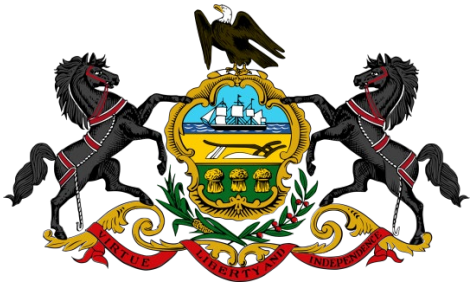
Environmental Hearing Board

Adjudications and Opinions



2020
VOLUME I

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

2020

JUDGES OF THE

ENVIRONMENTAL HEARING BOARD

Chief Judge and Chairman	Thomas W. Renwand
Judge	Michelle A. Coleman
Judge	Bernard A. Labuskes, Jr.
Judge	Richard P. Mather, Sr. (Retired October 2020)
Judge	Steven C. Beckman
Secretary	Christine A. Walker

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2020 EHB 1

FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2020.

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

ADJUDICATIONS

OPINIONS

ENVIRONMENTAL HEARING BOARD

2020 EHB DECISIONS SUBJECT MATTER INDEX

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEPHEN AND ELLEN GERHART	:	
	:	
v.	:	**EHB Docket No. 2017-013-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	**Issued: January 7, 2020**

OPINION AND ORDER ON
APPELLANTS' APPLICATION FOR COSTS AND FEES

By Bernard A. Labuskes, Jr., Judge

Synopsis

In an appeal that constitutes a proceeding pursuant to the Clean Streams Law in which the appellants have applied for reimbursement of $265,976.27 in attorney's fees and costs, the Board awards $13,135.77 due to the appellants' limited success and refusal of a settlement offer that would have provided them with the same relief that was awarded in the Board's Adjudication.

O P I N I O N

On September 25, 2019, this Board issued an Adjudication and Order that sustained in part Stephen and Ellen Gerhart's appeal of two permits issued by the Department of Environmental Protection (the "Department") to Sunoco Pipeline, L.P. ("Sunoco") authorizing the installation of natural gas liquids pipelines. The Gerharts' appeal was limited to the portion of Sunoco's project that traversed their property in Union Township, Huntingdon County. We held that a wetland on the Gerharts' property denominated as Wetland L24/25 was a palustrine forested (PFO) wetland that had been improperly classified as a palustrine emergent (PEM)

wetland. The Department erred by approving Sunoco's restoration plan, which was based on the flawed classification. We held that the impacted portion of the wetland must be restored and replanted as a PFO wetland in accordance with the permits and Sunoco's approved plans.

The Gerharts' notice of appeal filed on February 23, 2017 contained several pages of objections, but as the case progressed, the list of actively pursued objections was narrowed down to the point that the Gerharts preserved three main arguments in their post-hearing brief: (1) not all of the wetlands on their property were properly delineated, (2) Wetland L24/25 on their property was improperly classified as PEM instead of PFO, and (3) Sunoco and the Department failed to identify all of the streams on the Gerharts' property, and therefore, the Department failed to require sufficient streamside buffer restoration. In our Adjudication we rejected the Gerharts' claims that unidentified wetlands and streams existed on their property. Those two issues played a relatively small part in the case.

The bulk of the parties' and our attention was directed at the wetland classification issue. The pipeline crossed Wetland L24/25 at two places. The portion of the wetland located within the pipeline's permanent right of way totaled 0.066 acres. There was never any question that the wetland would be restored. Rather, the issue was what vegetation was to be planted during restoration, which depended upon how the wetland was classified before being impacted by the installation of the pipeline. The Gerharts argued that there were two overlapping bases for classifying the wetland as a PFO wetland. First, they argued that there were enough trees *in* the wetland to satisfy the definition of a PFO wetland. Second, they argued that a wetland can be classified as "forested" by way of overhanging tree cover originating from trees growing outside the delineated boundaries of the wetland. The Department and Sunoco disputed both points.

We accepted the Gerharts' argument that Wetland L24/25 should have been classified as a PFO wetland. We found that there had been hydrophytic trees of sufficient size and amount to provide at least 30-percent areal cover rooted in and growing out of the wetland within its delineated boundaries before Sunoco clear-cut the pipeline corridor, thereby satisfying the definition of a PFO wetland. We held that the Gerharts carried their burden of proving that the Department erred by approving a defective restoration plan for the wetland and we ordered that the wetland be restored as a PFO wetland. As to the Gerharts' overhanging branches theory, we found that the issue was "somewhat of a distraction from the more basic issue of whether there were in fact trees growing within the boundaries of Wetland L24/25 on the Gerhart property." (Adjudication, slip op. at 19.) We did not address the overhanging branches issue any further.[1]

The Gerharts have now filed a timely application to recover their fees and costs from the Department and Sunoco, along with a memorandum of law in support of the application. The Gerharts are seeking $265,976.27, approximately $50,000 of which are attorney's fees and costs with the rest constituting expert fees. The Department and Sunoco filed briefs opposing the application. On a conference call on December 18, 2019, the parties agreed that the application was ripe for disposition.[2]

With respect to *Sunoco's* liability for fees, we recently held that a permittee such as Sunoco in a third-party appeal will ordinarily not be required to reimburse third-party appellants such as the Gerharts for fees and costs unless the permittee engaged in dilatory, obdurate,

[1] We were told at the hearing by several qualified experts that accepting the Gerharts' consultant's overhanging branches theory would have resulted in a seismic shift in how wetlands are classified in the Commonwealth and indeed the nation as a whole. We continue to express no opinion on the matter.

[2] Sunoco acknowledges that the Gerharts' application is supported by an attorney affidavit but it complains that the application was not verified by the Gerharts. It is not entirely clear that our rules require such a verification. *See* 25 Pa. Code § 1021.182(b) and 1021.182(b)(3). In any event, Sunoco is not being ordered to pay any fees. The Department has not raised a similar complaint. We disregard any error on the Gerharts' part in this respect because there is no indication that it has affected the substantial rights of the parties. *See* 25 Pa. Code § 1021.4.

vexatious, or bad faith conduct. *Clean Air Council v. DEP*, EHB Docket No. 2017-009-L (Opinion and Order, Feb. 19, 2019), *appeals pending*, No. 309 C.D. 2019 (Pa. Cmwlth.). The Gerharts have not alleged that Sunoco engaged in any such conduct. Although the Department has advanced some arguments that are inconsistent with our holding in *Clean Air Council*, it has not explicitly argued that Sunoco engaged in any bad faith conduct. It also has not alleged that Sunoco has engaged in fraud or gross negligence in the preparation of its permit application. The Department only goes as far as saying there were "errors" in Sunoco's wetland data sheets, as found by the Board in our Adjudication. We would add that we have detected nothing approaching bad faith on the part of Sunoco in either its permit application or its litigation of this case. Accordingly, Sunoco is not liable for reimbursing the Gerharts for any of their fees or costs.

Turning to the *Department's* liability for fees, Section 307(b) of the Clean Streams Law provides that the 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). Section 307(b) provides the Board with broad discretion to award fees in appropriate proceedings. *Solebury Twp. v. Dep't of Envtl. Prot.*, 928 A.2d 990, 1003 (Pa. 2007); *Lucchino v. Dep't of Envtl. Prot.*, 809 A.2d 264, 285 (Pa. 2002). We generally employ a three-prong analysis in deciding an award of costs and fees under Section 307(b): (1) whether the fees have been incurred in a proceeding pursuant to the Clean Streams Law; (2) whether the applicant has satisfied the threshold criteria for an award; and (3) if those two prongs are satisfied, we then determine the amount of the award. *Sierra Club v. DEP*, 2018 EHB 297, 301; *Crum Creek Neighbors v. DEP*, 2013 EHB 835, 837; *Hatfield Twp. Mun. Auth. v. DEP*, 2013 EHB 764, 774-75, *aff'd*, No. 66 C.D. 2014 (Pa. Cmwlth. Dec. 23, 2014); *Angela*

Cres Trust v. DEP, 2013 EHB 130, 134. The threshold criteria for an award varies depending on whether the applicant obtained a final ruling on the merits. If there is a final ruling on the merits, as in the case here, we look to the criteria established in *Kwalwasser v. DER*, 1988 EHB 1308, *aff'd*, 569 A.2d 422 (Pa. Cmwlth. 1990). To be eligible for fees under *Kwalwasser*, an applicant must satisfy the following threshold criteria:

(1) The Board issued a final order;

(2) The applicant for fees and costs must be the prevailing party;

(3) The applicant must have achieved some degree of success on the merits; and

(4) The applicant must have made a substantial contribution to the determination of the issues.

Kwalwasser, 1988 EHB 1308, 1310; *Crum Creek, supra*, 2013 EHB 835, 838.

If a party satisfies the preliminary hurdles for a fee award, we turn to the assessment of a reasonable amount of the award. In employing our discretion to determine the appropriate amount of fees to award in a particular case, we consider factors such as:

- The fee applicant's degree of success;
- The extent to which the litigation brought about the favorable result;
- The fee applicant's contribution in bringing about the favorable result;
- The extent to which the favorable result matches the relief sought;
- Whether the appeal involved multiple statutes;
- Whether litigation fees overlap fees unrelated to the litigation itself;
- How the parties conducted themselves in the litigation, including in regards to settlement;
- The size, complexity, importance, and profile of the case;

- The degree of responsibility incurred and risk undertaken.

Hatfield Twp., 2013 EHB 764, 781 (citing *Hatfield Twp. Mun. Auth. v. DEP*, 2010 EHB 571, 589); *Solebury Twp. v. DEP*, 2008 EHB 658, 673-74.

The Gerharts' fees were incurred in a "proceeding pursuant to the Clean Streams Law." This language in Section 307 is essentially akin to a jurisdictional requirement. In determining whether a particular appeal qualifies as a proceedings pursuant to the Clean Streams Law, we consider such factors as the reason the appeal was filed and the purpose of the litigation, whether the notice of appeal raised objections under the Clean Streams Law, whether the Clean Streams Law objections were pursued throughout the appeal, whether the regulations at the center of controversy were promulgated pursuant to the Clean Streams Law, and whether the case implicates the discharge of pollutants to the waters of the Commonwealth. *Friends of Lackawanna v. DEP*, 2018 EHB 401, 405-09; *Longenecker v. DEP*, 2016 EHB 872, 874; *Borough of Kutztown v. DEP*, 2016 EHB 189, 191-92. Whether the appeal was also brought pursuant to other statutes as well does not prevent the appeal from being one brought at least in part pursuant to the Clean Streams Law. *Friends of Lackawanna*, *supra*.

Of course, there are cases where an appellant's Clean Streams Law claims, if they exist at all, play such a small part in the origination and prosecution of a case that the case cannot be fairly characterized as a proceeding pursuant to the Clean Streams Law. *See, e.g.*, *Angela Cres Trust v. DEP*, 2013 EHB 130. However, this is not such a case. This appeal sought to protect and restore wetlands and streams, all of which are waters of the Commonwealth. 25 Pa. Code § 102.1. The Gerharts' notice of appeal contained numerous objections related to wetlands, riparian buffers, pollution of the streams and pond on the property, antidegradation requirements, and erosion and sedimentation controls, all of which are Clean Streams Law issues. (*See, e.g.*,

Notice of Appeal at ¶¶ 18-20, 23-34, 37, 46.) The Gerharts pursued the wetland issues, successfully in part, and the riparian buffer issue, unsuccessfully, all the way through to their post-hearing brief. The pertinent regulations were all promulgated pursuant in part to the Clean Streams Law and were designed to protect, and if necessary, restore the waters of the Commonwealth. *See* 25 Pa. Code §§ 102.2 and 105.2. Sunoco's permits were issued in part pursuant to the Clean Streams Law.[3] (Parties' Joint Hearing Exhibit 1, 2.) Sunoco's destruction of the wetland by trenching through it and subsequent reconstruction resulted in the discharge of sediment and fill into the wetland. There is no doubt that, had Sunoco failed to obtain a permit for this work or failed to comply with its restoration obligations under the permit, the Department would have characterized these as violations of the Clean Streams Law.[4] *See, e.g.*, *Corsnitz v. DEP*, 2018 EHB 174.

The Department and Sunoco contend that this instead is a proceeding pursuant to the Dam Safety and Encroachments Act, which does not have a provision for fees. They say that the Gerharts only cited the Clean Streams Law once in their notice of appeal, and the Gerharts did not cite specific provisions of the Clean Streams Law in their pre-hearing memorandum or post-hearing briefs. But the exact same thing can be said of the Dam Safety and Encroachments Act, which was also cited only once in the notice of appeal and received little attention thereafter. An appeal that cites the Clean Streams Law and Dam Safety and Encroachments Act only once must

[3] It is perhaps worth mentioning that the primary function and value of Wetland L24/25, which is a narrow strip of land on both sides of a small stream, is groundwater recharge/discharge, which would support the hydrology of that stream. (Wetland Functions and Values Assessment – Huntingdon County, Parties' Joint Hearing Exhibit 17 (at 4, Attach. B).) Proper restoration of the wetlands is inextricably intertwined with protection of the stream.

[4] *See* Chapter 105 Permit at 4: "Any work authorized by this permit conducted prior to DEP's receipt of a signed copy of the Acknowledgement of Apprisal of Permit Conditions is a violation of the Dam Safety and Encroachments Act and The Clean Streams Law, and you may be subject to fines and penalties pursuant to those Acts."; Chapter 102 Permit Cover Letter: "The permit is effective on February 13, 2017 and will expire on February 12, 2022. You must comply with all conditions of the permit in accordance with Sections 402 and 611 of The Clean Streams Law (35 P.S. §§ 691.402 and 691.611).".

be a proceeding pursuant to *something* though. An overly formulaic approach to determining whether an appeal is a Clean Streams Law proceeding risks missing the forest for the trees. The Gerharts focused their objections on regulatory provisions of Chapters 102 and 105, but this does not diminish the overarching objective of the appeal to protect and restore waters of the Commonwealth on the Gerharts' property.[5] An unauthorized impact to a wetland or failure to restore a damaged wetland implicates the Clean Streams Law *and* the Dam Safety and Encroachments Act. They are not mutually exclusive. This appeal qualifies as a proceeding pursuant to the Clean Streams Law. *See Corsnitz v. DEP*, 2018 EHB 174; *Liddick v. DEP*, 2018 EHB 207; *Lyons v. DEP*, 2011 EHB 447.

Having concluded that the Gerharts' appeal was a proceeding pursuant to the Clean Streams Law, our next inquiry is whether the Gerharts have satisfied the threshold criteria for an award. Actually, neither the Department nor Sunoco dispute that the Gerharts meet these threshold criteria. The Gerharts obviously obtained a final order—the Adjudication and Order. They prevailed on their claim that the wetlands on their property were improperly classified as PEM wetlands instead of PFO wetlands, and that the site needs to be restored accordingly. They achieved this success on the merits, and their efforts were the exclusive contribution leading to this result. The threshold criteria have been met.

Our third inquiry is the determination of the amount of the award. On a positive note, thanks to the Gerharts' efforts, a 0.066 acre wetland will be restored as a PFO instead of a PEM wetland. That having been said, it must also be said that the Gerharts achieved a rather limited

[5] We also note that the Department touted certain special conditions in its permits as going beyond statutory and regulatory requirements, such as riparian buffer replanting for streams not located in high quality or exceptional value watersheds. *Compare* 25 Pa. Code § 102.14. It might be difficult for an appellant to cite a statutory provision while challenging a permit condition that itself is not derived directly from any specific statutory or regulatory provision. However, that challenge is no less a Clean Streams Law challenge and it does not somehow nullify the clear purpose of that condition to protect waters of the Commonwealth.

degree of success in the context of their appeal as a whole. They prevailed on only one objection—the classification of Wetland L24/25. The wetland would have been restored in any event but now Sunoco will presumably need to plant some trees in part of this wetland. Not all of that area can be planted with trees because there is a stream in the middle of the wetland and a safety buffer must be maintained around the pipeline itself. The Gerharts did not achieve *any* success on their other objections, which factors prominently in the ultimate amount of our award. *See Friends of Lackawanna*, 2018 EHB at 416; *Twp. of Harmar v. DER*, 1994 EHB 1107, 1137 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (courts should focus on the significance of the overall relief obtained by the fee applicant)).

In addition to considering the degree of success in determining the amount of the award, we also consider "how the parties conducted themselves in the litigation, including in regard to settlement." *Hatfield Twp.*, 2010 EHB at 589. This factor plays a major role in this case. We have now been informed that Sunoco presented a settlement offer for the first time to the Gerharts on September 11, 2017 and on multiple occasions thereafter. It turns out that Sunoco offered to restore Wetland L24/25 as a PFO wetland instead of a PEM wetland back in September 2017. This settlement was acceptable to the Department. This, of course, is not only exactly the best possible relief the Gerharts could have hoped for on their wetland classification issue, it was exactly the relief ultimately ordered by the Board. Although the appeal continued on at great expense for two more years, precisely the same result achieved could have been amicably attained by September 2017. Given the amount of attention devoted to this matter, this revelation is rather unsettling.

This begs the question why the Gerharts opted to continue litigating for two more years, incurring substantial fees and costs all that while, which in turn leads to the question whether it is

fair for the taxpayers to reimburse them for fees and costs that at first blush would appear to have been wholly unnecessary. It seems that the Gerharts refused the offer because they wanted to, in their words, "correct a programmatic error in how wetlands are protected in Pennsylvania." (*See, e.g.*, Memo in Support of Fee Petition at 33.) As stated in the Gerharts' Memorandum, "Settlement discussions did occur, but it became quickly apparent during discussions that the programmatic differences between the Gerharts' consultant and the erroneous Department and Sunoco interpretations would only be resolved using the EHB process." (*Id.* at 32.) The Gerharts apparently not only wanted to have the wetland on their land restored, they also wanted to establish as a matter of law their theory that wetlands everywhere should be classified as PFO even if there are no trees *in* the wetland so long as trees *outside of* the wetland have branches that overhang the wetland.

Whether or not this ill-fated attempt at *noblesse largesse* was a rational position, we do not believe it is a position that the taxpayers should be required to underwrite. First and most obviously, the Gerharts did not prevail on their theory. We refused to opine on the overhanging-branches issue because it was unnecessary to do so. The Gerharts should not be rewarded for their unsuccessful effort. They did not advance the law in any way. We see no basis for the statements made in their papers in support of their fee petition that they have "brought to light an incorrect theory of wetlands practice," that the Board's Adjudication "will resonate throughout the wetlands community to correct what was previously an inappropriate misclassification of forested wetlands as emergent in small polygons," or the Department was guilty of a "programmatic error." (Memo at *passim*.)

Furthermore, even if the Gerharts had prevailed on that issue, it would not have added any additional value *to them*. In other words, even if we found that (1) there were not enough

trees within the wetland itself to make it a PFO wetland, (2) the overhanging-branches theory had merit, and (3) there were enough overhanging branches to make it a PFO wetland, the result of that finding for the Gerharts would have been the same as what Sunoco offered in its 2017 settlement proposal: restoration of Wetland L24/25 as PFO. The Gerharts were entitled upon a finding of error to appropriate relief. They were not entitled to relief based on any one particular legal theory versus another. The Gerharts' wholly unnecessary effort to expand the law into wholly new territory only to get to the same place does not justify a fee award. Thus, we will cut off their recoverable fees and costs after September 2017.[6]

On the other hand, Attorney Rich Raiders' efforts in filing the appeal in February 2017 and in the early days of the case through September 2017 before the settlement offer do not appear to be excessive or unreasonable. Our review of his fee sheets satisfies us that Mr. Raiders' fees were related to the litigation, his hourly rate is reasonable (and not challenged), and the amount of time assigned to specific tasks was appropriate. In these very early months the Gerharts' claims shared a common core of facts and interrelated theories, so we see no need to apportion fees among the various claims for those months. *See Crum Creek Neighbors v. DEP*, 2013 EHB 835, 839. Although the fees and costs incurred in this appeal as a whole were entirely disproportionate to the matter at stake and the result obtained, the same criticism does not apply to the fees billed by Mr. Raiders from February through September 2017. Those fees and expenses totaled $7,482.50. In addition, Mr. Raiders billed $2,840 for work related to the fee petition. Although the level of work was appropriate, the limited degree of success as described in this Opinion compels us to reduce the award to $1,000, for a total award of attorney's fees of $8,482.50.

[6] Sunoco's settlement offer did not appear to address Gerharts' other issues (additional wetlands, riparian buffer), but the Gerharts did not prevail on those issues.

Expert witness fees are recoverable. *See, e.g.*, *Crum Creek, supra*; *Pine Creek Valley Watershed Ass'n v. DEP*, 2008 EHB 705; *Lipton v. DEP*, 2008 EHB 691. The Gerharts' consultant, Schmid & Company, Inc. ("Schmid"), billed $46,532.67 for work beginning in March 2016 through the end of September 2017. Although the invoices provide limited information on the itemized tasks, we know from the merits hearing that much of Schmid's early efforts were directed at the proper *delineation*, as opposed to the *classification*, of wetlands on the property, as well as an investigation of the pond and stream system. In addition, the efforts were not specific to the litigation but were directed more generally at an effort to persuade the Department, the United States Army Corps of Engineers, and Sunoco and its consultants to properly delineate and characterize the wetlands and streams on the Gerhart property. The Department and Sunoco largely came to accept Schmid's wetland boundaries during the permit application process and they were incorporated into Sunoco's plans. To be sure, due to Schmid's efforts the wetlands ultimately recognized on the Gerhart property were more extensive than originally proposed by Sunoco early on in the application process, but the boundaries were generally agreed-to before the permits were issued and not heavily litigated in the appeal.

Nevertheless, Schmid's early work ultimately proved important to the Gerharts' limited success in this appeal; it was Schmid's testimony based upon his extensive field work that convinced us that the wetlands were PFO wetlands. However, at the risk of piling on, we must again add that we did not opine on Schmid's overhanging branches theory, which consumed a great deal of time and testimony in this appeal. In light of these considerations, a percentage of the expert fees as of September 2017 fairly attributable to the Wetland L24/25 classification issue, on which the Gerharts prevailed, is 10 percent, for an award of $4,653.27.

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEPHEN AND ELLEN GERHART	:	
	:	
v.	:	**EHB Docket No. 2017-013-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	

O R D E R

AND NOW, this 7th day of January, 2020, we hereby order the Department to pay the Gerharts, care of Attorney Richard Raiders, Esquire, $13,135.77.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: January 7, 2020

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

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

For Appellants:
Richard Raiders, Esquire
(*via electronic filing system*)

For Permittee:
Terry R. Bossert, Esquire
Aaron S. Mapes, Esquire
Mica T. Iddings, Esquire
Robert D. Fox, Esquire
Neil S. Witkes, Esquire
Jonathan E. Rinde, Esquire
Diana A. Silva, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROCK SPRING WATER COMPANY	:	
	:	
v.	:	**EHB Docket No. 2018-110-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 8, 2020**

OPINION IN SUPPORT OF ORDER
ON MOTION TO COMPEL DISCOVERY

By Richard P. Mather, Judge

Synopsis

The Board grants an unopposed motion to compel discovery filed by the Department nine days after the parties' discovery deadline.

O P I N I O N

The Department of Environmental Protection ("Department") filed a Motion to Compel Discovery to compel Rock Spring Water Company ("Appellant") to respond to its interrogatories and request for production of documents. The discovery deadline applicable to the parties, initially established by a pre-hearing order issued on November 14, 2018 and subsequently modified by two Board ordered extensions, required the parties to complete discovery by December 9, 2019. The Department filed its motion to compel discovery responses on December 18, 2019, nine days after the discovery deadline passed. In its motion, the Department notes it agreed to give Appellant until December 13, 2019 to provide answers to the Department's discovery requests and the Department opted to file its motion after not hearing from Appellant by December 17, 2019. Appellant has not filed a response to the Department's

Motion but concurred with the Department's characterization of the facts on a conference call with the parties on January 3, 2020.

Discovery during litigation before the Board is primarily governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). "[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205. The Board may grant a motion to compel filed after a discovery deadline when the motion is filed soon enough that it will not delay a hearing and where there is no undue delay in filing the motion. *Compare DEP v. EQT Production Co.*, 2016 EHB 369, 370-71 (denying a motion to compel filed two months after close of discovery when objections to discovery featured in the motion were known six months to a year prior to filing the motion), *with Coalition of Religious and Civic Organizations, Inc. v. DER*, 1990 EHB 1376, 1379 (granting in part a motion to compel discovery response filed fourteen days after discovery deadline had passed and noting that the Board's abbreviated discovery period can create difficulty for parties seeking to file appropriate motions before the deadline). The circumstances in this appeal justified granting the Department's Motion to Compel.

When the Board issued the Order on January 3, 2020, the Appellant had still not responded to the Department's discovery and we found no reason to deny the Department's Motion. The Department filed its Motion only nine days after the Board's discovery deadline had passed and only four days after the parties negotiated extension to provide discovery had passed. Additionally, the Department's Motion was filed before any hearing on the matter had been scheduled. Finally, the Appellant has provided no reason, either through a response or

during the subsequent conference call with the parties, for the Board to deny the Department's Motion. For these reasons, the Board issued our Order granting the Department's Motion on January 3, 2020.

ENVIRONMENTAL HEARING BOARD

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

DATED: January 8, 2020

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

For the Commonwealth of PA, DEP:
Anne Shapiro, Esquire
(via electronic filing system)

For Appellant:
Paul J. Bruder, Jr., Esquire
Randy G. Hurst, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROCK SPRING WATER COMPANY	:	
	:	
v.	:	**EHB Docket No. 2018-110-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 3rd day of January, 2020, upon consideration of the Department's Motion to Compel Discovery and subsequent conference call with the parties, it is hereby ordered that the Appellant shall serve the Department with answers to the interrogatories and the requested documents set forth in the Department's First Set of Interrogatories and Request for Production of Documents no later than **January 17, 2020**. Additionally, it is ordered that all dispositive motions shall be filed on or before **February 24, 2020**.

ENVIRONMENTAL HEARING BOARD

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

DATED: January 3, 2020

c: **For the Commonwealth of PA, DEP:**
Anne Shapiro, Esquire
(via electronic filing system)

For Appellant:
Paul J. Bruder, Jr., Esquire
Randy G. Hurst, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

D.F. BART BARTHOLOMEW, JR.	:	
	:	
v.	:	**EHB Docket No. 2019-022-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WEST MANCHESTER TOWNSHIP, Permittee	:	**Issued: January 15, 2020**

OPINION AND ORDER ON
MOTION TO DISMISS

By Michelle A. Coleman, Judge

Synopsis

The Board grants a motion to dismiss where the Department has shown the appeal to be untimely and has demonstrated the Appellant received adequate notice.

O P I N I O N

D.F. Bart Bartholomew, Jr., proceeding *pro se*, has appealed the Department of Environmental Protection's ("the Department's") approval of an update to West Manchester Township's ("the Township's") Act 537 Plan for the extension of public sewer lines along certain roads in the Township in York County and for the connection of properties located on those roads. Bartholomew lives on Haviland Road, which is one of the roads in the plan update that is to receive public sewerage. The Department approved of the Township's plan update by a letter dated September 7, 2018. Notice of the approval was published in the *Pennsylvania Bulletin* on September 29, 2018. 48 Pa.B. 6281. Bartholomew appealed the plan update on March 28, 2019 after becoming aware of the approval through a letter he received from the Township on March 23, 2019. The letter from the Township advises Bartholomew that his home

will be connected to the public sewer and provides a breakdown of the anticipated costs, which include a capacity reservation fee of $3,955 for the year 2020, a $660 annual sewer bill, a front foot assessment cost yet to be determined, and an unspecified lateral connection cost.

The Department previously moved to dismiss Bartholomew's appeal, arguing that his appeal is untimely. In that motion, the Department correctly noted that Board jurisdiction does not attach to an appeal unless it is timely filed. In our Opinion issued August 29, 2019 denying the Department's earlier motion, we noted that 25 Pa. Code § 1021.52, our rule on timely appeals, explicitly defers to other statutory timely filing provisions if they exist. The rule reads: "jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, unless a different time is provided by statute." 25 Pa. Code § 1021.52(a). A "timely manner," for persons aggrieved by a Department action but not the direct subject of the action, is defined by the Board's regulations as 30 days after notice of the action has been published in the *Pennsylvania Bulletin.* 25 Pa. Code 1021.52(a)(2)(i). However, we have noted in the past instances where statutes or regulations require something other than the constructive notice provided by publication in the *Pennsylvania Bulletin* for certain classes of would-be appellants. *See McCarthy v. DEP*, EHB Docket No. 2019-049-L, *slip op.* at 3 (Opinion and Order, July 10, 2019) (holding that appellant was entitled under statute to 30 days from actual notice to appeal); *see also Stoystown Borough Water Auth. v. DEP*, 1997 EHB 1089. In these instances, we have determined the timeliness of an appeal by assessing the notice required by law against the notice provided to the appellant. *Id.*

We denied the Department's earlier motion because no party addressed whether Act 537 or the sewage planning regulations contain any notice provisions that would supersede the

default provision in our rules, because Bartholomew attached to his response a technical deficiency letter the Department sent to the Township that said the "30-day public notice is illegible" and no party explained what that statement meant, and because the Department failed to attach any of the exhibits it referenced in its motion. In short, we denied the motion because there were several unresolved questions of law and fact that prevented us from dismissing the appeal. We denied the motion without prejudice to the Department filing another motion addressing those issues. The Department has now done so.

The Board has the authority to grant a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *Lawson v. DEP*, 2018 EHB 513, 514; *Brockley v. DEP*, 2015 EHB 198, 198; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party. *Ctr. For Coalfield Justice v. DEP*, 2018 EHB 758, 761; *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB 913, 915. Importantly, motions to dismiss will be granted only when a matter is free from doubt. *Plainfield Twp. v. DEP*, EHB Docket No. 2018-092-C, slip op. at 3 (Opinion and Order, Jan. 28, 2019); *Merck Sharp & Dohme Corp. v. DEP*, 2015 EHB 543, 544; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Res., LP v. DEP*, 2007 EHB 611, 612. "As a matter of practice, the Board has authorized motions to dismiss as a 'dispositive motion' and has permitted the motion to be determined on facts outside of those stated in the appeal when the Board's jurisdiction…is in issue." *Felix Dam Preservation Ass'n v. DEP*, 2000 EHB 409 (quoting *Florence Twp. v. DEP*, 1996 EHB 282).

In its current motion to dismiss, the Department maintains that the Board's default rule applies because the only notice provision contained in the sewage planning regulations imposes a

notice requirement on municipalities as opposed to the Department itself. Section 71.31(c) requires a municipality to publish notice of its proposed sewage plan in a newspaper of general circulation and provide a 30-day public comment period.[1] Section 71.32(a) prevents the Department from considering a municipality's public sewer plan as complete until all the requirements of Section 71.31, including the notice requirement, are met, but the Department asserts that the question of whether the Township has provided adequate notice must be viewed by the Board as an issue of merit. In other words, failure to comply with Section 71.31(c) may be a reason to find the Department's approval of a plan unreasonable or contrary to law, but that failure would not operate to extend the timeframe for an appellant to file an appeal in the first place. In the Department's view, this determination on the merits can only take place after the Board is assured it has jurisdiction to hear the appeal. While maintaining that it is not required to argue the merits in its motion to dismiss, the Department also argues that the Township fully satisfied the notice requirements under Section 71.31(c).

Bartholomew, in turn, re-raises the same arguments that he raised in response to the Department's previous motion.[2] He contends that the Department's motion "presupposes that

[1] Section 71.31(c) provides in full:

> A municipality shall submit evidence that documents the publication of the proposed plan adoption action at least once in a newspaper of general circulation in the municipality. The notice shall contain a summary description of the nature, scope and location of the planning area including the antidegradation classification of the receiving water where a discharge to a body of water designated as high quality or exceptional value is proposed and the plan's major recommendations, including a list of the sewage facilities alternatives considered. A 30-day public comment period shall be provided. A copy of written comments received and the municipal response to each comment, shall be submitted to the Department with the plan.

25 Pa. Code § 71.31(c).

[2] We feel compelled to once again disabuse the Department of the assertion in its reply brief that Bartholomew's response was two days late. The Department filed its motion to dismiss on October 25, 2019. A party is required to file a response to a motion to dismiss "within **30 days of service** of the motion…." 25 Pa. Code § 1021.94(c) (emphasis added). Importantly, Bartholomew is not registered for

appropriate notice was given to the general public" and notice of the Act 537 Plan Update "did not address the full Township and thus was not properly advertised to the public." (Bartholomew Resp. at 1.)

We are now convinced that Board jurisdiction does not attach to Bartholomew's appeal. Section 71.31(c) places the onus on the municipality, not the Department, to provide newspaper notice to the public. After a municipality provides notice under Section 71.31(c), Section 71.32(a) then requires the Department to review the municipality's plan and prohibits the Department from considering the plan complete unless the plan includes documentation indicating proper notice was given, as well as the other requirements listed in Section 71.31. 25 Pa. Code 71.32(a). We agree with the Department that this is a question of merit, as opposed to a question of jurisdiction, and Section 71.31(c) does not alter the Board's rule on timely appeals.

We are then left with our default rule that requires an appeal to be filed within 30 days of publication in the *Pennsylvania Bulletin*. 25 Pa. Code 1021.52(a)(2). The Department published approval of West Manchester Township's Act 537 Plan Update in the *Pennsylvania Bulletin* on September 29, 2018. Bartholomew's appeal was dated March 27, 2019, clearly well over 30 days from publication and depriving the Board jurisdiction to hear this appeal. Although Bartholomew appears to take issue with the notice procedures in general, the Commonwealth Court has held

---

electronic filing. The certificate of service accompanying the Department's motion reflects that Bartholomew was served by first class mail. For motions served by mail, "the date of service is the date the document served is mailed…." 25 Pa. Code § 1021.35(a). However, as we explained in our earlier Opinion, under 25 Pa. Code § 1021.35(b)(3), "For the sole purpose of computing the deadlines under this chapter for responding to documents…Documents served by mail shall be deemed served 3 days after the date of actual service." Therefore, the Department's motion was deemed served on Bartholomew on October 28, 2019. Accordingly, his response was due within 30 days of October 28, or November 27. Bartholomew's response was timely received by the Board on November 27 with the certificate of service reflecting that it was mailed out to the Board and the Department on November 25, meaning it was deemed served on the Department on November 28. The Department's reply brief was due December 13, within "15 days of the date of service of the response." 25 Pa. Code § 1021.94(d). The Department filed its reply on December 12.

that publication of notice in the *Pennsylvania Bulletin* is sufficient to apprise interested parties of Department actions. *Feudale v. Aqua Pa., Inc.*, 122 A.3d 462, 466 n.4 (Pa. Cmwlth. 2015); *Grimaud v. Dep't of Envtl. Res.*, 638 A.2d 299, 301-02 (Pa. Cmwlth. 1994).

Because the Board has no jurisdiction over the matter, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

D.F. BART BARTHOLOMEW, JR.	:	
	:	
v.	:	**EHB Docket No. 2019-022-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WEST MANCHESTER TOWNSHIP, Permittee	:	

O R D E R

AND NOW, this 15th day of January, 2020, it is hereby ordered that the Department's Motion to Dismiss is **granted** and the Appeal of D.F. Bart Bartholomew, Jr. is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: January 15, 2020

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

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

For Appellant, *Pro Se*:
D.F. Bart Bartholomew, Jr.
1576 Haviland Road
West Manchester, PA 17408-4530
(*via U.S. mail*)

For Permittee:
West Manchester Township
380 East Berlin Road
West Manchester, PA 17408
(*via U.S. mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2018-080-R**
	:	**(Consolidated with 2019-101-R)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: January 30, 2020**
PROTECTION and APEX ENERGY (PA)	:	
LLC, Permittee	:	

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

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

In this challenge to the issuance of permits for two unconventional gas wells, partial summary judgment is granted to the Department of Environmental Protection and Permittee on limited issues. As to the question of whether the issuance of the permits violates Article I, Section 27 of the Pennsylvania Constitution or Section 1917-A of the Administrative Code due to alleged deficiencies in the permitting regulations, the Board declines to address this question in the context of a motion for summary judgment. While the Board has the authority to rule on the constitutionality of regulations, the issues presented in this appeal involve complex questions of law and fact and are more appropriately addressed after development of a full record.

O P I N I O N

Introduction

This matter involves a consolidated appeal filed by Protect PT challenging the issuance and reissuance of gas well permits by the Department of Environmental Protection (Department)

to Apex Energy (PA), LLC (Apex). The permits authorize the drilling of two unconventional gas wells, known as the Drakulic 1H well and the Drakulic 7H well, in Penn Township, Westmoreland County, pursuant to the Oil and Gas Act of 2012, Act of February 14, 2012, P.L. 87, *as amended*, 58 Pa.C.S. §§3201-3274.

Currently before the Board are a Motion for Summary Judgment filed by Protect PT, a Motion for Partial Summary Judgment filed by Apex, a Motion for Partial Summary Judgment filed by the Department, responses thereto, replies and numerous briefs in support or opposition.

Protect PT seeks summary judgment on the basis of the following arguments:

1) The Department failed as a matter of law to meet its obligations under Article I, Section 27 of the Pennsylvania Constitution to ensure that Apex submitted a complete emergency response plan prior to issuing the permits;
2) The Department failed as a matter of law to meet its obligations as a trustee under Article 1, Section 27 and Chapter 78a of the oil and gas regulations when it issued permits to drill and operate the wells despite the failure of the emergency response plan to adequately identify risks and hazards within ½ mile of the site; and
3) The Department failed as a matter of law to meet its obligations as a trustee under Article I, Section 27 and Section 510-17 of the Administrative Code when it issued permits to drill and operate the wells without first requiring Apex to address ongoing violations at a separate well site, known as the Fatur well site.
4) If the Board finds that Chapter 78a of the regulations imposed no obligation on the Department to consider the matters set forth above, then the lack of such compliance mechanisms in 25 Pa. Code §§ 78a.55(j) and 78a.15(b) violates Article I, Section 27 of the Pennsylvania Constitution.

Apex seeks partial summary judgment on the following objections set forth in Protect PT's notice of appeal:

1) The Department approved the permits despite Apex's alleged "track record of continuing and ongoing violations" at other sites.
2) The permits should be vacated or additional terms and conditions should be required as a result of Apex's alleged failure to meet certain portions of the emergency response plan requirements in Chapter 78a of the regulations.
3) The Department did not adequately address impacts to threatened and endangered species prior to issuing the permits.

The Department seeks summary judgment on only one of Protect PT's objections, i.e. that the Department failed to comply with its legal obligations to ensure protection of threatened or endangered species habitat when it issued the permits and renewals.

Assessment of Potential Impacts to Threatened or Endangered Species

We first address the issue upon which both the Department and Apex seek summary judgment: whether the Department failed to adequately address impacts to threatened and endangered species prior to issuing the permits.

Section 78a.15(d) of the oil and gas regulations states as follows:

> (d) The well permit application must include a detailed analysis of the impact of the well, well site and access road on threatened and endangered species. This analysis must include:
>
> (1) A PNDI receipt.
>
> (2) If any potential impact is identified in the PNDI receipt to threatened or endangered species, demonstration of how the impact will be avoided or minimized and mitigated in accordance with State and Federal laws pertaining to the protection of threatened or endangered species and critical habitat. The applicant shall provide

> written documentation to the Department supporting this demonstration, including any avoidance/mitigation plan, clearance letter, determination or other correspondence resolving the potential species impact with the applicable public resource agency.

25 Pa. Code § 78a.15(d).

Section 78a.1 defines "PNDI" or "Pennsylvania Natural Diversity Index" as a:

> . . .database containing data identifying and describing the Commonwealth's ecological information, including plant and animal species classified as threatened and endangered as well as other critical communities provided by the Department of Conservation and Natural Resources, the Fish and Boat Commission, the Game Commission and the United States Fish and Wildlife Service.

25 Pa. Code § 78a.1.

Both Apex and the Department assert that Apex complied with Section 78a.15(d) by submitting a PNDI receipt with the applications for the 1H and 7H wells. According to the documentation provided by Apex and the Department, the PNDI receipt indicated that there were no PNDI hits for either well site. (Exhibit B and Exhibit E, Appendix 1 to Department's Statement of Undisputed Material Facts; Affidavit of Christopher Hess, General Counsel, Vice-President of Land & Business Development and Corporate Secretary of Apex, Exhibit I to Apex Statement of Undisputed Facts (Hess Affidavit), para. 17.) Indeed, Protect PT's Project and Outreach Coordinator, Ann E. LeCuyer, acknowledged in her deposition testimony that there were no PNDI hits for the site in question. (Exhibit K to Apex Statement of Undisputed Material Facts, p. 17, 128.)

Protect PT's Executive Director, Gillian Graber, testified at her deposition that a threatened or endangered species was found near the site but she was not aware of any threatened or endangered species on the site. (Exhibit E to Apex Statement of Undisputed Material Facts, p. 18,

75-76.) In its response, Protect PT points out that Ms. Graber later clarified in her deposition testimony that she is not aware of whether a threatened or endangered species exists on the site because she has not been able to gain access to the site in order to conduct a survey. (*Id*. at 76.) However, Ms. Graber has not been identified as an expert with the qualifications necessary to identify a threatened or endangered species. Therefore, even if she had conducted her own survey at the site, it, by itself, would not be sufficient to challenge the PNDI findings.

Protect PT points to the results of a 2014 PNDI search that indicated that "species or resources under [the Department of Conservation and Natural Resources'] jurisdiction are located in the vicinity of the project." (Exhibit B to Protect PT's Response to Apex and Department's Statements of Undisputed Facts.) In a letter dated August 19, 2014, in response to the 2014 PNDI search, the Department of Conservation and Natural Resources (DCNR) recommended following specific guidelines and stated that "Areas of avoidance should be clearly identified on all project mapping." DCNR continued, "With the addition of these measures, DCNR has determined that no impact is likely." (*Id*.) Apex states that the site was redesigned in order to avoid any impact to threatened or endangered species. This is supported by the 2014 DCNR letter which states, "The proposed well pad was redesigned to avoid the areas of limits of disturbance. . ." (*Id.*)

Protect PT has failed to demonstrate that there is a credible dispute regarding the existence of threatened or endangered species on the well site or the potential for impact to threatened or endangered species. The most recent PNDI receipt indicates that no threatened or endangered species exist on the site, and Protect PT has presented no evidence to the contrary. It offers no credible rebuttal to the results of the most recent PNDI receipts finding no impact, only speculation. As we held in *Matusinski v. DEP*, 2008 EHB 489, 493:

> Our rules of practice and procedure require a response to a motion for summary judgment "to set forth *specific* facts showing there is

> a genuine issue for hearing." These specific facts must be supported by the affidavits of witnesses or with other admissible evidence from the record.[1]

Indeed, the Board's rule on summary judgment motions states as follows:

> l) *Summary judgment.* When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing. If the adverse party does not so respond, summary judgment may be entered against the adverse party.

25 Pa. Code § 1021.94a(l).

Protect PT provides no basis for us to conclude that there is a genuine issue as to whether threatened or endangered species exist on the site. Therefore, we grant summary judgment to the Department and Apex on this issue.

We now turn to the issues on which Protect PT and/or Apex seek summary judgment.

Emergency Response Plan

Protect PT asserts that the Department should have denied Apex's applications for the well permits because Apex did not submit an emergency response plan that complies with the regulatory requirements for such plans. In response, Apex argues that it has prepared an emergency response plan for the wells but submission of the plan is not required under the regulations as part of the permitting process for unconventional wells. The Department concurs with Apex.

Section 78a.15 of the oil and gas regulations, 25 Pa. Code § 78a.15, sets forth the requirements of a permit application. The submission of an emergency response plan is not

[1] *Matusinski* cites former subsection (h) of 25 Pa. Code § 1021.94a(h). That language is now codified at subsection (l) of § 1021.94a.

required as part of the permit application process. However, Section 78a.55 of the regulations does impose an obligation on operators of unconventional gas wells to prepare an emergency response plan, both for the entirety of their operations in the Commonwealth and for individual well sites, and to maintain those plans onsite. According to Apex, although it is not currently operating the Drakulic 1H and 7H wells, it has prepared an emergency response plan for the wells. This is supported by the affidavit of Apex's General Counsel, Vice-President of Land & Business Development and Corporate Secretary Christopher Hess. (Hess Affidavit, Exhibit I to Apex Statement of Undisputed Material Facts, para. 13.)

There appears to be no dispute that, under the mandatory requirements of the oil and gas regulations, Apex was not required to submit an emergency response plan with its permit applications. Gillian Graber, Protect PT's Executive Director, admitted in deposition testimony that she believes the Drakulic permit application met the required regulations and statutes. (Exhibit E to Apex Statement of Undisputed Material Facts, p. 83-84.)

Moreover, Protect PT does not dispute that the oil and gas regulations contain no requirement for the submission or review of an emergency response plan prior to the issuance of a permit for an unconventional gas well. Rather, its argument is that this omission in the regulations constitutes a violation of Article I, § 27 of the Pennsylvania Constitution. Protect PT contends that the Department's review of an emergency response plan prior to the issuance of a gas well permit is required by Article I, Section 27 which ensures Pennsylvania's citizens the right to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment" and establishes the Commonwealth as the trustee of those natural resources.

In response, the Department and Apex assert that Protect PT has not made the factual demonstrations necessary to establish a clear right to summary judgment on this issue. They assert

that Protect PT has proffered no evidence of specific harm that will occur as a result of the permit issuances but has offered only its opinion on what analysis and review should be part of the permitting process.

Apex and the Department also advance the argument that the Board has no authority to rule on the constitutionality of a regulation. We take this opportunity to disabuse Apex and the Department of this notion by pointing to a long line of precedent holding that, while the Board cannot rule on the constitutionality of a statute, it is within the scope of the Board's jurisdiction to rule on the constitutionality of a regulation: *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183, 1187-88 (Pa. Cmwlth. 1991) (citing *St. Joe Minerals Corp. v. Goddard*, 324 A.2d 800, 802 (Pa. Cmwlth. 1974); *Eagle Environmental II, L.P. v. DEP*, 2002 EHB 335, 356-58; *Empire Sanitary Landfill, Inc. v. DER*, 1994 EHB 30; *Refiner's Transport and Terminal Corp. v. DER*, 1986 EHB 400.

We find that summary judgment is warranted on the narrow question of whether 25 Pa. Code § 78a.15 requires the submission of an emergency response plan as part of a permit application for unconventional gas wells. It does not require the submission or review of such a plan prior to permit issuance, and none of the parties dispute this conclusion. As to the broader question of whether the regulations should require the submission and review of an emergency response plan as part of the permit application process pursuant to Article I, Section 27 of the Pennsylvania Constitution, we decline to rule on this question until after development of a full record at hearing. Determining the Department's duties pursuant to Article I, Section 27 of the Pennsylvania Constitution is a complex matter. Clearly, there will be facts in dispute on all sides, and it is not appropriate for the Board, as the arbiter of those facts, to make such a ruling without the benefit of testimony and extensive evidence. In cases that involve complex issues of fact and

law, we believe that such matters should be decided on a fully developed record. *Center for Coalfield Justice v. DEP*, 2016 EHB 341, 347; *Clean Air Council v. DEP*, 2013 EHB 404, 410-11.

Continuing Violations at Fatur Well Site

Protect PT asserts that ongoing violations at another Apex site should have prevented issuance of the permits. Apex disputes this contention on several grounds. First, it argues that the Department has no authority under the Oil and Gas Act to deny the well permits for alleged violations at other sites. Second, the violations complained of are the subject of a March 8, 2019 Consent Order and Agreement between Apex and the Department, with which Apex contends it is in compliance.

Section 3211 of the 2021 Oil and Gas Act addresses the issuance of well permits. Subsection e.1 sets forth the bases on which the Department may deny an application for a well permit. Among those is the following:

> The department finds that the applicant, or any parent or subsidiary corporation of the applicant, is in continuing violation of this chapter, any other statute administered by the department, any regulation promulgated under this chapter or a statute administered by the department or any plan approval, permit or order of the department, unless the violation is being corrected to the satisfaction of the department.

58 Pa. C.S. § 3211(e.1)(5). Likewise, Section 78a.15 of the regulations requires the Department to consider a number of factors before conditioning a permit that will impact a public resource, including whether the permittee is in compliance with all applicable statutes and regulations. 25 Pa. Code § 78a.15(g)(1).

Protect PT contends that at the time of the permit issuances that are the subject of this appeal, "Apex had numerous ongoing violations associated with its operation of the Fatur Well

Pad" located in Salem Township, Westmoreland County. (Protect PT Brief in Support of Motion for Summary Judgment, p. 38.) Apex asserts that the alleged violations have been resolved to the Department's satisfaction by means of the March 8, 2019 Consent Order and Agreement and, therefore, there was no basis for denying the permits under either the Oil and Gas Act or the regulations. (Hess Affidavit, Exhibit I to Apex Statement of Undisputed Material Facts, para. 6-7.) The Department concurs with Apex that the violations have been resolved by means of the Consent Order and Agreement, which established a schedule for Apex to eliminate the violations cited by the Department at the Fatur site. The Department states that it considered Apex's compliance history in its review of the permit applications and determined that since Apex is in compliance with the Fatur site Consent Order and Agreement there was no impediment to issuance of the permits for the Drakulic wells.

Protect PT argues that the Department had a duty under Article I, Section 27 to deny the permits on the basis of Apex's history of violations regardless of whether those violations have been addressed in a Consent Order and Agreement. Protect PT also cites Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended,* 71 P.S. §§ 510-17, in support of its argument that the Department had an obligation to deny the permits. That section deals with the abatement of public nuisances and states, in relevant part, that the Department[2] has the power and duty "[t]o protect the people of this Commonwealth from unsanitary conditions and other nuisances." It is Protect PT's contention that the alleged violations at the Fatur well site constitute public nuisances because of pollution to local water sources.

Clearly, the question of whether the Department had a duty to deny the permits under Article I, Section 27 and the Administrative Code for alleged ongoing violations involves disputed

[2] This section refers to the Department's predecessor, the Department of Environmental Resources.

issues of fact and law. As explained earlier, such matters are not appropriate for disposition in the context of a motion for summary judgment.

Failure to Identify Risks and Hazards Within ½ Mile of the Site

Protect PT argues that the Department failed to meet its obligations as a trustee under Article I, Section 27 of the Pennsylvania Constitution and Chapter 78a of the regulations when it issued permits for the 1H and 7H wells despite the failure of Apex's emergency response plan to identify risks and hazards within ½ mile of the site. As we have already noted, Section 78a.15 of the regulations does not require the submission of an emergency response plan as part of the permit application. Therefore, to the extent that Protect PT is arguing that Apex should have submitted a more comprehensive emergency response plan with its permit application, we find that there was no obligation under the regulations to submit a plan, and summary judgment is granted to Apex on that narrow issue. However, as to Protect PT's broader argument that the Department failed in its duties as trustee under Article I, Section 27 of the Pennsylvania Constitution to require an emergency response plan that adequately identified risks and hazards within ½ mile of the site, its motion for summary judgment is denied. As we have previously explained, this is an issue that involves questions of law and fact and is more appropriately addressed after the development of a full record.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2018-080-R**
	:	**(Consolidated with 2019-101-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and APEX ENERGY (PA), LLC, Permittee	:	

O R D E R

AND NOW, this 30th day of January, 2020, it is ordered as follows:

1) Summary judgment is granted to the Department and Apex on the question of whether the Department complied with its legal obligation to ensure the protection of threatened or endangered species in issuing the permits that are the subject of this appeal.

2) Summary judgment is granted to Apex on the question of whether 25 Pa. Code § 78a.15 required the submission of an emergency response plan prior to the issuance of the permits that are the subject of this appeal.

3) Summary judgment is denied as to all other issues raised in the parties' motions.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: January 30, 2020

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

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

For Appellant:
Ryan Hamilton, Esquire
(*via electronic filing system*)

For Permittee:
James V. Corbelli, Esquire
Joseph Reinhart, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

B&R RESOURCES, LLC AND RICHARD F. CAMPOLA	:	
v.	:	**EHB Docket No. 2015-095-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 14, 2020**

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

By Steven C. Beckman, Judge

Synopsis

Following the Commonwealth Court's instructions on remand, we find Richard F. Campola personally liable for four of the violations identified in the Department's June 2015 Order and he is, therefore, responsible for plugging four of the Abandoned Wells. During the relevant time period that Mr. Campola owned and operated B&R Resources, LLC, the company had available financial resources that would have enabled it to plug four wells had Mr. Campola directed it to make a reasonable effort to do so.

Background

This remand decision arises from the appeal by B&R Resources, LLC ("B&R Resources") and Mr. Richard F. Campola of a June 22, 2015 Administrative Order ("June 2015 Order") by the Department of Environmental Protection ("DEP" or "Department") alleging violations of the 2012 Oil and Gas Act. The June 2015 Order required B&R Resources and Mr. Campola to, among other things, plug and mark wells that had been deemed abandoned.[1] B&R Resources and Mr.

[1] Under the 2012 Oil and Gas Act, abandoned wells are required to be plugged in order to "stop vertical flow of fluids or gas within the well bore." 58 Pa. C.S.A § 3220(a). Abandoned wells that have not been

Campola filed a timely appeal of the June 2015 Order on July 10, 2015. The case proceeded through discovery and motions practice in front of the Board in which the Board issued several rulings.[2]

The Board issued its initial Adjudication in this case in August 2017 following a one-day hearing in November 2016. *B&R Resources, LLC v. DEP*, 2017 EHB 750 ("2017 Adjudication"). At that hearing, the Board heard extensive testimony regarding Mr. Campola's actions but received limited testimony and evidence concerning the financial condition of B&R Resources. On that record, the Board dismissed the appeal and held that Mr. Campola was personally liable for all of the violations identified in the June 2015 Order and, therefore, he was required to plug all 47 of the Abandoned Wells.[3] Mr. Campola appealed our decision to the Commonwealth Court and, on March 15, 2018, the Commonwealth Court issued a decision reversing the Board and remanding the matter to the Board for further proceedings consistent with the Commonwealth Court opinion. *B&R Resources, LLC v. Dep't of Envtl. Protection*, 180 A.3d 812 (Pa. Cmwlth. 2018).

After our review of the Commonwealth Court's opinion, we held a conference call with the parties that led to us ordering the parties to file briefs addressing the evidence and issues to be considered by the Board on remand. Following review of those briefs, as well as an amicus brief filed by the Pennsylvania Independent Oil & Gas Association, we determined that a further

---

properly plugged can cause a health and safety hazard for people and pollution to the environment including air, soil and water contamination. (DEP Fact Sheet entitled "Abandoned And Orphan Oil And Gas Wells And The Well Plugging Program, 8000-FS-DEP1670, Rev. 11/2014).

[2] A more detailed discussion of the initial pre-hearing and post-hearing proceedings can be found in our prior Adjudication in this case, *B&R Resources, LLC and Richard F. Campola v. DEP*, 2017 EHB 750.

[3] The only issue remaining for the Board to decide following the 2016 hearing was whether Mr. Campola was liable for B&R Resources' failure to plug the Abandoned Wells under the participation theory. At the time of the 2016 hearing and in post-hearing filings, B&R Resources did not contest its liability to plug the Abandoned Wells and, therefore, the Board formally dismissed B&R Resources' appeal of the June 2015 Order. B&R Resources did not appeal this part of the Board's 2017 Adjudication to the Commonwealth Court. B&R Resources remains responsible for fully complying with the June 2015 Order.

evidentiary hearing was required to take additional evidence on B&R Resources' finances to enable the Board to make the necessary factual and legal findings called for by the Commonwealth Court. The Board permitted further discovery by the Department which resulted in several discovery disputes and further rulings by the Board. Prior to the evidentiary hearing, the parties addressed one of the required factual findings and stipulated to a standard plugging cost for the Abandoned Wells of $18,500. (Joint Status Report, filed April 20, 2018). Mr. Campola filed a number of Motions in Limine, including one seeking to determine which party had the burden of proof in the remand. The Board issued an Order dated August 16, 2019, denying Mr. Campola's Motion in Limine Regarding Burden of Proof and held that Mr. Campola bore the burden of proof on the question of whether B&R Resources lacked the financial resources required to plug the Abandoned Wells.[4] The evidentiary hearing was held on August 20, 2019. At the hearing, the Board took testimony from two expert witnesses addressing financial matters, David Duffus for the Department and William Beaufait for Mr. Campola, along with testimony from Mr. Campola. The Board also admitted numerous exhibits detailing the finances of B&R Resources.[5] The parties filed post-hearing briefs setting forth their respective positions. The final post-hearing brief was submitted by Mr. Campola on January 3, 2020.

[4] See *Schlafke v. DEP*, EHB Docket No. 2016-117-B. (Adjudication issued January 8, 2019) slip op. at 32, (Where the individual raises the issue of the company's financial inability to address the violations as means to break the causation change, the financial inability claim is in the nature of an affirmative defense and the burden to demonstrate that the company lacked the necessary financial resources to address the violations rests with the party making the claim.)

[5] There is the potential for confusion regarding the labeling of the DEP Exhibits. DEP did not seek to admit its pre-labelled exhibits CC 2 and CC 3 and as result its pre-hearing exhibits CC 4 – CC 7 were relabeled CC 2 – CC 5 during the hearing. In addition to the exhibits admitted during the hearing testimony (Campola Exs. 1-3; DEP Exs. CC 1 – CC 5), the parties agreed to a joint stipulation regarding exhibits and the Board agreed to admit all the documents identified in the first section labelled "I. Stipulation As To The Authenticity And Admissibility Of Exhibits". The only exception was that the Department's Supplemental Pre-Hearing Memorandum Exhibits CC-2 and CC-3 were not admitted. See Parties' Joint Stipulation Regarding Exhibits (Docket No. 145) and 2019 Hearing Transcript at 276-280.

Additional Findings of Fact[6]

1. The cost to plug a single Abandoned Well is $18,500. (Joint Status Report, filed April 20, 2018)

2. The Abandoned Wells were owned by Dylan Resources when Dylan Resources filed for bankruptcy in 2010. (2016 Hearing Transcript ("T") at 12).

3. At the time of Dylan Resources' bankruptcy in 2010, all of the wells, including the Abandoned Wells, were shut in. (2016 Hearing T. at 12).

4. B&R Resources, LLC formed and took ownership of Dylan Resources wells, including the Abandoned Wells, following the bankruptcy. (2016 Hearing T. at 13).

5. Mr. Duffus and Mr. Beaufait calculated an annual book net loss for B&R Resources. (Campola Exhibit ("Ex."). 1; DEP Ex. CC-1).

6. The annual book net loss for B&R Resources was determined by subtracting the Total Deductions for the company from its Total Income with some limited further adjustments. (Campola Ex. 1).

7. The annual book net loss for B&R Resources for the time period starting from August 2011 through June 2015 was as follows: 2011: -$31,495; 2012: -$39,563; 2013: -$438; 2014: -$24,628; 2015: -$19,703. (Campola Ex. 1; DEP Ex. CC-1).

8. The total book net loss for B&R Resources for the time period starting from August 2011 through June 2015 was -$115,827. (Campola Ex. 1; DEP Ex. CC-1).

9. The book net loss number for B&R Resources (annual and total) includes a deduction for depreciation. (Campola Ex. 1; DEP Ex. CC-1).

[6] The Findings of Fact from our initial Adjudication in this case are incorporated herein as if fully set forth in this Adjudication.

10. Depreciation is an accounting measure and does not represent an actual cash outlay by B&R Resources. (2019 Hearing T. at 20).

11. The annual amount of depreciation claimed by B&R Resources for the time period starting from August 2011 through June 2015 was as follows: 2011: $44,279; 2012: $76,313; 2013: $59,794; 2014: $42,195; 2015: $21,098. (Campola Ex. 1; DEP Ex. CC-1).

12. The total amount of depreciation claimed by B&R Resources for the time period starting from August 2011 through June 2015 was $243,679. (Campola Ex. 1; DEP Ex. CC-1).

13. B&R Resources' expenses from August 2011 through June 2015 included the following: Pumper Fees ($124,526), Line Repair ($57,941), Legal ($50,151) and Other ($36,273). (Campola Ex. 1; DEP Exs. CC-1; CC-2).

14. Pumper fees are the fees and expenses paid to the person who maintains and services the wells. (2019 Hearing T. at 38, 102-103, 188).

15. The pumper fees paid by B&R Resources during the time period from August 2011 through June 2015 were generally consistent with the fees paid by B&R Resources prior to Mr. Campola's ownership of the company. (2019 Hearing T. at 106-110).

16. Repair of various gas lines was necessary to prevent the loss of natural gas to the environment and to ensure that gas was able to be sold. (2019 Hearing T. at 121-122).

17. B&R Resources was involved in litigation arising out of disputes with several of its lease holders and royalty owners. (2019 Hearing T. at 122-124).

18. The amounts spent by B&R Resources on items such as office supplies, professional dues, travel, meals and entertainment were minimal and in line with the amount and type of expenses incurred by a typical independent oil and gas well company. (2019 Hearing T. at 124-126).

19. B&R Resources retained certain liabilities, including the obligation to repay loans from Cortland Banks and Kurt Latell, when Mr. Campola purchased B&R Resources. (Campola Ex. 23).

20. The terms of the Cortland Banks loan are spelled out in an executed loan document and provide for a monthly payment of $1,721.30. (Campola Ex. 24).

21. The purpose of the Cortland Banks loan was to fund equipment and was secured by security agreements on a gas compressor and truck. (Campola Ex. 24).

22. B&R Resources paid off the Cortland Banks loan in the ordinary course of its business and in general compliance with the terms of the loan agreement. (Campola Ex. 14).

23. Loan payments on the Cortland Banks loan during the time period from August 2011 through June 2015 totaled $38,691. (Campola Exs. 2, 3, 14; DEP Ex. CC 3, CC 4).

24. The loan from Kurt Latell is evidenced by an unexecuted promissory note that provides for a minimum monthly payment of $1,171.41. (Campola Ex. 25).

25. B&R Resources made the monthly payments to Kurt Latell in general compliance with the terms of the promissory note although in some months a reduced payment was made. (Campola Ex. 14).

26. Loan payments on the Kurt Latell loan during the time period from August 2011 through June 2015 totaled $37,759. (Campola Exs. 2, 3, 14; DEP Ex. CC 3, CC 4).

27. Mr. Campola received funds from B&R Resources of $23,020 in 2014 and $10,856 in the first half of 2015. (Campola Exs. 3, 15; DEP Ex. CC-4).

Discussion

The Commonwealth Court ruled on three issues raised by Mr. Campola in his appeal. It rejected Mr. Campola's contention that the participation theory requires proof of an affirmative

act and cannot apply where his conduct consisted of inaction. The Commonwealth Court held that both its precedents and public policy support the conclusion that intentional and knowing inaction can be sufficient to support participation theory liability for a statutory violation. *B&R Resources, LLC*, 180 A.3d at 818-821. The Commonwealth Court also rejected Mr. Campola's argument that the Board had imposed liability on him solely based on his status as the owner and manager of B&R Resources. The Commonwealth Court found that the Board based its conclusion that Mr. Campola was liable under the participation theory on its factual determinations that Mr. Campola knew of B&R Resources' obligation to plug the Abandoned Wells, that he made a decision that B&R Resources would not plug any of the Abandoned Wells, and that he had B&R Resources spend its financial resources for purposes other than complying with the June 2015 Order. The Commonwealth Court stated that the Board's findings regarding Mr. Campola's knowledge and conduct were supported by the hearing record. *Id.* at 821.

The Commonwealth Court found merit in the third issue raised by Mr. Campola and therefore, reversed our decision and remanded the matter to the Board. Mr. Campola contended that liability could not be imposed on him for wells that B&R Resources lacked the financial resources to plug. In reversing our decision, the Commonwealth Court stated that a corporate or limited liability officer such as Mr. Campola "is liable for a statutory violation under the participation theory only if there is a causal connection between his wrongful conduct and the violation." *Id*. According to the Commonwealth Court, the wrongful conduct in this case as determined by the Board was Mr. Campola's intentional decision that B&R Resources would not plug the Abandoned Wells and that B&R Resources' financial resources would be used for purposes other than plugging the Abandoned Wells. The Commonwealth Court stated that "[S]uch conduct can only have a causal effect if B&R had an ability to plug those Wells." *Id*. The

Commonwealth Court also noted that the failure of B&R Resources to plug the Abandoned Wells constituted 47 separate violations of the 2012 Oil and Gas Act and not a single unitary violation. The Commonwealth Court then reversed our holding, finding that "because there was no showing or finding that Campola's decision that B&R would not plug the Wells contributed to the failure to plug all 47 Wells, the EHB's ruling that Campola is liable for all 47 Wells cannot stand." *Id*. at 822. The Commonwealth Court cited a lack of findings in our Adjudication regarding how many of the Abandoned Wells B&R Resources could have plugged based on a lack of factual findings concerning the costs of plugging a well and B&R Resources' financial resources. As a result of the lack of findings, a remand to the Board was required so the Board could "adjudicate the extent of Campola's liability, if any." *Id.* The Commonwealth Court concluded its remand instructions by stating "[B]ecause the EHB's findings are insufficient, we remand this matter to the EHB for additional findings of fact as to how many, if any, of the Wells could have been plugged if Campola had caused B&R to make reasonable efforts to plug the Wells and for an adjudication of Campola's liability in accordance with those findings." *Id*.

In their post-hearing briefs, the parties stake out different positions regarding both the issues to be decided by the Board on remand and the conclusion the Board should reach concerning B&R Resources' financial situation and Mr. Campola's actions. Mr. Campola's position is that the Commonwealth Court remand requires the Board to review the financial resources of B&R Resources, and based on those resources, determine whether B&R Resources had the financial resources to plug one or more of the Abandoned Wells during the relevant time period. (Campola Post-Hearing Brief ("PHB") at 2). He states that the case was not remanded to allow the Board to second-guess his business decisions or to evaluate every dollar spent by B&R Resources. Mr. Campola asserts that the financial resources available to B&R Resources were limited and that it

was "reasonable and necessary for B&R to have continued to use its limited resources for the continuation of the business" rather than for the plugging of wells. (Campola PHB at 2). He states that the Board should defer to his business judgment citing the court established business judgment rule as appropriate guidance for the Board to consider in evaluating his actions. Ultimately, Mr. Campola argues that the Board should reach the conclusion that B&R Resources did not have the financial resources to plug even a single well and, therefore, Mr. Campola "has no personal liability to plug wells that were owned and operated by B&R." (Campola PHB at 3).

The Department, on the other hand, states that "the Commonwealth Court Opinion is clear that the Board is to determine on remand how many of the Abandoned Wells could have been brought into compliance if Mr. Campola had directed B&R to spend its financial resources on complying with the regulations and the Department's directives." (DEP's Post-Hearing Brief ("PHB") at 6). The Department re-states its position as to the scope of the remand two additional times as follows: "what could have B&R done if Mr. Campola did the right thing and spent the money on resolving the violations?" and the "Commonwealth Court's Opinion is clear that the Board is to determine how many of the statutory violations were caused by Mr. Campola's wrongful conduct." (DEP's PHB at 6, 9). The Department accuses Mr. Campola of trying to use the remand to re-litigate the Board's finding in our initial adjudication that he engaged in wrongful conduct. The Department argues that B&R Resources could have addressed all 47 of the separate violations for failing to plug the Abandoned Wells. First, the Department asserts that addressing the violations only required that B&R Resources commit to and implement a plugging schedule for the Abandoned Wells citing 25 Pa. Code § 78.91. Pursuant to this regulation, the Department argues that if B&R Resources had submitted a well plugging schedule as requested several times by the Department, "all 47 of the separate violations found by the Commonwealth Court would

have been addressed upon the submission of the schedule and the Department would have been unable to issue the" June 2015 Order. (DEP's PHB at 10). Next, the Department asserts that during the relevant time period, B&R Resources had sufficient financial resources, including both revenue from selling gas and the demonstrated ability to borrow money, to bring all of the Abandoned Wells into compliance. In conjunction with this argument, the Department asserts that many of the expenses incurred by B&R Resources were discretionary, including depreciation, legal fees, pumper fees, line repairs, office supplies and support, dues and subscriptions, meals and entertainment, travel and automobile expenses. The Department argues that Mr. Campola should have directed B&R Resources' income to plugging wells rather than spending money on the discretionary expenses identified by the Department. The Department's final argument is that Mr. Campola intentionally cut off B&R Resources' income stream by rejecting the opportunity to purchase the Q-3 pipeline and maintain it as an outlet for the sale of B&R Resources' gas production. The Department states that this action was a "blatant attempt at defunding B&R" and that this action should not protect Mr. Campola from personal liability. (DEP's PHB at 13).

Neither party has fully set forth the proper interpretation of the Commonwealth Court's direction to the Board on remand. The Department's approach asks us to find that Mr. Campola should have complied with the Department's repeated requests to enter a plugging schedule, but he never took such a step and we do not think that the Commonwealth Court asked us to reach our decision based on hypothetical facts. Further, the Department suggests that the Board should find that most, if not all, of the income received by B&R Resources should have been applied to its plugging obligations. Again, we find that position inconsistent with the direction provided by the Commonwealth Court in its remand instructions. We also conclude that the Commonwealth Court's remand was not intended to permit the Board to second guess Mr. Campola's decision to

forgo purchasing the Q-3 pipeline that the Department argues would have allowed B&R Resources to remain in business and fund the plugging of the Abandoned Wells. Again, we find it doubtful that the Commonwealth Court intended the Board to speculate about what actions of this type Mr. Campola and B&R Resources might have taken. Instead, the remand is aimed at evaluating the manner in which Mr. Campola actually directed the financial resources of the company and what portion, if any, of those resources should have been used to plug the Abandoned Wells.

While we reject these positions suggested by the Department, we also strongly reject a fundamental point put forward by Mr. Campola. His articulated position appears to suggest that the Board treat B&R Resources' plugging obligation as a sort of afterthought to other business requirements. Just like we disagree with the Department's position that all of B&R Resources' income should be used for plugging, we think that relegating a business' environmental obligations to a second-class status behind all other business expenses is equally wrong and inconsistent with the law in Pennsylvania. Nothing in the Commonwealth Court's opinion suggests that either of the approaches is one the Board should adopt on remand in this case. We think the proper focus on the remand is in the last sentence of the Commonwealth Court's opinion where we are instructed to determine "how many, if any, of the Wells could have been plugged if Campola had caused B&R to make **reasonable efforts** to plug the Wells …." *B&R Resources, LLC,* 180 A.3d at 822. (emphasis added). Ultimately, we are called on to determine what constitutes a reasonable effort by B&R Resources, under Mr. Campola's direction, to meet its statutory obligation to plug abandoned wells. Further, in determining what constitutes a reasonable effort, the Board is instructed to consider B&R Resources' financial resources since we previously determined that the wrongful conduct that Mr. Campola committed consists of his intentional decision to use B&R Resources' financial resources for purposes other than plugging the wells.

We now turn to applying the guidance provided by the Commonwealth Court in its remand to the testimony and evidence presented by the parties in the initial hearing and the evidentiary hearing we held following the remand. After evaluating the evidence regarding B&R Resources' financial resources and Mr. Campola's actions, we hold that Mr. Campola's wrongful conduct caused B&R Resources' failure to plug four of the Abandoned Wells and he, therefore, is personally liable for four of the forty-seven separate violations identified in the June 2015 Order. We base this decision on our determination that B&R Resources' financial resources were sufficient to permit the plugging of four of the Abandoned Wells during the relevant time period and the fact that Mr. Campola failed to direct B&R Resources to do so but instead directed those financial resources to other business activities.

We reached this decision by first determining the relevant time period for evaluation of B&R Resources financial resources. B&R Resources formed in approximately 2010 to take over ownership of wells that were involved in the bankruptcy of Dylan Resources. At the time of Dylan Resource's bankruptcy, Mr. Campola testified that all of the Dylan Resources wells were shut in, i.e. non-producing. Mr. Campola purchased B&R Resources in July/August 2011. (2017 Adjudication, FOF #4). At the time of the purchase, B&R Resources' inventory of wells included 90 wells that were not producing. (Adjudication 2017, FOF #17). Under Pennsylvania law, oil and gas wells that have not been produced in a year are considered abandoned wells and are required to be plugged. (Adjudication 2017, FOF #15 citing 58 Pa. C.S.A. §3220(a)). As early as December 2011, DEP notified Mr. Campola that some of B&R Resources' wells appeared to be abandoned and asked if he had developed a plan for these wells. (2017 Adjudication, FOF #30). Mr. Campola's financial expert, Mr. Beaufait, did not include 2011 financial information in his calculations as reflected on Campola Exhibits 1-3. The Department's financial expert, Mr. Duffus,

includes all of 2011 financial information in his calculations as reflected on Department Exhibits CC 1 - CC 5. We think that both experts' approach on the proper starting time for considering B&R Resources' financial resources is incorrect. Mr. Campola's ownership began in July/August 2011. The first entry on Campola Exhibit 14, which is the general ledger for B&R Resources, is dated August 1, 2011 and we hold that is the proper starting date for our consideration of the financial resources of B&R Resources under the control of Mr. Campola. Additionally, we hold that the proper end date for our evaluation of B&R Resources' financial resources is tied to the issuance of the June 2015 Order. Therefore, we think that the correct time range to consider the financial resources of B&R Resources is from August 2011 through June 2015.

The parties and their experts are in general agreement regarding the income and expenses of B&R Resources during the relevant time period. This is not surprising given that both sides relied on the same accounting and tax records from B&R Resources and Mr. Campola. The different outcomes they reach stem from their differing interpretations of the Commonwealth Court's remand instructions and how the parties suggest that the Board should handle certain expenditures by B&R Resources. As stated above, the key point is to calculate the actual financial resources available to B&R Resources and then determine what financial resources B&R Resources could have allocated to plugging wells had Mr. Campola directed that the company make a reasonable effort to do so.

We begin with a set of numbers that are common to both parties: B&R Resources' book net loss for August 2011 through June 2015.[7] The book net loss figures are found on Campola's

[7] Mr. Campola's expert did not provide a net loss number for 2011 but given that his numbers for the other years were basically identical to those of the Department's expert, we think that it is reasonable to conclude that if he had determined a net loss for 2011, it would have been in agreement with the number presented by the Department which we use in our calculation.

Exhibit 1 (Net Loss per Books) and the Department's Exhibit CC-1 (Book Net Loss). The book net loss number accounts for B&R Resources' income from sales and other sources as well as depreciation and various expenses including lease operating expenses, legal services, repairs and maintenance. For two of the years, 2011 and 2015, we adjusted the net loss number so that we were only considering dollar amounts for the part of the year covered by the relevant time period.[8] The net losses we determined as our starting point are as follows: 2011: -$31,495; 2012: -$39,563; 2013: -$438; 2014: -$24,628; 2015: -$19,703. B&R Resources' total book net losses during the relevant time period equal -$115,827.

Mr. Campola argues that we should stop after determining the total net loss and conclude that B&R Resources lacked sufficient financial resources to plug any wells and, therefore, Mr. Campola could not have caused any of the violations in the June 2015 Order. The Department argues that we should add-back certain amounts to the net losses to get a more accurate picture of what B&R Resources could have done if Mr. Campola had directed B&R Resources to make a reasonable effort to plug wells. We agree with the Department that we should review the financial information further and determine whether any adjustments to the net loss figures should be made to arrive at a number for B&R Resources' available financial resources. Initially, we conclude that it is appropriate to add back the amount of depreciation that was included in the net loss figures. The depreciation amounts are an accounting measure and do not represent an actual cash expenditure by B&R Resources. We think including depreciation better reflects the available financial resources that could have been directed to well plugging by B&R Resources. Like the

[8] We calculated the adjustment by taking the full year figures and multiplying them by a percentage that represents the portion of the full year that we considered the appropriate time period. For example, for 2011, the percentage was calculated as follows: 5 (months from August to end of the year) / 12 (total no. of months) x 100% = 41.6%

net loss figures, except for 2013, both parties' depreciation amounts are generally identical. (See Campola Ex. 1 and DEP Ex. CC-1). The discrepancy in the 2013 depreciation number is minor ($59,062 on Campola Ex. 1 and $60,526 on DEP Ex. CC-1) and we are going split the difference and use a figure of $59,794. The depreciation add-back for the relevant time period are as follows: 2011: $44,279; 2012: $76,313; 2013: $59,794; 2014: $42,195; 2015: $21,098. The total depreciation add-back for the relevant time period equals $243,679. Adding this depreciation total back to the total book net losses during this period gives us an adjusted amount of $127,852.

We hold that this dollar amount of available financial resources needs further adjustment to determine how many wells B&R Resources could have plugged if Mr. Campola had directed it to make a reasonable effort to plug the Abandoned Wells identified in the June 2015 Order. The Department argues that we should add back further expenditures which it identified as discretionary. Specifically, the Department lists four categories of expenses that it contends should be added back: Pumper Fees ($124,526), Line Repair ($57,941), Legal ($50,151) and Other ($36,273). We took testimony regarding these expenses and reviewed the amounts of these expenses closely. We conclude that these were legitimate business expenses that B& R Resources was required to expend in order to remain in business. Pumper fees are the salary/expenses of the person tasked with servicing and maintaining the wells. B&R Resources could not have continued to operate its producing wells and generate income without hiring and paying a well pumper. The salary paid to the pumper was in line with the salary paid by B&R Resources prior to Mr. Campola taking ownership. Additionally, the Department did not provide any meaningful testimony challenging the salary/expenses of the pumper as being inflated or unreasonable. The same is true for the line repair costs. Without maintaining the lines, gas would leak out and not be available to be sold which, in addition to being bad for the environment, strikes us as an unsustainable business

practice. We also looked closely at the legal costs incurred by B&R Resources. The company was involved in a number of legal disputes with royalty holders and lease owners. Given the nature of the disputes, the evidence does not convince us that B&R Resources had much choice but to legally defend its interests and that it was reasonable for it to hire legal counsel to assist it in doing so. There was no testimony that the rates or amounts charged by B&R Resources' counsel were extravagant or outside those in the legal marketplace. Finally, the Department's catch-all category of other expenses, which included items such as office supplies, professional dues and subscriptions, meals and entertainment and travel involved generally small amounts. Mr. Campola offered testimony regarding these expenditures that convinced us that it would not be appropriate to add back these sums in reaching our determination.

