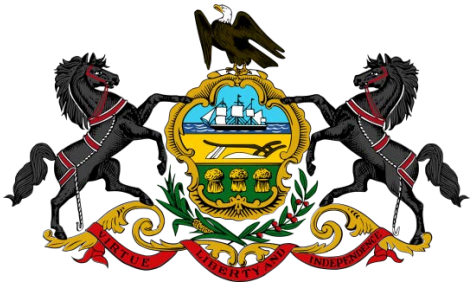
Environmental Hearing Board

Adjudications and Opinions



2019
VOLUME I

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

2019

JUDGES OF THE

ENVIRONMENTAL HEARING BOARD

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

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2019 EHB 1

FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2019.

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

2019 EHB DECISIONS SUBJECT MATTER INDEX

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARIA SCHLAFKE	:	
	:	
v.	:	**EHB Docket No. 2016-117-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 8, 2019**
	:	

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

By Steven C. Beckman, Judge

Synopsis

The Board finds that Maria Schlafke personally participated in the Safe Drinking Water Act violations that the Department relied on in its civil penalty assessment. Ms. Schlafke failed to demonstrate that Property One, LLC lacked the financial resources to address the cited violations and she is personally liable for the civil penalty assessment in this case. The Board reduces the civil penalty assessment sought by the Department because the amount sought was not a reasonable and appropriate exercise of the Department's discretion or otherwise was not supported by the evidence in the case. The Board holds that Ms. Schlafke is personally liable for a civil penalty in the amount of $64,220.00.

Background

This matter has a long and complicated history in front of the Environmental Hearing Board ("Board") spanning several years and two separate appeals.[1] In October 2012, the Department of Environmental Protection ("Department") issued an Administrative Order ("2012

[1] Because several prior Board rulings involving Property One and Ms. Schlafke are relevant to this Adjudication, we are providing a more detailed background discussion than usual to assist in understanding certain aspects of the Adjudication.

Administrative Order") to Property One, LLC ("Property One") and Maria Schlafke ("Ms. Schlafke") to address alleged environmental issues at the Doral Estates Mobile Home Park ("Doral Estates") located in Summit Township, Crawford County, Pennsylvania. Property One and Ms. Schlafke filed separate Notices of Appeal ("NOA") to the 2012 Administrative Order on November 13, 2012. These NOAs were docketed at 2012-186-B ("Property One 2012 NOA") and 2012-187-B ("Schlafke 2012 NOA"), but following review, the separate appeals were consolidated at 2012-186-B ("2012 NOAs"). The Board issued two Board Orders to Property One requiring it to obtain legal counsel pursuant to 25 Pa. Code § 1021.25(b). Property One failed to respond to either of the Board Orders and failed to have counsel enter an appearance on its behalf. On January 14, 2013, the Board issued an Order dismissing the Property One 2012 NOA for failure to comply with the two Board Orders and the requirement to obtain legal counsel as required by 25 Pa. Code § 1021.25(b) ("January 2013 Order"). Property One did not appeal the January 2013 Order. In its January 2013 Order, the Board stated that Ms. Schlafke could proceed with the Schlafke 2012 NOA and she elected to do so *pro se*. The Schlafke 2012 NOA moved through discovery and the deadline for the filing of dispositive motions. Ms. Schlafke proceeded without counsel and had difficulty with the discovery process and Board procedures in general and failed to comply with the Board's repeated Orders addressing discovery issues. These issues ultimately led the Board to sanction Ms. Schlafke by limiting the evidence she could present at the hearing. On September 30, 2013, the Board issued its standard Pre-Hearing Order No. 2 requiring the Department and Ms. Schlafke to file their pre-hearing memorandum on specified dates and scheduling a three-day hearing for mid-December 2013. The Department filed its pre-hearing memorandum on October 29, 2013, in compliance with Pre-Hearing Order No. 2. Ms. Schlafke failed to file her pre-hearing memorandum as required.

On November 26, 2013, the Board, pursuant to 25 Pa. Code § 1021.161, issued an Opinion and Order dismissing Ms. Schlafke's individual appeal as a sanction for her repeated failures to comply with Board Orders. Ms. Schlafke did not appeal the Board's Opinion and Order dismissing the Schlafke 2012 NOA.

This brings us to the appeal at hand. On August 17, 2016, Appellants Property One and Maria Schlafke filed a single NOA challenging the Department's Assessment of Civil Penalty dated June 30, 2016 ("2016 Assessment"). The 2016 Assessment assessed a civil penalty of $218,568.00 against Property One and Ms. Schlafke for alleged violations of the Pennsylvania Safe Drinking Water Act, 35 P.S. §§721.1-721.17 ("SDWA"). On July 31, 2017, the Department filed a Motion for Partial Summary Judgment incorporating a Statement of Undisputed Material Facts and a Brief in Support of the Motion for Partial Summary Judgment. On August 23, 2017, Property One and Ms. Schlafke filed an Amended Motion for Summary Judgment as to Appellant Maria Schlafke and Amended Proposed Undisputed Findings of Fact in Support of Motion for Summary Judgment. The parties filed responses and reply briefs to the summary judgment motions. In an Order and Opinion dated November 15, 2017, the Board granted partial summary judgment to the Department regarding Property One and Maria Schlafke's liability for certain violations identified in the civil penalty assessment. *Property One v. DEP*, 2017 EHB 1209 ("*2017 SJ Opinion*"). The Board found that Property One and Ms. Schlafke are "liable for the violations identified in the 2016 Assessment at Paragraphs L, P, R, S, U, and V. Furthermore, Property One and Ms. Schlafke are liable for failing to comply with the requirements in the following paragraph of the 2012 Order: 2, 3, 4, 7, 9, 12 and 13." *2017 SJ Opinion*, at 1226.

Following our issuance of the *2017 SJ Opinion*, a conference call was held and on November 21, 2017, the Board issued a standard Pre-Hearing Order No. 2 scheduling a hearing to begin on March 13, 2018. The Department filed its pre-hearing memorandum on January 19, 2018. Property One and Maria Schlafke filed their pre-hearing memorandum in a timely fashion on February 20, 2018, and concurrently counsel for Property One and Maria Schlafke filed a Motion for Leave to Withdraw Appearance. After affording the Department an opportunity to respond to the motion, the Board granted the Motion for Leave to Withdraw Appearance and additionally ordered Property One to retain counsel, as required by Board rules, on or before March 2, 2018. On February 27, 2018, Property One filed a Notice of Withdrawal of Appeal. The Board terminated the appeal of Property One on February 27, 2018. Ms. Schlafke's appeal continued, and acting *pro se*, she filed a Motion in Limine to Admit Evidence and Exclude Witnesses. Ms. Schlafke explained in her Motion in Limine that she would not be able to attend the March hearing due to financial inability and her husband's health issues. Ms. Schlafke requested the use of affidavits in her absence at the hearing and also requested that the Department be prevented from calling any witnesses due to an alleged failure to follow the pre-hearing order and applicable regulations and an alleged failure to clearly identify the witnesses it intended to call. The Department filed a response to the Motion in Limine on March 6, 2018, requesting denial of the motion, preclusion of the use of Ms. Schlafke's affidavits, and the allowance of Department witness testimony. The Board held a conference call with the parties on March 7, 2018, and subsequently issued an Order on March 8, 2018, postponing the hearing originally scheduled for March 13, 2018, in order to give Ms. Schlafke an opportunity to secure pro bono representation. On March 9, 2018, the Board issued an Order denying Ms. Schlafke's Motion in Limine and granting the Department's request to preclude the use of her affidavits.

Following a conference call with the parties on April 13, 2018, the Board issued an Order scheduling a hearing to begin on May 8, 2018. On April 23, 2018, Ms. Schlafke filed a Motion for Reconsideration requesting that the Board reconsider whether the Department's action assessing civil penalties against Ms. Schlafke personally was unreasonable and contrary to new law. Following the submittal of a Supplemental Brief in Support of the Motion, and an Answer filed by the Department, the Board denied the Motion for Reconsideration by Opinion and Order dated May 2, 2018.

On May 3, 2018, pro bono counsel for Ms. Schlafke entered an appearance in the matter and concurrently filed a Motion for Continuance of the Merits Hearing. Following another conference call with the parties, the hearing was rescheduled to begin on May 15, 2018. On May 7, 2018, Ms. Schlafke filed a Motion in Limine to Permit Her to Testify at the Merits Hearing via Telephone/Videoconference, or, in the Alternative, to Admit her Deposition Testimony into Evidence at the Merits Hearing in Lieu of Live Testimony. The parties resolved Ms. Schlafke's Motion in Limine independently and filed a Letter Regarding Motion in Limine Agreement on May 10, 2018, followed by filings by both the Department and Ms. Schlafke designating portions of Ms. Schlafke's deposition testimony to be used during the hearing. Following a one-day hearing on the merits on May 15, 2018, the Board issued an Order setting forth a post-hearing briefing schedule. The Department filed its post-hearing brief on August 6, 2018, and Ms. Schlafke filed her post-hearing brief on September 19, 2018. The Department filed a reply brief on October 4, 2018. The matter is now ready for adjudication.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Safe Drinking Water Act ("SDWA"); Section 1917-A of the Administrative Code of

1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-517; and the rules and regulations promulgated thereunder. (DEP Exhibit ("Ex.") C)

2. Property One, LLC is a registered Florida limited liability company, having a business address of 6520 Northwest 18th Avenue, Gainesville, FL 32605. (DEP Ex. C).

3. Property One, LLC's business address in Gainesville, Florida where it receives mail is also Ms. Schlafke's home address where she has resided since 2009. (Schlafke Ex. MS-26, at 15, 32).

4. Property One, Inc. was formed by Ms. Schlafke and Hector Venus in the early 1990's to buy, develop, and flip commercial real estate. (Schlafke Ex. MS-26, at 27).

5. Ms. Schlafke's duties at Property One, Inc. included finding real estate, doing due diligence and inspecting properties, putting together contracts and determining the potential of properties in the marketplace. (Schlafke Ex. MS-26, at 28).

6. During its operations Property One, Inc. purchased many different properties, including Doral Estates Mobile Home Park ("Doral Estates") in 2004. (Schlafke Ex. MS-26 at 27, 42).

7. Ms. Schlafke was aware at the time that Property One, Inc. purchased Doral Estates that it was acquiring a public water system and that it needed to hire an approved operator to run the water system. (DEP Ex. M, at 45, 72; Schlafke Ex. MS-26, at 44).

8. In 2011 Property One changed its corporate structure and became a limited liability company known as Property One, LLC. (Schlafke Ex. MS-26, at 28).

9. Only two individuals were involved with Property One, LLC, Ms. Schlafke, and her husband William Schlafke. (Schlafke Ex. MS-26, at 29).

10. At all times relevant to the civil penalty assessment, Ms. Schlafke has been the managing member of Property One. (T. 131-132; Schlafke Ex. MS-26, at 82, 178).

11. Ms. Schlafke was the only person responsible for signing checks on behalf of Property One. (DEP Ex. M, at 75).

12. At Doral Estates, Property One owned and operated a water supply for human consumption that consisted of a drilled well, disinfection treatment that utilizes chlorine, multiple storage tanks, and a distribution system serving the majority of the residents of Doral Estates ("Water Supply"). (T. 133-34; DEP Ex. C).

13. The Water Supply is a "system" as defined by 25 Pa. Code § 109.1, and is a "community water system," as defined by 35 P.S. § 721.3 and 25 Pa. Code § 109.1. (T. 104-105, 200; DEP Ex. C).

14. On July 26, 2004, the Department issued Property One a Public Water Supply Operation Permit, Permit No. 2090502-T1 ("Permit"), which required Property One to operate the Water Supply in accordance with the terms and conditions of the Permit. (DEP Ex. C).

15. On December 16, 2011, the Department amended the Permit with the issuance of Minor Operation Permit No. 2090502-T1-MA1 ("Amended Permit"), which required Property One to provide 4-log treatment of viruses for the Water Supply. (DEP Ex. B; T 106-107).

16. The Amended Permit was mailed with a cover letter addressed to Ms. Schlafke that discussed the monitoring and reporting requirements for the Water Supply. (DEP Ex. B).

17. In accordance with the Amended Permit, on February 1, 2012, Property One was required to begin chlorine residual disinfectant concentration monitoring of the entry point to the Water Supply. Neither Property One nor Ms. Schlafke began chlorine residual disinfectant

concentration monitoring, in violation of 25 Pa. Code §§ 109.504(c), 109.1305, and 109.1307. (T. 107, 110, 202-2-3; DEP Ex. B; *2017 SJ Opinion*, at 1221).

18. Pursuant to 25 Pa. Code §§ 109.301 and 109.1305, Property One was required to conduct periodic monitoring of the Water Supply to ensure compliance with the Safe Drinking Water Act and its Regulations. (DEP Ex. C).

19. Pursuant to 25 Pa. Code § 109.407(a), an owner of a system is required to give public notice for, among other things, the failure to perform water quality monitoring. (DEP Ex. C).

20. Failing to conduct periodic monitoring of the Water Supply means that there is no way to ensure that the Water Supply is working appropriately to disinfect or that the water is safe for human consumption. (T. 108, 115-116).

21. Pursuant to 25 Pa. Code § 109.704(a), Property One was required to retain the services of an operator certified under the Water and Wastewater Operator's Certification Act, 63 P.S. §§ 1001-1015.1, to operate the Water Supply. (DEP Ex. C; T. 110).

22. Ms. Schlafke understood that the Water Supply had to be operated by a certified water operator. (DEP Ex. M, at 71).

23. Ms. Schlafke, on behalf of Property One, made the decision to retain Mr. Rod Donghia as the certified water operator for the Water Supply. (DEP Ex. M, at 80).

24. Property One contracted with Mr. Donghia to provide testing of drinking water at Doral Estates in October 2009. (Schlafke Ex. MS-23).

25. Mr. Donghia has worked as a certified water operator for 38 years, operating in five counties in northwestern Pennsylvania. (T. 66).

26. Mr. Donghia began working as the certified drinking water operator at the Water Supply in 2010. (T. 56).

27. Mr. Donghia charged Property One approximately $275 per month for his services. (T. 68; Schlafke Ex. MS-23).

28. As a certified drinking water operator Mr. Donghia collected samples required at the Water Supply including, but not limited to, sampling for nitrate, nitrite, pH, chlorine, and synthetic organic compounds. (T. 56-58).

29. After Mr. Donghia collected samples he would send them to a laboratory for analysis and the laboratory would then report the sample results to the Department on behalf of Property One. (T. 56-57).

30. Mr. Donghia had conversations with Ms. Schlafke about the type of work and services that he conducted at the Water Supply. (T. 61).

31. When more expensive and infrequent sampling was required, Mr. Donghia notified Ms. Schlafke in advance so she was aware of the upcoming costs and could prepare appropriately. (T. 61).

32. Mr. Donghia provided monthly invoices to Ms. Schlafke that included his work performed and any incurred lab fees. (T. 62-63).

33. Following the issuance of the 2011 Amended Permit, Ms. Schlafke spoke with Mr. Donghia about the requirements and alleged that Mr. Donghia sent a bill for $4,000.00 related to the requirements in the Amended Permit and requested payment up front. (Schlafke Ex. MS-26, at 81).

34. Mr. Donghia denied that he ever told Ms. Schlafke she needed to pay him $4,000.00. (T. 87).

35. An invoice from Mr. Donghia dated March 11, 2012, requests $1,775.00 for services and testing. (Schlafke Ex. MS-7).

36. The cost for quarterly testing for synthetic organic compounds was $1,300.00 to $1,500.00 and the costs for annual testing for volatile organic compounds and inorganic compounds were in the range of $150.00 to $200.00. (T. 77-78; Schlafke Ex. MS-7).

37. While Mr. Donghia was a certified water operator for Property One continuously from 2010 until he terminated his services, there were times when he was owed money by Property One and would temporarily discontinue his services until he was paid. (T. 63; Schlafke Exs. MS-2, MS-6).

38. When Mr. Donghia was owed money for his services as a certified water operator for Property One he would speak with Ms. Schlafke. (T. 63).

39. When Mr. Donghia permanently discontinued his services as Property One's certified water operator it was due to lack of payment for services performed in the amount of approximately $1,500.00. After discussing the lack of payment with Ms. Schlafke and not receiving a payment Mr. Donghia discontinued his services as a certified water operator for Property One in February/March 2012. (T. 65; Schlafke Exs. MS-10; MS 26, at 81-83).

40. Mr. Donghia would have remained the certified water operator had he been paid money owed for services he had rendered. (T. 65).

41. Ms. Schlafke, on behalf of Property One, made the decision to stop paying Mr. Donghia and did not hire another certified water operator after determining that other operators would charge either more or the same amount of money as Mr. Donghia. (DEP Ex. M, at 81).

42. Mr. Jones has resided at Doral Estates since July 2011 and was a customer of the Water Supply at all relevant times. (T. 16-17).

43. Mr. Jones rented his lot at Doral Estates from Property One. He made monthly payments to Property One which included his water and sewage expenses. (T. 19).

44. When Mr. Jones moved into Doral Estates his monthly rent was $265 per month but it soon increased to $385 per month. (T. 19, 24-25).

45. Mr. Jones recalls making all rental payments until December 2012. (T. 19-20).

46. Neither Property One nor Ms. Schlafke contacted Mr. Jones about the Water Supply or directed him to disconnect from the Water Supply. (T. 22).

47. On December 7, 2012, the power was shut off to the Water Supply. (T. 23).

48. Mr. Jones ceased drinking the water from the Water Supply and stopped making rental payments after the power to the Water Supply was shut off in December 2012. (T. 20).

49. In late 2012 or early 2013, Mr. Jones received a boil water advisory and began buying Culligan water. (T. 25).

50. Ms. Nancy Close was a seasonal resident of Doral Estates and a customer of the Water Supply. (T. 26-27).

51. Ms. Close owned her home and rented the lot at Doral Estates. (T. 28).

52. Ms. Close made monthly rental payments of $145 per month for her Doral Estates lot that included separate monthly payments for sewage and water. (T. 29).

53. Each of the three payments was deposited into a separate checking account. (T. 29).

54. Rental payments were paid to "Property One, Maria Schlafke." (T. 29).

55. Despite making monthly water payments, Ms. Close did not drink the water from her tap supplied by the Water Supply because she had heard there were problems with the Water Supply. (T. 30).

56. Neither Property One nor Ms. Schlafke contacted Ms. Close about the Water Supply or directed her to disconnect from the Water Supply. (T. 31).

57. Property One received $32,936.00 in rent and $1,375.00 in separate water services fees in 2012. (DEP Ex. M, at 164; DEP Ex. N).

58. Property One did not collect any rent payments in 2013. (Schlafke Ex. MS-26, at 60).

59. In September 2011, the Department sent a letter addressed to Ms. Schlafke referencing an August 9, 2011 telephone conversation with Ms. Schlafke concerning her intention to reduce the number of connections to the Water Supply in order to avoid regulation as a community water system. (DEP Ex. P; Schlafke Ex. MS-26, at 90-91).

60. The Department's September 2011 letter set forth four steps that Property One would need to complete in order to reduce the number of connections and the population of Doral Estates to the point where the Water Supply would no longer be regulated as a public water system. (DEP Ex. P; Schlafke Ex. MS-26, at 90-91).

61. Property One and Ms. Schlafke did not provide evidence to the Department that any of the four required steps were completed at Doral Estates. (DEP Ex. J).

62. In March 2012, Ms. Schlafke and Property One sent a letter to the Department asserting that Property One was cancelling its permit on the basis that Property One was only supplying water to 12 lots at Doral Estates. (Schlafke Ex. MS-26, at 81-82; DEP Ex. J).

63. After sending the March 2012 letter purporting to cancel the permit for the Water Supply, neither Property One, Ms. Schlafke, nor anyone acting on their behalf, conducted any further monitoring/sampling of the Water Supply or reporting with regard to the Water Supply. (DEP Ex. C; *2017 SJ Opinion*; T. 109-110, 115, 201-228).

64. Neither Property One nor Ms. Schlafke reported to the Department the monthly total coliform sample results, the monthly chlorine disinfectant residual concentration in the distribution system of the Water Supply, or the daily entry point chlorine disinfectant residual concentration for the monitoring period of March 2012, or the quarterly synthetic organic chemicals sample results for the monitoring period of the 1st Quarter of 2012, in violation of 25 Pa. Code § 109.301. (*2017 SJ Opinion*, at 1221).

65. On April 20, 2012, the Department inspected the Site and determined that the Water Supply continued to be a community water system as defined by 25 Pa. Code § 109.1, because the connections to the Water Supply were greater than 14 and the population being served by the Water Supply numbered greater than 24 persons. (DEP Ex. C).

66. On April 26, 2012, the Department sent a letter to Property One and Ms. Schlafke informing them that they had not provided sufficient information for the Department to grant the request to cancel the permit and that the Water Supply remained a permitted and regulated public water system subject to the SDWA. (DEP Ex. J; T. 192-193).

67. The Department's April 26, 2012 letter set forth again the actions that Property One and Ms. Schlafke could undertake to reduce the number of connections served by the Water Supply in order to effectively request that the Department cancel the existing Amended Permit. (DEP Ex. J; T. 193).

68. Ms. Schlafke received the Department's April 26, 2012 letter but did not contact the Department. (DEP Ex. M, at 100; T. 194).

69. The Department followed up on its April 26, 2012 letter via e-mail a few weeks later but received no response. (T. 194).

70. The Department sent seven additional letters to Property One and Ms. Schlafke from June 2012 through September 2012. Ms. Schlafke stated in her deposition that she had not seen any of these letters but agreed that all of the letters had been sent to Property One's business address which was also her home address. (DEP Ex. P)

71. Neither Property One nor Ms. Schlafke provided the Department with any evidence that Property One had (1) permanently disconnected the water service lines so that the termination point was below ground at any of the lots; (2) removed the mobile home units from the lots owned by Property One that would be no longer occupied; or (3) removed any water service infrastructure from the lots not owned by Property One. (T. 171).

72. Neither Property One nor Ms. Schlafke provided the Department with a completed affidavit and map identifying which water service connections continued to receive water and which lots were permanently disconnected from the Water Supply. (T. 172).

73. On May 10, 2012, the Department again inspected the Site and determined that Property One and Ms. Schlafke continued to operate a public water system. (DEP Ex. C).

74. On July 19, 2012, the Department inspected the Water Supply and determined that no disinfectant residual concentration was detectable at either the entry point or in the distribution system, and that the disinfection feed system was not working properly in violation of 25 Pa. Code §§ 109.4(2), 109.202(c)(3), 109.710, and 109.1302. (T. 218-219; *2017 SJ Opinion,* at 1221).

75. During the July 19, 2012 inspection, the Department also confirmed that neither Property One nor Ms. Schlafke were employing the services of a certified operator for the Water Supply in violation of 25 Pa. Code § 109.704. (T. 222; *2017 SJ Opinion,* at 1221).

76. On July 19, 2012, the Department issued a public notice, as set forth in 25 Pa. Code §§ 109.408(a) and 109.411, to the residents of Doral Estates informing them that no disinfectant residual concentration was detected in the Water Supply and advising them to boil their water prior to any use. (DEP Ex. C).

77. Failure to conduct routine monitoring of the Water Supply and maintain the disinfection feed system at the Water Supply presented a risk to human health. (T. 108-109, 115-116).

78. On August 27, 2012, the Department inspected the Water Supply and determined that the Water Supply was serving more than 14 service connections, and that Property One and Ms. Schlafke continued to operate a community water system. (DEP Ex. C).

79. On August 27, 2012, the Department inspected the Water Supply and determined that the disinfectant residual concentration detected at the entry point was below the minimum requirement established in the Amended Permit, in violation of 25 Pa. Code §§ 109.504(c) and 109.1302. (T. 222; *2017 SJ Opinion,* at 1222).

80. The Department again confirmed on August 27, 2012, that neither Property One nor Ms. Schlafke were employing the services of a certified operator for the Water Supply, in violation of 25 Pa. Code § 109.704. (T. 222, 224; *2017 SJ Opinion,* at 1222).

81. Property One and Ms. Schlafke's failure to maintain a disinfectant residual concentration at the entry point above the minimum requirement on August 27, 2012, made the system susceptible to fecal contamination and viruses and presented a risk to customers of the Water Supply. (T. 105, 223).

82. Property One and Ms. Schlafke did not issue a Consumer Confidence Report ("CCR") for 2012. (T. 192).

83. Property One and Ms. Schlafke did not issue any public notices regarding missed monitoring at the Water Supply that occurred between February 2012 and October 2012. (T. 189-190, 216).

84. On October 5, 2012, the Department issued the 2012 Order against Property One and Ms. Schlafke. (DEP Ex. C).

85. Property One and Ms. Schlafke both appealed the 2012 Order to the Board, but no supersedeas was sought. (*See* EHB Docket No. 2012-186-B).

86. Neither Property One nor Ms. Schlafke ever complied with the 2012 Order. *(2017 SJ Opinion*; T. 119-120, 228)

87. A portion of Doral Estates was sold at a county tax sale in September 2012. (T. 296 – 300).

88. On November 16, 2012, the Department filed a Petition to Enforce the 2012 Order in the Crawford County Court of Common Pleas at Docket No. A.D. 2012-1403. (T. 117, 120).

89. On December 7, 2012, Ms. Schlafke contacted the electric company and had the electric power supply to the Water Supply turned off. Ms. Schlafke did not contact any residents of Doral Estates prior to turning off the Water Supply electrical power. (DEP Ex. P, at 146).

90. The interruption of power to the Water Supply depressurized the system and created a potential for contamination of the Water Supply and resulted in the Department issuing a notice to customers of the Water Supply advising them to boil their water prior to consumption. (T. 113-115).

91. Following the interruption of power to the Water Supply, a resident of Doral Estates contacted the utility company and had the electric service for the Water Supply placed in her name. (T. 34).

92. The power interruption to the Water Supply served as a catalyst for the formation of the Hardwood Estates Resident Association ("HERA") in December 2012. (T. 33-34).

93. HERA informally took over operating the Water Supply starting in December 2012 after the power interruption and continued to do so up until the time it was appointed as the receiver for the Water Supply. (T. 37, 50-51, 300-304; Schlafke Exs. MS-17, 18, 19, 21).

94. Mr. Donghia submitted water sampling data for the Water Supply in April 2012. (T. 300-301; Schlafke MS-17).

95. HERA submitted water testing results for the Water Supply to the state system for April 2013, May 2013 and June 2013. (T. 300-304; Schlafke Exs. MS-18, 19, 21)

96. In an effort to ensure the residents of Doral Estates had access to safe drinking water the Department sought extraordinary relief from the Crawford County Court of Common Pleas in the form of a court appointed receiver for the Water Supply. (T. 122-122).

97. On June 10, 2013, the Crawford County Court of Common Pleas granted the Department's Motion for Extraordinary Relief and appointed HERA as a court-appointed receiver for the Water Supply. The Court authorized HERA to manage and operate the Water Supply, maintain the Water Supply, and collect payments from customers of the Water Supply. (DEP Ex. I).

98. On April 24, 2015, HERA purchased Doral Estates and applied to transfer the public water supply permit from Property One to HERA. (T. 36).

99. On June 30, 2016, the Department assessed a civil penalty against both Property One and Ms. Schlafke in the amount of $218,568.00 for violations of the SDWA. (T. 128; DEP Ex. D).

100. The Department's penalty assessment covers the following 16 violations and listed the following penalty amounts for each violation:

a. Failure to collect/report entry point disinfectant residual results from February 2012 through October 2012 - $36,300.00 ("Violation 1");

b. failure to collect/report nitrate and nitrite at the entry point for the monitoring period of January 2012 through December 2012 - $150.00 ("Violation 2");

c. failure to collect/report synthetic organic compounds at the entry point for the first, second, and third quarters of 2012 - $450.00 ("Violation 3");

d. failure to collect/report inorganic compounds at the entry point for the monitoring period of January 2012 through December 2012 - $150.00 ("Violation 4");

e. failure to collect/report volatile organic compounds at the entry point for the monitoring period of January 2012 through December 2012 – $150.00 ("Violation 5");

f. failure to collect/report asbestos within the distribution system for the monitoring period of January 2011 through December 2013 - $150.00 ("Violation 6");

g. failure to collect/report monthly total coliform sample results from March 2012 through October 2012 - $1,200.00 ("Violation 7");

h. failure to collect/report monthly distribution system chlorine disinfectant residual results from March 2012 through October 2012 - $1,200.00 ("Violation 8");

i. failure to issue a Consumer Confidence Report for 2011 and 2012 - $300.00 ("Violation 9");

j. failure to issue a public notice for missed monitoring between February 2012 and October 2012 - $4,200.00 ("Violation 10");

k. failure of key treatment process resulting in lack of a disinfectant residual concentration on July 19, 2012 at either the entry point or in the distribution system - $350.00 ("Violation 11");

l. failure to respond to an emergency with regard to the July 19, 2012, lack of disinfectant residual concentration in the Water Supply - $350.00 ("Violation 12");

m. failure to respond to treatment technique violation with regard to the July 19, 2012, lack of disinfectant residual concentration in the Water Supply - $200.00 ("Violation 13");

n. failure to maintain on August 27, 2012, a disinfectant residual concentration at the entry point above the minimum requirement - $300.00 ("Violation 14");

o. failure to employ the services of a certified operator for the Water Supply - $5,850.00 ("Violation 15")

p. failure to comply with the Department's 2012 Order - $141,600.00 ("Violation 16"). (DEP Ex. E; T. 201-228).

101. The civil penalty assessment was drafted by Mr. Matthew Postlewaite and approved by Mr. Brad Vanderhoof. (T. 127-128).

102. Mr. Postlewaite has been employed by the Department for 29 years and is currently an Environmental Group Manager for the Department's Northwest Region Safe Drinking Water Program. He has performed over 50 civil penalty calculations. (T. 185-186)

103. Mr. Postlewaite used the Department's penalty matrix ("Penalty Matrix") and the Safe Drinking Water Program's Compliance Strategy ("Compliance Strategy") in determining the amount of the civil penalties assessed against Property One and Ms. Schlafke. (T. 196-197).

104. The Compliance Strategy includes the following factors to be used in calculating a civil penalty: size and/or type of water supply, culpability, and the seriousness of the violation. (T. 100; DEP Ex. F).

105. The Department determined that the Water Supply was a small community water system with a population of less than 100 for purposes of determining the amount of the civil penalty. (T. 200).

106. The Compliance Strategy identifies four levels of culpability which are in decreasing order of willfulness on the part of the water supplier as follows: deliberate or intentional, reckless, negligent, or no culpability. (T. 103, 198; DEP Ex. F).

107. Mr. Postlewaite determined that Ms. Schlafke's culpability for all of the violations was reckless except for Violation No. 16 which he treated as a deliberate violation. (DEP Ex. E; T. 201-228).

108. The Compliance Strategy identifies four levels of seriousness to violations of the SDWA which are in decreasing order of seriousness as follows: imminent threat violations; failure to comply with an order; priority violations; and operational or administrative violations (also identified as management violations) (T. 101, 197-198; DEP Ex. F).

109. Mr. Postlewaite identified the level of seriousness for the violations as follows: Operational/Management Violations (Violation Nos. 1 through 10, No. 13 and No. 15); Priority Violations (Violation No. 14); Failure to Comply with an Order Violations (Violation No. 16) and Imminent Threat Violations (Violation Nos. 11 and 12) (DEP Ex E; T. 201-228)

110. The Department's personnel costs assessed as part of the civil penalty assessment, total $3,695.00 based on 119 hours of Department time. (T. 229-230; Ex. E).

111. The breakdown of hours and rates presented by the Department is as follows: Mr. Singer - 72 hours at $21.93 per hour; Mr. Postlewaite - 32 hours at $42.69 per hour; Mr. Vanderhoof - 15 hours at $49.99 per hour. (DEP Ex. E).

112. The Department assessed $12,400.00 as part of the civil penalty assessment for alleged cost savings associated with failing to employ a certified water operator for 31 months as part of the civil penalty assessment. (T. 231).

113. Mr. Postlewaite used an estimated average monthly cost for employing a certified water operator of $400.00 and multiplied it by 31 months to arrive at the alleged cost savings of $12,400.00. (T. 231).

114. The Department's civil penalty assessment includes alleged costs savings associated with various monitoring violations totaling $8,040.00. (T. 232).

115. The amount of $8,040.00 was determined after contacting local accredited laboratories to determine the average costs associated with the types of sampling that Property One and Ms. Schlafke failed to conduct. (T. 232).

DISCUSSION

Legal Standard

Under the Board's Rules, the Department bears the burden of proof in an appeal of a civil penalty assessment. 25 Pa. Code § 1021.122(b)(1); *see, e.g.*, *Russell v. DEP*, 2015 EHB 360,

369, *Rhodes v. DEP*, 2009 EHB 599, 623. The Department must show by a preponderance of the evidence that: (1) the violations that led to the assessment in fact occurred; (2) the imposed penalty is lawful under applicable law; and (3) the penalty was a reasonable and appropriate exercise of the agency's discretion. *Brian Whiting and Whiting Roll-Off, LLC., v. DEP*, 2015 EHB 799; *Thomas Gordon v. DEP*, 2007 EHB 268; *Clearview Land Development v. DEP*, 2003 EHB 398; *Stine Farms and Recycling, Inc., v. DEP*, 2001 EHB 796. In an appeal from a civil penalty assessment based on violations of the Safe Drinking Water Act ("SDWA"), the Board determines first whether the underlying violations occurred, and then whether the amount assessed by the Department is reasonable. *Wilbar Realty Inc. v. DER*, 1994 EHB 999, *aff'd* 663 A.2d 857 (Pa. Cmwlth. 1995). In reviewing the reasonableness of civil penalty assessments, the Board "must determine whether there is a reasonable fit between each violation and the amount assessed." *Thebes v. DEP*, 2010 EHB 370, 398. When we review a civil penalty assessment, "we do not start from scratch by selecting what penalty we might independently believe to be appropriate. Rather we review the Department's predetermined amount for reasonableness." *Id.* at 398. The Board's scope of review is *de novo*. *See, e.g., Jake v. DEP*, 2014 EHB 38; *Smedley v. DEP*, 2001 EHB 131.

Additionally, the Board is not bound by the Department's civil penalty matrix. *Russell v. DEP*, at 368; *DEP v. Stambaugh*, 2012 EHB 93, 96 n.1. "Our task is not to review the Department's civil penalty matrix. The matrix is a guidance document which may be a useful tool to Department personnel, but it is not binding on the Department or the Board." *DEP v. Thebes*, 2010 EHB 370, 398. If we determine that the Department's calculations are not a reasonable fit, then the Board may substitute its discretion and direct the Department as to the

proper assessment. *The Pines at West Penn, LLC., v.* DEP, 2010 EHB 412, 420; *B & W Waste Disposal Inc. v. DEP*, 2003 EHB 456, 468.

Analysis

Ms. Schlafke's NOA challenged the Department's assessment of a civil penalty of $218,568.00 under the SDWA, 35 P.S. § 721.13(g). The penalty amount sought by the Department is based on 16 separate violations of the SDWA and also includes a claim for Department costs and alleged cost savings by Ms. Schlafke. As a result of our prior rulings in this matter, some of the issues that the parties discuss in their post-hearing briefs and which normally would be relevant to our decision in a penalty assessment case have already been resolved. Specifically, in the *2017 SJ Opinion*, we found that certain violations identified in the 2016 Assessment had in fact occurred and that Ms. Schlafke was liable for these violations. Unfortunately, the manner in which the violations were listed in the 2016 Assessment does not directly match the 16 violations that the Department presented in its hearing testimony and in the penalty calculations listed in the Department's Exhibit E. This creates some difficulty in determining which of the 16 identified violations are beyond challenge in this appeal. Based on our review, we conclude the occurrence of the following violations and Ms. Schlafke's liability for these violations was previously determined: Violation No. 1 (partial – February 2012 through June 2012; Violation No. 3 (partial – 1st and 2nd quarter of 2012); Violation No. 7 (partial – March 2012 through June 2012); Violation No. 8 (partial – March 2012 through June 2012); Violation No. 9 (partial – failure to issue 2011 CCR); Violation No. 11; Violation No. 12; Violation No. 13; Violation No. 14; Violation No. 15 (partial – No certified operator on August 27, 2012) and Violation No. 16 (partial, failure to comply with paragraphs 2, 3, 4, 7, 9, 10, 12, and 13 of the 2012 Administrative Order). The violations for which occurrence and/or Ms.

Schlafke's liability were not decided by the prior Board decisions are as follows: Violation No. 1 (partial – July 2012 through September 2012); Violation No. 2; Violation No. 3 (partial – 3rd quarter of 2012); Violation No. 4, Violation No. 5; Violation No. 6; Violation No. 7 (partial - July 2012 through October 2012); Violation No. 8 (partial – July 2012 through October 2012); Violation No. 9 (partial – failure to issue 2012 CCR); Violation No. 10; Violation No. 15 (partial – no certified operator – August 28 through October 5, 2012) and Violation No. 16 (partial – failure to comply with paragraphs 5 and 6 of the 2012 Administrative Order) (hereinafter collectively the "Undetermined Violations").

Review of Civil Penalty Assessment

We now turn our attention to the first issue that we review when addressing an appeal of a civil penalty, namely has the Department demonstrated that the violations that led to the assessment in fact occurred. We find that the Department presented adequate uncontested testimony to meet its burden regarding each of the Undetermined Violations that form the basis of a portion of the civil penalty assessed by the Department. Mr. Postlewaite testified regarding each of the 16 violations, including each of the Undetermined Violations. His testimony regarding the occurrence of the violations was credible and largely unchallenged by Ms. Schlafke. The Board is satisfied that the Department has shown by a preponderance of evidence that the violations, both the prior determined violations and the Undetermined Violations, that underlie the civil penalty assessment in fact occurred as stated in the 2016 Assessment.

While Ms. Schlafke did not significantly challenge the occurrence of the violations, she did argue that as the managing partner of Property One, she should not be personally liable for any of the violations and associated penalties. We previously held in our *2017 SJ Opinion* that

Ms. Schlafke was personally liable for some, but not all, of the identified violations under the doctrine of res judicata and based on her admissions during discovery. Ms. Schlafke asks us to re-consider that decision, but we decline to do so and stand by our prior determination. The Department argues that Ms. Schlafke is liable for the Undetermined Violations as a result of her personal participation in these violations. Ms. Schlafke asserts that she was not the permittee or operator of the Water Supply and therefore was not responsible for completing the various permit requirements and is not liable for any violations arising from the failure to comply with the permit or the SDWA. She relies, at least in part, on the alleged poor financial condition of Property One and the recent Commonwealth Court decision in *B&R Resources, LLC v. DEP*, 180 A.3d 812 (Pa. Commw. Ct. 2018) ("*B&R Resources*") to argue that she should not be personally liable for any violations, including the Undetermined Violations, and for any associated civil penalties. The Commonwealth Court in *B&R Resources* upheld application of the participation theory to actions of a corporate officer in a limited liability company. *Id*. at 818. As discussed in *B&R Resources*, Ms. Schlafke may be found liable under the participation theory if 1) she had knowledge of Property One's violations, 2) failed to direct Property One to take reasonable efforts to address the violations and/or actively avoided addressing the violations and 3) she had the necessary authority and duty to act to address the violations. The Commonwealth Court in *B&R Resources* further stated that "A … limited liability company officer 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*. at 821. Following the guidance set out by the Commonwealth Court in *B&R Resources*, we will review Ms. Schlafke's knowledge, authority and conduct to determine whether she is personally liable for the

Undetermined Violations and the extent of her liability, if any, for the civil penalties assessed by the Department.

Property One, Inc. was formed by Ms. Schlafke and one other individual, Hector Venus, in the early 1990's to buy, develop and flip commercial real estate. Ms. Schlafke's duties at Property One, Inc. involved finding suitable real estate, conducting due diligence on the real estate and putting together contracts for properties. Property One, Inc. purchased many different properties during its operations, including the purchase of Doral Estates in 2004. Ms. Schlafke understood at that time that Property One, Inc. was required to hire an approved operator to run the Water Supply. Property One, Inc. contracted with Rod Donghia of Donghia Environmental to serve as the certified water operator in 2009.[2] In 2011, Property One, Inc. changed its corporate structure and became a limited liability company known as Property One, LLC. Ms. Schlafke and her husband, William Schlafke, were the only two individuals involved with Property One, LLC according to Ms. Schlafke. She became the managing member when Property One, LLC was formed and remained the managing member at all times relevant to the issues in this case.

The Undetermined Violations arose out of the failure to meet certain testing, monitoring and reporting requirements for the Water Supply at Doral Estates in 2012 and 2013. In December 2011, an Amended Permit for the Water Supply was issued to Property One. The Department sent the Amended Permit to Property One under a cover letter addressed to Ms. Schlafke. The cover letter and attached permit detailed the requirements for the Water Supply including a specific requirement to begin compliance monitoring for free chlorine at the entry point no later than February 1, 2012. Ms. Schlafke acknowledged speaking to Mr. Donghia, the

[2] Nothing in the record addresses the compliance status of the Doral Estates public water supply prior to 2009.

certified operator for the Water Supply, about the requirements under the Amended Permit, and the associated costs for meeting those requirements. According to Ms. Schlafke, Mr. Donghia sent a bill for $4,000.00 related to the requirements in the Amended Permit and requested payment up front. Ms. Schlafke made the decision to cease employing Mr. Donghia as the certified Water Supply operator for the Water Supply in March 2012. Ms. Schlafke tried to hire a new certified operator but did not retain anyone to operate the Water Supply after March 2012 even though Property One continued to provide water to residents of Doral Estates. The failure to retain Mr. Donghia or another certified water operator to run the Water Supply was a principal cause of the Undetermined Violations since there was no one to collect, test and report on the water samples as required by the Amended Permit and the SDWA.

Instead of addressing the violations caused by the lack of a certified operator to conduct the required testing and reporting, Ms. Schlafke sent a letter on behalf of Property One to the Department dated March 14, 2012, advising the Department that Property One was canceling its permit for the Water Supply. In the letter, Ms. Schlafke claimed that the Water Supply only serviced twelve lots and therefore no testing was required. On April 26, 2012, the Department sent a letter addressed to Ms. Schlafke stating that Property One had not provided sufficient information to allow the Department to determine that the Water Supply no longer qualified as a public water supply and requested that further information be provided. The Department's April 2012 letter specifically noted that certain violations of monitoring and reporting requirements had occurred and that Property One was "required to continue to meet all of the requirements of the SDWA and its regulations, including monitoring and reporting of required parameters." (DEP Ex. J, at 2). Ms. Schlafke did not communicate with the Department following her receipt of the April 2012 letter. She took no action to address the lack of

monitoring or reporting or to follow through on the Department's request for evidence that the Water Supply no longer qualified as a public water supply. The Department attempted further written communication with Ms. Schlafke and Property One between the time of the April 2012 letter and the Department's issuance of the 2012 Administrative Order in early October 2012. However, the record appears to reflect that Ms. Schlafke failed to pickup/accept several certified letters sent by the Department during this time period. The Department issued the 2012 Administrative Order in October 2012 and served it on Ms. Schlafke through personal service by the local Florida sheriff. Ms. Schlafke acknowledged receipt of the 2012 Administrative Order and acknowledged that neither she nor Property One took any steps to comply with the specific requirements outlined in the 2012 Administrative Order. Her only apparent response to the Department's 2012 Administrative Order other than filing NOAs with the Board was to contact the electric service provider for the Water Supply on December 7, 2012, to have the power turned off to the well pump and disable the Water Supply.

The evidence presented demonstrates that Ms. Schlafke had knowledge of the problems with the Water Supply and the resulting violations and failed to direct Property One to take reasonable efforts to address the violations. Ms. Schlafke received various communications from the Department outlining the monitoring and reporting requirements and noting that there were ongoing issues with compliance at the Water Supply. She communicated directly with Mr. Donghia about the requirements under the Amended Permit issued in December 2011. Ms. Schlafke was aware that the required water testing was done or overseen by Mr. Donghia and that once he was let go, no certified water operator was conducting the required monitoring, testing and reporting. The information provided by the Department and Mr. Donghia was sufficient for Ms. Schlafke to know of the violations that took place. She was aware of Property

One's need to have a certified operator involved in running the Water Supply and, in the absence of a certified operator, that the permit requirements would not be met and the monitoring and reporting violations that make up the Undetermined Violations would result.

Ms. Schlafke failed to have Property One take reasonable steps to address the violations. The issues at the Water Supply first came to a head in the February/March 2012 time frame. Ms. Schlafke stated that Mr. Donghia requested a $4,000.00 payment in March 2012 to proceed with the required testing at the Water Supply and to continue his work as the certified water operator. However, the invoice from that time included as an exhibit (Schlafke Ex. MS-7) by Ms. Schlafke requests a payment of $1775.00 and there is no evidence supporting her $4,000.00 claim. Mr. Donghia specifically denied ever telling Ms. Schlafke that she needed to pay him that amount. Mr. Donghia stated that if Property One and Ms. Schlafke had continued to make payments, he was willing to continue as the certified operator for the Water Supply. Ms. Schlafke stopped paying Mr. Donghia and made no arrangements to have a certified operator run the Water Supply. Instead, Ms. Schlafke attempted to cancel the permit for the Water Supply by sending a letter to the Department. Her letter lacked supporting detail. The Department responded to her effort to cancel the permit with correspondence requesting additional information to demonstrate that a permit was no longer required. Ms. Schlafke did not respond to the Department's request and ignored several other letters from the Department over the following months.

The Department inspected the Water Supply after receiving Ms. Schlafke's letter purporting to cancel the permit. The Department determined that the Water Supply continued to qualify as a public water supply and that a permit was still required. As it became increasingly clear that the Water Supply was not being tested as required by the permit and the SDWA, the Department issued the 2012 Administrative Order naming both Property One and Ms. Schlafke.

There is no evidence that Ms. Schlafke contacted the Department after receiving the 2012 Administrative Order or made any effort to address the numerous requirements set forth in the 2012 Administrative Order. Instead she contacted the electric company to turn off the electricity to the well pump. Ms. Schlafke may have viewed this as an effort to satisfy a portion of the Department's requirements, but we conclude that it was not an adequate or appropriate response. When we view all of these actions, we think they demonstrate a failure on the part of Ms. Schlafke to have Property One take reasonable actions to address the violations. Ms. Schlafke and Property One undoubtably faced difficulties in trying to address the issues facing the Water Supply in 2012 but ignoring the Department's reasonable request for further information and failing to pursue some of the options available was patently unreasonable under the circumstances.

Ms. Schlafke had both the authority and duty to address the violations. She was the managing member of Property One at the time the Undetermined Violations took place. The only other member of Property One was her husband, William Schlafke, and there was no evidence presented that he played any meaningful role in the operations of Property One. It is clear that during the relevant time period, Ms. Schlafke was the main contact for Property One regarding the Water Supply for both the certified operator, Mr. Donghia, and for the Department. Ms. Schalfke testified in her deposition that she made the decision that Property One would contract with Mr. Donghia to serve as the certified water operator. Mr. Donghia stated that when issues arose or when the testing requirements changed, he contacted Ms. Schlafke to discuss them. Ms. Schlafke made the decision to terminate Mr. Donghia's services and she attempted to find a different certified operator. Ms. Schlafke was the only person to sign checks on behalf of Property One. It is clear that Ms. Schlafke had the authority to direct Property One's actions

including any actions necessary to address the Undetermined Violations. Ms. Schlafke also had the duty to address the issues that gave rise to the violations. Ms. Schlafke was the sole actor on behalf of Property One and directed all of the actions taken by Property One. Under these circumstances, the duty to address the Undetermined Violations rested firmly on Ms. Schlafke. No other person was in a position to ensure that the issues with the Water Supply were addressed by Property One. Ms. Schlafke clearly failed to exercise her authority over the actions of Property One and neglected her duty to address the significant issues that led to the Undetermined Violations.

We find that Ms. Schlafke personally participated in the actions that led to the Undetermined Violations. However, her personal liability for those violations needs to be evaluated under the standard set out in the Commonwealth Court's recent ruling in *B&R Resources*. In *B&R Resources*, the Commonwealth Court held that an officer of an LLC "is liable for a statutory violation under the participation theory only if there is a causal connection between his wrongful conduct and the violation." *B&R Resources*, at 821. According to the Commonwealth Court, Mr. Campola's wrongful conduct in *B&R Resources*, as determined by the Board, consisted of his decision to not address the violations (failure to plug wells) and to use the company's financial resources for other purposes. *Id*. The Commonwealth Court found that in order for there to be the required causal connection, the company had to have the ability to address the violations and remanded the case to the Board to determine how many of the violations the company could have addressed if Mr. Campola had caused the company to make reasonable efforts to address the violations. *Id*. at 821-22. Ms. Schlafke argues that, like Mr. Campola's claim in the *B&R Resources* case, her company, Property One, lacked the necessary financial resources to address the issues with the Water Supply and, as a result, there is no causal

connection between her wrongful conduct and the Undetermined Violations. The Department asserts that Ms. Schlafke's claim that Property One lacked the financial resources to address the violations is an affirmative defense and therefore, the burden to demonstrate financial inability rests with Ms. Schlafke. The Department contends that she has failed to meet this burden.

We agree with the Department that in a case involving a claim that an individual is liable under the personal participation theory, where the individual raises the issue of the company's financial inability to address the violations as a means to break the causation chain, the financial inability claim is in the nature of an affirmative defense. We think that is the context in which the Commonwealth Court viewed Mr. Campola's claim in *B&R Resources* when it stated "Petitioners also contend that liability cannot be imposed on Campola for wells that B&R lacked the financial resources to plug. This argument is meritorious." *Id.* at 821. Because the financial inability claim is in the nature of an affirmative defense, we also agree with the Department that the burden to demonstrate that the company lacked the necessary financial resources to address the violations rests with the party making the claim, in this case, Ms. Schlafke. Assigning the burden in this manner is appropriate because it places the burden on the party who is in the best position to access the information necessary to make the required demonstration. The company, along with its corporate officer or member, is more likely to be in possession of the financial information required to support a claim that the company lacks the financial resources to address the violations than the Department. In this case, therefore, we hold that Ms. Schlafke is responsible for demonstrating that Property One lacked the financial resources to address the Undetermined Violations. If she meets her burden on this issue, she will not be personally liable for any civil penalties associated with the Undetermined Violations since her wrongful conduct

cannot be found to have caused the Undetermined Violations pursuant to the Commonwealth Court's holding in *B&R Resources*.

We need to address one other preliminary issue before we look at the evidence regarding the financial resources of Property One. The Department asserted that the appropriate legal standard for measuring a company's financial inability to address violations is that the company must demonstrate "actual insolvency." The Department first notes that the Commonwealth Court in *B&R Resources* does not set forth a legal standard for assessing whether a company lacks the financial resources to address violations. Citing just a single case, the Department then argues that, in other corporate law contexts, Pennsylvania courts have treated the financial inability defense as requiring a showing of actual insolvency in order for the defense to prevail. We do not read the Commonwealth Court's discussion in *B&R Resources* as requiring a party to show that the company is insolvent in order to assert financial inability as a defense in a personal participation case. In *B&R Resources*, the Commonwealth Court stated that Mr. Campola could only be liable to the extent that the company had the ability to plug a well or wells. The Commonwealth Court remanded the matter to the Board to determine the cost to plug a well, and how many wells, if any, the company could have plugged if Mr. Campola had caused the company to make reasonable efforts to plug wells. Nothing in the Commonwealth Court's wording suggests that the extent of Mr. Campola's liability hinges on whether B&R Resources is actually insolvent. Instead, the Commonwealth Court decision requires the Board to examine the costs of compliance along with the financial resources of the company to determine what portion, if any, of those resources should have been used to address the violations. We reject the Department's argument that unless Property One was actually insolvent, Ms. Schlafke's assertion of a financial inability defense has no merit. We must evaluate the costs of compliance

and the financial resources available to Property One to determine whether Ms. Schlafke satisfied her burden to show that the financial inability defense should limit her personal liability.

We first look to see what evidence we have regarding the costs of compliance for the Undetermined Violations. These violations are principally related to the failure to retain a certified water operator for three months in 2012, the failure to collect and report certain water tests and the failure to provide certain required notifications. We have incomplete and inconsistent information as to the costs associated with the missed requirements that led to these violations. Ms. Schlafke testified in her deposition that she spoke with Mr. Donghia, the certified water operator in March 2012 about the new requirements for water testing under the Amended Permit. As previously discussed, Ms. Schlafke stated that he wanted the money upfront and sent her a bill for $4,000.00. We don't have any detail on what specific tasks and testing were included in the $4,000.00 bill amount. Mr. Donghia provided evidence regarding his fees and the costs of certain tests. Mr. Donghia testified that his monthly fee for his services which included some collection and testing of the water was $275.00. He also testified that the cost of quarterly SOC testing was $1,300.00 and the costs of annual testing for VOCs and IOCs were in the $150.00 to $200.00 range. We do have a copy of an invoice for $1,775.00 from Donghia Environmental from March 2012. The March 2012 invoice listed a fee of $275.00 for water plant operation services and $1,500.00 for quarterly SOC testing. The testimony did not provide an explanation for why the two different costs for quarterly SOC testing. Finally, we have the Department's request for cost savings that formed part of its civil penalty assessment. The claimed cost savings were based on information gathered by the DEP from other local service providers. The Department concluded that the average monthly service cost for a certified water operator was $400.00 and the costs for the missed water testing and reporting was

$8,050.00. It is not clear from the Department's testimony regarding the cost savings exactly what tests were included in the calculation, but it appears that it likely included testing that made up the settled violations and the Undetermined Violations. There was no testimony regarding any potential costs associated with the violation for failing to file the 2012 consumer confidence report ("CCR"), but these costs (principally printing and postage) would be minimal. The available information is less than perfect but, after our review of the information available to the Board, we find that the cost for Property One to have complied with the requirements that resulted in the Undetermined Violations and associated penalties was approximately $3,550.00 for 2012. If Property One had continued to operate the Water Supply in 2013 in compliance with the requirements, we estimate the annual costs to retain a certified water operator and conducting the necessary testing for 2013 at $10,000.00. These numbers appear to be relatively consistent with the alleged cost savings cited by the Department.

We now look at what evidence was presented regarding the financial resources of Property One to cover the identified costs. The evidence only provides a limited picture of the financial resources of Property One. Ms. Schlafke chose not to testify at the hearing, so we do not have the benefit of any live testimony she may have offered on this issue and once again have to rely on her limited deposition testimony entered as exhibits in the case. In her deposition testimony, Ms. Schlafke referenced a spreadsheet (DEP Ex. N) that listed rent payments that included water service and separate water service payments collected by Property One in 2012. According to Ms. Schlafke's testimony and the spreadsheet, Property One received $32,936.00 in rent and $1,375.00 in separate water service payments in 2012. A tenant, Ms. Close, testified that she paid rent of $145.00 and a water service payment of $25.00 that appear not to be reflected on the spreadsheet which calls into question the completeness of the information on the

spreadsheet. Ms. Close stated that she believed many tenants stopped paying rent and water service fees to Property One by early 2013. Another tenant, Mr. Jones, testified that he stopped paying rent to Property One in December 2012. This is consistent with testimony from Ms. Schlafke that Property One did not receive any rent payments in 2013.

While we have some information regarding the income of Property One from rent and the water services in the relevant time period, we have no information regarding any other sources of income collected by Property One or the value of the assets held by Property One. We also lack any real information concerning Property One's expenses related to Doral Estates beyond those related to the Water Supply discussed above. Property One was formed as a real estate investment company and, at least at one time, owned multiple properties. We do not know what, if any, properties Property One owned in 2012 besides Doral Estates. Property One did apparently have financial issues that lead to a portion of the real estate that made up Doral Estates being sold in a tax sale in September 2012. Ms. Schlafke also testified that Property One was behind on mortgage payments, but we have no information regarding the mortgage balance, the amount of any mortgage payments and how far in arrears Property One was on the mortgage.

Viewing the limited financial information available to the Board in this case, we conclude that Ms. Schlafke has not carried her burden to demonstrate that Property One lacked the financial resources to address the issues that led to the Undetermined Violations. The estimated costs to comply with the permit and SDWA requirements during 2012 were approximately 10% of the known income collected by Property One during that time period. We have no information about other income or assets available to Property One. We know that Property One faced some financial issues given that a portion of the Doral Estates property was sold at tax sale in 2012 and Ms. Schlafke's testimony that Property One was behind on mortgage payments.

However, we were not presented sufficient information about these issues by Property One and Ms. Schlafke and any conclusions we can draw about the financial condition of Property One would be speculation on our part. Ms. Schlafke did not give us sufficient evidence to rule in her favor on the financial inability defense. Therefore, we hold that Ms. Schlafke is liable under the personal participation theory for the Undetermined Violations.

Lawfulness of Penalty Amount

We now turn our attention to the second part of our analysis of a civil penalty appeal. We need to determine whether the penalty is lawful under the SDWA. The SDWA provides that the Department may assess a civil penalty of up to $5,000.00 per day for each violation of the SDWA, a Department rule or regulation, Department order or any term or condition of any Department-issued permit. 35 P.S. § 721.13(g). The maximum daily penalty sought by the Department in this case is $600.00 for violations of the Department's 2012 Administrative Order. The amount is obviously less than the legal amount provided by the SDWA and, therefore, we find that the penalty amounts sought by the Department are lawful.

Reasonable and Appropriate Penalty Amount

The Board must next evaluate whether the civil penalty amounts sought by the Department against Ms. Schlafke personally are reasonable and appropriate. The Department contends that the amounts it is seeking appropriately reflect the seriousness of the violations and properly consider Ms. Schlafke's culpability in the violations. The Department further argues that it properly used its discretion to adjust the penalty amounts to reflect the nature and magnitude of the risk associated with the violations. Ms. Schlafke argues that the penalty amount sought by the Department is not reasonable or appropriate because the penalty amount

selected for each violation was arbitrary and the duration selected by the Department for some of the penalties is inconsistent with the facts of the case.

The SDWA does not list criteria for consideration in determining the amount of a civil penalty. The Department relied on an internal guidance document, the Safe Drinking Water Program Compliance Strategy (DEP Ex. F) in determining the civil penalty in this case. The Compliance Strategy states that the goal of civil penalties under the SDWA is to provide incentive for the water supplier to not have repeat violations. The Compliance Strategy identifies certain factors that Department staff should consider in determining a civil penalty including the seriousness of the violation, culpability, the size of the water supply and the duration of the violation. The Board, of course, is not bound by the Department's internal guidance document. *DEP v. Victor Kenney d/b/a Kennedy's Mobile Home Park*, 2007 EHB 15; *United Refining Company v. DEP*, 2006 EHB 846*; Dauphin Meadows v. DEP*, 2001 EHB 521. However, in the absence of any statutory criteria in the SDWA, we think that the factors considered by the Department, as well as any additional factors unique to the case, are a proper basis for the Board's consideration in determining whether the civil penalty sought by the Department in this case is reasonable and appropriate.

As listed by the Department in DEP Ex. E, Violation Nos. 2 through 8 involve a common issue, the failure to collect and report test results for specific chemicals, in violation of 25 Pa. Code § 109.301 and 25 Pa. Code § 109.701(a). The Department calculated the penalties for these violations based on the required number of tests that should have been completed during the relevant time period (generally either quarterly or annually) and selected a relatively low dollar amount of $150.00 in determining the penalty. Given the serious nature of providing untested water to customers of the Water Supply that resulted from these violations, we disagree

with Ms. Schlafke that these civil penalty amounts were unreasonable and arbitrary. If anything, we are of the opinion that the Department was rather generous to Property One and Ms. Schlafke in not seeking higher penalties for this category of violations. Despite those reservations, we find that as to Ms. Schlafke, the civil penalties sought by the Department for Violation Nos. 2 through 8 are reasonable and appropriate and award the following civil penalty amounts: Violation No. 2 - $150.00; Violation No. 3 - $450.00; Violation No. 4 - $150.00; Violation No. 5 - $150.00; Violation No. 6 - $150.00; Violation No. 7 - $1,200.00; and Violation No. 8 - $1,200.00.

We also find that the Department's civil penalty amounts for Violations Nos. 9, 11, 12, 13, and 14 are reasonable and appropriate. Each violation involved a discrete event or occurrence that the Department properly determined constituted a single day duration. The dollar amounts sought by the Department were again relatively modest and reasonably reflect the seriousness of the violation and Ms. Schlafke's culpability. We award the following civil penalty amounts for these violations: Violation No. 9 - $300.00; Violation No. 11 - $350.00; Violation No. 12 - $350.00; Violation No. 13 - $200.00; Violation No. 14 - $300.00.

Violation Nos. 10 and 15 are violations where the Department calculated the civil penalty amounts to reflect multiple occurrences or multiple days of a single occurrence. Violation No. 10 involved the failure to issue 28 separate public notices that were required between February 2012 and October 2012. The total civil penalty amount for this violation was determined by assessing $150.00 for each of the 28 public notices that were missed. Violation No. 15 is for the failure to have a certified operator employed for the Water Supply. The evidence in the case is that there was no certified operator starting in March 2012. In determining the civil penalty for this violation, the Department started the duration from the date of its inspection on August 27,

2012, and then counted each day going forward until the issuance of the 2012 Administrative Order on October 5, 2012, to arrive at a duration of 39 days. The Department certainly could have extended the duration portion significantly more than 39 days and given the overall reasonableness of the penalty amount arrived at for the failure to have a certified water operator, and the fundamental role that violation played in all of the issues at Water Supply, we find no reason to reject the approach they selected on this issue. After reviewing the determinations by the Department, we find the amounts of the civil penalties for these violations (Violation No. 10 – $4,200.00 and Violation No. 15 - $5,850.00) are reasonable and appropriate under the circumstances of this case.

Turning our attention to the two remaining violations, Violation No. 1 and Violation No. 16 and associated civil penalties, we take issue with the amounts sought by the Department and conclude they are not reasonable and appropriate under the circumstances. The Department calculated a civil penalty of $36,300.00 for Violation No. 1 based on a daily penalty amount of $150.00 multiplied by 242 days. Violation No. 1 was the failure to collect daily entry point disinfection residual concentrations and report them on a monthly basis as required under the revised permit. The requirement began on February 1, 2012, and for purposes of calculating the duration for the civil penalty, ran for 242 days through September 30, 2012. The Department's witness concerning its penalty calculations, Matthew Postlewaite, stated that the Department has discretion in deciding whether to treat a monitoring violation as a single event or a multi-day event. As a result of calculating this as a daily penalty, the overall size of the civil penalty for this violation seems disproportionally high compared to other penalty amounts in this case. We recognize the seriousness of this violation and Ms. Schlafke's role in failing to meet this permit

requirement but reduce the civil penalty for Violation No. 1 as to Ms. Schlafke to $10,000.00. We find this amount more appropriate and reasonable under the circumstances of this case.

The Department assessed a civil penalty of $141,600.00 for Violation No. 16, the failure to comply with the 2012 Administrative Order. The Department arrived at this amount by determining a $600.00 daily penalty multiplied by 236 days. The duration of 236 days was derived from the date when the first obligation was due in October 2012 under the 2012 Administrative Order through the June 2013 date that the homeowner association, HERA, was officially appointed by the Crawford County Court of Common Pleas as the receiver for the Water Supply. Failing to comply with an administrative order of the Department is a serious violation but the size of the civil penalty sought by the Department for this violation, $141,600.00 seems disproportionate to the other penalties and the circumstances of this case. Ms. Schlafke largely ignored the 2012 Administrative Order. Her only response was her decision to shut off the electricity to the well that supplied the water for the Water Supply on December 7, 2012. We do not approve of Ms. Schlafke's self-help action in this situation, but the Department witnesses on cross-examination acknowledged that it was the decision to restart the well by an unnamed individual, not affiliated with Ms. Schlafke or Property One, that continued the flow of water in the Water Supply and created further risk from the unmonitored system. In addition, while HERA did not officially become the receiver of the Water Supply until June 2013, as a practical matter, it appears to have taken over responsibility for the system in December 2012. Ms. Close stated that HERA formed at that time and operated the Water Supply from around the time of the electricity shut off up and through the time it was appointed as the receiver. Mr. Donghia worked as the certified Water Supply operator on behalf of HERA starting at least in April 2013 and submitted required testing results. It is clear that for at least a

significant portion of the 236 days for which the civil penalty is sought, many of the actions required under the 2012 Administrative Order were being completed by HERA. While this does not excuse Ms. Schlafke's failure to comply, it does lead to the conclusion that many of the risks associated with non-compliance were mitigated and that the amount of the penalty is disproportionate to the risk. Because we conclude that the amount sought by the Department for Violation No. 16 is not reasonable or appropriate, we will reduce the civil penalty to $25,000.00. We think this amount better reflects the circumstances of the situation while still adequately sanctioning Ms. Schlafke for failing to comply with a Department order.

Overall, we have reduced the amount of the civil penalty assessed by the Department against Ms. Schlafke for the sixteen violations from $192,900.00 to $50,000.00. The amount of the civil penalty we are assessing against Ms. Schlafke is still significant and will certainly act as a sufficient deterrent against Ms. Schlafke committing future violations. We also think that it will serve as a sufficient deterrent to other water supply operators who may be aware of this situation. We find a civil penalty of $50,000.00 is a reasonable and appropriate amount reflecting the seriousness of the violations and the risk posed to the users of the Water Supply.

Department Costs and Alleged Cost Savings

In addition to the civil penalty for the 16 violations, the Department sought additional sums for its personnel costs and alleged cost savings totaling $25,668.00 in the 2016 Assessment. The Department failed to break out these claims and provide any details for this portion of the civil penalty in the 2016 Assessment. According to the testimony provided by Mr. Postlewaite at the May 2018 Hearing, the additional sum is based on Department personnel costs of $3,695.00 and alleged cost savings to Ms. Schlafke from her failure to retain and pay a

certified operator for an extended period of time ($12,400.00) and the failure to conduct and pay for sampling costs and lab tests ($8,050.00). In her post-hearing brief, Ms. Schlafke did not directly challenge the legality of the Department's claim for costs and cost savings under the penalty provision of the SDWA so we consider that issue to have been waived. She did raise the lack of documentation to support the claimed personnel hours and generally challenged the reasonableness of the overall penalty amount including the costs and alleged cost savings. Therefore, we will consider whether the particular amounts being sought are reasonable and appropriate under the facts of this case.

The Department's personnel costs are based on the time spent on the Property One/Schlafke matter by three people, Mr. Sean Singer, Mr. Matt Postlewaite and Mr. Brad Vanderhoof. The breakdown of hours and rates presented by the Department in DEP Exhibit E is as follows: Singer – 72 hours x $21.93 per hour = $1,579.00; Postlewaite – 32 hours x $42.69 per hour = $1,366.00 and Vanderhoof – 15 hours x $49.99 = $750.00. The Department only presented the testimony of Mr. Postlewaite in support of both the number of hours claimed and the individual hourly rates. As noted by Ms. Schlafke, the Department did not provide any documentation such as time sheets or pay scales supporting either the number of hours or the hourly rates. The lack of documentation regarding both the number of hours worked and the hourly rate used when the Department seeks to recover its costs continues to cause some concern for the Board when ruling on this portion of a penalty assessment and may lead us to reject this type of claim in the future.[3] However, in this case, the number of hours requested was relatively low and all three of the Department individuals for whom hours were claimed testified regarding their involvement in the case and this testimony, along with the other information available in the

[3] See *Whiting v. DEP*, 2015 EHB 799, 813-814.

record regarding the Department's actions, is adequate in our judgment to support the number of hours claimed. The hourly rates are somewhat more difficult to evaluate but Ms. Schlafke did not directly challenge those numbers and Mr. Postlewaite's testimony regarding the hourly rates was sufficiently credible for us to accept the hourly rates in this case. Therefore, we will accept the claimed costs in the amount of $3,695.00 and award them to the Department. We caution the Department that we may not be so willing to accept the lack of supporting documentation in future cases.

The Department seeks to recover alleged cost savings of $12,400.00 as part of its civil penalty for Ms. Schlafke's failure to retain a certified operator for a 31-month period running from October 2012 through April 2015. The dates are based on the timing of the issuance of the 2012 Administrative Order in October 2012 through the formal transfer of the Doral Estates Mobile Home Park by property deed in May 2015. The Department used a monthly fee of $400.00 based on an average rate determined by Mr. Postlewaite after contacting a couple of certified operators in the area. We think the manner that the Department used to calculate the alleged cost savings is inconsistent with the testimony in this case and is not reasonable and, therefore, we think it is proper to reduce the requested amount. The monthly rate used by the Department is higher than the actual rate charged by Mr. Donghia, the certified operator used by both Property One/Ms. Schlafke and the HERA during the relevant time period. Mr. Donghia testified that his monthly rate for those services was $275.00. Ms. Close, the president of HERA, testified that the cost for the operator "was in excess of 200 a month." (T. 42). We find that $275.00 is the proper monthly rate for determining the alleged cost savings rather than the $400.00 rate used by the Department.

We also think that the Department's decision to hold Ms. Schlafke responsible for this cost for a period of 31-months is unreasonable. Starting from the October 2012 date used by the Department, we think any claim for these cost savings should end no later than June 2013 when HERA was formally appointed as the receiver for the Water Supply by the Crawford County Court. The Department used the June 2013 date as the end date for the violations and other cost savings issues in this case and offered no explanation why it didn't follow this approach when looking at the cost savings related to the certified operator. Further, Mr. Donghia began working for HERA in April 2013 and the evidence presented is that he continued to fill the certified operator role after that date. While the operating permit for the Water Supply may have remained in Property One's name for a period of time, it is clear that HERA took over operating the Water Supply informally in late 2012 and formally in June 2013. Therefore, we don't think that it is reasonable to hold Ms. Schlafke responsible for alleged cost savings beyond that date. We find that the reasonable amount of cost savings associated with Ms. Schlafke's failure to retain a certified operator should be capped at $2,475.00 based on a $275.00 monthly rate times nine (9) months (October 2012 through June 2013). We will award that amount as part of the civil penalty in this case.

