24, 25, 26, 27 and 31. (T. 48-51, 59, 94, 238; D. Ex. K).

24. Lot 25 serves one year-round resident who receives water service from a well located near the Lot 22 residence and is shared by Lots 22, 23, 24, 25, 26, 27 and 31. (T. 48-51, 59, 94, 238; D. Ex. K).

25. Lot 26 serves one year-round resident who receives water service from a well located near the Lot 22 residence and is shared by Lots 22, 23, 24, 25, 26, 27 and 31. (T. 48-51, 59, 94, 238; D. Ex. K).

26. Lot 27 serves two year-round residents who receive water service from a well located near the Lot 22 residence and is shared by Lots 22, 23, 24, 25, 26, 27 and 31. (T. 31, 48-51, 59, 94, 239; D. Ex. K).

27. Lot 30 serves one year-round resident who receives water service from the well located near the residence on Lot 30 that serves Lots 18, 19 and 30. (T. 60, 96, 235-36; D. Ex. K).

28. Lot 31 serves one part-time resident, but the lot receives water service from a well located near the Lot 22 residence and is shared by Lots 22, 23, 24, 25, 26, 27 and 31. (T. 31, 48-51, 60, 94, 240; D. Ex. K).

Order

29. In response to a resident's complaint that the water at Spring Lake Park had made the resident's child sick, the Department conducted an inspection of Spring Lake Park on September 19, 2011. (T. 69-71; D. Ex. A, B).

30. A Department employee, Lynne Scheetz, observed that there 15 or more homes at Spring Lake Park, and she correctly and credibly determined that there were 15 or more service connections at Spring Lake Park. (T. 82).

31. Scheetz collected a water sample from an indoor faucet at the Dirian home, Lot 0, and a second water sample from an outdoor faucet from the Lake Drive side of Spring Lake Park. (T. 80-82; D. Ex. B, C).

32. The Department conducted laboratory analyses of the water samples taken during the September 19, 2011 inspection. The laboratory analyses concluded that both samples were contaminated with total coliform and E. coli bacteria. (T. 84-86, 91, 97; D. Ex. B, C, E).

33. The Department conducted an additional inspection on September 27, 2011. As of the date of this inspection, Dirian was not conducting any treatment or disinfection of any of the drinking water sources used for human consumption at Spring Lake Park. (T. 40, 88-98, 139-140, 192; D. Ex. B, C, E, H; Dirian post-hearing brief ¶ 25).

34. During the Department's September 27, 2011 inspection, the Department issued Dirian the field order that is the subject of this appeal. The order finds three violations:

1. Lab results indicate that two samples collected on September 19, 2011 from the distribution system at Spring Lake Park were positive for total coliform and E. coli bacteria. This is an Acute MCL violation.

2. Failure to provide continuous disinfection for community groundwater sources.

3. Two distribution samples of untreated water that were taken September 19, 2011 were positive for E. coli. Treatment equivalent to 4-log inactivation of viruses is not provided for the sources of water at Spring Lake Park prior to the first customer.

(D. Ex. E).

35. The Department ordered Dirian to take the following abatement or corrective actions:

1. As soon as possible, but no later than 24 hours after receipt of this order, supplier shall issue a Tier 1 PN in accordance with the provisions of 25 Pa. Code Section 109.408.

2. Within 10 days of receipt of this order, supplier shall obtain a Certified Water Operator to operate the system.

3. Within 10 days of receipt of this order, supplier shall obtain a Professional Engineer to begin the permitting process for this community water system.

4. Within 30 days of receipt of this order, supplier shall consult with the Department regarding the appropriate corrective action for addressing the source water E. coli contamination.

5. Supplier shall maintain the Tier 1 PN until receiving permission from DEP to remove it.

(D. Ex. E).

36. The Department conducted additional follow-up inspections of Spring Lake Park on August 10, 2012 and October 1, 2012. During the October 1, 2012 inspection the Department collected six water samples from most of the water sources at Spring Lake Park. The laboratory evaluation of each sample indicated that there was total coliform contamination of each sample and the samples collected from the water source located near lot 0 contained E. coli contamination. (T. 113-15; D. Ex. C).

37. Dirian submitted his own water sample testing to the Department. Eight of the eleven reported samples contained total coliform bacteria contamination, and three contained E. coli bacteria, which confirmed the Department's finding that the water from the water system contained E. coli bacteria. (T. 213; D. Ex. C).

38. Dirian operates one community water system made up of a group of facilities at Spring Lake Park. (T. 30-34, 48-50, 53-61, 88, 95-96, 188; D. Ex. H.)

39. The Department's September 27, 2011 field order was reasonable.

DISCUSSION

Dirian filed this appeal of a field order issued by the Department following several inspections of Spring Lake Park where the Department determined that Dirian was operating a water system without any permits issued by the Department under the Safe Drinking Water Act, 35 P.S. § 721.1 *et seq.* ("SDWA"), or providing any treatment of water sources used for human consumption at the park. The Department found in its inspections on September 19 and 27, 2011

that Spring Lake Park met the definition of a community water system under the SDWA and its regulations, which triggered a number of regulatory obligations. Initial water quality testing of several water sources at the park demonstrated exceedances of the maximum contamination levels allowed under the SDWA, which posed a risk to human health.

In an appeal from an order, the Department bears the burden of proving that its order was lawful, reasonable, and supported by the facts. *Barron v. DEP*, EHB Docket No. 2011-142-L (Adjudication, January 29, 2013); *Perano v. DEP*, 2011 EHB 453, 515; *Wilson v. DEP*, 2010 EHB 827, 833. Its burden, however, is limited to issues properly raised and thereafter preserved in the notice of appeal and amendments thereto, the prehearing memorandum, and the post-hearing brief. *Lower Salford Township Authority v. DEP*, Docket No. 1034 C.D. 2012 (Pa. Cmwlth. March 28, 2013); *Sunoco v. DEP*, 865 A.2d 960, 974 (Pa. Cmwlth. 2005); *Berks County v. DEP*, 2012 EHB 23; *GSP Management Co. v. DEP*, 2011 EHB 203, 207; *Thebes v. DEP*, 2010 EHB 370, 371.

Dirian's notice of appeal listed a series of objections to the Department's field order that fall within the following categories:

1. The Department has not interacted with Dirian in a fair, unbiased or appropriate manner. It entered his property without permission or cause for inspection. It made determinations of fact based on its assumptions and prejudices and without due diligence.
2. The Department based its order on water samples collected from non-representative sources which do not model the water sources in the park actually provided by Dirian for human consumption and were collected using procedures that failed to meet the Department's quality standards.

3. The facilities at Spring Lake Park do not constitute a public water system, and therefore Dirian cannot be regulated under the SDWA, because of lack of interconnection, disparate ownership and control, and lack of adjacency.
4. Dirian cannot afford to comply with the compliance measures contained in the order.

Three of Dirian's objections require little discussion. First, although clearly an acrimonious relationship developed between the parties, our review of the record does not support a finding of unfair treatment, bias, or selective prosecution. In any event, our role is not to police the Department's behavior. Rather, we conduct a *de novo* hearing and consider whether the Department's action can be supported by the evidence presented to the Board. *Lyons v. DEP*, 2011 EHB 169, 186-87 (citing *Leatherwood v. DEP*, 819 A.2d 604, 611 (Pa. Cmwlth. 2003); *Warren Sand & Gravel Co. v. DEP*, 341 A.2d 556 (1975). Second, the ability to afford to comply with a Department order is generally not a defense to the validity of the order in a Board proceeding, but rather, it is an issue to be raised, if at all, in an enforcement proceeding. *Rozum v. DEP*, 2008 EHB 731, 735 (*citing Ramey Borough v. DEP*, 351 A.2d 613, 615 (Pa. 1976)). Third, Dirian, who testified himself as his only witness, created no record to support a finding that the Department's water sampling prior to the Department's issuance of the field order was defective, but even if it was, Dirian's own water testing submissions to the Department support the Department's finding of E. coli and total coliform bacterial contamination. (D. Ex. C).

Turning to Dirian's primary objection, the key issue raised by Dirian is whether the facilities used to collect, store and distribute water for human consumption at Spring Lake Park make up a water system such that the Department may regulate Dirian under its safe drinking

water program. At its most basic level, the SDWA regulates "facilities" used to handle drinking water. Therefore, we start by asking whether the physical plant at the park constitutes "facilities." The regulations define a facility as a part of a public water system used for collection, treatment, storage or distribution of drinking water. 25 Pa. Code § 109.1. This definition is unfortunately circular, but the key point is that a facility is basically the plumbing that handles drinking water. There is no dispute that there are drinking water facilities at Spring Lake Park.

There is also no question under the regulation that a "group of facilities" can under an appropriate set of circumstances constitute a single system. 25 Pa. Code § 109.1. The basic dispute in this case arises because the Department believes that all of the plumbing attached to the various springs and wells throughout the park together constitute one system. Dirian argues that there are several separate systems as defined by the various wells and springs. For the most part, the plumbing originating at these sources do not interconnect.

We find that the Department's determination to aggregate the facilities connected to the various sources and the plumbing attached thereto within the park is reasonable, lawful, and supported by the facts. The regulations define a "system" as

> A group of facilities used to provide water for human consumption including facilities used for collection, treatment, storage and distribution. The facilities shall constitute a system if they are adjacent or geographically proximate to each other and meet at least one of the following criteria:
>
> A. The facilities provide water to the same establishment which is a business or commercial enterprise or an arrangement of residential or nonresidential structures having a common purpose and includes mobile home parks, multi-unit housing complexes, phased subdivisions, campgrounds and motels.
>
> B. The facilities are owned, managed or operated by the same person.

> C. The facilities have been regulated as a single public water system under the Federal act or the act.

25 Pa. Code § 109.1.

Spring Lake Park qualifies as one "establishment which is ... an arrangement of residential or nonresidential structures having a common purpose and includes mobile home parks, multi-unit housing complexes, phased subdivisions, campgrounds and motels." 25 Pa. Code § 109.1(A). Spring Lake Park is a community where residents own their cottages or mobile homes but are tenants of Dirian. Dirian owns the land which makes up the park. Although it is heavily debated between the parties about what the relationship looks like between Dirian and his tenants, that debate is not especially meaningful because, at minimum, Dirian operates a business of providing tenancy on his land to the residents of the park. Like the "mobile home parks, multi-unit housing complexes, phased subdivisions, campgrounds and motels" specifically identified in Subsection A of Section 109.1, Spring Lake Park is an establishment with the common purpose of providing a residency relationship between Dirian and his tenants, regardless of what the exact nature of that relationship is.

All of the facilities that serve Spring Lake Park are contained within the adjoining parcels of land owned by Dirian upon which all of Dirian's Spring Lake Park tenants reside. The Pool Circle cottages and the Dirian home receive water from two sources located near lot 9 and are distributed through underground pipes on the Pool Circle side of the park. Immediately across Fox Road from Pool Circle, the Lake Drive residents receive water service from the spring that feeds lots 12, 15 and 16, the well near lot 30 that feeds lots 18 and 19, the cistern on lot 13 that stores water drawn from a connection to a nearby spring in the park, or the well near lot 22 that supplies water to lots 22, 23, 24, 25, 27 and 31. All of these facilities, including collection,

distribution and storage facilities are adjacent and geographically proximate. Importantly, where, as here, the facilities are proximate and serve the same establishment, Section 109.1 does not require all of the facilities to be owned, managed, or operated by the same person. It also does not require the facilities to be interconnected in order to constitute one system.

The next question is whether the Spring Lake Park water system is a public and a community water system. Section 721.3 of the SDWA defines a "public water system" as:

> A system which provides water to the public for human consumption which has at least 15 service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year. The term includes:
>
> (1) collection, treatment, storage and distribution facilities under control of the operator of a system and used in connection with the system.
>
> (2) Any collection or pretreatment storage facilities not under control of the operator of a system and used in connection with the system.
>
> (3) A system which provides water for bottling or bulk hauling for human consumption.

35 P.S. § 721.3 A community water system is a "public water system which serves at least 15 service connections used by year-round residents or regularly services at least 25 year-round residents." *Id.* Community water systems require a permit. 35 P.S. § 721.7.

Lots 1, 2, 3, 4, 6, 8, 9, 12, 15 and 16 at Spring Lake Park are stipulated as being "connected to systems providing water for human consumption." (Stip. ¶ 6.) Lot 0, Dirian's home, and Lot 13 each receive water service from spring-fed water storage facilities located within Spring Lake Park. (Finding of Fact ("FOF") 6 and 16.) Additionally, Dirian admits that lots 22, 23, 24, 25, 26, 27 and 31 are connected to facilities that draw water from the well near lot 22, and lots 18, 19 and 30 are connected to facilities that draw water from the well near lot 30. (FOF 19-26, 27-28.) Of these connections, the following connections serve the number of year-round residents indicated below:

Lot #	Number of year-round residents
0	4
1	2
2	3
4	2
6	1
8	1
9	1
13	2
15	3
16	2
22	2
23	1
24	1
25	1
26	1
27	2
30	1

(*Id.*) Thus, Spring Lake Park's water system supplies water for human consumption through no less than 17 active service connections serving no less than 30 year-round residents, and there are at least four more service connections which may serve or are available to serve additional part-time or full-time residents of Spring Lake Park. Lots 3, 12, 18, 19, and 31 contain service connections to the Spring Lake Park system and are either vacant or provide water to part-time residents. The parties dispute the extent to which lots 5 and 11 currently or recently have had service connections or have provided water to residents. (*See, e.g.*, T. 214). In any event, Dirian provides water service through a public water system that meets the numeric requirements for being a community water system.

There has been much debate in this case about whether Dirian "controls" all of the facilities at the park, but in calculating the numeric criteria for a public water system, it is necessary to include "collection facilities" under control of the operator *and* not under the control of the operator. 35 P.S. § 721.3. The "collection facilities" are the parts of the system

"occurring prior to treatment, including source, transmission facilities and pretreatment storage facilities." 25 Pa. Code § 109.1. Thus, even if Dirian does not control all of the collection facilities at the park, they are included in the system. *Rhodes v. DEP*, 2009 EHB 599, 619-20.

Finally, we must ask whether Dirian is the proper recipient of the order. He is. A public water supplier is a person such as Dirian who *owns or operates* a public water system. 25 Pa. Code § 109.1. Similarly, the SDWA prohibits any person from *constructing or operating* a community system without a permit. 35 P.S. § 721.7(a). There is no dispute that Dirian owns, constructed, and operates at least parts of what the Department has reasonably determined to be one system, even assuming for purposes of argument that he does not control all of the collection facilities. In fact, he has demonstrated a great deal of operational control over the water system, including the facilities that allegedly belong to individual residents. (T. 30-34, 48-50, 53-61, 88, 95-96, 188; D. Ex. H; Dirian post-hearing brief ¶¶ 26, 36, Dirian reply brief at 15.). Among other things, Dirian admits to interconnecting waterlines to provide water to some lots on the Lake Drive side of Spring Lake Park by drawing water from a well he claims is the property of the residents of Lot 22. Furthermore, Dirian charges two different lease rates for his lots. In his own words, "[t]hose that have *appellant-supplied water* currently pay a base rate of $250 per month, and those who supply their own water currently pay a base rate of $200 per month." (D. Ex. H (emphasis added).)

Apart from his objections that Spring Lake Park should not be regulated under the SDWA as a public or community water system, Dirian has not shown that any specific requirement in the order under appeal oversteps the Department's legal authority to issue an order to comply with the SDWA's requirements and protect the public from harm. Dirian has not provided us with any basis for concluding that the order is unreasonable, regulatory coverage

having been established. Clearly, Spring Lake Park's community water system is being operated without a permit and without meeting any of the regulatory requirements of the SDWA. Dirian's own testing has shown that the system has failed to meet water quality standards that are appropriate for human consumption, and the water poses a risk to public health. Not only was the order lawful, the facts easily support the Department's decision to issue a field order to reasonably and quickly require Dirian to comply with his obligations under the SDWA to achieve and operate a properly permitted community water system and prevent an ongoing danger to public health.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this appeal. 35 P.S. § 7514; 35 P.S. §§ 6020.512(a) and 6020.1102.

2. The Department bears the burden of proof because this is an appeal from an order. 25 Pa. Code § 1021.122(b)(4).

3. The Board reviews the Department's action to ensure that it constitutes a lawful and reasonable exercise of the Department's discretion that is supported by the facts. *Perano v. DEP*, 2011 EHB 453, 515; *Wilson v. DEP*, 2010 EHB 827, 833.

4. The Board limits its review of the Department's action to issues properly raised and thereafter preserved in the notice of appeal and amendments thereto, the prehearing memorandum, and the post-hearing brief. 25 Pa. Code § 1021.131(c); *Berks County v. DEP*, EHB Docket No. 2010-166-L (Opinion and Order, March 16, 2012); *GSP Management Company v. DEP*, 2011 EHB 203, 207; *Thebes v. DEP*, 2010 EHB 370, 371.

5. The Department's burden of proving that its order was lawful, reasonable, and supported by the facts is limited to addressing the objections properly raised and preserved by the appellant. *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, 290.

6. A party's ability to afford to comply with a Department order is not a defense to the validity of the order in a Board proceeding, but rather is an issue suited to enforcement proceeding in Commonwealth Court. *Rozum v. DEP*, 2008 EHB 731, 735 (*citing Ramey Borough v. DEP*, 351 A.2d 613, 615 (Pa. 1976)).

7. Facilities for collection, treatment, storage and distribution used to provide water for human consumption constitute a system if the facilities are adjacent or geographically proximate to each other and constitute the same business establishment, commercial enterprise, arrangement of residential or nonresidential structures *or* are owned, managed or operated by the same person. 25 Pa. Code § 109.1.

8. A public water system is a "system for the provision to the public of water for human consumption which has at least 15 service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year." 35 P.S. § 721.3.

9. A community water system is "public water system which serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents." 35 P.S. § 721.3.

10. The Department is authorized under the Safe Drinking Water Act to issue orders for the effective enforcement of the act, rules, regulations or permits issued under the act, or to prevent an imminent and substantial risk to human health. 35 P.S. §§ 721.5(c)(3), 721.10(b).

11. A public water supplier must obtain permits from the Department prior to conducting any construction, operation or modification of a community water system. 35 P.S. § 721.7; 25 Pa. Code §§ 109.501-504.

12. There is one community water system at Spring Lake Park.

13. Dirian is a public water supplier who owns or operates the community water system at Spring Lake Park.

14. The field order constituted a reasonable and lawful exercise of the Department's discretion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DEAN W. DIRIAN	:	
	:	
v.	:	**EHB Docket No. 2011-155-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 5th day of April, 2013, it is hereby ordered that this appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chief Judge and Chairman

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

STEVEN C. BECKMAN
Judge

DATED: April 5, 2013

c: **DEP, Bureau of Litigation:**
Attention: Glenda Davidson
9th Floor, RCSOB

For the Commonwealth of PA, DEP:
Ann Johnston, Esquire
Office of Chief Counsel – Southcentral Region

For Appellant, *Pro Se*:
Dean W. Dirian
10 Fox Road
Newmanstown, PA 17073

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL A. KELLY	:	
	:	
v.	:	**EHB Docket No. 2012-142-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 6, 2013**

OPINION AND ORDER
ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

A motion to dismiss is denied for failure to comply with the Board's rules.

OPINION

Paul Kelly filed what he referred to as a motion to dismiss on April 12, 2013. The motion in its entirety reads as follows:

> Now comes Paul A. Kelly and moves the Hearing Board to dismiss with prejudice any and all proceedings against Paul A. Kelly and sets forth the following:
>
> 1. Any adverse ruling by the Board against Kelly will result in serious financial damage to Kelly and is criminal in nature as to its potential. The burden of proof to be carried by DEP must be "beyond a reasonable doubt". Any lesser burden is a violation of due process under the Constitution.
>
> 2. Any claim against Kelly is barred by laches. It violates due process for DEP to move forward against Kelly after almost nine years have passed and Lloyd Robinson, land owner is dead; David Hart, quarry operator, is dead; and David Lauer, prior permit owner is dead. It cannot be said that DEP exercised due diligence and Kelly had been seriously prejudiced by said delay. (59 A.3d 1136)

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http://ehb.courtapps.com

The Department of Environmental Protection opposes the motion on procedural and substantive grounds. We need not reach the merits of the motion because it is procedurally defective for several reasons. First, the motion is untimely. By Order dated August 8, 2012, all dispositive motions were due by March 4, 2013. Kelly's motion was more than a month late. Kelly did not ask for permission to file a late motion. The hearing on the merits has already been scheduled and the parties are in the midst of filing their prehearing memoranda.

Second, dispositive motions must be accompanied by a supporting memorandum of law or brief. 25 Pa. Code §1021.94(a). Kelly's motion was not. Third, the motion must be accompanied by a proposed order. 25 Pa. Code §1021.91(b). Kelly 's motion was not. Fourth, the motion must set forth in numbered paragraphs the facts in support of the motion and the relief requested. 25 Pa. Code §1021.91(d). Kelly's motion does not set forth any facts. Finally, although captioned as a motion to dismiss, Kelly's motion more closely resembles a motion for summary judgment. The motion does not comply in any respect to our rules regarding such motions. *See* 25 Pa. Code §1021.94a.

Accordingly, we issue the Order that follows:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL A. KELLY	:	
	:	
v.	:	**EHB Docket No. 2012-142-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 6th day of May, 2013, it is hereby ordered that the Appellant's motion to dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: May 6, 2013

c: **DEP, Bureau of Litigation:**
Attention: Glenda Davidson
9th Floor, RCSOB

For the Commonwealth of PA, DEP:
Stevan Kip Portman, Esquire
Office of Chief Counsel – Southcentral Region

For Appellant, *Pro Se*:
Paul A. Kelly
373 Cheanango Street
Montrose, PA 18801

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT A. GADINSKI, P.G., Appellant and MR. AND MRS. FRANK BURKE, Intervenors	:	
v.	:	**EHB Docket No. 2009-174-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GILBERTON COAL COMPANY, Permittee	:	**Issued: May 31, 2013**

ADJUDICATION

By Richard P. Mather, Sr., Judge

Synopsis:

The Board dismisses a third party appeal of the Department's issuance of a permit revision to a mining company's reclamation plan allowing for the beneficial use of coal ash for mine reclamation purposes. The Board finds that the Appellants have not carried their burden to demonstrate why the Department's decision to approve the permit revision should be reversed.

FINDINGS OF FACT

Parties

1. Appellant, Mr. Robert Gadinski, P.G., is a private resident of Lavelle, Pennsylvania. Mr. Gadinski's home is located at 105 Main Street, Ashland, Pennsylvania 17921, Schuylkill County. (Stipulation of Fact ("SF") 1.)

2. Mr. Gadinski is a Licensed Professional Geologist in Pennsylvania and worked for the Department as a geologist from 1986 to 2004 and served as hydrogeology supervisor from 1994 to 2004. (Notes of Transcript ("N.T.") 1, 3-16, Appellants' Ex. 52.)

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3. Appellants, Mr. Frank Burke and Mrs. Joan Burke, are private residents of Lavelle, Pennsylvania. The Burkes' home is located at 2998 Fairgrounds Road, Ashland, Pennsylvania 17921, Schuylkill County. (SF 2.)

4. The Pennsylvania Department of Environmental Protection (the "Department") is the agency in Pennsylvania responsible for issuing permits for Surface Coal Mining and approving Surface Mining Permit revisions. (SF 3.)

5. Permittee, Gilberton Coal Company ("Gilberton"), is a Pennsylvania corporation with offices located at 10 Gilberton Road, Gilberton, Pennsylvania 17934-1009. (SF 4.)

Permit Revision Application

6. On December 22, 2006, Gilberton submitted an application for a major permit revision to its Surface Mining Permit No. 49772304 to include the Beneficial Use of Coal Ash. (SF 5.)

7. On August 20, 2007, the Department received from Gilberton an application for a major permit revision to its Surface Mining Permit No. 49773204 to allow for the Beneficial Use of Coal Ash. The application number for the permit revision is 49772304C8. (SF 8.)

8. On September 11, 2007, the Department sent notification letters to Butler Township, Conyngham Township and Mt. Carmel Township advising that Gilberton had submitted an application to conduct mining activities in each respective municipality. (SF 10.)

9. On October 11, 2007, three days before the close of the public review comment period, the Department sent a letter to Mr. Gadinski to notify him that Gilberton had resubmitted a major permit revision regarding the Beneficial Use of Coal Ash. The letter invited Mr. Gadinski to conduct a file review and to submit any additional comments on the pending application. (SF 11.)

10. Mr. Gadinski provided comments and input regarding the Locust Summit Project on October 24 and 27, 2007 as well as on or about April 30 and May 9, 2008. (SF 12.)

11. On August 14, 2008, the Department sent a letter to Gilberton informing them that their application for a permit revision for the Beneficial Use of Coal Ash had been granted. (SF 13.)

Appeal of the Permit Revision

12. Mr. Gadinski was not informed of the Department decision to grant the permit revision until December 17, 2009 which was only after Mr. Gadinski emailed the Department inquiring as to the status of the application. (SF 13.)

13. On December 17, 2009,[1] Mr. Gadinski received a letter from the Department apologizing for its failure to properly notify Mr. Gadinski about the issuance of 49772304C8. (SF 14.)

14. Mr. Gadinski filed his notice of appeal on December 30, 2009,[2] with the following objections to the Department's issuance of Major Permit Revision 49772304C8:

a. The Department failed to notify Appellant, who had filed written objections and comments on the application of the issuance of the permit.

b. Gilberton failed to adequately characterize the site and to establish the groundwater gradient relative to the site.

c. The proposed site is inadequately monitored to ensure the protection of the public health and the environment from site impacts.

---

[1] The Stipulation of Fact Number 14 states that the date of the Department letter is December 17, 2008. Because this is clearly a typographic error, *see* Finding of Fact 13 based on Stipulation of Fact 14, the Board has changed the error to reflect the correct date.

[2] Neither the Department nor the Permittee has asserted that the Board lacks jurisdiction to consider this appeal. The Board will therefore not address any issues regarding the Board's jurisdiction or lack thereof.

d. The Department violated its own policies set out in Document Number: 563-2112-225.

(Notice of Appeal)

15. Since being granted major permit revision 49772304C8, Gilberton had not taken any further steps toward initiating the ash placement project. (N.T. 498.)

Project Site Description

16. The entire site, covered by Surface Mining Permit No. 49773204, is owned by Gilberton and consenting landowners and consists of approximately 958 acres located in Northumberland, Columbia, and Schuylkill counties. (SF 15.)

17. The area in question has been named the Locust Summit Project and applies to a 6.2 acre pit that has no reclamation requirements. (SF 16.)

18. The pit is located immediately east of State Route 901 on the northern side of the Ashland/Mahanoy Mountain and on the southern border of Northumberland County adjacent to Schuylkill County. (SF 17.)

19. The pit is in the geologic area known as the "Valley and Ridge Physiographic Province in the Western Middle Field of the Anthracite Coal Region" and is underlain by five coal seams that have been mined. (N.T. 52, 59.)

20. The coal seams in this area run from east to west and are within beds that are nearly vertical. (N.T. 74, 79.)

21. The proposed net volume of ash to be placed in the pit is estimated to be 350,612 cubic yards. The project's estimated life span is approximately 9.8 years.[3] (SF 18.)

[3] Appellants' Prehearing Memorandum includes the same proposed finding of fact as the Parties' Stipulation of Facts. Appellants' Prehearing Memorandum, Paragraph 15. Nothwithstanding Appellants' written agreement regarding the Stipulation of Facts, Appellants attempt to contest this stipulated fact in their Post-Hearing Brief. Appellants' Post-Hearing Brief, Paragraph 27 of Proposed Findings of Fact.

22. The Project site was strip mined on the Bottom and Top Split of the Mammoth Beds. The bedding plane exposed on the south wall of the pit is the bottom rock of the Bottom Split of the Mammoth Bed. (SF 19.)

23. Because of faulting, a portion of the Lower Mammoth Bed was deep mined to the north of the pit. Located on the north side of the pit in the highwall is the next highest coal seam, the Four-Foot Bed in the middle of the mined rock face. (SF 20.)

24. To the south of the pit are more deep mine workings, including the Lykens Valley 4 Vein, the Brenzel Tunnel, the Rock Slope, Skidmore and Buck Mountain veins. (SF 21; Appellants' Ex. 22.)

25. The Locust Summit Project site is directly above the Locust Gap Mine complex that drains to the Helfenstein Tunnel to the west of the Project site. (N.T. 338, Plan Map, Appellants' Ex. 63/Permittee's Ex. 17).

Reclamation of an Unreclaimed Pit

26. A deep unreclaimed pit currently exists on the Locust Summit Project site. The proposed beneficial use of the coal ash authorized by the permit revision in this appeal is to reclaim this existing unreclaimed pit. (N.T. 159.)

27. If the existing deep pit is filled in, it will have the effect of reestablishing appropriate surface contours, establishing positive drainage, and preventing the flow of surface water into the existing mine pool located beneath the Project Site which will improve water quality. (N.T. 380, 510, 530-532.)

Appellants' attempt fails, and Appellants and their expert witnesses are not able to contest this stipulated fact.

28. If the existing deep pit is filled in, it will have the benefit of eliminating the existing fall hazard that exists on the site, which will improve public safety. (N.T. 380, 510, 530.)

29. Other than the proposed permit modification to authorize the beneficial use of coal ash, there are no other plans to reclaim the existing deep pit on the project area. (N.T. 529.)

30. The use of the coal ash at the Project site to reclaim an unreclaimed surface mining pit was designed to improve water quality by eliminating a pit that collects runoff and diverts it into an abandoned deep mine complex. The reclamation reestablishes appropriate surface contours that allows positive surface drainage and reduces or eliminates infiltration of surface water into the abandoned underground mine complex. (N.T. 510, 530-532.)

Background Wells and Monitoring Points

31. To investigate the background geology/hydrogeology of the Locust Summit Project site and to determine which wells are best suited as monitoring points Gilberton drilled five wells. The background wells are AP-1 through AP-5. (N.T. 336.)

32. Well AP-2 was not used as a background/monitoring point because when it was drilled to a depth 280 feet it remained dry. (Table 8-2 Monitoring Well Water Level Summary; Appellants' Ex. 21.)

33. Gilberton's examination of the data collected from the background wells revealed the following water elevations (Appellants' Ex. 21.)

a. AP-1 was drilled to a total depth of 420 feet. The highest elevation the water level was measured at was 950 feet, and the lowest elevation the water level was measured at was 929 feet.

b. AP-3 was drilled to a total depth of 500 feet. The highest elevation the

water level measured at was 969 feet, and the lowest elevation the water level was measured at was 931 feet.

c. AP-4 was drilled to a total depth of 320 feet. The highest elevation the water level measured at was 1218 feet, and the lowest elevation the water level was measured at was 1181 feet.

d. AP-5 was drilled to a total depth of 260 feet. The highest elevation the water level measured at was 1180 feet, and the lowest elevation the water level was measured at was 1175 feet.

(Permit – Table 8-2, Locust Summit Monitoring)

34. Of the 5 background wells drilled, 3 were kept as monitoring wells for Module 25 parameters (AP-1, AP-3, and AP-4). (SF 23, Department's Ex. 6.)

35. The Brenzel Tunnel/Rock Slope discharge originates at least partially from water in the Lykens Valley 4 Vein. (SF 25.)

36. An additional monitoring well, AP-6, was added as a permit condition when the permit was issued. (N.T. 114.) AP-6 was drilled at a point below the Brenzel Tunnel gravity drain system. (SF 26.)

37. The water elevation found in AP-6 is 1044 feet above sea level. The total depth of this well is 200 feet or a bottom elevation of 866 feet. (SF 27.)

38. There were no background wells drilled to the south of AP-4. (SF 22.)

39. Gilberton also has a monitoring point at the Brenzel Tunnel/Rock Slope discharge which is located on the southside of the Ashland/Mahnoy Mountain. This point is labeled as MP-7 and discharges water at an elevation of 1135 feet above sea level. (SF 24.)

40. The elevation of the Rock Slope is 1,134.3 feet and the invert elevation of the Brenzel Tunnel discharge is at 1,133 feet, both of which are below the static water level of AP-5, which is located within the pit. (SF 28.)

41. The Department did not test and did not require Gilberton to test nearby residential wells. (N.T. 165.)

42. Testing of residential water wells is not typically required in evaluating a groundwater regime in an area of mining because residential wells are not typically logged when they are drilled. The depth of the well is not often known. The water bearing zones are often not known. Residential wells lack the necessary information to adequately evaluate the groundwater regime. (N.T. 450-452, 482.)

43. In contrast to residential water wells, monitoring wells are drilled for the purpose of monitoring groundwater, and the information about a monitoring well typically includes a log of the well when drilled, notation of water bearing zones, well depth, and groundwater elevations. (N.T. 451-452.)

44. Gilberton properly characterized the Project site, and the approved monitoring system was capable of detecting off-site migration of significant level of contaminants from the Project site. (N.T. 464-465, 473-474.)

Status of Barrier Coal Pillars

45. Beneath the Locust Summit Project site is the Locust Gap Mine complex that discharges at the Helfenstein Tunnel. (N.T. 338, Plan Map, Appellants' Ex. 63/Gilberton Ex. 17.)

46. Coal barrier pillars separate the Locust Gap Mine complex from the Potts Mine to the east and the Lavelle Mine to the south of the Locust Summit Project site. (N.T. 339, 466-67; Appellants' Ex. 63/Permittee's Ex. 17.)

47. Barrier Pillar XL is located to the east of the pit and is approximately 400 feet thick and is located between the pit and the Locustdale monitoring points 1, 2, and 3. (SF 31.)

48. Barrier Pillar XXXIX lies directly south of and adjacent to the pit. (SF 32.)

49. Barrier Pillar XL is intact and prevents groundwater from the Project site from flowing east toward the Potts Mine Complex. (N.T. 353-355, 365-366.)

50. Barrier Pillar XXXIX is intact and prevents groundwater from the Project site from flowing south towards the Lykens Valley 4 Vein Mine which discharges from the Brenzel Tunnel/Rock Slope. (N.T. 374-377.)

Distance from Ash Placement Area to Residential Wells

51. The closest residential well to the ash placement area is directly south of the Project site and is 1740 feet from the edge of the permitted ash placement area. (Permittee's Ex. 16 and 65 (Exhibits 8.3 and 8.3A South Extension.); N.T. 353.)