There is one other category of B&R Resources' financial information that we think should be considered in evaluating B&R Resources' financial condition. That category is loans and loan payments. The dollar amounts in the loan category were not part of the figures included in the net loss calculations that we used as our starting point. Our review convinces us that we need to make further adjustments to the amount of available funds based on this category. We first look at two loans that Mr. Campola and B&R Resources took over when he purchased the company. According to the testimony, B&R Resources borrowed money from Cortland Banks to fund equipment. The loan was evidenced by a standard loan agreement with a set repayment schedule. B&R Resources paid off the Cortland Bank loan through payments totaling $38,691 during the relevant time period. B&R Resources also owed money to an individual, Kurt Latell, on which it made monthly payments totaling $37,759 during the relevant time period. The testimony and exhibits lead us to conclude that these loan repayments were legitimate expenses of B&R Resources which it was not free to ignore without serious business consequences. Therefore, we

find that these loan repayment amounts totaling $76,450 should be deducted from the total funds available to pay for well plugging.

The final item we considered to determine if any further adjustment is necessary involves funds received by Mr. Campola from B&R Resources during the relevant time period. Mr. Campola did not take a direct salary from B&R Resources but in 2014 and 2015, he took money out of B&R Resources that his accounting expert classified as "loans from B&R Resources to Mr. Campola." (Campola Ex. 3). In 2014, the amount was $23,020 and, in 2015, the listed amount was $10,856. However, there are no loan agreements between Mr. Campola and B&R Resources evidencing these as standard business loans like the other loans discussed above.[9] In the initial hearing before the Board in 2016, Mr. Campola stated that "in 2013, I took $23,000 to help pay some of the – the doctor bills." (2016 Hearing T. at 86)[10]. Mr. Campola took the $10,856 out of B&R Resources in the first half of 2015 based on B&R Resources' balance sheets that show a reduction in the Note Payable to Richard Campola line of that amount ($10,856) between January 31, 2015 and June 30, 2015. (See Campola Ex. 15). At a time when B&R Resources was not meeting its statutory obligation to plug its abandoned wells, Mr. Campola's decision to take funds out of the company for his personal use was wrongful conduct and did not constitute a reasonable effort to meet its obligations. Therefore, we think the amounts Mr. Campola directed B&R Resources to give to him, namely the $23,020 in 2013/2014 and the $10,856 in 2015 should be added back in to the funds available for well plugging.

[9] Loans between Mr. Campola and B&R Resources occurring in 2016 and after are evidenced by simple loan agreements. These loans are generally from Mr. Campola to B&R Resources to provide funds to pay for the ongoing litigation in front of the EHB. (See Campola Ex. 27).

[10] We did not receive an explanation why if the money was taken in 2013 as Mr. Campola testified, it showed up in the accounting records for 2014. Regardless, based on the specific amount, we are confident that there was just one event where Mr. Campola took funds equaling $23,020 out of B&R Resources.

Conclusion

Working through all of the financial information and our conclusions set forth above, we arrive at the following amount of funds available to B&R Resources for well plugging that Mr. Campola wrongfully directed away from those statutory obligations during the relevant time period: $85,278.[11] The parties stipulated that the individual cost to plug each of the 47 Abandoned Wells is $18,500. We divide the available financial resources that Mr. Campola improperly directed away for well plugging ($85,278), by the stipulated cost to plug a well ($18,500), to arrive at the number of wells Mr. Campola is personally liable to address under the terms of the June 2015 Order. Therefore, we hold that Mr. Campola, by his wrongful conduct, personally caused four of the violations identified in the June 2015 Order and he is, therefore, personally liable to plug four of the Abandoned Wells.

CONCLUSIONS OF LAW

1. During the time period from August 2011 through June 2015, Mr. Campola wrongfully directed $85,278 of B&R Resources' financial resources away from B&R Resources' statutory obligation to plug Abandoned Wells identified in the June 2015 Order.

2. As a result of his wrongful conduct, Mr. Campola is personally liable for four of the violations identified in the June 2015 Order caused by that conduct and is, therefore, personally liable to plug four of the Abandoned Wells identified in the June 2015 Order.

3. Mr. Campola is not personally liable for forty-three of the violations identified in the June 2015 Order because his wrongful conduct did not cause these violations.

[11] The math on this calculation is as follows: (Net losses + Depreciation add back: $127,852) – (Cortland Bank and Latell loan repayments: $76,450) + (2013/2014 Campola Loan add back: $23,020) + (2015 Campola Loan add back: $10,856) = $85,278

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

B&R RESOURCES, LLC AND RICHARD F. CAMPOLA	:	
v.	:	**EHB Docket No. 2015-095-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 14th day of February 2020, it is hereby ordered the Mr. Campola's appeal is dismissed as to four of the forty-seven violations identified in the June 2015 Order. Mr. Campola's appeal is granted as to the remaining forty-three violations identified in the June 2015 Order.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: February 14, 2020

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

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

For Appellants
Jean M. Mosites, Esquire
James V. Corbelli, Esquire
(via electronic filing system)

DARLENE MARSHALL	:	
	:	
v.	:	**EHB Docket No. 2018-034-L**
	:	**(Consolidated with 2019-036-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WINDFALL OIL & GAS INC., Permittee	:	**Issued: February 18, 2020**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal of a Pennsylvania permit authorizing a company to drill a well to conduct underground injection disposal activities in accordance with its federal permit. The Appellant has not satisfied her burden of proof to show that the issuance of the Pennsylvania permit was unlawful, unreasonable, or not supported by the facts established at the hearing on the merits.

FINDINGS OF FACT

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

2. Windfall Oil & Gas Inc. ("Windfall"), is a Pennsylvania corporation with a business address of 63 Hill Street, Falls Creek, PA 15840. (Appellant Exhibit No. ("A. Ex.") 29 (at 1); Department Exhibit No. ("DEP Ex.") AS.)[1]

3. Windfall proposes to drill an underground injection control (UIC) disposal well located on property owned by Frank and Susan Zelman in Brady Township, Clearfield County. (Hearing Transcript Page No. ("T.") 99, 444; A. Ex. 29; DEP Ex. K, X, Y, AS.)

4. The Appellant, Ms. Darlene Marshall, resides in DuBois, Pennsylvania in an area known as the Highland Street Extension. (T. 372.)

5. Her home and private drinking water well are located to the northwest and topographically downslope from Windfall's Zelman UIC well, slightly beyond one-quarter of a mile away. (T. 344, 381-83; A. Ex. 1, 27.)

6. Marshall drilled a new private water well for her residence in October 2017 to a depth of 360 feet. (T. 347-48; A. Ex. 1.)

7. Windfall's application materials say that the Zelman UIC well is in a recharge area for nearby water wells, including Marshall's. (T. 380; A. Ex. 29 (at 16-17).)

8. In Pennsylvania, the United States Environmental Protection Agency (EPA) directly implements the federal Underground Injection Control regulations and issues permits for such wells because Pennsylvania has not assumed primacy over the UIC program. 40 CFR §§ 147.1951 – 147.1955. (T. 449, 551-52.)

[1] The Appellant presented a set of exhibits at the hearing numbered 1-32. She also presented a set of exhibits that were identical to the exhibits the Department attached to its motion for summary judgment filed in March 2019; these exhibits are labeled A-Z and AA-BC (with demonstrative exhibits BD and BE being drawn at the hearing by a Department witness). Accordingly, even though both sets of exhibits were presented by the Appellant, the numbered exhibits will be designated as the Appellant's, and the lettered exhibits will be designated as the Department's. Windfall did not present any of its own exhibits.

9. State-specific requirements applicable in Pennsylvania for the UIC program are set forth in the federal regulations at 40 CFR §§ 147.1951 – 147.1955.

10. In April 2012, Windfall submitted an application to the EPA to obtain a permit to operate a Class II UIC well. (A. Ex. 29.) Class II wells are defined as:

> Wells which inject fluids: (1) Which are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production and may be commingled with waste waters from gas plants which are an integral part of production operations, unless those waters are classified as a hazardous waste at the time of injection; (2) For enhanced recovery of oil or natural gas; and (3) For storage of hydrocarbons which are liquid at standard temperature and pressure.

40 CFR § 144.6(b).

11. Windfall's federal UIC permit application addressed, *inter alia*: (1) the proposed well's location; (2) well construction details; (3) the method of operating and monitoring the well; (4) existing drinking water and gas production wells in the surrounding area; (5) the geologic and hydrogeologic conditions surrounding the proposed well, including the proposed injection and confining zones; (6) the plugging and abandonment plan; and (7) Windfall's financial assurances. (A. Ex. 29; DEP Ex. B, C.)

12. The injection zone depth of the Zelman UIC well is proposed to be at 7,306 feet below ground surface. (T. 109, 120.)

13. The target geologic formations for injection are the Huntersville Chert and the Oriskany Sandstone, which are beneath the Onondaga Limestone, a 14-foot thick cap rock. (T. 120-21, 151-52; DEP Ex. AM.)

14. Windfall proposes to inject liquids from four potential waste streams: shallow production fluids, fluids from the Oriskany formation, production fluids from the Marcellus shale formation, and Marcellus shale frack fluids. (T. 100, 106.)

15. On February 14, 2014, the EPA issued UIC well permit number PAS2D020BCLE to Windfall for the Zelman UIC well, authorizing Windfall to construct a Class II disposal injection well and inject fluids produced in oil and gas operations into the Huntersville Chert and Oriskany Sandstone formations. (DEP Ex. I, J, K.)

16. The permit was subsequently reissued on October 31, 2014 with one change regarding the addition of a string of well casing. (T. 477-80; DEP Ex. I, J, K.)

17. The casing and cementing requirements for the well include the installation of a 24 ½-inch conductor pipe to be set at 8 feet and cemented to the surface, a 16-inch water string casing set to a depth of 170 feet and cemented to the surface, an 11 ¾-inch coal protection string casing set to 425 feet and cemented to the surface, an 8 ⅝-inch surface casing set to 1,000 feet and cemented to the surface, and the installation of a 4 ½-inch long string production casing to be set to the injection zone depth of 7,306 feet and cemented to approximately 5,000 feet in the well annulus. (T. 110-16, 567-68, 661-62; DEP Ex. AO (at 1), AX (at 18).)

18. Even though EPA administers the UIC program in Pennsylvania, the Department still requires operators to obtain a well permit from the Department before commencing UIC operations. (T. 551-52, 741-42.)

19. On September 10, 2015, Windfall submitted a permit application to the Department to drill and operate its UIC well. (DEP Ex. X.)

20. Even though Windfall had obtained a permit from the EPA, the Department proceeded to review Windfall's application and subsequent submissions over the course of two and a half years. (T. 535; DEP Ex. Z, AD, AE, AF, AH, AI, AJ, AK, AL, AM, AN, AO, AP, AR.)

21. The Department used Windfall's application as a means by which to develop a new procedure for reviewing UIC well permit applications in Pennsylvania. (T. 533, 741-42; DEP Ex. BB.)

22. The Department's review process changed around 2014 to, among other things, account for the prohibition in 25 Pa. Code § 91.51 that the underground disposal of waste not be detrimental to the public interest. (T. 507-08, 587.)

23. Although EPA administers Pennsylvania's UIC program and Windfall obtained a permit from the EPA, the Department nevertheless conducted a geologic review, a seismic review, a mechanical integrity review, and a review of Windfall's erosion and sediment control and control and disposal plans. (T. 533, 548-52, 741-42; DEP Ex. AJ, AM, AO, AR, BB.)

24. Ms. Marshall provided comments on the Zelman well to the Department at a public hearing held on March 7, 2016. (DEP Ex. AQ.)

25. In its March 21, 2018 technical review memorandum, the Department concluded

> that the application/project meets all applicable statutes, regulations and guidance manuals related to the permitting of a disposal well in Pennsylvania. The Department concludes that underground disposal into the proposed Zelman well would be for an abatement of pollution by providing a lawful alternative to other disposal options. Windfall's proposed operation is sufficient to protect surface water and water supplies, and it is improbable that disposal into the proposed Zelman well would be prejudicial to the public interest. In consideration of the proposed well's mechanical protections and the injection zone's distance and geologic separation from public natural resources, this project is unlikely to substantially degrade natural resources.

(DEP Ex. AR (at 3).)

26. On March 21, 2018, the Department issued Well Permit No. 37-033-27255-00-00 to Windfall for the Frank & Susan Zelman 1 Injection Disposal Well. (DEP Ex. AS.)

27. The Department's permit for Windfall's Zelman UIC well consists of three pages and contains 24 conditions mostly pertaining to seismic monitoring and mechanical integrity. (DEP Ex. AS.)

28. The Department's permit "is conditioned upon the existence" of Windfall's federal EPA permit. (DEP Ex. AS (at 3).)

29. An element of the review conducted by the Department and the EPA for a UIC well is to assess potential pathways that could serve as conduits for the migration of injected fluids into underground sources of drinking water, such as geologic faults or oil and gas wells penetrating the target injection formation. (T. 455-56, 539-42.)

30. The geographic area in which potential pathways to underground sources of drinking water are evaluated for a given UIC well is called the area of review. (T. 304.)

31. The area of review is a radial distance extending away from a UIC well that is calculated using either a zone of endangering influence equation, or by selecting a fixed radius of no less than one-quarter mile. 40 CFR § 146.6.

32. The zone of endangering influence (ZEI) is the pressure at which injected fluids could potentially reach an underground source of drinking water. 40 CFR § 146.6(a)(1)(i). (T. 553.)

33. Windfall selected a quarter-mile fixed radius area of review in its application to the EPA. (A. Ex. 29 (at 2).)

34. The EPA calculated the ZEI to be approximately 400-450 feet from the wellbore and so it elected to use the fixed radius one-quarter mile area of review to be more conservative, a decision with which the Department concurred. (T. 451-52, 536-37, 552, 744-46.)

35. One of the Department's ZEI calculations utilized a different input for reservoir pressure to obtain an output of approximately 700 feet, which is also less than the 1,320 feet in a quarter mile. (T. 753-55.)

36. There are six conventional gas wells drilled in the early 1960s that are located just outside of the quarter-mile area of review. (T. 46-47, 52-53, 157-75, 558-59; A. Ex. 27, 28, 29 (at 34-61, 140-55).)

37. The six conventional gas wells removed gases from the Oriskany formation, which created space for the injection of fluids. (T. 276-78, 305-06, 321, 554-55.)

38. Gas wells drilled into the target injection formation can serve as conduits for the migration of fluids if the injection pressure is high enough. (T. 319, 455-56, 496.)

39. The two conventional gas wells closest to Marshall's property are known as the Ginter and Carlson wells. (T. 338-39; A. Ex. 27, 28.)

40. The plugging record for the Carlson well reflects that it was plugged with a cast iron bridge plug and four cement plugs. (T. 130-34, 442-43, 684-85, 695; A. Ex. 29 (at 34).)

41. The Ginter well is still active. (T. 181-82.)

42. The Department's mechanical integrity reviewer evaluated the Ginter and Carlson wells, as well as the four other conventional gas wells, as if they were located inside the quarter-mile area of review even though other Department personnel viewed them as not a concern. (T. 584, 648-49, 683-84, 695-96; DEP Ex. AO.)

43. For an injection well, mechanical integrity involves looking at the construction of the well where pressure is being applied to pressurize the well and whether it has the potential to fail along the pressure profile. (T. 648-49.)

44. The permit requires Windfall to monitor mechanical integrity and submit monthly reports to the Department containing a record of injection pressures, annular pressures, injection rates, injection volumes, and cumulative volumes. (T. 657, 705; DEP Ex. AS (at 3).)

45. Windfall is required to install automatic high- and low-pressure shutoff valves on the Zelman well and it intends to add a pressure monitoring and pump shutdown device to the annular space for added protection in the event of a mechanical integrity failure. (T. 142-47, 212, 673; DEP Ex. K (at 7).)

46. Windfall's EPA permit and automatic shutoff devices require Windfall to keep its injection pressure below the fracture gradient, which is the geologic term for the pressure at which a rock will fracture. (T. 281, 468-69, 607-08, 672; DEP Ex. K (at 12-13).)

47. The significance of exceeding the fracture gradient is that existing faults and fractures in the rock could open up and convey fluids or cause seismic activity. (T. 607-08, 611, 615.)

48. A geologic fault is a break in the rock where there is or has been movement along a slip plane. (T. 251.)

49. A fault can be transmissive, meaning it would allow gas or fluid to cross it, or a fault can be non-transmissive, meaning it functions as a structural barrier to the movement of fluid. (T. 611, 629.)

50. The Department evaluated a fault oriented northeast-southwest approximately 1400-1500 feet away from the Zelman well, beyond the quarter-mile area of review, and determined it to be non-transmissive. (T. 249-52, 280, 537-38, 611; A. Ex. 27.)

51. A second, closer fault is reflected in Windfall's permit application, but the Department found no geologic record of the fault's existence. (T. 250-51; A. Ex. 27.)

52. Pursuant to its Pennsylvania permit, Windfall's UIC well is to be monitored with a small seismic network or with a component seismometer, which will be tied into the Pennsylvania State Seismic Network. (T. 220, 266-68, 270-71; DEP Ex. AS.)

53. The seismic monitoring will monitor for "induced seismicity," or earthquakes, that are believed to be caused by injecting fluids into faults or basement rock. (T. 268-71, 323, 457, 485, 558, 607, 609-10; DEP Ex. AM.)

54. Among other conditions, the permit requires the well to be shut down if the monitor detects a seismic event of 2.0 or greater on the Richter Scale. (T. 274; DEP Ex. AS.)

55. Windfall's EPA permit application contains a plan to monitor certain private water well supplies and surface water features on a monthly basis during well construction and semi-annually during operations. (T. 227-28, 380-81; A. Ex. 29 (at 16, 31).)

56. Windfall's emergency response plan identifies the Adrian Sandy Fire Department as the emergency responder because Windfall believes it is geographically the closest fire department to Windfall's proposed UIC well. (T. 224; DEP Ex. AI (at 7-8).)

57. Windfall's emergency response plan does not contain an evacuation plan for neighboring residents. (T. 225, 736; DEP Ex. AI (at 7-10).)

58. Windfall has obtained a standby trust agreement and an irrevocable standby letter of credit in the amount of $30,000.00 for the plugging and abandonment of the Zelman UIC well. (A. Ex. 29 (at 257-65).)

DISCUSSION

Darlene Marshall, proceeding *pro se*, has filed this appeal from Well Permit No. 37-033-27255-00-00 issued by the Department of Environmental Protection (the "Department") to Windfall Oil & Gas, Inc. ("Windfall") to drill and operate the Zelman 1 underground injection

control ("UIC") well in Brady Township, Clearfield County. The well will receive injected waste fluids derived from the production of oil and gas. Windfall previously obtained a permit for the UIC well from the United States Environmental Protection Agency (EPA). (DEP Ex. K.) The Department requires UIC operators to also obtain a Pennsylvania permit before drilling and operating the well. The permit from the Department was issued in March 2018 and required well drilling to commence within a year. (DEP Ex. AS.) The Department renewed Windfall's permit in March 2019 since drilling had not yet begun. Ms. Marshall also appealed the renewed permit and the parties agreed that the appeals should be consolidated for the merits hearing. We consolidated the appeals on July 1, 2019. The merits hearing began on September 30, 2019, lasting three days and encompassing both appeals.

The Environmental Hearing Board's role in the administrative process is to determine whether the Department's action was lawful, reasonable, and supported by our *de novo* review of the facts. *Logan v. DEP*, 2018 EHB 71, 90; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156. In order to be lawful, the Department must have acted in accordance with all applicable statutes, regulations, and case law, and acted in accordance with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution. *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 822; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016). As a third party appealing the issuance of the Zelman UIC permit, Marshall bears the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Joshi v. DEP*, EHB Docket No. 2017-116-L, slip op. at 9 (Adjudication, May 17, 2019); *Jake v. DEP*, 2014 EHB 38, 47.

In order to be successful in her appeal, Marshall must prove her case by a preponderance of the evidence. *United Refining Co. v. DEP*, 2016 EHB 442, 448, *aff'd*, 163 A.3d 1125 (Pa. Cmwlth. 2017); *Shuey v. DEP*, 2005 EHB 657, 691 (citing *Zlomsowitch v. DEP*,

2004 EHB 756, 780). The preponderance of evidence standard requires that Marshall meet her burden of proof by showing that the evidence in favor of her proposition is greater than that opposed to it. *United Refining*, 2016 EHB 442, 449. Marshall's evidence must be greater than the evidence supporting the Department's determination that the issuance of the Zelman UIC permit was reasonable, appropriate, and in accordance with the applicable law. *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 473. The evidence must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established by Marshall. *Clean Air Council v. DEP*, EHB Docket No. 2016-073-L, slip op. at 49 (Adjudication, Jan. 9, 2019); *Noll v. DEP*, 2005 EHB 505, 515.

The Department's permit consists of three pages comprised of 24 special conditions. Seventeen of those special conditions deal with seismic monitoring and mitigation, five deal with mechanical integrity, and the last two are miscellaneous conditions, one of which says that the Department's permit is conditioned on the permit issued by the EPA. (DEP Ex. AS.) At the outset we note that it is not exactly clear to us what the Department's role is in evaluating UIC wells and issuing permits. The EPA directly implements the UIC program in Pennsylvania, but the Department requires operators to obtain a state permit before drilling the well. There was testimony from a Department witness that the Department merely handles the siting of the well and verifies the information contained in the federal UIC permit (T. 552), but the Department reviewed Windfall's permit application for two-and-a-half years. There was also testimony that the Department's review of UIC permits changed in 2014, becoming more extensive, and that the Windfall application was used to develop a new review procedure. (T. 507-08, 533, 741-72.)

We are, of course, focused on the action under appeal—the Department's permit—and not the EPA permit or any process before the EPA or the federal Environmental Appeals Board

relating to that permit. But some discussion of the EPA permit seems unavoidable given the Department's reliance on it and the overlap with the Department's review. Windfall's EPA permit establishes, among other things, casing and cementing requirements, injection volumes and pressures, and sampling and monitoring requirements for the well. (DEP Ex. K.) The Department evaluated some of these same things during its geologic and mechanical integrity reviews. (DEP Ex. AM, AO, AR.) If the Department considered an issue in its evaluation of a permit then it is likewise appropriate for us to review the same issue. However, it seems to us that some aspects of the UIC process are more than a little redundant.

The Department tells us there are two regulations that serve as the backbone for the Department's review of Windfall's permit—25 Pa. Code §§ 78.18 and 91.51. Section 78.18 provides in relevant part:

> (a) A person may not drill a disposal or enhanced recovery well or alter an existing well to be a disposal or enhanced recovery well unless the person:
> (1) Obtains a well permit under § 78.11 (relating to permit requirements).
> (2) Submits with the well permit application a copy of the well permit, approved permit application and required related documentation submitted for the disposal or enhanced recovery well to the EPA under 40 CFR Part 146 (relating to underground injection control program).
> (3) Submits a copy of a control and disposal plan for the disposal or enhanced recovery well and related facilities that meets the requirements of § 91.34 (relating to activities utilizing pollutants).
> (4) Submits a copy of an erosion and sedimentation plan for the disposal or enhanced recovery well site that meets the requirements of Chapter 102 and § 78.53 (relating to erosion and sediment control; and erosion and sedimentation control).

25 Pa. Code § 78.18. Thus, under Section 78.18, an entity seeking to conduct UIC activities must submit to the Department a control and disposal plan and an erosion and sediment control plan, along with the UIC permit the entity obtained from the EPA.

Section 91.51 in turn provides:

> (a) The Department will, except as otherwise provided in this section, consider the disposal of wastes, including stormwater runoff, into the underground as potential pollution, unless the disposal is close enough to the surface so that the wastes will be absorbed in the soil mantle and be acted upon by the bacteria naturally present in the mantle before reaching the underground or surface waters.
>
> (b) The following underground discharges are prohibited:
>
> (1) Discharge of inadequately treated wastes, except coal fines, into the underground workings of active or abandoned mines.
>
> (2) Discharge of wastes into abandoned wells.
>
> (3) Disposal of wastes into underground horizons unless the disposal is for an abatement of pollution and the applicant can show by the log of the strata penetrated and by the stratigraphic structure of the region that it is improbable that the disposal would be prejudicial to the public interest and is acceptable to the Department. Acceptances by the Department do not relieve the applicant of responsibility for any pollution of the waters of this Commonwealth which might occur. If pollution occurs, the disposal operations shall be stopped immediately.

25 Pa. Code § 91.51. We are not entirely sure what the phrase "prejudicial to the public interest" means in 25 Pa. Code § 91.51(b)(3), but it does not seem to be fundamentally much different than the judgment we bring to bear during the review of any permit to determine if the Department's decision is lawful, reasonable, supported by the facts, and otherwise consistent with its obligations under Article I, Section 27 of the Pennsylvania Constitution.

Ms. Marshall's arguments throughout this appeal have not always been clear, but we have endeavored to give an appropriate assessment of her concerns as we understand them. Although we do not specifically address each and every point raised in Marshall's papers, we have given all of them due consideration and we find that she has not met her burden of proof with respect to the issues she has raised. *See, e.g., Big B Mining Co. v. DER*, 1987 EHB 815, 867, *aff'd*, 554 A.2d 1002 (Pa. Cmwlth. 1989); *Lower Providence Twp. v. DER*, 1986 EHB 802, 821; *Del-Aware Unlimited, Inc. v. DER*, 1984 EHB 178, 328, *aff'd*, 508 A.2d 348 (Pa. Cmwlth. 1986). With that, we now turn to a discussion of what we view as her main arguments.

Water Well Contamination

Marshall says her main concern is the protection of her private water well. Both she and her husband testified that they recently drilled a new well and they have good quality water. (T. 343-45, 350, 420.) Marshall is concerned about the potential for the injected fluids from the Zelman UIC well to migrate into and contaminate her water well. The possibility of fluid migration is evaluated by the EPA and the Department by assessing potential migration pathways within a certain radius from the proposed UIC well. This radius is called the area of review, and it is determined either by (1) running an equation to determine the zone of endangering influence (ZEI), which is the area in which injection pressures may cause fluid to reach an underground source of drinking water, or (2) selecting a fixed radius of no less than one-quarter mile from the well. 40 CFR § 146.6. For the Zelman well, Windfall selected a fixed radius of one-quarter mile. The EPA during its review accepted the quarter mile, as did the Department, because the zone of endangering influence calculations yielded a smaller radius of several hundred feet. (T. 451-52, 536-37, 552, 744-46.)

Initially, Marshall contests the selection of the area of review, saying that the quarter-mile area of review is a minimum, and it excludes six oil and gas wells drilled in the 1960s that fall just outside of the quarter-mile radius from the Zelman well. She says that the old oil and gas wells were drilled through the UIC well's target injection formation, the Oriskany Sandstone, and that the well bores provide a conduit for injected fluids to migrate up and into shallower formations that provide the source for Marshall's drinking water. Windfall and the Department do not dispute the concept in the abstract of fluid migration up old wellbores that are not plugged and abandoned. But they say that one needs to look at the pressure buildup in the injection formation and whether the injection of fluids creates enough hydrostatic head to cause the fluid

to migrate up the wellbores. (T. 455-56, 465-66.) They say that fluids can extend beyond the quarter-mile area of review but the key is to ensure that it is not at a pressure that would affect a source of drinking water. (T. 553.) This is as true for wells outside of the area of review as wells only a few hundred feet away from a UIC well, they say. (T. 466.)

Underlying Marshall's concern is her assertion that the plugging and casing of the old gas wells may have been inadequate. She also questions the efficacy of plugging techniques from several decades ago. She focuses on the plugging record for the Carlson well, which is the well closest to her property but beyond a quarter mile from the Zelman UIC well. The plugging record for the Carlson well reflects that it was plugged beginning on July 31, 1979 and concluded on August 8, 1979. (A. Ex. 29 (at 34).) However, Marshall points to a note in the plugging log that says: "Unable to cut 5-1/2" casing any lower than 2500' because casing was stuck in hole." (*Id.*) She also points to a handwritten note on the well location map for the Carlson well that says: "Partial plug 7-20-79." (*Id.* at 38.) Marshall says that this indicates that the Carlson well was never fully plugged and will therefore provide a pathway for fluid migration. She also says the plugging record shows that the well is only plugged with gelled water from the depth of 2,500 feet to 7,120 feet.

Without any testimony from anyone involved with the plugging of the Carlson well, we do not want to speculate what the "partial plug" notation on July 20, 1979 means (assuming "7-20-79" is indicative of a date), and how that relates to the plugging that was apparently begun on July 31, 1979. Marshall does not explain why we should rely on the handwritten "partial plug" notation on the well location map over other portions of the well record that seem to indicate that it was in fact plugged. The witnesses from the Department and Windfall who have experience with reading well plugging records all testified that, according to the well record, the Carlson

well was plugged with a cast iron bridge plug at 7,250 feet and four cement plugs on top of that. (T. 130-34, 443, 684-86, 695.) In any event, Marshall did not present any witnesses to support her contention that the Carlson well presents a possible pathway for fluid to migrate up the well bore and into the aquifer supplying her water well.

The other well Marshall expresses concern over is the Ginter well, which is also near her property and beyond the quarter-mile area of review. Marshall says that the records for the Ginter well indicate that, during its production life, 67,175 barrels of brine were removed and 612,992,000 million cubic feet of natural gas was produced. Marshall says that the UIC permit allows Windfall to inject 30,000 barrels of fluid per month, and therefore, the injection formation will be filled up in a matter of months. Presumably, Marshall believes that this will result in fluid escaping or being forced out of the target injection formation and moving to other places, such as private water wells. However, Marshall has not produced any evidence or expert testimony to support these concerns. Apart from her gross comparison of a single well's brine production to the Zelman well's permitted waste injection, she has not substantiated her assertions with any evidence that there is not enough space in the target formation, or that injected fluid will travel into other formations, or that, if the fluid does travel, it will travel upward and into the aquifers that supply her drinking water. There is nothing in the record to support the notion that the area of review was inappropriate or should have encompassed a larger radius due to the conventional gas wells. Regardless, the Department's mechanical integrity reviewer evaluated all six of the old gas wells as if they had been within the area of review. (T. 584, 648-49, 683-84, 695-96; DEP Ex. AO.) Without an expert, Marshall cannot credibly contest the Department's conclusion that the wells do not present a risk of fluid migration.

Marshall also contests the zone of endangering influence calculations, criticizing Windfall for not running its own calculations and finding fault in the calculations run by the Department (and the EPA). It is unclear to us of the continuing relevance of the zone of endangering influence since a fixed area of review was ultimately selected for the UIC permit. It would appear to only come into play if the calculations generated a result that exceeded a quarter mile. Stephen Platt, who reviewed Windfall's federal UIC application for the EPA, testified for Windfall that the ZEI calculations yielded a radius from the wellbore of 400 to 450 feet, and so the EPA used the larger quarter-mile radius (1,320 feet) to be more conservative. (T. 451-52.) The Department ran various calculations and used a different input for reservoir pressure to get a ZEI output of around 700 feet, but it was also well-short of the quarter mile. (T. 753-55.) Marshall variously asserts that the calculations are based on "simplified assumptions" and do not account for any faults, but she did not have an expert witness to support these claims. Marshall did not have an expert to testify that the ZEI calculations were wrong, that the correct calculations would have yielded a ZEI that exceeded the quarter-mile, or that the quarter-mile was otherwise insufficient.

There is also no evidence in the record to support Marshall's concern that any geologic faults in the area of the Zelman well will provide a pathway for fluid migration. Windfall and the Department testified that the only fault they found evidence of in the area was non-transmissive, meaning it acts as a structural barrier to the movement of gas or fluid. (T. 249-52, 280, 456, 458, 537-38, 611.) Marshall did not produce any evidence or testimony to challenge that assertion or say that the fault is transmissive or that somehow enough pressure could be exerted on the fault from injection activities to convert it to a transmissive fault, and that the fault could serve as a conduit for the contamination of her water well. Windfall is required to install

automated shutoffs on the well that activate when injection pressures approach the pressure at which rock could fracture or faults could move, known as the fracture gradient. (T. 281, 468-69, 607-08, 672; DEP Ex. K (at 7, 12-13).) Marshall did not have anyone to testify that the facture gradient is incorrect (i.e. too high), or that the shutoffs will not work or are inadequate.

Property Value

Marshall argues that Windfall's UIC operations will result in the devaluation of her property, primarily due to what she sees as the potential for contamination of her water well. Marshall says that this amounts to an unconstitutional taking of her property. However, Marshall did not produce any evidence or testimony to substantiate her claim. First, as just discussed, Marshall did not produce evidence to show that UIC fluids will migrate or are likely to migrate into her well. Second, she did not have the testimony of anyone who could support her argument that underground injection control activities will diminish the value of her home and property (or quantify that diminishment), or demonstrate that the presence of the Zelman UIC well near her property will make it more difficult to potentially sell. She also did not, for instance, produce any documentation establishing a correlation between the presence of UIC wells and the decline of nearby property values in general. Without such evidence she has not supported her claim.

We do, however, feel compelled to note that in its brief the Department once again wrongly asserts that this Board does not have jurisdiction to adjudicate a takings claim. We thought we dispelled this false belief in our earlier Opinion denying the Department's motion for summary judgment in this matter:

> One point in the Department's motion deserves mention. Marshall in her notice of appeal objects that the Department's issuance of the permit to Windfall constituted an unconstitutional taking of her private property without just compensation. She says the value of her property has been reduced because the permitted use poses a risk to her water supply, thereby resulting in a reduction in the value of her property, even in advance of any actual contamination. The

> Department in its motion argues that this Board has no jurisdiction to address this takings claim. The Department is incorrect. It is this Board's responsibility to determine in the first instance whether a Departmental action has resulted in an unconstitutional taking. *Domiano v. Dep't of Envtl. Prot.*, 713 A.2d 713 (Pa. Cmwlth. 1998); *Davailus v. DEP*, 2003 EHB 101; *Sedat, Inc. v. DEP*, 2000 EHB 927.

Marshall v. DEP, slip op. at 3 (Opinion and Order, May 16, 2019). *See also M & M Stone Co. v. DEP*, 2008 EHB 24, 74 n.9 ("The Board has jurisdiction over appeals which raise constitutional challenges to a Department order based upon a takings claim. The Board is empowered to adjudicate the lawfulness of those orders and to set them aside if they amount to an unconstitutional taking."). To the extent we need to reiterate the point, we unquestionably have authority to decide a takings claim. However, Marshall has not met her burden with respect to establishing that the permitting of Windfall's UIC well is an unconstitutional taking of her property.

Seismic Monitoring

The majority of the Department's three-page permit provides conditions related to seismic monitoring, which is designed to detect any seismic event or earthquake that might be induced by underground injection. Marshall complains that this monitoring will only last for five years. She appears to be referring to one or more of the following conditions in the permit:

> (15) The permittee shall maintain all calibration, maintenance and repair records for the seismometer for at least five (5) years.
>
> (16) The permittee shall maintain all calibration, maintenance and repair records for the seismic recorder for at least five (5) years.
>
> (17) The operator may submit a summary report and plan for modification or discontinuation of the seismic Monitoring Plan five (5) years after injection activities commence. The Department's review will be completed as soon as practicable after receipt of the summary report and a written response will be provided to the operator. DEP's assessment of the report will be dependent on, but not limited to, the following criteria:
>
> a. Magnitude and frequency of any events during the monitoring period;
> b. Operational history during the monitoring period (rates, volumes, pressures);

c. Planned operational conditions moving ahead (rates, volumes, pressures);
d. Demonstration through pressure fall-off that system is at equilibrium and behaving in as [sic] a homogenous reservoir;
e. Need for any mitigation/intervention during the monitoring period.

(DEP Ex. AS (at 3).)

Initially, under Condition 17 it does not appear a certainty that seismic monitoring will discontinue five years after injection activities commence. The permit leaves it open-ended (1) for Windfall to potentially submit a plan to modify or discontinue seismic monitoring, and (2) for the Department to approve, disapprove, or modify any plan that Windfall might submit. Harry Wise, P.G., the Department's lead seismic reviewer for the Windfall permit, testified that after five years Windfall could submit to the Department a report detailing its monitoring and request to stop monitoring, but that request would not necessarily be granted. (T. 268.) More fundamentally, Ms. Marshall did not articulate or produce any evidence to support a contention that five years of seismic monitoring is insufficient or otherwise unreasonable, or what the risks are if monitoring were to cease after five years. She has not challenged any of the other conditions regarding, e.g., the seismic monitoring network or the detectable thresholds for seismic events that require Windfall to reduce injection rates or cease all injection activities.

Emergency Plans and Monitoring

Marshall also criticizes the provisions in Windfall's Control and Disposal Plan, which is essentially akin to a Preparedness, Prevention, and Contingency Plan (PPC plan). She says that the plan does not identify the closest emergency response service. She also criticizes the plan for not including an evacuation plan for residents living within one-half mile of the UIC well or a plan for responding to a potential water supply contamination event.

Apart from her assertion based on personal knowledge, Marshall did not present any evidence in support of her contention that the Brady Township Fire Company is closer to the

UIC well than the Adrian Sandy Fire Department listed in the plan, or that it is otherwise the more appropriate emergency responder for UIC-related emergencies. We do not have a map indicating the actual distance between the various fire companies and the Zelman well. Nor do we know, regardless of geographic distance, whether one fire company can get to the well faster than another because of traffic, etc. We also do not know, for instance, the relative capabilities of the different fire departments, and whether they are equally equipped to respond to any potential emergency situation at the well site. The testimony of Windfall's president, Michael Hoover, indicates that he believed he had identified the closest emergency response unit to the site. (T. 224-25.) Ms. Marshall testified that there are several other fire companies that are closer to the site than Adrian Sandy but we have nothing in the record confirming that. (T. 413.)

Marshall also asserts that there are inadequate measures providing for the testing and monitoring of private water supplies after UIC operations have begun. She says the Department needs to revise the permit conditions to protect private water supplies, however, she does not say what those permit conditions should be. Windfall's EPA permit application contains a plan to monitor a handful of private water wells and surface waters. But again, at the risk of repeating ourselves, Marshall did not produce any evidence to show that the plan is inadequate or that, for example, more wells should be sampled or sampled at a greater frequency or sampled for the presence of different or additional contaminants.

She also argues that an evacuation plan needs to be included in Windfall's plan and provided to residents living within a one-half mile radius around the well. She says an evacuation plan is needed because some of the chemicals contained in the injected fluids are hazardous, according to Windfall's EPA permit application. (A. Ex. 29 (at 223-45).) Frankly, we have very little information one way or the other regarding how hazardous these chemicals are,

in what quantities they are likely to be disposed by Windfall, or what the effect would be if there were a spill of these chemicals at the well site. There are Material Safety Data Sheets for the chemicals in Windfall's permit application, but no one explained them to us at the hearing. A residential evacuation plan might well be prudent, but we simply do not have anything to explain why one is needed or what one would look like, or to say that the permit is inadequate due to the lack of an evacuation plan.

Financial Assurances

Marshall next alleges that the financial instruments Windfall has obtained for the Zelman well are inadequate. Windfall has a standby trust agreement and an irrevocable standby letter of credit in the amount of $30,000.00 for the plugging and abandonment of the Zelman well.[2] (A. Ex. 29 (at 257-65).) Marshall testified that she looked at the plugging costs for other UIC wells and found them to be around $60,000. (T. 430.) However, apart from this generalized comparison, Marshall did not introduce any evidence that $30,000 would be insufficient to plug and abandon the Zelman UIC well. She did not have anyone qualified in well plugging to opine that the cost to properly plug and abandon the Zelman well would exceed the amount provided for by Windfall. Windfall testified that its estimated costs are lower because Windfall can use its own equipment and employees to do nearly everything but the cementing. (T. 218.) Marshall did not have any evidence to question that assertion.

Marshall also contends in her brief that if the Department had to plug the well, it would have to pay prevailing wage rates and provide for 30 years of monitoring. Assuming for the sake of argument that this is true, Marshall has not produced any evidence outlining what she believes the true cost of plugging the Zelman well to be, taking into account these considerations. She

[2] It is again unclear to us what the Department's role is with respect to ensuring a permittee has a financial mechanism in place for the plugging of a UIC well. (*See* T. 327-29.) The documentation pertaining to the standby trust and letter of credit appears in Windfall's EPA application materials.

has not shown that $30,000 would not cover the necessary costs even if the Department did have to assume responsibility for plugging it, pay a contractor a prevailing wage rate, and monitor the well for 30 years.

Article I, Section 27

Ms. Marshall also raises a challenge to the UIC permit under Article I, Section 27 of the Pennsylvania Constitution.[3] She says that her neighbors previously experienced issues with their water supply due to oil and gas operations conducted in the 1970s, that the option of extending public water to her home is too costly for her if there is contamination of her well, and that there is not an effective water supply monitoring program in place after UIC operations begin. Although it is not entirely clear, we assume Marshall believes these things render the Department's issuance of the Zelman permit a violation of Article I, Section 27. However, as we explained above, Marshall has fallen well-short of producing enough evidence to substantiate her concerns about water supply contamination or to establish that Windfall's permit is deficient because of the issues raised in this appeal. We have difficulty understanding the relevance of the problems her neighbors had with gas development several decades ago to the operation of this UIC well. For many of the same reasons that her substantive arguments fail, her constitutional claim must fail as well. Apart from her general sense that the Zelman well is an environmental hazard, she has not demonstrated that, in issuing the permit to Windfall, the Department acted in derogation of its duties as a trustee of the Commonwealth's public natural resources.

---

[3] Article I, Section 27 reads as follows:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.

PA. CONST. art I, § 27.

Ms. Marshall presented her case without the benefit of having an expert witness. Although expert testimony is not a necessary requirement to prosecute an appeal before the Board, *Morrison v. DEP*, 2016 EHB 717, 722-23; *Casey v. DEP*, 2014 EHB 439, 453, it is often an uphill battle to proceed without one. That is particularly true in a case such as this where Marshall's claims rest on highly technical questions such as whether disposal fluids will migrate up into area water wells and whether geologic faults and old gas wells will provide conduits for migration. Marshall did not have anyone to testify to these questions in the affirmative, which is all but essential to meeting her burden of proof. Instead, she questioned witnesses from the Department and Windfall as on cross, but those witnesses by and large did not support the arguments she was trying to make. Although her efforts in pursuing her appeal without an expert and without the assistance of counsel are certainly laudable, she has not identified any provisions of law that the Department violated in issuing Windfall's permit and she has not met her burden to establish that issuing the permit was otherwise unreasonable or not supported by the facts as reflected by the record created at the hearing.[4]

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 7514.

2. As a third-party appellant appealing the Department's issuance of a permit, Darlene Marshall bears the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Gerhart v. DEP*, EHB Docket No. 2017-013-L, slip op. at 13-14 (Adjudication, Sep. 25, 2019); *Joshi v. DEP*,

[4] The Department preserves in its post-hearing brief a motion for a nonsuit that it first raised at the hearing, which was joined in by Windfall. (T. 435-40.) Having decided this case on the merits, the Department's motion is denied as moot.

EHB Docket No. 2017-116-L, slip op. at 9 (Adjudication, May 17, 2019); *Jake v. DEP*, 2014 EHB 38, 47.

3. Ms. Marshall must prove by a preponderance of the evidence that the Department's decision to issue Well Permit No. 37-033-27255-00-00 to Windfall Oil & Gas, Inc. was not reasonable, appropriate, supported by the facts, or in accordance with the applicable law. *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 473; *United Refining Co. v. DEP*, 2016 EHB 442, 448, *aff'd*, 163 A.3d 1125 (Pa. Cmwlth. 2017); *Shuey v. DEP*, 2005 EHB 657, 691 (citing *Zlomsowitch v. DEP*, 2004 EHB 756, 780).

4. Marshall did not meet her burden to show that the Department acted unlawfully, unreasonably, or that its decision to issue the permit to Windfall is not supported by the facts. *Joshi v. DEP*, EHB Docket No. 2017-116-L (Adjudication, May 17, 2019).

5. Issues not preserved and argued in a party's post-hearing brief are waived. 25 Pa. Code § 1021.131(c); *Wilson v. DEP*, 2015 EHB 644, 682.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DARLENE MARSHALL	:	
	:	
v.	:	**EHB Docket No. 2018-034-L**
	:	**(Consolidated with 2019-036-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WINDFALL OIL & GAS INC., Permittee	:	

O R D E R

AND NOW, this 18th day of February, 2020, it is hereby ordered that the Appellant's consolidated appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: February 18, 2020

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

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

For Appellant, *Pro Se*:
Darlene Marshall
(*via electronic filing system*)

For Permittee:
James Naddeo, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THREE RIVERS WATERKEEPER and SIERRA CLUB	:	
v.	:	**EHB Docket No. 2018-088-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GENON POWER MIDWEST, L.P., Permittee	:	**Issued: February 20, 2020**

OPINION AND ORDER ON
MOTIONS FOR PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge

Synopsis

Motions for partial summary judgment are denied where there are complex questions of fact and law, and where it is not clear that any party is entitled to judgment as a matter of law.

O P I N I O N

Introduction

This matter involves an appeal by Three Rivers Waterkeeper and Sierra Club (Appellants) of a National Pollution Discharge Elimination System (NPDES) permit issued by the Department of Environmental Protection (Department) to GenOn Power Midwest, L.P. (GenOn)[1] for discharges from the Cheswick Power Station into the Allegheny River and Little Deer Creek. According to the parties' filings, the Cheswick Station is a coal-fired power plant situated along the Allegheny River in Springdale Borough, Allegheny County. Notice of the permit issuance was

[1] The NPDES permit was issued to NRG Power Midwest, L.P., whose name was changed to GenOn Power Midwest, L.P. on March 8, 2019. (Unopposed Motion to Amend Caption filed October 16, 2019.)

published in the *Pennsylvania Bulletin* on August 4, 2018. The Appellants appealed the permit issuance on September 4, 2018 and filed an amended Notice of Appeal on September 24, 2018.

Pending before the Environmental Hearing Board (Board) are competing motions for partial summary judgment on the question of the Department's interpretation and application of the effluent limitations guidelines for the steam electric power generating point source category (the 2015 ELG Rule) in connection with GenOn's NPDES permit. After extensive briefing, the Board conducted a lengthy oral argument on September 25, 2019, where trial counsel ably articulated their respective positions. Subsequent to the oral argument, the EPA proposed revisions to the 2015 ELG Rule. The parties, at the Board's request, filed supplemental briefs discussing the impact of the EPA's proposed revisions on this case. Briefing concluded on January 10, 2020.

Standard of Review

The Board grants summary judgment in only the clearest of cases where the right to summary judgment is clear and free from doubt. 25 Pa. Code § 1021.94a(b); Pa.R.C.P. 1035.2; *Tri-Realty v. DEP*, 2016 EHB 214, 217; *PDG Land Development, Inc. v. DEP*, 2009 EHB 268, 271. Judge Coleman recently set forth the Board's standard for reviewing summary judgment motions in *Williams v. DEP,* EHB Docket No. 2018-067-C (Opinion and Order on Motions for Summary Judgment issued Dec. 30, 2019), slip op. at 3-4:

> Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. *See* 25 Pa. Code Section 1021.94a; Pa.R.C.P. 1035.1-1035.2; *Holbert v. DEP,* 2000 EHB 796, 807-08. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the non-moving party. *Stedge v. DEP,* 2015 EHB 31, 33.

The Board has also held that in cases involving complex issues of fact and law, summary judgment may not be appropriate. We believe such matters should be decided on a fully developed record at a merits hearing. *Center for Coalfield Justice v. DEP*, 2016 EHB 341-347; *Clean Air Council v. DEP*, 2013 EHB 404, 410-11.

Discussion

After carefully reviewing the parties' motions for partial summary judgment, together with the voluminous documents filed in support and in opposition, and studying the legal authorities cited in the parties' comprehensive briefs, we find that this is a case where the issues are not clear from doubt and which will benefit from a robust hearing on the merits. Our holding in *Consol Pennsylvania Coal Co. v. DEP*, 2012 EHB 229, 240-41, which also addressed a motion for summary judgment involving a complex set of facts and unique area of law, provides guidance to us in this case:

> We are hesitant to make any final judgments without hearing all of the facts underlying DEP's decision. Moreover, we are unconvinced that this is an issue,that is free from doubt where one party is clearly entitled to summary judgment as a matter of law. All of the issues raised by Consol on this subject raise material questions of fact on which the Board needs to hear testimony, including expert testimony.

We have the same concerns in this case about deciding these complex and heavily factually-laden issues involving mixed questions of law and fact without the benefit of a hearing. As we held in *Clean Air Council v. DEP*, 2013 EHB 346, 360, "In order to properly address the complex issues that are involved in this appeal, cross examination and the development of factual issues in context are often necessary in order to ensure due process." Therefore, we issue the following order denying the respective motions for partial summary judgment.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THREE RIVERS WATERKEEPER and SIERRA CLUB	:	
v.	:	**EHB Docket No. 2018-088-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GENON POWER MIDWEST, L.P., Permittee	:	

O R D E R

AND NOW, this 20th day of February 2020, it is hereby ordered that the parties' Motions for Partial Summary Judgment are denied.

ENVIRONMENTAL HEARING BOARD

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

DATED: February 20, 2020

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

For the Commonwealth of PA, DEP:
Bruce M. Herschlag, Esquire
Matthew Kessler, Esquire
(*via electronic filing system)*

For Appellant:
Benjamin M. Barczewski, Esquire
J. Michael Becher, Esquire
(*via electronic filing system*)

For Permittee:
Gary Steinbauer, Esquire
Mark Shepard, Esquire
Donald Bluedorn, II, Esquire
Alana Fortna, Esquire
James V. Corbelli, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

B&R RESOURCES, LLC AND RICHARD F. CAMPOLA	:	
v.	:	**EHB Docket No. 2015-095-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 5, 2020**

OPINION AND ORDER ON DEPARTMENT'S PETITION FOR RECONSIDERATION OF THE BOARD'S ADJUDICATION OF FEBRUARY 14, 2020

By Steven C. Beckman, Judge

Synopsis

The Board denies the Department's Petition for Reconsideration of the Board's Adjudication because the Department has failed to show that the grounds for reconsideration set forth in the Board's rules have been met.

OPINION

Background

On February 14, 2020, the Environmental Hearing Board ("Board") issued an Adjudication and Order ("2020 Adjudication") in this matter. On remand from the Commonwealth Court, the Board held that Richard F. Campola ("Mr. Campola") was personally liable for four violations of the 2012 Oil and Gas Act identified in the Department of Environmental Protection's June 22, 2015 Administrative Order. The Board concluded that during the relevant time period that Mr. Campola owned and operated B&R Resources, LLC ("B&R Resources") the company had available financial resources that would have enabled it to plug four wells had Mr. Campola directed it to make reasonable efforts to do so. Specifically, the Board found that B&R Resources

had $85,278 that could have been reasonably allocated to well-plugging. In calculating this figure, the Board conducted a thorough and thoughtful review of B&R Resources' financial records and the parties' expert's testimony. During this review, the Board concluded that certain amounts shown in B&R Resources' financial records should be "added back" to develop a more accurate understanding of the company's available financial assets. The Board determined that the amount of depreciation claimed by B&R Resources along with certain funds paid to Mr. Campola to cover personal expenses should be added back. We reasoned that depreciation is an accounting figure which does not represent actual cash expenditure by B&R Resources and that the funds paid to Mr. Campola, which his accounting expert characterized as loans, were not documented by loan agreements and were for his personal use. The Department filed a Petition for Reconsideration ("Petition") of the Board's 2020 Adjudication on February 24, 2020, asking us to reconsider our ruling. The Department asserts that certain additional funds involving a company named Select Energy, Inc. ("Select Energy") should also be added back to B&R Resources' available financial assets with the result that Mr. Campola would be personally liable for six violations instead of four violations as we held in our 2020 Adjudication. On March 2, 2020, Mr. Campola filed a Response to the Department's Petition. The Board is now in a position to rule on the Petition.

Standard

The rule governing reconsideration of final orders, 25 Pa. Code § 1021.152, provides that reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons that may include the following:

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

> (iii) Could not have been presented earlier to the Board with the exercise of due diligence.

25 Pa. Code § 1021.152(a).

The Board has stated that reconsideration of final orders may be appropriate when the Board simply misses a key legal or factual point, but is not available as a vehicle for arguing issues that should have been raised previously. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 117, 118. Mere disagreement is not a basis for reconsideration. *New Hope Stone & Lime Co. v. DEP,* 2016 EHB 741, 745 (citing *Consol Pa. Coal Co. v. DEP*, 2015 EHB 117). However, a mistake by the Board may serve as a compelling and persuasive reason for the Board to grant reconsideration. *Miller v. DEP*, 1997 DEP 335.

Analysis

The Department has not met the criteria for reconsideration of a final order by showing compelling and persuasive reasons for the Board to exercise its discretion to grant reconsideration. The Department argues that the crucial facts of record are inconsistent with the Board's findings of fact and that the Board made an inadvertent factual omission by not addressing and adding back certain loan repayments made by B&R Resources. The Department is concerned with several transactions dating from 2011 through 2013 involving the loaning of $28,000 by Select Energy to B&R Resources along with the full repayment of the $28,000 loan by B&R Resources to Select Energy. (See Campola Ex. 14, a page of which involving the Select Energy transactions is attached as Exhibit 1 to the Petition). The Department contends that the $28,000 that B&R Resources made in loan repayments to Select Energy should be included in the "add-backs," resulting in an increase of the amount of money available to pay for well plugging. The Department assumes that the Board mistakenly failed to consider the loan repayments B&R Resources made to Select Energy because we did not discuss the Select Energy transactions in our 2020 Adjudication.

The Department is correct that we did not include a discussion in the 2020 Adjudication concerning the Select Energy transactions, but it incorrectly assumes that this discussion was absent because the Board mistakenly failed to consider these transactions. In reaching our decision in the 2020 Adjudication, we evaluated certain expense categories of B&R Resources, including loans and loan repayments. In the 2020 Adjudication, we discussed the loan repayments B&R Resources made to Cortland Bank and Kurt Lattell and found that those loan amounts should be deducted from the total funds available to plug wells. Additionally, the Board's Adjudication addressed the "loan" Mr. Campola took from B&R Resources for his personal use that we concluded should be added back to the accounts to provide an accurate picture of the funds available to B&R Resources for well plugging. We similarly evaluated the Select Energy loan repayments in making our decision. Ultimately, we decided that the transactions involving Select Energy did not require us to make any adjustment, either positive or negative, to the amount of financial assets available to B&R Resources for well plugging and, therefore, it was not necessary to discuss these transactions in our decision.

In its Petition, the Department argues that B&R Resources' loan repayments to Select Energy should be treated by the Board in the same manner as the money that Mr. Campola took from B&R Resources for his personal use. This argument was made during the hearing and evaluated by the Board in reaching its' decision so no mistake was made by the Board and there are no inconsistent facts that would justify the reversal of the Board's decision. Therefore, reconsideration is not warranted. However, to clarify our decision, we will address the Department's argument briefly. The Department declares that Select Energy is "owned and controlled by Mr. Campola," creating the inference that Mr. Campola and Select Energy are one and the same. The record does not clearly support this as there was very limited discussion of

Select Energy in either of the prior hearings in this matter. Mr. Campola points out in his response to the Petition that he is not the sole owner of Select Energy, but rather, it is a business that is co-owned by him and another individual. That appears to have been true at least at the beginning of Select Energy in 2001 but apparently Mr. Campola's original partner left Select Energy prior to August 2011. (2016 Hearing, T. 18-19). The other main testimony we have regarding the ownership of Select Energy came from the Department's expert, Mr. Duffus, who stated his understanding that Select Energy was a company owned by Mr. Campola but there was not supporting evidence for this statement. (2019 Hearing, T. 19). Regardless of the ownership status of Select Energy, the main distinguishing feature between the payments to Mr. Campola and the transactions between Select Energy and B&R Resources is that the Select Energy transactions were a wash from a financial standpoint whereas the funds taken by Mr. Campola represented a depletion of overall B&R Resources' assets. The $28,000 in assets came in from Select Energy to B&R Resources and were paid back to Select Energy by B&R Resources. B&R Resources suffered no financial loss, nor did Select Energy reap any benefit. The receipt and repayment of funds between these two business entities that resulted in a wash from an accounting standpoint did not, in our opinion, create additional funds that Mr. Campola wrongfully directed away from B&R Resources statutory obligation to plug wells. Therefore, because we concluded the loan and loan repayment involving Select Energy did not require that we make any adjustment to our determination of the available assets for well plugging, we did not include those transactions in our discussion in the 2020 Adjudication.

Conclusion

The Department has not demonstrated that the Board made a mistake or the facts it set forth in its Petition are inconsistent with the findings of the Board, and therefore, we find the Department

has failed to establish a compelling and persuasive reason for granting their Petition. In conclusion, we find that the Department has not satisfied the criteria set forth in 25 Pa. Code § 1021.152 for granting reconsideration of our adjudication, and issue the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

B&R RESOURCES, LLC AND RICHARD F. CAMPOLA	:	
v.	:	**EHB Docket No. 2015-095-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 5th day of March, 2020, it is hereby ORDERED that the Department's Petition for Reconsideration is **denied**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 5, 2020

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

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

For Appellants
Jean M. Mosites, Esquire
James V. Corbelli, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JIM BURKEY	:	
	:	
v.	:	**EHB Docket No. 2019-111-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 10, 2020**
	:	

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion to dismiss an appeal as moot filed by the Department where the appellant has failed to respond to the motion and the Department has revoked and rescinded the compliance order under appeal.

O P I N I O N

Jim Burkey, proceeding *pro se*, has appealed a compliance order issued to him by the Department of Environmental Protection (the "Department") on August 16, 2019. The compliance order followed an inspection of Mr. Burkey's property in which the Department found that fill had been placed in wetlands and on the banks of an unnamed tributary to Lake Nockamixon in East Rockhill Township, Bucks County.

The Department has now moved to dismiss this appeal as moot. The Department attaches as an exhibit to its motion a one-sentence letter dated January 21, 2020 that the Department addressed and sent to Mr. Burkey, providing as follows:

> Please be advised that the Department of Environmental Protection hereby rescinds and revokes the Chapter 105 Compliance Order issued to you on August 16, 2019, and mailed to you on August 20, 2019.

(DEP Ex. A.) The Department argues that, because it has rescinded and revoked the compliance order issued to Mr. Burkey, there is no longer any meaningful relief that the Board can provide and this appeal should be dismissed. We agree.

We evaluate motions to dismiss in the light most favorable to the nonmoving party and will grant the motion where the moving party is entitled to judgment as a matter of law. *Monroe Cnty. Clean Streams Coal. v. DEP*, 2018 EHB 798, 799; *Dobbin v. DEP*, 2010 EHB 852, 857. Mr. Burkey did not file a response to the Department's motion to dismiss. Although we could grant the Department's motion on that basis alone, 25 Pa. Code § 1021.94(f); *Nitzschke v. DEP*, 2013 EHB 861, we will briefly address the mootness issue.

Mootness is a prudential limitation related to justiciability. *Lawson v. DEP*, 2018 EHB 513, 515. A matter becomes moot when events occur during the pendency of the appeal that deprive the Board of the ability to provide effective relief. *Clean Air Council v. DEP*, 2018 EHB 164, 165; *South v. DEP*, 2015 EHB 203, 206. Absent unusual circumstances, the Department's rescission of an order generally renders the appeal moot. *See, e.g.*, *Consol Pa. Coal Co. v. DEP*, 2019 EHB 146; *Hirsch v. DEP*, 2009 EHB 229; *West v. DEP*, 2000 EHB 462; *Kilmer v. DEP*, 1999 EHB 846. In *Consol*, we recently addressed a situation in which the Department vacated and withdrew a compliance order and notice of violation issued to an appellant. We found that the appeal was moot and granted the Department's motion to dismiss, reasoning that a rescinded, revoked, or vacated action no longer existed, and therefore, the Board could not provide any meaningful relief in that case. 2019 EHB at 149-50 (citing *Goetz v. DEP*, 2001 EHB 1127, 1132).

Since Mr. Burkey did not respond to the motion to dismiss, we have nothing explaining why this appeal is not moot or why the appeal should not otherwise be dismissed because, for instance, of any potential exceptions to the mootness doctrine. *See Klesic v. DEP*, 2016 EHB 142, 144; *ELG Metals, Inc. v. DEP*, 2011 EHB 741.

Therefore, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JIM BURKEY	:	
	:	
v.	:	**EHB Docket No. 2019-111-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 10th day of March, 2020, it is hereby ordered that the Department's motion to dismiss is granted and this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 10, 2020

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

For the Commonwealth of PA, DEP:
Brian G. Glass, Esquire
(*via electronic filing system*)

For Appellant, *Pro Se*:
Jim Burkey
1037 Mountain View Drive
Quakertown, PA 18951
(*via U.S. mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY D. KINSEY, P.E.	:	
	:	
v.	:	**EHB Docket No. 2018-122-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW ENTERPRISE STONE AND LIME CO., INC., Permittee	:	**Issued: March 19, 2020**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board denies a Motion for Summary Judgment filed by the Department, a Motion to Dismiss filed by the Permittee, and a Motion for Summary Judgment filed by the Appellant. Both the Department and the Permittee's Motions are denied because the Appellant has not just appealed a matter of prosecutorial discretion and the Appellant has successfully established a prima facie case concerning whether the Department adequately considered the risk of malodors when issuing coverage under a general permit. The Appellant's Motion is denied because the issues he raises concerning the risk of malodors at the Permitted facility are not clear and free from doubt.

O P I N I O N

On September 20, 2018 the Department of Environmental Protection ("Department") issued Plan Approval/Operating Permit No. GP13-40-003 ("Permit") to New Enterprise Stone & Lime Co., Inc. ("Permittee") for operation of its hot mix asphalt plant located in Plains Township, PA. The Permit authorizes the Permittee to operate its asphalt plant at an increased

capacity, from 180 tons of asphalt per hour to 300 tons of asphalt per hour. Prior to this modification, Gary D. Kinsey, P.E. ("Appellant") complained of odors emanating from the facility. Appellant filed an appeal on December 11, 2018 due to his concern that allowing an increased throughput at the facility would exacerbate the odor problems that the appellant alleges that he and his wife are experiencing.

In his appeal, Appellant alleges that the Department erred in issuing the Permit without "thoroughly address[ing] the issues which will result from the now proposed increase production to 300 TPH." Appeal at 2. The two issues raised by Appellant are that (1) the general permit allegedly does not address how the plant's equipment will be operated at the higher throughput to sufficiently contain malodors and (2) the Department allegedly failed to acknowledge numerous incidents of malodors emitted from the Facility when issuing the Permit.

Currently before the Board are dispositive motions from both the Department and the Permittee seeking to dispose of Appellant's appeal. The Department has filed a Motion for Summary Judgment arguing the appeal must be dismissed because Appellant has failed to establish a prima facie case. Alternatively, even if the Appellant has established a prima facie case, the Department argues the Appeal must be dismissed because the issues raised by Appellant concern the Department's prosecutorial discretion, and the Board does not have authority to compel a Department enforcement action.

The Permittee raises similar arguments in its Motion to Dismiss. While the Permittee has filed a Motion to Dismiss, Permittee's Motion complies with all the requirements in 25 Pa. Code § 1021.94a, for a Motion for a Summary Judgment. Because the Permittee is asking, in part, that the Board rule regarding the merits of the Appeal, the Board views Permittee's motion as a Motion for Summary Judgment. *See Consol Pa. Coal Co. v. DEP*, 2015 EHB 48, 54-55, *aff'd*,

129 A.3d 28 (Pa. Cmwlth. 2015) (noting that motions to dismiss are typically appropriate for issues of preliminary concern such as jurisdiction, in contrast to summary judgment where the party requests that the Board make a ruling regarding the merit of an appeal). We note here that the Board's decision to view Permittee's Motion to Dismiss as a Motion for Summary Judgment has no functional impact on the standard of review by which the Board views Permittee's argument concerning Board jurisdiction. Both motions require the Board to consider the issue in the light most favorable to the non-moving party and to only rule in favor of the moving party when there is no doubt. Additionally, both motions allow the Board to consider facts outside those stated in the appeal, since prosecutorial discretion is a matter concerning Board jurisdiction. *Bernardi v. DEP*, 2016 EHB 580, 586-87 (no Board jurisdiction because decision not to enforce expressed in a letter not a reviewable action); *Felix Dam Preservation Ass'n v. DEP*, 2000 EHB 409 (motions to dismiss may be determined on facts outside of those stated in the appeal when the Board's jurisdiction…is in issue).

Also before the Board is a Motion for Summary Judgment filed by the Appellant. In his Motion, Appellant argues that the Department issued the Permit in error, by failing to undergo an adequate technical analysis prior to issuing the Permit.

Standard of Review

The Board, following Pennsylvania's Rules of Civil Procedure, provides parties two ways to obtain summary judgment. First, summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. *See* 25 Pa. Code § 1021.94a; Pa.R.C.P. No. 1035.1-

1035.2; *Holbert v. DEP*, 2000 EHB 796, 807-08. Alternatively, summary judgment may be warranted:

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

25 Pa. Code § 1035.2(2); *see also Diehl v. DEP*, 2018 EHB 18. In evaluating whether either type of summary judgment is proper, the Board views the record in the light most favorable to the non-moving party. *Stedge v. DEP*, 2015 EHB 31, 33. Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217. Issues that involve mixed questions of fact and law are best decided at a full hearing and are generally not fit for summary judgment. *Ctr. for Coalfield Justice v. DEP*, 2016 EHB 341, 347.

Prosecutorial Discretion

The Department and Permittee both argue in their Motions that the Board lacks jurisdiction in this matter because it concerns prosecutorial discretion. The Department and Permittee are correct in noting that this Board will not interfere with the Department's exercise of its prosecutorial discretion. *DEP v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth. 2005); *Law v. DEP*, 2008 EHB 213, 215, *aff'd*; *Brooks v. DEP*, 2009 EHB 302, 304; *Bernardi v. DEP*, 2016 EHB 580. However, distinct from Board review of an enforcement action is Board review of a Department permit renewal, as we noted in *Friends of Lakawanna County*:

> "Whether or not the Board can order the Department to take an enforcement action on the basis of alleged violations…there is no question that we can certainly review issues with the ongoing operations of a facility in the context of a permit renewal to see if the renewal was properly issued…Relevance in conducting that review does not turn on whether the Department took any enforcement action with respect to any particular issue."

Friends of Lackawanna v. DEP, 2017 EHB, 1123, 1169.

The Appellant cites two permit conditions, conditions 5c and 5d, in his notice of appeal, which provide the basis for the Permittee and Department argument that the Appellant is appealing a Department decision not to enforce the permit conditions. Condition 5c states that the facility must be "Operated and maintained in accordance with practices based on manufacturer's specifications." Condition 5d states that the facility may not be operated in a manner that permits malodorous contaminants which are detectible outside of the facility property. Permittee notes that, in his deposition, the Appellant "would not have a problem" with the facility if these conditions were fully enforced and that the Appellant requests in his summary judgment that the Department "fully enforce" its permit requirements.

However, Appellant elaborates on what relief he is seeking directly below conditions 5c and 5d on his notice of appeal. Under Condition 5c, the Appellant writes "the General Permit approval process did not sufficient [sp] address how all sections of the installed plant equipment will be operated at the higher throughput to meet environmental requirements." Likewise, under Condition 5d, the Appellant alleges that the Department failed to acknowledge odor issues that were present at the time the Permit was issued and did not respond to the Appellant's request for information on how his concerns regarding odor would be addressed in the new Permit. Furthermore, on his Notice of Appeal, the Appellant lists that he is appealing the *issuance* of the Permit. While including permit conditions in his appeal may have created some degree of ambiguity, even the Department acknowledges that a fair reading of his Notice of Appeal suggests that Appellant "is asking the Board to either require the Department to take an enforcement action against New Enterprise to prevent 'malodorous' emissions that he alleges

have resulted from increased production at the Facility, or remand GP13-40-003 to the Department for reevaluation in order to address malodors." Dept. Brief at 4.

Viewing the Appeal in the light most favorable to Appellant, the Board finds that Appellant has appealed the issuance of coverage under the permit, as opposed to a Department decision not to enforce alleged malodor permit violations and therefore the Board has jurisdiction to hear his Appeal regarding the permitting decision.[1]

Prima Facie Case and Appellant's Motion for Summary Judgment

Having determined that the Board has jurisdiction over the Department's permitting decision, we next turn to the Department and the Permittee's argument that Appellant has not established a prima facie case. Appellant is required to produce evidence of facts essential to his cause of action. 25 Pa. Code § 1025.2(2). This criteria is satisfied if the Appellant, who has the burden of proof in this instance, has put forward some evidence sufficient to allow a trier of fact to find in his favor. Here, Appellant has alleged both: (1) the Department failed to acknowledge numerous incidents of malodors when deciding whether to issue the Permit and (2) the Permit does not address how the plant's existing equipment will be operated at the higher throughput to sufficiently contain malodors.

Malodors are not allowed under the Department's regulations and a violation of the regulations constitutes a public nuisance. 35 P.S. § 4013. Department regulations prohibit the emission of "any malodorous air contaminants from any source, in such a manner that malodors are detectable outside the property…" 25 Pa. Code § 123.31(b). A "malodor" is defined in the Department's regulations as "[a]n odor which causes annoyance or discomfort to the public and

[1] The Board agrees with the Department and the Permittee that it lacks the jurisdiction to compel the Department to take an enforcement action. *DEP v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth. 2005); *Law v. DEP*, 2008 EHB 213, 215, *aff'd*; *Brooks v. DEP*, 2009 EHB 302, 304; *Bernardi v. DEP*, 2016 EHB 580.

which the Department determines to be objectionable to the public." 25 Pa. Code § 121.1. Interpreting these regulations, the Board has held that the Department and more than one member of the public must experience an odor at the same time and place to create a malodor in violation of the Department's regulations. *Whitehall Township v. DEP*, 2018 EHB 609, 657; *see also Franklin Plastics v. DER*, 1996 EHB 645, 661-662; *see also DePaulo v. DEP*, 1997 EHB 137, 145.

In addition to enforcing its malodor requirements the Department also has a duty to evaluate the permits it issues for their potential to create malodors and other public nuisances. In *Baughman v. DER* we held that the Department's power under the Administrative Code of 1929 to abate nuisances "must include the power to prevent nuisances from occurring." *Baughman v. DER,* 1979 EHB 1, 19. We noted that "it would be absurd for [the Department] to permit the construction and operation of an expensive facility that might create a nuisance…without any consideration in the permitting process as to the likelihood of creating a nuisance." *Id.* Additionally, we noted that:

> "Article I, Section 27, of the Pennsylvania Constitution requires that when [the Department] is made aware of an activity for which a party is seeking from [the Department] a permit has the potential to cause a nuisance or an environmental incursion, [the Department] must at least determine the likelihood of its occurrence, and if need be, take steps to require the applicant to prevent or minimize the incursion."

Id. We affirmed this principle in *Plumstead Township v. DER,* an appeal concerning operational noise associated with surface mining, were we noted that "given prior Board precedent…the Board will find that the Department's issuance of [a permit] was an abuse of discretion if [the Appellant] has shown either: that the Department failed to evaluate noise when reviewing the permit application; or that the noise to be generated by the quarry will constitute a public nuisance." *Plumstead Township v. DER*, 1995 EHB 741, 790. More recently, in the context of

malodors, we noted in *Friends of Lackawanna v. DEP* that the Board may review a Department permit issuance to a landfill, given its "unavoidable propensity to produce offsite odors." *Friends of Lackawanna v. DEP,* 2017 EHB 1123, 1182. Furthermore, we recognized that "offsite landfill odors are a cognizable injury subject to evaluation and control pursuant to Article I Section 27 of the Pennsylvania Constitution" and we reviewed the permit in question to determine whether the Department violated the waste disposal site's neighbors' constitutional rights by renewing the permit and thereby effectively allowing the odors to continue for another ten years. *Id.*

The Appellant here alleges that the Department erred by ignoring a history of malodors when issuing the Permit. As the Permittee and Department correctly note, an appellant is required to demonstrate a facility's past emission of **malodors**, as defined by Board precedent, to show the Department erred in issuing a permit based off a Facility's compliance history. This requires the Appellant to show the facility has a history of producing annoying or discomforting odors that have been confirmed by the Department and experienced by more than one member of the public at the same time and place. *Id.* at 1181. Furthermore, even if the Appellant can put forward evidence of a malodor violation, one violation alone will likely not result in a finding of Department error. *Lower Windsor Twp. & People Against Contamination v. DEP*, 1993 EHB 1305, 1334 ("A single malodor incident does not establish systematic or routine or regular malodors to warrant rejection of [an application to create a 17-acre expansion of an existing municipal waste landfill]").

The filings before us do not establish a prima facie case that the Department erred in granting the permit given the facility's compliance history. Appellant alleges in his Appeal that several incidents of "malodorous odors" were reported to the Department online in 2016, and again in 2017. He alleges that the malodors increased in 2018 when the Permittee took over

operation of the facility. All of these odors were allegedly emitted while the facility was permitted at 180 TPH production. What the Appellant has not produced in his filings is any evidence that these odors were experienced or complained about by anyone outside his household.[2] The Permittee has produced exhibits indicating that the Appellant and his wife are the sole individuals to complain about malodors. The Department has put forward evidence that Department staff have responded to complaints by the Kinseys on 51 separate occasions and patrolled the facility. On none of these occasions were Department employees able to detect any objectionable or annoying odor from any source, including the Permittee's facility. The Appellant, in response to the Permittee and Department's exhibits, has put forward no evidence to the contrary. While the Appellant has put forward evidence that he and his wife experience objectionable odors, we find no basis in the record to hold that the Appellant has established a prima facie case that the facility has a compliance history of emitting malodors, as defined by the Department's regulations – let alone malodors "systemic or routine" enough to constitute a Department abuse of discretion in issuing the Permit.

The Appellant, however, also alleges the Department erred by failing to address how the facility will prevent malodors given the higher throughput allowed by the revised permit. As noted above, an Appellant can establish that the Department erred by issuing a permit while disregarding evidence of an ongoing public nuisance ***or*** by establishing that the new permit will ***create*** a public nuisance. *Plumstead Township*, 1995 EHB at 790. While the former requires the Appellant to demonstrate a past history of public nuisance, the ladder requires showing that the Permit will create a public nuisance in the future.

In *Plumstead Township*, we noted that the Department's regulations did not specify at what threshold operational noise could be considered a private, as opposed to public, nuisance.

[2] With the possible exception of one unverified complaint. Dept. Brief at 8.

Nevertheless, we were willing to consider the Department's issuance of the permit an abuse of discretion if the record indicated that the Department failed to evaluate the risk that operational noise from the operation would create a public nuisance, or if the evidence before the Department indicated that noise from the permitted operation would constitute a public nuisance. *Id.* at 790. It was only after evidence was presented at a hearing that the Department considered operational noise that we found the Appellant had failed to meet its burden. *Id.* at 790-791; s*ee also Santus v. DEP*, 1995 EHB 897, 928 (failure of the Department to consider the potential of a coal preparation facility to produce noise and dust amounting to a public nuisance would amount to an abuse of discretion).

We have applied this same principle in the context of malodors. In *Depaulo v. DEP*, the parties sought summary judgment on an appeal concerning the Department's permit issuance to a crematory that sought to temporarily operate out of a building adjacent to its permanent facility. Among other issues, the Appellants sought summary judgment alleging the Department conducted an inadequate technical review of the relocated crematory. *DePaulo v. DEP,* 1997 EHB 137, 144. The Department agreed that the new location of the temporary crematory was a factor in determining whether the facility would comply with 25 Pa. Code § 123.31, but argued it had conducted a meaningful review of the new information. We held in *Depaulo* that the dispute concerning the Department's review created a factual dispute that rendered summary judgment inappropriate. *Id.* at 145.

Appellant has established a prima facie case that the Department has not considered the risk that the permit modification to allow increase throughput will generate malodors. It appears to us that Appellant has put forward two primary factual contentions to support his assertion. First, he contends that when the Permittee responded to a technical deficiency letter that the

previous permittee failed to respond to, the information provided did not fully address the Department's technical deficiencies. Second, the Appellant notes there was no VOC emissions inventory done on the "back end" of the Plant, where the asphalt is mixed, conveyed into silos, and loaded into trucks. The facts Appellant has put forward may ultimately show that the Department has erred, or they may not. Regardless, they show us there is an issue of fact to decide, and for that reason alone the Appeal survives the Department and the Permittee's Motions.

While Appellant has established a prima facie case, the issues before us are not free of doubt and summary judgment for the Appellant on them would also be inappropriate at this time. The Department argues in its Response to Appellant's Motion that the Department had sufficient information from the Permittee, including a flow diagram and an equipment list, to assuage the concerns it raised in its technical deficiency letter. Furthermore, the Department notes that emissions testing was done at the facility to ensure no malodors would emanate off the Facility's premises. These facts alone suggest there is a dispute over material facts regarding whether the Department erred in its technical review before issuing the Permit. A hearing focused on the technical review and permitting of the facility will reveal whether the Department abused its discretion when it issued coverage under the general permit.[3]

Accordingly, we issue the Order that follows.

[3] Because we deny the Appellant's Motion on these grounds, we do not consider whether a denial of his motion would be an appropriate sanction for his failure to follow our procedural rules.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY D. KINSEY, P.E.	:	
	:	
v.	:	**EHB Docket No. 2018-122-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW ENTERPRISE STONE AND LIME CO., INC., Permittee	:	

O R D E R

AND NOW, this 19th day of March, 2020, upon consideration of Permittee's Motion to Dismiss, the Department's Motion for Summary Judgment, the Appellant's Motion for Summary Judgment, as well as all responses and replies, it is hereby ordered that all Motions are **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 19, 2020

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

For the Commonwealth of PA, DEP:
Sean L. Robbins, Esquire
(*via electronic filing system*)

For Appellant:
Gary D. Kinsey, P.E., *Pro Se*
5 Carey Lane
Jenkins Township, PA 18640

For Permittee:
Michelle Skjoldal, Esquire
John W. Carroll, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHRISTOPHER M. COYNE, BONNIE A. COYNE, AND JAMES J. COYNE, III	:	
v.	:	**EHB Docket No. 2019-153-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 6, 2020**

OPINION AND ORDER ON
ADVENTURE/CHAMPION PARTNERSHIP'S PETITION TO INTERVENE

By Steven C. Beckman, Judge

Synopsis

The Board denies a petition to intervene by Adventure/Champion Partnership in a third party appeal where it failed to file a timely appeal of a substantively identical compliance order that the Department directed at it, and where it has failed to demonstrate extraordinary circumstances justifying intervention. Granting such a petition would allow the petitioner to circumvent the time restraints for filing an appeal. Additionally, Adventure sought to intervene in order to obtain a decision by the Board allocating responsibility between private parties which extends beyond the Board's jurisdiction, and Adventure's interests in this matter are adequately protected by the Department.