The Department also sought to include alleged cost savings associated with the missed monitoring tests in its civil penalty in the amount of $8,050.00. The Department did not detail as part of its calculation which missed monitoring tests it used in determining the alleged cost savings. This information would have been helpful to the Board in evaluating this portion of the civil penalty assessment. There is no question that Property One and Ms. Schlafke did not conduct certain required monitoring tests at Doral Estates as evidenced by the violations discussed above. Further, Ms. Schlafke failed to address this Department claim, or the lack of

specific detail regarding the calculation, in her post-hearing brief. What we do know from Mr. Postlewaite's testimony is that the missed testing was for 2012 and the portion of 2013 up until the time HERA was appointed as the receiver in June of that year and that he determined the amount of the cost savings by contacting local accredited laboratories to determine costs associated with missed testing for particular parameters such as SOCs, VOCs, IOCs and total coliform. Mr. Donghia testified that the required quarterly SOC testing cost $1,300.00 and that other annual testing requirements for IOCs and VOCs each cost in the $150.00 to $200.00 range. (T. 77-78). The record reflects that quarterly SOC testing was not completed at all in 2012 or early 2013 (6 quarters) and that annual tests for IOCs and VOCs were not completed in 2012. The amount of cost savings from failing to complete these tests based on the costs testified to by Mr. Donghia are consistent with the amount sought by the Department. Therefore, based on the evidence presented, there is no basis for the Board to make any adjustment to the requested amount of $8,050.00 and we award that as part of the civil penalty in this case.

In conclusion, the Board finds that Ms. Schlafke is liable for a civil penalty in this matter of **$64,220.00**. This amount is based on a civil penalty of $50,000.00 for the violations identified by the Department, $3,695.00 in Department costs and $10,525.00 in cost savings.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this proceeding. 35 P.S. §721.13(g).

2. The Department bears the burden of proof when it assesses a civil penalty. 25 Pa. Code § 1021.122(b).

3. The Department must prove by a preponderance of the evidence that the underlying violations of law giving rise to the civil penalty in fact occurred, that the civil penalty is lawful, and that there is a reasonable fit between the violations and the penalty amount. *Paul*

Lynch Investments, Inc. v. DEP, EHB Docket No. 2016-014-B (Adjudication, Aug. 29, 2017); *Whiting v. DEP*, 2015 EHB 799, 805; *Paul Lynch Investments, Inc. v. DEP*, 2012 EHB 191, 198-199; *Taylor Land Clearing, Inc. v. DEP*, 2012 EHB 138, 147-148 (citing *Eureka Stone Quarry, Inc. v. DEP*, 2007 EHB 419, 449, *aff'd*, 957 A.2d 337 (Pa. Cmwlth. 2008)).

4. The Department met its burden of proof to sustain violations of the Safe Drinking Water Act.

5. Ms. Schlafke is personally liable for the violations, including the Undetermined Violations because she had knowledge of the violations, failed to direct Property One to take reasonable steps to address the violations and actively avoided addressing the violations, and she had the necessary authority and duty to act to address the violations. See *B&R Resources, LLC v. DEP*, 180 A.3d 812 (Pa. Commw. Ct. 2018).

6. A claim that an individual should not be personally liable for violations under the personal participation theory because of the financial inability of the corporation to address the violations is in the nature of an affirmative defense. See *B&R Resources, LLC v. DEP*, 180 A.3d 812 (Pa. Commw. Ct. 2018).

7. The burden to demonstrate that Property One lacked the necessary financial resources to address the violations rests with the party asserting financial inability as a defense to personal liability. See *B&R Resources, LLC v. DEP*, 180 A.3d 812 (Pa. Commw. Ct. 2018).

8. Ms. Schlafke raised the claim that Property One lacked the financial ability to address the violations, but she failed to prove her claim and, therefore, she remains liable for the civil penalty under the personal participation theory.

9. The Department may assess a penalty of up to $5,000 per day per violation of the Safe Drinking Water Act, the Regulations or a Department order. 35 P.S. § 721.13.

10. The Department's assessed civil penalty amount of $215,568.00 is not a reasonable and appropriate exercise of the Department's discretion and is not a reasonable fit for the violations identified in the Assessment.

11. The Board assesses a penalty of $64,220.00 against Ms. Schlafke for violations of the Safe Drinking Water Act.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARIA SCHLAFKE	:	
	:	
v.	:	**EHB Docket No. 2016-117-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 8th day of January, 2019, **it is hereby ordered** that Maria Schlafke's appeal of the Department's civil penalty assessment is sustained in part consistent with the foregoing adjudication. Maria Schlafke is liable for and shall pay a civil penalty in the amount of **$64,220.00**, for violations of the Safe Drinking Water Act. The appeal is dismissed in all other aspects.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: January 8, 2019

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

For the Commonwealth of PA, DEP:
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Angela N. Erde, Esquire
(via electronic filing system)

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WALTER STOCKI, JR., AND SCRAP ENTERPRISES, INC./SEI, INC.	:	
v.	:	**EHB Docket No. 2018-111-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 8, 2019**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies the Department's motion to dismiss for lack of jurisdiction because an appellant is not required to file a notice of appeal that perfectly complies with the Board's rules within thirty days of the Department's action.

O P I N I O N

Walter Stocki, Jr. and Scrap Enterprises, Inc./SEI, Inc. filed this appeal from a civil penalty assessment issued against them by the Department of Environmental Protection (the "Department"). The assessment was delivered to Walter Stocki's address and SEI's address on October 17, 2018 and to Scrap Enterprises' address on October 19, 2018. Stocki, Scrap Enterprises, and SEI (collectively "Stocki") do not deny the dates of delivery, although they say they did not retrieve the mailings until October 20. They filed a notice of appeal with this Board on November 16, 2018.

Stocki used our notice of appeal form to file their appeal. In the space on our form where an appellant is directed to list its objections to the Department's actions, Stocki wrote "See

Attached." When the Board's staff notified Stocki by telephone that nothing was attached, Stocki on November 21 submitted the notice of appeal with the attachment listing objections to the Department's actions.

The Department filed a motion to dismiss, arguing that the Board lacks jurisdiction due to what it characterizes as Stocki's untimely appeal. The verified motion contains the following averment at Paragraph 15:

> On November 21, 2018, Appellant filed a Notice of Appeal with the Environmental Hearing Board ("Board" or "EHB") appealing the Assessment.

This averment is misleading at best. Stocki filed the notice of appeal on November 16, 2018, not November 21. In its memorandum in support of the motion, the Department says, "Appellant filed the appeal on November 21, 2018." (Memorandum at 2.) There are other statements to the same effect in the memorandum. Again, these statements are, at best, misleading. In footnote 1 on page 3 of the memorandum, the Department says,

> On November 16, 2018, Appellant filed the Civil Penalty Assessment. No objections to the Department's action were set forth.

In response to the Department's motion, Stocki points out that the motion has no merit because they filed their notice of appeal on November 16. They ask that we assess costs against the Department "for abuse of civil process." The Department has not filed a reply brief or responded to the request that we assess costs.

We agree with Stocki that the Department's motion is without merit. Initially, Stocki filed an appeal on November 16, not November 21. That appeal may have been less than perfect, but we fail to understand why the Department repeatedly intimated that the only notice was filed on November 21. The Department did not fully correct its misleading averments by

stating in a footnote in its memorandum that Stocki "filed the Civil Penalty Assessment" on November 21. That statement simply makes no sense. In any event, Stocki's filing date, November 16, was indisputably within thirty days of Stocki's receipt of notice of the Department's action on October 17 and 19. Stocki's appeal was timely.

Reading the Department's filings in the best possible light, it seems to be arguing that Stocki was required to file a notice of appeal *with objections* within 30 days. Since the attachment to the appeal listing the objections was not filed until November 21, outside the 30-day period, the appeal was untimely in the Department's view. However, a notice that perfectly complies with our rules has never been required in order for the Board's jurisdiction to attach. *See Jake v. DEP*, 2012 EHB 477 (denying Department motion to dismiss in which it argued the Board lacked jurisdiction over an appeal because the appellant did not list his objections in separately numbered paragraphs but in letter form). Virtually anything will do. We have accepted appeals written on the back of napkins and placemats. If the appeal does not contain all of the information required by our rules at 25 Pa. Code § 1021.51, we issue an order requiring the party to perfect the appeal, typically within 20 days. It sometimes takes more than one order-to-perfect for an appellant to achieve perfect compliance with our rules, particularly parties appearing *pro se*. If an appellant ultimately fails to comply with our perfection orders, we may dismiss the case, not because of lack of jurisdiction, but in our discretion for failure to comply with the Board's rules and orders. *See Perrin v. DEP*, 2008 EHB 78 (dismissing appeal for failing to comply with Board rules and orders after appellant failed to file any objections with his appeal after being given multiple opportunities to do so over the course of several months).

The Department says our rules say a notice of appeal "must" include objections. However, our rules also say the notice "must" include the appellant's phone number. Query

whether the Department would have filed its motion in this case for lack of a phone number. An interpretation of our rules that requires that a perfect notice of appeal must be filed within 30 days in order for a person to benefit from the due process afforded by the Board is an overly harsh one that serves no purpose and is palpably unjust to the regulated community. *See generally also* 25 Pa. Code § 1021.4 (Board may disregard any error or defect in procedure which does not affect the substantial rights of the parties).

The Department curiously relies upon *Pa. Game Commission v. DER*, 509 A.2d 877 (Pa. Cmwlth. 1986), but our rules were amended years ago to clarify that a failure to file specific grounds for appeal within 30 days is *not* a defect going to jurisdiction. *See* 25 Pa. Code § 1021.53 Comment. Our rules now state that "[a]n appeal or complaint may be amended as of right within 20 days after the filing thereof." 25 Pa. Code § 1021.53(a). As reflected in the Comment to the rule, Section 1021.53(a) was specifically amended to clarify that a failure to file specific grounds for appeal within 30 days is *not* a defect going to jurisdiction, contrary to the apparent holding in *Pa. Game Commission, supra*. An appellant may add as many objections as it likes to its appeal *as of right* within 20 days, and with leave of the Board (applying a liberal standard) thereafter. Here, of course, no amendment was required because Stocki perfected their appeal in a timely manner.

With respect to Stocki's request that we assess costs against the Department for abuse of process, while we sympathize with Stocki due to the Department's rather frivolous motion, Stocki has not directed us to any authority for assessing such costs. Accordingly, we deny that request.

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WALTER STOCKI, JR., AND SCRAP ENTERPRISES, INC./SEI, INC.	:	
v.	:	**EHB Docket No. 2018-111-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 8th day of January, 2019, it is hereby ordered that the Department's motion to dismiss is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: January 8, 2019

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

For the Commonwealth of PA, DEP:
David R. Stull, Esquire
(via electronic filing system)

For Appellants:
Edmund J. Scacchitti, Esquire
(via electronic filing system)

CLEAN AIR COUNCIL	:	
	:	
v.	:	**EHB Docket No. 2016-073-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PARTNERS MARKETING & TERMINALS, L.P., Permittee	:	**Issued: January 9, 2019**

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

By Bernard A. Labuskes, Jr., Judge

Synopsis

In an appeal involving the concept of project aggregation under the Clean Air Act, the Board finds that the Department erred in concluding that the work permitted under one of several plan approvals sought by a major facility was a stand-alone project that did not need to be aggregated with other work at the facility for purposes of determining prevention of significant deterioration (PSD) and new source review (NSR) applicability. The Board remands the plan approval to the Department for further consideration.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Air Pollution Control Act, 35 P.S. §§ 4001 – 4015; Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder. (Stipulation of the Parties No. ("Stip.") 1.)

2. Sunoco Partners Marketing & Terminals, L.P. ("Sunoco" or "Sunoco Partners") owns and operates the Marcus Hook terminal facility (the "facility") in Marcus Hook Borough,

Delaware County, Pennsylvania under Title V Operating Permit No. 23-00119. (Stip. 2, 3; Sunoco Exhibit No. ("S.Ex.") 48.)

3. Appellant Clean Air Council (the "Council") is a citizens' group based in Philadelphia. (Stip. 4.)

4. The Marcus Hook facility operated as a crude oil refinery from its inception until the end of 2011. (Notes of Transcript page ("T.") 28, 113, 116.)

5. After it was shut down as a refinery, Sunoco's facility had the space, fractionators, docks, boilers, cooling towers, and other assets able to be reused for the processing and fractionation of natural gas liquids (NGLs). (T. 28-29, 179-80.)

6. Fractionation of NGLs means separating out the various component products, e.g. ethane and propane, from the mixed liquids. (T. 116, 181.)

7. In early 2013, Sunoco Logistics, of which Sunoco Partners is a division, purchased the facility from Sunoco Inc., which is a separate legal entity from Sunoco Partners. (T. 28, 113, 117, 181-83.)

8. Sunoco is in the process of repurposing the facility from a crude oil refinery into a facility for the processing and storage of NGLs. (T. 28-29, 113, 116, 177-78, 277; Appellant Exhibit No. ("A.Ex.") 2.)

9. The facility is intended to receive most of its NGL feedstock from the Mariner East pipelines. (T. 277, 294-95; A.Ex. 2, 6.)

10. The Mariner East pipelines are being constructed to transport NGLs from Pennsylvania's Marcellus Shale region to the Marcus Hook facility. (A.Ex. 2, 3, 4.)

11. The key components of NGLs are as follows:

a. Ethane (C_2H_6) (also known as C2 because it has two carbon atoms)

b. Propane (C_3H_8) (C3)

c. Butane (C_4H_{10}) (C4)

d. Pentane (C_5H_{12}) (C5)

(T. 40, 593; A.Ex. 8.)

12. C3+ is NGLs with the ethane (C2) already removed. (T. 39-41.)

13. C4+ is NGLs with the ethane (C2) and propane (C3) removed. (T. 140.)

14. Natural gasoline is C5+, which has already had the ethane (C2), propane (C3), and butane (C4) separated out. (T. 32, 40-41.)

15. Natural gasoline is fractionated into pentane (C5) (overheads product) and light naphtha (C6+) (bottoms product). (T. 32-33; A.Ex. 8.)

16. Due to its location in Delaware County, Sunoco's facility is subject to the Nonattainment New Source Review (NSR)[1] and Prevention of Significant Deterioration (PSD) regulations. (T. 735, 740.)

17. NSR is a regulation for nonattainment areas for major sources of nitrogen oxide (NOx), volatile organic compounds (VOCs), and particulate matter with a diameter less than 2.5 micrometers (PM 2.5). (T. 735.)

18. Delaware County is in nonattainment for NOx, VOCs, and PM 2.5. 25 Pa. Code § 127.201(f). (A.Ex. 24.)

19. Delaware County is designated nonattainment for ozone. 40 C.F.R. § 81.339.

[1] As discussed in our earlier Opinion in this case, *Clean Air Council v. DEP*, EHB Docket No. 2016-073-L, slip op. at 6-7 (Opinion and Order, Mar. 9, 2018), the term "New Source Review" tends to be used differently in various settings. In Pennsylvania's regulations, it generally refers to what in the federal regulations is known as Nonattainment New Source Review ("NNSR"). (*See also* T. 456-47.)

20. Sunoco's facility is located within an attainment area for carbon monoxide (CO) and is therefore subject to the PSD regulations for all the National Ambient Air Quality Standards pollutants, including CO. (Stip. 6.)

21. The PSD regulations apply to the construction of any new major stationary source, or any major modification of any existing stationary source in an area designated as attainment or unclassifiable. 40 C.F.R. § 52.21(a)(2) (incorporated by reference by 25 Pa. Code § 127.83).

22. Pennsylvania references and incorporates the federal PSD regulations. 25 Pa. Code § 127.83. (T. 456.)

23. Delaware County is in attainment for nitrogen dioxide, sulfur dioxide, carbon monoxide, particulate matter, and greenhouse gases. (T. 740.)

24. A facility located in Delaware County that emits or has the potential to emit at least 25 tons per year of VOCs or NOx is considered a major facility. 25 Pa. Code § 127.201(f). (T. 735.)

25. A facility located in Delaware County that emits or has the potential to emit at least 10 tons per year of PM 2.5 is considered a major facility. (T. 735.)

26. Sunoco's Marcus Hook facility is considered a major facility for NSR and PSD purposes. (T. 743-44.)

27. The Department performs a new source review applicability determination during its review of a plan approval application for the construction of a new major facility or a modification at an existing major facility. (T. 735-36.)

28. To calculate the emissions from the project, the Department determines which sources are new, which sources are existing and modified, and which sources are existing and

unmodified because the method of calculating the emissions is different for each one. (T. 736-37.)

29. An emissions increase that is "significant" triggers NSR requirements. 25 Pa. Code §§ 127.201(d), 127.203a.

30. An emissions increase is significant if the rate of emissions equals or exceeds the following rates:

Carbon monoxide: 100 tons per year (TPY)

Nitrogen oxides: 40 TPY

Sulfur dioxide: 40 TPY

Particulate matter: 25 TPY

40 C.F.R. § 52.21(b)(23)(i) (incorporated by reference by 25 Pa. Code § 127.83); 25 Pa. Code § 121.1 (definition of "significant").

31. After determining that a plan approval application is administratively complete, the Department reviews the application, looking at the different sources involved, the emissions, how the project relates to other projects, and the applicable regulations. (T. 732.)

32. After understanding the application, the Department begins to draft a technical review memo, explaining the Department's analysis of the application. (T. 732.)

33. After drafting the technical review memo, the Department drafts a plan approval. (T. 733.)

Plan Approval 1, 23-0119

34. In 2012, Sunoco commenced an "open season" for its Mariner East 1 pipeline. (T. 586-87; A.Ex. 2.)

35. An open season is a regulated process through which customers, primarily natural gas producers, can "subscribe" to use capacity on the pipeline to ship NGLs from the Marcellus Shale region to Marcus Hook. (T. 187, 586-87, 613; A.Ex. 2.)

36. At the time of the first open season, the Marcus Hook facility was still owned by Sunoco, Inc. (T. 181-83, 277-78; A.Ex. 2.)

37. In September 2012, Sunoco completed a successful open season for Mariner East 1. (T. 269-70, 586-87; A.Ex. 2.)

38. The customers who subscribed to take capacity on the pipeline contracted with Sunoco to secure their respective capacities. (T. 589.)

39. They also contracted with Sunoco to acquire the right to store ethane and propane at the facility in tanks that would be constructed as part of a plan approval. (T. 587.)

40. Brian P. MacDonald, Chairman and Chief Executive Officer of Sunoco, Inc. and Chairman of Sunoco Logistics, said in the open season announcement that "Mariner East is an important project in two ways. It supports the continued development of the Marcellus Shale, one of Pennsylvania's most important resources, by offering producers an outlet for valuable products. Mariner East also represents a significant step in re-purposing the former Marcus Hook refinery site and creating a world-class facility with a promising future based on natural gas liquids." (A.Ex. 2.)

41. Sunoco provides storage of NGLs to its customers for eventual redistribution and marketing because it makes pipeline operations more efficient. (T. 287-89.)

42. In November 2012, Sunoco submitted a plan approval application to the Department to install a cryogenic propane storage tank, a cryogenic ethane storage tank, a new flare, and associated piping ("Project 1"). (A.Ex. 6.)

43. Sunoco called the construction project "SXL Project Mariner." (A.Ex. 6.)

44. The stated purpose of the work was to build a new cryogenic ethane and propane storage facility that would store liquid ethane and propane to be loaded onto cryogenic marine vessels for export. (A.Ex. 6.)

45. The work covered by Project 1 would provide liquefied ethane and propane products received through an existing pipeline, Mariner East 1. The liquefied ethane and propane would not be blended before entering the pipeline. Each product would be transported separately in the pipeline and there would be some transmix created in the pipeline when transitioning from one product to the other. The transmix would still meet the propane product specification and would be directed to propane product storage. (A.Ex. 2, 6.)

46. Transmix is a term for when two different NGL products, e.g. ethane and propane, get mixed together during transport through a pipeline. (T. 39, 194, 226; A.Ex. 6.)

47. On February 4, 2013, the Department prepared a review memorandum on Sunoco's plan approval application. (T. 341-42; Commonwealth Exhibit No. ("C.Ex.") 2.)

48. The Department performed an NSR and PSD applicability determination and concluded that the emissions from the work covered by Project 1 did not exceed the thresholds under both programs. (C.Ex. 2.)

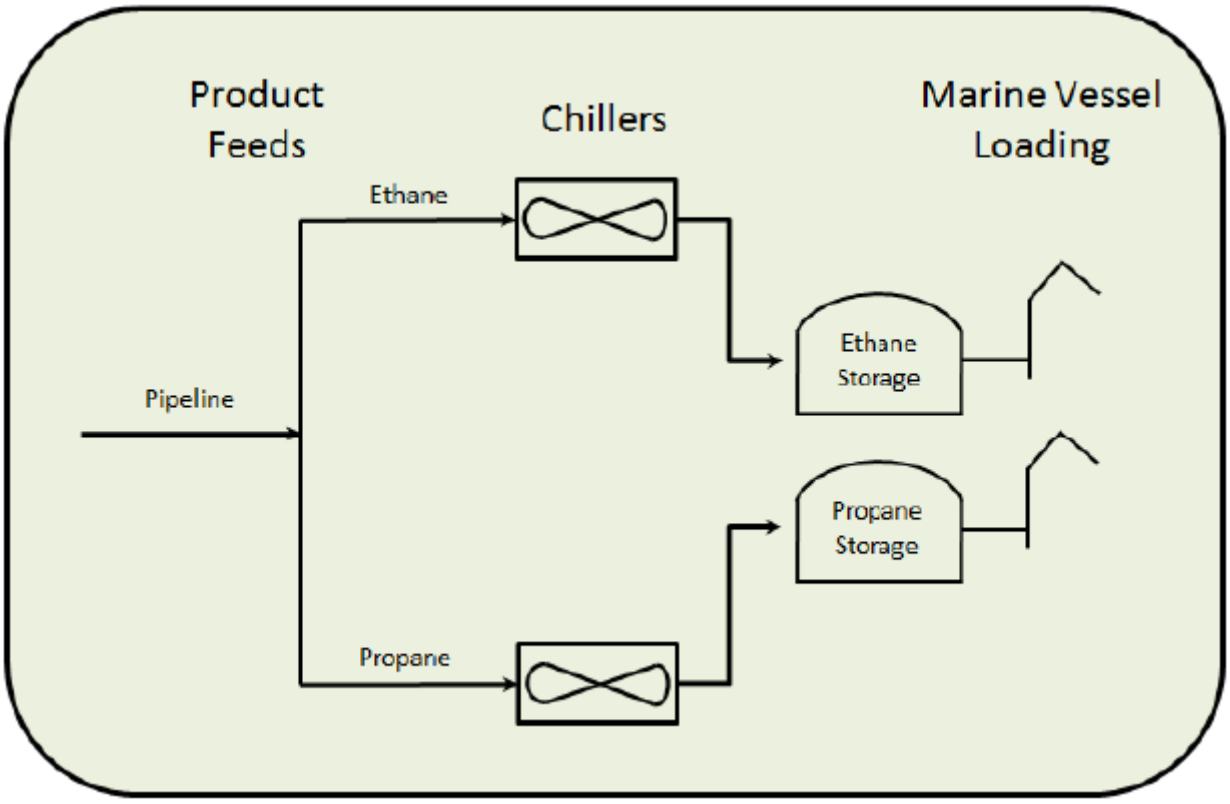
49. On February 5, 2013, the Department issued Plan Approval 23-0119 ("Plan Approval 1") to Sunoco for SXL Project Mariner. (Stip. 5; A.Ex. 29.)

50. The plan approval authorized the facility to receive liquefied ethane or propane via pipeline, which was to be cryogenically stored by separate liquefaction and boil-off gas management systems, with separate delivery and loading pipes. Periodically, these liquids would be shipped off-site by marine vessel. (C.Ex. 2.)

51. The specific components of the project were as follows: one new 500,000 barrel (bbl) cryogenic propane storage tank; one new 300,000 bbl cryogenic ethane storage tank; one new flare for emergency depressurization events; installation of the necessary piping, valves, flanges, etc. to receive and transfer ethane and propane; installation of new loading arms and dedicated vapor recovery at the existing marine loading docks, which are designed to purge the liquid ethane and propane back to storage prior to breaking the seal on the marine vessel; and separate refrigeration units capable of maintaining a liquid phase for the ethane and propane storage. (C.Ex. 2.)

52. Plan Approval 1 would also utilize the Marcus Hook facility's existing Cavern #5 for additional propane storage. (C.Ex. 2.)

53. The process diagram for Project 1 is as follows:



(A.Ex. 6.)

54. The Mariner East 1 pipeline used by Plan Approval 1 was an existing transport system that had been used to transport material from the former refinery to the western part of Pennsylvania and beyond. The flow of this pipeline would be reversed to transport ethane and propane to Marcus Hook. (C.Ex. 2.)

55. The two new cryogenic tanks would each have their own vapor pressure balance and collection system, collecting the evaporating vapors at 100-percent capture, condensing them back to a liquid phase, and then piping them back to their respective storage tanks. (C.Ex. 2.)

56. Three existing marine vessel docks would be utilized by Project 1. Docks 2A and 3A (both located in Pennsylvania), and 3C (located in Delaware). Ethane is planned to be loaded into 136,000 bbl cryogenic vessels from Dock 2A, while propane is planned to be loaded into 500,000 bbl cryogenic vessels at Docks 3A and 3C. Each dock would have two new identical loading arms and one vapor return line. The closed-loop vapor return line will collect the boil-off gases that are generated during loading. These vapors would be subsequently chilled, condensed, and returned to the proper storage tank. At the end of each loading event, each loading arm would be nitrogen purged to complete the transfer and capture all of the vapors. (C.Ex. 2.)

57. A new air-assisted flare would be utilized for flaring product streams that are less than -20 degrees Fahrenheit. The flaring is necessary for emergency depressurization caused by, e.g., power outages or equipment exposed fires. (C.Ex. 2.)

58. It was anticipated that, during flaring emergencies, additional flaring could include the use of an existing steam-assisted flare located in Delaware. This flare was previously operated when the facility was a refinery and was oversized due to the possible requirement in flare capacity at a petrochemical refinery. (C.Ex. 2.)

Plan Approval A, 23-0119A

59. On March 4, 2013, about a month after Plan Approval 1 was issued, Sunoco submitted a plan approval application to install and operate a deethanizer unit, amine treatment system, dehydration system, and associated piping ("Project A"). (A.Ex. 7.)

60. Sunoco called the work to be performed pursuant to Project A, "SXL Project Mariner – Deethanizer." (A.Ex. 7.)

61. The deethanizer unit would receive a liquefied blend of ethane and propane by pipeline and would utilize the ethane and propane tanks approved in Plan Approval 1. (A.Ex. 7, 18.)

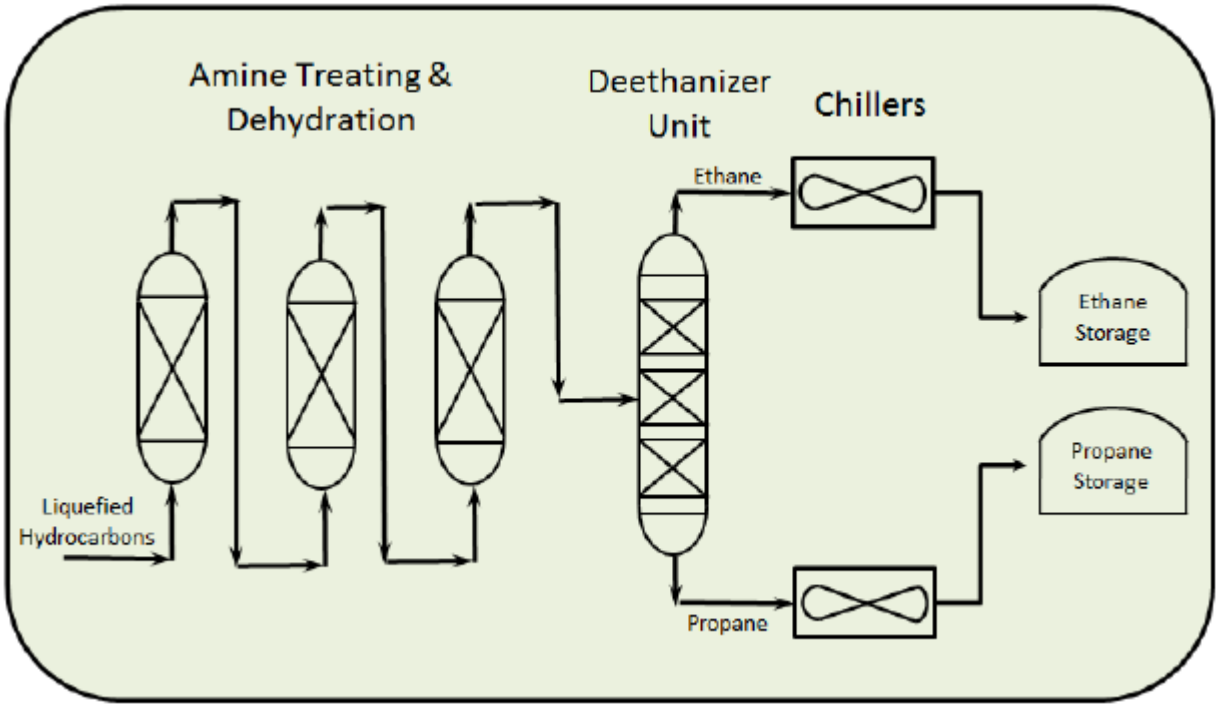
62. Sunoco's application stated, "All the sources and associated emissions from the cryogenic storage facility from Plan Approval No. 23-0119 [Plan Approval 1] are fully included in this project." (T. 352; A.Ex. 7.)

63. On September 5, 2013, the Department issued Plan Approval 23-0119A ("Plan Approval A") to Sunoco. (A.Ex. 30.)

64. The stated purpose of the work authorized under Plan Approval A was to "construct and operate a deethanizer for the purpose of separating a liquid pipeline stream of mixed propane and ethane (shipped from western Pennsylvania) into the ethane and propane fractions." (A.Ex. 30.)

65. Prior to this project, the former refinery supplied steam to itself to heat some of the storage tanks and the office building, as well as supplying steam to another facility owned by a different company (Braskem). With Project A, Sunoco would utilize the existing boilers to continue supplying this steam demand, in addition to supplying steam for the deethanizer project. (A.Ex. 18, 20.)

66. The process diagram for Project A is as follows:



(A.Ex. 7.)

67. The deethanizing system was to consist of an amine treatment system, a dehydration segment, and the deethanizer unit itself. Gases that are in demand from the Marcellus Shale region are removed by other companies, resulting in ethane and propane being left behind to be sold on the open market. Transportation of these products would utilize the existing Mariner East 1 pipeline. The liquid ethane and propane would be shipped via pipeline approximately 300 miles from western Pennsylvania to Marcus Hook resulting in some mixing of the two chemicals. The deethanizer would be used to separate (fractionate) these chemicals back into their two individual compounds. (A.Ex. 18.)

68. Amine treatment is used to remove hydrogen sulfide (H2S) and carbon dioxide (CO2) gases as these can corrode the downstream piping components and the deethanizer separation column. These two gases are commonly referred to as sour gases or acid gases.

There are several amines used, with the most common ones being the alkanolamines that are abbreviated as: DEA, MEA, and MDEA. Typically, the flowing amine solution absorbs H2S and CO2 from the counter flowing sour gas stream to produce a sweetened gas stream (i.e., a gas free of hydrogen sulfide and carbon dioxide) as a product and an amine solution rich in the absorbed acid gases. (A.Ex. 18.)

69. The amine treatment system essentially removes various contaminants from the NGL stream for the purpose of meeting product specifications. (T. 125.)

70. After removal of the acid gases, the liquefied hydrocarbon streams would be subjected to heated air for the removal of the entrained water by passing through a series of dehydrators. Super-heated propane would be used to regenerate the dehydrators, thus removing the water from this part of the system. The heat source for the propane would be electric. (A.Ex. 18.)

71. The deethanizer unit consisted of one separation column followed by ethane and propane chillers. Low-pressure steam would be supplied by the four existing auxiliary boilers from the former refinery. The dehydrated liquefied hydrocarbon stream then would enter the separation column and the ethane and propane fractions would be separated using a refrigerant. Once separated, each individual stream would be cooled using chillers prior to being sent to their respective storage tanks. (A.Ex. 18.)

72. The processing of NGLs through the deethanizer unit is a fractionation process. (T. 123-24.)

73. Sunoco and the Department estimated the piping components (valves, flanges, relief valves, etc.) associated with Project A as follows:

Valves – 786 components;
Pressure relief valves – 54 components; and

Flanges/Connections – 618 components

(A.Ex. 18.)

74. These components are sources of fugitive emissions. (A.Ex. 7, 18.)

75. The Department performed NSR and PSD applicability determinations and concluded that the work covered by Project A would not exceed the significant emissions thresholds. (A.Ex. 18.)

76. The Department determined that the work covered by Project A and the work covered by Plan Approval 1 were not "linked" because the work from Plan Approval 1 did not rely on the installation of a deethanizer, and "they were based on different customer specifications." (T. 350-51, 353.)

77. The Department used the term "linked" to refer to whether two or more projects are technically and economically connected to each other and whether the emissions resulting from all of the work associated with the projects should be added up to determine whether NSR or PSD requirements are triggered. (T. 350-55.)

Plan Approval B, 23-0119B

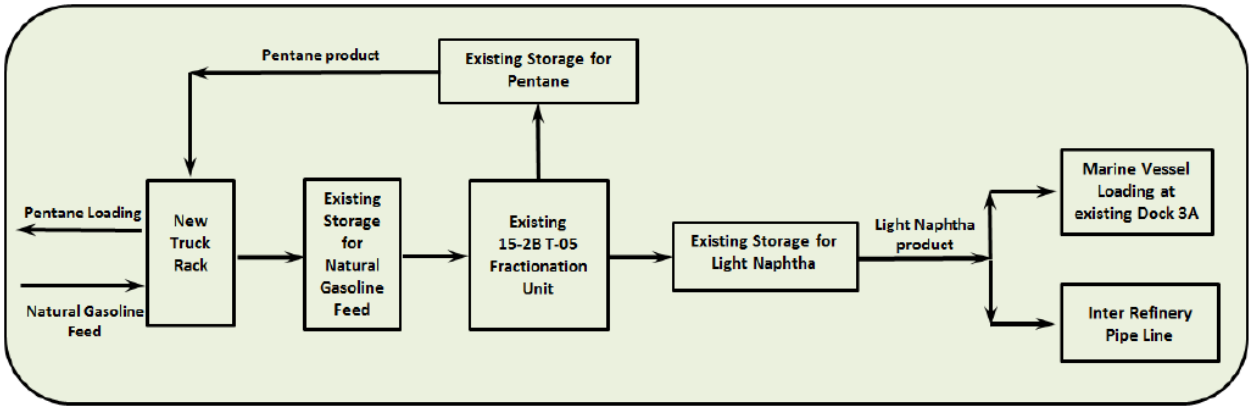
78. On September 13, 2013, less than two weeks after Plan Approval A was issued, Sunoco submitted a plan approval application to the Department to receive natural gasoline via a truck rack, fractionate the natural gasoline into pentane and light naphtha, and load the fractionated products onto marine vessels via an existing loading dock ("Project B"). (T. 593; A.Ex. 8.)

79. Sunoco called the Project B work the "SXL Natural Gasoline Project." (A.Ex. 8.)

80. The work would generally involve the installation of a truck loading and offloading facility and the repurposing of equipment, including an existing fractionation tower, the 15-2B T05 tower. (A.Ex. 8, 31.)

81. More specifically, the plan approval application was for the installation of a 4-bay unloading rack for the natural gasoline and to restart the following sources that had been operating under a Department approved deactivation and maintenance plan: the 15-2B T05 fractionation tower and associated piping and equipment; three existing internal floating roof tanks for storage of pentane; four existing internal floating roof tanks for storage of light naphtha; four existing internal floating roof tanks for the storage of natural gasoline; and off-loading of the light naphtha through either an existing marine vessel loading dock or via rail. (A.Ex. 19.)

82. The process diagram for Project B is as follows:



(A.Ex. 8.)

83. The natural gasoline feedstock to be received via tanker truck and off-loaded through the new 4-bay loading rack would be transferred into existing permitted storage tanks—Tanks 607 (Source 188), 609 (Source 188), 610 (Source 212), and 611 (Source 192)—until ready to be fractionated. (A.Ex. 19.)

84. Natural gasoline (C5+) (also called liquid natural gas) is defined as a natural gas liquid having a vapor pressure between that of natural gas condensate (drip gas) and liquefied petroleum gas, and having a boiling point within the range of gasoline. Natural gasoline is generally the C5s (pentane and isopentane) and heavier hydrocarbon chains (C6 and C6+, commonly called naphthas) that are liquids at ambient pressure and temperature. They are volatile and unstable but can be blended with other hydrocarbons to produce commercial gasoline. (A.Ex. 19.)

85. The 15-2B T05 fractionation tower (depentanizer) would separate pentane (C5) from the natural gasoline (C5+), leaving light naphtha (C6+). (T. 31-32; A.Ex. 31.)

86. The fractionation tower boils off liquids at various temperatures, and subsequently condenses them at just below the boiling temperature. This boiling and condensing process is repeated several times inside the tower, essentially purifying the liquid streams into their desired fractions and individual NGL products. (A.Ex. 19.)

87. Once fractionated and stored, the refined pentane would be stored in three existing spheres (numbers SPH-3, SPH-4, and HS-16) prior to being off-loaded onto tanker trucks through the 4-bay loading rack and its vapor balance system. (A.Ex. 8, 19.)

88. The light naphtha fraction would be stored in approved vessels awaiting either off-loading using the existing marine vessel loading at Dock 3B, which has a marine vapor recovery unit, or transported off-site via trucks. (A.Ex. 19.)

89. Steam from the existing auxiliary boilers would be used to provide the driving force of the fractionation tower for the distillation of natural gasoline into its speciated components of pentanes and heavier products. (A.Ex. 19.)

90. Steam from the boilers would continue to provide steam at the former refinery, as well as Sunoco's previously permitted projects, Plan Approvals 1 and A (23-0119 and 23-0119A). (A.Ex. 19.)

91. Commercial natural gas is mostly made up of methane, but can contain trace amounts of ethane, propane, butane, pentane, hexane, heptane, and heavier hydrocarbon chain molecules. The boilers at the facility were permitted to operate on natural gas, along with small amounts of H2S, methane, ethane, and propane from the amine treatment system as approved in Plan Approval A. Therefore, no new fuel would be added to the operation of the boilers and no new air pollutants would be emitted to the atmosphere. (A.Ex. 19.)

92. Air emissions at the loading rack would be minimized through the use of dry connections and a vapor recovery system, while air emissions from the marine vessel loading rack will be controlled by an existing permitted vapor recovery system. (A.Ex. 19.)

93. The loading rack would be equipped with a dry disconnect technology and a motor-operated valve that would only open while loading/unloading. (A.Ex. 19.)

94. Petroleum products would be off-loaded from Dock 3A, with the air emissions to be routed through a vapor recovery unit located on Dock 3B. The loading dock is an existing source that was previously permitted at the former refinery as Source 115. (A.Ex. 19.)

95. Sunoco and the Department stated that the loading operation was different from the loading operation of Plan Approval 1, which utilized loading Docks 2A, 3A, and 3C for the loading of liquid propane and liquid ethane; the cryogenic loading would occur at a different dock and utilize its own closed-loop return lines coupled with nitrogen purging to have zero emissions. (A.Ex. 19.)

96. Project B would use cooling water from the existing 15-2B cooling tower. (A.Ex. 8.)

97. As this was a new facility, piping components (valves, flanges, relief valves, etc.) were estimated by Sunoco and the Department as follows:

Valves – 687 components;
Pump seals – 19 components;
Pressure relief valves – 101 components;
Connectors – 952 components; and
Sampling connections – 41 components

(A.Ex. 8, 19.)

98. On January 30, 2014, the Department issued Plan Approval 23-0119B ("Plan Approval B") to Sunoco. (Stip. 7; A.Ex. 31.)

99. Plan Approval B authorized the installation and operation of a new four-lane offloading/loading facility for natural gasoline (aka natural gas condensates) and utilizing a vapor balance system. The project also entailed the use of the 15-2B T05 fractionation tower to separate pentane from natural gasoline (C5+). (T. 31-32; A.Ex. 31.)

100. There would be a change in the operation of the four auxiliary boilers as a new steam load from the fractionation tower would be placed back into service. (A.Ex. 19.)

101. The Department determined that the boilers were modified in part because of the change in the method of operation from the increased steam demand. (T. 355-56; A.Ex. 19.)

102. As part of Plan Approval B, the Department changed the emission caps on the four boilers to accommodate Project B and future projects. The Department used the new caps as the boilers' aggregate potential to emit limits. (A.Ex. 19, 20, 31.)

103. The Department treated the four boilers as one emissions unit for NSR/PSD purposes. (A.Ex. 31.)

104. The Department analyzed whether the work covered by Plan Approval B should be "linked" with previous work covered by Plan Approvals 1 and A. (T. 357.)

105. The Department looked at the dependency of the Plan Approval B work with work for Plan Approvals 1 and A, and whether it was a part of a common plan. (T. 357-58.)

106. In the Department's view, while Projects 1, A, and B were submitted over a short period of time, the work covered by Plan Approval B was not part of transporting ethane and propane through a pipeline and there were enough differences between the sources that the projects should not be linked. (T. 358.)

107. The Department determined, however, that the work covered by Plan Approval B exceeded the significant emission threshold for VOCs and Sunoco was required to obtain 34.65 tons of VOC emission reduction credits (ERCs) under the NSR program. (A.Ex. 19.)

108. The Department performed a PSD analysis as part of its review of the application for Plan Approval B and determined no PSD pollutant would be emitted at a rate greater than the significant emission threshold. (A.Ex. 19.)

109. The Department defined the project for purposes of NSR as the installation of a new source (loading rack and controls) and the modification of an existing major NSR facility because of the new steam load added from the fractionation tower. The fractionation tower and tanks had previously been placed into a Department-approved deactivation and maintenance plan in December 2011. (A.Ex. 19.)

110. In May 2015, Sunoco began to receive the natural gasoline feedstock that it was fractionating with the Project B equipment. (A.Ex. 12.)

111. After receiving the natural gasoline feedstock, but before fractionating it, Sunoco stores it in several existing storage tanks (Tanks 607, 609, and 611). (T. 93-94; A.Ex. 12.)

Plan Approval C, 23-0119C

112. Although Sunoco originally planned to use an air cooling system to perform the cooling function that is part of the deethanization process, Sunoco's engineers determined that water cooling would be preferable and more efficient. (T. 131-32, 595; A.Ex. 20.)

113. On April 7, 2014, while the application for Plan Approval B was still under review, Sunoco submitted its application for Plan Approval No. 23-0119C ("Plan Approval C"), which would authorize the installation of a cooling tower to provide cooling water to the deethanizer permitted under Plan Approval A. (A.Ex. 9, 20.)

114. Sunoco called the work to be covered by Plan Approval C "SXL Project Mariner – Cooling Tower" ("Project C"). (A.Ex. 9.)

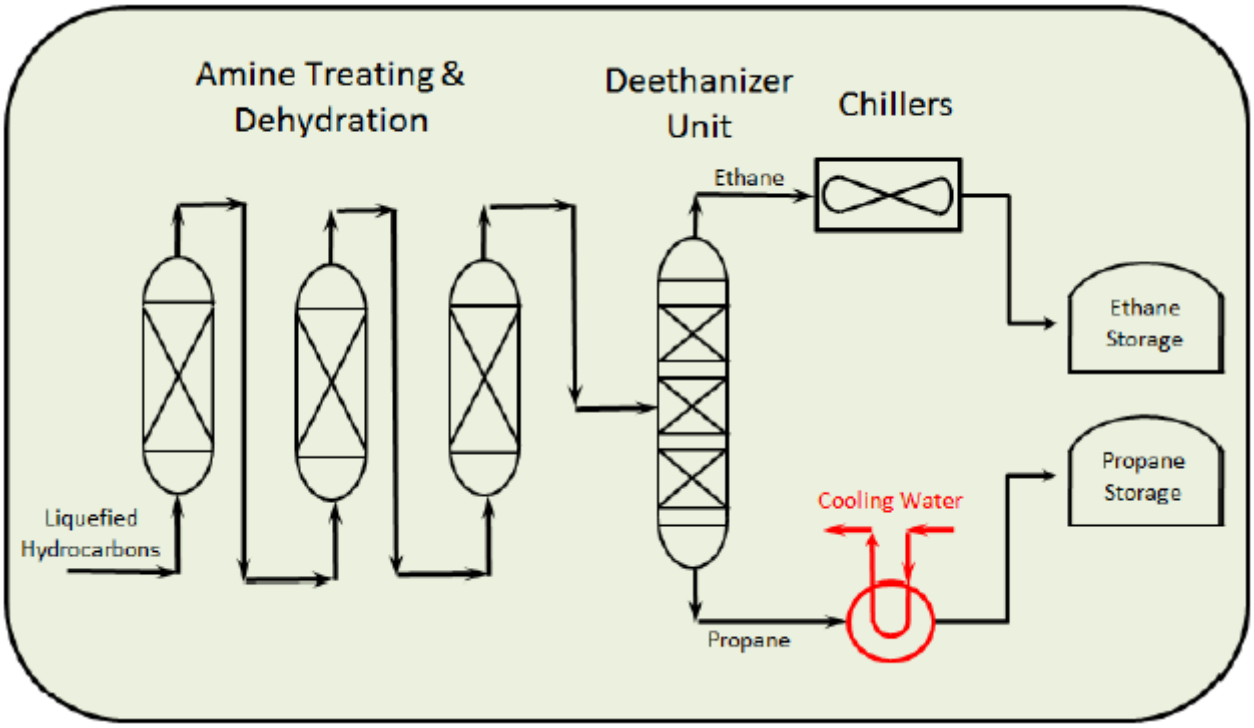
115. A Sunoco representative referred to Project C as "a design optimization that came about through the process of the engineering for 0119A [Plan Approval A]." (T. 594-95.)

116. The stated purpose of the Plan Approval C work was the installation and operation of a new cooling tower designed to process 30,000 gallons per minute (gpm) of cooling water required for the separation of ethane and propane at the deethanizer unit, which was installed as part of Plan Approval A. (A.Ex. 9, 32.)

117. Cooling towers are heat exchangers used to dissipate large heat loads to the atmosphere. (A.Ex. 20.)

118. Sunoco oversized the Project C cooling tower so it could be used with future planned projects. (A.Ex. 20, 32.)

119. The process flow diagram incorporating Projects A and C is as follows:



(A.Ex. 9.)

120. The process diagram for Project C shows the replacement of one chiller from the process diagram for Project A with a cooling tower. (A.Ex. 7, 9.)

121. The facility would continue to receive liquefied ethane and/or propane via pipeline, which would be separated using a liquefaction and boil-off gas management system condensed using the cooling tower, with the liquids being cryogenically stored. Periodically, these liquids would be shipped off-site by marine vessel. (A.Ex. 20.)

122. The Department stated in its technical review memo for Plan Approval C that "[t]he entire process from the previous plan approval will not change except for the addition of the cooling tower and the necessary piping, connections, flanges, relief valves, etc." (A.Ex. 20.)

123. After the NGL feedstock is separated by the deethanizer, ethane and propane are chilled and condensed before being sent to product storage tanks. The new cooling tower is

required for the propane streams generated by the process before entering the propane cryogenic storage tank. (A.Ex. 9.)

124. High efficiency drift eliminators would be used on the cooling tower to reduce water mist, thereby reducing particulate matter emissions. (A.Ex. 9, 32.)

125. The Department determined that the work covered by Plan Approval C was technically and economically linked to the work performed pursuant to Plan Approval A (the deethanizer part of the process). (T. 372-73, 745.)

126. In its technical review memo, however, the Department mistakenly referred to Project C as a modification of Plan Approval 1 instead of Plan Approval A. (T. 372-73; A.Ex. 20.)

127. Because the Department "linked" the Plan Approval C work with the Plan Approval A work, the Department added the emissions of Plan Approval C as if those emissions had been part of the application for Plan Approval A. (T. 745-47; A.Ex. 20.)

128. The Department concluded that the emission increases from the Plan Approval A work combined with the emissions from the Plan Approval C work would not have on their own triggered NSR, so no additional ERCs were needed above what had been required by Plan Approval B. (T. 746-47; A.Ex. 20.)

129. On November 19, 2014, the Department issued Plan Approval 23-0119C (Plan Approval C) to Sunoco. (Stip. 8; A.Ex. 32.)

Plan Approval D, 23-0119D

130. In December of 2013, Sunoco commenced an open season for a proposed "Mariner East 2" pipeline, which it would install parallel to the Mariner East 1 pipeline. (T. 595-96, 613-14; A.Ex. 3.)

131. During this open season, customers could subscribe to take capacity on the Mariner East 2 pipeline to ship ethane, propane, and butane from the Marcellus Shale region to Marcus Hook. (T. 595-96; A.Ex. 3.)

132. If the open season proved to be successful, Sunoco planned to build tanks at the facility to store the ethane, propane, and butane after transporting it there. (T. 595-96.)

133. In May of 2014, Sunoco completed the open season. (T. 613.)

134. The customers who subscribed to take capacity on the new pipeline contracted with Sunoco to secure their respective capacities. (T. 589-91, 595-96.)

135. Customers also contracted with Sunoco to acquire the right to store the ethane, propane, and butane at the facility. (T. 590-91, 595-96; A.Ex. 3.)

136. In a December 2013 press release announcing the open season for Mariner East 2, Sunoco stated that "we will continue to add storage and expand our Marcus Hook complex to be a world class NGL facility on the East Coast. In addition, the 800-acre Marcus Hook site is well positioned for further NGL processing." (T. 281; A.Ex. 3.)

137. On September 26, 2014, even before Plan Approvals B and C were issued, Sunoco submitted a plan approval application to the Department to expand storage of cryogenic ethane, butane, and propane to be loaded onto cryogenic marine vessels. (A.Ex. 10, 21.)

138. Sunoco called the work the "SXL New Tanks Project" ("Project D"). (A.Ex. 10.)

139. Project D is intended to store ethane, propane, and butane arriving mostly through the Mariner East 2 pipeline. (T. 194.)

140. Project D proposed to install one 300,000 bbl cryogenic ethane storage tank, one 600,000 bbl cryogenic butane storage tank, one 900,000 bbl cryogenic propane storage tank, one 600,000 bbl cryogenic propane storage tank, one new cold flare for emergency depressurization

events, one new pipeline dehydration system, one new cooling tower, install the necessary piping for the cryogenic product storage, and allow the use of the previously proposed deethanizer tower for separation of comingled materials. (A.Ex. 10.)

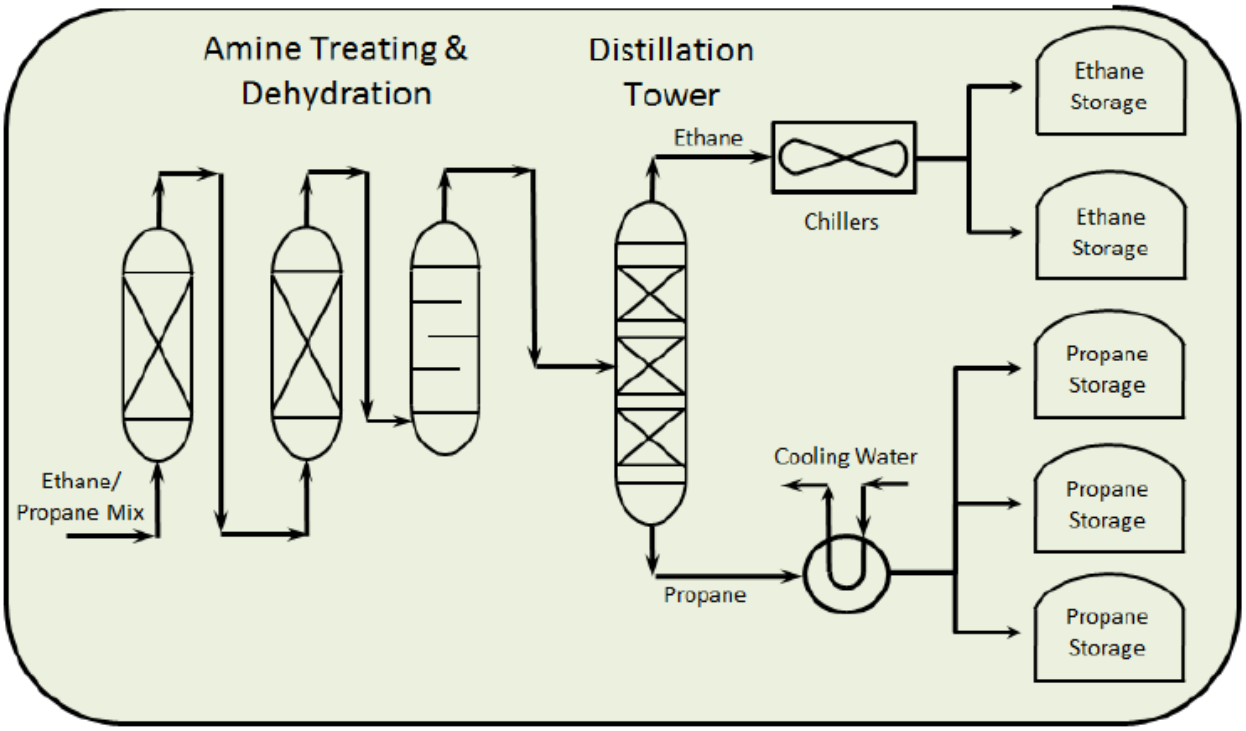
141. The Project D cooling tower is known as the Mariner East 2 cooling tower. (T. 133.)

142. The project would involve increased throughput of the previously permitted deethanizer distillation tower (from Plan Approval A) and additional steam demand from the auxiliary boilers (permitted in Plan Approval B), and use of the existing permitted flare located in the state of Delaware. (T. 393; A.Ex. 21.)

143. Products arriving by pipeline would either be transported as butane, propane, or a mix of ethane/propane. Each feedstock would be transported separately in the pipeline but there would be some transmix created during transportation. After processing, this transmix would meet the product specification of propane, and would be refrigerated and sent to product storage. After exiting the pipeline, the ethane, propane, and butane would be separated and refrigerated prior to being sent to storage. (A.Ex. 21.)

144. The ethane/propane mix would pass through an amine treatment and dehydration system. Amine treating removes the hydrogen sulfide (H2S) and carbon dioxide (CO2) gases as these can corrode the downstream piping components (previously permitted) and the deethanizer separation column (previously permitted). The raw materials, amine treatment and dehydrator, and distillation tower, and all of the tanks were permitted under previous plan approvals. (A.Ex. 21.)

145. A diagram of the ethane/propane processing looks like this:

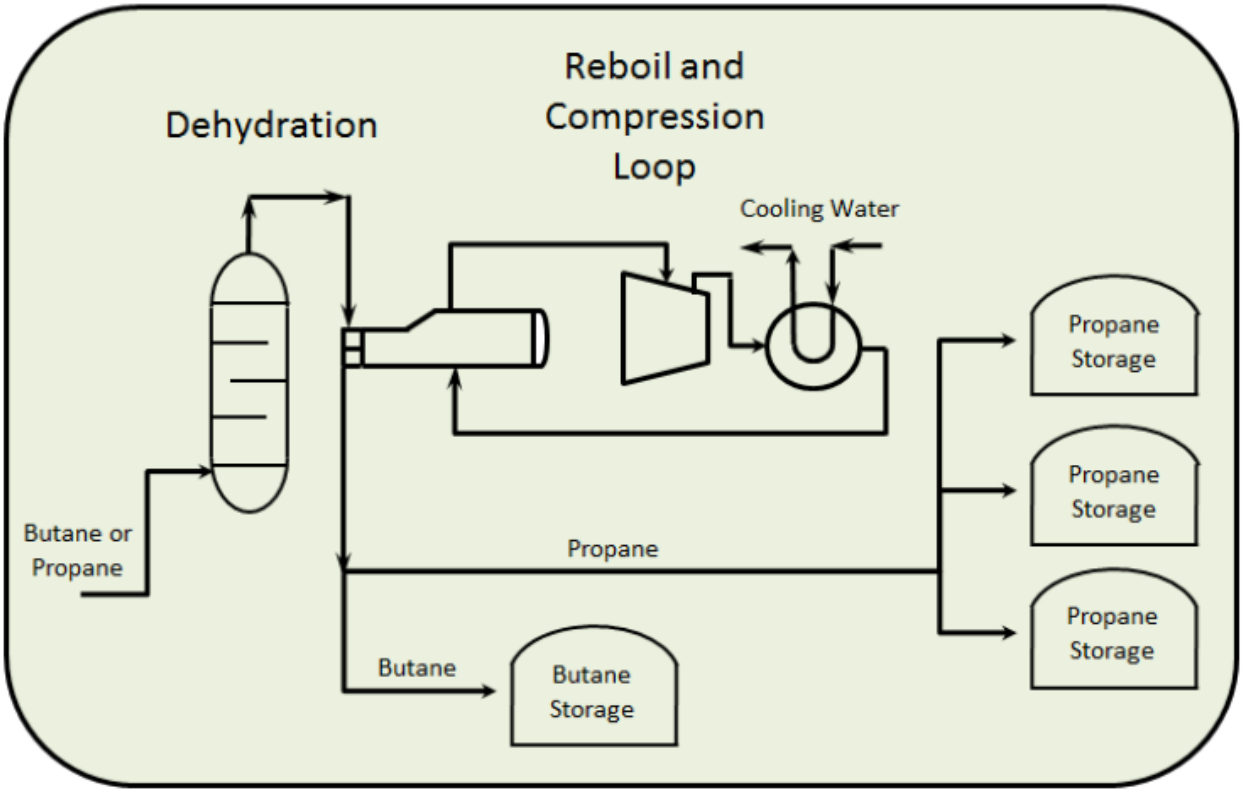


(A.Ex. 10, 21.)

146. Amine treatment and dehydration were part of the work completed under Project A. (A.Ex. 7, 18, 30.)

147. The only appreciable difference between the ethane/propane process diagram for Project D and the process diagram for Projects A and C (see Finding of Fact No. ("FOF") 119) is the addition of more ethane and propane storage. (A.Ex. 7, 9, 10.)

148. Propane and butane processing would be treated as outlined in the following diagram:



(A.Ex. 10, 21.)

149. The reboil and compression loop (seen in the diagram above between the dehydration and storage components) is a refrigeration loop for the incoming propane or butane. The reboilers (horizontal cylindrical figure), compressors (trapezoid figure), and chiller (circle figure) function to remove the heat from these materials, thus refrigerating them. (A.Ex. 21.)

150. The new storage tanks would be double-walled construction and would employ a boil-off gas management system that would allow the cryogenic liquids to auto-refrigerate and retain the material as a liquid in their respective tanks. (A.Ex. 21.)

151. The loading of the liquid ethane, propane, and butane onto marine vessels would be accomplished using the previously permitted loading docks. Each of the docks located in Pennsylvania was permitted under Plan Approval 1. Each dock contains two identical loading arms and one vapor return line. The loading operation is a closed-loop system, where the boil-

off gases are collected, chilled, and returned to the respective product storage tanks. At the completion of each loading event, each loading arm is purged with nitrogen to complete the transfer of the liquid products onto the marine vessel. (A.Ex. 21.)

152. The air-assisted cold flare (designed for cold temperatures) previously permitted under Plan Approval A would be redesigned to include controlling any failures from the new tanks. This new design would include high and low-pressure flare tips. (A.Ex. 21.)

153. A new air-assisted low pressure cold flare would be installed to be used for flaring streams that are less than -20 degrees Fahrenheit. Flaring for emergency depressurization caused by power failures or equipment exposed to pool fires would be handled by either of the two cold flares or the existing flare located in the state of Delaware. (A.Ex. 21.)

154. It was determined that a new 50,000 gpm cooling tower would be required for the additional boil-off gas management system, and the cooling water loop would contain a mixture of potable water and boiler condensate. This cooling tower would be equipped with high efficiency drift eliminators to reduce the amount of particulate matter emissions to the atmosphere. (A.Ex. 21.)

155. On February 26, 2015, the Department issued Plan Approval 23-0119D ("Plan Approval D") to Sunoco. (Stip. 9; A.Ex. 84; C.Ex. 9.)

156. Plan Approval D authorized the installation of "four (4) new cryogenic storage tanks for the storage of liquid ethane, butane, and propane. Additional installations include: the necessary piping components, a cold flare for depressurization events, a 50,000 gpm cooling tower [Source 112], and a new pipeline dehydration system for the processing of liquid propane and butane. A previously permitted cold flare (Source C01) will be modified to handle the

additional tankage in the event of an emergency situation with these additional storage tanks." (C.Ex. 9.)

157. Although Plan Approval D would result in steam demand, the Department determined that the facility was capable of producing enough steam for its own use from the existing auxiliary boilers as permitted under Plan Approval B, Title V Permit No. 23-0001, and Title V Operating Permit No. 23-00119. (A.Ex. 21.)

158. The Department decided that the additional steam demand placed on the existing auxiliary boilers would not result in a modification because the boilers were previously permitted under Plan Approval B and the additional usage would not result in exceeding any of the permitted emission limits established at that time. (T. 394; A.Ex. 21.)

159. The Department analyzed whether the work covered by Plan Approval D was "linked" with any previous project. While the applications for Plan Approvals 1 through D were admittedly submitted in a short time period, the various construction work was not technically linked together nor were the projects part of a common plan in the Department's view. (T. 391-96.)

160. The Department considered the use of existing equipment of previous projects in its analysis for Project D. The Department determined the Plan Approval D work was not linked with any other work and Sunoco did not attempt to circumvent regulatory requirements by submitting multiple separate applications for the various projects. (T. 391-96.)

161. Although many sources in the prior plan approvals were utilized in Project D, the Department did not view Project D as being linked with any earlier projects because Sunoco had stated that Project D was precipitated by product requests from new customers. (T. 394-96.)

162. The Department did not independently verify whether Project D would in fact accommodate new customers. (T. 396.)

163. The Department determined that the work under Plan Approval D did not trigger NSR. (A.Ex. 21.)

164. It also concluded that the Plan Approval D work did not trigger PSD. (A.Ex. 21.)

165. Plan Approvals 1 through D were not appealed to the Environmental Hearing Board.

Plan Approval E, 23-0119E

166. On September 16, 2015, Sunoco submitted a plan approval application to the Department to install two depropanizer fractionation towers, a debutanizer fractionation tower, a new flare header for the fractionation system, and additional piping and fugitive components. (T. 750; A.Ex. 11, 23, 24.)

167. Sunoco called the proposed work "ETP Project Revolution and SXL Depropanizer Project" ("Project E"). (A.Ex. 11.)

168. Project E was to install and operate the following equipment: three independent fractionation systems (two depropanizers and one debutanizer); additional piping for the flare header and fugitive components; increased steam demand from the previously permitted auxiliary boilers; and increased cooling water demand from the 15-2B cooling tower permitted under TVOP 23-00119. (A.Ex. 11, 24.)

169. The three fractionation towers are already present at the facility but are being repurposed from when Marcus Hook was a refinery. (A.Ex. 24.)

170. Project E involves the increased use of the existing ethylene complex flare, the existing 15-2B cooling tower, and the existing auxiliary boilers at the facility. (A.Ex. 11, 24, 33.)

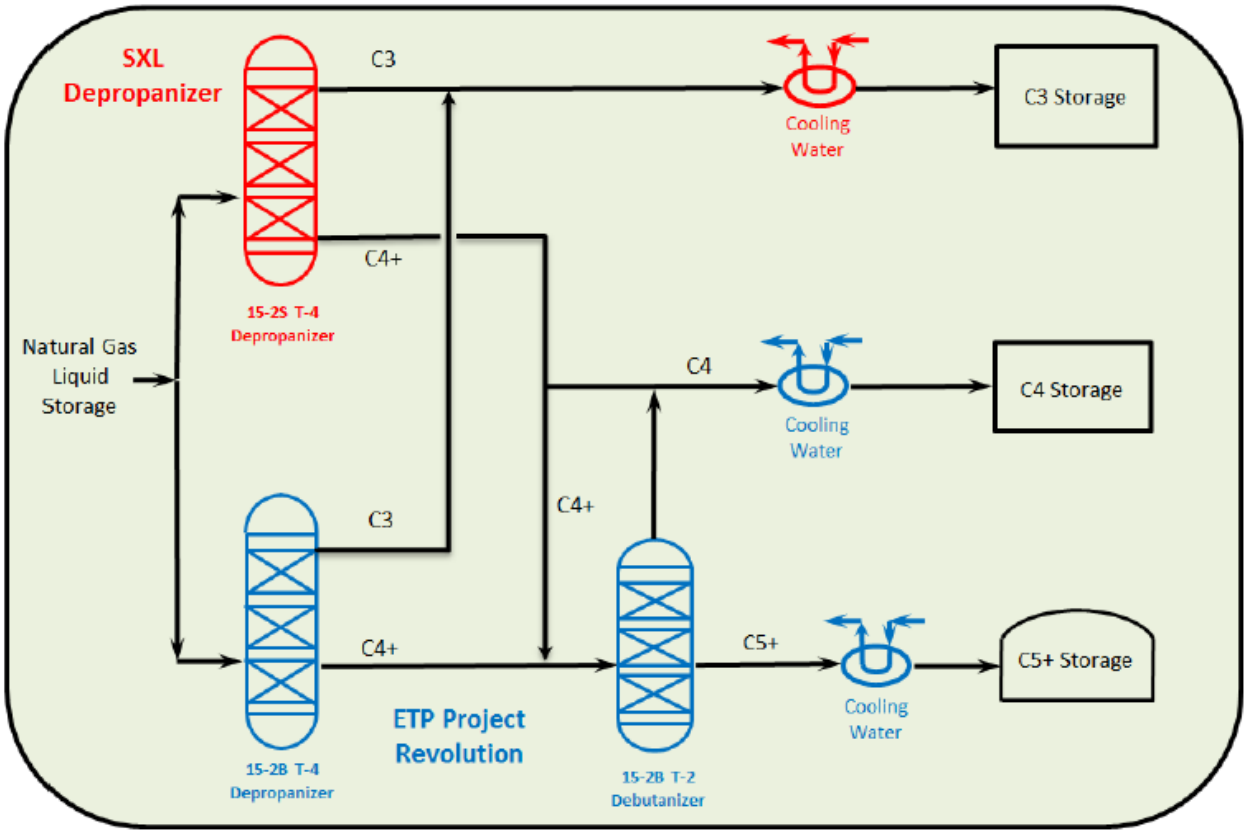
171. Project E includes the installation of new piping equipment, including valves, flanges, and relief valves. (A.Ex. 24.)

172. Sunoco will install new pipes leading from other emission units to the header systems for the flare, cooling tower, and boilers, which will accommodate their increased use. (T. 600-02, 623-24, 628-31; A.Ex. 11, 24.)

173. The work to be covered under Project E will use steam from the existing auxiliary boilers and use cooling water from the existing 15-2B cooling tower (Source 139). (T. 750; A.Ex. 11, 23, 24)

174. The application for Project E did not include new storage tanks. (T. 750.)

175. The process flow diagram for Project E is as follows:



(A.Ex. 11, 24.)

176. Project E will generally receive a mixture of propane and butane (transmix) or deethanized natural gas liquids at Marcus Hook via pipeline, which will then be processed by either fractionation system (depropanizer or debutanizer), refrigerated, and directed to product storage. Each fractionation system will produce export grade propane, mixed butanes, and natural gasoline. (A.Ex. 24.)

177. After the transmix and/or natural gas liquids arrive at the facility and are routed to either or both depropanizer units, the overhead product (propane, C3) will be cooled and cryogenically stored. The heavier bottoms will then be passed on to the debutanizer where the top-end product (butane, C4) will be separated, cooled, and cryogenically stored, while the bottoms (pentane and higher (natural gasoline), C5+) will be cooled and condensed for cryogenic storage. (A.Ex. 11, 24.)

178. Storage for ethane, propane, or butane will be either in existing caverns or the cryogenic storage tanks previously permitted under Plan Approvals 1 and D. (A.Ex. 24.)

179. Storage for the natural gasoline will be in existing floating roof tanks permitted in TVOP 23-00119 and Plan Approval B. (A.Ex. 24.)

180. The 15-2B cooling tower is equipped with high efficiency drift eliminators, has a rated water flow capacity of 25,000 gpm, and will use potable water and boiler condensate. (A.Ex. 24.)

181. The cooling tower unit was in a Department-approved deactivation and maintenance status from late 2012 to early 2014. Since then, it had been operating in a reduced capacity and the increase in cooling demand from Project E (19,500 gpm) was projected to max out its capacity. (A.Ex. 24.)

182. As part of Project E, Sunoco will make additions of piping and "tie-ins" to the 15-2B cooling tower's header system (or "circulation loop") connected to the tower, but not to the tower itself, in order to accommodate the increased demand for cooling water that other aspects of the project will place on the tower. (T. 59, 150-51, 155-56, 623-24.)

183. The 15-2B cooling tower services both the Plan Approval B and E projects. (T. 46; A.Ex. 8, 11.)

184. In the applications for Plan Approvals B and E, Sunoco's consultant used design margins to predict cooling water demand figures. (T. 51-56.)

185. However, in light of the final plans for Projects B and E, a set of data and calculations that were more accurate became available and, therefore, the design margins were removed from the equation, which lowered the figures for the total cooling water demand. (T. 81-86.)

186. The total cooling water demand for the Projects B and E is 24,993 gpm of the 15-2B cooling tower's 25,000 gpm limit. (T. 52, 83; A.Ex. 24, 52.)

187. The flare used by Project E will be the existing ethylene complex flare that is physically located in the state of Delaware. (T. 600-02; A.Ex. 11.)

188. A flare is a pollution control device with a lit pilot that destroys the emissions that are being vented, if any, from the various operations throughout the facility. (T.630; A.Ex. 24.)

189. The flare header is a collection pipe header that runs throughout the facility to gather emissions from various units to direct them to the flare for destruction. (T. 629.)

190. No changes will be made to the flare itself; however, there will need to be new piping connections and tie-ins installed to the flare header system from the fractionation towers. (T. 628-31; A.Ex. 24.)

191. As part of Project E, Sunoco also plans to install a new sub-header for the flare. (T. 601-03, 628-31; A.Ex. 11.)

192. New flare connections in the fractionation system will be routed to the new sub-header and then to the existing flare header and then the flare. (T. 602, 628-31; A.Ex. 11.)

193. The new sub-header and new connections will accommodate the increased use of the flare that will result from other aspects of the project. (T. 628-31; A.Ex. 11, 24.)

194. Sweep gas has always been sent to the flare on a regular basis to ensure safe and reliable operation, but no process hydrocarbon streams are routinely vented to the flare. (A.Ex. 24.)