52. The closest residential well to the ash placement area is about 350 feet from AP-6 which is 1400 feet from the Project site, and this well is not the Burkes residential water well or the Gadinski residential water well. (N.T. 353, 384-386.)

53. The Gadinski residential water well is southwest from the Project site and is approximately 3000 feet from the edge of the ash placement area. (N.T. 384.)

54. The Burkes' residential well is down the mountain from the Project site, and the mountain is approximately 50 yards behind the Burkes' home. (N.T. 9.)

55. The Burkes' home is above the High Road and the Fairground Road, and the home is southeast of the Project site. The Burkes' residential well is more than 1740 feet from the ash placement area. (Permittee's Ex. 16 (Exhibit 8.3.))

Hydrogeological Experts

56. Robert Gadinski, P.G. is a Licensed Professional Geologist with experience working for the Department and as a private consultant. Among other things, he has performed work in structural geology, groundwater movement, and work related to coal permitting. (N.T. 15-30; Appellants' Ex. 52.)

57. Mr. Gadinski, P.G., was admitted as an expert in geology, hydrogeology, and site characterization. (N.T. 19.)

58. Robert Hershey, P.G., is a Licensed Professional Geologist and is employed by Meiser and Earl, Inc. as the principal hydrogeologist and President where he has worked for 34 years. He has previously designed groundwater monitoring systems for waste disposal programs in the Anthracite coal region. (N.T. 328-331; Permittee's Ex. 18.)

59. Mr. Hershey was admitted as an expert in the field of hydrogeology. (N.T. 334.)

60. Nathan Houtz, P.G., is a Licensed Professional Geologist and is the Chief of the Permitting Section for the Department's Pottsville District Mining Office and has held that position since 2007; in that capacity, he supervises and oversees the work of the permit reviewers. (N.T. 420-421; Department's Ex. 2.) Prior to his current position, Mr. Houtz was a geologist in the Pottsville office, and before that he worked as a geologist in the private sector. (N.T. 422-423; Department's Ex. 2.)

61. Mr. Houtz has particular expertise in reading and interpreting underground mine maps. (N.T. 428-429.)

62. Mr. Houtz was qualified as an expert in geology; hydrogeology generally; hydrogeology of surface and under ground anthracite mining; and hydrogeology of coal ash placement to reclaim anthracite surface mining sites. (N.T. 424.)

63. Mr. Houtz oversaw the work of other geologic specialists and was actively engaged in the review of submittals from the applicant and submittals from the lone commenter. Mr. Houtz reviewed correspondence from the Department to the applicant and participated in drafting correspondence regarding the permit application and submittals. (N.T. 426-428, 430-434.) In this case, the Department did not simply rely upon the initial submittals of the applicant, but required additional information through the use of "correction letters." (N.T. 171, 498-500.)

64. Mr. Gadinski was the sole commenter on the Locust Summit permit revision application. (N.T. 435.)

65. Mr. Houtz specifically reviewed the monitoring plan for the permit, the geology and hydrogeology of the site, the mine maps, and all materials related to these aspects, including reviewing the submittals made by Mr. Gadinski. (N.T. 431-432.)

66. Mr. Houtz has been to the Locust Summit Project site at least three times to evaluate the conditions there. (N.T. 432.)

67. The Department does not look solely at features within a 1000-foot boundary around the permit site; rather the Department looks at any factor that is determined to be of significance. The Department does not confine its examination to the 1000-foot boundary, which is only a minimum distance for items that must be shown on a map. (N.T. 429-430, 484-486.)

Permit Conditions

68. The Department added special conditions to the permit revision to address the placement of coal ash at the Locust Summit Project site, including:

a. Special Conditions Nos. 34-36 were added to control surface water in the ash placement area, to prevent standing surface water on the ash, to avoid excessive wetting of the ash, and to set certain moisture content range as well as to allow the Department to review the site preparation work before ash is placed on the site. (N.T. 439-442, 497-498, 527; Department's Ex. 6.)

b. Special Condition No. 37 was added to establish a minimum eight-foot barrier of fill material between the coal ash and any coal outcrop, seam, or any groundwater elevation. (N.T. 442-443, 483, 506; Department's Ex. 6.)

c. Special Condition No. 38 was added to require that Gilberton must keep fugitive dust on the site under control. (N.T. 443; Department's Ex. 6.)

d. Special Condition No. 39 was added to provide the Department with enforcement options if the quality of the ash becomes unacceptable for use as fill. (N.T. 444; Department's Ex. 6.)

e. Special Condition No. 46 was added to establish the requirements for placement of final cover on top of the deposited ash. (N.T. 445-446, 479-480; Department's Ex. 6.)

f. Special Condition No. 47 was added to provide for the compaction and density requirements for the ash itself. (N.T. 446-447; Department's Ex. 6.)

g. Special Condition No. 48 was added to provide for prompt spreading and compaction of coal ash within 24 hours of placement. (N.T. 445-447; Department's Ex. 6.)

h. Special Condition No. 51 was added to require the permittee to install an additional monitoring well into the aquifer below the Brenzel Tunnel/Rock Slope gravity drain system, between the Brenzel Tunnel/Rock Slope discharge and the residential wells to the south. (N.T. 448-449, 470; Department's Ex. 6.)

Cumulative Hydrological Impact Assessment

69. A cumulative hydrologic impact assessment (CHIA) form is a form that allows the Department to use data in a permit application to determine what impacts to the hydrogeologic balance are anticipated from the proposed mining related activity. (N.T. 458-59, 470.)

70. The Department conducted an assessment of the data in the permit application and considered the probable impacts of the proposed activities on the hydrogeologic balance during its review of Gilberton's permit application even though the Department did not complete a CHIA form before it issued the permit under appeal. The Department would not have issued the permit if it determined that the proposed activity would damage the hydrogeologic balance. (N.T. 459-461, 470.)

71. The Pottsville District Mining Office did not initially complete a CHIA form because it believed the form was not necessary, and it completed a CHIA form for the permit revision after learning that the form was required for this permit revision. (N.T. 165-167, 460.)

Groundwater Flow

72. The United States Geological Survey maps describing mining activities at and near Gilberton's property are generally reliable to describe the location of the barrier pillars adjacent to the Locus Summit site. Most of the mining in the area was conducted before the maps and report were produced. (N.T. 353, 362-367, 455-557.)

73. The water level in AP-4, which is higher than the others to the north, demonstrates that the groundwater gradient is to the north and that water cannot flow through the barrier pillar to the south. This supports the expert testimony of Mr. Houtz and Mr. Hershey that there is no evidence of major faulting or fracturing in the area that would serve to create a preferential pathway to the south and that the barrier pillars are essentially intact. (N.T. 457, 468-469; Department's Ex. 1.)

74. The Potts Mine pool, located east of the site, has a higher elevation than the Locust Summit site. This demonstrates that there is no water flow to the east. (N.T. 492-493.)

75. All groundwater flow south of the ridge line goes through the Brenzel workings and along the tunnels and into the Lykens Valley 4 Vein and then from east to west to be discharged at the Brenzel Tunnel/Rock Slope discharge. (N.T. 502.)

76. Even if groundwater from the Project site were to flow south from the site, two of Gilberton's existing monitoring wells will detect any negatively impacted groundwater before it would reach any residential water supplies, or it would be detected by testing from the Brenzel Tunnel/Rock Slope discharge. (N.T. 381-382, 385, 473.)

77. The water observed seeping from the highwall at the Locust Summit pit was merely surface water from above the highwall percolating through the highwall or rainwater that

fell running down into the pit and was not evidence of a water table higher than the pit. (N.T. 452-487, 509-511.)

78. The mine maps for the Locust Summit are generally reliable, and current monitoring well data from AP-4 shows that the groundwater gradient is to the north and that water cannot flow through the coal barrier pillar to the south. (N.T. 457, 468-469.)

79. Mr. Hershey's and Mr. Houtz's expert opinions demonstrated:

a. That the monitoring plan proposed by Gilberton is sufficient to detect any effects of surface mining activities, including the beneficial use of coal ash on the quantity and quality of water in the groundwater system of the area; and

b. Gilberton has adequately characterized the groundwater under the site, including groundwater flow direction and the effects of abandoned deep mining underlying the site on the groundwater. (N.T. 465, 473-474; Department's Ex. 1.)

80. Dye testing is not typically conducted in anthracite mining cases where underground mine pools control groundwater flow. When dye testing is conducted, it is typically used in limestone/karst areas. The area around the Locust Summit Project site is not a site where a dye test would be helpful in determining groundwater flow. (N.T. 462-464, 476-479.)

81. No preferential pathways exist to allow the flow of groundwater to the south of the Locust Summit Project site, instead of to the north. (N.T. 467-469.)

82. After the permit revision was issued to Gilberton, the Department required Gilberton to update one module of its permit application to conduct twelve months of background water sampling of all monitoring points prior to ash placement and comply with a new updated Department Technical Guidance Document. (N.T. 471; Department's Ex. 1; Appellants' Ex. 67.)

83. Deep mining in the area of the Project site and the systems of tunnels and mine workings created by this earlier mining dominate the flow of groundwater under the site. (N.T. 389-390.)

84. The system of tunnels and mine workings under the Project site will direct water from the site to flow north away from Appellants' wells to the south. (N.T. 390-391.)

85. The dip of the bedrock under the Project site to the north contributes to the flow of groundwater to the north. (N.T. 379.)

Subsidence

86. Subsidence events occurred in 1994 and 1996 between the Project Site and Mr. Gadinski's house. The subsidence occurred in the Lykens Valley 4 Vein. (N.T. 75-80, 92.)

87. The Department did not consider the subsidence events, or the related backfilling of the voids created by the subsidence events, when it decided to issue the permit to Gilberton. (N.T. 461.)

88. The Department became aware of the subsidence events, Mr. Gadinski's concerns about the subsidence events, and related backfilling in December 2010, a month before the hearing in this matter. (N.T. 461, 501.)

89. The subsidence events would have had no effect on the Department's decision to issue the permit to Gilberton. If the Department had known of the subsidence events at the time it issued the permit, it would have still issued the permit revision because the 1994 and 1996 subsidence events and related backfilling would have been part of the background data. These events that occurred in the 1990's would have made no difference regarding the hydrology of the area at the time of the review of Gilberton's application. (N.T. 461-462, 475-476, 501.)

Placement of Ash

90. Schuylkill Energy Resources, Inc. ("SER"), with offices located at 120 Yatesville Road, Shenandoah, Pennsylvania 17976, is the approved source of ash for the pit. (SF 29.)

91. This is also the same ash source for the ash placement site known as Ellengowan/Knickerbocker Demonstration Site located in Yatesville, Pennsylvania. (SF 30.)

92. Sharon A. Hill, P.G., is a Licensed Professional Geologist, with the Department, and has acted in that capacity with the Department since 1992. She holds a master's degree in Education in Science and the Public from the State University of New York at Buffalo. (N.T. 514-517; Department's Ex. 3, 4.) As a permit reviewer for the Department for 13 years, she reviewed over 400 applications for mining permits for coal and non-coal operations. She has conducted hydrogeologic reviews for mine drainage issues, monitoring plans, coal ash, and biosolids placement in mine sites and in Karst hydrology. She has also investigated over fifty complaints for water supply diminution or contamination in coal areas and fractured rock aquifers. (N.T. 517-518; Department's Ex. 4.)

93. Ms. Hill was accepted as an expert without objection in geology, hydrogeology, hydrogeology of surface and underground anthracite mining, hydrogeology of coal ash placement to reclaim anthracite surface mining sites, and the chemical composition and behavior of coal ash placed at mine sites. (N.T. 520-522.)

94. Dr. Bryce Payne, Jr. has a Ph.D. in soil science. (N.T. 175.) Dr. Payne was accepted as an expert in soil science, coal ash, and the effects of coal ash on water quality. (N.T. 180-186.)

95. Once coal ash is placed in an anthracite mine stripping pit, it is compacted in a manner that forms an impervious plug of material, not unlike concrete, that fills up the pit and

can restore the pit to its approximate original contours and create a useful parcel of land, as well as reduce the effect of acid mine drainage. (N.T. 531.)

96. In granting Gilberton's permit amendment to allow placement of coal ash on the project site, the Department determined that such placement would create an impervious plug. (N.T. 531.)

97. Ms. Hill concluded that Fluidized Bed Combustion ("FBC") ash placed in the Project area would be nearly impermeable based upon:

a. The Department's twenty-year history of observing and utilizing FBC ash for beneficial use as fill;

b. The approximately fifty sites utilizing coal ash that are active at any given time;

c. Various instances where ash has been used specifically as a low-permeability material; and

d. Testing for hydrologic conductivity with results that demonstrate that the ash becomes impermeable. (N.T. 557-558.)

98. The permit amendment requires the coal ash to be managed carefully for placement at the Locust Summit site, including:

a. The ash must be moved efficiently from the generation source to the beneficial use site and not stored for a long period of time in an impoundment or stockpile. (N.T. 526.)

b. The ash certified for placement is required to be mixed with water to achieve optimal moisture content to prevent the ash from being dusty, and to allow the ash

to be easier to shovel and allow for compaction during placement. (N.T. 441-442, 527-529.)

c. The ash is required to be mixed with water before transport to reduce dustiness during transport, and the trucks used in transport must be tarped to prevent the spread of dust. (N.T. 527-528.)

99. The Department utilizes a procedure called Synthetic Precipitation Leaching Procedure ("SPLP") as a method to simulate the affect of acid rainfall on the ash so that the Department can test the leachate that comes out of the ash for its various constituents to test whether toxic or other contaminants would be released from the ash. (N.T. 555-556.)

100. Ms. Hill conducted a review of the SPLP testing conducted on the ash certified for use at the Locust Summit site which was prepared at the time that she was reviewing SER's application for certification of its ash. (N.T. 536.)

101. Ms. Hill followed up with SER regarding all of the constituent limitation exceedances recorded on the SPLP testing and found that SER satisfied her concerns by demonstrating that the exceedances were credibly explained anomalies or demonstrated inaccurate testing samples. She was satisfied with the quality of the SER ash. (N.T. 540-544.)

102. The limits set by the certification requirements are set so that any leachate that may come out of the ash will be diluted and attenuated by additional rock and mineral material and will not cause degradation or pollution if it enters the surrounding environment. (N.T. 556-562.)

103. Ms. Hill found that the SER generated FBC coal ash consistently meets the certification limits. (N.T. 544-545.)

104. In her expert opinion, based on her experience and observations investigating numerous placements of coal ash in mine reclamation projects, Ms. Hill finds that when placed properly, coal ash will not leach contaminants to ground or surface water at levels that contaminate these waters. (N.T. 545-546, 550.)

105. Coal ash does not have a high water retention capacity, and when it is compacted, any water is displaced because ash is a very fine grain material and there is little pore space to hold water. (N.T. 548, 558-560.)

106. Coal ash, when it is approximately worked, can be compacted to produce beds with low permeability. (N.T. 375.)

107. The permit conditions require that the coal ash placed on the Project site is appropriately worked. The coal ash must be spread and compacted in lifts less than two feet or less within 24 hours of on-site placement. (N.T. 445-447.)

DISCUSSION

Background

This case involves a third party appeal of the Department's issuance of a surface mining permit revision to Gilberton Coal Company ("Gilberton") for the beneficial use of coal ash as fill for the reclamation of a portion of the Locust Summit mine site owned by Gilberton in Northumberland County. The Appellants, Mr. Frank Burke and Mrs. Joan Burke and Mr. Robert Gadinski, are residents of nearby municipalities and use private water wells on their respective properties for residential or domestic water uses. They believe that Gilberton's proposed actions will affect their private water supplies.

The mine reclamation project permitted by the Department is located within an inactive portion of an anthracite coal mine located on the northern side of Ashland/Manahoy Mountain,

Northumberland County, within several thousand feet of several residential properties. The ash placement area is located in a corner of Gilberton's mine bordered by two barrier pillars, or unmined areas which among other things served to separate several underground anthracite coal mine complexes that were mined before the 1960's.

The placement of coal ash in Pennsylvania requires a two-step approval process through the Department before it can be used as regulated fill in a beneficial use program. As a by-product created by the combustion of coal for energy, the ash is composed of a number of substances. The composition of the coal ash varies depending upon several factors. During the first step, the ash must be certified by the Department as an appropriate candidate for placement, based on its known constituents and chemical and physical properties (through testing). This step is needed so that the ash's behavior when placed can be anticipated and accounted for in a placement setting. In this appeal, the ash in question is a fluidized bed combustor ("FBC") ash produced by Schuylkill Energy Resources ("SER"), which has undergone the testing process and been certified by the Department. This certification of the ash produced by SER was not challenged.

The second step in the Department's approval process is receiving a surface mining permit allowing for mine reclamation activities using a particular certified coal ash at a particular location. Here, Gilberton applied for a revision to its current mining permit seeking to utilize the certified SER ash at the Locust Summit site in its mine reclamation efforts. This is the action under appeal here.

The Department reviewed Gilberton's application, allowed for public comment, met personally with Mr. Gadinski – the sole commenter on this permit application – and approved Gilberton's application. The Department was satisfied that Gilberton had made a satisfactory

application supported by sufficient site and scientific inquiry to determine that the placement of the ash at Locust Summit was appropriate. With its approval, the Department also issued a series of permit conditions laying out Gilberton's responsibilities regarding the transportation, storage, protection from weather, moisture content, placement method, compaction, and grading of the site to control the ash's use and placement at Locust Summit.

Gilberton, having demonstrated to the Department as part of its application that the site was an appropriate candidate for ash placement, was required to characterize the flow of groundwater and other site conditions to show that any leachate or runoff from the placed ash would not produce water pollution that could, among other things, adversely affect the water supplies of nearby residents. As additional conditions of its permit, the Department approved Gilberton's water monitoring system intended to monitor changes to the surrounding groundwater through wells and other water monitoring points for evidence that contaminants from ash are moving into the surrounding groundwater and threatening human health and the environment.

Gilberton's groundwater characterization and monitoring plan relies on a series of wells and other monitoring points located in and near the ash placement area. The first well was drilled to the northwest of the site in the direction of Gilberton's anticipated groundwater flow from the site (AP-1). The second, which was used, was located within the ash placement area (AP-3, located on the northern side of the ash placement area).[4] A third was drilled into the barrier pillar located directly south of the deepest portion of the ash placement area (AP-4). A fourth was drilled in the pit and it was used to characterize the site, but it was not included as a monitoring well (AP-5). The Plan also included a non-well monitoring point measuring the

[4] Well AP-2 was drilled but not used because it was drilled to a depth of 280 feet and was dry.

outflow from the Brenzel Tunnel/Rock Slope discharge, a mine discharge point located south of the project site and the barrier pillar, serving as the discharge point for mine tunnels and workings located south of the Project site (MP-7). In addition, the Department, in response to Mr. Gadinski's concerns, required the addition of one more monitoring point, well AP-6, to be drilled in the area between the closest residents to the south and the site. Gilberton was further required to obtain background sampling from this well prior to ash placement.

The Appellants challenge the Department's decision to allow Gilberton to beneficially use coal ash to reclaim a deep unreclaimed pit on its permitted site. The Department issued Gilberton a Major Permit Revision No. 49772304C8 to authorize this activity.

The Appellants filed an appeal that raised several procedural and substantive objections. There are two main procedural objections. First, for reasons that are still not fully explained, the Department neglected to inform Gadinski that it had approved Gilberton's permit revision when it approved it even though the Department is required by its regulations to do so. Gadinski only learned of the approval months later when he contacted the Department to inquire about the status of the Department's review. Second, the Appellants object to the fact that the Department did not complete its Cumulative Hydrologic Impact Assessment (CHIA) form before it approved the permit revision.

The Appellants raised several related substantive objections in the Notice of Appeal. First, the Appellants assert that the site is inappropriate for the placement of coal ash because the site is "above a used aquifer" that can be contaminated by runoff from the site. Second, the Appellants assert that even if the site is appropriate, the Department did not require sufficient investigation or characterization of the site and did not require an adequate monitoring plan for the site. Appellants assert that Gilberton's investigation is inadequate because it failed to fully

investigate barrier pillars; failed to account existence of preferential pathways; failed to investigate site conditions of Brenzel Tunnel discharges; failed to investigate earlier subsidence events; and failed to properly establish groundwater gradients for the site. Third, Appellants assert that the ash should not be placed near and uphill from residential water wells, including the Appellant's wells. The Board will address these procedural and substantive objections below.

Standard of Review

The Board examines whether the Department's decision to issue the surface mining permit revision is a lawful and reasonable exercise of the Department's discretion that is supported by the evidence presented to the Board. *Wilson and Guest v. DEP*, 2010 EHB 827, 833; *Smedley v. DEP*, 2001 EHB 131, 156-60. Due to the nature of our *de novo* review, we do not conduct a review of the Department's record it relied upon to make its decision; rather, we construct our own record which may include evidence the Department has not considered. *Pennsylvania Trout v. DEP*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004).

Under our rules, the Appellants, as a third party appealing the Department's decision to issue the permit revision to Gilberton, bear the burden of proving by a preponderance of the evidence that the Department erred in issuing the permit revision. 25 Pa. Code § 1021.122(c)(2). After three days of hearings and the admission of several dozen exhibits to make the factual findings laid out above, the Board is now able to determine whether the Appellants have carried their burden.

Appellants are concerned that the water wells that supply their homes with water for domestic or residential uses will be adversely affected by the coal ash placement that the permit amendment allows. While concerns about impacts to their private water suppliers provide the

impetus for Appellants' challenge, Appellants have not provided the Board with any specific evidence regarding their particular water supplies. Even though all Appellants testified, no evidence regarding the existing quality or quantity of their water supplies was provided. No evidence regarding the depth of the well or the geologic source of the water was provided. Appellants have also misstated or understated the distances from the proposed ash placement area to the location of their homes and water wells in an apparent effort to try to strengthen their objections.[5] The obvious misstatements and errors have the opposite affect and tend to undercut their concerns when they are unable to accurately identify the distance from the proposed ash placement area to their homes and wells.

Along similar lines, Appellants claim that the ash placement area is above a "high quality used aquifer."[6] As the evidence at trial demonstrated, the proposed ash placement area is clearly directly above the Locust Gap Mine complex which ultimately drains to the Helfenstein Tunnel several miles away to the west of the Project site area. The proposed ash placement area is only "above" the aquifer that supplies the water to Appellants' residential water wells in the sense that it is at a higher elevation than the Appellants' residential water wells and the aquifer that supplies water to the residential water wells in question. The Project site is near the top of the mountain ridge, and the two residential water wells are near the southern base of the mountain. The concern is that water from the proposed ash placement area will somehow flow south to Appellants' residential wells and the aquifer that supplies these water supplies.

Rather than provide the Board with evidence that reveals how any contaminants from the

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[5] Gadinski's residence and water well are approximately 3000 feet from the proposed ash placement area, not the 1500 feet that Appellant Gadinski claims. See Adjudication at pages 8-9. Appellant Burkes' residence and water well is not 50 yards from the proposed ash placement area as Appellants assert, but it is approximately 50 yards from the base of the mountain behind their home. *Id.*

[6] The Board does not know what appellants mean by the use of the phrase "high quality" since it has no apparent legal or regulatory meaning. An aquifer is either used or not used.

ash deposited in the ash placement area would reach Appellants' residential water wells and adversely affect these wells, Appellants object to the issuance of the permit modification based upon Gilberton's failure to comply with various regulatory requirements governing mining permits and the beneficial use of coal ash for reclamation purposes at mine sites.

The Department and Gilberton have also not addressed Appellants' residential water wells in any direct manner. The quality or quantity of these private water supplies was not tested, and neither party testified regarding the type of wells or the depth of the wells or the source of the groundwater supplying the wells or the quantity of water either well could produce. Gilberton's expert merely testified that he was generally aware of the location of the wells which was beyond the location of the closest residential water well to the proposed ash placement as marked on one of Gilberton's maps.

The Department and Gilberton testified that there is a groundwater divide between the proposed ash placement area and the residential wells of the Appellants. The existence of this groundwater divide is the apparent reason for the Department's and Gilberton's lack of knowledge regarding Appellants' existing residential water wells. Under their collective view, ground and surface water that infiltrated the proposed ash placement site would flow north and away from Appellants' residential wells to the south. They assert that water from the site ultimately reaches the Locust Gap Mine complex beneath the site and discharges to the surface at the Helfenstein Tunnel entrance to the west of the Project site.

The Appellants are therefore concerned about possible impacts to their residential water supplies, but their objections to the permit revision are based upon various regulatory requirements regarding review and approval of mining permit applications. The Department and Gilberton also defend the Department's decision in connection with these permitting

requirements. The Board will now turn to these regulatory requirements.

The Appellants lay out the following regulatory requirements to demonstrate that the permit revision should not have been issued to Gilberton:

a. The use of coal ash must be "designed to achieve an overall improvement in water quality or shall be designed to prevent the degradation of water quality." 25 Pa. Code § 287.663(c).

b. Groundwater monitoring must comply with the applicable provisions of 25 Pa. Code Chapters 86-90.

c. Coal ash placement may not be within eight feet of the regional groundwater table. 25 Pa. Code § 287.663(d)(6).

d. Applications for a permit revision must be complete and demonstrate that the proposed revision complies with the applicable law. 25 Pa. Code § 86.52.

e. The Department must assess the probable cumulative impacts of the permit revision on the hydrologic balance of the area and that the activities proposed have been designed to prevent material damage to the hydrologic balance outside the proposed permit area. 25 Pa. Code § 86.37(a)(4).

We note that that Appellants have largely cited the coal mining and reclamation regulations in general, laying out only that the revision must be designed to achieve an overall improvement to or the prevention of degradation of water quality, that ash placement must be at least eight feet from the groundwater table, and that the Department must assess the project's affect on hydrologic balance. We will therefore assess the Appellants' specific objections laid out in their Joint Brief and listed below to determine whether the Department acted reasonably to issue the permit revision, and that the approved revision was lawful.

In their Joint Brief, the Appellants argue that the Department should not have issued the surface mining permit revision to Gilberton for the following reasons:[7]

a. Gilberton failed to adequately characterize the Locust Summit Project site such that the Department is unable to assess whether the site is an appropriate location for the placement of coal ash.

b. Gilberton failed to design a groundwater monitoring plan that is protective of public health and the environment.

c. The constituents of the ash certified for placement at the Locust Summit site are such that the ash must be placed further from drinking water sources than what has been approved by the Department.

d. The Department made procedural errors.

Procedural Errors

Before we consider the substantive objections at length and on their merits, we begin by noting that we can quickly dispense with the Appellants' final procedural objections. The nature of our *de novo* review causes us to be less concerned with the Department's exact decision making methodology and procedures, and we focus instead on whether the Department's decision should be sustained based on the facts before us. *Leatherwood v. DEP*, 819 A.2d 604, 611 (Pa. Cmwlth. 2003). The Appellants object to the Department's failure to perform a Cumulative Hydrologic Impact Assessment ("CHIA") before the issuance of the permit, which in their view is in violation of the Department's requirements. While the Department's failure to complete the CHIA form before the permit was issued is not in dispute, the Department

[7] In this Adjudication we address the matters raised in the Appellants' post-hearing brief. Other objections that may have been raised in the notice of appeal or at the hearing that were not raised in the post-hearing brief are deemed waived under the Board's rules. 25 Pa. Code § 1021.131(c); *see also Lucky Strike Coal Co. v. DER*, 547 A.2d 447 (Pa. Cmwlth. 1998).

completed the CHIA form shortly thereafter when the deficiency was discovered. (N.T. 460.) The Department's employee, and expert witness in hydrogeology, Nate Houtz testified that the Department's initial failure to produce a CHIA form was due to his misunderstanding that CHIAs were only prepared for new permits, and not as here, for permit revisions. (N.T. 460.) After Houtz learned that it was Department policy to prepare the CHIA for permit revisions, a CHIA was prepared. (N.T. 458-461.) Moreover, the data used by the Department to produce the CHIA is drawn from the permit revision application. Houtz testified that prior to approving the permit revision the Department still engaged in an assessment of the hydrologic balance just as they would to produce a CHIA. (N.T. 459, 461.) Mr. Houtz stated that the Department only granted the permit revision after having concluded that the project would not damage the hydrologic balance. To prevail on this point, therefore, the Appellants would have to demonstrate that the preparation of the CHIA form, however late, was inadequate or inaccurate such that it does not support the Department's approval of the permit revision. Having made no effort to contest the validity or sufficiency of the Department's late prepared CHIA in their post-hearing brief, the Appellants fail to carry their burden on their objection that the Department's failure to complete its CHIA form before it approved the permit revision entitle the Appellants to relief.

The Department conducted an assessment of the possible impacts to the hydrologic balance while it reviewed the permit application including comments from Mr. Gadinski that were submitted. This assessment was complete before the Department issued the permit revision under appeal, and the Department would not have issued the permit revision before making a determination that the project would not damage the hydrologic balance. After it approved the permit revision, the Pottsville District Mining Office learned that it needed to complete a CHIA

form for a permit revision, and it promptly completed a CHIA form for the permit revision. Under these facts, the Department's admitted failure to complete a CHIA form before it approved the permit revision is not a basis to sustain Appellants' appeal.

The Department's procedural error in failing to prepare a CHIA form before it made its permit decision to approve Gilberton's permit revision, is harmless error because Department testified that it fully consider impacts to the hydrologic balance during the review of Gilberton's application even though it did not complete the HCIA format this time. The Appellants' did not contest this assertion, and merely made the procedural objection that the CHIA was not completed before the Department made its permit decision.

The second procedural error is the Department's admitted failure to provide Mr. Gadinski with timely notices of its decision to approve the permit revision for Gilberton under 25 Pa. Code §§ 86.31, 86.32, 86.39, and 86.54. Mr. Gadinski reviewed Gilberton's permit revision application and provided comments during this public comment period, and under applicable requirements Mr. Gadinski should have been notified of the Department's decision to issue the permit revision to Gilberton. The Department failed to provide Mr. Gadinski with notice of its decision, and Mr. Gadinski only learned of the Department's decision when he contacted the Department to learn of the status of the pending application. He filed his appeal upon learning that the Department had already issued the permit revision to Gilberton.

The Department testified at the hearing that the Department's failure to provide Mr. Gadinski with timely notice of its decision was not intentional. (N.T. 458.) The Department explained that it was simply a matter that Mr. Gadinski's name inadvertently dropped off the copy list for notice of the permit action. (N.T. 458.) The failure to promptly notify Mr. Gadinski is harmless error. Mr. Gadinski through his own diligence learned of this Department's permit

decision and filed this appeal resulting in the earlier hearing and this Adjudication. The Department's failure to provide prompt notice to Mr. Gadinski did not prevent Mr. Gadinski from pursuing his appeal of the permit revision issued to Gilberton.

Characterization of Locust Summit Project Site Conditions

The Appellants raise two objections related to groundwater at or near the project site. First, as an initial matter the Appellants assert that Gilberton failed to adequately characterize the groundwater regime under the Locust Summit Project site as required by the Department's permitting regulation so the Department was unable to determine that the project site is an appropriate location for the placement of coal ash. Second, the Appellants assert that the approved groundwater monitoring plan is not adequate to protect public health and the environment. These related objections share a common basis regarding groundwater flow beneath and surrounding the Locust Summit Project site.

In support of these two general objections, the Appellants identify specific alleged failures on the part of Gilberton and the Department. Appellants assert that Gilberton failed to fully investigate the two coal barrier pillars that lie to the east and the south of the project site. According to the Appellants, numerous preferential pathways exist that allow drainage from the project area to flow south towards Appellants' private water wells. The Appellants also assert that Gilberton failed to fully investigate conditions at the Brenzel Tunnel or to consider subsidence that occurred in the 1990's near the Project site. Finally, Appellants claim that Gilberton failed to establish the correct groundwater gradient.

The Appellants object that Gilberton failed to fully investigate the barrier pillars at the site for their application for the placement of coal ash. Barrier pillars, areas of the naturally occurring bedrock intentionally designated to be left unmined for a number of purposes, are

located directly below and adjacent to the site's eastern and southern edges.[8] Mr. Gadinski, testifying as the Appellants' expert witness in geology, hydrogeology, and site characterization, asserted that due to the site's underlying geological history that the pillars and other bedrock in the area is heavily fractured, folded, and faulted such that they are not "intact" in a manner that allows them to serve as a groundwater barrier. Gadinski believes that Gilberton's inspection was inadequate because it failed to obtain core samples of the pillar to verify its integrity and relied on outdated underground maps of the site. More specifically, Gadinski challenged the accuracy of the alleged borders of the barrier, pointing to the age of the United States Geological Survey ("USGS") maps of the area which were completed in 1953, questioning the effect of subsequent mining on the area as well as the possible effects on their integrity through speculated undocumented or illegal mining of the barrier pillar and the use of demolition explosives during the construction of a nearby road.

We disagree with Gadinski's characterization of Gilberton's examination of the barrier pillars, particularly barrier pillar XXXIX which, as the southern border of the ash placement area serves as an important barrier between the ash placement and the closest residential properties south of the site. We find the testimony of Gilberton's expert witness more credible on this issue. (N.T. 374-377.) We credit the testimony of Mr. Hershey, Gilberton's hydrogeology expert, that his examination of the barrier pillar was entirely adequate to determine that pillar was serving as a suitable barrier to stop the flow of water. Mr. Hershey testified that the AP-4 well drilled into this barrier pillar demonstrated that the water chemistry measured within the barrier pillar was not being affected by the contaminated ground waters on either side of the pillar. During the actual drilling of the well, Hershey's observations also allowed him to

[8] Coal Barrier XL is located to the east of the Project site, and Coal Barrier XXXIX is located to the south of the Project site. (Findings of Fact 47 and 48.)

conclude that the fracturing in the bedrock of the barrier pillar was not so great as to allow water to enter the hole of the well until the drilling reached 300 feet, the water bearing zone. (N.T. 376.) This water level was higher than the surrounding groundwater points, demonstrating that the mined areas surrounding the pillar were not draining the pillar's groundwater. (N.T. 371.) Moreover, Hershey credibly testified that groundwater on either side of barrier pillar XXXIX moves away from the pillar because it is operating as a groundwater divide. (N.T. 377.) These expert findings by Hershey, in our view, support his further contention that the deep mining maps and the U.S. Bureau of Mines Bulletin 521 reasonably and accurately represent the underground mining and barrier pillars located near the ash placement site. These findings and contention further support his expert opinion that the barrier pillar is still functioning as a barrier to the movement of groundwater to the south of the project site. (N.T. 376-377.)