O P I N I O N

Background

On December 6, 2019, Christopher M. Coyne, Bonnie A. Coyne, and James J. Coyne, III ("the Coynes") appealed the Department of Environmental Protection's ("the Department's)

Compliance Order ("the Order"). The Order claims that the Coynes are in violation of the Dam Safety and Encroachments Act, 32 P.S. § 693, and related regulations in Chapter 105, 25 Pa. Code § 105, because of the failure to maintain a culvert on property they own in McCandless Township, Pennsylvania. The Order requires that the Coynes submit a restoration plan for maintenance of the culvert and complete the required work following the Department's approval of the plan. The culvert at issue runs from a pond that is located on Parcel 715-F-80 ("Parcel 80") on the southern side of Fairfield Road. Adventure is a company responsible "for stormwater management on [Parcel 80]." Adventure's Petition at 2. Prior to issuing the Order to the Coynes, the Department issued a separate compliance order on July 24, 2019 ("July Order") directed to Adventure that was substantively identical to the Order directed at the Coynes. Adventure did not appeal the Department's July Order. Instead, on February 7, 2020, Adventure/Champion Partnership ("Adventure") filed a Petition to Intervene ("Petition") in the Coynes' appeal. The Coynes filed a response opposing Adventure's Petition in this appeal. The Department did not file a response to the Petition.

Standard of Review

Section 4 of the Environmental Hearing Board Act states that "[a]ny interested party may intervene in any matter pending before the Board." See also 25 Pa. Code § 1021.81 (a person may petition to intervene in any matter prior to the initial presentation of evidence). The Board will deny the petition (to intervene) if it fails to include sufficient legal grounds or verified factual averments to establish the right to intervene. 25 Pa. Code § 1021.81(e). The Board has held that the right to intervene in a pending appeal should be comparable to the right to file an appeal at the outset and, therefore, an intervenor must have standing. *Logan v. DEP*, 2016 EHB 531, 533; *Wilson v. DEP*, 2014 EHB 1, 2; *Pileggi v. DEP*, 2010 EHB 433,434. A person or entity will have

standing if that person has a substantial, direct, and immediate interest in the outcome of the appeal. *Logan*, 2016 EHB at 533 (citing *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009)). This interest must be more than a general interest such that the entity seeking intervention "will either gain or lose by direct operation of the Board's ultimate determination." *Jefferson County v. DEP*, 703 A.2d 1063, 1065 (Pa. Cmwlth, 1997); *Wheelabrator Pottstown, Inc. v. Department of Environmental Resources*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *Browning-Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991); *Hostetter v. DEP*, 2012 EHB 386, 388; *Pagnotti Enterprises, Inc. v. DER*, 1992 EHB 433, 436.

Discussion

Adventure seeks to intervene on the grounds that "any determination by the Board will affect Adventure's current and future rights, interests, and obligations with regard to its property." Adventure's Petition at 1. The Coynes contend that Adventure missed its opportunity to challenge the Department's action because it failed to appeal the July Order directed at it, and that Adventure is now attempting to circumvent the 30 day time constraint established by 25 Pa. Code § 1021.52. Our precedent makes clear that a petitioner may not use intervention as a tool for circumventing the time constraints of 25 Pa Code § 1021.52. *Jefferson Township Supervisor v. DEP*, 1999 EHB 693, 695. Typically, third parties may intervene after the 30 day time period as long as their interests are sufficient to establish standing. *Id.* However, this rule does not apply if the third party was also subject to a Department order. *Id.* In such case, absent showing extraordinary circumstances, the third party will not be granted permission to intervene. *Id.*

We find merit in the Coynes' argument that Adventure is trying to intervene to avoid the 30 day timeframe for appealing a Department order. The July Order issued to Adventure became a final order when Adventure failed to appeal it and, as a result, Adventure has sole responsibility to address the remedial action requirements set forth in the July Order regarding the culvert. It

is clear from its statements in its Petition that Adventure wants to undo that result and require that the Coynes assume a share of the responsibility to address the culvert. ("[T]he gravamen of this matter is the allocation of responsibility to maintain a pipe in a stormwater maintenance system." Adventure's Petition at 8; "Adventure accepts the Department's judgment and its proportionate responsibility for maintaining the Fairfield Road Culvert." Adventure's Petition at 12 (underlined in the original) and "if the Coynes are successful in their appeal, Adventure will be solely responsible for the cost and liability to operate and maintain the culvert at issue." Adventure Petition at 21). Adventure provides no explanation as to why it did not appeal the July Order and raise any issues it had with ownership and/or responsibility for the culvert as part of a timely appeal. Having failed to do so, it cannot now intervene as a means to circumvent the 30 day timeframe for filing an appeal without setting forth extraordinary circumstances to support its position. The Petition fails to provide the Board with any extraordinary circumstances that would persuade us to grant Adventure's intervention in this appeal. At most, it cites the Department's cover letter to the Coynes that states that pursuant to the July Order, the Department received additional information (presumably from Adventure) regarding the ownership of the culvert and property. There is no explanation why Adventure considers this additional information to constitute extraordinary circumstances or why it could not have presented it as part of an appeal of the July Order and, on its face, we see no reason to conclude that this information satisfies the requirement for extraordinary circumstances.

In addition to our determination that there are no extraordinary circumstances that warrant granting intervention, we also conclude that the remedy sought by Adventure is beyond the Board's jurisdiction. In its Petition, Adventure seeks to have the Board allocate responsibility for the maintenance of the culvert between it and the Coynes. The Board has jurisdiction over matters

concerning Department actions but "does not extend to resolving disputes between private parties." *Pond Reclamation Company v. DEP*, 1997 EHB 468, 474. In the present case, the Board's jurisdiction extends to determining whether the Department's Order to the Coynes is reasonable and in compliance with the applicable law and regulations. Adventure proposes that the Board assign a proportionate degree of responsibility for restoring and maintaining the culvert to it and the Coynes. This request for relief extends beyond the Board's jurisdiction as Adventure seeks that we resolve a dispute between private parties. Any dispute between the Coynes and Adventure as to how much responsibility each of them carries for restoration and maintenance of the culvert is beyond the issue in the current appeal of whether the Department's Order to the Coynes was reasonable and lawful. We are not the appropriate forum to decide how to allocate responsibility between these two private parties in this case.

Finally, our decision to deny intervention is further supported by our conclusion that Adventure's actual interests in this case are adequately protected by the Department. The Order to the Coynes states that they have failed to maintain the culvert as required by their status as property owners with a water obstruction. The Order requires that the Coynes submit a complete Restoration Plan and implement that plan following Department approval. Presumably, the Department intends to defend its Order to the Coynes and if it receives a favorable decision from the Board, it will require that the Coynes comply with the Order. That outcome would protect any interest Adventure may have in this matter. If the Department does not defend its Order or is unsuccessful in doing so, Adventure remains free to pursue whatever remedy it believes it has in another venue.

Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHRISTOPHER M. COYNE, BONNIE A. COYNE, and JAMES J. COYNE, III,	:	
v.	:	**EHB Docket No. 2019-153-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 6th day of April 2020, it is hereby ORDERED that Adventure/Champion Partnership's Petition to Intervene is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 6, 2020

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

For the Commonwealth of PA, DEP:
Bruce M Herschlag, Esquire
Charney Regenstein, Esquire
(via electronic filing system)

For Appellants
Mark Shaw, Esquire
Russell Warner, Esquire
(via electronic filing system)

For Petitioners
Robert Dauer, Jr. Esquire
Jason Yarbrough, Esquire
Joseph Carroll, Esquire
(via electronic mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HANOVER TOWNSHIP, PARADISE WATCHDOGS/BAN THE QUARRY, AND JOHN C. AUMAN, Appellants	:	
v.	:	**EHB Docket No. 2018-072-L (Consolidated with 2018-075-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND GIBRALTAR ROCK, INC., Permittee	:	**Issued: April 24, 2020**

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

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board sustains a township's and citizens' appeal of a noncoal mining permit renewal and an NPDES permit issued by the Department for a proposed quarry. The proposed quarry is adjacent to a hazardous site with contaminated groundwater that is being cleaned up pursuant to the Hazardous Sites Cleanup Act. The Department failed to coordinate its permitting activity with its HSCA activity in violation of its duties under Article I, Section 27 of the Pennsylvania Constitution. The Department mistakenly concluded that the applicant had affirmatively shown that there was no presumptive evidence of potential pollution of the waters of the Commonwealth because quarry pumping would in fact extend the plumes of contaminated groundwater from the HSCA site. The Department's permit issuance was inconsistent with other statutory and regulatory requirements. The Department's effort to insert special conditions into the mining permit and the Department's promises of future enforcement action did not justify issuance of the permits. The Department's witnesses during the hearing on the merits expressed doubt whether the permits should have been issued, at least without further study. The permits

are rescinded rather than remanded because there is no schedule for future cleanup activities at the HSCA site.

Introduction

The appellant in the appeal docketed at EHB Docket No. 2018-072-L is New Hanover Township (the "Township"). The appellants in the appeal docketed at EHB Docket No. 2018-075-L are Paradise Watchdogs/Ban the Quarry and John C. Auman (collectively "Ban the Quarry"). We consolidated the two appeals. The Appellants filed their appeals from the Department of Environmental Protection's (the "Department's") renewal of Gibraltar Rock, Inc.'s ("Gibraltar's") noncoal surface mining permit, NPDES permit, and authorization to mine (the "permits") for Gibraltar's proposed quarry in New Hanover Township, Montgomery County.

Gibraltar's proposed quarry is directly adjacent to the "Hoff VC Site" (short for Hoffmansville Road and vinyl chloride). The Hoff VC Site was identified by the Department in 2011 as an area of soil and groundwater contamination involving several volatile organic compounds ("VOCs"), semi-volatile organic compounds ("SVOCs"), and other contaminants of concern. The Hoff VC Site has a record of reported contamination dating back to the 1970s. The Hoff VC Site is officially designated as a cleanup site under the Pennsylvania Hazardous Sites Cleanup Act ("HSCA"), 35 P.S. §§ 6020.101 – 6020.1305.

There has been a great deal of litigation regarding the proposed quarry as set forth below in our Findings of Fact, but there is really only one issue in this appeal: Did the Department err by issuing the permits in light of the risk posed by the groundwater contamination at the adjacent Hoff VC HSCA Site? For the reasons that follow, we hold that it did, and therefore, we rescind the permits.

FINDINGS OF FACT

I. Stipulated Facts

The Parties

1. Appellant New Hanover Township (the "Township"), is a Township of the Second Class with offices at 2943 North Charlotte Street, Gilbertsville, PA 19525-9718. (Joint Stipulation of Facts ("Stip.") 1.)

2. Appellant Paradise Watchdogs/Ban the Quarry is a citizen group comprised of member residents who own property in the immediate vicinity of the proposed quarry. (Stip. 2.)

3. Appellant John C. Auman is an adult individual residing at 3624 Church Road, Perkiomenville, PA 18074. (Stip. 3.)

4. The permittee is Gibraltar Rock, Inc. ("Gibraltar"), a Pennsylvania corporation with offices at 355 Newbold Road, Fairless Hills, PA 19030. (Stip. 4.)

5. The Pennsylvania Department of Environmental Protection (the "Department") is the executive agency with the duty and authority to administer and enforce the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Act), 52 P.S. §§ 3301 – 3326; the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001; the Hazardous Sites Cleanup Act (HSCA), 35 P.S. §§ 6020.101 – 6020.1305; the Pennsylvania Safe Drinking Water Act, 35 P.S. §§ 721.1 – 721.17; the Storage Tank and Spill Prevention Act, 35 P.S. §§ 6021.101 – 6021.2104; Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17; and the rules and regulations promulgated under those statutes. (Stip. 5.)

Permitting Background

6. This appeal concerns the Department's July 2, 2018 renewal of Large Noncoal Surface Mining Permit No. 46030301C2 & C3 (the "mining permit"), NPDES Permit No.

PA0224308, and Authorization to Mine No. 6794-46030301-02 (collectively the "permits"). (Stip. 6.)

7. The permits were issued by the Department's Pottsville District Mining Office. (Stip. 7.)

8. In March 2001, Gibraltar filed an application to the New Hanover Township Zoning Hearing Board challenging the substantive validity of the New Hanover Township Zoning Ordinance seeking zoning relief to operate a quarry on lands situate in the HI and LI (Heavy and Light Industrial) zoning districts of New Hanover Township, and in the alternative seeking a special exception to operate a quarry on the lands situate in the HI district. (Stip. 8.)

9. The zoning application GR-I eventually encompassed approximately 223 acres. (Stip. 9.)

10. In January 2003, Gibraltar filed a second application to the Zoning Hearing Board challenging the substantive validity of the zoning ordinance and seeking relief to operate a quarry on an additional 18 acres of land it acquired on the North Side of Hoffmansville Road at the intersection of Church and Colflesh Roads as well as the 223 acres encompassed by the GR-I zoning application. (Stip. 10.)

11. On March 7, 2003, Gibraltar submitted its initial application to the Department for a Large Noncoal (Industrial Minerals) Mine Permit for the 241 acres encompassed in the GR-I and GR-II zoning applications. The application to the Department was revised in 2004. (Stip. 11; Township Exhibit No. ("T. Ex.") 6; Permittee Exhibit No. ("P. Ex.") 16-25.)

12. Gibraltar commissioned several related geologic and hydrogeologic studies in support of its initial application to the Department. (Stip. 12; T. Ex. 3, 4, 6, 8, 9; P. Ex. 16-25.)

13. On April 15, 2005, the Department issued Noncoal Surface Mining Permit No. 46030301 and NPDES Permit No. PA00224308, authorizing surface noncoal mining activities on all 241 acres. (Stip. 13; T. Ex. 11; P. Ex. 62.)

14. A surface mining permit is valid for the life of the quarry and its reclamation. An NPDES permit, however, is valid for five years and must then be renewed every five years thereafter. (Stip. 14.)

15. In April 2010, the Department corrected the Gibraltar mining permit to renew the NPDES Permit and extend it for an additional five years. The Township appealed the matter to this Board. The Board, after hearing, denied the appeal and affirmed the issuance of the permit. (Stip. 15.)

16. In June of 2007, the New Hanover Township Zoning Hearing Board issued its decision relative to the GR I Zoning Application denying Gibraltar's request for relief to allow quarrying in both the LI and HI districts, and granting a special exception permitting quarrying only on the portion of the property located in the HI district subject to conditions. (Stip. 16.)

17. In July 2007, Gibraltar appealed the denial of its request for relief to allow quarrying in both the LI and HI districts and the imposition of certain of the conditions imposed by the Zoning Hearing Board to the Special Exception by filing a land use appeal in the Court of Common Pleas of Montgomery County (*Gibraltar Rock, Inc. v. New Hanover Township ZHB and New Hanover Township*, Docket No. 2007-16658). The Montgomery County Court of Common Pleas affirmed the denial of the challenge to the validity of the zoning ordinance but struck some of the conditions which the Zoning Hearing Board imposed on the special exception it granted. Gibraltar appealed the denial of its substantive challenge to the zoning ordinance to

the Commonwealth Court of Pennsylvania. On October 11, 2013, the Commonwealth Court affirmed in part. (*See* Commonwealth Court Docket No. 2287 C.D. 2011.) (Stip. 17.)

18. The mining permit issued to Gibraltar was required to be activated by April 15, 2008, pursuant to 25 Pa. Code § 77.128(b). Because of the pending litigation and appeal to the Commonwealth Court concerning the substantive validity of the zoning ordinance and zoning districts in which Gibraltar would be permitted to mine in accordance with the special exception (HI v. LI), Gibraltar sought and received several extensions from the Department pursuant to 25 Pa. Code § 77.128(b) to activate the mining permit. (Stip. 18.)

19. Although Gibraltar did not have final land development plan approval for its GR I plan, Gibraltar began to activate the mining permit in 2009 by beginning construction. The Township filed a petition for preliminary injunction in the Montgomery County Court of Common Pleas. The preliminary injunction was granted in May 2010, barring Gibraltar from further construction activity at the site until it had secured all local approvals. Because Gibraltar had already installed sediment basins and berms in the summer and fall of 2009, it sought "An Application for Temporary Cessation of Surface Mining Activities" pursuant to 25 Pa Code § 77.651(b) in the noncoal regulations in May of 2010. The Department ultimately issued its approval of temporary cessation status and granted numerous extensions to Gibraltar. The Township then filed appeals to this Board beginning December of 2010. The Board issued an Adjudication on November 3, 2014, sustaining in part the Township's appeal. *See New Hanover Twp. v. DEP*, 2014 EHB 834. (Stip. 19.)

20. The Board ordered Gibraltar to submit a mining permit renewal application if it wanted to maintain the mining permit while it pursued necessary local approvals "to ensure that

the 2005 permit is still up-to-date from a noncoal surface mining regulatory perspective." (Stip. 20.)

21. The Board determined that Gibraltar should be required to file an application for mining permit renewal, in a format to be determined by the Department, with the Department in its discretion to determine the nature of the additional, revised, or updated information to be submitted. (Stip. 21.)

22. Specifically, the Board directed that within thirty days of the date of the 2014 Adjudication the Department needed to notify Gibraltar of the format for a renewal application, as well as determine what additional, revised, or updated information would be required as part of the renewal application. (Stip. 22.)

23. Gibraltar filed an application for renewal of its NPDES Permit No. PA0224308 on October 10, 2014. (Stip. 23; T. Ex. 24; P. Ex. 72.)

24. On November 21, 2014, the Department issued instructions to Gibraltar outlining the information it would require to evaluate a surface mining permit renewal application in accordance with the Board's Adjudication and Order. The Department requested Gibraltar provide updated information with respect to: public notice; ownership and compliance information (Module 3); areas where mining is prohibited or limited (Module 4); property interest/right of entry (Module 5); hydrology (Module 8); streams/wetlands (Module 14); air pollution and noise control plan (Module 17); other modules that needed to be upgraded due to current regulatory requirements and/or operational situations; and recalculation of the bond applying current bond rates. (Stip. 24; T. Ex. 25; P. Ex. 73.)

25. On January 16, 2015, Gibraltar submitted a renewal application (Form 5600-PM-BM0315-1, Rev. 1/2014) along with updated modules as requested by the Department in its

November 21, 2014 correspondence, together with the application fee and information about public notice. (Stip. 25; T. Ex. 26; P. Ex. 82.)

26. With its initial renewal application submittal, Gibraltar included an updated Module 8 which noted "The Southeast Regional Office of PA DEP is investigating groundwater contamination at the Hoff VC HSCA Site ("the Hoff VC Site"), which is located to the north and west of the permit area." Gibraltar's sample analysis submitted with the renewal application identified the presence of 1,2-Dichlorobenzene; 1,1-Dichloroethane; 1,1-Dichloroethene; and Trichloroethene (TCE) in monitoring well OW-5 above their respective detection limits. (Stip. 26; T. Ex. 27; P. Ex. 82.)

27. The Department issued a technical deficiency letter to Gibraltar on April 21, 2015, identifying several deficiencies, including a request that Gibraltar submit a completed application Module 8: Hydrology with results of the additional background/monitoring samples. (Stip. 27; T. Ex. 29; P. Ex. 91.)

28. On May 20, 2015, Gibraltar, by and through its technical consultant, EarthRes Group, Inc. ("EarthRes"), submitted its response to the April 21, 2015 technical deficiency letter, including an updated Module 8 containing background/monitoring sample reports obtained in December of 2014 and January and February of 2015. (Stip. 28; T. Ex. 30; P. Ex. 94.)

29. The updated Module 8 provided by Gibraltar contained laboratory analyses of samples obtained in January and February of 2015, which indicated detections of volatile organic compounds (VOCs) at monitoring well OW-5. (Stip. 29; T. Ex. 30; P. Ex. 94.)

30. The Hoff VC Site is identified to be an area of contaminated groundwater originating from the northeast corner of the intersection of Layfield Road and Hoffmansville Road. (Stip. 30.)

31. The Good Oil property is located at 334 Layfield Road on the northeast corner of Layfield and Hoffmansville Roads. This property is considered by the Department to be the source of the Hoff VC Site groundwater contamination. (Stip. 31.)

32. The Hoff VC Site is located diagonally to the north and west of the Gibraltar mining permit area. (Stip. 32.)

33. The definition of a "site" under the Hazardous Sites Cleanup Act (HSCA) includes the "area where a contaminant or hazardous substance has been deposited, stored, treated, released, disposed of, placed or otherwise come to be located." 35 P.S. § 6020.103. (Stip. 33.)

34. On October 6, 2015, the Department sent Gibraltar a second technical deficiency letter. The letter noted that contaminants from the Hoff VC Site may enter or migrate onto Gibraltar's permit area by various pathways including surface and groundwater flow. The letter stated that the current permit application did not adequately address this possibility and requested that Gibraltar identify how it intends to monitor and provide for this possibility as part of its mining activities. (Stip. 58; T. Ex. 33; P. Ex. 102.)

35. On October 8, 2015, the Township sent a letter to the Department's HSCA program in the Southeast Regional Office, indicating its concerns that: (1) the evaluation of groundwater flow for the Hoff VC Site did not appear to have accounted for possible changes due to the quarry operations; (2) evaluation of contaminant transport did not consider future operations at the quarry; and (3) the Hoff VC Site file did not appear to discuss possible treatment of contamination through Gibraltar Rock Quarry operations as a remedy under the Hazardous Sites Cleanup program. (Stip. 59; T. Ex. 34.)

36. On October 21, 2015, the Department's Pottsville District Mining Office responded to the Township's October 8, 2015 letter indicating that it was working with the Southeast Regional Office's HSCA program to address the potential impact(s) of the contamination from the Hoff VC Site on the existing Gibraltar permit. (Stip. 60; T. Ex. 35.)

37. On November 5, 2015, Gibraltar/EarthRes sent the Department's Pottsville mining office a "draft response to your comment letter" for it to review and comment prior to issuance by Gibraltar and requested a meeting to discuss the contents of the letter. A meeting was held between Gibraltar and the Pottsville office staff on November 24, 2015. (Stip. 61; T. Ex. 38.)

Further Background on the Hoff VC HSCA Site

38. The Department had been informed in July 2011 that a nearby residential well serving a multitenant apartment building located at 324-332 Layfield Road had elevated levels of certain VOCs that exceeded drinking water standards. (Stip. 34.)

39. The Montgomery County Health Department initially collected a water sample from a well serving a multitenant apartment building as the result of a leaking heating oil tank. Chlorinated volatile organic compounds including trichloroethylene (TCE), cis-1,2-dichloroethylene (cis-1,2-DCE), 1,1-dichloroethylene (1,1-DCE), vinyl chloride (VC), and the gasoline additive methyl tertiary-butyl ether (MTBE) were detected at levels exceeding the applicable drinking water standard Maximum Contaminant Levels (MCLs). (Stip. 35.)

40. In July 2011, the Department's Southeast Regional Office (SERO) HSCA program began an investigation of groundwater contamination that exceeded drinking water standards in the vicinity of the Hoff VC Site. (Stip. 36.)

41. Well samples obtained by the SERO HSCA program in July of 2011 at nearby residences along Layfield Road also indicated the presence of 1,2-dichloroethane (1,2-DCA), benzene, 1,2-dichlorobenzene (1,2-DCB), and 1,4-dichlorobenzene (1,4-DCB) above the MCLs. (Stip. 37.)

42. On April 17, 2012, the HSCA program held a public hearing to alert affected neighboring property owners of the fact that pollutants were identified that exceeded drinking water standards. (Stip. 38.)

43. A subsequent HSCA program investigation revealed that the Hoff VC Site, which includes the Good Oil Company Property, had released a variety of hazardous substances resulting in a downgradient groundwater contaminant plume affecting residential drinking water wells at multiple homes in the area. (Stip. 39.)

44. The SERO HSCA program investigation included installing and sampling monitoring wells in the area, sampling of surface water and sediment, and conducting a vapor intrusion assessment. The SERO HSCA program contracted with Leidos Engineering, LLC ("Leidos") to assist with the investigation. (Stip. 40.)

45. Between March and April 2012, Leidos installed six deep monitoring wells: MW-1D, MW-2D, MW-3D, MW-4D, MW-5D and MW-7D. Leidos also installed three additional deep monitoring wells: MW-8D in April 2013, and MW-9D and MW-10D in May/June 2014. (Stip. 41.)

46. Between April 4 and 12, 2012, Leidos installed six shallow bedrock monitoring wells: MW-1S, MW-2S, MW-3S, MW-5S, MW-6S and MW-7S. (Stip. 42.)

47. Leidos also investigated and sampled wells and surface water points within the Gibraltar permit boundary area, including wells MW-7, OW-4, OW-5, and OW-6. Nested well screens were installed in wells OW-4 and OW-6 in September of 2012. (Stip. 43.)

48. Between January 2012 and July 2014, Leidos performed routine groundwater sampling activities as part of the site investigation. In addition, the SERO HSCA program conducted a round of groundwater sampling in May 2012. The Department's Bureau of Laboratories analyzed the samples for, among other things, VOCs, semi-volatile organic compounds ("SVOCs"), 1,4-Dioxane, and metals. (Stip. 44.)

49. The HSCA program selected an interim response in 2013 that connected the affected and threatened residential properties to the local public water supply. The Department funded construction of the waterline main, the lateral connections from the main to the affected properties, the connection of the laterals to the existing buildings' plumbing, the repairs to all road surfaces or properties disturbed by the waterline construction, and the abandonment of private wells. The interim response was completed in September 2014. (Stip. 45; T. Ex. 20, 21.)

50. In August 2014, the HSCA program had Leidos prepare a "Project Investigation Report for Hoff VC Site" ("Leidos Report") to assist with the site investigation to determine the origin of chlorinated organic compound impacts to groundwater in private potable water wells in the vicinity of the Hoff VC Site. (Stip. 46; T. Ex. 23; P. Ex. 165.)

51. The Leidos site investigation and sampling completed between January 2012 and July 2014 revealed the highest concentrations of chlorinated VOCs were detected in the Good Oil Property leaking underground storage tank case wells MW-4, MW-8, MW-13, and Department HSCA wells MW-1S, MW-4D, and MW-8D (all wells are located at the Good Oil

Property). In addition, Leidos concluded that migration of contaminants had occurred to the southwest, south, and west of the Good Oil Property. (Stip. 47; T. Ex. 23; P. Ex. 165.)

52. In 2016, the Department contracted Tetra Tech, Inc., to perform a "Groundwater Modeling and Fate and Transport Analysis for the Hoff VC Site" to evaluate the extent of the contaminant plume. (Stip. 48; T. Ex. 44, 56; P. Ex. 159.)

53. The Tetra Tech fate and transport study modeling did not account for hydrogeological changes resulting from the proposed Gibraltar Rock Quarry operations. (Stip. 49.)

54. In 2014, the HSCA program filed a cost recovery action against the owner of the Hoff VC Site. In the course of that matter, the HSCA program in 2016 learned that there remained on the property a concrete vault containing various hazardous compounds that had never been remediated. Among other actions, the HSCA program provided public notice of the concrete vault discovery. (Stip. 50; T. Ex. 54.)

55. In response to the discovery of the concrete vault at the Hoff VC Site, the HSCA program started to remediate the vault waste pit area, including disposal of the liquid waste and sludge in the vault, removal of the vault, and excavation of 217.38 tons of soil and 24,556 gallons of water surrounding the vault. Soil excavation work was terminated prior to attainment of non-impacted soil due to safety and structural concerns. The Department also installed two additional shallow monitoring wells, MW-A and MW-B, to try to track the concentration and pathway of contaminants. (Stip. 51, T. Ex. 80.)

56. The HSCA program is considering further remediation possibilities at the Hoff VC Site to address the groundwater contamination in order to be protective of human health and the environment. (Stip. 52.)

57. The HSCA program continues to monitor and collect groundwater and sediment samples at the Hoff VC Site. (Stip. 53.)

58. Recent samples have been collected in May and August of 2019 and analyzed for VOCs, SVOCs, pesticides, and metals, including the constituents TCE, MTBE, 1,2-DCB and 1,4-Dioxane. (Stip. 54; P. Ex. 166, 167.)

59. The concentration reported for 1,1-dichloroethene (1,1-DCE) in well OW-6-L for the sample dated August 6, 2019 is 2.4 micrograms per liter (ug/L). Leidos obtained at least 4 samples of well OW-6-L between 2012 and 2014. The greatest concentration of 1,1-DCE detected by Leidos was 0.71 ug/L on May 2, 2013. (Stip. 55; P. Ex. 165, 166.)

60. The concentration reported for trichloroethene (TCE) in well OW-6-L for August 6, 2019 was 4.2 ug/L. The highest concentration of TCE in well OW-6-L detected by Leidos between 2012 and 2014 was 0.74 ug/L. (Stip. 56; P. Ex. 165, 166.)

61. Well OW-6 is located on Gibraltar's property within the mining permit area. Well OW-6 is within the permit boundary and bonded support area, but not within the area that is bonded for mining activity. Well OW-6 is screened at intervals of 40 to 130 feet below ground surface (fbg) and at 210 to 260 fbg. (Stip. 57.)

Further Permitting Background

62. On December 16, 2015, Gibraltar/EarthRes submitted a five-page letter concerning the Hoff VC Site contamination. Gibraltar proposed monthly water level monitoring, as well as quarterly monitoring for various other parameters including VOCs, SVOCs, 1,4-Dioxane, total suspended solids, total dissolved solids, and pH. (Stip. 62; T. Ex. 36; P. Ex. 107.)

63. EarthRes proposed quarterly monitoring/sampling for VOCs at monitoring points OW-2, OW-4, OW-5, MW-1N, and MW-3N at the Hoff VC Site once mining commenced. (Stip. 63; T. Ex. 36; P. Ex. 107.)

64. EarthRes stated that its groundwater modeling done in 2003 showed groundwater drawdown due to quarry pumping at full development to be approximately 15 feet at the Hoff VC Site. (Stip. 64; T. Ex. 36; P. Ex. 107.)

65. Gibraltar has established what it has referred to as sentinel wells between the Hoff VC Site and the Gibraltar site. (Stip. 65.)

66. The sentinel wells have been in place for over a decade. The mining permit has requirements for quarterly sampling of VOCs/SVOCs at five groundwater monitoring points. The NPDES permit has requirements for quarterly sampling of three surface water discharge points. (Stip. 66.)

67. EarthRes also stated that there would be considerable time, 15 to 20 years, before the quarry's predicted zone of influence advances beyond the mining permit area. Gibraltar represented that any change in the water table would be gradual and identifiable and monitored by the sentinel well monitoring network. (Stip. 67; T. Ex. 36; P. Ex. 107.)

68. EarthRes offered that in the event remediation of the Hoff VC Site is not completed and contaminated water is intercepted by the quarry, water treatment options such as aeration were contemplated and would be evaluated more specifically in the future when the concentrations are known and the available technology for treatment options at that time can be accurately evaluated. (Stip. 68; T. Ex. 36; P. Ex. 107.)

69. On January 7, 2016, the SERO HSCA program notified Gibraltar that samples obtained in November 2015 at well MW-7D(L) on Gibraltar's property, directly to the south of

the Hoff VC Site on a parcel that is not proposed to be mined, detected VOCs above the Medium Specific Concentrations (MSCs) for Used, Residential Aquifers established by the Pennsylvania Land Recycling and Environmental Remediation Standards Act ("Act 2"), 35 P.S. §§ 6026.101 – 6026.908. (Stip. 69; T. Ex. 37; P. Ex. 106.) *See* 25 Pa. Code Chapter 250.

70. On January 27, 2016, the Department's Pottsville office sent Gibraltar a draft of the proposed water monitoring plan and proposed NPDES effluent limits. Draft condition #29 of the mining permit was modified to include quarterly monitoring reports for wells OW-2, OW-4 (upper and lower), OW-6 (upper and lower), MW-1N, and MW-3N after mining commenced. (Stip. 70; T. Ex. 38; P. Ex. 110.)

71. On February 23, 2016, Gibraltar submitted a "Groundwater Pumping Evaluation Addendum" to the SERO HSCA program and the Pottsville office on a later date. (Stip. 71; T. Ex. 40; P. Ex. 111.)

72. On February 22, 2016, the Township sent a letter to the Department with objections and comments to the NPDES permit renewal application and requested a public hearing be conducted. Ban the Quarry sent a similar letter on February 24, 2016. (Stip. 72; T. Ex. 39; P. Ex. 113, 115.)

73. The Pottsville office thereafter received public comments on the Gibraltar application from the Township as well as from citizens, including at a March 29, 2016 public hearing on the NPDES Permit renewal application. (Stip. 73; T. Ex. 41; P. Ex. 121, 122.)

74. On April 1, 2016, the SERO HSCA program notified Gibraltar that samples obtained in March 2016 at well MW-7D(L) (located on Gibraltar's property) detected VOCs above the MSCs for Used, Residential Aquifers established under Act 2. (Stip. 74; T. Ex. 42; P. Ex. 116.)

75. On April 28, 2016, Tetra Tech submitted to the HSCA program a report of its analysis and recommendation concerning the source or sources of contamination of the Hoff VC HSCA Site. (Stip. 75; T. Ex. 44.)

76. The Pottsville office issued its summary report of the March 29, 2016 public hearing on July 8, 2016. (Stip. 76; T. Ex. 46; P. Ex. 127.)

77. On September 22, 2016, Gibraltar/EarthRes met with the Pottsville office personnel. (Stip. 77.)

78. On October 6, 2016, Gibraltar sent the Pottsville office its official responses to the public comments conveyed in the office's July 8, 2016 Public Hearing Report. (Stip. 78; T. Ex. 52; P. Ex. 130.)

79. The Pottsville office sent Gibraltar a January 4, 2017 letter identifying the discovery of the concrete sludge vault at the Hoff VC Site and providing a list of all known contaminants detected therein. The Pottsville office again notified Gibraltar that contaminants from the Hoff VC Site may enter or migrate onto Gibraltar's mining permit area. (Stip. 79; T. Ex. 54.)

80. Because Gibraltar's then-current monitoring plan did not address all of the contaminants identified in the concrete vault investigation at the Hoff VC Site, the Pottsville office requested that Gibraltar provide a detailed proposal for all possible contaminants from the Hoff VC Site. (Stip. 80; T. Ex. 54.)

81. Gibraltar/EarthRes responded to the Pottsville office's January 4, 2017 letter on February 3, 2017. EarthRes proposed to "initially add pesticides (endrin and dieldrin) and metals (chromium and lead) to the groundwater and discharge sampling parameters to evaluate their presence in the groundwater at the Gibraltar Rock Site." Gibraltar proposed that (a) if additional

sampling conducted by the SERO HSCA program and (b) if the initial four quarters of groundwater sampling conducted by Gibraltar do not indicate the presence of endrin, dieldrin, chromium, or lead in groundwater above applicable standards, such analysis would be discontinued. (Stip. 81; T. Ex. 55; P. Ex. 132.)

82. EarthRes proposed that, if contaminant concentrations "reach levels of concern," the quarry monitoring and water handling system would be evaluated and modified to include remediation of contamination found above regulatory limits. Proposed remediation methods included aeration, oxidation (with hydrogen peroxide, ozone, etc.), thermal destruction, filtration, precipitation, and carbon polishing. (Stip. 82; T. Ex. 55; P. Ex. 132.)

83. On March 2, 2017, the Department notified Gibraltar that it had completed its technical review of the mining permit application but needed a mining and reclamation bond submittal before it could issue a permit. Gibraltar submitted the additional bond information on March 10, 2017. (Stip. 83; T. Ex. 57, 58; P. Ex. 131.)

84. On April 5, 2017, the Department notified Gibraltar that EarthRes needed to consult with the SERO HSCA program to discuss NPDES effluent limits and that the Department would be obliged to meet with public officials and citizens groups before the permit could be issued. (Stip. 84; T. Ex. 60.)

85. On June 15, 2017, Gibraltar and the Department conducted a meeting. Following the meeting, the Department sent Gibraltar a revised draft of the NPDES permit for Gibraltar to review prior to publication in the *Pennsylvania Bulletin*. (Stip. 85; T. Ex. 62; P. Ex. 133.)

86. A draft NPDES Permit No. PA0224308 was published in the *Pennsylvania Bulletin* on July 15, 2017, 47 Pa.B. 3882. (Stip. 86.)

87. On July 31, 2017, Gibraltar provided the Department with an operations map with a water handling plan as well as a drawing of the proposed final configuration of the quarries assuming full zoning approval. (Stip. 87; T. Ex. 63.)

88. On August 11, 2017, the Township sent the Department a letter with its written objections and comments to the draft published NPDES permit. The Township asked the Department to require Gibraltar to prepare a contaminant fate and transport model considering 3-dimensional groundwater flow. (Stip. 88; T. Ex. 64.)

89. EarthRes conducted a "Fate and Transport Analysis and Assessment of Hoff VC Site Contaminant Migration" to evaluate the potential groundwater migration of contaminants from the Hoff VC Site. EarthRes's Fate and Transport report was presented to various Pottsville District Mining Office officials in September 2017 in a PowerPoint presentation consisting of 22 slides. The analysis specifically evaluated the constituents TCE, MTBE, 1,2-DCB and 1,4-Dioxane. EarthRes's modeling concluded that contaminant capture due to quarry pumping was unlikely, and because the quarry footprint will develop slowly, with significant groundwater pumping not occurring for approximately 15 years, physical remediation and natural degradation of contaminants would continue at the Hoff VC Site. (Stip. 89; T. Ex. 66; P. Ex. 135.)

90. EarthRes also submitted its first round of updated background monitoring sample results for VOCs on September 6, 2017. (Stip. 90; T. Ex. 65; P. Ex. 134.)

91. On October 13, 2017, EarthRes/Gibraltar submitted formal written responses to the Township's and Ban the Quarry's August 2017 comment and objection letters. (Stip. 91; T. Ex. 67; P. Ex. 136.)

92. EarthRes/Gibraltar submitted a revised October 13, 2017 response letter on November 29, 2017. (Stip. 92; T. Ex. 69; P. Ex. 138.)

93. The Pottsville office requested additional information from Gibraltar by way of email dated December 27, 2017. (Stip. 93; T. Ex. 71.)

94. EarthRes/Gibraltar provided supplemental information to the Pottsville office on February 9, 2018. (Stip. 94; T. Ex. 72.)

95. Gibraltar submitted a revised and updated application Module 8: Hydrology on February 26, 2018. (Stip. 95; T. Ex. 74; P. Ex. 142.)

96. On March 30, 2018, the Pottsville office contacted Gibraltar proposing a few additional mining permit special conditions it wanted to discuss with Gibraltar. Additional draft permit conditions were circulated between the Pottsville office and EarthRes on April 23, 2018. (Stip. 96; T. Ex. 76, 77.)

97. Gibraltar provided a reclamation bond in the amount of $1,422,935.00, which the Pottsville office determined was reasonably calculated. (Stip. 97.)

98. The Pottsville office issued the final permits to Gibraltar on July 2, 2018. (Stip. 98; T. Ex. 79; P. Ex. 143.)

99. Gibraltar Rock's Final Land Development Plan remains pending for the GR-I/GR-II project. (Stip. 99.)

The NPDES Permit

100. The Gibraltar NPDES permit includes one mine drainage treatment discharge outfall (Outfall 001) to an Unnamed Tributary ("UNT") to Swamp Creek for groundwater and precipitation water from the mine pit sump via settling basins. In addition, the NPDES Permit includes two stormwater control discharges (Outfall 002 and Outfall 003) to the UNT to Swamp Creek for precipitation water via erosion and sediment (E&S) control facilities. (Stip. 100.)

101. The Department utilized the United States Geological Survey StreamStats ("USGS StreamStats") (streamflow statistics and spatial analysis) tool to delineate the drainage area, acquire basin characteristics, and estimate the flow statistics of the receiving stream, the UNT to Swamp Creek. (Stip. 101.)

102. Based on USGS StreamStats, at the point of discharge at Outfall 001, the drainage area is 0.087 square miles and flow yield $Q_{7\text{-}10}$ of 0.00268 cubic feet per second (cfs). (Stip. 102.)

103. Because there is no assimilative capacity in the receiving stream for the Outfall 001 discharge, the discharge must meet water quality-based effluent limits (WQBELs). The effluent limitations established in the NPDES permit have been set to prevent excursions above the water quality criteria of 25 Pa. Code § 93.8c in the receiving water of the proposed discharge to provide for the protection of aquatic life and human health. Certain water quality criteria in the NPDES permit are below the EPA-approved Test Method Detection level, in which case a Target Quantitation Limit (TQL) is set as the effluent limit. (Stip. 103.)

104. A water quality criterion has not been developed for 1,4-Dioxane, a contaminant found at the Hoff VC Site. 1,4-Dioxane is included in the NPDES permit and will be monitored. (Stip. 104.)

Site Geology

105. The Gibraltar site overlies the geologic units of the Triassic-aged Brunswick formation, which consists of reddish-brown shale, mudstone, and siltstone. (Stip. 105.)

106. Soils in the area of the quarry tend to be thin and fine grained, approximately 5 to 10 feet in thickness. (Stip. 106.)

107. Diabase dikes and sills have intruded into the Brunswick formation throughout the region. Dikes are between 5 and 100 feet thick and described as black, dense, very fine-grained rock composed of labradorite and augite. (Stip. 107.)

108. Where diabase intrudes, the Brunswick formation has metamorphosed to a hard, dark-colored hornfels, sometimes referred to as Baked Brunswick. The width of metamorphosed hornfels typically ranges between 40 to 100 feet, but hornfels can be present in a wider area where large diabase sills are present. (Stip. 108.)

109. The hornfels is the target rock for Gibraltar's quarry operations. (Stip. 109.)

110. There is a diabase sill that crops out on the ground surface to the north of the quarry site. The diabase was also found to be present beneath the surface, with the depth of the diabase increasing from northeast to southwest. (Stip. 110.)

111. The primary pathway for groundwater movement near the site is through secondary openings such as joints and fractures. Secondary openings include near vertical joints, as well as bedding planes. The orientation of the joints was found to be variable at the Gibraltar quarry site. (Stip. 111.)

112. The line of intersection of the sedimentary beds in the Triassic Brunswick formation and a horizontal surface is called the geologic strike. The strike of the bedrock in the area of the Gibraltar quarry was found to be consistently northwest to southeast. (Stip. 112.)

II. The Board's Additional Findings of Fact

The Hoff VC Site

113. There are several dozen contaminants at the Hoff VC HSCA Site, many of which continue to be present at levels that exceed Act 2 MSCs for used, residential aquifers. (T. 548-54, 568, 838, 1179-82, 1210; Department Exhibit No. ("DEP Ex.") 5.B, 9; T. Ex. 47, 54, 80.)

114. About a dozen compounds still exceed Act 2 MSCs. (T. 596-97, 1179-82; DEP Ex. 9; T. Ex. 47.)

115. The distribution of pesticides across the Hoff VC Site is uneven compared to the distribution of some of the other compounds such as TCE. (T. 553.) Different compounds will travel in different pathways depending on their molecular structure and where they were disposed or placed. (T. 543-44, 553.)

116. Despite the Department's interim cleanup measures, sources of continuing known and as yet unknown groundwater contamination remain at the site. (T. 99-101, 176-80, 182-83, 203-04, 450, 535-36, 554-55, 615, 617; T. Ex. 96 (at 23, 56-59).)

117. Although the Department has emptied and partially excavated around a concrete pit on the Hoff VC Site, contaminants are being detected in the groundwater that were not detected in the pit project, which shows there are sources at the site other than the pit. (T. 100-01.)

118. The concrete pit was about 40 feet long by 10 feet deep by 5 feet wide. The Department's Southeast Regional Office HSCA program removed about 8,000 gallons of hazardous waste from the pit in total and 217.38 tons of contaminated soil, plus another 16,000 gallons of nonhazardous liquid. (Stip. 51; T. 554, 613-14, 617; T. Ex. 80.) The pit was scrubbed, and soil was remediated around the pit, but no soil remediation was done under the concrete pit because it sits on bedrock. (Stip. 51; T. 555-56.) There were several holes in the side of the pit. (T. 554-55, 614.)

119. Not all contaminated soils could be removed because the Department decided that threats to human health were greater if they were removed than if they were left to remain in place in the context of the interim cleanup measures. (T. 614, 616-17.)

120. Areas were identified that were unable to be excavated due to the proximity of the excavation area to the facility's infrastructure, electrical lines, and/or other conditions threatening human health. (T. 616-17.)

121. The material removed from the concrete pit at the Hoff VC Site was tested and determined to be hazardous waste and disposed off-site; the soil tested next to the pit had lower concentrations of those same contaminants low enough to be disposed of as a nonhazardous waste. (Stip. 51; T. 551; T. Ex. 80.)

122. Some of the chemical contaminants at the Hoff VC Site can persist for as much as 100 years absent remediation. (T. 840.)

123. Natural degradation of contaminants is ongoing at the site but that does not mean that safety concerns have subsided. Many of the chemicals associated with the Hoff VC Site degrade into byproducts that are themselves contaminants of concern. (T. 182-83.)

124. TCE, for instance, degrades over time into dichloroethene and vinyl chloride. (T. 314-15.)

125. Monitoring well 7-D(U), located near the intersection of Hoffmansville Road and Layfield Road on Gibraltar's property, contained positive detections of TCE and 1,2-DCB for the first time in more recent sampling rounds from 2017 and 2019. (T. 183-84; T. Ex. 96 (at 60, 61).)

126. The Department's HSCA program employed consultants to assist with the interim cleanup measures. The consultants performed some groundwater flow modeling. That modeling focused on four contaminants identified at the Hoff VC Site due to the particular characteristics of those contaminants. (T. 1174-77.) Contaminants 1,4-Dioxane and MTBE were modeled because they tend to travel farther in groundwater than other contaminants identified at the site.

(T. 1175.) Contaminant 1,2-Dichlorobenzene was modeled because of historical records that the contaminant was released in the 1970s. (T. 1175-76.) TCE was chosen because it is an organic compound that can vaporize into the air from groundwater and pose a risk of inhalation. (T. 1176-77.)

127. The Department's HSCA consultants, including Tetra Tech and Leidos, have determined that contaminants from the Hoff VC Site migrated into residential wells. (T. 534-35, 595.) Of the list of contaminants, more than a dozen of them were determined to be contaminants of primary concern because they were detected at levels exceeding their respective MSC cleanup levels. (T. 596-97; T. Ex. 47.)

128. During the investigation, the HSCA program conducted multiple rounds of sampling of the residential properties located at the Hoff VC Site. As of March 2013, site contaminants had been detected at levels exceeding the MCL drinking water standards at nine residential properties. As of March 2013, 42 residential properties, businesses, and schools in the Township had been sampled. (T. Ex. 20.)

129. Pollutants from the Hoff VC Site contaminated residential water wells along Layfield Road and Hoffmansville Road, which prompted the Department to install a two-million-dollar water line to the houses and prohibit the use of groundwater at those residences for any purpose. The water line more or less transects Gibraltar's property. (T. 574-75, 577.) Nine houses had contaminants above Safe Drinking Water Act levels and seven houses had contaminants that were detected but not at levels above Safe Drinking Water Act standards. (T. 73-74, 83-84, 111-12, 533-34, 539-40, 544, 568-75, 580-81, 595, 602; T. Ex. 23, 44, 96 (at 8, 9, 11, 27).)

130. At least two of the houses with contaminated wells lie directly between the Hoff VC Site and the proposed quarry pit. (T. 73-78; T. Ex. 96 (at 8, 9).)

131. Some of the wells contained contaminants that were above the Act 2 MSC action levels used by the HSCA program, as well as safe drinking water levels. (T. 75-77; T. Ex. 96 (at 9).)

132. One of the Department's consultants during the HSCA investigation, Tetra Tech, expressed the following concern regarding the pumping of the residential wells in a 2016 report:

> Because of need to protect residences from further exposure to contaminants, PADEP was not able to directly measure the influence of nearby residential wells on groundwater flow directions at the site. However, based on limited storativity of the fractured aquifer in the area, the amount of pumping required to draw contaminants through the aquifer system is believed to be small.
>
> Pump testing performed as part of a quarry permitting process immediately south and adjacent to the site confirmed that limited pumping over short periods of time could measurably affect water levels and flow direction. Impacts were observed more than 1200 feet away during limited rate of flow, 72-hour pump tests immediately south of the truck wash area adjacent to the site where a quarry is being permitted (Gibraltar Rock Inc. 2003, Enclosure 3, Appendix D).
>
> The most impacted residential wells are less than 200 feet from the TCE wash area outfall. **Any pumping from a series of residential wells in this area would therefore very likely and strongly induce alteration of groundwater flow directions toward the residential supply wells.** Because of pumping of residential wells over time and the preferential orientation of fractures, discussed above, it is easy to understand why contamination has migrated from the washing facility outfall area to the impacted residential supply wells.

(T. Ex. 44 (at 7-8) (emphasis added).)

133. The Department has no immediate or specific plans at this time to conduct further studies and remediation activities at the Hoff VC HSCA Site, although there is no doubt that there will be such activities. (T. 159-60, 227, 533-34, 558, 618, 623-24, 1185.)

134. The Hoff VC Site remains the subject of an ongoing investigation and there is no plan to close out remediation efforts at the site. (T. 533-34, 584-85, 602-03, 613, 618, 623-24,

631, 1182-83.) One of the goals is to determine what type of further measures can be conducted at the site to address groundwater contamination. (T. 534.)

135. Only interim responses have been taken so far. (T. 534, 540, 554, 568, 597-98, 616-17, 1194-95.)

136. Other than periodic sampling, including sampling of the monitoring wells between the site and the proposed quarry pits, no active investigation or remediation is taking place at the site and there is no schedule for taking any action. (T. 533-34, 544-45, 558, 602-03, 618.)

137. The Department intends at some unspecified time to "develop a pilot study with a goal of gathering data that would be added to the administrative record to determine what type of interim response can be conducted at the site for groundwater contamination." (T. 534.)

138. There is no record evidence that anyone at the Department considered the effect that quarry pumping would have on the investigation, remedial design, or remedial action at the Hoff VC Site. (*See* T. 585, 613.)

139. There is no evidence that the Department's mining program asked its HSCA program personnel whether quarry pumping would complicate or increase the cost of HSCA activities at the Hoff VC Site. (*See* T. 1195-98, 1201, 1207-08.)

140. Although the risk of quarry pumping has been recognized, the Department's groundwater investigations to date at the Hoff VC Site have not included any consideration of a potential quarry causing the active migration of contaminants as a result of groundwater pumping. (T. Ex. 18, 20, 23, 44, 56.)

141. There is no evidence that the Department considered the interests of Potentially Responsible Parties (PRPs) at the Hoff VC Site when it issued the quarry permits.

142. The Department's primary focus throughout the quarry permitting process was on whether contaminants would enter the quarry pits, and if they did, making sure that any discharge containing those contaminants would be treated before they were discharged at unacceptable levels to surface waters. (T. 693-94, 1056-60; T. Ex. 46.)

Groundwater Monitoring Well Results Including Monitoring Well OW-6

143. Monitoring wells on and beyond the Hoff VC Site have multiple contaminants that exceed Act 2 MSCs for groundwater. (T. 86-96, 141-42, 149; T. Ex. 23, 96 (at 13-20, 39).)

144. Gibraltar's permit calls for quarterly sampling of monitoring wells once mining commences. (T. 1083, 1091-92; T. Ex. 79.)

145. Monitoring well test results so far do not support a finding that contamination at the Hoff VC Site is decreasing; rather, source contaminants appear *not* to have stabilized notwithstanding the Department's interim measures. (T. 175-187, 620, 674, 698-99, 891, 926, 1163-64, 1182-83; T. Ex. 96 (at 56-64).)

146. Monitoring well OW-5, which is the closest established well to the proposed south quarry pit at about 200 feet away, is not included in Gibraltar's approved monitoring program. Samples from OW-5 obtained by Gibraltar in 2014 and 2015 as part of its permit application detected chemicals associated with the Hoff VC Site. (T. 142-43; T. Ex. 96 (at 38).)

147. A review of the VOC data from the sampling events in December 2014 and January and February 2015 indicated the following compounds were detected in the samples from OW-5: 1,2-Dicholorobenzene (1.0 ug/L, 0.8 ug/L, 0.7 ug/L), 1,1-Dichlororethane (1.0 ug/L, 1.1 ug/L, 0.9 ug/L), 1,1-Dichloroethene (1,1-DCE) (1.2 ug/L, 1.5 ug/L, 1.2 ug/L), and Trichloroethene (TCE) (2.8 ug/L, 3.0 ug/L, 2.6 ug/L). (T. Ex. 30, 96.)

148. In sampling from November 2015, the Department detected three contaminants in excess of Act 2 MSC standards in monitoring well MW-7D(L). (T. 781; P. Ex. 106.) Sampling in March 2016 detected two contaminants in excess of Act 2 MSC standards. (T. 791-92; P. Ex. 116.) MW-7D(L) is located on Gibraltar's property, but not within the proposed mining area. (T. 791.)

149. There have not been any additional samples reported from well OW-5 since 2015. (T. 176.)

150. Well OW-6 is no more than 500 feet from Gibraltar's southern pit. (T. 892; T. Ex. 96 (at 39).)

151. Well OW-6 appears to be showing increasing concentrations of contaminants over time, although it remains to be seen whether this apparent trend will continue. (T. 185-87, 408-10, 601-02, 620; DEP Ex. 5.B; T. Ex 96 (at 63).)

152. The August 6, 2019 sample of well OW-6 showed 2.4 parts per billion (ppb) 1,1-dichloroethene, 5.1 ppb chlorobenzene, 4.2 ppb TCE, and 10.1 ppb arsenic. (T. 601; DEP Ex. 8, 9.)

153. 4.2 ppb of TCE is below the Act 2 cleanup standard for groundwater (5 ppb) but above the discharge limit contained in Gibraltar's NPDES permit (2.5 ppb). (T. 76-77, 926; T. Ex. 96 (at 39).)

154. The Department's HSCA program is not currently taking any action with respect to the contamination in monitoring well OW-6 and it has no immediate plans to take any action. (T. 1182-83.)

155. The sampling results taken at OW-6 are of particular interest because they suggest that contaminants have already spread from the Hoff VC Site across Hoffmansville Road and to

no more than 500 feet of the location of Gibraltar's southern pit. (T. 892-93, 897-98, 901, 926-28.)

156. There are no other known sources of the contaminants in the area. (T. 539-41.)

157. Toby Kessler, P.G., the Township's highly qualified expert geologist, credibly testified to a reasonable degree of scientific certainty that the contamination being detected in monitoring wells OW-5 and OW-6 originated at the Hoff VC Site. (T. 93-96, 111-12, 213-15, 247, 283-84; T. Ex. 44, 96 (at 27).)

158. The exact edges of the groundwater contamination plume(s) stretching from the Hoff VC Site as detected in the monitoring wells have not been determined, but they clearly extend onto Gibraltar's property to within no more than 500 feet of the southern quarry pit. (T. 85-98, 132-35, 707; T. Ex. 96 (at 12-20, 26, 34, 35).)

159. The Department's HSCA program has not conducted any analysis of how quarry pumping would affect the existing plumes or have an impact on the HSCA site cleanup. (T. 106-07, 1195-98, 1201, 1207-08.)

160. The Department's HSCA staff's role with respect to the mining permits was to provide a list of the contaminants at the Hoff VC Site to the Department's district mining office, and it was consulted in some way on permit conditions regarding monitoring. (T. 560, 564-65, 608, 623, 625-26, 629, 1195-96.)

161. The Department's mining program staff did not consult with the HSCA staff on how quarry pumping would affect remediation of the Hoff VC Site. (T. 612.)

162. There is no apparent program for coordination between the Department's mining program and its HSCA program regarding the Hoff VC Site and the proposed quarry going forward. (T. 585, 613.)

163. Although well OW-6 is now showing what appear to be increasing contaminant levels, the Department lacked that particular monitoring result at the time the permit was issued. (T. 703-04.) Because of recent data provided through monitoring, including the results for OW-6, the Department's mining office intends to immediately send a letter to Gibraltar asking for more information about what is going on at the site in order to make sure that the contamination is not migrating in unanticipated directions, even with the lack of quarry pumping. (T. 704, 1080-81, 1130, 1133-34, 1139-40.) The mining office personnel who testified at the hearing on the merits expressed the Department's intention to increase the frequency of sampling and to get a fresh round of all monitoring points being tested due to its concern regarding the latest sampling of OW-6. (T. 710, 1140-41.)

164. Gibraltar's NPDES permit is currently up for renewal. (T. 1087-88.) While the current NPDES permit would be administratively extended pending review, the mining office will be looking at the data from the Hoff VC Site, the available data on the mining permit, and the information gleaned from the hearing itself, including information that will be expected from Gibraltar in response to the Department's aforementioned letter. (T. 1080-81, 1088-89, 1133-35.)

165. Based on the most recent sampling in August 2019, monitoring wells MW-8D(U), MW-8D(L), MW-4D(U), MW-4D(L), and MW-B still contain the highest concentrations of contaminants exceeding the MSCs for organic substances in groundwater. (DEP Ex. 9.) Those monitoring wells are centrally located on the Hoff VC Site on the Good Oil property.

Hydrogeology

166. The presence of the Hoff VC Site required increased scrutiny in reviewing Gibraltar's permits because of the mining office's recognition of the potential risk of having a quarry next to a contaminated site. (T. 1031.)

167. The rock in the area of the Hoff VC Site and the proposed quarry is mapped as the Brunswick formation, which is a red mudstone, shale and silt stone that is fine-grained. It has been contact metamorphosed from the intrusion of a diabase near the quarry site. The diabase is a crystalline rock that begins in a thick molten state that is pushed up toward the surface and "cooks" or "bakes" the Brunswick formation surrounding it, turning the original mudstone, sandstone, and silt stones into a rock called hornfels, which is harder, and therefore desirable from an aggregate standpoint. The hornfels rock is primarily what Gibraltar seeks to mine. (T. 1043-44.)

168. The Department issued the permits based on the belief (which has turned out to be mistaken) that contamination from the Hoff VC Site would likely never reach the quarry. (T. 1065-66, 1095-1100, 1104.)

169. Natural groundwater flow in the study area tends to be from northeast to the south and southwest. (T. 114-16; T. Ex. 96 (at 28.))

170. Groundwater below the proposed quarry areas lies approximately 15-30 feet below ground surface and the quarry will encounter groundwater while excavating the first 50-foot bench elevation. (T. 842, 889.)

171. Conceptual cross sections created from well boring logs indicate that there is a continuous connection through geological layers between the Hoff VC Site and the Gibraltar quarry pits. (T. 125-27; T. Ex. 96 (at 30-31).)

172. The quarry and the Hoff VC Site are connected by fractured bedrock in continuous geology, which provides a preferential pathway for groundwater flow. The geologic setting is conducive to quarry pumping pulling contaminants toward and into the quarry pits from the Hoff VC Site. (T. 123-36, 168-74; T. Ex. 96 (at 30-36, 51-53).)

173. Gibraltar's experts acknowledge that there is a pathway for contaminants to reach the quarry pits. (T. 873-74, 977, 1007.)

174. The geological pathway for contaminant transport from the Hoff VC Site to the quarry will be primarily through fractured bedrock underlying the Hoff VC Site and beyond. The geologic strike, or direction which underlying bedrock intersects with a horizontal plane in the vicinity of the quarry, is from the northwest to the southeast. The dip is the slope of the bedrock relative to the horizontal plane, which in the area of the Hoff VC Site and Gibraltar quarry is from the northeast to the southwest at approximately 30 degrees. The proposed quarry excavations are aligned with the direction of the geologic strike and groundwater pumping typically has the most influence in the direction along the geologic strike. In this case, expected influence along the strike would be northwest to southeast, i.e. from the Hoff VC Site toward the quarry pits. (T. 114-16, 169-70; T. Ex. 3, 96 (at 28, 51).)

175. Groundwater pumping in the quarry would cause groundwater to favor flow along geological strike, i.e. northwest (area of the Hoff VC Site) to the southeast (area of the quarry pits). (T. 114-21, 131-34, 259; T. Ex. 96 (at 28, 29, 34, 35).)

176. Reported data from groundwater pumping evaluations prepared on behalf of Gibraltar in 2002 and 2016 indicate that pumping in the vicinity of the quarries tends to have the most influence on groundwater movement in the direction of the geologic strike, or northwest to southeast. (T. 116-21; T. Ex. 96 (at 29).)

177. Contaminated groundwater is already moving through the fractured bedrock from the Hoff VC Site toward the quarry, even without any pumping. (T. 132-36; T. Ex. 96 (at 34, 35).)

178. Drawdown is a term to describe the removal of water from an aquifer through, e.g., pumping, that creates a vacuum into which more water flows, with the drawdown reflecting the shape of the water table as water flows toward the point of water withdrawal. (T. 304-05.)

179. Groundwater modeling submitted on behalf of Gibraltar in 2003 predicted changes in the water table in the areas surrounding the quarry, including groundwater drawdown of the water table that extends beneath the Hoff VC Site. This supports the conclusion that groundwater levels at the Hoff VC Site will be impacted by the Gibraltar quarry pumping. (T. 122-24.)

180. A capture zone is the area that contributes water to quarry pumping. The zone of influence is the area where the water table changes as a result of the pumping (although water still may be flowing away from the pumping source) and the capture zone is where the pumping actually captures the water and controls its flow direction. (T. 68, 136-37, 916.)

181. The Hoff VC Site is within the capture zone of the quarry. (T. 319-21, 455; T. Ex. 96 (at 32-36), 97 (at 17, 48).)

182. As the quarry pit would be excavated, the water table would be drawn down approximately to the base of the quarry. (T. 131-32.)

183. Contaminants would travel from the areas within the capture zone to the quarry. (T. 136-37; T. Ex. 96 (at 32-33).)

Fate and Transport Modeling

184. A fate and transport model is used to evaluate hydrogeologic contaminant movement from a source, predicting estimated contaminant concentration, direction, and arrival time to a selected destination while accounting for parameters such as contaminant degradation and aquifer porosity. (T. 52-53, 310-14, 335-39, 349-56, 456, 657, 931-49, 976.)

185. The Department issued the Gibraltar permits in part based upon a fate and transport model prepared by EarthRes, which concluded that contamination from the Hoff VC Site would not be drawn into the quarry pits as a result of quarry pumping. (T. 657-58, 675-77, 686, 695, 722, 1042, 1054-57.)

186. The Department's mining program does not have the ability to run models on its own. The mining program does not and cannot run computer groundwater models. The Department did not call any expert witnesses on modeling, geology, or any other subject in this appeal. (T. 660-61.)

187. The Department's mining program has no in-house expertise in groundwater computer modeling, although it makes an assessment to the best of its ability. (T. 660-61, 1053.)

188. The Department accepted a PowerPoint presentation prepared by EarthRes in September 2017 of its model without the benefit of any backup files, a modeling report, or model calibration results. (T. 330-32, 339, 659-60, 376-77, 849, 870; P. Ex. 135.)

189. Dr. Charles McLane was retained by the Township to analyze whether operation of the quarry would lower groundwater elevations in such a way that it would draw contamination from the adjacent Hoff VC HSCA Site toward and into the quarry. His review included an analysis of the fate and transport studies that had been performed to date, particularly EarthRes's 2017 model that the Department relied upon as a basis for issuing the quarry's permits. (T. 297-99, 360-73, 381-82; T. Ex. 66.)

190. Of the experts who testified in this matter, Dr. McLane is the most highly qualified expert on fate and transport analysis, with more than 30 years of experience in studying the fate and transport of chemical contaminants in the subsurface, including the use of computer

simulation and digital graphic techniques to support risk assessment and remedial engineering investigations. (T. 294-96; T. Ex. 97.)

191. Dr. McLane credibly opined to a reasonable degree of scientific certainty that the EarthRes model was fatally flawed and should not have been relied upon by the Department in support of its decision to renew the quarry's permits. (T. 357-58, 360-73, 403, 451, 530; T. Ex. 97 (at 38, 41).)

192. McLane credibly opined that many of the EarthRes study's multiple flaws would have themselves individually prevented the scientifically invalid study from being relied upon. (T. 373, 403; T. Ex. 97 (at 41).)

193. McLane credibly testified that *all* of the EarthRes study's flaws had a tendency to skew the results toward a finding that quarry pumping would not draw contamination from the Hoff VC Site into the quarry pit. (T. 373, 481-82, 501-02.)

194. EarthRes's model did not show contaminants traveling from the Hoff VC Site to the Hoffmansville Road homes with contaminated wells, yet the Department has already determined, and there is no dispute, that those wells were contaminated by the Hoff VC Site. (T. 687-88.)

195. EarthRes's model does not show contaminants flowing to monitoring well OW-6, yet they have, in fact, already done so. (T. 92-94, 110-11, 213-15, 247, 283-84, 333; T. Ex. 96 (at 16).)

196. McLane also reviewed a groundwater modeling study performed by EarthRes for the quarry in 2003, before the Hoff VC Site was identified as a problem. (T. 299-300; T. Ex. 8.)

197. The ***2003*** report showed that drawdown around the quarry clearly would extend to the Hoff VC Site. (T. 300-09, 324, 898-99; T. Ex. 97 (at 5, 6).)

198. The 2003 study showed there would be approximately 15 feet of drawdown at the Hoff VC Site. (T. 301, 304, 324; T. Ex. 97 (at 6).)

199. However, EarthRes's ***2017*** fate and transport study purported to show that there would be no drawdown at the Hoff VC Site, so the 2003 study (pre-Hoff VC Site discovery: there is drawdown) and the 2017 (post-Hoff VC Site discovery: there is no drawdown) are inconsistent. (T. 301, 381-83; T. Ex. 97 (at 50, 51).)

200. The size of the EarthRes model was too small to fairly and accurately quantify quarry impacts at the Hoff VC Site consistent with good modeling practices. (T. 332, 361-67, 373-84; T. Ex. 97 (at 5, 6, 42-48, 50, 51).)

201. The EarthRes study's use of too small of a study area brought artificial boundary conditions too much into play in predicting the effects of quarry pumping. (T. 332, 362-67, 375-84; T. Ex. 97 (at 44, 45, 50, 51).)

202. EarthRes inappropriately set a constant (fixed) head condition very close to the quarry, which has the modeling effect of not letting the aquifer draw down. In the model, there is an unlimited supply of groundwater, which will feed water to the quarry and inaccurately limit its impact. (T. 332-33, 361-67, 373-84, 394; T. Ex. 97 (at 41-51, 57).)

203. The net result is a scientifically unsupportable prediction that the quarry will not draw groundwater from the Hoff VC Site into the quarry. (T. 377-84, 394; T. Ex. 97 (at 47-51, 57).)

204. The EarthRes report showed drawdown of 40 feet at the quarry even at the full quarry buildout of 300 feet depth. (T. 334, 373, 378, 382.)

205. EarthRes inaccurately modeled a relatively low permeability diabase dike as a barrier beside the Hoff VC Site as if it extended from 450 feet down all the way up to the

surface, when in fact, it only extends up to 100 feet below the surface, allowing contamination to flow over it. (T. 367-68, 981.)

206. EarthRes's model inaccurately has the flow of contaminated groundwater entering the diabase, slowing down immediately, then being consumed by EarthRes's aggressive degradation rate so that only miniscule amounts come out the other side. (T. 395-96, 480.)

207. EarthRes used erroneous contamination source locations at the Hoff VC Site, which, in addition to being inaccurate, had the effect of moving them outside the area where groundwater would be pulled by the quarry using EarthRes's model. (T. 369, 393-98, 547-48, 987-91, 1005-06; DEP Ex. 8; T. Ex. 57, 58; P. Ex. 172.)

208. EarthRes, in some cases, used concentration levels one to two orders of magnitude below some of the actual concentration levels recorded at the site. (T. 369-70, 396, 982-85; T. Ex. 23 (at 52-54).)

209. EarthRes represented to the Department that its model assumed a degradation half-life of 13 years, but when Dr. McLane investigated EarthRes's model files, he found that the degradation rate used by EarthRes was actually 4.5 years. (T. 370-71, 396, 400-402, 976-80; T. Ex. 97 (at 60); P. Ex. 135 (at 11, 12).)

210. This had the effect of removing chemicals from the aquifer faster and reducing the chances that the degraded chemicals would reach the quarry. (T. 370-72, 396, 976-79.)

211. EarthRes's modeler revealed for the first time in his deposition that he had not used the 13-year rate. He referred to the change as a "typo." (T. 978; P. Ex. 135 (at 11, 12).)

212. He testified that using the 13-year rate resulted in too much contamination reaching the quarry, so he changed it. (T. 978-79.)

213. Half-life degradation rates should be explained and justified, which EarthRes did not do. (T. 516-17.)

214. Even using EarthRes's defective study, quarry pumping will spread the contaminant plumes and will result in contamination of groundwater in areas that are not currently contaminated. (T. 406-07, 873-74, 888-89, 982; T. Ex. 97 (at 59).)

215. Groundwater that was not contaminated before will become contaminated as a result of quarry pumping. (T. 351-53, 406-07, 505-06, 514; T. Ex. 97 (at 31-35).)

216. In contrast to EarthRes's model, Dr. McLane's own modeling credibly predicts that quarry pumping will divert contaminated groundwater originating at the Hoff VC Site toward the quarry pits. (T. 335-58, 442, 444-45, 492, 514, 525-26; T. Ex. 97 (at 27-35).)

217. Dr. McLane is not able to opine exactly *when* the contamination will enter the quarry pits. (T. 441-48, 461-63, 496.)

218. Unlike EarthRes's model, McLane's modeling placed boundaries far away from the areas of interest and consistent with natural hydrologic boundaries, as dictated by good and accepted modeling practices. (T. 335-36; T. Ex. 97 (at 27).)

219. Unlike the EarthRes model, the McLane model was extensively calibrated and shown to jibe well within a statistically acceptable level with actual geological information that is known about the study area (e.g. well logs, precipitation data, well water level measurements). (T. 336-45, 423, 487-89; T. Ex. 97 (at 28).)

220. McLane's model utilized the contaminant source locations on the Hoff VC Site previously identified by the Department's HSCA consultants. (T. 351-52.)

221. The contamination that is drawn towards and into the quarry is credibly predicted to exceed Pennsylvania's MSC standards. (T. 355-58, 442, 462, 498; T. Ex. 97 (at 36, 37).)

Gibraltar's Program for Monitoring Encroaching Contamination

222. The Department issued the permits based in part on the assumption that Gibraltar's system of "sentinel wells" would pick up encroaching contamination from the Hoff VC Site in time to take unspecified preventative measures or other unspecified appropriate actions. (T. 1066-67.)

223. The idea of a "sentinel" well network is to establish monitoring points between the quarry pits at areas with no known contaminants and the Hoff VC Site contamination so that movement of contaminants can be observed. (T. 140-41.)

224. Monitoring wells are unable to constrain the spread of a contaminant plume and only serve to indicate the spread of contamination after it has occurred. (T. 605.)

225. The monitoring program is deficient because the so-called sentinel wells are already contaminated and no longer function to provide an early warning of the spread of contamination. (T. 140-47, 195, 246-47; T. Ex. 96 (at 38-40).)

226. There are currently not enough wells in place to fully define the edge of the plume. (T. 85.)

227. There is nothing in the permits or elsewhere requiring any action on Gibraltar's part if the groundwater in the vicinity of the monitoring wells becomes more contaminated. (T. Ex. 79.)

228. The Department witness's speculation that monitoring wells might be able to be used as recovery wells in remediation to arrest the spread of contamination is not credible. (T. 1076-79.)

229. No one at the Department has evaluated the potential interaction between any recovery wells and quarry pumping with respect to the containment and remediation of groundwater contamination emanating from the Hoff VC HSCA Site. (T. 1125-26.)

230. Monitoring wells should not typically also be used as remediation or recovery wells because then they would not be observing the influence of pumping, and because they would have to be deconstructed in order to place a pump down the well. (T. 1076-79, 1123-26.)

Treatment of Contaminated Water

231. The Department issued the permits in significant part based on the assumptions (1) that the only contamination of concern is contaminated water that actually enters the quarry pits, and (2) that contaminated pit water can and will be treated prior to discharge to surface waters. (T. 160-61, 1057-60, 1065, 1096-99, 1104-05, 1113; T. Ex. 96 (at 46).)

232. Gibraltar's permits do not specify any obligation on Gibraltar's part to clean up contaminated groundwater emanating from the Hoff VC Site, regardless of whether quarry pumping has caused the active migration of contaminants in the groundwater. (*See*, e.g. T. Ex. 79 (at Special Conditions 38, 39).)

233. Under Special Condition 38 in Gibraltar's permit, Gibraltar is only required to cooperate with the Department to allow access to its permit area. (*Id.*)

234. Under Special Condition 39, the Department reserved the right to modify, suspend, revise, or rescind Gibraltar's permits only if (1) unforeseen circumstances or issues (2) related to the Hoff VC Site developed that (3) would impact or potentially impact (4) permitted activities (5) that were not addressed or anticipated in the permit. (*Id.*)

235. The permits do not address Gibraltar's obligations, if any, with regard to contaminated pit water post-mining. (T. Ex. 79.)

236. Contaminated groundwater entering the pits would accumulate in unlined sumps in the bottom of the pits. (T. 906, 910.)

237. Gibraltar must satisfy discharge limits for several but not all of the contaminants found at the Hoff VC Site such as VOCs, SVOCs, metals, and pesticides if it discharges pit water pursuant to its NPDES permit. (T. 689; T. Ex. 79.)

238. The Department has determined that 1,4-Dioxane, a probable carcinogen, is a monitor-only chemical because Pennsylvania has not developed a surface water quality criterion for it. Gibraltar may discharge unlimited amounts of 1,4-Dioxane. The Act 2 MSC for 1,4-Dioxane is 6.4 ppb. (T. 70, 77, 150-53, 553, 556, 565, 1110; T. Ex. 96 (at 42).)

239. In response to Township comments and the Department's inquiries, Gibraltar during the permit application process identified hypothetical methods for treating its discharge. (T. 65-66, 160-61, 232; T. Ex. 39, 55, 96 (at 6).)

240. No treatment method for dealing with any of the contaminants is specified in the permits. (T. 145, 208, 907, 1096-99; T. Ex. 97.)

241. Neither Gibraltar nor the Department performed any analysis of what treatment processes would work or how they would or could be installed, or how quickly they could be brought online, or what would be done with contaminated water in the pit in the meantime. (T. 65-66, 160-61, 820-22, 907, 924-25, P. Ex. 130, 138.)

242. There have been no estimates of potential treatment costs, and the quarry's bond does not account for any treatment costs. (T. 50-51, 66-67, 145, 157-62, 208, 278-79, 658-59, 670, 907-08, 1144-47; T. Ex. 57, 58.)

Department Witnesses' Concerns About the Permits

243. The Department's mining office's intent was to not issue a permit that allows the quarry to intercept contamination plumes or allows contamination to move near or toward the quarry. (T. 1059-60, 1129-30.) The Department's theory was that, if the monitoring reports showed that contaminants were being encountered in the groundwater moving toward the quarry, then the mining office would not let the quarry get to the point of pumping and drawing more contaminants into the quarry. (T. 720-21.)

244. Monitoring results now confirm that contaminants are being encountered in the groundwater moving toward the quarry. (T. 93-96, 111-12, 213-15, 246-47, 283-84; T. Ex. 44, 96 (at 27).)

245. The two Department witnesses involved in reviewing and approving the permit renewals were Michelle Hamlin, Geologic Specialist, and Michael Kutney, Environmental Group Manager (or the permits chief). (T. 643, 1014-15.)

246. Mr. Kutney testified that he intended to require more information from Gibraltar following the revelations at the hearing, including the contamination found in the closest actively sampled monitoring well to the mine site (OW-6) and Dr. McLane's criticisms of the EarthRes model. (T. 1080-81, 1092, 1114-15, 1130-41, 1151-55, 1158.)

247. He testified that the Department will look at EarthRes's model again "really hard." (T. 1131-32.)

248. Mr. Kutney testified that he would not have issued the permits if he knew then what he knows now. (T. 1136-37, 1153-55.)

249. Mr. Kutney testified that Gibraltar could expect to receive a letter requesting further explanation regarding the inconsistencies revealed at the hearing. (T. 1080-81, 1114-15, 1130, 1132-34, 1137.)

250. Mr. Kutney was concerned regarding EarthRes's fate and transport study, which indicates contamination will never reach the quarry, yet recent sampling of monitoring well OW-6 indicates that contamination may have already spread to the permit area. (T. 1114-15, 1130-32.)

251. After hearing Dr. McLane's testimony at the hearing, Ms. Hamlin testified that, if the Department's mining staff had been aware of Dr. McLane's criticisms of EarthRes's model prior to issuing the permit, the criticisms were sufficiently concerning that the Department would have asked EarthRes to respond. (T. 676-78, 719, 721.)

252. Ms. Hamlin testified as follows:

> Q. Would you agree that the testimony and evidence presented by Mr. Kessler and Dr. McClane [sic] is presumptive evidence of potential pollution resulting from the mining application?
>
> A. I think it presents some questions that we should evaluate and ask EARTHRES to – Gibraltar quarry to respond to.

(T. 725.)

253. Ms. Hamlin also testified she was concerned with the contamination detected in monitoring well OW-6. (T. 704, 710, 725.)

DISCUSSION

In third-party appeals such as this, the appellants bear the burden of proof. 25 Pa. Code § 1021.122(c)(2). The appellants must show by a preponderance of the evidence that the Department acted contrary to law or unreasonably or that its decision is not supported by the facts. *Solebury School v. DEP*, 2014 EHB 482.

The purpose of the Noncoal Act includes protecting land, decreasing soil erosion, preventing pollution of rivers and streams, generally improving the use and enjoyment of the lands, and preventing and eliminating hazards to health and safety. 52 P.S. § 3302. *See Tinicum Twp. v. Del. Valley Concrete*, 812 A.2d 758, 760 n.4 (Pa. Cmwlth. 2002) ("The Non-Coal Act was passed to address the negative affects [sic] of surface mining by improving conservation of the land, protecting the health and safety of citizens and wildlife, and limiting pollution."). No permit may be issued unless the applicant affirmatively demonstrates that:

> (1) The permit application is accurate and complete and that all requirements of this act and the regulations promulgated hereunder have been complied with.
> (2) The operation and reclamation plan contained in the application can be accomplished as required by this act and regulations.
> (3) The operation will not cause pollution to the waters of this Commonwealth.