195. Sweep gas is put into the flare header to keep positive flow and positive pressure on the flare head. (T. 636.)

196. Sunoco will be installing multiple meters to determine the volume of product sold to its various customers. These meter provers will need to be calibrated against a known quantity of material on a semi-annual basis, which will require the piping system to be evacuated and the gases to be routed to the Delaware flare. These "blowdown" events will result in incremental flare emission increases of CO, NOx, VOC, SO2, and CO2e. (A.Ex. 24.)

197. Additional steam demand will be required by each fractionation tower, as well as in a preheater for the feedstock. This will be provided by the currently permitted auxiliary boilers. (A.Ex. 24.)

198. The additional steam demand will primarily come from the 15-2B T-4 depropanizer and 15-2B T-2 debutanizer reboilers. (A.Ex. 11.)

199. As part of Project E, Sunoco will make additions of piping to the steam header ("boiler header") system, which transports steam from the auxiliary boilers, but not to the auxiliary boilers themselves. (T. 619-23, 633-34; A.Ex. 24.)

200. On April 1, 2016, the Department issued Plan Approval 23-0119E ("Plan Approval E") to Sunoco. (Stip. 10; A.Ex. 34.)

201. Plan Approval E authorized Sunoco "to construct and operate three distillation units (two depropanizers and one debutanizer) to separate and purify the natural gas liquids and pipeline transmix into propane, butane, and C5+ products. These new processes will utilize steam and cooling water from existing permitted equipment." (A.Ex. 34.)

202. The Department initially determined in its technical review memo drafted prior to the issuance of Plan Approval E that the increase in the steam demand for the fractionation towers required the addition of new steam lines. (A.Ex. 23.)

203. The Department also determined prior to the issuance of Plan Approval E that the boiler-related changes constituted a modification to the boilers even though the increase in emissions from the boilers would not cause the emission limits for the boilers to be exceeded. (A.Ex. 23.)

204. The Department later changed its mind and determined in a revised memo seven months after the issuance of Plan Approval E and after this appeal was filed that new steam and condensing lines would not be added to the boilers, and therefore, they would not be modified. (T. 760-61; A.Ex. 24.)

205. The Department and Sunoco considered the incremental emissions from the boilers related to Project E to be zero because of the adjustment of the permit limit for the boilers as part of Plan Approval B. (T. 381-82, 745-46, 752; A.Ex. 11.)

206. The Department considered the new emissions from the boilers to have been previously accounted for as part of Project B. (T. 381-82, 745-76, 752.)

207. Project E will result in increased steam demand of 238,700 pounds per hour. (A.Ex. 11, 24.)

208. The Department also initially determined that new lines would need to be added to the 15-2B cooling tower. (A.Ex. 23.)

209. The Department considered this a modification of the cooling tower unit before issuing the plan approval. (A.Ex. 23.)

210. As with the boilers, the Department later changed its mind after Plan Approval E was issued and determined that new lines would not be added to the cooling tower, and thus it would not be modified. (A.Ex. 24.)

211. The Department ultimately determined that the cooling tower was not modified by Plan Approval E because, in addition to lines not being added to the source itself, the capacity of the unit did not change, and there were no new emissions added above permitted levels. (T. 761; A.Ex. 24.)

212. Similarly, the Department ultimately determined that the flare was not modified because no changes would be made to the flare itself as part of Plan Approval E. (T. 761; A.Ex. 24.)

213. The Department determined that the flare header is a separate new source. (T. 755; A.Ex. 24.)

214. Thus, after first determining the flare, cooling tower, and boilers were modified as part of the work covered by Plan Approval E, after this appeal was filed the Department changed its conclusion and said the equipment would not be modified. (A.Ex. 23, 24.)

215. The Department ultimately determined the cooling tower, flare, and auxiliary boilers were existing unmodified sources. (T. 755; A.Ex. 24.)

216. Therefore, despite what was stated in its initial technical review memorandum, the Department eventually determined there were no modified sources associated with the Plan Approval E work. (T. 755; A.Ex. 24.)

217. In his 23 years working with the Department, the Department's permit reviewer had not previously composed a revised technical review memorandum for a project after a plan approval had already been issued for the project. (T. 402.)

218. The Department's permit reviewer admitted that the revised technical review memorandum for Plan Approval E was written in response to the Council's appeal in this matter. (T. 402.)

219. The Department determined the three fractionation towers, meter prover, flare header, and miscellaneous valve and piping components were new sources. (T. 755; A.Ex. 24.)

220. The three existing fractionation towers were each being modified from their prior use in the former petrochemical refinery to now process liquid/vapor, and therefore, the Department considered them to be new sources. (A.Ex. 24.)

221. The project would also involve the following, which the Department did not consider to be modifications: use of previously permitted underground caverns (Source 800 in TVOP 23-00119); use of already permitted cryogenic storage tanks and internal floating roof tanks; and use of the existing permitted flare located in Delaware. (A.Ex. 24.)

222. For purposes of performing a PSD applicability determination, the Department defined the Plan Approval E work as the installation of several new sources—the three fractionation systems (two depropanizers and one debutanizer), additional piping to the flare

header and fugitive components, and the meter prover—along with incremental emissions increases from the cooling tower, boilers, and the flare. (T. 765-66; A.Ex. 24.)

223. For purposes of NSR, the Department defined the Plan Approval E work as the modification of the three existing fractionation systems, installation of additional piping to the flare header and fugitive components, and the installation of a meter prover system. (T. 762-63; A.Ex. 24.)

224. As nonmodified existing sources, Sunoco and the Department included "incremental" increases in emissions from the flare and cooling tower in their calculations of total emissions for Project E in the applicability analysis. (T. 664-68, 698-99, 755-57, 765-66, 875-76; A.Ex. 11, 24, 33.)

225. Incremental emissions from the flare and cooling tower were included in the Department's applicability calculations even though the existing permit limits accommodated those increases. (A.Ex. 24.)

226. The Department determined that the Plan Approval E work should not be "linked" with the Plan Approval 1 work because "the projects and sources were different." (T. 753.)

227. The Department determined that the Plan Approval E work should not be "linked" with the Plan Approval A work because the processes were different in each project—two depropanizers and a debutanizer versus a deethanizer. (T. 753.)

228. The Department determined that the Plan Approval E work should not be "linked" with the Plan Approval B work because the Plan Approval B work dealt with a different product, natural gasoline, delivered by trucks and rail, while the Plan Approval E work dealt with propane and butane or deethanized NGLs delivered by pipeline. (T. 753-54.)

229. The Department determined that the Plan Approval E work should not be "linked" with the Plan Approval C work because "they were two totally different projects with totally different sources." (T. 754.)

230. The Department determined that the Plan Approval E work should not be "linked" with the Plan Approval D work because even though the Plan Approval E work used some of the storage capability associated with the Plan Approval D work, that was not a sufficient enough "link" because other products could be stored in those tanks. (T. 754-55.)

231. Similar to Project D, the Department's permit reviewer did not aggregate Project E with the earlier projects in large part because he was told that the sources being installed were for "new customer demand." (T. 451-52.)

232. There is no record evidence to support the permit reviewer's belief, and it in fact cannot be true because Project E was to produce some of the same products as earlier projects. (A.Ex. 10, 11, 18.)

233. For example, the products produced by Project E were propane, butane, and natural gasoline. (A.Ex. 11.) Propane was produced as early as Project A, (C.Ex. 4), and Project D involved propane and butane, (A.Ex. 10).

234. The permit reviewer did not believe the projects were technically linked in part because any piece of equipment that can be used for multiple projects does not support linking the projects. (T. 392, 452-54.)

235. The permit reviewer may have been referring to "new customers" for the same products, such that in his view, increased customer demand is a basis for segmenting projects for separate permits. (T. 396, 452, 454.)

236. The Department concluded that the Plan Approval E work alone did not trigger PSD significance thresholds. (T. 510; A.Ex. 24.)

237. The Department did not consider whether aggregated Projects 1 through E would trigger PSD significance thresholds. (T. 381-83, 521-22, 820-26; A.Ex. 6-11.)

RFD 5236

238. A request for determination ("RFD") is a request by a company to determine whether an operating permit or plan approval is needed for a particular project. (T. 331.)

239. On August 6, 2015, Sunoco submitted an RFD to install two new spherical tanks to store propane and butane materials (C3+ natural gas liquids with ethane removed) entering the facility ("RFD 5236"). (T. 333; C.Ex. 15.)

240. On August 13, 2015 (before the issuance of Plan Approval E), the Department issued RFD 5236, indicating that a plan approval was not required for the proposed work. (C.Ex. 16.) There was no appeal from RFD 5236.

241. In approving the RFD, the Department stated, "[T]he Department exempts the installation of these two (2) 50,000 barrel spheres for the storage of propane and butane from the requirements to obtain a plan approval." (C.Ex. 16.)

Aggregation

242. Since the issuance of Plan Approval E, Sunoco has obtained RFDs and plan approvals or submitted pending applications for plan approvals or RFDs for other construction work at the facility involving receiving, fractionating, storing, and shipping natural gas liquids. (A.Ex. 12, 35 [Plan Approval F], 13 [Plan Approval G], 14 [Plan Approval H], 15 [Plan Approval I]; C.Ex. 17, 18 [RFD 5597].)

243. In December 2015, before Plan Approval E was issued, Sunoco submitted an application for Plan Approval No. 23-0119F ("Plan Approval F"), which increased the VOCs emissions limits for the tanks storing natural gasoline (which had been reactivated under Plan Approval B) and updated the emissions limits for two other tanks so that they could be used to store high vapor pressure materials, including gasoline. (A.Ex. 12.)

244. Sunoco prepared a helpful summary of the components of the Marcus Hook project and numbered them in an exhibit as follows:

> Plan Approval 0119: Ethane & Propane Storage Facility
>
> (1) ME1 [Mariner East 1] ethane storage tank and boil-off gas system
> (2) ME1 propane storage tank and boil-off gas system
>
> Plan Approval 0119A: Deethanizer Unit
>
> (3) ME-1 Amine treating system
> (4) ME-1 Dehydration system
> (5) Deethanizer unit
>
> Plan Approval 0119B: Natural Gas Fractionator
>
> (6) Four-lane offloading/loading facility
> (7) Existing 15-2B T-05 fractionation tower & associated equipment
> (8) Existing spheres for pentane overhead product
>
> Plan Approval 0119C: ME1 Cooling Tower
>
> (9) Cooling Tower
>
> Plan Approval 0119D: ME2 [Mariner East 2] Ethane, Butane, Propane Storage Facility
>
> (10) New 300,000 barrel ethane storage tank
> (11) New 600,000 barrel butane storage tank
> (12) New 900,000 barrel propane storage tank
> (13) New 600,000 barrel propane storage tank
> (14) New cold flare for emergency depressurization events
> (15) ME2 dehydration system
> (16) ME2 cooling tower
>
> Plan Approval 0119E: Revolution Fractionation Systems
>
> (17) 15-2B depropanizer and debutanizer (fractionation towers)
> (18) 15-2S depropanizer (Fractionation tower)

(19) Existing auxiliary boilers (for steam)
(20) 15-2B cooling tower

(T. 118-19; A.Ex. 45.)

245. These components are numerically keyed to the following aerial photograph of the site:

(T. 118-19; A.Ex. 45.)

246. The two spherical tanks installed pursuant to RFD 5236 are reflected on the aerial photograph as two dark spheres located to the right and slightly down of the spheres labeled as No. 8. (T. 142-43; A.Ex. 45.)

247. The timeline for the phased construction of the projects is shown on Sunoco's Plan Approval Summary as follows:

PLAN APPROVAL SUMMARY

		Dates						
PA No.	Description	BD Period (BD Engr)	BD App'l	Engineering	Permit Application	Permit Approval	Construction	Comments
0119	"Tank Project" Orig plan – propane/ethane batched , not blended ME1 Tanks – 500K BBL propane; 300K BBL ethane Cold Flare Product loading to marine vessels Allow use of cavern for propane	2010 – Sept 2012	8/12 12/12 1/13 3/13 7/13	Aug 2011 – Oct 2014 (95%)	Nov 2012 (ERM- Aug '12)	Feb 2013	March 2013 – Jan 2016	
0119A	Deethanizer Amine unit → Dehydration → Deethanizer → Chill → Tanks	Sept '12: -final tank size - end open season Oct: Final capacity		Sept 2011 – Oct 2014 (95%)	Mar 2013 (ERM- Jan '13)	Sept 2013	Feb 2014 – Jan 2016	
0119B	Natural Gasoline (C5 Splitter). Receive NG by rail Fractionate and store feedstock and product Out by truck via new truck rack	Feb '13 – May '13	Interim – 6/13 Full – 11/13	May '13 - Dec '13	Sept 2013 (ERM- June '13)	~Jan '14	Aug 13 – Mar 14	
0119C	Cooling Tower New CT for deethanizer Design change to use water-cooler exchangers vs air-cooled	NA	NA	Part of ME1 Engr	April 2014 (ERM- Jan '14)	Sept '14	Part of ME1 Constr	
0119D	"New Tanks" – ME2 Tanks Ethane, propane, butane tanks Expansion on ME1 Flare Product loading to marine vessels Dehydrators Cooling tower Convert deethanizer to demethanizer	Mar 2013- Dec 2014 (Open Season 12/13 – 5/'14)	Numerous interim approvals through BD period: Apr '13 – Dec '14	Sept '13 – Nov '16	Sept 2014 (ERM- Jan '14)	Feb '15	Feb '15 – Dec '17	
0119E	Depropanizer (Revolution Frac) Fractionation – restart of 3 towers (2 – deprop; 1 – debut) Product feed and storage (Spheres – RFD5236- Aug 2015) Increase steam and cooling water and associated emissions	Dec '14 – ~ May '15	~June '15	Apr '15 –	Sept 2015 (ERM- July '15)	April '16	April '16 – July '17	Scope: • Target 30M BPD • Inlet storage spheres • 15-2B towers T4 (deprop) and T2 (debut) • Future: 15-2S T04 to get to 48 M BPD

(A.Ex. 45; S.Ex. 53.)

248. The units at the Marcus Hook facility that are involved in Projects 1, A, B, C, D, and E and RFD 5236 are all spatially close, as shown on Sunoco Exhibit 52. (*See also* T. 392.)

249. Projects 1, A, B, C, D, and E and RFD 5236 have all been devised and permitted in quick succession between November 2012 (Project 1) and April 1, 2016 (Project E), with applications overlapping in some cases and only days or weeks between Sunoco receiving one plan approval and applying for the next one in others. (T. 392; S.Ex. 53.)

250. Sunoco has planned and developed the work covered by Plan Approvals 1 through E and RFD 5236 in close succession in time. (A.Ex. 6-11, 29-34; C.Ex. 15, 16; S.Ex. 53.)

251. Projects 1, A, B, C, D, and E and RFD 5236 are all part of Sunoco's common plan to convert the refinery into a full service NGL processing, storage, and shipping facility. (T. 29-41, 179-80, 220, 278-79; A.Ex. 2, 3, 4.)

252. Projects 1, A, B, C, D, and E and RFD 5236 are all geared toward fractionating, storing, and shipping out NGLs. (T. 29, 35-36, 117, 144-46, 220; A.Ex. 6-11, 18-24, 29-34, 84.)

253. With Plan Approvals 1 through E, the Marcus Hook facility is capable of storing, fractionating, and distributing all of the products from an NGL stream of C3+. (T. 144-46.)

254. Projects 1, A, B, C, D, and E and RFD 5236 are all operationally and technically interdependent. (T. 35-36, 93-95, 99, 143-44, 211-20, 229, 358, 372, 393, 594-95, 864; A.Ex. 6-11, 18-24, 29-34; C.Ex. 2, 15, 16.)

255. Projects 1, A, and C were all part of what Sunoco called Project Mariner, which prepared the facility for receiving NGLs from Mariner East 1. (T. 34; A.Ex. 6, 7, 9.)

256. Sunoco and the Department linked Project A and Project C "due to the economic and technical dependency between these two projects." (T. 371-73; A.Ex. 9, 32.)

257. The cooling tower installed as part of Project C was designed to provide cooling water to the deethanizer installed as part of Project A. (T. 33-34, 372; A.Ex. 9.)

258. Project D was a revision to the scope of Project Mariner, to increase its capacity due to the additional volumes of NGLs coming from the Mariner East 2 pipeline. (T. 35-36, 138-39.)

259. Project D was an expansion on Projects 1, A, and C. (T. 35-36, 137-39, 210-11.)

260. Sunoco aggregated Projects 1, A, C, and D in its application for Project D, incorporating the emissions from the previous projects into Project D. (T. 37; A.Ex. 10.)

261. Projects 1, A, C, and D share much common equipment. (T. 134-37, 147-48, 201-04, 357-58, 393; A.Ex. 6, 7, 9, 10, 18, 20, 21; C.Ex. 2.)

262. Sunoco's permitting consultant believed that Projects 1, A, C, and D were all similar and involved similar processes. (T. 36.)

263. In its technical review memo for Project D, which installed four new storage tanks (one ethane, one butane, and two propane), the Department stated that one cryogenic ethane tank and one cryogenic propane tank shown on the process diagram had been previously permitted under Plan Approval 1. (A.Ex. 21.)

264. The Department linked additional equipment in Project 1 to Project D, stating that "[t]he previously permitted air-assisted cold flare (see plan approval 23-0119) will be redesigned to include controlling any failures from the new tanks in this project." (A.Ex. 21.)

265. The Project D dehydration system is similar in general process to the Project A dehydration system. (T. 133.)

266. Project D uses the deethanizer installed as part of Project A, which continues to be used for separating out ethane, although Sunoco intends to repurpose it as a demethanizer. (T. 134-36, 201-04.)

267. Project D uses the same amine treatment system installed as part of Project A. (T. 137.)

268. Projects D and E handle and process NGLs from the Mariner East 2 pipeline. (T. 35-36, 67-68, 132-33, 138-39, 190-91; A.Ex. 3, 10, 11.)

269. Project E separates out propane (C3) and butane (C4) from C3+ to produce a C5+ natural gasoline stream that will utilize the same tanks for storage as Project B. (T. 41, 93-96, 143.)

270. Project B then has the capability of taking the natural gasoline in those tanks and removing the pentane from it. (T. 143-44.)

271. At least in part, the ethane, propane, and butane storage for Plan Approval E will use the cryogenic tanks associated with the work done under Plan Approvals 1 and D. (T. 96-99, 140-42; A.Ex. 24.)

272. One of the fractionation towers that Sunoco built as part of Project A and renamed as part of Project D was up for consideration for use as part of Project E, but there was concern with the threat that if Sunoco reused that tower the Department would aggregate Project Mariner (Projects 1, A, and C) with Project E. (T. 41-45.)

273. Sunoco then decided to use a different fractionation tower for the Plan Approval E work. (A. Ex. 11.)

274. As part of Project E, Sunoco offers its customers the service of separating a propane/butane mixture that is created by Project D. (T. 229.)

275. RFD 5236 constructed spherical storage tanks that function to store the C3+ feedstock for Project E. (T. 38, 142-43.)

276. In determining whether to aggregate emissions from various smaller projects, the Department considers future projects that the permittee admits are planned. (T. 337, 859-60, 863-64.)

277. As part of its circumvention analysis, the Department considers past and future planned projects and their dependency on one another, installation over short periods of time, how the project affects the business economically or in terms of productivity, the use of common equipment, and whether new sources were installed to meet new customer demand. (T. 335, 451-54, 542-43, 863-64.)

278. The Department appeared to consider as part of its circumvention analysis whether feedstock for the various projects came from trucks, rails, or pipeline. (T. 358-60.)

279. The potential to emit permit limit for the boilers that was decreased in connection with Plan Approval B was selected to accommodate future projects. (A.Ex. 19, 20.)

280. When the Department determines that multiple plan approvals concern a single project, it goes back and looks at the projects as a whole for purposes of the New Source Review analysis. (T. 386-87.)

281. For example, as the Department determined that Plan Approval C was linked to an earlier project, it added up the emissions from the linked projects for the purpose of going through the NSR evaluation process. (T. 376; A.Ex. 20.)

282. The Department's regulatory interpretation is that a physical or operational change in a source is not a "modification" if any increased emissions resulting from the change do not cause the source to exceed its existing permit limits. (T. 760-62, 787-88, 844-49, 856-59.)

283. Project D uses or reuses the fractionation tower, the amine treatment system, and the dehydration system that were built as part of Project A. (T. 393.)

284. Sunoco uses the same boilers for Projects A, B, D, and, E. (T. 147, 344, 347, 864; A.Ex. 7, 8, 10, 11, 18, 19, 21, 24.)

285. Sunoco uses the same 15-2B cooling tower (Source No. 139) for Projects B and E. (T. 147-48; A.Ex. 8, 11, 19, 24.)

286. Sunoco uses the same ethane storage tank for Projects 1, A, D, and E. (A.Ex. 6, 7, 10, 11, 18, 21, 24; C.Ex. 2.)

287. Sunoco uses the same propane storage tank for Projects 1, A, D, and E. (A.Ex. 6, 7, 10, 11, 18, 21, 24; C.Ex. 2.)

288. Sunoco uses loading docks 2A, 3A, and 3C and associated equipment (e.g. loading arms, vapor return line) for Projects 1, B, and D. (A.Ex. 6, 8, 10, 19, 21; C.Ex. 2.)

289. Sunoco uses the same cold flares for Projects 1, A, and D. (A.Ex. 6, 7, 10, 18, 21; C.Ex. 2.)

290. Sunoco uses the same ethylene complex flare for Projects B and E. (T. 147; A.Ex. 8, 11, 19, 24.)

291. Sunoco uses the same amine and CO_2 (removes hydrogen sulfide) treatment system for Projects A, C, and D. (T. 393; A.Ex. 7, 9, 10, 18, 20, 21.)

292. Sunoco uses the same dehydration system (for removing water) for Projects A, C, and D. (T. 393; A.Ex. 7, 9, 10, 18, 20, 21.)

293. Sunoco uses the same deethanizer for Projects A, C, and D. (T. 393; A.Ex. 7, 9, 10, 18, 20, 21.)

294. The Plan Approval E work would not be independently viable without the previously permitted boilers, flare, cooling tower, and tanks. (T. 59, 150-51, 155-56, 600-03, 619-24, 628-31, 633-34; A.Ex. 11, 23, 24.)

295. The work done under Plan Approvals 1, A, B, C, D, and E, and RFD 5236 are all components of an overarching, cohesive NGL project at the Marcus Hook facility. (T. 29-45, 67-68, 93-99, 117-19, 132-39, 179-80, 190-91, 201-04, 210-20, 229, 278-79, 344, 347, 357-58, 371-73, 392-93, 594-95, 864; A.Ex. 2, 3, 4, 6-11, 18-24, 29-34, 45, 84, C.Ex. 2, 9, 15, 16; S.Ex. 53.)

DISCUSSION

Sunoco Partners Marketing & Terminals, L.P. ("Sunoco") operates the Marcus Hook Industrial Complex in Delaware County. There are several air contamination sources at the facility, which are permitted under several plan approvals and Title V Operating Permit No. 23-00119. The complex, which also includes air contaminant sources located at Sunoco's facility in the state of Delaware (permitted under Title V Operating Permit No. AQM-003/00021), is

considered by the Department of Environmental Protection (the "Department") to be a single facility for purposes of the regulations regarding Nonattainment New Source Review (NSR), Prevention of Significant Deterioration (PSD), and Title V.

The Marcus Hook Industrial Complex was formerly a crude oil refinery. As refinery operations gradually wound down, Sunoco decided to convert the complex into a facility for the storage, processing, and shipping of natural gas liquids (NGLs). The facility continues to operate pursuant to the same Title V permit. Rather than convert the facility into an NGL storage and processing facility pursuant to one comprehensive plan approval, Sunoco has been repurposing the facility pursuant to several plan approvals and requests for determinations (RFDs). An RFD is a mechanism for determining whether a plan approval for certain work is required.

The Clean Air Council (the "Council") has filed this appeal from the Department's April 1, 2016 issuance of Plan Approval No. 23-0119E ("Plan Approval E") to Sunoco. Plan Approval E authorizes Sunoco to install new air emissions units at its Marcus Hook facility. The Council's objections boil down to two major claims. First, the Council argues that the Department erred by treating the construction being performed pursuant to Plan Approval E, which the parties also refer to as "Project E," as a stand-alone project for purposes of determining whether the PSD and NSR programs apply. A proper applicability determination for Plan Approval E in the Council's view would have recognized that Project E is merely one component of a much larger project involving the transformation of the Marcus Hook facility from a crude oil refinery into an NGL hub. Since it is in reality all one project, emissions from all of the nominally separate segments of the project must be combined for purposes of determining PSD/NSR applicability, and other permitting consequences may follow as well if all the work is treated as one project, the Council

argues. Secondly, the Council objects that the Department erred in determining which emission units involved in Project E were "modified," and the Department undercounted emission increases associated with those modifications, thereby allowing Sunoco to avoid PSD and NSR requirements. Fundamentally, the Council believes that Sunoco is improperly being allowed through creative permitting to avoid the requirements that should have been imposed pursuant to the PSD and NSR programs.

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*, EHB Docket No. 2016-091-L, slip op. at 20 (Adjudication, Jan. 29, 2018); *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.[2] *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 plan approval, the Council bears the burden of proof. 25 Pa. Code § 1021.122(c)(3); *Groce v. DEP*, 2006 EHB 856, 894.

In order to be successful, the Council must prove its 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 the Council meet its burden of proof by showing that the evidence in favor of its proposition is greater than that opposed to it. *United Refining*, 2016 EHB 442, 449. The Council's evidence must be greater than the evidence

[2] The Council has not argued in this appeal that the Department acted inconsistently with its duties under the Pennsylvania Constitution.

supporting the Department's determination that the issuance of the plan approval was reasonable, appropriate, and in accordance with the applicable law. *Delaware Riverkeeper Network v. DEP*, EHB Docket No. 2014-142-B, slip op. at 27 (Adjudication, May 11, 2018). The evidence must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established by the Council. *Noll v. DEP*, 2005 EHB 505, 515.

Project Aggregation

This appeal involves the concept of project aggregation. Project aggregation is to be distinguished from a single-source determination, which analyzes whether multiple sources are located at one "facility" for permitting purposes. That determination turns on whether the pollutant-emitting activities belong to the same industrial grouping, are located on contiguous properties, and are under the control of the same person. *Nat'l Fuel Gas Midstream Corp. v. DEP*, 2015 EHB 909, 922-24, *rev'd on other grounds*, No. 116 C.D. 2016, 2017 Pa. Commw. Unpub. LEXIS 400 (Pa. Cmwlth. Jun. 2, 2017). *See also Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979).

With project aggregation, it is already clear that there is only one facility. The question presented when project aggregation is involved is whether multiple, nominally separate but apparently related physical or operational changes at a facility should be deemed a single project for purposes of determining whether the facility has triggered NSR and/or PSD applicability. The issue generally comes up where, as here, an existing facility is being modified. The Department must perform an applicability determination when it receives an application for a plan approval at a major facility such as Sunoco's. 25 Pa. Code § 127.203a; 40 C.F.R. § 52.21. The Department must calculate the total emissions "from the project" to determine whether the thresholds for when NSR and/or PSD requirements apply have been exceeded. *Id*. Thus, the

Department needs to define the boundaries of the "project." In some cases, this may present no difficulty at all. In others, such as here, the Department needs to decide whether ostensibly separate construction activities are really all part of the same project. If they are, the emissions from all of those construction projects need to be totaled up or aggregated to see if the NSR/PSD requirements have been triggered.

There is no dispute in this case that the Department has the authority to, in its words, "link" ostensibly separate projects and treat them as one aggregated project for purposes of NSR/PSD applicability. The Department has "linked" various components of Sunoco's work subject to separate plan approvals and aggregated the emissions from those components for applicability purposes, without objection from Sunoco. Indeed, Sunoco has conceded that some of its projects subject to separate plan approvals were correctly aggregated for the applicability determination. There is also no disagreement that the Department can in an appropriate case reach back and aggregate the emissions from previously approved projects with the emissions from a project currently under review because there is only one project.

The Department performed an applicability determination in this case, and it concluded that Project E is a stand-alone project. Using its words, it did not "link" Project E with any other past or future construction work at the Marcus Hook facility. There is really only one key question, then, that must be answered to resolve this part of this appeal: Did the Department err in concluding that Project E is a stand-alone project? To be more precise, was the Department's determination that Project E is a stand-alone project reasonable and supported by the facts? The Council has the burden of proving by a preponderance of the evidence that the Department's conclusion was unreasonable or unsupported by the facts. We conclude that the Council has satisfied that burden. The Department's applicability determination was neither reasonable nor

supported by the evidence because Projects 1 through E and RFD 5236 are all part of the same "project" and the emissions from all of the components of that project should have been aggregated.

The Department and Sunoco argue that the anti-circumvention regulation found at 25 Pa. Code § 127.216 has not been violated here for various reasons, including that the regulation does not apply to the PSD (as opposed to the NSR) program, the regulation only applies if a facility fails to obtain *any* permits or approvals for construction work, and the regulation only applies if it can be shown that the facility's only purpose in fragmenting work was to deliberately avoid permitting requirements.[3] However, even if all of these things are true, as noted above, no party contests the fact that the Department must nevertheless define the "project," and that exercise sometimes involves aggregating work covered by separate plan approvals. The Department must perform that function for both the PSD and NSR programs, it must do it even though the facility has not tried to avoid obtaining any permit or approval, and it must do it even if the facility cannot be shown to be deliberately scheming to avoid permitting requirements. It must perform that function even if the prior plan approvals are otherwise administratively final, as it has done in this case, not for purposes of reopening the earlier approvals, but for purposes of defining the boundaries of the project as properly delineated for the plan approval application currently under review.[4] Looking back at earlier plan approvals, as well as known future projects, in order to define the proper scope of the project currently under review is precisely the point of project aggregation. Allowing a facility to subdivide a project in any way it sees fit, based on its

[3] 25 Pa. Code § 127.216 reads: "[A]n owner or other person may not circumvent this subchapter by causing or allowing a pattern of ownership or development, including the phasing, staging, delaying or engaging in incremental construction, over a geographic area of a facility which, except for the pattern of ownership or development, would otherwise require a permit or submission of a plan approval application."

[4] The Board's authority is similarly limited to awarding relief with respect to the plan approval that has been appealed, in this case Plan Approval E.

business plan or otherwise, would render the regulatory thresholds meaningless. Without constraints, any project could be divided up in such a way that each divided part falls below the applicability thresholds.

Although there has been talk for years about promulgating regulations to better define project aggregation, no such rules have been promulgated and survived.[5] "Project" is defined in Pennsylvania's regulations as "a physical change in or change in the method of operation of an existing facility, including a new emissions unit." 25 Pa. Code § 121.1. The regulation is not particularly helpful because there is obviously no question that a project is being implemented. The question we are faced with involves defining the boundaries of the project.

There is considerable room for judgment and discretion in the grouping of possibly related tasks to determine whether they together constitute one project. *United Refining Co. v. DEP*, 2008 EHB 434, 445. There is no bright-line rule to follow:

> Instead, the Department must independently consider such factors as the relationship of the various tasks measured in time and space, the tasks' operational, technical, and economic interdependence, whether the tasks are geared toward achieving a shared objective, whether the tasks were conceived originally as part of a common plan, and other relevant considerations.

Id. Closeness in timing and in space suggest that there is one project, as does integrated planning. If one phase of a phased project would not be viable without other phases, aggregation may be appropriate. Other relevant considerations might include funding information indicating one project, whether the changes are involved in the production of one product or related products, and the relationship of the changes to the overall basic purpose of the facility. No one factor is dispositive, and the list is not intended to be exclusive, although closeness in timing and functional interdependence strike us as particularly significant. A rule of thumb of three years has been proposed at the federal level, 83 Fed. Reg. 57326-31, but we are not ready to adopt such

[5] For the most recent development of which we are aware, *see* 83 Fed. Reg. 57324 (Nov. 15, 2018).

a rebuttable presumption. Instead, the Department should evaluate all relevant and objective criteria specific to a case to determine if multiple changes at a facility should be aggregated as a single project for purposes of the applicability determination. Ultimately, it is a judgment call, and we must decide whether the Department's judgment call was reasonable and supported by the facts. Ultimately, we should not lose sight of the fact that the Legislature created and adopted the NSR program to ensure that new significant emissions do not slow progress toward cleaner air, and the PSD program is designed to ensure that new emissions do not cause air quality to deteriorate significantly and will continue to obtain air quality standards. 42 U.S.C. §§ 7470, 7503(a). Here, the facts simply do not support the Department's determination.

The parties refer to the construction work at issue here that potentially needs to be aggregated with Plan Approval E as Projects 1, A, B, C, and D, and RFD 5236.[6] We have described these projects in great detail in our Findings of Fact, but by way of summary, in February 2013, the Department issued Sunoco a plan approval to construct one storage tank for ethane and one for propane (Plan Approval 23-0119). This is Project 1. In September 2013, the Department issued Sunoco a separate plan approval to construct a deethanizer to separate the ethane-propane mix delivered to the facility into its constituent parts for storage in the same tanks constructed as part of Project 1 (Plan Approval 23-0119A). This is Project A. In January 2014, the Department issued Sunoco a separate plan approval authorizing the installation of a truck loading and offloading facility and the repurposing of equipment, including an existing fractionation tower, to fractionate (or separate a mixture into its component parts) natural gasoline (another type of NGL) into pentane and light naphtha and store and distribute those products (Plan Approval 23-0119B) (Project B).

[6] Future projects will be discussed below.

In November 2014, the Department issued a separate plan approval to Sunoco to install a cooling tower to facilitate the water cooling that is part of the deethanization process previously constructed as part of Project A (Plan Approval 23-0119C) (Project C). In February 2015, the Department issued a separate plan approval to Sunoco to construct one storage tank for ethane, two for propane, and one for butane, and to convert a deethanizer permitted as part of Plan Approval A to a demethanizer (Plan Approval 23-0119D) (Project D). In April 2016, the Department issued a separate plan approval for the development of two fractionation systems, made up of two depropanizers and one debutanizer and associated piping and "fugitive components." The project also involved installing a new sub-header for Marcus Hook's ethylene complex flare (located in Delaware), using cooling water from what is identified as the 15-2B cooling tower, and using steam from auxiliary boilers at the facility (Plan Approval 23-0119E) (Project E). It is from this plan approval that the Council filed this appeal. Finally, in August 2015, the Department issued an RFD to Sunoco authorizing two new 50,000-barrel sphere tanks to store propane and butane materials (RFD 5236). Our review leaves us with no doubt that all of these phased construction projects are part of the same project for applicability purposes, based upon the considerations that follow.

Physical Proximity

In evaluating physical proximity, a picture is worth a thousand words, and that picture is reproduced above at Finding of Fact No. ("FOF") 245.[7] That aerial depiction of the site clearly shows that all of the components of Projects 1 through E and RFD 5236 are physically proximate to each other. The physical proximity is not surprising given the functional interdependence of the various components and the fact that various of the components are literally linked by common infrastructure. Reference to Sunoco's aerial depiction quickly reveals the close

[7] The Board performed a site view in this case.

proximity of points 1 through 20, all parts of Projects 1 through E, all parts of what is in reality one project.

Temporal Proximity

Where, as here, a facility submits multiple plan approval applications within a relatively short period, it is strong evidence that there is a single project that should be addressed cumulatively in permitting. Sunoco essentially concedes the point. (Sunoco Brief at 63 n.16: "Although arguably, Project E is temporally proximate to the pre-Plan Approval E projects…") The Department acknowledges that the plan approval applications were "definitely" submitted over a "short period of time." (T. 358, 391-92.)

The timeline for Projects 1 through E weighs heavily in favor of aggregation. In November 2012, Sunoco submitted its application for Project 1, which was granted on February 5, 2013 (storing ethane and propane). (T. 29-30.) Only one month later, Sunoco submitted its application for Project A (the deethanizer). (T. 30-31.) The Department granted a plan approval for Project A on September 5, 2013. During that same month, September, Sunoco submitted its application for Project B (natural gasoline). (T. 31-32.) On January 30, 2014, the Department granted the plan approval for Project B. Less than three months later, Sunoco submitted its application for Project C (the cooling tower). (T. 33.) The Department granted a plan approval for Project C on November 19, 2014. Two months before the Department granted a plan approval for Project C, Sunoco submitted its application for Project D. (T 34-35.) On February 26, 2015, the Department granted a plan approval for Project D (increased storage). Less than six months later, Sunoco submitted RFD 5236 (more storage). (T. 38.) Within one week, the Department approved RFD 5236. About one month later, Sunoco submitted its application for Project E (depropanizers and debutanizer). (T. 38-41.) On April 1, 2016, the Department granted

the plan approval for Project E. The engineering and construction periods for the various components of Sunoco's phased projects overlap to a significant degree, as shown on Sunoco's Plan Approval Summary reproduced at FOF 247. Clearly there can be no reasonable dispute that the sequenced projects at issue indeed occurred in relatively quick succession.

Interdependence of Phased Projects

The fact that nominally separate construction projects are in fact operationally, technically, and economically interdependent strongly supports a finding that the projects should be considered to be one project for purposes of PSD/NSR applicability. We are struck by the contrast between the detailed analysis of interdependence set forth in the Council's brief, and the near complete lack of any substantive response by Sunoco or the Department on the facts regarding the showing of that interdependence.[8] In truth, Sunoco and the Department would have been hard pressed to mount a meaningful response because the interdependence of Project E with earlier projects is clear and persuasive.

Sunoco argues that Project E must be *independently* linked to each of the other projects for each of those projects to be aggregated. It criticizes the Council for trying to "daisychain" the projects, which we understand to mean that Project 1, or any other project, cannot be *indirectly* linked to Project E to support aggregation, but Project E must be linked to each other project individually. This attempt at a distinction strikes us as rather artificial. Ultimately, the

[8] Sunoco argues that the Council is unable to establish the technical and operational interdependence of the projects because the Council did not have any expert witness testimony. Sunoco posits that fractionating NGLs is inherently scientific, and explaining the interrelation among the projects requires specialized understanding of, e.g., organic chemistry and chemical engineering. However, we do not think expert testimony or specialized knowledge is necessary to make the connections that the Council has made and established through substantial evidence from Sunoco's own plan approval applications and the Department's own plan approval review memos. *Cf. Casey v. DEP*, 2014 EHB 439, 453 (expert testimony not necessarily needed when testimony of witnesses involved in permit application and its review can potentially show that permit does not satisfy the requirements of the law). As discussed *infra*, the interdependence of the projects is obvious and overwhelming based on the evidence.

issue is whether there is really only one project, and if so, what are the components of that project. We see no reason why, e.g., Project 1 cannot be included in the overall "project" for aggregation applicability purposes because the connection between Project 1 and E goes through or is enabled through, e.g., Project A. Sunoco's proposed prohibition against "daisychaining" is inconsistent with the notion that we ought to be examining the realities of the situation using common sense, not elevating form over substance.

For example, Sunoco acknowledges that Projects 1 and C are parts of the same project. (Sunoco Brief at 42-43.) It even refers to it as Project 1/C. (Sunoco Brief at 43.) The record certainly supports this aggregation. It would seem, then, that even under Sunoco's construct (that Project E must be linked with each of the other projects separately), the "other project" is not 1 or C but Project 1/C. Meanwhile, the Department acknowledges that Project C and Project A are parts of the same project. (DEP Brief at 32-33; T. 371-73.) Sunoco does not seem to dispute that point. One of its representatives even testified that Project C was a "design optimization" of Project A. (T. 594-95.) The record certainly supports this aggregation. Sunoco could not store separated NGLs in the Project 1 tanks without the transmix separation capability provided by the Project A equipment. The Department expressly concedes, and we agree, that Projects A and C needed to be aggregated. (DEP Brief at 33.) It determined that Project C, installation of a new cooling tower, was technically and economically linked to Project A because it was being constructed to provide cooling water for the deethanizer unit permitted in Plan Approval A. Based on the technical and economic relatedness of Projects A and C, the Department linked the projects together as one project. (DEP Brief at 33.) In light of the Department and Sunoco's concessions, it would seem that we ought to be referring to Project 1/A/C.

While the aggregation of Project 1/A/C makes perfect sense, we have trouble understanding the Department's rationale for not aggregating other Marcus Hook projects. For example, Project D uses the marine vessel docks permitted in Project 1, and it also redesigns the cold flare permitted in Project 1. Project D uses the amine treatment system and dehydration unit from Project A. It also uses the deethanizer unit permitted in Project A, repurposing it as a demethanizer. Plan Approval D creates storage for the use of the amine treatment and dehydration system permitted as Plan Approval A, while also expanding storage permitted as Plan Approval 1. Sunoco's plan approval application even stated that it was fully incorporating all sources and emissions increases associated with Projects 1, A, and C. (A.Ex. 10.) Yet, the Department did not aggregate Project D with any other project.

Multiple plan approvals that involve the same emissions units are strong evidence of a single project. The Department gets it exactly wrong when it says that separate projects that use the same equipment demonstrates that the projects are unrelated. (T. 392.) Here, Project E and the other construction work rely on common equipment. The flares and cooling towers serve multiple projects. Project E uses the 15-2B cooling tower that was permitted in the facility's Title V permit. The 15-2B cooling tower is also used by Project B. We are not sure why this interconnection is so different from the Project C cooling tower that was being constructed to provide cooling water for the Project A deethanizer, projects which the Department told us clearly needed to be aggregated. Projects B and E also use the same boilers and the same ethylene complex flare. The deethanizer (Plan Approval A), depentanizer (Plan Approval B), and depropanizers and debutanizer (Plan Approval E) all depend upon and require the steam produced by the auxiliary boilers, as does Project D. Projects 1, A, and B use many of the same piping components. Many of the same storage tanks serve multiple projects, as do the off-

loading facilities. Multiple projects use the dehydration units and amine treatment system. The fractionation towers are integrated into the process chain for multiple projects. We have great difficulty understanding the Department's conclusion that Project E is a stand-alone project in light of these interconnections.

Where, as here, multiple plan approvals relate to the same process, it is evidence of a single project. Project E will produce export grade propane, mixed butanes, and natural gasoline. The propane produced by Project A (which uses tanks from Project 1) is available for further processing by Project E. The propane and butane mixture produced by Project D can be separated by Project E. Storage for the ethane, propane, or butane will be either in existing caverns or the cryogenic storage tanks permitted under Plan Approvals 1 and D. The 50,000-barrel sphere tanks approved with RFD 5236 to store propane and butane feedstock entering the facility are also available for processing by the depropanizers and debutanizers constructed with Project E. Storage for the natural gasoline will be in existing floating roof tanks permitted in Plan Approval B (Source Nos. 188, 190, 192, 212). (A.Ex. 21.) At least Sources 188 and 212 are the feedstock tanks for Project B (A.Ex. 19), which means that the natural gasoline produced by Project E is available for further processing by the Project B depentanizer. This is further evidence of interdependence between B and E. The fact that all of the feedstock for Project B may not derive from Project E and all Project E product will not go to Project B equipment shows just how interconnected the various product streams are at the facility. Without the storage provided by sources permitted under Plan Approvals 1, B, and D, and RFD 5236, Project E as designed would not be viable, and cryogenic product storage is at the heart of the service that the Marcus Hook facility provides.

As confirmed by Sunoco's senior director of terminal engineering and construction, with Plan Approvals 1 through E, the Marcus Hook facility is capable of receiving, storing, fractionating, and distributing all of the products from an NGL stream of C3+. (T. 144-46.) Plan Approval E is integrated into the overarching process of handling NGLs at Marcus Hook and it shares equipment with the plan approvals that preceded it. There is no question that Plan Approval E is a component of a larger project from an operational standpoint.

Common Plan and Shared Objective

In *United Refining*, *supra*, 2008 EHB 434, we spoke of tasks being geared toward achieving a shared objective and being implemented as part of a common plan. Although these considerations are more subjective than close timing and interconnectedness, they reflect the fact that even a facility developer sees the various construction phases as part of one project. Here, the evidence of a common plan and shared objective supports our conclusion that there is actually only one true project.

The common objective of Projects 1 through E and RFD 5236 is to take the NGLs that are delivered from the Mariner East pipelines and other sources, fractionate those NGLs into individual products, and store and ship those products offsite. The purpose of all of the equipment, working together, is to convert mixed NGLs into their marketable subparts. Projects 1 through E operating together can process a wide array of NGLs into all of their component constituents. Sunoco's effort to distinguish the objectives of the various phases strikes us as somewhat contrived as illustrated by its argument that the objective of one project was to store ethane and propane but the objective of another project was to store "additional quantities" of ethane and propane. (Sunoco Brief at 58.)

There is some evidence of record to show that Sunoco had a plan to develop its facility in such a way as to deliberately avoid triggering PSD/NSR requirements. For instance, one of the fractionation towers that Sunoco built as part of Project A and renamed as part of Project D was up for consideration for use as part of Project E, but Sunoco was concerned that if it reused that tower the Department would aggregate Projects 1, A, and C with Project E, so Sunoco decided to use a different tower for Project E. (T. 41-45; A.Ex. 11.) In any event, such a deliberately evasive plan is not a prerequisite to a finding that nominally separate projects are actually parts of a larger project whose emissions should be aggregated for applicability purposes. There is no question that Sunoco *did* have a plan to make all the adjustments necessary to turn the Marcus Hook facility into a comprehensive NGL hub, and Project E is simply one part of that plan.

There is substantial evidence of planned integration. For example, the permit limits for the auxiliary boilers were changed as part of Plan Approval B to a level well beyond what was needed or would ever be needed for Project B or the previously permitted projects by themselves. Future expansion was clearly anticipated. The Department has relied heavily on that fact in support of its argument that the boilers were not modified as part of Project E, but for current purposes we see it as strong evidence of coordinating what is in reality a single project.

We are unable to credit the suggestion that Sunoco planned anything less than a facility designed to store, fractionate, and export multiple components of NGLs. Although Sunoco began by permitting two tanks for ethane and propane (Project 1), we cannot credit the notion that Sunoco ever thought that would be the end of site development. We do not believe that, when Sunoco decided to install a deethanizer (Project A), its plan was to stop there. The same point maintains through and including the equipment permitted under Plan Approval E. The fact

that the details of the project may have changed over time does not change the reality that it has all been part and parcel of one project from the beginning.

Sunoco's own public announcements support a finding of a common plan and a shared objective. For example, Sunoco has referred to Projects 1, A, and C as all parts of the "SXL Project Mariner." In its press release for its open season for the Mariner East 1 pipeline, Sunoco advertised a comprehensive natural gas liquids takeaway solution for its customers, through the Mariner East pipeline to the terminal at the Marcus Hook facility:

> **SUNOCO LOGISTICS PARTNERS L.P. ANNOUNCES SUCCESSFUL OPEN SEASON FOR PROJECT MARINER EAST**
>
> *Second Phase in Development Based on Significant Interest*
>
> PHILADELPHIA, Sept. 26, 2012 – Sunoco Logistics Partners L.P. (NYSE: SXL) announced today a successful open season for Mariner East, **a pipeline project to deliver propane and ethane from the liquid-rich Marcellus Shale areas in Western Pennsylvania to Sunoco, Inc.'s facility in Marcus Hook, Pennsylvania, where it will be processed, stored, and distributed to various domestic and waterborne markets**. Binding commitments for all of the pipeline capacity offered have been received from shippers enabling the project to move forward. Mariner East, along with the previously announce Mariner West project which will deliver ethane to the Sarnia, Ontario market by mid-2013, **will provide Marcellus Shale basin producers with a comprehensive natural gas liquids takeaway solution**. Sunoco Logistics is projecting to invest over $600 million for the Mariner projects.

(A.Ex. 2 (emphasis added).) Sunoco further stated in the press release,

> Brian P. McDonald, Chairman and Chief Executive Officer of Sunoco, Inc., and Chairman of Logistics, said: "Mariner East is an important project in two ways. It supports the continued development of the Marcellus Shale, one of Pennsylvania's most important resources, by offering producers an outlet for valuable products. **Mariner East also represents a significant step in re-purposing the former Marcus Hook refinery site and creating a world-class facility with a promising future based on natural gas liquids**.

(*Id.* (emphasis added).)

In its open season for Mariner East 2, Sunoco advertised a second pipeline to transport NGLs to the Marcus Hook facility:

SUNOCO LOGISTICS ANNOUNCES BINDING OPEN SEASON FOR PROJECT MARINER EAST 2

> PHILADELPHIA, December 4, 2013 – Sunoco Logistics Partners L.P. (NYSE: SXL) today announced that it will commence a binding Open Season for its Mariner East 2 project. **This Open Season is for a pipeline that will transport natural gas liquids** from processing facilities built in the liquid-rich Marcellus and Utica Shale areas in Western Pennsylvania, West Virginia and Eastern Ohio **to Sunoco Logistics' Marcus Hook Industrial Complex on the Delaware River**, approximately 300 to 400 miles from the production region. The Mariner East 2 pipeline is expected to be operational in early 2016.

(A.Ex. 3 (emphasis added).) Sunoco stated further,

> "We are pleased to launch the Open Season for Mariner East 2," said Michael J. Hennigan, president and chief executive officer. "We are bullish on the production growth from the Marcellus and Utica Shales. **We are proceeding with the Open Season as we have received considerable market interest to develop this project to provide producers with several marketing options for their expanding production**. We believe the market is long NGLs as the supply will continue to outpace demand. As a result, Mariner East 2 would provide the highest value option for producers in this region as an export solution on the East Coast. **We will continue to add storage and expand our Marcus Hook complex to be a world class NGL facility on the East Coast. In addition, the 800-acre Marcus Hook site is well positioned for further NGL processing**."

(*Id.* (emphasis added).) In its open season for Mariner East 2X, Sunoco offered the capacity to receive and process C3+ and other feedstocks, thereby expanding the range of capacity for NGLs:

MARINER EAST 2 EXPANSION PROJECT

NOTICE OF OPEN SEASON

> Sunoco Pipeline L.P. ("SPLP") held successful open seasons, Project Mariner East and Project Mariner East 2, in 2012 and 2013, respectively, **for pipeline transportation of propane, butane and ethane** from origin points in Houston, PA, Seto, OH, via Hopedale, OH, and Follansbee Jct., WV (the "NGLs Origin Points") **to the Sunoco Partners Marketing & Terminals L.P. terminal in Marcus Hook, PA** and Claymont, DE (the "SPMT Terminal").

> Shippers have expressed interest in an expansion of Project Mariner East 2 to (i) **increase the capacity available for transportation of propane and butane** from the NGLs Origin Points **to the SPMT Terminal**, (ii) **increase the capacity available for transportation of ethane** from Houston, PA **to the SPMT Terminal**, and (iii) **provide capacity for transportation of C3+, natural gasoline and condensate** from some or all of the NGLs Origin Points to the SPMT Terminal (Project Mariner East 2, as so expanded the "Mariner East 2 Expansion Project").

(A.Ex. 4 (emphasis added).) It further stated,

> Highlights of Mariner East 2 Expansion Project
>
> Potential Priority Service Shippers would have the ability to make a volume commitment to the Mariner East 2 Expansion Project **for ethane, propane, butane, C3+, natural gasoline or condensate or any combination of such products**.
>
> ….
>
> It is anticipated that the Mariner East 2 Expansion Project would be in-service for the transportation of ethane, propane, butane, C3+ and natural gasoline in 2017 and for condensate in 2017/2018.

(*Id.*) These announcements support our finding that there has been one common plan from the beginning. The details will change continuously, but that does not mean there was not a common plan.

Other Relevant Factors

Sunoco says it could have developed Project E at some remote facility instead of at Marcus Hook, but the record does not support that. Project E is dependent on a cooling tower that was not built or reactivated as part of Project E. The same goes for the boilers and the flare, existing pipes and storage, and shipping facilities. Project E would have looked much different at a remote facility. Sunoco makes a striking concession in its brief acknowledging Project E's dependence on other elements of the facility: "[Sunoco], however, would have needed to acquire new space and construct or acquire various pieces of new equipment (e.g., cooling tower and boilers) to support the project, as opposed to using space and equipment that already existed at

[Marcus Hook]." (Sunoco Brief at 63.) This is precisely the point. The operation of Project E is dependent upon equipment that was permitted previously. But for the cooling tower and boilers, Project E would not be able to function on its own. Although the cooling tower and boilers were carried through from the former refinery's Title V permit, it is still compelling evidence that the facility is functioning as one cohesive, interdependent project. Further, as noted, the permitted boiler capacity was adjusted with Plan Approval B.

Sunoco expresses the concern that the entire facility's redevelopment plans could get roped into a single project for applicability purposes. The Department will need to consider on remand whether the project that encompasses Projects 1 through E should also include Sunoco's other known construction projects, but if it turns out that the project is in fact a rather big one, it would seem that that is precisely the sort of project that the Legislature intended to capture in the PSD and NSR permitting programs. We see nothing inherently improper in considering multiple sources at a single facility holistically, even if it is a large facility.

Both Sunoco and the Department rely on the existence of "new customers" as a basis for not aggregating Project E with the other projects. We have virtually no evidence regarding these purported new, unidentified customers. We are not entirely clear whether the "new customers" refer to companies shipping NGLs to the site, to companies purchasing final products, or both. It should be noted that the Department had no evidence of its own of "new customers." It seemed willing to make an important regulatory decision with no evidence other than Sunoco's vague assurances. (T. 395-96.) Sunoco was in a better position to provide background on these "new customers," but it failed to do so. It instead ambiguously refers to, e.g., "evolving business opportunities and other variables" and "divergent purposes and customer needs." (Sunoco Brief at 6, 12, 13, 26, 55, 59.) Without any details or specifics, we are unable to credit these claims or

the testimony that was offered to support them. There is some vague, apparently hearsay evidence of a new supply, (T. 597-98), but we simply do not have enough evidence to support a finding that new customers justify treating Project E as a stand-alone project entirely separate from the other construction phases.

In any event, we do not understand why the existence of new customers should weigh so heavily in the aggregation analysis. Indeed, the Department seems to think it is virtually dispositive. (DEP Brief at 32-33.) It offers almost nothing else in support of its conclusion to treat Project E as a stand-alone project. It does not strike us as particularly significant that a processing and storage facility finds new suppliers of raw materials or new customers of finished products. The existence of new buyers of the same finished product seems entirely irrelevant. As to new suppliers of the raw materials to be processed, those suppliers, whoever they may be, are all supplying mixed NGLs for storage, processing, and shipping. Sunoco obviously solicited customers through its various open seasons, so it does not seem that the arrival of "new customers" was a deviation from Sunoco's plan for the facility or that "new customers" were coming as some great surprise to Sunoco.

The Department says Sunoco is providing "different services," but the service strikes us as exactly the same, with only slight differences depending upon the nature of the mixed feedstock involved. The Department mentions new ways the raw material comes into the facility (e.g. trucks versus pipeline), but again, it fails to explain why that is significant, particularly in the context of evaluating air emissions. It does not impress us as particularly relevant that raw material is shipped to the site by blue trucks versus red trucks, or railcars versus pipelines. The Department pays lip service to the *United Refining* factors, but seems instead to have relied on new factors of its own invention without any explanation of why its factors should weigh

materially if at all in the determination of whether phased construction projects are all part of one project for project aggregation applicability purposes.

Sunoco attempts to distinguish *United Refining* by asserting that each of the projects from 1 through E achieve their "own, separate objective, ranging from storing quantities of ethane and propane to fractionating natural gasoline into products to storing additional quantities of ethane and propane and storing butane to transferring a cooling load between cooling towers." (Sunoco Brief at 58.) Sunoco accuses the Council of taking an overly broad view of the projects' objectives in contending that all of the projects are geared toward making the Marcus Hook facility an NGL processing, storage, and distribution hub. On the contrary, as evidenced by Sunoco's unconvincing attempt to distinguish the projects' objectives, we believe that Sunoco has taken an overly narrow view.

In *United Refining*, we upheld a Department decision to aggregate emissions from different phases of a single project. A petroleum refinery had submitted various plan approval applications to the Department over the span of several years that were aimed at complying with EPA rules regarding the removal of sulfur from the gasoline produced at the facility. A plan approval issued in 2002 was for the production of low sulfur gasoline. A subsequent plan approval issued in 2007 (and subject of the permittee's appeal) was for the production of ultra low sulfur gasoline. We determined that both of these projects shared a common objective in allowing the permittee to produce gasoline in compliance with the EPA's Tier 2 fuel standards. We found that the low sulfur gas project was dependent upon the ultra low sulfur gas project because the two gas streams were blended to produce gas that complied with the EPA standards; the gas streams were not independently marketable. The two projects were operationally interconnected—the permittee received a single stream of feedstock, produced two separate

streams of gasoline, processed each stream separately, and then combined them back together to meet the low sulfur gasoline requirements. There was no doubt that these two projects were in reality two components of an overarching project.

The case before us is closer to *United Refining* than Sunoco is willing to admit. Indeed, Sunoco's own brief essentially concedes the point. Again, we do not understand why, for instance, Sunoco's assertion that "storing quantities of ethane and propane" and "storing additional quantities of ethane and propane" is evidence that the various Marcus Hook projects are *not* related. (Sunoco Brief at 58.) As discussed in detail above, all of the projects are dependent upon or interrelated with other projects at least in part to fulfill their objectives. Project E is dependent upon the tanks from Projects 1 and D, the products produced by Projects A and D, and the previously permitted cooling tower, flare, and boilers (re-permitted with Project B) to achieve its objective of fractionating a C3+ stream into propane, butane, and natural gasoline. Although some of the products from the individual projects may be independently marketable like in *United Refining*, the overall process for receiving, storing, processing, and distributing NGLs is wholly integrated to serve a common objective. Marcus Hooks receives NGL feedstocks and directs those feedstocks to the appropriate arm of its fractionation operation using common tanks, pipes, and ancillary equipment. It is a more complex process chain than in *United Refining*, but that complexity does not belie an underlying coherence to the entire project.

In conclusion, it is the *combination* of factors here that convinces us that Project E should have been aggregated with the earlier projects. Geographic and temporal proximity, operational interdependence, and the common plan are all compelling evidence of a single project. Sunoco and the Department offer little, and nothing persuasive, to convince us otherwise.

Modifications

Now that we have decided that there is only one "project" for at least the equipment permitted under Plan Approvals 1 through E and RFD 5236, the Department may need to reconsider on remand what sources if any have been "modified" as that term is used in the PSD and NSR programs, and the consequences of any such modifications.

Determining whether a source has been "modified" is one of the most contentious parts of air pollution law and it is complicated and highly fact-specific. A modification is defined as follows:

> *Modification* – A physical change in a source or a change in the method of operation of a source which would increase the amount of an air contaminant emitted by the source or which would result in the emission of an air contaminant not previously emitted, except that routine maintenance, repair and replacement are not considered physical changes. An increase in the hours of operation is not considered a modification if the increase in the hours of operation has been authorized in a way that is Federally enforceable or legally and practicably enforceable by an operating permit condition.

25 Pa. Code § 121.1. *See also* 40 CFR 52.21(b)(52) (defining "project" the same way). Not all modifications trigger new source review. For example, it depends in part upon whether there has been an increase in pollutant emissions from the project. 25 Pa. Code § 127.203a.

It is not entirely clear how the Department should address the modification of emission units in a *post facto* project aggregation situation such as that presented here. For example, the Department determined that the boilers were not modified as part of Project E because they were modified as part of Project B.[9] The 15-2B cooling tower was determined not to have been modified as part of Project E but it may have been modified if one considers RFD 5597, which

[9] It is ironic that the Department essentially argues that Projects B and E can be considered together for modification purposes but not for purposes of deciding whether one project is involved for applicability purposes.

immediately followed Project E. We believe the Department should be afforded the opportunity to decide in the first instance on remand how to address this problem.

The Council has raised a few issues that are likely to persist on remand. In determining whether an emissions unit has been modified, there is an open issue in a case like this (where multiple emission units are attached to each other), where one emission unit ends and a different emission unit begins. We have not been referred to any helpful statutory, regulatory, or precedential language or guidance on point. The Department eventually decided in support of its conclusion that the boilers, cooling tower, and flare were not modified as part of Project E and that the external pipes leading into the boilers, cooling tower, and flare (or their headers) are not part of the boilers, cooling tower, and flare themselves, but it has not been entirely consistent on this point. Secondly, there is as an open issue of how emissions attributable to modified and unmodified sources need to be calculated for purposes of the PSD/NSR applicability determinations. Although the Department designated the flare, cooling tower, and boilers as unmodified existing sources when it reviewed the application for Plan Approval E, Sunoco and the Department nevertheless acknowledge that there will be increased emissions from those sources as a direct result of Project E. They refer to these increases as "incremental emissions." They included the "incremental emissions" from the flare and the cooling tower, but not from the boilers, in their totals for seeing if PSD/NSR thresholds were triggered. The way the Department has handled the boiler increases is irreconcilably inconsistent with the way it has handled the flare and cooling tower increases. It does not explain the inconsistency. We have been provided with very little guidance on the use of "incremental emissions" from existing nonmodified sources. There is passing reference to an unidentified "EPA guide." (T. 668.) Sunoco refers to two hearsay EPA memos that are not in the record and upon which we are not willing to rely

without a sponsoring witness or any record explanation. We note that the two memos are the only sources Sunoco cites for the practice of including "incremental emissions" from nonmodified existing sources, which arguably suggests there is no controlling statutory or regulatory law on point. The Department is all but silent on the issue.

The Department and Sunoco say that incremental emissions must be counted toward the PSD/NSR triggers. Although it makes logical sense, there is no citation to any authority for that proposition. They say the emissions that count are emissions that are "attributable to the project" or "related to the project." Once again, we have no legally binding authority to back that up. It is curious that emission increases from *modified* sources depend on an elaborate process involving, *inter alia*, baseline actual emissions (BAE), but emission increases from *nonmodified* sources simply need to be shown to be "related to the project." We are not necessarily questioning the standard; we are simply wondering where it comes from.

Next, the Department apparently in some cases, albeit not necessarily consistently, considers existing permit limits as a factor in determining whether a source has been modified for applicability purposes. The Department does not cite any authority for its practice of considering existing permit limits when it decides whether something is a modification. The operative regulations regarding modifications do not say that something that is otherwise a modification is not a modification if existing permit limits can accommodate the physical or operational change. The regulations do *not* say that an operator can make any physical or operational changes it wants and it will not be a modification if existing permit limits can still be satisfied, yet the Department repeatedly says that in its brief. As just one such example, on page 42 it says, "If there were no emission increases above the permitted levels, there was no modification regardless of whether there were any changes made." The operative regulations say

that whether something is a modification turns on a physical change or change in operation method that causes an increase in emissions, not that necessitates an increase in permit limits. We have not been referred to any case law that supports the Department's approach, but our independent review of federal cases finds no support under current law for the increase-within-permit-limits requirement. *See e.g., New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) ("any" physical change that increases emissions means just that: *any* change).

The Department alternatively or perhaps relatedly relies on exclusions for a mere increase in hours of operation within existing permit limits in the regulations defining modifications. However, the Department does not explain why the increased use of the boilers for Project E constitutes nothing more than an increase in "hours of operation." There is nothing in the record to support a finding that the increased steam demand constitutes a mere increase in hours of operation. The exclusion for a mere increase in hours of operation is a limited exclusion. *See Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990) (the exclusion for hours of operation was provided to take advantage of fluctuating market conditions, not new construction); *United States v. Cinergy Corp*., 458 F.3d 705, 708 (7th Cir. 2006) (a physical change that enables increased production is not excluded); *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 298 (1st Cir. 1989) (increased capacity not same as increased hours); *United States v. Ameren Mo.*, 229 F. Supp. 3d. 906, 987 (E.D. Mo. 2017) (increase of hours of operation caused or enabled by physical change must be included in PSD analysis). [10]

[10] On the flip side, the Department says, "If, however, the increase in emissions requires an increase in the previously permitted limit, then that increase does constitute a modification." (DEP Brief at 35.) This also seems inconsistent with the applicability requirement that there be a physical or operational change. Whether an emission increase requires a plan approval or permit modification is one thing; whether that increase is independently a factor in PSD/NSR applicability is quite another.

Remand

The Department testified, quite correctly in our view, that known future construction projects must be considered as part of the project aggregation (or, in its words, "linking") analysis. (FOF 276.) Neither the Council nor Sunoco dispute that point. The Department acknowledged in its brief that known future projects should be included in the aggregation analysis. (DEP Brief at 31.) Projection of future events is not at all uncommon in the air quality permitting process. *See Pa. v. Allegheny Energy, Inc*., 2008 U.S. Dist. LEXIS 93800 at *20 (W.D. Pa. 2008) (permittees required to project future emissions to determine significant net emissions increase under PSD program). Now that projects postdating Project E have been approved in plan approvals and RFDs, those projects are obviously now known. Those certain projects include RFD 5597 and Projects F through I. The Department will need to decide on remand whether any of that construction work should be considered part of the same project that includes Project 1 through Project E for its revised applicability determination for Project E.

We have concluded that the emissions from the equipment permitted under Plan Approval E must be aggregated with the emissions from equipment permitted under Plan Approvals 1 through D and RFD 5236, and on remand, possibly from the equipment permitted in postdated RFDs and plan approvals. The Council has attempted to show us that such aggregation will necessarily result in total emissions that trigger the PSD and NSR programs, and therefore, that Plan Approval E will need to be redone in full compliance with all PSD and NSR requirements (e.g., air quality modeling).[11] The Department for its part asserts that "no matter what the Board decides in this appeal," even if every project since Project 1 is combined, it will not make any difference in the final analysis on remand regarding applicability of control

[11] We are aware that the Council has made this attempt at least in part to address our previously expressed hope that this appeal practically speaking should not represent a purely academic exercise.

requirements. And even if the analysis would change, Sunoco will easily be able to revise its application in such a way as to avoid PSD, the Department says. Sunoco also argues that a future project aggregation analysis, if done correctly, will not trigger PSD requirements even if Projects 1 through E are combined. The parties make essentially the same arguments with respect to the modification issue; that is, even if we decide that the Department erred with respect to what equipment was modified and how emissions were calculated from modified equipment, it will make no practical difference either with respect to PSD/NSR applicability or pollution control requirements.

There does not appear to be any dispute that the applicability determination for Project E must be redone by Sunoco and the Department in the first instance in the event of a Board remand. No party has invited us to do the determination ourselves. Indeed, the Council argues repeatedly that it would be improper for us to do so. It acknowledges that Sunoco maintains some discretion in formulating the data used in a revised application, and it says there is no one "correct" set of NSR calculations.

At this point the parties' various predictions regarding what will happen on remand are just that: predictions. We will not attempt to add our own prediction to the mix, preferring instead that Sunoco and the Department perform the proper analysis in the first instance. Our only constraints on remand with respect to project aggregation are that (1) the emissions from Projects 1 through E must be aggregated as part of the new applicability determination for Plan Approval E, and (2) the Department must consider whether the now-known projects postdating Plan Approval E should also be aggregated with the Project E emissions as part of the new applicability determination for Plan Approval E.

The Council urges us to revoke Plan Approval E while this additional analysis is performed. It says the Department's errors are far too serious to allow construction to proceed pursuant to a defective Plan Approval E during a remand. Unfortunately, neither Sunoco nor the Department have addressed this aspect of the Council's prayer for relief. Nevertheless, the Council has not shown us that such a potentially extreme remedy is necessary or appropriate in light of any actual harm to public health or the environment. The Department and Sunoco are convinced that further study will make no practical difference, and the Council has not convinced us that they are wrong. If at any point it becomes clear to the Department that extensive additional study will be needed because, e.g., PSD applies, we will leave it to the Department to decide in the first instance whether Plan Approval E should remain in place during that study. We will not revoke the plan approval, but we instead remand it to the Department for further consideration in accordance with this Adjudication.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 4006; 35 P.S. § 7514.

2. The Department's decision must be lawful, reasonable, and supported by a *de novo* review of the facts. *Logan v. DEP*, EHB Docket No. 2016-091-L, slip op. at 20 (Adjudication, Jan. 29, 2018); *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156.

3. The Council bears the burden of proof in this appeal. 25 Pa. Code § 1021.122(c)(3).

4. To meet its burden, the Council must prove its case by a preponderance of the evidence, meaning it must show that its evidence is greater than the evidence supporting the Department's decision. *Delaware Riverkeeper Network v. DEP*, EHB Docket No. 2014-142-B,

slip op. at 27 (Adjudication, May 11, 2018); *United Refining Co. v. DEP*, 2016 EHB 442, 448-49, *aff'd*, 163 A.3d 1125 (Pa. Cmwlth. 2017); *Shuey v. DEP*, 2005 EHB 657, 691 (citing *Zlomsowitch v. DEP*, 2004 EHB 756, 780).

5. The Department must perform a determination of whether New Source Review / Prevention of Significant Deterioration requirements apply when it receives a plan approval application for a major facility. 25 Pa. Code § 127.203a; 40 C.F.R. § 52.21.

6. To make this applicability determination, the Department must decide what constitutes the "project," which is defined as "[a] physical change in or change in the method of operation of an existing facility, including a new emissions unit." 25 Pa. Code § 121.1.

7. In evaluating what constitutes the project for purposes of NSR/PSD, we consider such factors as "the relationship of the various tasks measured in time and space, the tasks' operational, technical, and economic interdependence, whether the tasks are geared toward achieving a shared objective, whether the tasks were conceived originally as part of a common plan, and other relevant considerations." *United Refining Co. v. DEP*, 2008 EHB 434, 445.

8. Projects 1 through E and RFD 5236 constitute a single project for purposes of New Source Review and Prevention of Significant Deterioration.

9. Project E should have been aggregated with Projects 1 through D and RFD 5236, and the Department erred when it issued Plan Approval E without aggregating it with Sunoco's former and known future projects at the Marcus Hook facility.

10. The Council's appeal need not be dismissed due to a purported lack of proper timely corporate authorization to file the appeal. *Clean Air Council v. DEP*, EHB Docket No. 2016-073-L (Opinion and Order, Feb. 9, 2018).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL	:	
	:	
v.	:	**EHB Docket No. 2016-073-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PARTNERS MARKETING & TERMINALS, L.P., Permittee	:	

O R D E R

AND NOW, this 9th day of January, 2019, it is hereby ordered that Plan Approval No. 23-0119E is remanded to the Department for further consideration consistent with this Adjudication.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: January 9, 2019

c: DEP, General Law Division:
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Brigid Landy Khuri, Esquire
Thomas DeCesar, Esquire
(*via electronic filing system*)

LANCASTER AGAINST PIPELINES, GERALDINE NESBITT AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2016-075-L (Consolidated with 2016-076-L and 2016-078-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	**Issued: January 10, 2019**
LANCASTER AGAINST PIPELINES, DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER	:	
v.	:	**EHB Docket No. 2017-095-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	**Issued: January 10, 2019**

OPINION AND ORDER ON
MOTIONS TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses as moot appeals from a Section 401 water quality certification and several water obstruction and encroachment permits relating to the construction of a pipeline.