Likewise, barrier pillar XL acts as a separation between the ash placement area and the area to the east. (N.T. 353-355, 365-366.) The Potts Mine located directly east of the site has a higher groundwater elevation than the Locust Summit site and the surrounding area. (N.T. 361.) This establishes, as Hershey and Houtz expertly opined, that there is no groundwater flow from the project site to the east. (N.T. 492.)

The Appellants raise a final point on the integrity of the barrier pillars. The Appellants' argue that Gilberton has not provided an adequate description of the geology of all lands within the proposed permit area, the adjacent area, and the general area, and also did not require Gilberton to obtain updated hydrogeological and water supply information. The Appellants appear to use this argument as an objection to the inquiry into the barrier pillars, particularly Houtz's and Hershey's decisions that the geological information for the area from the 1950s was still accurate, as opposed to obtaining an updated map of the barrier pillars. For one, the decision

to rely on older mine maps and publications by the USGS is allowed by Section 88.23 of the Department's regulations, which specifically allow reliance on State or Federal Agency documentation. 25 Pa. Code § 88.23. That, however, is not the entirety of what Gilberton cited in their application or presented before the Board. As we have already discussed in part above and will continue to lay out below, Gilberton and the Department considered the surrounding geology and hydrogeology in detail, relying on some older documentation, but also on recent data collected from existing monitoring points and new wells drilled for the sole purpose of this application and project. (N.T. 376-377.) Data from these old investigations and documentation was supported and corroborated by more recent data from new investigations establishing that the barrier pillars were operating as intended. Therefore, we find that the Department has not violated its regulations on this point and did require the Permittee to base their application on updated hydrogeological information.

The integrity of the barrier pillars as a barrier to groundwater movement notwithstanding, Gadinski also posits that water will be able to move through a number of "preferential pathways" created both by mining activities and tunnels, but also by natural faults and crevices in the bedrock itself. (N.T. 34-35.) This, to a point, is not in dispute. Anthracite mines, like those under the Locust Summit Project site, drain through a system of tunnels to a known discharge point to prevent water from collecting in the mine. Here, Hershey testified that the deep mining in the area of the Project site and the system of tunnels created by this earlier mining dominate the flow of groundwater. (N.T. 388-390.) The Board agrees with Hershey and the Department that the system of tunnels and mine workings under the Project site will direct water from the site to flow north away from Appellants' wells to the south.

Gadinski also points to tunnels and other mine workings south of barrier pillar XXXIX as

preferential pathways that could allow groundwater from the Project site to flow to Appellants' water wells further to the south. (N.T. 52-54.) Because the Board finds that there is a groundwater divide in barrier pillar XXXIX, as Hershey testified, these tunnels and other workings south of this barrier pillar will not allow groundwater from the Project site to flow south towards Appellants' water wells. (N.T. 364-365.) Groundwater under the Project site will flow north away from Appellants' water wells as Hershey testified. (N.T. 389.)

In addition, Hershey, in contrast to Gadinski, does not believe that other cracks and faults in the rock will create other "preferential pathways" to carry the water away from the mine drainage system under the Project site and towards residential wells to the south and across the barrier pillars. (N.T. 372.) The Board finds Mr. Hershey's testimony more credible on this point. (N.T. 379.) Without disagreeing with Gadinski about the fact that the bedrock is generally full of cracks and fractures, and even yielding that not every molecule of water can be accounted for, Hershey persuasively explained why the hydrogeology underlying the site will contain the vast majority of water that flows away from the site and prevents it from flowing towards residential wells towards the east and the south of the site. (N.T. 372-376.)[9] Aside from the reasons established above, that the barrier pillars are functionally intact, Gilberton, through Hershey's testimony, has adequately demonstrated that the groundwater gradient flows from south to north below the ash placement area. (N.T. 375-376) Any contaminated water, which would somehow cross the barrier pillar, would still be collected by the mine drainage system to the south of the site and discharge at the Brenzel Tunnel/Rock Slope discharge point, a point monitored by Gilberton. (N.T. 381-382.) This monitoring point is between the Project site and

[9] The Board also rejects Appellants' claim that the Department should have required Gilberton to obtain core samples of the barrier pillar. The Board accepts Hershey's testimony that core samples were not needed and that Gilberton's approved monitoring system is better in understanding whether water is moving through fractures. (N.T. 394-395.)

Appellants' homes and wells.

Furthermore, the necessity to rely on the Brenzel Tunnel/Rock Slope monitoring point to protect surrounding residential water supplies was established by Mr. Hershey as quite unlikely. Water from the ash placement site flowing south must flow in the opposite direction of the groundwater gradient which flows, strongly, from south to north and away from Appellants' homes and wells.

In the Appellants' Brief, they contend that Gilberton has failed to establish the groundwater gradient under the ash placement area. We disagree. The objections laid out in opposition to Gilberton's finding of a south-to-north groundwater gradient center around Gadinski's testimony that Gilberton failed on three levels in their investigation. First, Gadinski believes that the wells drilled underlying the ash placement area are arranged in a south-north line, which do not allow for modeling of east and west affects. Second, during the drilling of the AP-5 well, Gadinski points out that the drill operator began encountering wet and saturated conditions almost immediately after beginning to drill, but continued to drill. Gadinski contends that the well operator should have stopped drilling as soon as wet conditions were encountered to ensure that the final elevation of water in the well would accurately model the groundwater elevation. Third, Gadinski would have Gilberton conduct a dye test to establish the flow and discharge of groundwater around the site.[10]

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[10] In their brief, the Appellants make a fourth point purporting to demonstrate that Gilberton had inadequately modeled the groundwater gradient at the site, by pointing to brief cross-examination where the Appellants' attorney elicited an admission from Mr. Hershey that although Hershey testified that well AP-3 demonstrated a significant response to a major rainfall event – a response which Hershey took to support Gilberton's position that AP-3 accurately modeled drainage from the site – AP-3 was the only well for which Gilberton had data immediately following the rain event. Although the Appellants would like us to take this "gotcha" moment to undermine Hershey's credibility, the Appellants do nothing to show us why Hershey's opinion about AP-3 is false, or to show us any evidence whatsoever refuting AP-3's usefulness to monitor the site's drainage. The Board agrees with Mr. Hershey that data from the extraordinary rain event actually supports his overall position. (N.T. 346.) As we set out in the

To begin with Gadinski's initial point (that the wells drilled under the site do not allow for the triangulation of groundwater flow, and therefore only allow for groundwater flow to be measured along the single north and south direction), Gadinski only considered the three wells that are located in close proximity within the ash placement area. Hershey, when questioned on the same point, responded that he did, in fact, triangulate groundwater flow using two of the wells in the ash placement area *and* a third well, AP-1, located directly to the west, allowing him to establish a flow from south to north using a measurement that would have detected east and west flow as well. (N.T. 401.) Gadinski neglected to consider this well when he testified. Again, the Board finds that Mr. Hershey's testimony is more credible than Mr. Gadinski's because he did not ignore the third well needed to triangulate groundwater, AP-1.

Moreover, Hershey observed the actual depth of water in the AP-5 hole, when it was drilled. He observed the water level at 34 to 39 feet below the surface, and he was able to use the water level in AP-5 to establish the correct groundwater gradient. (N.T. 347.) Because the water level AP-4 was always higher than AP-5 the groundwater north of AP-4 always flows north. (N.T. 371.)

Gadinski's final objection to Gilberton's efforts to characterize the groundwater gradient was to demand that Gilberton be ordered to conduct dye testing to follow the groundwater flow because it would conclusively demonstrate a hydrologic connection between the site and a given monitoring point. While it is true that dye or trace tests can be conducted to show groundwater flow, such a test is inappropriate for the geology at the Locust Summit Project site. (N.T. 396-397.) Hershey testified that it is common to use a dye test for limestone areas and for quarries, or where a stream has gone into a sinkhole, to map where there is a connected spring. Here,

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beginning, the Appellants have the burden of production and proof. Simply raising questions about the permittee's evidence is not going to meet their burdens.

however, examining the flow on the way to the Appellants' properties involves water passing through bedrock, some of which has not been mined. Hershey explained that the range for feet per day or feet per year that water flow could be very broad. Therefore, when beginning a dye test, there is no way to know that the test has been conducted for a long enough period to be satisfied that there is no hydrological connection between the site and, as Hershey offered, Gadinski's house, located 3,000 feet away. (N.T. 396-397.) The Board agrees with Mr. Hershey that the use of a dye test, as Mr. Gadinski asserted, was not necessary or appropriate to characterize groundwater flow under or near the Project site.

Finally, the Appellants make a brief argument that subsidence near the area "could potentially affect two of Gilberton's monitoring wells." They assert that three subsidence events took place during the 1990's at the same location, which were subsequently filled in with unknown on-site material. They protest that the Department was unaware of the existence of the subsidence at the time that they granted the permit and that the subsidence shows the instability of the surrounding area. Houtz testified that knowing about the subsidence earlier would not have changed the way that the Department looked at the project. Any affect produced by the subsidence and related placement of fill would have become part of the background water sampling in the area. He opined that any subsidence during the 1990's would have made no difference regarding the current hydrogeology of the area. (N.T. 462.) The Board agrees with Houtz.

In summary, we find that Hershey's testimony credibly addresses the Appellants' objections to Gilberton's efforts to characterize the site as an appropriate location for coal ash placement, and his testimony was met with full agreement by the Department's expert as well. (N.T. 474.) Further, Hershey's testimony goes beyond Gadinski's objections in support of

Gilberton's permit application as well. Hershey's testimony is based upon his finding that there are intact barrier pillars and the resulting groundwater divide directs water to the north, away from residential wells and the aquifer they rely upon. He also found a steep groundwater gradient to the north, which is supported by decreasing groundwater elevations to the north and dips in the slope of the bedrock towards the north, supported by the data of collected from the monitoring wells. Further, these findings are consistent with the influence of deep mining below the Locust Summit Project site and in the surrounding area, an influence which does and will continue to dominate the flow of groundwater to the north in and around the site.

Appellants have therefore not met their burden to establish their claim that Gilberton failed to adequately characterize the Project site, which is necessary for Appellants to further establish that the site is not an appropriate location of the placement of ash.

Gilberton's Approved Groundwater Monitoring Plan is Capable of Detecting the Off-site Migration of Significant Levels of Contaminants from the Project Site

The Appellants next assert that Gilberton's approved groundwater monitoring plan is inadequate because it is not capable of detecting any migration of significant levels of contaminants from the Project Site as required under *Citizen Advocates United to Safeguard the Environmental, Inc. ("CAUSE") v. DEP*, 2007 EHB 632, 688-692. The Appellants have correctly identified the legal requirement that a monitoring system, such as the one approved by the Department for the Project site, must be capable of detecting the off-site migration of significant levels of contaminants. The Appellants have, however, not applied this standard to the facts of this appeal. For the reasons set forth below, the Board agrees with the Department and Gilberton that Gilberton's approved groundwater monitoring plan is capable of detecting the off-site migration of significant levels of contaminants.

Gilberton's approved monitoring system has monitoring points that are both north and

south of the area where fly ash will be place under the beneficial use approval. Monitoring points AP-1 and AP-3 are directly north of the area, and as discussed in other parts of the Adjudication, the Board has determined that this is the direction that groundwater will flow from the site. Monitoring points AP-1 and AP-3 are located within the overall ash operations area, and they are very close to the ash placement area. These monitoring points are capable of detecting off-site migration of significant levels of contaminants from the beneficial use placement area. (N.T. 381.)

Gilberton's approved monitoring system is also capable of detecting the off-site migration of significant levels of contaminants from the beneficial use placement area in the unlikely event that groundwater flows south as the Appellants have alleged. (N.T. 385.) There are three monitoring points to the south: AP-4, AP-6, and the Brenzel Tunnel/Rock Slope discharge. Monitoring point AP-4 is closest to the placement area, and it is located in barrier XXXIX along the groundwater divide. It will provide the most direct indication of the off-site migration of contaminants because it is within one hundred feet of the southern edge of the ash placement area. The Brenzel Tunnel/Rock Slope discharge monitoring point collects water south of barrier pillar XXXIX from the Lavelle and Lykens Valley 4 Mines. AP-6 is an additional monitoring well between the Brenzel Tunnel/Rock Slope discharge and monitoring point and the residential wells to the south. These additional monitoring points are capable of detecting off-site migration of significant levels of contaminants from the ash placement area and guard against the very remote possibility of groundwater flowing south from the ash placement area.

The situation in this appeal is very different than the situation the Board faced in the *CAUSE* appeal. In *CAUSE,* the single down gradient monitoring point, the Hazelton Shaft, was one and one half miles away from the project area where massive amounts of residual waste

were approved for placement under a beneficial use approval. The Board correctly determined that the Hazelton Shaft monitoring point was not capable of detecting off-site migration because "the water in the shaft [Hazelton] is so diluted that a monitoring point there will be all but useless in detecting any contaminations that emerges from the site." *CAUSE*, 2007 EHB at 293. The situation in this appeal is very different. Gilberton is not proposing to monitor at the Helfenstein Tunnel discharge which is comparable to the Hazelton Shaft in the *CAUSE* appeal.[11] Gilberton has proposed, and the Department has approved, several monitoring points that are on or immediately adjoin the overall ash operations areas. These approved monitoring points are capable of detecting that off-site migration of significant levels of contaminants from the approved ash placement areas.

Nevertheless, we, responding to the Appellants' objection generally, examine the groundwater monitoring system set up by Gilberton to ensure that the Department's decision to approve the permit revision was reasonable. The monitoring system, designed by Hershey, places most of the monitoring points in close proximity to the ash placement site to allow them to be as reactive as possible should the constituents of the ash migrate via the groundwater. (N.T. 391.) One additional point is located further from the site at the Brenzel Tunnel/Rock Slope discharge, to monitor any affect that the site might have on the mine tunnel system south of the site at its discharge point. Finally, a permit condition mandated that an additional monitoring well, AP-6, was placed between the ash placement area and the closest residential well, directly south of the site.

We believe this monitoring system is well designed to detect any migration of ash constituents through the groundwater surrounding the site. To monitor the known northern flow

[11] The Helfenstein Tunnel is the groundwater outlet for the Locust Gap Mine complex and it is about two miles from Gilberton's approved ash placement area. The Locust Gap Mine complex underlies

of groundwater for ash contamination, wells AP-1 and AP-3 are positioned on the eastern and western ends of the northern side of the ash, and placed closely to provide the earliest notification. (N.T. 391, 393.) AP-4, as we discussed previously, is a well drilled into the barrier pillar that follows the southern border of the ash placement area. By being drilled adjacent to the deepest portion of the ash, and drilled into the pillar, it will both demonstrate the pillar's efficacy as a groundwater divide and act as an indicator to the south at the most extensive point of ash placement. (N.T. 391.) Further, AP-4 is joined by two other points south of the ash placement, MP-7 in the Brenzel Tunnel/Rock Slope discharge which monitors the water flowing through the mining tunnels and the mine affected areas to the south of the ash placement area, and AP-6, a final well installed by the Department's requirement as a permit condition, to place an additional well between the ash placement area and the closest residential well. (N.T. 353, 392.) Finally, any groundwater contaminants that would migrate away from the site to the east would be observed in the Potts Mine discharge, monitored at MP-6. (N.T. 337.) Thus, contrary to Appellants' assertions, Gilberton's approved monitoring plan is capable of detecting the off-site migration of significant levels of contaminates from the Project site.

Use of SER FBC Ash for Reclamation of Pit at Locust Summit Project Site

The Appellants argue that their private water supplies will be adversely affected by Gilberton's beneficial use of coal ash to reclaim the pit on the Project site. For this to occur, two events would need to occur. First, the coal ash would have to leach contaminants at levels to cause pollution to their private water supplies. Second, the contaminants would have to travel from the Project site to reach their private water wells that Appellants have identified as likely to be adversely affected. The evidence introduced at the hearing does not support either of these propositions. The first issue will be addressed below. The second issue was initially addressed

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Gilberton's approved ash placement area.

above in the Adjudication when the Board addressed Appellants' objections to Gilberton's initial site characterization and approved monitoring plan. There is, however, one additional aspect to this contention that Appellants also raise that will be addressed below.

The Appellants presented the testimony of Dr. Bryce Payne, Jr., Ph.D., who was qualified as an expert in soil science, coal ash, and the effects of coal ash on water quality, to assert that the ash certified for placement at the Locust Summit site poses a particular danger to nearby residents when beneficially used as permitted. Dr. Payne's testimony focused on the constituents of the ash, their dangers, and the physical attributes of the ash, which, in his opinion will lead to the contamination of groundwater affecting Appellants' private water wells. In essence, Payne believes that the leachate from the ash, certified for placement, will be contained within the ash placement area only until a significant rain event will cause a surge in hydraulic pressure that forces the leachate out of the sides and bottom of the ash placement. (N.T. 212, 236-240.) Payne arrived at his conclusion by drawing from wide examples, discussing various types of ash and various types of placement, at times interchangeably. As a consequence, his conclusions that there is a great deal of uncertainty associated with the placement of coal ash, was one where the uncertainty of outcome from placement was more a matter of what the particular variables would be in this placement and less a question of what would happen under the particular permitted situation here. His lack of familiarity with the conditions and ash approved by the Department for placement at Locust Summit cause us to question any value that his expert opinions sought to provide.

The Department presented the testimony of Sharon Hill, P.G., who was qualified as an expert in geology, hydrogeology, hydrogeology of surface and underground anthracite mining, hydrogeology of coal ash placement to reclaim anthracite surface mining sites and the chemical

composition and behavior of coal ash placed at mine sites. Ms. Hill testified in support of the appropriateness of the placement of the SER FBC ash at the Locust Summit site under the conditions laid out by the Department.

A major point of disagreement between Dr. Payne and Ms. Hill is Dr. Payne's assertion that contaminants in toxic amounts will leach out of the coal ash used at the Project site for reclamation. In contrast, Ms. Hill asserts that the SER coal ash is well within the certification limits and will not leach out contaminants in toxic levels. (N.T. 549-550.) The Board finds that Ms. Hill's testimony is more credible based upon her experience. Ms. Hill has investigated complaints that coal ash for mine reclamation has caused groundwater degradation. (N.T. 545-546.) In addition, she has reviewed groundwater monitoring data for sites in Pennsylvania, and she has not seen any evidence of groundwater degradation at any of these sites. (N.T. 545-546.)

Dr. Payne on the other hand gave widely varied estimates of the likelihood of degradation of groundwater from the use of coal ash on the site. Dr. Payne asserted that there is roughly a 60 to 70 percent likelihood that coal ash proposed for use on the Project site will leach toxic contaminants at some point in the future. (N.T. 208-209.) Later, he asserted that there is a 90 percent probability of adverse impact to the aquifer south of the Project site that is the source of Appellants' water wells. (N.T. 282.) He then backed off this estimate and testified that there is a 50 percent probability that there will be adverse impacts to Appellants' water wells in 10 to 30 years. (N.T. 282-283.) Dr. Payne's inability to provide a consistent answer to the questions about degradation of groundwater from contaminants leaching from the coal ash severely undercuts the credibility of his testimony.

Another point of disagreement between Dr. Payne and Ms. Hill is Dr. Payne's testimony that the coal ash itself would cause water from the Project site to flow south to degrade

Appellants' water wells. The Department and Gilberton disagree, and the Board agrees with them and finds that Dr. Payne's concerns are not credible for the reasons set forth below.

Under Dr. Payne's view, coal ash can act like a sponge and retain a large amount of water. The water is perched in the ash against gravity, and eventually the height of the ash and the retained water will be above the barrier pillars. (N.T. 238-239.) As more ash is placed in the Project site more water is collected until the weight of the additional ash and water becomes too great and the water is suddenly released. According to Dr. Payne, the point of release can be in any direction and at higher elevations in the ash pile allowing the released water to flow south over the coal barrier and towards the Appellants' wells.

The Board rejects this position and gives Dr. Payne's testimony no credibility for the following reasons. First, Dr. Payne's testimony was based on the assumption that about one million tons of coal ash will be placed in the Project site, and this assumption is wrong based upon the stipulated record before the Board. See Footnote 1, pages 4-5 of this Adjudication, (N.T. 240.) As the parties stipulated the proposed net volume of ash to be placed in the pit is estimated to be 350,612 cubic yards with an estimated life span of approximately 9.8 years. Finding of Fact 21, based on Stipulated Fact 18. According to Dr. Payne 350,612 cubic yards converts to approximately 250,000 tons of coal ash. (N.T. 289-290). The agreed to stipulated record reveals that Dr. Payne based his opinion on an amount of ash that is approximately four times greater than the amount of ash that the parties stipulated will be used. Dr. Payne's mistaken assumption severely undermines his testimony on this point. Second, Dr. Payne's opinion is premised upon his assertion that coal ash acts like a sponge and retains large amounts of water until it is suddenly released. Ms. Hill disagreed and testified that coal ash does not have a high water retention capacity, and when it is compacted any retained water is displaced because

coal as is a very fine grain material that has little pore spaces to retain water. (N.T. 548, 558 – 560.) The Board finds Ms. Hill's testimony more credible. She testified that coal ash, when it is appropriately worked, can be compacted to produce beds with low permeability. (N.T. 375.) The permit conditions require that the coal ash, placed on the Project site, is appropriately worked. The coal ash must be spread and compacted in lifts two feet or less within 24 hours of on-site placement. (N.T. 445-447.)

Hill testified that the ash placement, as permitted, is intended to form an impervious plug of material similar to concrete in order to reduce acid mine drainage, promote positive surface drainage and reduce the danger posed by open mine pits. (N.T. 530-532, 557-558.) The placement at Locust Summit is required under very specific moisture, storage, grading, and placement conditions to ensure that the site maintains a solid foundation. The ash will not be placed as a slurry, and the solid ash will be walked or driven upon and will be more like a brick than like a sponge as Payne contended. (N.T. 532-533.) Hill based her conclusions on the Department's observations through twenty years of utilizing coal ash placement programs, the success of the programs at sites across the Commonwealth, specific instances where the ash has been placed specifically as a low-permeability material, and the Department's testing for hydrologic conductivity, finding that the ash becomes impermeable. (N.T. 557-558.)

The Appellants' expert witness does not even contest this point – when asked, whether "coal ash, when appropriately worked, can be compacted to produce beds with low permeability?" Dr. Payne simply replied, "yes." (N.T. 325.) Payne agreed with Hill that coal ash when properly worked can produce coal ash beds with low permeability which is exactly what the permit conditions require. At best, all of Payne's testimony raises hypothetical problems that could happen with some coal ash placed in some improper fashions at some sites.

He did not in any meaningful way identify any specific concerns with Gilberton's beneficial use of the SER FBC coal ash at the Project site under the permit conditions imposed by the Department. The Appellants have not met their burden to demonstrate that there is anything deficient about the Department's approval of the permit revision to allow Gilberton to place SER FBC ash at Locust Summit Project site.

Additional Concerns

The Parties also raise several additional concerns that the Board will briefly address below. The Appellants briefly cite to the regulatory requirements that coal ash should not be placed within eight feet of the regional groundwater table, but they have failed to lay out any argument that the permit revision and Gilberton's plans for ash placement at Locust Summit would violate this regulatory requirement. *See* 25 Pa. Code § 287.663(d)(6). In fact, Special Condition 37 of the permit revision requires that a minimum of eight feet of fill material be maintained between the coal ash and any coal outcrop or seam or any groundwater elevation. Gadinski attempted to make the point during the hearing that if there was flawed data on the groundwater height below the ash placement area, the water level could be less than eight feet from the ash placement. The Board has rejected his point on groundwater height below the Project site. Moreover, even if Gadinski was correct on this point, the requirement in the permit for fill placement overcomes any objection that the Appellants could have made had that argument been presented in their Post-Hearing Brief. With the minimum of eight feet of fill requirement, groundwater will always be at least eight feet from ash placement.

The Appellants have objected to the Department's decision to *not* require that Gilberton sample the residential wells of the Appellants. Without these background sampling results, the Appellants claim there will be no way to determine if a problem develops from Gilberton's

beneficial use of coal ash on the project site. All Parties agree that the Department did not require Gilberton to sample the residential wells of the Appellants or any residential well that is closer to the project site than the Appellants' wells. In addition, the Board does not know if the Appellants have sampled their wells because none of Appellants provided testimony or other evidence to the Board regarding the background quality of the water from their residential water wells. To address this objection of the Appellants, the Board will need to decide whether it was reasonable for the Department to approve Gilberton's permit revision without this information. For the reasons set forth below, the Board rejects the Appellants' objection based upon the facts of this appeal.

To address this objection, the Board is required to resolve one of the factual disputes between the Appellants and the Department and Gilberton regarding the distance between the coal ash placement area and the Appellants' residential water wells. The Appellants claim that the Burkes' residential water well is approximately "50 yards (150 feet) downhill from the pit." Appellants also assert that Gadinski's well is within 1000 to 1500 feet from the coal ash placement area. Gilberton challenges these assertions, and it asserts that Gadinski's home and well are about 3000 feet away from the pit. (N.T. 384.) Gilberton asserts that the closest private well is approximately 1740 feet from the project site, and that the closest water well is not the Burkes' which is located further away from the project site than the closest private water well identified on Gilberton's Exhibits 8.3 and 8.3A. (Permittee's Ex. 16 and 65.) Neither the Department nor Gilberton provide a more detailed estimate of the distance from the project site to the Burkes' home and water well.

The Board rejects the Appellants' claims as not credible and accepts Gilberton's testimony and evidence concerning the distance between the project site and the Gadinski and

Burke home and private water wells. Gadinski's home and water well is about 3000 feet from the project site and the Burkes' water well is more than 1740 feet away from the project site. Based on the Board's earlier finding that water from the Project site will flow north away from Appellants' wells, as Gilberton and the Department assert, the Department did not abuse its discretion in deciding not to require the sampling of Appellant's residential wells.

On a different point, the Appellants assert that the use of coal ash must be "designed to achieve an overall improvement in water quality or shall be designed to prevent, the degradation of water quality". 25 Pa. Code § 287.663(c). The Department and Gilberton agree with this statement and assert that the use of coal ash at the Locust Summit Project site is designed to achieve this important overall requirement. The Board agrees with the Department and Gilberton that the Project is designed to achieve an overall improvement of water quality in the greater Project area. The unreclaimed pit currently collects stormwater runoff and diverts it into abandoned mine workings where it can become mine drainage. (N.T. 380.) By reclaiming the pit, Gilberton reestablishes positive drainage and appropriate surface contours that divert stormwater away from the pit where it was previously able to enter the old underground mine workings. Reclamation of the pit is, therefore, designed to improve water quality in the greater project site area, and it meets the regulatory requirements in Section 287.663(c).

The Board rejects Gilberton's argument that the Department's legal determinations in approving the permit must be "treated with deference" under *DEP v. North American Refractories Company ("NARCO")*, 791 A.2d 461 (Pa. Cmwlth. 2002). Under *NARCO,* the Board is required to give Department interpretations of regulations deference, but the deference does not extend to include the Department's determinations that Gilberton complied with Department's permitting requirements and is entitled to the permit modification. These

Department decisions are not interpretations of its regulations and are not entitled to deference under *NARCO*. The Department considered and applied its regulations to Gilberton's permit applications, but this consideration does not make the Department's permit decision under appeal a regulatory interpretation. The Department's permitting decisions at issue in this appeal are not entitled to deference as a Department regulatory interpretation would be under appropriate circumstances under *NARCO*.

The Appellants also object to the fact that the Department did not require that Gilberton take twelve months of background water sampling of all of the monitoring points prior to issuance of the permit revision. After the permit revision was issued, the Department nevertheless required Gilberton to update one module of its application to conduct twelve months of sampling of all monitoring points, including the new monitoring points added by permit condition, prior to ash placement. This additional water sampling is consistent with a Department Technical Guidance Document that was newly updated after the permit revision was approved. The record before the Board established that the Department directed Gilberton to collect twelve months of background samples from the all monitoring points by the date of the hearing.

Conclusion

It is evident that the Appellants' have failed to carry their burden to demonstrate that the Department's issuance of the permit revision to Gilberton was unlawful, unreasonable, or unsupported by the facts. The Appellants have not persuaded us that the placement of the SER FBC ash at the Locust Summit site poses an unreasonable risk to human health and the environment, or is in any way contrary to the law. Moreover, the Department's failure to complete a CHIA form at the time that the permit revision was issued did not prevent the

Department from finding that the project did not harm the hydrologic balance of the area. Further, the Appellants have not demonstrated in any way that the Department's hydrologic balance finding, at the time of the permit revision issuance or in the CHIA, was insufficient or incorrect. Lastly, the Appellants have failed to demonstrate that the permit revision would allow Gilberton to place ash within eight feet of the groundwater in violation of the regulations.

Accordingly, we will dismiss the Appellants' appeal and we make the following.

CONCLUSIONS OF LAW

1. The Board examines whether the Department's decision to issue the surface mining permit revision is lawful and reasonable and is supported by the evidence presented to the Board. *Wilson and Guest v. DEP*, 2010 EHB 827, 833.

2. The Appellants bear the burden of proof to demonstrate that the Department erred in issuing the permit revision. 25 Pa. Code § 1021.122(c)(2).

3. *De novo* review causes the Board to be less concerned with the Department's exact decision making methodology and procedures and focus instead on whether the Department's decision should be sustained based on the facts presented. *Leatherwood v. DEP*, 819 A.2d 604, 611 (Pa. Cmwlth. 2003).

4. Objections raised in the Notice of Appeal that are not raised in the post-hearing brief are deemed waived. 25 Pa. Code § 1021.131(c); *see also Lucky Strike Coal Co. v. DER*, 547 A.2d 447 (Pa. Cmwlth. 1998).

5. The Appellants have failed to carry their burden to demonstrate that the Department's issuance of the permit revision was unlawful, unreasonable, or unsupported by the facts.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT A. GADINSKI, P.G., Appellant and MR. AND MRS. FRANK BURKE, Intervenors	:	
v.	:	**EHB Docket No. 2009-174-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GILBERTON COAL COMPANY, Permittee	:	

ORDER

AND NOW, this 31st day of May, 2013, it is hereby ordered that the above captioned appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chief Judge and Chairman

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

Steven C. Beckman

STEVEN C. BECKMAN
Judge

DATED: May 31, 2013

c: **DEP, Bureau of Litigation:**
Attention: Glenda Davidson
9th Floor, RCSOB

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P.O. Box 450
Pottsville, PA 17901

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2011-021-CP-C**
v.	:	**Issued: June 4, 2013**
MIECZYSLAW KLECHA	:	

ADJUDICATION

By Michelle A. Coleman, Judge

Synopsis:

The Board assesses a civil penalty in the amount of $45,530 for violations of the Clean Streams Law and costs in the amount of $2,451.52. The Defendant does not dispute that he conducted unpermitted activities at the Site in violation of the Clean Streams Law and had a cost savings of $50,000 by continuing the unpermitted activities rather than complying with the law.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the provisions of the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1, et. Seq. ("Clean Streams Law"), and the rules and regulations promulgated under Title 25 of the Pennsylvania Code.

2. The Defendant is an individual, Mieczyslaw Klecha ("Klecha").

3. On April 30, 2002 the Department approved coverage under the NPDES General Permit for discharges of stormwater from construction activities (PAG-2) to Homestead in the Pines, LLC by NPDES Permit No. PAR101334 ("NPDES Permit"). The NPDES Permit

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http://ehb.courtapps.com

authorized the discharge of stormwater from construction activities to Saw Mill Run, a water of the Commonwealth. (Admitted; Klecha Post Hearing Brief, ¶ 3.)

4. The Homestead in the Pines development is located in Franklin Township, Carbon County. (Department's Exhibit ("DEP Ex.") 2 Klecha Post Hearing Brief, ¶ 3.)

5. Klecha entered a sales agreement to purchase Homestead in the Pines prior to the Department's approval of the NPDES Permit on April 30, 2002. (Admitted.[1])

6. On June 4, 2002 Klecha purchased the Homestead in the Pines subdivision (the "Site") from Frederick W. Sherrerd, III, and Nina E. Sherrerd. (Admitted; Klecha Post Hearing Brief, ¶ 4.)

7. Klecha engaged in construction activities at the Site without first acquiring a permit from the Department or having the NPDES Permit that was issued to Homestead in the Pines, LLC transferred to him. (Admitted; Klecha Post Hearing Brief, ¶ 5.)

8. The Carbon County Conservation District contacted Klecha on September 1, 2004 informing him that the NPDES Permit issued to Homestead in the Pines, LLC was not transferred to Klecha from the former owner of the Site. (Admitted; Klecha Post Hearing Brief, ¶ 7.)

9. During the first inspection of the Site on September 1, 2004, the Conservation District representative informed Klecha that he was required by law to possess a permit authorizing earth disturbance activities and stormwater management facilities needed to be installed at the Site. (T. 29-30; DEP Ex. 3; Klecha Post Hearing Brief, ¶¶ 31, 32.)

10. Klecha asserted that he "reasonably believed he had the permit due to his purchase of the Homestead in the Pines development . . . ." (Klecha Answer, ¶ 1; Klecha

[1] Admitted by Board Opinion & Order dated April 11, 2012.

Prehearing Memorandum, ¶ 9; Klecha Post Hearing Brief, ¶ 6.)

11. Klecha conducted construction activities at the Site which did not comply with the design requirement authorized by the NPDES Permit issued to Homestead in the Pines, LLC, nor did the activities comply with the approved erosion and sediment control plan for the Site. (Admitted; Klecha Post Hearing Brief, ¶ 8.)

12. The NPDES Permit authorized a discharge of stormwater from 3.8 acres of earth disturbance activities. (T.[2] 16; DEP Ex. 39-8, note 12; Klecha Post Hearing Brief, ¶ 9.)

13. Klecha disturbed approximately 10 acres of the Site through his construction activities. (T. 17; DEP Ex. 5; Klecha Post Hearing Brief, ¶ 10.)

14. The NPDES Permit did not authorize the construction of any residences on individual lots at the Site because the majority of lots 1 through 12 are outside of the identified limits of disturbance of the permit as expressly described in the plans associated with the permit. (Admitted; Klecha Post Hearing Brief, ¶¶ 17, 18.)

15. Klecha constructed all of the existing residences in the approximately 12 lot subdivision at the Site known as the Homestead at the Pines. (Admitted; Klecha Post Hearing Brief, ¶ 17.)