52 P.S. § 3308(a). The applicable regulations provide that a permit, permit renewal, or revised permit application may not be approved unless the applicant affirmatively demonstrates and the Department finds in writing that, among other things,

> (1) The permit application is accurate and complete and that the requirements of the act, the environmental acts and this chapter have been complied with.
> (2) The applicant has demonstrated that the noncoal mining activities can be reasonably accomplished as required by the act and this chapter under the operation and reclamation plan contained in the application.
> (3) The applicant has demonstrated that there is no presumptive evidence of potential pollution of the waters of this Commonwealth.

25 Pa. Code § 77.126(a). Among other requirements of 25 Pa. Code Chapter 77, the chapter that deals with noncoal mining, the applicant must show that it will ensure the protection of the quality and quantity of surface water and groundwater, both within the permit area and adjacent areas, as well as the rights of present users of surface water and groundwater. 25 Pa. Code § 77.457(a); *Plumstead Twp. v. DER*, 1995 EHB 741, 776-77. *See also* 25 Pa. Code § 77.521 (mining to be planned and conducted to minimize disturbances to the prevailing hydrologic

balance in the permit and adjacent areas).[1] The Department's duty to ensure that mining can be "reasonably accomplished" requires it to ensure that the mining can be performed in accordance with the law without an undue risk to health, safety, and the environment. *Solebury School*, 2014 EHB at 521.

Presumptive Evidence of Potential Pollution

One of the central questions in this appeal is whether there is presumptive evidence of potential pollution of the waters of the Commonwealth if the quarry is permitted. Or, to be more precise (and convoluted), whether the Appellants have shown by a preponderance of the evidence that the Department incorrectly concluded that Gibraltar affirmatively demonstrated that its activities presented no presumptive evidence of potential pollution.[2] The issue boils down to whether it is appropriate to permit the quarry next to a hazardous site with contaminated groundwater. The Appellants contend that contaminants from the Hoff VC Site will migrate via groundwater through bedrock toward and into the Gibraltar quarry and ultimately into the quarry discharge, and thus the Department should not have allowed Gibraltar to receive a mining permit renewal or the NPDES permit. The Department and Gibraltar originally claimed that contaminants would never reach the quarry, but if they did and pit water became contaminated, that would be okay because Gibraltar would be required to treat the water to meet strict discharge limits in its NPDES permit before discharging the water to surface waters. The Department now

[1] Hydrologic balance is defined as "[t]he relationship between the quality and quantity of water inflow to, water outflow from and water storage in the hydrologic unit, such as a drainage basin, aquifer, soil zone, lake or reservoir. The term includes the dynamic relationships among precipitation, runoff, evaporation and changes in groundwater and surface water storage." 25 Pa. Code § 77.1.

[2] The Appellants' complaint to the contrary notwithstanding, Gibraltar's combined mining/NPDES permit, the NPDES Written Findings Document, and the Comment Response Document together satisfied the Department's obligation to make a *written* finding regarding the presumptive evidence of potential pollution as required by 25 Pa. Code § 77.126(a). Section 77.126(a) does not require the use of any particular form.

appears to have backed off that position, seemingly now recognizing that spreading groundwater contamination is itself problematic.

Since the risk here originates at the Hoff VC Site, it is important to understand that groundwater there is contaminated with numerous substances including VOCs, SVOCs, heavy metals, and pesticides, some at levels of magnitude above Act 2's medium specific concentrations (MSCs) for groundwater. There is reason to believe that not all substances have been identified. Certainly not all sources have been identified and ameliorated, notwithstanding the Department's interim measures. There is no consistent trend yet on whether groundwater is improving, getting worse, or stabilizing, despite the Department's interim measures. Contamination at the site will persist indefinitely absent remediation. Natural attenuation alone cannot be counted upon to resolve the contamination. Yet there are no current plans for investigation, remedial design, or remediation.

Gibraltar and the Department correctly point out that the restriction against presumptive evidence of potential pollution is not a restriction against any impact whatsoever. Permits exist to provide a limited allowance of what might otherwise constitute an unlawful activity. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 243, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Birdsboro Mun. Auth. v. DEP*, 2001 EHB 377.

The Department's initial error in this case is that from the very beginning it has unduly, if not exclusively, focused on whether the quarry would pollute *surface* waters. The Department's review of Gibraltar's permit application analyzed whether polluted groundwater from the Hoff VC Site would be drawn *into the quarry pits* as a result of quarry pumping, and, therefore, contaminated water would need to be treated and then discharged to surface waters. For example, in responding to a public comment that the quarry pumping could threaten residential

wells with contamination, the Department responded that there was nothing to worry about because Gibraltar's NPDES permit limits would be protective of the public, yet the NPDES permit only relates to the surface water discharge. (T. Ex. 46.) In its pre-hearing memorandum, the Department identified the key question in this appeal to be whether contaminants from the Hoff VC Site will migrate via groundwater to the quarry and ultimately into the quarry discharge. (Pre-hearing Memo. at 17-18.) To be fair, the Department's focus on the quarry's discharge was driven by the Appellants' own framing of the issue in the same way, but regardless of the Appellants' position, it is incumbent on the Department to be just as concerned with contamination underground as it is with contamination above ground.

The Department appears to have come around to the correct position in its post-hearing brief, claiming that it determined that groundwater from the Hoff VC Site was not likely to move *toward* or be intercepted by quarry operations. (*See, e.g.*, Brief at 66.) We are hesitant to credit this claim, but at least the Department has begun to properly frame the issue. At another point, the Department in its brief states:

> If the monitoring reports show that contaminants are being encountered in the groundwater moving *toward* the quarry, then PDMO [the Department's mining office] expects that it would not let the quarry get to the point of pumping and drawing more into the quarry.

(Brief at 78 (emphasis added).) This promise of future enforcement action is, of course, not binding or particularly relevant, but again, it is premised on the correct issue: preventing new groundwater contamination matters. (*See also* Brief at 83 ("Even so, PDMO's [the mining office's] intent is not to issue a permit that allows the quarry to intercept the contamination plume or allows contamination to move near or toward the quarry, 'whether it's within 1 foot' of the quarry pit or even half-way there…"); *id.* at 86 (mining office's "obvious concern for preventing the undue spread of contamination" and the mining office "does not intend to allow

mining that causes the contaminant plume to move in an unanticipated direction…").) Perhaps most interesting is the Department's following commitment without citation to the record:

> Should the plume spread in an unanticipated manner due to any future quarry pumping, and it impacts water supplies not currently covered by the SERO [Southeast Regional Office] HSCA response of providing a public water supply line, the Department would require Gibraltar to be responsible for any remediation or costs associated with such action.

(Brief at 87 n.2.)

The record does not support a finding that permitted quarrying will result in potential pollution of surface waters. As for groundwater, it is hard to believe that the drafters of the Noncoal Act and the regulations promulgated thereunder contemplated the spread of groundwater contaminated with solvents from another site when they spoke of the presumptive evidence of potential pollution, and all parties agree this case presents a novel situation. Under the highly unusual circumstances presented here, we are able to conclude that the spread of multiple hazardous contaminants in the groundwater that would result from quarry pumping constitutes the sort of presumptive evidence of potential pollution that cannot be permitted consistent with the Noncoal Act. 52 P.S. § 3308(a); 25 Pa. Code § 77.126(a)(3). In this case, the record clearly supports a finding that quarrying pursuant to the permits is likely to intercept the contamination plumes emanating from the Hoff VC Site and contaminate previously uncontaminated or less contaminated groundwater, a scenario that is not meaningfully accounted for in the permits. Therefore, the permits were issued in error.

In order to determine whether there is presumptive evidence of potential water pollution, we require the testimony of expert witnesses. Unfortunately and inexplicably, the Department chose not to present *any* expert testimony in this appeal, despite the fact that the key issue requires expert testimony. Instead, the Department presented the testimony of the permit reviewers to explain as a factual matter what they decided. They explained as a factual matter

why they did what they did, but they did not follow it up with any expert opinion that those decisions were scientifically defensible. As a result, we have no expert testimony from the Department on whether there is presumptive evidence of potential water pollution. We have no expert testimony from the Department on the geology of the site. We have no expert opinion from the Department on the geological modeling that was done. We have no expert testimony from the Department (or any party for that matter) on the effect the quarry would have on the HSCA remediation of the Hoff VC Site.

At numerous points throughout its brief the Department refers to "its own team of expert geologists" who have substantial "expertise" regarding the matters in question. While we do not doubt these statements are generally true, we are obviously limited to the record produced in this appeal and there is *no record in this case* generated in accordance with the rules of evidence regarding the admission of expert opinion evidence of any such expertise. Therefore, we have only the factual testimony of the permit reviewers.[3]

The Department's lack of any expert testimony leaves us with the expert testimony on the potential pollution issue of four experts: Toby Kessler, P.G., the Township's expert geologist; Dr. Charles McLane, the Township's expert fate and transport modeler; Louis Vittorio, P.G., Gibraltar's expert geologist; and Mathew Weikel, P.G., Gibraltar's expert modeler. It has not escaped our notice that the Department in its brief makes little attempt to endorse the testimony of Vittorio or Weikel, Gibraltar's witnesses. The Department criticizes the testimony of Kessler and McLane in its brief, but those criticisms are largely lawyerly attacks on general credibility (e.g. McLane was "evasive") rather than substantive criticisms supported by expert testimony.

[3] At the hearing we sustained objections to the Department's perhaps inadvertent attempts to present expert testimony. No party has challenged those rulings in its post-hearing brief.

In any event, we found both Kessler and McLane to be highly credible witnesses. Toby Kessler is a registered professional geologist in the state of Pennsylvania who has 20 years of experience working in the field. He has a master's degree from MIT and focuses his work on geology, hydrogeology, and environmental site assessments. His testimony reflected a considered examination of the geology of the Hoff VC Site and the Gibraltar permit area. Dr. Charles McLane has 35 years of experience assessing contaminated sites and the effects of groundwater withdrawals on aquifers. He was qualified as an expert in hydrogeology, chemical fate and transport analysis, and contaminated site investigation and remediation. His testimony demonstrated his extensive experience with groundwater modeling and his learned analysis of contaminant movement through groundwater.

Weighing competing expert testimony is one of the Board's core functions. *Gerhart v. DEP*, 2019 EHB 534, 558. *See also DEP v. EQT*, 2017 EHB 439, 497, *aff'd*, 193 A.3d 1137 (Pa. Cmwlth. 2018). The weight given an expert's opinion depends upon factors such as the expert's qualifications, presentation and demeanor, preparation, knowledge of the field in general and the facts and circumstances of the case in particular, and the quality of the expert's data and other sources. *Crum Creek Neighbors v. DEP*, 2009 EHB 548, 561. "We also look to the opinion itself to assess the extent to which it is coherent, cohesive, objective, persuasive, and well grounded in the relevant facts of the case." *EQT*, 2017 EHB at 497. "Resolution of evidentiary conflict, witness credibility, and evidentiary weight are matters committed to the discretion of the Board." *EQT Prod. Co. v. Dep't of Envtl. Prot.*, 193 A.3d 1137, 1149 (Pa. Cmwlth. 2018) (citing *Kiskadden v. Dep't of Envtl. Prot.*, 149 A.3d 380, 387 (Pa. Cmwlth. 2016)).

Geologic Setting Conducive to Potential Pollution

Perhaps the length of this Adjudication could have been reduced if hydrogeologic conditions in the area of the quarry and the Hoff VC Site were not conducive to the expansion of groundwater contamination associated with the Hoff VC Site as a result of pumping, but we credit the expert opinion of Toby Kessler given to a reasonable degree of scientific certainty that they are. Kessler explains the hydrogeologic connection by pointing to the homogeneous bedrock connecting the two sites, which is hardly surprising given that the sites are adjacent to each other. Although passive natural groundwater migration from the Hoff VC Site is more south or southwest than southeast, quarry pumping would pull that flow sideways more to the southeast toward the pumping. This is not a case where natural groundwater flow is in the opposite direction. All that is necessary here is a shift to the side. The water table would be lowered and its gradient will change. Pumping would be likely to move groundwater flow along the northwest-southeast strike of the bedrock, i.e. from the Hoff VC Site and its contaminated plumes toward the quarry. There would be an elongated zone of influence along geologic strike. This will extend the plumes of contaminants into previously uncontaminated or less contaminated areas.

The contamination detected in the residential wells and the monitoring wells supports Kessler's opinion of the hydrogeologic connection between the Hoff VC and quarry sites. In August of 2019, the HSCA program performed additional sampling and testing for contamination at wells on Gibraltar's property monitored as part of the Hoff VC Site, including well OW-6. Well OW-6 had not been tested for contamination since September of 2017. The Township has concerns, echoed by its experts, that contaminant concentrations in OW-6 have exhibited a gradual increase over time. TCE in well OW-6(L) is now only .8 ug/L from

exceeding the MSC under Act 2. 1,1-DCE exhibited similar increases in concentrations over time, more than tripling from a detection of .71 ug/L in 2013 to 2.1 and 2.4 ug/L in 2017 and 2019, respectively. Not only have contaminant levels increased in monitoring wells, but new contaminants also associated with the Hoff VC Site have recently appeared. For example, TCE was not detected in well MW-7D(U) until 2017. While the contaminant levels are relatively low, the trend is concerning and the data support the existence of a hydrogeologic pathway.

The presence of the contaminated residential wells between the Hoff VC Site and the quarry site shows that contamination was headed in a southerly direction even without quarry pumping. This is "real world" data, to use the Department's phrase, which has nothing to do with modeling. The contamination exceeds drinking water and/or Act 2 groundwater MSCs by as much as two orders of magnitude. The residential well results are consistent with monitoring well results. The credible expert opinion is that this contamination originated at the adjacent Hoff VC Site. For the Department to say as it does that the source of the contamination in the monitoring wells remains to be determined strikes us as bordering on willful blindness given the results from the nearby residential wells, which it has determined came from the Hoff VC Site. Quarry pumping will not need to reach far to expand this contaminated groundwater; the plume is already within 500 feet of the southern quarry pit. The Department takes comfort in the fact that monitoring wells close to the Hoff VC Site are more contaminated than wells closer to the quarry site, which is undoubtedly comforting but we do not follow why that fact would support issuance of the permits. The Department also tells us there are hazardous sites that are far more contaminated than the Hoff VC Site, but again, we fail to see the relevance of that comparison.

As previously mentioned, we do not have the benefit of any expert testimony from the Department. Gibraltar's expert, Mr. Vittorio, opines that, due to the tight geologic formations

lacking substantial interconnected fractures at the site, there would be a steep cone of depression around the quarry and not much groundwater would be pulled into the pit. We respect Mr. Vittorio's extensive experience with quarries in the area and we have no reason to doubt this opinion. Mr. Kessler acknowledged the limited groundwater movement in the strata involved. (T. 113-14.) However, Mr. Vittorio's conclusion does not support issuance of the permits. First, the focus of Mr. Vittorio's opinion throughout has been that contaminants are not likely to actually get drawn into the quarry pits during active operations, but as we have discussed, that should not have been the exclusive inquiry in this case. Mr. Vittorio concedes that it is certainly possible contaminated water will be drawn toward the pits (T. 873-74), and it is that additional groundwater contamination that should be the true cause for concern. There is simply no doubt the quarry pumping will expand the plumes. EarthRes's 2003 model showed groundwater would be drawn toward the quarry, and EarthRes's fate and transport model shows an expansion of the plumes. Mr. Vittorio has not opined to a reasonable degree of scientific certainty that quarrying will not intercept the plumes and draw them further from the Hoff VC Site. By conceding the possibility of contaminants being drawn toward the quarry, Mr. Vittorio concedes the hydrogeologic connection between the sites.

The second problem with Mr. Vittorio's opinion about the tight geology is that it proves very little. He opines that the steep cone of depression will not extend out a "significant distance." (T. 865.) This opinion is not entirely consistent with the data, but assuming it is correct, a "significant distance" is obviously quite vague and has not been credibly defined. More importantly, very little distance is required in this case. The contamination is already at the residential homes, some of which are in between the two proposed pits, as well as OW-5 and OW-6. Contamination is already present on the Gibraltar property.

Similarly, Mr. Vittorio's prediction that not much groundwater will seep into the pits is vague and based largely on rough comparisons with other similar quarries such as the "Perkiomenville Quarry." We were presented with few specifics and no actual data regarding these "other quarries." This lack of foundation detracts from the weight we might otherwise have afforded the opinion, especially in the face of the Township's expert's unequivocal and well supported opinion that the Hoff VC Site itself, let alone the existing contaminant plumes emanating therefrom, is well within the quarry's projected capture zone.

Modeling

Mr. Kessler on behalf of the Township persuaded the Department that it should require Gibraltar to perform a fate and transport model to predict whether contaminants would be drawn toward and into the quarry pits from the Hoff VC Site. We have the sense that the Department accepted the suggestion more as a way of appeasing the Township and the public than because it agreed that the information would be valuable. Nevertheless, the Department clearly relied in part on EarthRes's model in deciding to issue the permits. We were left with the impression that the model helped tip the balance in favor of permit issuance after nearly four years of deliberation following our remand.

Gibraltar had EarthRes prepare a model. It then presented a 22-slide PowerPoint presentation to the mining program staff. There is no record that the mining personnel have any expertise in modeling or the ability to critically assess a model. The Department witnesses certainly minimized their abilities in this regard. The Township goes so far as to argue that one of the Department's greatest errors in this case was issuing a permit based upon a model that the Department was unable to fully understand without obtaining some outside experts as it did with the HSCA cleanup.

The PowerPoint presentation was at best incomplete and arguably misleading in some respects. Among other things, EarthRes represented to the Department that it used a different and more favorable degradation rate for TCE than it actually used (13 years vs. 4.5 years). EarthRes later referred to this as a "typo," which goes to its credibility. The Department neither requested nor received the back-up files for the model, which are necessary if the model is to be fully understood.

Like the Department and Gibraltar, we believe that the importance of modeling should not be exaggerated. In *M & M Stone Co. v. DEP*, 2008 EHB 24, *aff'd*, No. 383 C.D. 2008 (Pa. Cmwlth. Oct. 17, 2008), we were faced with what the appellant fairly characterized as two dramatically different understandings of hydrogeologic reality. We were unable to credit the opinion of one of the experts in that case whose opinions regarding a hydrogeologic connection were almost entirely based on modeling because the model results did not appear to calibrate well with actual results gathered in the field. In *Solebury School v. DEP*, 2014 EHB 482, we were unable to credit a model coincidentally relied upon by Mr. Vittorio, Gibraltar's expert in this case, because the model predicted wildly crenellated contour lines, lines not supported by adequate data, and lines that depicted "crazy flow paths." Modeling is obviously a valuable tool, but as a computer-generated prediction based on many input decisions, there is plenty of opportunity for manipulation designed to achieve a desired result. Proper calibration of the model with actual field measurements (e.g. computer-generated water levels vs. actual levels) operates as a check on manipulation, but it cannot eliminate the possibility for mischief entirely.

In this case, we are presented with dueling models. EarthRes's model predicts no impact; the Township's model performed by Dr. McLane predicts that the quarry will intercept the contaminated groundwater at and near the Hoff VC Site and draw it toward and into the quarry

pits. We find Dr. McLane's model to be more credible, which stands as further proof that Gibraltar failed to affirmatively show that there would be no presumptive evidence of potential pollution.

Dr. McLane was generally the far more credible witness based upon his experience and presentation. The Department accuses him of being evasive in his answers, but we strongly disagree. We found him to be exceptionally erudite and persuasive. His presentation was organized, detailed, and unbiased toward or against noncoal mining.

EarthRes's credibility suffers from the inconsistency between its fate and transport model and its earlier pumping test. The later model was a small area and shows no transport to the pits, yet the earlier pumping test report showed drawdown extending below and past the Hoff VC Site. At the time, the Hoff VC Site was not being considered as a problem. This suggests the later model may be somewhat result-oriented. Mr. Vittorio says the earlier model was based on porous media, but so was the later fate and transport model. Mr. Vittorio says the earlier work was based on a deeper quarry pit, yet EarthRes's latest work postulates groundwater inflow far up on the quarry wall, which means the depth of the quarry in this context would seem to have little relevance.

We also have EarthRes's shifting explanations regarding the half-life degradation rates of solvents as they are pulled toward the quarry. We do not view this factor as particularly significant in and of itself, but EarthRes's handling of the issue is pertinent in weighing credibility. EarthRes apparently ran its model using 13 years as the half-life of TCE, which was the figure used by one of the Department's HSCA consultants in its earlier work. When asked on cross-examination whether using 13 years resulted in "just too much contamination" in the pits, apparently in relation to poorly described calibration with actual monitoring results, Mr.

Weikel, Gibraltar's modeler, answered yes. (T. 979.) Therefore, he ran the final model using a 4.5-year value, which made the TCE degrade before reaching the quarry. Yet the PowerPoint presentation to the Department kept the value at 13 years. This discrepancy was not revealed until Mr. Weikel's deposition. (T. 978.) Both Mr. Vittorio and Mr. Weikel referred to the discrepancy as a "typo." (T. 810, 978.)

As previously noted, calibration of the model is critically important to assess whether the model reflects reality. Dr. McLane explained the calibration of his model and how it performed within generally accepted statistical limits. EarthRes has not, which is particularly noteworthy in that its calibration or lack thereof has been challenged. That alone weighs very heavily in favor of the McLane model.

We credit Dr. McLane's other criticisms of EarthRes's model, none of which were adequately explained by Mr. Vittorio or Mr. Weikel. EarthRes modeled an area that was too small to appropriately quantify quarry impacts at the Hoff VC Site. The model size compares unfavorably with EarthRes's use of a much larger area for its previously mentioned pumping tests and with McLane's model which used the natural drainage basin. EarthRes's unsatisfactory reason for shrinking the domain size: cost of the modeling. EarthRes's choice, as well as the input choices pertinent to all of McLane's other criticisms, tended to minimize the effect of quarry pumping.

Exacerbating the small domain size was EarthRes's use of constant head cells near the Hoff VC Site, which had the effect of artificially supplying the quarry with an unlimited supply of groundwater. This, in turn, contributed to a flattening of the drawdown curve from the quarry. EarthRes's model created a greater diabase barrier to groundwater flow than is actually present that, when combined with long contaminant degradation rates previously mentioned, prevented

undegraded contaminants from reaching the quarry. EarthRes used contaminant levels that did not in all cases jibe well with field measurements (e.g. MTBE 50 ppb vs. 4,870 ppb; 1,2-DCB 100 ppb vs. 1,000 ppb).

One of the most troubling and inadequately justified aspects of EarthRes's model is that it placed the source area for contaminants at the Hoff VC Site at a place removed from the known hotspot, the concrete vault. This placement had the effect of diverting contaminants away from the quarry pits in the model.

While we discount EarthRes's model, we credit Dr. McLane's expert opinions given to a reasonable degree of scientific certainty that, based on his modeling, quarry pumping will cause groundwater at and beyond the Hoff VC Site to be drawn toward and into the quarry pits. Dr. McLane's expert testimony, together with Mr. Kessler's expert testimony, convinces us that Gibraltar has failed to affirmatively show that its operations will not result in presumptive evidence of potential water pollution. As discussed further below, Department witnesses at the hearing gave every indication that they now agree.

Despite the sophisticated modeling in this case, we must leave room for some common sense in the analysis. Here, there is a proposal to pump groundwater in up to 300-feet deep pits immediately adjacent to an ongoing hazardous site with contaminated groundwater being cleaned up pursuant to HSCA. Hornfels quarries may not produce that much water, but the danger zone here is *right next door*. The monitoring wells next to the proposed pits are already contaminated. It is nearly impossible to believe that quarry pumping will not have some impact on that groundwater and the remediation of that site. McLane's model is consistent with common sense and is inherently more believable.

Assuming for the purposes of argument only that these models cancel each other out, it nevertheless cannot be gainsaid that there is a significant risk that quarry pumping will expand groundwater contamination. The EarthRes model does not stand as proof that risk does not exist or there will be no contamination. Indeed, it actually supports or at least is not inconsistent with a finding that groundwater contamination will spread, the only debate being exactly where and how fast.

Back-up Measures

The Department has never disputed that quarry pumping beside the Hoff VC Site creates a risky situation. However, it argues that, aside from the risk being minimal (an incorrect conclusion as discussed above), the risk is further ameliorated by the back-up measures it has negotiated with Gibraltar, and by the enforcement measures that are available to the Department in the future should things go awry. As we understand its position, the Department concedes that back-up measures only support issuance of the permits, where, as here, there is a preliminary finding that those back-up measures are unlikely to be necessary. We actually agree with that logic, but unfortunately for the Department, the preliminary finding does not hold up here. Quarry pumping will in fact cause additional groundwater contamination. None of the back-up measures will do anything to prevent that, which makes them largely irrelevant.

Nevertheless, in the interests of a complete record, we will address the Department's back-ups. The Appellants have convincingly argued that individually and collectively, the back-up measures and justifications would not have justified issuance of the permits. The Department summarizes its reasons for issuing the permits despite the risk of groundwater contamination as follows:

> [G]roundwater migration of contaminants from the Hoff VC Site to the quarry is unlikely because of the current and anticipated groundwater flow path and the

> nature of the bedrock geology; that a network of sentinel wells will detect contaminant migration well in advance of any effect at the quarry, and the quarry is not expected to pump groundwater for approximately 10-20 years; that there will be ongoing remediation and degradation of contaminants at the Hoff VC Site, thus continuing the overall reduction in concentrations of groundwater contaminants; that the present NPDES Permit effluent limits are protective of the environment and are the most stringent available; that the Department will have a host of proactive measures memorialized as special conditions in the permit and in regulatory authority by which it may address any unanticipated contaminant migration at any future date; that the NPDES Permit is automatically subject to renewal every 5 years and can be revisited at any time if it appears that contamination may make its way to the quarry; and that the quarry must submit supporting analyses for Department approval before proceeding to each 50-foot depth increment of mining.

(Brief at 2.) Gibraltar's analysis is essentially the same.

Surprisingly, every step in the Department's analysis is either wrong or does not support issuance of the permits. Pervading the entire analysis is the Department's mistaken assumption that the only contamination that matters is contamination that is drawn into the pits. As discussed throughout this Adjudication, the spread of groundwater contamination as a result of quarry pumping is the much greater and more pertinent threat. But even if the Department's legal assumption were correct, the record does not support its factual assumptions.

Another sentiment we detect throughout the Department's analysis is that contamination would not be likely to manifest in the quarry pits for a long time. Again, we reject the Department's legal conclusion or at least intimation that delayed contamination is acceptable. It is also factually unsupportable. Mr. Vittorio testified that groundwater will be encountered in the first bench. The contaminated groundwater plume already extends onto Gibraltar's permit area. Very little distance remains for it to travel into the pits. The Department has not scheduled any further cleanup measures at the Hoff VC Site yet, and natural attenuation does not appear to be solving the problem anytime soon.

The Department next says it will have a "host of proactive measures." Again, this is exactly wrong. The measures are reactive, not proactive, and none of them support the issuance of the permits.

The "sentinel wells" can no longer be considered sentinels because the closest wells to the quarry, OW-5 and OW-6, are already contaminated. The Department says the wells will detect contamination "if it starts to move." (Brief at 74.) This is misleading because the contamination has already moved. It is too late to see if it "starts to move." The "early warning" that the wells were designed to provide has already sounded. The Department says it can immediately cease quarry pumping if the wells show migrating contaminants. It would appear that that point has already been reached.[4]

The sentinel well program is something of a toothless tiger because nothing is spelled out anywhere about what happens if the wells detect spreading contamination. There is actually nothing in Gibraltar's permits setting forth any duty or limitation on Gibraltar's part. There are no action levels, or for that matter, action requirements. Neither Gibraltar nor the Department is committed to anything other than continued monitoring if the monitoring wells show additional contamination. The Department simply says, "[a] series of scientific determinations must be made presently, as well as going forward." (Brief at 65.)

The closest the permits come to assigning responsibility is Special Condition 38, which requires Gibraltar to allow the Department's HSCA program and its contractors access to its property to allow *the Department* to do work, and Special Condition 39, in which the Department reserved the right to modify, suspend, or rescind the permit or require a permit revision "should unforeseen circumstances or issues related to [the Hoff VC Site]…develop and

[4] The Department's HSCA program has not taken or planned any action in response to the contamination being detected in the monitoring wells.

impact or potentially impact the activities authorized under this SMP [permit] that are not addressed or anticipated in the current and approved SMP [permit] plan, modules and designs." (P. Ex. 143.) Special Condition 39 is impossibly vague and may be worse than having no condition at all because it arguably limits the discretion the Department otherwise would have. At best it creates litigation issues. Condition 39 reserves to the Department the right to modify, suspend, or rescind the permits only if there are unforeseen circumstances or issues. Spreading contamination is clearly foreseen. The Department can only act if the unforeseen circumstances would "impact or potentially impact" quarry "activities" "that are not addressed" in the permit. It is not clear what any of these phrases mean. It is not clear why the Department would agree to such limits on its authority to act in the interests of the public safety and welfare and the protection of the environment. It is also not clear whether the permit conditions would be used to limit Gibraltar's liability under HSCA either directly or vis-à-vis potentially responsible parties (PRPs).

The Department's and Gibraltar's next line of defense is that, if contaminants enter the quarry, it will not be a concern because Gibraltar is required to treat its discharge so that no contaminants are discharged above the strict levels set forth in Gibraltar's NPDES permit. Surface waters will, therefore, be protected. In other words, the quarry can serve as a recovery well for the cleanup of the Hoff VC Site.

Our first reaction is that, if the Department is going to start permitting new quarries as massive recovery wells for hazardous site cleanups, that intention should be clearly expressed and then evaluated from the perspective of the Noncoal Act and HSCA. We would think that the quarry would want to know how its role in the HSCA cleanup affects its overall liability for

cleaning up the site. We have unanswered concerns about whether the Noncoal Act can or should legally accommodate such a use of new quarries.

Our second reaction is that this is the first case of which we are aware where the Department has issued an NPDES permit where it has no idea how the permittee will meet its permit limits. Normally, the concern with noncoal surface mine discharges is with such issues as sediment, which is handled in settling basins. Here, the concern is with hazardous substances. In such cases the Department would normally insist on a water quality management permit, also known as a Part II permit, or some mechanism like that to ensure in advance that the NPDES permit limits can be met.

In defending its decision not to require Gibraltar to employ any particular type of treatment to meet its NPDES limits, the Department makes the following statement in its brief:

> Meanwhile, even if we assume that a contaminant may make its way to the quarry, there is no way at this point of truly knowing what contaminant it might be, what the flow might be, [or] what the concentration or the pounds of contaminant might be….

(Brief at 81.) This is arguably the equivalent of saying that the Department has authorized a life-size experiment in the field with real world consequences with virtually no understanding of the risks involved or how those risks will be managed. The most that the Department and Gibraltar can say is that there are treatment options out there that hypothetically exist for solvent-contaminated water. There has been *no* analysis of the economic or technical feasibility of any treatment option at the quarry. This is not consistent with proper and thoughtful environmental regulation.

Figuring it all out later is particularly unacceptable here because the contaminants potentially needing treatment are a mixture of VOCs, SVOCs, heavy metals, and pesticides. Not all of the contaminants can be treated the same way, and treatment of contaminated groundwater

that needs to be discharged can get very expensive very fast. To conclude as the Department has that this is all too complicated to figure out now is not grounds for gambling with the future; it is a strong argument in favor of not issuing the permits. The Noncoal Act and the regulations require that a permit application must be accurate and complete. 52 P.S. § 3308(a)(1); 25 Pa. Code § 77.126(a)(1). Gibraltar's application, premised on an ability to treat a potential discharge, is not complete because it does not describe how that discharge will be treated.

The Department's next line of defense is that there will be a bond in place to cover Gibraltar's treatment obligations even if Gibraltar defaults on its duty to treat its discharge. This defense lacks all merit. Gibraltar's bond does not account for treatment of the discharge. Although the Department says it has the legal authority to use the bond to pay for treatment, the bond amount is based on the cost of reclamation, so every penny used for treatment is a penny that is no longer available for reclamation of the site.

The Department's last line of defense is that it can always take enforcement action if things go awry. The Department says it will have many opportunities to reevaluate the quarry as mining progresses and contamination continues to spread and it has broad legal authority to act based upon its "dynamic evaluation." Once again we find ourselves in disagreement with the Department's legal position. No permit should be issued when it is not clear from the start that the permitted quarry can be operated in accordance with the law. Frankly, it does not get anymore fundamental than that. The Department should not issue bad permits with assurances that they can always be fixed later. Furthermore, the fact that the Department to our knowledge has not done anything to follow up on its testimony that it would not have issued the permits had it known then what it knows now speaks volumes on whether the citizens of the Commonwealth can rely on it to take appropriate action based upon it "dynamic evaluation." Further still, and as

a practical matter, it becomes more difficult for the Department to justify shutting down an operation once it is underway. Finally, the Department's assurances of future action are also unfair to Gibraltar. Gibraltar should not be teased into starting mining, only to be told to stop later based upon a "dynamic evaluation."

The Department has not told us exactly what it would take for it to act based upon its "dynamic evaluation." The Appellants persuasively argue that by that point it may be too late. This is not the typical quarrying situation where stopping pumping will eventually allow well levels to recover or sinkholes to stop forming. Here, the quarry pumping will draw solvent-contaminated groundwater into previously uncontaminated or less contaminated areas. That contamination does not simply go away once it has been drawn into those areas. Rather, the migration simply increases the area that then must be cleaned up. And at the risk of undue repetition, the Department has yet to do any evaluation of how to treat the existing groundwater plume, let alone the expanded plume that would accompany quarry pumping.

Article I, Section 27

Ban the Quarry (but not the Township) argues that the Department has failed to act in accordance with Article I, Section 27 of the Pennsylvania Constitution, which reads as follows:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.

PA. CONST. art I, § 27. We have recently summarized the Board's approach to reviewing whether the Department's decision to issue a permit comports with Article I, Section 27, as follows:

> We first must determine whether the Department has considered the environmental effects of its action and whether the Department correctly determined that its action will not result in the unreasonable degradation,

> diminution, depletion or deterioration of the environment. Next, we must determine whether the Department has satisfied its trustee duties by acting with prudence, loyalty and impartiality with respect to the beneficiaries of the natural resources impacted by the Department decision.

Del. Riverkeeper Network v. DEP, 2018 EHB 447, 493. *See also Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 855-62; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1160-62.

Ban the Quarry argues three main points. First, it says that the Department failed to fully consider the environmental effects of the quarry permits. It says the Department did not have enough information to make an informed decision about whether the permit issuance would result in the unreasonable degradation of the environment. Ban the Quarry is particularly critical in this regard of the Department's failure to coordinate in any meaningful way the activities of the HSCA program regarding the Hoff VC Site. Second, it says that the Department incorrectly concluded that the additional adverse environmental impact caused by the quarry would not result in unreasonable degradation of the environment. Third, it argues that the Department failed to satisfy its trustee duties by acting with prudence, loyalty, and impartiality. We agree with Ban the Quarry on all three counts.

Article I, Section 27 requires the Department to fully consider the environmental effects of its action. *Ctr. for Coalfield Justice*, 2017 EHB 799, 857-59; *Friends of Lackawanna*, 2017 EHB 1123, 1160-61. "The Department cannot make an informed decision regarding the environmental effects of its action if it does not have an adequate understanding of what those effects are or will be." *Friends of Lackawanna*, 2017 EHB at 1161. *See also Blue Mtn. Preservation Ass'n v. DEP*, 2006 EHB 589; *Hudson v. DEP*, 2015 EHB 719. The Department must consider whether its action is likely to cause the unreasonable degradation or deterioration of the waters of the Commonwealth. *Id.*

We will not address Ban the Quarry's contention that the Department's issuance of the permits to Gibraltar violated Article I, Section 27 because it would result in unreasonable degradation of the waters of the Commonwealth. We would instead like to focus on a different reason the Department erred. The Department describes at length how it considered whether the Hoff VC Site will affect the quarry, but the record is devoid of any evidence that the Department has considered how the quarry will affect remediation of the Hoff VC Site. Quarry operations and the HSCA remediation are inextricably intertwined, yet the Department failed to consider how quarry operations would impact the HSCA remediation.

The Department makes much of the fact that its mining program personnel were aware of the Hoff VC Site and its HSCA program personnel were aware of the possible quarry. Simple awareness is hardly enough. The mining personnel asked the HSCA personnel about conditions that should be in the mining and NPDES permit, such as what contaminants were at the HSCA site and some undefined questions regarding monitoring. But this consultation is emblematic of the problem: the sole focus was on the quarry, not the ongoing HSCA remedial project.

Gibraltar tells us that the HSCA program never recommended that the Pottsville mining office deny the permits. We have no evidence that the HSCA program was ever asked for its recommendation, so it could just as easily be said that the HSCA program never recommended that the permits be issued. The characterization best supported by the record is that the HSCA program simply was not asked.

There is no evidence that anybody in the mining program asked anyone in the HSCA program whether permitting active pumping of the contaminated aquifer associated with the Hoff VC Site would complicate remediation of that site. Mr. Kutney of the mining program freely admitted throughout his testimony that he has no personal background in managing the cleanup

of contaminated sites such as the Hoff VC Site. Nor would we expect him to. Mr. Wade of the HSCA program provided no testimony on how quarry operations might impact the site cleanup. His only apparent concern was how contamination associated with the Hoff VC Site might affect the quarry. Article I, Section 27 requires the Department to consider the full environmental effects of its action, and here it failed to do so.

It is not clear that the Department's mining program consulting with the HSCA program further about the HSCA project would have had any value in any event. There is no record that the HSCA program has performed any analysis of whether quarry pumping would jeopardize the ongoing HSCA project. Indeed, none of the studies of groundwater commissioned to date by the HSCA program account for an active pumping source near the toe of the contaminated plume. The "coordination" that the Department touts between its two programs was essentially meaningless from the perspective of the management of the HSCA cleanup, and any additional coordination based upon the current state of knowledge regarding the HSCA project would have essentially been a waste of time.

The Hoff VC Site still needs to be cleaned up. The plume of contaminated groundwater appears to be spreading even without the more active migration that quarry pumping will cause. The scope of the groundwater problem in particular and the contamination of the site in general has not been defined, let alone remediated. However, the potential for remaining harm is underscored by the work that the Department has already performed. More than $2 million has been spent on interim measures alone. The Department has spent thousands of dollars on studies regarding groundwater now in the area, none of which accounted for an active nearby pumping source at the quarry, rendering the continuing value of that work uncertain.

The Department in vague terms appears to be batting around internally the idea of some sort of *in situ* treatment of groundwater, but there are no concrete specific plans for further investigation or remediation. Everything is up in the air. But what is certain is that somebody is going to be required to pay for future work. Those somebodies may be potentially responsible parties under HSCA (PRPs), fee payers into HSCA funds, and/or taxpayers. The Department has not given any apparent consideration to those stakeholders.[5]

Notwithstanding the myriad uncertainties in place, and without any apparent regard for the potential environmental effects of its action on the Hoff VC Site's remediation, the Department decided to permit the quarry. It is interesting to contrast the Department's consideration of the risks involved now with a risk identified by one of its HSCA consultants regarding the pumping of the residential wells:

> Because of need to protect residences from further exposure to contaminants, PADEP was not able to directly measure the influence of nearby residential wells on groundwater flow directions at the site. However, based on limited storativity of the fractured aquifer in the area, the amount of pumping required to draw contaminants through the aquifer system is believed to be small.
>
> Pump testing performed as part of a quarry permitting process immediately south and adjacent to the site confirmed that limited pumping over short periods of time could measurably affect water levels and flow direction. Impacts were observed more than 1200 feet away during limited rate of flow, 72-hour pump tests immediately south of the truck wash area adjacent to the site where a quarry is being permitted (Gibraltar Rock Inc. 2003, Enclosure 3, Appendix D).
>
> The most impacted residential wells are less than 200 feet from the TCE wash area outfall. **Any pumping from a series of residential wells in this area would therefore very likely and strongly induce alteration of groundwater flow directions toward the residential supply wells.** Because of pumping of residential wells over time and the preferential orientation of fractures, discussed above, it is easy to understand why contamination has migrated from the washing facility outfall area to the impacted residential supply wells.

[5] We need not address the Appellants' claim that the quarry property is now actually part of the Hoff VC HSCA Site, or their contention that Gibraltar's ownership of land where contamination has passively migrated or the active migration of contaminants as a result of any future pumping would make Gibraltar jointly and severally liable as a PRP for the costs of cleaning up the Hoff VC HSCA Site.

(FOF 132; T. Ex. 44 (at 7-8) (emphasis added).) Obviously, there would be far more pumping at the quarry than there would be from pumping the residential wells.

There is no doubt whatsoever that the two sites should be considered in tandem. There is no program or protocol in place for the Department to coordinate its regulatory oversight of the quarry with its remediation of the hazardous site. It would seem that one of the first and most important objectives of any site cleanup is to contain the problem. Yet quarry pumping will have exactly the opposite effect, extending the plume of contaminated groundwater toward the quarry. Quarry pumping will expand the area of contamination, which seems entirely at odds with how we would expect remediation of a hazardous site should be responsibly managed, both fiscally and with the best interests of the environment in mind.

As noted above, using the quarry itself as, in effect, a recovery well hardly seems appropriate at first blush, at least without further study and consideration of the technical and legal ramifications of that reality. The conjecture we heard at the hearing that maybe *in situ* remediation might work, or that maybe the quarry's monitoring wells could be converted to recovery wells provides no comfort. Again, the point here is that the Department has failed to give the issue any serious thought. This is inconsistent with its constitutional duty to fully understand and consider the environmental effects of its actions.

Even if we assume for purposes of argument that it was not obvious that quarry pumping would expand groundwater contamination, it certainly was recognized from the beginning as a distinct possibility. After all, that is why the Department requested further modeling. The Department should have given at least some thought to how this *possibility* could impact the HSCA site cleanup. There is no record that it did.

We also agree with Ban the Quarry that the Department has failed to act with prudence and impartiality as the trustee of Pennsylvania's public natural resources. As we said in *Friends of Lackawanna*,

> In performing its trust duties, the Commonwealth is a fiduciary and must act towards the natural resources with prudence, loyalty, and impartiality. According to the Supreme Court in *PEDF* [*v. Cmwlth.*, 161 A.3d 911 (Pa. 2017)], the duty of prudence requires the Commonwealth "to 'exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.'" The duty of loyalty imposes an obligation to manage the corpus of the trust, i.e. the natural resources, so as to accomplish the trust's purpose for the benefit of the trust's beneficiaries. Finally, the duty of impartiality requires the trustee to manage the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust.

2017 EHB at 1162 (citations omitted). *See also Del. Riverkeeper Network*, 2018 EHB at 504. The obvious purpose of cleaning up the Hoff VC Site is to contain and hopefully restore the public natural resources in the area such as the groundwater. Permitting a source of active groundwater migration immediately adjacent to the site without a full scientific understanding of the consequences of that migration and how to deal with those consequences is not prudent environmental management. It also exhibits partiality to one party, Gibraltar, at the as yet unknown expense of other interested parties, including but not limited to PRPs who may be required to fund the cleanup. We do not mean to suggest that the Department has deliberately favored Gibraltar at the purposeful expense of other beneficiaries. Rather, we simply find that the Department did not give the matter any thought. This does not represent compliance with the Department's fiduciary responsibilities. In short, the Department did not perform its duties in conformance with Article I, Section 27.[6]

[6] As previously mentioned, Special Condition 39 in Gibraltar's permit is unclear, but it could be argued that it limits the Department's authority under HSCA as well as the Noncoal Act. This is not consistent with the Department's duties as a trustee under Article I, Section 27.

Other Statutory and Regulatory Requirements

The Appellants contend that the Department issued the permits in violation of legal requirements in addition to the prohibition against presumptive evidence of potential water pollution. They point to the requirement in the Noncoal Act that the quarry operation and reclamation can be accomplished as required by the Act and regulations, 52 P.S. § 3308(a)(2), and the requirement in the regulations that the noncoal activities "can be reasonably accomplished as required by the [Noncoal] act and this chapter under the operation and reclamation plan contained in the application," 25 Pa. Code § 77.126(a)(2). As Gibraltar correctly points out, (Brief at 70), the Department's duty to ensure that mining can be "reasonably accomplished" requires it to ensure that mining can be performed without an undue risk to health, safety, and welfare. *See Solebury School*, 2014 EHB at 521.

For the same reasons we have found that the Department erred in concluding that Gibraltar affirmatively demonstrated no presumptive evidence of potential pollution, we find that it erred in concluding that Gibraltar's operations could be reasonably accomplished in accordance with the law. Most obviously, the mine cannot be operated without groundwater pumping, and that pumping will cause the spread of existing contamination. Cleaning up the Hoff VC Site as efficiently and effectively as possible is in the public interest, and the spread of contamination that quarry operations will cause is inconsistent with that objective, at least without further analysis. Without that analysis, there has been no affirmative showing.

Assuming *arguendo* that it is acceptable to use the quarry as, in effect, a recovery well for the Hoff VC Site cleanup, the Department has imposed permit discharge limits, but there is no plan on how those discharge limits would be met. To say as the Department and Gibraltar have that essentially anything can be treated is not enough to conclude that treatment at this quarry

under these circumstances can be reasonably accomplished. We are not aware of any other instance where the Department issued a discharge permit with no idea of how those limits would be met or no permit requirements regarding the treatment to be used.

25 Pa. Code § 77.521 reads:

> (a) Non-coal mining activities shall be planned and conducted to minimize disturbances to the prevailing hydrologic balance in the permit and adjacent areas.
>
> (b) Changes in water quality and quantity, the depth to groundwater and the location of surface water drainage channels shall be minimized so that the approved postmining land use of the permit area is not adversely affected.
>
> (c) The operator shall conduct the noncoal mining activities to prevent water pollution and, if necessary, operate and maintain the necessary water treatment facilities until applicable treatment requirements and effluent limitations established under § 77.522 (relating to effluent standards) are achieved and maintained.

For the reasons already discussed, Gibraltar has not shown that the quarry can be operated without disturbance to the prevailing hydrologic balance, without deleterious changes in groundwater quality, and without causing water pollution. *See also* 25 Pa. Code § 77.457 (mining must be conducted in such a way as to protect surface and groundwater).

25 Pa. Code § 77.202 provides that the amount of a bond for a noncoal mine shall be the estimated cost to the Department if it had to complete the reclamation, restoration, and abatement work required under the law. It is undisputed that the bond set for Gibraltar's quarry does not account for the costs of treating water contaminated by the Hoff VC Site before discharge in accordance with the NPDES permit. Ban the Quarry convincingly argues that, in order to be compliant with 25 Pa. Code § 77.202, Gibraltar's bond should account for the treatment required by its NPDES permit. Of course, it is impossible to account for such treatment because there has been no site-specific analysis of what that treatment might be. Thus, there are no financial assurances to back up the experiment that the Department has authorized with its permits. The

Department argues that bonded money that was dedicated to, say, backfilling, can be diverted to treatment if that becomes necessary. What it fails to explain is what monies will then be available for backfilling once that money is diverted to treating solvent-contaminated water.

The Department Witnesses' Hesitancy Regarding the Department's Action

The Department's equivocation regarding the soundness of its decision to issue the permits was palpable at the hearing on the merits after the Appellants had presented their cases in chief. The Department's equivocation continues into its post-hearing brief.

Here are some examples from Ms. Hamlin, one of the Department's permit reviewers:

- "Q. Now, after sitting here for two days, has your opinion changed that, hey, there could be a problem with this model?

  A. I think if we had Dr. McClain's [sic] report prior to issuing the permit, we would have considered his points and asked EARTHRES to -- or asked Gibraltar to respond to those.

  Q. Okay. But it doesn't quite answer my question. Is your opinion changed now, now that you've heard that testimony, that, listen, there's a serious problem with this model?

  A. It has changed to the degree that it would have prior to issuing the permit, we would have had the same concerns.

  Q. But today, as we sit here today, your opinion hasn't changed, is that what you're saying?

  A. No. I'm saying that yes, we would consider Dr. McClain's [sic] criticisms and we would ask the quarry to address them, but we didn't receive those criticisms until after we have permitted [sic]." (T. 677-78.)

- "Q. Now, regarding Dr. McClain's [sic] testimony yesterday, is it fair to say you agree that his criticisms were sufficient such that DEP would consider them and require Gibraltar to respond?

  A. Yes. I stated that we would have -- if we had received them prior to issuing a permit, we certainly would have asked Gibraltar to respond." (T. 721.)

- "Q. Is it your opinion that the groundwater plume associated with the Hoff VC site will not be impacted by the proposed quarry operations?

  A. That was our -- our opinion was that it would not reach the quarry and would not be discharged. Contaminant waters wouldn't be discharged based upon the fate and transport study that was provided to us." (T. 722.)

- "Q. Would you agree that the testimony and evidence presented by Mr. Kessler and Mr. McClane [sic] is presumptive evidence of potential pollution resulting from the mining application?

  A. I think it presents some questions that we should evaluate and ask EARTHRES to -- Gibraltar quarry to respond to." (T. 725.)

Mr. Kutney was ultimately responsible for issuance of the permits. (T. 1021.) Here are some examples from Mr. Kutney, the permits chief:

- "And so, you know, it's safe to say that in the coming – you're looking at the Gibraltar team. It's me and Ms. Hamlin. So as soon as we're not here, and hopefully not here on Monday – we're going to be working on a letter asking for more information about what's going on at your site in order to make sure that doesn't happen, that this contamination, as it was presented to us, is supposed to be there in the first place [sic]." (T. 1080-81.)

- "I can write a letter saying please provide more hydrogeologic information. That's fully within my realm of powers or however you'd like to phrase it. That's why I'm comfortable sitting here today saying we're going to write them a letter. But I can't tell you we're going to rescind their permit or cease some sort of currently permitted operation.

  Q. You would need further additional approval above your head?

  A. Yeah.

  Q. Are you going to recommend that?

  A. I'm going to bring that up as a choice. It's something to consider for Mr. Latshaw. And it's – I'm going to be very frank about everything we heard today or over the last few days and discuss it with him." (T. 1137.)

- "A. But I would ask EarthRes or Gibraltar's consultant for more information. There's no doubt about that.

  Q. And you would not issue the permit at that point, correct?

  A. Not until we got the information, reviewed it, considered it, allowed for a proper dueling hydrogeologist debate and then made a decision based on that.

  Q. And that would be because the applicant had, at that point, not demonstrated no presumptive evidence of potential pollution. You would need more evidence?

  A. I would need more information. Now, at the time that we issued the permit, we felt like we had all the information we needed." (T. 1154.)

- "Q. Since you required additional information, you would not have issued the permit at that point, correct?

A. I'd have to say yeah. We would have got the letter back from Dr. McLane or whoever it was and then we would have given EarthRes a chance to explain all that business." (T. 1155.)

Here are some of the examples in the Department's post-hearing brief that show it is now concerned with allowing the quarry to begin operations:

- "The Department remains confident that the permits were reasonable and well-designed at the time they were issued, and that they remain viable as instruments to further define the proper course of oversight and action, especially in light of recent sampling data and information gleaned at the hearing in this matter." (Page 65.)

- "Meanwhile, Gibraltar has not yet begun mining, and there remains the potential that it may never be allowed to do so, despite permit issuance." (Page 65.)

- "[The mining office] is following up on the alleged faults with the ERG F&T [EarthRes Fate & Transport Model] and will evaluate whether they are of any consequence, meanwhile evaluating McClane's [sic] input." (Page 72.)

- "[The mining office] stated its intention at hearing to ask Gibraltar for more information about what is going on at the site in order to make sure that the contamination is not migrating in unanticipated directions, even with the lack of quarry pumping." (Page 78.)

- "Because of these unexpected results [the latest sampling of OW-6], Gibraltar will be required to conduct additional monitoring and analysis, which PMDO [the mining office] will scrutinize to evaluate whether there are any discrepancies in the current data, and will consider its next options." (Page 113.)

All of this testimony and briefing amounts to a concession that, if the Department knew then what it knows now, it would not have issued the permits, at least without further study and explanation. When the Department demonstrates such a lack of confidence in its own action, it is difficult to imagine us issuing an Adjudication in its favor. Indeed, if the Department believes more study is required, we are left to wonder why the Department has pursued this appeal through an Adjudication rather than put the permit on hold pending further investigation.[7]

[7] That, in turn, draws into question the Department's repeated assurances that the Township and its citizens need not worry because the Department has the ability to take unilateral action if there is a problem.

It is also interesting that Gibraltar argues that the Department's action was lawful and reasonable *based upon the information available to it at the time of its action*. It is highly critical of the fact that the Township did not provide the Department with Dr. McLane's criticisms of EarthRes's model, and notes that it and the Department did not have the latest round of sampling from monitoring well OW-6.[8] The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Solebury School*, 2014 EHB at 519; *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't Envtl Res*., 341 A.2d 556 (Pa. Cmwlth. 1975).

In performing its permit review, the Department acknowledged the risk of allowing a quarry to pump groundwater next to an active HSCA site with contaminated groundwater and continuing sources of contamination. (T. 1031.) The Department ultimately determined, however, that the risk was tolerable based upon several findings and assumptions. The record shows that virtually all of those findings and assumptions were wrong. Therefore, the permits cannot remain in place, at least until the risk is better understood and perhaps more manageable.

Remedy

Clearly the Department has issued the Gibraltar permits prematurely in light of the unanswered questions regarding the Hoff VC Site. As investigation and remediation of that hazardous site evolves, it may become clear that quarrying can be accomplished in harmony with the cleanup. However, given the lack of any momentum on that site, we are concerned that a *remand* pending HSCA activities would drag on indefinitely, again giving rise to the staleness concerns that required a remand in our first Adjudication. *New Hanover Twp. v. DEP*, 2014 EHB

[8] The Township in response complains that it has been required at great expense to hire consultants that have essentially done the work that the Department should have done in the first place. It says that the Noncoal Act expressly envisioned this scenario when it placed the burden in the first instance upon the permit applicant to "affirmatively" show that these would be no presumptive evidence of potential pollution.

834. Therefore, we will rescind the permits but without prejudice to Gibraltar's right to reapply for the permits if remediation of the Hoff VC Site matures to the point that it becomes apparent that there will be no presumptive evidence of potential pollution and quarrying will not unreasonably interfere with the HSCA cleanup.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 691.7; 35 P.S. § 7514.

2. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Solebury School v. DEP*, 2014 EHB 482, 519; *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't Envtl Res*., 341 A.2d 556 (Pa. Cmwlth. 1975).

3. In third-party appeals, the appellants bear the burden of proof. 25 Pa. Code § 1021.122(c)(2).

4. The appellants must show by a preponderance of the evidence that the Department acted contrary to law or unreasonably or that its decision is not supported by the facts. *Solebury School v. DEP*, 2014 EHB 482.

5. The resolution of evidentiary conflict, witness credibility, and evidentiary weight are matters committed to the discretion of the Board. *EQT Prod. Co. v. Dep't of Envtl. Prot.*, 193 A.3d 1137, 1149 (Pa. Cmwlth. 2018); *Kiskadden v. Dep't of Envtl. Prot.*, 149 A.3d 380, 387 (Pa. Cmwlth. 2016).

6. An applicant for a noncoal mining permit must show that it will ensure the protection of the quality and quantity of surface water and groundwater, both within the permit area and adjacent areas, as well as the rights of present users of surface water and groundwater.

25 Pa. Code § 77.457(a); 25 Pa. Code § 77.521; *Plumstead Twp. v. DER*, 1995 EHB 741, 776-77.

7. An applicant for a noncoal mining permit must demonstrate to the Department that there is no presumptive evidence of potential pollution to waters of the Commonwealth from its activities. 25 Pa. Code § 77.126(a)(3).

8. The spread of multiple hazardous contaminants in the groundwater that would result from Gibraltar's quarry pumping constitutes presumptive evidence of potential pollution that cannot be permitted consistent with the Noncoal Act. 52 P.S. § 3308(a); 25 Pa. Code § 77.126(a)(3).

9. The Department erred in concluding that Gibraltar had demonstrated that there would be no presumptive evidence of potential pollution of waters of the Commonwealth as a result of its mining activities next to the Hoff VC Site.

10. Gibraltar has not shown that the quarry can be operated without disturbance to the prevailing hydrologic balance, without deleterious changes in groundwater quality, and without causing water pollution in violation of 25 Pa. Code § 77.521 and 52 P.S. § 3308(a). *See also* 25 Pa. Code § 77.457.

11. Article I, Section 27 of the Pennsylvania Constitution requires the Department to consider the full environmental effects of its action and ensure that its action will not result in the unreasonable degradation, diminution, depletion, or deterioration of the environment. PA. CONST. art I, § 27; *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 493; *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 855-62; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1160-62.

12. The Department did not uphold its constitutional duty to fully consider and understand the environmental effects of permitting the Gibraltar quarry next to the Hoff VC Site. PA. CONST. art I, § 27.

13. Article I, Section 27 of the Pennsylvania Constitution requires the Department, as trustee of Pennsylvania's public natural resources, to act with prudence, loyalty, and impartiality with respect to the beneficiaries of the natural resources impacted by the Department's decision. PA. CONST. art I, § 27; *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 493; *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 855-62; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1160-62.

14. The Department failed to act with prudence and impartiality as the trustee of Pennsylvania's public natural resources by permitting Gibraltar's quarry. PA. CONST. art I, § 27; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1162.

15. An applicant for a noncoal mining permit must demonstrate that quarry operations and reclamation can be reasonably accomplished in accordance with the Noncoal Act and the regulations. 52 P.S. § 3308(a)(2); 25 Pa. Code § 77.126(a)(2).

16. The Department's duty to ensure that mining can be reasonably accomplished requires it to ensure that the mining can be performed in accordance with the law without an undue risk to health, safety, and the environment. *Solebury School v. DEP*, 2014 EHB 482, 521.

17. The Department erred in mistakenly concluding that Gibraltar's operations could be reasonably accomplished in accordance with the law.

18. The Noncoal Act and the noncoal regulations require that a permit application must be accurate and complete. 52 P.S. § 3308(a)(1); 25 Pa. Code § 77.126(a)(1).

19. Gibraltar's application is not complete because it does not describe how a discharge potentially containing hazardous substances will be treated.

20. The Department erred in issuing to Gibraltar Rock, Inc. Large Noncoal Surface Mining Permit No. 46030301C2 & C3, NPDES Permit No. PA0224308, and Authorization to Mine No. 6794-46030301-02.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HANOVER TOWNSHIP, PARADISE WATCHDOGS/BAN THE QUARRY, AND JOHN C. AUMAN, Appellants	:	
v.	:	**EHB Docket No. 2018-072-L (Consolidated with 2018-075-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND GIBRALTAR ROCK, INC., Permittee	:	

O R D E R

AND NOW, this 24th day of April, 2020, it is hereby ordered that Large Noncoal Surface Mining Permit No. 46030301C2 & C3, NPDES Permit No. PA0224308, and Authorization to Mine No. 6794-46030301-02 issued to Gibraltar Rock, Inc. are **rescinded**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 24, 2020

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

For the Commonwealth of PA, DEP:
Craig S. Lambeth, Esquire
Angela S. Bransteitter, Esquire
(*via electronic filing system*)

For Appellant, New Hanover Township:
Andrew J. Bellwoar, Esquire
Anthony J. DelGrosso, Esquire
(*via electronic filing system*)

For Appellants, Paradise Watchdogs/Ban the Quarry and John C. Auman:
Christopher P. Mullaney, Esquire
(*via electronic filing system*)

For Permittee:
Stephen B. Harris, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JUDITH R. ACKERMANN	:	
	:	
v.	:	**EHB Docket No. 2019-126-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and WASHINGTON TOWNSHIP, Permittee	:	**Issued: May 11, 2020**

OPINION AND ORDER ON
MOTION TO DISMISS

By Steven C. Beckman, Judge

Synopsis

The Board grants a motion to dismiss where the Appellant failed to file a response to the Department's motion and where the Department has shown the appeal to be untimely and, therefore, the Board lacks jurisdiction to hear the appeal.

O P I N I O N

Background

Judith R. Ackermann proceeding *pro se*, appealed the Department of Environmental Protection's ("the Department's") approval of a revision to Washington Township's ("the Township's") Act 537 Plan ("the Plan Revision") for the extension of sewer lines to two separate areas of the Township. Ms. Ackermann attached a copy of the Department's approval letter to the Township dated November 2, 2018 to her Notice of Appeal. Notice of the Department's approval of the Plan Revision was published in the *Pennsylvania Bulletin* on November 24, 2018. Ms. Ackermann's appeal of the Department's approval of the Plan Revision was filed with the Board

on November 14, 2019, after she learned of the Plan Revision "[a]t a residents meeting on October 23, 2019." Ms. Ackermann's Notice of Appeal at 1. The Board consolidated Ms. Ackermann's appeal with two other individuals' appeals of the Plan Revision; Kevin McCauley (2019-118-B) and Kim Fletcher (2019-145-B). The Department filed a Motion to Dismiss ("the Motion") the consolidated appeals on February 11, 2020. The Township filed a Memorandum of Law in support of the Department's Motion on February 24, 2020. While Mr. McCauley responded to the Motion, neither Ms. Ackermann nor Ms. Fletcher filed any response. The Board unconsolidated the cases for purposes of addressing the Department's Motion.

Standard of Review

A motion to dismiss is appropriate where a party objects to the Board hearing an appeal due to a lack of jurisdiction, an issue of justiciability, or another preliminary concern. *Consol Pennsylvania Coal Company, LLC v. DEP*, 2015 EHB 48, 54. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *Id., See also Bernardi v. DEP*, 2016 EHB 580, 581; *West Buffalo Township Concerned Citizens v. DEP*, 2015 EHB 780, 781; *Boinovych v. DEP*, 2015 EHB 566, 567; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving motions to dismiss, we accept the nonmoving party's version of events as true. *Id.; Ehmann v. DEP*, 2008 EHB 386, 390.

Discussion

Ms. Ackermann failed to file any response to the Department's Motion. The Board's rule on dispositive motions, 25 Pa. Code § 1021.94(f), provides that "[i]f the adverse party fails to

adequately respond, the dispositive motion *may* be granted against the adverse party." (emphasis added). "Board precedent supports the use of discretion in such matters and emphasizes that Board decisions should be made on the merits and not based on procedural nuances." *Rohanna v. DEP*, 2017 EHB 287, 290. In *Burnside Township v. DEP*, the Board granted the Department's motion to dismiss where the appeal was untimely filed and the appellant failed to respond to the Department's motion, but not before evaluating the full record and noting that the appellant's notice of appeal did not contain any evidence disputing the date the appellant received notice of the Department action. *Burnside Township v. DEP*, 2002 EHB 700, 703; *See also, Kresge v. DEP,* 2001 EHB 1169; *Neville Chemical Co. v. DEP,* 2003 EHB 530. In the alternative, the Board has refused to grant motions to dismiss even when a party has failed to respond to such motion and there appears to be a genuine issue of material fact. *See Rohanna v. DEP*, 2017 EHB 287; *Rakoci v. DEP,* 2002 EHB 590. Although in this case, we clearly can grant the Motion on the basis of Ms. Ackermann's failure to respond alone, we chose not to do so until after we consider the full record.

The record is clear that Ms. Ackermann's appeal is untimely and, therefore, the Board lacks jurisdiction to hear her appeal. The Department published approval of the Township's Act 537 Plan Update Revision in the *Pennsylvania Bulletin* on November 24, 2018. Department's Motion – Holden Affidavit, Para. 9; Exhibit H to Holden Affidavit. We have held that the Department's publication of approval of an Act 537 Plan Update Revision in the *Pennsylvania Bulletin* is sufficient notice to apprise interested parties of the Department's action, thereby triggering our default rule, 25 Pa. Code § 1021.52(a)(2), that requires an appeal to be filed within 30 days of the publication. *Bartholomew v. DEP*, EHB Docket No. 2019-022-C (Opinion and Order on Motion to Dismiss issued January 15, 2020) slip op. at 5. *See also Pikitus v. DEP* 2005

EHB 354, 357; *Lehigh Township, Lackawanna County et al. v. DEP et al.,* 1995 EHB 1098. Therefore, Ms. Ackermann had until December 24, 2018, to file her appeal. Instead, Ms. Ackermann filed her appeal on November 14, 2019, well beyond the 30 day appeal period provided in our rules. Hence, Ms. Ackermann's appeal is untimely and the Board has no jurisdiction over this matter. After reviewing the record and viewing the facts in the light most favorable to Ms. Ackermann, we find that the Department has met its burden of demonstrating that her appeal should be dismissed. Therefore, we grant the Department's Motion.

Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JUDITH R. ACKERMANN	:	
	:	
v.	:	**EHB Docket No. 2019-126-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASHINGTON TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 11th day of May 2020, it is hereby ORDERED that the Department's Motion to Dismiss is **granted** and this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: May 11, 2020

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

For the Commonwealth of PA, DEP:
Carl Ballard, Esquire
Michael Braymer, Esquire
(via electronic filing system)

For Appellant, *Pro Se*:
Judith R. Ackermann
19633 Rt. 208
Fryburg, PA 16326
(U.S. first class mail)

For Petitioner
Mark Shaw, Jr. Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KIM M. FLETCHER	:	
	:	
v.	:	**EHB Docket No. 2019-145-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and WASHINGTON TOWNSHIP, Permittee	:	**Issued: May 11, 2020**

OPINION AND ORDER ON
MOTION TO DISMISS

By Steven C. Beckman, Judge

Synopsis

The Board grants a motion to dismiss where the Appellant failed to file a response to the Department's motion and where the Department has shown the appeal to be untimely and, therefore, the Board lacks jurisdiction to hear the appeal.

O P I N I O N

Background

Kim M. Fletcher proceeding *pro se*, appealed the Department of Environmental Protection's ("the Department's") approval of a revision to Washington Township's ("the Township's") Act 537 Plan ("the Plan Revision") for the extension of sewer lines to two separate areas of the Township. Ms. Fletcher attached a copy of the Department's approval letter to the Township dated November 2, 2018 to her Notice of Appeal. Notice of the Department's approval of the Plan Revision was published in the *Pennsylvania Bulletin* on November 24, 2018. Ms. Fletcher's appeal of the Department's approval of the Plan Revision was filed with the Board on

November 15, 2019, after she was informed of her "right to appeal on November 8, 2019 - by Kevin McCauley." Ms. Fletcher's Notice of Appeal at 1. The Board consolidated Ms. Fletcher's appeal with two other individuals' appeals of the Plan Revision; Kevin McCauley (2019-118-B) and Judith Ackermann (2019-126-B). The Department filed a Motion to Dismiss ("the Motion") the consolidated appeals on February 11, 2020. The Township filed a Memorandum of Law in support of the Department's Motion on February 24, 2020. While Mr. McCauley responded to the Motion, neither Ms. Fletcher nor Ms. Ackermann filed any response. The Board unconsolidated the cases for purposes of addressing the Department's Motion.

Standard of Review

A motion to dismiss is appropriate where a party objects to the Board hearing an appeal due to a lack of jurisdiction, an issue of justiciability, or another preliminary concern. *Consol Pennsylvania Coal Company, LLC v. DEP*, 2015 EHB 48, 54. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *Id., See also Bernardi v. DEP*, 2016 EHB 580, 581; *West Buffalo Township Concerned Citizens v. DEP*, 2015 EHB 780, 781; *Boinovych v. DEP*, 2015 EHB 566, 567; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving motions to dismiss, we accept the nonmoving party's version of events as true. *Id.; Ehmann v. DEP*, 2008 EHB 386, 390.

Discussion

Ms. Fletcher failed to file any response to the Department's Motion. The Board's rule on dispositive motions, 25 Pa. Code § 1021.94(f), provides that "[i]f the adverse party fails to

adequately respond, the dispositive motion *may* be granted against the adverse party." (emphasis added). "Board precedent supports the use of discretion in such matters and emphasizes that Board decisions should be made on the merits and not based on procedural nuances." *Rohanna v. DEP*, 2017 EHB 287, 290. In *Burnside Township v. DEP*, the Board granted the Department's motion to dismiss where the appeal was untimely filed and the appellant failed to respond to the Department's motion, but not before evaluating the full record and noting that the appellant's notice of appeal did not contain any evidence disputing the date the appellant received notice of the Department action. *Burnside Township v. DEP*, 2002 EHB 700, 703; *See also, Kresge v. DEP,* 2001 EHB 1169; *Neville Chemical Co. v. DEP,* 2003 EHB 530. In the alternative, the Board has refused to grant motions to dismiss even when a party has failed to respond to such motion and there appears to be a genuine issue of material fact. *See Rohanna v. DEP*, 2017 EHB 287; *Rakoci v. DEP,* 2002 EHB 590. Although in this case, we clearly can grant the Motion on the basis of Ms. Fletcher's failure to respond alone, we chose not to do so until after we consider the full record.

The record is clear that Ms. Fletcher's appeal is untimely and, therefore, the Board lacks jurisdiction to hear her appeal. The Department published approval of the Township's Act 537 Plan Update Revision in the *Pennsylvania Bulletin* on November 24, 2018. Department's Motion – Holden Affidavit, Para. 9; Exhibit H to Holden Affidavit. We have held that the Department's publication of approval of an Act 537 Plan Update Revision in the *Pennsylvania Bulletin* is sufficient notice to apprise interested parties of the Department's action, thereby triggering our default rule, 25 Pa. Code § 1021.52(a)(2), that requires an appeal to be filed within 30 days of the publication. *Bartholomew v. DEP*, EHB Docket No. 2019-022-C (Opinion and Order on Motion to Dismiss issued January 15, 2020) slip op. at 5. *See also Pikitus v. DEP* 2005 EHB 354*,* 357; *Lehigh Township, Lackawanna County et al. v. DEP et al.,* 1995 EHB 1098. Therefore, Ms.

Fletcher had until December 24, 2018, to file her appeal. Instead, Ms. Fletcher filed her appeal on November 15, 2019, well beyond the 30 day appeal period provided in our rules. Hence, Ms. Fletcher's appeal is untimely and the Board has no jurisdiction over this matter. After reviewing the record and viewing the facts in the light most favorable to Ms. Fletcher, we find that the Department has met its burden of demonstrating that her appeal should be dismissed. Therefore, we grant the Department's Motion.

Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KIM M. FLETCHER	:	
	:	
v.	:	**EHB Docket No. 2019-145-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASHINGTON TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 11th day of May 2020, it is hereby ORDERED that the Department's Motion to Dismiss is **granted** and this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: May 11, 2020

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

For the Commonwealth of PA, DEP:
Carl Ballard, Esquire
Michael Braymer, Esquire
(via electronic filing system)

For Appellant, *Pro Se*:
Kim M. Fletcher
19338 Rt. 208
PO Box 24
Fryburg, PA 16326
(U.S. first class mail)

For Petitioner
Mark Shaw, Jr. Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GLENN J. MORRISON, M.D.	:	
	:	
v.	:	**EHB Docket No. 2019-053-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and INSURANCE AUTO AUCTIONS, INC., Permittee	:	**Issued: May 13, 2020**

OPINION AND ORDER ON
MOTION FOR PARTIAL SUMMARY JUDGMENT

By Michelle A. Coleman, Judge

Synopsis

The Board grants in part Permittee's Motion for Partial Summary Judgment, which seeks judgment on two objections in Appellant's notice of appeal. Appellant's first objection, concerning whether the Department erred in granting the Permittee a Permit to use land the Permittee allegedly did not possess, was previously raised in Appellant's 2016 appeal of the Permit and is now barred by administrative finality. Appellant's fourth objection, concerning the manner in which the Department approved amendments to the Permit, is not barred by administrative finality.

O P I N I O N

The Adams County Conservation District ("Conservation District") approved a minor permit amendment on February 6, 2019 submitted by Insurance Auto Auctions, Inc. ("Permittee"). This amendment concerns changes to Permittee's coverage under General NPDES Permit for Stormwater Discharges Associated with Construction Activities, permit No. PAG-02-0001-13-025 ("Permit"). The Permit amendment involved design changes to a rock-lined channel either near or

directly on Dr. Glenn J. Morrison's ("Appellant") property that drains into an unnamed tributary. The channel is located in Latimore Township, Adams County. Pursuant to 25 Pa. Code § 102.32(c), the Department of Environmental Protection ("Department") held an informal hearing at Appellant's request concerning the Conservation District's approval of the Amendment. In a letter dated May 23, 2019, the Department upheld the Conservation District's minor permit amendment approval. The Department's approval is the subject of this appeal. The Department's approval letter states two additional minor amendments were approved along with the initial minor amendment, which appear to alter "riprap downchute channels" related to the rock-lined channel.

Appellant, proceeding *pro se*, lists four objections to the Department's Action in his Notice of Appeal. First, he alleges that the Department erred in allowing Permittee to use his land without permission. Second, Appellant argues that the Department erred in issuing a minor amendment to the Permittee because the changes to the permit allowed by the approved amendments are significant and the Department was required to study their impact before approving them. Third, Appellant contends that the Department erred by approving overly vague permit amendments. Finally, Appellant contends the Department erred by approving these Permit amendments as minor amendments, without addressing a defective swale designed to collect water prior to entering Appellant's land.

The Permittee has filed a Motion for Partial Summary Judgment to dispose of Appellant's first and fourth objections as barred by the doctrine of administrative finality. Permittee argues that Appellant's first objection was already raised in a 2016 Appeal to the Board of the original authorization of coverage under the Permit. *See* Docket No. 2016-009-L. Permittee argues that Appellant's fourth objection should have been raised in his 2016 Appeal but was not. Therefore, Permittee argues that summary judgment be granted for both of these objections under the doctrine

of administrative finality.[1] The Department has not filed a memorandum on the matter but concurs with the Permittee via a letter to the Board.

Standard of Review

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. *See* 25 Pa. Code § 1021.94a; Pa.R.C.P. No. 1035.1-1035.2; *Holbert v. DEP*, 2000 EHB 796, 807-08. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the non-moving party. *Stedge v. DEP*, 2015 EHB 31, 33. Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217. We will review this Motion in accordance with the stated standard.

Administrative Finality

Administrative finality generally requires that a party appeal a Department action close to the time the action actually occurs, and not at a significantly later point in time. *DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977); *see also Sierra Club v. DEP*, 2017 EHB 685, 688. As we noted in *Wheatland Tube Co. v. DEP*, 2004 EHB 131:

> Only issues that relate to *that action* [currently on appeal] may be raised. An appellant may not use the occasion of an action that takes the form of a change, renewal, or update to challenge whether the original permit should have been issued in the first place. Similarly, the appellant may not use the occasion of the most recent change to challenge changes that were finalized in earlier modifications. The appellant is limited to challenging whether the current change is appropriate. That

[1] In his Response to the Motion, Appellant alludes to a regulatory taking. We note here, as Permittee itself notes in its Reply, that this issue is beyond the scope of Permittee's Motion, and therefore we do not address it here. If Appellant believes he can prove a cause of action on this issue, he is free to raise it at a later date.

> challenge will turn on the factors relevant to the current change, which may or may not resemble factors that were considered when the original action was taken.

Wheatland Tube Co., 2004 EHB at 134. The doctrine imposes this constraint to prevent an appeal from being used as a vehicle "for reviewing or collaterally attacking" the appropriateness of an earlier Department action. *Love v. DEP*, 2010 EHB 523, 525. The action under appeal here is the Department's approval of the Conservation District's granting three minor amendments to Permittee. Therefore, we must review Appellant's first and fourth objections to determine if the issues they raise are implicated in the Department's approval of the amendments, or if the issues relate to the original issuance of permit coverage.

First Objection

In his 2016 appeal, Appellant's 10th objection contended his property extended to the middle of Bonner's Hill Road, and this portion of his property was only subject to an easement for public use as a road. (Permittee Exhibit B.) Appellant argued at that time that Permittee trespassed on his property by constructing a drainpipe on the road, an activity that did not constitute public use. The Board granted summary judgment to the Permittee and Department on this issue due to Appellant's failure to adequately respond to Permittee's Motion for Summary Judgment. *Morrison v. DEP*, 2016 EHB 717, 721 ("[Appellant] does not respond in any way to the challenges to Objections 3, 10, and 11…Having not addressed [those challenges] it appears that Morrison has abandoned those challenged objections").

Appellant makes the same argument in the instant Appeal. Appellant now claims that "the township has a clearly defined easement that allows the township to use the easement only for roadway purposes. The township does not have the authority to delegate their easement on my property to a corporation that subleases an adjoining property." (Appeal at 2.) Appellant alleges in his Notice of Appeal that Permittee is trespassing on his land because it is not a public utility and

cannot benefit from the easement on his property. (*Id.*) Permittee notes in its Motion that the drainpipe will continue to run along the same channel, located in the same strip of land, at issue in 2016 and Appellant does not suggest otherwise.

Appellant suggests in his Response that the amendments create a "new and unique easement issue." (Response at 5.) In support, he incorporates two arguments he originally raised under the second objection of his appeal, which Permittee has stated are beyond the scope of its Motion. Appellant first argues the amendments will cause an increase in water velocity discharging into a stream, which will cause erosion on his property. Second, Appellant agues the amendments allow an alteration to "riprap" along the channel that he believes will threaten the wildlife in the stream.

While Appellant is free to make these arguments in the context of his second objection, we do not view them as reasons to find Appellant's first objection is not barred by administrative finality. Regardless of the amendments' purported effect on water velocity and stream wildlife, the issue implicated by Appellant's first objection is whether the Department erred in granting a permit to work on land that the Permittee does not own. That issue first arose in 2016 and Appellant challenged it at that time but abandoned that challenge. *Morrison,* 2016 EHB at 721. Appellant has put forward no facts to indicate that, had the easement issue been resolved on the merits in 2016, it would not control the dispute currently before us. This is precisely the type of review and collateral attack that the Board was referring to in *Wheatland Tube* and the type of re-litigation that administrative finality was designed to prohibit.

Fourth Objection

Appellant's fourth objection concerns a swale on the Permittee's property that is apparently supposed to convey stormwater from the property. Appellant argues that issues such as mistaken water storage calculations and construction in an elevated area have left the swale functionally unable to store excess water, which then runs onto his property. Permittee argues in its Motion that the swale's design was first addressed in the original permit coverage, so Appellant is barred by administrative finality from raising concerns with it now. In response, Appellant argues he is not taking issue with the original design of the swale but states the lack of functionality is a relevant factor that should have been taken into consideration by the Department before issuing an amendment. In Appellant's words: "the information provided regarding the original permit deficiencies is used to illustrate why a major amendment is required…the issue is not recalculation of the storage system or swale, the issue is the issuance of a minor amendment." (Response at 16.)