O P I N I O N

The Department of Environmental Protection (the "Department") issued a water quality certification under Section 401 of the Federal Clean Water Act to Transcontinental Gas Pipe Line Company, LLC ("Transco") for its Atlantic Sunrise Pipeline Project on April 5, 2016.

Lancaster Against Pipelines, Geraldine Nesbitt, and the Sierra Club filed the appeals consolidated at EHB Docket No. 2016-075-L (consolidated with 2016-076-L and 2016-078-L) from the Section 401 Certification. Transco applied for and received from the Department several water obstruction and encroachment permits for the project. Lancaster Against Pipelines, Delaware Riverkeeper Network, and Maya van Rossum, the Delaware Riverkeeper, filed the appeal docketed at EHB Docket No. 2017-095-L from the Department's issuance the water obstruction and encroachment permits.

Transco and the Department have filed motions to dismiss both appeals. They argue that the Board lacks jurisdiction and Transco also argues that the appeals are moot. The Appellants in both appeals oppose the motions, arguing that the Board has jurisdiction, but curiously failing to address the claim that the appeals are moot.

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. *Consol Pa. Coal Co., LLC v. DEP*, 2015 EHB 48, 54; *Dobbin v. DEP*, 2010 EHB 852, 857. Mootness is a prudential limitation related to justiciability. *Clean Air Council v. DEP*, EHB Docket No. 2016-073-L, slip op. at 2 (Opinion and Order, Feb. 20, 2018). A matter becomes moot when events occur during the pendency of the appeal that deprive the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *South v. DEP*, 2015 EHB 203, 206; *Wheeling-Pittsburgh Steel Co. v. DEP*, 2005 EHB 59, 62. Mootness does not deprive the Board of jurisdiction; rather, where an appeal is moot the Board has the authority based upon its own measure of prudence to proceed. *Sludge Free UMBT v. DEP*, 2015 EHB 888, 890; *Robinson Coal Co. v. DEP*, 2011 EHB 895, 900. However, "[i]t is axiomatic that a court should not address itself to moot questions and instead should only concern itself with real

controversies, except in certain exceptional circumstances." *Goetz v. DEP*, 2001 EHB 1127, 1131.

Transco has advised us that it has completed its construction activities, stabilized the areas disturbed by construction, obtained FERC's approval to place the project in service, and has, in fact, placed the project in service. The Appellants have not denied those facts. Transco argues that there is no effective relief that the Board can offer at this point.

In a telephone conference predating the motions, we asked the Appellants' counsel why these appeals were not moot. They were unable to answer the question with anything specific. Now, as noted above, the Appellants have failed to address the point in their responses to the motion to dismiss. We are unable to independently divine why these appeals are not moot, nor should we try to do so.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LANCASTER AGAINST PIPELINES, GERALDINE NESBITT AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2016-075-L (Consolidated with 2016-076-L and 2016-078-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	
LANCASTER AGAINST PIPELINES, DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER	:	
v.	:	**EHB Docket No. 2017-095-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	

O R D E R

AND NOW, this 10th day of January, 2019, it is hereby ordered that Transco's motion to dismiss both the above-captioned appeals for mootness is **granted**. The appeals are dismissed and the dockets shall be marked 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/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: January 10, 2019

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

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For Appellant, Sierra Club:
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(*via electronic filing system*)

For Permittee:
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Pamela S. Goodwin, Esquire
Andrew T. Bockis, Esquire
(*via electronic filing system*)

LANCASTER AGAINST PIPELINES, GERALDINE NESBITT AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2016-075-L (Consolidated with 2016-076-L and 2016-078-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	**Issued: January 10, 2019**
LANCASTER AGAINST PIPELINES, DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER	:	
v.	:	**EHB Docket No. 2017-095-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	**Issued: January 10, 2019**

OPINION AND ORDER ON
MOTIONS TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses as moot appeals from a Section 401 water quality certification and several water obstruction and encroachment permits relating to the construction of a pipeline.

O P I N I O N

The Department of Environmental Protection (the "Department") issued a water quality certification under Section 401 of the Federal Clean Water Act to Transcontinental Gas Pipe Line Company, LLC ("Transco") for its Atlantic Sunrise Pipeline Project on April 5, 2016.

Lancaster Against Pipelines, Geraldine Nesbitt, and the Sierra Club filed the appeals consolidated at EHB Docket No. 2016-075-L (consolidated with 2016-076-L and 2016-078-L) from the Section 401 Certification. Transco applied for and received from the Department several water obstruction and encroachment permits for the project. Lancaster Against Pipelines, Delaware Riverkeeper Network, and Maya van Rossum, the Delaware Riverkeeper, filed the appeal docketed at EHB Docket No. 2017-095-L from the Department's issuance the water obstruction and encroachment permits.

Transco and the Department have filed motions to dismiss both appeals. They argue that the Board lacks jurisdiction and Transco also argues that the appeals are moot. The Appellants in both appeals oppose the motions, arguing that the Board has jurisdiction, but curiously failing to address the claim that the appeals are moot.

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. *Consol Pa. Coal Co., LLC v. DEP*, 2015 EHB 48, 54; *Dobbin v. DEP*, 2010 EHB 852, 857. Mootness is a prudential limitation related to justiciability. *Clean Air Council v. DEP*, EHB Docket No. 2016-073-L, slip op. at 2 (Opinion and Order, Feb. 20, 2018). A matter becomes moot when events occur during the pendency of the appeal that deprive the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *South v. DEP*, 2015 EHB 203, 206; *Wheeling-Pittsburgh Steel Co. v. DEP*, 2005 EHB 59, 62. Mootness does not deprive the Board of jurisdiction; rather, where an appeal is moot the Board has the authority based upon its own measure of prudence to proceed. *Sludge Free UMBT v. DEP*, 2015 EHB 888, 890; *Robinson Coal Co. v. DEP*, 2011 EHB 895, 900. However, "[i]t is axiomatic that a court should not address itself to moot questions and instead should only concern itself with real

controversies, except in certain exceptional circumstances." *Goetz v. DEP*, 2001 EHB 1127, 1131.

Transco has advised us that it has completed its construction activities, stabilized the areas disturbed by construction, obtained FERC's approval to place the project in service, and has, in fact, placed the project in service. The Appellants have not denied those facts. Transco argues that there is no effective relief that the Board can offer at this point.

In a telephone conference predating the motions, we asked the Appellants' counsel why these appeals were not moot. They were unable to answer the question with anything specific. Now, as noted above, the Appellants have failed to address the point in their responses to the motion to dismiss. We are unable to independently divine why these appeals are not moot, nor should we try to do so.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LANCASTER AGAINST PIPELINES, GERALDINE NESBITT AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2016-075-L (Consolidated with 2016-076-L and 2016-078-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	
LANCASTER AGAINST PIPELINES, DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER	:	
v.	:	**EHB Docket No. 2017-095-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	

O R D E R

AND NOW, this 10th day of January, 2019, it is hereby ordered that Transco's motion to dismiss both the above-captioned appeals for mootness is **granted**. The appeals are dismissed and the dockets shall be marked 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/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: January 10, 2019

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

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Curtis C. Sullivan, Esquire
Anne Shapiro, Esquire
Nels Taber, Esquire
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For Appellants, Lancaster Against Pipelines and Geraldine Nesbitt:
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Mark L. Freed, Esquire
Lauren M. Williams, Esquire
Joanna Waldron, Esquire
(*via electronic filing system*)

For Appellant, Sierra Club:
Joanne Kilgour, Esquire
Diana A. Csank, Esquire
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For Appellants, Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper:
Aaron J. Stemplewicz, Esquire
(*via electronic filing system*)

For Permittee:
John Stoviak, Esquire
Pamela S. Goodwin, Esquire
Andrew T. Bockis, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOL PENNSYLVANIA COAL CO., LLC	:	
	:	
v.	:	**EHB Docket No. 2017-097-B**
	:	**(Consolidated with 2018-061-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**Issued: January 23, 2019**

OPINION AND ORDER ON
MOTION TO DISMISS

By Steven C. Beckman, Judge

Synopsis

The Board dismisses as moot the consolidated appeals from a Compliance Order and Notice of Violation issued by the Department where the Department has since vacated and withdrawn the actions and there are no exceptions to the mootness doctrine under the unique circumstances of this case.

O P I N I O N

Background

The case involves consolidated appeals by Consol PA Coal Company ("Consol") of a Compliance Order issued by the Department of Environmental Protection ("DEP or "Department") on September 25, 2017, and a Notice of Violation issued by the Department on May 22, 2018. The Compliance Order and the Notice of Violation both allege violations of the Bituminous Coal Mine Safety Act, 52 P.S. §§ 690-101 – 690-708 ("Mine Safety Act"). The case proceeded through discovery and no dispositive motions were filed by either party by the deadline established by the Board. On November 6, 2018, the Department filed its Pre-Hearing

Memorandum and Consol filed its Pre-Hearing Memorandum on December 7, 2018. The case remained on track towards its scheduled hearing in mid-January 2019.

On December 14, 2018, Consol filed three Motions In Limine, to which the Department responded on December 26, 2018. On January 3, 2019, the Board held a conference call with the parties to discuss the Motions in Limine. During that conference call, the Board raised questions concerning the statutory authorities cited by the Department in both the Compliance Order and the Notice of Violation and whether the Board would be able to reach the underlying issue of concern to both parties. On January 7, 2019, the Department filed a Motion for Stay Of The Hearing In This Matter And Any Ruling On The Motions In Limine ("Stay Motion"). In its Stay Motion, the Department stated that it had vacated and withdrawn both the Compliance Order and the Notice of Violation under appeal and informed the Board that it planned to file a Motion to Dismiss based on mootness. On the same day, the Department issued an Administrative Order to Consol addressing the underlying issue in this case, whether Consol is permitted to splice a specific type of cable used in its longwall mining operations ("Administrative Order").[1] The Administrative Order prohibits Consol from splicing these cables.[2] The Department then filed a Motion to Dismiss ("Motion"), later in the day on January 7, 2019. On January 9, 2019, Consol filed a Response In Opposition to Department's Motion which addressed the Department's Motion for Stay and the Department's Motion to Dismiss ("Response"). We held another conference call with the parties on January 10, 2019, after which we issued an Order granting the

[1] As of the date of this Opinion and Order, no appeal of the Administrative Order has been filed with the Board.

[2] The parties disagree on how to refer to the type of cable at issue. Consol appears to refer to them as Shield Power Supply Cables. The Department apparently refers to them as Longwall Illumination Cables. As best we can tell at this point in the proceedings, the parties are referring to the same cables but using a different name rather than referring to different cables. In this Opinion and Order, we will simply refer to them as cable or cables.

Stay Motion and ordering the Department to file a reply to Consol's Response on or before January 15, 2019. On January 15, 2019, the Department filed a Reply to Consol's Response to the Motion to Dismiss ("Reply") and the matter is now ready for a decision on the Motion.

Standard

A motion to dismiss is appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, an issue of justiciability, or another preliminary concern. *Consol Pa. Coal Company, Inc. v. DEP*, 2015 EHB 48, 54. The Board evaluates a motion to dismiss in the light most favorable to the non-moving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *Burrows v. DEP*, 2000 EHB 20, 22. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving motions to dismiss, we accept the non-moving party's version of events as true. *Consol*, 2015 EHB at 54, citing *Ehmann v. DEP*, 2008 EHB 386, 390.

"Mootness is a prudential limitation related to justiciability," and so is generally an issue that is properly resolved by a motion to dismiss. *M & M Stone Co. v. DEP*, 2009 EHB 495, 500. "A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome." *Horsehead Res. Dev. Co. v. DEP*, 1998 EHB 1101, 1103, *aff'd*, 780 A.2d 856 (Pa. Cmwlth. 2001). There are exceptions to mootness under certain exceptional circumstances. Examples of exceptional circumstances that may overcome mootness include where the action complained of is capable of repetition but likely to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision by the Board. *Consol*, 2015 EHB at 56. The existence of any of these circumstances "may justify" the Board retaining jurisdiction of the matter. *Id*. citing *Ehmann*, 2008 EHB at 390.

Analysis

The Department argues in its Motion that the Board should dismiss Consol's consolidated appeals as moot because the Department has vacated the underlying actions and none of the exceptions to the mootness doctrine apply to this matter. Consol acknowledges that the specific Department actions addressed in this appeal have been vacated, but it argues that the Department's actions, including the issuance of the Administrative Order, prejudice Consol and attempt to usurp the Board's authority while denying Consol due process. Consol asks that the Board deny the Motion or in the alternative requests that if the Board grants the Motion, that the Board dismiss the case with prejudice and limit the Department from relitigating or enforcing a prohibition on splicing the cables.

We hold that this appeal is moot because, at this point in the proceeding, we cannot grant effective relief to the specific actions that are being appealed in this case, the Compliance Order and the Notice of Violation and the specific statutory violations cited therein. The parties do not dispute the key fact that the Department has vacated and withdrawn both the Compliance Order and Notice of Violation that are the subjects of the consolidated appeals. (See Exhibit A to the Motion). The Board has previously addressed the question of mootness in cases where a compliance order that is the subject of an appeal has been withdrawn or vacated by the Department. See *Goetz v. DEP*, 2001 EHB 1127, 1132 (citing, *See, e.g., West v. DEP*, 2000 EHB 462; *Kilmer v. DEP*, 1999 EHB 846; *Power Operating Company v. DEP*, 1999 EHB 466). In *Goetz*, we observed that "[w]here the Department has acted to rescind its prior appealable action, the Board has generally not hesitated to dismiss such appeals as moot." *Id.* citing, *Pequea Township v. DER*, 1994 EHB 755, 758. The Board in *Goetz* noted that a rescinded, revoked, or

vacated action no longer exists, and the Board cannot provide any meaningful relief with regards to the action. *Id.*

Consol argues that the matter is not moot because the case and controversy are still alive as evidenced by the Administrative Order. This argument is similar to that presented by Ms. Lawson in *Lawson v. DEP*, EHB Docket No. 2017-051-B, slip op. at 4 (Opinion, May 17, 2018) ("*Lawson*"), who argued that the Board could still address the underlying issue of brine spreading despite the fact that the plan approval in question had expired. We rejected that argument finding that the proper focus is the action taken by the Department. "Our role is necessarily circumscribed by the Departmental action that has been appealed. … Our responsibility is limited to reviewing the propriety of *that action*." (emphasis in original). *Lawson*, at 5 citing *Winegardne*r *v DEP*, 2002 EHB 790, 793. The actions under appeal in this case are the Compliance Order and the Notice of Violation issued by the Department and subsequently vacated. Because those specific actions have been vacated, there is no relief we can grant Consol as to those actions.

Having determined that the consolidated appeals are moot, we now address whether to allow the appeal to continue due to the existence of exceptional circumstances. *Id*, citing *Consol Pa. Coal Company, Inc. v. DEP*, 2015 EHB 48, 61. The Department asserts that there are no exceptions to the mootness doctrine that apply to the circumstances of this case. Consol argues that it satisfies all three of the stated exceptions to the mootness doctrine because the action is capable of repetition while evading review, it will suffer a detriment without a decision from the Board and that the issue of miner safety is of great public importance. We will address each of these arguments in turn.

The first issue is whether the action is capable of repetition while evading review. Consol contends that the facts and circumstances of this case up to this point demonstrate that the action is capable of repetition and yet likely to evade review. We agree that the real factual and legal issue that the parties wish to contest, whether these cables can be spliced under the Mine Safety Act, is capable of repetition as evidenced by the Administrative Order. However, we conclude that because Consol is in control of whether the issue evades review at this point, it does not meet the exceptional circumstances necessary to overcome the mootness doctrine. The Administrative Order squarely raises the underlying issue and an appeal of the Administrative Order provides the vehicle for a proper review by the Board. An appeal of the Administrative Order is an action that is entirely within the control of Consol so whether the Board is able to review the Department's position on the issue is up to Consol. Consol raises a concern that the Department could vacate the Administrative Order a week before the next scheduled hearing and prevent review of its action again. First, this is simply speculation on Consol's part and is inconsistent with statements made by the Department to the Board and its actions in filing the Administrative Order. The Department stated in its Reply that it will agree to an expedited hearing in any appeal of the Administrative Order and that it is in favor of retaining the already completed discovery and Pre-Hearing Memoranda in these consolidated cases in such an appeal. This makes any effort by the Department to avoid the review of the cable splicing issue unlikely in our view. Second, just as in this case, any Motion to Dismiss an appeal of the Administrative Order would be subject to Board review. The Board's control of that process makes it unlikely to evade our review. If the Department were to act in the manner that Consol suggests, the Board would have the authority to deny any such motion under the right factual circumstances.

Consol argues that it will suffer a detriment if the Board dismisses the consolidated cases. The only detriment identified by Consol is that it will be required to continue to comply with the Department's ruling requiring that it replace these cables rather than splice them as it contends the law allows. In other words, the status quo will be required to be maintained for some period going forward until the Board rules on the issue. We do not believe that maintaining the status quo is a sufficient detriment to Consol to meet the exceptional circumstances requirement for overcoming mootness. In its Response, Consol does not set forth any specific information on how frequently it is required to change out these cables or what costs or impact it suffers as result of the requirement that it do so rather than splice the cables. It does argue generally that the costs involved are significant and that splicing enhances miner's safety by reducing the risk of injury by decreasing exposure to material handling and slip or fall injuries. However, Consol does not provide any factual detail supporting its position such as the actual costs involved and how many miners have been injured while replacing the cables. We lack sufficient information to rule in Consol's favor on its' argument that it will suffer a meaningful detriment if this case is dismissed. Further, any impact resulting from dismissal of the case is limited by the potential to proceed on an appeal of the Administrative Order and the Department and the Board's stated willingness to proceed with any appeal on an expedited basis. Assuming an appeal takes place, a Board decision on the underlying issue is likely to be delayed by only a few months, if at all, when compared to proceeding forward with this case.

Consol does not set forth any specific argument in its Response addressing whether the exception for issues of great public importance applies to this case. It simply points out the Department's statement in its motion that the subject matter involves questions of public importance. That statement could likely be made in every case that comes to the Board and is

insufficient in our opinion to meet the requirements for an exception to the mootness doctrine. Without intending to diminish in any way the importance of mine safety, we do not see the issue of whether the particular actions taken by the Department in this case are lawful and reasonable as an issue of great public importance. In the absence of any direct argument from Consol and seeing no readily apparent basis for granting an exception on this basis, we do not need to address this question further.

Finally, beyond the stated exceptions, we need to address Consol's assertion that the Department's actions in this case are an effort to further delay resolution of the issues presented by the case, deny Consol due process and constitute an end run around the judicial and legislative process. We reject Consol's characterization of the Department's actions and find that those actions do not create exceptional circumstances that overcome the application of the mootness doctrine to the facts of this case. The Department's action to vacate and withdraw the Compliance Order and Notice of Violation that were the challenged Department actions in this consolidated case, and issue an Administrative Order, was a rational response to the issues raised in the conference call with the Board and the parties. It was evident to the Board in that call and the filings up to that point that both parties wished for the Board to decide the underlying issue concerning the Department's position prohibiting the splicing of the cables. The Board expressed reservation about whether it could reach that issue in deciding the appeals of the Compliance Order and Notice of Violation. The Board further expressed its concern that we might proceed with a multi-day hearing, post-hearing briefing and the issuance of a resulting adjudication several months in the future that would not resolve the underlying issue. In light of those discussions, the Department's decision to vacate its prior actions and issue an Administrative Order that squarely set up the underlying issue strikes us as rational and proper

action on its part. It does not, in our opinion, deny Consol due process, unnecessarily delay matters or end run around the Board's process. In fact, we find that it is consistent with due process and the Board's interest in providing a proper review of the issues of interest to the parties in this case. As such, we find that there is no basis for finding that these constitute exceptional circumstances that warrant proceeding in the case.

We hold that the Department's decision to vacate and withdraw the Compliance Order and Notice of Violation renders any appeal of those specific actions moot and that no exceptional circumstances exist that convince the Board to allow the appeal to continue. For these reasons, the Motion to Dismiss is granted.[3]

[3] In its Response, Consol requests that the Board enter an order in its favor with prejudice against the Department to prevent it from relitigating or enforcing a prohibition on splicing the cables at issue in the consolidated appeals. We view this request as in essence Consol asking for a summary judgment in its' favor. At no point in this proceeding did Consol file a Motion for Summary Judgment despite the apparent issues with the Compliance Order and Notice of Violation noted by the Board and Consol and discussed by the Board and the parties in the conference calls. A Response to a Motion to Dismiss is not the proper procedural vehicle for seeking summary judgment and, therefore, we will not address Consol's request.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOL PENNSYLVANIA COAL CO., LLC	:	
	:	
v.	:	**EHB Docket No. 2017-097-B**
	:	**(Consolidated with 2018-061-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 23rd day of January, 2019, it is hereby ordered the Motion to Dismiss is **granted.**

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 23, 2019

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

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Matthew Kessler, Esquire
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For Appellant:
R. Henry Moore, Esquire
Patrick W. Dennison, Esquire
(*via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PLAINFIELD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2018-092-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GRAND CENTRAL SANITARY LANDFILL, INC.	:	**Issued: January 28, 2019**

OPINION AND ORDER ON
MOTION TO DISMISS

By Michelle A. Coleman, Judge

Synopsis

The Board denies a motion to dismiss where an appellant has appealed a letter from the Department sent to a permittee regarding proposed modifications to a sedimentation basin. The moving party has not provided enough information for the Board to conclude that dismissal is appropriate and free from doubt.

O P I N I O N

Before the Board is a motion to dismiss filed by Grand Central Sanitary Landfill, Inc. ("Grand Central"). Grand Central apparently operates a solid waste facility in Plainfield Township, Northampton County. Plainfield Township has appealed a letter dated August 10, 2018 issued by the Department of Environmental Protection (the "Department") to Grand Central regarding proposed modifications to a sedimentation basin at the facility. The letter provides:

> The Department of Environmental Protection (DEP) has reviewed information provided by EarthRes Group, Inc (ERG) regarding proposed modifications to sedimentation basin number 2. ERG provided DEP with background information

> regarding the history of this basin in an email correspondence dated June 26, 2018. (copy enclosed) The purpose of this correspondence was to seek clarification regarding the regulatory classification of this body of water.
>
> Upon review of the information provided and DEP's historic knowledge regarding basin number 2, DEP has determined that the basin was engineered and presently being maintained as a sediment basin and stormwater control facility. It is a regulated body of water under Pa Code Chapter 105. However, modifications, including filling a portion of the facility is waived from state water obstruction and encroachment permitting requirements under 105.12(a)6 [sic]. This waiver is for water obstructions and encroachments located in, along, across or projecting into a stormwater management facility or an erosion and sedimentation pollution control facility which meets the requirements in Chapter 102.
>
> I trust that you find this information helpful. If you have additional questions about your application, please contact me.

The letter is signed by Roger Bellas, Program Manager for the Department's waste management program.

The Township contends in its notice of appeal, among other things, that Sedimentation Basin No. 2 is not eligible for a permit waiver, that the sedimentation basin has a significant effect on the protection of life, health, property, or the environment, that the continued use of the sedimentation basin will cause contamination to waters of the Commonwealth, and that Sedimentation Basin No. 2 is actually an abandoned quarry pit from an old slate mine that has never been properly engineered to function as a sedimentation basin or stormwater control facility.

Grand Central argues in its motion to dismiss that the letter is not an appealable action because it only provides the Department's legal interpretation and it does not direct any action of or impose any obligations on anyone. The Department has filed a letter indicating its concurrence in Grand Central's motion. The Township opposes it, arguing that there are several determinations made in the letter that have real impacts upon the Township. Primarily, the Township contends that the purpose of the modification to the sedimentation basin is to accommodate a future sewage sludge drying operation on Grand Central's property, and it is

unknown whether the Department assessed the potential impact of the modification on safety, life, health, property, or the environment, as the Township says it requested the Department to determine.

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*, EHB Docket No. 2017-051-B, slip op. at 2 (Opinion and Order, May 17, 2018); *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*, EHB Docket No. 2018-028-R, slip op. at 4 (Opinion and Order, Sep. 5, 2018); *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. *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.

Our issue with Grand Central's motion is that it provides almost no contextual or background information on its site or the sedimentation basin addressed in the letter. Grand Central has not explained what the site is, what happens at the site, or how Sedimentation Basin No. 2 fits in at the site. We are told that Sedimentation Basin No. 2 is currently covered by Solid Waste Permit No. 100265 and NPDES Permit No. PA0074083, but we do not know what that means exactly, or how that relates to what the Department is saying in the letter. Even though Grand Central may think it is self-evident, only the Township has told us that this site is a solid waste facility. Only the Township has taken the time to address in even any remote detail what it contends is the function and history of Sedimentation Basin No. 2. The Department's letter

purports to be prompted by an email sent to the Department from Grand Central's consultant, but no party has at any time provided the Board with a copy of that email. The email may not end up being material to the issue of whether the Department's letter is an appealable action, but we do not know that for sure at this point. Perhaps because we do not have the email, we do not know what the proposed modifications to the basin involve. It is also unclear what "application" Mr. Bellas is referring to in the letter, although we note that a portion of the subject line contains "Minor Permit Modification – Slate Belt Heat Recovery Center."

Motions to dismiss are only to be granted when a matter is free from doubt, and we typically proceed with caution when there are unresolved questions. *See Diehl v. DEP*, 2016 EHB 853 (denying a motion to dismiss premised on lack of jurisdiction where the limited record before the Board at an early stage of the proceedings did not provide adequate context for the letter under appeal). We do not have enough information one way or the other to resolve the issue of jurisdiction at this time. The denial of the motion to dismiss is without prejudice to Grand Central filing a subsequent dispositive motion with more factual support.

We issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PLAINFIELD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2018-092-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GRAND CENTRAL SANITARY LANDFILL, INC.	:	

O R D E R

AND NOW, this 28th day of January, 2019, it is hereby ordered that Grand Central Sanitary Landfill, Inc's motion to dismiss is **denied**. The previously ordered stay of discovery in this matter is lifted, and the deadlines originally established in this matter in the Board's Pre-Hearing Order No. 1 shall be in effect.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: January 28, 2019

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

For the Commonwealth of PA, DEP:
Lance H. Zeyher, Esquire
(*via electronic filing system*)

For Appellant:
John R. Embick**,** Esquire
(*via electronic filing system*)

For Permittee:
Robert D. Fox, Esquire
Thomas M. Duncan, Esquire
(*via electronic filing system*)

LANCASTER AGAINST PIPELINES, GERALDINE NESBITT AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2016-075-L (Consolidated with 2016-076-L and 2016-078-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	**Issued: January 29, 2019**
LANCASTER AGAINST PIPELINES, DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER	:	
v.	:	**EHB Docket No. 2017-095-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	**Issued: January 29, 2019**

OPINION AND ORDER ON
PETITION FOR RECONSIDERATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

A petition for reconsideration of a Board order dismissing appeals as moot is denied because the Appellants have failed to show that the grounds for reconsideration set forth in the Board's rules have been met.

O P I N I O N

The Department of Environmental Protection (the "Department") issued a water quality certification under Section 401 of the Federal Clean Water Act to Transcontinental Gas Pipe

Line Company, LLC ("Transco") for its Atlantic Sunrise Pipeline Project on April 5, 2016. Lancaster Against Pipelines, Geraldine Nesbitt, and the Sierra Club filed the appeals consolidated at EHB Docket No. 2016-075-L (consolidated with 2016-076-L and 2016-078-L) from the Section 401 Certification. Transco applied for and received from the Department several water obstruction and encroachment permits for the project. Lancaster Against Pipelines, Delaware Riverkeeper Network, and Maya van Rossum, the Delaware Riverkeeper, filed the appeal docketed at EHB Docket No. 2017-095-L from the Department's issuance of the Chapter 105 water obstruction and encroachment permits.

Transco and the Department filed motions to dismiss both appeals. They argued that the Board lacks jurisdiction and Transco also argued that the appeals are moot. The Appellants in both appeals opposed the jurisdictional claims in the motions, but failed to address the claim that the appeals are moot. We granted Transco's motion to dismiss for mootness. We held as follows:

> Transco has advised us that it has completed its construction activities, stabilized the areas disturbed by construction, obtained FERC's approval to place the project in service, and has, in fact, placed the project in service. The Appellants have not denied those facts. Transco argues that there is no effective relief that the Board can offer at this point.
>
> In a telephone conference predating the motions, we asked the Appellants' counsel why these appeals were not moot. They were unable to answer the question with anything specific. Now, as noted above, the Appellants have failed to address the point in their responses to the motion to dismiss. We are unable to independently divine why these appeals are not moot; nor should we try to do so.

(Opinion and Order, Jan. 10, 2019, slip op. at 3.)

Lancaster Against Pipelines, Delaware Riverkeeper Network, and Maya van Rossum ("Petitioners") have filed a petition for reconsideration.[1] They argue that there are two reasons for the Board to grant reconsideration under our rule governing reconsideration of final orders,

[1] Geraldine Nesbitt and Sierra Club have not joined in the petition.

25 Pa. Code § 1021.152. First, they say our final order rests on a legal ground or a factual finding that has not been proposed by any party. 25 Pa. Code § 1021.152(a)(1). Second, they argue that the crucial facts set forth in their petition are (i) inconsistent with the findings of the Board, (ii) are such as would justify a reversal of the Board's decision, and (iii) could not have been presented earlier to the Board with the exercise of due diligence. 25 Pa. Code § 1021.152(a)(2). Both Transco and the Department oppose the petition for reconsideration.

Section 1021.152 establishes a high standard for reconsideration of our final orders. *Rural Area Concerned Citizens v. DEP*, 2013 EHB 374, 375. A petition for reconsideration of a final order is within the discretion of the Board and will only be granted for "compelling and persuasive reasons." 25 Pa. Code § 1021.152(a). The Petitioners' petition falls short of this high standard.

With respect to the Petitioners' first argument—the final order rests on a legal ground or a factual finding not proposed by any party—the Petitioners essentially argue that they did not have a proper chance to contest the mootness issue; that the issue was not properly joined. We disagree. As noted in our Opinion, upon hearing from Transco that the pipeline was up and running, we advised the parties in a telephone conference before the motions were filed that we needed to understand why the appeals are not moot. The Petitioners could not explain why the appeals are not moot, which perhaps may be forgiven because we were putting them on the spot. However, they were on notice that the issue was of concern to the Board.

Transco followed up with a motion to dismiss that included the mootness argument. It included the following averments in its motion,

> 26. The Federal Energy Regulatory Commission authorized Transco to place the Project into service via letter approval on October 4, 2018. *See* Letter from FERC Office of Energy Projects (Oct. 4, 2018), Exhibit D.

> 27. Transco placed the Project into full service on Saturday, October 6, 2018. *See* Letter from Transco to FERC (Oct. 9, 2018), Exhibit E. Therefore, the consolidated appeals are moot.

The exhibits supported the averments. In its supporting memorandum, Transco stated,

> Even if the Board had jurisdiction, which it does not based on the clear and controlling jurisdictional determination of the Third Circuit, the consolidated appeals are moot. Transco has completed its construction activities, stabilized the areas disturbed by construction, obtained FERC's approval to place the project in service, and has, in fact, placed the project in service. *See* Letter from FERC Office of Energy Projects (Oct. 4, 2018), Exhibit D; Letter from Transco to FERC (Oct. 9, 2018), Exhibit E….
>
> The Petitioners responded to the motion as follows:
>
> 26. Denied. The Letter from FERC Office of Energy Projects is a document that speaks for itself and any inconsistent characterization thereof in the Motion is denied.
>
> 27. Denied. Appellants are without knowledge or information to form a belief as to the truth of the averment. Further, the Letter from Transco to FERC is a document that speaks for itself and any inconsistent characterization thereof in the Motion is denied. Additionally, the averment contains a conclusion of law to which no response is required.

The Petitioners admit that their memorandum in support of their response did not mention the issue at all.

> Our rules on dispositive motions provide as follows:
>
> When a dispositive motion is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response must set forth specific issues of fact or law showing there is a genuine issue for hearing. If the adverse party fails to adequately respond, the dispositive motion may be granted against the adverse party.

25 Pa. Code § 1021.94(f). The Petitioners did not comply with this rule. Other than two unhelpful, generic denials, the Petitioners failed to provide any meaningful response. Thus, contrary to the Petitioners' first argument, the mootness issue was squarely if briefly proposed by a party. As we have held before, petitions for reconsideration may be appropriate when the

Board misses a key legal or factual point, but are not available simply as a vehicle for arguing issues that should have been argued in the first instance. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 117, 118; *Solebury Twp. v. DEP*, 2008 EHB 718, 720.

As to the second ground for reconsideration—the presentation of crucial new facts—we also find that the Petitioners' argument must fail. The "crucial facts" the Petitioners rely upon boil down to an assertion that the pipeline construction site has not been *permanently* stabilized—facts the Petitioners claim have been revealed for the first time in a status report Transco has filed with FERC. Accepting this as true, the Petitioners have once again failed to explain why that fact would justify a reversal of our decision. They have once again failed to describe what meaningful relief we could provide at this point, three years after they filed their appeal, many months after the Third Circuit has disposed of their federal case on the merits, and months after the pipeline has been put in service.[2] They tell us the site has not been permanently stabilized, but fail to explain why the absence of permanent stabilization prevents this case from being moot. As we stated in our original Opinion, we simply cannot make the Petitioners' arguments for them.

Further, the Petitioners fail to explain why they could not have presented their "crucial facts" earlier with the exercise of due diligence. Transco credibly points out that its status reports to FERC regarding its construction activities, stating that some permanent stabilization remained to be completed, were available before our ruling. Indeed, those reports were served upon the Petitioners. No new information has been revealed after our ruling.

[2] The Petitioners belatedly provide some explanation in a reply, but our rules on reconsideration do not allow for such replies. The Petitioners offer no explanation for why their points could not have been raised in a timely manner in response to the motion to dismiss, or even in their petition for reconsideration.

Because the reasons for reconsideration mentioned in Section 1021.152(a) are not exclusive, and reconsideration is discretionary, it is perhaps worth noting that the Petitioners essentially let these appeals sit for years while the pipeline was built. Rather than seek a supersedeas or even attempt to proceed in the normal course with the appeals, they agreed to very lengthy stays while the federal courts sorted out the jurisdictional issues. Given the jurisdictional morass that characterizes this issue, we are not criticizing the Petitioners' tactics, but surely they must understand that further Board review at this extremely late date would be futile. The Petitioners are clearly trying to preserve a jurisdictional issue, but we are loath to decide purely academic issues. *Lawson v. DEP*, EHB Docket No. 2017-051-B, slip op. at 4 (Opinion and Order, May 17, 2018); *Solebury Twp. v. DEP*, 2004 EHB 23, 34. The Petitioners did not argue that any exceptions to the mootness doctrine apply.

Accordingly, there being no grounds shown for reconsideration, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LANCASTER AGAINST PIPELINES, GERALDINE NESBITT AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2016-075-L (Consolidated with 2016-076-L and 2016-078-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	
LANCASTER AGAINST PIPELINES, DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER	:	
v.	:	**EHB Docket No. 2017-095-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	

O R D E R

AND NOW, this 29th day of January, 2019, it is hereby ordered that the petition for reconsideration filed by some of the Appellants 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: January 29, 2019

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

For the Commonwealth of PA, DEP:
Joseph S. Cigan, Esquire
Curtis C. Sullivan, Esquire
Anne Shapiro, Esquire
Nels Taber, Esquire
(*via electronic filing system*)

For Appellants, Lancaster Against Pipelines and Geraldine Nesbitt:
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Mark L. Freed, Esquire
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Joanna Waldron, Esquire
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For Appellant, Sierra Club:
Joanne Kilgour, Esquire
Diana A. Csank, Esquire
(*via electronic filing system*)

For Permittee:
John Stoviak, Esquire
Pamela S. Goodwin, Esquire
Andrew T. Bockis, Esquire
(*via electronic filing system*)

LANCASTER AGAINST PIPELINES, GERALDINE NESBITT AND SIERRA CLUB	:	
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	**Issued: January 29, 2019**
LANCASTER AGAINST PIPELINES, DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER	:	
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	**Issued: January 29, 2019**

OPINION AND ORDER ON
PETITION FOR RECONSIDERATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

A petition for reconsideration of a Board order dismissing appeals as moot is denied because the Appellants have failed to show that the grounds for reconsideration set forth in the Board's rules have been met.

O P I N I O N

The Department of Environmental Protection (the "Department") issued a water quality certification under Section 401 of the Federal Clean Water Act to Transcontinental Gas Pipe

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> Transco has advised us that it has completed its construction activities, stabilized the areas disturbed by construction, obtained FERC's approval to place the project in service, and has, in fact, placed the project in service. The Appellants have not denied those facts. Transco argues that there is no effective relief that the Board can offer at this point.
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> In a telephone conference predating the motions, we asked the Appellants' counsel why these appeals were not moot. They were unable to answer the question with anything specific. Now, as noted above, the Appellants have failed to address the point in their responses to the motion to dismiss. We are unable to independently divine why these appeals are not moot; nor should we try to do so.

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[1] Geraldine Nesbitt and Sierra Club have not joined in the petition.

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25 Pa. Code § 1021.94(f). The Petitioners did not comply with this rule. Other than two unhelpful, generic denials, the Petitioners failed to provide any meaningful response. Thus, contrary to the Petitioners' first argument, the mootness issue was squarely if briefly proposed by a party. As we have held before, petitions for reconsideration may be appropriate when the

Board misses a key legal or factual point, but are not available simply as a vehicle for arguing issues that should have been argued in the first instance. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 117, 118; *Solebury Twp. v. DEP*, 2008 EHB 718, 720.

As to the second ground for reconsideration—the presentation of crucial new facts—we also find that the Petitioners' argument must fail. The "crucial facts" the Petitioners rely upon boil down to an assertion that the pipeline construction site has not been *permanently* stabilized—facts the Petitioners claim have been revealed for the first time in a status report Transco has filed with FERC. Accepting this as true, the Petitioners have once again failed to explain why that fact would justify a reversal of our decision. They have once again failed to describe what meaningful relief we could provide at this point, three years after they filed their appeal, many months after the Third Circuit has disposed of their federal case on the merits, and months after the pipeline has been put in service.[2] They tell us the site has not been permanently stabilized, but fail to explain why the absence of permanent stabilization prevents this case from being moot. As we stated in our original Opinion, we simply cannot make the Petitioners' arguments for them.

Further, the Petitioners fail to explain why they could not have presented their "crucial facts" earlier with the exercise of due diligence. Transco credibly points out that its status reports to FERC regarding its construction activities, stating that some permanent stabilization remained to be completed, were available before our ruling. Indeed, those reports were served upon the Petitioners. No new information has been revealed after our ruling.

[2] The Petitioners belatedly provide some explanation in a reply, but our rules on reconsideration do not allow for such replies. The Petitioners offer no explanation for why their points could not have been raised in a timely manner in response to the motion to dismiss, or even in their petition for reconsideration.

Because the reasons for reconsideration mentioned in Section 1021.152(a) are not exclusive, and reconsideration is discretionary, it is perhaps worth noting that the Petitioners essentially let these appeals sit for years while the pipeline was built. Rather than seek a supersedeas or even attempt to proceed in the normal course with the appeals, they agreed to very lengthy stays while the federal courts sorted out the jurisdictional issues. Given the jurisdictional morass that characterizes this issue, we are not criticizing the Petitioners' tactics, but surely they must understand that further Board review at this extremely late date would be futile. The Petitioners are clearly trying to preserve a jurisdictional issue, but we are loath to decide purely academic issues. *Lawson v. DEP*, EHB Docket No. 2017-051-B, slip op. at 4 (Opinion and Order, May 17, 2018); *Solebury Twp. v. DEP*, 2004 EHB 23, 34. The Petitioners did not argue that any exceptions to the mootness doctrine apply.

Accordingly, there being no grounds shown for reconsideration, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LANCASTER AGAINST PIPELINES, GERALDINE NESBITT AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2016-075-L (Consolidated with 2016-076-L and 2016-078-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	
LANCASTER AGAINST PIPELINES, DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER	:	
v.	:	**EHB Docket No. 2017-095-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	:	

O R D E R

AND NOW, this 29th day of January, 2019, it is hereby ordered that the petition for reconsideration filed by some of the Appellants 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: January 29, 2019

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

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

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Jordan B. Yeager, Esquire
Mark L. Freed, Esquire
Lauren M. Williams, Esquire
Joanna Waldron, Esquire
(*via electronic filing system*)

For Appellant, Sierra Club:
Joanne Kilgour, Esquire
Diana A. Csank, Esquire
(*via electronic filing system*)

For Permittee:
John Stoviak, Esquire
Pamela S. Goodwin, Esquire
Andrew T. Bockis, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL J. KOPKO	:	
	:	
v.	:	**EHB Docket No. 2018-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC., Permittee	:	**Issued: February 5, 2019**

OPINION AND ORDER ON
MOTION TO DISMISS

By: Judge Richard P. Mather, Sr.

Synopsis

The Permittee's Motion to Dismiss is denied. Although the Board agrees that the Appellant may not collaterally attack previously issued well permits or compel the Department to take enforcement action in the context of this appeal of the issuance of coverage under General Permit ESCGP-2, the Appellant has challenged the decision to approve coverage under ESCGP-2. He seeks to overturn the approval of coverage. The Appellant asserts that the Department did not conduct the appropriate compliance history review required by law and failed to consider the effect of a violation identified in a Notice of Violation that the Department previously issued to the Permittee. In the context of a motion to dismiss, the Board is unable to grant the Permittee's Motion without a more complete record and without some indication from the Department regarding the scope and nature of the compliance history review that it actually undertook before it approved the Permittee's application for coverage under ESCGP-2.

O P I N I O N

Introduction

This matter involves an appeal filed by Michael J. Kopko challenging the Department of Environmental Protection's ("Department" or "DEP") decision to approve application for coverage under the Erosion and Sediment Control General Permit ESCGP-2 ("General Permit" or "ESCGP-2") for Range Resources – Appalachia, LLC ("Range Resources" or "Permittee") in connection with Range Resources' gas well activities in Canton Township, Washington County. In his Notice of Appeal ("NOA") Mr. Kopko states that he is the owner of property located at 419 Malone Ridge Road in Washington, PA, and on or about March 19, 2008 he entered into an Oil and Gas Lease with Range Resources permitting Range Resources to conduct certain drilling activity on his property. On November 17, 2016 the Department issued a Notice of Violation ("NOV") to Range Resources, finding that Range Resources had violated Section 3215(a) of the 2012 Oil and Gas Act, Act of February 14, 2012, P.L. 87, 58 Pa. C.S. § § 3201-3274, at § 3215(a), by drilling a well (the 1H well) within 500 feet of a building without obtaining the written consent of the owner or a variance (Exhibit A to Notice of Appeal). According to the Notice of Violation, Range Resources drilled the well 285 feet from a building on the Kopko property "defined as 'an occupied structure with walls and a roof [in] which persons live or customarily work.'"

Subsequently, on or about December 27, 2017 the Department approved Range Resources' application for coverage under the Erosion and Sediment Control General Permit, and the approval was published in the *Pennsylvania Bulletin* on January 13, 2018. Mr. Kopko appealed the approval. In his NOA the Appellant alleges several objections. He asserts that Range Resources did not obtain his consent to drill the 1H well within 500 feet of his building and further "misrepresented to DEP that it had [Mr. Kopko's] approval to dig five new wells

upon approval of the [General Permit.]" (Notice of Appeal, para. 15, 16). He also alleges that the Department granted coverage notwithstanding the NOV issued on November 17, 2016 that cited Range Resources for violating 58 Pa. C.S.A. § 3215(a) (siting an unconventional gas well within 500 feet of a building without the landowner's consent).

Range Resources has filed a Motion to Dismiss, arguing that Mr. Kopko is using this appeal of the General Permit as a backdoor means of challenging the permit for the 1H well, as well as an attempt to force the Department to take enforcement action against Range Resources. Range Resources asserts that even if we assume every allegation in Mr. Kopko's NOA to be true, there is no basis for concluding that the Department acted contrary to law or abused its discretion when it authorized coverage under the General Permit.

Mr. Kopko responded to the motion on December 11, 2018 and Range Resources filed a Reply on December 20, 2018. In his Brief in Opposition to Range Resources' Motion to Dismiss, Mr. Kopko asserts that there is a basis for keeping his appeal alive. While the Board agrees with Range Resources that Mr. Kopko may not collaterally attack the previously issued well permit or compel the Department to take enforcement action in the context of an appeal of the issuance of coverage under ESCGP-2, Mr. Kopko asserts that he has alleged more. In his response to Range Resources' Motion to Dismiss, Mr. Kopko indicated that his appeal "amounts to a collateral attack on the location of the 1H Well inasmuch as it is located within 500 feet of an occupied structure." Kopko's Brief at 2. Mr. Kopko also asserts that his collateral attack is permissible based upon the language of 25 Pa. Code § 102.5(m)(6), and he concludes:

> As the Board can see, the appeal is not just a collateral attack on the issuance of the natural gas well drilling permits. It is an attack on the approval of an ESCGP-2 for a well in violation of the statute, so naturally, it also brings the gas well drilling permit into play.

Id. The Board believes that Mr. Kopko's argument has merit to the extent it focuses on the Department's decision to grant ESCGP-2 coverage to Range Resources under 25 Pa. Code § 102.5(m)(6). Mr. Kopko may not collaterally attack the previously issued well permits or compel the Department to take enforcement in the context of this appeal, but he can challenge whether the Department properly applied 25 Pa. Code § 102.5(m)(6) when it decided to approve Range Resources' application for coverage under ESCGP-2.

According to Mr. Kopko the general permit coverage under appeal covers the well permit issued to Range Resources for the Kopko Michael Et Al Unit 1H Well. The Department previously issued the NOV with respect to the 1H Well asserting that the well is in violation of 58 Pa.C.S.A. § 3215(a) because the well is within 500 feet of an existing building. In reliance on the NOV, Mr. Kopko challenges the approval of Range Resources' application for coverage under ESCGP-2 under 25 Pa. Code § 102.5(m)(6). Paragraph (m)(6) provides:

> (6) Denial of coverage. The Department may deny, revoke, suspend or terminate coverage under a general permit for failure to comply with The Clean Streams Law (35 P.S. §§ 691.1-691.1001), this chapter or the conditions of the general permit and the Department may require the person to apply for an individual permit.

25 Pa. Code § 102.5(m)(6). Mr. Kopko asserts that the Department should have denied Range Resources' application for coverage under ESCGP-2 under this provision because of Range Resources' outstanding violation of Section 3215(a) listed in the November 17, 2016 NOV.

The Department filed a letter stating only that it "joins in Range Resources' requested relief that the appeal be dismissed" and an equally short subsequent letter joining in Range Resources' Reply. Neither Department letter provides any insight regarding the nature and scope of the compliance history review that the Department undertook under 25 Pa. Code § 102.5(m)(6) before it approved Range Resources' application for coverage under ESCGP-2.

Discussion

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*, EHB Docket No. 2017-051-B, slip op. at 2 (Opinion and Order, May 17, 2018); *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*, EHB Docket No. 2018-028-R, slip op. at 4 (Opinion and Order, Sep. 5, 2018); *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB 913, 915. Motions to dismiss will be granted only when a matter is free from doubt. *Monroe County Clean Streams Coalition v. DEP* and *Broadhead Watershed Ass'n et al*., EHB Docket No. 2017-107-L, slip op. at 2-3 (Opinion and Order issued October 11, 2018); *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.

In light of the Department's sparse letter-responses to Range Resources' initial Memorandum and Reply, there is considerable doubt on several key considerations related to the pending Motion to Dismiss. A better, more complete response from the Department might have reduced the level of doubt, but unfortunately the Department elected to stay silent on several key issues.

For example, there is no doubt that the Department has clear authority to conduct a compliance history review prior to approving an application for coverage under a general permit issued under 25 Pa. Code § 102.5(m)(6). Under Paragraph (6) the Department may deny an application for coverage under a general permit for violations of the Clean Streams Law, Chapter 102 of Title 25 and the conditions of the general permit. There is therefore no doubt that the

Department had the authority to conduct a proper compliance history review before approving Range Resources' application for coverage under ESCGP-2. Mr. Kopko points out that the Department had previously issued an NOV to Range Resources for violating 58 Pa. C.S.A. § 3215(a). There is considerable doubt regarding how or whether the Department considered the violation identified in the NOV during its required compliance history review.

There is also some doubt whether the Department has the authority to consider such violations when conducting the regulated compliance history review. While it is clear that a violation of 58 Pa.C.S.A. § 3215(a) is not a violation of the Clean Streams Law, it is not clear that the violation identified in the NOV is not a violation of Chapter 102 or a violation of ESCGP-2.[1] Paragraph (4) of subsection (m) requires a person who conducts an activity under a general permit such as ESCGP-2 to comply with "other applicable laws." 25 Pa. Code § 102.5(m)(4). A violation of "other applicable laws" such as Section 3215(a) could be a violation of 25 Pa. Code § 102.5(m)(4) and could be viewed as a violation of Chapter 102 subject to compliance history review under Paragraph (6). *See* 25 Pa. Code § 102.5(m)(4) and (6).

In addition, ESCGP-2 is a general permit that is specifically limited to various earth disturbances associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities. ESCGP-2 is issued under various authorities including 58 Pa. C.S.A. §§ 3201-3274. [2] Section 3215(a) is included in these listed authorities for ESCGP-2,

[1] Violations identified in a notice of violation are often not an appealable action standing alone. *Perano v. DEP*, 2011 EHB 750; *Cnty of Berks v. DEP*, 2003 EHB 77. A person may ultimately challenge the violations alleged in the notice of violation if the Department relies upon the violations identified in the notice of violation in a subsequent civil penalty assessment or permit denial. The fact that a notice of violation is not directly or immediately appealable does not prevent the Department from considering the violations in a subsequent civil penalty assessment or compliance history review. The alleged violations are reviewable at the time the Department makes the subsequent decision that is appealed to the Board.

[2] The Department maintains an E-Library that includes general permits and associated documents including Erosion and Sediment Control General Permit ESCGP-2. http://www.depgreenport.state.pa.vs/elibrary/GetFolder?FolderID=3899 (elibrary/Permit and

and it is possible that the Department may have authority to consider compliance with these requirements and the oil and gas regulations promulgated thereunder when it approves an application for coverage under ESCGP-2. With the limited record before us and the Department's absolute silence on this issue, the Board is not able to evaluate whether the Department conducted the appropriate compliance history review under Section 102.5(m)(6).

Range Resources argues that Mr. Kopko's NOA is deficient in that there is no allegation that Range Resources "acted contrary to the Clean Streams Law, (35 P.S. § 691.1-691.101), 25 Pa. Code Chapter 102 or conditions of the general permit." Range Resources Memorandum in Support of Motion to Dismiss at 2-3. Range Resources would have the Board treat Mr. Kopko's NOA as a pleading and grant its Motion to Dismiss because Mr. Kopko's objections in his NOA fail to state a claim as a matter of law. The Board disagrees that it should view Mr. Kopko's NOA as a pleading.[3] *See Pitikus v. DEP*, 2004 EHB 910; 25 Pa. Code § 1021.2. The Board does not agree that Range Resources is entitled to judgment notwithstanding the facts set forth in the NOA as a matter of law. Under our Rules in an appeal the Board does not grant demurrers based upon an appellant's failure to plead sufficient facts to support a cause of action in the appellant's NOA.

Mr. Kopko is entitled to challenge the Department's decision to approve Range Resources' application for coverage under ESCGP-2. When viewed in a light most favorable to Mr. Kopko, he has claimed that the violations of well siting limitations in 58 Pa.C.S.A. §

Authorization Packages/Oil and Gas/Erosion and Sediment Control General Permit ESCGP-2 8000-PM-00GM0005/). ESCGP-2 is an E and S General Permit that is issued in conjunction with unconventional oil and gas well permits issued under 58 Pa.C.S.A. §§ 3201-3274.

[3] Under the Board's Rules of Practice and Procedures, pleadings are only allowed in several Special Actions under 25 Pa. Code §§ 1021.71-76a that are initiated by a party by complaint and require the filing of an answer. Documents filed in appeals, including the notice of appeal are not pleadings, by definition. 25 Pa. Code § 1021.2. (definition of pleading).

3215(a), identified in the November 17, 2016 NOV, should have prompted the Department to deny Range Resources' application for coverage.

The Board lacks a sufficient record to evaluate and resolve this objection in the context of a motion to dismiss. The Board does not know what the Department considered as part of its compliance history review under Section 102.5(m)(6). The Department's letter-responses did not address this. The Board is also unable to resolve the legal issue whether the Department has the legal authority to consider the violations of Section 3215(a) in the context of a compliance history review under Section 102.5(m)(6) without a more complete record, including some indication from the Department regarding its authority and a record that includes the terms and conditions of ESCGP-2. Again, the Department's silence on these items prevents resolution of this important legal issue at this time. Finally, the Board is unaware of the status of the NOV issued on November 17, 2012 and the underlying violation identified in it. The Department's complete silence on these considerations provides additional uncertainty and doubt.

Because the Board evaluates a motion to dismiss in the light most favorable to the nonmoving party, the Board evaluated Range Resources' motion in a light most favorable to Mr. Kopko. In this light most favorable to Mr. Kopko, the Board believes that there are major uncertainties and doubts. The doubts, discussed above, prevent the Board from granting the motion and arise because the Department filed an inadequate response to the motion that was silent on the details of the nature and scope of the compliance history review the Department undertook before it approved Range Resources' application for coverage under ESCGP-2 under 25 Pa. Code § 102.5(m)(6).

The Board believes that Mr. Kopko has raised a somewhat straightforward objection. The Department approved Range Resources' application for coverage under ESCGP-2

notwithstanding the allegation that Range Resources violated Section 3215(a) by drilling a non-conventional well within 500 feet of one of his buildings without first securing his approval. At this preliminary stage of the appeal and in the context of a motion to dismiss the Board is not able to evaluate the basis or merits of this objection, which finds support in the NOV the Department issued on November 17, 2016. The Department's absolute silence on how or whether it conducted the compliance history review mandated by Section 102.5(m)(6) creates several serious doubts that prevent the Board from granting Range Resources' Motion to Dismiss.

For the reasons set forth above, we issue the following Order denying Range Resources' Motion to Dismiss.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL J. KOPKO	:	
	:	
v.	:	**EHB Docket No. 2018-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES - APPALACHIA, LLC., Permittee	:	

O R D E R

AND NOW, this 5th day of February, 2019, it is hereby ordered that the Motion to Dismiss is **denied.**

ENVIRONMENTAL HEARING BOARD

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

Chief Judge and Chairman Thomas W. Renwand's concurring opinion, in which Judge Steven C. Beckman joins, is attached.

DATED: February 5, 2019

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

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

For Appellant:
David Neely, Esquire
(via electronic filing system)

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL J. KOPKO	:	
	:	
v.	:	**EHB Docket No. 2018-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RANGE RESOURCES – APPALACHIA, LLC, Permittee	:	

CONCURRING OPINION OF
CHIEF JUDGE AND CHAIRMAN THOMAS W. RENWAND
IN WHICH JUDGE STEVEN C. BECKMAN JOINS

As pointed out by our colleagues in the majority, Mr. Kopko may not use his appeal of the Erosion and Sediment Control General Permit (ESCGP-2) as a collateral attack on the 1H well permit or any future drilling permits. Yet, that is precisely what Mr. Kopko's response says he is intending to do. On page 2 of his response to Range's motion, he states as follows:

> Range is absolutely correct that Kopko's appeal of the approval of the ESCGP-2 amounts to a collateral attack on the location of the 1H Well inasmuch as it is located within 500 feet of an occupied structure. However, it is Kopko's position that his collateral attack on the general permit is permissible based on the language of 25 Pa. Code § 102.5(m)(6).

(Response, p. 2.)

Mr. Kopko relies on 25 Pa. Code 102.5(m)(6), yet this provision sets forth very limited circumstances under which the Department may deny coverage under the ESCGP-2. An applicant may be denied coverage for one of the following: 1) a violation of the Clean Streams Law, 2) a violation of Chapter 102 of the regulations, or 3) a violation of the terms of the permit.

An improperly located gas well, while a violation of Section 3215(a) of the Oil and Gas Act, is not a violation of the Clean Streams Law, nor, in our view, does it appear to be a violation of Chapter 102 of the regulations which deal with erosion and sediment control. Moreover, Mr. Kopko points to no section of the Clean Streams Law or Chapter 102 regulations for which he claims Range is in violation.

However, the question of whether the location of the 1H well is a violation of the permit itself is not so clear. According to the Pennsylvania Bulletin notice accompanying the notice of appeal, it appears that the ESCGP-2 at issue in this appeal is a renewal of an earlier General Permit. Neither the original permit nor the renewal are part of the record. They were not provided with the notice of appeal, nor with the motion to dismiss or response. Since disputes of material fact in the context of a motion to dismiss must be decided in favor of the non-moving party,[1] we are reluctant to grant dismissal of the appeal without further information regarding the terms of the permit itself.

On that note, we agree with the majority that a more complete response from the Department of Environmental Protection to Range's motion to dismiss would have been helpful, and we are puzzled by its decision to remain silent. The Department's sparse letter in response to Range's motion states that it agrees that the appeal should be dismissed but does not state that it agrees with any of the grounds upon which Range bases its motion. A complete response may have cleared up some of the uncertainty in this matter.

[1] *Williams v. DEP*, EHB Docket No. 2018-067-C (Opinion and Order issued December 18, 2018), slip op. at 4; *Center for Coalfield Justice v. DEP*, EHB Docket No. 2018-028-R (Opinion and Order issued September 5, 2018), slip op. at 4.

ENVIRONMENTAL HEARING BOARD

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: February 5, 2019

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY ROHANNA	:	
	:	
v.	:	**EHB Docket No. 2016-148-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMERALD CONTURA, LLC	:	**Issued: February 13, 2019**

ADJUDICATION

By Steven C. Beckman, Judge

Synopsis

The Board finds that the Appellant has not met his burden of proving by a preponderance of the evidence that the Department erred when it concluded that mining was not the cause of the alleged damage to his pool liner and concrete pool apron and denied his damage claim.

Background

Gary Rohanna co-owns a property located at 156 Curry Road, Waynesburg, Pennsylvania ("Rohanna Property"). On August 31, 2016, Mr. Rohanna filed Claim No. SA2006 ("2016 Claim") with the Department of Environmental Protection ("Department") alleging damage at the Rohanna Property to an in-ground pool liner and additional cracking of the concrete apron around the pool due to mine subsidence from mining conducted by Emerald Contura, LLC ("Contura").[1] By letter dated October 17, 2016, the Department denied the 2016 Claim ("2016 Denial"). In the 2016 Denial, the Department concluded that mining was not the cause of the damage alleged in the 2016 Claim. Mr. Rohanna appealed the 2016 Denial to the Board on

[1] Mr. Rohanna filed two previous subsidence damage claims with the Department related to the Rohanna Property, one in March 2013 and one in July 2015. The Department denied both of these earlier claims and Mr. Rohanna did not appeal either of the Department denials.

November 18, 2016. On February 6, 2017, Contura filed a Motion to Dismiss or Limit Issues ("Contura Motion") and the Department filed a letter in support of the Contura Motion on February 21, 2017. On March 14, 2017, the Board issued an Opinion and Order on the Contura Motion denying the Motion to Dismiss and granting the Motion to Limit Issues holding that the appeal would be limited to the specific damages raised in the 2016 Claim. Shortly after the Board issued its decision on Contura's Motion, the Department filed a Motion to Dismiss which the Board denied in an Opinion and Order dated April 25, 2017. A Prehearing Order was issued on October 16, 2017, setting forth dates for the filing of prehearing memoranda and a hearing in the matter. Following resolution of an issue regarding electronic service on Mr. Rohanna's attorney, the Board issued a revised Prehearing Order on February 27, 2018, setting forth new filing deadlines and a new hearing schedule. At the request of the Department, the Board and all parties conducted a site visit at the Rohanna Property on July 9, 2018. A three day hearing was held in this matter beginning July 10, 2018. Mr. Rohanna filed a post-hearing brief on September 7, 2018; the Department and Contura filed their post-hearing briefs on October 26, 2018; Mr. Rohanna filed a reply brief on November 9, 2018, concluding briefing in this matter. The matter is now ripe for a decision.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. *as amended*, 52 P.S. §§ 1406.1 – 1406.21 ("Mine Subsidence Act") and the rules and regulations promulgated thereunder ("Regulations"). (Joint Stipulation of Facts ("Stip."), 1).

2. Gary Rohanna is an individual who co-owns approximately 0.71 acres of property located at 156 Curry Road, Waynesburg, PA 15370, Franklin Township, Greene County. (Stip. 2)

3. Emerald Contura, LLC is the successor permittee to Emerald Coal Resources, LP, following the bankruptcy of Emerald Coal Resources, LP and its parent company. Emerald Contura, LLC is the permittee of the Emerald Mine, CMAP No. 30841307. A portion of the Emerald Mine is located in the vicinity of the Rohanna Property. (Stip. 3).

Underground Mining Activities

4. A mine operator has a regulatory obligation to conduct a pre-mining inspection before doing any kind of mining operations within 30 degrees of a structure. (T. 478; 25 Pa. Code §89.412a(b)).

5. On or about August 18, 2009, Penn Environmental and Remediation, Inc. conducted a Pre-Mining Survey for Emerald Coal Resources, LP at the Rohanna Property in anticipation of underground mining of the Pittsburgh coal seam in the Emerald Mine. ("Pre-Mining Survey"). (Stip. 4; Joint Ex. 1).

6. The closest longwall mining to the Rohanna Property is approximately 1,150 feet from the Rohanna Property. (Stip. 5).

7. The closest room and pillar mining to the Rohanna Property, located approximately 140 feet from the Rohanna Property, is the C District main entries ("C Mains"). (T. 469, 479, 488; DEP Ex. C-2).

8. The approximate overburden depth at the Rohanna Property and the C Mains is 340 feet. (T. 622; Stip. 9).

9. The pillars in the C Mains are roughly 60 by 120 feet with 16-foot wide roadways (entryways) in between pillars. (T. 465).

10. The C Mains were driven in 2009. (T. 622).

11. Mine mains are different from gate entries; gate entries often fail after longwall mining. (T. 469-470).

12. Mine mains are the lifeline of the mine providing entry for workers and supplies and ventilation and are designed to provide long term stability. (T. 467-468).

13. Mine mains are designed to never fail. (T. 470).

14. Failure of the mains would shut down the belt preventing workers from accessing the mine and resulting in a potential economic loss. (T. 476).

15. Subsidence in the C Mains is unlikely given the size of the solid coal pillars. (T. 465).

16. The C Mains were developed using the room and pillar mining method. (T. 488).

17. Partial or complete failure of a single pillar in the C Mains would not cause subsidence at the surface. (T. 475-476, 633-636).

18. Surface subsidence could only occur if multiple pillars in the C Mains failed or collapsed completely. (T. 475-476, 633-636).

19. To provide long term surface support, the Department requires pillars to have a minimum factor of safety of 2.0 or greater. (T. 472).

20. The calculated factor of safety for pillars in the C Mains is approximately six; three times stronger than required for support. (T. 472-472, 625-627).

21. Recovery ratio is the amount of coal removed from an area compared to what is left in place. (T. 628).

22. A typical rule of thumb in studying subsidence is that if there is a 50 percent or less recovery of coal, the possibility for subsidence is almost none. (T. 628).

23. In the C Mains, the recovery ratio is 28.61 percent, meaning slightly more than 71 percent of the coal was left in place when they were developed. (T. 627-628).

24. Sloughage is a natural occurrence that happens when small pieces of coal break off of a pillar. (T. 560-561).

25. Pillar design and sizing takes into account normal occurrences, which would include sloughage. (T. 562).

Rohanna Property and Pool

26. The Rohannas have resided at the Rohanna Property since 1969. (T. 104).

27. The Rohanna Property includes an in-ground wood framed swimming pool installed in 1976 with a concrete apron installed in 1988 or 1989. (Stip. 6).

28. The pool is not undermined and sits on solid coal. (T. 469).

29. The pool liner has been replaced two or three times since 1976. (Stip. 8).

30. The water in the pool holds up the walls of the pool. (T. 169).

31. Draining the pool for a prolonged period of time will cause the pool walls to collapse. (T. 170).

32. The pool liner split on August 12, 2016. (T. 112).

33. When the pool liner ripped, water that was in the pool drained out. (T. 171-172).

34. The Rohanna Pre-Mining Survey performed in 2009 documented the presence of cracks in the concrete apron surrounding the pool area. (T. 194-195; Joint Ex. 1).

35. Cracks in the concrete pool apron became progressively worse over time. (T. 174-175).

Mine Subsidence Claims

36. The Rohannas first noticed issues at the Rohanna Property that they attributed to mine subsidence in August of 2012. (T. 105).

37. One issue noticed by Ms. Suzanne Rohanna in August 2012 was the increased size of cracks in the concrete pool apron. (T. 105-106).

38. Mr. Rohanna filed his first subsidence claim with the Department on March 20, 2013. (T. 108; EC Ex. 2).

39. The size of the cracks in the concrete pool apron increased from August 2012 up until the time that the first subsidence claim was filed in March 2013. (T. 108).

40. The Department determined that mine subsidence was not the cause of the damages to the Rohanna Property complained of in the March 20, 2013 subsidence claim. (T. 109; EC Ex. 3).

41. Mr. Rohanna did not appeal the Department's denial of his first subsidence claim. (T. 207).

42. The cracks in the concrete pool apron got bigger between 2013 and 2015. (T. 110-111).

43. Mr. Rohanna filed his second subsidence claim with the Department on July 18, 2015. (T. 109; EC Ex. 4).

44. The Department determined that mine subsidence was not the cause of the damages to the Rohanna Property complained of in the July 18, 2015 subsidence claim. (T. 112; EC Ex. 3).

45. Mr. Rohanna did not appeal the Department's denial of his second subsidence claim. (T. 206-207).

46. On or about August 31, 2016, Mr. Rohanna filed a third mine subsidence claim with the Department, Claim No. SA2006 ("2016 Claim"). (Stip. 10).

Contura Evaluation of 2016 Subsidence Claim

47. Mr. Dirk Cole is a land agent for Contura and has been since 2010. (T. 557-558).

48. Mr. Cole does not consider himself to be a mine subsidence expert. (T. 584).

49. Mr. Vanata, another Contura land agent, handled Mr. Rohanna's subsidence claims in 2013 and 2015. (T. 582).

50. Mr. Cole knows Mr. Rohanna because he graduated from high school with his son. He considers Mr. Rohanna to be a friend. (T. 93).

51. Mr. Cole went to the Rohanna Property to evaluate the claim. (T. 582-583).

52. Following Mr. Cole's evaluation of Mr. Rohanna's 2016 Claim he discussed the claim with the other land agents, Jeremy Rafferty and Andrew Vanata, as well as engineer Ed Zegland. Mr. Cole denied the claim based on the fact that the Rohanna Property was more than 1000 feet away from longwall mining. (T. 94-96).

53. As a matter of course, Contura always denies claims of structural damage from subsidence that are over 1,000 feet from the edge of longwall mining. (T. 97, 99).

54. Subsidence impacts can affect a subsurface aquifer at a greater distance from longwall mining than where subsidence may impact the surface. (T. 98).

Department Investigation of 2016 Subsidence Damage Claim

55. Joseph D. Floris conducted the Department's investigation of Mr. Rohanna's 2016 Claim. (T. 462).

56. Mr. Floris is employed as a subsidence investigator for the Department and is assigned to the California District Mining Office. (T. 460-465).

57. Mr. Floris has worked for the Department since 2000 and his work has exclusively focused on mine subsidence and its effects. (T. 444).

58. Mr. Floris has worked in the mining field since 1976 and has spent thirty-four years investigating the effects of underground mining subsidence (T. 444-448).

59. Mr. Floris has investigated 225 mine subsidence claims filed with the Department since 2000 and approximately 100 or more mine subsidence insurance claims. (T. 448-449).

60. Mr. Floris was accepted by the Board as an expert in mine subsidence and the effects of mine subsidence. (T. 459).

61. Prior to conducting a mine subsidence investigation, Mr. Floris reviews the pre-mining inspection reports and mine maps. (T. 454-456).

62. During the course of a mine subsidence investigation, Mr. Floris interviews the homeowners, conducts visual observations, and makes computations such as distance from the mine, width of entries, and size of pillars to determine the angle of draw from the mine and likelihood of subsidence. (T. 456-457).

63. An angle of draw is a term of art that refers to the angle from the vertical projected at the furthest extent of mining to where subsidence damage stops. (T. 458).

64. An angle of draw is relevant only if there is a subsidence event. (T. 458).

65. If a complete mine collapse occurs, subsidence effects generally occur within 15 degrees of the extent of coal extraction. (T. 477, 479-480).

66. The 15 degree area of potential subsidence effects is only applicable for full coal extraction. (T. 480).

67. Mr. Floris has never investigated a claim for damages and determined that damages were due to subsidence when the damages were more than 600 feet away from the nearest longwall panel. (T. 515-516).

68. Mr. Floris conducted the investigation into Mr. Rohanna's 2016 subsidence claim and visited the Rohanna Property on October 5, 2016. (T. 481-482).

69. During the October 5, 2016 site visit, Mr. Floris looked for characteristics of mine subsidence at the Rohanna Property such as patterned cracks in the concrete and evidence of deep ground movement such as a large depression or trough. (T. 485-486).

70. Cracks were documented to exist in the concrete apron prior to mining as noted in the Pre-Mining Survey. (T. 484-485).

71. During the inspection on October 5, 2016, Mr. Floris observed that cracks in the concrete were randomly oriented around the pool. (T. 484).

72. When a subsidence event occurs with a lot of cover, such as the 340 feet at the Rohanna Property, a subsidence trough or large depression is typically visible on the surface of the ground. (T. 486).

73. For a subsidence event with less cover, such as 50 feet, Mr. Floris would expect to see a sinkhole affecting a small portion of the surface. (T. 486).

74. Mr. Floris observed no depressions or troughs on the Rohanna Property. (T. 486).

75. Mr. Floris calculated the safety factor of the pillars to be approximately 6. (T. 4.73).

76. In order for subsidence effects to propagate to the surface there would need to be a complete failure of multiple pillars. (T. 476).

77. In room and pillar mining, coal will be left in place so if a pillar fails, the angle of subsidence effects will be less than 15 degrees. (T. 480).