16. Klecha did not contact the Conservation District at least seven days prior to beginning construction activities at the Site as expressly required in the NPDES Permit. (Admitted; T. 26-27; DEP Exs. 1, 39-8; Klecha Post Hearing Brief, ¶¶ 15, 16.)

17. NPDES Permit requires that, "all lot owners will be required to have an adequate erosion and sedimentation control plan approved by the Carbon County Conservation District." (DEP Ex. 39-5; Klecha Post Hearing Brief, ¶ 19.)

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[2] Citations to the hearing transcript will be denoted as "T."

18. Klecha constructed houses at the Site without implementing and maintaining appropriate erosion and sedimentation control plan best management practices. (T. 55-57; DEP Exs. 81, 8n, 8o, 8p, 8q and 8r; Klecha Post Hearing Brief, ¶ 21.)

19. The NPDES Permit requires that "all lots shall have house roof drains connected to an underground infiltration system" and none of the houses constructed in the 12 lot subdivision at the Site have their house roof drains connected to underground infiltration systems. (Admitted; DEP EXs. 39-4, 19, 39-9; Klecha Post Hearing Brief, ¶¶ 22, 23.)

20. Klecha did not submit any individual erosion and sedimentation plans for any of the 12 individual lots at the Site. (Admitted; Klecha Post Hearing Brief, ¶ 20.)

21. On September 19, 2006 the Conservation District inspected the Site and observed that the erosion and sedimentation controls had not been installed, the construction sequence was not being followed and earth disturbance was occurring in areas beyond approved limits of disturbance, including unauthorized house construction. (T. 34; DEP Ex. 5; Klecha Post Hearing Brief, ¶ 35.)

22. On October 11, 2006 the Department issued a Compliance Order to Klecha concerning the unpermitted discharge of stormwater from earth disturbance activities at the Site requiring Klecha to cease all earth disturbance activities, to implement permanent stabilization best management practices for all disturbed areas, to submit a revised erosion and sediment control plan that conforms with both Department regulations and current Site conditions; and to acquire permit authorization for earth disturbance activities for the Site. (Admitted; Klecha Post Hearing Brief, ¶ 26.)

23. Klecha did not appeal the Department's October 11, 2006 Compliance Order. (T. 64; Admitted; Klecha Post Hearing Brief, ¶ 27.)

24. Klecha did not file any written non-compliance reports to the Department or Conservation District pursuant to the terms and conditions of the NPDES Permit. (Admitted; Klecha Post Hearing Brief, ¶¶ 24, 25.)

25. Klecha did not develop and submit a revised erosion and sediment control plan to the Conservation District by October 25, 2006 as required by paragraph 3 of the Department's October 11, 2006 Administrative Order. (Admitted; Klecha Post Hearing Brief, ¶ 52.)

26. Representatives of the Department and/or the Conservation District inspected the Site and observed the failure to implement erosion and sedimentation controls on the following dates: September 19, 2006, October 6, 2006, October 11, 2006, October 19, 2006, October 27, 2006, November 14, 2006, January 8, 2007, April 24, 2007, June 28, 2007, August 20, 2007, November 19, 2008 and June 23, 2009. (Admitted; Klecha Post Hearing Brief, ¶ 30.)

27. Klecha failed to produce an erosion and sedimentation plan on Site in response to a request from a representative of the Conservation District on October 11, 2006, October 19, 2006, October 27, 2006, November 14, 2006, January 8, 2007, April 24, 2007, June 28, 2007 and August 20, 2007, this is in violation of 25 Pa. Code § 102.4(b)(8). (Admitted; T. 44-45, 89, DEP Exs. 7, 9, 12, 15, 17, 19, 22, 24, 26, 30; Klecha Post Hearing Brief, ¶¶ 50, 59.)

Stormwater and Detention Basin

28. The approved erosion and sedimentation plan associated with the NPDES Permit expressly states, "[t]he Detention basin will be constructed prior to the roadway to allow additional time for stabilization." (DEP Exs. 2, 39-8; Klecha Post Hearing Brief, ¶ 13.)

29. NPDES Permit does not authorize the discharge of stormwater from any of the lots where houses were proposed to be constructed, and the areas where houses where proposed to be located are outside the limits of the Permit as shown in the approved plans. (T. 19-20; DEP

Ex. 39-5; Klecha Post Hearing Brief, ¶ 11.)

30. By letter dated May 31, 2006 Klecha's engineering consultant, Spotts, Stevens & McCoy, informed Klecha that additional storm water facilities needed to be constructed at the Site. (DEP EX. 4; Klecha Post Hearing Brief, ¶ 34.)

31. A field survey crew did not go to the Site until May 22, 2006 to determine a location for the basin. (DEP Ex. 4; Klecha Post Hearing Brief, ¶ 33.)

32. The basin that was installed by Klecha was not adequately installed because it never had a sediment filtering device. As a result, the facility was incapable of ever properly functioning as an erosion and sedimentation control facility. (T. 22-23, 91-92; DEP Exs. 39-5, 39-8; Klecha Post Hearing Brief, ¶ 36.)

33. The Conservation District provided written notice to Klecha on October 27, 2006, November 14, 2006 and January 8, 2007 that the basin lacked a filtering device. (DEP Exs. 15, 17, 19; Klecha Post Hearing Brief, ¶ 37.)

34. The sediment basin was not installed in accordance with the approved construction schedule in that the road had been installed prior to the basin. (T. 27-28; DEP Exs. 2, 39-8; Klecha Post Hearing Brief, ¶ 38.)

35. The approved erosion and sedimentation plan expressly provided that the basin will be constructed prior to the roadway, however the basin was still not stable even four years after the Conservation District's first inspection at the Site. (T. 40, 106-07; DEP Ex. 31b; Klecha Post Hearing Brief, ¶ 39.)

Road Construction

36. Klecha constructed two roads without first acquiring a permit from the Department or developing and implementing an erosion and sediment control plan. (T. 53-54,

61; DEP Exs. 8j, 8v; Klecha Post Hearing Brief, ¶ 54.)

37. One of the unauthorized roads constructed by Klecha without erosion and sediment controls led to another area on his property where construction and demolition waste was being burned. (T. 62, DEP Ex. 8y.)

38. Five years after the construction of the road, the roadside swales had yet to be installed at the Site. (T. 111, DEP Ex. 34h; Klecha Post Hearing Brief, ¶ 40.)

39. As of October 2006 Klecha had not installed Swale E in accordance with the terms and conditions of the NPDES Permit. (Admitted; Klecha Post Hearing Brief, ¶ 45.)

40. As of June 23, 2009 Klecha had not installed Swale B in accordance with specifications and the swale was not stabilized by appropriate erosion control measures. (T. 111; DEP Ex. 34h; Klecha Post Hearing Brief, ¶ 46.)

41. Klecha installed additional swales outside the approved limits of disturbance in a manner that would not have been approved by the Department because the design would have resulted in additional accelerated erosion and sedimentation. (T. 48, 58, 98; DEP Exs. 8d, 8s, 8t, 20a, 20b, 27q and 27r; Klecha Post Hearing Brief, ¶ 47.)

42. Two years after the construction of the road, Klecha still had not installed the drop inlet "to take water from the roadway and direct it to the detention basin" as required by the approved plans." (T. 42, 77, 85; DEP Exs. 18f, 20h; Klecha Post Hearing Brief, ¶ 41.)

43. When the drop inlet was installed, no silt filtering device had been installed. (T. 97-98; Klecha Post Hearing Brief, ¶ 42.)

44. The silt fabric fence that was installed by Klecha was not done properly so the facility did not function as a proper erosion and sedimentation filtering device. (T. 67-68; DEP Exs. 13d, 13f; Klecha Post Hearing Brief, ¶ 48.)

Stockpiles and Stabilization

45. Klecha created unapproved soil stock piles outside of the limits of disturbance without installing any temporary erosion and sediment control measures. 9T. 39; DEP Exs. 6d, 8x, 16c, 18b, 18c, 18d, 25b, 25e, 27h and 27i; Klecha Post Hearing Brief, ¶ 43.)

46. Representatives of the Department and/or the Conservation District inspected the Site and observed erosion and sediment control best management practices were not properly operating and maintained on the following days: September 19, 2006, October 6, 11, 19, 27, 2006, November 14, 2006, January 8, 2007, April 24, 2007, June 28, 2007, August 20, 2007, November 19, 2008 and June 23, 2009. (Admitted. DEP Exs. 5-9, 12, 13, 15-20, 22-27, 30, 31, 33 and 34; Klecha Post Hearing Brief, ¶ 49.)

47. Representatives from the Department and/or the Conservation District inspected the Site and observed a failure to stabilize areas that had been disturbed as a result of construction activities on: October 19, 2006, October 27, 2006, November 14, 2006, January 8, 2007, April 24, 2007, June 28, 2007, August 20, 2007, November 19, 2008 and June 23, 2009. (Admitted; DEP Exs. 5, 6, 7, 8, 9, 12, 13, 15, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 30, 31, 33 and 34; Klecha Post Hearing Brief, ¶ 51.)

48. The Conservation District representatives that inspected the Site had never observed any mulch applied at the required rate during any inspections. (T. 112; DEP Exs. 6a-6e, 8a-8c, 8g, 8h, 8l-8r, 8u-8y, 13a-13f, 16a-16f, 18b-18k, 20g, 20h, 23b-23e, 25a-25j, 27q-27t, 31a-31e, 34a-34h and 35; Klecha Post Hearing Brief, ¶ 44.)

Saw Mill Run

49. On January 8, 2007 a representative of the Conservation District inspected the Site and observed the discharge of sediment from unstablized earth disturbance on the Site to

waters of the Commonwealth. (T. 82-84; DEP Exs. 20a, 20e, 20f; Klecha Post Hearing Brief, ¶ 79.)

50. The Department determined on August 6, 2004 that Saw Mill Run has attained an in stream water use of "Exceptional Value" as that term is defined by Chapter 93 of the Department's regulations at Title 25 of the Pennsylvania Code. (Admitted; T. 32; Klecha Post Hearing Brief, ¶ 77.)

51. Klecha disturbed the soil outside of the approved limits of disturbance and immediately adjacent to an exceptional value surface water without adequate erosion and sediment controls. (T. 46-47; DEP Exs. 8a, 8b; Klecha Post Hearing Brief, ¶ 53.)

52. On August 20, 2007 representatives of the Department and/or Conservation District conducted an inspection of the Site and observed the discharge of sediment pollution from the Site to Saw Mill Run. (T. 53, 94-95, 100-01; DEP Exs. 8h, 8i, 26, 27n, 27o, 27p; Klecha Post Hearing Brief, ¶¶ 55, 78.)

Transfer Application

53. On or about February 26, 2007 Klecha, through his counsel, submitted an incomplete application to transfer the NPDES permit from Homestead in the Pines, LLC to himself. The application was incomplete due to a lack of signatures from the prior owner. (Admitted; T. 126, 138; Klecha Post Hearing Brief, ¶ 56.)

54. On April 30, 2007 the NPDES Permit issued to Homestead in the Pines, LLC expired by its own terms. Klecha did not submit any application to renew the NPDES Permit. (Admitted; T. 33, 138-39; Klecha Post Hearing Brief, ¶ 58.)

55. The transfer application was to be submitted 90 days prior to the expiration of coverage, April 30, 2007. Klecha submitted his incomplete application after the deadline to

submit a renewal application. (DEP Ex. 1; Klecha Post Hearing Brief, ¶ 57.)

56. On May 5, 2009 Klecha submitted an application for an NPDES permit for the discharge of stormwater from construction activities at the Site. (Admitted; Klecha Post Hearing Brief, ¶ 62.)

57. The application submitted by Klecha on May 5, 2009 was technically deficient and failed to meet appropriate design standards. (T. 154-55; Klecha Post Hearing Brief, ¶ 63.)

58. On November 30, 2009 the Department sent a technical deficiency letter to Klecha that identified several deficiencies of the pending permit application which accompanied the post construction stormwater management plan. The letter requested a written response to the identified deficiencies on or before January 29, 2010. (Admitted; Klecha Post Hearing Brief, ¶ 64.)

59. Klecha was informed by his newly hired engineering consultant, Keystone Consulting Engineers, that it would cost an additional $50,000 to address the technical deficiencies identified in the Department's November 30, 2009 technical deficiency letter. (T. 186; Klecha Post Hearing Brief, ¶ 65.)

60. On May 11, 2010 the Department sent a letter indicating that the Department had not received a response to its November 30, 2009 technical deficiency letter. The Department also represented that it would return the application if a response to the technical deficiency letter was not received on or before June 10, 2010. (Admitted; Klecha Post Hearing Brief, ¶ 67.)

61. The Department did not receive a response to its May 11, 2010 letter. (Admitted; Klecha Post Hearing Brief, ¶ 68.)

62. Franklin Township delayed releasing Klecha's bond because he had not installed the roads and associated appurtenance in accordance with the specifications authorized by the

NPDES Permit. (Admitted; Klecha Post Hearing Brief, ¶ 69.)

63. Franklin Township had issued a stop work order for the Homestead in the Pines development in 2007. (T. 167; Klecha Post Hearing Brief, ¶ 70.)

64. On July 16, 2010 the Department sent a letter to Klecha's attorney and a proposed Consent Order and Agreement. The letter indicated that the Department would pursue formal enforcement if the matter could not be resolved through written agreement. The letter requested a response within three weeks. (Admitted; Klecha Post Hearing Brief, ¶ 71.)

65. The Department received no response to its July 16, 2010 letter and associated Consent Order and Agreement. (Admitted; Klecha Post Hearing Brief, ¶ 72.)

66. On December 1, 2011 the Department sent a letter to Klecha indicating that it had not received a response to its November 30, 2009 technical deficiency letter and that the Department would return the application if it did not receive a response in thirty days. (DEP Ex. 45; Klecha Post Hearing Brief, ¶ 73.)

67. The Department never received a response to its November 30, 2009 technical deficiency letter. (T. 33, 117; Klecha Post Hearing Brief, ¶ 75.)

68. On January 9, 2012 the Department issued a letter returning Klecha's permit application and notifying Klecha that the Department considered the application to be withdrawn. (DEP Ex. 46; Klecha Post Hearing Brief, ¶ 74.)

69. Representatives of the Department and the Conservation District met with Klecha and his agents on several occasions to discuss the chronic violations at the Site. (T. 63, 87, 103, 139-40; DEP Exs. 10, 21, 28, 29; Klecha Post Hearing Brief, ¶ 81.)

70. The Conservation District expended $2,451.52 in inspecting the site and participating in enforcement meetings associated with violations occurring at the Site. (Admitted;

Klecha Post Hearing Brief, ¶ 76.)

71. The Department's Complaint requests a civil penalty in the amount of $45,530 for the violations of the Clean Streams Law set forth above.

DISCUSSION

This matter began with the Department filing a Complaint for an assessment of civil penalties against Klecha for unpermitted activities he conducted at the Site in violation of the Clean Streams Law. Our role where the Department has filed a complaint for penalties under the Clean Streams Law is slightly different than our review in an appeal from the Department's assessment, we determine whether the underlying violations occurred, and then decide whether the amount assessed is lawful, reasonable and appropriate. *DEP v. Leeward Construction*, 2001 EHB 870, 885-86. The Board is responsible to assess a penalty based upon the applicable statutory and regulatory criteria and precedent. *DEP v. Kennedy*, 2007 EHB 15, 25; *DEP v. Hostetler*, 2006 EHB 359, 365. The Board will consider the willfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration and other relevant factors, such as cost savings to the violator, volume of discharge, size of the violating facility and the deterrent effect. *DEP v. Perano*, 2011 EHB 878-89; *DEP v. Angino*, 2007 EHB 175, 2003; *DEP v. Kennedy*, 2007 EHB at 25-26.

In Count I of the Department's Complaint, the Department provides that Klecha engaged in earth disturbance activities in violation of Section 402 of the Clean Streams Law, 35 P.S. § 691.402 and Section 102.5(a) of the Department's erosion and sediment control regulations, 25 Pa. Code § 102.5(a). Klecha purchased the Homestead in the Pines on June 4, 2002. On September 1, 2004, the Conservation District inspector happened to be in the area and noticed the earth disturbance activities. He informed Klecha, in person, that he needed to apply for a

transfer of the existing permit because the permit had never transferred to him at the purchase of the Homestead in the Pines. The Conservation District then followed up the conversation with a letter reasserting that the permit issued to Homestead in the Pines, LLC, did not transfer to Klecha and he would need to submit an application for a transfer. He failed to get the permit transferred in accordance with the Department's request.

Klecha argues in his post hearing brief that "he mistakenly believed he had an appropriate permit without realizing that he had to have it transferred from the original owners." (Klecha Post Hearing Brief, p. 16.) He claimed that he could not obtain the original owners' signatures necessary for the transfer.

In Count II of the Department's Complaint the Department states that Klecha's earth disturbance activities caused discharge of pollution to Saw Mill Run. Under Section 401 of the Clean Streams Law, "[i]t shall be unlawful for any person . . . to put or place into any waters of the Commonwealth, or allow or permit to be discharge from property owned or occupied by such person . . . into any waters of the Commonwealth, any substance of any kind or character resulting in pollution herein defined." (35 P.S. § 691.401.) On August 20, 2007 sediment pollution was being discharged from the Site to the water of the Commonwealth. (T. 94-95, 100-01; DEP Ex. 26, 27n, 27o and 27p.) There was also accumulated sediment on the stream bed in the area of the discharge basin and the area where Klecha engaged in earth disturbance activities. (T. 52-53; DEP Ex. 8.) There was also evidence of sediment pollution leaving the Site and entering the waters of the Commonwealth on January 8, 2007 from the unauthorized earth disturbance. (T. 82, 84; DEP Ex. 20a, 20c, 20e, 20f.) Klecha does not dispute that sediment pollution discharged from the Site into Saw Mill Run, a water of the Commonwealth.

Count III of the Department's Complaint states that two years after the Department

notified Klecha that he did not have a permit, that he did not have erosion control measures installed, and that the Site was unstable, he still had done nothing to evaluate the problem. The Department issued a compliance order on October 11, 2006 to compel Klecha to comply with those requirements. (DEP Ex. 11.) Failure to comply with a Department order is a violation of the Clean Streams Law, 35 P.S. § 402.

The compliance order required Klecha to cease all activities until the Department provided written authorization to resume the earth disturbance activities. Klecha was also ordered to stabilize the Site by implementing BMPs for all disturbed areas. He also had to submit an erosion and sediment control plan by October 25, 2006 in compliance with the Department's regulations and to obtain a permit for the activities at the Site.

Klecha claims he did not disturb the Site after 2007, however the photographs in evidence indicate recently disturbed earth at the Site. Also, the October 11, 2006 order required Klecha to cease all activities immediately. (DEP Exs. 34b, 34g.) Klecha also did not stabilize the Site, by seeding or mulching the disturbed areas. Six months beyond the date of the order, Klecha still had not stabilize the Site. (DEP Ex. 13b, 23c). The permit issued to the previous owner required mulch in the amount of 3 tons per acre and the District's inspector testified that he had never seen mulch applied at that rate at the Site. (T. 112-13; DEP Ex. 39-9.) On June 23, 2009 a representative of Carbon County Conservation District inspected the Site and observed that lot #8 had been cleared and grubbed without any erosion control. (DEP Exs. 33, 34a-34g; T. 109-10.)

Klecha did not submit an erosion plan by October 25, 2006, as required by the Department's order. He also did not submit either a renewal application or a complete transfer application for the permit issued to the previous owners. The permit expired by its own terms on

April 30, 2007. In fact, Klecha did not submit either an erosion control plan or permit application until May 5, 2009, and that submission was deficient. Therefore, it is undisputed that Klecha failed to comply with the Department's compliance order. (Answer, ¶ 13.)

Count IV of the Complaint asserts that Klecha did not implement and maintain best management practices at the Site. Section 102.4 under the Department's erosion and sediment control regulations states, "[t]he implementation and maintenance of erosion and sediment control BMPs are required to minimize the potential for accelerated erosion and sedimentation." (25 Pa. Code § 102.4(b)(1).) Section 102.22(b) states, "[e]rosion and sediment control BMPs shall be implemented and maintained until the permanent stabilization is completed." (25 Pa. Code § 102.22(b).)

At the Site, Klecha did not install a sediment basin in accordance with the original approved plans. The sediment basin is the largest erosion control facility to be installed at the Site. Five years after the Conservation District's first inspection, the basin was still not properly installed or stabilized. (T. 106-07; DEP Exs. 31b, 33.) The basin that was installed created more problems by allowing concentrated stormwater to flow and discharge to an unstable area that was not authorized to receive discharge. (T. 47-48, 78-79; DEP Exs. 8a, 8b.) In fact, the basin never functioned properly as an erosion control facility because it lacked a necessary filter. (T. 40.) The original plans also required that the basin be constructed prior to construction of the roadway. At the time of the Conservation District's first inspection, the roadway had been constructed but it would still be two more years before the location of the basin would even be identified. (DEP Exs. 3, 4.)

The swales had not been properly installed on the Site. At the first inspection, the swales had not been installed even though the roadway had been graded and stoned. (DEP Ex. 3.)

Approximately five years later, the swales had not been installed in accordance with the approved dimensions. (T. 111; DEP Ex. 34h.)

The approved plans called for a silt fence. The silt fence was not installed correctly. It could not function as an erosion control facility because the fabric did not filter the stormwater since the flow ran under the improperly installed fence. (T. 26, 28, 34, 35, 39, 42-43, 56-57, 67-68, 76-77, 97, 110-11; DEP Exs. 6a, 6g, 8o, 13d, 13f.) In addition, vegetative stabilization measures such as seed, mulch or filter fabric were not found on the Site even years after construction started. (T. 55; DEP Exs. 8l, 8n, 8o, 8p, 8q, 8r, 18h, 23d.) None of the individual lots had any evidence of erosion controls installed. The construction entrance had not been maintained and, consequently sediment had accumulated and left the Site and run onto the public roadway. (T. 75, 99-100; DEP Exs. 6f, 18a, 20d, 27m.) The drop inlet had not been installed timely and ultimately was installed incorrectly in that the fabric filter also was not installed. (T. 85, 98; DEP Exs. 20h, 31e.) Klecha does not dispute the fact that he did not implement and maintain erosion and sediment controls when he engaged in the unauthorized construction activities at the Site. (Answer, ¶¶ 15, 16, 49.)

In Count V the Department states that Klecha failed to have an erosion and sediment control plan available. This is required by Department regulations when earth disturbance activities exceed 5,000 square feet. (25 Pa. Code § 102.4(b)(2).) The plan is to be available for review and inspection by the Department or Conservation District at the project site during all stages of earth disturbance. (25 Pa. Code § 102.4(b)(7).)[3] Klecha admits that he failed to produce an E&S Plan at the site on October 11, 2006, October 19, 2006, October 27, 2006, November 14, 2006, January 8, 2007, April 24, 2007, June 28, 2007 and August 20, 2007. (Answer, ¶¶ 17, 52.)

[3] The requirement of this section is now found at Section 102.4(b)(8) as a result of an amendment on November 19, 2010 of the Chapter 102 regulations.

In Count VI the Department requests cost recovery for the expenditures of the Conservation District's expenditures in the amount of $2,451.52 associated with inspections and enforcement meetings. Section 316 of the Clean Streams Law states, "[f]or the purpose of collecting or recovering the expense involved in correcting the condition, the department may assess the amount due in the same manner as civil penalties are assessed under the provisions of Section 605 of this act." (35 P.S. § 691.316.)

There is no dispute of the liability on the part of Klecha. Klecha asserts that, "[t]he one legal issue is what penalty ought to be assessed under the circumstances of this case." (Klecha, Pre-hearing Memorandum.) The Department's calculated penalty for the above violations is $45,530.00 and a cost recovery of $2,451.52. Virtually all of Klecha's proposed findings of facts submitted for this Adjudication are identical to the Department's findings of fact. Since there is no opposition to the liability of this case, we are asked to decide the appropriate penalty in this matter. The Board is authorized to assess a civil penalty filed by the Department. 25 Pa. Code § 1021.71. The penalty proposed in the Department's Complaint is purely advisory. *Leeward v. DEP*, 2001 EHB 870, 885. The Board sets the amount of the penalty under the Clean Streams Law and may assess a higher or lower penalty than the Department's Complaint. *Id.* at 885-886.

Klecha's post hearing brief and his testimony at trial do little to argue a lower penalty. In fact his entire argument is set out below:

> Mr. Klecha candidly conceded that he made a lot of mistakes during the course of his project. He mistakenly believed he had an appropriate permit without realizing that he had [to] have it transferred from the original owners. He could not obtain from the original owners signatures necessary for the transfer application. He submitted the transfer application with an excerpt from the agreement of sale but it was declined. He relied on his own worker to do work that proved beyond his capabilities. The decision before the Board is to decide whether Mr. Klecha was a wanton violator or whether he was unknowledgeable and inept.

> The Klechas paid the Sherrerds for the existing NPDES permit as part of the purchase price for the development. They arranged a letter of credit to secure payment for the required improvements for Homestead in the Pines. They paid the engineering firm of Spotts, Stevens, and McCoy for additional work. They paid workers to do the work that had to be redone. They paid the Fish Commission civil penalties for pollution events. They paid an alternative engineering firm, KCE, approximately $38,000+ more to redo the erosion and sediment plan and also to submit an application for a new NPDES permit. Because the Saw Mill Run had been redesignated as a higher-quality stream permit requirements were more stringent. The engineering firm required an additional $50,000 in order to meet the deficiencies identified in the permit application. The Township had drawn down on the letter of credit for $190,000+ to undertake completion of the required improvements. That sum is class obligation to repay. Klecha had no financial resources from which to draw. He offered the Department the prospect of signing over the parcel of land which the Department indicated it could not do. The Department declined because it is not in a position to undertake such measures to satisfy a civil penalty.

Klecha's Post Hearing Brief, p. 16-17.

Klecha may have reasonably believed he had the permit when he first purchased the Homestead at the Pines. However, the Department had informed him as early as September 1, 2004 that the permit did not transfer with the purchase of the Site. Even if he reasonably believed he had the permit, despite the Department informing him he did not, he still did not comply with the terms of the permit. He did not follow the construction sequence, he disturbed approximately 10 acres when the permit authorized only 3.8, he constructed homes without a construction permit, roads and a pad for burning residual waste, he failed to install post construction stormwater facilities, and he failed to install any roof drains connected to underground filtration systems on all the homes he constructed.

Klecha's own consultant informed him in writing on May 31, 2006 that erosion controls were required, but none were installed. In fact, Klecha even admitted at the hearing that he saved

thousands of dollars by not continuing to pursue the required permit. (T. 186.) In fact, the Department ordered Klecha to acquire a permit, have the erosion control plan and to implement temporary and permanent stabilization measures. Klecha failed to meet any of these obligations. Further his activities at the Site caused damage to the waters of the Commonwealth. *See* 35 P.S. § 691.605. The stream's use is exceptional value and the Department has documented several instances where sediment pollution was discharged from Klecha's construction activities into the stream. There is also documentation of partially constructed swales and ditches being clogged with sediment.

Klecha has not provided any evidence in this record for the Board to consider in adjusting the civil penalty proposed by the Department. We have very little explanation of why he consistently failed to follow the law or adhere to the terms of the permit he claims to have possessed. Despite numerous attempts by the Department to get him in compliance, he has not provided any reasonable explanation for his wanton disregard of the Clean Streams Law and the Department's Order. In Klecha's deliberate disregard of the law in failing to obtain a permit and comply with the requirements of the Clean Streams Law, he has actually incurred a savings. Klecha even cited *DEP v. Hostetler*, 2006 EHB 359, 367-68, in support of the proposition that a party who has enjoyed an economic benefit because of his violations of the law should receive "a penalty high enough to deprive the violator of any savings or profit." Klecha Post-Hearing Brief, p. 18. In *Hostetler*, former Chief Judge Krancer cites his concurring opinion in *Leeward* wherein he states,

> I think that a prominent theme of the civil penalty imposed in cases like this one, which involve such a flagrant and volitional course of chronic violative conduct, should be, at a minimum, to make sure that any and all profit that the violator may have made on the job on which it engaged in its pattern of illegal conduct is totally disgorged.

Leeward Construction, 2001 EHB at 918-19. Klecha's own testimony indicates that if he were to comply with the law he would have had to expend an additional $50,000. Since Klecha did not come into compliance with the Clean Streams Law he saved that amount and still continued his project without the proper permit.

In Klecha's argument listed above, he states that the Board has to decide between two possibilities: Klecha "is a wanton violator or . . . unknowledgeable and inept." There is nothing in the record to suggest that Klecha was unknowledgeable or inept. In this case even if we conclude that he was "unknowledgeable or inept", we can not ignore the fact that he got advice from his contractor and saved money by not making repairs and adjustments. The Conservation District repeatedly told him of violations and he did not abate the problems for years. The Department is asking a civil penalty for these violations in the amount of $45,530 which is less than the amount Klecha saved for noncompliance, however under these circumstances we find this penalty a more than reasonable penalty for the violations at the Site. We also assess costs in the amount of $2,451.52 that the Conservation District expended in inspecting the Site. Therefore, we find that the Department's suggested penalty is appropriate.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this appeal.

2. The Department has proven that Klecha engaged in earth disturbance activities in violation of Section 402 of the Clean Streams Law, 35 P.S. § 691.402 and Section 102.5(a) of the Department's erosion and sediment control regulations, 25 Pa. Code § 102.5(a).

3. Klecha's earth disturbance activities caused discharge of pollution to Saw Mill Run in

violation of Section 401 of the Clean Streams Law, 35 P.S. § 691.401.

4. Klecha failed to comply with the Department's October 11, 2006 Compliance Order in violation of the Clean Streams Law, 35 P.S. § 402.

5. Klecha did not implement and maintain best management practices at the Site to minimize the potential for accelerated erosion and sedimentation in violation of 25 Pa. Code § 102.4(b)(1), and failed to implement and maintain best management practices until permanent stabilization was completed in violation of 25 Pa. Code § 102.22(b).

6. Klecha failed to have an erosion and sediment control plan available as required when disturbing more than 5,000 square feet in violation of 25 Pa. Code § 102.4(b)(2).), and failed to have the plan available for review and inspection by the Department or Conservation District at project site during all stages of earth disturbance in violation of 25 Pa. Code § 102.4(b)(8).

We enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2011-021-CP-C**
v.	:	
MIECZYSLAW KLECHA	:	

ORDER

AND NOW, this 4th day of June, 2013, it is hereby ordered that the Board assesses a civil penalty in the amount of $45,530 with costs in the amount of $2,451.52.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

Steven C. Beckman

STEVEN C. BECKMAN
Judge

DATED: June 4, 2013

c: **DEP, Bureau of Litigation:**
Attention: Glenda Davidson

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GALE MELLINGER, on behalf of AGAINST BIOSOLID CONTAMINATION	:	
v.	:	**EHB Docket No. 2012-163-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOROUGH OF CARLISLE, Permittee and TIM FAHNESTOCK FARM	:	**Issued: June 5, 2013**

OPINION AND ORDER
ON PETITION FOR SUPERSEDEAS

By Richard P. Mather, Sr., Judge

Synopsis

The Pennsylvania Environmental Hearing Board ("Board") denies Appellant's Petition for Supersedeas, without hearing, under the authority of 25 Pa. Code § 1021.62(c). There was a lack of particularity in the facts pleaded. There was a lack of particularity in the legal authority cited. Finally, Appellant failed to state grounds sufficient to support granting of a supersedeas.

O P I N I O N

The Appellant/Petitioner Gale Mellinger filed an appeal on September 20, 2012 in which she challenged, on behalf of a neighborhood group Against Biosolid Contamination ("ABC"), a Department approval to apply biosolids on a farm in Cumberland County. On May 9, 2013, the Appellant filed a Petition for Supersedeas with the Board. On May 10, 2013, the Board had a conference call with the Parties to discuss the Petition for Supersedeas. Following the call with the Board, the Appellant filed a First Amended Notice of Appeal and a First Amended Petition for Supersedeas on May 13, 2013. On May 17, 2013, the Board held a second conference call to

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discuss the recently amended Notice of Appeal and Petition for Supersedeas. After the second call, the Board issued an order directing the Department and the Permittee, Borough of Carlisle, ("Carlisle") to file a Response to Appellant's Petition for Supersedeas. The Department and Carlisle filed their respective Responses on May 22, 2013. Upon review of the Petition for Supersedeas and the Responses, the Board is now in a position to address the issues raised by the Petition without a hearing as allowed under 25 Pa. Code § 1021.62(c).

Standards for evaluating petition for supersedeas

A supersedeas is an extraordinary remedy that will not be granted absent a clear demonstration of appropriate need. *Rausch Creek Land LP v. DEP and Porter Associates, Inc.*, 2011 EHB 708, 709. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802; *Tinicum Township v. DEP*, 2002 EHB 822, 827; *Global Eco-Logical Services v. DEP*, 1999 EHB 649, 651; *Oley Township v. DEP*, 1996 EHB 1359, 1361-1362. Our rules provide that the granting or denying of a supersedeas will be guided by relevant judicial precedent and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a). Among the factors to be considered are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a)(1)-(3); *Neubert v. DEP*, 2005 EHB 598, 601. The issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *UMCO Energy, Inc.*, 2004 EHB at 802; *Global Eco-Logical Services, supra; Svonavec, Inc. v. DEP*, 1998 EHB 417, 420. *See also Pennsylvania PUC v. Process Gas Consumers Group*, 467 A.2d 805, 808-809 (Pa. 1983). In order for the Board to grant a supersedeas, a petitioner must make a credible showing on each of the three regulatory criteria. *Neubert v. DEP*, 2005 EHB 598, 601; *Pennsylvania Mines Corporation*, 1996 EHB 808, 810; *Lower Providence Township v.*

DER, 1986 EHB 395, 397. Where unlawful activity is occurring or is threatened or there is a violation of express statutory or regulatory provisions, there is irreparable harm *per se*. *Pleasant Hills Construction Co. v. Public Auditorium Authority of Pittsburgh*, 782 A.2d 68, 79 (Pa. Cmwlth. 2001); *Council 13, A.F.S.C.M.E., AFL-CIO v. Casey*, 595 A.2d 670 (Pa. Cmwlth. 1991); *Tinicum Twp. v. DEP*, 2002 EHB 822, 826; *Harriman Coal Corp. v. DEP*, 2001 EHB 234, 252. If any petitioner fails to carry their burden on any one of the factors under 25 Pa. Code § 1021.63(a), the Board "need not consider the remaining requirements for supersedeas relief." *Oley Township v. DEP*, 1996 EHB 1359, 1369.