Reading the objection in the light most favorable to Appellant, we find that the fourth objection concerns the manner in which the amendments were approved, as opposed to an issue with the original design of the swale. Appellant states in his Notice of Appeal, after detailing the issues he has observed with the swale, that it "needs a major amendment to the plans, …I ask this court to initiate a major amendment addressing the ongoing flooding of my property." (Appeal at 12-13.) As we understand it, Appellant's argument is that the Department had an obligation to review the function of the swale before approving an amendment to the permit and, by issuing a minor permit amendment instead of a traditional permit amendment, the Department sidestepped this obligation. Regardless of the merits of Appellant's objection, we do not find it to be a collateral attack on the original design of the swale, but rather an objection to the Department's decision to

treat the permit amendments as minor amendments. Since this argument is beyond the scope of Permittee's Motion, Appellant is free to make it moving forward.

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 13th Day of May 2020, upon consideration of Permittee's Motion for Summary Judgment, as well as all responses and replies, it is hereby ordered that Permittee's Motion is **granted in part**. Appellant's first objection is **dismissed.**

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: May 13, 2020

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

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

For Appellant, *Pro Se*:
Glenn J. Morrison, M.D.
221 Bonners Hill Road
York Springs, PA 17372

For Permittee:
David J. Raphael, Esquire
Jonathan Vaitl, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FOOD & WATER WATCH	:	
	:	
v.	:	**EHB Docket No. 2018-108-L**
	:	**(consolidated with 2017-114-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE PROTEIN COMPANY, Permittee	:	**Issued: May 21, 2020**

ADJUDICATION

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Board dismisses an appeal of an NPDES permit issued to a poultry processing and rendering plant. The Board finds that the appellant has standing to pursue the appeal but has not demonstrated that nutrient credit trading is prohibited by the federal Clean Water Act or state 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 Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1 – 691.1001, Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17, and the rules and regulations promulgated thereunder, and it is the agency with the primary responsibility for implementing and administering the National Pollutant Discharge Elimination

---

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

System (NPDES) program in Pennsylvania in accordance with Section 402 of the Federal Clean Water Act, 33 U.S.C. § 1342. (Joint Exhibit No. ("JE-") 1, JE-2, JE-3, JE-13.)

2. Appellant Food & Water Watch ("Food & Water") is a national membership organization that advocates for clean water and the public control of water resources, including oceans, rivers, and groundwater. (Joint Stipulation of Facts No. ("Stip.") 9.)

3. Keystone Protein Company ("Keystone") is a company with a business address of 154 W. Main Street, Fredericksburg, PA 17026. (JE-1, JE-2, JE-3.)

4. Keystone proposes to operate the Keystone Protein Fredericksburg facility, a poultry processing and rendering plant located in Bethel Township, Lebanon County. (JE-1, JE-2, JE-3.)

5. On August 19, 2017, the Department published notice in the *Pennsylvania Bulletin* of draft NPDES Permit No. PA0266345 for discharges associated with a wastewater treatment plant at Keystone's Fredericksburg facility, 47 Pa.B. 4845. (Stip. 1.)

6. On October 26, 2017, the Department issued the final version of NPDES Permit No. PA0266345 for discharges of treated industrial wastewater to Elizabeth Run, an unnamed tributary to Beach Run, and to Little Swatara Creek. (Stip. 2; JE-1.)

7. Food & Water filed an appeal of the October 2017 permit on December 4, 2017. (Stip. 3.)

8. On August 4, 2018, the Department published notice in the *Pennsylvania Bulletin* of a draft revision to Keystone's permit, termed Amendment No. 1, 48 Pa.B. 4634. (Stip. 4.)

9. The *Pennsylvania Bulletin* notice for the draft revision provided: "The permit is amended to include a provision in Section C.I.C. of the permit to allow nutrient credits for compliance with Chesapeake Bay Cap loads." 48 Pa.B. 4634.

10. On September 27, 2018, the Department issued the final revised NPDES Permit No. PA0266345 and response to comments. (Stip. 5; JE-3.)

11. Food & Water filed an appeal of the Department's issuance of the revised permit on November 7, 2018. (Stip. 6.)

12. Keystone's NPDES permit contains effluent limits applicable to a proposed discharge of treated industrial wastewater to the main stem of Little Swatara Creek at a location identified in the permit as Outfall 001. (JE-1 (at 2-3), JE-2 (at 1), JE-3 (at 2-3).)

13. Little Swatara Creek is a tributary to Swatara Creek, which is a tributary to the Susquehanna River, which in turn flows into the Chesapeake Bay. *See* 25 Pa. Code § 93.9o. (JE-2 (at 2, 6).)

14. The phosphorous Keystone is permitted to discharge at Outfall 001 is subject to mass and concentration effluent limits as well as a "net total phosphorus" limit. (JE-1 (at 2-3, 7), JE-3 (at 2-3, 7).)

15. The nitrogen Keystone is permitted to discharge at Outfall 001 is subject to concentration effluent limits as well as a "net total nitrogen" limit. (JE-1 (at 2-3, 7), JE-3 (at 2-3, 7).)

16. Part C of Keystone's permit provides that "[t]he Annual Net Total Nitrogen (TN) and Annual Net Total Phosphorus (TP) Mass Load effluent limitations ('Cap Loads') in Part A of this permit are required in order to meet the downstream water quality standards of the State of Maryland, as required by 25 Pa. Code Chapter 92a, the federal Clean Water Act, and implementing regulations." (JE-1 (at 22), JE-3 (at 22).)

17. The permit sets limits for net total nitrogen at 19,786 pounds per year, and for net total phosphorus at 380.5 pounds per year, with a monthly monitoring and reporting requirement at Outfall 001 for each constituent. (JE-1 (at 7), JE-3 (at 7).)

18. These limits are the same in the September 2018 amended permit as the October 2017 original permit. (JE-1 (at 7), JE-3 (at 7).)

19. The amended permit provides that "[w]here effluent limitations for TN and/or TP are established in Part A of the permit for reasons other than the Cap Load assigned for protection of the Chesapeake Bay ('local nutrient limits'), the permittee may purchase and apply credits for compliance with the Cap Load(s) only when the permittee has demonstrated that local nutrient limits have been achieved." (JE-3 (at 23).)

20. Food & Water relies on two of its members, Debra Ryan and Ann Pinca, to claim representational standing to appeal both the October 2017 permit and the September 2018 amended permit. (*See* Stip. 8, 10-21; JE-5, JE-6, JE-7, JE-8.)

21. Debra Ryan and her children have spent time kayaking, fishing, and taking their dogs along portions of the Swatara Creek in Swatara State Park and the Lickdale Campground. (Stip. 13; JE-6, JE-8.)

22. She also enjoys hiking on the paths near Swatara Creek. (JE-6, JE-8.)

23. She is concerned that the discharge from Keystone authorized by the permit could affect her use of Swatara Creek by disrupting water levels and affecting wildlife. (Stip. 14; JE-6.)

24. Ms. Ryan is also concerned that it will adversely affect the health of her husband who is immuno-suppressed. (JE-6, para. 10.)

25. Ann Pinca is an avid birdwatcher who enjoys observing herons, other birds, and other wildlife near Swatara Creek while walking and driving along, and kayaking and wading in, the Creek. (JE-5, JE-7.)

26. She is concerned that Keystone's permitted discharges will adversely affect wildlife, as well as her birdwatching and kayaking on Swatara Creek. (Stip. 21; JE-5.)

27. Ms. Ryan and Ms. Pinca's concerns extend to Keystone's ability to engage in nutrient trading since it affects Keystone's discharge levels. (JE-5, para. 15; JE-6, para. 12.)

DISCUSSION

On October 26, 2017, the Department of Environmental Protection (the "Department") issued NPDES Permit No. PA0266345 to Keystone Protein Company ("Keystone"). The permit was subsequently amended on September 27, 2018. The Appellant, Food and Water Watch ("Food & Water"), has appealed both the original permit and the amended permit, and those appeals have been consolidated. The permit authorizes Keystone to discharge treated wastewater to the Little Swatara Creek from a poultry processing and rendering facility in Bethel Township, Lebanon County. Little Swatara Creek is a tributary to the Swatara Creek, which in turn flows into the Susquehanna River, which eventually terminates in the Chesapeake Bay. The wastewater from Keystone's discharge is expected to contain nitrogen and phosphorus, among other parameters. A portion of the permit contains provisions related to nutrient credit trading for net total nitrogen and net total phosphorus. There are also independent mass and concentration effluent limits for total nitrogen and total phosphorus in the permit for Outfall 001, which is the discharge point to Little Swatara Creek.

In lieu of a hearing on the merits, the parties submitted this case on a joint stipulated record in accordance with our rule at 25 Pa. Code § 1021.112.[1] The joint stipulation provides that "this Joint Stipulation of Facts and Exhibits constitutes the entire record of the case before the Board. No additional evidence shall be used or submitted by the parties in litigating this matter. Appellant rests its case-in-chief based on the below joint stipulated record." The stipulated record consists of 21 stipulated facts and 13 joint exhibits. The joint exhibits are primarily comprised of the permit, revised permit, permit fact sheets, and the declarations and depositions of the two members Food & Water relies on to assert standing. After receiving the stipulated record we set a briefing schedule and all parties filed briefs containing proposed findings of fact and conclusions of law and their arguments based on the agreed-to record. Although we are deciding this appeal in the absence of any live testimony, our charge as an agency to determine the propriety of the Department's action remains the same.[2] *See, e.g.*, *Schiberl v. DEP*, 2010 EHB 161; *United Refining Co. v. DEP*, 2008 EHB 434.

Standing

In their post-hearing briefs, both Keystone and the Department have challenged Food & Water's standing to maintain this consolidated appeal. The question of Food & Water's standing has already been thoroughly examined and discussed in a previous opinion issued in this matter.

[1] That rule provides: "A hearing need not be held if waived by appellant or respondent or if parties stipulate the essential facts or agree to submit direct and rebuttal testimony or documentary evidence in affidavit form (sworn or affirmed on personal knowledge) or by deposition." 25 Pa. Code § 1021.112(a).

[2] The Environmental Hearing Board's role in the administrative process is to determine whether the Department's action was lawful, reasonable, and supported by our *de novo* review of the facts. *Logan v. DEP*, 2018 EHB 71, 90; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156. In order to be lawful, the Department must have acted in accordance with all applicable statutes, regulations, and case law, and acted in accordance with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution. *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 822; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016). As a third party appealing the issuance of Keystone's permit, Food & Water bears the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Gerhart v. DEP*, 2019 EHB 534, 546-47; *Joshi v. DEP*, 2019 EHB 356, 364; *Jake v. DEP*, 2014 EHB 38, 47.

In *Food & Water Watch v. DEP*, 2019 EHB 459, the Board denied a motion for summary judgment filed by Keystone premised in part upon a challenge to Food & Water's standing (summary judgment opinion).[3] In that opinion, the Board found that the record clearly supported the conclusion that Food & Water has standing to pursue its appeal. Since the matter has again been raised by both Keystone and the Department, we once again take a look at this issue.

Issues such as standing are threshold matters that generally should be resolved before addressing the merits of the parties' dispute. *Borough of St. Clair v. DEP*, 2015 EHB 290, 300 (citing *Robinson Twp. v. Cmwlth.*, 83 A.3d 901, 917 (Pa. 2013); *Borough of Roaring Spring v. DEP*, 2004 EHB 889). When standing is challenged in a pre-hearing memorandum and in a post-hearing brief, an appellant must demonstrate by a preponderance of the evidence that it has standing. *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1147; *Stedge v. DEP*, 2015 EHB 577, 594; *Pa. Trout v. DEP*, 2004 EHB 310, 355; *Greenfield Good Neighbors Group., Inc. v. DEP*, 2003 EHB 555, 564; *Giordano v. DEP*, 2000 EHB 1184. Not only does the appellant have the burden of proving standing when challenged at the hearing on the merits, but the Board has recognized that the means of proving standing is within the control of the appellant. *Roaring Spring*, 2004 EHB at 895.

Food & Water asserts that it has representational standing on behalf of its members. An organization such as Food & Water has representational standing if it demonstrates that at least one of its members has standing. 35 P.S. § 7514(c); *Robinson Twp.*, 83 A.3d 901, 922; *Funk v. Wolf*, 144 A.3d 228, 245-46 (Pa. Cmwlth. 2016); *Citizens for Pennsylvania's Future v. DEP*, 2015 EHB 750, 752-53. A member (and therefore the member's organization) has standing if the member has a substantial, direct, and immediate interest in the outcome of the appeal. *Robinson Twp.*, 83 A.3d at 917; *Friends of Lackawanna*, 2017 EHB at 1152. To be substantial

[3] That same opinion also denied a motion for summary judgment on the merits filed by the appellant.

an appellant's interest must surpass the common interest of all citizens in procuring obedience to the law. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). In other words, there must be "some discernable adverse effect" to an interest other than that in ensuring compliance with the law. *Drummond v. DEP*, 2002 EHB 413, 423 (quoting *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975)). An interest is direct and immediate where there is a sufficiently close causal connection between the matter complained of and the harm alleged. *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009).

To that end, in the context of third-party appeals of permits, we have focused on an appellant or appellant-member's use of an area, and the potential for that use to be affected by the permitted activity. "In order to have standing in an environmental case, the appellant must demonstrate by his or her use of the site in question or relation thereto that his or her interest rises above that of the public at large." *Borough of St. Clair*, 2015 EHB at 301 (quoting *Greenfield Good Neighbors*, 2003 EHB at 562-63). *See also Citizens for Pennsylvania's Future*, 2015 EHB at 753. We have held that "[a] realistic potential of harm" to a person's use or aesthetic appreciation of an environmental resource is all that is needed to establish a right to appeal. *Citizen Advocates United to Safeguard the Environment, Inc.* (*"CAUSE"*) *v. DEP*, 2007 EHB 632, 673. In short, here at the adjudication stage, Food & Water has standing if it shows by a preponderance of the evidence that one or more of its members use the area to be affected by Keystone's permit (a substantial interest) and that there is a realistic concern that their use of that area could be adversely affected by the activity authorized by the permit (a direct and immediate interest). *Sierra Club v. DEP*, 2017 EHB 685, 695; *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643. *See also Funk*, 144 A.3d at 243-48.

The members Food & Water relies on for its claim to standing are Debra Ryan and Ann Pinca. Both Ms. Ryan and Ms. Pinca recreate in and around the Swatara Creek, which is a mainstem for the Little Swatara Creek tributary that will receive Keystone's discharge. The declarations and depositions of Ms. Ryan and Ms. Pinca contain credible averments that they hike, walk, kayak, wade, fish, and birdwatch in and around Swatara Creek. (Stip. 8, 10-21; JE-5, JE-6, JE-7, JE-8.)

Ms. Ryan has lived near Swatara Creek, which she refers to as "the Swattie," most of her life and has frequently visited the waterway with her children and husband. (JE-6, para. 3.) When her children were small, she and her family used to "wade in the water, play with [their] dogs, and fish along the banks." (*Id*.) Now that her children are grown, she enjoys hiking with them along the Swatara Creek paths and picnicking with her grandchildren near the water. (JE-6, para. 4.) She hopes to be able to take her grandchildren wading and fishing in the creek as she did with her children. (*Id.*) Additionally, Ms. Ryan has been a kayaker since 2001 and has kayaked many times along various stretches of the Swatara. (JE-6, para. 5.) The parties stipulated to the fact that Ms. Ryan and her children have spent time kayaking, fishing and walking their dogs along portions of the Swatara Creek. (Stip. 13)

Ms. Pinca lives a few miles from the Swatara Creek and she has a long history of advocating for its protection. (JE-5, para. 4.) She states that her advocacy efforts are motivated in part by her personal use and enjoyment of the Swatara Creek. (JE-5, para. 6.) She and her husband purchased kayaks a few years ago to kayak on the Swatara as well as other local waterways. (*Id.*) During the summers of 2016 and 2017 they kayaked three or four times, and in July 2018 they re-purchased launch permits that allow them to kayak on the creek for two years. (JE-5, para. 6, 8.) The area they kayak includes the section near the confluence of Swatara Creek

and Little Swatara Creek. (JE-5, para. 9.) She states that there are many times when kayaking puts her and her husband in direct contact with the water. This includes getting in and out of the kayak, walking through shallow stretches of the creek, and dealing with the occasional kayak flip. (JE-5, para. 10.) She also likes to wade and look for animals and aquatic life while kayaking. (*Id*.) Ms. Pinca is a bird watcher. When she and her husband drive across or near Little Swatara Creek she takes the opportunity to look for birds and nests. She has seen herons on the creek and eagles perched in trees adjacent to the stream. (JE-5, para. 12.) She observed a bald eagle nest along Little Swatara Creek, downstream from the Keystone discharge point. (*Id*.) Other wildlife that she has observed in the area include robins, blue jays and squirrels. (*Id.*) Ms. Pinca describes in great detail a walk she took through the wooded area along the creek in the area of the Fish and Boat Commission property:

> There are many wildflowers at that time of year, and on this day the Virginia blue-bells and Jack-in-the-Pulpits were in full bloom. I heard the usual woodpeckers in the trees, but a wood thrush caught my eye so I stopped to watch it as it foraged through the leaf litter. They are generally shy birds so I was quite glad to have the chance to quietly watch this song bird known for its beautiful voice. I also spent time watching the water fowl that day, observing a pair of mallards floating downstream, and an unexpected flock of domestic geese noisily splashing into the water, startling the Canada geese nearby. . . It is little surprises like this that make this spot so special, and why I like to visit here.

(JE-5, para. 13.)

Based on the extensive evidence in the record of Ms. Ryan and Ms. Pinca's use and enjoyment of the area around Swatara Creek and Little Swatara Creek, there is no question that they, and therefore Food & Water, have a substantial interest in this matter. In addition, Ms. Ryan and Ms. Pinca have credibly testified that due to the issuance of the permit, they expect that they will enjoy their Swatara Creek activities less and it may cause them to curtail their

activities altogether. Thus, their interest is direct and immediate. Specifically, Ms. Pinca is concerned that "increased pollution from the facility will degrade the ecosystem, deplete the water's oxygen levels, and harm fish and other wildlife." (JE-5, para. 14.) She states:

> My knowledge of this proposed new source of pollution into Little Swatara Creek causes me concern for the eagles, the herons, and all wildlife living along the stream, and this concern will diminish my enjoyment of my birdwatching near Little Swatara Creek, while kayaking, and in areas downstream.

(*Id.*)

Likewise, Ms. Ryan states that if Keystone is allowed to discharge as currently authorized by its permit, she will have to curtail her recreational activities along Swatara Creek. She is concerned that the new discharge will harm water quality in the areas where she enjoys kayaking and spending time with her family. She states that she will not be able to hike near the creek with her sons' dogs for fear of them drinking polluted water. (JE-6, para. 11.) Her plans to go fishing with her grandchildren will not come to fruition, and she will choose to kayak at other locations that are further from her home and less convenient to visit. (*Id*.) She states:

> Since learning about Keystone's future discharge plans, I think about it every time I visit the Swattie. Knowing that there is a new source of pollution upstream from me that is allowed to discharge far more nutrients than would otherwise be allowed under the Chesapeake Bay plan will lessen my aesthetic and recreational enjoyment of my kayaking trips on Swatara Creek, because I will be concerned about the water quality and the ecosystem, as well as concerned of potential risks of direct contact with the water.

(JE-6, para. 10.) Ms. Ryan is especially concerned that kayaking in what she believes to be polluted water could have health effects on her husband who is immuno-suppressed. (*Id*.)

Ms. Ryan and Ms. Pinca's concerns extend to Keystone's ability to engage in nutrient credit trading and how it will affect the discharge into Little Swatara Creek. Ms. Ryan believes that if the Department were to remove the nutrient trading provisions of the permit, Keystone

would be subject to more protective annual limits on nitrogen and phosphorous discharges, which would significantly reduce her concern over the impact of the discharges on her kayaking and recreational activities. (JE-6, para. 12.) Likewise, Ms. Pinca states that if the permit had included firm limits for nitrogen and phosphorus, rather than allowing Keystone to engage in nutrient trading, she would know more about the overall pollution coming downstream from the facility, which would significantly reduce her concerns about the discharge. (JE-5, para. 15.)

There is no question that Ms. Ryan and Ms. Pinca, and therefore Food & Water, have more than met their burden of demonstrating that they have standing to challenge the issuance of Keystone's permit authorizing a discharge in the waters in which they engage in recreational activities. As Judge Coleman stated in *Borough of Roaring Spring*, "The Board has long held that a person using a surface stream for fishing or other forms of recreation has standing to appeal a DEP permit authorizing an activity that may impact the water quality of the stream." 2004 EHB at 903 (citing *Blose v. DEP*, 1998 EHB 635, 638; *Belitskus v. DEP*, 1997 EHB 939, 951; *Pohoqualine Fish Association v. DEP*, 1992 EHB 502). Further, "[t]he Board has also recognized that an aesthetic appreciation for an environmental resource is a cognizable interest for purposes of conferring standing on a person." *Id.* (citing *Orix-Woodmont Deer Creek I Venture, L.P. v. DEP*, 2001 EHB 82, 86; *Ziviello v. DEP,* 2000 EHB 999, 1004, n. 9).[4]

Keystone argues that it is not enough for Ms. Pinca and Ms. Ryan to state they are simply *concerned* about potential impacts to water quality; it is Keystone's contention that, in order to have standing, they must prove by a preponderance of the evidence, by means of expert testimony or scientific tests, that such impacts *will* occur. We disagree. The Board has long held

[4] *Borough of Roaring Spring* also relies on *Franklin Township v. Department of Environmental Protection*, 452 A.2d 718, 720 (Pa. 1982) ("[a]esthetic and environmental well-being are important aspects of the quality of life in our society" and *Susquehanna County v. Department of Environmental Resources*, 458 A.2d 929 (Pa. 1983) (environmental, aesthetic and quality of life considerations are sufficient to confer standing).

that an appellant is not required to prove its case on the merits in order to have standing to appeal. *Delaware Riverkeeper v. DEP*, 2004 EHB 599; *Giordano v. DEP*, 2000 EHB 1184; *Ziviello v. DEP*, 2000 EHB 999. As the Board explained in *CAUSE*, 2007 EHB at 674:

> "In determining whether a party has standing, a court is concerned only with the question of who is entitled to make a legal challenge and not the merits of that challenge." *United Sportsmen v. Pa. Game Commission*, 903 A.2d 117, 122 (Pa. Cmwlth. 2006) . . . Whether a party can ultimately prove its case is one thing; whether it is entitled to try is quite another.

And, further, as the Board recognized in its earlier summary judgment opinion:

> For standing purposes, it does not matter that neither Ryan nor Pinca engaged expert consultants to confirm their fears, or that they themselves are not experts in the science of nutrient pollution, or even whether they could recite the names of the particular contaminants at issue during their depositions. It is enough that they are reasonably concerned Keystone's upstream discharges could pollute the waterway and adversely impact their activities, and that they could provide a basis for those concerns.

Food & Water Watch, 2019 EHB at 474 (citations omitted). In that opinion, Judge Labuskes went on to state:

> Pinca's environmental concerns are informed by her extensive reading about Chesapeake Bay water issues, and she is aware that nutrient pollution can cause harmful algae blooms, degrade water quality, and deplete water oxygen levels, thereby harming the aquatic ecosystem. Ryan shares the concern for Swatara Creek wildlife, based on her reasonable belief that excessive upstream pollution discharges will degrade water quality. Both members cite the fact that, based on their past kayaking experiences, there is the potential of coming into direct contact with the polluted water while recreating. Whether or not members' health will in fact be affected, or the ecosystem will in fact be harmed is "beside the point of the standing inquiry." *CAUSE*, 2007 EHB at 677. It is enough that members have credibly averred a "realistic potential" of harm by articulating the sensible reasons for their concerns. *See Friends of Lackawanna*, 2016 EHB at 643-44.

Id. at 472.

Even Keystone recognizes the shortcomings of its argument and acknowledges in footnote 1 of its post-hearing brief that Board precedent clearly holds that an appellant need not produce expert testimony to prove standing based on potential impacts to recreational activities, citing *Greenfield Good Neighbors, supra*. However, it then makes the even weaker argument that the appellants in *Greenfield Good Neighbors* alleged "far more frequent, proximate and substantial recreational activities and/or aesthetic appreciation than Appellant's standing witnesses do here." (Keystone Post-Hearing Brief, p. 15-16, n. 1.) First, this claim is blatantly untrue – notably, the Board's earlier opinion found that the record was "overstuffed" with examples demonstrating Ms. Ryan and Ms. Pinca's use and enjoyment of the Swatara Creek watershed. Indeed, the summary judgment opinion questioned why "Keystone would devote its and the Board's resources to contesting the issue" in light of such a comprehensive record on standing. *Food & Water Watch*, 2019 EHB at 464. The stipulated record now before us is also rife with numerous and detailed examples of Ms. Ryan and Ms Pinca's use and enjoyment of the area, as we have painstakingly set forth over the preceding pages. Second, we reject Keystone's attempt to "quantify" standing. To the extent Keystone is arguing that Ms. Pinca and Ms. Ryan should have engaged in *more* kayaking, hiking or birdwatching, or that they didn't appreciate the aesthetics of their surroundings *enough*, that argument is flatly rejected. As we stated when dismissing this very same argument put forth by Keystone in its motion for summary judgment, "The Board is not particularly interested in counting up the times a person uses a resource, but putting that aside, the record here supports frequent use and enjoyment by Pinca and Ryan" and their use and enjoyment of the area is similar to that of other appellants that the Board has recognized as clearly having standing. *Id*. at 468.

Both the Department and Keystone raise an additional argument with respect to standing. They assert that Food & Water's decision to waive one of its objections has caused it to lose standing. In its pre-hearing memorandum, Food & Water stated as follows:

> FWW originally raised two primary challenges to the Keystone permits: (1) the Clean Water Act (CWA) and its implementing regulations do not allow for nutrient or other pollution trading, and (2) other limits in the permits were insufficient to protect local water quality. FWW is no longer pursuing the second of these challenges, leaving before the Board only the legal question of whether DEP may authorize pollution or nutrient trading in an NPDES permit.

(Food & Water Pre-hearing Memorandum, p. 1-2.) Thus, this leaves only one issue before the Board: the legal question of whether the Department acted within the scope of its authority when it included a provision allowing nutrient trading in the amended permit issued to Keystone.

The Department and Keystone posit that any standing that Food & Water may have had was based on its claim that the permit's effluent limits were not sufficient to protect local water quality - in other words, Ryan and Pinca's standing is premised on their enjoyment and use of their *local* stream, and if they are no longer challenging the effect of the permit limits on local water quality, they have no standing to proceed. In the view of the Department and Keystone, Ms. Ryan and Ms. Pinca, and therefore, Food & Water, lack the necessary elements of standing to challenge the nutrient trading provision of the amended permit. The Department and Keystone contend that nutrient trading applies only to the Chesapeake Bay and not Swatara Creek and since the record contains no evidence of Ms. Pinca and Ms. Ryan partaking in recreational activities in or near the Chesapeake Bay, they cannot demonstrate a substantial, direct or immediate interest in this particular issue. The Department frames the argument as follows:

> . . . [Food & Water] focuses on its one and only issue: the legality of trading as a concept unrelated to the terms of Keystone's Amended Permit. Simply put, [Food & Water] has not argued that Keystone's Amended Permit will affect either Ms. Pinca or Ms. Ryan. There is no assertion that the Chesapeake Bay or its tributaries may be harmed, or their recreational or aesthetic nature diminished. Ms. Pinca and Ms. Ryan's use and enjoyment of their local watershed will be unaffected by any determination about legality of trading.

(Department's Post-hearing Brief, p. 15) (underlining in original.)

This argument rests on the mistaken premise that standing must be demonstrated for each of an appellant's claims. As the Board has long held, standing is a function of the *activity* being challenged, not the legal claims being pursued. An appellant is not required to have issue-specific standing. *See CAUSE*, 2007 EHB at 674 ("Standing is specific to each Departmental action, not whatever objections there may be to the action"); *Borough of Roaring Spring,* 2004 EHB at 904 ("The agency action is the subject of an appeal, not the individual objections raised.")

As the Board explained in *CAUSE*:

> [W]hen a person's right to file an appeal is challenged, we consider three things: (1) the Department's action, (2) the person's interests, and (3) the potential link between the two. We do not consider *why* the person objects to the Department's action. We do not consider whether the Department's action was proper. An analysis of the merits has no place in the inquiry regarding standing beyond the requirement that the threat of harm must amount to more than pure speculation . . .

2007 EHB at 674 (emphasis in original).

The challenged activity in this case is the Department's issuance of the permit and amended permit authorizing a discharge to Little Swatara Creek. Whether Food & Water has standing to challenge that action is not dependent on its objections to that action but on whether its members, Ms. Ryan and Ms. Pinca, have a substantial, direct and immediate interest in the

action itself. We have already found that they clearly do, both on the record before us and in the opinion denying Keystone's previous challenge to standing. As the Board stated in *CAUSE*, the parties "have not cited and we have not independently uncovered a single court case that holds that standing must be established with respect to each and every specific allegation in a complaint." *Id*. at 675.

The Department and Keystone argue that Food & Water's decision to forego its claim regarding the inadequacy of local water-quality based effluent limits and to focus entirely on its claim related to nutrient trading has somehow fundamentally changed the standing analysis. However, a particular objection does not control whether standing exists. Either an appellant has standing or it does not. A third-party appellant's standing is not based on the merits of its objections but on whether it has a substantial, direct and immediate interest in the action which has been appealed. Once an appellant has been determined to have standing, only then may it proceed to argue the merits of its claims. Standing is what gets the appellant in the door; once in, it is up to the appellant to prove its case by a preponderance of the evidence. The Department and Keystone would have us find the reverse, i.e., that an appellant's claims must have merit before it can be found to have standing. This argument conflates the notion of burden of proof with that of standing. It has been thoroughly considered and rejected in *CAUSE,* 2007 EHB at 674-75. There, Judge Labuskes, writing for the Board, explained as follows:

> The confusion between the standing inquiry and the merits inquiry has resulted in a great deal of unfortunate and unnecessary confusion in litigation before the Board. Because we do not delve into a person's specific objections in the standing inquiry, it necessarily follows that standing cannot be "issue-specific." Standing is specific to each Department action, not whatever objections there may be to the action. *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 904 . . . In a related context, the Commonwealth Court has admonished us not to erect incremental barriers to participation in Board proceedings that are not found in

> our statute. *BFI v. DER*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991). There is nothing in our jurisdictional statues to suggest that a person must have standing with respect to specific issues.

And further:

> In summary, a person's right to appeal turns on our assessment of the objective threat to the person's interests from the Department's action, not the merits of the Department's action. There is nothing relating to the applicable statutory language, our administrative process, or consideration of prudential restraint that suggests that the standing inquiry should be convoluted with the merits inquiry or that standing must be established on an objection-by-objection basis. Any suggestion to the contrary in our case law is hereby overruled.

Id. at 675-76.

In short, Food & Water's standing is not determined by the objections it chooses to pursue in its appeal, but by the activity that it is appealing, i.e., the Department's issuance of permits authorizing a discharge to Little Swatara Creek. Regardless of what objections the appellant chooses to pursue or waive, the action that is the subject of the appeal remains constant. Food & Water, through its members Ms. Ryan and Ms. Pinca, have clearly demonstrated a substantial, direct and immediate interest in that action. They have standing to appeal that action. Whether their objection to the permit and amended permit has merit is a question of whether they have met their burden of proof, not whether they have standing to bring their appeal.

Moreover, although the Department and Keystone contend that Food & Water is merely challenging the "concept" or "policy" of nutrient trading, this ignores the real world impact of the trading provision on Food & Water's members, Ms. Ryan and Ms. Pinca. If nutrient trading is allowed for purposes of meeting the Chesapeake Bay TMDL, this impacts how much of each pollutant Keystone can emit at the source of its discharge, Little Swatara Creek. Any provision

of the permits that impacts the Chesapeake Bay also has the potential to impact the entire Swatara Creek watershed. As we recognized in the summary judgment opinion:

> If the discharge has been determined to potentially impact the [Chesapeake] Bay, it necessarily follows that it must also affect the Bay's tributaries between the discharge and the Bay. Any use of the Bay or the tributaries between the discharge and the Bay is sufficiently proximate to confer standing. . .

Food & Water Watch, 2019 EHB at 466. And further:

> Keystone's permit has been found to potentially impact users of the Chesapeake Bay. If there is a reasonable potential to impact the Bay, it necessarily follows that there is a reasonable potential to impact the tributaries between the discharge and the Bay and the users thereof, otherwise there would be no need for a permit to regulate such impacts.

Id. at 466.

Food & Water's appeal is not some abstract challenge to the general concept of nutrient trading. Rather, it is a challenge to a very specific provision of a Department-issued permit that authorizes discharges to a very real stream where Ryan and Pinca spend time and engage in recreational activities. Once the Department makes a decision to issue a permit, then the permit and all its provisions are subject to challenge by anyone who has a substantial interest in the matter, including those who live and engage in activities in the area impacted by the permit. This is the very essence of standing.

In summary, we find that Food & Water's members have more than adequately demonstrated their use and enjoyment of the area in question and have articulated specific reasons for their concerns about the Department's issuance of the permit and amended permit. Having concluded that Food & Water clearly has standing to pursue this appeal, we now turn to the merits of its appeal.

Keystone's Permit and Nutrient Trading

Food & Water challenges the provisions of the amended permit that authorize the use of nutrient trading. It is Food & Water's contention that the trading provisions of the permit violate both state and federal law. We examine its argument below.

Pennsylvania Law

Keystone's permit, as amended, authorizes it to engage in "nutrient credit trading" (also known as nutrient trading, water quality trading and water pollution trading). Pennsylvania's nutrient trading program is codified at 25 Pa. Code § 96.8, entitled "Use of offsets and tradable credits from pollution reduction activities in the Chesapeake Bay Watershed." A "credit" is defined in § 96.8(a) as:

> The tradeable unit of compliance that corresponds with a unit of reduction of a pollutant as recognized by the Department which, when certified, verified and registered, may be used to comply with NPDES effluent limitations.

In effect, "trading" constitutes the buying and selling of pollution reduction credits. Section 96.8(b)(1) authorizes credits to be used to meet the legal requirements for restoration, protection and maintenance of the water quality of the Chesapeake Bay. Credits may be generated only from a pollutant reduction activity that is "certified, verified and registered" by the Department. *Id.* at § 96.8(b)(2). Credits may be used by permittees to meet effluent limits contained in NPDES permits for nitrogen, phosphorus and sediment and may only be used for comparable pollutants unless otherwise authorized by the Department (e.g., nitrogen credits may only be used to meet nitrogen limits). *Id*. at § 96.8(b)(3) and (4). As explained in the summary judgment opinion in this matter, "Trading allows Keystone to meet its Chesapeake Bay related limits by using another source's excess nutrient reductions." *Food & Water Watch*, 2019 EHB at 461. Notably, the regulations require a ten percent "set aside" for the Department's reserve. *Id.* at §

96.8(e)(3)(v). This means that for every ten credits generated by a source, one must be placed into the Department's reserve.

Pennsylvania's nutrient trading regulations were promulgated pursuant to Sections 5(b), 202, 307 and 402 of the state's Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 *et seq*., at §§ 691.5(b), 691.307 and 691.402. Section 5(b) of the Clean Streams Law gives the Department the power and duty, among other things, to promulgate regulations necessary to implement the provisions of the Clean Streams Law and to establish policies for effective water quality control and management. *Id*. at § 691.5(b)(1) and (2). Sections 307 and 402 of the act require a permit for any discharge of industrial waste into waters of the Commonwealth or any activity that has the potential to cause pollution. *Id*. at §§ 691.307 and 691.402.

When an agency adopts a regulation pursuant to its legislative rulemaking power, it is valid and binding as long as it is 1) within the power granted to the agency, 2) issued pursuant to proper procedure and 3) reasonable. *Popowsky v. Pa. Public Utility Commission*, 910 A. 2d 38, 53 (Pa. 2006) (cited in *Hillcorp Energy v. DEP*, 2013 EHB 701, 722 (J. Mather concurring)). Where there exists an applicable regulatory scheme, duly promulgated by the Environmental Quality Board, there is a presumption that the regulatory scheme meets the objectives of the underlying statute, in this case the Clean Streams Law. *Pennsylvania Game Commission v. DER*, 1985 EHB 1, 30 (citing *Coolspring Township v. DER*, 1983 EHB 151).

Here, there appears to be no question that the nutrient trading provisions of Keystone's NPDES permit comply with Pennsylvania's nutrient trading regulations set forth at 25 Pa. Code § 96.8. Those regulations were adopted pursuant to the Environmental Quality Board's legislative rulemaking power under the authority of the Clean Streams Law. However, this is not

the end of the inquiry since Pennsylvania's NPDES regulations also require compliance with the federal Clean Water Act. 25 Pa. Code §§ 92a.1(a) and 92a.2. In particular, Section 92a.3 incorporates the federal NPDES regulations at 40 CFR Parts 122, 124, 125 and 132 by reference. *Id.* at § 92a.3. Food & Water asserts that "[t]he net effect of the close integration of federal NPDES regulations into Pennsylvania's state NPDES regulations is that DEP is bound to follow federal law when issuing NPDES permits" such as Keystone's permit. (Food & Water Post-hearing Brief, Opening Memorandum, p. 28.)

Specifically, Food & Water focuses on the language of 25 Pa. Code § 92a.3(a) that states as follows:

> In the event of a conflict between a Federal regulatory provision and a regulation of the Commonwealth, the provision expressly set out in this chapter shall be applied *unless the Federal provision is more stringent.*

(emphasis added). It is Food & Water's position that the Clean Water Act does not authorize nutrient trading. Therefore, argues Food and Water, if the federal Clean Water Act and its regulations do not authorize nutrient trading, they must be considered to be "more stringent" than the state regulations and the federal regulations must apply. In contrast, the Department and Keystone assert that nutrient trading is not prohibited by the Clean Water Act and, therefore, the state regulations authorizing nutrient trading are in line with federal law. Before making a determination on this issue, we first examine the federal Clean Water Act and its interconnection with Pennsylvania's NPDES permitting program.

Federal Law

The Clean Water Act is a complex and technical statute. *American Farm Bureau Federation v. U.S. E.P.A*, 792 F.3d 281 (3d Cir. 2015). As stated in the Act, its goal is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33

U.S.C. § 1251(a). In furtherance of this goal, the Clean Water Act requires that when a body of water is impaired for one or more pollutants, a total maximum daily load – or TMDL – must be developed. 33 U.S.C. § 1313(d)(1)(C). A TMDL is the maximum amount of a pollutant that a body of water can receive while still meeting water quality standards. *Id.* at § 1313(d).

In December 2010, EPA established a TMDL for the Chesapeake Bay. (JE-11.) The Chesapeake Bay TMDL Executive Summary explains the basis for the TMDL and the goals it is intended to accomplish as follows:

> The U.S. Environmental Protection Agency (EPA) has established the Chesapeake Bay Total Maximum Daily Load (TMDL), a historic and comprehensive "pollution diet" with rigorous accountability measures to initiate sweeping actions to restore clean water in the Chesapeake Bay and the region's streams, creeks and rivers . . .
>
> The TMDL – the largest ever developed by EPA – identifies the necessary pollution reductions of nitrogen, phosphorous and sediment across Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia and the District of Columbia and sets pollution limits necessary to meet applicable water quality standards in the Bay and its tidal rivers and embayments.

(JE-11, p. 1.) Because the discharges authorized by Keystone's permit are in the Chesapeake Bay watershed, they are subject to the Chesapeake Bay TMDL. The TMDL limitations are set forth as "Net Total Nitrogen" and "Net Total Phosphorous" pounds per year.

As Food & Water explains in its post-hearing brief, the federal Clean Water Act "utilizes a cooperative federalism approach" with regard to state NPDES programs. (Food & Water Post-hearing Brief "Opening Memorandum," p. 27.) While the Clean Water Act empowers the Administrator of EPA to implement the program, it also allows EPA to delegate that authority to states whose permitting program meets minimum federal standards. 33 U.S.C. § 1342(b); 40 C.F.R. Parts 122-125. Pennsylvania and EPA entered into a Memorandum of Agreement

memorializing the delegation of authority from EPA to Pennsylvania over its NPDES program. (JE-13.) Pursuant to the Memorandum, Pennsylvania is required to administer the NPDES program in accordance with Section 402 of the Clean Water Act, the requirements of 40 C.F.R. Parts 122-125 and "other applicable Federal regulations." (JE-13, p. 1.) Therefore, Food & Water asserts, if federal law prohibits nutrient trading, then the Department cannot issue an NPDES permit that authorizes it.

The Department and Keystone concede that no section of the Clean Water Act mentions nutrient credit trading. However, they point out that neither does any provision of the Clean Water Act *prohibit* nutrient trading. They rely on what they describe as "EPA's long-held position" that credit trading is permitted under the Clean Water Act, as demonstrated by numerous EPA documents that are supportive of nutrient trading. This includes the Chesapeake Bay TMDL (JE-12) which specifically discusses "Water Quality Trading" and states:

> EPA recognizes that a number of Bay jurisdictions already are implementing water quality trading programs. EPA supports implementation of the Bay TMDL through such programs, as long as they are established and implemented in a manner consistent with the [Clean Water Act], its implementing regulations, and EPA's 2003 *Water Quality Trading Policy* . . . and 2007 *Water Quality Trading Toolkit for NPDES Permit Writers*. . .

(Ex. JE-12, p. 10-3.)

Once EPA issued the Chesapeake Bay TMDL, it was left to the states to implement it in accordance with the requirements of the Clean Water Act and its implementing regulations. (JE-12.) The Clean Water Act is largely silent with respect to how states are to comply with TMDL requirements. There is no list of approved methods for achieving TMDL compliance, nor a list of prohibited methods.

It is clear that the language of the Clean Water Act neither authorizes nor prohibits the creation of a nutrient trading program by the Department and the inclusion of permit terms in Keystone's permit that allow for the use of nutrient trading to meet limits required to comply with the Chesapeake Bay TMDL. In the absence of any clear statutory direction one way or the other, we look to whether allowing nutrient trading to satisfy Keystone's permit requirements is consistent with the goals of the Clean Water Act. For the reasons that follow we believe it is and, therefore, Food & Water has failed to persuade the Board that the Department's permitting action violates federal law.

The United States Supreme Court has recognized that "the Clean Water Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution." *Arkansas v. Oklahoma*, 503 U.S. 91, 108 (1992). Additionally, the Third Circuit Court of Appeals has held that Congress has entrusted EPA with "broad regulatory authority" to administer the Clean Water Act using the agency's expertise and to fill in the details of any "gaps" consistent with the Act's purpose. *American Farm Bureau,* 792 F.3d at 295-97. Nutrient credit trading is supported by EPA as a means of achieving water quality improvements. In fact, the language of the Chesapeake Bay TMDL expressly recognizes that states may utilize trading programs as a means of meeting the allocations set forth in the TMDL. As this Board has recognized, "EPA encourages nutrient trading. So does the Department." *Food & Water*, 2019 EHB at 461.

Federal courts have recognized nutrient trading as an appropriate means of achieving the Chesapeake Bay TMDL. The Federal District Court for the Middle District of Pennsylvania has noted that individual sources are free to trade pollution amounts without the need to revise or adjust the TMDL allocation. *American Farm Bureau Federation v. U.S. E.P.A.*, 984 F. Supp. 2d

289, 328 (M.D. Pa. 2013), *aff'd*, 792 F.3d 281 (3d Cir. 2015). And, in Food & Water's challenge of the Chesapeake Bay TMDL before the Federal District Court for the District of Columbia, the court clearly recognized states' ability to implement trading programs, stating, "if States wish to accommodate growth and development and meet the goals of the [Clean Water Act], they may have to use offsets and trading programs to implement the Bay TMDL, which happen to be encouraged and supported – but not authorized – by the Bay TMDL." *Food & Water Watch v. U.S. E.P.A.*, 5 F. Supp. 3d 62, 77-78 (D.D.C. 2013).[5]

As we have already stated, the Clean Water Act leaves a great deal of discretion to the states as to the manner in which to accomplish the goals of the Act, including implementation of TMDLs. Pennsylvania has developed a comprehensive set of regulations aimed at restoring, protecting and maintaining the water quality of the Chesapeake Bay in accordance with the Bay TMDL. 25 Pa. Code § 96.8(b). Nutrient trading is one of many tools being used to accomplish those goals.

Moreover, Pennsylvania's nutrient trading regulations provide additional protections for water quality. As noted earlier, Section 96.8(e)(3)(v) requires a ten percent credit "set aside." 25 Pa. Code § 96.8(e)(3)(v). This means that for every ten credits generated, one must be placed in reserve. Additionally, the Department may impose other requirements beyond the ten percent set aside. 25 Pa. Code § 96.8(e)(3)(vi). Thus, at a minimum, for every credit generated there will be a $1/10^{th}$ reduction in the nutrient load delivered to the Chesapeake Bay. Not only is this consistent with the goals of the Clean Water Act, but, in our view, provides even more stringent protection.

[5] *See also, Ohio Valley Environmental Coalition v. Horinko*, 279 F. Supp. 2d 732, 774 (S.D.W.V. 2003) (Federal District Court upheld effluent trading provisions as part of West Virginia's antidegradation program).

Finally, not only are the permit and amended permit consistent with Pennsylvania's duly promulgated regulations and the Chesapeake Bay TMDL, but both permits have been reviewed by EPA with no objection. Section 1342(d)(2) of the Clean Water Act, 33 U.S.C. § 1342(d)(2) states, "No [NPDES] permit shall issue . . . if the Administrator . . . objects in writing to the issuance of such permit as being outside the guidelines and requirements of [the Clean Water Act]." The Department's regulations at 25 Pa. Code §§ 92a.91 and 92a.93 contain a similar requirement: NPDES permits are to be sent to the EPA Administrator, who has the right to review and object to the issuance of any permit. EPA reviewed both the October 2017 permit and the September 2018 amended permit containing the nutrient trading provisions and had no objections.[6] Clearly, if EPA had disapproved of any provision of Keystone's permit, including authorization for the use of nutrient trading, it had the ability to voice its objection or reject the permit altogether. Its failure to do so speaks volumes.

For the reasons set forth above, we conclude that the Clean Water Act does not prohibit states from adopting water quality protection programs that incorporate the use of nutrient trading. Nor has Food & Water persuaded us that Pennsylvania's NPDES program is any less stringent than the federal program. In our view, Pennsylvania's nutrient trading regulations are consistent with federal law. In light of this finding, we apply Pennsylvania law in determining whether to uphold the permit and, specifically, the nutrient trading provisions of the permit. Because Pennsylvania has duly promulgated regulations authorizing nutrient trading, which we believe are consistent with the goals of the Clean Water Act, we find that the Department's issuance of the permit and amended permit allowing Keystone to engage in nutrient trading was an appropriate exercise of its authority.

[6] The record indicates that the only comments the Department received on Keystone's permit and amended permit were from Food & Water. (JE-1, p. 1-2; JE-3, p. 1-2.)

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 691.7; 35 P.S. § 7514.

2. As a third-party appellant appealing the Department's issuance of a permit, Food & Water bears the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Gerhart v. DEP*, 2019 EHB 534, 546-47; *Joshi v. DEP*, 2019 EHB 356, 364; *Jake v. DEP*, 2014 EHB 38, 47.

3. An organization has representational standing if it demonstrates that at least one of its members has a substantial, direct, and immediate interest in the outcome of the appeal. 35 P.S. § 7514(c); *Robinson Twp. v. Cmwlth.*, 83 A.3d 901, 917 and 922 (Pa. 2013); *Citizens for Pennsylvania's Future v. DEP*, 2015 EHB 750, 751-53.

4. Appellants in third-party permit appeals have standing if they credibly aver that they use the area to be affected by a permitted activity and there is a realistic potential that their use of that area could be adversely affected by the challenged activity. *Sierra Club v. DEP*, 2017 EHB 685, 695; *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643; *Citizen Advocates United to Safeguard the Environment, Inc. v. DEP*, 2007 EHB 632, 673. *See also Funk v. Wolf*, 144 A.3d 228, 243-48 (Pa. Cmwlth. 2016).

5. When standing is challenged in a pre-hearing memorandum and in a post-hearing brief, an appellant must demonstrate by a preponderance of the evidence on the record that it has standing. *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1147; *Stedge v. DEP*, 2015 EHB 577, 594; *Pa. Trout v. DEP*, 2004 EHB 310, 355; *Greenfield Good Neighbors Group, Inc. v. DEP*, 2003 EHB 555, 564; *Giordano v. DEP*, 2000 EHB 1184, 1187.

6. Food & Water has demonstrated that it has standing as an organization as a representative of its members to challenge Keystone's NPDES permit.

7. Issues not preserved in a party's pre-hearing memorandum are waived. 25 Pa. Code § 1021. 104(a)(2); *Benner Township*, 2019 EHB at 635-36.

8. When an agency adopts a regulation pursuant to its legislative rulemaking power, it is valid and binding as long as it is 1) within the power granted to the agency, 2) issued pursuant to proper procedure and 3) reasonable. *Popowsky*, 910 A.2d at 53.

9. Where there exists an applicable regulatory scheme duly promulgated by the Environmental Quality Board, there is a presumption that the regulatory scheme meets the objectives of the underlying statute. *Pennsylvania Game Commission*, 1985 EHB at 30.

10. Pennsylvania's nutrient credit trading regulations are consistent with and no less stringent than federal law.

11. Nutrient credit trading is authorized under Pennsylvania law. 25 Pa. Code § 96.8

12. Nutrient credit trading is not prohibited by the federal Clean Water Act.

13. The Department did not err as a matter of law or abuse its discretion by including nutrient trading provisions in the permit issued to Keystone.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FOOD & WATER WATCH	:	
	:	
v.	:	**EHB Docket No. 2018-108-L**
	:	**(consolidated with 2017-114-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE PROTEIN COMPANY, Permittee	:	

O R D E R

AND NOW, this 21st day of May, 2020, it is hereby ordered that the Appellant's consolidated appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

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

DATED: May 21, 2020

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

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

For Appellant:
Kenneth T. Kristl, Esquire
(*via electronic filing system*)

For Permittee:
Terry R. Bossert, Esquire
Ryan M. Logan, Esquire
Aaron S. Mapes, Esquire
Lindsay A. Berkstresser, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FOOD & WATER WATCH	:	
	:	
v.	:	**EHB Docket No. 2018-108-L**
	:	**(consolidated with 2017-114-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and KEYSTONE PROTEIN	:	
COMPANY, Permittee	:	

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

By Bernard A. Labuskes, Jr., Judge

I concur only in the result of the Majority's decision dismissing this appeal. I write separately because I respectfully disagree that Food & Water has demonstrated by a preponderance of the evidence in the stipulated record that it has standing. I would have dismissed this appeal on that basis and not reached the merits.

Food & Water, of course, asserts that it has representational standing on behalf of its members.[1] When standing is challenged in a pre-hearing memorandum and in a post-hearing brief, an appellant such as Food & Water must demonstrate by a preponderance of the evidence at the hearing on the merits, or in this case on the basis of the stipulated record, that it has standing even where a motion for summary judgment by opposing parties on the issue has been denied. *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1147; *Stedge v. DEP*, 2015 EHB 577, 594; *Pa. Trout v. DEP*, 2004 EHB 310, 355; *Greenfield Good Neighbors Group., Inc. v. DEP*, 2003 EHB 555, 564. In *Giordano v. DEP*, 2000 EHB 1184, we explained in detail the accretive

[1] Curiously, Food & Water has not asserted that it has standing as an organization itself independent of representational standing on behalf of its members.

showing a party must make on standing depending on the point in the proceedings when it is challenged:

> The appropriate evidentiary standard of review in evaluating a standing challenge depends upon when standing is challenged. In that respect, the standing issue is really no different than any other issue in the case. Although it is not necessary to plead standing, it is the appellants who are ultimately required to prove that they have standing if the question is put at issue. If the question is raised in a motion to dismiss early in the case, we essentially accept all of the appellant's allegations as true and decide whether the opposing party is nevertheless entitled to judgment as a matter of law. If the question is raised at or near the conclusion of discovery in the context of a summary judgment motion, we will only rule on the issue if there are no genuine issues of material fact and it is clear that the appellant does or does not have standing as a matter of law. If the question is still contested after the evidentiary hearing, we determine whether the appellants have carried their burden of proving that they have standing by a preponderance of the evidence.

Id. at 1187 (internal citations omitted). Thus, in the context of an adjudication, Food & Water must have shown by a preponderance of the evidence (1) that one or more of its members use the area to be affected by Keystone's permit, and (2) that there is a realistic potential that their use of that area could be adversely affected by the activity authorized by the permit. *Sierra Club v. DEP*, 2017 EHB 685, 695; *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643. *See also Funk v. Wolf*, 144 A.3d 228, 243-48 (Pa. Cmwlth. 2016). It is this second part, the realistic potential of harm to its members' use, that Food & Water has failed to show.

I have no reason to doubt Ms. Ryan and Ms. Pinca's use of and interest in the area of the Swatara Creek for recreation and aesthetic appreciation. However, the key problem for Food & Water is that it has made no showing with record evidence that Ryan and Pinca's use of the area will be affected by Keystone's discharges under the NPDES permit. Food & Water's sole objections to the permit concern nutrient credit trading and why it believes trading is unlawful under the federal Clean Water Act. It presents legal arguments but nothing on the real-world effect of credit trading on water quality, whether at Little Swatara Creek, Swatara Creek, or the

Chesapeake Bay. Food & Water has not pointed to *any* record evidence that any provision of the permit, or any aspect or Keystone's proposed activity, poses any threat whatsoever to Ryan and Pinca's recreational use of the Swatara Creek, or that Keystone's facility will have any impact at all on the water quality that provides the basis for Ryan and Pinca's use and enjoyment.

Food & Water says in its brief that Ryan and Pinca

> are concerned that excessive nutrient discharges into Little Swatara Creek will give rise to (1) health risks from recreating in polluted water, (2) damage to the Swatara Creek ecosystem, its aquatic life, and wildlife, and consequently, (3) diminished enjoyment and curtailment of their recreational and aesthetic activities. In particular, if Keystone engages in nutrient trading as allowed by its Permit, Ms. Ryan's concern over water quality will cause her to curtail her recreation, including changing where she kayaks, abandoning plans to fish in the Creek with her granddaughters, and no longer hiking with family pets.

(Brief at 22 (record citations omitted).) Again, I do not question their concerns. But Food & Water never shows on the record that there is any likelihood that the "nutrient trading allowed by [Keystone's] permit" presents any cause for those concerns. It never produces any record evidence showing *how* there could be "excessive nutrient discharges" from Keystone's facility.

Food & Water instead presents its case as if it is self-evident that the trading provisions in the permit will result in harm—that nutrient credit trading will result in unlimited amounts of nitrogen and phosphorus being dumped into the Little Swatara Creek and the Chesapeake Bay—but that is not at all self-evident. Food & Water poses it as an almost foregone conclusion that, because there is a discharge to Little Swatara Creek, its members' use of the Swatara Creek watershed *must* be harmed or diminished, but there is simply no evidence in the stipulated record that Food & Water identifies to support that connection.

Part of the problem is that Food & Water has not produced any record evidence substantiating its understanding of the nutrient trading program that it alleges presents a risk of harm. In the Opinion denying summary judgment, I asked the parties to explain how the trading

program works more broadly, and how it relates specifically to the permit under appeal, but Food & Water, bearing the burden of proof, has not done that.

> [T]he trading program has not been adequately explained in the parties' filings. Trading is a complex, controversial issue of potentially national importance. It is, perhaps, unrealistic to expect us to resolve its legality in the context of a summary judgment motion. The better course is to proceed to a hearing and an adjudication.

Food & Water Watch v. DEP, 2019 EHB 459, 479. The stipulated record we have before us now actually contains fewer documents than the record accompanying the parties' competing summary judgment motions. Apparently Food & Water expected the Board to have an intimate and intuitive understanding of the federal credit trading program, how it may or may not interact with Pennsylvania law on trading, and how both of those things are implicated by the permit under appeal, without any factual testimony or record support.

Food & Water at one point ironically criticizes the Department and Keystone for "produc[ing] *zero* evidence about the actual effects of trading on water quality." (Reply Brief at 16 n.10.) But neither did Food & Water, which again carries the burden of proof in this appeal. There is no *record* evidence one way or the other on how credit trading might impact water quality in relation to Keystone's permit at Little Swatara Creek, Swatara Creek, or the Chesapeake Bay.

Essentially all there is from Food & Water is the argument of counsel. Food & Water's articulation of how it believes the trading provisions of Keystone's permit operate admittedly rests on "implicit assumptions":

> From [Food & Water]'s perspective, the nutrient/pollutant trading provisions of the Permit operate on two implicit assumptions: (1) that somewhere in the watershed someone creates a "credit" for a reduction of a particular pollutant; and (2) Keystone can then exceed its own permit limit, and apply the purchased "credits" by subtracting the credits from its actual quantity discharged to get back down to its "net" limit, at least on paper. Credit trading does nothing to limit the amount of pollution at the point of discharge into local waterways, but is

> implemented on the assumption that at some point downstream the net amount of pollution from credit generators and credit purchasers will be the same as if no trading had occurred.

(Brief at 30.) However, Food & Water does not support its conception of trading with any record evidence. Furthermore, regardless of whether credit trading itself "does nothing to limit the amount of pollution at the point of discharge into local waterways," Food & Water does not explain how credit trading allows Keystone to circumvent the local water quality-based effluent limits that are laid out in Keystone's permit.

Indeed, although the record is far from clear on the effect of nutrient trading on Keystone's discharges, if anything, the record seems to suggest that Keystone must nevertheless comply with the local effluent limits for total phosphorus and total nitrogen before engaging in any trading. The amended permit contains the following provision:

> Where effluent limitations for TN and/or TP are established in Part A of the permit for reasons other than the Cap Load assigned for protection of the Chesapeake Bay ('local nutrient limits'), the permittee may purchase and apply credits for compliance with the Cap Load(s) **only when the permittee has demonstrated that local nutrient limits have been achieved**.

(JE-3 (at 23) (emphasis added).) Food & Water pointedly never addresses this provision in its briefs. From what I can gather, the provision appears to be saying that Keystone is bound by the local effluent limits regardless of what happens with nutrient trading, and it is no longer disputed that those limits are adequately protective of the stream that Ms. Pinca and Ms. Ryan use and enjoy.

In the summary judgment Opinion, I expressed my understanding that Keystone cannot use credits or offsets to get around the local effluent limits imposed in the permit for the Little Swatara Creek. *See Food & Water Watch*, 2019 EHB 459, 460-61. In other words, as I understand it, regardless of any credits obtained by Keystone in relation to the Chesapeake Bay

requirements, Keystone cannot exceed the average monthly and daily maximum mass limits, or the average monthly, daily maximum, and instantaneous maximum concentration limits for total phosphorus, or the average monthly and daily maximum concentration limits for total nitrogen imposed on pages two and three of the permit. I more or less invited Food & Water to correct me if I was wrong: "Unless we are missing something or misinterpreting its position, Food & Water is entirely incorrect in believing otherwise on this very important point." *Id.* at 461. Despite having been provided with this invitation, Food & Water has not pointed to any record evidence that makes me question this understanding.

In fact, Food & Water seems to concede that this is true in its reply brief: "[I]t is only the Permit's wholly separate local water quality-based effluent limitations, which are in place to arguably maintain local water quality standards and are unrelated to the Bay TMDL [Total Maximum Daily Load], that prevent Keystone from engaging in completely unlimited nutrient discharges." (Reply Brief at 14.) How the credit trading provisions nevertheless allow Keystone to discharge an amount of pollution into Little Swatara Creek that exceeds the local effluent limits and risks harming Food & Water's members remains elusive.

This matters because a crucial part of the standing analysis requires there to be a causal connection between the matter complained of and the harm alleged that is sufficiently close so as not to be remote or speculative. *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009). *See also William Penn Parking*, 346 A.2d 269, 282 ("The requirement that an interest be 'direct' simply means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains."). I am mindful that standing is not a merits inquiry, *Sierra Club*, 2017 EHB 685, 696, but an appellant must nevertheless establish by a preponderance of the evidence that the challenged activity presents a "realistic potential of harm"

to that person's use of an area. *Citizen Advocates United to Safeguard the Environment, Inc. ("CAUSE") v. DEP*, 2007 EHB 632, 673. Food & Water has done nothing to establish the connection between the trading provisions in the permit (or any other provision) and any potential harm to Ryan and Pinca's use of the Swatara Creek.

Food & Water only needed to make a minimal showing to establish its standing. Indeed, a minimal showing is all that we have required in the past for parties to demonstrate standing. For instance, in *Pennsylvania Trout v. DEP*, 2004 EHB 310, an appellant organization challenged a Chapter 105 permit issued to a developer that planned to convert six acres of wetlands to a shopping center. We found that the organization had standing on behalf of its members, first because the members provided testimony that they watched wildlife and fished in the area of the proposed development, *id.* at 356-58, and second because there was no question that the members' use and aesthetic appreciation of the area would be impacted by the loss of a significant area of wetlands, *id.* at 358-59. Thus, we found the members' interests in the 105 permit substantial, direct, and immediate.

There is no evidence of harm in this appeal on the basis of the stipulated record. There is no record evidence that the activities that Ms. Ryan and Ms. Pinca enjoy in and around the Swatara Creek will be impacted by credit trading or by Keystone's activities under its NPDES permit. In *Pennsylvania Trout*, there was evidence that the wetlands would be destroyed to make way for the permitted shopping center, and that the loss of those wetlands would impact the appellant's members by curtailing their fishing and aesthetic appreciation—in other words, the causal connection was established between the permitted activity and the members' use. Here, there is no evidence that Keystone's discharge will impact Food & Water's members' use and enjoyment of the Swatara Creek watershed. In *Pennsylvania Trout*, the causal link may have

been more obvious, but in response to a standing challenge the appellant nevertheless put on evidence of that link and how it would impact its members.

In *CAUSE v. DEP*, 2007 EHB 632, we found standing for an appellant group based on four members who lived within a mile of a proposed project to beneficially use residual waste to reclaim and remediate a site containing old, unlined landfills that also had a legacy of surface coal mining. We found standing because the members testified to objectively reasonable concerns that the project could adversely affect their daily life, health, and property if the beneficial use of the waste did not go as planned by the Department and permittee. Among these concerns was potential pollution to groundwater, which emerged on a member's property as springs and seeps. In contrast to *CAUSE*, Food & Water did not provide any factual support for a "direct and proximate link" between the nutrient trading provisions and the discharges authorized by Keystone's permit and its members' interests in the Swatara Creek. *Id.* at 677.

In *Smedley v. DEP*, 2001 EHB 131, we considered a citizen's standing to appeal a minor modification to an air quality permit for a paper mill. We found standing because there was evidence in the record of the emissions from the plant settling into a valley in downtown Lock Haven where the appellant frequented for business and community reasons. *Id.* at 161-62. There was also testimony from the appellant that he observed emissions from the plant coming down the valley and going by his home. *Id.* at 162. We rejected an argument from the permittee that the appellant needed any air quality dispersion and modeling studies to demonstrate standing. Instead, we were satisfied with lay testimony from the appellant about his use of the areas affected by the paper mill's operations, and testimony from another lay witness about his observations of emissions from the plant descending into downtown Lock Haven. We found that the testimony met the requirements for a direct, substantial, and immediate interest in the

challenged activity. Once again, the link between the appellant's use of an area and the emissions from the paper mill was established on the record.

As *Smedley* demonstrates, the evidentiary showing does not need to be extensive to establish a realistic potential threat to one's use of an area—expert evidence is not required, as the Majority recognizes—but *some* evidentiary showing must actually be made on the record. Food & Water has made no showing on the record of *how* the use of its members stands to be impacted by Keystone's permitted discharge, apart from the apparently baseless assertion that the permit could result in "unlimited" amounts of nitrogen and phosphorus being discharged into the Little Swatara Creek due to nutrient credit trading. To repeat, the record if anything seems to suggest that such unrestrained pollution cannot happen so long as Keystone meets the unchallenged local water quality-based effluent limits. There is no credible link in the record between Keystone's permit (whether from the trading provisions or any other provision) and any impact to Food & Water's members' interests.

I have been generous in the past in according appellants standing, and indeed, I gave the appellant here the benefit of the doubt at the summary judgment phase. Frankly, it is and should be a relatively simple matter to establish standing in Board proceedings. However, here, there is simply **no evidence whatsoever** that the permit in question will cause any harm, let alone any harm to the appellant. In such an important case, it is not too much to ask that the appellant give us something, and here it gave us absolutely nothing. If this is all it takes to establish standing, I fear that the requirement is essentially illusory. For these reasons I would have dismissed the appeal for failure to demonstrate standing on the basis of the stipulated record.[2]

[2] Although I express no opinion on the merits, I do wonder why EPA would ever need to promulgate regulations if it can implement a major change or supplement to the law with guidance documents and the other informal mechanisms cited as evidence of its support for nutrient trading.

ENVIRONMENTAL HEARING BOARD

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

DATED: May 21, 2020

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRYER EXCAVATING, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-042-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 27, 2020**

OPINION AND ORDER ON
PETITION TO APPEAL NUNC PRO TUNC

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Board finds that emergency measures taken by the Commonwealth of Pennsylvania in response to the COVID-19 global pandemic constitute unique and compelling circumstances that justify the granting of petitioner's request for permission to appeal nunc pro tunc, particularly where the petition was filed only one day past the appeal period. Therefore, the petition to appeal nunc pro tunc is granted.

O P I N I O N

On April 7, 2020, the Environmental Hearing Board (Board) received a Petition to Proceed with Appeal Nunc Pro Tunc (petition) filed on behalf of Fryer Excavating, LLC (Fryer). The petition seeks permission from the Board to file a nunc pro tunc appeal of an Assessment of Civil Penalty (civil penalty assessment) issued to Fryer by the Department of Environmental Protection (Department) on March 4, 2020 and received by Fryer on March 6, 2020.

Pursuant to the Board's Rules of Practice and Procedure, appeals must generally be filed within 30 days of notice of the action. Our rules specifically state as follows:

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

25 Pa. Code § 1021.52(a).

As a general matter, "[t]he untimeliness of the filing deprives the Board of jurisdiction." *Rostosky v. Department of Environmental Resources*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976). However, in limited circumstances, the Board may grant permission to appeal *nunc pro tunc* upon written request and for good cause shown. 25 Pa. Code § 1021.53a; *Feudale v. DEP*, 2016 EHB 774, 775. Good cause is determined in accordance with "the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth." *Id.* Generally, good cause requires a showing of fraud, breakdown in the administrative process or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal. *Grimaud v. Department of Environmental Resources*, 638 A.2d 299, 303-04 (Pa. Cmwlth. 2004) (quoting *Falcon Oil Co. v. Department of Environmental Resources*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992). As Judge Coleman explained in *Feudale*, in order to prevail on a nunc pro tunc petition:

> [t]he party seeking nunc pro tunc filing must show 1) that extraordinary circumstances, involving fraud or breakdown in the

> administrative process or non-negligent circumstances related to the party, its counsel or a third party caused the untimeliness ; 2) that it filed the document within a short time period after the deadline or date that it learned of the untimeliness; and 3) that the respondent will not suffer prejudice due to the delay.

2016 EHB at 776 (quoting *Bureau Veritas North America, Inc. v. Department of Transportation,* 127 A.3d 871, 879 (Pa. Cmwlth. 2015)). As the Pennsylvania Supreme Court has recognized, "an appeal nunc pro tunc is intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain extraordinary circumstances." *Commonwealth v. Stock*, 679 A.2d 760, 764 (Pa. 1996).

Here, Fryer received the Department's civil penalty assessment on March 6, 2020. Therefore, the last day of the appeal period would have been April 6, 2020 (since the 30th day, April 5, fell on a Sunday). Fryer's petition to appeal nunc pro tunc was filed one day past the appeal period, on April 7. In its petition, Fryer states as follows:

> 3. As a result of the Covid-19 pandemic, the declaration of a state of emergency both locally and statewide, and the mandated closure of all non essential business including the offices of Fryer Excavating, LLC and James J. Loll, PC [Fryer's attorney] Fryer Excavating missed the appeal deadline by one day.
>
> 4. Due to the unique, compelling and unprecedented nature of the current pandemic, Fryer Excavating was concentrating all of its efforts and attentions [sic] to constantly evolving business issues which required immediate attention.

(Petition to Proceed Nunc Pro Tunc, para. 3-4.)

The Department filed a response opposing Fryer's petition to proceed nunc pro tunc. It asserts that Fryer has failed to allege the circumstances necessary for allowing an appeal nunc pro tunc, i.e., fraud, breakdown in Board process or other non-negligent circumstances that prevented Fryer from filing a timely appeal. In particular, the Department argues that Fryer has

failed to allege with any specificity the "constantly evolving business issues" that caused it to miss the appeal deadline. The Department points out that the Redevelopment Authority of Lawrence County was assessed a civil penalty for the same facts and alleged violations as Fryer. It received the assessment on March 9, 2020 and filed its appeal 24 days later, well within the 30-day appeal period. The Department asserts that the Redevelopment Authority was able to file its appeal in a timely manner while subject to the same emergency conditions as Fryer.

The Board rarely grants petitions to appeal nunc pro tunc. In the vast majority of cases where the Board has been confronted with a petition to appeal nunc pro tunc, the request has been denied for failure to show good cause. See, e.g. *Feudale, supra* (failure to obtain relief in Pennsylvania's appellate courts did not provide a basis for filing a nunc pro tunc appeal with the Board); *Ametek v. DEP,* 2014 EHB 65 (Department's alleged agreement to toll the appeal period and/or extend the litigation schedule did not provide a basis for allowing appeal to proceed nunc pro tunc); *Spencer v. DEP*, 2008 EHB 573 (Board's receipt of notice of appeal one day beyond the appeal period, even though Department received it within the appeal period, was not a sufficient basis for allowing the appeal to proceed nunc pro tunc); *Greenridge Reclamation, Inc. v. DEP*, 2005 EHB 390 (inadvertently mailing a notice of appeal to the Department instead of the Board did not constitute grounds for granting a petition to appeal nunc pro tunc); *Pedler v DEP*, 2004 EHB 852 (starting a new job and being out of state did not constitute good cause for allowing an appeal nunc pro tunc); *Decker v. DEP*, 2002 EHB 45 (a strong desire to bring alleged statutory violations to the Board's attention does not constitute good cause for allowing an appeal nunc pro tunc); *Ziccardi v. DEP*, 1997 EHB 1 (appellants' confusion regarding permits did not provide a basis for allowing an appeal nunc pro tunc). As former Environmental Hearing Board Chairman Maxine Woelfling has recognized, "the Board and the appellate courts have had

little sympathy" for litigants who fail to make themselves aware of the statutory requirements or rely on the Department to make them aware of the appeal procedures. *Fisher v. DER*, 1993 EHB 425, 428. Nonetheless, the Board has on occasion found good cause for allowing a late-filed appeal to go forward. See, e.g., *Smith v. DEP*, 2002 EHB 640 (petition to appeal nunc pro tunc was granted where it was not clear that the Department's letter was a final action); *Fisher, supra* (appellant was entitled to have her appeal heard nunc pro tunc where the language of a mine subsidence insurance agreement relating to the appeal period was misleading and erroneous).

As we have noted, in the absence of fraud or breakdown in the Board's operation, the circumstances justifying the grant of an appeal nunc pro tunc must be extraordinary and compelling. This includes "unforeseeable and unavoidable events" that preclude a petitioner from filing his or her appeal. *Criss v. Wise*, 781 A.2d 1156, 1160 (Pa. 2001). We find that the declaration of emergency conditions and the unforeseeable and sudden closure of businesses in the face of a global pandemic presents just such an extraordinary and compelling circumstance.

Following the declaration of a public health emergency by the World Health Organization and the United States Department of Health and Human Services due to the novel coronavirus and COVID-19, on March 6, 2020 Governor Wolf proclaimed the "existence of a disaster emergency throughout the Commonwealth." On March 19, 2020, the Governor issued an "Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses That Are Not Life Sustaining."[1] The order closed all non-life sustaining businesses effective immediately. Businesses that failed to comply were subject to enforcement action beginning on March 21, 2020.

[1] The March 19, 2020 Order, as well as other orders relating to the COVID-19 emergency declaration, may be obtained at www.governor.pa.gov.

In light of the emergency closure, the Pennsylvania Supreme Court has recognized the challenges facing the courts while ensuring that parties' due process requirements are met. The Court issued an Emergency Order of April 28, 2020 (extending its prior order), declaring that the COVID-19 pandemic has resulted in a statewide judicial emergency and calling on courts to "put forward their best efforts to accomplish the timely administration of justice." See Emergency Order of Statewide Judicial Administration, Nos. 531 and 532 Judicial Administration Docket. In some cases, this may require the extension of deadlines (as set forth in the Emergency Order). For example, in its recent order in *Commonwealth v. Williams*, 2020 Pa. LEXIS 2398, No. 61 MM 2020 (Pa. April 29, 2020), the Court granted leave to file a Petition for Allowance of Appeal nunc pro tunc and acknowledged the "extensions conferred due to the COVID-19 pandemic."

We find that the petitioner, Fryer, has set forth a unique and compelling set of circumstances that justify the filing of an appeal nunc pro tunc. One factor that the Board has taken into consideration when evaluating a petition to appeal nunc pro tunc is the petitioner's speed in filing the petition to remedy the late-filed appeal. Even where good cause is shown, a petition may be denied if a petitioner has not acted in a timely manner to correct the situation. For example, in *Delaware Riverkeeper Network v. DEP*, 2017 EHB 1100, the Board denied a petition for leave to appeal nunc pro tunc largely because the petitioner did not act promptly to remedy its failure to file a timely appeal. In that case, the petitioner waited 205 days before filing its petition to appeal nunc pro tunc with the Board. Here, Fryer filed its petition only one day past the 30-day appeal deadline.

We, therefore, enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRYER EXCAVATING, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-042-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 27th day of May, 2020, it is hereby ordered that the Appellant's Petition to Proceed With Appeal Nunc Pro Tunc is *granted.* Appellant shall file its Notice of Appeal on or before **June 10, 2020.**

ENVIRONMENTAL HEARING BOARD

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

DATED: May 27, 2020

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

For the Commonwealth of PA:
Carl D. Ballard, Esquire
David R. Hull, Esquire
(*via electronic filing system*)

For Appellant:
Dana Marie Kwidis, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LYNDA WILLIAMS	:	
	:	
v.	:	**EHB Docket No. 2018-067-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ESTATE OF HARRY SIMON, Permittee	:	**Issued: May 28, 2020**

OPINION AND ORDER ON MOTION
IN LIMINE AND MOTION TO AMEND NOTICE OF APPEAL

By Michelle A. Coleman, Judge

Synopsis

The Board grants an Appellant's Motion to Amend Notice of Appeal. While the Board generally disfavors such motions filed close in time to the start of a hearing, it causes no undue prejudice on opposing parties, who had notice of the issue and have been actively litigating the issue from early in the Appeal.

O P I N I O N

The matter currently before the Board stems from the Notice of Appeal filed by Lynda Williams ("Appellant") on July 13, 2018. In her Notice of Appeal, Appellant sought review of the Department of Environmental Protection's ("Department's") issuance of PAD 150046 ("Permit") which authorized the Estate of Harry Simon ("Permittee") to discharge stormwater and conduct earth disturbance activities associated with construction activities to expand a residential development. In her Notice of Appeal, filed *pro se*, Appellant raised concerns that the Permit would result in building in and disturbance of an area located in wetlands. Specifically,

Appellant alleged that grading work associated with the project would be conducted within a delineated wetland area, contrary to a report provided by the Permittee's engineers to the Department when seeking approval under the Permit.

In January 2019, the Department and Permittee served interrogatories on Appellant asking for clarification on the statements made in her Notice of Appeal. Appellant, who had by that point obtained counsel, stated in her response to interrogatories that her legal claim was that the permit did not comply with Pennsylvania's Riparian Forest Buffer Requirements, 25 Pa. Code § 102.14. Her full response was as follows:

> Subject to the general objections and reservation of rights above, and without waiving the same, Appellant responds as follows: Based on visual observation as well as documents prepared by or on behalf of the Estate (including the Plan of Subdivision and a Grading Plan drawing in connection with a Highway Occupancy Permit), there is a pond, associated wetlands, and a stream located on the Estate property to the west of Grove Road. According to the Plan of Subdivision, these carry "waters of the United States." The pond, wetlands, and/or stream are visible up to a culvert on the property, which then diverts the stream into an underground conveyance shown on pages of the Plan of Subdivision into a chamber which splits the stream flow, diverting some stream flow under Grove Road into an above-ground swale on the east side of Grove Road and the rest through an underground line located under the middle of Grove Road. The stormwater management system approved by the Permit sends stormwater flow into this underground line. Whether on the east side or middle of Grove Road, the stream flows into Broad Run south of the Estate Property. The Permit itself describes the project's discharge as being an "Unnamed Tributary of Broad Run." The Permit was issued pursuant to 25 Pa. Code Chapter 102.
>
> According to 25 Pa. Code § 93.9g, Broad Run is an Exceptional Value (EV) water of the Commonwealth (*see also* 25 Pa. Code § 93.3 for definitions). The Permit, Permit Application, and Record of Decision identify the unnamed tributary of Broad Run as a High Quality (HQ) water of the Commonwealth. Because of the direct hydrological connection to Broad Run, the pond, wetlands, and stream on the Estate property are within the Broad Run watershed for regulatory purposes. Whether an EV or HQ water, the Broad Run watershed is a special protection watershed for regulatory purposes. According to Pennsylvania's 2016 Integrated Water Quality Report, Broad Run is a category 4c impaired waterway. 25 Pa. Code § 102.14(a)(2) states:
>
> > Persons proposing or conducting earth disturbance activities when the activity requires a permit under this chapter where the project site is

> located in an Exceptional Value or High Quality watershed where there are waters failing to attain one or more designed uses as listed in Category 4 or 5 on Pennsylvania's Integrated Water Quality Monitoring and Assessment report, as amended and updated, at the time of the application, and the project site contains, is along or within 150 feet of a perennial or intermittent river, stream, or creek, lake, pond or reservoir shall, in accordance with the requirements of this section do one of the following:
>
> (i) Protect an existing riparian forest buffer.
> (ii) Covert an existing riparian buffer to a riparian forest buffer.
> (iii) Establish a new riparian forest buffer.
>
> According to 25 Pa. Code § 102.14(b), the width of the buffers in a special protection watershed like the Broad Run must be 150 feet.
>
> Both the Plan of Subdivision and the Grading Plan documents show that the Estate will be conducting earth disturbance activities within 150 feet of the pond, wetlands, and stream near Grove Road on the Estate Property by: (1) creating a paved entrance/exit to/from Grove Road for the proposed development on the Estate property; and (2) by removing portions of a berm that exists between the pond, wetlands, and stream and Grove Road in order to create sight lines for the entrance/exit. Appellant believes that the removal of berm work will likely result in trees located on the top of the berm being damaged and ultimately falling onto Grove Road or into the pond, wetlands, and stream on the Estate Property and potentially introduce berm materials into the waters of the United States that are the pond, wetlands, and/or stream. Whether or not the trees or excavation materials fall into the pond, wetlands and/or stream, the proposed subdivision covered by the Permit will be conducting earth disturbance activities within the Special Protection watershed, and otherwise violating the buffer requirements in 25 Pa. Code § 102.14. It is these violations of the buffer requirements, and the potential dumping of materials into the waters of the United States, that Appellant believes constitutes improper and legally prohibited disturbance of wetlands. Discovery continues.