78. Mr. Floris concluded that even if a complete mine collapse had occurred, the subsidence would likely not have damaged the pool liner and concrete pool apron because they

are located a horizontal distance beyond 15 degrees from the edge of the C Mains. (T. 451, 479-480; DEP Ex. C-2, C-3).

79. Mr. Floris concluded that damages to the Rohanna Property were not caused by mine subsidence based upon the following facts: the distance to mining, the type of mining, the lack of pattern on the surface, and lack of signs of deep-rooted ground movement. (Joint Ex. 3; T. 486-487).

80. Mr. Floris has never seen a mine main pillar failure in his career in the mining field. (T. 490-491).

81. Mr. Floris observed no evidence during his visit to suggest that the C Mains in the Emerald Mine failed. (T. 493).

82. On or about October 6, 2016, the Department completed an investigation of Claim No. SA2006 and concluded that the claimed damage was not caused by mining induced ground movements. (Stip. 12).

83. There is evidence of mining in the Waynesburg and Waynesburg A seams; those mines are commonly known as punch mines. (T. 489).

84. Punch mines are typically shallow, do not go deep into the ground, and are often used for house coal. (T. 489-490).

85. The Waynesburg and Waynesburg A coal seams overlie the Pittsburgh Coal seam by several hundred feet and are above the elevation of the Rohanna pool. (T. 490).

Fact Witness John B. Hayhurst

86. Mr. John B. Hayhurst lives about 600 feet from the Rohanna Property on the west side of the creek and south of the Rohanna Property. (T. 44).

87. The creek that runs near the homes of Mr. Hayhurst and Mr. Rohanna often rises and floods, once leaving its banks and approaching the home of Mr. Hayhurst. (T. 55).

88. Mr. Hayhurst worked in the Emerald Mine and worked on development of the C Mains. (T. 76-77).

89. Mr. Hayhurst testified that sandstone was present while developing the C Mains. (T. 74).

90. Mr. Hayhurst observed a gas line break in the creek by his home at some point during 2016 or 2017. (T. 46, 55, 61-62).

91. Mr. Hayhurst observed a crack in the sandstone creek bed of the creek by his home which occurred at some point in 2016 or 2017. (T. 47-48, 61-62).

92. Mr. Hayhurst does not know what caused the gas line break or the crack in the creek and agrees that forces other than subsidence could have caused the gas line to break. (T. 55).

93. Mr. Hayhurst testified that there are seldom roof falls when you have a sandstone roof because sandstone roofs expand and hold up better. (T. 79).

94. Mr. Hayhurst believed he heard a roof fall in the Emerald Mine in the vicinity of his home prior to the pipeline and creek incidents but is not sure if the noise was a roof fall. (T. 52, 63).

Fact Witness James Renner

95. Mr. James Renner is a retired former employee of Equitable Resources or EQT. (T. 22).

96. Mr. Renner's former duties as an EQT employee can be summarized as maintaining pipelines. (T. 22).

97. Over the Labor Day weekend in 2013, Mr. Renner was sent out to investigate a leak in a gas pipeline to the east of the Rohanna Property. (T. 23).

98. He located a damaged pipeline that appeared to have been bent and shoved in on itself. (T. 25; Rohanna Exs. R26A, R26B and R26C).

99. The distance from the damaged pipeline to the Rohanna's pool was approximately 264 feet. (T. 163).

100. The damage to the pipeline on the hill east of the Rohanna Property occurred on September 1, 2013. (T. 39).

101. Longwall mining was completed in the panel closest to the Rohanna Property and the damaged pipeline on August 31, 2013. (T. 39-40; EC Ex. 37).

102. Determining the cause of pipeline damage was not part of Mr. Renner's job duties. (T. 35).

103. Mr. Renner does not know if EQT determined that the pipeline east of Mr. Rohanna's home was damaged by mine subsidence. (T. 38).

Water Replacement Claim

104. Contura settled a water replacement claim related to the disruption of a water supply at a residence located approximately 650 feet south of the Rohanna Property. (T. 88-91, T. 157; Rohanna Ex. 28-A).

105. The settlement of the water replacement claim pre-dated the 2016 Claim. (T. 90).

Rohanna Expert Witness Robert Scott Krabill

106. Mr. Krabill holds a professional engineer license from West Virginia but is not licensed in Pennsylvania. (T. 264-265; Joint Ex. 7).

107. The Board accepted Mr. Krabill as an expert witness in mine subsidence related to post-mining evaluation of causation. (T. 232-233, 274).

108. Mr. Krabill testified that he usually looks at the mine map that is available online and available online geology when conducting project research but does not recall the extent of his research into the Rohanna project. (T. 309-310).

109. Mr. Krabill did not review the Department's Emerald Mine permit file, the Emerald Mine permit, the Department's deep mine safety files, or any records retained by the federal Mine Safety and Health Administration. (T. 310-311).

110. Prior to writing his expert report, Mr. Krabill interviewed Mr. and Mrs. Rohanna. (T. 312).

111. Mr. Krabill did not interview Mr. Hayhurst or Mr. Renner and was not familiar with their testimony until the hearing. (T. 312).

112. Mr. Krabill did not review drill logs from the Emerald Mine permit. (T. 315).

113. Mr. Krabill did not calculate the safety factor of the pillars in the C Mains. (T. 380).

114. Mr. Krabill did not calculate the dimensions of the area necessary for a roof failure to propagate to the surface. (T. 381).

115. The first time Mr. Krabill inspected the pool liner and the concrete pool apron at the Rohanna Property was in 2017, approximately 10 months after the water had drained from the pool. (T. 321).

116. At the time of his first inspection of the pool and concrete pool apron, the empty pool had gone through one winter freeze-thaw cycle. (T. 321-323).

117. The winter freeze-thaw cycle has an effect of enlarging cracks and creating new cracks although he concluded that the crack damage was not related to freeze/thaw. (T. 323).

118. Mr. Krabill identified a specific pillar in the C Mains on Exhibit R-35F1 that he believes may have failed causing a roof failure based on the nature of observable damages. (T. 327; Rohanna Ex. R35F1).

119. Mr. Krabill stated that the pillar failure must have occurred in 2013 or prior. (T. 349).

120. Mr. Krabill agrees that it would be unlikely for the pillars in the C Mains, with a hard competent roof, to punch through the roof as a cause of pillar failure. (T. 338).

121. A pillar could potentially punch through the floor of a mine if the floor becomes degraded due to moisture. (T. 340).

122. Mr. Krabill did not review Module 22 of the Emerald Mine permit; Module 22 covers the type of subsidence control in an underground mine. (T. 341).

123. Mr. Krabill has no information or evidence to support his belief that water caused a pillar to fail. (T. 379).

124. Mr. Krabill testified that he eliminated soil problems, frost heaves, drainage problems and lightning strikes as sources of the damages he observed. (T. 331).

C Mains Conditions

125. Katerina Gump worked at the Emerald Mine from 2011 until the Emerald Mine closed in 2016 as foreman, then special project manager, and finally as a mining engineer. She holds a bachelor's degree in mining engineering and is a licensed engineer. (T. 537).

126. Ms. Gump is personally familiar with the area underground in the C District in the area of the Rohanna Property. (T. 538).

127. Ms. Gump was one of the last people to be in the C Mains prior to sealing up that area of the mine in 2014. (T. 538-539).

128. Ms. Gump was responsible for cleaning up the C District and ensuring that equipment, material, and trash were removed, and then sealing the section (T. 539-541).

129. The C-4 longwall panel and associated mains were sealed off in June 2014. (T. 538).

130. The federal Mine Safety and Health Administration ("MSHA") and the Department's Bureau of Mine Safety were required to thoroughly examine and inspect the C District before it was sealed. (T. 539-540).

131. Ms. Gump personally walked through and inspected the Emerald Mine prior to sealing the C District and C Mains in 2014. (T. 539).

132. Ms. Gump did not observe any roof failures or pillar failures in the C Mains during her walk through in 2014. (T. 541).

133. Any roof falls or pillar failures in the C Mains near the C-4 panel would have been documented. (T. 545).

134. As part of her job duties, Ms. Gump would have been aware of any pillar failures in the C Mains adjacent to the C-4 panel. (T. 541).

135. Only one roof fall occurred in the C-4 panel. The roof fall occurred in the C-4 longwall gates in August 2013 while retreat mining of the C-4 longwall was occurring. (T. 545, 558-559, EC Ex. 37-1).

136. An individual standing on the surface would be unable to hear a roof fall that occurred in the Emerald Mine through approximately 350 feet of overburden. (T. 551).

137. Sandstone is present in the roof of the C-4 panel and was addressed in the roof control plan. (T. 546).

138. A roof control plan is always based upon a worst-case scenario. (T. 547).

139. Contura's roof control plans typically call for pillars averaging 50 by 120 feet or 60 by 70. (T. 562-563).

140. In the area of the C Mains close to the Rohanna Property Contura used coal blocks averaging 75 by 225 feet. (T. 562).

141. Water did not collect in the C Mains between 2011 and 2014. (T. 548).

142. C Mains, in the area between the C-4 longwall panel and the Rohanna Property, are the highest area of the C District and as such it is not likely that any water would accumulate in that area. (T. 550-551).

143. Emerald Contura monitors water accumulation at the lowest point of the mine in order to monitor the water elevation for the entire mine. (T. 566-568).

144. Weekly water monitoring is conducted by dropping a camera down bore holes or shafts in the mine and noting the elevation of the water and recording the elevation on the mine maps. (T. 548-549).

145. Ongoing monitoring of the Emerald Mine mine pool shows that the C Mains are presently not flooded and have not flooded since they were sealed. (T. 548-549).

Emerald Contura Expert Witness Dr. Yi Luo, Ph.D.

146. Dr. Yi Luo received his Ph.D. from West Virginia University in Mining Engineering with a focus on mine subsidence. (T. 591).

147. The Board accepted Dr. Luo as an expert in mine subsidence and its impact on structures in the vicinity of mines. (T. 602, 619).

148. Dr. Luo concluded that it is not possible that the Rohanna pool and apron were damaged by longwall mining given the distance from the longwall mining. (T. 639-640).

149. As part of his investigation, Dr. Luo calculated the safety factor of the pillars in the C Mains closest to the Rohanna home at 5.68. (T. 624-625).

150. Two pillars in the C Mains would need to fail in order to create a subsidence event that would propagate to the surface. (T. 635-636).

151. If two pillars in the C Mains failed, the surface subsidence would extend 106 feet from the edge of the C Mains. (T. 638).

152. Water does not impact the coal in a coal pillar (T. 641).

153. A coal pillar can be impacted by water if it is associated with clay rock. (T. 641).

154. The clay rock can dissolve in water and this can reduce the strength of the pillar (T. 641).

155. Clay rock is not associated with the Pittsburgh coal seam mined in the Emerald Mine. (T. 642).

156. Dr. Luo concluded that the damages in the 2016 Claim were the result of a landslide associated with the construction of a Wal-Mart to the west of the Rohanna Property pushing the structure and causing the swimming pool failure. (T. 642; EC Ex. 36).

DISCUSSION

Legal Standard

Mr. Rohanna has the burden of proof in this matter. 25 Pa. Code § 1021.122(c)(2). He must demonstrate by a preponderance of the evidence that the Department erred in finding that mining was not the cause of the damage to Mr. Rohanna's pool liner and concrete pool apron. *Lang v. DEP and Maple Creek Mining, Inc.*, 2006 EHB 7, 17. The preponderance of the evidence standard requires that Mr. Rohanna meet his burden of proof by showing that the

evidence in favor of his proposition is greater than that opposed to it. It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established. *United Refining Company v. DEP*, 2016 EHB 442, 449. The Board's review is de novo, and we can admit and consider evidence that was not before the Department when it made its initial decision, including evidence developed since the filing of the appeal. *United Refining, supra.*; *see also Smedley v. DEP*, 2001 EHB 131; *Warren Sand & Gravel v. Dep't of Envtl. Res.* 341 A.2d 556 (Pa. Cmwlth. 1975).

Analysis

The primary issue for the Board to decide in this case is whether Mr. Rohanna has met his burden and demonstrated, by a preponderance of the evidence, that the Department erred in determining that the claimed damages to the Rohanna pool liner and concrete pool apron were not the result of mining related subsidence. Mr. Rohanna alleges that the damages to his pool liner and concrete pool apron are the result of Contura's mining activities at the Emerald Mine. Mr. Rohanna asserts that the claimed damages are not disputed by the Department and Contura and that the nature of the damages demonstrates that mine subsidence caused the damages. Mr. Rohanna also contends that the timing of these damages, along with other damages in the vicinity of the Rohanna Property, support his position. The Department and Contura dispute Mr. Rohanna's claim that the damages were caused by mine subsidence and assert that the Department's decision rejecting the 2016 Claim was the correct determination.

We start first by examining the damages asserted by Mr. Rohanna in the 2016 Claim. The damages center on an in-ground pool installed in 1976 and the concrete pool apron that was installed in 1988 or 1989. The pool was constructed with wooden sides, a vinyl pool liner, concrete coping and was surrounded by a concrete pool apron. The water in the pool held the

liner and wooden walls in place. The damage to the pool liner that is part of the 2016 Claim is a discrete event that took place on August 12, 2016. Mr. Rohanna stated that on the day that the pool liner split it looked like a rock had punched through the liner. (T. 788). The liner that split was the third liner in the 40 years since the pool was constructed. The Rohannas did not testify to the age or the condition of the damaged liner prior to it splitting but the Department's investigator, Mr. Joe Floris, stated that he had been told it was 4 or 5 years old. (T. 529). The Rohannas testified that when the pool liner split all of the water drained from the pool in a short time period.

Neither the Department nor Emerald contest the fact that the pool liner split and released the water from the pool. The Department offered into evidence a picture of the split liner from early October 2016 along with two additional photos showing the concrete apron. (DEP Exs. C 6.1 - 6.3). Mr. Floris's photos of the Rohanna pool and apron show a nearly empty pool with a clear split in the liner and a cracked but generally intact concrete apron. These pictures contrast with some of the pictures taken by and testified to by Mr. Rohanna where cracks around the pool are larger and the coping around the pool is severely out of level with the apron. (Rohanna Exs. 16, 18, 25). Mr. Rohanna was unable to state exactly when his pictures were taken but testified it was either in November 2016 or March 2017. With the water out of the pool, the walls of the pool were no longer supported by the water and the overall condition of the pool and concrete pool apron deteriorated further as evidenced by the pictures presented by Mr. Rohanna.[2]

[2] The Board is focused on the condition of the pool and the concrete pool apron at the time of the 2016 Claim which occurred approximately three weeks after the liner split and at the time the Department's investigation took place on October 5, 2016. Much of the damage to the pool and concrete that is evident in certain pictures and was clearly evident during the Board's site visit in 2018 appear to be the result of the lack of support of the pool walls in the absence of water in the pool.

Unlike the split in the pool liner, the claimed damages to the concrete apron around the pool were not a discrete event but developed over time according to the Rohannas. Some cracking in the concrete around the pool was noted in the August 2009 Pre-Mining Survey. Ms. Rohanna testified that, in August 2012, she and her husband noticed these cracks starting to get larger. These cracks, along with a concern about movement at the corner of the back porch, led the Rohannas to file the March 2013 subsidence damage claim with the Department. The Department investigated and denied the March 2013 claim and the Rohannas did not appeal that denial. The claim filed in 2015 by Mr. Rohanna, that was also denied by the Department, did not mention the condition of the concrete pool apron, but Ms. Rohanna testified that the cracks in the pool apron got bigger between 2013 and 2015. In the 2016 Claim, Mr. Rohanna stated that the concrete around the pool had cracked more than the first claim, an apparent reference to the March 2013 claim. Ms. Rohanna testified that the cracks were bigger and had separated more at the time of the 2016 Claim. Mr. Rohanna and the Department's investigator, Mr. Floris, presented pictures of the cracks in the concrete apron taken in the weeks and months after the split in the liner and the emptying of the water from the pool in August 2016. Based on the testimony and the evidence presented in the hearing, it is clear that the concrete apron had some cracking as early as 2009 and that cracks were evident in the concrete apron at the time of the denied claim in March 2013 and the denied 2016 Claim. It is difficult to judge exactly how the cracks progressed through time since we do not have any measurements and we have only a limited number of pictures showing the size or location of the cracks through the years. However, we do have testimony that the cracks got bigger through the years. Mr. Floris stated that the cracks did not appear to follow a pattern or direction and there was no testimony offered to contradict this statement.

In addition to the damages that are part of the 2016 Claim, Mr. Rohanna points to other alleged damages in the vicinity of the Rohanna Property as supporting his claim that the damages to the pool liner and concrete pool apron were caused by mine subsidence at Contura's Emerald Mine. Mr. Rohanna's neighbor to the south, Mr. Hayhurst, testified about a crack in the creek that runs to the east of the Rohanna Property and a leak in a gas pipeline that runs beneath the creek.

Mr. Hayhurst's testimony lacked precision when it came to both the location and the timing of these damages. The crack in the streambed and the gas pipeline leak apparently occurred in locations south and east of the Rohanna pool at a distance Mr. Hayhurst loosely estimated as 200 feet from the Rohanna house. When asked about the timing of these damages, he initially stated that they took place sometime in 2016 or 2017 after the liner in the Rohanna's pool broke. On further questioning, he stated that he believed that these events took place in 2016 but could not rule out that they took place in 2017. Mr. Hayhurst acknowledged that he did not know what caused the damages to the creek bed and the gas pipeline in the creek and that it was very possible that other forces besides mine subsidence could have caused the damages. Mr. Hayhurst also testified that the creek often floods, and he has not noticed any flow differences in the creek since observing the crack in the creek. This is at least suggestive that the crack in the creek bed is limited in size and depth and is not draining significant flow from the creek.

The Board also heard limited testimony about a water replacement settlement that Contura reached with an individual, identified as Mr. Greg Mankey, at a residence located approximately 650 feet south of the Rohanna Property. According to Mr. Dirk Cole, a Contura employee whose job responsibilities include dealing with property owners who have complaints, Contura reached a settlement with Mr. Mankey related to the disruption of his water supply. Mr.

Cole was unable to pinpoint the timing of Mr. Mankey's claim but stated that he believed it was before the Rohanna's 2016 Claim. Mr. Cole testified that a subsurface aquifer can be impacted at a further distance from the longwall panel than where you see surface subsidence impacts.

Finally, Mr. Rohanna pointed to a separate damage incident involving the gas pipeline located east of the Rohanna Property. This damage incident involved the same gas pipeline discussed by Mr. Hayhurst but took place a few years earlier than the leak described by Mr. Hayhurst. On September 1, 2013, Mr. Renner, a former employee of EQT was called out to address a reported leak in a section of the gas pipeline located east of the Rohanna Property and on a hillside above the creek. Mr. Renner testified that the pipe was damaged and presented photographs of the damaged pipe. The pipe appeared to have buckled and folded in on itself. Mr. Renner stated his belief that this damage was the result of longwall mining but acknowledged that it was not his job responsibility to determine the cause of the pipe damage and he did not know whether EQT made an official determination of the cause of the damage. Mr. Renner agreed that he had observed other instances of damage to pipelines related to mining, but he had also observed damages to pipes that were not caused by mine subsidence. Mr. Rohanna measured the distance to the section of the damaged pipe from his pool using a golf range finder and determined that it was 264 feet.

Mr. Rohanna asserts that the nature of the observed damages, including but not limited to those in the 2016 Claim, are sufficient evidence for the Board to find that the damages were caused by mine subsidence. We disagree that the nature of the damages, on their own, are sufficient for the Board to conclude that the damages in the 2016 Claim were the result of Contura's mining activities. We think that it would be the rare case where the damages themselves would be so clearly distinctive and uniquely related to mine subsidence that the

Board would not need to consider other factors in reaching a conclusion about the cause of any alleged damages. In this case, the testimony and evidence on the nature of the damages do not rule out mine subsidence as a cause but it also is clear that mine subsidence is not the only possible explanation for the claimed damages. The Board needs to consider other issues such as the timing and nature of the mining activity in the area and the relationship of the mining to the claimed damages before reaching any conclusions.

Contura's mining in the vicinity of the Rohanna Property involved both development mining and longwall mining. The mining took place to the east of the Rohanna Property and the Rohanna Property itself was not undermined as part of the development or mining of the Emerald Mine. The closest portions of the Emerald Mine to the Rohanna Property are the C Mains located approximately 140 feet east of the Rohanna's pool. The C Mains were constructed in 2009 and were sealed off in June 2014. The C Mains were developed using room and pillar mining and are designed for long term stability to allow for the movement of men and supplies into the mine, as well as ventilation. The nearest longwall mining to the Rohanna Property took place in the C-4 Panel approximately 1,150 feet to the east of the Rohanna Property. The longwall mining in the C-4 Panel was completed on August 31, 2013.

The experts in this case, including Mr. Rohanna's expert, R. Scott Krabill, all concluded that longwall mining was not the cause of the damages claimed by Mr. Rohanna in the 2016 Claim. The experts' conclusion that longwall mining did not cause the claimed damages is based largely on the timing of the longwall mining and the distance between the closest longwall mining and the Rohanna's pool and concrete pool apron. Ms. Rohanna testified that she and her husband first noticed that the cracks in the pool apron were expanding in August 2012. During this timeframe the closest longwall mining was approximately 2,500 feet from the Rohanna

Property. As stated above, the closest approach of the longwall to the Rohanna Property was in the C-4 Panel at a distance of approximately 1,150 feet. Longwall mining in the C-4 Panel was completed at the end of August 2013 and the damage to the Rohanna's pool liner occurred three years later in August 2016. Mr. Floris stated that in his experience, which includes investigating 225 separate subsidence claims for the Department, the distance from the longwall mining by Contura to the Rohanna's pool was well beyond the distance at which subsidence impacts are typically observed. Dr. Yi Luo, Contura's expert witness, calculated that the maximum horizontal distance that subsidence from the longwall mining would extend beyond the end of the C-4 longwall panel in the Emerald Mine was 147 feet, a distance significantly less than the distance to the Rohanna's pool. During cross-examination, Mr. Krabill agreed that he offered no opinion in his expert report that longwall mining caused the damage to the Rohanna pool or the concrete pool apron. He also agreed that longwall mining was too far away to impact the surface at the Rohanna residence stating, "I feel it is more likely effected by subsidence in the mains." (T. 357).

In the absence of subsidence from longwall mining as the cause, Mr. Krabill asserted that the damage claimed in the 2016 Claim was the result of failures in the C Mains located to the east of the Rohanna Property. Mr. Krabill was not entirely clear regarding this conclusion, but our understanding is that he ultimately attributed the subsidence at the Rohanna Property to a roof fall in an entryway in the C Mains, that may or may not have been associated with a pillar failure caused by water degrading the pillar. "Q. So based on your analysis, what is your conclusion as to the causes of the damages at the Rohanna Property? A. I'm confident that they are related to mine subsidence, failure – roof failure in an underground coal mine." (T. 306). "Q. … it's your contention that that slow and subtle failure of – that the mine degradation of the coal

pillar caused the mine roof ultimately to collapse? A. I think it could have degraded to help precipitate or prompt the roof failure. I don't think it was necessary for the roof to fail to cause that; but in all likelihood, it was probably a component of that failure." (T. 377). Mr. Krabill offered no direct evidence of a roof fall or pillar failure in the C Mains but he did identify on the mine map where he felt that the roof fall had mostly likely taken place at the intersection of a roadway and a crosscut in the C Mains. (T. 295; Rohanna Ex. 35 F). Mr. Krabill testified that:

> …I picked this location because it made the most sense to me with – in terms of location with respect to the Rohanna Property and the angle of draw that would be involved.
>
> Q. Well, you picked it because it was close to the Rohanna house?
>
> A. That fit the criteria I was looking for, yes.
>
> Q. The criteria you were looking for was to find the place that was closest to the Rohanna home where you could argue that it's most likely that it had some impact on the pool and pool apron?
>
> A. Certainly. And it is as an area where there was an increased roof exposure. And just like you said, there could be subsidence up and down these roadways that we may not even be aware of at this point in time.
>
> Q. And there could be no subsidence at all?
>
> A. Yep, and Mr. Rohanna could get hit by lightning tomorrow.

(T. 407).

The first issue we have with Mr. Krabill's theory is the timing of the alleged failure in the C Mains. Based apparently on the Rohannas' statements that they first began to experience subsidence impacts to the Rohanna Property in 2012, along with the damage to the gas line in 2013, Mr. Krabill testified that the failure in the C Mains must have occurred prior to 2014. However, the testimony of Katrina Gump, a professional engineer for Contura's Emerald Mine during the relevant time period, directly contradicts Mr. Krabill's speculation regarding a

possible roof fall or pillar failure in the C Mains in 2013 or earlier. Ms. Gump was underground in the C Mains on an almost daily basis from 2011 to June of 2014. She was project manager for the sealing off of the C Mains in 2014 and was one of the last people to walk all of that area prior to sealing in June 2014. Ms. Gump stated that if there had been a roof fall or pillar failure in that area during the time period of 2011 to June 2014, she would have been aware of it. She testified that there were no pillar failures or roof falls in the C Mains during that time period.[3] Ms. Gump's testimony was credible and her direct observations regarding the conditions in the C Mains and the lack of any roof falls or pillar failure during the relevant time period show that Mr. Krabill's attribution of the subsidence damage to a roof fall or pillar failure in the C Mains prior to 2014 is not supported by the best available evidence in this case.

Even when we look beyond the timing issue, we do not find support for Mr. Krabill's theory that the alleged subsidence was the result of a roof fall or pillar failure in the C Mains. Mr. Krabill's testimony regarding the potential causes of a roof fall or a pillar failure consisted largely of conjecture on his part. He offered little testimony about what could have potentially caused a roof fall in the C Mains other than stating that the roof areas undergo stress and can experience isolated rock falls years after the development of the mains and completion of the longwall. Mr. Krabill theorizes that conditions in the mine could have deteriorated post-sealing of the C Mains in June 2014 and emphasized that no one has been in the C Mains since they were sealed but offered no real evidence of that fact.[4] Mr. Krabill acknowledged that mains are

[3] Ms. Gump testified that there was one roof fall that took place in August 2013 in one of the gate areas adjacent to the C-4 Panel during the time retreat mining was occurring in the C-4 Panel. It was in a location significantly east of the Rohanna Property and the C Mains. None of the experts stated that this roof fall, which was marked on the mine maps, played any possible role in the alleged subsidence at the Rohanna Property.

[4] In addition, this speculation clearly directly contradicts the testimony he offered that the damages were the result of a failure in the C Mains that must have occurred prior to 2014.

designed to be stable and that 50% or more of the coal was left in place in the C Mains. He made no effort to calculate the actual recovery ratio to determine the amount of coal that remained in place in this area and to what degree the amount exceeded 50%. We also find it important that the size of the entryways was significantly less than Mr. Krabill believed to be the case when he was developing his theory. He incorrectly estimated the width of the mined-out areas and resulting roof spans in the C Mains as 60 feet. MSHA requires the entryways to be 20 feet or less in width and Ms. Gump testified that the entryways were only 16 feet in width in the C Mains. Mr. Floris confirmed this actual width and based on his measurements on the scaled mine maps. The smaller area of exposed roof makes a roof fall less likely and would lessen the potential for any surface impact from a roof fall. Mr. Krabill also acknowledged that the roof areas were bolted together to reinforce the roof although he was not familiar with the specific roof control plan. Overall, we found Mr. Krabill's assertion that there was a roof fall in the C Mains leading to the damages in the 2016 Claim to be highly speculative.

Mr. Krabill also testified about the possibility that an issue with the pillars in the C Mains could have contributed to the subsidence. At times his testimony on this point was not clear, but to the extent he offered a theory that a partial pillar failure may have contributed to the roof fall, Mr. Krabill stated that water could have degraded the pillar in what is commonly referred to as sloughage. Sloughage causes portions of the base of the pillars to fall off reducing the overall size of the pillar and causing them to become overstressed and eventually fail. Alternatively, Mr. Krabill testified that water infiltration can weaken a soft mine floor, or pavement, causing the mine pillar to punch through the floor of the mine, in turn causing a roof fall. He speculated that shallow punch mines in the area may have created fracturing in the overlying rocks that allowed water to penetrate into this section of the mine. He also noted the creek to the east of the

Rohanna Property as a possible source of water infiltration. However, Mr. Krabill acknowledged that he had no information or evidence that water flooded the area where he suspected the roof fall had taken place. In contrast to this lack of evidence, Ms. Gump stated that she saw no water collecting in the C Mains when she was in those sections between 2011 and June 2014. She also testified that Contura has continued to monitor water levels in the Emerald Mine since June 2014 and that she was not aware of any water collecting in the C Mains and that in fact the C Mains are the highest section of the mine so that any water that might enter the mine in that section would flow away to the south. She also noted that even if there was some sloughage, the size of the pillars in the C Mains were sufficient to maintain their integrity and support of the overburden.

Mr. Krabill's alternative theory about the mine floor weakening and allowing the pillars to punch through also lacked any real support. Besides the apparent lack of water entering and collecting in the C Mains, the geology in the Emerald Mine does not conform to the conditions necessary for his scenario. During cross examination, the Department asked Mr. Krabill if he had reviewed Module 22[5] of the Emerald Mine permit application, which is available in public files and Mr. Krabill stated he had not. In a description of the Emerald Mine in Module 22 it states that, "…These calcareous shales and limestone provide a competent working bottom and prevent pillars from punching through even in saturated conditions." (T. 344-345). Mr. Krabill asserted that this is standard language discussing an ideal situation and is not specific to any area of the mine, but acquiesced that he had no evidence to dispute that the floor provides a competent working bottom. Mr. Krabill also acknowledged that he did not have any evidence to contradict Module 22's statement that the geologic conditions of the overburden do not have a

[5] Module 22 is a section of the Emerald Mine permit application covering the type of subsidence control in underground mines.

history of failure. Mr. Krabill failed to present any evidence demonstrating that either the mine floor or roof were faulty or compromised.

The only evidence in support of his theory Mr. Krabill offered was indirect. He argued that the damages themselves were proof because he claimed to have ruled out any other possible cause including soil issues, frost heave and drainage issues. Mr. Krabill conducted a field classification of the soil by rubbing it on his teeth to determine the amount of silt and determined that the soil would be classified as a clay sand meaning it is more stable. Mr. Krabill explains that he ruled out frost heave because he would expect to see a continual progression in the cracks around the Rohanna pool and apron which he states were not present based on his conversations with the Rohannas. Mr. Krabill notes that he also excluded drainage issues from the list of possible damage causes but provides no information on how he came to this determination. We found his testimony ruling out other possible causes unconvincing. For instance, the cracking in the concrete pool apron appears to have been just the type of progressive damage (starting in 2009 and continuing up and through the 2016 Claim) one would expect from water infiltration and frost action. Mr. Floris who investigated all three of the claims filed by the Rohannas (2013, 2015 and 2016) testified that there were more and more cracks and that the cracks continued developing through time. Ms. Rohanna provided very similar testimony that the cracks in the pool apron got bigger from 2012 through the date of the 2016 Claim. We also received very little information about the vinyl pool liner and its strength and durability. If, as Mr. Rohanna stated, a rock appears to have punched through the liner, Mr. Krabill offered us no explanation about why the puncture by the rock was necessarily subsidence related and not the result of another cause such as frost heave or simply long-term wear of the vinyl liner.

The only other evidence Mr. Krabill cited as support for his theory of a roof fall was the testimony of Mr. Hayhurst, who Mr. Krabill had not spoken to prior to the hearing. During his testimony, Mr. Hayhurst testified that while in his house he heard a noise he attributed to a roof fall taking place underground in the Emerald Mine around the same time he observed the issues with the creek behind his home in 2016 or 2017. Besides the timing issue that this noise observation creates for Mr. Krabill's theory, we are not convinced that Mr. Hayhurst's testimony regarding the noise he heard and attributed to a roof fall from the mine is reliable evidence that a roof fall actually took place in the C Mains. The amount of overburden above the C Mains in the vicinity of the Rohanna Property is 340 feet and it increases as you move east towards the C-4 Panel. Ms. Gump was asked whether it was possible to for a person on the surface to hear a roof fall through 340 feet of overburden and she stated that it was not possible to do so. We believed Ms. Gump's testimony on this point.

In contrast to Mr. Krabill's testimony, which was largely speculative and/or conclusory, the Department and Contura presented testimony relying on the witnesses' extensive experience as well as certain subsidence calculations. Mr. Floris, the Department's inspector and expert witness stated that the mine mains are designed to never fail because they are important access and ventilation routes for the mine company. Concerning the safety and stability of the coal pillars in the C Mains, he described them as "monster pillars" roughly 60 feet by 120 feet in size. (T. 465). He stated that Department requires that each pillar have a minimum of two as a safety factor but that these pillars have a factor of approximately six and, therefore, are three times as strong as the Department would require for support. The pillars are strong enough that if one pillar were to fail, other nearby pillars could take up the stress and provide the necessary support. Mr. Floris also stated that based on his experience, even if multiple pillars in the C Mains had

collapsed, the distance between the edge of the C Mains and the Rohanna pool was greater then the distance where one would expect to see subsidence damage. The distance between where subsidence damage takes place and the outer edge of the mining is usually described as an angle of influence or draw and is dependent on the depth of cover. Mr. Krabill calculated the angle of draw in the Rohanna's case to be 23 degrees, a horizontal distance of approximately 140 feet. While noting that if there is no subsidence damage, it is improper to describe an angle of draw, Mr. Floris stated that in his experience, subsidence damage is limited to angle of 15 degrees and that is when there is full extraction. Therefore, the angle would be even less in this situation where significant coal was left in place in the C Mains. In this case, a 15-degree angle from the western edge of the C Mains would be 91.1 horizontal feet. The distance from the edge of the C Mains to the Rohanna's pool was approximately 140 feet, well beyond the distance where he expects to see subsidence damage to the surface or structures. Finally, we note Mr. Floris' observation from his investigation of the 2016 Claim that he saw no evidence of a subsidence trough which he would expect to see if there had been deep-rooted movement of the land. Overall, we found Mr. Floris' testimony credible and well supported by the evidence presented in this case.

Contura's expert, Dr. Yi Luo, has extensive experience in subsidence issues involving coal mining in Western Pennsylvania. He supported the testimony of Mr. Floris regarding the likelihood of pillar failure and subsidence at the Rohanna Property. Dr. Luo calculated a safety factor of 5.68 for the coal pillar in the C Mains nearest to the Rohanna Property and stated that a pillar with that safety factor will not fail. He also stated that the coal recovery ratio in the C Mains was 28.61% meaning that approximately 71% of the coal in the C Mains was left in place. He stated that the rough rule of thumb is that if the recovery ratio is 50% or less, the possibility

for subsidence is "very, very low." (T. 628). Even though he opined that he did not think the pillars in the C Mains would fail, Dr. Luo also evaluated the extent of a failure of the pillars in the C Mains that would be required to create subsidence that would propagate to the surface. The one-third rule dictates that a failure underground would need to be wide enough to be equivalent to one third of the overburden depth to see any subsidence propagate to the surface. He stated that you would need two pillars spanning a distance of 140 feet for subsidence to occur at the surface.[6] He went further and looked at whether a failure of two pillars would cause subsidence at the Rohanna pool and concluded that even if two pillars failed the surface subsidence would only reach 106 feet from the edge of the C Mains which is less than the 140 feet distance to the Rohanna Pool. Based on his testimony, it is clear that a roof fall in the 16-foot-wide entryways in the C Mains would not be sufficient to cause subsidence that would reach the surface and would not extend to the Rohanna pool. Dr. Luo also discussed Mr. Krabill's testimony concerning the possibility of water contributing to the failure of the coal pillars. He stated that water does not degrade coal itself but can impact clay zones in the floor or roof areas that can impact pillars. However, he stated that clay zones were not typical in the stratigraphy in this region and there was no evidence of clay zones in the C Mains. In conclusion, Dr. Luo opined that the damage to the Rohanna pool and the concrete pool apron were not the result of mine subsidence associated with Contura's Emerald mine.[7] We found his testimony and opinion credible and supported by the facts in this case.

[6] Dr. Luo appears to have used a cover depth of 420 feet in this calculation which he testified was the average depth of cover over the C Mains. This contradicts the depth of cover which the parties stipulated was 340 feet. Applying the one-third rule to the stipulated depth of cover of 340 feet, the failure underground would need to be approximately 113 feet to propagate to the surface.

[7] Dr. Luo offered an alternative theory about the cause of the damages to the Rohanna pool and concrete pool deck. He stated that the construction of a Wal-Mart shopping plaza located 550 feet west and vertically above the Rohanna Property caused a landslide movement to the east which impacted the Rohanna Property. We are not convinced that Dr. Luo's causation theory is correct but since Mr.

Conclusion

Mr. Rohanna bears the burden of proof to show by a preponderance of the evidence that the Department erred in finding that Contura's mining activity was not the cause of the damages set out in the 2016 Claim. When we consider all of the testimony and evidence presenting in this case, we hold that Mr. Rohanna has failed to meet his burden in this case. Therefore, we conclude that Mr. Rohanna's appeal should be denied.

CONCLUSIONS OF LAW

1. Mr. Rohanna bears the burden of proof in this appeal. 25 Pa. Code § 1021.122(a),

2. In order to meet his burden of proof, Mr. Rohanna must show by a preponderance of the evidence that the Department erred when it determined that mining was not the cause of the damages to his pool and apron that were alleged in Mr. Rohanna's appeal.

3. The preponderance of the evidence standard requires that the evidence in favor of the proposition is greater than the evidence opposed to it and that the evidence is sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established. *United Refining Company v. DEP*, 2016 EHB 442, 449.

4. Mr. Rohanna failed to show by a preponderance of the evidence that the Department erred when it determined that mining was not the cause of the damages to the pool liner and concrete pool apron at the Rohanna Property alleged in his 2016 Claim.

Rohanna has the burden of proof in this case, we do not need to accept or reject Dr. Luo's theory to reach our decision.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 13th day of February, 2019, it is hereby ORDERED that Gary Rohanna's appeal of the Department's determination 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: February 13, 2019

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

For the Commonwealth of PA, DEP:
Michael J. Heilman, Esquire
Nicole M. Rial, Esquire
(*via electronic filing system)*

For Appellant:
David C. Hook, Esquire
(*via electronic filing system)*

For Permittee:
Nicole V. Schmitt, Esquire
Kevin K. Douglass, Esquire
(*via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL, THE DELAWARE RIVERKEEPER NETWORK, AND MOUNTAIN WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2017-009-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	**Issued: February 19, 2019**

OPINION AND ORDER ON
APPLICATIONS FOR COSTS AND FEES

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies an application for attorney's fees submitted by appellants seeking to recover fees from a permittee for work done in connection with two petitions for partial supersedeas. The Board also denies an application for fees submitted by a permittee seeking to recover fees from the appellants for work performed in the final months leading up to the hearing on the merits, which was never held. There was no bad faith or vexatious conduct on the part of either side.

O P I N I O N

Before the Board are competing applications for costs and fees filed by the Appellants (Clean Air Council, the Delaware Riverkeeper Network, and Mountain Watershed Association, Inc.), and Sunoco Pipeline, L.P. ("Sunoco"). On February 13, 2017, the Department of

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

Environmental Protection (the "Department") issued to Sunoco three Chapter 102 erosion and sediment control permits under 25 Pa. Code Chapter 102 and seventeen Chapter 105 water obstruction and encroachment permits under 25 Pa. Code Chapter 105 authorizing the construction of Sunoco's Mariner East 2 pipeline project. The Appellants filed a notice of appeal objecting to the issuance of each of the 20 permits. On February 14, 2017, the Appellants filed their first petition for supersedeas and an application for temporary supersedeas seeking an immediate halt to all activity authorized under the permits. On February 17, 2017, the Board issued an Order denying the application for temporary supersedeas and scheduling an evidentiary hearing on the supersedeas petition. The hearing on the petition for supersedeas lasted three days and concluded on March 3, 2017. Upon conclusion of the hearing, the parties requested that the Board rule from the bench and the presiding judge denied the petition for supersedeas.

On July 19, 2017, the Appellants filed a second petition and application, this time for a partial supersedeas and a temporary partial supersedeas, seeking an immediate halt to horizontal directional drilling ("HDD") activities authorized under the permits because of what the Appellants averred were numerous spills and inadvertent returns of drilling fluids that had occurred during HDD activities up to that point. On July 25, 2017, the Board granted the Appellants' application for temporary partial supersedeas in part and scheduled a hearing on the petition for partial supersedeas. Prior to the scheduled hearing, the parties negotiated an agreement to resolve the application for temporary partial supersedeas and petition for partial supersedeas. On August 8, 2017, the parties submitted to the Board a proposed stipulated order setting forth the terms and conditions of their agreement. The following day, the Board signed and approved the stipulated order, but only after we deleted language pertaining to the Board retaining jurisdiction over enforcement of the order. The parties prepared a revised agreement

that corrected certain inaccuracies in exhibits attached to the stipulated order and also incorporated the Board's change in what came to be referred to as the "corrected stipulated order," which we entered on August 10, 2017.

The corrected stipulated order contained several provisions related to Sunoco's ongoing HDD activities. For example, Sunoco was required to perform reevaluations of some of its HDD sites that were to include, as appropriate, additional geotechnical evaluations. The parties also agreed to revisions to several plans that are incorporated by reference into the Chapter 105 permits—the HDD Inadvertent Return Assessment, Preparedness, Prevention and Contingency Plan (the "HDD Plan"); the Water Supply Assessment, Preparedness, Prevention and Contingency Plan; and the Void Mitigation Plan for Karst Terrain and Underground Mining. Sunoco agreed to abide by those plans, as revised.

On October 27, 2017, the Appellants filed a motion for summary judgment, seeking judgment on three issues that the Appellants argued were controlling issues in the appeal that should prompt the Board to invalidate Sunoco's permits. The Appellants' arguments related to (1) the "water dependency" of the Mariner East 2 pipeline (and all pipelines) in being permitted to encroach upon exceptional value (EV) wetlands, (2) the Department's allegedly improper application of the antidegradation requirements and analysis of the existing uses of the EV wetlands crossed by the pipeline, and (3) Sunoco's alleged failure to submit required letters from all municipalities and counties crossed by the pipeline. We denied the Appellants' motion on all three issues (Opinion and Order, Jan. 8, 2018), and denied a subsequent request from the Appellants to certify that denial for interlocutory appeal to the Commonwealth Court (Opinion and Order, Feb. 2, 2018). At around the same time, Sunoco filed a motion for partial summary judgment. Although we denied the motion in an Order, we included language recognizing that

the Appellants had irrevocably waived some of their objections in the appeal. We then scheduled the hearing on the merits for blocks of days in June, August, and September 2018. We amended that schedule in response to an unopposed request from the Appellants so that the hearing was rescheduled to begin on August 1, 2018.

On February 28, 2018, the Appellants filed a separate appeal of a Consent Order and Agreement (COA) entered into between the Department and Sunoco on February 8, 2018. *See* EHB Docket No. 2018-023-L. The Appellants complained in that appeal that the COA effected revisions to the HDD Plan that had been previously revised in August 2017 as part of the corrected stipulated order issued by the Board resolving the Appellants' second petition for supersedeas. The Appellants were not involved in the discussions precipitating those revisions.[1] Concurrently, the Appellants also filed a complaint for injunctive relief in the Commonwealth Court seeking to have the Court enforce the August 2017 settlement agreement reached before the Board in accordance with the Appellants' interpretation of that agreement.

On March 23, 2018, the Appellants filed a petition for partial supersedeas in the appeal of the COA, the third petition overall, asking the Board to supersede the COA to the extent it was inconsistent with the corrected stipulated order. We *sua sponte* consolidated the appeal of the COA with the appeal of the permits on April 2, 2018 and scheduled a hearing on the petition for partial supersedeas for April 16, 2018. Prior to the hearing, the parties filed yet another proposed stipulated order with further revisions to the HDD Plan. The proposed order provided that the Appellants would withdraw their supersedeas petition in the consolidated appeal, and the appeal of the COA would be withdrawn in its entirety. We held a hearing on April 16 to determine whether the latest proposed stipulated order truly reflected the mutual agreement of the parties

[1] The HDD Plan had also been revised by the Department in December 2017, apparently following consultation with the Appellants but not Sunoco. The Board was not involved in nor aware of any revisions to the HDD Plan referenced in our corrected stipulated order.

and that it was otherwise fair, reasonable, and in the public interest. Having been satisfied by the parties' presentations at the hearing, we issued a stipulated order on April 16 and closed out the appeal of the COA docketed at 2018-023-L.

Thereafter, all parties filed their pre-hearing memoranda according to the schedule set in the original appeal of the permits. Motions in limine were filed by all parties. During our pre-hearing conference call on July 26, 2018, we were told that the Appellants and the Department were finalizing a settlement agreement and the hearing on the merits scheduled to begin on August 1 would not be necessary. Sunoco was apparently not involved in the latest discussions between the Appellants and the Department. We declined the request to postpone the hearing. The Department and the Appellants were nevertheless able to settle the matter. Their stipulation of settlement generally provides for the development or revision of Department policies and procedures relating to future natural gas pipelines in consideration for the Appellants withdrawing their appeal. The settlement provides for the establishment of a stakeholder group on pipeline construction, and for the online availability of pipeline permit applications and review documents. No part of the settlement altered any of the 20 permits under appeal, the COA, or the various other stipulated orders entered into by all the parties. The Appellants received $27,500 in reimbursement of costs and attorney's fees from the Department in the settlement and agreed not to seek further reimbursement for fees and costs from the Department. The Appellants withdrew their appeal on July 31, 2018, and we issued an Order on the same day acknowledging the withdrawal and cancelling the hearing. The instant applications for costs and fees followed.

The Appellants seek a total of $228,246.00 in fees and costs *from Sunoco* for their work related to the July 2017 partial supersedeas leading up to the corrected stipulated order, the

March 2018 partial supersedeas leading up to the additional stipulated order, and the proceedings pertaining to the fees applications. The Appellants are not seeking to recover fees for any work performed outside of those three segments of the appeal. Sunoco is seeking to recover $298,906.12 in fees and costs *from the Appellants* for its work in the appeal from April 17, 2018 until July 31, 2018, plus any fees incurred in the course of the fees application proceedings. After the responses to the applications were filed, we held a conference call with the parties to find out what they desired in terms of additional briefing on the applications, if any. *See* 25 Pa. Code § 1021.184(a) (parties may file briefs in accordance with a schedule established by the Board). Neither the Appellants nor Sunoco requested any further briefing, but the Department, which had not filed a response to either application, asked to submit a brief on the issue of whether a party may recover fees from a permittee as a matter of law, which was raised by Sunoco as an issue in its response to the Appellants' application. We issued an Order allowing the Department to file a brief on that issue within 30 days, and allowed any other party to file a response to that brief. The Appellants and Sunoco filed additional briefs in response to the Department's brief. The Department filed a request for oral argument, which we granted. *En banc* oral argument was held before the Board on January 18, 2019. The applications are now ripe for disposition. For the reasons discussed below, we find that neither the Appellants nor Sunoco is entitled to recover costs and fees in this matter.

Section 307(b) of the Clean Streams Law provides in part 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). When a party seeks reimbursement for fees from the Department, we employ a three-prong analysis: (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. *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. However, the matter before us does not involve an award of fees against the Department. Rather, the Appellants and Sunoco are seeking fees from each other, a less common situation. And although fees are occasionally sought from unsuccessful appellants in third-party permit appeals, it is rarer for fees to be sought from a permittee. Indeed, Sunoco in its briefs seemed to argue that a permittee can *never* be ordered to pay fees as a matter of law. But Sunoco dramatically narrowed that position at oral argument and unequivocally acknowledged that there may be circumstances in which it is appropriate to require a permittee to reimburse another party's fees. It cited bad faith litigation as a possible example of such a circumstance.

That said, there is no dispute in this case that the Board has the authority under Section 307(b) to order one private party to pay another private party's costs and attorney's fees reasonably incurred by such party in proceedings pursuant to the Clean Streams Law.[2] Indeed, our Supreme Court has so held. *See Lucchino, supra*, 809 A.2d 264 (Pa. 2002) (appellant can be ordered to pay permittee's fees). *See also Solebury Twp., supra*, 928 A.2d 990, 1005 (Pa. 2007) (reaffirming bad faith/vexatious conduct standard). The question then becomes: under what circumstances should a private party be responsible for paying another private party's fees, and

[2] There is also no dispute that this appeal is a proceeding pursuant to the Clean Streams Law.

should different considerations come into play for awarding fees against private parties (as opposed to the Department) or different types of private parties (e.g. appellants and permittees)?

Initially, the standard for awarding fees against any private party need not be concomitant with the standard for fees against the Department. *Cf.* 27 Pa.C.S. § 7708(c) (setting different standards in coal mining cases); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 692 n.12 (1983) ("We do not mean to suggest that private parties should be treated in exactly the same manner as governmental entities. Differing abilities to bear the cost of legal fees and differing notions of responsibility for fulfilling the goals of the Clean Air Act likely would justify exercising special care regarding the award of fees against private parties.") Different rights and circumstances are at play between the government and private parties. It is the Department's responsibility to issue defensible permits and it is the Department's action that we review. *See* 35 P.S. § 691.5 (Department's duty to implement and enforce the Clean Streams Law). Importantly, we review the permit as issued, not the application submitted by the permittee. 35 P.S. § 7514(a) (defining Board's jurisdiction to hold hearings and issue adjudications on orders, permits, licenses, or decisions of the Department). *See also O'Reilly v. DEP*, 2001 EHB 19, 51 (Board's objective is to determine whether issuance of final permit was appropriate, not to dwell on immaterial errors in the application process). Focusing on the permit application as opposed to the permit itself is not entirely consistent with our *de novo* review. *R.R. Action and Advisory Comm. v. DEP*, 2009 EHB 472, 476-77 (Board is not limited to considering what the Department considered when it made its decision and deferring to the Department's factual findings would violate Board's responsibility to conduct a *de novo* review). *See also Friends of Lackawanna v. DEP*, 2018 EHB 401, 417 (it is ultimately the Department's responsibility to scrutinize permit applications to ensure that they comply with the law before issuing the permit). Any relief that the Board can

award must relate to the Department's action, so even when a permittee agrees to something beneficial to the appellant in the course of settlement discussions, the Department must still approve of it if the benefit is tied to the action (e.g. the HDD plans in this case).

In *Lucchino*, the Supreme Court upheld a bad faith standard for awarding fees against a private party appellant. The Court held that, where "the record supports a tribunal's finding of fact that the conduct of the party was dilatory, obdurate, vexatious, or in bad faith," an award of fees will not be disturbed by an appellate court absent an abuse of discretion. *Id.*, 809 A.2d at 269-70. *See also Solebury Twp.*, *supra*, (same).[3] The Court in *Lucchino* did not limit its holding to fee awards against appellants, and we see no compelling reason to establish different standards for different private litigants. The standard for awarding fees should not vary depending upon whether the private party who engaged in bad faith litigation was an appellant, permittee, intervenor, or any other private party involved in a third-party appeal of a Department-issued permit. A heightened standard is appropriate for fee awards against appellants so as to avoid chilling constitutional rights to due process. *Lucchino*, 809 A.2d at 270. A heightened standard is just as appropriate for fee awards against permittees because, as private parties, permittees are just as entitled to unfettered access to due process. Indeed, under the Board's rules, permittees have no choice but to be a party in third-party permit appeals, 25 Pa. Code § 1021.51(i), and they should not be dissuaded from vigorously protecting their interests in those proceedings in good faith. A permittee's right to defend an appeal is entitled to the same consideration as an appellant's right to pursue an appeal. *See generally White Twp. v. DEP*, 2005 EHB 611, 614 ("The purpose underlying the Rule [an earlier version of 25 Pa. Code § 1021.51(i)] is to protect the due process rights of appellees when their permits are challenged. A system which allows

[3] The Court in *Solebury Twp.* also held that fees may be awarded solely on the basis of bad faith or vexatious conduct without reference to any threshold criteria that would otherwise apply. *Id.*, 928 A.2d at 1005.

third parties to attack permits without providing an opportunity for the Permittee to participate fully in the case would suffer serious constitutional problems.").[4] Thus, we hold that if either the Appellants or Sunoco engaged in dilatory, obdurate, vexatious, or bad faith conduct in the course of prosecuting or defending the appeal, we may in our discretion order them to pay an appropriate amount of the opposing party's reasonably incurred costs and fees in this Clean Streams Law proceeding.

For purposes of the instant appeal, no other credible, workable alternative to the bad faith standard has been proposed. All of the parties contend, and we agree, that it is not possible to conceive of every possible scenario where a fee award might be appropriate. The Department has presented a series of hypotheticals where an award might be appropriate, but we are charged with deciding the third-party appeal of a permit that did not result in an Adjudication, and not a series of hypothetical scenarios. We do not wish to entirely rule out the possibility that fees might be awarded against a permittee where, for example, an Adjudication after a hearing on the merits reveals that a permittee engaged in fraud or something akin to gross negligence in the permit application process. But such a standard would be unworkable in this catalyst case where deciding whether there was such fraud or something akin to gross negligence would require a fact-finding hearing no less involved than a hearing on the merits, which is precisely what the parties wanted to avoid when they settled the case.[5] *See Upper Gwynedd Towamencin Mun.*

[4] We note as a point of interest that, under the statute governing attorney's fees in proceedings concerning coal mining activities, a private party initiating or participating in such a proceeding apparently may only recover fees from a permittee in cases involving enforcement actions. 27 Pa.C.S. § 7708(c)(1). The standard for a permittee recovering fees "from any party" is the bad faith standard. *Id.*, § 7708(c)(4). The Clean Streams Law does not have such limiting language.

[5] For example, the Department and Appellants say Sunoco made what ultimately turned out to be inaccurate predictions in its applications about the likelihood of inadvertent returns of drilling fluids during HDD activities. First, inaccurate predictions are not the same as fraud. But also, how are we to decide whether they were inaccurate based upon information available at the time? At a minimum we would need expert testimony from hydrogeologists. This sort of protracted, backward-looking, otherwise

Auth. v. Dep't of Envtl. Prot., 9 A.3d 255, 264-65 (Pa. Cmwlth. 2010) (discussing catalyst analysis for fee awards in cases that do not reach a final resolution on the merits). In the instant case, the bad faith standard is the appropriate basis for the exercise of our discretion.[6]

With the bad faith standard in mind and turning to the Appellants' application for fees from Sunoco, the Appellants have not alleged that Sunoco litigated in bad faith or that it engaged in dilatory, obdurate, or vexatious conduct in defending the appeal. Nor could they. Sunoco made significant concessions that resulted in substantial changes in its HDD practices in both the corrected stipulated order and the order resolving the third petition for supersedeas. The Board was closely involved in all aspects of this case and we never detected anything approaching bad faith or vexatious conduct on Sunoco's part. Accordingly, no fees are awarded against Sunoco.

Turning to Sunoco's application for fees against the Appellants, Sunoco acknowledges that the Appellants acted in good faith when they filed their notice of appeal in February 2017 to challenge the twenty permits issued by the Department for the pipeline project. It does not point to any bad faith until after April 16, 2018, the date on which the Board held an evidentiary hearing and entered the stipulated order that dismissed Appellants' petition for partial supersedeas filed in the appeal from the COA and approved further revisions to the HDD Plan.[7] After that fateful date, however, Sunoco argues that continued prosecution of the appeal amounted to bad faith. In other words, Sunoco believes the Appellants were required to settle or

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pointless exercise hardly seems to be in the parties' or the public's interest or a wise use of the Board's resources.

[6] The Department argues that shared responsibility for fees will incentivize permittees to submit better permit applications. This is a policy argument better suited for the Legislature. Nevertheless, we cannot help wondering whether the distant threat of attorney's fees in a third-party appeal adds any real marginal incentive to a party seeking permits for a multi-billion dollar project. Any incentivizing is at best a zero-sum game; sharing fee responsibility with permittees at least theoretically disincentivizes the Department to do a good job and issue defensible permits.

[7] Sunoco does complain about some of the Appellants' conduct in discovery occurring well before April 2018, but it does not appear to specifically allege bad faith for that conduct.

withdraw their entire appeal as of April 16, 2018. Anything less constituted pure harassment in Sunoco's view.

Sunoco points to the fact that the Appellants' final settlement was only with the Department and only involved programmatic changes regarding the Department's review of future pipeline permits. (In this contention Sunoco fails to mention that the Appellants had already obtained Sunoco's agreement to implement dramatic changes to its HDD practices.) The Appellants could not have realized such changes through an Adjudication from the Board, says Sunoco. The Appellants also continued to try (unsuccessfully) to extract additional concessions from Sunoco in earlier settlement discussions that Sunoco believes the Board could not have awarded in an Adjudication (e.g. restoration projects). Sunoco complains that the Appellants did not have any expert witnesses lined up for the merits hearing, and notes they did not conduct any fact discovery on Sunoco (as opposed to the Department). The Appellants did not prevail on their motion for summary judgment, Sunoco remarks (although they did not entirely lose either). Seemingly, in Sunoco's view, the Appellants' case was falling apart, so they were *required* to settle. To Sunoco, "it was clear" that the Appellants no longer had any intention of pursuing their appeal after April 16, 2018.

We will assume for current purposes that fees can be awarded against an appellant in an appeal initiated in good faith based upon bad faith that arises during the course of the litigation, although the case law might suggest otherwise. *See Friends of Lackawanna, supra*, 2018 EHB at 418 ("in seeking fees from a third-party appellant, we have required that a permittee show that the appellant *brought the appeal* in bad faith.") (emphasis added); *Lyons v. DEP*, 2011 EHB 447, 449 ("The only circumstance that we can currently imagine where such an award might be appropriate is a case where the appellant's appeal was frivolous or *brought* in bad faith.")

(emphasis added); *Lucchino v. DEP*, 1998 EHB 556, 561 ("The right to petition the courts does not protect abuse of the judicial process through the *initiation* of baseless litigation.") (emphasis added); *Alice Water Protection Ass'n v. DEP*, 1997 EHB 840, 851 ("we hold that in order for a permittee to recover attorney's fees from an appellant under Section 4(b) of the Pennsylvania Surface Mining Act or Section 307(b) of the Clean Streams Law…it must demonstrate that the appeal was *brought* in bad faith.") (emphasis added).

We find no basis to conclude that the Appellants' appeal was initiated or continued for the purpose of harassing Sunoco or that any of the Appellants' behavior was improper or dishonest or in bad faith. We find nothing untoward about continuing to pursue the appeal before reaching a final settlement within days of the scheduled hearing on the merits. It is certainly not uncommon for cases to settle on the courthouse steps, and indeed, we more frequently see cases settle as the hearing date nears than perhaps at any other point in the appeal. Deadlines are a source of motivation to get things done in litigation as much as in any other area of life. If settling shortly before trial were concomitant with bad faith, we suspect we would have claims for fees against appellants in dozens of cases on that basis alone. Additionally, we see nothing amounting to bad faith in the Appellants' settlement activity. The entire nature of settlement involves concessions, moving off of previously held positions, asking for items that might be beyond what the court or Board could itself award, and a give-and-take between the negotiating parties. With that there is also a certain amount of posturing to try to obtain the best possible outcome for a client's interests. We have no interest whatsoever, and indeed think it would be arguably improper, getting into a "he said, she said" analysis of actual settlement negotiations between counsel. Nothing here strikes us as being beyond typical conduct in negotiations. Nothing comes close to approaching bad faith or vexatious conduct.

Despite Sunoco's complaints that it was unnecessarily burdened by having to undertake hearing preparations for a case that settled, we note that all indications suggest that the Department and the Appellants also continued to prepare for the hearing with what appears to be the prudent thought that, if settlement were unsuccessful, the hearing would continue as scheduled. The Board had indicated that there would be no further extensions of the hearing date. The Appellants continued to prepare for the hearing up until they withdrew their appeal. They filed a prehearing memorandum consisting of 410 paragraphs and including more than 500 exhibits. They also filed a motion in limine regarding three of Sunoco's expert witnesses. A new attorney was added to their team. There were documented conversations among the parties regarding the order of witnesses. The Appellants indicated their intention to serve subpoenas. Sunoco's suggestion that this was all just a ruse is not credible. There is nothing inherently unfair or improper about pursuing settlement while continuing with hearing preparations. We think that likely happens in a number of cases both before this Board and any other tribunal.

Further, we are not persuaded by Sunoco's contention that settlement terms must necessarily be tied to the relief one could obtain before the Board in order for the party pursuing settlement to be continuing the appeal in good faith. It is not uncommon for parties to seek relief that cannot strictly be obtained in a potential adjudication of a legal matter. Although the Board cannot award damages, it is not unheard of for settlements between parties to involve some sort of, e.g., monetary compensation. Settlements are essentially a type of bargained-for contract. A third-party appellant may seek money or equitable relief in a settlement in consideration for the withdrawal of the appeal. *See In re Larsen*, 616 A.2d 529, 595 (Pa. 1992) ("One of the strengths of the legal system -- definitive, precedential rulings to promote clarity, certainty, and order -- may actually be dysfunctional for the creation of innovative and idiosyncratic solutions to

problems that may never reach judicial resolution. *To the extent that negotiations in the shadow of the court are limited by conceptions of what the court would do, negotiation may present no real, substantive alternative to trial….The limited remedial imagination of courts, when extended to negotiation, narrows not only what items might be distributed but also how those items might be apportioned*." (quoting Menkel-Meadow, *Toward Another View of Legal Negotiation*, 31 UCLA L. Rev. 754, 790-91 (1984)) (emphasis in opinion)). We also see nothing wrong with the Appellants' behavior in discovery and how that may have influenced their hearing preparations. The decision to not have expert testimony is an element of a party's litigation strategy, whatever the wisdom of that strategy may be. At least some of the Appellants' surviving claims were largely legal in nature. Even if Sunoco is correct and the Appellants' case was weakening, the Appellants needed to preserve their issues for appeal.

Even accepting all of Sunoco's assertions as true, there is nothing in them that shows that the Appellants had no goal other than to harass, embarrass, or annoy Sunoco, or that the Appellants were behaving in a corrupt or inappropriate way during the litigation after April 16, 2018. All the conduct detailed by Sunoco stands in stark contrast to that in *Lucchino v. DEP*, 1998 EHB 1070, 1082, where we did award fees to a permittee against an appellant because the appellant had exhibited bad faith "at the time he filed his appeal and throughout th[e] action." That award was eventually upheld by our Supreme Court, where it summarized the appellant's bad faith as follows:

> Lucchino lacked standing because he was not even remotely affected by the Department permit he sought to challenge, but filed his appeal anyway merely to harass. He candidly admitted in his deposition that the permitted coal removal would not affect either him or his property, and that dust, noise or pollution from the removal operation would not reach him. He stated that his appeal was not directed at stopping the permitted coal removal, which he had voted in favor of in his capacity as a township supervisor, but instead was directed at Department personnel, whom Lucchino accused of violating the law.

Lucchino, 809 A.2d at 269. Lucchino's appeal was not a challenge to the action taken by the Department, "but was merely an attack on agency employees and officials." *Id.* We have nothing remotely close to that situation here. Instead, Sunoco has compiled a list of rather hyperbolic complaints about the Appellants' litigation strategy, which is nowhere near the sort of conduct that can be characterized as vexatious or obdurate.

Sunoco appears to be forgetting one fundamental point: unless the Appellants could resolve their differences with the Department **and** Sunoco, they needed to proceed to a hearing. The Appellants needed to keep their appeal alive against Sunoco **and** the Department in order to obtain the concessions they were seeking from the Department. The Appellants had already obtained substantial concessions in the field from Sunoco, but there is no mechanism for simply dropping Sunoco from the case. The fact that some of the negotiations in the final stretch were only with the Department does not equate to a finding of bad faith. Sunoco says the Appellants were fighting a losing cause. However, we believe they were pursuing legitimate arguments to the very end that did not necessarily require expert testimony. For all we know, the Appellants may have settled more because installation of the pipeline was all but completed than because they viewed their arguments as anything less than good faith challenges to the Department's actions. As with Sunoco, we detect nothing even remotely approaching bad faith or vexatious conduct in the Appellants' continuing prosecution of their appeal up to the time of the hearing on the merits.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 19th day of February, 2019, it is hereby ordered that the Appellants' and Permittee's applications for costs and fees are **denied**.

ENVIRONMENTAL HEARING BOARD

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

*** Chief Judge and Chairman Thomas W. Renwand files an Opinion Concurring in Part and Dissenting in Part, which is attached.**

DATED: February 19, 2019

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

OPINION OF CHIEF JUDGE AND CHAIRMAN THOMAS W. RENWAND
CONCURRING IN PART AND DISSENTING IN PART

I respectfully concur in part and dissent in part in the majority opinion. I fully agree that no attorney's fees should be awarded against the Appellants in this appeal. The majority is correct that the Appellants raised important issues of vital public concern that are very much in the public interest.

Where I part company with my esteemed colleagues is on the question of when attorney's fees may be awarded against a permittee and the standard to be applied under Section 307(b) of the Clean Streams Law. According to the majority's view, attorney's fees may be awarded to an appellant against a permittee only when the latter has engaged in conduct that is vexatious or amounts to bad faith. This is a much higher standard than that applied against the Department of Environmental Protection when awarding fees. The majority offers no clear explanation or, more importantly, any legally-sound reasoning as to why the same standards applied against the Department should not be equally applied when considering a fee request against a permittee.

The majority opinion seems to state that while the Board has broad discretion to award attorney's fees against the Department, such awards against permittees should be rarely, if ever,

permitted, noting that "although fees are occasionally sought from unsuccessful appellants in third-party permit appeals, it is rarer for fees to be sought from a permittee." Majority Opinion at page 7.[1] However, Section 307(b) of the Clean Streams Law makes no such distinction. With regard to the awarding of attorney's fees, Section 307(b) says simply:

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

35 P.S. § 691.307(b). The language of Section 307(b) does not differentiate between private parties and the Department. It authorizes the Board to exercise our discretion and award fees to "any party" whenever such fees have been "reasonably incurred by such party in proceedings pursuant to this act." *Id.* Likewise, Section 307(b) does not shield any parties from fee liability. When the words of a statute are clear and free from ambiguity, we may not ignore the plain language of the statute under the pretext of pursuing its spirit. 1 Pa. C.S. § 1921(b).

In my view, if the Pennsylvania General Assembly had wanted the Board to apply a different standard in considering fee awards against a permittee than against the Department, I believe it would have stated so, as it did in Act 2000-138, 27 Pa. C.S. § 7708 (Costs for mining proceedings), which sets forth the standards for attorney's fee awards in surface coal mining cases. Act 138 clearly envisions attorney's fee awards against a permittee and establishes a less strict standard than for fee awards against appellants. While attorney's fees may be awarded against an appellant only where it has engaged in bad faith or behavior for the purpose of harassing or embarrassing the permittee, Act 138 permits awards against a permittee upon a finding that a violation of a statute, regulation or permit occurred or an imminent hazard existed

[1] One reason that fees are rarely sought from a permittee might stem from the fact that the Board has never awarded fees against a permittee.

and the party seeking the award made a substantial contribution to the determination of the issues. 27 Pa. C.S. § 7708(c)(1) and (4).

I agree with the majority that, even when the language of a statute does not set out different standards for fee awards, the courts have applied a higher standard when reviewing fee petitions brought against an appellant on the basis that, to do otherwise, would have "a potential 'chilling effect' on the willingness of the ordinary citizen to pursue resolution of his disputes in the courts." *Lucchino v. Dep't of Environmental Protection*, 809 A. 2d 264, 270 (Pa. 2002). Robust public involvement in environmental issues, including permit decisions, may have beneficial environmental and health impacts benefiting the citizens of Pennsylvania. Thus, even though Section 307(b) of the Clean Streams Law contains no such language requiring higher scrutiny for petitions filed against an appellant, we are required to do so under the case law established by our higher courts. I am aware of no such case law by the Commonwealth Court or Supreme Court requiring a stricter standard of scrutiny for an attorney's fee award against a permittee, and the majority opinion cites none. Nor do I believe that allowing attorney's fee awards against permittees will have a "chilling effect" on permit applicants.

Sunoco correctly points out that the Board has been loath to award attorney's fees against a permittee in the past, citing *Jay Township v. DER*, 1987 EHB 36; *Township of Harmar v. DER*, 1994 EHB 1107; and, most recently, *Friends of Lackawanna v. DEP*, 2018 EHB 401. In *Friends of Lackawanna*, the appellant did not seek attorney's fees against the permittee, and the Board was reluctant to grant such an award where it was not requested. Here, the Appellants have filed a petition seeking an award of attorney's fees and costs against Sunoco which has enabled us to look at this important issue anew. As to *Jay Township* and *Township of Harmar*, those cases were decided prior to the Pennsylvania Supreme Court's instructive holding in *Solebury Township v. Dep't of Environmental Protection*, 928 A.2d 990 (Pa. 2007), requiring the Board to

apply less rigid standards for recovery of fee awards under Section 307(b) of the Clean Streams Law. Indeed, in *Solebury Township*, the Court recognized the "broad language of Section 307 and the public policy favoring liberal construction of fee-shifting provisions." *Id.* at 1005. The standard set forth in *Jay Township* and *Township of Harmar* is no longer valid.

Sunoco argues that allowing a fee award against a permittee will cause the Department to "abrogate its legal responsibility" and "dis-incentivize the Department from carefully reviewing permit applications." (Sunoco Brief, p. 1.) This is a disingenuous argument since the Department also shares in the risk of an attorney's fee award by a successful third-party appellant. Allowing fees against a permittee does not abrogate the duties and responsibilities of the Department in reviewing permit applications and issuing environmentally sound permits.

Sunoco further argues that there has been no success on the merits because there was no decision by the Board suspending the permits. However, as the Court held in *Solebury Township*, a hearing or formal judgment on the merits is not a prerequisite to a finding that a party has prevailed with some degree of success on the merits. *Id*. at 1004. There appears to be no question here that the Appellants secured changes to the design of the project and plans related to the permit application.

According to Sunoco's rationale and that of the majority opinion, the entire burden of attorney's fees should fall on the shoulders of the taxpayers of the Commonwealth, even though the permittee directly benefits from the permitting process and, indeed, provides much of the information on which the Department relies in issuing permits. In fact, when permits are challenged, the permittee and the Department many times work closely in defending the permit before the Environmental Hearing Board. It is only appropriate then, if the law mandates an award of attorney's fees under the Clean Streams Law, that a permittee should shoulder at least some of its rightful responsibility. Of course, when a fee petition is brought against a permittee,

the permittee will be accorded its full panoply of due process rights in challenging this responsibility. This is more than fair. The permittee is not a disinterested party. Indeed, this appeal illustrates that fact. Even though many hard-working Department professionals spent thousands of hours reviewing the permit application and accompanying information and crafting a permit that they believed to be in accordance with the law, the Department still had to rely heavily on the professional judgment of Sunoco's experts and consultants. In many instances, this reliance was completely justified, but the record also shows that problems unfortunately did occur.