Under the Board's Rules, the Board may deny a petition for supersedeas, upon motion or *sua sponte*, without hearing for one or more of four listed reasons. *See* 25 Pa. Code § 1021.62(c)(1)–(4); *Hopewell Township Board of Supervisors v. DEP*, 2011 EHB 372; *Timber River Development Corp. v. DEP*, 2008 EHB 635; *Dickinson Township v. DEP*, 2002 EHB 267. For the reasons set forth below, the Board denies Appellant's Petition for Supersedeas.

Lack of particularity in the facts pleaded

Under the Board's Rules, a person shall, with particularity, plead facts that would support the grant of a supersedeas and, as a general rule, provide an affidavit that supports these facts. 25 Pa. Code § 1021.62(a). A review of the Appellants' Petition reveals that the Appellant has failed to meet standard to plead facts with particularity that would support the grant of a supersedeas.

Appellant's first Amended Petition for Supersedeas Stay of Action contains four numbered paragraphs which contain several subparagraphs.[1] Paragraphs 1 and 2 list the names and addresses of some parties, identify the Department action under appeal, identify the location

[1] The Gale Mellinger affidavit supporting these facts contains similar statements.

of the challenged action and provide the date when the Appellant received notice of the challenged action.

Paragraph 3 contains the factual basis for Appellant's Petition for Supersedeas. Subparagraph 3(a) states that the site for the biosolids application is within a designated watershed area (as described in Exhibit C). Subparagraph 3(b) asserts that the site for the biosolids application threatens Big Spring Creek, which is designated as having Exception Value. Subparagraph 3(c) states proper notice was not given. Subparagraph 3(d) states that there is a sinkhole proximate to the application site on field TF-P2 which is problematic and a cause for concern. Appellant also asserts that the location of the application site in relation to Big Spring Creek and its watershed is objectionable. Finally, Subparagraph 3(e) states that the application site is atop a Karst geological formation.

Paragraph 4 describes the basis for Appellant's Petition for Supersedeas. Appellant seeks a supersedeas because 1) Appellant will suffer irreparable harm as biosolids may not be practically removed after land application; 2) Appellant has high likelihood of success on the merits based upon the facts in Paragraph 3; 3) pollution and public injury are threatened; and 4) Permittee will suffer no harm as Carlisle can apply biosolids to pasture ground at any time. Without citing the Board's Rule at Section 1021.63(a) and (b), Paragraph 4 sets forth the general standard governing the Board's grants or denial of or petition for supersedeas.

The facts supporting Appellant's Petition in Paragraph 3 are not sufficient to meet Appellant's obligation to plead sufficient facts with particularity. Everywhere in Pennsylvania is in a watershed so the assertions in Subparagraph 3(a) provide no support to the Petition. In Subparagraph 3(b), Appellant asserts that Big Spring Creek, which is designated as Exception Value, is threatened, but Appellant does not specify how it is threatened in any manner. Simply

stating that something is "threatened" without explanation is not sufficient. Similarly, Subparagraph 3(c) states that proper notice was not given, but no factual basis for this conclusion was provided. What notice is required? Was any notice given, and if so why was this notice improper? In Subparagraph 3(d), Appellants described the location of a sinkhole as "problematic" or "a cause for concern" and the location of the biosolid application site in relation to Big Spring Creek as "objectionable", but these broad conclusions are not supported by any supporting facts that explain why or how it is problematic, a cause for concern or objectionable. In conclusion, Appellant's Petition is deficient because it fails to plead facts, with particularity, that would support a supersedeas.

Lack of particularity in the legal authority cited as the basis for the grant of the supersedeas

The Appellant's Petition for Supersedeas is also deficient from a legal authority perspective, and there is a lack of particularity in legal authority cited as a basis for the grant of the Supersedeas. *See* 25 Pa. Code § 1021.62(c)(2). The Board's Rules set forth the legal standards governing the granting or denying of a supersedeas. 25 Pa. Code § 1021.63(a). Section 1021.63(a) provides.

> (a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered:
>
> (1) Irreparable harm to the petitioner.
>
> (2) The likelihood of the petitioner prevailing on the merits.
>
> (3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.

Id. The Petition is deficient because it fails to cite this Rule as authority or any relevant judicial precedent or the Board's own precedent.

The only legal authority that Appellant cited addresses the point "that where the harm sought to be avoided is one that is immediate and irreparable, the ultimate effect of denying a stay is tantamount to denying such relief." Appellant's First Amended Petition for Supersedeas Stay of Action at page 3 *citing Mergerowitz v. Pathology Laboratory Diagnostics, Inc.* 451 Pa. Super. 72, 78-79 (1996) and *Canter's Pharmacy, Inc. v. Elizabeth Associates*, 396 Pa. Super. 505 (1990). While the Board agrees with this general cited proposition, it alone does not provide a sufficient legal basis for the grant of a supersedeas.

Failure to state grounds sufficient for the granting of a supersedeas

As previously mentioned, the Board's Rules govern the circumstances affecting the grant or denial of a request for a supersedeas. 25 Pa. Code § 1021.63(a). In general, the person requesting a supersedeas must establish irreparable harm to the petitioner, the likelihood of the petitioner prevailing on the merits and the lack of likelihood of injury to the public or other parties, such as the permittee in third party appeals. 25 Pa. Code § 1021.63(a)(1)-(3). In addition, a supersedeas will not be issued where pollution or injury to public health, safety or welfare exists or is threatened during the period when supersedeas would be in effect. 25 Pa. Code §1021.63(b). Under Section 1021.62(c)(4), the Board may deny a request for a supersedeas, without hearing, for a failure to state grounds sufficient for granting a supersedeas. For the reasons set forth below, Appellant has failed to state grounds sufficient to support granting a supersedeas.

Irreparable harm to appellant

The Appellant is Gale Mellinger who filed the appeal on behalf of "ABC". She also signed the affidavit supporting the Petition for Supersedeas. The affidavit and the petition contain no allegations of irreparable harm to Ms. Mellinger or others who may be associated

with ABC. The briefest mention of irreparable harm is found in the Petition in Paragraph 4 where Appellant asserts that she will suffer irreparable harm because biosolids may not be practically removed after application. This brief mention of irreparable harm is not tied to Ms. Mellinger in any way. Even if the Appellant is correct that there is not practical way to remove biosolids after application, there is no basis to decide that this will cause irreparable harm to Ms. Mellinger. General assertions of irreparable harm without greater specificity are no sufficient to establish irreparable harm. *Benjamin A. and Judith E. Stevens*, 2005 EHB 619, 625. In addition, Appellant's general assertions that Big Spring Creek is threatened and that biosolids application is objectionable are also not sufficient to support a finding of irreparable harm to the Appellant.

Likelihood of success on the merits

Appellant asserts that the facts set forth in her Petition establish a "high likelihood of prevailing on the merits." The Board disagrees and finds that the Appellant has failed to plead sufficient facts, with particularity, to support its claim of likelihood of success on the merits. The Appellant asserts in Paragraph 3(c) that "Proper Notice" was not given without any further specificity. This bare statement does not establish likelihood of success on the merits. See Opinion at page 4. In addition, the statement in Paragraph 3(d) that the site in relation to Big Spring Creek "is objectionable" lacks the particularity to support a finding of likelihood of success on the merits. An evidentiary hearing on the Petition is unnecessary because even if we take all of Appellant's factual allegations as true, there is nevertheless little likelihood of success on the merits. *Dickinson Township v. DEP*, 2002 EHB 267.

Likelihood of injury to the public or other parties

Appellant asserts that that Carlisle will suffer no harm if a supersedeas is granted. The Department and Carlisle dispute this assertion. In light of the other reasons to deny the Petition for Supersedeas, the Board does not have to resolve this dispute at this time.

Affidavits supporting petition for supersedeas

Under the Board's Rules, a Petition for Supersedeas shall be supported for affidavits, prepared as specified in Pa. R.C.P. 76 and 1035.4[2], setting forth facts upon which issuance of the supersedeas may depend. Under these Rules, the affidavits supporting a petition for supersedeas shall be made on personal knowledge. The Department in its Response to the Petition for Supersedeas asserts that Appellant's sole affidavit is deficient because it fails to state that the facts in the affidavit were made on personal knowledge.

The Appellant provided a single affidavit along with the Petition for Supersedeas. The affidavit does not include any specific language indicating that the affiant made the factual statements on personal knowledge, but the affidavit also does not include any specific language indicating that the facts were not made on personal knowledge. Because the Board denied the Petition for other reasons, it need not reach the issue whether the affidavit complies with the Board's Rules and is in fact made on personal knowledge. Parties can, however, avoid this concern in the future if they include specific language that the affidavit is made on personal knowledge in the affidavit itself.

In conclusion, the Board denies Appellants' Petition for Supersedeas under 25 Pa. Code § 1021.62(c)(1)(2) and (4) without a hearing. There is a lack at particularity in the facts pleaded

[2] Rules 76 and 1035.4 of the Rules of Civil Procedure relate to Definitions and Affidavits. Pa. R.C.P. 76 and 1035.4. Rule 1035.4 provides that affidavits supporting or opposing a motion for summary judgment shall be made on personal knowledge. By referencing this Rule, the Board Rule also establishes that affidavits supporting a petition for supersedeas must be based on personal knowledge.

and in the legal authority cited. In addition, Appellant has failed to state grounds sufficient to establish irreparable harm or likelihood of success on the merits.

For the foregoing reasons we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GALE MELLINGER, on behalf of AGAINST BIOSOLID CONTAMINATION	:	
v.	:	**EHB Docket No. 2012-163-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOROUGH OF CARLISLE, Permittee and TIM FAHNESTOCK FARM	:	

ORDER

AND NOW, this 5th day of June, 2013, it is hereby **ORDERED** that the Petition for Supersedeas is **denied**.

ENVIRONMENTAL HEARING BOARD

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: June 5, 2013

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS (RACC)	:	
v.	:	**EHB Docket No. 2012-072-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE AND LIME, LLC, Permittee	:	**Issued: June 12, 2013**

OPINION AND ORDER ON DEPARTMENT'S AND PERMITTEE'S MOTION TO STRIKE WITNESSES FROM RACC'S PRE-HEARING MEMORANDUM

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Motion to Strike Witnesses. The Appellant did not comply with the Board's earlier directions regarding fact and expert witnesses, and the Board will strike fact and expert witnesses from Appellant's Pre-Hearing Memorandum where Appellant failed to comply with the Board's earlier directions.

OPINION

The Appellant, Rural Area Concerned Citizens ("RACC"), filed its Pre-Hearing Memorandum on May 17, 2013 in advance of the hearing in the appeal that is scheduled for July 15-19, 2013 in the Board's Pittsburgh Offices. In addition, on May 14, 2013, RACC filed a document entitled a "Supplement Witness Statement" in which RACC identified Ron Caligure as an additional witness along with 126 pages of exhibits that consist primarily of water temperature and flow data collected from 2008 to 2012. The Department of Environmental

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Protection ("Department") and Bullskin Stone & Lime, LLC., ("Bullskin" or "Permittee") filed a Joint Motion to Strike Witnesses from RACC's Pre-Hearing Memorandum on May 23, 2013.

On May 31, 2013, the Board held a conference call with the Parties to discuss the Motion to Strike. During the call RACC indicated it was planning to file a Response, and on June 4, 2013, RACC filed its Response. The Department and Bullskin filed a Joint Reply to RACC's Response on June 5, 2013. The Board is now in a position to decide the pending Motion to Strike and for the reasons set forth below the Board grants the Department's and Bullskin's Motion.

In their Motion to Strike Witnesses, the Department and Bullskin seek to strike a total of five witnesses from RACC's Pre-Hearing Memorandum. The Motion identified two expert witnesses (Philip S. Getty and Todd Michael Hurd) and three fact witnesses (James Chrisner, Frank Uhrin and Ron Caligure) that the Department and Bullskin seek to strike from RACC's witness list. The Board will address each type of witness separately because the Board addressed each type of witness in a separate manner during the conference calls and subsequent orders related to the numerous discovery disputes that the parties raised in this appeal.

Two Additional Expert Witnesses

As a result of the recent conference call, the dispute regarding expert witnesses is easier to resolve. During the conference call, counsel for RACC indicated that RACC would not contest that aspect of the Motion to Strike concerning the two additional expert witnesses listed in RACC's Pre-Hearing Memorandum. The Board had previously address expert witnesses in its February 25, 2013 Opinion and Order on RACC's Motion for Enlargement of Time to File Supplemental Discovery Responses. *See, Rural Area Concerned Citizens v. DEP and Bullskin Stone and Lime, LLC*, EHB Docket No. 2012-072-M, Opinion and Order dated February 25,

2013, pages 4-5. RACC offered no justification for the Board to modify its earlier decision. The Board sees no reason to change its position on the late addition of additional expert witnesses, and the Board will grant that part of the Motion to Strike Witnesses.

While RACC did not specifically address the expert testimony of Mr. Getty or Mr. Hurd as part of its case-in-chief, in its Response RACC raised the possibility of calling Mr. Getty or Mr. Hurd as rebuttal witnesses at the hearing should the need for rebuttal arise. RACC is correct in stating that the Board will allow rebuttal testimony in appropriate circumstances. The Board should nonetheless offer a cautionary note to RACC in advance of the hearing.

First, under the Board's rules, a party need only list witnesses that will be called as part of the party's case-in-chief. 25 Pa. Code § 1021.104(c). Rebuttal witnesses need not be listed in a party's Pre-Hearing Memorandum. Second, as the Board previously observed the scope of rebuttal evidence, is narrow and "a party cannot, as a matter of right, offer in rebuttal evidence which is properly part of his case-in chief, but will be confined to matter requiring explanation and to answer new matter introduced by his opponent" 2 *Henry Pennsylvania Evidence*, § 730 (Fourth Edition 1953) *cited in Billy J. Higgins v. DEP and Eighty-four Mining Company*, 2007 EHB 230, 233; *see also* 8 *Standard Pennsylvania Practice 2d* § 88:26. The Board will address any requests to provide rebuttal testimony in the future at the hearing, if and when the situation arises, but RACC should not expect a second opportunity to present its case-in-chief through rebuttal testimony where it earlier missed the deadlines and opportunities to identity additional expert witnesses during discovery.

Three Additional Fact Witnesses

The Department and Bullskin seek to strike three fact witnesses from RACC's Pre-Hearing Memorandum. The three witnesses are James Chrisner, Frank Uhrin and Ron Caligure.

In support of their Joint Motion to Strike, the Department and Bullskin assert that these fact witnesses should not be available to testify because they were not properly disclosed and made available for deposition as the Board previously directed. In its Response, RACC agreed to remove James Chrisner from RACC's Pre-Hearing Memorandum Witness List, but RACC opposes efforts to strike Ron Caligure or Frank Uhrin from RACC's witness list. RACC asserts that both were properly identified and that the Department and Bullskin had adequate time to depose these witnesses. The Board disagrees with RACC and for the reasons set forth below grants that portion to strike fact witnesses from RACC's Pre-Hearing Memorandum that were not previously deposed or made available for deposition.

The Board has spent considerable time and effort addressing numerous discovery disputes among the Parties in this appeal.[1] The issue regarding the additional fact witnesses is a direct outgrowth of the Board's decisions to address one of these earlier discovery disputes.[2] At one point there was a dispute regarding the number of individuals that the Department and Bullskin wanted to depose who were identified by RACC as having knowledge of the allegations in RACC's Notice of Appeal.

To resolve this dispute the Board directs RACC to identify persons that would be called as witnesses and to make these individuals available for deposition. The Board further cautioned RACC that witnesses that were not identified and were not made available for deposition would not be allowed to testify at the hearing. After RACC identified its witnesses, the Board understands they were deposed.

---

[1] For this Judge, the seven conference calls to discuss and resolve discovery disputes and related disputes regarding witnesses is a personal record that the Judge hopes will *not* soon be repeated.

[2] RACC added new trial counsel later in the litigation process and this change in trial counsel may explain why RACC has attempted to add fact witnesses in a manner inconsistent with the Board's prior directions.

On the day discovery ended on January 18, 2013 the Board scheduled a call to ensure that all outstanding discovery disputes were resolved. Not surprisingly, they were not. During the call, RACC raised two new issues regarding a new fact witness (Carter Booher) and a new expert witness (Dr. Todd Hurd). The Board directed RACC to file a written motion to address these new items which was filed on January 18, 2013. The Department and Bullskin filed separate responses in opposition to RACC's motion.

The Board issued an Opinion and Order on February 25, 2013 in which it addressed RACC's request to add a new fact witness and a new expert witness. The Board denied RACC's request to add a new expert witness for the reasons set forth in the opinion. The Board granted RACC's request to add Mr. Booher, the new fact witness provided RACC made Booher available for deposition.

Now we have RACC's request to add two more fact witnesses who have not been deposed notwithstanding the Board's clear direction that RACC would not be able to call any fact witnesses who RACC had not previously made available for deposition. RACC had an opportunity to identify its two new fact witnesses during the January 18, 2013 conference call when it identified Mr. Booher or when it filed its motion on January 18, 2013. RACC failed to disclose these two fact witnesses at this time or to subsequently make them available for deposition.

Following the recent conference call, the Board gave RACC an additional opportunity to explain its need to add new fact witnesses in its Responses to the Motion to Strike Witnesses. There is, however, no basis in the Response for the Board to change its longstanding position regarding fact witnesses, and the Board will not allow RACC to add two new fact witnesses at this late date.

For the foregoing reasons the Board grants the Motion to Strike and enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS (RACC)	:	
v.	:	**EHB Docket No. 2012-072-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE AND LIME, LLC, Permittee	:	

ORDER

AND NOW, this 12th day of June, 2013, it is hereby ordered that Bullskin Stone & Lime, LLC ("Bullskin") and the Department of Environmental Protection's (the "Department") Joint Motion to Strike Witnesses from RACC's Pre-Hearing Memorandum and Request for Extension of Time to File Responsive Pre-Hearing memorandum is GRANTED. James Chrisner, Frank Uhrin, Ron Caligure, Philip S. Getty and Todd Michael Hurd are hereby stricken from Rural Area Concerned Citizen's ("RACC") Pre-Hearing Memorandum. RACC is hereby directed to file an amended Pre-Hearing Memorandum within 5 days of this Order. Bullskin and the Department shall file their Pre-Hearing Memoranda within 21 days from the date RACC files its amended Pre-Hearing Memorandum.

ENVIRONMENTAL HEARING BOARD

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: June 12, 2013

c: **DEP, Bureau of Litigation:**
Attention: Glenda Davidson
9th Floor, RCSOB

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Two Gateway Center, 6th Floor
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

M & M STONE COMPANY	:	
	:	
v.	:	**EHB Docket No. 2013-076-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 14, 2013**

OPINION AND ORDER ON MOTION
FOR EXTENSION OF TIME – NOTICE OF APPEAL

By Steven C. Beckman, Judge

Synopsis

The Board treats a party's "Motions for Extension of Time to Respond to Assessment of Civil Penalty" as a Notice of Appeal and orders the party to perfect the appeal within twenty (20) days.

O P I N I O N

On June 3, 2013, twenty-eight days after receiving three assessments of civil penalties from the Department of Environmental Protection ("Department"), M & M Stone Co. ("Appellant") filed motions requesting an "Extension of Time to Respond to Assessment of Civil Penalty Dated May 1, 2013" for each assessment. Appellant appears to request that the Board extend the thirty-day deadline for appealing an action of the Department. The language in Appellant's motion also makes clear its intention to appeal the civil penalty assessments. The proper method of invoking the Board's jurisdiction to hear a challenge to an action of the Department is to file a Notice of Appeal in conformance with the requirements of 25 Pa. Code §

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1021.51. However, the Board construes its rules liberally and may disregard an error or defect of procedure in the service of justice. *See* 25 Pa. Code § 1021.4.

Parties, under 25 Pa. Code § 1021.53a, may petition the Board for the allowance of an appeal after the normal 30-day deadline. The Board has discretion to grant leave for the filing of an appeal *nunc pro tunc* for good cause shown. Alternatively, the Board may construe a filing by an appellant to be a Notice of Appeal, despite the filing not conforming to the Board's procedural rules. In *Caernarvon Township Supervisors v. Department of Environmental Protection and Chester County Solid Waste Authority*, 1997 EHB 60, the township supervisors filed a letter which stated their interest in seeking review of an action by the DEP, but that also lacked some of the information required by 25 Pa. Code § 1021.51. The Board construed the letter as an appeal, and ordered the appellant to submit the additional information to perfect the appeal. *Id.* Here, M & M Stone Co. filed motions clearly demonstrating its intention to appeal the Assessments of Civil Penalty before the Board prior to the 30-day deadline. The Board accordingly will treat M & M Stone Co.'s motions as a timely Notice of Appeal, rather than a petition for an allowance to file an appeal *nunc pro tunc*.

The Board has promulgated strict rules governing the commencement of proceedings as well as the required form and content of a Notice of Appeal. 25 Pa. Code §§ 1021.51–1021.52. Appellant's motions followed some of the Board's procedures for noticing an appeal, including supplying Appellant's contact information and providing copies of the motions to the Department. *See* 25 Pa. Code § 1021.51(c) and (g). However, many of the provisions of 25 Pa. Code § 1021.51 were not followed. 25 Pa. Code § 1021.53(a) allows Appellant to amend its appeal as of right within twenty (20) days of filing the initial appeal. Similarly, upon request of the Board, the Appellant has twenty (20) days to perfect its appeal by filing any missing

information required by certain provisions of 25 Pa. Code § 1021.51. 25 Pa. Code § 1021.52(b).[1] Accordingly, the Board gives Appellant twenty (20) days from the issuance of this Opinion and Order to perfect its Notice of Appeal according to the Board's rules of procedure.[2]

Furthermore, as a corporation, Appellant is required to be represented by counsel before the Board under 25 Pa. Code § 1021.21. The Board takes note that Appellant is currently seeking counsel, according to its motions. We strongly encourage Appellant to retain counsel prior to amending and perfecting its Notice of Appeal in accordance with this Opinion and Order.

Accordingly, we enter the following order:

[1] Appellant is encouraged to closely read and follow the Notice of Appeal Instructions and use the Notice of Appeal Form which are available on the Board's website. http://ehb.courtapps.com/public/index.php.
[2] Because a deadline of twenty (20) days from this Opinion and Order falls on a holiday, the Appellant shall perfect its appeal on or before July 5, 2013.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

M & M STONE COMPANY	:	
	:	
v.	:	**EHB Docket No. 2013-076-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 14th day of June, 2013, IT IS ORDERED as follows:

1. The Board is hereby docketing the Appellant's Motions for Extension of Time to Respond to Assessment of Civil Penalty as a Notice of Appeal.

2. The Appellant shall perfect its appeal, in accordance with the requirements of 25 Pa. Code § 1021.51, on or before **July 5, 2013**.

3. Failure to supply any missing information, including but not limited to copies of written notification of an action of the Department, as required may result in dismissal of the appeal under 25 Pa. Code § 1021.161.

ENVIRONMENTAL HEARING BOARD

Steven C. Beckman

STEVEN C. BECKMAN
Judge

DATED: June 14, 2013

c: **DEP, Bureau of Litigation:**
Attention: Glenda Davidson
9th Floor, RCSOB

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL	:	
	:	
v.	:	
	:	**EHB Docket No. 2011-072-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM & RESOURCES, LLC, Permittee	:	**Issued: June 20, 2013**

OPINION AND ORDER
ON PERMITTEE'S MOTION TO LIMIT ISSUES FOR HEARING OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board denies the Permittee's Motion to preclude the Appellant from presenting evidence aimed at showing a functional relationship between the Permittee's gas processing plant and compressor stations for purposes of determining whether the emissions should be aggregated under federal and state air quality law. The Board is not persuaded by the Permittee's argument that functional relationship should never be considered in determining whether two or more pollutant emitting activities are "adjacent" for

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purposes of air quality regulation. Questions of fact exist and should be decided after a trial on the merits.

OPINION

This matter involves an appeal by Clean Air Council, challenging the Pennsylvania Department of Environmental Protection's (Department's) issuance of a Plan Approval to MarkWest Liberty Midstream & Resources, LLC (MarkWest) for the expansion of its gas processing operation at its plant in Chartiers Township, Washington County, Pennsylvania (known as the Houston Plant).

Based on the documents submitted by the parties, we find the following facts to be undisputed: MarkWest Liberty Midstream & Resources, LLC (MarkWest) owns and operates the Houston Plant and ten compressor stations that are connected to the Houston Plant via pipelines. The stations compress the collected gas before it is sent to the Houston Plant for processing. The gas may also be sent to a gathering pipeline owned by a third party, NiSource, or placed directly into interstate gas transmission lines without being processed at the Houston Plant. Though they are all connected to the Houston Plant via pipeline, the compressor stations are located at various distances from the plant, with the closest being 1.5 miles from the plant, and the furthest being a distance of 11.6 miles. The

minimum distance between compressor stations is 1.1 miles. MarkWest does not own the properties located between the plant and the various compressor stations.

On April 13, 2011, the Department issued a Plan Approval authorizing MarkWest to construct a fractionator tower and certain other equipment at the Houston Plant. In granting MarkWest's application for a Plan Approval, the Department made a determination under federal and Pennsylvania air quality law that the emissions of the Houston Plant should not be aggregated with those of one or more of the compressor stations. Clean Air Council has appealed the Plan Approval to the Pennsylvania Environmental Hearing Board (Board), which is charged with reviewing actions of the Department. Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §§ 7511-7516. A hearing on the merits of this case is scheduled before the Environmental Hearing Board beginning on September 10, 2013, and continuing through September 20, 2013.

Background

Multiple pollutant emitting sources, such as MarkWest's Houston Plant and compressor stations, can be aggregated and considered a single stationary source for purposes of air quality regulation if they: (1) are under common control; (2) belong to the same major industrial grouping; and (3) are "located on one or more

contiguous or adjacent properties." 40 C.F.R. § 71.2; 25 Pa. Code § 121.1.[1] If the Houston Plant and even one of the compressor stations are determined to be a single source and their emissions aggregated, the emissions would exceed major source thresholds, thereby subjecting MarkWest to additional regulatory requirements.

There is no dispute that the Houston Plant and compressor stations meet the first two criteria, i.e., they are under common control and belong to the same industrial grouping. With regard to the third criterion – i.e., the activities are located on properties that are contiguous or adjacent – there appears to be no dispute among the parties that the properties on which the Houston Plant and compressor stations are located are *not* contiguous, i.e., sharing a common border. The question, then, is whether the properties are adjacent.

The term "adjacent" is not defined by the Environmental Protection Agency (EPA) in the regulations. Over several decades EPA has issued memoranda with differing statements on the issue of how to determine if oil and gas facilities are "adjacent." On January 12, 2007, then EPA Acting Assistant Administrator, William L. Wehrum issued guidance for making source determinations for the oil and gas industry (the Wehrum Memorandum) that placed the emphasis on

[1] Pennsylvania has adopted the relevant requirements of the Clean Air Act. 25 Pa. Code §§ 127.81 and 127.83; 25 Pa. Code § 127.1.

"proximity." (Exhibit H to MarkWest's Motion to Limit Issues). On September 22, 2009, EPA Assistant Administrator Gina McCarthy withdrew the Wehrum Memorandum, stating that "proximity may serve as the overwhelming factor in a permitting authority's source determination decision. However, such a conclusion can only be justified through reasoned decision making after examining whether other factors are relevant to the analysis." (McCarthy Memorandum) (Exhibit G to Clean Air Council's Response). The McCarthy Memorandum reasoned that the simplified approach of the Wehrum Memorandum, with its emphasis on physical proximity in the determination of what constituted a stationary source, was no longer appropriate.

In reviewing MarkWest's application for Plan Approval, the Department considered mutual interdependence or "functional relationship" to be a factor in determining whether the Houston Plant and compressor stations are adjacent. According to the Department's Technical Review:

> Neither EPA policy nor regulations includes a "bright line" or numeric standard for determining how far apart activities may be and still be considered "adjacent." EPA has consistently stated that it is a case-by-case, fact-specific determination since the PSD aggregation regulation was promulgated in [sic] August 7, 1980. This approach has been reaffirmed in many EPA guidance documents since then. The determination of whether sources are "adjacent" is based on the "common sense" notion of source (whether they functionally operate as a single source). In explaining this concept, EPA has noted that whether or not facilities are adjacent *depends on the*

> *functional inter-relationship of the facilities* and is not simply a matter of physical distance between the two facilities.

(Department's Technical Review, Exhibit A to MarkWest's Motion to Limit Issues, p. 11) (footnotes omitted) (emphasis added).

The Department concluded that the plant and compressor stations are not adjacent because they are not "located together on the same parcel of land or on adjoining parcels of land" and because they "will not be mutually dependent in function." *Id.* at 13. Following the Department's issuance of the Plan Approval, this appeal ensued. It is the contention of Clean Air Council that the Houston Plant and the compressor stations are, in fact, mutually dependent and share a functional relationship.

On January 25, 2013, MarkWest filed a Motion to Limit Issues for Hearing or, in the Alternative, for Partial Summary Judgment seeking to exclude Clean Air Council from presenting evidence at trial of a functional relationship between the Houston Plant and the compressor stations. MarkWest argues that the only factor that may properly be considered in determining whether two or more facilities are located on "adjacent" properties is geographic distance; it asserts that the functional relationship of the facilities is not relevant to the question of "adjacency." The Department filed a response disputing that portion of MarkWest's motion that would restrict evaluations of "adjacency" in single source

determinations to a consideration of "distance only." The Department argues that various factors must be taken into consideration on a case-by-case basis. Clean Air Council also opposes MarkWest's motion, arguing that an analysis of "adjacency" requires a review of both distance and functional relationship. An *en banc* oral argument on MarkWest's motion was held in Pittsburgh on April 3, 2013. This Opinion and Order addresses the issue raised in that motion and the responses filed by Clean Air Council and the Department. The question before the Environmental Hearing Board is whether "functional relationship" is a factor that may be considered in determining whether air pollutant sources should be aggregated for purposes of air quality regulation.

Discussion

Because MarkWest's motion seeks a ruling on the question of whether "functional relationship" may be considered in determining whether two or more air pollutant sources should be aggregated, we treat it as a motion for partial summary judgment, rather than merely a motion to limit issues. Motions that seek to dispose of issues rather than limit evidence that may be presented at trial are treated as motions for summary judgment. *Florence Mining Co. v. DER*, 1991 EHB 1301, 1306. Summary judgment may only be granted "in the clearest of cases where the right is clear and free from doubt." *Macyda v. DEP*, 2011 EHB 526, quoting *Lyman v. Boonin*, 635 A.2d 1029, 1032 (Pa. 1993). All doubts as to

the presence of a genuine issue of material fact must be resolved against the moving party. *Rozum v. DEP,* 2008 EHB 731, citing *Albright v. Abington Memorial Hospital*, 696 A.2d 1159, 1165 (Pa. 1997).

In support of its argument that functional relationship may not be considered when making a determination of "adjacency," MarkWest cites the recent decision by the United States Court of Appeals for the Sixth Circuit in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012). That case involved a natural gas producer (Summit) that owned and operated a gas sweetening plant and approximately one hundred gas production wells. The plant and wells were separated by a distance ranging from 500 feet to eight miles, but were connected by a series of pipelines. Summit did not own the property in between the wells or in between the wells and the plant. As in the present case, there was no question that the sweetening plant and wells were commonly owned and part of the same industrial grouping or that the properties on which the wells and plant were located were not contiguous. Like the present case, the question came down to whether the properties were adjacent. After much deliberation,[2] EPA found all of Summit's facilities to constitute a single stationary source. On the question of adjacency, EPA stated that factors such as the "nature of the relationship between the facilities" and the "degree of interdependence between them" had been important

[2] But evidently, without holding a hearing.

to the question of whether the facilities were adjacent. EPA found that Summit's plant, wells, and flares worked together as a single unit that "together produced a single product." *Id.* at 740. Summit filed a petition for review with the Court of Appeals for the Sixth Circuit challenging EPA's use of functional relationship in determining adjacency. The Sixth Circuit found the term "adjacent" to be unambiguous and solely referring to "physical proximity" and not functional relationship. The Court stated as follows:

> Our research satisfies us that dictionaries agree that two entities are adjacent when they are "[c]lose to; lying near . . . [n]ext to, adjoining." American Heritage Dictionary of the English Language, *available at* www.ahdictionary.com (search "adjacent") (last visited May 16, 2012). The EPA does not cite, nor could we locate, any authority suggesting that the term "adjacent" invokes an assessment of the functional relationship between two activities. *See, e.g.*, Meriam-Webster Dictionary, *available at* www.meriam-webster.com (search adjacent") (last visited May 16, 2012)

Id. at 742.

The Court in *Summit* went on to state:

> The EPA makes an impermissible and illogical stretch when it states that one must ask the *purpose* for which two activities exist in order to consider whether they are adjacent to one another. Resp't Br. at 26-27 ("A distance of one mile between two properties may be considered sufficiently small to be close to each other if one is driving between them; not so if one is trying to throw a softball from one to the other.") Whether the distance between two facilities enables a given relationship to exist between them is immaterial to the concept of

> adjacency—it merely answers the question of whether a certain activity can or cannot occur between two locations that were, and will continue to be regardless of whether they host the activity, physically distant or physically adjacent.

Id. at 742-43 (footnote omitted) (emphasis in original).

We are cognizant that *Summit* is an opinion of the United States Court of Appeals of the Sixth Circuit and, as such, has no binding effect outside that jurisdiction. Moreover, as we stated in *GASP v. DEP and Laurel Mountain Midstream Operating, LLC*, 2012 EHB 329, 340:

> It is important to note that in the *Summit* case, the Court did not make a determination that the distance between the Summit plant and the gas wells failed to meet the "adjacency" requirement of the single source test. Rather, it disagreed with the manner in which EPA had made its determination, and the Court remanded the matter to the EPA to make a new determination by applying the Court's interpretation of "adjacency" to the specific facts of the case. The Court in *Summit* recognized that this determination must be made on a case-by-case basis.

Id. at 339.