(App. Ex. D, E.)

Discovery closed on July 15, 2019 and Permittee and Appellant both filed Motions for Summary Judgment on August 14, 2019. Permittee noted in its Motion that the construction would not cause any impact to identified wetlands in the area but its motion focused on a challenge to Appellant's standing. Appellant, in turn, sought summary judgment on the issue of Permittee's alleged failure to comply with the riparian buffer requirements in 25 Pa. Code §

102.14. The Department did not file a summary judgment motion of its own but did respond to the Permittee and Appellant's Motions. Appellant and Permittee filed their Replies in support of their Motions on September 27, 2019.

On October 25, 2019, prior to the Board's issuance of an Opinion on the Summary Judgment Motions, the Department filed a Motion to Strike Appellant's Reply or in the Alternative to File Sur-Reply. This motion, filed roughly one month after the last summary judgment reply and nine months after Appellant clarified her appeal in response to the Permittee and Department's interrogatories, was the first instance where a party raised an argument that the riparian buffer issue was beyond the scope of Appellant's Notice of Appeal. We noted that this issue might well be a valid one, but felt it was inappropriate to consider the issue, raised for the first time in an errant filing at the very tail end of summary judgment briefing where Appellant would not have an opportunity to brief a response to this issue. We denied the Department's Motion and denied the two Summary Judgment Motions in a single Opinion. *Williams v. DEP*, 2019 EHB 746.

After scheduling the matter for a hearing, Appellant filed her pre-hearing memoranda and, perhaps unsurprisingly, riparian buffers are central to Appellant's case-in-chief. The Department has filed a Motion in Limine, arguing that the issue of riparian buffers goes beyond the scope of issues raised in Appellant's Notice of Appeal. The Department's Motion seeks to preclude Appellant from calling any lay or expert witnesses to testify on riparian buffers. Appellant has responded to the Motion in Limine and has filed her own Motion seeking to amend her Appeal to include the riparian buffer issue. The Permittee has not expressed a position on either motion. As discussed below, the history of this Appeal indicates it has centered on riparian buffers for quite some time, and the Department and Permittee are not unduly prejudiced

by amending the notice of appeal to reflect this reality. Because we are granting the Motion to Amend, we deny the Department's Motion in Limine.[1]

Standard of Review

A party may amend its appeal once as a matter of right within 20 days after filing. 25 Pa. Code § 1021.53(a). After 20 days, the Board may grant leave to amend an appeal upon motion as long as it will not result in undue prejudice to the opposing parties. 25 Pa. Code § 1021.53(b). The burden of proving that no undue prejudice will result to opposing parties in on the party making the request *Id.* While the moving party must demonstrate the amended appeal will not cause undue prejudice to other parties, we also note that, when possible, "the right to amend should be liberally granted to secure determination of cases on their merits." *Chester Water Authority v. DEP*, 2016 EHB 358, 362; *Wm. Penn Parking Garage v. Pgh.,* 346 A.2d 269, 279 (Pa. 1975).

Discussion

When the Board determines whether an amended motion would unduly prejudice opposing parties, we typically look to five factors: (1) the time when the amendment is requested relative to other developments in the litigation, including the hearing schedule; (2) the scope and size of the amendment; (3) whether the opposing party had actual notice of the issue; (4) the reason for the amendment; and (5) the extent to which the amendment diverges from the original appeal. *Chester Water Authority v. DEP*, 2016 EHB 358, 362; *Baker v. DEP*, 2015 EHB 535, 537-38; *Rhodes v. DEP*, 2009 EHB 595, 601.

In *Chester Water Authority*, the Board applied and weighed these five factors in a situation similar to the one currently before us. In that appeal, a motion to amend was brought by

[1] Apparently never content to let another party have the last word as envisioned by the response and reply scheme set forth in our rules, the Department's "Motion for Leave to File a Response to New Factual Allegations Set Forth in Appellant's Response to the Department's Motion in Limine" is also denied.

appellant after two issues featured in its motion for summary judgment were denied for being beyond the scope of appellant's appeal. The appellant in *Chester Water Authority* filed its motion roughly two months prior to the scheduled hearing on the matter. *Id.* at 363. While we noted this factor clearly weighed against appellant, it was but one consideration. We held in *Chester Water Authority* that, despite the late filing, opposing parties were not unduly prejudiced by appellant's motion because the issues in question were an iteration of legal issues that had been in dispute since the inception of the appeal and the underlying factual issues were generally the same. *Id.* at 364. Furthermore, the issues in the amended appeal had already been the subject of discovery, did not diverge significantly from the original issues on appeal, and did not surprise the opposing parties. *Id.* at 361, 364. Finally, we noted that the issue was already the focus of discussion in summary judgment briefing and it appeared much of the legwork "had already been completed preparing argument against the objections." *Id.*

As in *Chester Water Authority*, Appellant's Motion comes on the eve of trial, a mere two weeks before the original hearing date, which was later postponed due to COVID-19. We have additional sympathy for opposing parties here because the amendment deviates substantially from the original notice of appeal which, as the Department indicates, does not mention riparian buffers once. However, while we feel Appellant would have been wise to amend her appeal sooner to avoid ruling on this issue so soon before a hearing, we note that the Department and Permittee also had multiple earlier opportunities to raise this issue to the Board. Unlike the parties in *Chester Water Authority*, who in their responses to appellant's motion for summary judgment argued that the appellant had raised issues beyond the scope of its appeal, the Department did not proceed that way here. Instead, the Department waited until a month after Appellant submitted her reply brief to raise the issue in a motion to strike Appellant's reply. We

indicated that the Department's point may well be a valid one but its opportunity to raise the issue in the context of summary judgment had passed. *Williams v. DEP*, 2019 EHB 764, 772. Permittee has not explicitly raised the issue in any filing.

Despite the timing of Appellant's Motion, we find it has not unduly prejudiced the Department or Permittee. While Appellant, filing *pro se*, did not mention riparian buffers in her notice of appeal, she did clarify her position early on in the litigation. Appellant indicates in her Motion to Amend that both the Department and Permittee served interrogatories to Appellant on January 2019 specifically asking her to clarify her notice of appeal. Appellant responded at that time that she was pursuing a cause of action pursuant to Pennsylvania Riparian Buffer Requirements, 25 Pa. Code § 102.14. Continuing in her answer, Appellant explained that her visual observations and review of documents prepared by Permittee led her to believe the berm removal could disturb wetlands on Permittee's property. By appealing the Permit for its failure to include buffer requirements, Appellant could potentially halt or otherwise mitigate the damage to the berm and any potential wetland disturbance. While it may be dubious how well Appellant's answer fits the riparian buffer issue within the scope of her initial notice of Appeal, it undoubtedly gave the Department and Permittee actual notice of the legal issues Appellant was pursuing early on in the litigation. The Department characterizes Appellant's Response as a "headscratcher" that did not merit further follow-up, but this characterization does not fit with its actions during summary judgment, when the Department had an ideal opportunity to express this position in a Response. Instead, both the Department and Permittee opted to engage Appellant on the merits of her riparian buffer argument and successfully showed this Board that a hearing was required to resolve factual issues on the matter.

As in *Chester Water Authority*, much of the legwork on this issue already appears to be done and, as we approach our hearing, the parties have placed the riparian buffer issue front and center before the Board. Appellant put the Department and Permittee on notice in January 2019 that this was the legal issue she was pursuing in her appeal. All parties briefed the riparian buffer issue extensively during summary judgment. Finally, the riparian buffer issue is the central issue the parties have identified in their pre-hearing memoranda. We note that, beyond a couple cites by the Department to the regulatory definition of "wetland," none of the parties even cite Chapter 105, which contains Pennsylvania's regulatory scheme for protecting wetlands. *See* 25 Pa. Code §§ 105.17, 105.18a. While it is unfortunate that the Board was tasked with deciding this issue so late in this proceeding, the fault for not raising it earlier lies roughly equally upon the parties. And, most importantly, no undue prejudice will result from our decision to amend a notice of appeal to include an issue that the parties have been extensively litigating since the beginning of this Appeal.

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LYNDA WILLIAMS	:	
	:	
v.	:	**EHB Docket No. 2018-067-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ESTATE OF HARRY SIMON, Permittee	:	

O R D E R

AND NOW, this 28th day of May, 2020, it is hereby ordered as follows:

1. Appellant's Motion to Amend Her Notice of Appeal is **granted**. Appellant's Notice of Appeal is hereby amended to include the following objection:

   > The Permit was issued in violation of the requirements of 25 Pa. Code § 102.14(a) and the associated requirements of 25 Pa. Code Chapter 102, in that the Estate failed to submit, and DEP approved the permit despite the lack of, a riparian forest buffer plan required by that section because (1) there is a stream on, and/or within 150 feet of, the Project Site that is the Estate Property which triggers the requirement; and/or (2) there is earth disturbance activity within 150 feet of a stream which triggers the requirement.

2. The Department's Motion in Limine is **denied**.

3. The Department's Motion for Leave is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: May 28, 2020

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

For the Commonwealth of PA, DEP:
William J. Gerlach, Jr., Esquire
(*via electronic filing system*)

For Appellant:
Kenneth T. Kristl, Esquire
(*via electronic filing system*)

For Permittee:
Michael T. Shiring, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GLENN J. MORRISON, M.D.	:	
	:	
v.	:	**EHB Docket No. 2019-053-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and INSURANCE AUTO AUCTIONS, INC., Permittee	:	**Issued: June 10, 2020**

OPINION AND ORDER ON
PETITION FOR RECONSIDERATION

By Michelle A. Coleman, Judge

Synopsis

An Appellant's Petition for Reconsideration is denied. The Board's Order is not based on incorrect or inconsistent factual findings.

O P I N I O N

In 2016, Dr. Glenn J. Morrison ("Appellant") appealed a General NPDES Permit for Stormwater Discharges Associated with Construction Activities, permit No. PAG-02-0001-13-025 ("Permit"), granted to Insurance Auto Auctions, Inc. ("Permittee"). Permittee's coverage under the Permit was approved by the Adams County Conservation District ("Conservation District"). The Department of Environmental Protection ("the Department") affirmed the Conservation District's coverage after an informal hearing requested by Appellant pursuant to 25 Pa. Code § 102.32(c). Appellant raised 12 objections in his 2016 Appeal. In his 10th objection, Appellant argued the Permit allowed Permittee to install a drainpipe across his property without his consent. *See Morrison v. DEP,* 2016 EHB 717, 719. In a summary judgment motion, Permittee sought to

dismiss all 12 of Appellant's objections and, with regard to objection 10, argued that this objection had no legal merit. We granted summary judgment to the Permittee on this issue because Appellant had abandoned this claim by failing to file a response to Permittee on this issue. *Id.* at 721.

In 2019, Permittee's coverage under the Permit was modified by the Conservation District and, after an informal hearing with the Department, Appellant raised four objections in an appeal challenging the modification. The precise nature of the modifications is not clear from the parties' filings. We gather that at least a portion of the 2016 drainpipe featured a rock-lined channel and this channel will be modified in some fashion to include plastic piping. What is clear from the filings is the location of both the original and altered drainpipe is the same.

In the first objection of his 2019 Appeal, Appellant raised the argument that the Department erred in approving the permit modification because it allowed Permittee to modify land that belonged to him without his consent. We noted in our Opinion granting summary judgment to Permittee on this issue that Appellant makes the same argument in 2019 that he made in 2016. Namely, Appellant argued he owned the property the drainpipe was located on and, while the property was subject to an easement for use as a public road, that easement did not extend to use by Permittee to construct and maintain a drainpipe. *Morrison v. DEP*, EHB Docket No. 2019-053-C (Opinion issued May 13, 2020), *slip op.* at 4-5.

Appellant argued in his response to Permittee's Summary Judgment Motion that there was a "new and unique easement issue" that distinguished his 2016 objection from his 2019 objection because the alteration to the drainpipe would allegedly impact water quality and wildlife located in a nearby stream. We noted Appellant remained free to make these arguments in the context of his other objections, holding only that Appellant was prohibited under the doctrine of administrative finality from relitigating the land ownership issue he raised in 2016. *Id.*

Our rules provide the Board discretion to reconsider an earlier order, but parties requesting we do so must meet a high standard. *Rural Area Concerned Citizens v. DEP*, 2013 EHB 374, 375. The Board grants a petition for reconsideration only when presented with a compelling and persuasive reason for doing so. 25 Pa. Code § 1021.152. Appellant argues we should reconsider our Order because its issuance is inconsistent with facts on the record. This contention, if made persuasively and compellingly, is a valid reason for the Board to grant a petition for reconsideration. 25 Pa. Code § 1021.152(1-2). Here, however, we find Appellant's Petition falls short of our high standard and we deny his Petition.

Appellant argues in his Petition that the amended permit allows Permittee to replace the rock-lined channel with a buried pipe. This argument does not imply that the location of the rock lined channel is significantly different than the location of the proposed buried pipe. Indeed, Appellant notes elsewhere in his Petition that the site of the rock-lined channel and the proposed site of the buried pipe are in the same general area. Petition at 4. The point remains that, in 2016, Appellant raised the issue that the Department erred in granting a permit to the Permittee to install a drainpipe on land not within its possession. Permittee responded by arguing the claim had no legal merit and Appellant then abandoned the issue. Appellant cannot now re-raise the issue in 2019 because the drainpipe, which by all accounts runs along the same path it did in 2016, now has a modified design. Particularities concerning the design of the drainpipe have no bearing on the Department's 2016 approval regarding the placement of the drainpipe and cannot be used now to collaterally attack the issue.

Appellant alleges in his petition that the amended permit allows major construction and water flow changes which he characterizes as a "new and unique trespass." Petition at 5. Appellant also argues the Department's actions violate his constitutional rights. We note here, as we did in

our Opinion, that Appellant is not prohibited from raising these issues, as they are beyond the scope of Permittee's Motion. *Morrison v. DEP*, EHB Docket No. 2019-053-C (Opinion issued May 13, 2020), *slip op.* at 5.

Since Appellant offers no compelling reason to reconsider our previous Order, we issue the Order that follows.

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

O R D E R

AND NOW, this 9th day of June it is hereby ordered that Appellant's Motion for Reconsideration is **denied**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 10, 2020

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

For Appellant, *Pro Se*:
Glenn J. Morrison, M.D.
221 Bonners Hill Road
York Springs, PA 17372

For Permittee:
David J. Raphael, Esquire
Jonathan Vaitl, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM CALVIN ABERCROMBIE	:	
	:	
v.	:	**EHB Docket No. 2020-049-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 12, 2020**
	:	

OPINION AND ORDER ON
PETITION FOR SUPERSEDEAS

By Steven C. Beckman, Judge

Synopsis

The Appellant's Petition for Supersedeas is denied following a hearing where the Appellant failed to convince the Board that he is likely to succeed on the merits of his claim and that he would suffer irreparable harm if the Petition for Supersedeas was not granted.

O P I N I O N

Background

On April 9, 2020, the Pennsylvania Department of Environmental Protection ("the Department or DEP") issued an Administrative Order ("the Order") revoking William Calvin Abercrombie's ("Mr. Abercrombie's") Assistant Mine Foreman Certification ("Certification") pursuant to Section 510(b) of the Bituminous Coal Mine Safety Act ("Mine Safety Act"), Act of July 7, 2008, P.L. 654, 52 P.S. § 690.510(b)(2). The Department's Order alleges that Mr. Abercrombie violated Section 218 of the Mine Safety Act "by not performing a complete inspection of the pertinent beltline, and by inaccurately certifying that he had conducted his

assigned examination." Department's Order at 3. According to the Order, Mr. Abercrombie was employed by CNX Coal Resources, LP ("CONSOL") and worked at CONSOL's Bailey Mine located in Greene County, Pennsylvania. On May 6, 2020, Mr. Abercrombie filed a Notice of Appeal to the Pennsylvania Environmental Hearing Board ("the Board") of the Department's Order revoking his Certification. Pursuant to 52 P.S. § 690.510(b)(2), the appeal of a Department action involving revocation of a mine certification is automatically treated as a petition for supersedeas by the Board. The Board held a conference call with the parties on May 13, 2020 to discuss how the parties wished to proceed with the Petition for Supersedeas ("the Petition"). In light of the restrictions resulting from Covid-19 and the state of emergency declared by the Governor, the parties mutually agreed to conduct the supersedeas hearing remotely via phone call. A telephonic hearing on the Petition was held on May 28, 2020. Mr. Abercrombie represented himself and was his only witness. The Department presented written and live testimony of two Department employees and three CONSOL employees. Mr. Abercrombie filed a post-hearing brief on June 3, 2020 and the Department filed its post-hearing brief on June 5, 2020. The Board is now ready to rule on the Petition.

Standard

The Board has the power and duty to hold hearings and issue adjudications on orders, permits, licenses or decisions of the Department. 35 P.S. § 7514(a). No action of the Department adversely affecting a person is final as to that person until that person has had the opportunity to appeal the Department's action to the Board. 35 P.S. § 7514(b). In cases where the Department has modified, suspended or revoked a mine certification, an appeal of this action also functions as an automatic petition for supersedeas. 52 P.S. § 690.510(b)(2). A supersedeas, as defined by the Board, is a "suspension of the effect of an action of the Department pending proceedings

before the Board." 25 Pa. Code § 1021.2. In other words, the Board's ruling on a supersedeas is a temporary and/or limited decision on the Department's action, until the Board makes a final ruling on the merits of the appeal. "The Board's ruling on supersedeas is not, nor is it intended to be, the final word on the legality of the Department's action." *Erie Coke Corporation v. DEP*, 2019 EHB 481, 484.

A supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need. *See Weaver v*. DEP, 2013 EHB 486; *Global Eco-Logical Servs., Inc. v. DEP*, 2000 EHB 829. In mine certification cases, the petitioner bears the burden to prove that a supersedeas should be issued. *Beardslee v. DEP*, 2016 EHB 198. The standard for granting or denying a petition for supersedeas is set forth in the Environmental Hearing Board Act, and by the regulations promulgated thereunder. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63. In ruling on a supersedeas request, the Board is guided by relevant judicial precedent and its own precedent. *Id*. Among the factors to be considered are: 1) irreparable harm to the petitioner; 2) likelihood of the petitioner's success on the merits; and 3) likelihood of injury to the public or other parties, such as the permittee in third party appeals. 35 P.S. §7514(d)(1); *Erie Coke Corporation v. DEP*, 2019 EHB 481, 485.

For the Board to grant a supersedeas, a successful petitioner generally must make a credible showing on each of the three regulatory factors, with a strong showing of a likelihood of success on the merits. *Beardslee v. DEP*, 2016 EHB 198, 203. If the petitioner fails to carry its burden on any one of the regulatory factors, the Board need not consider the remaining requirements for supersedeas relief. *Center for Coalfield Justice v. DEP and Consol Pennsylvania Coal Co., 2017 EHB 38*, 42 (citing *Hudson v. DEP*, 2015 EHB 719, 726). In order to be successful, the petitioner's chance of success on the merits must be more than speculative;

however, it need not establish the claim absolutely. *Global Eco-Logical Services, Inc. and Atlantic Coast Demolition and Recycling Inc. v. DEP*, 2000 EHB 829, 831-32. It is important to remember that a ruling on a supersedeas is merely a prediction, based on the limited record before the Board and the shortened timeframe for consideration, of who is likely to prevail following a final disposition of the appeal. *Weaver v. DEP*, 2013 EHB 486, 489; *Tinicum Twp. v. DEP*, 2008 EHB 123, 127. In the final analysis, the issuance of a supersedeas is committed to the Board's sound discretion based upon a balancing of all the above criteria. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797.

Discussion

Mr. Abercrombie must demonstrate to the Board that suspending the Department's action revoking his certification is appropriate based on our balancing of the various factors presented by his case. He has failed to present sufficient evidence to convince the Board that a grant of supersedeas is warranted in this case and, therefore, the petition for supersedeas is denied. The two main factors we considered in reaching our decision are the likelihood of success on the merits and the issue of whether Mr. Abercrombie will suffer irreparable harm.

First and foremost, Mr. Abercrombie has failed to convince us that he is likely to succeed on the merits of his claim that the Department's action to revoke his certification was not reasonable, lawful or supported by the facts. The Department clearly has the necessary statutory authority to revoke Mr. Abercrombie's certification pursuant to the Mine Safety Act. Section 510(b)(1) of the Mine Safety Act authorizes the Department to modify, suspend or revoke a certification if it determines that the certificate holder has (1) failed to comply with the statute, a regulation, or any approval, standard, or order under the statute, (2) interfered with the safe and lawful operation of any mine, or (3) engaged in unlawful conduct. The Mine Safety Act defines

unlawful conduct to include the failure to perform a required examination. 52 P.S. § 690.504. A pre-shift examination of the belt conveyor and the track haulage way between 1 wall and 52 wall in the 4 West portion of CONSOL's Bailey Mine was required by 52 P.S. § 690-218. There is no dispute that on the night of February 8, 2020, Mr. Abercrombie was assigned to complete the required pre-shift examination. (Transcript ("T.") 13-16; 33, 64-65). The dispute in this case hinges on whether the required pre-shift examination was in fact completed by Mr. Abercrombie. He testified that he did complete it as required. (T. 32). The Department and the witnesses it presented testified that Mr. Abercrombie did not complete the required pre-shift examination. (Written Statements[1] of Travis Hartley, Shane Smith, and Russell McHenry; T. 52-53, 67; DEP Exhibit ("Ex.") 2). Following its investigation, the Department revoked Mr. Abercrombie's Certification because of its determination that he had failed to complete the required pre-shift examination. The Department concluded that he failed to comply with the Mine Safety Act, created an unsafe condition in the mine and he engaged in unlawful conduct as defined in the statute.

In presenting his Petition, Mr. Abercrombie did not contest that he was required to perform the pre-shift examination or that the Department's decision to revoke his certification, as opposed to simply modifying or suspending it, was improper. Nor did he meaningfully challenge the Department's contention that a failure to properly complete the required pre-shift examination would pose a serious safety risk for people in the mine. He relied solely on his assertion that he properly completed the required examination and, therefore, the Department's claim that he had not done so was factually incorrect and its action revoking his certification was not supported by the facts. The difficulty in this case stems from the fact that neither side

[1] The Department presented some of its direct testimony in the form of sworn written statements. The parties agreed to this procedure and the written statements are part of the record of this case the same as if presented live during the hearing.

presented any evidence beyond the contradictory testimony of their respective witnesses concerning whether the required examination took place or not. There is no physical or documentary evidence that directly supports either version of the events in the mine that evening. Mr. Abercrombie entered two exhibits, No. 3 and 4, which purport to be tracking data in the mine for himself and Mr. Hartley from February 8, 2020. Unfortunately, neither party presented clear testimony explaining the nature and significance of the tracking data and whether it supported their case. As best we could determine from the testimony provided, Mr. Abercrombie contested the accuracy of the tracking data in general and argued that it was not reliable in determining where and when things occurred in the mine. (T. 58-60, 109-110, 113-116). The Department acknowledged that the tracking in this case had gaps and the DEP's inspector, Mr. Galie, testified that the tracking was only used to substantiate limited location information from Mr. Hartley and Mr. Smith. (T. 115-118). The Department, however, did not offer any live direct testimony using the exhibits to demonstrate how the tracking information supported its version of events. Furthermore, the Department did not clarify Mr. Galie's inconsistency between his written and live testimony concerning his use of Mr. Abercrombie's tracking data during his investigation. In fact, the Department sought to keep the tracking data exhibits from being admitted into the record. (T. 121). The conclusion that we draw from this testimony is that the tracking information does not provide reliable information to support either side's position in this case.

That leaves us with the written and oral testimony presented at the hearing. When we consider the weight of that testimony, we are forced to conclude that based on the evidence presented at the supersedeas hearing, Mr. Abercrombie has not demonstrated that he is likely to prevail on the merits of his appeal. That may change at the full evidentiary hearing when the

Department will have the burden of proof regarding its Order. Mr. Abercrombie adamantly denied that he failed to complete the required examination. He did indicate that he felt that his time to complete the examination was more limited than usual because of an air change that was scheduled to take place in the mine at 11 pm. However, at times, we found the limited testimony from Mr. Abercrombie created confusion as to the exact steps he took to complete the examination in the mine. Some of that confusion clearly stemmed from the fact that Mr. Abercrombie, representing himself, presented almost no direct testimony and, instead, primarily relied on his cross-examination of the Department's witnesses to try and establish his case. Mr. Abercrombie was able to raise some questions about the Department's investigation in to this matter but not enough to overcome the remaining testimony.

The Department's two main witnesses from CONSOL were the Acting Asst. Shift Foreman, Mr. Hartley and the Shift Foreman, Mr. Smith. Both testified that they were instructed to investigate whether Mr. Abercrombie was conducting a proper pre-shift examination. CONSOL's General Mine Foreman, Mr. McHenry, assigned this task to Mr. Hartley and Mr. Smith based on an anonymous complaint he received that Mr. Abercrombie was not performing his assigned pre-shift examination. Mr. Hartley and Mr. Smith both testified that they had a good professional relationship with Mr. Abercrombie and believed him to be a good employee. Mr. McHenry stated that he did not have any issues with Mr. Abercrombie and that there had been no warnings given to Mr. Abercrombie about his work performance prior to the events of February 8, 2020. There was no significant testimony that any of the CONSOL witnesses had an issue with Mr. Abercrombie professionally or personally, or any motivation to force him out of the company.

Mr. Hartley and Mr. Smith testified that they investigated Mr. Abercrombie's actions on February 8th by proceeding into the 4 West belt and track area that Mr. Abercrombie had been assigned to complete the pre-shift examination. The method by which a person documents their presence in a certain part of the mine and the completion of a given task is through the marking of their name/initials and a time and date on a date board. The date boards are located at various points throughout the mine. In this case, date boards were located at certain points along the 4 West belt and the 4 West track. Both the 4 West belt and 4 West track were areas assigned to Mr. Abercrombie for the pre-shift examination. During their investigation, Mr. Hartley and Mr. Smith testified that they observed Mr. Abercrombie crossing from the track section to the belt section to fill out the date boards. In addition, they observed that the date boards were completed by Mr. Abercrombie with times that inaccurately reflected when Mr. Abercrombie was in certain areas of the mine to conduct the required examination. These observations lead Mr. Hartley and Mr. Smith to conclude that Mr. Abercrombie had failed to complete the required examination and they testified that they proceeded to complete the examination themselves. Mr. Abercrombie neither offered testimony that directly challenged the testimony of Mr. Hartley and Mr. Smith regarding his marking of inaccurate times on the date boards or their observation of Mr. Abercrombie crossing from the track to the belt area to mark date boards, nor did he raise significant issues with their testimony on cross examination. On the issue of the allegedly inaccurate date boards, Mr. Hartley and Mr. Smith did acknowledge that no one else independently observed the date boards in question and there is no physical record of the date boards.

In addition to this testimony, the Department also offered testimony that Mr. Abercrombie admitted at various times and to various individuals that he had not completed the

required pre-shift examination. Mr. Abercrombie denied ever having done so. According to Mr. Hartley, he approached Mr. Abercrombie on the evening of February 8th after determining that Mr. Abercrombie had failed to complete the assigned examination and questioned him about it. Mr. Hartley stated that Mr. Abercrombie did not deny his failure to do so. Two days later, on February 10th, a meeting was held between Mr. Abercrombie and three CONSOL officials, including Mr. McHenry. Mr. McHenry stated that when questioned about the events of February 8th, Mr. Abercrombie admitted that he did not conduct the required examination and that he had falsified times on the date boards to make it look otherwise. Mr. Abercrombie did not directly challenge this testimony during his cross-examination of Mr. McHenry.

The Department became aware of the allegations against Mr. Abercrombie during a phone call and meeting between Mr. McHenry and Mr. Galie, DEP's Underground Bituminous Mine Inspector[2] for the Bailey Mine, on the morning of February 10th. The Department investigated the allegation by interviewing Mr. Hartley, Mr. Smith and Mr. McHenry on or around February 10th. Mr. Abercrombie was contacted after those interviews and met with DEP personnel, including Mr. Galie and Mr. Schuessler, DEP's Bituminous Mine Program Manager, on February 20, 2020. Based on that interview with Mr. Abercrombie and the prior interviews with CONSOL personnel, DEP concluded that Mr. Abercrombie had failed to complete the required examination on February 8th, and that the appropriate course of action was to issue the Order revoking Mr. Abercrombie's Certification. Mr. Abercrombie correctly pointed out that DEP had no independent verification of the information provided by CONSOL personnel. Certainly, the Board's decision here would be easier if either side had presented independent corroborating evidence one way or the other but such is not the case. We wish that what took place in the mine on the evening of February 8th was clear from the evidence that was presented

[2] Mr. Galie recently retired from his position with the Department.

in the supersedeas hearing and trust that the parties will work to make that happen for the full hearing, but on the basis of the limited evidence we have at this point, we cannot reach the conclusion that Mr. Abercrombie is likely to succeed on the merits of his appeal.

In deciding a supersedeas petition, a showing of irreparable harm is important in the Board's consideration of whether to suspend the Department's action. Mr. Abercrombie failed to provide sufficient evidence to convince us that he will suffer irreparable harm if the supersedeas is not granted. Mr. Abercrombie, who was representing himself in this matter, provided limited direct testimony on this issue in this case. Mr. Abercrombie neither argued that he lost his position with CONSOL because of the Department's decision, nor did he argue that he lost wages from CONSOL. The facts would not have supported either argument anyway since he acknowledged that he was terminated by CONSOL on February 10, 2020, approximately two months prior to the Department's action revoking his Certification. Instead, Mr. Abercrombie asserted during his opening statement[3] that the Department's publication on the DEP website of its decision to revoke his Certification irreparably harmed him because it will result in him being blacklisted and prevent him from getting any job in any capacity within the coal mining industry. (T. at 8; Abercrombie Ex. 2). Additionally, he stated that he thought it would make it difficult to be hired in any capacity outside of the coal mining industry as well.

While we recognize that Mr. Abercrombie is concerned that the Department's publication of his Certification revocation will hinder his future employment opportunities, such speculative concern does not constitute sufficient evidence of irreparable harm for granting a supersedeas. Mr. Abercrombie did not provide any testimony or evidence that he had sought employment, in or out of the coal mining industry, since his certification was revoked in April 2020. (T. 31-32).

[3] The Board does not typically treat opening statements as evidence, but in this case, Mr. Abercrombie had been sworn in prior to making what he called an opening statement and the Board had instructed him that since he was representing himself he should go ahead and tell his version of the events in question.

At this point, any impact on his future employment would require speculation on our part. Mr. Abercrombie has only been employed in the mining industry for approximately seven years and he held the revoked certificate for less than one year of that time. He is still a certified miner in the state of Pennsylvania and can be employed as a miner or miner laborer. In addition, he held various other jobs prior to entering the mining industry and it is not clear that the potential to return to other types of work will be impacted by loss of his Certification during the duration of this case. We don't intend this discussion to downplay that finding suitable work may be difficult under current circumstances and that if a future employer was made aware of the circumstances of this case, it may make the search for employment even more difficult. However, based on the evidence in this case, we conclude that the harm Mr. Abercrombie may suffer during the time required to proceed to a full hearing does not rise to the level of irreparable harm and, therefore, does not support his request that we grant his Petition.[4]

Conclusion

A grant of a petition for supersedeas by the Board is an extraordinary remedy and is generally only given upon a strong showing by the Petitioner that the facts of the case warrant the Board suspending the Department's action during the time required to reach a final decision. Mr. Abercrombie has not met his burden in order to convince us that the grant of supersedeas is necessary in this case, therefore, the Petition for Supersedeas is denied.

[4] Having determined that Mr. Abercrombie failed to carry his burden on two of the regulatory factors, we need not consider any of the remaining arguments offered by the Department.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM CALVIN ABERCROMBIE	:	
	:	
v.	:	**EHB Docket No. 2020-049-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 12th day of June, 2020, it is hereby ordered that the Appellant's Petition for Supersedeas is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 12, 2020

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

For the Commonwealth of PA:
George Jugovic, Jr., Esquire
Gail Guenther, Esquire
Matthew Kessler, Esquire
(*via electronic filing system*)

For Appellant:
William C. Abercombie
(*via electronic mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KEVIN L. MCCAULEY	:	
	:	
v.	:	**EHB Docket No. 2019-118-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and WASHINGTON TOWNSHIP, Permittee	:	**Issued: June 18, 2020**

OPINION AND ORDER ON DEPARTMENT'S MOTION TO DISMISS AND APPELLANT'S MOTION TO APPEAL NUNC PRO TUNC

By Steven C. Beckman, Judge

Synopsis

The Board grants a motion to dismiss where the Department has shown the appeal to be untimely and, therefore, the Board lacks jurisdiction to hear the appeal. Further, the Board denies a petition to file the appeal nunc pro tunc where the Appellant has failed to demonstrate a showing of fraud, breakdown in the administrative process or unique and compelling factual circumstances.

O P I N I O N

Background

Kevin L. McCauley ("Mr. McCauley") appealed the Department of Environmental Protection's ("the Department's") approval of a revision to Washington Township's ("the Township's") Act 537 Plan ("the Plan Revision") for the extension of sewer lines to two separate areas of the Township. Mr. McCauley attached a copy of the Department's approval letter to the Township dated November 2, 2018 to his Notice of Appeal. Notice of the Department's

approval of the Plan Revision was published in the *Pennsylvania Bulletin* (or "*the Bulletin*") on November 24, 2018. Mr. McCauley's appeal of the Department's approval of the Plan Revision was filed with the Board on October 4, 2019, after he was "informed of [his] right to appeal on 25 Sept 2019 by legal counsel." Mr. McCauley's Notice of Appeal at 1. The Board consolidated Mr. McCauley's appeal with two other individuals' appeals of the Plan Revision; Judith Ackermann (2019-126-B) and Kim Fletcher (2019-145-B). The Department filed a Motion to Dismiss ("the Motion") the consolidated appeals on February 11, 2020. The Township filed a Memorandum of Law in support of the Department's Motion on February 24, 2020. On March 19, 2020, Mr. McCauley filed his Response to the Motion to Dismiss. In addition, Mr. McCauley included, in the alternative, a written request in the form of a Motion To File Appeal Nunc Pro Tunc ("NPT Motion"). Neither Ms. Ackermann nor Ms. Fletcher filed any response. Washington Township filed their Reply and their Memorandum in Support thereof, to Mr. McCauley's Response on April 30, 2020. The Department submitted a letter the next day, agreeing with Washington Township's Reply. The Board unconsolidated the cases for purposes of addressing the Department's Motion, and subsequently issued Opinions on May 11, 2019, dismissing both Ms. Ackermann's and Ms. Fletcher's appeals, reasoning that the appellants had failed to respond to the Department's Motion and that the Board did not possess jurisdiction over the matter as the appellants' appeals were untimely. On May 21, 2020, Mr. McCauley filed his Response to Washington Township's Reply. The Board is now ready to rule on the Department's Motion to Dismiss and Mr. McCauley's NPT Motion.

Standard for Motion to Dismiss and Nunc Pro Tunc

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

Pennsylvania Coal Company, LLC v. DEP, 2015 EHB 48, 54. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *Id., See also Bernardi v. DEP*, 2016 EHB 580, 581; *West Buffalo Township Concerned Citizens v. DEP*, 2015 EHB 780, 781; *Boinovych v. DEP*, 2015 EHB 566, 567; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving motions to dismiss, we accept the nonmoving party's version of events as true. *Consol Pennsylvania Coal Company, LLC*, 2015 EHB at 54*; Ehmann v. DEP*, 2008 EHB 386, 390. An appeal that is untimely deprives the Board of its jurisdiction and must be dismissed. 25 Pa. Code § 1021.52(a); *GEC Enters., Inc., v. DEP,* 2010 EHB 305, 311.

However, in limited circumstances, the Board may grant permission to appeal nunc pro tunc upon written request and for good cause shown. 25 Pa. Code § 1021.53a; *Feudale v. DEP*, 2016 EHB 774, 775. "[T]he standards applicable to what constitutes good cause shall be the common law standards." 25 Pa. Code § 1021.53a. In order for the Board to grant a request to appeal nunc pro tunc, the appellant must demonstrate:

> 1) that extraordinary circumstances, involving fraud or breakdown in the administrative process or non-negligent circumstances related to the party, its counsel or a third party caused the untimeliness; 2) that it filed the document within a short time period after the deadline or date that it learned of the untimeliness; and 3) that the respondent will not suffer prejudice due to the delay.

Feudale v. DEP, 2016 EHB 774 at 776 (quoting *Bureau Veritas North America, Inc. v. Department of Transportation,* 127 A.3d 871, 879 (Pa. Cmwlth. 2015)). "[A]n appeal nunc pro

tunc is intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain extraordinary circumstances." *Commonwealth v. Stock*, 679 A.2d 760, 764 (Pa. 1996).

Discussion

Timeliness

Here, there is no question that Mr. McCauley's appeal was untimely filed. Pursuant to the Board's Rules of Practice and Procedure, appeals must generally be filed within 30 days of notice of the action. Our rules, in relevant part, state as follows:

> [J]urisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, unless a different time is provided by statute:
>
> ***
>
> (2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within one of the following:
>
> (i) Thirty days after notice of the action has been published in the Pennsylvania Bulletin.

25 Pa. Code § 1021.52(a).

The Department published approval of the Township's Act 537 Plan Update Revision in the *Pennsylvania Bulletin* on November 24, 2018. Department's Motion – Holden Affidavit, Para. 9; Exhibit H to Holden Affidavit. Therefore, in accordance with our rules, Mr. McCauley had until December 24, 2018, to file his appeal. Instead, Mr. McCauley filed his appeal on October 4, 2019, well beyond the 30-day appeal period provided in our rules.

Mr. McCauley contends that his appeal is not untimely. Mr. McCauley relies on *Harvilchuck v. DEP*, 117 A.3d 368, 372 (Pa. Cmwlth. Ct. 2015), where the Commonwealth Court held that "constitutionally adequate notice of administrative action is notice which is reasonably calculated to apprise interested parties of the pendency of the action and afford them

an opportunity to present their objections." Mr. McCauley argues that publication in "[t]he *Pennsylvania Bulletin* is not "reasonably calculated" to give "adequate notice" to the residents of Washington Township" as the residents were unaware of the existence of the *Pennsylvania Bulletin*. Mr. McCauley's Brief in Support of His Response at 3. However, *Harvilchuck* does not stand for the proposition that the *Pennsylvania Bulletin* does not constitute adequate notice. In *Harvilchuck*, the Court explicitly stated that the Department's action *had not* been published in the *Bulletin*, and, therefore, the Court was tasked with determining whether the notice the appellant received via automated e-mail constituted actual notice.

We have held that the Department's publication of approval of an Act 537 Plan Update Revision in the *Pennsylvania Bulletin* is sufficient notice to apprise interested parties of the Department's action, thereby triggering our default rule, 25 Pa. Code § 1021.52(a)(2), that requires an appeal to be filed within 30 days of the publication. *Bartholomew v. DEP*, EHB Docket No. 2019-022-C (Opinion and Order on Motion to Dismiss issued January 15, 2020) slip op. at 5. *See also Pikitus v. DEP* 2005 EHB 354*,* 357; *Lehigh Township, Lackawanna County et al. v. DEP et al.,* 1995 EHB 1098. Hence, Mr. McCauley's appeal is clearly untimely and the Board has no jurisdiction over this matter.

Nunc Pro Tunc

We now turn to Mr. McCauley's request that the Board permit him to file his appeal nunc pro tunc and thus cure his untimely filing. As the Commonwealth Court has explained, in order for an appeal to warrant a nunc pro tunc filing, the petitioner must demonstrate the following:

> 1) that extraordinary circumstances, involving fraud or breakdown in the administrative process or non-negligent circumstances related to the party, its counsel or a third party, caused the untimeliness; 2) that it filed the document within a short time period after the deadline or date that it learned of the

> untimeliness; and 3) that the respondent will not suffer prejudice due to the delay.

Bureau Veritas North American, Inc. v. Department of Transportation, 127 A.3d 871, 880 (Cmwlth. Ct. Pa. 2015).

The Board rarely grants requests to appeal nunc pro tunc. In general, the Board has denied the requests for failure to show good cause and/or extraordinary circumstances. See *Feudale v. DEP*, 2016 EHB 774 (failure to obtain relief in the appellate courts did not provide a basis for filing a nunc pro tunc appeal with the Board); *Ametek v DEP*, 2014 EHB 65 (Department's alleged agreement to toll the appeal period and/or extend the litigation schedule did not provide a basis for allowing appeal nunc pro tunc); *Spencer v. DEP*, 2008 EHB 573 (Board's receipt of notice of appeal one day beyond the appeal period, even though the Department received it within the appeal period, was not a sufficient basis for allowing the appeal to proceed nunc pro tunc); *Greenridge Reclamation, Inc. v DEP*, 2005 EHB 390 (inadvertently mailing a notice of appeal to the Department instead of the Board did not constitute grounds for granting an appeal nunc pro tunc); *Decker v. DEP*, 2002 EHB 45 (a strong desire to bring alleged statutory violations to the Board's attention does not constitute good cause for allowing an appeal nunc pro tunc); *Ziccardi v. DEP*, 1997 EHB 1 (appellants' confusion regarding permits did not provide a basis for allowing an appeal nunc pro tunc). In most instances, "the Board and the appellate courts have little sympathy" for litigants who fail to make themselves aware of the statutory requirements or rely on the Department to make them aware of the appeal procedures." *Fryer Excavating, LLC v. DEP*, EHB Docket No. 2020-042-R, (Opinion and Order on Petition to Appeal Nunc Pro Tunc issued May 27, 2020) slip op. at 4-6 (quoting *Fisher v. DER*, 1993 EHB 425, 428).

However, in a recent case, the Board found that the appellant had demonstrated extraordinary circumstances sufficient for allowing such an appeal. In *Fryer Excavating, LLC v. DEP*, the petitioner filed its appeal one day late but argued that it had faced circumstances that justified allowing it to proceed nunc pro tunc. Slip op. at 3. The appeal period occurred in the midst of the Covid-19 pandemic with state of emergencies being declared locally and statewide, and the mandated closure of all non-essential business, including the petitioner. This Board found the petitioner had "set forth a unique and compelling set of circumstances that justify the filing of an appeal nunc pro tunc." Slip op. at 6. The Board also noted the short amount of delay in filing the appeal in support of granting Fryer Excavating's request.

Unlike *Fryer Excavating*, the facts in Mr. McCauley's case do not constitute the type of extraordinary circumstances that compel the Board to grant a nunc pro tunc request. Mr. McCauley's circumstances are much more akin to those cases discussed above where the Board denied the request. Here, Mr. McCauley argues that there was a breakdown in the administrative process because he "did not receive notice from the *Clarion News* or the *Pennsylvania Bulletin*." McCauley's Brief at 6. It appears Mr. McCauley is asserting that because *he* was not aware of the publication, this somehow invalidates the notice provided by the *Bulletin*. These are hardly unique and compelling circumstances. As discussed above, both the Board's rules and its precedent make clear that the publication of a Department action in the *Pennsylvania Bulletin* constitutes appropriate notice. Contrary to his argument, here, the administrative process was followed in accordance with our rules and our well-settled precedent, and did not suffer a fraud or breakdown. After the notice of the extension was published in the *Bulletin*, Mr. McCauley had 30 days to file his appeal which he failed to do.

Additionally, Mr. McCauley seems to imply that he was misled from filing an appeal with the Board. He alleges that "he was misinformed that any appeal would be handled by the EADS Group's reference to the existing decree." McCauley's Brief at 6. However, we have held that "a lack of understanding of the legal process does not excuse the bright line requirement that the third-party appeals must be filed within 30 days of publication in the *Pennsylvania Bulletin*." *Hopwood v. DEP, and Consol Pennsylvania Coal Co.*, 2001 EHB 1254, 1260. Further, neither negligence nor a mistake on the part of an appellant is an excuse for late filing. *Id; Ziccardi v. DEP,* 1991 EHB 1. While we recognize that Mr. McCauley may have formed a misunderstanding of his right to appeal due to the representation of others, his mistaken understanding is not enough to support a finding of good cause or extraordinary circumstances.

Finally, even if we accept that Mr. McCauley did not understand the impact of the Plan Revision project or his legal options up to a point, Mr. McCauley's filings with the Board acknowledge that he was aware of the project no later than March 2019. In its Reply, the Township provided an affidavit from its consulting engineer, Mr. Kyle Schwabenbauer of the EADS Group, demonstrating that in March and April 2019, Mr. McCauley was actively engaged with the Township, the EADS Group, and his neighbors in evaluating and raising concerns about the Plan Revision project. His efforts included attending a March 27, 2019 meeting at which the project was discussed in detail and where the agenda specifically acknowledged the Department's approval of the Plan Revision on November 24, 2018. Washington Township's Reply at 5. Mr. McCauley admits that he attended the events laid out by the Township. McCauley's Response to Washington Township's Reply at 2. Despite his active involvement in the issues involving the Plan Revision project in the Spring of 2019, Mr. McCauley did not file his appeal to the Board until several months later on October 4, 2019. Mr. McCauley argues that

he only became aware of his untimeliness in challenging the Department's action when he consulted with counsel on September 25, 2019 and that he filed his appeal nine days later. In order for the Board to grant a request to proceed nunc pro tunc, we also require that the appeal be filed within a short time after the appeal deadline or the date that the party learned of the untimeliness. In this case, Mr. McCauley's filing was clearly not within a short time of the appeal deadline. Further, it is difficult to accept that, given the evidence of his extensive involvement in challenging the Plan Revision project, he only became aware of the Department's action and his need to timely challenge that action to the Board several months later. The timing issue, while not perhaps determinative in this case, does not lend support to his request to proceed nunc pro tunc.

Conclusion

After reviewing the record and viewing the facts in the light most favorable to Mr. McCauley, we find that the Department has met its burden of demonstrating that his appeal is untimely. Furthermore, it is apparent that Mr. McCauley has presented facts that fall far short of a showing of fraud, breakdown in the Board's administrative process, or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal. Accordingly, we must deny Mr. McCauley's request to file his appeal nunc pro tunc and grant the Department's Motion because we do not have subject matter jurisdiction over an untimely appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KEVIN L. MCCAULEY	:	
	:	
v.	:	**EHB Docket No. 2019-118-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASHINGTON TOWNSHIP, Permittee	:	

O R D E R

AND NOW, this 18th day of June, 2020, it is hereby ordered that:

1. The Department's Motion to Dismiss the above referenced matter is **granted**.

2. The Appellant's Petition to Proceed With Appeal Nunc Pro Tunc is **denied**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 18, 2020

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

For the Commonwealth of PA:
Carl D. Ballard, Esquire
Michael A. Braymer, Esquire
Paul J. Strobel, Esquire
(*via electronic filing system*)

For Appellant:
Megan C. Willey, Esquire
(*via electronic filing system*)

For Permittee:
Mark J. Shaw, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRICIA A. LIDDICK	:	
	:	
v.	:	**EHB Docket No. 2019-151-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 26, 2020**

OPINION AND ORDER ON
MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants a Department Motion to Dismiss an appeal as untimely. To the extent a field order issued by the Department pursuant to the Safe Drinking Water Act affected the Appellant, it did so at the time it was issued, and it became administratively final 30 days after the Appellant received actual notice.

O P I N I O N

On August 2, 2018 an amended field order ("Order") was issued by the Department to Anthony Liddick declaring he was operating an unauthorized public water system and requiring corrective actions to become compliant with the Pennsylvania Safe Drinking Water Act. The Order only named Mr. Liddick. The water system at issue is located at the Old Trail Campgrounds, on property Mr. Liddick owns with his wife, Mrs. Liddick ("Appellant"), as tenants by the entireties. The Order was not published in the *Pennsylvania Bulletin*. Appellant

states she did not receive a copy of the Order[1] until sometime after the Department of Environmental Protection ("the Department") initiated a petition to enforce the Order in Commonwealth Court on June 28, 2019. (Notice of Appeal at ¶ 6). Appellant admits she received actual notice of the Department's Petition no later than July 26, 2019. Appellant filed her Appeal on December 5, 2019, at least 132 days from the date Appellant admits she received actual notice of the Petition. The Department has filed a Motion to Dismiss the Appeal as untimely, since more than 30 days passed between when Appellant received actual notice of the Order and when she filed her appeal.

Standard of Review

The Board has the authority to grant a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *Lawson v. DEP*, 2018 EHB 513, 514. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party. *Ctr. For Coalfield Justice v. DEP*, 2018 EHB 758, 761; *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB 913, 915. Additionally, motions to dismiss will only be granted when a matter is free from doubt. *Plainfield Twp. v. DEP*, 2019 EHB 157, 160; *Merck Sharp & Dohme Corp. v. DEP*, 2015 EHB 543, 544; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Res., LP v. DEP*, 2007 EHB 611, 612.

Analysis

Our regulations require an appeal to be filed within 30 days of a Department action, unless a different time is provided by statute. 25 Pa. Code § 1021.52(a). For a person to whom an action is directed, the 30-day appeal period begins from when that person receives written notice of the action. 25 Pa. Code § 1021.52(a)(1). For any other aggrieved person, the 30-day appeal

[1] The Appellant notes the Liddicks' adult daughter signed the proof of service for the Order addressing Mr. Liddick and she asserts that her adult daughter did not provide the Liddicks a copy of the Order, putting into doubt an earlier time that the Appellant may have had notice.

period begins from when the party received actual notice of the action, if no notice was published in the *Pennsylvania Bulletin*. 25 Pa. Code § 1021.52(a)(2).

If the Parties agreed that Appellant was aggrieved by the Department's Order at the same time as her husband was aggrieved, this case would be more straight forward. They do not agree, and the Appellant asserts that she became aggrieved much later than her husband. Only Mr. Liddick's name is on the Order, and the Order was not published in the *Pennsylvania Bulletin*, so our rules would normally require Appellant to file her appeal 30 days from when she received actual notice of the Order. Appellant concedes that, at the very latest, she received actual notice of the Order 132 days before she appealed, well past our deadline.

However, Appellant contends she was not "any other aggrieved person" at the same time that her husband was aggrieved by the Order. Rather, she contends she only became aggrieved by the Department's action much later, after an Opinion and Order of Commonwealth Court, issued on November 21, 2019, granted enforcement of the Order against her husband. Commonwealth Court also "issued an Order permitting the Department to conduct discovery to ascertain Mr. Liddick's financial status thereby affecting [Appellant's] interest as a tenant by the entireties." (Response at ¶ 14). If this scenario is true it leaves Appellant in a Catch-22 situation, where she couldn't successfully initiate an appeal when she first had notice because she was not yet aggrieved, and she couldn't initiate an appeal when she was first aggrieved because the 30-day window when she first had notice had passed. According to the Appellant, such a scenario would be inconsistent with our statutory provisions guaranteeing a right to be heard. 35 P.S. § 7514(d); *Stevens v. DEP*, 2000 EHB 438*,* 444.

Appellant correctly notes that in the past we have recognized Department actions that were final as to one party but not to another party. *See Stevens v. DEP,* 2000 EHB at 444. In

Stevens, we held that appellant landowners were not aggrieved by a permittee's coverage approval under a general permit to apply sludge at the time the Department issued the general permit. The general permit did not automatically apply to any party and, at the time of the issuance and its publication in the *Pennsylvania Bulletin*, no particular site was designated for sludge application. *Id.* at 439. We noted in *Stevens* that Appellants would have to be clairvoyant to appeal within 30 days of publication in the *Pennsylvania Bulletin* because, at that time, they would have had no idea that the location of sludge application would be near their property. *Id.* at 440. Furthermore, any attempts by Appellants to appeal the permit approval or coverage determination at the time would be doomed to fail due to a lack of standing. *Id.* at 441. In light of this, we held that the first instance that Appellants were "aggrieved" by the coverage determination was at the point that the 30-day notice required by regulation was given to them that sludge application would occur near their property. That was the first time that appellants "could face the possibility of being adversely affected." *Id.* at 443. *See also Army for a Clean Environment ("ACE") v. DEP*, 2006 EHB 698, 702 ("it is difficult to conclude that any party is aggrieved by a general permit because such permits are by definition divorced from particular sites. They create standards that are not self-executing" and it is preferable to review challenges to a general permit after it has been applied to a particular case).

Appellant asserts that the Department's issuance of the Order to Mr. Liddick creates the same conditions as the issuance of a general permit and the subsequent grant of coverage under it. While the two-step general permit scenario only involves two separate actions of the Department, the current situation involving the Department Order involves an action of the Department, issuing the Order, and a subsequent action of the Commonwealth Court, issuing its November 21, 2019 Opinion and Order.

The Appellant further asserts that she and her husband co-own the campground property as tenants by the entireties. Under this type of ownership a husband and wife individually own the entire or whole property, and not one-half or a divisible portion. *Clingerman v. Sadowski*, 519 A.2d 378 (Pa. 1986). Neither spouse may deprive the other spouse of the use and enjoyment of the property, and neither spouse may sever or encumber the property without the consent of the other spouse. *Schweitzer v. Evans*, 63 A.2d 39 (Pa. 1949). Property held by the entireties is not affected by the bankruptcy of one spouse, and title cannot be conveyed by one spouse. *See Madden v. Gosztonyi Savings and Trust*, 200 A. 624 (Pa. 1938). The Board agrees with the Appellant that "the practical consequences of a tenancy by the entireties is that the debt and judgements against one spouse cannot affect property held by the entireties." (Appellant's Memorandum of Law at 8). The Appellant also asserts that she and her husband manage the campground together as a sole proprietorship. (Response at ¶ 4).[2] [3]

We do not agree with the Appellant that the Order at issue in this appeal creates the same type of bifurcated finality as a general permit. In contrast to the general permit discussed in *Stevens*, the Order at issue here specifies the exact location subject to the Department's Order. Whereas the landowners in *Stevens* could not possibly have known whether the coverage determination would affect them 30 days after notice was published in the *Pennsylvania Bulletin*,

---

[2] The Department alleged that Mr. Liddick operates the "Site" as a campground under the name "Old Trail Campground." (Department's Motion to Dismiss at ¶ 4). The Appellant admitted the campground uses the name "Old Trail Campground," and that Mr. Liddick "operates the campground" but further asserted that "that admission does not necessarily result in the conclusion of law that he is an operator for purposes of the Safe Drinking Water Act." (Appellant's Response at ¶ 4). The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party.

[3] To an extent, Appellant's admission that she managed the campground with her husband, which is an integral component to her argument that she was an aggrieved person, has a downside for the Appellant. Tenancy by the entireties is a form of property ownership that shields the property from the claims against only one of the two co-owners. If in addition to co-ownership of the property, the Liddicks also co-manage the business, then claims against the business are claims against both spouses thereby exposing the co-owned property.

it would be obvious to the Appellant, once she received notice, that the Order concerns a camp ground that she alleges that she owns and operates with her husband.

Furthermore, no intermediate step was required after the Order was issued for it to take effect. In a general permit scenario, there is normally a two-step procedure for securing coverage under the general permit. First, the Department issues the general permit, and second, a person applies for coverage or gives notice to operate under the general permit at a later date. Unlike in *Stevens* and *ACE*, where subsequent application or notification by a permittee was required before the conditions of a general permit were applied to a particular area of land, the Order here took full effect at the time it was issued. The Order only named Mr. Liddick as operating an unauthorized public water system. The Act requires "any person" to diligently comply with an order when issued. 35 P.S. §§ 721.7(b), 721.13(a). As Mr. Liddick was expected to diligently comply with the Order when it was issued, any impact his compliance (or non-compliance) would have on Appellant, as the co-owner of the property and co-manager of the solo-proprietorship, would also occur at the time the Order was issued. In short, neither of the unique circumstances raised by general permits are implicated by the Order under appeal here.

Finally, Appellant alleges the Board would have been unable to hear her appeal at the time the Order was issued because she was not aggrieved by the Department's action at that time. The Board disagrees. If the Appellant is aggrieved by the Order issued to her husband because she is a co-owner of the campground, she was aggrieved when the Order was issued before the Department filed its Petition to Enforce Order and Commonwealth Court issued its November 21, 2019 Opinion and Order.

Even assuming it is true that the Appellant was not aggrieved until Commonwealth Court acted on the Department's Petition, we fail to see how the Department's earlier action has

aggrieved her any more so now. Appellant asserts that she feels the impact of the Order now solely because Commonwealth Court has issued an order on November 21, 2019 unfavorable to the Appellant, which requires enforcement of the Department's Order and allows discovery into her husband's finances. This is not an action taken by the Department and we have no authority to review it. 35 P.S. § 7514(a); *McKees Rocks Forging, Inc. v. DER*, 1991 EHB 405, 409-10 ("the Board's jurisdiction is limited to appeals of actions taken by the Department…"). For the reasons set forth above, the Board rejects Appellant's reliance on the Board's precedent in general permit scenarios, such as *Stevens*, to justify filing her appeal on December 5, 2019.

The Board will nevertheless evaluate her claim that her appeal was timely. The underlying facts necessary to evaluate the Department's Motion to Dismiss are not in dispute. The Department issued a July 26, 2018 field order to Mr. Liddick. The Department suspended that Order with an August 2, 2018 Order that it also issued to Mr. Liddick. The Appellant in the current appeal, Tricia A. Liddick, was not named in either Order. The August 2, 2018 Order is the Department action that the Appellant has challenged in the current appeal. Mr. Liddick did not file an appeal with the Board, and the Department filed a Petition to Enforce Orders in Commonwealth Court on June 28, 2019 (Docket No. 360 M.D. 2019).[4] The Appellant admits that she received a copy of the Department's August 2, 2018 Order when she was served with a copy of the Department's Petition to Enforce Orders filed by the Department on June 28, 2019. (Notice of Appeal at ¶ 6; Department's Motion to Dismiss at ¶ 8). The Department asserts that the Appellant was served with the Petition to Enforce Orders along with Commonwealth Court's scheduling Order on July 3, 2019, but the Appellant asserts she has no recollection of this

[4] When that Petition to Enforce Orders was filed it involved three Department orders. The Parties entered into a stipulation prior to the hearing to address two of the three orders. Commonwealth Court held hearings on September 26 and October 16, 2019 on the Department's Petition to Enforce Orders, but when the hearings were held the Department's August 2, 2018, the Order was the only order remaining.

service. The Appellant does admit she received actual notice no later than July 26, 2019. (Motion to Dismiss and Response to Motion at ¶ 11). Appellant filed her appeal of the Department's August 2, 2018 Order on December 5, 2019, one hundred and fifty-five (155) days from July 3, 2019, when the Department asserts she first received actual notice of the Order, and one hundred and thirty-two (132) days from July 26, 2019, the later date she admits she received actual notice of the Order.[5]

An appeal that is filed more than one hundred days beyond the end of the thirty-day appeal period is untimely. *See e.g., Palmer v.* DEP, 2016 EHB 220; 25 Pa. Code § 1021.52(a)(2)(ii). If the Appellant was aggrieved by the Department's August 2, 2018 Order, she was aggrieved from the date it was issued and her appeal period began on the date she received actual notice of the Order which, under our facts, was no later than July 26, 2019. The Appellant does not challenge these facts. As we have previously determined, Commonwealth Court's November 21, 2019 Order granting the Department's Petition to Enforce Orders did not change these underlying facts or provide a basis for Appellant to file her appeal when she did. For these reasons, we issue the Order that follows.

[5] The Appellant received actual notice of the August 2, 2018 Order no later than July 26, 2019. The difference between the dates does not alter the analysis. An appeal that is one hundred and thirty-two days late is just as untimely as one that is one hundred and fifty-five days late.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRICIA A. LIDDICK	:	
	:	
v.	:	**EHB Docket No. 2019-151-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 26th day of June, 2020, it is hereby ordered that the Department's Motion to Dismiss is **granted** and the Appeal of Tricia A. Liddick is **dismissed.**

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 26, 2020

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

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

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2018-080-R**
	:	**(Consolidated with 2019-101-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and APEX ENERGY (PA), LLC, Permittee	:	**Issued: August 4, 2020**

OPINION AND ORDER ON
APPELLANT'S MOTION TO REOPEN DISCOVERY
AND DEPARTMENT'S MOTION TO STRIKE

By Thomas W. Renwand, Chief Judge

Synopsis

Appellant's Motion to Reopen Discovery is granted in part. Discovery is reopened on a limited basis to allow additional discovery on one factual issue raised by the Appellant, to allow the Appellant to name two expert witnesses, and to allow the filing of expert reports by the Appellant and supplemental expert reports by the Department and Permittee. Since no hearing has been scheduled, we do not believe that reopening discovery at this time will cause prejudice to the Department or Permittee. The Department's Motion to Strike is denied. The Appellant's Motion to Reopen Discovery was properly filed as a procedural motion.

O P I N I O N

Introduction

This matter involves an appeal filed by Protect PT challenging the issuance of unconventional gas well permits to Apex Energy (PA), LLC (Apex) by the Department of Environmental Protection (Department). Protect PT also appealed the renewal of the well

permits, and the two appeals have been consolidated. The permits pertain to the 1H and 7H wells on the Drakulic well pad in Penn Township, Westmoreland County. Protect PT describes itself as "a grassroots nonprofit organization which formed in 2014 to ensure [that] the safety, security and quality of life for people in Penn Township, Trafford and surrounding areas were protected from the impacts of unconventional natural gas development." (Motion to Reopen Discovery, para. 1.) Its objections to the Drakulic well permits include the following: 1) The Department failed to adequately evaluate the Apex Emergency Response Plan prior to the issuance of the well permits and 2) the Department failed to ensure that Apex brought ongoing erosion and sedimentation violations into compliance at a nearby well site known as the Fatur site.

By Order dated August 29, 2019, the deadline for filing dispositive motions in this matter was extended to September 6, 2019. Protect PT filed a Motion for Summary Judgment, and the Department and Apex filed Motions for Partial Summary Judgment. On January 30, 2020, the Board issued an Opinion and Order granting summary judgment to the Department and Apex on two issues but denying summary judgment as to all remaining issues. *Protect PT v. DEP*, EHB Docket No. 2018-080-R (Opinion and Order issued January 30, 2020).

The matter now before the Board is a Motion to Reopen Discovery filed by Protect PT on March 9, 2020. On March 13, 2020, the Department and Apex requested an extension of time in which to respond to the motion, and the Board granted an extension to April 23, 2020. On March 6, 2020, Governor Wolf issued a Proclamation of Disaster Emergency in response to the novel coronavirus, and on March 23, 2020 issued a Stay-at-Home Order aimed at mitigating the spread of COVID-19. In response to the Governor's declaration and order, on March 31, 2020 the Board issued a COVID-19 General Order that extended the deadlines for conducting

discovery and filing dispositive motions by 90 days. The order also extended the time for responding to a pending dispositive motion to 90 days instead of the usual 30 days. The parties subsequently jointly requested two more extensions in order to give them an opportunity to pursue settlement discussion, and an extension was granted to June 30, 2020. On June 30, 2020, the Department filed a Motion to Strike Protect PT's Motion to Reopen Discovery, as well as a response to the Motion to Reopen. Apex also filed a response to the Motion to Reopen on June 30, 2020. Protect PT filed a response to the Motion to Strike on July 10, 2020. This matter is now ready for disposition.

Department's Motion to Strike

The Department asserts that Protect PT improperly filed its Motion to Reopen Discovery as a procedural motion under Section 1021.92 of the Board's rules, 25 Pa. Code § 1021.92, when it should have been filed as a discovery motion pursuant to Section 1021.93, 25 Pa. Code § 1021.93. The Department argues that this is not merely a technical oversight, as the rules for procedural motions and discovery motions have different requirements. For example, a verification is not required for a procedural motion. 25 Pa. Code § 1021.92(a). Additionally, and importantly in the Department's view, a memorandum of law may not be filed with a procedural motion unless ordered by the Board. 25 Pa. Code § 1021.92(g). By filing its motion as a procedural motion, the Department asserts that Protect PT deprived the Department of the opportunity to file a memorandum of law explaining why reopening discovery at this stage of the proceeding will cause prejudice to the Department. In contrast, Protect PT argues that its motion was properly filed, asserting that Section 1021.93 is only appropriate for motions to resolve discovery issues while discovery is ongoing. Additionally, Protect PT argues that even if the Board determines that the motion should have been filed pursuant to Section 1021.93, it may

remedy the error by ordering Protect PT to file a memorandum of law pursuant to Section 1021.92(g) which authorizes the Board to order the filing of a memorandum of law in support of a procedural motion.

The Board's rules set forth the purpose and scope of procedural and discovery motions as follows:

> § 1021.92. Procedural motions.
>
> (a) This section applies to motions pertaining to the procedural aspects of a case, including motions for continuance, for expedited consideration, for extensions of time in which to file documents and for a stay of proceedings.
>
> *****
> § 1021.93. Discovery motions.
>
> (a) This section pertains to motions filed to resolve disputes arising from the conduct of discovery.
>
> *****

25 Pa. Code §§ 1021.92(a) and 1021.93(a).

Each of the parties has presented a valid argument for why they believe the motion should be treated as a procedural motion or a discovery motion. It is a close call; indeed, reasonable minds may disagree. However, we believe that Protect PT has presented the stronger argument and, therefore, we find that its motion was properly filed as a procedural motion. Protect PT's motion more appropriately fits into the category of motions set forth as examples of procedural motions in Section 1021.92 – e.g., motions to extend deadlines. In this case, the discovery period has ended, and Protect PT is seeking to reopen and, in effect, to extend it. Its motion does not concern the resolution of a dispute "arising from the conduct of discovery." The types of motions envisioned by Section 1021.93 involve disputes arising during the course of discovery, e.g., motions to compel more complete answers to interrogatories or motions to quash

a subpoena. Section 1021.93 pertains to motions addressing the technical aspects of the discovery process. This is evidenced by subsection (b) of the rule which states in relevant part, "Discovery motions must contain as exhibits the discovery requests and answers giving rise to the dispute." 25 Pa. Code § 1021.93(b). In contrast, Section 1021.92 deals with the procedural management of a case.

Moreover, as Protect PT points out, even if we were to determine that its motion should have been filed as a discovery motion, the remedy would not be to strike it but simply to provide the parties with an opportunity to file supporting memoranda. Section 1021.93 does not require that a memorandum of law be filed in support of a discovery motion or response; it simply allows a party to file a memorandum of law if it chooses to do so. 25 Pa. Code § 1021.93(d). Thus, even if Protect PT had filed its motion as a discovery motion, it was not required to file a supporting memorandum of law. Likewise, although Section 1021.92 does not generally allow parties to include a supporting memorandum of law with a procedural motion, it is not an absolute prohibition. If a party believes that a memorandum of law should be filed in support of a procedural motion or response, it simply must request leave of the Board. 25 Pa. Code § 1021.92(g). Here, none of the parties requested leave to file a memorandum of law and we see no reason to order it. Moreover, the Department submitted a memorandum of law in support of its Motion to Strike that addressed, in part, the merits of Protect PT's request to reopen discovery. We believe that the filings currently before us provide an adequate basis on which to rule on Protect PT's motion. We now turn to the merits of the Motion to Reopen Discovery.

Protect PT's Motion to Reopen Discovery

Protect PT seeks to reopen discovery 1) to conduct additional factual discovery in connection with Department actions taken in late 2019 and 2) to add two expert witnesses to

opine on issues not disposed of by the Board's Opinion and Order on Summary Judgment. The Department and Apex have filed responses opposing the motion, asserting that the factual discovery that Protect PT seeks to conduct is not relevant and the designation of expert witnesses should not be permitted at this late stage of the appeal.

Reopening of Factual Discovery

As noted in the background section of this Opinion, this matter involves Protect PT's appeal of gas well permits issued to Apex for the 1H and 7H wells on the Drakulic well site, as well as the renewal of those permits. One of Protect PT's objections is that the Department failed to consider erosion and sedimentation violations at Apex's nearby Fatur well site before issuing the permits for the Drakulic wells. This issue was raised by Protect PT in its Motion for Summary Judgment filed in September 2019. The Department and Apex responded to Protect PT's summary judgment motion by stating that Apex and the Department had entered into a Consent Order and Agreement on March 8, 2019 that resolved issues at the Fatur site. Both Apex and the Department stated that Apex was in compliance with the Consent Order and Agreement.

According to Protect PT's Motion to Reopen Discovery, on December 19, 2019, the Department issued a denial of Apex's application for renewal of the Fatur #7HN permit, stating that the Department "has reviewed the above-referenced application and has determined that noncompliance with the March 8, 2019 Consent Order and Agreement prohibits issuance of the permit." (Exhibit A to Notice of Appeal filed by Apex at EHB Docket No. 2020-005-R.)[1] It is Protect PT's contention that the Fatur #7HN permit renewal is the same type of permit renewal as that which is at issue in the current appeal. Protect PT states that if discovery is reopened it

[1] The denial of Apex's application for renewal of the Fatur #7HN permit is the subject of a separate appeal before the Board filed by Apex at EHB Docket No. 2020-005-R.

intends to investigate the Department's factual basis for denying the well permit renewal at the Fatur site and why the Department did not exercise the same authority with regard to the permit applications at the Drakulic site.

Additionally, Protect PT avers that Apex applied for a renewal of its Erosion and Sediment Control GP-2 Permit for the Drakulic site, for which the Department issued deficiency letters on October 16, 2019 and February 25, 2020. Protect PT states that if discovery is reopened it intends to investigate the Department's factual basis for issuance of the deficiency letters and whether there are ongoing erosion and sedimentation issues at the Drakulic site similar to those at the Fatur site.

The Department and Apex object to the reopening of factual discovery. Apex objects to the fact that Protect PT's motion was filed well after the close of discovery which was extended three times at the joint request of the parties. It also contends that the issues on which Protect PT wishes to obtain discovery are unrelated to the objections set forth in Protect PT's notice of appeal. The Department contends that the information that Protect PT seeks to obtain is irrelevant because it pertains to another well site. Additionally, in the memorandum of law submitted with its Motion to Strike, the Department contends that Protect PT is seeking discovery on new factual matters outside the scope of its notice of appeal.

It is the Board's "duty and responsibility to regulate and effectively monitor the discovery process." *Kiskadden v. DEP*, 2013 EHB 21, 23. In evaluating a party's motion to extend or reopen discovery, we are guided by Judge Mather's sage advice in *Damascus Citizens for Sustainability v. DEP*, 2011 EHB 105, 107:

> To properly manage our responsibility to regulate prehearing discovery, the Board recognizes that we must adequately balance the need to move matters to conclusion, while providing parties with enough time to prepare their case. *Collier v. DEP*, [2010

> EHB 867]; 25 Pa. Code § 1021. 102(a). In doing so, the Board has broad discretion to decide how discovery will and will not be conducted. *DEP v. Neville Chemical Co*., 2005 EHB 1, 3. In general, the deadlines imposed by our orders are important, and parties must be able to rely upon them when preparing for litigation. *Id*. at 4. However, the discovery deadlines we set are imposed almost immediately after we open a docket for consideration and the Board grants nearly every first request to extend discovery deadlines. *Id.*

In the matter before us, the discovery deadline has been extended three times, at the joint request of all parties. Dispositive motions have been filed and decided. However, no hearing date has been scheduled, and deadlines were held in abeyance while the parties conferred to determine if this matter could be resolved without a hearing. Additionally, deadlines were stayed by the Board's General Order issued in response to COVID-19 and Governor Wolf's emergency orders. We believe that a limited reopening of discovery will not prejudice any party and may be helpful in narrowing the issues and creating a complete record before the Board. "Full disclosure of a party's case underlies the discovery process." *Kiskadden*, 2013 EHB at 24 (citing *Clean Air Council v. DEP*, 2012 EHB 286).

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a); *New Hope Crushed Stone & Lime Co. v. DEP*, 2016 EHB 666, 683. Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. As we held in *New Hope*, "In evaluating whether discovery regarding a matter should be permitted, we must first determine whether it appears to be reasonably calculated to lead to information that is relevant to the subject matter involved in the appeal." 2016 EHB at 683. As stated in *Bucks County Water & Sewer Authority v. DEP*, 2014 EHB 143:

> Relevance is not an exacting standard. . . As it is often stated, relevance simply refers to the ability of a piece of evidence to function as a proverbial brick in the wall of a fact of consequence.

Id. at 152 (citing Pennsylvania Evidence Courtroom Manual Ch. 401 (2014 ed. Matthew Bender)).

Apex and the Department assert that issues at the Fatur site are irrelevant and outside the scope of the notice of appeal. We disagree. In paragraph 4 of the Amended Notice of Appeal, Protect PT alleges that the Department issued the permits for the 1H and 7H wells at the Drakulic site "with knowledge of Apex's ongoing and continuing violations at the Fatur Well Site which constitute a public nuisance, and which violates the Department's responsibilities under 71 P.S. § 510-17 to abate such nuisances." (Amended Notice of Appeal, para. 4.) In our Opinion and Order on Summary Judgment, we addressed Protect PT's argument that ongoing violations at the Fatur site should have prevented the Department from issuing the permits at issue in this appeal. We determined that this issue involved disputed questions of both law and fact, and in reaching this conclusion we relied on statements made by the Department and Apex that the alleged violations were the subject of a Consent Order and Agreement, with which Apex was in compliance. If, as alleged by Protect PT, Apex is not in compliance with the Consent Order and Agreement, this information appears to be relevant to the allegations raised by Protect PT. Moreover, if the alleged violations at the Fatur site were the subject of previous discovery between the parties and the information provided in discovery has changed, Apex and the Department have a duty to update their discovery responses.

The other subject on which Protect PT wishes to reopen factual discovery pertains to deficiency letters issued by the Department for the renewal of Apex's Erosion and Sedimentation Control GP-2 Permit for the Drakulic site. This subject does not appear to be within the scope of

this appeal. While Protect PT's amended notice of appeal asserts that the well permits for the Drakulic site should not have been issued due to alleged ongoing erosion and sediment control violations at the *Fatur* site, it does not raise any objections regarding the Erosion and Sedimentation Control Permit for the *Drakulic* site.

In the early stages of an appeal, it may be difficult to determine what is relevant. *Clean Air Council v. DEP*, 2016 EHB 567. Therefore, "we tend to interpret the relevancy requirement broadly at the discovery stage, and we will generally allow discovery into an area so long as there is a reasonable potential that it will ultimately prove to be relevant." *Id*. at 570 (citing, *inter alia*, *Cabot Oil & Gas Corp. v. DEP*, 2016 EHB 20.) Here, we are past the discovery phase, and Protect PT is asking to reopen discovery; at this stage of the proceeding the issues are more defined and any additional discovery must be narrowly focused. Protect PT has not provided a basis for delving into the Erosion and Sedimentation Control Permit for the Drakulic site or deficiencies surrounding its renewal. We agree with Apex that if a renewal of the Erosion and Sedimentation Control Permit is granted for the Drakulic site, Protect PT is free to file an appeal at that time and conduct discovery on the Department's deficiency letters in the context of that appeal.

We also agree with Apex and the Department that any discovery at this stage of the proceeding should be limited in scope, and this is reflected in our order granting the Motion to Reopen Discovery.

Expert Witnesses

In its motion, Protect PT states that it has "retained Ranajit ("Ron") Sahu, Ph.D, QEP, CEM, as an expert witness to opine on the emergency response planning issues not disposed of by the Board's January 30, 2020 Opinion and Order on Summary Judgment." It also states that

it "is working to retain an additional expert witness to opine on the issues not disposed of by the Board's January 30, 2020 Opinion and Order on Summary Judgment." (Motion to Reopen Discovery, para. 16, 17.) It explains its late retention of expert witnesses as follows: "Due to the limited resources of a small nonprofit like Protect PT, testifying experts were not retained at the previous close of discovery and not identified in any of Protect PT's discovery responses." (*Id.* at para. 18.) It goes on to state, "The complex issues of law and fact at stake in this matter should be decided on a fully developed record with the benefit of expert testimony and extensive evidence." (*Id.* at para. 20.)

Rule 4003.5 has this to say on the late disclosure of expert witnesses:

> (b) An expert witness whose identity is not disclosed in compliance with subdivision (a)(1) or (2) of this rule [in response to interrogatories or other means as ordered by the court] shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

However, as we have recognized:

> These rules as written would suggest that we must not allow [a late-disclosed witness] to testify unless there are extenuating circumstances beyond the control of the defaulting party. . . Notwithstanding the mandatory language of the rules, the courts and this Board have traditionally taken a less Draconian approach that considers, among other things, the prejudice caused to each party by allowing or excluding the testimony and the extent to which the prejudice can be cured.

CMV Sewage v. DEP, 2010 EHB 725, 730 (citing *Rhodes and Valley Run Water Co. v. DEP*, 2009 EHB 237; *DEP v. Angino*, 2006 EHB 278). See also *Bucks County*, 2014 EHB at 149-50, citing *CMV Sewage, supra* (Despite the language of Pa.R.C.P. 4003.5(b) mandating that courts

bar the testimony of tardily identified expert witnesses absent extenuating circumstances, both courts and this Board have taken a less Draconian approach.)