Although I agree with my colleagues that the responsibility for issuing a permit falls on the Department, it is the responsibility of the permit applicant to submit complete and accurate permit applications, and it is reasonable for the Department to rely on this information. I agree with the Department that its "duty is not to replicate studies. . .but to verify that the applicant has completed these studies and to assess, based upon the application provided and the permit reviewer's professional judgment, whether those studies were done appropriately and provide adequate information to proceed." (Department's Brief, p. 20.) As aptly stated by the Appellants, "It is neither realistic nor desirable that responsibility for ensuring the accuracy of every detail of every permit application should rest solely with the Department; such a process would require tremendous resources that have never been available to the Department, and would greatly delay the review of permit applications." (Appellants' Brief, p. 2.) Moreover, whenever an appeal is taken from the issuance of a permit, the Board's review is *de novo*. This means that both an appellant and a permittee may introduce evidence at the hearing before the Board that was not available to the Department when it conducted its review. As stated earlier, the permittee shares in the responsibility for ensuring that a permit is based on the most accurate and complete data, and, as such, should not be shielded from a fee award when that permit is

challenged. The taxpayers of this Commonwealth should not bear the sole burden for such an award.

The Board's jurisdiction regarding the Department's review and issuance of permits is triggered when the Department takes a final action, which occurred in this case when it issued the permits under appeal. The provisions of the Environmental Hearing Board Act establishing the Board's jurisdiction do not in any way shield a permittee for liability under Section 307(b) of the Clean Streams Law. The fact that the Board's jurisdiction is not triggered by the filing of the permit application has no bearing on the Board's consideration of a fee petition against a permittee after a permit has been issued and timely appealed.

As the Department correctly points out in its excellent and scholarly brief, a determination that fees can only be awarded against the Commonwealth ignores the intent of the General Assembly to favor the public interest as against any private interest. 1 Pa.C.S. § 1922(5). According to the majority, when an appellant successfully challenges the issuance of a permit, the Board should hold only the Department responsible for its errors, even when those errors may have been the joint responsibility of the permittee. I agree with the Department that, if the Board also held permittees responsible for errors or shortcomings proven to be their responsibility (or joint responsibility), permittees "will have ample incentive to be fully engaged in the permitting process and defense of an application, which will result in better permit applications, fewer fee awards, and, more importantly, cleaner streams." (Department's Brief, p. 16.)

A critical component of a model regulatory program is meaningful citizen participation. Citizens often have information that is developed in cases before the Board that was not available to either the Department or the permittee. However, the Department makes clear that the General Assembly has not allocated any funds to the Department for the payment of fee

awards assessed pursuant to Section 307(b) of the Clean Streams Law. Instead, those awards are paid from the Clean Water Fund. A strong public policy argument can be made for allocating at least some responsibility for payment of attorney's fees to a permittee. This recognizes the significant role that a permittee plays both in the permitting process and in proceedings before the Board and further recognizes the financial benefit that permittees receive from the issuance of a permit.

As I stated in *Sierra Club v. DEP and Lackawanna Energy Center, LLC,* 2018 EHB 297, (Renwand, C.J., dissenting), the Pennsylvania Supreme Court and Commonwealth Court have given the Board "clear and specific direction on how we should evaluate an application for attorneys' fees and costs under Section 307(b) of the Clean Streams Law," and the courts have not hesitated to overturn the Board's rulings when we have taken an overly narrow approach. *Id*. at 308. The courts have stated over and over again that the Board has broad discretion to award attorney's fees, and time and time again the Board has failed to heed this directive. In my opinion, my colleagues have, once again, applied an overly restrictive interpretation to Section 307(b) without any legal basis for doing so.

ENVIRONMENTAL HEARING BOARD

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

DATED: February 19, 2019

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNITED ENVIRONMENTAL GROUP, INC., KLESIC ENTERPRISES, L.P., AND STEPHEN W. KLESIC	:	
v.	:	**EHB Docket No. 2018-115-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 7, 2019**

OPINION AND ORDER ON
MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board dismisses an appeal by a corporate appellant for failure to obtain counsel in violation of the Board's rule at 25 Pa. Code § 1021.21(b). Likewise, the Board dismisses an appeal by a limited partnership where the general partner is a corporation that has failed to obtain counsel. Finally, the Board dismisses an appeal by an individual for lack of standing. The order that is the subject of the appeal was not directed to the individual appellant, and his roles as corporate shareholder and limited partner do not provide him with the authority to represent the other appellants or with standing to challenge the order directed to them.

O P I N I O N

Introduction

This matter involves an appeal filed by United Environmental Group, Inc. (UEG); Klesic Enterprises, L.P. (Klesic Enterprises); and Stephen W. Klesic (Mr. Klesic) from an Order of the Department of Environmental Protection (Department) issued to UEG and Klesic Enterprises on

October 10, 2018 (Access Order). The Access Order directs UEG and Klesic Enterprises to grant access to Department employees and contractors to a site in Sewickley, Allegheny County, owned by Klesic Enterprises, on which UEG operated a hazardous waste treatment, storage and disposal facility and a residual waste processing and transfer facility. The site was the subject of previous litigation before the Environmental Hearing Board (Board) in which the Board upheld a Department order and civil penalty assessment for violations of the Solid Waste Management Act and Storage Tank Facilities Act. *See Klesic v. DEP*, 2017 EHB 606. The Board also upheld a subsequent Department action to forfeit the permit bonds of UEG as a result of UEG's continuing failure to comply with the Solid Waste Management Act. *See United Environmental Group, Inc. v. DEP*, 2017 EHB 638. The Department issued the Access Order as part of its efforts to close and remediate UEG's site using the bond forfeiture proceeds. According to the Access Order, there are "continuing and unresolved violations of the regulations and [the hazardous waste] and [residual waste] Permits at the Site" that pose "threats to public health and the environment." (Department October 10, 2018 Order, Ex. J to Notice of Appeal, para. F and G.) The Department seeks access to the site so that its employees and contractors may conduct remediation. (Department October 10, 2018 Order, Ex. J to Notice of Appeal, para. H.)

The matter currently before the Board is a Motion to Dismiss filed by the Department. The Department seeks to dismiss the appeals by UEG and Klesic Enterprises because they are not represented by an attorney in violation of the Board's rule at 25 Pa. Code § 1021.21(b). The Department also seeks to dismiss the appeal filed by Mr. Klesic individually on the basis that he lacks standing to pursue the appeal on his own behalf or on behalf of UEG and Klesic Enterprises.

The Board has the authority to grant a motion to dismiss where there are no material facts

in dispute and the moving party is entitled to judgment as a matter of law. *Diehl v. DEP*, 2017 EHB 1248, 1252; *Boinovych v. DEP*, 2015 EHB 566; *Brockley v. DEP*, 2015 EHB 198; *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. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party. *Lancaster Against Pipelines v. DEP*, EHB Docket No. 2016-075-L (Consolidated) (Opinion and Order on Motion to Dismiss issued January 10, 2019), *slip op*. at 2; *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB 913, 915.

United Environmental Group, Inc.

Appellant UEG is a corporation, and pursuant to the Board's Rules of Practice and Procedure, "corporations *shall* be represented by an attorney of record admitted to practice before the Supreme Court of Pennsylvania" or "admitted to practice before the highest court of another state on a motion *pro hac vice*." 25 Pa. Code § 1021.21(b) (emphasis added). Mr. Klesic lists himself as "owner and sole shareholder of UEG" (cover page to Response) and "president/owner" of UEG (cover letter accompanying Notice of Appeal), and appears to argue that, in this capacity, he is able to represent UEG in litigation before the Board. The Board has long-standing precedent that once an appeal is filed corporations must be represented by an attorney, and failure to secure legal representation is likely to result in dismissal of a corporate appellant's appeal. *Earth First, LLC v. DEP*, 2018 EHB 819, 821; *L.A.G. Wrecking, Inc. v. DEP*, 2015 EHB 338, 341; *KH Real Estate, LLC v. DEP*, 2012 EHB 155; *Gary Berkley Trucking, Inc. v. DEP*, 2006 EHB 330; *Potts Contracting Co. v. DEP*, 1999 EHB 958. As stated by Judge Coleman, "In considering the mandatory language of our rule, we have consistently held that corporations may not proceed with an appeal without legal representation." *L.A.G.*

Wrecking, 2015 EHB at 341. This rule is consistent with practice before the courts of this Commonwealth: "Corporations may appear and be represented in Pennsylvania courts only by an attorney at law 'duly admitted to practice.'" *David R. Nicholson, Builder, LLC v. Jablonski*, 163 A.3d 1048, 1052 (Pa. Super. 2017), citing *Walacavage v. Excell 2000, Inc*., 480 A.2d 281, 284 (Pa. Super. 1984). The Pennsylvania Superior Court explained the reasoning behind the general rule requiring counseled representation of a corporation:

> "The reasoning behind the general rule governing counseled representation of corporations is…a corporation can do no act except through its agents and…such agents representing the corporation in [c]ourt must be attorneys at law who have been admitted to practice, are officers of the court and subject to its control. This rule holds even if the corporation has **only one shareholder.**" *Walacavage*, *supra* at 284 (internal citations omitted) (emphasis added). *See also Advanced Telephone Systems, Inc. v. Com-Net Professional Mobile Radio, LLC*, 2004 Pa. Super. 100, 846 A.2d 1264, 1278 (Pa. Super. 2004), appeal denied, 580 Pa. 687, 859 A.2d 767 (2004) (stating: "The general rule is that a corporation shall be regarded as an independent entity even if its stock is owned entirely by one person"). The purpose of the rule requiring corporations to appeal in court through counsel "[i]s not the protection of stockholders but the protection of the courts and the administration of justice, and that **a person who accepts the advantages of incorporation for his…business must also bear the burdens, including the need to hire counsel to sue or defend in court.**" *Walacavage, supra* at 284 (internal quotations omitted) (emphasis in original).

David R. Nicholson, 163 A.3d at 1052. The Board's Rules impose the requirement that UEG have counseled representation, and UEG must also bear the burden to have counsel to represent it in an appeal before the Board.[1] Under our Rules, Mr. Klesic is not able to represent UEG in the appeal before the Board.

In some instances, the Board may provide a corporate appellant with a period of time in which to secure legal counsel in order to come into compliance with 25 Pa. Code § 1021.21(b).

[1] The same burden is imposed on Klesic Associates, Inc., which is the general partner of Klesic Enterprises, L.P. As a Corporation, Klesic Associates, Inc. must have counseled representation, and Mr. Klesic is not able to defend Klesic Associates, Inc.'s interests as general partner to Klesic Enterprise, L.P. in this appeal.

Here, however, UEG has had ample opportunity to obtain an attorney and it has not indicated in its response to the Department's Motion to Dismiss that it intends to do so. Therefore, we find that UEG's appeal should be dismissed for failure to comply with 25 Pa. Code § 1021.21(b).[2]

Klesic Enterprises, L.P.

Appellant Klesic Enterprises is a limited partnership. Its general partner is Klesic Associates, Inc., a corporation. (Department's Motion, para. 3 and Ex. A; Response, para. 3.) Stephen W. Klesic is a limited partner of Klesic Enterprises and a shareholder of Klesic Associates, Inc. (Department's Motion, para. 3; Response, para. 3.)

The Department asserts that Mr. Klesic may not represent Klesic Enterprises either in his capacity as a limited partner of Klesic Enterprises or as a shareholder of the general partner, Klesic Associates, Inc. The Department argues that only a general partner may act on behalf of a limited partnership, and where the general partner is a corporation, as it is here, it may only act through legal counsel. In his response, Mr. Klesic asserts that he is the "Managing Partner" of Klesic Enterprises, and he appears to rely on this title as conveying to him the authority to act on behalf of the partnership. (Response, para. 3.) In reply, the Department argues that the term "Managing Partner" has no legal significance and conveys no authority to Mr. Klesic to represent the partnership in a legal capacity.

We agree that Mr. Klesic may not represent Klesic Enterprises in this appeal.[3] As a limited partner, Mr. Klesic does not have the authority to represent the partnership in a legal

[2] We note that the Board has previously dismissed an appeal by UEG for failure to comply with 25 Pa. Code § 1021.21(b). *See Klesic v. DEP*, EHB Docket No. 2015-150-M (Consolidated with 2015-169-M), Orders issued on December 7, 2015 and December 30, 2015. There is no question that UEG is familiar with the requirement that corporate appellants must be represented by an attorney.

[3] If Mr. Klesic were the general partner of Klesic Enterprises, he could represent Klesic Enterprises to defend his personal interest as the general partner under the Board's Rules. *See* 25 Pa. Code § 1021.21; *In re Lawrence County Tax Claim Bureau*, 998 A.2d 675, 679-80 (Pa. Cmwlth. 2010) (A general partner or a limited partner who has become subject to the liability of a general partner may proceed *pro se* or on

proceeding. *See In re Lawrence County Tax Claim Bureau*, 998 A.2d 675, 680, n. 9 (Pa. Cmwlth. 2009), cited in *David R. Nicholson*, 163 A.3d at 1054, holding that a limited partner of a Pennsylvania partnership may not represent the partnership either *pro se* or in the partnership's name because the limited partner does not share the partnership's liabilities. Thus, even if Mr. Klesic is the "Managing Partner" of Klesic Enterprises, under the legal structure of the partnership, as a limited partner he may not legally act on its behalf. Nor may the general partner, Klesic Associates, Inc. represent the partnership without counsel since, as an incorporated entity, it is subject to the same requirements as UEG.

As the Department correctly points out, as a limited partner Mr. Klesic has no personal liability for the debts of the partnership. 15 Pa. C.S. § 8633. Additionally, as a shareholder of the partnership's general partner, Klesic Associates, Inc., he has no personal liability for the debts of either the corporation or the partnership. As the court held in *Walacavage*, when one "accepts the advantages of incorporation for his or her business, [one] must also bear the burdens, including the need to hire counsel to sue or defend in court." *Walacavage*, 480 A.2d at 284. The same holds true for a limited partnership. As a limited partner one avoids personal liability for the debts of the partnership, but also bears the burden of a more limited role in acting on behalf of the partnership. A limited partnership has been described as "a 'quasicorporate entity' that can act only through a statutorily designated representative, *the general partner*." 59A Am Jur 2d *Partnership* § 782, quoted in *Lawrence County*, 998 A.2d at 679. Where the general partner is a corporation, it must be represented by legal counsel, as required by 25 Pa. Code § 1021.21(b).

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behalf of a partnership and may proceed or defend actions arising from the partnership's activities). Mr. Klesic is, however, not the general partner of Klesic Enterprises, L.P, and he has not alleged that he has become subject to the liability of a general partner.

As with UEG, Klesic Enterprises has had ample opportunity to retain legal counsel, and its response to the Department's motion gives no indication that it intends to do so. Therefore, we find that its appeal should be dismissed for failure to comply with 25 Pa. Code § 1021.21.

Stephen W. Klesic

The Department argues that not only is Mr. Klesic prohibited from bringing this appeal as a representative of UEG or Klesic Enterprises, but he lacks standing to pursue the appeal in his individual capacity because the Access Order was not issued to him individually. The Access Order names only UEG and Klesic Enterprises as the entities to whom it is directed. It is the Department's position that Mr. Klesic's status as president and shareholder of UEG and limited partner of Klesic Enterprises does not confer standing upon him to challenge the order as an individual. [4]

A person has standing if he or she has a substantial, direct, and immediate interest in the outcome of the appeal. *Funk v. Wolf*, 144 A.3d 228, 243 (Pa. Cmwlth. 2016); *Lawson v. DEP*, 2017 EHB 1040-41, citing *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009). A party's interest is "substantial" if it surpasses the common interest of all citizens in seeking compliance with the law. *Funk, supra* at 244; *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). A party's interest is "direct" if there is a causal connection between the matter complained of and the harm alleged. *Funk, supra* at 244, citing *Fumo, supra* at 496. A party's interest is "immediate" if the causal connection is not remote or speculative. *Id.*

The Department asserts that Mr. Klesic cannot demonstrate that he has suffered any harm as an individual separate and distinct from that of UEG and Klesic Enterprises. As further

[4] The Department points out that Mr. Klesic did not sign the cover letter accompanying the appeal in his individual capacity, but as "President/Owner of United Environmental Group, Inc." and "Managing Partner, Klesic Enterprises, L.P." However, on the appeal form itself, in paragraph 1 Mr. Klesic lists himself individually as one of the appellants.

support for its argument, the Department asks the Board to take judicial notice of two civil cases filed by UEG and Mr. Klesic in the Allegheny County Court of Common Pleas. In each case, the court ruled that Mr. Klesic lacked standing to pursue an action in his own personal capacity based on his role as an officer and shareholder of UEG.[5] The Department argues that allowing an officer or shareholder of a corporation, or of the corporate general partner of a limited partnership, to appeal the Department's actions against the corporation or limited partnership in his own name circumvents both Pennsylvania law and the Board's rules.

We agree that Mr. Klesic has no standing to pursue this action in his individual capacity. As we have already discussed, his role as owner, president and shareholder of UEG and limited partner of Klesic Enterprises does not convey upon him the legal right to challenge orders directed to those entities. Further, since the order was not directed to Mr. Klesic, he has no standing to challenge it in his own name.

Mr. Klesic makes the following argument: "Considering that the Order was sent in care of Mr. Klesic and since neither UEG or Klesic Enterprises have the ability to read or respond without input from Mr. Klesic it is certainly implied that this was being sent to Mr. Klesic for a response." (Response, p. 3.) A review of the Access Order shows that it was issued solely to UEG and Klesic Enterprises. The cover letter to the Order states the mailing address as follows:

[5] The two cases are cited in the Department's Memorandum of Law filed in support of its Motion to Dismiss: *United Environmental Group, Inc. v. Fleming*, Allegheny County Court of Common Pleas, Docket No. GD 11-010198, July 9, 2015 Opinion and Order (appeal dismissed, Superior Court Docket No. 83 WDM 2015, November 17, 2015 Order); and *United Environmental Group, Inc. v. Underground Storage Tank Indemnification Board*, Allegheny County Court of Common Pleas, Docket No. GD 09-008486, June 10, 2014 Order (appeal dismissed, Superior Court Docket No. 1283 WDA 2014, November 10, 2014 Order, petition for allowance of appeal denied, Supreme Court Docket No. 535 WAL 2014, March 4, 2015 Order, reconsideration denied, April 14, 2015). The Department also refers us to Exhibits A and B to its Post-Hearing Brief at EHB Docket No. 2015-150-M (consolidated with 2015-169-M) for excerpts from the orders and docket sheets of the Common Pleas Court cases.

United Environmental Group, Inc. and Klesic Enterprises, LP
c/o Stephen Klesic
241 McAleer Road
Sewickley, PA 15143

(Exhibit J to Notice of Appeal.) Simply because the Order was mailed to UEG and Klesic Enterprises in care of Mr. Klesic bestows upon him no legal standing to challenge the Order.

Mr. Klesic also argues that "the Courts allow an officer or partner to represent the Corporation in litigation providing that the monetary damages are less than $12,000." (Response, p. 3.) Mr. Klesic provides no citation for this assertion, but we agree with the Department that he is likely referring to magisterial district courts whose jurisdiction includes civil claims not exceeding $12,000 in certain classes of actions. 42 Pa. C.S. § 1515(a)(3). In magisterial district court proceedings, partnerships may be represented by "a partner, or by an employee or authorized agent of the partnership," and corporations may be represented by an officer of the corporation or "an employee or authorized agent of the corporation." 246 Pa. Code § 207(A)(2) and (3). These rules have no application in a proceeding before the Environmental Hearing Board. Our Rules of Practice and Procedure, codified at Chapter 1021 of 25 Pa. Code, require corporations, and limited partnerships with a corporate general partner, to be represented by an attorney.

Even when we view the facts in the light most favorable to Mr. Klesic, as we are required to do when evaluating a motion to dismiss, *Teska, supra*, we do not find that Mr. Klesic has standing in this matter as an individual. The Access Order does not impact Mr. Klesic personally. It does not direct him to take any action. Even if we accept his claim that he is the owner, president and sole shareholder of UEG and the "Managing Partner" of Klesic Enterprises, those roles convey no status that provides him with standing to participate in this appeal. As we have stated previously, he has structured UEG and Klesic Enterprises so as to benefit from the

protection from personal liability that a corporation or limited partnership provide, and, as such, he is bound by the legal requirements surrounding those entities. The use of these business forms confers certain benefits, but they also impose burdens as previously discussed. Mr. Klesic benefits from the protection of personal liability, but his role as corporate shareholder or limited partner does not, by itself, convey him with standing to challenge an order directed to those entities. UEG, Klesic Enterprises, L.P. and Klesic Associates, Inc., have standing to appeal the Access Order before the Board to defend their interests, but they must be represented by counsel under the Board's Rules and the facts of this appeal. None of the entities are represented by counsel in this appeal despite ample time to secure representation.

Therefore, we issue the following order granting the Department's Motion to Dismiss.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNITED ENVIRONMENTAL GROUP, INC., KLESIC ENTERPRISES, L.P., AND STEPHEN W. KLESIC	:	
v.	:	**EHB Docket No. 2018-115-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 7th day of March, 2019, it is hereby ordered that the Motion to Dismiss is **granted.** The appeal docketed at EHB Docket No. 2018-115-M is marked *closed and discontinued.*

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

Judge Steven C. Beckman is recused and did not participate in this decision.

DATED: March 7, 2019

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

For the Commonwealth of PA, DEP:
John H. Herman, Esquire
Marianne Mulroy, Esquire
(via electronic filing system)

For Appellants, *Pro Se*:
United Environmental Group, Inc.
Klesic Enterprises, L.P.
Stephen W. Klesic
241 McAleer Road
Sewickely, PA 15143

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RAUSCH CREEK LAND, LP	:	
	:	
v.	:	**EHB Docket No. 2017-070-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PORTER ASSOCIATES, INC., Permittee	:	**Issued: March 18, 2019**

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

By Bernard A. Labuskes, Jr., Judge

Synopsis

Following the Board's suspension and remand of a mining permit in an Adjudication in 2013, the Department renewed the permit, but for reclamation only. In this Adjudication, the Board sustains an appeal of the landowner from the renewal of the permit for reclamation only. The Board finds that the Department acted unlawfully in renewing the permit because, among other things, the operator did not have a valid existing permit in place capable of being renewed.

FINDINGS OF FACT

The parties submitted and the Board approved a joint stipulation. Rausch Creek has not proposed any additional findings of fact in its post-hearing brief.

Stipulated Facts

1. Rausch Creek Land, L.P. ("Rausch Creek") is a Pennsylvania Limited Partnership with a business address of 978 Gap Street, Valley View, PA 17983. (Joint Stipulation No. ("Stip.") 1.)

2. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1 – 1396.19b; The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001; the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, *as amended*, 52 P.S. §§ 30.51 – 30.66; 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 adopted thereunder. (Stip. 2.)

3. Porter Associates, Inc. ("Porter"), the Permittee, is a Pennsylvania corporation with a business address of P.O. Box 478, Wilkes-Barre, PA 18703-0478. (Stip. 3.) (Porter has not participated in this appeal.)

4. The subject of the instant appeal is Surface Mining Permit No. 54890105R5, identified as a renewed/reissued mining permit for reclamation activities only, dated July 17, 2017, issued to Porter for what is referred to as the Porter stripping operation. (Stip. 4; Rausch Creek Exhibit No. ("RCL Ex.") 1.)

5. Rausch Creek filed a previous appeal, docketed at EHB Docket No. 2011-137-L, the subject of which was the Department's renewal of Porter's Surface Mining Permit No. 54890105R4. That permit was dated August 12, 2011. (Stip. 5.)

6. The Environmental Hearing Board issued an Adjudication dated October 11, 2013, as a result of a hearing on the merits in the appeal docketed at EHB Docket No. 2011-137-L, which suspended and remanded Permit No. 54890105R4. (Stip. 6; *Rausch Creek Land, L.P. v. DEP*, 2013 EHB 587.)

7. The October 11, 2013 Adjudication was not a final adjudication for purposes of appeal to the Commonwealth Court. (Stip. 7.)

8. The October 11, 2013 Adjudication addressed the final reclamation grades incorporated into Permit No. 54890105R4, which have been referred to as "the 2011 reclamation grades." (Stip. 8.)

9. As part of the appeal docketed at EHB Docket No. 2011-137-L, Rausch Creek asserted that the reclamation grades established in Porter's 2002 permit renewal should have been utilized rather than the 2011 reclamation grades. (Stip. 9; *Rausch Creek Land, L.P. v. DEP*, 2013 EHB 587.)

10. The July 17, 2017 permit, which is the subject of this appeal, incorporates the 2011 reclamation grades. (Stip. 10.)

11. Rausch Creek raised the issue of the inclusion of the 2011 reclamation grades in the 2017 permit as part of the instant appeal. (Stip. 11.)

12. The Department and Rausch Creek stipulated and agreed that the Board had previously heard testimony and decided the issue of what constitutes approximate original contour (AOC) and thus acceptable final reclamation grades as part of the Adjudication issued in the appeal docketed at EHB Docket No. 2011-137-L. (Stip. 12.)

13. The Department and Rausch Creek stipulated that either party may raise issues addressed in the October 11, 2013 Adjudication as part of any appeal to the Commonwealth Court from a final adjudication in the instant appeal. (Stip. 13.)

14. On November 11, 2016, the Department issued an inspection report in conjunction with Compliance Order 16-5-050-S. The inspection report and the compliance order referenced twelve significant deficiencies that Porter was to address as part of its permit renewal

application, deficiencies which had been identified in a technical review letter dated May 23, 2016 and which were to have been responded to and addressed by Porter by June 23, 2016. The compliance order required action by December 17, 2016. (Stip. 23; RCL Ex. 3, 6, 7.)

15. By letter dated December 7, 2016, Porter's attorney at the time issued a letter to the Department, which stated in relevant part that "Porter Associates indicated to you that it was unable to continue any reclamation at the site due to financial constraints…[,]" that "Porter Associates further indicated to you that you could seek forfeiture of the bonds posted pursuant to the requirements of this Surface Mining Permit….[,]" and that "Porter intends to cooperate with the Department in any way necessary to conclude this matter, including, but not limited to, waiving any right to appeal the forfeiture of the bonds." (Stip. 25; RCL Ex. 4.)

16. The Department issued an inspection report dated December 20, 2016, and issued Failure to Comply Compliance Order 16-5-058-S dated December 21, 2016. The inspection report and the compliance order indicated that Porter had submitted a response to the previously issued compliance order but had failed to address the twelve significant deficiencies identified in the prior inspection report and compliance order. (Stip. 24; RCL Ex. 8, 9.)

17. On February 6, 2017, the Department issued a letter to Porter that served as Permit Suspension Notice No. 17-5-003-S, Notice of Intent to Suspend Mining License, Notice of Intent to Forfeit Bonds, and Notice of Violation based on the two outstanding compliance orders, 16-5-050-S and 16-5-058-S. (Stip. 21; RCL Ex. 5.)

18. The Department's February 6, 2017 letter to Porter served as notice that the permit had been suspended and that the Department intended to suspend Porter's mining license and forfeit the reclamation bond because Porter allowed the violations cited in Compliance Orders 16-5-050-S and 16-5-058-S to remain unabated. (Stip. 22; RCL Ex. 5.)

19. The Department forfeited the bond for Porter's surface mining operation by letter dated April 17, 2017. (Stip. 18; RCL Ex. 2.)

20. The bond forfeiture referenced generally violations of the law, including:

a. Failure to comply with orders of the Department;
b. Failure to submit required information to address deficiencies listed in the Department's May 23, 2016 letter;
c. Failure to maintain valid liability insurance;
d. Failure to complete reclamation activities on operations that are permanently ceased; and
e. Failure to maintain a valid mining license.

(Stip. 19; RCL Ex. 2.)

21. Porter did not appeal the bond forfeiture. (Stip. 20.)

22. On May 30, 2017, the Department issued a letter returning Porter's pending permit application as incomplete, indicating that Porter had failed to provide the updated calculations for the bond liability associated with the permit, and had failed to submit the information requested in the Department's May 23, 2016 technical deficiency letter and the December 20, 2016 pre-denial letter. (Stip. 17; RCL Ex. 10.)

23. On July 17, 2017, the Department issued Permit No. 54890105R5 to Porter. (Stip. 14; RCL Ex. 1.)

24. Upon issuance of the 2017 permit, the Department's District Mining Manager, Michael Menghini, attached a cover letter, which stated in part that "[t]his approval only authorizes reclamation activities on areas previously affected and bonded by Porter as delineated on the Exhibit 9: Module 9 Operations Map dated June 30, 2010." (Stip. 14, 15; RCL Ex. 1.)

25. The July 17, 2017 cover letter also stated that "Porter is not authorized to affect any new areas within the Primrose Pit." (Stip. 16; RCL Ex. 1.)

26. The Department reissued/renewed the permit for the Porter stripping operation after forfeiting the reclamation bond and returning the permit application as incomplete. (Stip. 26.)

Additional Findings

27. On May 11, 2012, Porter submitted a minor surface mining permit correction application to the Department for the purpose of revising and upgrading the erosion and sedimentation (E&S) pollution controls at the Porter stripping operation, which sought to address concerns raised during the 2011 appeal regarding the need for an updated E&S control plan. (Notes of Transcript page ("T.") 86-88; Commonwealth Exhibit No. ("C. Ex.") 1.)

28. The Department ultimately approved the changes to Porter's E&S control plan and incorporated its approval in the 2017 permit. (T. 88-96, 154, 156-59; RCL Ex. 1.)

29. Porter submitted a permit renewal application on June 17, 2015. (T. 11; RCL Ex. 1.)

30. The Department responded with a technical deficiency letter, inspection reports, two compliance orders, and a predenial letter, all insisting that Porter needed to submit additional information before the Department could review Porter's application on the merits, but Porter failed to fully respond. (Stip. 17, 23, 24; T. 18-24, 52-55, 94; RCL Ex. 3, 6, 7, 8, 9, 10, 15.)

DISCUSSION

Rausch Creek bears the burden of proof in this appeal of the Department's renewal of a permit. 25 Pa. Code § 1021.122(c)(2). To prevail, Rausch Creek must show by a preponderance of the evidence that the Department acted unlawfully or unreasonably or that its action is not supported by the facts. *Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot.*, 131 A.3d 578,

587 (Pa. Cmwlth. 2016); *Logan v. DEP*, 2018 EHB 71, 90; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156. Rausch Creek has satisfied its burden in this case.

For a detailed description of the complex history of this matter the reader is referred to our Adjudication in *Rausch Creek Land, L.P. v. DEP*, 2013 EHB 587. By way of summary, Porter first began ash disposal activities at the Porter stripping operation in Porter Township, Schuylkill County in 1991. Its permit was renewed several times since then, including in 2002, 2006, and 2011. Rausch Creek, the owner of the site, was dissatisfied with the final reclamation grades that the Department approved in Porter's 2011 renewal. The final grades describe the top of the ash disposed at the site. Those grades as a general rule must reflect the approximate original contour of the site before it was mined (AOC). 25 Pa. Code §§ 87.1 and 88.1. Rausch Creek said the approved grades were too high and did not blend in well with the original contours. It appealed the renewed permit to this Board for that and a few other reasons.

In our 2013 Adjudication, we suspended and remanded Porter's permit for four reasons: (1) there was a property dispute regarding Porter's legal right to conduct ash disposal on a portion of the site known as the Primrose Pit; (2) the Department approved a reclamation plan that did not account for the fact that the site in its current condition deviated substantially from AOC even as defined by the Department due to overfilling of coal ash; (3) the site did not have adequate erosion and sedimentation (E&S) controls; and (4) the permit did not account for the discharge of pit water from the Primrose Pit.

Initially there were signs after our remand that Porter intended to continue ash disposal at the site. Among other things, it continued litigation in the Court of Common Pleas regarding its right to engage in activity in the Primrose Pit section of the site, and it submitted plans for revised E&S controls. The Department repeatedly requested in letters and then demanded in

orders that Porter submit more information in order for Porter to be allowed to resume ash disposal. For example, the Department requested updated information regarding cross-sections to show the current grades at the site and calculations of the available onsite spoil material. Porter never submitted complete information, and it ultimately abandoned the site. The Department (somewhat redundantly) suspended Porter's already suspended permit (RCL Ex. 5), and ultimately forfeited Porter's bonds.

The Department then renewed Porter's permit. While the 2011 permit at issue in our 2013 Adjudication was No. 54890105R4, the newly renewed permit was assigned No. 54890105R5. Note the change from R4 to R5. The "R" designates a renewal. (A letter "C" designates a correction.) The R5 permit is for reclamation activities only. Additional ash disposal is expressly forbidden.

Rausch Creek filed this appeal from the R5 permit. It has two main objections. First, the R5 permit simply reincorporates final reclamation grades from the R4 permit that Rausch Creek continues to find objectionable. Even though we held in our 2013 Adjudication that those grades would almost certainly need to be revised to address the overfilling at the site, Rausch Creek filed this appeal in order to preserve its challenge to the grades for purposes of an appeal to the Commonwealth Court.[1] The parties agreed, as do we, that there was no need to relitigate whether the Department's approved grades in the R4 (and now R5) permit represent AOC. The issue has been adequately preserved for Commonwealth Court review.

Second, Rausch Creek argues that the Department acted unlawfully by issuing *any* renewed permit to Porter on remand. It says the requirements of 25 Pa. Code § 86.55, which describe the permit renewal process, have not been complied with. It says the Department is

[1] The Court *sua sponte* quashed Rausch Creek's attempt to appeal our 2013 Adjudication because we remanded the permit for the exercise of further discretion by the Department. Cmwlth. Ct. No. 2015 C.D. 2013 (Order issued Nov. 26, 2013).

prohibited from renewing the permit of a forfeited operator that has no complete application pending, no mining license, no insurance, and multiple outstanding violations. The Department responds that our 2013 Adjudication required it to renew the permit, and that none of the regulatory requirements and prohibitions cited by Rausch Creek apply to reclamation-only permit renewals.

We find ourselves in agreement with Rausch Creek first and foremost because, at the most basic level, in order to renew a permit there must be a valid existing permit in place. *See* 25 Pa. Code § 86.55. Porter did not have a valid existing permit in place when the Department issued its renewal. Rather, Porter's permit was suspended and had considerable deficiencies that needed to be corrected as described in our Adjudication. The permit needed to be corrected before it could be renewed. The Department erred by simply renewing a suspended permit.

Beyond that basic problem, the Department simply had no authority to renew Porter's permit. The regulation codified at 25 Pa. Code § 86.55 sets forth the general requirements for a mining permit renewal. The regulation specifies that a permit cannot be renewed if the Department finds one of the following:

> (1) The terms and conditions of the existing permit are not being satisfactorily met.
>
> (2) The present mining activities are not in compliance with the environmental protection standards of the Department.
>
> (3) The requested renewal substantially jeopardizes the operator's continuing ability to comply with the acts, this title and the regulatory program on existing permit areas.
>
> (4) The operator has failed to provide evidence that a bond required to be in effect for the activities will continue in full force and effect for the proposed period of renewal, as well as an additional bond the Department might require.
>
> (5) Revised or updated information required by the Department has not been provided by the applicant.

> (6) The permittee has failed to provide evidence of having liability insurance as required by § 86.168 (relating to terms and conditions for liability insurance).

25 Pa. Code § 86.55(g). Along the same lines, Section 3.1(d) of the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.3a(d), provides that the Department shall not renew a mining permit if it finds that the permittee continues to fail to comply with the law or has shown a lack of ability or intention to comply.

There is no dispute that any one of these statutory and regulatory prohibitions would ordinarily preclude the Department from renewing Porter's permit. Porter is not meeting the terms and conditions of its existing permit. As discussed in our Adjudication, the site is not in compliance with environmental protection standards. Its bonds are forfeit and it has no liability insurance, and the updated information requested by the Department and required by our Adjudication has not been supplied. Porter in a letter to the Department has unequivocally acknowledged that it has no intention to reclaim the site or otherwise comply with the law. (RCL Ex. 4.) It certainly seems odd that Porter said it is unwilling and unable to comply with the law, yet the Department issued a permit to it anyway.

The Department takes the position that none of these statutory and regulatory prohibitions on the renewal of a permit apply because it is a reclamation-only permit. The Department's first reason for disregarding the prohibitions and requirements is that it says our Adjudication required it to renew the permit. This is entirely incorrect. Our Adjudication did not require, authorize, or even anticipate a permit renewal. Our Adjudication did not identify any particular procedures that needed to be followed on remand, although a permit correction would seem to have been the obvious choice. It did not excuse compliance with any regulatory requirements or limitations related to renewals. Our Adjudication found four specific substantive problems with

the R4 permit. We did not revoke or rescind that permit; we suspended it with instructions to address those problems in the R4 permit, not issue a new, renewed permit.

In fact, not only did our Adjudication neither authorize nor require a renewal, but the Department has failed to comply with our remand order. A key concern in our Adjudication was the fact that the site had been allowed to be substantially overfilled by Porter:

> [I]n the final analysis, we cannot disagree that reclaiming the site to the final grades contained in the 2011 renewal would meet the AOC requirement, regardless of the tortuous path that got us to where we are today.
>
> That said, it is also universally agreed among the experts in this case that the site at the time of permit renewal does not reflect AOC, which is to say it does not conform to the final contours that were reviewed and approved in the 2011 permit renewal. Put simply, the top of the fill at its northern perimeter, and to some extent at the western perimeter of the fill, extends out too far. Instead of a triangle that blends into the hillside, picture a rectangle that protrudes above the natural contour of the hillside. As a result, the northern end of the fill is too high. This in turn creates a very steep drop-off. It is cliff-like in some places. It is unsafe, environmentally unsound, and aesthetically unacceptable. The deviation is substantial and may involve tens of thousands of cubic yards of fill. As Schmidt accurately testified, the activity at the site represents building a pile or mountain in contrast to reclaiming an abandoned pit to AOC.
>
> The regulations at 25 Pa. Code § 86.55(g) prohibit the Department from renewing a permit if the terms of the existing permit are not being satisfactorily met, the present mining activities are not in compliance with the environmental protection standards of the Department, or the renewal substantially jeopardizes the operator's continuing ability to comply with the law on the existing permit. The Department's renewal was designed to bring the site into compliance after the fact, but it was not successful in even doing that because Porter had already deviated from the newly approved grades. It would also seem that the Department should not renew a permit that immediately puts the operator in violation of the permit as renewed.
>
> Porter and the Department argue that it was not an error for the Department to renew the permit with the site in a state that significantly exceeds AOC, even as defined in the renewed permit, because Porter can simply remove the overfill at the northern end of the site as part of the reclamation, which is still underway. There are several problems with this argument. First, the permit expressly authorized Porter to continue to accept ash at the site notwithstanding the substantial overfill problem. Second, proper reclamation does not entail overfilling portions of a site and then redistributing substantial volumes of

> compacted ash from overfilled areas. What may be acceptable redistribution of backfill at a traditional mining operation is not necessarily acceptable at an ash reclamation site. Deviations from final grades within a narrow range are common and acceptable, *Clancy v.* DEP, EHB Docket No. 2011-110-R slip op. at 27-28 (Adjudication, Oct. 11, 2013), but the deviations at the Porter Stripping fall well outside that narrow range. Ash placement above what is necessary to attain reclamation arguably no longer constitutes beneficial use. *See*, 25 Pa. Code § 290.104.
>
> It is not clear how the Department expects that the final contours it approved can be attained. There is no room at the bottom of the slope because the ash extends right up to the haul road, which constitutes the permit boundary. The Department says that some ash might be able to be moved to the west, but the limit of the approved ash disposal appears to have been reached at that edge as well. The southern end of the fill already meets AOC and blends in well. It is not clear to what extent dried out, commingled, and compacted ash can be moved and still satisfy the criteria that allowed it to be used on the site in the first place. 25 Pa. Code §§ 290.101 and 290.104. The Department assumed that the fill could simply be moved to the Primrose Pit (S.T. 541), but that is not a forgone conclusion as discussed above. Finally, neither the site in its condition at the time of renewal (or now) nor the approved final grades make any accommodation for erosion and sedimentation control on the northern side of the fill. The final grades as described in the permit may satisfy AOC, but they do not allow for any E&S control in the area of the site that, now due its steepness, is most prone to accelerated erosion. E&S control must be added, and this will involve at least some change in the grades, as the Department has acknowledged. (S.T. 287.) The permit must be suspended and remanded to the Department so that these issues can be resolved. The Department will also need to determine on remand whether any modifications in the approved reclamation plan that prove to be necessary require a change in the bond.

2013 EHB at 607-09. In suspending and remanding the permit, we concluded that Porter's existing permit needed more attention. *Id.* at 612.[2] The Department failed to address our requirement for revised, updated consideration of how the site could possibly be reclaimed in accordance with the law and instead simply incorporated the previous reclamation plan from the suspended R4 permit into the R5 permit. It is thus, perhaps, ironic that the Department now argues that it was simply following the Board's Order.

[2] The 2017 (R5) permit expressly prohibits any mining in the Primrose Pit, so Rausch Creek concedes those issues are moot. The permit contains a revised E&S Plan, but Rausch Creek has not presented any evidence or argument that the plan is inadequate.

The Department's second reason for disregarding the statutory and regulatory prohibitions against renewing a recalcitrant permittee's permit is that none of those prohibitions or requirements apply if the Department is merely renewing the permit for reclamation-only. The Department has not referred us to any general exception in the law for reclamation-only renewals because there is no such exception. Its best authority is 25 Pa. Code § 86.55(i), which reads as follows:

> If coal extraction, coal preparation and coal refuse disposal will not be conducted, and treatment facilities are not required after the permit expiration date, and if the remaining surface mining activities will consist solely of reclamation, including topsoil replacement and revegetation, the permittee may provide written notice to the Department of the reclamation in lieu of submitting a complete application for renewal and providing the public notice as required by this section. In these circumstances, the Department may renew the permit conditioned upon only reclamation activities occurring and no further coal extraction, coal preparation and coal refuse disposal occurring.

25 Pa. Code § 86.55(i).[3] As noted above, this provision only makes sense if there is a valid existing permit in place. The underlying requirements for a permit have already been satisfied. Unlike here, there is an adequate reclamation plan already in place, so a limited application requirement is appropriate. We do not believe this provision was intended to trump everything else in Section 86.55 regarding the requirements for a renewal. Subsection (i) envisions a situation where an otherwise compliant operator proposes to conduct reclamation only. Such operators need not submit a full-blown renewal application. There is nothing inconsistent between the reduced application requirements in Subsection (i) and the requirements in the other

[3] The Department believes we should defer to its interpretation of Section 86.55(i) as regulatory support for its decision to renew a permit for a site where the Department has already forfeited the reclamation bonds. The Board disagrees because courts need not give deference to an agency's interpretation where its construction of a regulation is contrary to its plain meaning or where the agency ignores the language of its own regulations. *Tri-State Transfer Co. v. Dep't of Envtl. Prot.*, 722 A.2d 1129, 1133 (Pa. Cmwlth. 1999). There is no evidence in the record to suggest that Porter attempted to rely upon this provision by providing the required written notice, and the Department interpretation ignores the conflict with Section 86.55(g)(2) that prohibits the renewal of a permit where the mining activities are not in compliance. The Department's interpretation is not entitled to deference.

portions of the regulation that, *inter alia*, require that an operator be in good standing for its permit to be renewed. In short, we find no basis in the law for the Department's proposed exception for reclamation-only renewals.

The Department argues that it had no choice but to issue a renewed permit so that the reclamation plan for the site was memorialized *somewhere*. The simple answer that comes to mind is that a permit correction of the R4 consistent with our Adjudication should have sufficed. Indeed, the Department took that approach with respect to the E&S problem at the site. (C. Ex. 1.) We cannot help noticing that issuing the R5 renewal had the effect of skirting the requirement in our remand order that the site be reevaluated based on the overfilling of the pit with ash. In any event, the Department cannot simply ignore the law in order to achieve a desired result.

The Department understands that there is almost zero chance of Porter reclaiming the site, but it says there must be a renewed permit in place for use by a third party. Again, this explanation does not explain the renewal versus the correction. Further, if a third party is commissioned to reclaim the site, the Department would have broad discretion to deviate from grades in the permit anyway in any deal with a contractor under certain circumstances, such as a finding that completing the reclamation plan in the permit would be unreasonable, unnecessary, or physically impossible. 25 Pa. Code § 86.187(b) and (c).

To the extent the Department renewed the permit because of a concern that the R4 permit was set to expire, we are not convinced that a permit under a Board ordered suspension could expire in the normal course, but even if time was an issue, it does not explain the choice to renew rather than correct. It does not explain the choice between permit expiration (if that is possible for a suspended permit) and renewal. Most importantly, it cannot justify ignoring the law that

says recalcitrant operators with an announced intention to disobey the law should not have their permits renewed. Assuming *arguendo* that the Department acted lawfully, we cannot see how issuing a permit to Porter under the facts of this case can be considered a reasonable exercise of its discretion.

Finally, to Rausch Creek's point that the Department could not have issued a reasoned permit renewal due to the lack of information to support a renewal, we agree. The Department asked Porter repeatedly to submit updated information in support of its application, but Porter never fully complied. The Department's explanation that such information was only needed if there would be additional ash disposal is not credible in light of our Adjudication holding that the reclamation plan needed to be updated. For example, the Department asked for cross-sections through the ash placement areas, and even more to point, "volume calculations for the amount of ash that has been placed above the final grade in the Main Pit area." (RCL Ex. 3.) That information was not provided. We do not understand how the Department could have competently evaluated the overfilling issue without some understanding of the extent of that overfilling.

Accordingly, Permit No. 54890105R5 must be rescinded. Permit No. 54890105R4 remains in place, albeit in suspended status.[4]

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 7514; 52 P.S. § 1396.4(c).

[4] Rausch Creek's suggestion that the reclamation grades set forth in Porter's **2006** permit sprang back to life as a result of our 2013 remand is fanciful. Our Adjudication merely suspended the 2011 permit, and that permit remains in effect, although suspended in its entirety.

2. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *New Hope Crushed Stone & Lime Co. v. DEP*, 2017 EHB 1005, 1020-21 n.1, *aff'd,* No. 1373 C.D. 2017 (Pa. Cmwlth. Jul. 18, 2018); *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

3. As a third party appealing Porter's permit, Rausch Creek bears the burden of proof in this appeal. 25 Pa. Code § 1021.122(c)(2).

4. Rausch Creek must demonstrate by a preponderance of the evidence that the Department acted unlawfully, unreasonably, or that its action is not supported by the facts. *Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot.*, 131 A.3d 578, 587 (Pa. Cmwlth. 2016); *Logan v. DEP*, 2018 EHB 71, 90; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156.

5. Rausch Creek has adequately preserved its objections to the final reclamation grades set forth in Porter's 2011 permit, although the Department has a continuing, unsatisfied obligation to reconsider those grades in light of current conditions.

6. The Department erred by renewing a Board ordered suspended permit without first taking some action to address the suspension, such as issuing a permit correction.

7. 25 Pa. Code § 86.55(i) applies to reclamation-only permit renewals.

8. The Department cannot lawfully renew the permit of a permittee that has unequivocally stated that it is unable and unwilling to comply with the law. 52 P.S. § 1396.3a(d); 25 Pa. Code § 86.55(g).

9. Rausch Creek met its burden of proving that the Department's renewal of Porter's permit was unlawful and unreasonable.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RAUSCH CREEK LAND, LP	:	
	:	
v.	:	**EHB Docket No. 2017-070-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PORTER ASSOCIATES, INC., Permittee	:	

O R D E R

AND NOW, this 18th day of March, 2019, it is hereby ordered that this appeal is **sustained**. Porter Associates' Permit No. 54890105R5 is rescinded. Permit No. 54890105R4 remains in force, albeit suspended.

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 18, 2019

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

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Angela S. Bransteitter, Esquire
(*via electronic filing system*)

For Appellant:
Charles B. Haws, Esquire
(*via electronic filing system*)

For Permittee:
Porter Associates, Inc.
350 Laird Street
Wilkes-Barre, PA 18702

UNITED ENVIRONMENTAL GROUP, INC., KLESIC ENTERPRISES, L.P., AND STEPHEN W. KLESIC	:	
v.	:	**EHB Docket No. 2018-115-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 27, 2019**

OPINION AND ORDER ON
MOTION FOR RECONSIDERATION

By Richard P. Mather, Sr., Judge

Synopsis

The Board denies a petition for reconsideration of our order dismissing the appeals of a corporation, limited partnership and individual where the petition is untimely filed and fails to demonstrate grounds for reconsideration as required by the Board's rules. The Appellants do not have a constitutional right to a hearing before the Board; their due process rights are protected by virtue of their right to appeal an adverse decision of the Department of Environmental Protection to the Board.

O P I N I O N

Introduction

This matter involves an appeal filed by United Environmental Group, Inc. (UEG); Klesic Enterprises, L.P. (Klesic Enterprises); and Stephen W. Klesic (Mr. Klesic) (collectively "the Appellants") from an Order of the Department of Environmental Protection (Department) directing UEG and Klesic Enterprises to grant access to a site in Sewickley, Allegheny County on which UEG operated a hazardous waste treatment, storage and disposal facility and a residual

waste processing and transfer facility. On March 7, 2019, the Environmental Hearing Board (Board) granted a motion to dismiss filed by the Department and dismissed the appeals for failure of UEG and Klesic Enterprises to obtain counsel, as required by the Board's rule at 25 Pa. Code § 1021.21(b), and for lack of standing on the part of Mr. Klesic. *See United Environmental Group, Inc. et al. v. DEP*, EHB Docket No. 2018-115-M (Opinion and Order on Motion to Dismiss issued March 7, 2019).

On March 20, 2019, the Appellants filed a "Request for Reconsideration," which we will treat as a petition for reconsideration. The Department filed a response in opposition on March 21, 2019.

DISCUSSION

A petition for reconsideration of a final order shall be filed within 10 days of the date of the order. 25 Pa. Code § 1021.152(a). Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons, which may include the following:

> (1) The final order rests on a legal ground or 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 reversal of the Board's decision.
> (iii) Could not have been presented earlier to the Board with the exercise of due diligence.

Id.; Becker v. DEP, 2018 EHB 316, 318.

Section 1021.152 establishes a high standard for reconsideration of final orders. *Lancaster Against Pipelines v. DEP*, EHB Docket No. 2016-075-L (Consolidated) (Opinion and Order on Petition for Reconsideration issued January 29, 2019); *Rural Area Concerned Citizens v. DEP*, 2013 EHB 374. The Appellants' petition falls far short of that standard. First, the Appellants' petition is untimely, as it was filed outside the requisite timeframe. A petition for

reconsideration must be filed within 10 days of the order for which it is seeking reconsideration. The Board's order was issued on March 7, 2019, and the Appellants' petition was filed on March 20, 2019. Taking into consideration that March 17, 2019, the 10th day following our order, was a Sunday, the Appellants' petition needed to be filed no later than the next business day, March 18, 2019. Although the certificate of service states that the "**Request for Reconsideration of the Board's Order to Dismiss dated March 7, 2019,** was sent to the EHB for posting on the EHB's E-File system for all parties to review. . .on this the 18th day of March, 2019," (Request for Reconsideration, page 6) (emphasis in original), the Request for Reconsideration was not *received* by, and therefore not *filed* with, the Board until two days later on March 20, 2019. For that reason alone, the petition may be denied. *Rozum v. DEP*, 2018 EHB 289, 292.

Moreover, even if the Appellants' petition had been timely, it does not present any grounds that justify a grant of reconsideration pursuant to 25 Pa. Code § 1021.152(a). The Appellants simply rehash many of the arguments made in their response to the Department's Motion to Dismiss. The petition sets forth no "compelling and persuasive" basis for reconsidering our earlier order; it does not assert that the Board's Opinion and Order rests on a legal ground or factual finding not proposed by any of the parties, or that the facts are inconsistent with the findings of the Board. Simply because we did not agree with the arguments presented by the Appellants in their response to the Department's motion does not provide a basis for reconsideration. *Mountain Watershed Association, Inc. v. DEP*, 2005 EHB 592, 594.

The Appellants argue that they have a constitutional right to be heard. However, a party has no constitutional right to a hearing before the Environmental Hearing Board; rather, as explained by our Commonwealth Court, a party's right to due process is protected by virtue of his or her right to *appeal* an adverse determination to the Board. *Fiore v. Department of*

Environmental Resources, 655 A.2d 1081, 1086 (Pa. Cmwlth. 1995) (citing *Morcoal Co. v. Department of Environmental Resources,* 459 A.2d 1303 (Pa. Cmwlth. 1983), and *Commonwealth v. Derry Township*, 314 A.2d 868 (Pa. Cmwlth. 1973), *modified in part,* 351 A.2d 606 (Pa. 1976), *overruled in part on other grounds, Chalkey v. Roush*, 805 A.491 (Pa. 2002)). If the appeal does not successfully survive a dispositive motion prior to reaching a hearing on the merits, there has been no violation of the appellant's right to due process. *Id.*; *Fiore v. DEP*, 1995 EHB 1298, 1304-06.

In summary, the Appellants have not provided the Board with any legitimate basis for granting their Request for Reconsideration. *Rural Area Concerned Citizens*, 2013 EHB at 377. Therefore, we deny the petition and enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNITED ENVIRONMENTAL GROUP, INC., KLESIC ENTERPRISES, L.P., AND STEPHEN W. KLESIC	:	
v.	:	**EHB Docket No. 2018-115-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 27th day of March, 2019, it is hereby ordered that the Request 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

Judge Steven C. Beckman is recused and did not participate in this decision.

DATED: March 27, 2019

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER	:	
v.	:	**EHB Docket No. 2018-020-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CONSTITUTION DRIVE PARTNERS, LP, Permittee	:	**Issued: April 26, 2019**

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

By the Environmental Hearing Board

Synopsis

The Board finds that the 2007 Amendment and the 2010 Amendment (collectively the "Amendments") to a prospective purchaser agreement entered into between the Department and a developer for the remediation and redevelopment of the Bishop Tube HSCA Site are arbitrary and capricious. The Amendments are considered settlements under Section 1113 of the Hazardous Sites Cleanup Act. Under Section 1113, the Department shall provide notice of any settlements when they are proposed, and the settlements are not final until the Department has provided public notice of the settlements and responded to any public comments. Although the Amendments were executed in 2007 and 2010, the Department did not publish notice as required by Section 1113 until 2017, and it did not issue its comment response finalizing the Amendments as settlements until 2018. Conditions at the Bishop Tube HSCA Site evolved during the intervening years and the Department's actions with regards to the Amendments failed to meet

the requirements of Section 1113 and failed to identify and account for the changed circumstances and conditions at the Site.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency of the Commonwealth of Pennsylvania vested with the duty and authority to administer and enforce the provisions of the Hazardous Sites Cleanup Act ("HSCA"), 35 P.S. §§ 6020.101 – 6020.1305, the Land Recycling and Remediation Standards Act ("Act 2"), 35 P.S. §§ 6026.101 – 6026.908, Section 1917-A of the Administrative Code, 71 P.S. § 510-17, and the rules and regulations duly promulgated thereunder. (Administrative Record Page No. ("AR") 0001.)

2. The site at issue in this appeal is known as the Bishop Tube HSCA Site ("Site"), which is located on Malin Road, south of U.S. Route 30, in Frazier, East Whiteland Township, Chester County. (AR 0002, 0117, 0119, 0485.)

3. The 13.7-acre Site is currently owned by Constitution Drive Partners L.P. ("Constitution Drive"), which purchased it from the Central and Western Chester County Industrial Development Authority in 2005 in order to redevelop the property. (AR 0002, 0117, 0485.)

4. Constitution Drive is a Pennsylvania Limited Partnership with a business address of 700 South Henderson Road, Suite 225, King of Prussia, Pennsylvania 19406. (AR 0002.)

5. The Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper, the appellants in this appeal (hereinafter collectively "the Riverkeeper"), make up an organization based in Bristol, Pennsylvania that has actively participated in the Department's oversight of the Bishop Tube Site. (AR 0157-0210.)

6. Beginning in the 1950s, the J. Bishop Company used the Site for manufacturing steel tubes. (AR 0486.)

7. The manufacturing and processing of metal alloy tubes and associated equipment continued at the Site until 1999 under the ownership of several companies, including successors to the J. Bishop Company. (AR 0486.)

8. A 2005 remedial action work plan developed for the Site and approved by the Department noted that manufacturing operations at the Bishop Tube facility included the cleaning, shaping, welding, degreasing, annealing, straightening, sandblasting, polishing, and painting of stainless steel and specialty metals into tubes and pipes and other various metal products. (AR 0024, 0120.)

9. The work plan found that the facility utilized a variety of raw materials and chemicals in the manufacturing process, including nitric acid, hydrofluoric acid, caustic materials, motor and gear oils, specialty drawing lubricants, degreasing solvents (primarily trichloroethene (TCE)), anhydrous ammonia, coolants, polishing compounds, and paints. (AR 0024.)

10. The Department has found that hazardous substances were employed in the manufacturing processes throughout the history of manufacturing at the Site, particularly TCE, which it says was utilized in two vapor degreasers, processed in onsite distillation units, and stored in an above-ground tank at the Site. (AR 0486.)

11. The Department has evidence that TCE was released into soil and groundwater as early as the mid-1960s. (AR 0487.)

12. In addition to TCE, monitoring wells at the Site have detected fluoride, chromium, and nickel in exceedance of Pennsylvania's residential medium specific concentrations. (AR 0487.)

13. Soil samples have also detected tetrachloroethene, 1,2-dichloroethene, and 1,1,1-trichloroethane. (AR 0488.)

14. The Department has described the Site as having "extremely high levels of contamination in the subsurface…." (AR 0478.)

15. The Department has determined that a large plume of contaminated groundwater now exists at the Site that originates from the property and extends off-site in a northern and eastern direction, as well as toward portions of Little Valley Creek, a designated exceptional value (EV) stream. (AR 0002, 0023, 0119.)

16. Constitution Drive did not cause the historic releases of hazardous substances or contaminants at the Site. (AR 0003.)

17. On March 17, 2005, the Department entered into a prospective purchaser agreement (the "2005 PPA") with Constitution Drive in the form of a consent order and agreement pursuant to various statutory authorities, including HSCA and Act 2, in connection with Constitution Drive's proposed acquisition and planned redevelopment of the Site. (AR 0120.)

18. The 2005 PPA contained the following provision at Paragraph 3 regarding the work to be performed by Constitution Drive:

> **Work To Be Performed:** In exchange for the benefits conferred by the Department to Developer [Constitution Drive] under this CO&A, and as compensation for response costs incurred and to be incurred by the Department in connection with the Site, Developer hereby agrees that, by March l, 2009, Developer shall undertake investigation and/or remediation of soils at the Site necessary to demonstrate attainment with a non-residential statewide health

> standard or site-specific standard under Act 2 for soils at the Site in accordance with the Remedial Action Work Plan ("Plan"') attached hereto as Exhibit B and incorporated herein by reference. In this regard, Developer shall follow all required procedures and notices under Act 2 within the time frame set forth in this paragraph.

(AR 0005-0006.)

19. Subject to a list of exceptions, the Department in the 2005 PPA covenanted not to sue Constitution Drive for any claims relating to the historic contamination at the Site. (AR 0007-0008.)

20. The Department provided in the agreement that Constitution Drive was entitled to contribution protection pursuant to Section 705 of HSCA, 35 P.S. § 6020.705, and Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613 (f)(2), relating to hazardous substances previously released at the Site. (AR 0008-0009.)

21. Constitution Drive agreed to complete this work by March 1, 2009. (AR 0005.)

22. On April 9, 2005, pursuant to Section 1113 of HSCA, 35 P.S. § 6020.1113, the Department published notice of the 2005 PPA in the *Pennsylvania Bulletin*, 35 Pa.B. 2166, and opened a 60-day public comment period. (AR 0033-0034, 0120.)

23. No person commented on the 2005 PPA during the public comment period, and the 2005 PPA became final under Section 1113 of HSCA when the Department notified Constitution Drive that no comments had been received. (AR 0014, 0120.)

24. The Department and Constitution Drive subsequently sought to amend the 2005 PPA on two separate occasions. (AR 0120.)

25. In the first amendment, dated January 22, 2007, the parties agreed to modify certain performance obligations of Constitution Drive related to the investigation and remediation of unsaturated soils at the Site (the "2007 Amendment"). (AR 0035-0095, 0120.)

26. The 2007 Amendment "amended and restated" Paragraph 3 of the 2005 PPA in several key respects. (AR 0037-0042.)

27. Apart from modifying Constitution Drive's performance obligations, the 2007 Amendment generally left the 2005 PPA unmodified and in full force and effect. (AR 0044, 0122.)

28. The 2007 Amendment provided that Constitution Drive would partner with the Department to design, install, and operate a physical treatment technology, known as an air sparging/soil vapor extraction system (the "AS/SVE system") at the Site and provided a timeline for the specific tasks necessary to complete the work on the AS/SVE system. (AR 0037-0042, 0092-0093, 0120, 0478.)

29. The AS/SVE system was intended to reduce contamination present in soils and groundwater. (AR 0065-0066.)

30. Among other things, Constitution Drive was required to operate the AS/SVE system for a 30-day start up period, and then operate the system for 60 days in accordance with certain specifications, while removing an average of ten pounds of volatile organic compounds (VOCs) per day. (AR 0039-0040.)

31. The 2007 Amendment at Paragraph 1(c)(2) provided in part that, once it was determined that the AS/SVE system was operational in accordance with the performance standards, Constitution Drive "shall have no further remedial obligations to the Department relating to the Site pursuant to the CO&A [the 2005 PPA], and the Department shall be solely responsible, with no cost or liability to Developer, to operate the AS/SVE System at the Site, with the objective of demonstrating attainment with one or a combination of remediation standards pursuant to Act 2 for unsaturated soils at the Site." (AR 0040-0041.)

32. In 2008, the AS/SVE system was installed and operated by Constitution Drive. (AR 0121.)

33. The AS/SVE system ultimately did not meet the performance standards. There were operational difficulties resulting from the shallow water table and system flooding. As a result, operation of the system was halted. (AR 0121.)

34. On June 4, 2010, the Department and Constitution Drive entered into a second amendment to the 2005 PPA (the "2010 Amendment") that further modified Constitution Drive's work obligations that were established in the 2005 PPA and amended by the 2007 Amendment. (AR 0100-0103, 0121.)

35. The 2010 Amendment contained the following WHEREAS clauses:

> WHEREAS, Developer has installed and commenced operation of the AS/SVE System and has made significant progress towards meeting the system operational criteria established in the First Amendment, and Developer and the Department believe that future operation of the AS/SVE System will assist in the remediation of hazardous substances in soil and groundwater at the Site;
>
> WHEREAS, Developer and the Department desire to further amend the CO&A to allow the Department to assume operational control of the AS/SVE System ….

(AR 0099.)

36. The 2010 Amendment "amended and restated" Paragraph 3 of the 2005 PPA in several key respects. (AR 0100-0103.)

37. The 2010 Amendment required Constitution Drive to: (1) make repairs to the air sparging system as necessary for the system to be fully operational for a 72-hour startup period; (2) be solely responsible for the system during the startup period and demonstrate that it operated continuously without incident for 72 hours; (3) provide the Department with operational manuals and as-built drawings for the system; (4) pay the Department $30,000; (5) repair a road along the

north side of the main building at the Site in accordance with certain specifications; and (6) install 7-foot fencing around certain areas of the Site. (AR 0100-0102.)

38. In exchange for completing this work, the 2010 Amendment included the following provision:

> Upon satisfaction of Developer's obligations pursuant to Paragraph 3(a) above, the Department shall provide Developer with a letter within fourteen (14) days of satisfaction of Developer's obligations confirming that Developer has satisfied its obligations pursuant to Paragraph 3(a), and Developer shall have no further remedial obligations at all to the Department relating to the Site pursuant to the CO&A and First Amendment (including, but not limited to any obligation to remediate soil, groundwater, or surface water at or beyond the Site, or for the operation and maintenance of the AS/SVE System at the Site).

(AR 0102-0103.)

39. As with the 2007 Amendment, the 2010 Amendment provided that it was to be made a part of the original 2005 PPA, which otherwise would remain unmodified and in full force and effect. (AR 0103.)

40. During the 72-hour startup period, the AS/SVE system is estimated to have removed 23.75 pounds of contaminant mass. (AR 0108-0112.)

41. In total, the system is estimated to have removed approximately 680 pounds of VOCs during a two-month period that it operated. (AR 0132.)

42. On September 11, 2010, the Department placed the Site on the Pennsylvania Priority List of contaminated sites to be addressed by the Department under HSCA. (AR 0119.)

43. In a letter dated December 22, 2010, the Department determined that Constitution Drive had satisfied its obligations under the 2010 Amendment to the 2005 PPA. (AR 0115.)

44. However, during visits to the site in June 2011, the Department discovered that a consultant hired by Constitution Drive damaged the AS/SVE system through the use of heavy equipment on the Site. (AR 0263-65.)

45. In a letter dated July 26, 2011, the Department requested that Constitution Drive repair the AS/SVE system. (AR 0263-0265.)

46. As of January 2014, the AS/SVE system had not been repaired. (AR 0267.)

47. On January 28, 2014, the Department sent Constitution Drive a letter which advised it that, because of the damage to the AS/SVE system caused by Constitution Drive's contractor and it potentially exacerbating the existing contamination at the Site, the Department viewed Constitution Drive as having violated the 2005 PPA and its Amendments, and the Department considered these violations to have voided the covenant not to sue established in the 2005 PPA. (AR 0267-0268.)

48. Constitution Drive disputed the Department's factual findings and asked that the Department rescind its January 28, 2014 letter. (AR 0269-0274.) Constitution Drive appealed the Department's letter to the Board but that appeal was dismissed because the Board determined that the letter was not an appealable action. *Constitution Drive Partners, L.P. v. DEP*, 2014 EHB 465. (AR 0275-0309.)

49. Constitution Drive has been unsuccessful in redeveloping the Bishop Tube Site for commercial purposes. (AR 0269-0273.)

50. Constitution Drive engaged in discussions with East Whiteland Township about the potential rezoning of the Site to allow for residential redevelopment. In 2014, East Whiteland Township approved Constitution Drive's request to adopt a zoning amendment that changed the zoning of the Site from industrial to residential. (AR 0121-0122, 0125, 0144.)

51. In 2016, Constitution Drive submitted a Remediation Scope of Work to the Department that proposed targeted soil removal activities to reduce or eliminate the risk of future Site occupants. (AR 0333-0352, 0447-0451, 0481.)

52. In January 2017 and April 2017, Constitution Drive submitted a first and second revised Remediation Scope of Work for Targeted Soil Excavation in response to comments from the Department on the Remediation Scope of Work. (AR. 0333-0352, 0371-0375, 0445-0451.)

53. As part of the Remediation Scope of Work, a consultant for Constitution Drive stated that Constitution Drive planned to develop the Site for townhouses and apartments. (AR. 0337.)

54. Under HSCA, the Department is required to publish notice of proposed prospective purchaser agreements and any amendments thereto in the *Pennsylvania Bulletin* and a newspaper of general circulation in the area of the Site and provide a 60-day public comment period. 35 P.S. § 6020.1113.

55. Public notice for the 2007 Amendment and the 2010 Amendment was not published at the time Constitution Drive and the Department drafted the respective Amendments. (AR 0122.)

56. There is no support in the administrative record for the Department's assertion that the failure to publish timely notice was an "inadvertent administrative oversight." (See, e.g., DEP Brief at 2, 10, 10 n.8.)

57. On April 1, 2017, the Department for the first-time published notice in the *Pennsylvania Bulletin* of the Amendments. 47 Pa.B. 1902. The notice provided as follows:

> The Department of Environmental Protection (Department), under the authority of the Hazardous Sites Cleanup Act (HSCA), 35 P.S. §§ 6020.101—6020.1305, and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9601—9675, has entered into an amended Prospective Purchaser Agreement (PPA) with Constitution Drive Partners, L.P. (CDP) regarding the Bishop Tube HSCA Site (Site).
>
> The Site is located approximately .25 mile south of US Route 30 in East Whiteland Township, Chester County. The Site consists of land totaling approximately 13.7 acres and was formerly used as a precious metals and

> stainless steel manufacturing facility. The Department has determined that there is significant soil and groundwater contamination at the Site.
>
> The Site was acquired by the Central and Western Chester County Industrial Development Authority for potential redevelopment and was subsequently sold to CDP for purposes of redevelopment. Under the terms of the Agreement with the Department, which was executed immediately prior to CDP's acquisition of the Site, CDP agreed to (1) assess and clean up soil contamination at the Site to one of the standards set forth in the Land Recycling and Environmental Remediation Standards Act (Act 2), 35 P.S. §§ 6026.101—6026.908; (2) not to exacerbate any existing contamination at the Site; and (3) to provide access and right of entry to the Department for potential future remediation of groundwater contamination in exchange for a covenant not to sue and contribution protection from the Department. The Department and CDP subsequently amended the PPA on two occasions. On January 22, 2007, the Department and CDP agreed that, in order to satisfy its remediation obligations under the PPA, CDP would design, provide mechanical equipment and demonstrate performance of a soil vapor extraction and air sparging remedial system (AS/SVE System), which the Department would install and take over upon performance demonstration. On June 4, 2010, the Department and CDP amended the PPA for a second time and agreed that, to satisfy its remediation obligations, CDP would repair and run the AS/SVE system for a seventy-two (72) hour period, after which it would relinquish control to the Department and pay the Department an amount of $30,000.
>
> This notice is provided under section 1113 of HSCA, 35 P.S. § 6020.1113. The agreements may be examined at the Department's offices at 2 East Main Street, Norristown, PA 19401 by contacting Dustin Armstrong at 484.250.5723 or Robert Schena at 484.250.5865. The Department will accept public comments for a period of 60 days from the date of publication of this notice. Interested persons may submit written comments regarding this PPA and its amendments by submitting them to Dustin Armstrong at the Department's address as listed above.

(AR 0117.)

58. The Department also published notice in *The Daily Local News* on March 18, April 1, April 29 and June 14, 2017. (AR 0122.)

59. The public comment period initially ran from March 18 through June 7, 2017, but the Department agreed to extend the public comment period to July 7, 2017 at the request of East Whiteland Township. (AR 0122.)