A case-by-case analysis to determine "adjacency" is the approach recommended by the Department in its "Guidance for Performing Single Stationary Source Determinations for the Oil and Gas Industries" (Guidance), issued on October 6, 2012 to assist its permit reviewers in making single source determinations under federal and state air quality regulations. (Exhibit 1 to

Department's Response) According to the Department's Guidance, properties separated by more than ¼ of a mile may be considered contiguous or adjacent only on a case-by-case basis. Id. at 6-7.[3] According to the Department, this case-by-case analysis is essential in order to apply the term "adjacent" to real-world permitting situations. The Department's Guidance explains this approach as follows:

> Because of the nature of the oil and gas extraction industry, wells are scattered across a large resource area creating duplicate facilities that perform identical functions. For instance, well production pads and compressor stations are dispersed across a wide area that could encompass many square miles so that the leased properties can be accessed and natural gas can be extracted, compressed, and conveyed via pipeline to a nearby processing facility. Such expansive operations would not generally comport with the "common sense notion of a plant." Additionally, two aggregate stationary sources located on properties spread throughout a large geographical area would not be consistent with the plain meaning of the terms contiguous or adjacent properties. Consequently, only sources that are in close proximity should be considered contiguous or adjacent properties for single source determination purposes.

Id. at 5-6.[4]

MarkWest argues that the Department's interpretation of "adjacent" as including an evaluation of functional relationship is not entitled to deference by the

---

[3] The Department points out that EPA declined the opportunity to quantify how close pollutant emitting activities must be in order to be considered "adjacent," leaving the evaluation to be conducted on a case-by-case basis.

[4] The Board may give deference to the Department's interpretation where we find it to be reasonable and correct. *North American Refractories Inc. v. DEP*, 791 A.2d 461 (Pa. Cmwlth. 2002).

Board because it is not a reasonable interpretation. According to MarkWest, the only reasonable interpretation of "adjacent" is one that denotes physical and geographic proximity. In support of this position, MarkWest argues that there is no interpretive authority, i.e., dictionary definition, regulatory or statutory definition, or court decision, that includes "functional relationship" in the definition of the word "adjacent." According to MarkWest, the only factor that may be considered in evaluating whether two properties are adjacent is their physical proximity.

However, just as no dictionary definition of "adjacent" includes the term "functional relationship," nor does any dictionary definition of "close" or "proximate" specify any particular distance, as Clean Air Council points out. Even if we were to agree with MarkWest that geographic proximity is the only factor that may be considered when evaluating whether properties are adjacent, we find the word "proximate" to be equally ambiguous.[5] As Clean Air Council points out in its brief:

> ...the question of whether two objects are "close" depends on the purposes for which that question is asked. See generally, *United States v. St. Anthony R. Co.* 192 U.S. 524, 530 (1904) ("[A]djacency must be defined with reference to the context, at least to some extent.") Whether two homes are "close" for purposes of weekly

[5] At oral argument, Judge Labuskes posed this very question to counsel for MarkWest: "Isn't proximity just another word? Proximity is the base for the word approximate. To me, approximate seems even more ambiguous than adjacent." (Transcript, p. 10)

> visits with one's parents is a different question than whether two homes are "close" for purposes of borrowing a cup of sugar. A grocery store may be "close" for a car owner but not "close" for a pedestrian.

(Clean Air Council Brief, p. 14)

The Department's Guidance suggests that properties separated by a distance of ¼ mile or less are unequivocally "proximate," "nearby" or "close enough" to be adjacent, whereas properties separated by more than ¼ mile must be examined on a case-by-case basis. There is no explanation for the cut off of ¼ mile, and even if the Department had provided an explanation for its chosen cut off distance, it is clearly a factual issue which may not be decided in the context of a motion for partial summary judgment. Why was a distance of ¼ mile chosen, as opposed to ½ mile, one mile, or for that matter, 1.5 miles, the distance between the Houston Plant and the closest compressor station? In another recent case, the Department decided that two plants 18 miles apart *should* be considered a single source. *Clean Air Council v. DEP*, EHB Docket No. 2012-165-L.[6] Yet, here we are talking about activities located as close as 1.5 miles away as not being proximate. For purposes of air quality regulation, the terms "close" and "proximate" appear to us to be abstract. It is clear that what is considered nearby or close in one context may be entirely different in another context. If two facilities are close enough to be

[6] This determination by the Department was also appealed to the Board. The appeal was subsequently settled and withdrawn. EHB Docket No. 2012-165-L (Order marking docket closed issued on April 23, 2013).

connected by pipeline – as the Houston Plant is to each of the compressor stations – is that evidence of proximity? We note the statement expressed by Judge Moore in her dissent in the *Summit* case that, in some cases, "functional interrelatedness has a physical dimension." Thus, where two or more facilities are physically interconnected due to a functional relationship existing between them, it raises an issue at this point in the proceeding as to whether this may be evidence of proximity. As stated by the dissent in *Summit*:

> [F]unctional interrelatedness can inform the determination of whether two objects that are a given distance apart are adjacent. If two properties are close enough to each other to house stationary sources that contribute to the same interrelated operation, and only to that operation, those properties are more likely to be close enough reasonably to be considered adjacent. Likewise, the EPA could reasonably conclude that two or more sources that exist only as part of the same larger process or sequence will likely be close enough to each other to be considered adjacent. As the EPA recognizes, circumstances may exist in which the distance between two stationary sources is too great for those sources to be considered adjacent, even if they are functionally interrelated. This fact does not mean that interrelatedness can never be a factor, but that it will not support a finding of adjacency in that instance.

Summit, 690 F.3d at 752-53 (Moore, C.J., dissenting).

Clearly, "nearby" and "proximate" are relative terms, and because they are relative other factors must be considered in determining whether something is "near" or "proximate" in a given set of circumstances. An examination of whether

two objects are "adjacent" in the context of air quality regulation necessarily involves questions of fact. We will allow Clean Air Council to present evidence of functional relationship between the Houston Plant and compressor stations at the trial on the merits and determine at that time the weight that it should be given.

Even in *Summit*, the majority opinion remanded the matter to EPA to decide whether the properties were adjacent based on the criteria enunciated in the opinion. The majority was clearly exasperated by the approximately five years' worth of conference calls and memos submitted by the parties. Here, the issue raised by MarkWest in its motion is not free from doubt, and we believe that attempting to decide it summarily would not be in accordance with the law. We are required to view a motion for partial summary judgment by looking at the evidence in the light most favorable to the nonmoving party, not the moving party. In order to properly address the complex issues that are involved in this appeal, cross examination and the development of factual issues in context are often necessary in order to ensure due process. In examining the question raised in MarkWest's motion, we conclude that factual issues are in dispute and should be decided after a trial on the merits. Accordingly, MarkWest's Motion to Limit Issues, or in the Alternative, for Partial Summary Judgment is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL	:	
	:	
v.	:	**EHB Docket No. 2011-072-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM & RESOURCES, LLC, Permittee	:	

ORDER

AND NOW, this 20th day of June, 2013, it is hereby **ORDERED** that MarkWest's Motion to Limit Issues for Hearing or, in the Alternative, for Partial Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chief Judge and Chairman

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: June 20, 2013

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM & RESOURCES, LLC, Permittee	:	**EHB Docket No. 2011-072-R**

CONCURRING OPINION OF JUDGE STEVEN C. BECKMAN

I concur in the Board's Order denying MarkWest's Motion to Limit Issues, or in the Alternative, for Partial Summary Judgment because I agree that "the issue raised by MarkWest in its motion is not free from doubt, and . . . that attempting to decide it summarily would not be in accordance with the law." (Op. at 15.) I write separately because, in addition to articulating some concerns that I have moving forward in this matter, I want to state my position that the issue of whether the "functional relationship" of pollution emitting activities located on separate properties should play any role in determining whether those properties are adjacent for purposes of aggregation is still an open issue in this case. To the extent the Opinion can be read to suggest otherwise, I do not agree with that reading.

Specifically, the Opinion's citation to the *Summit Petroleum* dissent and subsequent discussion of the issue may suggest to the Parties and some readers of the Opinion that the Board has determined that functional relationship is properly considered in evaluating whether properties are adjacent. (*See* Op. at 14–15.) The Opinion states that we will allow Clean Air Council to present evidence of a functional relationship at the trial on the merits and "determine at that time the weight that it should be given." (Op. at 15.) I would modify that phrase to read that the Board will "determine at that time the weight that it should be given, *if any*." That would make clear that the Board after testimony is presented at the hearing may still reach the conclusion that functional relationship is not a proper factor for consideration.

A question that arises if functional relationship is not a proper consideration is, when determining whether properties are adjacent, if one can only look at their physical or geographic proximity, then how close is close enough? The Department states in its Guidance Document, as well as at the oral argument, that it applies a quarter-mile or less rule of thumb that takes a common sense approach to determining if sources are located on adjacent properties. When asked during the oral argument how the Department decided on the quarter-mile rule of thumb, the Department stated that it was done based upon a survey of what other states have done as well as its experience in looking at facilities and sources in the oil and gas

industry. (Tr. at 38.) As the Opinion points out, the Department did not articulate a good explanation for the quarter-mile cut off or why it was chosen as opposed to some other distance such as a half-mile, a mile or one and a half miles which is the distance that apparently separates two of the sources in this case. (Op. at 13.) While MarkWest acknowledged during oral argument that, if the Board found that functional relationship was not a proper consideration, additional testimony would still be necessary on the issue of whether the properties were adjacent (Tr. at 20), none of the Parties addressed just what that testimony would consist of. It is not clear to me at this point, if consideration of functional relationship or some other similar concept is not permissible, what factors can be used by the Department and how should they be applied to determine that two properties are sufficiently close enough or sufficiently proximate to be considered adjacent. I trust the Parties will address this point in the hearing.

Finally, if the Board were to decide that functional relationship was not an appropriate factor to consider in determining whether the activities in this case were located on adjacent properties, I believe the proper action by the Board would be to remand this matter for a new determination by the Department. The Department acknowledges that it considered the functional relationship of the activities in reaching its determination that these sources should not be aggregated. (Tr. at 26.) If that consideration was improper, the logical next step would be to

send the matter back to the Department to reach a determination using the proper approach articulated by the Board.

Steven C. Beckman

STEVEN C. BECKMAN
Judge

DATED: June 20, 2013

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT CONCILUS and LEAH HUMES	:	
	:	
v.	:	**EHB Docket No. 2011-167-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CRAWFORD RENEWABLE ENERGY, LLC, Permittee	:	**Issued: June 26, 2013**

OPINION AND ORDER ON
APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

Where questions of material fact exist as to the adequacy of the alternatives analysis performed on a plan approval application for a power plant, we must deny the Appellants' motion for partial summary judgment.

OPINION

Before the Board is a motion for partial summary judgment filed by the Appellants Robert Concilus and Leah Humes (Appellants), in connection with their appeal of an air quality plan approval issued by the Pennsylvania Department of Environmental Protection (Department) to Crawford Renewable Energy, LLC (Crawford). The plan approval authorizes Crawford to construct a 90-megawatt, tire-fueled electrical power plant in Greenwood Township, Crawford County, Pennsylvania.

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http://ehb.courtapps.com

The Appellants raise numerous objections to the plan approval but seek partial summary judgment on only one of the objections, their claim that Crawford's plan approval application failed to contain a proper alternatives analysis pursuant to 25 Pa. Code§ 127.205(5).

Background

The Crawford power plant will be located in Crawford County, Pennsylvania, which is part of the Northeast Ozone Transport Region. As such, it is subject to additional requirements for the control and reduction of ozone-producing pollutants, volatile organic compounds and nitrogen oxides. Because Crawford's power plant has the potential to emit more than 100 tons per year of nitrogen oxides and is within the Northeast Ozone Transport Region, its plan approval was subject to Nonattainment New Source Review. 25 Pa. Code § 127.201(c). Among the requirements of Nonattainment New Source Review is the need to conduct an alternatives analysis. Section 127.205(5) of Pennsylvania's air quality regulations reads as follows:

> The Department will not issue a plan approval, or an operating permit, or allow continued operations under an existing permit or plan approval unless the applicant demonstrates that the following special requirements are met:
>
> * * *
>
> (5) for a new or modified facility which meets the requirements of and is subject to this subchapter, an analysis shall be conducted of alternative sites, sizes, production processes and environmental control techniques for the proposed facility, which demonstrates that the benefits of the proposed facility significantly outweigh the environmental and social costs imposed within this Commonwealth as a result of its location, construction or modification.

25 Pa. Code § 127.205(5).[1]

[1] The language of Section 127.205(5) is similar to the nontattainment requirements of the federal Clean Air Act. 42 U.S.C. § 7503(a)(5).

The Appellants assert that Crawford's application failed to: (1) analyze alternative sites for the plant; (2) analyze alternative sizes; (3) analyze alternative production processes; and (4) conduct a costs-benefit analysis, as required by Section 127.205(5). The Appellants seek summary judgment on this issue.

A motion for summary judgment or partial summary judgment may be granted where there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Rural Area Concerned Citizens v. DEP and Bullskin Stone and Lime, LLC,* EHB Docket No. 2012-072-M (Opinion and Order issued February 8, 2013), *slip op.* at 3, *citing New Hanover Twp. v. DEP*, 2012 EHB 44, *Ehmann v. DEP*, 2008 EHB 325, 326, and *Bertothy v. DEP*, 2007 EHB 254, 255. When a motion for summary judgment is made and supported as set forth in Rule 1021.94a of the Board's Rules of Practice and Procedure, an adverse party must set forth facts showing there is a genuine issue for trial in order to avoid summary judgment being entered against him. 25 Pa. Code § 1021.94a(k). When deciding summary judgment motions, the Board views the motion in the light most favorable to the non-moving party and resolves all doubts as to the existence of a genuine issue of fact against the moving party. *Clean Air Council v. DEP and MarkWest Liberty Midstream & Resources,* EHB Docket No. 2011-072-R (Opinion and Order issued June 20, 2013), slip op. at 7-8; *Rural Area Concerned Citizens, supra, citing Bethenergy Mines, Inc. v. Dept. of Environmental Protection*, 676 A.2d 711, 714 n.7 (Pa. Cmwlth.), *appeal denied*, 546 Pa. 668 (1996), and *Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162.

The Department and Crawford argue that there are facts in dispute. In the alternative, Crawford argues that if the Board finds there are no facts are in dispute, we should award summary judgment on this issue to Crawford and the Department. Based on our review of the

pleadings, we agree that there are genuine questions of material fact surrounding the adequacy of the alternatives analysis performed with regard to Crawford's plan approval application and, therefore, summary judgment on this issue is not appropriate.

A reading of the Appellants' Memorandum of Law indicates to us that each of the contentions made by the Appellants involves a factual dispute. For example, with regard to the question of the analysis of alternative size for the facility, the Appellants admit that Crawford discusses the size of the proposed facility on pages 2, 7, 9 and 10 of Section 9.3 of the application but contend that the discussion is general and incomplete. (Appellants' Memorandum of Law, p. 8) With regard to the question of analysis of alternative production processes, the Appellants acknowledge that Crawford's application mentions "bubbling fluidized bed technology," but that "*it is not clear* that such a unit is in fact an 'alternate production process.'" (Appellants' Memorandum of Law, p. 9) (emphasis added) With regard to the question of analysis of alternative environmental control techniques, the Appellants state that the "Section 9.3 submittal appears to discuss its chosen techniques in a generic fashion on pp. 7-8 of the Analysis" and "makes generic reference to its 'add-on' controls,' but it does so in a vacuum." (Appellants' Memorandum of Law, p. 9-10) The Appellants' own choice of words indicates to us that questions of fact surround these issues.

Likewise, with regard to the question of analysis of alternative sites, the Appellants argue that the analysis was inadequate because Crawford limited its search to Crawford County, which the Appellants contend was "arbitrary." (Appellants' Memorandum of Law, p. 10) Section 127.205(5) does not set forth how expansive an applicant's search for alternative sites must be. Without further information, we cannot rule on whether it was arbitrary for Crawford to limit its search to Crawford County.

With regard to the question of cost-benefit analysis, the Appellants acknowledge that the application contains a section on benefits entitled "Project Benefits Summary" in Section 9.3, but claim that it is "rife with completely unsupported factual claims offered as alleged benefits of the proposed tire-burning power plant." Clearly, this issue involves questions of fact which cannot be decided in the context of a summary judgment motion. On page 14 of its response, Crawford enumerates ten benefits which it contends were addressed in the application. Whether those benefits are "completely unsupported factual claims" as alleged by the Appellants is a matter on which evidence must be presented at trial.

With regard to the costs portion of the analysis, the Appellants point out that there is no corresponding heading in Section 9.3 dealing with a summary of social and environmental costs. (Appellants' Memorandum of Law, p. 11) They also contend they were unable to obtain economic and environmental cost information from Crawford through discovery because Crawford objected to their interrogatories as being irrelevant. We note initially that the Appellants never filed a motion to compel the answers that Crawford objected to providing. Second, in response to the Appellants' argument that Section 9.3 contains no cost analysis, both the Department and Crawford assert that environmental and social costs are evaluated in other sections of the plan approval, including the emissions modeling and risk evaluation contained in Section 8. Crawford admits that the application did not contain a section entitled "Alternatives Analysis." But, Crawford and the Department assert that the necessary information to complete an analysis under Section 127.205(5) was contained in various sections of the application. The Department also states that some of the information which it relied upon in the alternatives analysis was "developed through the Department's review, comment and response process." They therefore argue that although the information necessary for conducting an alternatives

analysis may not have been packaged in one concise place in the application, it does not mean that the information is not there or that an evaluation was not done. The Department contends that, in addition to reviewing each section of the application, it also performed its own search of nationwide databases and reference materials and responded to comments from the public and the Environmental Protection Agency. Whether the Department's review was sufficient necessarily involves questions of fact.

The cases cited by Appellants stand for the proposition that a thorough alternatives analysis must be done. However, we are not in a position to make that determination without hearing testimony and reviewing the evidence presented by the parties at trial. Therefore, we find that an award of partial summary judgment is not appropriate and we will proceed to trial on this matter.

We enter the following order.

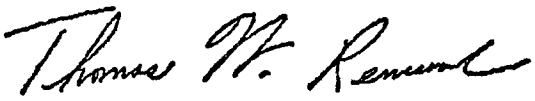
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT CONCILUS and LEAH HUMES	:	
	:	
v.	:	**EHB Docket No. 2011-167-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CRAWFORD RENEWABLE ENERGY, LLC, Permittee	:	

ORDER

AND NOW, this 26th day of June, 2013, it is hereby **ORDERED** that the Appellants' Motion for Partial Summary Judgment is denied for the reasons set forth in this Opinion.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman

DATED: June 26, 2013

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS (RACC)	:	
v.	:	**EHB Docket No. 2012-072-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE AND LIME, LLC, Permittee	:	**Issued: July 9, 2013**

OPINION AND ORDER ON APPELLANT'S MOTION TO RECONSIDER THE BOARD'S OPINION AND ORDER ON THE DEPARTMENT'S AND THE PERMITTEE'S JOINT MOTION TO STRIKE WITNESSES FROM RACC'S PRE-HEARING MEMORANDUM

By Richard P. Mather, Sr., Judge

Synopsis

The Board denies the Appellant's Motion to Reconsider the Board's earlier opinion and order in this appeal that granted the motion to strike witnesses from Appellant's Pre-Hearing Memorandum. The Appellant has failed to demonstrate extraordinary circumstances to support its request to reconsider the Board's earlier interlocutory opinion and order as required by 25 Pa. Code § 1021.151.

OPINION

On June 26, 2013, the Appellant, Rural Area Concerned Citizens (RACC), filed a Motion to Reconsider the Board's earlier Opinion and Order dated June 12, 2013 which granted the Joint Motion to Strike Witnesses from RACC's Pre-Hearing Memorandum. During a previously scheduled pre-hearing conference call on June 27, 2013, the Board discussed the recently filed Motion with the parties. The Department of Environmental Protection and the Permittee,

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Bullskin Stone and Lime, LLC, (Bullskin) indicated that they opposed RACC's Motion to Reconsider. During the conference call the Board indicated that it would deny the Motion, and this Opinion and Order reflect the Board's decision to deny the Motion.

Rule 1021.151 of the Board's Rules, 25 Pa. Code §1021.151, governs Reconsideration of Interlocutory Orders. Rule 1021.151(a) provides:

> A petition for reconsideration of an interlocutory order or ruling shall be filed within 10 days of the order or ruling. The petition must demonstrate that extraordinary circumstances justify consideration of the matter by the Board. A party may file a memorandum of law at the time the motion or response is filed.

25 Pa. Code § 1021.151(a). The Board's June 12, 2013 Opinion and Order granting the motion to strike witnesses is an interlocutory order, and therefore, RACC's Motion is subject to this Rule. For the reasons set forth below, RACC has failed to demonstrate extraordinary circumstances that would support a Board decision to reconsider its prior opinion and order to the contrary, and there is no legitimate reason for the Board to grant RACC's motion.[1]

In its Motion to Reconsider, RACC asserted that a request for reconsideration will only be granted for a "compelling and persuasive" reason, citing *Mountain Watershed Association v. DEP*, 2005 EHB 592, 593. This decision applied Rule 1021.152 of the Board's Rules which governs reconsideration of final orders of the Board. 25 Pa. Code § 1021.152. Rule 1021.152 establishes a high standard for reconsideration of final orders of the Board, but the standard for reconsideration of interlocutory orders, under Rule 1021.151, is even higher. RACC has not

[1] It also appears that RACC's Motion to Reconsider is untimely. The Board's earlier Opinion and Order was electronically issued on June 12, 2013. RACC's Motion to Reconsider this Opinion and Order was filed on June 26, 2013 which is more than 10 days after the prior opinion and order were issued and served on the Parties. Under Rule 1021.151 a motion to reconsider must be filed within 10 days of the order or ruling at issue. 25 Pa. Code § 1021.151(a).

provided the Board with any basis to support its motion to reconsider under either of these very rigorous standards to secure reconsideration of either final or interlocutory orders.

RACC Motion to Reconsider is nothing more than a rehash of its earlier arguments in opposition to the Motion to Strike Witnesses from RACC's Pre-Hearing Memorandum that the Board previously granted. RACC asserts in its memorandum, but not in its motion, that "this petition has set forth facts that are inconsistent with the findings of this Board, being that Ron Caligure as a witness after that disclosure." This assertion is entirely without merit, and it is entirely inconsistent with the facts of this appeal and the Board's prior decisions.

As the Board described in its earlier opinion granting the Motion to Strike Witnesses from RACC's Pre-Hearing Memorandum, the Board had previously decided that RACC had to identify its fact witnesses it intended to call at the hearing because the Permittee and the Department wanted to depose them. The parties conferred, RACC identified its witnesses and they were made available for deposition.[2] After this point, when the Board had to resolve a prior discovery dispute, RACC was not able to freely add additional fact witnesses.

RACC's argument in support of its Motion to Reconsider regarding Ron Caligure is truly without merit for two reasons. First, as the Board previously described, the Board scheduled a special conference call on the last day of discovery to ensure all discovery disputes were resolved. The Board decided this was necessary in light of the large number of discovery disputes in this appeal. During the conference call, RACC requested permission to add a new expert witness and a new fact witness beyond the existing discovery deadlines. After the parties filed a written Motion and Responses, the Board denied the request to add a new expert witness,

[2] It is correct that Frank Uhrin was earlier identified in discovery by RACC. When RACC objected to his subsequent deposition, among others, and the Board decided that the parties confer (so RACC could identify the fact witnesses it intended to call at trial, and they would be made available for deposition), RACC decided to not identify Mr. Uhrin at this time as a witness for trial. Since he was not identified by RACC at this time, he cannot be added now.

but the Board allowed RACC to add a new fact witness (Mr. Booher) provided he was promptly made available for deposition. RACC made no mention of Ron Caligure during the special conference call or in RACC's written motion. RACC's failure to disclosure its desire to call Ron Caligure at this late date during a conference call, when it disclosed another new fact witness who the Board ultimately allowed, cannot be excused by the Board.

Second, RACC repeatedly mentions that Ron Caligure was disclosed as a fact witness in Supplemental Answers to Interrogatories on January 18, 2013 and that he was available for deposition after this date. January 18, 2013 was the date of the special conference call the Board scheduled, and equally important, that was the last day for discovery. How could the Permittee and the Department schedule a deposition in response to this written disclosure that was not mentioned on our call when discovery ended on the date RACC stated it submitted its Supplemental Answers now identifying Mr. Caligure?[3] The time for discovery ended on January 18, 2013, and there was not time within this prescribed period, which was previously extended at Appellant's request, to depose Mr. Caligure. RACC's attempt to add Mr. Caligure as a fact witness on the last day of discovery violated the Board's prior directions on identifying witnesses so that they could be deposed within the deadline for completing discovery by January 18, 2013.

In summary, RACC has not provided the Board with any legitimate basis to grant its Motion to Reconsider and it has failed to identify any extraordinary circumstances that support

[3] While Appellant asserts that it "filed" Supplemental Answers on January 18, 2013 containing Mr. Caligure's name, the Board has no record of this filing and it appears that the Appellant merely mailed or served its Supplemental answers on this date. There is nothing in the record before the Board to suggest that the Permittee and the Department were aware that Appellant has filed, mailed or served Supplemental Answers, as alleged, on January 18, 2013. During the call on January 18, which the Board scheduled to identify and resolve all remaining discovery disputes, it appears that only the Appellant was aware of its desire to add Mr. Caligure as a witness. Appellant's failure to disclose Mr. Caligure during the call or in its Motion, which identified Mr. Booher, compels the Board to deny Appellant's Motion to Reconsider.

its Motion. The Board therefore denies RACC Motion to Reconsider and enters the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS (RACC)	:	
v.	:	**EHB Docket No. 2012-072-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE AND LIME, LLC, Permittee	:	

ORDER

AND NOW, this 9th day of July, 2013, it is hereby ordered that the Board denies RACC's Motion to Reconsider.

ENVIRONMENTAL HEARING BOARD

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: July 9, 2013

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN R. WEAVER	:	
	:	
v.	:	**EHB Docket No. 2013-041-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 9, 2013**

OPINION AND ORDER ON
MOTION FOR LEAVE TO AMEND

By Bernard A. Labuskes, Jr., Judge

Synopsis

A motion for leave to amend a notice of appeal is granted to the extent that it seeks to add to and refine an appellant's grounds for appeal. The motion is denied to the extent that it seeks to add a new appellant because an appeal may not be amended to add a new appellant more than 30 days after the date that person received notice of the Department's action.

O P I N I O N

This is an appeal from an order that the Department of Environmental Protection (the "Department") issued to John R. Weaver and B. Laura Weaver pursuant to the Dam Safety and Encroachments Act, 32 P.S. § 693.1 *et seq.*, concerning activities conducted on their property in Crawford County. Only John R. Weaver appealed the order. Mr. Weaver filed the appeal *pro se* and requested *pro bono* representation. We forwarded that request to the Pennsylvania Bar Association's Environmental and Energy Law Section Pro Bono Program. The Program determined that Mr. Weaver was eligible for representation, and the program was thereafter able to successfully place the case with counsel listed below. Now represented by counsel, Weaver

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http://ehb.courtapps.com

has moved to amend his appeal. First, he seeks to add his wife, B. Laura Weaver, as an appellant. Second, he seeks to add to and refine the grounds for his appeal. The Department does not object to the amendment to add additional grounds for appeal, but it opposes the request to add an additional appellant.

Mr. Weaver received notice of the Department's April 2 order on April 2. (See Motion for Leave to Amend ¶4.) The order was taped to the front of the Weavers' house. (Notice of Appeal ¶2(d).) As Mr. Weaver's wife, who also lived at their marital property (see Motion ¶5), it would appear Ms. Weaver also received notice of the Department's action on April 2. Mr. Weaver has not alleged otherwise in support of the motion to amend.[1] Indeed, Mr. Weaver says that he "intended" his notice of appeal (filed on April 6) to apply to himself and his wife. Therefore, Ms. Weaver had 30 days from April 2 to file an appeal. She failed to do so, and Mr. Weaver's motion to amend was not filed with the Board until June 18. Her failure to file a timely appeal deprives the Board of jurisdiction. 32 P.S. § 693.24; 25 Pa. Code § 1021.52(a)(1); *Rostosky v. DER*, 364 A.2d 761 (Pa. Cmwlth. 1976). This jurisdictional defect may not be overcome by way of an amendment to another party's timely appeal. *Gemstar Corp. v. DEP*, 1997 EHB 367, 369. *Cf. Robachele v. DEP*, 2006 EHB 373 and 997 (appeal of one Department action may not be amended to include an appeal of a separate Department action more than 30 days after notice was received of the separate Department action).[2] To allow such an amendment would rather effectively vitiate the 30-day jurisdictional requirement. Accordingly, Mr. Weaver's

[1] Mr. Weaver does assert that Ms. Weaver was not "properly served," but the Board's jurisdictional clock turns on the receipt of written notice, not "proper service."

[2] The situation presented here, which involves an attempt to add a new appellant, should be distinguished from cases involving the substitution of a successor in interest, which is allowed under certain circumstances. 25 Pa. Code § 1021.83; *Seder v. DEP*, 1999 EHB 782. *Compare also Jamcracker, Inc. c/o John Gonsalves v. DEP*, 2002 EHB 244 (appeal amended to clarify ambiguous caption, not add a new party).

motion for leave to amend his notice of appeal must be denied to the extent it seeks to add his wife as an appellant.

On the other hand, Mr. Weaver's motion will be granted to the extent that it seeks to add to and refine his objections to the Department's actions. The Department does not object to this portion of the amendment, and rightly so. As we recently explained in *Borough of St. Clair v. DEP*, EHB Docket No. 2012-148-L (Opinion issued February 28, 2013),

> [a] notice of appeal can be amended as of right within 20 days of its filing. 25 Pa. Code § 1021.53(a). After that, we may grant leave for further amendment "if no undue prejudice will result to the opposing parties." 25 Pa. Code § 1021.53(b). The burden of proving that no undue prejudice will result to the opposing parties is on the party requesting the amendment. *Id.* Our rule, with a heavy emphasis on a determination of prejudice,
>
> > was intentionally selected as a more liberal standard to replace the Board's rigid former rule that made amendment more difficult. *Groce v. DEP*, 2006 EHB 289, 291. So long as a party is seeking to amend its grounds or objections to a timely appealed action and not seeking to extend the Board's jurisdiction, "[r]egardless of when a motion to amend is submitted, whether to allow an amendment after the period for amendments as of right is, of course, within the Board's discretion." *Robachele, Inc. v. DEP*, 2006 EHB 373, 375, 379.
>
> *Henry v. DEP*, 2012 EHB 324, 325. The *Official Comment* to the Rule reads as follows:
>
> > In addition to establishing a new standard for assessing requests for leave to amend an appeal, this rule clarifies that a nunc pro tunc standard is not the appropriate standard to be applied in determining whether to grant leave for amendment of an appeal, contrary to the apparent holding in *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986).
>
> In assessing whether the parties opposing the amendment will suffer undue prejudice, we consider such factors as (i) the time when amendment is requested relative to other developments in the litigation (including but not limited to the hearing schedule); (ii) the scope and size of the amendment; (iii) whether the opposing party had actual notice of the issue (e.g. whether the issue was raised in other filings); (iv) the reason for the amendment; and (v) the extent to which the amendment diverges from the original appeal. *Rhodes v. DEP*, 2009 EHB 325,

328-29. *See also Upper Gwynedd Twp. v. DEP*, 2007 EHB 39, 42; *Angela Cres Trust v. DEP*, 2007 EHB 595, 601; *PennFuture v. DEP*, 2006 EHB 722, 726; *Robachele v. DEP,* 2006 EHB 373, 379; *Tapler v. DEP*, 2006 EHB 463, 465.

(*Borough of St. Clair*, slip op. at 2-3.)

Coming so early in the litigation, we do not see that the Department will suffer any undue prejudice as a result of Mr. Weaver's amended objections. There appears to be a long history of involvement between Mr. Weaver and the Department, which suggests that the issues raised in the amendment should come as no surprise. The amended objections do not diverge dramatically from the objections set forth in the original notice of appeal. Finally, the fact that Mr. Weaver originally proceeded *pro se* but now has the benefit of *pro bono* counsel is not entirely irrelevant. *Henry*, 2012 EHB at 326-27. Therefore, the amendment to add additional objections to the Department's action will be allowed.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN R. WEAVER	:	
	:	
v.	:	**EHB Docket No. 2013-041-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 9th day of July, 2013, it is hereby ordered that the motion for leave to amend the notice of appeal is **denied** with respect to the request to add B. Laura Weaver as an appellant, and **granted** with respect to the request to add to and refine the objections to the Department's action.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: July 9, 2013

c: **DEP, Bureau of Litigation:**
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9th Floor, RCSOB

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Philadelphia, PA 19103

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARIA SCHLAFKE	:	
	:	
v.	:	**EHB Docket No. 2012-186-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 15, 2013**

OPINION AND ORDER ON
PARTIES PROCEDURAL AND DISCOVERY MOTIONS

By Steven C. Beckman, Judge

Synopsis

The Board denies Appellant's Motion to Compel the Secretary to the Environmental Hearing Board ("Board") to appoint pro bono representation. The Board grants Appellant's unopposed Motion for Extension of Time to complete discovery. However, where Appellant failed to respond to the Department's discovery requests and to the Department's motions, the Department's Motion to Deem Admitted Matters Set Forth in the Department's First Request for Admissions and Admission Interrogatories will be granted. The Board also grants the Department's Motion to Compel responses to interrogatories and production of documents.

O P I N I O N

The Parties filed three Motions that are currently pending with the Board. The first of these Motions was filed by Appellant, Maria Schlafke, on June 20, 2013 and seeks to compel the Board to appoint pro bono counsel and extend the time for discovery. The Department filed two Motions on June 21, 2013. The Department's first Motion requests that the Board deem admitted certain matters based on the failure of Ms. Schlafke to file responses to request for admissions.

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The Department's second Motion seeks to compel responses to interrogatories and request for production of documents. The Board held a conference call with the parties on June 24, 2013 to discuss the Motions. Thereafter, neither party filed a response to the Motions filed by the opposing party. The time provided for by the Board's Rules to file a response has passed so the record is complete on these Motions.[1] *See* 25 Pa. Code § 1021.92(f). Based on our review of the pending Motions, we believe that the Motions raise two issues that warrant discussion by the Board.

I. Appellant Maria Schlafke's Motion to Compel the Secretary of the Board to Appoint Pro Bono Counsel Is Not Supported by the Board's Rules and Is Therefore Denied.