Here, the prejudice to the Department and Apex in allowing Protect PT to add expert witnesses at this stage of the proceeding is small. The case has not yet been scheduled for hearing. And, due to the COVID-19 restrictions in place, an in-person hearing may not be scheduled for an extended period of time. Although the Board is equipped to hold hearings remotely, we surmise that due to the size and complexity of this matter, an in-person hearing may be preferable to a remote hearing. Any prejudice to the Department and Apex by allowing Protect PT to add expert witnesses at this time can be cured by allowing the limited reopening of discovery.

As we have noted, the Board "has wide discretion to determine appropriate measures to insure adequate discovery while at the same time limiting discovery where required." *Northampton Township v. DEP*, 2009 EHB 202, 205. We believe that a limited reopening of discovery will not prejudice Apex and the Department and will provide a more complete record on which to decide this matter. As stated in *Damascus*, "all parties benefit from well informed opponents in litigation, who may be better suited to agree to factual stipulations limiting the need for presentation of evidence on certain matters at hearing." 2011 EHB at 108 (citing *Capelli v. DEP*, 2006 EHB 426, 427).

Moreover, as we held in *Pennsylvania Trout v. DEP*, 2003 EHB 354, 357:

> The revised schedule fashioned by the Board should enable the parties to conduct and complete all necessary discovery and adequately prepare their case for hearing. This is required by both the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure which envision the broad exchange of information prior to a hearing.

Therefore, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2018-080-R**
	:	**(Consolidated with 2019-101-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and APEX ENERGY (PA), LLC, Permittee	:	

O R D E R

AND NOW, this 4th day of August, 2020, it is hereby ordered as follows:

1) The Department's Motion to Strike is *denied*.

2) Protect PT's Motion to Reopen Discovery is *granted in part.*

3) Factual discovery is reopened and extended to **October 28, 2020** for the limited purpose of addressing the Department's basis for denial of a well permit renewal for the Fatur site.

4) Expert discovery is reopened for the limited purpose of allowing Protect PT to add expert witness Ranajit (Ron) Sahu to opine on the emergency response planning issues not disposed of by the Board's January 30, 2020 Opinion and Order on Summary Judgment (Summary Judgment Opinion) and to add an additional expert witness to opine on the issues not disposed of by the Board's Summary Judgment Opinion.

5) Protect PT shall disclose the identity of its additional expert witness on or before **October 9, 2020.**

6) Protect PT shall disclose its expert witness reports on or before **November 13, 2020.**

7) The Department and Apex shall disclose any supplemental expert witness reports on or before **December 16, 2020**.

8) No further dispositive motions may be filed in this matter without first obtaining leave of the Board.

ENVIRONMENTAL HEARING BOARD

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

DATED: August 4, 2020

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

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

For Appellant:
Ryan Hamilton, Esquire
(*via electronic filing system*)

For Permittee:
James V. Corbelli, Esquire
Joseph Reinhart, Esqure
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 20, 2020**
	:	

OPINION AND ORDER ON MOTION TO COMPEL DISCOVERY AND FOR EXPEDITED RELIEF

By Thomas W. Renwand, Chief Judge

Synopsis

The Appellant's Motion to Compel is dismissed without prejudice. Counsel are directed to confer in an attempt to amicably resolve any remaining discovery disputes. If the disputes cannot be resolved between the parties, any further discovery motions and responses should comply with the guidance set forth in this Opinion.

O P I N I O N

Introduction

This matter involves an appeal filed by Range Resources – Appalachia, LLC (Range) from an Order issued by the Department of Environmental Protection (Department) on January 13, 2020 asserting that natural gas leaked from one of Range's wells, known as the Harman Lewis Unit 1H well (1H well), and affected ground water and surface waters in Lycoming County. The order directs Range to take a number of actions, including the restoration and replacement of affected water supplies, investigation of the migration of natural gas from the 1H

well, and submission of a remedial investigation plan and well plugging plan. Range has mounted a vigorous and robust defense contesting the Department's order.

On March 27, 2020 the parties filed a Joint Proposed Plan for Conducting Document Discovery, Including Electronic Discovery (Joint Discovery Plan) and by Order dated April 20, 2020 the Board approved the Joint Discovery Plan. The matter now before the Board is Range's Motion to Compel Discovery and for Expedited Relief (Motion to Compel). Pursuant to the Board's Rule at 25 Pa. Code § 1021.93(c), the Department filed a response to the Motion to Compel on July 30, 2020. By its motion, Range asks the Board to order the Department to comply with the Joint Discovery Plan.

Range's Motion to Compel contests the vast majority of the Department's discovery answers and responses. Its main complaint is with how quickly and thoroughly the Department has answered its discovery. Specifically, Range asks that the Department be ordered to 1) utilize Range's proposed search terms, pursuant to paragraph 7 of the Joint Discovery Plan and 2) produce within seven days all documents referenced in the Department's Responses and Supplemental Responses to Range's First Set of Interrogatories. In addition, Range seeks an extension of the August 19, 2020 deadline for Range's expert disclosure to 30 days after the Department confirms in writing that all documents referenced in its interrogatory responses and all documents responsive to Range's First Set of Requests for Production of Documents have been produced. By separate Order issued on August 12, 2020 the Board extended this deadline to September 2, 2020 and provided other relief to Range.

Discussion

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a); *Protect PT v. DEP*, EHB Docket No. 2018-080-R

(Opinion and Order on Motion to Reopen Discovery issued August 4, 2020); *Hickory Hill Group, LLC v. DEP*, 2019 EHB 377. "The Board is charged with overseeing ongoing discovery between parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Township v. DEP*, 2009 EHB 202, 205. This oversight requires the Board to assess discovery in terms of a proportionality standard, *Friends of Lackawanna v. DEP*, 2015 EHB 785, 787 (citing *Tri-Realty Co. v. DEP*, 2015 EHB 517, to ensure that discovery obligations are "consistent with the just, speedy and inexpensive determination and resolution of litigation disputes." *Whitehall Township v. DEP*, 2016 EHB 764, 767 (quoting 2012 Explanatory Comment Prec. Rule 4009.1, Part B). Additionally, a moving party must certify that prior to filing a discovery motion, it has in good faith conferred or attempted to confer with the party against whom the motion is directed in an effort to secure the requested information without Board action. 25 Pa. Code § 1021.93(b).

After a detailed review of Range's Motion to Compel and the Department's response, it is readily apparent that the Joint Discovery Plan has serious flaws and is not working in accordance with paragraph 2(b) which states that the purpose of the Joint Discovery Plan is:

> to promote the just, speedy and inexpensive determination of the Action in accordance with 25 Pa. Code Section 1021.4, and ensure that discovery complies with the proportionality standard at Subsection (B) of the 2012 Explanatory Comment preceding Rule 4009.1 of the Pa. R. Civ. P.

In the alternative, there has been such a breakdown in necessary communication between Counsel that the mechanisms that Counsel set up, and that the Board adopted at their request, are simply not working. Counsel should be able to work out these discovery issues, including search term issues. If they are at an impasse on a particular issue, despite their best efforts and after

genuine attempts at compromise by both sides, only then should they seek the Board's involvement. Following an extensive review of the filings, we believe these discovery issues should have been resolved by Counsel. We are not convinced that Counsel put in the necessary time, work and effort here.

Indeed, in all cases, before filing a discovery motion with the Board, Counsel must first focus on resolving the issues and then specifically setting forth what the Board needs to decide. Attaching the actual responses and objections is a necessary step and is certainly helpful. But, it is not the final step. For example, if Range contends an interrogatory has not been answered in accordance with the Rules of Civil Procedure, it needs to set forth why. It did not do so. Simply highlighting certain answers and responses is appreciated, but a discussion of all allegedly deficient responses and an explanation of why they are deficient should also be set forth. In order to decide the Motion to Compel it is necessary to review each of the interrogatory answers and responses to the requests for production that Range contends are deficient. Likewise, if the Department claims it has provided the documents requested, it needs to be more specific, rather than simply alleging it has produced all responsive documents and, therefore, the Motion to Compel is moot. This is especially true where, as in this case, there is a search term overlay. The Board needs guidance from both parties to adequately and fairly decide these discovery matters. The Board has reviewed the parties' individual requests and responses in most instances with little or no guidance from either side except to highlight certain issues that each side believes are particularly egregious. As esteemed Allegheny County Common Pleas Court Judge Silvestri Silvestri said on more than one occasion "Judges are not law clerks for attorneys."

As we held in *Friends of Lackawanna*, "it is difficult to make broad proclamations about the appropriate scope of an appeal in the relative abstract of a discovery motion," and "the

threshold for relevance in discovery is lower than that at a hearing on the merits." 2015 EHB at 789. Nonetheless, all discovery must still be governed by a proportionality standard. *Id.* at 790. The proportionality standard requires us to consider the following factors:

(1) The nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake;

(2) The relevance of the information sought and its importance to the court's adjudication in the given case;

(3) The cost, burden, and delay that may be imposed on the parties to deal with the information;

(4) The ease of producing the information and whether substantially similar information is available with less burden; and

(5) Any other factors relevant under the circumstances.

Id.; *Tri-Realty*, 2015 EHB at 525-26 (citing 2012 Explanatory Comment, Prec. Rule 4009.1, Part B).

As explained in *Tri-Realty*:

> To a large extent the proportionality standard is merely a restatement of the general principle that discovery must relate to information that is relevant and reasonably calculated to lead to the discovery of admissible evidence, and it must not be sought in bad faith or cause unreasonable annoyance, embarrassment, oppression, burden, or expense.

2015 EHB at 526.

Counsel need to keep these factors in mind as we proceed. This is especially true while we are in the midst of a world-wide pandemic that has drastically changed the work habits of businesses, government and the legal profession. Many people are working almost exclusively from home. Although teleworking has been tackled with the usual optimism and ingenuity of the Bench and Bar, on occasion it still presents technological and logistical challenges.

Discovery is not an end in itself. Instead, it is a mechanism by which a party can explore the strengths and weaknesses of both its case and its opponent's case, identify witnesses, and locate documents. Discovery helps to insure that all parties can fully prepare for trial, yet at the same time move toward an amicable resolution of the dispute after gleaning a more complete picture of the respective merits of the case.

Here, the main sticking point centers around the search terms and its protocols. The procedures agreed to by the parties, and adopted at their request by the Board, have extremely short timeframes. Those timeframes require the parties to cooperate. The Department contends that the search terms proposed by Range return far too many documents. Meanwhile, Range states that it was constantly kept in the dark as to what the Department was encountering when it ran the searches. Obviously, Counsel need to work more closely together. We are convinced that some of these issues could have been avoided if the parties would have modified the timeframes and truly worked together on developing workable search terms.

In a not uncommon development, the filing of Range's Motion to Compel prodded the production of thousands of documents by the Department. Therefore, what prompted Range to file its Motion to Compel has changed. Range itself recognizes this fact and has requested leave to file a reply to the Department's response. In its response the Department says that Range's Motion to Compel is now moot. Rather than try to make sense of this moving legal landscape, we think the better course of action is to dismiss without prejudice Range's Motion to Compel and Motion for Leave to File Response.

Counsel should confer in an attempt to amicably resolve any remaining discovery disputes. If it is necessary to involve the Board, we expect the issues to be set forth in a much more concise and comprehensive manner as explained earlier in this Opinion. We will not be

hesitant to apply the principles of proportionality in reviewing the issues that have stymied the experienced Counsel involved in this matter.

According to Counsel, and as set forth in the voluminous filings provided to the Board over the past month, the underlying issues in this case have been litigated and argued off and on for the past nine years. By now both parties should be intimately familiar with what is in controversy in this matter. Furthermore, no hearing has been scheduled in this case and discovery is not even set to conclude until November 2, 2020. We are confident that there is ample time to complete the discovery process in a fair and lawful manner which benefits both the Department and Range.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 20th day of August, 2020, after review of Range's Motion to Compel Discovery and for Expedited Relief (Motion to Compel) and the Department's Response, it is hereby ordered as follows:

1) The Motion to Compel is **denied without prejudice**.
2) On August 12, 2020 by separate Order the Board extended Range's deadline for disclosure of its expert witnesses to September 2, 2020 and granted other relief as set forth in the Order.
3) Counsel are directed to confer to attempt to amicably resolve any remaining discovery issues.

ENVIRONMENTAL HEARING BOARD

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

DATED: August 20, 2020

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

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

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNENVIRONMENT, EARTHWORKS, and ENVIRONMENTAL INTEGRITY PROJECT	:	
v.	:	**EHB Docket No. 2020-002-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM AND RESOURCES, LLC, Permittee	:	**Issued: August 26, 2020**

OPINION AND ORDER ON
MOTION TO COMPEL

By Thomas W. Renwand, Chief Judge

Synopsis

A Permittee's Motion to Compel is granted in part and denied in part. Section 10.2 of the Air Pollution Control Act provides standing to persons or entities who participate in the public comment process. Therefore, since Appellants submitted a comment letter in response to the proposed permit, discovery aimed at determining whether the Appellants were aggrieved by the permit issuance and plan approval is not relevant. The question of timeliness under Section 10.2 of the Air Pollution Control Act is more appropriately addressed in a motion to dismiss or motion for summary judgment where parties are required to file a memorandum of law or brief in support of their motion or response. However, limited discovery in that area will be allowed.

O P I N I O N

Introduction

This matter involves an appeal filed with the Pennsylvania Environmental Hearing Board (Board) by PennEnvironment, Earthworks, and Environmental Integrity Project (Appellants).

The appeal challenges the Department of Environmental Protection's (Department) issuance of State-Only Operating Permit No. 63-00968 (permit) to MarkWest Liberty Midstream and Resources, LLC (MarkWest) for the continued operation of its Smith Compressor Station, an existing natural gas compressor station previously permitted under a general permit, GP-5, and plan approval PA 63-00968A. The Appellants submitted comments to the proposed permit in a letter dated September 16, 2019 (comment letter), which is attached to the Notice of Appeal as Exhibit B.

The matter currently before the Board is a Motion to Compel filed by MarkWest on July 24, 2020. The Department and Appellants filed responses to the motion on August 10, 2020. Pursuant to the Board's Rules of Practice and Procedure at 25 Pa. Code § 1021.93(b), MarkWest certified that it conferred with the Appellants and attempted in good faith to resolve this matter but has been unable to reach a resolution.

Discussion

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a); *Protect PT v. DEP*, EHB Docket No. 2018-080-R (Opinion and Order on Motion to Reopen Discovery issued August 4, 2020); *Hickory Hill Group, LLC v. DEP*, 2019 EHB 377. Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa. R.C.P. 4003.1; *Protect PT v. DEP*, slip op. at 8. Relevancy, for purposes of discovery, is broadly construed. *Tri-Realty v. DEP*, 2015 EHB 552, 555-56. In the early stages of an appeal, it may be difficult to determine what is relevant. *Clean Air Council v. DEP*, 2016 EHB 567. Therefore, "we tend to interpret the relevancy requirement broadly at the discovery stage, and we will generally allow discovery into

an area so long as there is a reasonable potential that it will ultimately prove to be relevant." *Id*. at 570 (citing, *inter alia*, *Cabot Oil & Gas Corp. v. DEP*, 2016 EHB 20.) Full disclosure of a party's case underlies the discovery process before the Board. *Pennsylvania Trout v. DEP*, 2003 EHB 652, 657. Nevertheless, "the Board is charged with overseeing ongoing discovery between parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Township v. DEP*, 2009 EHB 202, 205.

According to its motion, on May 29, 2020 MarkWest served its first set of interrogatories and request for document production on each of the Appellants. (Motion to Compel, para. 2.) The Appellants responded to the discovery requests on June 29, 2020 and supplemented their responses on July 14, 2020. (*Id*. at para. 2, 5; Exhibit A to Motion to Compel.) At issue are Appellants' responses to Interrogatory Nos. 3, 4, 9, 10, 11, 12, 13 and 16 and related Requests for Production 8 – 12.

Interrogatory Nos. 3 and 4 and Requests for Production 8 and 9

Interrogatories No. 3 and 4 and Requests for Production No. 8 and 9 ask the Appellants to identify and produce all internal communications and communications with third parties relating to the Smith Compressor Station, "including without limitation communications related to (a) the subject matter of the objections attached to the Notice of Appeal, (b) the Permit, or (c) the September 16, 2019 comment letter attached as Exhibit B to the Notice of Appeal." (Motion to Compel, Exhibit A.) Appellants objected to the interrogatories and request for production as being vague, overbroad, unduly burdensome, not reasonably calculated to lead to the discovery of relevant or admissible evidence and intended to harass rather than for legitimate discovery

purposes. They also assert that the information sought is protected by attorney-client privilege, work product privilege and other unnamed privileges. The Department takes no position.

In its motion, MarkWest states that, while it does not believe Interrogatories No. 3-4 and Requests for Production No. 8-9 are overly broad, it is willing to narrow the request to "Appellants' third-party and internal communications related to (a) the subject matter of the objections attached to the Notice of Appeal, (b) the Permit, or (c) the September 15, 2019 comment letter attached as Exhibit B to the Notice of Appeal."

We do not agree that this significantly narrows the scope of the request. As the Appellants point out, the subject matter of their objections involves issues that the Appellants have worked on for decades and are central to permitting decisions under the Air Pollution Control Act and the Clean Air Act. Although some of this information may be relevant to the permit at issue in this appeal and the comment letter submitted in response to the permit, much of it is neither relevant nor admissible. Even though relevancy for discovery purposes is to be construed broadly, *Parks v. DEP*, 2007 EHB 54, 58, we must look at these requests with a view as to whether they will help the Board and the parties resolve the issues in this case. As we held in *Cabot Oil*, 2016 EHB at 24 (citing *Parks, supra*), "since it can be difficult to tell early on in a case whether a matter is relevant, we interpret the relevancy requirement broadly and generally allow discovery into an area so long as there is a reasonable potential that it will lead to relevant information."

The Appellants have demonstrated to us that much of the requested information would not be relevant or otherwise discoverable. Therefore, we will allow limited discovery of the information requested by MarkWest as further narrowed in its motion. We limit this discovery to a defined period from August 1, 2019 through January 13, 2020. We believe that documents

within this timeframe might be relevant or likely to lead to admissible evidence. Of course, any communications protected by attorney-client privilege, work product privilege or any other applicable privilege are not discoverable.

Interrogatories No. 9, 11, 12, 13 and Requests for Production No. 10, 11, 12

Interrogatory No. 12 asks the Appellants to state the factual and legal basis by which they assert standing. Interrogatory No. 9 asks the Appellants to identify all bylaws, articles of incorporation or other documents "that bear upon its existence, organizational structure, purpose, authority, or decision-making process." Interrogatory No. 11 asks each of the Appellants if they have members and, if so, how one becomes a member. Interrogatory No. 13 asks the Appellants to identify members who reside or work in Washington County and any county adjacent to Washington County. Requests for Production No. 10-12 ask for documents related to the Appellants' organizational structure. MarkWest states that this information is necessary in order to determine whether the Appellants have standing to prosecute this appeal.

The Appellants base their standing on the language of Section 10.2 of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119 (1959), *as amended*, 35 P.S. §§ 4001-4106, which states in relevant part as follows:

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

35 P.S. § 4010.2 (emphasis added). The Appellants participated in the public comment process surrounding the permit at issue in this appeal (Exhibit B to Notice of Appeal).

In support of their argument that, as participants in the public comment process, they automatically have standing to pursue this appeal, the Appellants rely heavily on the Board's opinion in *Logan v. DEP*, 2016 EHB 801. There the Board stated:

> Standing…is particularly broad in appeals from a plan approval [under the Air Pollution Control Act] because Section 10.2 of the Air Pollution Control Act, 35 P.S. § 4010.2, provides that aggrieved persons "or any person who participated in the public comment process for a plan approval or permit" has a right to appeal to the Board. So long as an appellant has standing because the appellant submitted comments, further inquiry into the person's actual aggrievement seems to be largely redundant and a waste of resources.

Id. at 804. The Department agrees that Section 10.2 provides the Appellants with standing since they participated in the public comment process.

The language of the Air Pollution Control Act is controlling. However, MarkWest argues that the Appellants and Department's interpretation is not correct. It asserts as follows:

> The General Assembly did not intend that the mere submission of comments under Section 10.2 of the [Air Pollution Control Act] entitles any person or entity to appeal a permit issued by the Department. The General Assembly did not intend, as Appellants' argument necessarily contends, that any person living or residing anywhere in the Commonwealth, or well beyond its borders, that submits comments to the Department under Section 10.2 of the [Air Pollution Control Act] can appeal to the Board *even if* that person or entity does not *otherwise* have a substantial, direct and immediate interest in the outcome of the appeal.
>
> Rather, implicit in Section 10.2 of the [Air Pollution Control Act] is that a person or entity may have standing where they have engaged in the public participation process leading to the permit **and** the record indicates that they had a reasonable real-world concern that they would be adversely affected.

(Motion to Compel, para. 26 and 27) (emphasis in original).

In other words, MarkWest argues that being a person or entity who participated in the public comment process is not enough in and of itself to convey standing; one must also be

aggrieved by the permit. However, that is not what Section 10.2 says. Section 10.2 unequivocally states that "any person aggrieved by an order or other administrative action of the department issued pursuant to this act *or* any person who participated in the public comment process for a plan approval or permit" shall have the right to appeal to the Board. Pursuant to this language, one has standing to appeal if he or she is aggrieved or if he or she participated in the public comment process. To require a commenter to also be aggrieved renders that language superfluous.

MarkWest argues that this interpretation of Section 10.2 would allow "*any* person or entity, located *anywhere* on this planet" automatically to have standing to appeal a permit issued under the Air Pollution Control Act simply by submitting a comment to the Department. While we recognize that this outcome seems to go beyond the traditional notion of standing, nonetheless, where the General Assembly has created a statutory right to appeal, we are bound to follow it. Here, the language of Section 10.2 of the Air Pollution Control Act allows commenters in the public participation process the right to appeal, notwithstanding the absence of traditional legal standing requirements. MarkWest has provided no legislative history to the contrary in support of its argument. Because Section 10.2 of the Air Pollution Control Act provides commenters with a statutory right to appeal, further inquiry into the Appellants' basis for standing is not relevant.[1]

As to Interrogatories No. 9 and 11 and Requests for Production No. 10 and 11, MarkWest has not set forth how the information requested is relevant or would lead to admissible evidence.

[1] MarkWest relies on the Board's decision in *Triggs v. DEP*, 2001 EHB 444. However, in that case, the Board declined to address the question of whether the submission of comments on a proposed permit or plan approval was sufficient to confer standing under Section 10.2 of the Air Pollution Control Act. Nonetheless, the Board did recognize that Section 10.2 appeared to create a basis for standing beyond the traditional requirements of standing.

There appears to be no basis for delving into the details of the Appellants' organizational structure or membership where a statutory right to standing has been established. *See Friends of Lackawanna v. DEP*, 2016 EHB 641, 647 (holding that the Board need not delve into the internal workings of an organization where standing has been established).

Interrogatory No. 10

Interrogatory No. 10 asks the Appellants to identify the date on which they first received notice of the Department's issuance of the permit, the individuals who first received notice of the permit issuance or the manner by which those individuals first received notice. The Appellants objected on the basis that "actual notice" is not relevant since notice of the permit issuance was published in the *Pennsylvania Bulletin*. The Appellants rely on the Board's rule at 25 Pa. Code § 1021.52(a) which governs the timeliness of appeals and states as follows:

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

Specifically, subsection (a)(2) states that a third-party appeal must be filed within 30 days after notice of the action has been published in the *Pennsylvania Bulletin*, or within 30 days of actual notice if not published in the *Pennsylvania Bulletin*. Here, notice of the permit issuance was published in the *Pennsylvania Bulletin* on December 14, 2019, and the Appellants filed their appeal within 30 days of that publication, on January 13, 2020. Therefore, the Appellants argue that their appeal was timely and there is no basis for inquiring into when actual notice of the permit issuance was received.

MarkWest relies on the language of Section 10.2 of the Air Pollution Control Act, which reads in relevant part as follows:

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

35 P.S. § 4010.2 (emphasis added). MarkWest reads the word "or" as restrictive, i.e., that the clock starts running on the date on which a potential appellant first receives notice, whether actual or constructive, of the action of the Department. Here, the permit was issued on December 9, 2020. Therefore, MarkWest argues that if the Appellants had actual notice of the permit issuance prior to the publication in the *Pennsylvania Bulletin*, that is when the appeal period began running. In other words, if a potential appellant has actual notice of a permit issuance prior to publication of notice in the *Pennsylvania Bulletin*, the clock begins running on the earlier of the two dates.

We agree with MarkWest that Section 10.2 of the Air Pollution Control Act is the controlling provision for determining whether the Appellants' appeal is timely. Indeed, our rule states as much: "[J]urisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal…is filed with the Board in a timely manner, as follows, *unless a different time is provided by statute*." 25 Pa. Code § 1021.52(a).[2] However, the question is whether Section 10.2 of the Air Pollution Control Act provides a different timeframe than that set forth in the Board's rules.

Both the Appellants and the Department argue against MarkWest's intepretation. The Department argues that the language of Section 10.2 is ambiguous and subject to at least two interpretations – the interpretation set forth by MarkWest and a less restrictive interpretation that would allow the clock to begin running after either actual or constructive notice. Under such a scenario, argues the Department, the less restrictive interpretation must be chosen, citing the decision of the Pennsylvania Commonwealth Court in *Lower Allen Citizens Group, Inc. v. Department of Environmental Resources*, 546 A.2d 1330, 1331 (Pa. Cmwlth. 1988) (where the pertinent regulations are ambiguous, we choose to err on the side of assuring an opportunity to be heard in a governmental forum.) The Appellants make a similar argument. They argue that MarkWest's interpretation could place a more stringent deadline on those who participate in the public comment process than a member of the general public since, presumably, a commenter is likely to have notice of a permit issuance prior to publication in the *Pennsylvania Bulletin*.

[2] MarkWest cites the Board's decision in *Doctorick v. DEP*, 2012 EHB 244. That case, like this case, involved an appeal filed pursuant to the Air Pollution Control Act. However, unlike the current appeal, it involved an appellant to whom the Department's action was directed (a civil penalty assessment). The Board determined that the appeal was untimely and noted that the Air Pollution Control Act did not provide the appellant with any additional time for filing his appeal.

The question of when the appeal clock starts running under Section 10.2 of the Air Pollution Control Act appears, to us, to be a legal question more appropriately addressed in the context of a motion to dismiss or motion for summary judgment, with memoranda of law and an opportunity for reply by the moving party. Here, only the Appellants have filed a memorandum of law.[3] Although we are not convinced that the date of actual notice is relevant, we will allow MarkWest to conduct limited discovery in this area to ascertain the date(s) on which the Appellants obtained notice of the Department's action. Should MarkWest wish to pursue this matter further in the context of a motion to dismiss or motion for summary judgment, accompanied by a memorandum of law containing citation to legal authority, we recognize that this discovery is necessary in order to obtain the factual underpinning required for its motion.

Interrogatory No. 16

Interrogatory No. 16 askes whether the Appellants or any attorney associated with the Appellants represents the organizations and individuals named in the September 16, 2019 comment letter and, if so, the identity of the organization or individuals, the nature of the representation, the date on which the representation commenced and, if not ongoing, when the representation ended. In the absence of representation, then the interrogatory asks for information on the relationship between the Appellants and the organizations and individuals named in the comment letter. MarkWest states that this information "goes directly to any asserted claims of privilege in connection with [the comment] letter and communications surrounding it." (Motion to Compel, para. 34.) The Appellants objected on the basis that the information requested is not relevant and is protected by the attorney-client privilege. Further, in

[3]Although the Board's rules state that a party *may* file a memorandum of law in support of a discovery motion and response, 25 Pa. Code § 1021.93, the filing of a memorandum of law in support of a discovery motion and response is strongly encouraged and appreciated where, as here, the issues are complex and would benefit from legal argument and citation to caselaw.

their memorandum of law in opposition to MarkWest's motion, the Appellants assert that they have provided MarkWest with sufficient information that responds to the basis for the request, and if MarkWest needs additional information it can obtain it through more direct and narrow means rather than inquiring into the Appellants' legal representation. The Department takes no position.

We conclude that the Appellants have sufficiently responded to Interrogatory No. 16. We will issue an order in accordance with our opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 26th day of August 2020, it is hereby ordered as follows:

1) The Motion to Compel is granted in part and denied in part.

2) The Appellants are directed to provide more complete answers to Interrogatories No. 3 and 4 and Requests for Production No. 8 and 9 as set forth in this Opinion and covering the period of time from August 1, 2019 to January 13, 2020.

3) The Appellants are directed to answer Interrogatory No. 10.

4) Such answers and responses shall be provided on or before **September 25, 2020**.

5) The Motion to Compel is denied in all other respects.

ENVIRONMENTAL HEARING BOARD

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

DATED: August 26, 2020

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

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

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

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 3, 2020**
	:	

OPINION AND ORDER ON
MOTION TO STRIKE AND EXCLUDE DEP'S EXPERT OPINION
AND FOR EXPEDITED RESPONSE AND RELIEF

By Thomas W. Renwand, Chief Judge

Synopsis

The Permittee's Motion to Strike and Exclude DEP's Expert Opinion is denied. A Department Order is not a pleading and, therefore, the Department may disclose additional factual allegations and theories of its case in discovery. Moreover, the Board's standard of review is *de novo* and, therefore, we may review evidence that was not raised or considered by the Department when it took its action.

O P I N I O N

Introduction

This matter involves an appeal filed by Range Resources – Appalachia, LLC (Range) from an Order issued by the Department of Environmental Protection (Department) on January 13, 2020 asserting that natural gas leaked from one of Range's wells, known as the Harman Lewis Unit 1H well, and affected ground water and surface waters in Lycoming County. The order directs Range to take a number of actions, including the restoration and replacement of

affected water supplies, investigation of the migration of natural gas from the 1H well, and submission of a remedial investigation plan and well plugging plan.

On March 4, 2020, the parties filed a Proposed Joint Case Management Order (Case Management Order), which the Board adopted by Order of March 5, 2020. The Case Management Order set forth the parties' agreement on how expert discovery would proceed in this appeal. In accordance with the terms of the Case Management Order, on June 18, 2020, the Department served a document on Range entitled "Disclosure of Testifying Experts" that identified six expert witnesses and a summary of their expert opinions. Range requested, and the Department granted, a 30-day extension to disclose the identity of its expert witnesses. Range subsequently asked for an additional extension, and by Order of August 12, 2020, the Board extended its deadline to September 2, 2020.

The matter now before the Board is a Motion to Strike and Exclude DEP's Expert Opinion and for Expedited Response and Relief (Motion to Strike) filed by Range on August 12, 2020. Pursuant to the Board's Rule at 25 Pa. Code § 1021.93(c), the Department filed a response and supporting memorandum of law on August 27, 2020.[1] By its motion, Range asks the Board to 1) strike that portion of the Department's Disclosure of Testifying Experts that deals with certain proposed expert testimony by Bryce J. McKee and 2) exclude any such opinion from being offered in this matter.

Discussion

Range argues that the Department has impermissibly adopted a new expert theory that relies on factual allegations not set forth in its January 13, 2020 order. The Department's January 13, 2020 order alleges that Range is responsible for natural gas migrating from the

[1] By Order dated August 12, 2020, the Board directed that all motions and responses filed in this matter shall be accompanied by a memorandum of law.

Harman Lewis Unit 1H well into water supplies and causing surface expressions due to "defective cementing" of the gas well. (Exhibit A to Notice of Appeal.) In its Disclosure of Testifying Experts, filed on June 18, 2020, the Department states that Bryce J. McKee may testify as to a number of matters, including the following:

> [T]he Harman Lewis 1H well was drilled in a unique geological setting that has resulted in the hydraulic fracture stages in the Harman Lewis 1H well communicating with the pre-existing natural fractures, allowing pressurized methane gas to migrate into the local groundwater.

(Range Motion to Strike, Exhibit A.) Range asserts that this theory appears nowhere in the Department's order and "represents an impermissible attempt at a wholesale 'do-over' by the Department." (Range Motion to Strike, p. 4.) Range further argues that the Department's "out of scope expert disclosure violates the Pennsylvania Rules of Civil Procedure and longstanding legal precedent, would further delay the resolution of this case, and would prejudice Range" and, therefore, "the Department should be limited to presenting expert evidence on the allegations and theories it disclosed in the Order on appeal." (*Id*.)

In support of its argument, Range cites two decisions by the Pennsylvania Superior Court: *Rachlin v. Edmison*, 813 A.2d 862, 870 (Pa. Super. 2002) (holding that "the purpose of pleadings is to place the defendants on notice of the claims upon which they will have to defend"), and *Reynolds v. Thomas Jefferson University Hospital*, 676 A.2d 1205, 1209 (Pa. Super. 1996) (holding that "a party is not permitted to introduce evidence that is inconsistent with or fails to correspond to the allegations made by that party"). Notably, Range does not cite any Environmental Hearing Board decisions or Commonwealth Court decisions in support of its argument.

The Department disputes Range's motion on a number of grounds. First, it points out that the Board's review is *de novo* which allows it to look beyond the four corners of the Department's order and broadly review all facts surrounding the Department's action. Second, it argues that the case law cited by Range is inapplicable and holds no precedential value since an action before the Board is not equivalent to a civil action commenced by a complaint and a Department order is not a pleading. Finally, it asserts that Range has suffered no prejudice by the Department's disclosure of its experts and expert testimony as part of the discovery process. We agree with the Department.

De Novo Review

The Board's *de novo* review was explained by Former Chief Judge Krancer in *Smedley v. DEP*, 2001 EHB 131:

> As the Commonwealth Court in *Warren Sand & Gravel Co. v. DER,* 341 A.2d 556, 565 (Pa. Cmwlth. 1975) pointed out, the Board conducts its hearings *de novo.* We must fully consider the case anew and we are not bound by prior determinations made by DEP. Indeed, we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "[d]e novo review involves full consideration of the case anew. The [EHB], as a reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources,* 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly* v. *DEP,* [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.

Id. at 156.

The practical effect of this is that parties are not limited to the record that was before the Department when it took its action. As we stated in *Milco v. DEP,* 2001 EHB 995, the Department is not limited to the findings set forth in its action. By the same token, an appellant

and permittee may also present evidence that was not available to the Department or taken into consideration by the Department in preparing its action. *Kiskadden v. DEP*, 2014 EHB 642, 643-44. As the Department points out in its memorandum of law, Range has availed itself of the Board's *de novo* review standard in a previous matter before the Board. In *Kiskadden*, the appellant filed a Motion in Limine to Exclude Expert Testimony and Expert Report of one of Range's witnesses on the basis that the expert's opinions were not in agreement with the Department's Determination Letter that was the subject of the appeal. Range argued that, pursuant to the Board's *de novo* review power, it could raise arguments and present evidence even if those positions were not raised or considered by the Department in taking its original action. The Board agreed, holding, "The Board's jurisdiction and *de novo* review not only afford full due process protection to Appellants but to all parties before the Board which necessarily includes Permittees, recipients of the action, Intervenors, and the Department." *Id.*

Department's Order is Not a Pleading

The Superior Court decisions cited by Range have no application here. An administrative appeal before the Board is not the same as an action commenced by complaint in the Court of Common Pleas. Specifically, the Department's order is not a pleading. *North American Oil & Gas Drilling Co. v. DER*, 1991 EHB 22, 27. In *Milco v. DEP*, 2001 EHB 995, we addressed a Motion for Judgment on the Pleadings filed by the appellant. In rejecting the motion, the Board held, "We do not…accept motions for judgment on the pleadings in appeals from Departmental actions for the simple reason that there are no pleadings in such cases." *Id.* at 996 (citing 25 Pa. Code § 1021.2 and *Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 790). Indeed, the Board's Rules of Practice and Procedure state that, with the exception of complaints and answers filed pursuant

to 25 Pa. Code §§ 1021.71 – 1021.74, "documents filed in appeals, including the notice of appeal, are not pleadings." 25 Pa. Code § 1021.2.[2]

Range misconstrues the administrative process. It incorrectly equates the precedent that surrounds civil actions, where parties file pleadings and where the issues in the case are framed by the factual support found in the pleadings, to the administrative process followed by the Environmental Hearing Board (and other administrative agencies), as set forth in the Board's Rules of Practice and Procedure, 25 Pa .Code Chapter 1021; the General Rules of Administrative Practice and Procedure, 1 Pa. Code § 31.1 *et seq*.; and in case law handed down by the Pennsylvania Commonwealth Court. As an administrative tribunal, practice before the Board, for the most part, does not involve pleadings. The initial filing in most appeals – a notice of appeal – is not a pleading. Nor is the Department order that provides the impetus for the appeal a pleading. The Department explains the nature of a Departmental action quite well in its memorandum of law:

> Unlike a complaint in a civil action, a Department order does not commence a civil action, but rather, serves as the written memorialization of the Department action. The filing of a notice of appeal, not the Department order, commences the Board's review of the Department's action. As such, Range, not the Department, initiated the present appeal through the filing of its notice of appeal.

[2] In earlier decisions, the Board grappled with the question of "what constitutes a pleading?" usually in the context of reviewing a motion for judgment on the pleadings. The history of this debate is set forth in detail in *Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 790. The Board's rules were subsequently amended to remove the definition of "pleadings" adopted from the Pennsylvania Rules of Civil Procedure and to include a new definition of "pleadings" at 25 Pa. Code § 1021.2. 32 Pa.B. 3085. This rule clarifies that, for purposes of proceedings before the Environmental Hearing Board, the only documents that constitute "pleadings" are complaints filed pursuant to 25 Pa. Code §§ 1021.71-1021.73 and answers filed pursuant to 25 Pa. Code § 1021.74. Notably, even before the rules were clarified, the Board has never treated a Department order as a pleading.

(Department's Memorandum of Law, p. 4.) Although we do not consider a notice of appeal to be a pleading, it is more comparable to a complaint filed to initiate a civil action than is a Department order. For example, our rules allow for the automatic amendment of a notice of appeal within 20 days, but after that time period, leave of the Board is required. 25 Pa. Code § 1021.53. The notice of appeal sets the framework for the issues in the appeal. In contrast, the Board is not held to the four corners of the Department's order in reaching a decision. *B&R Resources, LLC v. DEP*, 2016 EHB 475, 480.

No Undue Prejudice

Range argues that if the Department is allowed to introduce new factual allegations and a new theory of causation, Range will be prejudiced because it will "be forced to engage in additional and unplanned factual and expert discovery." (Range's Motion, para. 36.) We are not entirely sure what Range means by "unplanned factual and expert discovery." The parties are currently in the discovery phase. The purpose of discovery is to learn about each other's case. As the Board has previously stated, "The point of discovery is to obtain all the potential evidence that the other side may possess." *Hilltown Township v. DEP*, 1996 EHB 908, 910). It is not unusual that the information gained in discovery may lead to the need for additional discovery.

Range believes that the Department's case is limited to what was set forth in its order, and that any factual allegations or expert opinions not clearly set forth in the order are outside the scope of the appeal. As we have explained, that is simply not true where the Board's standard of review is *de novo*. As long as there is no prejudice to opposing parties, such as new witnesses disclosed on the eve of trial, the Department, like the appellant, is free to present evidence that was not considered by the Department at the time it took its action. *See Ganzer Sand & Gravel,*

Inc. v. DER, 1993 EHB 1142 (the Department may base its case on new information and a new theory not set forth in its original action).

Here, the Department is setting forth its expert theory of the case during discovery, not on the eve of trial. In doing so, the Department has followed the proper procedure. The Department provided the names and summaries of its experts during the discovery period, as agreed to by the parties in the Case Management Order. Indeed, the Department has followed the very procedure set forth in the Case Management Order negotiated by the parties and adopted by the Board at their request. Range has had this information for two and one-half months, while at the same time obtaining two extensions to delay the disclosure of its own experts and expert summaries. The Pennsylvania Rules of Civil Procedure, the Board's Rules of Practice and Procedure and relevant Board case law require parties to place their cards face up on the table in discovery. By revealing its experts and summaries to Range, the Department is carrying out the mandate of the parties as set forth in the Case Management Order. This case is in the early stages of discovery and is not yet scheduled for trial. Given these circumstances, we are hard-pressed to find any prejudice to Range.

Furthermore, in its response to Range's motion, the Department counters Range's claim that it was unaware of the Department's reasons for finding that the Harman Lewis 1H well is the most likely cause of methane migration. The Department states as follows:

> Range continues to ignore the fact that Range and the Department have been involved in this continuing investigation for over eight years. During that time, there have been countless exchanges of information, numerous technical meetings, and the exchange of draft consent order and agreements all involving the issues that resulted in the issuance of the Department's order. It is specifically denied that the Department has ever represented that defective cement was the exclusive reason for the gas migration.

(Department's Response to Motion, para. 34-35.)

The early disclosure of expert witnesses and summaries of their testimony is the opposite of "trial by ambush." By disclosing this information, the Department is complying with the Case Management Order and contributing to the orderly development of the important technical issues in the case. We agree with the Department that Range "has more than ample time to prepare a rebuttal to Mr. McKee's opinion testimony." (Department's Memorandum, p. 9.) The Department points out that in answers to written interrogatories submitted to Range on May 14, 2020, the Department disclosed that its determination that the Harman Lewis 1H well was the most likely source of gas migration was based, in part, on the geologic setting of the well. (*Id.* at p. 10-11.) Therefore, Range has been aware of this information since at least May 14, 2020. Moreover, we agree with the Department that it can come as no surprise to Range, a gas exploration and development company, that a case involving an allegation of underground gas migration necessarily involves expert testimony on the subject of geology.

For these reasons, we conclude that Range has set forth no legal basis supporting its Motion to Strike, and we will issue an order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 3rd day of September, 2020, after review of Range's Motion to Strike and Exclude DEP's Expert Opinion, and the Department's Response and Memorandum of Law, it is ordered as follows:

1) Range's Motion is *denied*.

2) Range may retain experts to address the issues raised in the summary of testimony of expert witness Bryce J. McKee.

3) Range shall identify such expert(s) and provide the necessary summaries of testimony to the Department on or before **October 5, 2020.**

ENVIRONMENTAL HEARING BOARD

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

DATED: September 3, 2020

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

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

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CAMP RATTLESNAKE	:	
	:	
v.	:	**EHB Docket No. 2020-018-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PA WASTE, LLC, Permittee	:	**Issued: September 22, 2020**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a permittee's motion for summary judgment where there are still disputed material facts regarding a right-of-way that an appellant says it possesses across the permittee's property at the site of a newly-permitted landfill.

O P I N I O N

Camp Rattlesnake has appealed the Department of Environmental Protection's (the "Department's") issuance of Solid Waste Permit No. 101719 to PA Waste, LLC for the Camp Hope Run Landfill in Boggs Township, Clearfield County. Camp Rattlesnake is a four-acre property located on the western boundary of the landfill site. Camp Rattlesnake asserts in its appeal that the maps and plans submitted by PA Waste in its permit application do not reflect or acknowledge an existing right-of-way that Camp Rattlesnake holds for a road that traverses PA Waste's property and provides access to Camp Rattlesnake. Camp Rattlesnake includes with its notice of appeal a map prepared by PA Waste on which Camp Rattlesnake has highlighted and identified Camp Rattlesnake's right-of-way.

PA Waste has moved for summary judgment, arguing that its permit application complied with all applicable regulatory requirements, including those pertaining to the various maps and plans it submitted with its application. Camp Rattlesnake opposes summary judgment. The Department has not weighed in on the motion one way or the other.

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

PA Waste's motion essentially argues that it is entitled to summary judgment because it complied with all of the regulations pertaining to municipal waste landfills in compiling and submitting its permit application. PA Waste addresses four regulatory provisions cited in Camp Rattlesnake's notice of appeal—25 Pa. Code § 273.113(a)(1) and (a)(7), addressing the requirements for a topographic map in the permit application, and 25 Pa. Code §§ 273.135 and 273.212, relating to the requirement for an access control plan. PA Waste says that the undisputed facts show that its permit application contained all of the documents required by these regulations and they were submitted to the Department for review. However, we think PA Waste's framing misses the point of Camp Rattlesnake's appeal. Camp Rattlesnake is not really

contesting that PA Waste submitted documents to the Department. Instead, it contends that the documents were incomplete, contained errors, and/or were not properly reviewed by the Department to recognize Camp Rattlesnake's right-of-way access road across the landfill site.

Beginning with the regulations addressing the topographic map, Section 273.113 provides in relevant part:

> (a) An application shall contain a topographic map, on a scale of 1 inch equals no more than 200 feet with 10-foot maximum contour intervals, including necessary narrative descriptions, which shows the following:
>
> (1) The boundaries and names of present owners of record of land, both surface and subsurface, and including easements, rights-of-way and other property interests, for the proposed permit area and adjacent area; the boundaries of the land within the proposed permit area; and a description of title, deed or usage restrictions affecting the proposed permit area.
>
> ….
>
> (7) The location of rights-of-way for high tension power lines, pipelines, railroads and public and private roads within 1/4 mile of the proposed facility.

25 Pa. Code § 273.113(a)(1) and (a)(7). The topographic plan sheet maps submitted by PA Waste to the Department in June 2018 and April 2019 depict features at the site such as topographic contours, roads, streams, gas pipelines, former mining areas, and property lines for PA Waste and nearby properties. (Ex. 5, 8.) The maps identify Camp Rattlesnake's property on the western border of the landfill site. The April 2019 map also generically identifies three existing access roads with a notation of "typical." The notation then references Note 10 on the map, which says, "These features were abandoned from prior surface mining operations at the site." None of the access roads are specifically identified as the Camp Rattlesnake right-of-way.

Indeed, PA Waste says in its statement of undisputed material facts that "[t]here is not a specific road on the PA Waste property clearly identified as Camp Rattlesnake's access road." (Statement of Facts, ¶ 29.) That largely encapsulates the parties' dispute as we understand it: Camp Rattlesnake says it was granted the use of an access road running across the PA Waste

property and the maps and plans submitted to and approved by the Department do not appear to acknowledge that access road, which we assume for our current purposes exists.

PA Waste says it included a copy of Camp Rattlesnake's deed with its application materials (Ex. 6), which Camp Rattlesnake does not dispute, and it appears to be the same deed Camp Rattlesnake attached to its notice of appeal. The deed is between Camp Rattlesnake and Al Hamilton Contracting Company and is dated December 27, 1995. (Although the precise relationship between any property once owned by Al Hamilton and the current PA Waste site has not been explained by the parties, PA Waste's April 2019 map, (Ex. 8), identifies various former strip mines owned by Al Hamilton that are within the boundaries of the PA Waste site.) The deed conveys a parcel of land from the grantor, Al Hamilton, to the grantee, Camp Rattlesnake. It also contains the following provision addressing a right-of-way granted to Camp Rattlesnake:

> Also granted to the GRANTEE is the right to use the current existing access road from Pennsylvania Route 153 to the property hereby conveyed. The GRANTEE shall in no way interfere with the GRANTOR's right to use the said road.

(Ex. 6.) According to the April 2019 map, Route 153 runs north and south along the eastern side of PA Waste's site. (Ex. 8.) As mentioned, Camp Rattlesnake's property is on the other end of the site on the western side, which might suggest that the right-of-way in the deed runs right through PA Waste's property, much like the road Camp Rattlesnake highlights in its notice of appeal. Although PA Waste may have provided the deed to the Department, nowhere on the topographic maps do we see the right-of-way depicted or identified as required by Section 273.113(a), nor has PA Waste shown us where it is identified.

Instead, with respect to 25 Pa. Code § 273.113(a)(7), PA Waste somewhat confusingly argues that the regulation does not apply because the Department's Form 2 portion of the application only requires the identification of rights-of-way for "high tension power lines, and/or

pipelines." (Ex. 5.) We are not sure why Form 2 is apparently inconsistent with the regulatory requirements, but it does not appear that the form absolves an applicant of the regulatory requirement to also show rights-of-way for "public and private roads" on a topographic map. 25 Pa. Code § 273.113(a)(7).

PA Waste at one point says that there are many roads that cross its property and none of them are associated with Camp Rattlesnake, but it provides no record support for that assertion. PA Waste also says that there are other ways to access the Camp Rattlesnake property, but we are not sure why that is relevant. If Camp Rattlesnake has a legal right-of-way from Route 153 running across the PA Waste property, and if use of that right-of-way will be impacted by the landfill operations on the property, then it would seem that Camp Rattlesnake has a legitimate concern, regardless of whether Camp Rattlesnake can get to its property by some other means.[1]

PA Waste contends in its reply brief that, even if there is a property dispute between it and Camp Rattlesnake, the Board is not the proper forum to litigate property disputes. However, the Department clearly has some level of interest in property issues if numerous property interests are required by the regulations to be identified in the permit application. Accordingly, such matters are also appropriate for Board review. *See Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1165 ("Although we are not necessarily limited to what the Department considered, we clearly can and should at a minimum review what the Department did consider when we evaluate whether it made the correct decision.").

Viewing the facts in the light most favorable to Camp Rattlesnake, the deed suggests that Camp Rattlesnake may have a right-of-way that appears to run across PA Waste's property and

[1] PA Waste also asserts Camp Rattlesnake has no fee simple interest in PA Waste's property, but we again do not know why that is relevant. The record before us seems to indicate Camp Rattlesnake may possess a right-of-way that appears to run across PA Waste's property, and under Section 273.113(a) PA Waste was required to identify that right-of-way on a topographic map, but from what we can tell it does not appear to have done so.

PA Waste has done nothing to resolve that issue in its motion. From the record we have before us, PA Waste's topographic maps do not show a right-of-way that seems to be contained in the deed, and PA Waste does not provide any good explanation why the maps do not show it. Having not weighed in itself on the motion, we also do not know how the Department considered the deed and right-of-way during its review of PA Waste's permit application.

Turning to the access control plan provisions, the parties' dispute centers on 25 Pa. Code §§ 273.135 and 273.212. Section 135 requires an applicant to submit a plan that complies with Section 212, which in turn provides:

> (a) A gate or other barrier shall be maintained at potential vehicular access points to block unauthorized access to the site when an attendant is not on duty.
>
> (b) The operator shall maintain a fence or other suitable barrier around the site, including impoundments, leachate collection and treatment systems and gas processing facilities, sufficient to prevent unauthorized access.
>
> (c) Access to the site shall be limited to those times when an attendant is on duty.

25 Pa. Code § 273.212. Camp Rattlesnake contends in its appeal that PA Waste's access plan does not provide for Camp Rattlesnake's access to the right-of-way, and that the plan would block Camp Rattlesnake from using the access road. It also says in its appeal and in its response to PA Waste's motion that the right-of-way undermines PA Waste's asserted control of access to the site. As we understand Camp Rattlesnake's claim, if the right-of-way is to be maintained, then PA Waste has not shown in its plans how it will control access to the site from that point of entry.

PA Waste says that Camp Rattlesnake is asking the Board to read into the regulation a requirement that PA Waste provide access to Camp Rattlesnake in its access control plan. Although not particularly well-articulated, we read Camp Rattlesnake's objection to be that the access control plan is unreasonable because it potentially interferes with Camp Rattlesnake's access to its right-of-way. PA Waste argues that its access control plan nevertheless fully

satisfies the regulations in that it discusses things like fences and gates, but we again think this largely misses the point of Camp Rattlesnake's argument—the plan does not address the right-of-way, whether Camp Rattlesnake will still be able to access the right-of-way, and if so, how that access will be provided and/or controlled. PA Waste's motion does not address the substance of Camp Rattlesnake's objection.

Finally, PA Waste asserts that, even if there were errors in its permit application documents, those errors are immaterial. However, PA Waste has not demonstrated beyond all reasonable doubt on the record before us that the potential foreclosure of Camp Rattlesnake's use of a right-of-way is immaterial.

We issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CAMP RATTLESNAKE	:	
	:	
v.	:	**EHB Docket No. 2020-018-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PA WASTE, LLC, Permittee	:	

O R D E R

AND NOW, this 22nd day of September, 2020, it is hereby ordered that the Permittee's motion for summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: September 22, 2020

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

For the Commonwealth of PA, DEP:
George Jugovic, Jr., Esquire
Anne C. Shapiro, Esquire
(*via electronic filing system*)

For Appellant:
John R. Ryan, Esquire
(*via electronic filing system*)

For Permittee:
M. Joel Bolstein, Esquire
Philip L. Hinerman, Esquire
Robert J. Schena, Jr. Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT HORDIS AND HORDIS FAMILY CABOT, LP	:	
	:	
v.	:	**EHB Docket No. 2020-059-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CABOT OIL AND GAS CORPORATION, Permittee	:	**Issued: October 8, 2020**

OPINION AND ORDER ON
MOTIONS TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies motions to dismiss filed by the Department and permittee where it is not clear on the basis of the current record that an appeal of a Department email does not constitute a final, appealable action, and where the appellants have said their appeal is confined to the email and does not reach any earlier Department actions falling outside of the window for filing a timely appeal.

O P I N I O N

Before the Board are two motions to dismiss, one filed by the Department of Environmental Protection (the "Department"), and one filed by Cabot Oil and Gas Corporation ("Cabot"). The appeal concerns an email sent by counsel for the Department to counsel for the appellants, Robert Hordis and Hordis Family Cabot, LP ("Hordis"), regarding an erosion and sediment control permit authorization granted to Cabot in connection with the drilling of a gas well on a leased portion of Hordis's 194-acre property in Lathrop Township, Susquehanna County.

The somewhat convoluted set of facts leading up to the email, as we understand them, are as follows. In October 2012, the Department approved coverage for Cabot under an erosion and sediment control general permit (ESCGP) in connection with the development of a gas well on the Hordis property. (First Am. Notice of Appeal, Attach. C.)[1] The permit coverage was good for five years and was set to expire in October 2017. In July 2017, Cabot asked the Department for an extension of that coverage, which the Department granted and extended to July 1, 2018. (Attach. F, G.) In April 2018, Cabot sought a major modification to the permit coverage and the Department granted the major modification in May 2018, giving coverage to Cabot under the ESCGP-2 permit until May 2023. (Attach. H, I.)

On September 19, 2019, the Department conducted an inspection of Cabot's well site at the Hordis property. The inspection report noted various violations, but the pertinent portion of the report for our current purposes is the following statement:

> E&S permit was disposed in 2012 and is now expired. The Department is requesting that the whole site be repermitted and the E&S/PCSM controls be reworked to address the stormwater management deficiencies documented elsewhere in this report.

(Attach. K.)

Discussions between counsel for Hordis and counsel for the Department occurred in late 2019 and through 2020 regarding what Hordis viewed as ongoing violations at the site and whether the May 2018 major modification remained valid in light of the statement in the inspection report. (Attach. L-O.) On May 1, 2020, counsel for Hordis sent an email to counsel for the Department asking the following:

> Has the Department had a chance to consider the follow-up correspondences from myself and from Attorney LeVan, from February 7, and in particular, the issues

[1] In their motions, Cabot and the Department for the most part rely on the documents filed with Hordis's first amended notice of appeal, and we will do the same.

> of: 1) the validity and effectiveness of the 2018 ESCGP-2 major modification; and 2) the disturbed acreage discrepancy between and among the various permits?

(Attach. A.) The Department responded by email on May 14, 2020, stating the following:

> The Department has the following responses to the questions posed in your May 1st e-mail: 1) with respect to the validity of the major modification to the permit, the major modification was issued and is a valid ESCGP; 2) with respect to the acreage discrepancy, it appears that the original ESCGP had additional area that was never used, and was simply not included in the later submissions because it was never disturbed. When the Notice of Termination is filed, the Department's Water Quality Specialist will inspect the site to confirm that the entire area has been not disturbed or was disturbed and has been addressed and stabilized.

(*Id.*) It is this email that Hordis has appealed.

In their motions the Department and Cabot both argue that Hordis's appeal is untimely because the appeal in reality challenges the May 2018 ESCGP-2 permit modification, not the May 2020 email. They add that, in any event, the email is not a final, appealable action of the Department subject to the Board's jurisdiction because it does not affect any party's rights and merely expresses the Department's legal opinion.

The Board has the authority to grant a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *Lawson v. DEP*, 2018 EHB 513, 514; *Brockley v. DEP*, 2015 EHB 198, 198; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party. *Ctr. For Coalfield Justice v. DEP*, 2018 EHB 758, 761; *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB 913, 915. Importantly, motions to dismiss will be granted only when a matter is free from doubt. *Bartholomew v. DEP*, 2019 EHB 515, 517; *Merck Sharp & Dohme Corp. v. DEP*, 2015 EHB 543, 544; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Res., LP v. DEP*, 2007 EHB 611, 612.

As a general matter, appeals before the Board must be received within 30 days of a party receiving notice of the action. *See* 25 Pa. Code § 1021.52. For a third party appealing a Department permitting action, an appeal must be received by the Board within 30 days of notice being published in the *Pennsylvania Bulletin*, or within 30 days of receiving actual notice of the action if the notice is not published in the *Bulletin*. 25 Pa. Code § 1021.52(a)(2). We are told that the major modification to Cabot's permit was not published in the *Bulletin*, but Cabot and the Department point out that counsel for Hordis indicated knowing about the major modification in an email as late as February 7, 2020, more than four months before the appeal was filed in June 2020. (Attach. N.) Thus, Cabot and the Department contend that an appeal of the 2018 major modification to the permit would be untimely.

Critical to the timeliness argument is Cabot and the Department's assertion that Hordis is simply trying to lodge a backdoor challenge to the major modification granted in May 2018. They say such a challenge is not only untimely but it is also precluded by administrative finality. However, in its response to the motions, Hordis expressly disavows that it is challenging the major modification. Instead, it says it is only appealing the decision contained in the Department's May 2020 email. In the context of deciding the current motions to dismiss, we take Hordis at its word that its appeal is confined to the May 2020 email.

To that end, we are reminded that the specific Department action under appeal largely defines the scope of an appeal before the Board. As we have explained before:

> Our role is necessarily circumscribed by the Departmental action that has been appealed. 35 P.S. § 7514 (defining Board's jurisdiction). Our responsibility is limited to reviewing the propriety of *that action*. We may not use an appeal from one Departmental action as a vehicle for reviewing the propriety of prior Departmental actions. *See Grimaud v. DEP*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994), *citing Fuller v. DEP*, 599 A.2d 248 (Pa. Cmwlth. 1991) (a party's appeal of one permit does not allow it to raise issues related to permits for which it filed no appeals). It follows that only objections that relate to the propriety of the action

> under appeal are directly relevant. Objections to a different Departmental action are beside the point of our inquiry.

Winegardner v. DEP, 2002 EHB 790, 793. *See also Wheatland Tube Co. v. DEP*, 2004 EHB 131, 134. Although we do not need to define the precise scope of this appeal here, at first blush it would seem that an appeal of the May 2020 email would be rather narrow. Nevertheless, we expect it to become clearer as we move forward and the record is better developed.

Turning to whether the Department's email is an appealable action, Cabot argues that the Department email is not an appealable action because it does not order or require any action on behalf of Cabot or Hordis, and it does not make any determination affecting any party's personal property rights, privileges, duties, liabilities, or obligations. Cabot says the email did nothing more than affirm the status quo of an approved permit. The Department adds that the email is not an appealable action because it expresses a legal opinion of Department counsel. The Department says that its email merely advised counsel for Hordis of counsel for the Department's interpretation of the validity of Cabot's permit, which the Department says it never believed to be invalid, and counsel for the Department's understanding that a notice of termination did not need to be submitted by Cabot yet. Hordis pushes back, construing the email as a decision that "reverses" the decisions made in the September 2019 inspection report that Cabot's 2012 ESCGP is expired, the site needs to be repermitted, and the site's erosion and sedimentation and post-construction stormwater controls need to be reworked.

The Board only has jurisdiction over final Department actions affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations. 35 P.S. § 7514(a); 25 Pa. Code § 1021.2 (definition of "action"); *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747, 750; *Kennedy v. DEP*, 2007 EHB 511, 511-12. With respect to Departmental communications, there is no bright line rule for what constitutes a final, appealable action. *Chesapeake Appalachia, LLC*

v. Dep't of Envtl. Prot., 89 A.3d 724, 726 (Pa. Cmwlth. 2014); *HJH, LLC v. Dep't of Envtl. Prot.*, 949 A.2d 350, 353 (Pa. Cmwlth. 2008); *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121. The appealability of Department decisions needs to be assessed on a case-by-case basis. *Northampton Bucks Cnty. Mun. Auth. v. DEP*, 2017 EHB 84, 86; *Dobbin v. DEP*, 2010 EHB 852, 858; *Kutztown*, 2001 EHB 1115, 1121. In determining whether a Departmental letter constitutes a final, appealable action, we generally consider: the wording of the letter; its substance, meaning, purpose, and intent; its practical impact; the regulatory and statutory context; the apparent finality of the letter; what relief, if any, the Board can provide; and any other indicia of the impact upon the recipient's personal or property rights. *Merck v. DEP*, 2015 EHB 543, 545-46; *Teska v. DEP*, 2012 EHB 447, 454; *Dobbin*, 2010 EHB 852, 858-59; *Kutztown*, 2001 EHB at 1121. In short, we ask whether a Department decision adversely affects a person. 35 P.S. § 7514(a) and (c); 25 Pa. Code § 1021.2.

Based on the record before us, it is difficult for us to assess whether the Department's email does or does not affect any personal or property rights, privileges, immunities, duties, liabilities, or obligations of a party. Much of our uncertainty stems from the somewhat confusing and inadequately explained history leading up to the Department's email, and whatever the Department did in its September 2019 inspection report.

In its reply brief Cabot says that "at best" the reference in the inspection report "to the 2012 permit is unclear or may be in error given the new authorization issued on May 31, 2018." (Reply Brief at 4.) The problem is, the moving parties have not cleared up at all what was going on in the inspection report. The Department is obviously the party in the best position to do this, but it has not done so in its papers. There are no affidavits from any Department program staff attached to the Department's motion that could shed light on things, perhaps because we are

dealing with a motion to dismiss. There is no record from anyone involved in the inspection regarding whether they were aware of the 2018 permit modification and/or whether the statements in the report were made in error. The Department tells us in its motion that its inspector was not aware of the 2018 permitting action at the time of the inspection and that the inspector did not invalidate the 2018 permit (DEP Memo. at 6), but there is no record to support those assertions. The Department even admits in its reply brief that it is unclear why the inspector noted the expiration of the 2012 permit.[2] (DEP Reply Brief at 2.)

We also note that Cabot in its reply brief says that the May 2018 authorization is not a modification to an existing permit at all, but rather "a full authorization." (Cabot Reply Brief at 11.) Cabot asserts that "[n]othing in the 2018 Authorization is phrased or written as an amendment or modification of the 2012 authorization. Everything is written and phrased as a new authorization issuing the ESCGP-2 permit." (*Id.* at 12.) This only seems to add to the confusion. The Department's email clearly refers to the 2018 authorization as a major modification, and as far as we can tell it was issued in response to a request from Cabot for a major modification. (Attach. H.) We are not sure if this makes a material difference, but it further adds to our hesitation to dismiss the appeal.

We typically approach motions to dismiss with caution when there are unresolved questions regarding the appealability of a Departmental communication. In *Plainfield Township v. DEP*, 2019 EHB 157, we denied a motion to dismiss an appeal of a Department letter where the moving party had not provided sufficient contextual information for us to assess the import

[2] Cabot and the Department also argue that the inspection report itself was not a final, appealable action of the Department because it did not order or require Cabot to take any action. They then deduce that, if the inspection report is not an appealable action, the Department's email supposedly "reversing" the inspection report also cannot be an appealable action. We are not entirely sure that it is relevant whether or not the inspection report was an appealable action, but the report nevertheless provides context for the email that Hordis is appealing now.

or effect of the letter. Similarly, in *Diehl v. DEP*, 2016 EHB 853, we denied a motion to dismiss an appeal of a letter where the limited record before the Board did not provide adequate context for the appeal and left us with uncertainty regarding the Department's legal authority to take the measures outlined in its letter. In these cases we have deferred to our standard to evaluate motions to dismiss in the light most favorable to the non-moving party and denied the motions. Given the lack of clarity surrounding the email and inspection report and the lack of explanation in the current record, we think it makes sense to take the same approach here. Accordingly, we think it is prudent to deny the motions to dismiss and allow for the development of a more complete record.

We issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT HORDIS AND HORDIS FAMILY CABOT, LP	:	
v.	:	**EHB Docket No. 2020-059-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CABOT OIL AND GAS CORPORATION, Permittee	:	

O R D E R

AND NOW, this 8th day of October, 2020, it is hereby ordered that the Department's and Permittee's motions to dismiss are **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: October 8, 2020

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

For the Commonwealth of PA, DEP:
Anne C. Shapiro, Esquire
(*via electronic filing system*)

For Appellants:
Mark L. Freed, Esquire
Peter H. LeVan, Jr., Esquire
(*via electronic filing system*)

For Permittee:
Amy L. Barrette, Esquire
Robert L. Burns, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SUNOCO PIPELINE L.P.	:	
	:	
v.	:	**EHB Docket No. 2020-085-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 25, 2020**

OPINION AND ORDER ON
MOTION FOR PROTECTIVE ORDER

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies an appellant's motion for a protective order to keep certain information confidential during an upcoming hearing on the appellant's petition for supersedeas. The appellant has not established a proper foundation for why certain monetary figures related to its pipeline project should remain confidential, and the appellant has failed to address the standard governing the presumption of openness of Board proceedings.

O P I N I O N

Sunoco Pipeline L.P. ("Sunoco") has appealed an order issued by the Department of Environmental Protection (the "Department") on September 11, 2020 that, among other things, required Sunoco to halt its work installing a portion of its Mariner East 2 pipeline project and to reroute a segment of the pipeline. The Department's order came in response to an inadvertent return (IR) of drilling fluids that occurred during horizontal directional drilling (HDD) for the installation of a 20-inch pipeline near Little Conestoga Road in Upper Uwchlan Township, Chester County, at a site known as HDD 290. According to the Department's order, more than 8,000 gallons of drilling fluid surfaced in a wetland and two streams, and then flowed into Marsh

Creek Lake. We are told a similar IR incident occurred near this same site in 2017 during the installation of a 16-inch pipeline.

Sunoco has filed a petition for supersedeas. In its petition, Sunoco argues that it will suffer irreparable harm if it is forced to reroute this section of the pipeline. In support of this argument, Sunoco asserts that it will incur unspecified costs over and above what it would cost to complete HDD 290 as originally planned and that Sunoco will lose unspecified revenue and profits from the delay in putting the 20-inch pipeline into service. In its petition and the accompanying affidavits Sunoco has self-designated the monetary figures underlying these assertions as confidential and redacted them.

Sunoco has now filed a motion for a protective order to keep these figures confidential during the supersedeas hearing scheduled to be held October 27-29, and throughout the proceedings for the underlying appeal. Sunoco seeks to file under seal unredacted versions of its petition and accompanying affidavits and to close off the supersedeas hearing to only the parties and the Board while certain witnesses are testifying about the dollar amounts. The Department has filed a response opposing the motion.

Sunoco's motion requires us to assess the request to close our proceedings and exclude the public against the overarching presumption of openness that governs all courts, and to which this Board adheres. *See Horsehead Res. Dev. Co. v. DEP*, 1998 EHB 1087, 1091. The presumption of openness begins with the touchstone enshrined in our Constitution: "*All courts shall be open*; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay." PA. CONST. art. I, § 11 (emphasis added). "In Pennsylvania it is *specifically* and constitutionally mandated that courts shall be open. In other words, the public shall not be

excluded from trials, the courts shall not be closed." *Commonwealth v. Contakos*, 453 A.2d 578, 580 (Pa. 1982) (emphasis in original). This right not only exists in the Pennsylvania Constitution, but also in the First Amendment to the United States Constitution, as well as in an independent common law basis for public access to judicial proceedings. *Commonwealth v. Fenstermaker*, 530 A.2d 414, 417 (Pa. 1987). In Pennsylvania, the presumption of openness applies in both the criminal and civil context. *Pa. ChildCare, LLC v. Flood*, 887 A.2d 309, 312 (Pa. Super. 2005); *Katz v. Katz*, 514 A.2d 1374, 1377 (Pa. Super. 1986). It applies with equal force to proceedings before the Environmental Hearing Board.

There are important policy considerations underlying the preservation of open judicial proceedings. As explained by our Supreme Court, the reasons are,

> generally, to assure the public that justice is done even-handedly and fairly; to discourage perjury and the misconduct of participants; to prevent decisions based on secret bias or partiality; to prevent individuals from feeling that the law should be taken into the hands of private citizens; to satisfy the natural desire to see justice done; to provide for community catharsis; to promote public confidence in government and assurance that the system of judicial remedy does in fact work; to promote the stability of government by allowing access to its workings, thus assuring citizens that government and the courts are worthy of their continued loyalty and support; to promote an understanding of our system of government and courts.

Fenstermaker, supra, 530 A.2d 414, 417 (quoting *Contakos, supra*, 453 A.2d 578, 579-80). *See also Goldstein v. Forbes (In re Cendant Corp.)*, 260 F.3d 183, 192 (3d. Cir. 2001) ("As with other branches of government, the bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury, and fraud.").

A request to close our proceedings can be evaluated under a Constitutional rubric and a common law rubric, but it must always begin with the strong presumption of openness. The analyses have been succinctly summarized by our Superior Court:

> There are two methods for analyzing requests for closure of judicial proceedings, each of which begins with a presumption of openness—a constitutional analysis and a common law analysis. Under the constitutional approach, which is based on the First Amendment of the United States Constitution and Article I, Section 11 of the Pennsylvania Constitution, the party seeking closure may rebut the presumption of openness by showing that closure serves an important governmental interest and there is no less restrictive way to serve that interest. Under the common law approach, the party seeking closure must show that his or her interest in secrecy outweighs the presumption of openness.

Pa. ChildCare, supra, 887 A.2d 309, 312 (quoting *Zdrok v. Zdrok*, 829 A.2d 697, 699 (Pa. Super. 2003)).

In addition, the Commonwealth Court recently rearticulated the so-called "experience and logic" test with respect to the constitutional inquiry, which was laid out by the United States Supreme Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986):

> In addressing the constitutional right of access, courts have adopted the experience and logic test. The experience test considers whether there has been a tradition of accessibility, and the logic test considers whether public access plays a significant positive role in the functioning of the particular process in question. In conducting the logic inquiry, the court must balance two competing concerns — the value of openness that enhances the fairness and perception of fairness in the justice system versus the privacy concerns involved. If the right asserted is grounded in both experience and logic, then a right of access to the proceedings in question exists. It is then the burden of the party seeking closure to rebut the presumption of openness by showing that closure serves an important governmental interest and there is no less restrictive way to serve that interest.

Milton Hershey Sch. v. Pa. Human Rels. Comm'n, 226 A.3d 117, 128 (Pa. Cmwlth. 2020) (internal citations and quotations omitted). *See also Commonwealth v. Long*, 922 A.2d 892, 900 (Pa. 2007). "In cases involving requests for closure of judicial proceedings, the same analysis applies under both Article I, Section 11 of the Pennsylvania Constitution and the First Amendment to the United States Constitution." *In the Interest of M.B.*, 819 A.2d 59, 64 n.4 (Pa. Super. 2003).

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Fenstermaker*, 530 A.2d at 418 (quoting *Richmond Newspapers v. Va.*, 448 U.S. 555, 572 (1980)). What strikes us from a review of the case law surrounding requests to close proceedings or seal judicial records is the gravity of granting such a request. The presumption of openness is not overcome lightly. Maintaining public access to the Board's proceedings is something that we have always taken seriously and we have tried to preserve it even during a global pandemic by moving our proceedings online and providing a livestream so that the public can continue to observe our hearings and be confident in the due process provided by our proceedings and the impartial and transparent adjudication of an appeal. We have developed protocols posted on our website governing remote hearings, with attorney admonitions and witness instructions that are to be read into the record for each hearing. The upcoming supersedeas hearing in this case will be done online and we will endeavor to provide the same level of openness as we have in our in-person hearings for nearly the last 50 years. Sunoco must provide compelling reasons for us to turn away from our strong commitment of transparency.

Ultimately, the decision of whether to close proceedings is committed to the discretion of the trial court, or here, the Board. *Milton Hershey Sch., supra*, 226 A.3d 117, 127 (quoting *In re Estate of duPont*, 2 A.3d 516, 521 (Pa. 2010)). Our courts have outlined various considerations that go into a decision to close proceedings:

> [T]he public may be 'excluded, temporarily or permanently, from court proceedings or the records of court proceedings to protect private as well as public interests: to protect trade secrets, or the privacy and reputations [of innocent parties], as well as to guard against risks to national security interests and to minimize the danger of an unfair trial by adverse publicity.' 'These are not necessarily the only situations where public access…can properly be denied. A bright line test has yet to be formulated. Meanwhile, the decision as to public access must rest in the sound discretion of the trial court.'

Zdrok, supra, 829 A.2d 697, 700 (quoting *Katz, supra*, 514 A.2d 1374, 1377-78 (citations omitted)).

Sunoco's motion for a protective order seeking to hold part of our proceedings behind closed doors does not mention any of the law just discussed relating to closed proceedings. Sunoco instead relies on a standard for determining whether a protective order should be issued to protect trade secrets or confidential business information (CBI) that is sought in discovery by an opposing party. *See MarkWest Liberty Midstream & Res., LLC v. Clean Air Council*, 71 A.3d 337 (Pa. Cmwlth. 2013). As the Department points out in its response, it does not appear that this is a good surrogate for determining when to close public proceedings. For one, the Commonwealth Court in *MarkWest* specifically acknowledges that the discovery process bears important distinctions from a public process such as a hearing:

> [D]iscovery is an open process among the parties to litigation, but it is not an open process between the parties to litigation and the public. Liberal discovery is allowed for the purpose of preparing a litigant's case, and a litigant has no right to disseminate private documents gained through the discovery process. Discovery materials not filed with the court or an agency or used in a litigant's case are not "public."

MarkWest, 71 A.3d 337, 345 n.15 (citation omitted). This distinction has been drawn more explicitly by our Superior Court:

> Moreover, and perhaps more significantly, a clear distinction must be drawn between First Amendment access rights to publish information acquired during trial, and access rights to publish information obtained in a pretrial discovery context. It is in a pretrial discovery context in preparation for a civil trial between private litigants, as is the circumstance at bar, that First Amendment access rights to litigation are at their nadir.

Stenger v. Lehigh Valley Hospital Center, 554 A.2d 954, 957-58 (Pa. Super. 1989) (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984)).

The Court in *R.W. v. Hampe*, 626 A.2d 1218 (Pa. Super. 1993), recognized this important distinction. After discussing the potential need for a protective order during discovery to preserve confidentiality of documents, it said, "It is clear, however, that once at trial, the presumption of openness is in place." *Id.* at 1224. In our view, the relative burdens placed on the parties in a discovery dispute as discussed in *MarkWest*, 71 A.3d 337, 344, are not consistent with the application of the openness standard, where the burden remains on the party seeking closure to overcome the presumption of openness. We have not been referred to any case which holds that the burden of proof shifts when the issue involves closure of public proceedings. To the contrary, there is a strong presumption of openness that remains in place and may only be overcome for compelling reasons. *See Long, supra*, 922 A.2d 892, 905-06. The right to be preserved and protected when it comes to the openness of proceedings is the right of the public founded upon our historical aversion to star chamber proceedings, the consideration of which may be said to be of much greater import than the rights of a litigant conducting discovery.

It is true that protection of CBI and trade secrets can constitute a compelling reason to close proceedings to the public. *Zdrok, supra*. Even where CBI is involved, however, it does not automatically follow that proceedings must be closed. *See Borough of St. Clair v. DEP*, 2013 EHB 177, 181 ("It is important to note that CBI is not privileged. There is no absolute bar to the issuance of a subpoena for such documents."). Furthermore, we will not simply assume that disclosure of financial information will interfere with a party's ability to attract investors and/or customers or otherwise put it at a competitive disadvantage just because a party says so. 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.

When weighing business confidentiality in the context of the openness standard, it might also be said that there are degrees of confidentiality ranging from a trade secret that defines a product's and its producer's identity, such as the secret formula hidden in a vault, to more routine information the revelation of which is merely uncomfortable. Litigation perforce involves disclosing information that one would ordinarily want to keep private. The existence of CBI does not automatically trump the consideration of all other factors in deciding whether a party has overcome the strong presumption in favor of openness. In this case, for example, we must remain mindful of the fact that the Mariner East pipeline project has a high level of public interest. It has been subject to both public and governmental scrutiny both before and in the years since the Department issued the permits for the project in 2017. The project spans nearly the entire state and affects untold numbers of people in the 17 counties through which the project passes.

In order to assess whether protecting CBI is a compelling reason to close otherwise public proceedings, we obviously first need to decide that the information at issue qualifies as CBI or a trade secret. The Board has defined confidential business information as "'any compilation of information which is used in a business and which gives that business an opportunity to obtain an advantage over competitors who do not know or use it.' Such information must be maintained by the owner in a substantial amount of secrecy. Information which is public knowledge will not be considered confidential." *Wallace Twp. v. DEP*, 2002 EHB 841, 850 n.30 (quoting *T.W. Phillips Oil and Gas Co. v. DEP*, 1997 EHB 608, 611 n.2). Although the Court's discussion in *MarkWest* regarding the shifting burden of proof does not

apply here, its delineation of how to consider whether information qualifies as CBI is helpful. The Court listed the factors to be considered as including (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the party to guard the secrecy of the information; (4) the value of the information to the party and to its competitors; (5) the amount of effort or money expended by the party in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *MarkWest* at 344.

As discussed above, Sunoco's motion fails to discuss the appropriate standard for closing an otherwise public proceeding. Furthermore, Sunoco's motion fails to provide a sound basis for concluding that the specific dollar amounts alluded to but not quantified in its materials qualify as CBI important enough to justify hearing them in closed proceedings. Sunoco's entire support for its assertion of confidentiality is as follows:

> Detailed construction costs that Sunoco Pipeline negotiates with its contractors, the capacity that Sunoco Pipeline would expect to lose as a result of the Administrative Order, and the revenue, operating expenses, and profits associated with that lost capacity, are not known outside of Sunoco Pipeline and in fact are known by very few employees even within Sunoco Pipeline. Sunoco Pipeline consistently expends effort and resources to maintain these commercial and financial figures as confidential and has internal corporate safeguards in place to guard their secrecy. This information cannot otherwise be acquired or duplicated by others.