60. The only mention in the public notice of the failure of the AS/SVE system is in noting that Constitution Drive was required to repair the system as part of the 2010 Amendment.

There is no mention of the subsequent damage to the system and it being rendered inoperable. (AR 0117.)

61. The public notice does not mention Constitution Drive's plan to now redevelop the Site for residential use or the 2014 change in zoning at the Site. (AR 0117.)

62. The public notice does not mention the 2016/2017 Remediation Scope of Work for Targeted Soil Excavation submitted by Constitution Drive and reviewed by the Department. (AR 0117.)

63. The Riverkeeper, among several others, submitted written comments to the Department on the Amendments. (AR 0157-0210.)

64. East Whiteland Township submitted comments regarding the 2010 Amendment in a letter dated July 7, 2017. (AR 0217-0220.)

65. Among other things, the Township provided the following comments:

> 2. The 2005 PPA and its amendments are predicated on a non-residential remediation of the Site. As DEP is aware, the proposed use of the Site is now residential. How will DEP address this change of use at the Site within the context of the existing PPA, which was based upon a non-residential use of the Site? Will DEP require another amendment to the PPA or other agreement to address residential-related issues, specifically the more stringent remediation standards required for residential use purposes?
>
> 3. Although the PPA was entered into under HSCA, does DEP have any plans to now require attainment with Act 2 and its remediation standards, given the proposed residential use of the Site? Does DEP have any plans to negotiate additional amendments to the PPA to include, among other things, the more stringent statewide health standards for soil under Act 2?
>
> ….
>
> 11. The 2005 PPA provides CDP with both a Covenant Not To Sue and Contribution Protection under HSCA for any "Existing Contamination" determined to be present at the Site. In 2014, DEP advised CDP that the Covenant Not To Sue provision is void. Please confirm that DEP's present position is that the Covenant Not To Sue provision is indeed void. If DEP does not consider the Covenant Not To Sue provision to be void, then please explain any change in position since DEP's 2014 determination. Furthermore, do the Contribution Protection provisions in the PPA still apply to CDP? (PPA, Paragraph K).

(AR 0218-0219.)

66. Whittaker Corporation and Johnson Matthey, Inc., potentially responsible parties (PRPs) at the Site, submitted lengthy comments to the Department on June 7, 2017, supplemented on July 7, 2017. (AR 0141-0153.)

67. Among other things, they commented that the Amendments do not properly account for the changed proposed use of the Site from nonresidential to residential purposes. They commented that the 2005 PPA and its Amendments inaccurately provide that Constitution Drive is entitled to contribution protection. They point out that the Department rescinded its covenant not to sue, yet the Amendments were proposed for finalization. (AR 0141-0151.)

68. On January 26, 2018, the Department issued its comment response document titled "Response to Significant Public Comments Regarding Second Amendment to Prospective Purchaser Agreement Between the Department and Constitution Drive Partners," in which the Department determined that entry and finalization of the Amendments complied with the requirements of HSCA. (AR 0119-0137.)

69. Pursuant to Section 1113 of HSCA, the Amendments became final on the date the Department issued the comment response document. 35 P.S. § 6020.1113.

70. In response to comments regarding the delay in public notice of the Amendments, the Department only stated that "the Department provided proper notice and an opportunity for public comment on the initial PPA and received no comments. Consequently, the initial PPA became final. The purposes of the 1st and 2nd PPA were to modify CDP's performance obligations, and the Department has now provided proper notice and opportunity for public comment on the 1st and 2nd Amended PPAs as required by Section 1113 of HSCA." (AR 0126.)

71. In response to comments regarding the change in development to a residential use and the change in zoning at the Site, the Department stated that "zoning and land use decisions are outside of the Department's purview but are the responsibilities of local municipalities. In addition, the Department has limited control over the timeline associated with land use and development so long as the development activities don't interfere with investigation and remediation activities." The Department further stated that "it is pure speculation as to whether the Department would have acted differently in 2010 had the Site been zoned residential. Nevertheless, the comment does not persuade the Department that its entries into the 1st and 2nd Amended PPAs are inappropriate or should be rescinded." (AR 0125, 0127.)

72. In response to comments regarding the covenant not to sue and contribution protection, the Department said that "[t]hose arguments may ultimately be litigated in a court of law, but they do not persuade the Department that its entries into the 1st and 2nd Amended PPAs are inappropriate or should be rescinded." (AR 0126.)

73. The Department did not address the substance of many of the comments because the Department viewed them as irrelevant to the Amendments. Instead, the Department invited commenters to "continue with active interest in this matter" as their comments "may be germane to the Department's selection of a final remedy for the Site." (AR 0125, 0126, 0127, 0129-0133, 0135, 0136, 0137.)

74. While the Department was working with Constitution Drive, in 2008 and 2009 the Department entered into a consent order and agreement with Johnson Matthey Inc. and Whittaker Corporation, two PRPs at the Site. (AR 0121, 0241-0262.)

75. Pursuant to this consent order and agreement, Johnson Matthey and Whittaker agreed to complete a Remedial Investigation and Feasibility Study for the Site. (AR 0121, 0241-0262.)

76. According to the Department, upon completion of the Remedial Investigation and Feasibility Study, a final comprehensive Site remedy will be proposed by the Department, and the Department says the public will have an opportunity to review and comment on the proposed remedial response. (AR 0121.)

77. Once this process is complete, the Department says it will select a final remedial response for the Site that meets the substantive and procedural requirements of HSCA. (AR 0121.)

78. As of January 2018, the Remedial Investigation and Feasibility Study agreed to in 2008 and 2009 has not been completed. (AR 0121.)

DISCUSSION

The Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper (hereinafter collectively "the Riverkeeper"), have appealed the Amendments to the 2005 PPA entered into by the Department of Environmental Protection (the "Department") and Constitution Drive Partners, L.P. ("Constitution Drive"). The 2005 PPA was executed on March 17, 2005, in the form of a consent order and agreement and addressed an abandoned steel tube manufacturing facility located in East Whiteland Township, Chester County, known as the Bishop Tube HSCA Site ("Site"). The Site has a history of contamination with hazardous waste, primarily trichloroethene ("TCE"). Constitution Drive bought the contaminated property originally with the intent of redeveloping it for commercial purposes. Pursuant to the 2005 PPA, Constitution

Drive agreed by March 1, 2009, to undertake an investigation and/or remediation of soils at the Site necessary to demonstrate attainment with a nonresidential statewide health standard or site-specific standard under Act 2 in accordance with a remedial action work plan that was attached and incorporated into the PPA. In exchange for Constitution Drive's work relating to the existing contamination at the site, the Department entered into a covenant not to sue Constitution Drive and agreed that Constitution Drive was afforded contribution protection pursuant to HSCA and CERCLA.

The 2005 PPA was amended twice, the first time on January 22, 2007, and the second time on June 4, 2010. The 2007 Amendment "amended and restated" Constitution Drive's remedial obligations established under the 2005 PPA. The 2007 Amendment mostly concerned the installation of an air sparging/soil vapor extraction system ("AS/SVE system"), which was intended to expedite the remediation of soils and groundwater at the Site. (AR 0036.) Among other things, Constitution Drive was required to operate the system for 60 days under certain specifications while removing an average of ten pounds of volatile organic compounds (VOCs) per day in order to complete its remedial obligations. (AR 0039-0041.) After Constitution Drive had fulfilled these obligations, it would be released of its remedial obligations at the Site and the Department would then assume operation of the AS/SVE system. (AR 0040-0041.) Unfortunately, the AS/SVE system never worked as planned and Constitution Drive could not get it to meet the agreed-upon performance standards.

The Department and Constitution Drive then entered into a second amendment to the 2005 PPA in June 2010 that again "amended and restated" Constitution Drive's remedial obligations. Under the 2010 Amendment, Constitution Drive was to repair the AS/SVE system and get it to operate continuously without incident for 72 hours (a significantly shorter time than

the 30-day startup period and 60-day operational period called for under the 2007 Amendment). Constitution Drive was also required to pay the Department $30,000, repair a road, and install some security fencing.[1] Constitution Drive completed its remedial obligations under the 2010 Amendment, and in December 2010, the Department released Constitution Drive from all further remedial obligations established in the 2005 PPA and the Amendments.[2]

A number of additional events involving Constitution Drive have taken place at the Site after the remedial tasks were completed and the Department's release letter was issued in December 2010. In June 2011, the Department discovered that a contractor for Constitution Drive had damaged the AS/SVE system and rendered it inoperable. (AR 0115, 0263-0267.) In July 2011, the Department requested that Constitution Drive repair the AS/SVE system. Constitution Drive and the Department appear to have conducted discussions regarding the continuing necessity and viability of the AS/SVE system but, as of January 2014, the AS/SVE system had not been repaired. In a January 2014 letter, the Department declared the covenant not to sue to be void because of Constitution Drive's failure to repair the AS/SVE system. The covenant not to sue was important to Constitution Drive and its efforts to redevelop the Site and formed part of the consideration for the 2005 PPA and the Amendments. (AR 0007-0008, 0269-0273.) Constitution Drive appealed the January 2014 letter to the Board, but the Board ruled that the letter was not an appealable action by the Department. (*Constitution Drive Partners, L.P. v. DEP*, 2014 EHB 465, Judge Beckman dissenting.) Also, in 2014, East Whiteland Township changed the zoning at the Site from industrial to residential at the request of Constitution Drive, which decided to pursue a residential development at the Site after being unsuccessful in

[1] Constitution Drive paid the Department $32,000 over two installments in 2010 and 2011, which included a $2,000 delay penalty. (AR 0121.)

[2] The 2010 Amendment did provide that Constitution Drive would be financially responsible for certain additional Engineering Controls if the Department deemed them necessary as part of Remedial Action for the Site. (AR 0103.)

redeveloping it for commercial purposes. (AR 0121-0122, 0125, 0144, 0337.) Finally, in 2016/2017, the Department reviewed and commented on a new remediation workplan for the Site proposed by Constitution Drive that provided for targeted soil excavation that Constitution Drive claimed would reduce or eliminate the risk of exposure to the compounds of concern for the future occupants. In addition to these post-2010 actions involving Constitution Drive, there also were other remediation activities and Department actions at the Site that did not directly involve Constitution Drive based on documents included in the administrative record.

There is no disagreement among the parties that the Amendments to the 2005 PPA constitute orders issued pursuant to Section 1102 of the Hazardous Sites Cleanup Act (HSCA), 35 P.S. § 6020.1102. There is also no disagreement that the Amendments to the 2005 PPA are settlement agreements within the purview of Section 1113, 35 P.S. § 6020.1113. *See also Chirico v. DEP*, 2002 EHB 25, 34. Section 1113 of HSCA states certain procedures for noticing settlement agreements and it defines how the Board must review these agreements if there is an appeal:

> When a settlement is proposed in any proceeding brought under this act, notice of the proposed settlement shall be sent to all known responsible persons and published in the Pennsylvania Bulletin and in a newspaper of general circulation in the area of the release. The notice shall include the terms of the settlement and the manner of submitting written comments during a 60-day public comment period. The settlement shall become final upon the filing of the department's response to the significant written comments. The notice, the written comments and the department's response shall constitute the written record upon which the settlement will be reviewed. A person adversely affected by the settlement may file an appeal to the board. The settlement shall be upheld unless it is found to be arbitrary and capricious on the basis of the administrative record.

35 P.S. § 6020.1113.

Notably, under Section 1113, settlements do not become final until notice is provided, and the Department responds to any comments. This is where we find an odd wrinkle in this

case. Although the Amendments were drafted and signed in 2007 and 2010, due to what the Department without any record support terms an "inadvertent administrative oversight," the notice required under Section 1113 was not published for either the 2007 Amendment or the 2010 Amendment until 2017, seven and ten years after the fact. A notice for both of the Amendments was published in the *Pennsylvania Bulletin* on April 1, 2017, and notice was published in *The Daily Local News* on March 18, April 1, April 29, and June 14, 2017. In response to the Department's notice, extensive comments were submitted, including by the Riverkeeper, East Whiteland Township, local residents, and potentially responsible parties (PRPs). The Department issued its response to those comments on January 26, 2018. Accordingly, even though Constitution Drive and the Department undertook performance pursuant to the 2007 and 2010 Amendments, the Amendments did not legally become final until the Department issued its comment response document in January 2018.

The Riverkeeper filed this appeal of both of the Amendments on February 21, 2018. Under Section 1113, any appeal of a HSCA settlement is to be decided on the basis of an administrative record, as opposed to the *de novo* review afforded by the typical Board appeal, *see United Ref. Co. v. Dep't of Envtl. Prot.*, 163 A.3d 1125, 1135-36 (Pa. Cmwlth. 2017). The administrative record for purposes of Section 1113 is limited to the notice of the settlements, written comments to the settlements, and the Department's responses to the comments. Under the language of Section 1113, the Riverkeeper has the burden of showing that the Amendments are arbitrary and capricious on the basis of the administrative record that has been filed with the Board.[3] The Department, in its Brief, states the "standard for the Board's review in this appeal is

[3] The Department tells us in its brief that there are a number of other actions pertaining to the Bishop Tube site in other courts. Despite acknowledging at the outset of its brief that the Board's review is "based exclusively" on the administrative record filed with the Board, the Department invites us to take "judicial notice" of the other court actions and pleadings filed in them. The Department even goes so far

limited solely to whether the Department acted arbitrarily or capriciously in finalizing the Amendments through the DEP Response." (DEP's Response Brief, at 6.)

On June 21, we issued an Order staying all proceedings and scheduling an in-person case management conference with the parties on June 26. At the conference, we discussed with the parties how this matter should move forward in terms of compiling the administrative record and submitting briefs. We thereafter issued an Opinion and Order on Case Management wherein we outlined procedures for the appeal going forward, including when the Department would provide the other parties with a proposed administrative record, when the Department would file the administrative record with the Board and in what form, and when the other parties could move the Board to include additional documents or exclude certain documents from the administrative record. 2018 EHB 666. We also issued an Opinion and Order on the Department's motion to quash the Riverkeeper's discovery requests, wherein we determined that discovery was generally inconsistent with the administrative record review envisioned by Section 1113 of HSCA. 2018 EHB 672. The parties were subsequently able to agree upon the contents of the administrative record and filed the administrative record on our docket. We accepted that record as the basis for our review.

Before delving into the merits of this appeal, it is important to keep in mind the underlying goals and policies of HSCA and Act 2 in terms of advancing the cleanup of contaminated sites. "HSCA's Declaration of Policy expressly declares that the cleanup of

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as to attach to its brief a petition for review filed by the Riverkeeper in a matter before the Commonwealth Court. Relying on case law to make legal arguments is one thing; relying on pleadings in actions before other tribunals and courts in an administrative record review proceeding is quite another. We think this attempt to essentially supplement the administrative record is inappropriate and it is contrary to Section 1113, what the parties agreed upon during our in-person case management conference, and what we laid out in our Opinion and Order on Case Management, 2018 EHB 666. We decline the Department's invitation to dig into the pleadings in those matters for purposes of evaluating the propriety of the PPA amendments.

properties contaminated with hazardous materials is vital to the economic development of the Commonwealth and that the Department should be provided with flexible and effective means to enter into various settlement agreements with responsible parties at contaminated sites." *Chirico v. DEP*, 2002 EHB 25, 32 (citing 35 P.S. §§ 6020.102(3), 6020.102(12)(vii) and (ix)). *See also Guerin v. DEP*, 2014 EHB 18, 24-25 (HSCA provides the Department broad authority to effectuate its provisions and further its goals). Along the same lines, the Pennsylvania Legislature has created programs to incentivize the cleanup of contaminated sites, *see, e.g.*, 35 P.S. § 6026.102 (Act 2 declaration of policy), while the Department pursues responsible persons to recover costs, *see, e.g.*, 35 P.S. § 6020.507 (recovery of response costs under HSCA). Cognizant of these policies, we must not lose sight of the fact that Constitution Drive did not cause the historic contamination at the Site. Rather, at the time of the 2005 PPA, it was an innocent purchaser seeking to redevelop a brownfield property for a new use, a property that might otherwise remain abandoned and contaminated. We do not wish to erect unnecessary barriers to cleaning up a site or discourage innocent purchasers from contributing to cleaning up and redeveloping contaminated property.

The crux of the Riverkeeper's primary argument in this appeal is that the Department's ratification of the Amendments was arbitrary and capricious due to the passage of time, the inadequacy of the 2017 public notice and the changed circumstances between when the Amendments were signed by the Department and Constitution Drive in 2007 and 2010, and when they became final in January 2018. The Riverkeeper contends that, by January 2018, (1) the AS/SVE system was not operable because it had been damaged by one of Constitution Drive's contractors, (2) the Department indicated that the covenant not to sue established in the 2005 PPA was either void or would be deemed void at some point in the future, (3) the

redevelopment plans for the site changed from commercial to residential without appropriate changes in the Amendments, and (4) the Bishop Tube site has remained severely contaminated and the Amendments did not materially advance any cleanup. The Riverkeeper also argues that, in finalizing the Amendments, the Department has failed to uphold its duties as a trustee of the Commonwealth's natural resources under Article I, Section 27 of the Pennsylvania Constitution.[4]

Initially, the Riverkeeper focuses on the Department's public notice of the Amendments and argues that the notice was defective because it was so late. The Riverkeeper cites the language in Section 1113 providing that notice shall be published "[w]hen a settlement is proposed," and says that this means notice must be published at the time a settlement is entered into, not years later. In addition to the arguments that the statutorily required notice took place several years too late, the Riverkeeper also challenges the wording of the notice and argues that it did not contain any meaningful information on what had changed in the intervening years. It says the late and inadequate notice published by the Department denied the public its right to comment on the agreements when they were proposed, which could have affected the public's ability to meaningfully comment and potentially influence the final agreements.

The Department repeatedly asserts that the failure to publish timely notice was an "inadvertent administrative oversight," but it fails to point to anything in the administrative record substantiating that claim.[5] The Department merely states that no one in this appeal has questioned that the failure to publish notice was an administrative oversight. There is nothing in the administrative record that explains or justifies the belated notice. In response to the

[4] Because we find the 2007 and 2010 Amendments arbitrary and capricious for other reasons, we do not reach, and there is no need to decide the Riverkeeper's Article 1, Section 27 argument.

[5] We note that the procedures for publishing notice and receiving comments, and an explanation of the effect of the Department responding to comments, are detailed in the 2005 PPA. (AR 0013-0014.)

Riverkeeper's comments directed at the untimely notice and its inadequate wording, the Department, in the January 2018 comment response document, unhelpfully states that it "has now provided proper notice and opportunity for public comment on the 1st and 2nd Amended PPAs as required by Section 1113 of HSCA." (AR 0126.) Constitution Drive for its part asserts that the Department's failure to timely publish public notice of the 2007 Amendment and the 2010 Amendment was cured with the 2017 publication. It also contends that the delay allowed the public to comment on a more informed and developed record for the site, and that the public had a more meaningful opportunity to review and comment on the Amendments because of the delay. Constitution Drive points to nothing in the administrative record to support these assertions.

The Board has not previously addressed the issue presented in this case by the Riverkeeper's claim of untimely and inadequate notice of a HSCA settlement agreement. The Department identified *Chirico v. DEP*, 2002 EHB 25, as the only prior case in which the Board has considered a challenge to a similar agreement and states that the outcome of this case is controlled by the Board's decision in *Chirico* upholding the Department's entry into the prospective purchase agreement in that case. We disagree with the Department's conclusion that *Chirico* controls this case. The facts in *Chirico* regarding the Department's actions in finalizing the agreement under Section 1113 of HSCA are completely different. In *Chirico*, the agreement was entered into on May 24, 2000 and notice of the agreement was published in the *Pennsylvania Bulletin* a month later on June 24, 2000. *Chirico*, 2002 EHB at 26-27. There is nothing in the Board's opinion in *Chirico* to suggest that the challengers raised inadequate wording in the public notice as an issue in the case. Further, there is no indication that any significant changes took place at the site in *Chirico* in the one month of time that elapsed

between the execution of the agreement and the publication of the required notice in the *Pennsylvania Bulletin*.

In other cases, unlike *Chirico*, the Board has been required to evaluate public notice issues, and we have been hesitant to overturn Department actions in these cases. These cases have involved challenges to permitting actions by the Department and have raised both untimely notice and inadequate notice issues. *See Groce v. DEP*, 2006 EHB 856; *Hopewell Township v. DEP*, 1996 EHB 956, *Fontaine v. DEP*, 1996 EHB 1333; *Anjar Trust v. DEP*, 2001 EHB 927, *aff'd*, 806 A.2d 482 (Pa. Cmwlth. 2002); *Kleissler v. DEP*, 2002 EHB 737. We are not convinced that these permitting cases are a good analog for our current case because of their different and distinct notice requirements when compared to those in Section 1113. The overall principal we derive from these cases is that issues with public notice should be viewed from the perspective of the Department action and what impact the public notice shortcomings had on the public's ability to meaningfully comment on the Department's actions. For various reasons, including the role of public comments in permitting decisions, in most cases, it seems likely that the party challenging the action will have an uphill climb to convince the Board that public notice issues rise to a level where the party has been denied an opportunity for meaningful comment and, as consequence, the Board should undo the Department's action.

Despite our concerns expressed above, we find that the Riverkeeper's notice arguments have merit under the relevant HSCA statute and the unique facts present in this case. The notice and public comment process play a key role in HSCA settlements under the terms of Section 1113 of HSCA. The legislature expressly provided that a settlement agreement is not final until certain enumerated steps are completed including: (1) notice is sent to all responsible parties and published in the *Pennsylvania Bulletin* and a local newspaper; (2) a 60-day window for public

comment is completed; and (3) the Department responds to the significant written comments. Consistent with the central role that the notice and comment procedures created by the legislature play in HSCA settlements, we conclude that the Department is required to provide a timely and meaningful notice and comment process in order to finalize HSCA settlements under Section 1113. The steps taken by the Department in this case were woefully inadequate in satisfying this requirement. Therefore, in the language of the standard of review set forth by the Department in its Response Brief, we hold that "the Department acted arbitrarily or capriciously in finalizing the Amendments through the DEP Response." (DEP's Response Brief, at 6.)

We agree with the Riverkeeper that the Department's egregiously late public notice is a clear violation of the requirement that notice of a HSCA settlement be published when it is proposed. There is no reasonable reading of the Section 1113 language that allows for publication seven and ten years later and the Department's excuse—that there was an "inadvertent administrative oversight"—finds no support in the administrative record and in any event is hardly a legitimate excuse. This is not a case where the required notice was a few weeks or even a few months late, a circumstance where any impact from the late notice might be negligible and/or readily mitigated by subsequent publication. The Department's action initially placed the public, and now places the Board, in a bizarre situation of evaluating the propriety of the Department finalizing the Amendments to the 2005 PPA years removed from the execution of those Amendments with Constitution Drive. The lapse in time presents obvious challenges for the public's ability to provide timely and meaningful comment on the Amendments.

The problems created by the unacceptably late publication of the notice are compounded, in our opinion, by the shortcomings in the content of the notice and how it fails to address the changed circumstances at the Site between 2010 and 2017. The notice is not at all forthcoming

on revealing how dramatically late it is or what has changed in the intervening years since the Amendments were entered into. For instance, the AS/SVE system had not worked for several years before the Department sought comment on whether it would be a good idea to install an AS/SVE system. The only allusion in the public notice to any issues with the AS/SVE system occurs in the description of the 2010 Amendment wherein it states that Constitution Drive agreed to "repair" the AS/SVE system. (AR 0117.) The notice does not reveal that a contractor for Constitution Drive subsequently damaged the AS/SVE system and it has not been operated ever since. The Riverkeeper also notes that the notice does not mention the Department's rescission of the covenant not to sue that followed the contractor's damaging of the AS/SVE system. Nor does the notice mention that the zoning of the site changed from industrial to residential in 2014. Further, the notice makes no mention of the 2016/2017 Remediation Scope of Work for Targeted Soil Excavation submitted by Constitution Drive and under review by the Department. Although most of the commenters appear for the most part to be aware of the ongoing issues with the remediation of the site, the notice is wholly unhelpful to anyone who was not paying close attention to the developments over the course of the last decade.

The Department's response to comments is at times equally frustrating. For example, the Department asserts that the Riverkeeper's comments do not address the Amendments, but this is just not true. The Riverkeeper's comment says that the AS/SVE system "will not protect the public health, safety and welfare and the natural resources of this Commonwealth from the short-term and-long-term effects of the release of hazardous substances and contaminants into the environment from the Bishop Tube site." (AR 0161.) The AS/SVE system, of course, was not part of the 2005 PPA and only became part of the remediation during the 2007 Amendment. The Department deals with this comment in its response by saying the actions taken pursuant to the

2005 PPA and the Amendments are just an interim response and a final response action is forthcoming. (AR 0127.) Indeed, the Department repeatedly tries to minimize the importance of the Amendments by assuring the commenters that further investigation and cleanup is needed and a final response action will come someday. However, this is a bit of a dodge that is not particularly helpful in evaluating whether the Amendments should have been finalized by the Department. The AS/SVE system was almost a complete failure and appears to have not materially advanced the cleanup of the site, yet the Department seems unwilling to acknowledge this reality in its response to comments. The Amendments are premised on basic assumptions that have not existed for years.

This is somewhat emblematic of the Department's entire comment response document. The Department says that the majority of comments it received were not related to the Amendments themselves and the modifications of Constitution Drive's performance obligations. Perhaps some of that that can be forgiven since the commenters were asked to comment on two agreements that the passage of time had rendered nearly superfluous. Further, the notice of public comments says that "[i]nterested persons may submit written comments **regarding this PPA and its amendments**…." (AR 0117 (emphasis added).) Yet in its response the Department repeatedly criticizes the commenters for offering comments on the 2005 PPA. The Department says in its brief that the Amendments may not have been fully understood by the public without reference to the original PPA, so the notice offered the public the opportunity to comment solely on the Amendments but viewed in the context of their relation to the 2005 PPA. Although we are in no way saying that the language in the notice opens up the 2005 PPA to challenge, it is illustrative of the Department's less than careful approach to seeking public input on the Amendments. The Department defends its response and construes its effort in responding to

comments as "painstaking," but it instead reads like a series of pro forma statements meant to belatedly satisfy its obligations under Section 1113 but go no further. The Department goes through the motions but does not earnestly address some of the comments, and its response almost treats it as a foregone conclusion that the Amendments would be finalized, without modification or further consideration.

The Department's response to extensive comments about the change in zoning of the Bishop Tube site from industrial to residential is similarly unsatisfying. The zoning change was made by East Whiteland Township in 2014 at the request of Constitution Drive. The 2005 PPA provided that Constitution Drive "plans to develop the site for commercial purposes." (AR 0003.) It also provides that Constitution Drive would remediate the soils at the site to a level "necessary to demonstrate the attainment of a non-residential statewide health standard or site-specific standard…." (AR 0005.) The 2007 Amendment to the PPA altered that obligation. In exchange for Constitution Drive getting the AS/SVE system up and running for 60 days, the 2007 Amendment provided that the Department would assume the responsibility of demonstrating attainment with an unspecified remediation standard:

> [t]he Department agrees…to expeditiously perform (or require responsible parties other than Developer [Constitution Drive] to perform) other necessary remedial actions at the Site in order to **demonstrate attainment with one or a combination of remediation standards under Act 2 for soils and groundwater at the Site that are consistent with Developer's intended redevelopment activities**.

(AR 0041 (emphasis added).) It is unclear whether the 2010 Amendment further modifies that obligation or not. The 2010 Amendment again provided a mechanism to relieve Constitution Drive of any further remediation obligations at the Bishop Tube site under the PPA in exchange for running to AS/SVE system for 72 hours:

> Upon satisfaction of Developer's obligations pursuant to Paragraph 3(a) above, the Department shall provide Developer with a letter within fourteen (14) days of satisfaction of Developer's obligations confirming that Developer has satisfied its obligations pursuant to Paragraph 3(a), and Developer shall have no further remedial obligations at all to the Department relating to the Site pursuant to the CO&A and First Amendment (including, but not limited to any obligation to remediate soil, groundwater, or surface water at or beyond the Site, or for the operation and maintenance of the AS/SVE System at the Site).

(AR 0102-0103.)

There is very little support in the administrative record to show that the Department gave serious consideration to the change in zoning from industrial to residential. One commenter noted that "[n]owhere in the 2007 [Amendment] did the parties address whether these remediation measures were appropriate for property that would later be rezoned for residential use." (AR 0143.) But the Department widely panned such comments on the change in zoning, saying "zoning and land use decisions are outside of the Department's purview but are the responsibilities of local municipalities." (AR 0125.) Nor did the Department make any mention in the comment response document of the ongoing discussions between itself and Constitution Drive regarding the 2016/2017 Remediation Scope of Work for Targeted Soil Excavation that appears related to the zoning change and revised development plans. While zoning decisions themselves are largely outside of the Department's authority, that is not to say that zoning decisions do not influence the cleanup for the site. The 2007 Amendment makes clear that remediation must be consistent with the Site's intended use after redevelopment. Nowhere in the comment response document does the Department explain why the AS/SVE system will further the cleanup of the Site for its use for residential purposes

Instead, the Department simultaneously attempts to use the passage of time as a sword and a shield by saying things like it is "pure speculation" whether the Department would have acted differently in 2010 if the property had been zoned residential. (AR 0127.) This completely

ignores the fact that the 2010 Amendment was not final until the Department issued its response to the public comments. We do not have to speculate what the Department would have done in 2010 because the 2010 Amendment is being finalized in 2018, and the Department does not at any point explain what it will do now on the basis of the zoning change. The Department also says that "at the time of the amendments to the PPA, the Department's understanding of the proposed usage of the Bishop Tube property had not yet changed. East Whiteland later changed the zoning at [Constitution Drive's] request to residential in 2014." (AR 0121-0122.) But that again misses the point. The Amendments were not final and were still subject to change. The Department could have changed the Amendments in light of its understanding of the proposed use of the property in 2018. The Department never explains why, based on its understanding of the zoning now, and the apparent ongoing efforts surrounding the 2016/2017 Remediation Scope of Work, these Amendments are still appropriate to finalize. The Department cannot cure its initial failure to comply with the notice and comment requirements in Section 1113 by the significantly late publication of an inadequate notice compounded with responding to the public comments it did receive as though nothing had changed at the Site or relative to the provisions of the Amendments since 2010.

The Department's action to finalize the Amendments in the face of the unique circumstances in this case is arbitrary and capricious in the opinion of this Board. We therefore sustain the appeal of the Riverkeeper and find that the 2007 Amendment and the 2010 Amendment are void because they were never properly finalized under Section 1113 and, at this point, we see no pathway for properly finalizing them in their current form.[6]

[6] We take no position on the continuing viability of the 2005 PPA. The Riverkeeper's appeal did not challenge that HSCA settlement document. Constitution Drive, in its Brief in Response, asserts that among the Riverkeeper's proposed relief is a request that the 2005 PPA be declared null and void. (Constitution Drive's Brief in Response, at 22.) In its Reply Brief, the Riverkeeper states that "DRN did

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 7514; 35 P.S. § 6020.1113.

2. The Board's review of a settlement under HSCA is limited to determining whether the settlement is arbitrary or capricious on the basis of an administrative record. 35 P.S. § 6020.1113.

3. A prospective purchaser agreement in the form of a consent order and agreement, and any amendments thereto, are settlements of a proceeding under Section 1113 of HSCA. *Chirico v. DEP*, 2002 EHB 25, 24.

4. A person appealing a settlement under Section 1113 of HSCA bears the burden of proving that the settlement is arbitrary and capricious on the basis of the administrative record. 35 P.S. § 6020.1113.

5. The Department's actions addressing the 2007 Amendment and the 2010 Amendment under Section 1113 of HSCA were arbitrary and capricious and render those two settlements themselves arbitrary and capricious.

6. The Amendments were never properly noticed and made final in accordance with Section 1113 of HSCA and are, therefore, void because the Department's attempt to notice and finalize the Amendments in 2018 was inadequate, untimely and failed to identify and account for the changed circumstances and conditions at the Site

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not request that the Board do anything about that 2005 PPA" while restating its belief that the 2005 PPA is void because it was unperformed by the March 1, 2009 deadline. (Riverkeeper's Reply Brief, at 15.)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER	:	
v.	:	**EHB Docket No. 2018-020-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CONSTITUTION DRIVE PARTNERS, LP, Permittee	:	

O R D E R

AND NOW, this 26th day of April 2019, it is hereby ordered that this appeal is **sustained**. The 2007 Amendment and the 2010 Amendment are declared void.

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 26, 2019

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

For the Commonwealth of PA, DEP:
Anderson Lee Hartzell, Esquire
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For Appellants:
Deanna Kaplan Tanner, Esquire
(*via electronic filing system*)

For Permittee:
Jonathan Spergel, Esquire
Nicole R. Moshang, Esquire
James McClammer, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2018-044-CP-B**
v.	:	**Issued: May 13, 2019**
TIMOTHY A. KECK	:	

ADJUDICATION

By Steven C. Beckman, Judge

Synopsis

The Board assesses a civil penalty of $42,500 against Timothy A. Keck for multiple violations of the Clean Streams Law arising from an oil and brine discharge from a well and associated tank and the failure to comply with an Administrative Order.

Background

The present matter before the Board is a complaint filed by the Department of Environmental Protection (the "Department") requesting the Board to assess $50,292 in civil penalties against Timothy A. Keck. The complaint comes before the Board following our earlier resolution of Mr. Keck's appeals of an August 24, 2015, administrative order ("August 2015 Order") and an October 26, 2015, administrative order ("October 2015 Order") (collectively the "Department Orders"). The Department Orders alleged violations of the Clean Streams Law, the Oil and Gas Act and the Solid Waste Management Act and required Mr. Keck to investigate and remediate the contamination caused by a June 2, 2014, oil and brine discharge ("June 2014 Spill"). The Board issued a *sua sponte* Consolidation Order on November 25, 2015, consolidating the separate appeals of the Department Orders into one case docketed at 2015-186-B. A two-day

hearing was held in that matter on October 4-5, 2016, at the Board's Northwest Office and Court Facility in Erie, Pennsylvania ("2016 Hearing"). The Department acknowledged that the August 2015 Order was null and void at the 2016 Hearing and the parties agreed that the only matter for the Board's consideration was Mr. Keck's appeal of the October 2015 Order. Based on evidence presented at the 2016 Hearing, we concluded that the Department demonstrated that the discharge of oil and brine that contaminated the soils and waters of the Commonwealth was from a well and tank owned and operated by Mr. Keck. The Board ruled against Mr. Keck's appeal and found that the Department's issuance of the October 2015 Order was supported by a preponderance of evidence, was authorized by statute and was a reasonable and proper exercise of the Department's authority. *Keck v. DEP*, 2017 EHB 292. Mr. Keck did not appeal the Board's Adjudication.[1]

On May 2, 2018, a little more than a year after our decision upholding the October 2015 Order, the Department filed a Complaint for Civil Penalties ("Complaint") requesting that the Board assess a civil penalty pursuant to Section 605 of the Clean Streams Law, 35 P.S. § 691.605, in the amount of $50,292. Mr. Keck did not respond to the Complaint and has not participated at any point in this matter. On July 20, 2018, based on Mr. Keck's failure to respond to the Complaint, the Department filed a Motion for Entry of Default Judgment seeking a default judgment pursuant to 25 Pa. Code § 1021.76a. Under this Board Rule, the Board may hold an evidentiary hearing on the amount of the requested civil penalty. 25 Pa. Code § 1021.76a(d). Following our review of the Complaint and the exhibits attached to the Complaint, the Board had questions regarding the civil penalty and how the Department had arrived at the requested amount.

[1] We consider the 2016 Hearing record (transcript and exhibits) and our 2017 Adjudication, *Keck v. DEP*, 2017 EHB 292, as facts that we can take official notice of in determining this matter. (See 25 Pa. Code §1021.125). In addition, the Department requested in the 2018 Evidentiary Hearing that the Board consider the testimony in the 2016 Hearing as part of the record in the 2018 Evidentiary Hearing. (2018 Evidentiary Hearing, T. 48-49).

In order to allow the parties an opportunity to address the Board's questions, we held an evidentiary hearing on November 8, 2018, at the Board's Northwest Office and Court Facility in Erie, Pennsylvania ("2018 Evidentiary Hearing"). Mr. Keck did not attend or participate in the 2018 Evidentiary Hearing. This appears to be the first time that the Board has held an evidentiary hearing under 25 Pa. Code § 1021.76a(d), and as a result, procedural questions arose about how to proceed in this matter following the 2018 Evidentiary Hearing. The Board directed the Department to file an initial post-hearing brief limited to the procedural context of the 2018 Evidentiary Hearing and the appropriate standard to be utilized at this particular stage in the proceeding. The Department filed its initial post-hearing brief on December 28, 2018. The Board issued an Order on January 4, 2019, notifying Mr. Keck of his ability to file a responsive brief, which Mr. Keck did not do. Following review of the Department's initial post-hearing brief, the Board issued an order on February 4, 2019, granting the Department's Motion for Default Judgment as to Mr. Keck's liability for the violations identified in the Complaint and affording the Department an opportunity to file a further post-hearing brief addressing the reasonableness and amount of the requested civil penalty. The Department filed the Department's Secondary Post-Hearing Brief (Department's 2nd Brief") on March 18, 2019. The Board issued an Order the same day notifying Mr. Keck of his ability to submit a post-hearing brief in response to the Department's 2nd Brief, but again Mr. Keck did not submit anything to the Board. The matter is now ripe for the Board to assess an appropriate civil penalty.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L.

177, as amended, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder ("Regulations"). Complaint at ¶ 1.[2]

2. Mr. Keck is an adult individual engaged in oil and gas exploration activities in Pennsylvania, and maintains a mailing address of 93 Carrier Street, Summerville, PA 15864-6301. Complaint at ¶ 2.

3. On March 15, 2005, the Department issued oil and gas drilling well permit No. 031-24056 to Mr. Keck for the Rodney N. Klepfer 10 1 well located in Limestone Township, Clarion County ("Well"). Complaint at ¶ 4.

4. Beginning on November 1, 2005, through December 1, 2005, Mr. Keck drilled, and then subsequently began operating the Well. Complaint at ¶ 5.

5. The Well is located on property owned by Rodney N. Klepfer, which is more particularly described at Deed Book 2014, Page 4491, in the Clarion County Recorder of Deeds ("Property"). Complaint at ¶ 6.

6. The Well is served by a tank at the Property ("Tank"). Complaint at ¶ 7.

7. At all relevant times hereto, Mr. Keck was the "owner" and "operator" of the Well and the Tank as those terms are defined in Section 3203 of the 2012 Oil and Gas Act, 58 Pa. C.S. § 3203. Complaint at ¶ 8.

8. On March 6, 2015, the Department approved the transfer of the Well from Mr. Keck to Howard Drilling, Inc. ("Howard"). Complaint at ¶ 9.

9. On June 2, 2014, June 3, 2014, June 4, 2014, June 5, 2014, and June 17, 2014, the Department inspected the Property and documented that: 1) the bung on the bottom of the Tank

[2] Because Mr. Keck did not file an answer to the Complaint, we treat the facts asserted by the Department as admitted and therefore, we can cite them as facts for the purpose of the Findings of Fact in this Adjudication.

was leaking; 2) the valve assembly connected to the Tank was leaking; and 3) the valve did not have a bull plug. The Department further observed an unpermitted discharge of crude oil and brine onto the ground at the Property near the Tank, on the hill, on the ground between the hill and Sloan Run, and discharging into Sloan Run and Piney Creek ("June 2014 Spill Site"). Complaint at ¶ 10.

10. The crude oil and brine discharged at the Property came from the Tank. Complaint at ¶ 12.

11. Crude oil and brine are "industrial wastes" as that term is defined in Section 1 of the Clean Streams Law, 35 P.S. § 691.1, and "residual wastes" as that term is defined in Section 103 of the Solid Waste Management Act, 35 P.S. § 6018.103. Complaint at ¶ 13.

12. Sloan Run and Piney Creek are each a "water of the Commonwealth" as defined in Section 1 of the Clean Streams Law, 35 P.S. § 691.1. Complaint at ¶ 14.

13. Neither Mr. Keck nor any other person or entity had or has a permit or authorization from the Department to discharge industrial wastes or residual wastes onto the ground or into the waters of the Commonwealth. Complaint at ¶ 15.

14. Richard Neville is currently the District Oil and Gas Manager for the Northwest Region of the Department and has worked for the Department for 28 years. (2018 Evidentiary Hearing, T. 8).

15. Mr. Neville was the only Department witness at the 2018 Evidentiary Hearing. (2018 Evidentiary Hearing, T. 3).

16. Approximately three miles of streams were impacted by the June 2014 Spill. (2018 Evidentiary Hearing, T. 12).

17. An emergency contractor was hired to clean up the June 2014 Spill and used absorbent pads and booms as part of the clean-up effort. (2018 Evidentiary Hearing, T. 16).

18. Mr. Keck paid some portion of the emergency contractor's costs incurred in the clean-up effort on Sloan Run and Piney Creek. (*Keck v. DEP*, 2017 EHB at 299, FOF 50; 2016 Hearing, T. 275-276, 287; 2018 Evidentiary Hearing, T. 58).

19. A Department inspection conducted on June 17, 2014, stated that the booms and pads had been removed from the streams and that there was no visible contamination in Sloan Run and Piney Creek. (*Keck v. DEP*, 2017 EHB at 298, FOF 39).

20. The Department completed biological monitoring of the impacted streams following the June 2014 Spill but was unable to locate the monitoring study and the Department staff person who did the study was unable to recall the results. (2018 Evidentiary Hearing, T. 27-28).

21. Mr. Neville believed that there were dead macroinvertebrates as a result of the June 2014 Spill but acknowledged that he had no quantitative measure of the macroinvertebrate impact and did not testify that he or any Department staff directly observed dead macroinvertebrates. (2018 Evidentiary Hearing, T. 27-28).

22. Mr. Neville did not believe that there were any dead fish as result of the June 2014 Spill and no evidence of dead fish was presented in the 2018 Evidentiary Hearing. (2018 Evidentiary Hearing, T. 27-28).

23. On August 24, 2015, the Department issued an administrative order to Mr. Keck. Complaint at ¶ 16.

24. On October 26, 2015, the Department issued an administrative order to Mr. Keck replacing the August 24, 2015, administrative order. Complaint at ¶ 17.

25. The Department's Order directed Mr. Keck to, among other things, immediately cease discharging crude oil and brine at the June 2014 Spill Site, hire a qualified environmental

consultant to investigate and remediate the release of crude oil and brine at the June 2014 Spill Site, submit to the Department a written plan to investigate and remediate the release of crude oil and brine at the June 2014 Spill Site, implement the investigation and remediation of the contaminated soil and waters of the Commonwealth at the June 2014 Spill Site, and provide written "Progress Reports" to the Department on a quarterly basis describing the actions taken to comply with the requirements of the Department's Order. Complaint at ¶ 18.

26. On November 24, 2015, Mr. Keck appealed the Department's Order to the Environmental Hearing Board at Docket No. 2015-186-B (consolidated with 2015-143-B). Mr. Keck did not seek a supersedeas of the Department's Order. Complaint at ¶ 19.

27. On April 28, 2017, the Environmental Hearing Board dismissed Mr. Keck's appeal of the Department's Order. Complaint at ¶ 21.

28. Mr. Keck did not appeal the decision of the Environmental Hearing Board dismissing his appeal within the 30-day appeal period. Accordingly, the content of the Department's Order is final. Complaint at ¶ 22.

29. Mr. Keck did not hire a qualified environmental consultant to investigate and remediate the release of crude oil and brine at the June 2014 Spill Site, as required by Paragraph 3.b. of the Department's Order. Complaint at ¶ 23.

30. Mr. Keck did not submit to the Department a written plan to investigate and remediate the release of crude oil and brine at the June 2014 Spill Site, as required by Paragraph 3.c. of the Department's Order. Complaint at ¶ 24.

31. Mr. Keck did not implement the investigation and remediation of the contaminated soil and waters of the Commonwealth at the June 2014 Spill Site, as required by Paragraph 3.d. of the Department's Order. Complaint at ¶ 25.

32. Mr. Keck did not provide written "Progress Reports" to the Department on a quarterly basis describing the actions taken to comply with the requirements of the Department's Order, as required by Paragraph 3.e. of the Department's Order. Complaint at ¶ 26.

33. The Department filed a Complaint for Civil Penalties against Mr. Keck on May 2, 2018. ("Complaint") (2018 Evidentiary Hearing, T. 19).

34. Mr. Neville oversaw the staff conducting investigations at the June 2014 Spill Site and the subsequent preparation of the October 2015 Order. (2018 Evidentiary Hearing, T. 11).

35. Mr. Neville calculated the civil penalties requested by the Department in the Complaint. (2018 Evidentiary Hearing, T. 19).

36. The Oil and Gas Program uses a guidance document when calculating civil penalties under the Clean Streams Law to ensure consistency in penalty calculations and includes a penalty calculation worksheet. (2018 Evidentiary Hearing, T. 19, 22; Exs. R, S).

37. Mr. Neville stated that in calculating a penalty he first assesses damage to the resource from the violation and then modifies that amount based on the violator's willfulness, taking into consideration cost to the Commonwealth, savings to the violator, compliance history, and violator cooperation. (2018 Evidentiary Hearing, T. 21).

38. In calculating the penalty, Mr. Neville considered seven separate violations. (2018 Evidentiary Hearing, T. 22).

39. The Department determined that Mr. Keck's actions that resulted in the violations identified in Counts I-III were negligent and his actions that resulted in the violations identified in Counts IV-VII were deliberate. (2018 Evidentiary Hearing, T. 29, 37, 42, 51, 52, 54, 56).

40. Count I is identified as violations of Section 301 and 307 of the Clean Streams Law which prohibit the discharge of industrial waste into waters of the Commonwealth. (2018 Evidentiary Hearing, T. 22-23).

41. The Department requested a civil penalty of $5,264 (including $764 in Department costs) for Count I of the Complaint. (2018 Evidentiary Hearing, T. 29-31).

42. Count II is identified as a violation of Section 78.54 of the oil and gas regulations which require the control of brines and fluids to prevent pollution to the ground and waters of the Commonwealth. (2018 Evidentiary Hearing, T. 33).

43. The Department requested a civil penalty of $5,264 (including $764 in Department costs) for Count II of the Complaint. (2018 Evidentiary Hearing, T. 35-36).

44. Count III is identified as a violation of Section 78.57(a) of the oil and gas regulations which prohibits, unless approved by the Department, the discharge of brine and other fluids onto the ground or into the waters of the Commonwealth. (2018 Evidentiary Hearing, T. 36; 25 Pa. Code § 78.57(a)).

45. The Department requested a civil penalty of $5,264 (including $764 in Department costs) for Count III of the Complaint. (2018 Evidentiary Hearing, T. 38).

46. Count IV is identified as the failure to comply with Paragraph 3.b. of the Order which required Mr. Keck to hire a qualified consultant to conduct an investigation and submit a plan to the Department. (2018 Evidentiary Hearing, T. 39).

47. The Department requested a civil penalty of $10,000 for Count IV of the Complaint (2018 Evidentiary Hearing, T. 42).

48. Count V is identified as a failure to comply with paragraph 3.c. of the Order which required Mr. Keck to submit a plan to investigate and remediate the June 2014 spill. (2018 Evidentiary Hearing, T. 51).

49. The Department requested a civil penalty of $10,000 for Count V of the Complaint. (2018 Evidentiary Hearing, T. 52-53).

50. Count VI is identified as a failure to comply with paragraph 3.d. of the Order which required Mr. Keck to implement the remediation plan. (2018 Evidentiary Hearing, T. 53).

51. The Department requested a civil penalty of $10,000 for Count VI of the Complaint. (2018 Evidentiary Hearing, T. 54).

52. Count VII is identified as a failure to comply with 3.e. of the Order which required Mr. Keck to submit quarterly reports. (2018 Evidentiary Hearing, T. 55).

53. The Department requested a civil penalty of $4,500 for Count VII of the Complaint. (2018 Evidentiary Hearing, T. 55-56).

54. Mr. Neville estimated that the cost to do an investigation and remediate the June 2014 Spill Site was in the range of $28,000 to $30,000. (2018 Evidentiary Hearing, T. 43)

55. To determine how much Mr. Keck saved by not complying with the 2015 October Order, Mr. Neville relied on a letter sent to the Department by Mr. Keck stating it would cost $30,000 to clean up the site; a phone conversation with Jason Kronenwetter who stated he gave Mr. Keck an estimate of $28,000; and Mr. Neville's own experience with cleanups. (2018 Evidentiary Hearing, T. 44; Ex. P).

56. The total civil penalty requested by the Department in the Complaint was $50,292. (2018 Evidentiary Hearing, T. 56).

57. The total civil penalty requested by the Department included a claim for $2,292 for Department costs. (2018 Evidentiary Hearing, T. 32).

58. The Department's costs were calculated using the man-hours of Department staff and their rate with some additional amount for mileage reimbursement. (2018 Evidentiary Hearing, T. 30).

59. The Department did not enter into evidence the spreadsheets showing the individual employee's hours, wages, and mileage referenced in Exhibit R in support of its claim for its costs in the 2018 Evidentiary Hearing. (2018 Evidentiary Hearing, T. 31).

DISCUSSION

The Board's role in evaluating a complaint for civil penalties is to make an independent determination of the appropriate penalty amount. *DEP v. Percora*, 2007 EHB 545. The Department has the burden of proof in a case where it files a complaint for civil penalty assessments. *DEP v. EQT Production Company*, 2017 EHB 435, *aff'd*, 193 A.3d 1137 (Pa. Cmwlth. 2018). The Department must show by a preponderance of the evidence that Mr. Keck violated the applicable statutes and regulations and that there is a lawful basis for the assessment of a civil penalty. *Id*. citing *DEP v. Seligman,* 2014 EHB 755, 763; *DEP v. Simmons*, 2010 EHB 262, 276. The Department may suggest an amount in the complaint, but the suggestion is purely advisory. *Id.* citing *Seligman,* 2014 EHB at 763; *DEP v. Simmons*, 2010 EHB 262, 276; *DEP v. Strubinger*, 2006 EHB 740, 748, *aff'd*, 2195 C.D. 2006 (Pa. Cmwlth. Jun. 13, 2007). The guidance the Department uses in determining a suggested civil penalty is not binding on the Board. *United Refining Company v. DEP*, 2006 EHB 846, 849-50. The Board's responsibility is to assess a penalty based upon applicable statutory criteria, any applicable regulatory criteria, and our own precedent. *DEP v. EQT Production Company,* 2017 EHB 435, 480, citing, *DEP v. Perano* 2011 EHB 867, 878; *DEP v. Weiszer*, 2011 EHB 258, 381.

The Clean Streams Law provides that a civil penalty shall not exceed $10,000 per day for each violation. 35 P.S. § 691.605(a). The statute also outlines specific factors to consider in determining the amount of a civil penalty, including the willfulness of the violation, the damage or injury to the waters of the Commonwealth or their uses, the costs of restoration, and "other relevant factors." *Id.* We have previously held that other relevant factors include costs incurred by the Department to undertake enforcement, the cost savings to the violator, the volume of pollution released, and the deterrent effect of the penalty. *EQT Production Company*, 2017 EHB at 480. We have also said that civil penalties should be no less than what it would have cost to comply with the law. See, e.g., *Perano*, 2011 EHB at 879 ("[T]he Board's civil penalty should, at a minimum, be high enough to deprive the violator of any savings or profit achieved through non-compliance with the law."); *DEP v. Breslin*, 2006 EHB 130, 141 n.6 ("[I]t should *never* be cheaper to violate the law than to comply with the law. Civil penalties should, at an absolute minimum, recoup any savings or excess profit that resulted from the choice to violate the law." (emphasis in original)).

Analysis

We granted the Department's Default Judgment Motion as to Mr. Keck's liability with an order dated February 4, 2019, and the only issue to be decided by the Board in this matter is the appropriate civil penalty to be assessed against Mr. Keck. Mr. Keck is liable for two broad categories of violations cited in the Complaint. The first category involves specific spill/discharge violations of Sections 301, 307 and 311 of the Clean Streams Law and underlying violations of the oil and gas regulations at 25 Pa. Code §§78.54 and 78.57(a). The second category involves Mr. Keck's failure to comply with requirements of the Department's October 2015 Order in violation of Sections 610 and 611 of the Clean Streams Law.

Spill Specific Violations - Count I through Count III

Count I of the Complaint sets forth violations of Sections 301 and 307 of the Clean Streams Law. Section 301 states:

> No person or municipality shall place or permit to be placed, or discharged or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any industrial wastes, except as hereinafter provided in this act.

35 P.S. § 691.301. Section 307 states in relevant part that:

> No person or municipality shall discharge or permit the discharge of industrial wastes in any manner, directly or indirectly, into any of the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department.

35 P.S. § 391.307(a)

Count II of the Complaint asserts a violation of Section 611 of Clean Streams Law by virtue of Mr. Keck's violation of Section 78.54 of the oil and gas regulations. Section 611 of the Clean Streams Law states that:

> It shall be unlawful to fail to comply with any rule or regulation of the department or to fail to comply with any order or permit or license of the department, to violate any of the provisions of this act or rules and regulations adopted hereunder, or any order or permit or license of the department, to cause air or water pollution, or to hinder, obstruct, prevent or interfere with the department or its personnel in the performance of any duty hereunder or to violate the provisions of 18 Pa.C.S. section 4903 (relating to false swearing) or 4904 (relating to unsworn falsification to authorities). Any person or municipality engaging in such conduct shall be subject to the provisions of sections 601, 602 and 605.

35 P.S. § 691.611. Section 78.54 of the oil and gas regulations, promulgated under the Clean Streams Law, states that:

> The well operator shall control and dispose of fluids, residual waste and drill cuttings, including tophole water, brines, drilling fluids, drilling muds, stimulation fluids, well servicing fluids, oil,

> production fluids and drill cuttings in a manner that prevents pollution of the waters of this Commonwealth and in accordance with § § 78.55—78.58 and 78.60—78.63 and with the statutes under which this chapter is promulgated.

25 Pa. Code §78.54.

Count III of the Complaint asserts another violation of Section 611 of the Clean Streams Law by virtue of Mr. Keck's violation of Section 78.57 of the oil and gas regulations. Section 78.57, promulgated under the Clean Streams Law, states as follows:

> Unless a permit has been obtained under § 78.60(a) (relating to discharge requirements), the operator shall collect the brine and other fluids produced during operation, service and plugging of the well in a tank, pit or a series of pits or tanks, or other device approved by the Department for subsequent disposal or reuse. Except as allowed in this subchapter or otherwise approved by the Department, the operator may not discharge the brine and other fluids on or into the ground or into the waters of this Commonwealth.

25 Pa. Code § 78.57.

The Complaint suggests a civil penalty of $15,792 (three identical civil penalties of $4,500 plus $2,292 in Department costs) for the violations set forth in Counts I, II, and III. As previously stated, to determine an appropriate penalty under the Clean Streams Law we look to the statute, which directs us to consider the willfulness of the violation, the damage or injury to the waters of the Commonwealth or their uses, the costs of restoration, and other relevant factors. The Department determined Mr. Keck's level of willfulness for the spill related violations in Counts I, II, and III, to be negligent. We agree with this determination as there is not sufficient evidence to hold Mr. Keck to a higher level of willfulness. The evidence of the damage or injury to the waters of the Commonwealth from the June 2014 Spill is mixed. The oil slick in the immediate aftermath of the release on June 2, 2014, was visible on Sloan Run and Piney Creek and required the deployment of several booms and numerous absorbent pads in the streams. A video admitted in

the 2016 Hearing showed oil collected behind booms and a sheen on the water surface. However, this impact appeared to be short-lived and there was inconclusive evidence of damage to the biology of the streams. A Department inspection conducted on June 17, 2014, noted that the pads and booms had been removed and that there was no visible contamination in Sloan Run and Piney Creek. (*Keck v. DEP*, 2017 EHB at 298, FOF 39). During a September 2014 follow-up inspection, the Department's inspector again noted that there were no visible signs of contamination in Sloan Run or Piney Creek. (*Keck v. DEP*, 2017 EHB at 298, FOF 41; 2016 Hearing, Ex. F). The Department referenced biological monitoring conducted on the impacted stream, but it did not know the results and could not find the document setting forth monitoring results. (2018 Evidentiary Hearing, T. 27). Mr. Neville, the Department's District Oil and Gas Manager for the Northwest Region and its only witness at the 2018 Evidentiary Hearing, testified that he was "sure there was evidence of dead macroinvertebrates," but was unable to provide any specific evidence of harm to the macroinvertebrate communities in the impacted streams. (2018 Evidentiary Hearing, T. 28). Mr. Neville was also questioned about whether there was any evidence of dead fish resulting from the June 2014 Spill and stated that "I don't believe there were any dead fish." (2018 Evidentiary Hearing, T. 28). We also have little evidence regarding the costs of restoration to the waters of the Commonwealth related to Counts I, II, and III. We know that Mr. Keck was invoiced for and paid several thousand dollars in costs associated with the emergency response and investigation activities resulting from the June 2014 Spill. (*Keck v. DEP*, 2017 EHB at 299, FOF 50; 2016 Hearing, T. 275-276, 287) The Department did not present any evidence of costs directly related to the restoration of the waters of the Commonwealth.

The Department requested a civil penalty of $4,500 for the violation set forth in Count I and we will assess the requested amount. The Department requested the same amount ($4,500)

for each of Counts II and III. These counts involve the violation by Mr. Keck of similar oil and gas regulations that essentially require that the operator control and properly dispose of well fluids (in this case, oil and brine) in a manner that is protective of the waters of the Commonwealth. The Department attempts to distinguish the violations under Count II and Count III by stating that 25 Pa. Code §78.54 requires the operator to take preventative measures to prevent pollution whereas 25 Pa. Code § 78.57 takes it one step further and says that the operator failed to control the fluids and caused a discharge. (T. 38- 39). We are not sure that we read these regulations in quite the same manner as suggested by the Department, but Mr. Keck's liability for these violations was already established by default. Still, our concern that, under the facts of this case, these violations address essentially the same behavior by Mr. Keck makes us cautious about awarding the full amount requested by the Department. Instead, we find that in light of the statutory factors discussed above, and the fact that the regulatory provisions violated in Counts II and III sanction very similar behavior and therefore, may not warrant the full amount requested by the Department, we will assess a civil penalty of $2,500 each for Count II and Count III. Considering all of this information, we assess a $9,500 civil penalty against Mr. Keck for the violations set forth in Counts I, II and III of the Complaint. We will address the Department's costs when we consider the other relevant factors as provided by the Clean Streams Law.

Order Violations - Counts IV, V, VI, VII

The remaining violations in the Complaint address Mr. Keck's failure to comply with requirements in the Department's October 2015 Order in violation of Sections 610 and 611 of the Clean Streams Law. Count IV of the Complaint addresses Mr. Keck's failure to comply with paragraph 3.b. of the October 2015 Order that required Mr. Keck to hire a qualified environmental consultant to investigate and remediate the release of crude oil and brine at the June 2014 Spill

Site. Count V of the Complaint seeks a penalty for Mr. Keck's failure to comply with paragraph 3.c. of the October 2015 Order that required Mr. Keck to submit a written plan to investigate and remediate the release of crude oil and brine at the June 2014 Spill Site. Count VI seeks a penalty for Mr. Keck's failure to implement the investigation and remediation of the contaminated soil and waters at the June 2014 Spill Site in accordance with paragraph 3.d. of the October 2015 Order. Finally, Count VII addresses Mr. Keck's failure to provide the Department with written quarterly progress reports describing the actions taken to comply with the October 2015 Order as required by paragraph 3.e of the October 2015 Order. Section 610 of the Clean Streams Law declares that the failure to comply with a Department Order is a nuisance and Section 611 of the Clean Streams Law makes it unlawful to fail to comply with a Department Order and provides that any person engaging in such conduct is subject to the civil penalty provision found at Section 605 of the Clean Streams Law. 35 P.S. § 691.610-611.

The reasonable intent of the October 2015 Order was to ensure that any remaining soil contamination that resulted from the June 2014 Spill was properly addressed and any further impact to the waters of the Commonwealth was prevented. Mr. Keck failed to take required actions set out in the October 2015 Order, even after his appeal was heard and dismissed by the Board. The failure to follow the requirements of the October 2015 Order makes Mr. Keck liable for a civil penalty under the Clean Streams Law. As previously stated, to determine the appropriate penalty under the Clean Streams Law we look to the statute, which directs us to consider the willfulness of the violation, the damage or injury to the waters of the Commonwealth or their uses, the costs of restoration, and other relevant factors. Given Mr. Keck's failure to address many of the requirements of the October 2015 Order, the Department determined that the level of willfulness for Counts IV through VII of the Complaint was deliberate and we agree with that determination.

The impact to the waters of the Commonwealth or their uses resulting from Mr. Keck's failure to comply with the October 2015 Order is again harder to gauge. Mr. Keck took some limited actions at the June 2014 Spill Site soon after the June 2014 Spill that he argued in the 2016 Hearing were adequate remediation of the contamination. We stated in our prior adjudication in this case that we were not convinced that the contamination had been sufficiently addressed by his limited efforts. (*Keck v. DEP*, 2017 EHB at 310.) At the same time, as noted previously, a Department inspection conducted on June 17th, 15 days after the June 2014 Spill, stated that there was no visible contamination in Sloan Run and Piney Creek. Soil samples collected on July 2, 2014, provided evidence of continued soil contamination in the area adjacent to Sloan Run. We received no additional analytical data demonstrating ongoing soil, groundwater or surface water contamination from the June 2014 Spill after early July 2014. A September 2014 Department inspection again stated that there was no visible contamination in Sloan Run or Piney Creek. The same September inspection did note that the inspector observed that soil on the bank/bench area near Sloan Run still showed signs of contamination including an odor in the soil. (2016 Hearing, Ex. F). There was no definitive information presented addressing the biological impacts to the stream inhabitants from any potential ongoing releases related to the June 2014 Spill. Therefore, the scope of any damages to the waters of the Commonwealth resulting from the violations described in Counts IV – VII are indeterminate and we will take that into account in determining an appropriate civil penalty.[3] Overall, we find that Mr. Keck's deliberate decision to ignore his obligations under the October 2015 Order, as outlined in Counts IV through VII, warrants the assessment of a $5,000 civil penalty.

[3] We think that costs of restoration related to Counts IV – VII are essentially the same issue as the cost savings to Mr. Keck and we will discuss that issue when we address the other relevant factors we used in determining the appropriate civil penalty.

Other Relevant Factors

In addition to the specific enumerated factors, the statute also provides that the Board should consider "other relevant factors" in determining a civil penalty under the Clean Streams Law. Two relevant factors we need to consider in order to determine the appropriate civil penalty in this case are the cost savings to Mr. Keck and the Department's costs. Turning first to cost savings, Mr. Keck failed to follow several requirements set forth in the October 2015 Order. These requirements were reasonable and simply required Mr. Keck to hire a professional to undertake the further investigation of any remaining environmental impacts of the June 2014 Spill and complete any necessary remediation identified by the investigation. Mr. Keck retained an environmental consultant to begin the investigation process, but he stopped that effort and instead proceeded with a legal challenge to the Department's actions. After a hearing in front of the Board, we found that Mr. Keck was responsible for the June 2014 Spill and that the Department's October 2015 Order was reasonable and appropriate in this case. Even after his day in court, Mr. Keck apparently choose not to complete the requirements of the October 2015 Order. The record demonstrates that Mr. Keck enjoyed cost savings as a result of this decision. As we have previously stated, a violator should not benefit from cost savings as a result of the violation and the civil penalty should be high enough to erase any such cost savings.

The difficulty in this case is determining the amount of the cost savings. Mr. Keck was questioned in the 2016 Hearing about the costs to comply with the October 2015 Order. He testified at the time that he did not know what it would cost him to hire back the consultant he had previously engaged to complete that work. (2016 Hearing, T. 287.) However, in a letter written by Mr. Keck in June 2014 and admitted in the 2018 Evidentiary Hearing, he states the clean-up "slates a cost of over $30,000." (Ex. P.) It is not clear in the letter whether the $30,000 plus

includes costs already paid by Mr. Keck or just represents future costs related to the items that eventually made it into the October 2015 Order. Mr. Neville testified that based on this letter, discussions with Jason Kronenwetter from EnviroTrac, the consultant retained at one point by Mr. Keck, and his own experience, he determined the cost savings to be in the range from $28,000 to $30,000. We have no evidence of record that contradicts this estimate, so we find that the cost savings were at least $28,000 and will add that amount to our civil penalty related to the violations identified in Counts IV – VII.

We now look at the Department's claim for its costs. The Complaint included a request from the Department that we assess $2,292 in Department costs as part of our assessment of a civil penalty. Mr. Neville testified that amount reflects the total amount the Department expended on enforcement in this matter through the issuance of the October 2015 Order. He stated that the $2,292 encompasses, "the man-hours of the folks that were involved times their rate, and then we added a little bit of additional cost in there for mileage reimbursement for Travis Walker, Ruth Taylor, and Chad Meyer." (T. 30). In a footnote in its second post-hearing brief, the Department asserts that Department costs were "specifically set forth in the matrix worksheets that were attached to the Complaint. Complaint Exhibits C, D and E." (DEP Post-Hearing Brief, at 15, n.3). The Department's Complaint Exhibits C, D, and E are included in the 2018 Evidentiary Hearing Exhibit R and are the Department's penalty calculation worksheets for the Complaint. The worksheets for Counts I-III each list a Commonwealth cost of $764 with a note to "see attached sheets." Although Mr. Neville testified that the "attached sheets" consist of a spreadsheet with each employee's hours, wage, and mileage, and that he knew where they were, the attached sheets were not included with the Complaint and the Department did not present them or admit them into the record in the 2018 Evidentiary Hearing. (2018 Evidentiary Hearing, T. 31). In addition to the

lack of the attached sheets supporting the claimed amount, a further examination of the worksheets shows the following information regarding Department costs set forth on the initial worksheet (Complaint, Ex. C): Mileage $50 Hours $950. (2018 Evidentiary Hearing, Ex. R). These amounts are inconsistent with any of the cost amounts testified to by Mr. Neville or requested by the Department.

We recently held that "lack of documentation regarding both the number of hours worked and the hourly rate used when the Department seeks to recover its costs continues to cause some concern for the Board when ruling on this portion of a penalty assessment and may lead us to reject this type of claim in the future." *Schlafke v. DEP*, EHB Docket No. 2016-117-B, slip op. at 43 (Adjudication, January 8, 2019) (citing *Whiting v. DEP*, 2015 EHB 799, 813-814). Once again in this case, the Department is seeking to have the Board award costs it claims to have incurred while providing no evidentiary support other than the testimony of a staff person. The lack of supporting information is especially troubling in this case because the Department witness testified that he knew where the "attached sheets" were and that they contained the relevant information to support the costs claimed by the Department. Despite the information being readily available, the Department offered no explanation for the failure to present it as evidence at the 2018 Evidentiary Hearing in this case whose sole purpose was to determine an appropriate civil penalty, including the requested costs. This oversight is further compounded by the fact that the testimony of Mr. Neville is not completely consistent with the information set forth in the only exhibit that the Department did present in support of its claim. The Department made no effort to explain the information listed on Exhibit C of the Complaint that set forth costs of $50 for mileage and $950 for hours, numbers that are not consistent with the costs claimed by the Department. In light of the lack of supporting documentation, and the discrepancy between the testimony and the

documentary evidence that was presented, we find that the Department has not carried its burden on the requested costs and will not include any Department costs as part of the civil penalty in this case.

Mr. Keck is liable for the seven violations identified in the Complaint as Counts I-VII. We find that the appropriate civil penalty for these violations is $42,500 and we assess a civil penalty in that amount against Mr. Keck for the multiple violations of the Clean Streams Law resulting from the June 2014 Spill and his failure to comply with certain requirements in the October 2015 Order.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. 691.605; 35 P.S. §7514.

2. The Department must show by a preponderance of the evidence that Mr. Keck violated the applicable statutes and regulations and that there is a lawful basis for the assessment of a civil penalty. *DEP v. EQT Production Company,* 2017 EHB 435, citing *DEP v. Seligman,* 2014 EHB 755, 763; *DEP v. Simmons,* 2010 EHB 262, 276.

3. The Department may suggest an amount in the complaint, but the suggestion is purely advisory. *Seligman,* 2014 EHB at 763; *DEP v. Simmons*, 2010 EHB 262, 276; *DEP v. Strubinger,* 2006 EHB 740, 748, *aff'd*, 2195 C.D. 2006 (Pa. Cmwlth. Jun. 13, 2007).

4. The Board's responsibility is to assess a penalty based upon applicable statutory criteria, any applicable regulatory criteria, and our own precedent. *DEP v. EQT Production Company,* 2017 EHB 435, 480, citing, *DEP v. Perano* 2011 EHB 867, 878; *DEP v. Weiszer*, 2011 EHB 258, 381.

5. The Clean Streams Law outlines specific factors to consider in determining the amount of a civil penalty, including the willfulness of the violation, the damage or injury to the waters of the Commonwealth or their uses, the costs of restoration, and "other relevant factors." 35 P.S. § 691.605(a).

6. Other relevant factors include costs incurred by the Department to undertake enforcement, the cost savings to the violator, the volume of pollution released, and the deterrent effect of the penalty. *EQT Production Company*, 2017 EHB at 480.

7. Civil penalties should be no less than what it would have cost to comply with the law. *DEP v. Perano* 2011 EHB 867, 879.

8. Mr. Keck's failure to file an answer to the Complaint containing a notice to defend resulted in the entry of default judgment in favor of the Department with regards to Mr. Keck's liability for the violations. 25 Pa. Code 1021.76a(a).

9. The Board assesses a civil penalty in the amount of $42,500 against Mr. Keck for his violations of the Clean Streams Law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2018-044-CP-B**
v.	:	
TIMOTHY A. KECK	:	

O R D E R

AND NOW, this 13th day of May, 2019, it is hereby ordered that Timothy A. Keck is assessed a civil penalty of $42,500.

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, 2019

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

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

For Defendant:
Timothy A. Keck
93 Carrier Street
Summerville, PA 15864-6301

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL E. THOMAS	:	
	:	
v.	:	**EHB Docket No. 2018-064-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, LLC, Intervenor	:	**Issued: May 13, 2019**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal of the Department's denial of a mine subsidence claim where the appellant did not respond to a motion to dismiss filed by the intervenor and supported by the Department.