Ms. Schlafke is currently representing herself in this matter. As such, Ms. Schlafke has had difficulty in following the Board's rules and ensuring that her filings comply with the Board's requirements. In her initial Notice of Appeal, she filed a document labeled "Answer of Respondents Property One, LLC; Maria Schlafke to the Complaint of the Department of Environmental Protection" as her objection to the Department's action. She included in this Answer a section labeled "Defenses" and, as her Fourth Defense, requested "the Secretary to the

[1] On July 12, 2013, Appellant Maria Schlafke filed a "Motion for Protective Order, Motion Objecting to Appellee's Motion to Compel and For Sanctions, and Motion to Dismiss." The Board first notes that Ms. Schlafke's objection to the Department's Motion to Compel and For Sanctions was after the time to respond provided by the Rules, and is therefore untimely. *See* 25 Pa. Code § 1021.93(c). Furthermore, even upon review of Appellant Maria Schlafke's Motion Objecting to Appellee's Motion to Compel and For Sanctions, we stand by the decision in this Opinion and Order regarding the discovery issues raised in the Department's Motion.

With respect to Appellant's Motion to Dismiss, the Board notes that this matter comes before the Board because Ms. Schlafke filed her Notice of Appeal on November 13, 2012. By doing so, Appellant subjects herself to the rules and procedures of the Board, including those governing filing of documents and participating in discovery. Under the Board's Rules, Ms. Schlafke may withdraw her appeal at any time prior to adjudication. 25 Pa. Code § 1021.141(a)(1). Until such time, however, Appellant is expected to adhere to all rules, procedures, and orders like all other parties appearing before the Board.

The Board will not rule on the Motion for Protective Order and Motion to Dismiss filed by Appellant Maria Schlafke on July 12, 2013 until the Department has had the opportunity to respond in accordance with Section 1021.93(c).

Hearing Board to cause a referral to pro bono counsel" for herself and Property One LLC ("Property One"). Ms. Schlafke is allegedly the managing member of Property One.

On November 14, 2012, we ordered Property One to obtain counsel and have counsel enter an appearance on or before December 14, 2012 in accordance with 25 Pa. Code Section 1021.21(b). This rule requires corporations to be represented by counsel. Neither Property One nor Ms. Schlafke responded to this Order. On December 19, 2012, we issued a second Order requiring that counsel enter an appearance on behalf of Property One on or before January 4, 2013, and stated that a failure to comply with the Order would result in dismissal of Property One's appeal. Again, there was no response to the Order by Property One or by Ms. Schlafke and, as a result of the failure to comply with the Board's Order, Property One's appeal was dismissed on January 14. The January 14th Order clearly stated that Ms. Schlafke's appeal, in her individual capacity, was permitted to continue.

The Department filed a Motion to extend the discovery period to which Ms. Schlafke again filed no response. The Board granted an extension until June 21, 2013. One day before the close of the discovery period, Ms. Schlafke filed her current Motion seeking to compel the Board to appoint pro bono counsel, citing 25 Pa. Code Section 1021.24. This rule provides that the Board Secretary "is authorized to refer" persons who appear in front of the Board on a pro se basis to either the pro bono committee of the Pennsylvania Bar Association ("PBA") Environmental and Energy Law Section or a county bar association lawyer referral service. 25 Pa. Code § 1021.24(a). Pursuant to this Rule, the Board routinely refers pro se parties to the PBA Environmental and Energy Law Section pro bono program. However, in order to initially qualify for consideration for pro bono representation under the PBA program, the pro se party must meet certain requirements, including having limited financial resources. Parties are usually asked to

provide relevant financial information, including tax returns, from which the PBA pro bono coordinator can determine the eligibility of the party for consideration for pro bono representation. Many pro se parties fail to provide the relevant financial information or otherwise do not meet the program guidelines for representation and therefore, no referral is made.[2] Even if the pro se party meets the program requirements, there is no guarantee that pro bono counsel willing to represent the party will be found to handle the matter.[3]

Of course the key concept in this Rule for deciding Ms. Schlafke's Motion to Compel the Board to appoint pro bono counsel is that the Board *is authorized to*, or may, refer persons to the pro bono committee. The plain language of the Rule makes it clear that it is a completely discretionary action by the Board. The Board is not required to provide pro bono counsel to parties appearing before the Board, or to even make a referral to a pro bono program. Ms. Schlafke's Motion also appears to claim that the Department should appoint counsel for Ms. Schlafke. Again, there is no requirement in our Rules that the Department provide pro bono counsel to Ms. Schlafke. Therefore, given the discretionary nature of Section 1021.24 regarding our authority to make referrals to *pro bono* programs, as well as the complete lack of authority regarding Board appointment of counsel, we will deny Ms. Schlafke's Motion to Compel.

II. Pennsylvania Rule of Civil Procedure 4014 Requires that the Board Deem Admitted the Matters Set Forth in the Department's First Request for Admissions and Admission Interrogatories.

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[2] Despite the fact that the Board is not required to provide or make a referral to pro bono counsel, following the June 24th conference call with the parties, we contacted a representative of the PBA Environmental and Energy Law Section pro bono program, Alexandra Chiaruttini, Esq., with regard to Ms. Schlafke's request. We note that a letter was filed with the Board by Ms. Chiaruttini confirming that she spoke with Ms. Schlafke and informing her that she was not eligible for pro bono counsel in the Section's program. (*See* Docket Doc. No. 19.)

[3] The Board appreciates how important *pro bono* representation is for our profession. We thank those members of the Bar who routinely provide representation on a *pro bono* basis. We encourage other members to consider offering *pro bono* services to *pro se* parties appearing before the Board.

The Department's unopposed Motion states that it mailed its First Request for Admissions and Admission Interrogatories, Interrogatories, and Production Documents to Ms. Schlafke's address of record via First Class and Certified Mail on May 3, 2013. Attached to the Motion as Exhibit B is a copy of the Track and Confirm for the Certified Mail showing that the mailing was available for pickup on May 9, 2013. According to the unopposed Motion, the certified mail was returned to the Department but the First Class mailing was not. As of June 21, 2013, the date of the Department's Motion, Ms. Schlafke had not filed any response to the Department's Request.

The Board rules provide that written requests for admissions are governed by Pennsylvania Rule of Civil Procedure 4014. 25 Pa. Code § 1021.102(a). Rule 4014(b) specifically provides that:

> The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection, signed by the party or his attorney . . . .

Pa.R.Civ.P. 4014(b). Under this rule, the Board has consistently found that admissions are deemed automatically admitted if answers are not provided within the 30 day time frame. *Rockland Natural Gas Company, Inc. et al v. DEP*, 2010 EHB 40 (citing *Kennedy v. DEP*, 2001 EHB 109, 110; *Lentz v. DEP*, 2001 EHB 838, 840-841). Despite a second request from the Department mailed June 13, 2013, Ms. Schlafke still had not responded to the request as of the time of Department's Motion. Therefore, because more than 30 days has elapsed since the Department's initial request, the matters addressed in the Department's request for admissions must be deemed admitted.

In accordance with the discussion above, and to address all issues raised in Ms. Schlafke's Motion of June 20, 2013 and the Department's Motions of June 21, 2013, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARIA SCHLAFKE	:	
	:	
v.	:	**EHB Docket No. 2012-186-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 15th day of July, 2013, upon review of Appellant Maria Schlafke's Motion to Compel and Motion for Extension of Time filed on June 20, 2013 and the Department's Motion to Deem Admitted Matters Set Forth in the Department's First Request for Admissions and Admission Interrogatories and Motion to Compel filed on June 21, 2013, and in accordance with the reasoning set forth in the Opinion above, we order the following:

1. Appellant Maria Schlafke's Motion to Compel the Secretary to the Hearing Board to appoint pro bono counsel is **DENIED**;
2. Appellant Maria Schlafke requested that the Board extend the time for discovery and the Department did not file a response opposing the requested extension. Therefore, Appellant Maria Schlafke's Motion for Extension of Time is **GRANTED**. All discovery shall be completed by **August 16, 2013**. Dispositive motions shall be completed by **September 16, 2013**.
3. The Department's Motion to Deem Admitted Matters Set Forth in the Department's First Request for Admissions and Admission Interrogatories is **GRANTED**. All of the Requests for Admissions and Admission Interrogatories labeled as such in Exhibit A of the Department's Motion are deemed admitted; and

4. The Department's Motion to Compel discovery is **GRANTED**. Within **twenty (20)** days from the date of this Order, Appellant Maria Schlafke shall serve the Department with responses to the interrogatories and request for production of documents found in the document attached as Exhibit A to the Department's Motion. Failure to comply with this section of the Order shall result in appropriate sanctions.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chief Judge and Chairman

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

STEVEN C. BECKMAN
Judge

DATED: July 15, 2013

c: **DEP, Bureau of Litigation:**
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9th Floor, RCSOB

For the Commonwealth of PA, DEP:
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Office of Chief Counsel - Northwest Region

For Appellant, *Pro Se*:
Maria Schlafke
6520 NW 18th Avenue
Gainesville, FL 32605

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CRUM CREEK NEIGHBORS	:	
	:	
v.	:	**EHB Docket No. 2007-287-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PULTE HOMES OF PA, LP, Permittee	:	**Issued: July 19, 2013**

OPINION IN SUPPORT OF ORDER GRANTING MOTION TO REOPEN FEE PETITION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board reopens an application for attorney's fees that was previously suspended for prudential reasons due to the Board's suspension and remand of the permit to the Department for further fact-finding and the pendency of a Commonwealth Court appeal. The Department has now renewed and modified the permit, as well as expressly lifted the suspension of the permit. The Commonwealth Court appeal was quashed, and the renewed permit has not been appealed. The conjecture that the permit may be subject to further amendment in the future is not a basis for continuing to suspend the fee application.

O P I N I O N

Crum Creek Neighbors ("CCN") filed this appeal from the Department of Environmental Protection's (the "Department's") issuance of a stormwater management NPDES permit to Pulte Homes of PA, L.P. ("Pulte") for a residential development in Marple Township, Delaware County. After a hearing, we issued an Adjudication and Order on October 22, 2009 suspending Pulte's permit and remanding the matter for further fact-finding and analysis by the Department

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regarding the project's impact upon Holland Run, an Exceptional Value stream. We concluded that the Department erred in treating the permitted site as a "nondischarge site" when there was no material disagreement among the expert witnesses that the site would in fact have a discharge when there was anything more than a two-year storm. We were also concerned that there had been no considered analysis of the hydrogeological impact of the project on the EV stream. We did not hold that the stormwater management system for the project necessarily needed to be redesigned. Rather, we remanded the permit to the Department with instructions to review the matter further using a proper analysis consistent with our Adjudication. We suspended the permit pending the Department's reevaluation.

Then, two things happened: Pulte appealed our Adjudication to Commonwealth Court, and CCN filed an application with us to recover its attorney's fees from the Department. In addition, somewhere along the way Pulte's suspended permit was transferred to its successor in interest, Sentinel Ridge Development, LLC ("Sentinel Ridge"). We are informed that Sentinel Ridge is the current permittee.

In its appeal to Commonwealth Court, Sentinel Ridge argued that our Adjudication was not supported by sufficient scientific evidence and that we erred in shifting the burden of proof to Pulte and the Department. The Court directed the parties to address in their briefs whether it had jurisdiction due to the remand nature of our order. In response, Sentinel Ridge contended that our order was a final order pursuant to Pa.R.A.P. 341(b) because it disposed of all claims by all parties following a full evidentiary hearing. Alternatively, Sentinel Ridge argued that it could appeal pursuant to Pa. R.A.P. 311(f) because the issues in the case would evade appellate review if an immediate appeal was not allowed. The Department disagreed, and argued that our order was neither a final order nor an order that implicated issues that would evade appellant review if

not reviewed immediately. In a case of strange bedfellows, CCN joined in Sentinel Ridge's arguments that the appeal was ripe for review.

The Court rejected Sentinel Ridge and CCN's arguments. It held that our order was neither a final order nor an otherwise appealable interlocutory order. *Sentinel Ridge Development, LLC v. DEP*, 2 A.3d 1263 (Pa. Cmwlth. 2010). It also was not persuaded by Sentinel Ridge's alternative argument that an appeal should be allowed under Pa. R.A.P. 311(f) because the issues raised would evade appellate review. The Court reasoned:

> In this case, the EHB suspended the permit and remanded the case for DEP to conduct additional fact finding. This is not a ministerial task. DEP will use its expertise and discretion to further investigate the hydrogeologic aspects of the site as relates to the project's impact on the EV portion of Holland Run.
>
> After DEP conducts its review, it will either restore the permit or revoke it. Any aggrieved party can then appeal. The EHB can then review the permit in light of the additionally gained information. The issues here relating to the overflow and to the hydrogeology can then be fully addressed with a fully developed record.
>
> * * *
>
> In this case, the EHB did not finally address any aspect of the permit. The EHB specifically indicated that it was not revoking the permit, but that it was not "particularly receptive ... based on the existing record" to "simply approv[ing] the permit and dismiss[ing] the appeal." EHB Dec. at 18. Rather, the EHB accepted many of the concerns and questions raised by CCN and its experts as to the methodologies used by Sentinel Ridge and DEP, and has remanded the matter for further evaluation of the permit under appropriate methodologies.
>
> Further, it is not clear what will occur upon further evaluation by DEP. Thus, it is not clear what will happen with the permit, why it will happen, and which party, if any, will be aggrieved. Under these circumstances, the EHB order is not final and reviewable.

Id., 2 A.3d at 1267. The Court quashed the appeal.

Meanwhile, on the attorney's fees front, the Department filed a response in opposition to CCN's application for fees. The Department among other things argued that CCN's application was premature because the Board remanded certain issues to the Department for further consideration. It also suggested that it would be prudent for the Board to refrain from ruling on the application until the resolution of Pulte's appeal before the Commonwealth Court. Upon seeing the Department's response, we ordered CCN to file a position statement and/or brief limited to the Department's argument that resolution of the fee application was premature. It did so. It argued that a final order is not necessary for a fee award, and in any event, that the Board's Adjudication constituted a final order for purposes of a fee application. It also argued that we should move forward on the application notwithstanding Pulte's appeal to the Commonwealth Court.

Although we rejected the contention that our Adjudication was anything other than a final order for purposes of the fee application, we nevertheless decided to defer a ruling on the application given the uncertainties associated with the remand and the Commonwealth Court appeal. *Crum Creek Neighbors v. DEP*, 2010 EHB 67. We suspended CCN's fee petition pending further order of the Board.

Unfortunately for CCN, more than three years have passed. However, on May 25, 2013, the Department published the following announcement in the Pennsylvania Bulletin:

Request to Renew and Modify
NPDES Stormwater Permit

> **NPDES Permit PAI012306006RA-1 Stormwater, Sentinel Ridge Development, LLC**, 110 North Phoenixville Pike, Suite 100, Malvern, PA 19355. The Department of Environmental Protection (Department) approves the request of Sentinel Ridge Development, LLC to renew and modify National Pollutant Discharge Elimination System (NPDES) Stormwater Permit No. PAI012306006R-1 to conduct earth disturbance activities and

discharge stormwater associated with construction activities from its Ravenscliff development located in Marple Township, **Delaware County**, into Holland Run (a.k.a. Hotland Run) (EV-CWF), Holland Run (WWF), and Crum Creek (WWF). *The Department also approves the request to lift the remaining NPDES permit suspension imposed by the October 22, 2009 Order of the Environmental Hearing Board (EHB) in the matter of Crum Creek Neighbors v. DEP and Pulte Homes of PA, L.P., EHB Docket No. 2007-287-L, to allow Sentinel Ridge Development, LLC, to conduct earth disturbance activities and discharge stormwater associated with construction activities to Holland Run (EV-CWF) from Phase III of its development.*

The NPDES permit suspension was previously lifted for Phases I and II of the project. In approving the above requests, the Department evaluated the application, documentation, and plans in support thereof, and concluded that the requests satisfy all applicable legal and regulatory requirements.

The Department's approval authorizes earth disturbance activities in, and the discharge of stormwater associated with construction activities from, the Phase III Limit of Disturbance Area of the development. Phase III is situated in the northeasterly portion of the development and consists of 18.86 acres of total area (11.84 acres disturbed area), as depicted on plans by Wilkinson & Associates dated February 1, 2012 and last revised July 11, 2012. 13.71 acres of the Phase III total area (7.60 acres disturbed area) are located in the Holland Run Watershed. Permanent work for the Phase III area is authorized to consist of the construction of 73 units encompassing 146 townhouses and associated site improvements. Activities in Phase III will also include several additional Post-Construction Stormwater Best Management Practices to address changes in the rate, volume and quality of runoff resulting from a net increase of disturbed area of 4.1 acres and a net increase in impervious area of 3.2 acres. Construction phases for the project are clearly depicted on the Erosion and Sedimentation Control Plan Drawings, dated February 1, 2012, last revised March 20, 2013, submitted by the developer and approved by the Department and the Delaware County Conservation District. These plans are available for public inspection and review at the District's offices.

The Best Management Practices and the Antidegradation Analysis Module for the project site set forth in NPDES Permit No. PAI01230600R-A1, as modified, along with supporting

> documentation and plans thereto, constitute the effluent limitations for Phase III of the development.
>
> The Department's approval is subject to the limitation that all earth disturbance activities and related work, and any discharge of stormwater from the site, must be in accordance with applicable regulations and the terms of the NPDES permit, including supporting documentation and plans that include a Hydrologic and Water Quality Evaluation of Stormwater Impacts on Holland Run, a Hydrogeologic Evaluation Report, and other information, that examine the effect of the project on the base flow to Holland Run, and the effect of certain modeled basin overflows, on Holland Run.
>
> The authorization does not relieve the applicant from applying for and obtaining any and all additional permits or approvals from local, state, or federal agencies for the construction activity.

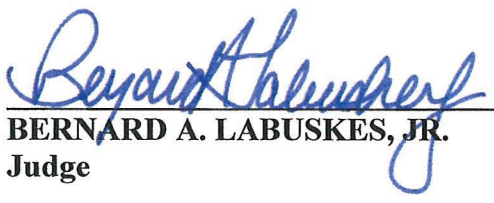
43 Pa. Bull. 2947 (May 5, 2013)(italics emphasis added).

Now that the Department has expressly lifted "the remaining permit suspension" imposed by our Adjudication, CCN has filed a motion to reopen consideration of its fee petition, i.e., lift the suspension we imposed in our order of February 12, 2010. The Department has opposed that request for the sole reason that it has "become aware" that Sentinel Ridge may apply to amend the permit, which means the permit "may not be 'final.'" The Department's opposition to CCN's request has no merit. The permit, of course, *is* final. The conjecture that it might be subject to further amendment does not prevent the permit from being final. As CCN correctly points out, the permit could have been appealed. It is clearly a final Departmental action.

More to the point, it is not the finality of the Department action that matters for purposes of a fee application; it is the finality of the *Board's* decision that is prerequisite to a fee application. Our Adjudication was clearly a final order. CCN was obligated to file its application within 30 days of that order. 25 Pa. Code 1021.172 We could have acted on the application at any time. Had we known that three years would go by, we might have done so.

The Department's opposition to lifting the suspension on the fee application is difficult to understand given its simultaneous decision as memorialized in the Pennsylvania Bulletin to expressly "lift the remaining NPDES permit suspension imposed by the October 22, 2009 Order of the Environmental Hearing Board (EHB) in the matter of *Crum Creek Neighbors v. DEP and Pulte Homes of PA, L.P.*, EHB Docket No. 2007-287-L, to allow Sentinel Ridge Development, LLC, to conduct earth disturbance activities and discharge stormwater associated with construction activities to Holland Run (EV-CWF) from Phase III of its development." This language clearly conveys a sense of finality with respect to the work performed pursuant to our remand order. There is no suggestion that any further work is currently required, or that the project is not going forward, or that there will not be a discharge to Holland Run. No party has appealed the permit and the time for doing so has now passed. Any appeal of any future amendment would be limited to the terms of that amendment. The uncertainties that drove our prudential decision to defer a ruling on the application no longer exist. The conjecture that there may be future permit amendments will not materially interfere with our immediate ability to assess, for example, the degree of CCN's success or otherwise apply the factors that may come into play when a prevailing party obtains a favorable ruling. In short, we perceive no impediment to moving forward now on the merits of CCN's fee application in accordance with the briefing schedule that has been previously agreed to by the parties. That is why we previously issued an order reopening CCN's application. A copy of that order is attached.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: July 19, 2013

c: **DEP Bureau of Litigation:**
Attention: Priscilla Dawson

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CRUM CREEK NEIGHBORS	:	
	:	
v.	:	**EHB Docket No. 2007-287-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PULTE HOMES OF PA, LP, Permittee	:	

ORDER

AND NOW, this 17th day of July, 2013, upon consideration of Crum Creek Neighbors' Motion to Re-Open Fee Petition and the Department's response in opposition thereto, it is hereby ordered that the motion is **granted**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: July 17, 2013

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

CLEAN AIR COUNCIL	:	
	:	
v.	:	**EHB Docket No. 2011-072-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM & RESOURCES, LLC, Permittee	:	**Issued: July 25, 2013**

OPINION AND ORDER ON PERMITTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON APPELLANT'S CIRCUMVENTION CLAIM

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Environmental Hearing Board denies the Permittee's motion for partial summary judgment where mixed questions of law and fact exist. We interpret the clause "which...would otherwise require a permit or plan approval" in 25 Pa. Code § 127.216 as referring to "the pattern of development of a facility."

OPINION

This matter involves Clean Air Council's challenge to a plan approval issued by the Department of Environmental Protection (Department) to MarkWest Liberty Midstream and Resources, LLC (MarkWest) on April 13, 2011. MarkWest owns and operates a gas processing plant in Chartiers Township, Washington County known as the Houston Plant and ten compressor stations connected to the Houston Plan via pipelines. Gas is compressed at the compressor stations and then either sent to the Houston Plant for processing or to a gathering

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pipeline owned by a third party, known as the NiSource pipeline, or placed directly into the interstate lines without processing. The gas entering the NiSource pipeline does so by means of a high pressure connection. MarkWest holds a number of plan approvals in connection with its operation. The plan approval that is the subject of this appeal is the fourth plan approval and it authorizes MarkWest to construct a fractionator tower and other equipment at the Houston Plant

The Board recently addressed a motion to limit issues, or in the alternative for partial summary judgment, filed by MarkWest regarding Clean Air Council's claim that the emissions of the Houston Plant and the compressor stations should be aggregated for the purpose of air permitting. The Board denied the motion, holding as follows:

> [T]he issue raised by MarkWest in its motion is not free from doubt, and we believe that attempting to decide it summarily would not be in accordance with the law. We are required to view a motion for partial summary judgment by looking at the evidence in the light most favorable to the nonmoving party, not the moving party. In order to properly address the complex issues that are involved in this appeal, cross examination and the development of factual issues in context are often necessary in order to ensure due process. In examining the question raised in MarkWest's motion, we conclude that factual issues are in dispute and should be decided after a trial on the merits.

Clean Air Council v. DEP and MarkWest Liberty Midstream & Resources, LLC, Docket No. 2011-072-R (Opinion and Order issued on June 20, 2013), *slip op.* at 15.

The matter now before the Board is another motion for partial summary filed by MarkWest. This motion addresses Clean Air Council's contention that MarkWest has violated the prohibition on circumvention set forth in 25 Pa. Code § 127.216. Clean Air Council's argument regarding circumvention is related to its aggregation argument. In addition to responses filed by Clean Air Council and the Department and a reply filed by MarkWest, the

Board has also permitted the filing of a sur-reply by Clean Air Council and a reply-to-sur-reply filed by MarkWest.

Discussion

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, admissions of record and affidavits, if any, show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. *Harriman Coal Corp. v. DEP*, 2000 EHB 1008. Summary judgment may only be granted "in the clearest of cases where the right is clear and free from doubt." *Macyda v. DEP*, 2011 EHB 526, quoting *Lyman v. Boonin*, 635 A.2d 1029, 1032 (Pa. 1993). All doubts as to the presence of a genuine issue of material fact must be resolved against the moving party. *Rozum v. DEP,* 2008 EHB 731, citing *Albright v. Abington Memorial Hospital*, 696 A.2d 1159, 1165 (Pa. 1997).

Section 127.216 of Pennsylvania's air quality regulations reads as follows:

> Regardless of the exemptions provided in this subchapter, an owner or other person may not circumvent this subchapter by causing or allowing a pattern of ownership or development, including the phasing, staging, delaying or engaging in incremental construction, over a geographic area of a facility which, except for the pattern of ownership or development, would otherwise require a permit or submission of a plan approval application.

25 Pa. Code § 127.216. This provision prevents a permittee from constructing an air pollution source in a piecemeal fashion so as to avoid requiring a permit. Or, as stated by MarkWest, "the prohibition on circumvention is designed to prevent the incremental construction of minor emission sources so as to avoid major source permitting requirements." (MarkWest Reply Brief, p. 4)

Clean Air Council alleges that the NiSource pipeline connection was installed in an attempt to circumvent New Source Review requirements that would otherwise be applicable

here. (Clean Air Council Response to MarkWest Statement of Undisputed Facts, No. 4) MarkWest and the Department argue that Clean Air Council's circumvention claim must fail because it cannot establish a fundamental element of the claim, i.e., that the pipeline connection requires a permit. Clean Air Council does not dispute the fact that a permit is not required for the pipeline connection by itself. (Clean Air Council Response to MarkWest Statement of Undisputed Facts, No. 17). In fact, there appears to be no disagreement among the parties that permitting is not implicated for the NiSource pipeline connection, as it is simply a conduit and does not emit air contaminants.

However, Clean Air Council argues that MarkWest and the Department have misinterpreted Section 127.216 of the regulations by incorrectly reading the clause "which would otherwise require a permit or submission of a plan approval application" as referring to "pattern of development." Clean Air Council asserts that this language instead refers to the word immediately preceding it, i.e. "facility." Under Clean Air Council's reading of Section 127.216, it is the facility, i.e., the Houston Plant, that would otherwise require a permit or plan approval, not the pipeline connection.

Clean Air Council cites to the Environmental Protection Agency's (EPA) Technical Support Document for Pennsylvania New Source Review and Emission Registry Regulations in support of its interpretation. In that document, EPA states as follows:

> All sources are also clearly prohibited from circumventing the new source requirements by any strategy, including phasing, staging, delaying, or incrementally constructing a facility that would otherwise require a permit or plan approval.

(Clean Air Council's Opposition Brief, Exhibit L, p. 2)

We do not see the parties' different readings of Section 127.216 as being mutually exclusive. We read "otherwise require a permit or plan approval" as referring to "the pattern of

development of a facility." In other words, Section 127.216 prohibits circumvention of the regulations where the pattern of development of a facility would otherwise require a permit if the development were not done in stages.

With this reading of Section 127.216 in mind, we consider the circumvention argument raised by Clean Air Council. The Council summarizes its argument as follows:

> The Council has not argued that the NiSource connection itself required an air permit. Rather, it has argued that the MarkWest facility consisting of the Houston Plant, ten associated compressor stations, and the pipelines connecting them required a permit, specifically an NSR [New Source Review] permit. The Council has argued that because of the NiSource connection, MarkWest did not apply for and did not obtain a permit for this facility...Whether the connection required an air permit is irrelevant. In a circumvention claim, as with NSR generally, the question is whether a major facility was in fact permitted as a major facility. See 25 Pa. Code § 127.201(a). The Council's circumvention claims raise precisely this question.

(Clean Air Council Sur-Reply, p. 5) (Clean Air Council's citation to Opposing Brief omitted).

MarkWest cries foul, asserting that the argument raised by Clean Air Council in its sur-reply is broader than that stated in its notice of appeal and in answers to interrogatories. MarkWest asserts that this is the first time that Clean Air Council has included the Houston Plant and compressor stations in its circumvention claim. In its notice of appeal and answers to interrogatories Clean Air Council contends that the development of the pipeline connection is part of a pattern of development involving the Houston Plant and compressor stations. Paragraphs 42 and 43 of the notice of appeal state as follows:

> 42. The Department issued Plan Approval PA-63-00963D despite evidence that the Applicant intends to take actions which will violate the prohibition on NSR [New Source Review] circumvention at 25 Pa. Code § 127.216, specifically *the development of a pipeline without which Applicant could make no*

> *claim to avoid aggregation of its Houston Plant and local MarkWest compressor stations.* The Department's action is therefore unreasonable, an abuse of discretion, arbitrary and capricious, or otherwise contrary to law.
>
> 43. The Department has ignored and or violated the Pennsylvania SIP [State Implementation Plan], the prohibition on circumvention at 25 Pa. Code § 127.216, by encouraging and proposing to require MarkWest to *build an additional pipeline to avoid aggregation and NSR [New Source Review] for the Houston Plant and local MarkWest compressor stations.* The Department's action is therefore unreasonable, an abuse of discretion, arbitrary and capricious, or otherwise contrary to law.

(Notice of Appeal, Objections, para. 42 and 43) (emphasis added).

Contrary to MarkWest's assertion, we do not see Clean Air Council as expanding the scope of its initial objections. Clean Air Council is not referring to the development of the NiSource pipeline connection in a vacuum but as part of the development of the facility as a whole. While the notice of appeal may not set forth the objection in exactly the same language as that set forth in Clean Air Council's sur-reply to MarkWest's motion, we think that this issue was fairly raised in the notice of appeal. *Ainjar Trust v. DEP*, 2001EHB 59, 66, *aff'd*, 806 A.2d 402 (Pa. Cmwlth. 2002). *See Croner, Inc. v. DER*, 598 A.2d 1183, 1187 (Pa. Cmwlth. 1991) (Objections raised in a notice of appeal are to be broadly construed.)

Clean Air Council's answers to interrogatories set forth its contention that the pipeline development is part of a pattern of development of the entire facility. For example, MarkWest's Interrogatory No. 14 asked Clean Air Council to "state all facts upon which you base your contention in paragraph 42 of the Notice of Appeal that 'the development of a pipeline' by MarkWest 'will violate the prohibition on NSR [New Source Review] circumvention at 25 Pa. Code § 127.216." In response, Clean Air Council provided the following answer:

> The development of the third party line (NiSource Line 1360) violates the prohibition on NSR [New Source Review]

> circumvention at 25 Pa. Code § 127.216 because the installation of the line was a pattern of development *relating to the Houston Gas Plant* such that without the development, MarkWest *would have been required to obtain a major source permit for the Houston Plant and associated compressor stations as one major source.*

(MarkWest Reply to Sur-Reply, p. 5) (emphasis added). Based on this answer, it should have come as no surprise to MarkWest that Clean Air Council saw the development of the NiSource pipeline as a pattern of development that related back to the Houston Plant and compressor stations.

Whether there was a pattern of development in this case involves mixed questions of law and fact on which the parties clearly disagree. Moreover, what is also at issue here are inferences and presumptions that arise from those facts. We have stated that summary judgment is not appropriate in complex matters involving mixed questions of law and fact. *Group Against Smog v. DEP and Laurel Mountain Midstream Operating, LLC,* 2012 EHB 329, 336; *Borough of Ambler v. DEP*, 2007 EHB 364, 367-68; *Citizen Advocates United to Safeguard the Environment,* 2007 EHB 101, 106; *Groce v. DEP,* 2006 EHB 268, 270; *Mountaintop Joint Area Sewer Authority v. DEP,* 2006 EHB 153, 161-162; *Defense Logistics Agency v. DEP,* 2001 EHB 337, 348. Indeed, this is a complex matter involving mixed questions of law and fact.

The size and complexity of the filings in this case, and on the circumvention issue alone, indicates that summary judgment, even partial summary judgment, is not appropriate. Under normal circumstances, when a party has filed a motion for summary judgment or partial summary judgment, the opposing party files a response and the moving party may file a reply. Here, not only were those documents filed, but Clean Air Council also filed a sur-reply to MarkWest's reply, and MarkWest filed a reply to Clean Air Council's sur-reply. A reading of

the motion, responses, replies, sur-replies, and replies to sur-replies raises more questions in our mind than provides answers. To quote the Board in *Citizen Advocates*:

> It is difficult to imagine issues less suited to resolution on summary judgment than these. All of these issues are at least as much factual as they are legal. Summary judgment makes sense when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. . .This consolidated appeal presents quite the opposite scenario.

2007 EHB at 106 (citation omitted).

Therefore, partial summary judgment on the issue of circumvention is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL	:	
	:	
v.	:	**EHB Docket No. 2011-072-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM & RESOURCES, LLC, Permittee	:	

ORDER

AND NOW, this 25th day of July, 2013, it is hereby **ORDERED** that the Motion for Partial Summary Judgment on Appellant's Circumvention Claim is denied.

ENVIRONMENTAL HEARING BOARD

Thomas W. Renwand

THOMAS W. RENWAND
Chief Judge and Chairman

DATED: July 25, 2013

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CUMBERLAND COAL RESOURCES, LP	:	
	:	
v.	:	**EHB Docket No. 2011-095-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 31, 2013**

ADJUDICATION

By Steven C. Beckman, Judge

Synopsis

The Board upholds the Department's issuance of an Order requiring a coal company to retrain its staff on the requirements of Sections 104 and 109 of the Bituminous Coal Mine Safety Act to provide notification to the Department within fifteen minutes of the discovery of an accident. Not all injuries caused by electric shocks occurring in underground coal mines are reportable accidents as defined in the Act; whether an incident requires notification depends on the specific circumstances present at the time of and soon after the injury. When operators must determine with only scarce information whether an incident constitutes an accident which must be reported, the prudent course of action is to notify the Department, given purposes of the Act and the minimal burden imposed by the requirement.

FINDINGS OF FACT

I. Background

1. The Department of Environmental Protection ("Department") is the Pennsylvania agency with the authority and duty to administer and to enforce the Bituminous Coal Mine

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Safety Act, Act of July 7, 2008, P.L. 654, No. 55, 52 P.S. Sections 690-100–690-708; and Sections 1915–1917 of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended,* 71 P.S. §§ 510-15–510-17. (Stipulation, filed by the Parties on January 7, 2013 ("Stip.") ¶ 1.)

2. Cumberland Coal Resources, L.P. ("Cumberland") is a Delaware Limited Partnership, qualified to do business in Pennsylvania. Cumberland maintains a mailing address of P.O. Box 1020, Waynesburg, Pennsylvania 15370. (Stip. ¶ 2.)

3. Cumberland Mine ("Cumberland Mine" or "the Mine") is located in Whitely Township, at 855 Kirby Road, in Greene County, Pennsylvania. (Stip. ¶ 3.)