(Motion at 4.) This is little more than paraphrasing some of the *MarkWest* factors in the affirmative, and it falls far short of what is needed to support a request to close public proceedings. Sunoco's motion constitutes the averments of counsel. It is not supported by affidavit. It is not specific. Every request to close proceedings must be decided on its own facts, *Zdrok*, 829 A.2d at 700, but in order to make that decision, we actually need to have some factual

foundation for the assertion of confidentiality. It is certainly not self-evident why dissemination of Sunoco's construction and installation costs for the one-mile lines in question would put it at a competitive disadvantage.

Other factors are at play here in deciding whether the presumption of openness has been overcome. It appears that the dollar amounts are the only things at issue in terms of confidentiality. For instance, there is no claimed confidentiality in Sunoco's basic assertion that it will cost more to reroute the pipeline than to finish the drilling at HDD 290. The actual dollar amounts Sunoco utilizes for its irreparable harm claims may not be critically important here when compared to things like the relative harms and benefits of the pipeline reroute remedy. We also suspect extended inquiry into dollar amounts in the context of a supersedeas hearing will be rather difficult to develop under the time constraints. This is especially true for Sunoco's far more abstracted assertions of revenue and profit loss and the myriad factors that would go into calculating that for a project of this complexity. We are also cognizant of the fact that there is limited ability for the Department to develop cross-examination and mount a thorough adversarial challenge, especially here where the Department has had no opportunity to conduct any discovery and Sunoco has not even revealed the numbers to the Department yet. The information that Sunoco seeks to protect relates exclusively to whether it will suffer irreparable harm, which is only relevant in the supersedeas proceeding, not, we suspect, in the underlying action. If Sunoco chooses not to reveal the dollar amounts as a result of this ruling, we discern no prejudice to it in the underlying appeal.

In sum, Sunoco has failed to provide compelling reasons for overcoming the presumption of openness. On the one hand we have the presumption of transparency that must be viewed as

particularly strong in a case with this level of historic public interest.[1] Against that we balance a poorly supported, nonspecific motion seeking to sequester questionable CBI of what might be limited utility vis-à-vis the more pressing issues of public health and safety and environmental protection at hand.[2]

Accordingly, we issue the Order that follows.

[1] Although it is true that we have no motion from the press to keep the proceedings open, there has been limited opportunity given the quick-moving nature of a supersedeas hearing. Irrespective of any motion from the press or any other interest advocating for open proceedings, we have an independent obligation to ensure that the public interest is taken into account in the face of a request to cloister our proceedings.

[2] Sunoco in a footnote in its motion also states that the Board is subject to Pennsylvania's Right to Know Law, 65 P.S. §§ 67.101 – 67.3104. Sunoco says that a record is exempt from disclosure under the law if it contains "confidential proprietary information," which the law defines as "[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information." 65 P.S. § 67.102. But again, Sunoco never provides a foundation for why the information is confidential or proprietary and it never once explains how revealing the information it seeks to keep confidential would cause substantial harm to its competitive position (and again it is not at all self-evident to us). *See, e.g.*, *Crouthamel v. DOT*, 207 A.3d 432 (Pa. Cmwlth. 2019) (affidavits submitted in support of trade secret claim under the Right to Know Law).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SUNOCO PIPELINE L.P.	:	
	:	
v.	:	**EHB Docket No. 2020-085-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 25th day of October, 2020, it is hereby ordered that Sunoco's motion for protective order is denied.

ENVIRONMENTAL HEARING BOARD

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

DATED: October 25, 2020

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

For the Commonwealth of PA, DEP:
Nels J. Taber, Esquire
William J. Gerlach, Esquire
Melanie Seigel, Esquire
(*via electronic mail*)

For Appellant:
Robert D. Fox, Esquire
Thomas M. Duncan, Esquire
Neil S. Witkes, Esquire
Diana A. Silva, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GLENN J. MORRISON, M.D.	:	
	:	
v.	:	**EHB Docket No. 2019-053-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and INSURANCE AUTO AUCTION, Permittee	:	**Issued: November 3, 2020**

OPINION AND ORDER ON
PERMITTEE'S MOTION IN LIMINE

By Michelle A. Coleman, Judge

Synopsis

The Permittee's motion in limine is granted to preclude testimony regarding an easement issue that has been addressed by the Board in prior opinions. The motion is also granted to preclude expert testimony by the Appellant or by witnesses on behalf of the Appellant where the Appellant identified no expert witnesses in his prehearing memorandum and identified himself as a fact witness.

O P I N I O N

Introduction

This matter involves an appeal filed by Glenn J. Morrison, M.D. challenging a minor permit amendment submitted by Insurance Auto Auction, Inc. (Permittee) under General NPDES Permit for Stormwater Discharges Associated with Construction Activities (permit). The Permittee was granted coverage under the permit for stormwater discharges associated with a site it operates in Latimore Township, Adams County. This case is scheduled for hearing on November 17-20, 2020, and, pursuant to 25 Pa. Code § 1021.104, the parties have filed

prehearing memoranda. The matter now before the Board is a motion in limine filed by the Permittee on October 12, 2020, seeking to exclude testimony pertaining to certain matters raised in Dr. Morrison's prehearing memorandum. Specifically, the Permittee is seeking to exclude (1) all testimony related to easements and/or property rights and (2) all expert testimony that may be offered on behalf of Dr. Morrison. On October 23, 2020, the Department of Environmental Protection (Department) submitted a letter stating that it concurs with the motion in limine and the relief requested therein. Dr. Morrison filed a response opposing the motion.

Discussion

A motion in limine is the proper vehicle for addressing evidentiary matters in advance of a hearing. *The Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, 161; *Kiskadden v. DEP*, 2014 EHB 634, 635. Its purpose is to provide the Board with an opportunity to consider potentially prejudicial and harmful evidence and rule on the admissibility of such evidence before it is referenced or offered at trial. *Kiskadden*, 2014 EHB at 635. A motion in limine should generally be used to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. *Gintoff v. DEP*, 2017 EHB 147, 150 (citing *Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235, 237). In evaluating a motion in limine, the Board is asked to determine whether the probative value of the proposed evidence is outweighed by considerations such as undue delay, waste of time, or needless presentation of cumulative evidence. *Delaware Riverkeeper,* 2016 EHB at 161.

Testimony regarding easements and/or property rights

In his prehearing memorandum, Dr. Morrison asserts that the Department erred in authorizing the Permittee to construct a stormwater discharge system on his property without his consent and without being required to obtain an easement. The Permittee argues that this issue

has been addressed and disposed of by the Board in opinions issued in this appeal and in a prior appeal and, therefore, Dr. Morrison is precluded from raising it at the hearing.

Dr. Morrison raised the issue of the easement in a previous appeal filed in 2016. The Board found that because Dr. Morrison had failed to sufficiently respond to a motion for summary judgment filed by the Permittee, he had abandoned his claim regarding the easement, and, therefore, summary judgment was entered against him on this issue. *Morrison v. DEP*, 2016 EHB 717, 721. In the present appeal, Dr. Morrison again raised the issue of the easement. The Board determined that the issue was barred by the doctrine of administrative finality due to the Board's earlier ruling and again entered summary judgment against Dr. Morrison on this issue. *Morrison v. DEP*, EHB Docket No. 2019-053-C (Opinion and Order on Motion for Partial Summary Judgment issued May 13, 2020), *slip op*. at 5. Dr. Morrison sought reconsideration of the Board's May 13, 2020 decision which was denied. *Morrison v. DEP*, EHB Docket No. 2019-053-C (Opinion and Order on Petition for Reconsideration issued June 10, 2020).

In his prehearing memorandum, Dr. Morrison again indicates his intent to litigate the issue of the easement at the hearing scheduled in November. The Permittee seeks to exclude any testimony on this issue, arguing that the Board has fully considered it and has determined that this issue is barred. We agree. The Board has now addressed this matter three times with the same result. If Dr. Morrison wished to pursue his claim regarding the easement, the time to do so was in his 2016 appeal.

However, in his response to the Permittee's motion, Dr. Morrison asserts that he is making a new argument, one that is not precluded by administrative finality. He asserts he is "litigating the fact that the construction was completed without a permit and the DEP is required to nullify the permit." (Appellant's Response, p. 2.) He argues:

> The EHB could not have granted a summary judgment on this issue as it was clearly not an issue for review in 2016 as no pertinent trespass had occurred in 2016. A trespass has since occurred starting in January of 2019 and construction was completed on Appellant's property in 2019 without an easement, making this issue ripe for review at this time.
>
> At issue in Appellant's 2019 appeal, along with numerous other issues, is whether the permit must be nullified after construction is completed without obtaining an easement, resulting in a trespass. Therefore, the instant issue before the EHB is not barred by the doctrine of administrative finality as the EHB could not have heard or ruled on this issue before the trespass occurred.

(*Id*.)

To the extent this is simply a reframing of the argument raised by Dr. Morrison in his current appeal, that issue has already been addressed by the Board in its Opinion and Order on Motion for Partial Summary Judgment and again in its Opinion and Order on Motion for Reconsideration. To the extent it is a new argument being raised by Dr. Morrison in his prehearing memorandum, it is untimely. *Williams v. DEP,* 1999 EHB 708.

The Board's decisions have been clear: Dr. Morrison is precluded from presenting testimony or other evidence on the question of whether the Permittee required an easement to implement its NPDES permit.

Expert Witnesses

In his prehearing memorandum, Dr. Morrison states that he does not plan to call any expert witnesses "at this time." He goes on to state that he "reserves the right to call expert witnesses to counter any arguments the opposing parties may put forth." (Appellant's Prehearing Memorandum, p. 13.) The Permittee seeks to bar any expert testimony by or on behalf of Dr. Morrison due to his failure to disclose the identity of any expert witnesses he intends to call.

The Pennsylvania Rules of Civil Procedure are clear that a party is entitled to discover the identity of persons having knowledge of any discoverable matters. *DEP v. EQT Production Co*., 2016 EHB 489, 491. Pa.R.C.P. No. 4003.5 governs the discovery of expert testimony and provides in relevant part as follows:

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

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

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

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

According to the Permittee, it served Dr. Morrison with discovery, including expert interrogatories, on December 11, 2019, but Dr. Morrison did not respond. To date, he has not identified any witnesses he intends to call as experts, nor has he provided summaries of their testimony. In response to the motion in limine, Dr. Morrison contends that he did not answer the Permittee's interrogatories because they were untimely and would have resulted in him

"violating a court order should he proceed with answering the request." (Appellant's Response, p. 3.) He states that he informed the Permittee of his reasons for not responding.

We have explained the importance of expert discovery in Board matters:

> Expert testimony is usually critically important in Board cases. The Rules of Civil Procedure are explicit regarding parties' responsibilities in conducting expert discovery. In response to expert interrogatories a party must identify expert witnesses expected to be called at trial and disclose the substance of the facts and opinions of the expert's anticipated testimony, or the responding party may provide an expert report in lieu of answering expert interrogatories. Pa.R.C.P. No. 4003.5(a)(1). The duty to supplement discovery responses extends to identifying experts. Pa.R.C.P. No. 4007.4(1). The consequence for failing to disclose an expert and provide the substance of the expert's testimony is essentially the same as that…with respect to any other witness – the expert shall not be permitted to testify on behalf of the defaulting party absent extenuating circumstances. Pa.R.C.P. No. 4003.5(b).

EQT Production, 2016 EHB at 493.

The question of whether the Permittee's discovery was timely should have been addressed at the time the discovery was served. However, neither Dr. Morrison nor the Permittee brought it to the Board's attention. If Dr. Morrison believed he would have been in violation of a Board order by responding to the discovery, he could have filed a motion for extension of time in which to respond or a motion for clarification. Instead, he simply ignored the discovery request. Likewise, the Permittee could have filed a motion to compel a response to its discovery request. A review of the docket in this matter indicates that neither party took any action with regard to the discovery request. As a result, we are now on the eve of trial with each party pointing the finger at the other.

Nonetheless, even if Dr. Morrison believed that he was under no duty to respond to the Permittee's request for discovery, he was clearly under a duty to comply with the Board's

Prehearing Order No. 2 which explicitly requires parties in their prehearing memorandum to provide "a list of all expert witnesses and indicate whether their qualifications will be challenged" and "a summary of the testimony of each expert witness or a report of the expert as an attachment." Dr. Morrison identified no expert witnesses in his prehearing memorandum, nor did he provide a summary of testimony or an expert report.

As we clearly explained in *Borough of Edinboro v. DEP*, 2003 EHB 725:

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

Id. at 772 (quoted in *Kiskadden v. DEP*, 2014 EHB 648, 653).

We have recognized that although it may be difficult to foresee everyone who will be called to testify early in the discovery process, "it does not excuse the obligation to promptly identify persons when they become known." *EQT Production,* 2016 EHB at 492. The Board has excluded the testimony of expert witnesses first identified in a prehearing memorandum. *Id.* Here, Dr. Morrison has not identified any expert witnesses in his prehearing memorandum but appears to be reserving the right to call such unidentified witnesses at trial. Although the Board allows rebuttal witnesses, the scope of rebuttal evidence is narrow. As we explained in *Rural Area Concerned Citizens v. DEP*, 2013 EHB 333, 335 (quoting 2 *Henry Pennsylvania Evidence*, § 730 (Fourth Edition 1953, cited in *Higgins v. DEP*, 2007 EHB 230, 233), "a party cannot, as a matter of right, offer in rebuttal evidence which is properly part of his case-in-chief." Moreover, "parties cannot skirt our expert disclosure requirements by calling their experts 'rebuttal' or 'merely responsive.'" *Kiskadden v. DEP*, 2014 EHB at 654.

As we explained in *People United to Save Homes v. DEP*, 1996 EHB 1131, 1134, "one of the Board's responsibilities is to insure that all parties receive a fair trial." Our case law and Prehearing Order No. 2 are clear that a party is obligated to disclose the identity of his or her expert witnesses and the failure to do so may result in the expert being precluded from testifying. Since Dr. Morrison has identified no expert witnesses in response to Prehearing Order No. 2, he is precluded from presenting expert testimony at the hearing.

Expert Testimony by Dr. Morrison

In his prehearing memorandum, Dr. Morrison identifies himself as a fact witness. However, the Permittee asserts that Dr. Morrison has put forth opinions in his prehearing memorandum that require specialized knowledge to which he is not qualified to testify. Specifically, the Permittee asserts that Dr. Morrison is not qualified to offer opinions on water flow, erosion standards or stormwater management engineering design. Moreover, the Permittee argues that even if Dr. Morrison were qualified to testify on those issues, he has not identified himself as an expert witness nor complied with the rules on expert witness disclosure.

Rule 702 of the Pennsylvania Rules of Evidence addresses expert testimony as follows:

> If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Pennsylvania Rule of Evidence 702. As further explained in *DEP v. Angino*, 2006 EHB 278, 282-83:

> An expert witness is a person who will be asked to express an opinion to us on our record. It must be given under tightly controlled circumstances. An expert opinion as contemplated by the rules of evidence can only be given by a duly qualified person of specialized knowledge or skill…If [the witness] is only being called to testify about facts regarding his involvement with the

> site…he is not an expert witness. If, however, [the party] intends to qualify him as an expert and introduce substantive opinions on the record given to a reasonable degree of professional certainty, he is an expert witness.

The Board will generally only accept expert testimony if the testimony will assist us in understanding the evidence or determining a fact in issue. *Rhodes v. DEP*, 2009 EHB 237. As explained in *Rhodes*:

> Expert testimony will generally only assist us to understand the evidence or determine a fact in issue if it represents scientific, technical, or other specialized knowledge beyond that possessed by a typical layperson, or for that matter, the Members of this Board.

Id. at 238-39.

The issue of whether a particular witness qualifies as an expert is within the discretion of the trial court, in this case, the Board. *Ruzzi v. Butler Petroleum Co*., 588 A.2d 1 (Pa. 1991). To qualify as an expert, a witness must have a "reasonable pretension" of specialized knowledge on the subject. *Miller v. Brass Rail Tavern* 664 A.2d 525, 528 (Pa. 1995); *Blythe Township v. DEP*, 2011 EHB 433, 434. The specialized knowledge may be acquired by formal training or experience. *Miller,* 664 A.2d at 528.

We agree with the Permittee and Department that many of the subjects which Dr. Morrison intends to include in his case call for specialized scientific and technical expertise and, thus, require expert testimony. Such "matters would involve knowledge and capability possessed only by…a person with specialized knowledge beyond that possessed by a layperson, i.e. one who qualifies as an expert under [Pennsylvania Rule of Evidence] 702" and may only be testified to as such. *Smedley v. DEP*, 2000 EHB 120, 125. Dr. Morrison has not demonstrated that he is qualified to testify as an expert witness on those subjects. More importantly, he has listed himself only as a fact witness and has not complied with the requirement of providing a

summary of expert testimony. The Board does not condone attempts to admit what amounts to expert testimony under the guise that it is opinion testimony of a lay witness. *People United to Save Homes*, 1996 EHB at 1134-35.

Dr. Morrison argues that the "[j]udicial process must not be a game of blind man's bluff where only one party is required to wear a blindfold." (Appellant's Prehearing Memorandum, p. 3.) He asserts that he "has the right to present argument to counter any and all arguments the opposition may present, including expert testimony." (*Id.*) Dr. Morrison will be given an opportunity to respond to the arguments presented by the Permittee and the Department. However, he cannot testify as an expert, as we have explained above. It is the Board's duty to insure that all parties have a fair hearing; it is also the Board's responsibility to insure that all parties follow the rules of practice and procedure that are in place to guarantee a fair trial. Dr. Morrison may testify as to his observations and perceptions on the topics in question, but he may not cross the line into offering an opinion based on scientific, technical or other specialized knowledge.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GLENN J. MORRISON, M.D.	:	
	:	
v.	:	**EHB Docket No. 2019-053-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and INSURANCE AUTO AUCTION, Permittee	:	

O R D E R

AND NOW, this 3rd day of November, 2020, it is hereby ordered that the Permittee's Motion in Limine is *granted* as set forth in this Opinion.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: November 3, 2020

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

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

For Appellant:
Glenn J. Morrison, M.D., *pro se*
221Bonners Hill Road
York Springs, PA 17372

For Permittee:
David J. Raphael, Esquire
Jonathan Vaitl, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANDY J. SPENCER	:	
	:	
v.	:	**EHB Docket No. 2019-121-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 16, 2020**
	:	

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Steven C. Beckman, Judge

Synopsis

The Board grants the Department's motion for summary judgment pursuant to 25 Pa. Code § 1021.94(l) where the Appellant failed to file a response to the motion.

Background

In September 2019, the Department of Environmental Protection ("the Department") issued an Administrative Order ("the Order") to Randy J. Spencer ("Mr. Spencer") to address alleged violations of The Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375 *as amended*, 32 P.S. §§ 693.1-693.27 ("Dam Safety Act") and The Clean Streams Law, Act of June 22, 1937, P.L. 1987 *as amended*, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"). The Order required Mr. Spencer to remove campers, vehicles and other items from his property on Deep Hollow Road in Cranberry Township because of their proximity to Lower Twomile Run. The Department asserted in the Order that these items are located in the floodway for Lower Twomile Run as designated by the Federal Emergency Management Agency and that

during a rain event in July 2019, the items on Mr. Spencer's property washed downstream, obstructed a culvert and were deposited in Lower Twomile Run and the Allegheny River.

On October 31, 2019, Mr. Spencer filed his Notice of Appeal of the Department's Order. In his Appeal, Mr. Spencer raised the following objections:

> 1. Allegations, assertions and information delineated as "A" through "ZZ" are not accurate or are conclusions of law or are subjective conclusions.
>
> 2. The "Order" attached constitutes an overreach by government; an effective attempt to take private property for public use without just compensation; an attempt to impede my constitutional rights without due process and equal protection.

Mr. Spencer filed a Petition for Supersedeas on December 4, 2019. The Department filed a Response in Opposition to the Petition and a Motion to Deny Supersedeas Without Hearing. On December 16, 2019, Mr. Spencer filed his Response to the Department's Motion to Deny Supersedeas Without Hearing ("Response"). Mr. Spencer stated that it is "clear that there is really no issue in this case and that all he needs is a reasonable amount of time to comply with the Order." (Response, para. 1). In the Affidavit he attached to the Response, Mr. Spencer admitted he was the owner of the property in question and that he was also the owner of approximately 20 recreational vehicles and/or motor homes and/or travel trailers located on the property. He further conceded in the Affidavit that he planned to begin removing the vehicles and stated that he intended to have all of the vehicles removed from the property before the end of February 2020. The Board granted the Department's Motion to Deny Supersedeas Without Hearing by an Opinion and Order dated December 16, 2019.

On May 29, 2020, the Department filed a Motion to Compel Discovery Responses and Deem Admitted Matters Set Forth in the Department's First Request for Admissions. The Board granted the Department's Motion on June 16, 2020, therefore admitting the statements set forth

by the Department. On October 30, 2020, the Department filed a Motion for Summary Judgment ("the Motion") stating that there were no genuine issues of material fact regarding Mr. Spencer's violation of the Dam Safety Act and Clean Streams Law, and that Mr. Spencer's constitutional objections had no merit. Mr. Spencer did not file a response to the Motion. The Board is now ready to rule on the Department's Motion.

Standard

The Board may grant a motion for summary judgment if the record indicates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Lexington Land Developers Corp. v. DEP*, 2014 EHB 741, 742. Summary judgment, including partial summary judgment, may only be granted in cases where the right to summary judgment is clear and free from doubt. *Clean Air Council v. DEP and Mark West Liberty Midstream and Resources,* 2013 EHB 346, 352. In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party. *Perkasie Borough Authority v. DEP*, 2002 EHB 76, 81. The record on which the Board decides a summary judgment motion consists of the parties' filings, as well as discovery responses, depositions, affidavits, and other documents accompanying the motion or response labeled as exhibits. See 25 Pa. Code § 1021.94a(a), (h); Pa.R.C.P. 1035.1.

Our Rule that governs motions for summary judgment requires that a response to such a motion shall be filed within 30 days of service and contain "a responding statement either admitting or denying or disputing each of the facts in the movant's statement and a discussion of the legal argument in opposition to the motion." 25 Pa. Code 1021.94(a)(f). As the Board has

previously stated, this Rule "pointedly contains mandatory language for responding." *Stedge v. DEP*, 2015 EHB 19, 21. Section 1021.94(a)(l) of our rules provide:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing. If the adverse party does not so respond, summary judgment may be entered against the adverse party. *Summary judgment may be entered against a party who fails to respond to a summary judgment motion*.

25 Pa. Code § 1021.94(l) (emphasis added).

Analysis

Mr. Spencer did not file a response denying the Department's arguments set forth in the Motion within the designated time frame set forth in our Rule governing summary judgment responses. The Board has dealt with similar circumstances on numerous occasions and has frequently granted summary judgment against a party who has failed to respond to such a motion. *See, e.g., Stedge v. DEP*, 2015 EHB 19; *Morris v. DEP*, 2012 EHB 65; *Langille v. DEP*, 2010 EHB 516; *Thornberry v. DEP*, 2010 EHB 61; *Koch v. DEP*, 2010 EHB 42; *J&D Holdings v. DEP*, 2009 EHB 15; *Lucas v. DEP*, 2005 EHB 913; *Brian E. Steinman Hauling v. DEP*, 2004 EHB 846; *Hamilton Bros. Coal, Inc. v. DEP*, 2000 EHB 1262; *Kochems v. DEP*, 1997 EHB 428, aff'd, 701 A.2d 281, 283 (Pa. Cmwlth. 1997) (Board permitted to grant summary judgment solely upon a party's failure to respond to a summary judgment motion). There is no indication that Mr. Spencer conducted any written discovery, depositions, or designated any experts to support the objections he raised in his Notice of Appeal. His failure to respond to the Motion as well as the prior statements contained in his Response demonstrates to the Board he does not dispute the material facts on which the Department based its Order. Mr. Spencer expressed in that Response the only issue in the case was that he needed more time to comply with the Department's Order.

He admitted to being the owner of the property and the vehicles on it, and he conceded he intended to move the vehicles. It is clear that there are no material facts at issue in this case. Mr. Spencer also failed to dispute the Department's assertion that his constitutional claims lacked merit as set forth in the Motion. Given our review of the record in this case, including Mr. Spencer's prior statements and admissions, there is no reason to deviate from the case law cited above in which we granted summary judgment when the opposing party fails to provide a response in accordance with our Rules.

Conclusion

Mr. Spencer failed to respond to the Department's Motion. In such a case, the Board may grant summary judgment against the party who fails to respond to a summary judgment motion. 25 Pa. Code § 1021.94(l). We conclude that it is appropriate to do so in this case. Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANDY J. SPENCER	:	
	:	
v.	:	**EHB Docket No. 2019-121-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 16th day of November, 2020, it is hereby ORDERED that the Department's motion for summary judgment is **granted**. The appeal in the above-referenced matter is terminated and the docket will be marked as **closed.**

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 16, 2020

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

For the Commonwealth of PA, DEP:
Hope C. Campbell, Esquire
David R. Hull, Esquire
Paul J. Strobel, Esquire
(via electronic filing system)

For Appellant
Timothy D. McNair, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SUNOCO PIPELINE L.P.	:	
	:	
v.	:	**EHB Docket No. 2020-085-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 16, 2020**
	:	

OPINION AND ORDER ON
PETITION FOR SUPERSEDEAS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants in part an appellant's petition for supersedeas of a Department order issued in response to an inadvertent return at a horizontal directional drilling site for the installation of a pipeline. The Board provisionally supersedes a paragraph of the order requiring the appellant to immediately implement a reroute of its drill because that paragraph is not consistent with an earlier Board-approved process for evaluating a potential restart of drilling operations following an inadvertent return. The appellant has submitted a restart plan to the Department for the resumption of drilling operations, but it is unclear whether the Department is conducting a review of that plan in accordance with the Board-approved process. The supersedeas is granted in part pending the Department's review of, and final decision on, the appellant's restart plan.

O P I N I O N

Sunoco Pipeline L.P. ("Sunoco") has appealed and petitioned to supersede portions of an order issued by the Department of Environmental Protection (the "Department") on September 11, 2020 that, among other things, required Sunoco (1) to halt its horizontal directional drilling

(HDD) work installing a portion of its Mariner East 2 pipeline project, (2) to grout or otherwise stabilize the HDD borehole, and (3) to implement a reroute of a segment of the pipeline. The Department's order came in response to an inadvertent return (IR) of drilling fluids that occurred on August 10, 2020 during HDD activities for the installation of a 20-inch diameter pipeline near Little Conestoga Road in Upper Uwchlan Township, Chester County, at a site known as HDD-290. The IR originated in a wetland referred to as Wetland H-17, moved into streams H-10 and H-11, and traveled 1,900 linear feet of stream into a cove of Marsh Creek Lake, which is in Marsh Creek State Park. (Transcript Page No. ("T.") 162-63; Joint Exhibit No. ("J. Ex.") 8.) Sunoco was not able to fully contain the IR, as it overwhelmed the erected containment structures and affected the entire reach of the streams. (T. 727-28; Department Exhibit No. ("DEP Ex.") 1.) The wetland and streams were covered in a thick slurry of drilling fluid. (T. 830-35; J. Ex. 7; DEP Ex. 1; Sunoco Exhibit No. ("S. Ex.") 50.) A visible plume of drilling fluid extended out into Marsh Creek Lake. (DEP Ex. 2, 3.) The Department's emergency response coordinator, who responded to the IR on August 10, described the drilling fluid as "rolling" across the bottom of the cove, not completely suspended in the water column. (T. 837; DEP 1 (at 7).)

Ultimately, nearly 8,000 gallons of drilling fluid were released. (T. 67; J. Ex. 8 (at 1).) Sunoco worked to clean up the IR by installing turbidity curtains in the streams, constructing sand bag dams, and pumping the drilling fluid out of the streams. (J. Ex. 8.) A 3-foot by 15-foot hole that opened up in the wetland at the location of the IR was filled by Sunoco with 26 cubic yards of flowable fill pursuant to an emergency permit granted by the Department to try to stabilize the area. (T. 66, 428-34, 720-21; J. Ex. 9.) Sunoco has not yet cleaned up the drilling fluid deposited on more than seven acres of the bottom of Marsh Creek Lake. (T. 749-51; J. Ex.

10.) Sunoco has submitted a plan to clean up the lake, but as of the close of briefing, the Department had not approved Sunoco's cleanup plan.[1]

On August 17, a week after the IR, Sunoco submitted to the Department what the parties refer to as a restart report seeking the Department's approval to resume HDD operations at HDD-290. (J. Ex. 8.) Putting the restart report in its proper procedural context requires some explanation. In an earlier appeal involving Sunoco's Mariner East 2 project, the Board, pursuant to what has come to be called the Stipulated Order, approved revisions to Sunoco's HDD Inadvertent Return Assessment, Preparedness, Prevention and Contingency Plan (the "IR Plan"). (EHB Docket No. 2017-009-L, Docket Entry #129; DEP Ex. 41.) These revisions were negotiated between Sunoco, the Department, and three citizens group organizations. The IR Plan was incorporated into Sunoco's permits. In short, under the IR Plan, if there is an IR greater than 50 gallons or an IR to a wetland or waterbody, Sunoco must suspend drilling and submit a restart report. Sunoco cannot restart drilling until the Department approves the restart report. The restart report basically requires Sunoco to explain how it can restart drilling without causing additional problems. Sunoco's August 2020 restart report outlines how Sunoco believes it can resume operations at HDD-290 while minimizing the risk of another IR.

[1] The August 2020 IR was not the first IR at HDD-290. It was preceded by two other IRs in the same general area in 2017 during the installation of the 16-inch diameter line of the Mariner East 2 project. (T. 44-45.) The first of those IRs occurred in June 2017 and measured a comparatively small 100 gallons. (T. 77-78, 112-15, 174; S. Ex. 33.) The second IR occurred in August approximately 30 feet away from the June IR and measured about 40 gallons. (T. 78-79, 116, 799.) Sunoco filed a reevaluation report with the Department in May 2019 analyzing the 2017 IRs and evaluating HDD alternatives versus the potential for another IR during the installation of the 20-inch line. (J. Ex. 2.) One of the alternatives Sunoco evaluated was the one-mile reroute that has now been identified in the Department's order, which Sunoco said was "technically feasible" while still maintaining that "HDD is the preferred option." (*Id.* (at 6).) The report concluded that HDD with additional supposed safety measures was "the preferred option" even though it presented "a moderate to high risk of drilling fluid loss and IRs." (*Id.* (at 6, 30).) In January 2020, the Department approved of proceeding with HDD for the installation of the 20-inch line as outlined in the reevaluation report. (J. Ex. 5.) The "moderate to high risk" of another IR at HDD-290 proved correct in August 2020, although no one predicted the immense magnitude of the third IR.

As of briefing, the Department had not responded to Sunoco's restart report. Unfortunately, the record is very unclear about whether the Department is actually reviewing the restart report. At first we were prepared to assume that the Department is reviewing the report and it is preparing to make a decision one way or the other on whether drilling may restart. After careful review, however, we are not satisfied that the record supports that assumption. There is some indication that, despite the agreed-upon, Board-approved process for reviewing the restart report, the Department views its issuance of the order under appeal as a substitute for that review.

At least in its brief, the Department seems to indicate that it *is* reviewing the restart report. It says, "The Department **has not fully reviewed** the Restart Report." (DEP Brief at 11 (emphasis added).) The Department also says:

> The Department **has not completed its review** of Sunoco's Restart Report. Based upon current information, considerable doubt exists as to whether drilling on HDD 290 should ever recommence. The geology at this location presents numerous challenges that Sunoco has not addressed. Those challenges pose significant threats to human health, safety and the environment. **Until Sunoco addresses those geologic issues to the Department's satisfaction, the Restart Report cannot be approved.** Sunoco must still remove the drilling fluid from Marsh Creek Lake. Sunoco failed to present any evidence or details at the time of hearing on its proposal to construct a containment structure in Wetland W-H 17 to capture anticipated inadvertent returns.

(DEP Brief at 53 (emphasis added).) This paragraph is pregnant with negative implication, but it still suggests the possibility of a restart remains despite the existence of "considerable doubt." The present perfect tense of the Department's statements gives the impression that the Department's review *might* be ongoing.

The testimony we have in the record is not clear on whether that is true, though, and at times the testimony from different witnesses seems to be in conflict. John Hohenstein, P.E., the Department's program manager for waterways and wetlands, testified at various points about the

August 17 restart report. During his testimony on direct, Mr. Hohenstein readily identified the restart report when it was presented to him and he knew when it had been submitted. (T. 753.) He seemed familiar with its proposals on, e.g., utilizing an unconventional pressure relief point, employing a partial open cut in the area, etc. (T. 754, 757-58, 764-65.) He testified that after receiving the restart report the Department consulted with its geology and drilling experts. (T. 757.) He testified on cross that the Department needs to carefully evaluate Sunoco's proposal and all of its supporting documentation before deciding whether to authorize the use of an unconventional pressure relief point with Wetland H-17 since it is a resource that has already been severely impacted at the site. (T. 765-66.) In response to a question on cross of whether the Department has reviewed the measures Sunoco has proposed in its restart report to reduce the likelihood of another IR and complete the HDD, Mr. Hohenstein testified that "we are in receipt of the restart report, but that has not been fully reviewed at this point." (T. 792.) He then reiterated, "That report has not been fully reviewed yet." (T. 792.)

Mr. Hohenstein seemed to indicate that he envisioned some back and forth with Sunoco on the restart report. He testified that having additional geophysical information would be helpful for the Department to corroborate Sunoco's proposal. (T. 804-05.) He was then asked how he would look at a proposal from Sunoco to proceed with the HDD and he responded:

> There would be -- there would have to be a lot more geophysical data submitted. There would have to be a much more detailed plan describing how -- even just going into very specific detail on how the day-to-day operation would occur and who would be responsible for it and -- I believe there's a lot of that information out there, but specific to allowing this need to restart, they -- they would really have to convince the Department that they had the ability to implement their proposal.
>
> As proposed the last time, the occurrence of the IR vastly exceeded what obviously they were expecting to happen and they -- it also appears that it was not discovered in a timely fashion either. So there would be a lot of -- a lot of hurdles to – and capability issues to answer in order for that -- for us to agree that any

proposal would be the least impactful option at this area because when we do an alternatives analysis we look at the least impactful and we usually go with that.

(T. 810-11.) Mr. Hohenstein's testimony suggests that the Department has conducted at least some level of review of the restart report, but it is still not clear whether that review is ongoing and continuing and a decision on the restart is forthcoming, or whether the Department stopped any review once it decided to issue its order.

Other testimony suggests it is the latter. Dominic Rocco, the Department's director of the office of regional permit coordination, left us with even less certainty that the Department is conducting an ongoing review of the restart report. This excerpt of his testimony on cross captures what gives rise to our doubt:

Q In lieu of evaluating the restart report, the Department issued the administrative order essentially revoking this permit; correct?
A It would have been premature for us to do that, so I would agree.

(T. 1203.) We have no idea what "[i]t would have been premature for us to do that" means. But Mr. Rocco seems to be saying that the Department did not review the restart report and instead issued the order. We do not necessarily view those things as mutually exclusive, but it appears that Mr. Rocco does.

The testimony immediately following that statement does not provide any comfort that the Department is conducting a review of the restart report in accordance with the Board-approved process in the IR Plan:

Q And is that when the Department issued the administrative order, it did not evaluate the efficacy of the containment structure because it had decided to escalate the enforcement due to the enforcement history that you testified about. Fair?
A I don't know how far the review of that made it. I mean so they're two different actions. So that's something that staff may have looked at, may have considered. But at the end of the day, what we decide [sic] to do was to issue the order.

Q And the normal action under the corrected stipulated order would be to respond to the restart report, issue comments, and give Sunoco an opportunity to respond to those comments; correct?
A I don't know if that's the case.

Q But that happened in the past where there's been restart reports, the Department has commented, and then there's been revisions and upgrades to protectiveness; correct?
A I would agree that that is one process that happens, but I don't think that necessarily happens all the time.

(T. 1203-04.) Again, it is not entirely clear what part of the process described by Sunoco's counsel Mr. Rocco disagrees with. In short, the record at this point does not support a conclusion that the Department is reviewing Sunoco's restart report or preparing a decision on whether Sunoco can restart drilling.

On October 8, 2020, Sunoco filed its petition for supersedeas. Sunoco among many other things argues that the Department is ignoring the agreed-upon, Board-approved process outlined in the IR Plan, and instead of reviewing Sunoco's restart report, the Department simply issued the order under appeal. Sunoco argues that the Department added insult to injury by requiring Sunoco to immediately reroute the pipeline instead of giving Sunoco a chance to restart the HDD. Sunoco seeks to supersede Paragraphs 1, 2, and 6 of the Department's order. Those paragraphs provide:

> 1. Except as specified herein, Sunoco shall immediately suspend all work authorized by the permits described in Paragraph D, above, for HDD S-3-0290 until the Department provides written authorization to resume work, except as is necessary to stabilize the site to prevent erosion and sedimentation in accordance with Paragraph 6, and to prevent additional pollutants from entering waters of the Commonwealth, including wetland WL-17, unnamed tributaries S-H 10 and S-H 11 of Marsh Creek Reservoir, and the Marsh Creek Reservoir, which is located in Marsh Creek State Park. In no event shall Sunoco undertake any pipeline installation activities at the site of HDD S-3-0290, including drilling or drilling-related preparation and drilling support activities, or the installation of casing, unless expressly authorized by the Department in writing.
>
> 2. Sunoco shall take all steps necessary, including the submission of appropriate applications and supporting materials for permit amendments, to implement the

> reroute of HDD S-3-290 that Sunoco previously found to be technically feasible in the Re-evaluation Report.
> ….
> 6. Effective immediately, Sunoco shall secure the partially constructed borehole with grouting or an equivalent method and stabilize all disturbed areas at HDD S-3-0290 in accordance with the approved E&S Plans and in compliance with 25 Pa. Code § 102.22(a) and/or (b), as appropriate. Sunoco shall continue routine monitoring of the installed BMPs and shall perform all necessary ongoing operation and maintenance activities to ensure the BMPs continue to perform as designed, in accordance with the approved E&S Plan and permit until the disturbed areas along the current alignment for HDD S-3-0290 are permanently stabilized.

(J. Ex. 6.)

We held a hearing on Sunoco's petition via WebEx from October 27 through October 30 and livestreamed it to the public on YouTube in accordance with the Board's protocols for conducting remote hearings during the Covid-19 pandemic.[2] The parties proposed that they be permitted to file simultaneous briefs on November 23 following the receipt of expedited transcripts on November 9, which we allowed. The petition is now ripe for disposition.

The Environmental Hearing Board Act of 1988, 35 P.S. §§ 7511 – 7514, provides adversely affected parties with the right to file an appeal from a Department action. No appeal acts as an automatic supersedeas, but the Board may grant a supersedeas upon cause shown. 35 P.S. § 7514(d)(1). The grant or denial of a supersedeas is guided by relevant judicial precedent and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a). Among the factors to be considered are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a); *Erie Coke Corp. v. DEP*, 2019 EHB 481, 485. In order for the Board to grant a supersedeas, a petitioner generally must make a credible showing on each of the three regulatory criteria, with a strong showing of likelihood of success on the

[2] Available at: https://ehb.courtapps.com/content/Board Protocols During Covid Emergency.pdf

merits. *Hudson v. DEP*, 2015 EHB 719, 726; *Mountain Watershed Ass'n v. DEP*, 2011 EHB 689, 690-91 (citing *Pa. Mining Corp. v. DEP*, 1996 EHB 808, 810); *Lower Providence Twp. v. DER*, 1986 EHB 395, 397.

Sunoco has a very clear likelihood of success on the merits of its argument that the Department cannot simply ignore Sunoco's restart report. The IR Plan, which is the product of intense negotiations and which we approved, clearly contemplates that the Department will review and either approve, modify, or reject Sunoco's restart report after there is a qualifying IR. That was certainly our understanding when we reviewed and approved the IR Plan. The Department is not entitled under the Plan or our Orders to issue an order **instead of** making a decision on a restart report. Requiring the Department to do what it said it would do will not result in any harm to the public or the environment.

If, indications in the record to the contrary notwithstanding, the Department has in fact decided that Sunoco cannot restart the HDD, the Department acting in good faith with appropriate transparency needs to say so. If it is still considering the matter, it is in the public interest that it proceed as expeditiously as possible. Basic fairness dictates that the Department avoid dissembling and make a decision one way or the other. Only then will Sunoco's other arguments be properly teed up for our review.

There is nothing in the Board-approved process that completely precludes the Department from issuing an administrative order. It is the content of the order that matters. Sunoco first asks us to supersede Paragraph 1. Paragraph 1 of the Department's order is repeated here:

> Except as specified herein, Sunoco shall immediately suspend all work authorized by the permits described in Paragraph D, above, for HDD S-3-0290 until the Department provides written authorization to resume work, except as is necessary to stabilize the site to prevent erosion and sedimentation in accordance with

> Paragraph 6, and to prevent additional pollutants from entering waters of the Commonwealth, including wetland WL-17, unnamed tributaries S-H 10 and S-H 11 of Marsh Creek Reservoir, and the Marsh Creek Reservoir, which is located in Marsh Creek State Park. In no event shall Sunoco undertake any pipeline installation activities at the site of HDD S-3-0290, including drilling or drilling-related preparation and drilling support activities, or the installation of casing, unless expressly authorized by the Department in writing.

The paragraph seems straightforward enough—Sunoco must suspend work on HDD-290 until the Department says in writing that drilling can resume. Paragraph 1 is entirely consistent with the Board-approved process detailed in the IR Plan. It does not preclude the possibility of restarting the HDD. By its very terms Paragraph 1 leaves open the possibility that Sunoco could "resume work" if the Department provides written authorization. We presume the Department would not have mentioned authorization if the possibility of such an authorization did not exist. The Department's order "suspends" all work; it does not terminate it.

Sunoco says Paragraph 1 of the order should be superseded because it is unnecessary and redundant—the IR Plan already requires everything that is set forth in the paragraph. The Department says basically the same thing in the context of arguing that an order is not necessary to maintain the status quo. We tend to agree. Sunoco could not restart drilling even without the order unless it obtained the Department's written authorization pursuant to the IR Plan. If we were to supersede Paragraph 1 based on its apparent redundancy, the situation with the HDD would revert to essentially the same place that it is without a supersedeas: the Department must complete its review of Sunoco's restart report and Sunoco must await the Department's decision.[3] A supersedeas, of course, is an extraordinary remedy that will not be granted absent a clear demonstration of appropriate need. *Dougherty v. DEP*, 2014 EHB 9, 11; *Mellinger v. DEP*, 2013 EHB 322, 323; *Rausch Creek Land, LP v. DEP*, 2011 EHB 708, 709; *UMCO Energy, Inc.*

[3] With the possible exception of grouting the borehole pursuant to Paragraph 6 of the order, but that is not clear as discussed below.

v. DEP, 2004 EHB 797, 802; *Tinicum Twp. v. DEP*, 2002 EHB 822, 827; *Oley Twp. v. DEP*, 1996 EHB 1359, 1361-1362. If the order is redundant, superseding the redundant order would also seem to be redundant. We see no appropriate need for extraordinary intervention in the restart process based on Paragraph 1.

Sunoco next asks us to supersede Paragraph 2 of the order. Unlike Paragraph 1, Paragraph 2 of the order does not appear to be consistent with the IR Plan and the idea that restarting the HDD remains a possibility following the completion of the Department's review of the restart report. Paragraph 2 reads as follows:

> Sunoco shall take all steps necessary, including the submission of appropriate applications and supporting materials for permit amendments, to implement the reroute of HDD S-3-290 that Sunoco previously found to be technically feasible in the Re-evaluation Report.

If the Department is in the process of fulfilling its obligation to give Sunoco a decision on its restart report, and a restart is still at least theoretically possible, then why would Sunoco be required to start the process for obtaining approval of a reroute? Sunoco asks us to supersede Paragraph 2 and clarify that it has no *immediate* obligation to do a reroute. We believe that Sunoco has shown a likelihood of success on the merits that Paragraph 2 is not consistent with the Board-approved process as set forth in the IR Plan, to the extent that Paragraph 2 can be interpreted to impose an immediate obligation on Sunoco to begin implementation of a reroute before the Department acts on the restart report. Accordingly, Paragraph 2 is superseded pending the Department's review of, and determination on, the restart report. Sunoco is not required to do anything yet regarding the reroute while it seeks authorization to restart the HDD.[4]

Sunoco does not stop with its request that we supersede Paragraph 2 temporarily pending the Department's review of the restart report. It goes on to argue that the paragraph should be

[4] Of course, nothing in the order or the IR Plan stops Sunoco from beginning the process for a reroute while it simultaneously works through its attempt to restart the HDD.

superseded, in practical effect, permanently, and that it be allowed by Board order to restart drilling without any further interference from the Department. Just as the Department may have been trying to short-circuit the IR Plan process with its order, Sunoco tries its own end run. This we will not allow.

Our immediate criticism of the Department in this case is that it seems to be ducking its responsibility to make a decision. As noted above, the Department needs to make a decision first so that we have something meaningful to review.

Sunoco has put on a detailed case attempting to show us that allowing a restart is a better idea than the reroute. The showing is both premature and probably inapposite. It is premature because the Department needs to complete its own review first. It is probably inapposite because Sunoco's case is built upon a false dichotomy. Sunoco mistakenly believes that there are only two possible choices going forward: obtain a restart or do the reroute that was first identified in its 2019 reevaluation report. We have no reason to believe the Department would refuse to consider other alternatives. Mr. Rocco testified that the Department expects to consider several other alternatives from Sunoco in the context of a permit application for the reroute if it comes to that. (T. 1153.) Indeed, the evaluation of other alternatives may be required if a restart of the HDD is not possible and Sunoco's permit application for the reroute reveals that it cannot be performed in accordance with the regulations, and Sunoco wishes to complete its project.

Sunoco builds on its false dichotomy by arguing that, because the Department exceeded its authority in ordering a particular reroute, it somehow necessarily follows that it must be permitted to resume its HDD. This is simply wrong. It is a *non sequitur*. If Paragraph 2 is stricken, it in no way follows that the HDD must necessarily be allowed to continue. The ability to continue drilling at HDD-290, at least initially, will turn on whether that can be accomplished

while "adequately protect[ing] public health, safety, and the environment" as set out in the IR Plan. Drilling does not suddenly become acceptable simply because a reroute is also a bad idea, albeit for different reasons.

While the Department ordering a reroute at a particular location might ordinarily raise our eyebrows, it is important to remember here that it was Sunoco who originally identified the reroute in an earlier bid to continue work at HDD-290 for the installation of the 20-inch line after the two earlier IRs during the installation of the 16-inch line. We do not believe Sunoco deliberately set up the reroute in the reevaluation report as a straw man, but it is certainly now trying to have it serve that purpose. We reject the comparison entirely. As just explained, evaluating whether the HDD can restart is not based on whether it is a better idea than the reroute straw man. Comparing the restart of HDD-290 to the reroute is not the proper analysis at this stage. The option of proceeding with HDD-290 must stand on its own merits without reference or comparison to other options. The "practicability" of restarting the HDD versus rerouting, as Sunoco focuses its attention on, has no place in the analysis. Even if the reroute is as "impracticable" as Sunoco claims it is, that in no way suggests that a potentially unsafe HDD must be restarted. If no other safer or tolerable alternatives exist, it follows that the project may not be able to be completed.

For purposes of argument only, let us suppose Sunoco's proposed comparison between a potentially unsafe HDD and an "impracticable" reroute is conceptually meaningful and legally correct. In that case, what are we supposed to compare? On the one hand, Sunoco's plan on how to conduct the HDD is continuously evolving. It seems to keep on adding conditions, which it claims will reduce the risk of another release. Apparently, its latest version was submitted on November 20. On the other hand, Sunoco has not submitted the required permit application for

the reroute, so we do not know what we are supposed to compare on that side of the equation either. We have the basic outline and some specifics, but that does not substitute for a proper permit review. It was clear at the hearing that specifics need to be worked out. In short, there is insufficient detail on both sides of Sunoco's proposed comparison for us to perform a meaningful analysis. The record produced at the supersedeas hearing is an ineffective substitute. Any attempt to move forward, whether it be on new conditions to make the HDD safer or the details of a reroute, must be presented to the Department in the first instance.

Sunoco next asks us to put a time limit on the Department's review of the restart report. It legitimately complains that already weeks have gone by in apparent stasis. The IR Plan imposes a 72-hour timeframe for the Department to review a restart report for an IR that is *less than* 50 gallons and the first at a location, but appears to be silent on the timeframe to review an IR of greater than 50 gallons or not the first IR at a location.[5] We can certainly understand why the IR Plan does not impose strict timelines for reviewing a restart report of more than 50 gallons. Those HDDs might be more complicated. The IR Plan requires more information to be included in those restart reports. And the volume or severity of the IR can vary widely, from 51 gallons to 8,000 gallons or greater. Even in the truncated testimony we received at the supersedeas hearing, we were left with the impression that the underlying geology, the fracture zone along the drill profile, and Sunoco's various and evolving new drilling techniques and

[5] Indeed, the process for restarting an HDD with an IR of less than 50 gallons is much more defined than that for an IR of more than 50 gallons:

> Such PADEP approval [of the restart of HDD operations] shall occur no later than 72 hours after SPLP has submitted the required written notice and documentation to PADEP in the manner described in the following sentence, at which time SPLP may resume trenchless construction unless PADEP disapproves restart or requests additional information before restart. Written notice and documentation of the inadvertent return and SPLP's response thereto shall be provided on the Initial IR and Interim/final report forms attached as Appendix B (the requirements of Initial, Interim, and Final IR reports are set forth below in Section 6.5 (Notifications)).

(DEP Ex. 41 (at 8).)

mitigation measures all require a careful analysis. We reject outright Sunoco's request that we issue an order requiring the Department to act on the restart report within an arbitrary 20-day timeframe, particularly when Sunoco appears to be coming up with an ever-evolving set of proposals.

However, lengthy delay in the review of the restart report does not appear to be in anybody's or the public's interest. While we will not issue an Order requiring an immediate restart of drilling, we will reconsider a request for a renewed supersedeas if the Department does not appear to be acting with appropriate diligence in reviewing the restart report. Sunoco, the Department's sister agency DCNR, and perhaps most importantly, the public and the community surrounding HDD-290, all deserve to know what is going to happen at the site. Our view of the situation in light of the supersedeas criteria may need to be revisited in the absence of appropriate diligence.

In summary, Paragraph 2 is unlikely to withstand Board review to the extent the Department intended it as a device to allow it to abdicate its duty to perform a considered evaluation of Sunoco's report. The Department must decide in the first instance, in accordance with the IR Plan, whether Sunoco's additional measures in the restart report "will adequately protect public health, safety, and the environment." (DEP Ex. 41 (at 9).) While the Department is reviewing the restart report, Sunoco is under no obligation to immediately implement the reroute.

Paragraph 6 of the Order

Sunoco also asks us to supersede that portion of Paragraph 6 that requires it to "[e]ffective immediately…secure the partially constructed borehole with grouting or an equivalent method…." Again, grouting the borehole is not consistent with the possibility of

restarting the HDD. Sunoco believes that grouting will result in an additional IR in the area of the wetland, which is why it has applied for a permit to construct a containment structure at that location to collect the IR. The Department has not approved that permit application. Mr. Hohenstein testified that "[t]he emergency permit application for the grouting operation is pending before the Department…." (T. 794.) The Department has not suggested that the grouting should go forward without approval of Sunoco's permit application, notwithstanding the "effective immediately" language in the order. There is no other evidence that Sunoco is under any immediate obligation to grout the borehole, notwithstanding the language of the order. The Department by its actions has shown that Sunoco in fact has no obligation to grout the hole "immediately." The Department has made no serious effort to defend Paragraph 6 of its order. Its brief is virtually silent on the matter. If HDD is to be restarted, we assume grouting is not in order, but we are not clear on whether some sort of temporary or limited grouting is anticipated.

We also do not have any clear record support from Sunoco, which has the burden of proof, that grouting the hole would potentially cause more harm than good. Sunoco in its brief has cobbled together diverse testimony that might support a conclusion that the supposed benefit of grouting (preventing subsidence) is outweighed by the risk it presents (yet another IR), but no witness clearly testified to that fact.

In short, the record presented in this case does not provide us with a basis for making an informed decision regarding the merits of immediately grouting the hole in accordance with Paragraph 6. We are loath to issue an order that would result in another IR. The Department's failure to respond to that threat, or more generally to Sunoco's permit application that would allow grouting to go forward, and its near complete lack of attention to the issue at the hearing and in its brief, signals that no supersedeas is necessary at this point to maintain the status quo.

The Department will presumably act on the pending application that would allow grouting to go forward, which will create another appealable action. Even without a supersedeas, Sunoco has no immediate obligation to grout the hole and could not fairly be penalized for failing to do so because its failure to act is entirely the result of the Department's inaction. We are open to revisiting the issue as necessary based on circumstances as they evolve.

We issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SUNOCO PIPELINE L.P.	:	
	:	
v.	:	**EHB Docket No. 2020-085-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 16th day of December, 2020, it is hereby ordered that Sunoco's petition for supersedeas is **granted in part** in accordance with the preceding Opinion. Paragraph 2 of the Department's order is temporarily superseded pending the Department's review of, and final decision on, Sunoco's restart report for HDD-290.

ENVIRONMENTAL HEARING BOARD

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

DATED: December 16, 2020

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

For the Commonwealth of PA, DEP:
Nels J. Taber, Esquire
William J. Gerlach, Esquire
Melanie Seigel, Esquire
Adam T. Duh, Esquire
(*via electronic filing system*)

For Appellant:
Robert D. Fox, Esquire
Thomas M. Duncan, Esquire
Neil S. Witkes, Esquire
Diana A. Silva, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD BLACKWOOD	:	
	:	
v.	:	**EHB Docket No. 2020-097-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 29, 2020**
	:	

OPINION AND ORDER ON
FAILURE TO PERFECT

By Steven C. Beckman, Judge

Synopsis

The Board dismisses an appeal where the Appellant has failed to perfect his appeal and subsequently failed to respond to a second notice to perfect. Where a party has demonstrated a disinterest in proceeding with an appeal, dismissal is appropriate.

O P I N I O N

On November 16, 2020, Richard Blackwood ("Mr. Blackwood") filed his Notice of Appeal ("NOA") and registered with our e-filing system that same day. In his NOA, Mr. Blackwood challenges the Department's disapproval of an environmental consulting company's determination that further groundwater delineation is not necessary after underground storage tanks were removed from a former gas station site. In his objections to the Department's action, Mr. Blackwood stated the belief that no further site characterization is necessary. On November 17, 2020, we issued our standard Prehearing Order and, more importantly for this decision, an Order to Perfect ("the First Order"). Mr. Blackwood's NOA did not contain a copy of the Department action being appealed, proof of service of the NOA upon the Department or to the

officer who took the action being appealed, and Mr. Blackwood failed to provide his completed signature on the signature page. Our First Order directed Mr. Blackwood to perfect his appeal by providing the three pieces of missing information no later than December 7, 2020. The First Order had our standard language stating that the "Failure to supply the missing information as ordered may result in dismissal of the appeal under 25 Pa. Code § 1021.16." (First Order at 2). Mr. Blackwood failed to file any response to the First Order or to contact the Board with any questions or to clarify the First Order. In the absence of any response from Mr. Blackwood, on December 9, 2020, the Board issued a Second Order ("the Second Order"), again instructing Mr. Blackwood to perfect his appeal. The Board's Second Order gave Mr. Blackwood an additional two weeks to correct the errors in his appeal, requiring him to perfect by December 21, 2020. The Second Order again contained the notice language that a failure to perfect his appeal may result in the dismissal of that appeal. At the time of this Opinion and Order, approximately six weeks from our First Order, the Board has not received any response to its First Order or Second Order (collectively, "the Orders") from Mr. Blackwood despite the warning that a failure to respond might result in the dismissal of his appeal.

The Board has the power to impose sanctions, including dismissal of an appeal for failure to comply with Board orders. 25 Pa. Code § 1021.161; *Martin v. DEP*, 1997 EHB 158. Failure to comply with Board orders clearly demonstrates a lack of intent to pursue an appeal and dismissal is warranted. *Scottie Walker v. DEP*, 2011 EHB 328; *K H Real Estate, LLC v. DEP*, 2010 EHB 151; *Pearson v. DEP*, 2009 EHB 628, 629 (citing *Bishop v. DEP*, 2009 EHB 259; *Miles v. DEP*, 2009 EHB 179, 181; *RJ Rhodes Transit, Inc. v. DEP*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54). Where a party has evidenced a demonstrable disinterest in proceeding with an appeal, dismissal is appropriate. *See Mann Realty*

Associates, Inc. v. DEP, 2015 EHB 110, 113; *Casey v. DEP*, 2014 EHB 908, 910-11; *Nitzschke v. DEP*, 2013 EHB 861, 862.

In this case, Mr. Blackwood did not respond to either of the Orders directing him to perfect his appeal and failed to make any contact with the Board to discuss the Orders or offer an explanation as to why he could not comply with the Orders. The Board instructed Mr. Blackwood to include a copy of the Department action being appealed, to serve the notice of the action on the Department and the Department official who took the action, and to submit a completed signature page. None of the items necessary to comply with our Orders placed an unreasonable burden on Mr. Blackwood. Further, the Board staff would have willingly assisted Mr. Blackwood in understanding what was required of him as they have done with numerous appellants in many cases over the years. As of the date of this Opinion, Mr. Blackwood has failed to file any response to either of the Board's Orders or attempted any communication with the Board. The lack of response is even more difficult to comprehend in the face of the warning notice in both Orders that a failure to perfect would potentially result in the dismissal of the appeal.

The Board works hard to give parties a full and fair opportunity to challenge Department actions. That is our role in the system and what due process requires. However, our collective experience suggests that when a party fails to make even a basic attempt to comply with our orders or remains totally silent in the face of a possible dismissal, it generally portends a lack of interest in proceeding with the appeal and/or the inability or unwillingness to comply with the rules of proceeding in front of the Board. In such cases, we find it best to dismiss those actions early in the process rather than prolong it which most often simply delays the ultimate outcome and eventual dismissal. Therefore, the Board dismisses this appeal for Mr. Blackwood's failure

to comply with Board Orders as a sanction pursuant to 25 Pa. Code § 1021.161. We issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD BLACKWOOD	:	
	:	
v.	:	**EHB Docket No. 2020-097-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 29th day of December, 2020, following the Appellant's failure to comply with Board orders, and pursuant to 25 Pa. Code § 1021.161, it is hereby ORDERED that the appeal in the above-referenced matter is terminated. The docket will be marked as **closed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: December 29, 2020

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

For the Commonwealth of PA:
Edward Stokan, Esquire
(*via electronic filing system*)

For Appellant, *Pro Se*:
Richard Blackwood
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KEVIN MCCAULEY AND JUDITH ACKERMANN	:	
v.	:	**EHB Docket No. 2019-124-B (Consolidated with 2019-127-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY, Permittee	:	**Issued: December 30, 2020**

OPINION AND ORDER ON WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY'S MOTION IN LIMINE

By Steven C. Beckman, Judge

Synopsis

The Board denies in part and grants in part Permittee's Motion in Limine. We deny the request to strike evidence or testimony pertaining to information contained in the Act 537 Plan Amendment, and to the cost of the project and PENNVEST grants, to the extent such information was considered by the Department in granting the Permit. The Board also denies the Permittee's Motion in Limine to exclude fact witness testimony from witnesses that were not disclosed by Appellants during discovery. Finally, the Board grants the Permittee's Motion in Limine precluding expert witness testimony from Appellants' witness.

O P I N I O N

Introduction

This matter involves an appeal filed by Kevin McCauley ("Mr. McCauley") and Judith Ackermann ("Ms. Ackermann") (collectively, "the Appellants") challenging the Department of

Environmental Protection's ("the Department's") approval of a Water Quality Management Permit ("the Permit"). The Permit was issued to the Washington Township Municipal Authority ("WTMA") for the construction of a sewer line extension in Washington Township. Preceding the issuance of the Permit, the Department approved Washington Township's Act 537 Sewage Facilities Plan Amendment that added the sewer line extension to the existing Act 537 Plan ("the Plan Amendment"). Mr. McCauley previously appealed the Plan Amendment, but this Board dismissed that appeal based on untimeliness. *McCauley v. DEP*, EHB Docket No. 2019-118-B (Opinion and Order issued June 18, 2020). Ms. Ackermann also appealed the Plan Amendment, but the Board dismissed that appeal for her failure to respond to the Department's dispositive motion. *Ackermann v. DEP,* EHB Docket No. 2019-126-B (Opinion and Order issued May 11, 2020). The current appeal of the Permit is scheduled for a hearing on January 13, 2021, through January 14, 2021. Pursuant to 25 Pa. Code § 1021.104 and the Board's scheduling order, the parties have filed their prehearing memorandum.

The matter now before the Board is a Motion in Limine ("the Motion") filed by WTMA on December 7, 2020. The Motion seeks to exclude the following: (1) evidence or testimony relating to the Act 537 Plan and Plan Amendment; (2) testimony from witnesses who were not previously identified in discovery; (3) expert testimony from Wes Summerville; and (4) testimony from David Henning and any evidence or testimony relating to the price change or PENNVEST grants. (Motion, p. 13-14). WTMA also filed a Memorandum of Law in support of the Motion on December 7, 2020. The Department filed a one-line letter stating that it joined WTMA's Motion on December 8, 2020. Mr. McCauley filed his response opposing the Motion along with a Brief in Opposition to the Motion on December 11, 2020. Ms. Ackermann did not file anything in response to the Motion.

Standard

The purpose of a motion in limine is to provide the Board with an opportunity to consider potentially prejudicial and harmful evidence and rule on the admissibility of such evidence before it is referenced or offered at trial. *Kiskadden v. DEP*, 2014 EHB 634, 635; *Angela Cres Trust v. DEP*, 2007 EHB 595, 596; *RESCUE Wyoming v. DER*, 1994 EHB 1324, 1325-26. A motion in limine is the proper and even encouraged vehicle for addressing evidentiary matters in advance of the hearing. *Kiskadden v. DEP*, 2014 EHB at 635. A motion in limine should generally only be used to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. *Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235, 237. "In evaluating a motion in limine, the Board is asked to determine whether the probative value of the proposed evidence is outweighed by considerations such as undue delay, waste of time, or needless presentation of cumulative evidence." *Delaware Riverkeeper Network, et. al, v. DEP*, 2016 EHB 159, 161. When considering whether to impose sanctions precluding evidence or testimony based on discovery violations, we assess the respective prejudices to the parties. *Wetzel v. DEP*, 2016 EHB 230, 232. Discovery sanctions may be appropriate absent a motion to compel as long as a sanction is reasonable given the severity of the violation. *DEP v. Colombo*, 2012 EHB 370, 371-72 (citing *Kochems v. DEP*, 1997 EHB 422, 424, aff'd, 701 A.2d 281 (Pa. Cmwlth. 1997)).

Discussion

Evidence/testimony on Act 537 Plan Amendment and related Exhibits

WTMA first asserts that the Board should bar all evidence and/or testimony related to the Act 537 Plan, including the Plan Amendment. In its Motion, WTMA specifically identifies certain issues regarding engineering investigations and alleged sewer malfunctions and related

exhibits raised in Appellants' prehearing memorandum that it says should be excluded because the Board dismissed Mr. McCauley's appeal of the Act 537 Plan Amendment. WTMA states that hearing evidence relating to the Act 537 Plan Amendment would be irrelevant and would functionally relitigate an already decided issue. WTMA cites *Hankin v. DEP et al.,* 2004 EHB 509, in support of its argument that the Board should prohibit Mr. McCauley from introducing evidence related to the Act 537 Plan and the Plan Amendment. WTMA argues that the *Hankin* case sets precedent demonstrating an appellant may not bring evidence challenging the information contained in an Act 537 Plan when the appeal at hand arises from the issuance of a Part II sewer extension permit. Further, WTMA states that "[t]he Department did not consider the merits of the Township Act 537 Plan Amendment approved on November 2, 2018 in determining whether to approve or deny the permit; the Department only considered that such approval had been previously provided." (WTMA's Memorandum at 3). In other words, WTMA alleges that the Department did not rely on the facts presented in the Act 537 Plan and the Plan Amendment in deciding to issue the Permit, but instead, made its decision solely on the basis that the Plan, including the Plan Amendment had been approved.

WTMA's request to exclude this evidence and testimony at this point in the case is premature. Because we do not know what information the Department relied on when deciding to issue the Permit, we cannot properly evaluate the relevance of the evidence and testimony WTMA is challenging. We agree with the point made by Mr. McCauley that in order for this Board to grant the Motion to exclude this evidence and testimony, it would require us to assume what information the Department considered when granting the Permit. In its Motion, WTMA only offers an unsupported statement that the Department did not consider the merits of the Plan Amendment in reaching its permit decision. (WTMA's Motion, at Para. 13). There are no

exhibits, affidavits or deposition testimony attached to the Motion supporting this statement. The Department joined the Motion but did not add any supporting documentation or evidence on this issue to its letter. In the absence of any affirmative evidence pertaining to the Department's actions or considerations in granting the Permit, we deny the request to exclude this line of evidence and/or testimony. We agree with WTMA that Mr. McCauley cannot relitigate the Department's approval of the Act 537 Plan and Plan Amendment, however, Mr. McCauley may introduce evidence and testimony pertaining to the Act 537 Plan and Plan Amendment to the extent he can demonstrate how that evidence or testimony relates to the Department's Permit decision.

Further, we find that the Board's decision in the *Hankin* case supports our decision to admit this evidence rather than the position asserted by the WTMA. In *Hankin*, the Board never ruled on the question of whether a challenge to a governmental agency's determination of the existence of system malfunctions must be raised in an appeal of the Act 537 Plan and not in a subsequent appeal of the Part II sewer extension permit. The appellant in the *Hankin* case abandoned any such claim and no argument on the merits of this issue was presented to the Board. In fact, the Board concluded that the doctrine of administrative finality in cases involving Act 537 planning and subsequent permitting actions is not readily susceptible to a bright line test and went on to state that:

> Our review of these cases tells us that there are no categorical or mechanically applicable answers to the question of what particulars are or are not included in any of the respective steps along the continuum and, thus, what is administratively final upon completion of a certain step. The result of each of the cases cited is heavily dependent upon its procedural posture, its specific factual and legal background and the nature of the arguments made by the parties. This case, likewise, will not involve, nor could it, our setting forth a universally applicable prescription of the subjects which are included in and excluded from each of the three steps of the process. We will, however, attempt to parse out, in the context of the factual, legal and procedural

> background of this case, in light of the arguments made by the parties and with the guidance of the cases cited before, which matters are included in this Part II permit appeal and which are not.

Hankin v. DEP et. al, 2004 EHB at 513; citing, *Perkasie Borough*, 2002 EHB at 773. The *Hankin* case makes clear that issues of administrative finality in an Act 537 Plan permitting case are case specific and require a review of the factual, legal and procedural background of the case. A motion that seeks to prematurely exclude the Board's consideration of the factors identified in *Hankin*, particularly in the absence of any supporting documentation or evidence about the Department's decision process, is not proper. WTMA should bring any challenges to the relevance of the testimony or evidence that it is concerned about when it is offered at the hearing so that the Board can consider it in the proper case specific context.

Fact Witnesses

Next, WTMA seeks to exclude potential fact witnesses that Mr. McCauley named in his prehearing memorandum but failed to identify in his discovery responses. WTMA names nine witnesses that Mr. McCauley lists in his prehearing memorandum but did not disclose in discovery.[1] However, WTMA only objects to the presentation of testimony from Wes Summerville ("Mr. Summerville") and Mark Beichner ("Mr. Beichner"). WTMA argues that it "will be unfairly prejudiced if Appellants are permitted to introduce the testimony of those witnesses, whom were not previously identified as witnesses and where the subject matter of their testimony was not previously disclosed." (WTMA's Memorandum at 10). WTMA goes on to assert that it also believes testimony from each of these witnesses "is likely irrelevant to the instant appeal." *Id*. at 11. Since WTMA filed its Motion, Mr. McCauley stated in his response

[1] Ms. Ackermann did not submit her own prehearing memorandum but instead filed a statement with the Board, adopting Mr. McCauley's prehearing memorandum.

that he has supplemented his discovery and provided WTMA and the Department with the witnesses he plans to call at the hearing.

The Rules of Civil Procedure make clear that a party is entitled to discover the identity of persons having knowledge of any discoverable matter. Pa.R.C.P. No. 4003.1(a). Further, the Rules impose a duty for parties to seasonably supplement certain responses to discovery. Pa.R.C.P. No. 4007.4. While the obligation to seasonably supplement is not categorical in scope, it is automatic and it does encompass persons with knowledge of discoverable information and persons expected to be called as expert witnesses. Pa.R.C.P. No. 4007.4(1); Pa.R.C.P. No. 4007.4, Explanatory Comment--1978. The Rules are equally clear that any witness whose identity has not been revealed in accordance with the Rules shall not be permitted to testify on behalf of the defaulting party, unless the failure to disclose is the result of extenuating circumstances. Pa.R.C.P. No. 4019(i). "Courts and this Board, however, have not been unequivocal in the application of barring witness testimony." *Gintoff v. DEP*, 2017 EHB147, at 150-51. *See generally Feingold v. SEPTA*, 517 A.2d 1270 (Pa. 1986); *Borough of Edinboro v. DEP*, 2003 EHB 725.

WTMA served discovery requests to both the Appellants on February 26, 2020, and March 16, 2020, respectively, requesting that the Appellants identify all witnesses and experts they expected to call at the hearing in this appeal, including the nature and subject of their testimony. Ms. Ackermann never responded to any of the discovery requests. In response to the interrogatories, Mr. McCauley stated that he had not yet identified witnesses or experts but that he would supplement the interrogatory pursuant to the Pennsylvania Rules of Civil Procedure. Mr. McCauley failed to supplement the discovery requests. In reviewing Mr. McCauley's pre-hearing memorandum, WTMA noted that Mr. McCauley identified nine witnesses he had not

previously disclosed in discovery. Mr. McCauley stated in his response to WTMA's Motion, that he has supplemented his responses since WTMA filed its Motion.

While we do not condone Mr. McCauley's dilatory response to WTMA's interrogatories, we recognize the guidance that the Pennsylvania Supreme Court has provided when considering the question of exclusion of witnesses. The Court has instructed that consideration be given to the following factors: (1) the prejudice or surprise to the party against whom the excluded witnesses would testify; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case; and (4) bad faith or willfulness in failing to comply with an order of the court. *Feingold v. SEPTA*, 517 A.2d 1270, 1273 (Pa. 1986) (quoting *Feingold v. SEPTA*, 488 A.2d 284, 288 (Pa. Super. 1985)). See also *Miller v. Brass Rail Tavern*, 664 A.2d 525, 532 n.5 (Pa. 1995). On this last factor we are also cognizant of the Board's line of cases holding that we should be cautious in excluding crucial portions of a party's case absent a motion to compel and failure to comply with an order of the Board. *See Wetzel v. DEP*, 2016 EHB 230 (and cases cited therein). No motion to compel was filed at any time in this appeal.

Turning our attention to the two specific witnesses that WTMA requests that the Board exclude from testifying at the hearing, we find that it would be inappropriate to grant this portion of WTMA's Motion. The first witness it seeks to exclude is Mr. Beichner. In his prehearing memorandum, Mr. McCauley lists Mr. Beichner as follows: "Mark Beichner, Washington Township Municipal Authority (as if on cross)." (Mr. McCauley's Prehearing Memorandum at 3). In his response to the Motion, Mr. McCauley identifies Mr. Beichner as a representative of WTMA. In its Motion, WTMA does not provide any information about who it understands Mr. Beichner to be or his relationship to WTMA, but claims it will be prejudiced if the testimony of

Mr. Beichner is allowed at the hearing. In the absence of any further information, we will accept that Mr. Beichner is associated with WTMA as a representative and/or possibly an employee. If that is in fact the case, we do not see how WTMA will be prejudiced if we allow testimony from this fact witness. This Board has previously found that employees of a party to a case called by the opposition as witnesses pose little risk of prejudice. *See Gintoff v. DEP,* 2004 EHB 147, 152 (finding that the Department would not be prejudiced by its own employees' testimony despite the appellant failing to disclose those witnesses in discovery). Therefore, we presume that WTMA generally knows what Mr. Beichner can attest to in this case and that WTMA has had the opportunity to talk extensively with Mr. Beichner regarding his knowledge. If WTMA can demonstrate at the time of the hearing that Mr. Beichner's relationship to WTMA is different than our current understanding and that WTMA did not have access to Mr. Beichner to discuss his possible testimony, we will reconsider a request to exclude his testimony at the time of the hearing. But based on the information before us at this point, we will deny this portion of the Motion.

We now address the portion of the Motion seeking to exclude fact testimony from Mr. Summerville. As we noted above, the Rules of Civil Procedure do not permit a witness to testify on behalf of the defaulting party, unless the failure to disclose that witness is the result of extenuating circumstances. Pa.R.C.P. No. 4019(i). Mr. McCauley states in his response that he "learned on the day previous to submitting McCauley's Prehearing Memorandum that Mr. Summerville was involved in the implementation of a leech field within the system area. Therefore, it would have been impossible for McCauley to provide WTMA with this information prior to the discovery deadline." (Mr. McCauley's Brief in Opposition to WTMA's Motion in Limine at 6). Because Mr. McCauley did not know about Mr. Summerville until the day before

filing his prehearing memorandum, he could not have disclosed him any earlier. We believe that such an explanation constitutes an extenuating circumstance and we will allow the lay testimony of Mr. Summerville to be presented. If WTMA has evidence to the contrary, it can renew a motion to exclude at the time of hearing. However, based on the information presented by Mr. McCauley, excluding Mr. Summerville is an excessive penalty. The Board does have some questions as to the relevancy of Mr. Summerville's testimony, but we feel that those concerns can be adequately addressed at the hearing.

Expert Witness

In its third issue, WTMA objects to Mr. McCauley calling Mr. Summerville as an expert witness. In his response, Mr. McCauley states that he does not intend to present Mr. Summerville as an expert but only seeks lay testimony from him. While there appears to be no real dispute when considering WTMA's arguments opposing expert testimony and Mr. McCauley's concession that he will not present Mr. Summerville as an expert witness, we feel it important to emphasize that proper disclosure of expert testimony during the discovery phase is important in Board cases. "Expert discovery is to be conducted under tightly controlled circumstances as detailed in Rule 4003.5 of the Pennsylvania Rules of Civil Procedure." *Tri-Realty Co. v. DEP*, 2015 EHB 184, 191-92. In response to expert interrogatories, a party must identify expert witnesses expected to be called at trial and disclose the substance of the facts and opinions of the expert's anticipated testimony, either by answering the interrogatories directly, or providing an expert report. Pa.R.C.P. No. 4003.5(a)(1). Our Board has been consistent and clear in holding "expert witnesses, along with their qualifications, opinions and bases for the opinions, must be provided in response to discovery inquiries." *Rural Area Concerned Citizens v. DEP*, 2010 EHB 337, 339 (Citing *Midway Sewerage Auth. v. DER*, 1991 EHB 1445; *Chernicky Coal*

Co. v. DER, 1985 EHB 360). Therefore, the Board grants WTMA's third Motion in Limine, and will prohibit Appellants from introducing Mr. Summerville as an expert witness. Appellant's examination of Mr. Summerville at the hearing will be limited to fact witness testimony.

Henning Testimony or Information regarding price change or PENNVEST Grants

Lastly, WTMA argues that Appellants should neither be allowed to present testimony from Dave Henning ("Mr. Henning") nor any information relating to the price change or PENNVEST grants. Specifically, WTMA objects to potential testimony it identified in Mr. McCauley's prehearing memorandum that the overall cost of the sewer extension project had changed along with cost related testimony from Mr. Henning regarding PENNVEST grants and the reasonableness of sewer rates. It argues that evidence and testimony on these issues should be excluded because "the Department did not consider the cost of the project in determining whether or not to approve or deny the Sewer Extension Permit Info on price change and Pennvest Grants." (WTMA's Memorandum at 14). WTMA questions the relevancy of this evidence relying once again on an unsupported assertion that the Department did not consider costs of the sewer extension project in making its permitting decision. Similarly, it flatly asserts that the PENNVEST grant evidence is irrelevant because it relates to the treatment plant and was obtained by an entity not a party to this appeal.

The arguments set forth by WTMA in this portion of its Motion are largely identical to the arguments set forth in the first part of its Motion seeking to exclude evidence regarding the Act 537 Plan and Plan Amendment. As we discussed earlier, we think it is premature to rule on a relevancy issue on these points since we have no evidence of record as to what the Department considered in reaching the permit decision that is the subject of this appeal. At this point in the

process, we only have WTMA's statement in its Motion asserting that the costs of the sewer project were not part of the information considered by the Department in reaching its permit decision. We cannot determine the relevancy of this evidence in the abstract. We therefore deny WTMA's fourth motion in limine requesting this court to bar any evidence and/or testimony from Mr. Henning relating to any changes in the overall price of the project and PENNVEST grants. WTMA may of course raise an objection again at the time of the hearing once the Board has received sufficient evidence and testimony on the issues at hand to evaluate relevancy.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KEVIN MCCAULEY AND JUDITH ACKERMANN	:	
	:	
v.	:	**EHB Docket No. 2019-124-B**
	:	**(Consolidated with 2019-127-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY, Permittee	:	

O R D E R

AND NOW, this 30th day of December 2020, WTMA's Motion in Limine is **granted in part and denied in part**. It is hereby ORDERED as follows:

1. Appellants will be permitted to present testimony and evidence relating to information in the Act 537 Plan and Plan Amendment.
2. Appellants will be permitted to call Mr. Summerville and Mr. Beichner as fact witnesses.
3. Appellants will not be permitted to illicit expert testimony from Mr. Summerville.
4. Appellants will be permitted to present evidence relating to the cost of the project and PENNVEST grants and to call Mr. Henning as a witness.
5. Nothing in this ORDER precludes WTMA or the Department from raising further challenges to the admission of the testimony or evidence that are the subject of this ruling on WTMA's Motion in Limine at the appropriate point during the hearing.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: December 30, 2020

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

For the Commonwealth of PA, DEP:
Michael Braymer, Esquire
Carl Ballard, Esquire
Paul Strobel, Esquire
(via electronic filing system)

For Appellants:
Megan Willey, Esquire
(via electronic filing system)

Judith Ackermann, *Pro se*
(via electronic mail and U.S. first class mail)

For Permittee:
Mark Shaw, Esquire
(via electronic filing system)