O P I N I O N

Paul E. Thomas has filed an appeal of the Department of Environmental Protection's (the "Department's") determination that mine subsidence was not the cause of damage to Thomas's property in East Finley Township, Washington County. Thomas had filed a mine subsidence damage claim form with the Department in April 2018 for what Thomas believed was damage to his farm caused by underground coal mining operations at the Enlow Fork Mine, operated by Consol Pennsylvania Coal Company ("Consol"). After conducting an investigation, the Department determined that Thomas's farm was either not affected by any mine subsidence, or if

it was, any damage to the farm did not constitute "material damage" as defined in the regulations.[1]

Consol has moved to dismiss Thomas's appeal, arguing that Thomas lacks standing because he conveyed his interest in the surface of the property prior to filing his claim for subsidence damage. According to Consol, only "landowners" have standing to appeal to the Board under the Bituminous Mine Subsidence and Land Conservation Act under 52 P.S. § 1406.16. The Department has filed a memorandum of law in support of Consol's motion. The Department echoes Consol's position and also argues that the provisions of the Act dealing with damage to structures from underground mining and the procedures for securing compensation employ the term "owner" in relation to buildings that are protected from damage, and that appeal rights are only specifically granted to a "landowner" or a "mine operator." *See* 52 P.S. §§ 1406.5d and 1406.5e.

Consol filed its motion on March 14, 2019. The Department filed its supporting memorandum in accordance with our rule at 25 Pa. Code § 1021.94(b) on March 29, 2019. Accordingly, Thomas's response to the motion was due within 30 days of service of the supporting memorandum, which was April 29, 2019 (the first business day following the due date). 25 Pa. Code § 1021.94(c). Thomas has not filed a response to the motion even after Board staff reached out to counsel for Thomas to inquire whether he would be responding.

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[1] Material damage is defined as follows:

> Damage that results in one of the following:
> (i) Functional impairment of surface lands, structures, features or facilities.
> (ii) Physical change that has a significant adverse impact on the affected land's capability to support current or reasonably foreseeable uses or causes significant loss in production or income.
> (iii) Significant change in the condition, appearance or utility of a structure or facility from its presubsidence condition.

25 Pa. Code § 89.5.

Our rules on filing and responding to dispositive motions provide:

> When a dispositive motion is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response must set forth specific issues of fact or law showing there is a genuine issue for hearing. If the adverse party fails to adequately respond, the dispositive motion may be granted against the adverse party.

25 Pa. Code § 1021.94(f). As we have held before in a similar situation, "No response is clearly not an adequate response, and the Board may grant the motion 'if the adverse party fails to adequately respond.'" *RES Coal, LLC v. DEP*, 2017 EHB 1239, 1244. Accordingly, we will dismiss Mr. Thomas's appeal on the basis of his failure to file a response to the motion.

We issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL E. THOMAS	:	
	:	
v.	:	**EHB Docket No. 2018-064-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, LLC, Intervenor	:	

O R D E R

AND NOW, this 13th day of May, 2019, it is hereby ordered that Consol'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 13, 2019

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

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

For Appellant:
Jeffry Grimes, Esquire
(*via electronic filing system*)

For Intervenor:
Marc C. Bryson, Esquire
Jon C. Beckman, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DARLENE MARSHALL	:	
	:	
v.	:	**EHB Docket No. 2018-034-L**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: May 16, 2019**
PROTECTION and WINDFALL OIL & GAS	:	
INC., Permittee	:	

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion for summary judgment because there are disputed issues of material fact.

O P I N I O N

Darlene Marshall filed this appeal *pro se* from a permit issued by the Department of Environmental Protection to Windfall Oil & Gas, Inc. to drill and operate an underground injection control ("UIC") well in Brady Township, Clearfield County. The Department has filed a motion for summary judgment to dismiss Marshall's appeal essentially based on the lack of evidence supporting her claims. Marshall opposes the motion. Interestingly, Windfall has not participated in the motions practice.

A motion for summary judgment may be granted when the pleadings, depositions, answers to interrogatories and admissions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. Nos. 1035.1 and 1035.2(1); *Diehl v. DEP*, 2018 EHB 18; *Robinson Coal Co. v. DEP*, 2011 EHB 895,

905; *Energy Res., Inc. v. DER*, 1990 EHB 901, 904; *Miller v. DER*, 1988 EHB 538, 541. The Board reviews the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party, and resolving all doubts as to the presence of a genuine issue of material fact against the moving party. *Paul Lynch Investments, Inc. v. DEP*, 2016 EHB 845, 847; *Perkasie Borough Auth. v. DEP*, 2002 EHB 75, 81. Summary judgment may also be available

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

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

After our review of the record in this case, the Department has not convinced us that there are no genuine issues of material fact such that it is entitled to judgment in its favor as a matter of law, or that Marshall's proffered evidence necessarily falls short of a *prima facie* case. Marshall has filed a 79-page list of objections and we are not convinced that she will necessarily be unable to prevail on any of her claims given, *inter alia*, her failure to retain an expert witness. Having said that, we must caution Marshall that much of the proffered evidence that she points to in her brief in opposition to the Department's motion for summary judgment appears to be inadmissible hearsay or otherwise inadmissible evidence. The Board is not a forum in which a party can simply "research" a number of studies about UIC wells and expect to have those studies admitted into the record without appropriate sponsoring witnesses and/or accompanying

admissible expert testimony. Marshall has also referred us to what appear to be expert reports from other cases, but it is extremely unlikely that we would find these to be admissible in this proceeding. Notwithstanding our ruling today, it may very well be appropriate to reassess whether Marshall has made out a *prima facie* case at the conclusion of her case at the hearing on the merits if these potential evidentiary problems persist.

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.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 16th day of May, 2019, it is hereby ordered that the Department's motion for summary judgment is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: May 16, 2019

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

For the Commonwealth of PA:
Geoffrey J. Ayers, Esquire
(*via electronic filing system*)

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

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SAM JOSHI	:	
	:	
v.	:	**EHB Docket No. 2017-116-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COVANTA PLYMOUTH RENEWABLE ENERGY, LLC, Permittee	:	**Issued: May 17, 2019**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal of a renewal of a Title V Operating Permit for a waste to energy facility. The appellant did not meet his burden of proving that the renewal of the permit was unlawful, unreasonable, or not supported by the facts because of (1) an alleged failure of the permittee to have its permit application signed by an appropriate "responsible official," (2) an alleged failure of the permittee to correctly fill out the compliance review form in its application to identify "related parties," and (3) an alleged improper failure by the Department to review the impacts of the combustion of "municipal-like residual waste" before issuing the permit renewal.

FINDINGS OF FACT

1. The Commonwealth of Pennsylvania, Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Air Pollution Control Act, Act of January 8, l960, P.L. 2119 (1959), as amended, 35 P.S. §§ 4001 – 4015; 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. (Stipulation of the Parties No. ("Stip.") 1.)

2. The Department has the powers and duties to implement the provisions of the federal Clean Air Act in the Commonwealth. (Stip. 2.)

3. Covanta Plymouth Renewable Energy ("Covanta") is a limited liability company, or an LLC, which is the permittee in this matter concerning the renewal of Title V Operating Permit No. 46-00010 issued to Covanta by the Department on November 21, 2017. (Stip. 3; Notes of Transcript page ("T.") 71-72; Covanta and DEP Joint Exhibit No. ("C. Ex.") 24; Joshi Exhibit No. ("J. Ex.") 14.)

4. Covanta owns and operates a municipal waste resource recovery facility located in Plymouth Township, Montgomery County. (T. 70.)

5. Covanta's Plymouth Township facility brings in waste to combust it for the generation of heat and steam to create electricity. (T. 88-89, 131-32.)

6. Until December 31, 2014, Covanta was organized as a Delaware limited partnership with the name Covanta Plymouth Renewable Energy, LP, at which point it converted to the organizational form of an LLC. (Stip. 8, 9, 10, 11; T. 74-76; C. Ex. 10, 11.)

7. On May 5, 2015, the Department received a request from Covanta to administratively amend its Title V permit to change the name of the company from Covanta Plymouth Renewable Energy, LP, to Covanta Plymouth Renewable Energy, LLC. (Stip. 12; C. Ex. 12.)

8. On November 15, 2016, Covanta sent the Department its application to renew Title V Operating Permit No. 46-00010. (Stip. 14; C. Ex. 15, 16.)

9. Under the Department's air quality regulations, a permit application submitted to the Department must contain a certification from a "responsible official" as to the truth, accuracy, and completeness of the application. 25 Pa. Code § 127.402(d).

10. The regulatory definition of a "responsible official" differs depending on whether the individual is associated with a corporation, a partnership or sole proprietorship, a municipality, or an "affected source." 25 Pa. Code § 121.1.

11. The definition of a "responsible official" does not explicitly mention LLCs such as Covanta. 25 Pa. Code § 121.1.

12. The Department views the responsible official as the person who knows about the day-to-day operations at the facility and the person who signs documents submitted to the Department on behalf of the facility. (T. 140-41.)

13. The Department typically approves facility managers, directors of operation, and other similar individuals as responsible officials. (T. 141.)

14. Covanta's 2016 renewal application was signed by John J. Polidore in the space for a responsible official's signature. (Stip. 15, 16; C. Ex. 16 (at 0202).)

15. John Polidore's title on the 2016 renewal application is identified as "facility manager." (Stip. 17; C. Ex. 16 (at 0202).)

16. Covanta promoted John Polidore to facility manager of the Plymouth Township facility in November of 2010 and he served in that position until the fourth quarter of 2017. (T. 87-88.)

17. Polidore was promoted by Glenn Madelmayer, who was the Regional Vice President of Operations for Covanta and an officer of the general partner for the partnership that existed at that time. (T. 87-88.)

18. In his role as facility manager, Polidore was responsible for the overall operations of the facility, ensured Covanta complied with its environmental permits, and he oversaw all of the facility's approximately 40 employees who reported to him either directly or indirectly. (T. 88, 92.)

19. Upon Polidore's promotion to facility manager, Glenn Madelmayer designated him as the responsible official for the Plymouth Township facility. (T. 89.)

20. On February 16, 2012, Covanta submitted a letter request to the Department seeking to officially change the responsible official for its Plymouth Township facility to John Polidore. (T. 92-93; C. Ex. 6.)

21. The Department approved this request on the same day. (T. 93; C. Ex. 7.)

22. On the subsequent renewal of Covanta's Title V permit, issued on May 15, 2012, Polidore is listed as the responsible official for the facility. (T. 93-94; C. Ex. 8.)

23. On May 19, 2015, the Department amended Covanta's Title V permit to reflect the conversion of Covanta from an LP to an LLC, and Polidore is again listed as the responsible official for the facility. (T. 124; C. Ex. 13.)

24. Polidore was authorized to act as on behalf of Covanta when signing documents and certifying their accuracy and completeness before submitting them to the Department. (T. 88-89, 91-92, 94.)

25. Polidore would review with his support staff and environmental specialists compliance submittals, quarterly and annual reports, and permit applications before certifying their accuracy and completeness and submitting them to the Department. (T. 89-91.)

26. Polidore and his team conducted a page-turn review of the then-current Title V permit and the 2016 renewal application to determine the application's completeness and accuracy before signing and submitting it to the Department. (T. 94.)

27. Under the air quality regulations, a responsible official (or corporate official) must also sign a compliance review form completed as part of an operating permit application and attest to the completed form's truth and accuracy. 25 Pa. Code § 127.412(b).

28. The compliance review form provides information related to the compliance status of the applicant and its related parties so that the Department can determine if the applicant and its related parties are in violation of the Air Pollution Control Act or have shown a lack of ability or intent to comply with the Act. 25 Pa. Code § 127.412(c). *See also* 35 P.S. § 4007.1.

29. The regulations define a "related party" for purposes of compliance review as a general partner, parent, or subsidiary corporation of the applicant or permittee for a plan approval or operating permit. 25 Pa. Code § 121.1.

30. As an LLC, Covanta does not have a "parent" company per se, but Covanta Energy, LLC is its sole member, holding all of Covanta's membership interests, which is essentially a parent-subsidiary relationship. (T. 71-72.)

31. Covanta Energy, LLC operates as a holding company, meaning its only operations are to own other companies. It holds no plan approvals or permits for any air pollution sources in Pennsylvania and has no offices or locations in Pennsylvania. (T. 72-73.)

32. Covanta Energy's membership interests are in turn held by Covanta Holding Corporation, a corporation that also operates as a holding company and has no other operations besides the ownership of other companies. Covanta Holding Corporation likewise holds no plan

approvals or permits for any air pollution sources in Pennsylvania and has no offices or locations in Pennsylvania. (T. 73-74.)

33. Covanta Holding Corporation is the ultimate parent entity of the Covanta family of companies. (T. 74.)

34. Since forming as an LLC, Covanta has not had any partners or subsidiaries. (T. 77.)

35. Covanta's 2016 renewal application included the Department's Air Pollution Control Act Compliance Review Form, No. 2700-PM-AQ0004. (Stip. 18.)

36. Covanta's submitted compliance review form did not list Covanta Energy, LLC or Covanta Holding Corporation as parents or related parties. (Stip. 19; C. Ex. 16 (at 0242-43).)

37. Covanta's submitted compliance review form disclosed no related parties with places of business or facilities in Pennsylvania. (T. 111-13; C. Ex. 16 (at 0242).)

38. The compliance review form also asks an applicant to identify any documented violations or enforcement actions arising out of the Air Pollution Control Act for the applicant and its related parties occurring during the past five years. (T. 145; C. Ex. 28.)

39. Covanta listed on the form its violations, enforcement actions, and deviations related to the Air Pollution Control Act and its Title V permit in the five years preceding the renewal application. (T. 113-14; J. Ex. 3 (at 63-66).)

40. In addition to its Title V permit, Covanta's Plymouth Township facility also operates pursuant to Waste Management Permit No. 400558. (Stip. 4; C. Ex. 9, 14.)

41. Condition 15a of Covanta's current waste permit, last renewed in 2014, lists the categories of waste that the facility may accept. (Stip. 7; C. Ex. 9 (at 6-7).)

42. Covanta's Title V permit at Condition #004(c), Section E incorporates by reference to its waste permit the types of wastes approved for combustion: "Only the municipal waste and municipal-like residual waste approved by Waste Management of the Department, Permit No. 400588 [sic], shall be combusted in the incinerators." (J. Ex. 14 (at 33).)

43. Unlike municipal waste or residual waste, "municipal-like residual waste" is not defined in the regulations; however, the Department considers it to be residual waste that is similar to municipal waste that could be generated from residential, commercial, or institutional establishments. (T. 131.)

44. The Department provided carpet scraps as an example of municipal-like residual waste because the scraps could be removed from a residence as municipal waste, or they could be thrown out by a carpet manufacturer, which would typically be a residual waste. (T. 131.)

45. The Department says that municipal-like residual waste does not need to undergo a chemical analysis to characterize the residual waste. (T. 131.)

46. The Department coordinates its review of permit applications across its various environmental programs with a weekly meeting where the programs can determine if an application in one program requires any approvals from the other programs before the project moves forward. (T. 130, 148.)

47. Any requested changes to Covanta's waste stream in its waste permit would also have to be approved by the Department's Air Quality Program. (T. 148-49.)

48. After the construction of a new facility, air quality modeling may occur if the facility applies for a major modification that exceeds the thresholds found in the Prevention of Significant Deterioration (PSD) regulations. (T. 149-51.) *See* 40 CFR § 52.21 (incorporated by reference by 25 Pa. Code §§ 127.81 – 127.83).

49. An air quality analysis was performed in 1986 as part of the facility's initial plan approval application, and a revised analysis was conducted in 2001. (C. Ex. 4.)

50. The Department did not require Covanta to submit a revised air quality analysis as part of its Title V permit renewal because it was already an established facility and it did not request any changes to its operations that would trigger PSD requirements as part of its application. (T. 151, 155.)

51. Covanta is required in its Title V permit to conduct annual stack testing for its emissions and it has continuous emissions monitoring equipment to monitor and record certain pollutants. (T. 152-53; C. Ex. 24.)

52. On November 21, 2017, the Department renewed Covanta's Title V Operating Permit No. 46-00010 and notified the Appellant of the Department's decision to issue the renewal, accompanied by a copy of the permit as issued and the associated Comment and Response Document. (Stip. 21; C. Ex. 23, 24.)

DISCUSSION

Sam Joshi, an individual proceeding *pro se*, is appealing the Department of Environmental Protection's (the "Department's") renewal of Title V Operating Permit No. 46-00010 issued to Covanta Plymouth Renewable Energy, LLC ("Covanta") for its operation of a municipal waste resource recovery facility in Plymouth Township, Montgomery County. The facility burns various waste streams for the purpose of generating electricity. The Department issued the renewal permit on November 21, 2017, renewing Covanta's Title V permit through November 21, 2022. Joshi asks us to suspend the renewal permit. He has argued three issues in his post-hearing brief in support of his position:

(1) Covanta's Title V permit renewal application was not signed by an appropriate "responsible official" as that term is defined in the air quality regulations.

(2) The compliance review form Covanta submitted with its renewal application was incorrect and incomplete because it did not identify all "related parties" associated with Covanta.

(3) The Department permitted Covanta to combust non-municipal waste without reviewing its impact on human health and the environment.[1]

Joshi's arguments over the course of this appeal have not always been clear or consistent, but we have endeavored to give appropriate consideration to his arguments as we understand them. Nevertheless, we will only address the issues as they have been preserved and argued in his post-hearing brief. 25 Pa. Code § 1021.131(c) (issue not argued in a post-hearing brief may be waived); *Wilson v. DEP*, 2015 EHB 644, 682 (Board will only address issues or objections preserved in a party's post-hearing brief).

As a third-party appellant, Joshi bears the burden of proof in this appeal of the Department's permit renewal. 25 Pa. Code § 1021.122(c)(2). To prevail, Joshi must show by a preponderance of the evidence that the Department acted unlawfully or unreasonably or that its action is not supported by the facts. *Rausch Creek Land, LP v. DEP*, EHB Docket No. 2017-070-L, slip op. at 6 (Adjudication, Mar. 18, 2019); *Logan v. DEP*, 2018 EHB 71, 90; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156; *Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot.*, 131 A.3d 578, 587 (Pa. Cmwlth. 2016). Joshi has not met his burden with respect to his three issues, which we discuss in turn.

[1] We previously granted summary judgment in favor of the Department and Covanta on Joshi's argument that the permit should be vacated because, according to Joshi, Covanta did not submit its renewal application to the Department on time. *Joshi v. DEP*, 2018 EHB 824.

Responsible Official

Section 127.402(d) of the air quality regulations requires that a permit application submitted to the Department contain a certification from a "responsible official" attesting to the truth, accuracy, and completeness of the information contained in the application to the best of the official's information and belief after a reasonable inquiry. 25 Pa. Code § 127.402(d). Who exactly qualifies as a "responsible official" varies depending generally on the type of entity submitting the application. The term is defined in the regulations as:

> An individual who is:
>
> (i) For a corporation: a president, secretary, treasurer or vice president of the corporation in charge of a principal business function, or another person who performs similar policy or decision making functions for the corporation, or an authorized representative of the person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for, or subject to, a permit and one of the following applies:
>
> (A) The facility employs more than 250 persons or has gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars).
>
> (B) The delegation of authority to the representative is approved, in advance, in writing, by the Department.
>
> (ii) For a partnership or sole proprietorship: a general partner or the proprietor, respectively.
>
> (iii) For a municipality, State, Federal or other public agency: a principal executive officer or ranking elected official. A principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency—for example, a regional administrator of the EPA.
>
> (iv) For affected sources:
>
> (A) The designated representatives in so far as actions, standards, requirements or prohibitions under Title IV of the Clean Air Act (42 U.S.C.A. §§ 7641 and 7642) or the regulations thereunder are concerned.
>
> (B) The designated representative or a person meeting provisions of subparagraphs (i)—(iii) for any other purpose under 40 CFR Part 70 (relating to operating permit programs) or Chapter 127 (relating to construction, modification, reactivation and operation of sources).

25 Pa. Code § 121.1.

There is no explicit mention of limited liability companies (LLCs) such as Covanta in the definition of a "responsible official." Joshi argues that the portion of the definition of a "responsible official" that applies to corporations should extend to LLCs. The Department and Covanta disagree with Joshi and instead they argue that Subparagraph (iv)(B) of the definition concerning "affected sources" applies to LLCs as a catch-all provision.[2] In the alternative, they argue that Covanta would nevertheless satisfy the definition concerning corporations if it is determined to apply.

We will assume for purposes of discussion only that Joshi is correct and that the definition of responsible official that applies to corporations applied to Covanta as an LLC. Under the part of the definition concerning corporations, a responsible official can be "an authorized representative…responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for, or subject to a permit" so long as "[t]he delegation of authority to the representative is approved, in advance, in writing, by the Department." 25 Pa. Code § 121.1. Covanta has satisfied this definition. John Polidore is the representative of Covanta that has been authorized to sign the renewal application. He assumed the role of facility manager of the plant in 2010 after being promoted by Covanta's Regional Vice President of Operations, who also designated Polidore as the facility's responsible official. Polidore was subsequently approved by the Department in writing to be the responsible official in 2012 in response to a letter from Covanta notifying the Department of the personnel change. (C. Ex. 6, 7.)

[2] The Department and Covanta have largely coordinated their efforts in defending Joshi's challenge to Covanta's permit. Earlier in the case they filed a joint motion for summary judgment and a joint motion in limine. They indicated in their pre-hearing memoranda that the two memoranda were intended to complement each other. They utilized a group of joint exhibits at the hearing. They also drafted their post-hearing briefs to dovetail, with Covanta incorporating entire sections of the Department's brief into its own brief, and the majority of the proposed findings of fact being verbatim across the two briefs. Any differences in the Department's and Covanta's positions will be noted.

At the time the renewal application was submitted, Polidore was responsible for the overall operation of the facility, and he was responsible for the more than 40 staff at the facility. He was responsible for reviewing with his staff compliance submittals, quarterly and annual reports, and permit applications. He testified that he sat down with the environmental specialists on his staff and reviewed the renewal application at issue here to ensure it was accurate and complete before signing it and submitting it to the Department. (T. 90-91, 94.) Polidore also testified that, when he signed the renewal application, he understood that he was signing on behalf of Covanta and he had the authority to sign for Covanta by province of his role as facility manager. (T. 91, 94.)

Joshi has failed to satisfy his burden of proving that Covanta's renewal application was not signed by a responsible official. We do not have the sense, as Joshi argues, that Polidore did not have the requisite authority within the business structure to be a "responsible official" or that he otherwise lacked the knowledge or competence to be able to execute the required certification on the application. The responsible official requirement appears to be aimed at having someone sign the application who is familiar with the operations being conducted at the facility and who can vouch for the contents of the application for that facility. For the reasons indicated above, even if we assume Joshi's legal position is correct that the regulation regarding the definition of a responsible official for a corporation applies here, we have no doubt that John Polidore met those requirements.

Compliance Review

Joshi next takes issue with the fact that Covanta did not list any "related parties" on the compliance review form it submitted to the Department with its application. Joshi says that Covanta has related parties that should have been identified. However, based on our review of

the Air Pollution Control Act and the corresponding air quality regulations, it does not appear that Covanta was required to identify any related parties because they do not have any operations in Pennsylvania.

Under Section 7.1. of the Air Pollution Control Act, the Department is prohibited from issuing an operating permit to an applicant or permittee that is in violation of the Act, and the Department may refuse to issue an operating permit to an applicant that has shown a lack of ability or intent to comply with the Act. 35 P.S. § 4007.1(a) and (b). The compliance review required by Section 7.1 is not limited to just the permit applicant or permittee but also includes "a general partner, parent or subsidiary corporation of the applicant or permittee." 35 P.S. § 4007.1(a). *See also* 35 P.S. § 4007.1(b) ("a partner, parent or subsidiary corporation of the applicant or permittee.") The process for an applicant completing a compliance review is outlined in the regulations at 25 Pa. Code § 127.412. Under Section 412, an applicant must submit a compliance review form that, among other things, lists the compliance status of the applicant and "related parties." Consistent with the language employed in Section 7.1 of the Act, a "related party" is defined in the regulations as "a general partner, parent or subsidiary corporation of the applicant or permittee for a plan approval or operating permit…." 25 Pa. Code § 121.1.

Although the compliance review extends to an applicant's related parties, the Air Pollution Control Act distinctly limits the scope of consideration of compliance issues and directs the Department to "only consider violations arising under this act that occurred or are occurring *in Pennsylvania*." 35 P.S. § 4007.1(c) (emphasis added). The regulations are consistent with this direction. In Section 412, an applicant need only identify with respect to its related parties:

- Related parties in the Commonwealth, 25 Pa. Code § 127.412(c)(3);
- Any plan approvals or operating permits issued in the Commonwealth to related parties in effect currently or during the previous five years, *id.* at 127.412(c)(5); and
- Any "documented conduct and deviations" of any plan approval or operating permit held by related parties, *id.* at 127.412(c)(6).[3]

Like the Act, the regulations are focused on activities in Pennsylvania, and only encompass related parties to the extent that they have offices in Pennsylvania or have any plan approvals or operating permits for sources in Pennsylvania. Otherwise, the compliance review scheme does not require the identification of an applicant's related parties.[4]

Covanta does not have any partners or subsidiaries, but it does have the LLC-equivalent of a parent, Covanta Energy, LLC. (T. 71-72, 77.) However, Covanta points out that both its parent, Covanta Energy, and its ultimate parent, Covanta Holding Corporation, are holding companies that have no operations of their own other than to own other companies. (T. 71-74.) They do not have any offices or locations in Pennsylvania. (T. 73-74.) Thus, Covanta's only two related parties have no operations in Pennsylvania, do not possess any permits for any air pollution sources in Pennsylvania (or any other state), and have had no violations or enforcement actions against them related to the Air Pollution Control Act. Under the Act and the regulations,

[3] "Documented conduct" and "deviations" are defined terms in the regulations that generally involve exceedances of emissions limits or other violations of the Act, the regulations, or the provisions of a plan approval or operating permit. 25 Pa. Code § 121.1.

[4] There is some discrepancy between what is required in the regulations and what is requested of applicants on the Department's compliance review form. For instance, Section B of the Department's form only asks for information regarding corporations. First, the Department says this section should request information from all applicants, not just applicants that are corporations. Section B then asks corporate applicants to list all subsidiaries of their parent corporation (i.e. sister companies), which is not covered by the regulatory definition of related party. The Department admits that its compliance review form is not clear. (DEP Brief at 18.) The Department's resource review chief in the air quality program testified that the form needed to be revised so it corresponds with the regulations. (T. 147.) Regardless of the unfortunate discrepancies and uncertainties in the Department's compliance review form, it is clear that Covanta has fulfilled the *statutory and regulatory* requirements related to compliance history.

Covanta did not need to disclose its related parties because they do not have any operations or conduct relevant to the determination of whether Covanta should be granted a permit renewal based on air quality compliance issues.

Joshi also argues that the Department should place Covanta on its compliance docket, for reasons that are not clear to us.[5] Covanta properly listed the violations and "documented conduct and deviations" that it had for the facility for the prior five years. (T. 113-14; J. Ex. 3 (at 63-66).) We have no evidence that any of these violations are unresolved or should otherwise prevent the issuance of the renewal permit. Joshi also raises an argument for the first time in his post-hearing brief that Covanta lacks the ability or intention to comply with the law, asserting that Covanta does not have the ability to comply with its emissions limit for hexavalent chromium. Because Joshi failed to argue this point at any time prior to his post-hearing brief, he has waived his ability to pursue the issue. *Penn Coal Land, Inc. v. DEP*, 2017 EHB 337, 367-68; *Berks Cnty. v. DEP*, 2012 EHB 23, 32-34; *Rhodes v. DEP*, 2009 EHB 325, 327-28. Regardless, there was no evidence presented to substantiate the contention that Covanta lacks the ability or intent to comply with the Air Pollution Control Act.

Waste Combustion

Joshi's final issue concerns the types of wastes that can be burned at the facility. He argues in his brief that the Department has permitted the combustion of non-municipal waste without reviewing its impact on human health or the environment, and says that the Department should have required an appropriate ambient impact analysis of that waste. He is primarily

[5] The "compliance docket" is "[t]he list of violations or lack of intention or ability to comply maintained by the Department which identifies sources and facilities for which plan approvals and operating permits cannot be issued based on noncompliance with the act and the regulations adopted under the act." 25 Pa. Code § 121.1. Under 25 Pa. Code § 127.412(h), an operating permit will not be issued to an applicant or related party if one of its air pollution sources appears on the compliance docket.

focused on the combustion of "municipal-like residual waste."[6] Joshi also complains that there was no public participation related to this aspect of the permit. As we lamented in our earlier Opinion and Order on Cross Motions for Summary Judgment, Joshi's articulation of this objection has been rather malleable and difficult to follow throughout the course of this proceeding. *Joshi v. DEP*, 2018 EHB 824, 834. Joshi was cautioned by that Opinion that he needed to clarify his objection going forward. He has failed to do so. We are under no obligation to assume the role of Joshi's advocate and argue an issue he has not argued himself. *Casey v. DEP*, 2014 EHB 439, 455.

In his post-hearing brief, Joshi seems to focus his attention on a new condition in the renewed operating permit, a portion of Condition #004 in Section E, which provides that Covanta shall only burn the wastes that are approved in its Waste Management Permit:

> (c) Only the municipal waste and municipal like residual waste approved by Waste Management of the Department, Permit No. 400588 [sic], shall be combusted in the incinerators.

(J. Ex. 14 (at 33).) He says this condition was not contained in the draft permit that was publicly noticed, and the public did not have an opportunity to comment on what Joshi views as a "material and significant" change to the permit. Joshi does not seem to object so much to the condition itself, but rather complains that Subsection (c) of the condition, which was contained in the final permit, was not contained in the draft permit that was noticed for the purpose of soliciting comments. Perhaps there may be a circumstance where renoticing a revised draft permit would be appropriate based on new or different permit terms or conditions, but Joshi has not adequately explained why that should have been done here. The waste streams approved for processing at the facility have not changed since 1999, before Covanta owned the facility. (C.

[6] "Municipal-like residual waste" is not defined in the air quality program, but the Department tells us that it considers it to be residual waste that is similar to municipal waste that could be generated from residential, commercial, or institutional establishments. (T. 131.)

Ex. 2, 3, 9, 14.) The permit condition Joshi highlights is similar to conditions in prior permits. (*See* J. Ex. 34 (at 20)). For instance, the 2017 renewal, like the 2012 renewal before it, still limits the amount of municipal-like residual waste to 10-percent of the total waste accepted. (J. Ex. 14 (at 33); J. Ex. 34 (at 20).) More crucially, Joshi has not explained to us why the condition itself is unreasonable or contrary to the law.

Turning to Joshi's air quality analysis argument, the Department points out that there is no requirement to perform air quality modeling or an ambient air analysis for Covanta's Title V renewal. It correctly asserts modeling is only required for a new major source or for a facility making a major modification to an existing source, and that ambient air quality only needs to be analyzed if a facility exceeds Prevention of Significant Deterioration (PSD) thresholds. 40 CFR § 52.21 (incorporated by reference by 25 Pa. Code § 127.83). When there is no statutory or regulatory obligation to perform air quality modeling, the decision to not require it is a matter of the Department's discretion. Joshi has not presented anything in his post-hearing brief to suggest that the Department's decision to not require Covanta to perform modeling was unreasonable. Joshi has not come forth with any evidence, in the form of expert opinion or otherwise, to show that there is any unique harm from burning municipal-like residual waste that was not previously accounted for, or that the Department should have required new or additional air quality modeling for the renewed permit.

Finally, in his reply brief, Joshi accurately states that the Department is a trustee of the Commonwealth's public natural resources and must act toward those resources with prudence, loyalty, and impartiality. Joshi does not explicitly cite Article I, Section 27 of the Pennsylvania Constitution, but he does cite one of our cases that discusses the provision. *See Del. Riverkeeper v. DEP*, 2018 EHB 447, 492. Joshi did not raise any argument regarding Article I, Section 27 in

his notice of appeal or pre-hearing memorandum. Nor did he raise any broadly worded issue involving the Department's duties as a trustee. Accordingly, Joshi has waived his right to argue this issue. *Penn Coal Land, Inc. v. DEP*, 2017 EHB 337, 367-68; *Berks Cnty. v. DEP*, 2012 EHB 23, 32-34; *Rhodes v. DEP*, 2009 EHB 325, 327-28. However, even if we were to consider Joshi's argument, he has not explained why the Department's renewal of Covanta's permit is contrary to the Department's duties as a trustee. Joshi has merely quoted language describing the duty; he has not articulated why the Department purportedly failed in its duty here.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 4006; 35 P.S. § 7514.

2. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *New Hope Crushed Stone & Lime Co. v. DEP*, 2017 EHB 1005, 1020-21 n.1, *aff'd*, No. 1373 C.D. 2017 (Pa. Cmwlth. Jul. 18, 2018); *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

3. As a third party appealing Covanta's permit, Joshi bears the burden of proof in this appeal. 25 Pa. Code § 1021.122(c)(2).

4. Joshi must demonstrate by a preponderance of the evidence that the Department acted unlawfully, unreasonably, or that its action is not supported by the facts. *Rausch Creek Land, LP v. DEP*, EHB Docket No. 2017-070-L, slip op. at 6 (Adjudication, Mar. 18, 2019); *Logan v. DEP*, 2018 EHB 71, 90; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156; *Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot.*, 131 A.3d 578, 587 (Pa. Cmwlth. 2016).

5. Joshi has not met his burden of showing that the Department acted unlawfully, unreasonably, or that its decision to renew Covanta's Title V operating permit is not supported by the facts.

6. No compliance issues on behalf of Covanta or any related party prevented the Department from renewing Covanta's Title V permit. 35 P.S. § 4007.1; 25 Pa. Code § 127.412.

7. The Department did not err by not performing or requiring Covanta to perform a new air quality modeling or ambient impact analysis as part of the permit renewal.

8. 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

SAM JOSHI	:	
	:	
v.	:	**EHB Docket No. 2017-116-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COVANTA PLYMOUTH RENEWABLE ENERGY, LLC, Permittee	:	

O R D E R

AND NOW, this 17th day of May, 2019, it is hereby ordered that this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: May 17, 2019

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

For the Commonwealth of PA, DEP:
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Jessica Hunt, Esquire
(*via electronic filing system*)

For Appellant, *Pro Se*:
Sam Joshi
(*via electronic filing system*)

For Permittee:
Christopher Roe, Esquire
Adam Cutler, Esquire
Karen Davis, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HICKORY HILL GROUP, LLC/JOHN SEITZ	:	
v.	:	**EHB Docket No. 2018-065-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 24, 2019**

OPINION AND ORDER ON
MOTIONS TO COMPEL

By Michelle A. Coleman, Judge

Synopsis

The Board grants two unopposed motions to compel filed by the Department to compel the deposition of the Appellant, to compel answers to interrogatories, and to compel answers to expert discovery.

O P I N I O N

Background

Hickory Hill Group, LLC and John Seitz (collectively "Hickory Hill") have appealed a compliance order issued by the Department of Environmental Protection (the "Department") on May 31, 2018 for alleged violations of the Clean Streams Law and the regulations contained in 25 Pa. Code Chapter 102. Among other things, the order alleges that Hickory Hill conducted earth disturbance activities without a permit and without implementing best management practices (BMPs), which resulted in the potential for sediment pollution to reach an unnamed tributary to the West Branch of Big Elk Creek in East Nottingham Township, Chester County. The order requires Hickory Hill to cease all earth disturbance activities, implement appropriate

BMPs, delineate the wetlands on the property, and submit an NDPES permit application for discharges associated with construction activities.

The Department has filed two motions to compel answers to its discovery requests. In its first motion the Department seeks to schedule and conduct the deposition of Appellant John Seitz, and to obtain answers to its expert interrogatories from Alan Hill, an expert witness previously identified by Hickory Hill, or obtain an expert report from him. In its second motion the Department seeks to obtain answers to its second set of interrogatories. Hickory Hill has not responded to either motion.[1]

The Department attaches several exhibits to its motions that detail the Department's rather extensive efforts to get answers to the discovery requests at issue. On March 22, 2019, the Department sent Hickory Hill its second set of discovery requests, which included a request for admissions and a group of interrogatories and request for production of documents. (Second Motion, Ex. 1.) The discovery requests were sent by email and regular mail. In the email enclosing the discovery requests, the Department also proposed dates and times for the deposition of four witnesses. One of the witnesses was Appellant John Seitz, who the Department sought to depose in his personal capacity and as a representative of Hickory Hill, with a proposed deposition date of May 2, 2019. The Department asked Hickory Hill to let the Department know if the dates and times worked before the Department sent out its notices of deposition. On March 26, 2019, having received no response from Hickory Hill, the Department sent Hickory Hill another email asking if the proposed deposition dates were agreeable. (First Motion, Ex. 2.) The Department sent additional emails on March 29 and April 1, and left Hickory Hill a voicemail, all following up on the proposed deposition dates. (*Id.*) On April 2,

[1] Responses to the Department's motions were due on May 15 and May 20, 2019, respectively, under our rules for responding to discovery motions. 25 Pa. Code § 1021.93(c) ("Responses to discovery motions shall be filed within 15 days of the date of service…").

the Department sent Hickory Hill by email and regular mail its notices of deposition for three of the witnesses, scheduling the depositions at the previously proposed dates and times. (First Motion, Ex. 3.) In its email, the Department noted that it had not heard back from Hickory Hill, but told Hickory Hill to let the Department know if any changes to the deposition dates were needed.

On April 12, the Department sent Hickory Hill a set of expert interrogatories by email and mail. (First Motion, Ex. 4.) In the email, the Department noted that it had not yet heard anything from Hickory Hill regarding the depositions and the Department asked Hickory Hill to contact it to discuss the issue. On April 17, Hickory Hill responded by email in what appears to be the first time since the Department first served its discovery requests on March 22. (First Motion, Ex. 5.) In the email, Hickory Hill stated its belief that interrogatories are limited to parties, not expert witnesses (citing Pa.R.C.P. No. 4005), and said that John Seitz has a medical condition that would not allow him to be deposed on May 2. Hickory Hill said that it could discuss the particulars of the medical condition with the Department if those particulars would not be widely disclosed.

The Department responded to Hickory Hill on the same day. (First Motion, Ex. 6.) The Department cited Pa.R.C.P. No. 4003.5(a)(1)(B) as authority for serving its expert interrogatories. Regarding the deposition of John Seitz, the Department said it was willing to conduct the deposition at his home, if he was agreeable, and asked if Hickory Hill had alternate dates other than May 2. The Department also inquired about the depositions for the other two witnesses. In a rare moment of promptness, Hickory Hill responded the next day saying that it did not read the rule cited by the Department to permit interrogatories of an expert witness. (First Motion, Ex. 7.) Hickory Hill also stated that the Department had not provided assurance that the

details of Seitz's medical condition would remain confidential and offered to discuss the condition with the Department and explain why Seitz would be unable to attend the May 2 deposition.

The Department responded later that day, inviting Hickory Hill to discuss these matters over the phone, outlining its position on expert interrogatories with further legal support, and again asking for alternate dates to depose Seitz. The Department also asked if Seitz needed any accommodations, and noted that the Department did not necessarily need to know about Seitz's medical issues if a deposition could still be set up on terms agreeable to Hickory Hill and Seitz. (First Motion, Ex. 8.) The Department also noted that the close of discovery was three weeks away and Hickory Hill still had not indicated whether the other witnesses would be available for deposition. The Department then sent another email with additional support for its position on expert interrogatories. (First Motion, Ex. 9.) In its first motion to compel, the Department represents that Hickory Hill left the Department a voicemail on April 24 in which Hickory Hill said that Seitz would not be available for deposition until after June 19, 2019, but counsel for Hickory Hill stated he was not sure about that. The Department tells us that since that time Hickory Hill has not clarified a date on which Seitz could be deposed. The Department filed its first motion to compel on April 30.

Regarding the interrogatories and request for admissions served on March 22, the Department reached out to Hickory Hill on April 30 to inquire whether Hickory Hill intended to answer the discovery requests. (Second Motion, Ex. 2.) On May 1, Hickory Hill emailed the Department its answers to the Department's request for admissions but did not answer the interrogatories. (Second Motion, Ex. 3.) Later that day the Department inquired about the answers to the interrogatories. (Second Motion, Ex. 4.) The Department tells us in its second

motion to compel that counsel for Hickory Hill informed the Department that its client had not yet answered the interrogatories. The Department filed its second motion on May 3.

Discussion

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). "[T]he Board is charged with overseeing ongoing discovery between parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205. As noted above, Hickory Hill has not responded to either of the Department's motions to compel. Therefore, we have no basis on which to dispute the version of events presented by the Department regarding the parties' communication. *See Wilson v. DEP*, 2014 EHB 435, 436 (deeming a party's failure to respond to a motion to compel as an admission of all properly-pleaded facts in the motion under 25 Pa. Code § 1021.91(f)). *See also Kennedy v. DEP*, 2006 EHB 193, 194 ("the Board will typically consider a party's failure to respond in any way to a nondispositive motion as an expression that the party does not oppose the motion.").

Beginning with the Department's second set of interrogatories, which were served on March 22, the rule is clear. Under Pa.R.C.P. No. 4006(a)(2), answers to written interrogatories (and any objections) must be served within 30 days of the answering party being served with those interrogatories. Having not answered the Department's interrogatories within 30 days, Hickory Hill shall be compelled to do so. *Wilson v. DEP*, 2014 EHB 435; *Mann Realty, Inc. v. DEP*, 2013 EHB 730.

Turning to the deposition of John Seitz, he is a named appellant in this appeal. By filing this appeal and submitting to the legal process of an appeal before the Board, Seitz should have a

reasonable expectation that he will be subjected to some amount of discovery. In *Kennedy v. DEP*, 2006 EHB 193, we compelled the deposition of an appellant who failed to appear for a noticed deposition and who failed to respond to a subsequent motion to compel. In granting the unopposed motion to compel, we held that "there is no doubt that Kennedy must make himself available to be deposed at a reasonable date, time, and place. He is the appellant in both [consolidated] appeals and doubtless has key factual information." *Id.*, 2006 EHB at 195. The same is true here.

Regarding Seitz's medical condition, we agree with the Department that the details of his condition are not necessarily relevant and do not need to be disclosed unless it is Hickory Hill's position that the condition prevents Seitz from being deposed *at all*. Unfortunately, Hickory Hill did not take the opportunity to articulate its position by responding to the motion. Nevertheless, it appears that the Department is willing to accommodate Seitz, whatever accommodations are necessary due to his medical condition. The Department has offered to take the deposition at his home, and presumably would be willing to conduct the deposition at another location convenient to Seitz if he does not want the deposition to be conducted in his home. The Department has also offered to take necessary breaks during the course of the deposition and to limit the entire deposition to a few hours. These appear to be reasonable accommodations.

Moving on to the Department's expert discovery, we disagree with the position Hickory Hill expressed to the Department via email that the Rules of Civil Procedure do not "permit[] direct interrogatories to an expert witness." (First Motion, Ex. 7.) We succinctly summarized the obligations in conducting discovery of experts in *DEP v. EQT Production Co.*, 2016 EHB 489:

> The Rules of Civil Procedure are explicit regarding parties' responsibilities in conducting expert discovery. In response to expert interrogatories a party must identify expert witnesses expected to be called at trial and disclose the substance of the facts and opinions of the expert's anticipated testimony, or the responding

> party may provide an expert report in lieu of answering expert interrogatories. Pa.R.C.P. No. 4003.5(a)(1). The duty to supplement discovery responses extends to identifying experts. Pa.R.C.P. No. 4007.4(1). The consequence for failing to disclose an expert and provide the substance of the expert's testimony is essentially the same as that discussed above with respect to any other witness—the expert shall not be permitted to testify on behalf of the defaulting party absent extenuating circumstances. Pa.R.C.P. No. 4003.5(b).

Id., 2016 EHB at 493. *See also Kiskadden v. DEP*, 2014 EHB 648, 653 (quoting *Borough of Edinboro v. DEP*, 2003 EHB 725, 772). To the extent Hickory Hill wishes to utilize Alan Hill as an expert witness at the hearing on the merits, it must comply with these rules and answer the Department's expert interrogatories or provide the Department with an expert report.

Discovery in this matter closed on May 13, 2019. We will extend the discovery period solely for the purpose of completing the discovery subject to the instant motions to compel. We grant the Department's motions in accordance with the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HICKORY HILL GROUP, LLC/JOHN SEITZ	:	
	:	
v.	:	**EHB Docket No. 2018-065-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 24th day of May, 2019, it is hereby ordered that the Department's first and second motions to compel are **granted** as follows:

1. Hickory Hill shall serve answers to the Department's second set of interrogatories on or before **June 3, 2019**.
2. Hickory Hill shall serve answers to the Department's expert interrogatories or serve the Department with an expert report on or before **June 7, 2019**.
3. The deposition of John Seitz shall be conducted no later than **June 28, 2019**.

Any party wishing to file a dispositive motion shall do so on or before **August 2, 2019**.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: May 24, 2019

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

For the Commonwealth of PA, DEP:
Aviva H. Reinfeld, Esquire
(*via electronic filing system*)

For Appellant:
Thomas J. Wagner, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BENNINGTON INVESTMENT GROUP, LLC	:	
	:	
v.	:	**EHB Docket No. 2015-190-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DILLSBURG AREA AUTHORITY, Intervenor	:	**Issued: July 8, 2019**

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

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board finds that the Department did not err in denying a land developer's private request to order a municipality to revise its Act 537 Plan. The developer has failed to meet its burden of proving that the municipality's plan should be revised to allow the developer to build and operate a package sewage treatment plant in an area served by public sewers.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, Act of Jan 24, 1966, P.L. 1535, *as amended*, 35 P.S. § 750.1 *et seq*. ("Sewage Facilities Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*,

Opinion of the Board by Judge Labuskes, joined by Chief Judge Renwand and Judge Coleman.
Dissenting Opinion by Judge Mather, joined by Judge Beckman.

71 P.S. § 510-17 ("Administrative Code"), and the rules and regulations promulgated thereunder. (Stip. 1.)[1]

2. Appellant Bennington Investment Group, LLC ("Bennington") is a Pennsylvania limited liability company with a mailing address of 336 West King Street, Lancaster, Pennsylvania 17603. (Stip. 2.)

3. The Intervenor is the Dillsburg Area Authority ("Authority"), a Pennsylvania Municipal Authority with a mailing address of 98 W. Church Street, P.O. Box 370, Dillsburg, Pennsylvania 17019. (Stip. 3.)

4. Franklin Township Ordinance No. 3-1999 designates the Authority as the exclusive agent of Franklin Township for handling sewer matters. (Stip. 12; N.T. 160; D-2.)

5. Franklin Township Ordinance No. 3-1999 provides that the Authority will provide sewer services and treat Franklin Township's municipal wastewater. (Stip. 13; D-2.)

6. Section I of the Township's plan states that developers are expected to deal directly with the Authority in capacity-related matters. (Stip. 17.)

7. Bennington proposes to develop a 344-unit residential subdivision project known as Lexington Fields in Franklin Township, York County, Pennsylvania. (Stip. 10.)

8. Lexington Fields will be located on a plot of land that is approximately 66 acres in size. (N.T. 12.)

[1] The Parties filed a Joint Stipulation on October 4, 2017. Stipulations will be designated as (Stip. #) with the appropriate # from the Joint Stipulation. Notes of testimony for the hearing conducted on October 10, 2017, shall be referenced as (N.T. #), with reference to the appropriate page of the hearing transcript. Commonwealth exhibits shall be designated as (C-#) with reference to the appropriate Commonwealth exhibit. Appellant's exhibits shall be designated as (A-#) with reference to the appropriate Appellant's exhibit. The Dillsburg Area Authority's exhibits shall be designated as (D-#) with reference to the appropriate Dillsburg Area Authority exhibit.

9. The proposed Lexington Fields development is adjacent to the Franklintown Pump Station which is part of the Dillsburg Area Authority's sewage collection system. (Stip. 18.)

10. Lexington Fields also abuts a public road with public sewer lines. (Stip. 19.)

11. Lexington Fields is located in an area of Franklin Township's Act 537 Plan that is designated to be served by public sewer. (N.T. 149-150; C-3.)

12. There is no evidence that Bennington ever submitted a planning module under the Sewage Facilities Act to Franklin Township requesting connection to the public sewers. (*See* N.T. 38, 72-73.) Since no request was submitted, Bennington was never refused a connection to the public sewer system.

13. The Act 537 planning module that Bennington submitted to Franklin Township called for the construction of a 144,000 gallon per day package sewage treatment plant. (N.T. 72; C-4.)

14. The Township denied this planning module. (C-4.)

15. On June 16, 2015, the Department received an application from Bennington for a private request to revise the Act 537 Plan of Franklin Township. (Stip. 5.)

16. Bennington's private request seeks to construct a private package sewage treatment plant to address the sewage needs for the proposed development of Lexington Fields. (Stip. 6.)

17. On July 29, 2015, the Department received comments from the Dillsburg Area Authority regarding the private request application. (Stip. 20.)

18. The Authority commented that the private request is inconsistent with Franklin Township's current Act 537 Plan and that the proposed development abuts a public road with existing public sewers that are serviced by the Dillsburg Area Authority. (Stip. 21.)

19. On August 1, 2015, the Department received comments from Franklin Township regarding the private request. (Stip. 22.)

20. Franklin Township commented that the Township's current Act 537 Plan is adequate to meet the needs anticipated by Bennington, and that the Dillsburg Area Authority is the exclusive agent of the Township to provide sewer service to the proposed location of Lexington Fields. (Stip. 23.)

21. The Department considered Franklin Township's current Act 537 Plan in its decision to deny Bennington's Private Request. (Stip. 24.)

22. Franklin Township's Official Wastewater Facilities Plan ("Act 537 Plan" or "Plan") was approved by the Department on April 1, 1994. (Stip. 14.)

23. Section I of the Act 537 Plan provides that undeveloped sewer service areas that are within 1000 feet of an existing municipal sanitary sewerage line are required to tie into that line. (Stip. 15; N.T. 162; C-3 p. DEP 0011.)

24. Section I of the Act 537 Plan states that the use of package treatment plants for new developments will only be allowed if no other alternatives are available. (Stip. 16; N.T. 161; C-3 p. DEP 0010.)

25. The Authority's Chapter 94 Reports for 2014, 2015, and 2016 indicated that there were no hydraulic or organic capacity issues at its treatment plant. (N.T. 150-152, 163-164; C-6.)

26. The Authority's Chapter 94 Reports for 2014, 2015, and 2016 indicated that there were no capacity issues within the collection and conveyance system. (N.T. 150-152, 163; C-6.)

27. The five-year projection for Dillsburg Area Authority's system indicated that there was capacity within the system for the Lexington Fields subdivision. (N.T. 164.)

28. Meanwhile, on the land development side, Bennington had sought preliminary subdivision plan approval for the Lexington Fields development from the Township. (T. 12.)

29. In order for an applicant to gain preliminary subdivision plan approval, Franklin Township requires the submission of a sewer feasibility report approved by the Authority. (N.T. 102-103.)

30. The Authority will not approve a feasibility report until the applicant executes a sewer capacity reservation agreement with the Authority. (N.T. 104.)

31. One component of the Authority's sewer capacity reservation agreements is the applicant must pay quarterly reservation fees. (Stip. 11.)

32. The reservation fees charged by the Authority at the time of Bennington's appeal were $37.31 per EDU per quarter for wastewater and $23.00 per quarter for water. (Stip. 11.)

33. The Authority does not issue an official capacity letter indicating that capacity is available for a proposed development absent an executed reservation agreement. (N.T. 105-06.)

34. Bennington never submitted a final feasibility report. (T. 29, 102-03, 118-119.)

35. Bennington was unwilling to pay the reservation fees required by the Authority at the Township's preliminary subdivision approval stage. (T. 154; C-6.)

36. Bennington has refused to execute a reservation agreement with the Authority, saying the reservation fees are too expensive. (T. 14-16.)

37. The Department did not consider the reservation fee issue in its review of Bennington's private request. (Stip. 25; N.T. 165-65.)

38. The Department timely denied the private request on November 13, 2015 because Bennington failed to submit any evidence that the Township's plan was not being implemented or was inadequate to meet Bennington's sewage disposal needs. (Stip. 7, 8.)

39. Department concluded that:

> 1) The private request failed to document that the Official Plan of Franklin Township is not being implemented or is inadequate to meet the sewage disposal needs of the property as required by Section 5(b) of the Act and Chapter 71, Section 71.14(a).
>
> 2) Franklin Township's Official Act 537 Plan designates this area as a sewer service area to be served by the Dillsburg Area Authority, of which Franklin Township is a member. Pursuant to Franklin Township Ordinance 3-1999, the Dillsburg Area Authority is the exclusive agent of the Township to provide public water and sewer within its service area.

(*Id.*)

DISCUSSION

This is an appeal from the Department's denial of a private request under the Sewage Facilities Act. To summarize our Findings of Fact, Bennington wishes to develop a 344-unit development in Franklin Township, York County to be known as Lexington Fields. A public sewer system operated by the Dillsburg Area Authority is readily available to serve the development, and the Township's Act 537 plan requires Bennington to hook up to it. In the course of beginning the subdivision approval process with the Township under the Municipalities Planning Code, 53 P.S. § 10101, *et seq.*, Bennington learned that it could not obtain preliminary subdivision approval unless it obtained approval to use the public sewers, and it could not obtain approval unless it paid reservation fees to the Authority to hold capacity

open.[2] Bennington does not object to the idea of paying reservation fees. It does not object to the amount of the fees on a per-EDU basis. It does not even object to the need for all developers to pay the fees as a prerequisite to obtaining preliminary subdivision approval. Instead, it says a special exception should be made for "large-scale" developments such as its own. And since there have been no other unphased "large-scale" developments, a special exception should be carved out in the Township's subdivision approval procedures for Bennington alone. (Bennington Post-Hearing brief at 11; Post-Hearing reply brief at 5.) It says paying reservation fees at the preliminary subdivision stage is not "typical" and would be too expensive.

Rather than pay the fees, Bennington submitted a private request to the Department asking the Department to order the Township to revise its 537 Plan to carve out an exception from the public sewers requirement for the Lexington Fields development and allow Bennington to build and operate (presumably in perpetuity) a private sewage treatment plant squarely within the public sewer district.[3] The Department denied the request, indicating that it represented nothing more than an attempt to avoid paying reservation fees for the entire development (which Bennington has refused to develop in phases) at the preliminary subdivision phase. (N.T. 154-55; D-6.) Other than acknowledging its existence, the Department ignored the fee issue. Bennington filed this appeal from the Department's denial.

Section 5(b) of the Sewage Facilities Act, 35 P.S. § 750.5(b), provides that "any person who is a resident…in a municipality may file a private request with the Department requesting that the Department order the municipality to revise its official plan if the resident…can show

[2] There is actually limited record support for Bennington's characterization of the Township's subdivision approval processes, undoubtedly due in part to Bennington's failure to call any witnesses from the Township. Nevertheless, we will accept Bennington's characterization for purposes of our discussion.

[3] It is not clear from the record that Bennington properly teed up its proposal to build a package plant, even putting aside the fee issue. It is not clear that Bennington submitted a complete planning module for what appears to be a major revision to the 537 Plan, such as information to support the viability of Bennington's proposed method of achieving water and wastewater services.

that the official plan is not being implemented or is inadequate to meet the resident's…sewage disposal needs." The Department's regulations contain a similar requirement. 25 Pa. Code § 71.14. Under these provisions there are two ways to get the Department to approve a private request: 1) show that the municipality's plan is not being implemented, or 2) show that the existing plan is inadequate to meet a resident's sewage disposal needs. *Gilmore v. DEP*, 2006 EHB 679, 684 (citing *Yoskowitz v. DEP*, 2006 EHB 342). The Department's decision to approve or deny a private request is discretionary. *Pequea Twp. v. Herr*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998). The Board reviews the Department's decision to grant or deny a private request to ensure that the decision is reasonable, supported by the facts, and in accordance with law. *Gilmore*, 2006 EHB at 685.

The remedy provided for in the Act is an order from the Department to the municipality. If the municipality is not implementing its plan, the Department can, in its discretion, order the municipality to implement its plan. If the municipality does not have a plan that is adequate to meet the resident's sewage disposal needs, the Department can, in its discretion, order the municipality to revise its plan. 35 P.S. § 750.5(b).

Bennington has not complained that Franklin Township is failing to implement its plan. Indeed, it might be said that Bennington is complaining because the Township *is* implementing its plan. Therefore, the issue in this case is whether Bennington has shown that the Township's plan is inadequate to meet its sewage disposal needs. If it has, the Township may be ordered to revise its plan. Neither this Board nor the Department has the authority under Section 750.5(b) to order the Township to revise its subdivision approval process. Relief is limited to an order to the Township to revise its sewage facilities plan. And that is where the first difficulty with Bennington's private request arises.

Bennington's complaint in a nutshell is that the Township will not process its preliminary subdivision planning approval under the Municipalities Planning Code, 53 P.S. § 10101, *et seq*. Its concerns center on what the Township requires Bennington to do the receive preliminary subdivision plan approval under that Code.[4] It has not pointed us to anything in the Township's *sewage plan* that controls the timing of the reservation fee vis-à-vis preliminary subdivision approval. Bennington cannot point to any provision in the Township's *sewage plan* that we can order to be revised to directly address its complaint regarding what it believes is a premature requirement to pay sewage reservation fees as part of the subdivision approval process.

Bennington relies very heavily if not exclusively on our decision in *Gilmore v. DEP*, 2006 EHB 679, but in that case the municipality's *sewage plan* contained allegedly onerous procedural hurdles before the municipality would allow for sewage disposal at a particular location. Section 604.2 of the municipality's plan required a new, extensive hydrogeological study (among other things) for a small site that had already been extensively studied. The private requestor asked the Department to order the municipality to revise Section 604.2 of the municipality's sewage plan to not require such a study. When the Department said it would not even consider procedural hurdles in the sewage plan, we held that was error. We held that the Department had the authority and duty to consider procedural as well as substantive aspects of the sewage plan.[5] *Id*., 2006 EHB at 686-87. We did *not* hold that the Department had the authority or duty to delve into the municipality's subdivision approval process under the Municipalities Planning Code.

[4] We are told that Bennington's challenge to the Township's subdivision process is pending before the York County Court of Common Pleas. (T. 26.)

[5] The Board did not find that the requirements were in fact unduly onerous, just that the Department needed to consider the issue.

Similarly, in *Heritage Building Group v. DEP*, 2007 EHB 302, we found that the Department did not give adequate consideration to whether the township's plan, as the township interpreted *the plan*, really offered the private requestor a feasible means of sewage disposal. The requestor pointed to the provisions *in the plan* that required an alternatives analysis for nine types of community disposal technologies. The requestor wanted to put in a package plant but the municipality was pushing for spray irrigation. These are issues that go to the heart of sewage facilities planning and the terms and conditions of the municipality's 537 plan. Although we found that the Department did not give this technical dispute the attention it deserved, we nowhere suggested that the Department could or should meddle in the township's subdivision approval process, or address the timing of the payment of sewer fees not addressed in the sewer plan.[6]

Since Bennington cannot point to anything in Franklin Township's sewage plan that we could order to be revised to solve its problem with fees directly, to its credit, it has gotten rather creative. It says that the plan requires it to use public sewers that are readily available immediately next to its site, but to use those sewers it must pay reservation fees earlier than it wants to under the Township's subdivision approval process. Since there is nothing in the plan capable of being revised that could directly address the payment problem, Bennington asks that we revise the plan to provide that it does not need to use the sewers at all. Instead, it asks that the plan be revised to carve out an exception for its development so that it does not have to pay any fees.

In order to take Bennington's proposal seriously, we would think that its proposed solution must be shown to have some independent merit. As it happens, Bennington's proposed

[6] Again, we did not hold that the request needed to be approved and an order issued. Generally speaking, the Board has traditionally expressed a reluctance to delve too deeply into the allocation of costs associated with connection to public sewers. *See Force v. DEP*, 1998 EHB 179, 188.

solution has none. It appears to be little more than a ploy to get the Township to bend to its will on paying fees. There is some question whether it is consistent with the planning policy as set forth in the regulations. Section 91.37 of the Department's regulations, 25 Pa. Code § 91.37, provides that the Department will not approve applications for sewer permits for private sewage projects to be built within the built-up parts of townships unless the applicant can demonstrate a compelling public need for the project. Bennington has not alleged or shown that there is a compelling public need for its project. In any event, the Township's plan quite appropriately says that private systems in a public sewer district such as where the Lexington Fields development is located are only to be considered as a last resort when all other options fail.

To be blunt, Bennington's proposal to build and operate a package plant immediately adjacent to the public sewer system simply makes no sense. There is no need for such a plant, and a multiplicity of redundant plants represents poor planning. What might seem fair to Bennington would seem to be equally unfair to the other residents of the Township who have been required to bear the costs of the public system. Bennington has not explained why it alone should be afforded special treatment.

There is no dispute in this case that the proposed Lexington Fields development is adjacent to the Franklintown Pump Station which is part of the Dillsburg Area Authority's sewage collection system. Lexington Fields also abuts a public road with public sewer lines. Lexington Fields is in an area of Franklin Township's Act 537 Plan that is designated to be served by public sewer. Dillsburg Area Authority's Chapter 94 Reports for 2014, 2015, and 2016 indicated that there were no hydraulic or organic capacity issues at its treatment plant. The Chapter 94 Reports also reported that there were no capacity issues within the collection and

conveyance system.[7] The five-year projection for Dillsburg Area Authority's system indicated that there is plenty of capacity within the system for the Lexington Fields subdivision. Indeed, other than as a device to avoid the fees, Bennington has not presented any evidence to show that there is any merit to installing a package plant. It is difficult to imagine how the Department could have lawfully and reasonably ordered such a plan revision.

Bennington argues that the Department should have at least considered the fee issue instead of essentially ignoring the issue and claiming a lack of authority. The Department continues to maintain its position in this appeal that it does not need to consider the fee issue. (Stip. 25.) As discussed above, given that the Department's authority to issue an order under Section 750.5(b) only extends to an order to revise the plan itself, it is highly questionable whether the Department needed to consider what is really a subdivision planning issue that it might not be able to do anything about. But if we assume *arguendo* that the Department should have taken a closer look, we still arrive at the same conclusion.

First, to repeat, permitting a private plant was a wholly inappropriate solution to the purported problem. Secondly, it is undoubtedly true that a plan can fail to provide for feasible sewage disposal in more ways than one. As we said in *Gilmore*, a resident can not only be deprived of sewage disposal due to a lack of any actual available disposal mechanism at a particular location, a municipality can erect procedural or financial hurdles in the plan that are so onerous that the resident is just as effectively deprived of feasible sewage disposal. Rather than creating artificial distinctions between substantive and nonsubstantive aspects of a 537 plan and limiting its review to substantive requirements only, the Department has a duty to review *all*

[7] Bennington complains that reservation fees should not be required because the Authority's Chapter 94 reports show there is plenty of capacity. However, the purpose of a reservation fee is to *hold*, i.e. reserve, that capacity for the exclusive benefit of one potential user.

aspects of a plan to ensure that the plan is adequate to meet a resident's sewage disposal needs. *Gilmore*, 2006 EHB 686-87. In other words,

> The Department must conduct an independent and critical review of both the Township's position and the Appellant's analysis to ensure that the Appellant had not been deprived of a reasonable and lawful use of its property because the Township has not provided feasible means of sewage disposal.

Heritage Building Group, Inc. v. DEP, 2007 EHB 302, 320.

Bennington has the burden of proof, and it has failed to carry that burden of convincing us that it has been deprived of a feasible method of sewage disposal. Bennington tells us the Township's practice is not "typical." We are not sure what "typical" means in this context, and we are not aware of any legal requirement that plans must be "typical." Still further, Bennington provided no specifics to back up its characterization, which would have made its assertion more credible.

Bennington next gets to the heart of the matter, which is that the Township's procedure will result in "significant" costs. It says if it executed reservation agreements in 2005 when it started the subdivision process, it would have paid $995,838.72. The record does not support a finding of what fees would actually have been incurred had Bennington proceeded with the subdivision process. However, assuming Bennington would have been required to pay large fees, Bennington has not claimed it is being treated any differently than any other developers in the Township. We see nothing inherently wrong with charging a developer large fees to hold a large amount of capacity open for a large amount of time. To the contrary. We also must ask "large" in what context? Large compared to the money to be made by building 344 new homes? Large compared to the cost to build and operate a package plant? The fees asserted by Bennington, even if accurate, do not strike us as facially unreasonable. Finally, we also see

nothing inherently wrong in the Township ensuring that there will be adequate sewerage available before approving a subdivision, even preliminarily.

In short, no matter how we look at it, Bennington has failed to carry its burden of proving by a preponderance of the evidence that its private request to build a package plant in the area specifically designated for public sewage service in the Township's plan should have been granted.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 693.24; 35 P.S. § 691.7; 35 P.S. § 7514.

2. The Department is the executive agency of the Commonwealth of Pennsylvania with the duty and authority to administer and enforce the Sewage Facilities Act, 35 P.S. § 750.1, *et seq*., and the administration of Sewage Facilities Planning Program Regulations, 25 Pa. Code § 71.1, *et seq*.

3. Appellant, in this case Bennington, bears the burden of proof. 25 Pa. Code § 1021.122(c)(1).

4. Appellant must show by a preponderance of the evidence that the Department's action is unreasonable, contrary to law, not supported by the facts, or inconsistent with the Department's obligations under the Pennsylvania Constitution. *Logan v. DEP*, 2018 EHB 71, 90; *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269.

5. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *Smedley v. DEP*, 2001 EHB 131, 156; *O'Reilly v. DEP*, 2001 EHB 19, 32.

6. Section 5(b) of the Sewage Facilities Act, 35 P.S. § 750.5(b) provides, in part, as follows:

> Any person who is a resident or legal or equitable property owner in a municipality may file a private request with the department requesting that the department order the municipality to revise its official plan if the resident or property owner can show that the official plan is not being implemented or is inadequate to meet the resident's or property owner's sewage disposal needs.

35 P.S. § 750.5(b). The Department's regulations contain a similar requirement. 25 Pa. Code § 71.14.

7. There are two ways to get the Department to approve a private request: (1) show that the municipality's plan is not being implemented, or (2) show that the plan is inadequate to meet an applicant's sewage needs. *Yoskowitz v. DEP*, 2006 EHB 342.

8. In arriving at its decision on a private request, the Department is required to consider the following items:

1) The reasons advanced by the requesting person.

2) The reasons for denial advanced by the municipality.

3) Comments submitted under [25 Pa. Code § 71.14].

4) Whether the proposed sewage facilities and documentation supporting the proposed sewage facilities are consistent with this part.

5) The existing official plan developed under this chapter.

25 Pa. Code § 71.14(d).

9. If Bennington is successful in proving that the Department erred in denying its private request, the Board may substitute its discretion and order appropriate relief. *Pequea Twp. v. DEP*, 716 A.2d 678, 687 (Pa. Cmwlth. 1998).

10. The relief that can be afforded pursuant to a private request under Section 750.5(b) consists of either an order to municipality to (a) implement its plan, or (b) revise its plan to allow for an adequate method for meeting the requestor's sewage disposal needs.

11. Bennington has failed to carry its burden of proving that the Department acted unlawfully, unreasonably, or inconsistently with the facts when it denied Bennington's private request for an order to Franklin Township directing Franklin Township to revise its 537 Plan to allow Bennington to build a private treatment plant immediately adjacent to the existing public sewer system called for in the Township's Plan.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BENNINGTON INVESTMENT GROUP, LLC	:	
	:	
v.	:	**EHB Docket No. 2015-190-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DILLSBURG AREA AUTHORITY, Intervenor	:	

O R D E R

AND NOW, this 8th day of July, 2019, this appeal is hereby **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

*** Judge Mather files a Dissenting Opinion, joined by Judge Beckman, which is attached.**

DATED: July 8, 2019

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

For the Commonwealth of PA, DEP:
Nels J. Taber, Esquire
(*via electronic filing system*)

For Appellant:
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Jeffrey C. Clark, Esquire
(*via electronic filing system*)

For Intervenor:
Steven A. Hann, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
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DISSENTING OPINION OF JUDGE RICHARD P. MATHER, SR.
JOINED IN BY JUDGE STEVEN C. BECKMAN

By Richard P. Mather, Sr., Judge

I would have sustained the appeal and remanded the matter back to the Department for further consideration because the Department failed to consider the facts presented to the Board at the hearing before denying Bennington Investment Group, LLC's Private Request. Under *Gilmore v. DEP*, 2006 EHB 679, 686-87, the Department had a duty to fully evaluate Bennington's claims that Franklin Township's Plan was inadequate to meet its sewage needs. An Act 537 Plan is inadequate if it fails to afford an individual a feasible means to address the individual's sewage needs. *Heritage Business Group v. DEP*, 2007 EHB 302, 316. As the Board stated in *Heritage Business Group*:

> We are simply holding that the Department must conduct an independent and critical review of both the Township's position and the Appellant's analysis to ensure that the Appellant had not been deprived of a reasonable and lawful use of its property because the Township has not provided a feasible means of sewage disposal.

Id. at 319-320. The Department utterly failed to satisfy its duty under *Gilmore* and *Heritage Business Group* in this appeal, and it stipulated that it failed to consider Bennington's claim that the Authority demand to pay reservation fees made it proposed development uneconomical in its

decision to deny Bennington's Private Request. The Authority's reservation fees played no part in the Department's decision.

Bennington claimed that Franklin Township and the Authority had a two-step arrangement that effectively blocked Bennington's proposed 344 unit development. According to Bennington, Franklintown Township refused to give preliminary plan approval without Bennington obtaining a letter of capacity from the Authority. The Authority refused to provide such a letter of capacity without Bennington's execution of capacity reservation agreements and the payment of substantial reservation fees on a quarterly basis. Bennington testified at the hearing that the payment of the reservation fees over the life of the project made the proposed development uneconomical and further claimed that the payment of these fees effectively blocked large scale developments in Franklin Township such as Bennington's proposed 344 unit development. The Department failed to conduct an independent and critical review of Bennington's claims to ensure that Bennington had not been deprived of a reasonable and lawful use of its property because Franklin Township with the Authority's assistance has not provided Bennington with a feasible means of sewage disposal for its proposed 344 unit development. I would remand the appeal back to the Department to conduct a full, independent and critical evaluation of Bennington's claims as *Gilmore* and *Heritage Business Group* require.

ENVIRONMENTAL HEARING BOARD

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 8, 2019