4. Cumberland Mine operates three shifts each day. The afternoon shift begins work at 3:00 PM. Despite its name, the "midnight shift" begins work at 11:00 PM. (Stip. ¶ 9.)

5. Gregory Keith Shriver is employed at the Cumberland Mine as a Construction Mechanic. Mr. Shriver has worked in underground mining for approximately six years and holds a Miner's Certificate from the Commonwealth of Pennsylvania and Electrical Cards from MSHA. (Stip. ¶ 13.) Mr. Shriver is the person who was shocked on May 27, 2011. (Stip. ¶ 14.)

6. James Schuessler is employed by the Commonwealth of Pennsylvania, Department of Environmental Protection as an Inspector in the Bureau of Mine Safety. He is assigned to inspect the Cumberland Mine. (Stip. ¶ 10.)

7. Joseph Culp is employed at the Cumberland Mine as a "Weekend Warrior Shift Foreman." A Weekend Warrior Shift Foreman works the midnight shift on Thursday, Friday and Saturday nights. (Stip. ¶ 18.)

8. Mr. Culp has almost forty years of experience in underground mining. (Stip. ¶ 19.) He has worked in a variety of jobs in underground mining. (Transcript of the January 11,

2013 Hearing ("Tr."), 94.) He became a Pennsylvania certified Mine Foreman in 2012. (Tr. 95.) Mr. Culp holds Electrical Cards from MSHA. (*Id.*)

9. James Barnish is a certified emergency medical technician ("EMT") and a management employee at Cumberland Mine. (Tr. 129.) He was supervising personnel in a maintenance group at the Mine at the time of Mr. Shriver's injury. (Tr. 130.)

10. Joseph McElwee is employed at Cumberland Mine as a Grade Four Mechanic. He has nine years of experience in underground mining. (Stip. ¶ 22.) Mr. McElwee is a member of the United Mine Workers Union Local 2300's Safety Committee at the Cumberland Mine. (Stip. ¶ 23.)

11. Dennis Wayne Osborne is employed at the Cumberland Mine as a Maintenance Clerk. (Tr. 76.) Mr. Osborne has been a Maintenance Clerk at Cumberland since September 2007. (Tr. 77.) In that capacity he is responsible to monitor, from the surface, everything that goes on in the Mine. Communications between persons underground and those on the surface are funneled through him. (Stip. ¶ 24.)

12. Mr. Osborne took the call from underground with the information that Mr. Shriver had been injured. (Stip. ¶ 25; Tr. 79.) The person who called him said that Mr. Shriver had been shocked and needed help, but provided no other information. (Tr. 80.)

13. Brian McKnight is employed at the Cumberland Mine as a Belt Maintenance Supervisor. He has approximately 7 years of experience in underground mining. Mr. McKnight is Mr. Shriver's supervisor. (Stip. ¶ 29.)

14. Mr. McKnight was not physically present at the Mine the evening that Mr. Shriver was injured, but spoke with Mr. Shriver by phone before the incident in which Mr. Shriver was injured. (Stip. ¶ 30.)

15. Robert Bohach was employed at Cumberland Mine as the Manager of Safety at the time Mr. Shriver was injured. (Tr. 110.) He was not at the Mine the night Mr. Shriver was injured, but was notified of the incident. (Tr. 111–12.)

II. Timeline Below Ground

16. On May 27, 2011, Mr. Shriver was working at the Cumberland Mine as a Construction Mechanic on the afternoon shift, which begins at 3:00 PM. (Stip. ¶ 31.)

17. Mr. Shriver's responsibilities as Construction Mechanic were to take care of the conveyer belts, with an emphasis on the electrical aspects of the belts. (Stip. ¶ 32.)

18. On May 27, 2011, Cumberland Mine was experiencing trouble at the "take up unit" at the 61 head gate. The take up unit is also known as a 575 VAC Variable Frequency Drive Vector Winch Cable Controller. The take up unit functions to keep proper tension on the conveyer belt. Over the previous day or two, the unit kept faulting, that is, shutting down. (Stip. ¶ 33.)

19. The voltage on the take up unit is 575 volts. (Stip. ¶ 34.)

20. Mr. Shriver located what he believed to be the source of the problem with the take up unit. (Stip. ¶¶ 35, 38.) Sometime between 9:30 PM and 10:00 PM, Mr. Shriver called his boss, Mr. McKnight, to report that he thought that the source of the problem was the chopper drive. (Stip. ¶¶ 36, 38.)

21. Mr. McKnight agreed that Mr. Shriver's theory made sense, and asked Mr. Shriver to obtain the part number so that a new part could be ordered promptly. (Stip. ¶ 37.)

22. At the time of that conversation, Mr. Shriver was in the company of Ronny Stickles and Jimmy Porter. He left those men to obtain the part number. (Stip. ¶ 39.)

23. Mr. Shriver opened the door of the take up unit. (Stip. ¶ 40.) The chopper drive that was thought to be the problem was positioned in the take up unit in such a way that the part number could not easily be seen. (Stip. ¶ 41.)

24. Mr. Shriver took off his safety helmet to try to peek around to the back of the chopper drive to get the part number, and, in so doing, he came into contact with the electrically charged equipment and was shocked. (Stip. ¶ 42.)

25. At his deposition, Mr. Shriver testified that he believed he was rendered unconscious by the shock, but that he did not know how long he was unconscious. (Stip. ¶ 43.)

26. At his deposition, Mr. Shriver testified that, when he woke up, he was lying in the take up unit and having difficulty breathing. (Stip. ¶ 44.)

27. At his deposition, Mr. Shriver testified that he initially could not move. He realized that he had been shocked. (Stip. ¶ 45.)

28. At his deposition, Mr. Shriver testified that had no feeling in his legs, but managed to crawl to a door and call for help. (Stip. ¶ 46.)

29. Upon Mr. Shriver's contact with the energized equipment, a ground fault monitor tripped the 400 AMP breaker, de-energizing power to the take up unit. (Commonwealth's Exhibit 2.)

30. Louis D'Angelis was working as a Communications Technician during the evening of May 27, 2011. He was in the same area of the Mine as Mr. Shriver, Mr. Stickles and Mr. Porter. (Stip. ¶ 48.)

31. As Mr. D'Angelis was dragging pager wire up along the belt, he heard someone saying "help me." He knew immediately that there was an emergency, dropped what he was doing and ran towards the call. (Stip. ¶ 50.)

32. Mr. D'Angelis was the first person to reach Mr. Shriver. He found Mr. Shriver on the ground, saying "I was electrocuted. Please don't let me die." (Stip. ¶ 51.)

33. Mr. Stickles and Mr. Porter also came to Mr. Shriver's assistance. They heard the door bang open, and heard Mr. Shriver calling for help. (Stip. ¶ 52.)

34. Mr. Shriver told Mr. Stickles and Mr. Porter that he had been shocked and that his skin was burning. (Stip. ¶ 53.)

35. They called the Mine Office on the surface to report that Mr. Shriver had been shocked, but did not report anything that Mr. Shriver had said. (Stip. ¶ 54.)

36. The three miners assessed Mr. Shriver's condition; they observed that he was able to move, and seemed coherent. (Stip. ¶ 55.)

37. They then obtained the backboard stretcher and placed Mr. Shriver on it. They carried Mr. Shriver to an emergency vehicle and secured him on the Jeep. (Stip. ¶ 56.)

38. Mr. Porter and Mr. D'Angelis were on either side of Mr. Shriver, while Mr. Stickles was driving the Jeep out of the Mine. They continued to call the Mine Office as they passed each section of the Mine to keep the Mine Office informed about their location. (Stip. ¶ 57.)

39. The Jeep transporting Mr. Shriver was met part of the way out of the Mine by certified EMTs William Dean and James Barnish, who got onto the Jeep with Mr. Shriver and evaluated him. (Stip. ¶ 58.)

40. The EMTs found entrance and exit wounds on Mr. Shriver's head and hand, but that information was not communicated to management employees on the surface. (Stip. ¶ 59.) James Barnish, one of the EMTs attending to Mr. Shriver, is himself a management employee, however. (Tr. 129.)

41. The Jeep, with the EMTs and Mr. Shriver, continued out of the Mine to the elevator shaft. (Stip. ¶ 60.)

42. Mr. Shriver was taken up in the elevator, out of the Mine. (Stip. ¶ 61.)

III. Timeline on Surface

43. Dennis Osborne, the Maintenance Clerk, took the first phone call with news that Mr. Shriver had been shocked. He received that call at 10:10 PM. (Stip. ¶ 62.)

44. The first caller did not report that Mr. Shriver had said anything other than that he was shocked, and that he needed help. (Tr. 80.) Those in the Mine Office, however, knew soon after that Mr. Shriver was being evacuated from the Mine by his colleagues. (Tr. 83.)

45. Mr. Osborne called for the ambulance within a minute or two of when he first received the call from underground. That is something that he is expected to do. (Stip. ¶ 64.)

46. There is a standard form which the Clerks at the Mine fill out during emergencies. (Stip. ¶ 63; *see* Commonwealth's Exhibit 7 ("Ex. 7").)

47. During subsequent calls, those calling the Mine Office from underground told Mr. Osborne that Mr. Shriver had been injured at the 61 Head Gate, on the "belt winch control box", which had 575 volts. (*See* Ex. 7.)

48. At approximately 10:15 PM, Mr. Osborne went into the locker room to find the incoming Shift Foreman, Joseph Culp, and reported to him that there had been an accident. (Stip. ¶ 66.)

49. Mr. Culp left the locker room and went into Mr. Osborne's office. There, Mr. Culp heard a report that Mr. Shriver was hurt, and a crew was trying to get him evacuated. There was only "sketchy" information about Mr. Shriver's medical condition. (Stip. ¶ 67.)

50. Robert Bohach, the Manager of Safety at Cumberland Mine at the time of the incident, was notified of Gregory Shriver's injury sometime between 10:30 and 11 PM. (Tr. 111–12.)

51. Mr. Osborne and Mr. Culp discussed whether to call for a helicopter and Mr. Culp decided to do so to err on the side of caution. Mr. Osborne placed a call for the helicopter at 10:38 PM. (Stip. ¶ 69; Ex. 7.)

52. The EMTs attending to Mr. Shriver had suggested that a helicopter be called to evacuate him from the Mine. (Stip. ¶ 68.)

53. Additionally, Mr. Culp testified at the hearing that he was concerned about Mr. Shriver's injuries because "being an electrician as well, you know . . . what can happen, what can go wrong." (Tr. 97.)

54. A rain storm prevented the LifeFlight helicopter which had been summoned from landing at the mine. (Stip. ¶ 70.) Because of this, when Mr. Shriver came out of the Mine, he was driven by ambulance to the Greene County Airport where he was transferred to the LifeFlight and flown to Mercy Hospital. (Stip. ¶ 71; Commonwealth's Exhibit 12 ("Ex. 12").)

IV. Reporting of the Accident to Mine Safety Agencies

55. Joseph McElwee, a mechanic at the mine, called Inspector James Schuessler of the Department's Bureau of Mine Safety at 10:40 PM. Mr. McElwee called Mr. Schuessler to let him know that something had happened that Mr. McElwee believed to be a potentially fatal accident. No one from Cumberland asked Mr. McElwee to call Mr. Schuessler, nor did Mr. McElwee believe that he was making the call on Cumberland's behalf. (Stip. ¶ 79.)

56. According to his testimony at the hearing, Inspector Schuessler attempted to contact the shift foreman and management personnel at Cumberland after receiving the call from

Mr. McElwee. Inspector Schuessler was unable to reach anyone after numerous calls to the lamp room and shift foreman's office. (Tr. 32–34; Commonwealth's Exhibit 19.)

57. Following the call from Mr. McElwee, Inspector Schuessler began driving to the Mine from his home. He arrived at the Mine at approximately 11:55 PM. (Stip. ¶ 83.)

58. While he was on his way to the Mine, Mr. Schuessler received a call from his wife, informing him that Cumberland Mine had called to report an incident. (Stip. ¶ 83.)

59. Mr. Culp, as the Shift Foreman, made the decision to report the incident to the Federal Mine Safety and Health Administration ("MSHA") and the Department, even though he was uncertain whether the injury was immediately reportable. (Stip. ¶ 82.)

60. According to Mr. Osborne's testimony, he contacted MSHA at 11:20 PM. (Tr. 85–86.)

61. The injury was reported to the Department by Mr. Osborne on behalf of the company at 11:40 PM. (Stip. ¶ 80.)

62. At some point prior to Mr. Osborne's call to the Department, Mr. McElwee told Mr. Culp that he had called Mr. Schuessler. (Stip, ¶ 81.)

63. On June 1, 2011, the Department issued a Compliance Order to Cumberland. (*See* Commonwealth's Exhibit 1 ("Ex. 1").) The Department's Order only required Cumberland to retrain the responsible persons at the Mine about the requirement to notify the Department within fifteen minutes of the discovery of an accident. (Stip. ¶ 86.)

64. Cumberland subsequently retrained the responsible persons and Inspector Schuessler has been receiving all of the phone calls which he believes he should be receiving. (Stip. ¶ 87.)

DISCUSSION

This is an appeal from a Compliance Order issued by the Department of Environmental Protection to Cumberland Coal Resources, L.P., for an incident occurring at the Cumberland Mine. On May 27, 2011, Gregory Shriver, a Construction Mechanic for the Mine, was shocked when he attempted to locate a part number inside a piece of equipment located underground at the Mine. The Department determined that the shock injury received by Mr. Shriver was an accident as that term is defined in Section 104 of the Bituminous Coal Mine Safety Act.[1] 52 P.S. § 690-104. The Department further determined that it was not timely notified of the accident by Cumberland, in violation of Section 109(a) of the Act. 52 P.S. § 690-109(a). This section of the Bituminous Coal Mine Safety Act requires that the Department be notified within fifteen minutes of discovery of an accident. The Department issued a Compliance Order directing Cumberland to retrain "responsible persons" at the Mine "on the requirements of section 109 of the [Act] with reference to section 104." (Ex. 1.) Despite complying with the terms of the Order, Cumberland appealed to the Board, principally arguing that there was no violation of the Act because the injury suffered by Mr. Shriver did not meet the statutory definition of an "accident." Thus, Cumberland argues that it had no obligation to notify the Department within fifteen minutes. The fundamental issue for the Board to decide is twofold: (1) whether the injury to Mr. Shriver meets the statutory definition of an accident under Section 104 of the Act, and (2) if it was an accident, whether Cumberland notified the Department no later than fifteen minutes after the discovery, as required by Section 109(a). Because the Board finds that the injury to Mr. Shriver was an accident within the meaning of the Act and that the notification to the Department by Cumberland occurred well beyond fifteen minutes after the

[1] Bituminous Coal Mine Safety Act, Act of July 7, 2008, P.L. 654, 52 P.S. §§ 690-101–690-708 ("Bituminous Coal Mine Safety Act" or "Act").

discovery of the accident, we conclude that Cumberland violated the Act and that the Compliance Order issued by the Department was a proper exercise of the Department's authority under the Act.

I. The electric shock injury sustained by Gregory Shriver had a reasonable potential to cause his death and therefore was an "accident" within the meaning of Section 104 of the Bituminous Coal Mine Safety Act.

The Bituminous Coal Mine Safety Act is a comprehensive piece of legislation covering numerous aspects of underground coal mining safety. While the issues before the Board narrowly concern the provisions regarding an operator's duties in response to an injury at the mine, it is nevertheless informative to consider the Commonwealth's goals in passing the Act. The General Assembly passed the Act in 2008 with the stated purpose of using "the full extent of the Commonwealth's powers to protect the lives, health and safety" of underground coal miners. 52 P.S. §690-103(b)(1). While the General Assembly found that the "operators . . . have primary responsibility to prevent the existence of" unsafe conditions at mines, it also found it "imperative that the [D]epartment have the capability to coordinate and assist rescue operations in response to accidents." 52 P.S. § 690-103(a)(6), (10). To that end, the Act intends to "improve and expand research, development and training programs aimed at preventing [accidents]" and to "enable the Commonwealth to respond as necessary and appropriate to accidents and other emergencies" at underground coal mines. 52 P.S. § 690-103(b)(5), (6). Given these findings and purposes, the Board is mindful that the notification provision at issue in this case was enacted to facilitate timely investigation of accidents with the overall goal of miner safety.

Section 109(a) of the Act imposes certain duties on an operator regarding notification, investigation, and reporting in the event that an accident occurs at its mine. The most immediate obligation is to "notify the [D]epartment no later than fifteen minutes [after] discovery of the accident." 52 P.S. § 690-109(a)(1). The Act defines an accident as "[a]n unanticipated event" and

then clarifies that definition by listing 14 examples of events that constitute accidents, including "an injury to an individual at a mine, which has a reasonable potential to cause death." 52 P.S. § 690-104. Whether any particular event, including an injury, is an "accident" as that term is defined in the Act calls for a case by case determination based on the specific facts of the event.

Looking at the facts of this case, we conclude that Mr. Shriver's injury did have the reasonable potential to cause death. Mr. Shriver was shocked by a 575 volt piece of equipment. While there is some contradictory information, Mr. Shriver testified at his deposition that he was knocked unconscious for an unknown period of time and, when he regained consciousness, he had no feeling in his legs and had difficulty breathing. When the first individuals reached Mr. Shriver after the accident, he told them that he had been electrocuted, his skin was burning and that he did not want to die. As he was being transported to the surface of the mine, the EMTs noted entrance and exit wounds on Mr. Shriver's head and hand. Scars from these wounds were still visible at the time of the hearing in this matter. The EMTs suggested to Mine officials that a helicopter be called to transport Mr. Shriver from the Mine so that he could receive prompt medical attention.

The shift foreman, Joseph Culp, has almost forty years of underground mining experience, including time as a mine electrician, and has held his electrical card from MSHA since 1978. Mr. Culp's experience gave him significant concern about Mr. Shriver's injuries: "being an electrician as well, you know . . . what can happen, what can go wrong." (Tr. 97.) Mr. Culp reiterated his concern when discussing why he called for the LifeFlight, after he was aware of the nature of the shock, but before he had seen Mr. Shriver personally. Mr. Culp stated that "getting shocked like that, you don't know the potential." (Tr. 100.)

As part of its argument that the injury was not an accident under the Act, Cumberland calls the Board's attention to a series of decisions by the Federal Mine Safety and Health Review Commission ("Review Commission"), a federal agency charged with enforcing similar regulations. We note, however, that the relevant federal regulations are slightly different, and that the Board is not bound by case law of the Review Commission. "[F]ederal cases are not binding on us but merely persuasive." *Group Against Smog Pollution v. DEP & Laurel Mountain Midstream Operating, LLC*, 2012 EHB 329, 340 (*quoting Clean Air Counsel v. DEP & MarkWest Liberty Midstream & Resources, LLC*, 2012 EHB 286, 291). Cumberland relies on *Newmont USA Limited*, 32 FMSHRC 391 (2010), for the contention that "[t]heoretical postulations of what might occur in the treatment of the injury are not relevant to the assessment of the injury as required by Section 109." (Cumberland Post-Hearing Br. at 15.) We agree that what is important for the purposes of determining whether to notify the Department is the assessment of the severity of the injury at the time notification should be made. Our reading of the Review Commission cases, however, supports a finding that, in this instance, Mr. Shriver's injuries had the reasonable potential to cause his death. In *Newmont*, rather than an electrical injury of uncertain severity, "it was clear within a few minutes after the incident that [the worker] suffered a broken leg, and that this injury did not present a reasonable potential that he was going to die." 32 FMSHRC at 396. Further, the parties stipulated in that case that "the company EMT who arrived at the scene within 15 minutes" of the injury "at no time believed [the worker] had suffered an injury that had a reasonable potential to cause death." *Id.* (internal quotes omitted).

Cumberland also cites to Review Commission cases that involve electrical injuries. In *Cougar Coal Company*, a miner was found unconscious with no pulse after being shocked by

7200 volts, falling 18 feet, and hitting his head. *Cougar Coal Company, Inc.*, 25 FMSHRC 513, 520 (2003). There, the Review Commission held that the injuries resulting from these circumstances "had a reasonable potential to cause death *per se*." *Id.* More recently, however, the Review Commission has rejected the position that *every* electrical injury is *per se* an immediately reportable injury, instead favoring the consideration of the circumstances of each individual case. *See CEMEX Construction Materials of Florida, LLC*, 34 FMSHRC 1408, 1438 (2012). In *CEMEX*, the Review Commission found that an above ground worker was shocked by a 240 volt piece of equipment which resulted in a dislocated shoulder. 34 FMSHRC at 1437. The worker did not lose consciousness and did not require emergency transport. *Id.*

We do not think that the cases that Cumberland cites are determinative in this case. The facts show that the injury suffered by Mr. Shriver falls somewhere between those discussed in *Cougar Coal Company* and *CEMEX*. It is clear from reviewing those cases that the decisions turn on the specific facts of the case. We think that is likely to be true when cases on this issue come before the Board.

The Department during the hearing appeared to argue that all electrical shocks have a reasonable potential to cause death and therefore would constitute an accident under the Act. We do not believe that all electrical shocks will automatically meet the definition of an accident. Each injury situation is unique and will have to be evaluated on its unique set of facts to determine whether the injury has the reasonable potential to cause death and therefore constitutes an accident under the Act. The Department presented expert opinion from its employees on this point but we did not find it particularly helpful. Regardless, we still conclude, given the totality of the facts regarding the shock received by Mr. Shriver and the impact and wounds he suffered,

that his injury had the reasonable potential to cause death and therefore was an accident as that term is defined in the Act.[2]

II. Cumberland failed to notify the Department within fifteen minutes of the discovery of the accident as required by the Act.

Having determined that the injuries to Mr. Shriver satisfy the Act's definition of an accident, the Board must determine whether Cumberland's notification of the Department was made within fifteen minutes of the discovery of the accident. The timeline of events in this case leads us to conclude that Cumberland failed to provide timely notification of the accident to the Department.

Relevant parts of the timeline are as follows: Dennis Osborne received notice at 10:10 PM that Mr. Shriver had been shocked and that he needed help. At approximately 10:15 PM, Mr. Osborne notified the Shift Foreman, Joseph Culp, of Mr. Shriver's injury. Sometime shortly thereafter, EMTs who were assisting in bringing Mr. Shriver out of the mine suggested that a

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[2] Although the Department did not emphasize it at the hearing or in its post-hearing filings, one of the exhibits presented by the Department was a guidance document entitled "Accident Reporting Requirements." (*See* Commonwealth's Exhibit 21 ("Guidance Document").) The listed purpose of the Guidance Document is to provide guidance concerning the types of accidents/incidents that shall be reported to the Department under the Act. In discussing the section relevant to this matter, the Guidance Document states that an accident includes "[A]n injury to an individual that has a reasonable potential to cause death *and/or serious injuries resulting in the injured being admitted to a hospital.*" *Id.* at 4 (emphasis added). We find this to be an improper expansion of the language of the Act. The phrase "serious injuries resulting in the injured being admitted to a hospital" does not appear in the Act. 52 P.S. § 690-104. If the legislature had intended to broaden the definition of accident to include serious injuries requiring hospitalization, it could easily have done so. In fact, the very next example given in the definition of accident states that it includes an entrapment of an individual "which has a reasonable potential to cause death *or serious injury.*" *Id.* (emphasis added).

The legislature clearly draws a distinction between a reasonable potential to cause death and a reasonable potential to cause serious injury. The Department by Guidance Document cannot expand the definition of accident in a manner that is directly contradictory to the plain language of the Act. *Cf. Eagle Environmental v. DEP*, 803 A.2d 805, 809 (Pa. Cmwlth. 2003) (stating that the Department's interpretation of regulations is entitled to no deference where "its construction of a regulation is contrary to its plain meaning"). Therefore, when we evaluated whether the injury to Mr. Shriver qualified as an accident, we disregarded the Department's Guidance Document suggestion that it only had to show that there was a reasonable potential to cause serious injuries resulting in the injured being admitted to a hospital and focused on the proper question of whether the injury had the reasonable potential to cause death.

helicopter be summoned for his evacuation and a call was made to LifeFlight at 10:38 PM. Mr. McElwee, a mechanic at the mine, called the Department's Mine Safety Inspector at 10:40 PM to report that there had been an injury at the mine. Mr. Osborne contacted MSHA at 11:20 PM to report the injury. Finally, Mr. Osborne reported the incident to the Department on behalf of Cumberland at 11:40 PM. Mr. Osborne's call occurred an hour and a half after he was first made aware of the injury to Mr. Shriver. On its face, therefore, it would appear that it is relatively simple to determine that the notification was well beyond the fifteen minutes permitted under the statute. However, there are a number of issues that make that determination more complicated than it would first appear.

The first issue, and one that Cumberland poses in its post-hearing filing, is when the fifteen minute timeframe for notification begins to run. We note that Commonwealth Court decisions as well as the Board's prior decisions state that the fifteen minute rule requires "prompt notice" and "quick action" by the operator. *See Department of Environmental Protection v. Cumberland Coal Resources, L.P.*, 29 A.3d 414, 425 (Pa. Cmwlth. 2011); *Emerald Coal Resources, L.P. and Cumberland Coal Resources, L.P. v. DEP*, 2010 EHB 109, 122. Operators must decide whether prompt notification is required when they become aware of an incident, often in the absence of complete information. "Discovery" in Section 109(a)(1) does not permit extensive investigation by the operator, nor does it allow for after-the-fact rationalization.[3] Operators must look at the totality of facts that are available at the time the accident is

[3] Both the Department and Cumberland rely on facts that the Board finds irrelevant to the question of what Cumberland knew at the time the operator is required to make the determination to notify the Department. For instance, the Department points out that Mr. Shriver developed heart arrhythmia during the helicopter flight to the hospital. There was no evidence indicating whether the arrhythmia was occurring while Mr. Shriver was still in the mine. Similarly, Cumberland incorrectly relies on management's face-to-face assessment of Mr. Shriver, which occurred nearly an hour after the injury was first reported. Our decision rests on the facts that were available during the time in which the operator must determine whether immediate notification is required.

discovered. This interpretation is supported by the preamble to the federal Mine Safety and Health Administration's similar notification requirement: "The judgment is based on what a reasonable person would discern under the circumstances, particularly when the decision to call [the agency] must be made in a matter of minutes after a serious accident." 71 Fed. Reg. 71430, 71434 (Jan. 24, 2006) (internal quotations omitted). When there is some question regarding whether an injury is reportable or not, we think that the operator should err on the side of making a notification call, given the goal of the Act is to promote mine safety and the minor burden involved in calling the Department.

In this case, the Parties stipulate that notification was made to the Department by Mr. Osborne at 11:40 PM. This requires that Cumberland have discovered the accident no earlier than 11:25 PM—otherwise the call would be untimely as it was beyond the fifteen minute window provided for in the Act. Without determining exactly when the discovery of the accident was made by Cumberland for purposes of requiring notification under the Act, it is clear that it was before 11:25 PM. At the very minimum, Mr. Osborne contacted MSHA at 11:20 PM to report the injury but twenty more minutes passed before notification was made to the Department.[4] LifeFlight was contacted at 10:38 PM, a full hour before the Department was notified and 47 minutes before 11:25 PM. Mr. Bohach, the Manager of Safety at Cumberland Mine at the time of the incident, testified at the hearing that he was contacted by phone about Mr. Shriver's injury between 10:30 PM and 11:00 PM. When looking at all of the facts of this case, we determine that notification to the Department by Cumberland occurred more than fifteen

[4] To the extent Cumberland implies that staffing issues generally, or issues associated with the change in shifts at the mine specifically, inhibited prompt notification of the Department, we do not believe that excuses the delay. It is incumbent on the operator to staff its operations appropriately so that it can fulfill its responsibilities under Section 109.

minutes after discovery of the accident and therefore, Cumberland was in violation of the requirement under Section 109 (a) of the Act.

Cumberland argues that Joseph McElwee's call to the Department's Inspector, Mr. Schuessler, at approximately 10:40 PM excuses Cumberland's delay in notifying the Department of the accident. The Board disagrees. The law is unambiguous: in event of an accident, it is the responsibility of *the operator* to notify the Department no later than fifteen minutes after discovery of the accident. 52 P.S. § 690-109(a). "Operator" is defined as "an owner, lessee or other person who operates, controls or supervises a coal mine." 52 P.S. § 690-104. Mr. McElwee is a member of the Safety Committee of the mine workers' union at Cumberland Mine, and does not represent Cumberland. The company did not ask Mr. McElwee to call, and he did not believe he was calling on Cumberland's behalf.

Under these circumstances, it is clear to the Board that non-management employees such as Mr. McElwee are *not* operators for the purposes of notifying the Department of an accident. Only those with the capacity to supervise or control the mining operations can be expected to have the information necessary, as well as the authority, to coordinate with the Department on appropriate responses to accidents in the mine.[5] This is highlighted by Inspector Schuessler's attempts to contact the shift foreman and others at Cumberland after he received the call from

[5] Despite Cumberland's assertion that Mr. McElwee's call to Mr. Schuessler mitigates its failure to promptly notify the Department of the accident, Cumberland also argues that "it is unrealistic" to expect the EMTs who found Mr. Shriver's wounds, suggested that LifeFlight be called, and accompanied Mr. Shriver during his evacuation to provide Cumberland with more information about his injuries because "they were not management." (Cumberland Post-Hearing Br. at 15, nt. 7.) The record before us indicates, however that at least one of the EMTs was a supervisor, a maintenance trainee, and was already considered to be a management employee. While these facts did not weigh heavily in our decision, we believe it is reasonable to expect a supervisor to relay information regarding an emergency situation to the foreman in charge. The EMTs should have informed the managers in the Mine Office of what injuries they had found.

Mr. McElwee. Despite calling the lamp room and foreman's office four times, Mr. Schuessler was unable to reach anyone.[6]

III. Robert Bohach should not have been treated as an expert witness.

In addition to the Board's decision on the merits of this case, there is one procedural issue we feel it appropriate to discuss. In its post-hearing brief, Cumberland argues that Robert Bohach should have been admitted as an expert witness. During discovery, Mr. Bohach was identified as a potential fact witness, but not as an expert witness. (*See* Cumberland's Post-Hearing Br., 32.) At the time Mr. Shriver was injured, Mr. Bohach was the Manager of Safety at Cumberland Mine. (*Id.*, 31.) Discovery in proceedings before the Board is generally governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Accordingly, Cumberland was under a continuing obligation to supplement its discovery responses with respect to the identity of expert witnesses and the substance of their testimony. *See Achenbach and Bishop v. DEP*, 2006 EHB 218, 221; *see also* Pa.R.C.P. 4007.4(1), (2). When Mr. Bohach was identified as an expert witness in Cumberland's Pre-Hearing Memorandum, the Department objected to his appearing as an expert witness. Cumberland's Memorandum offered only a single vague sentence about the subject matter on which Mr. Bohach would testify, and nothing of the substance of his opinion. The Board finds that Cumberland "has failed to comply fully and in good faith with the rules of discovery regarding experts." *See Angino, King Drive Corporation, and Sebastiani Brothers v. DEP*, 2006 EHB 278, 284.[7] Under these circumstances, the Board concludes that Mr. Bohach was properly prohibited from testifying as an expert.

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[6] It is worthwhile to reiterate that Cumberland must staff its operations such as to meet its obligations under the Act.

[7] The Board also notes that expert testimony would not have been particularly helpful on the specific issues Bohach would address. At trial, Mr. Bohach was permitted to testify, as a fact witness, about the process at Cumberland Mine by which management is made aware of an injury that occurs at the mine and his experiences with the Department's investigations of injuries, as well as to respond to testimony

In summary, the Board finds that Cumberland failed to notify the Department within fifteen minutes of the accident on May 27, 2011 in which Gregory Shriver was shocked. While we acknowledge that the management at Cumberland did not have much information by which to evaluate the severity of the accident, the evidence available to them at the time indicated that the electric shock was such that it had a reasonable potential to cause Mr. Shriver's death. In deciding the core issue of this matter, the Board does not find especially relevant the testimony and briefing offered by either party of facts discovered long after Mr. Shriver had been evacuated, or about the value of the investigation process. The General Assembly has outlined its findings and purposes for the Act, and the substantive provision is clear in what it requires. Operators must notify the Department within fifteen minutes of discovery of an accident. Thus armed with whatever information is available when the operator provides notification, the Department can then respond as it sees fit, whether it is following up as things develop, or immediately coordinating rescue efforts. Given the relatively minor burden on the operator, and the prime goal of miner safety, we find that operators should not delay notification where available information about an accident indicates the existence of an injury with the reasonable potential to cause death.

CONCLUSIONS OF LAW

1. The Board has jurisdiction to hear and decide this appeal. 35 P.S. § 7514.

2. The Department bears the burden of proof because this is an appeal from an order. 25 Pa. Code § 1021.122(b)(4).

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from the Department's witnesses on those points. (Tr. 112–116.) The testimony of Mr. Bohach, as well as the testimony of the Department witnesses on the same issues, did not have a significant impact on the Board's final decision.

3. The Board reviews the Department's action to ensure that it constitutes a lawful and reasonable exercise of the Department's discretion that is supported by the facts. *Perano v. DEP*, 2011 EHB 453, 515; *Wilson v. DEP*, 2010 EHB 827, 833.

4. The electric shock injury sustained by Gregory Shriver at about 10:10 PM on May 27, 2011 had "a reasonable potential to cause [his] death" and thus was an "accident" within the meaning of Section 104 of the Bituminous Coal Mine Safety Act. *See* 52 P.S. § 690-104.

5. Accordingly, the operator had the duty to "notify the department no later than fifteen minutes of discovery of the accident" under 52 P.S. § 690-109(a)(1).

6. Cumberland did not notify the Department of the accident until the maintenance clerk's office called James Schuessler at 11:40 PM on May 27, 2011, which was untimely.

7. Joseph McElwee was not an "operator" for the purposes of providing notification to the Department of an accident.

8. The Department did not abuse its discretion in issuing an Order in response to these events, requiring Cumberland to retrain the responsible officials at Cumberland Mine about the obligation to notify the Department within fifteen minutes of discovery of an accident.

9. Robert Bohach was properly excluded from testifying as an expert witness.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CUMBERLAND COAL RESOURCES, LP	:	
	:	
v.	:	**EHB Docket No. 2011-095-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 31st day of July, 2013, the appeal of Cumberland Coal Resources, L.P. is **dismissed.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chief Judge and Chairman

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

STEVEN C. BECKMAN
Judge

DATED: July 31, 2013

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