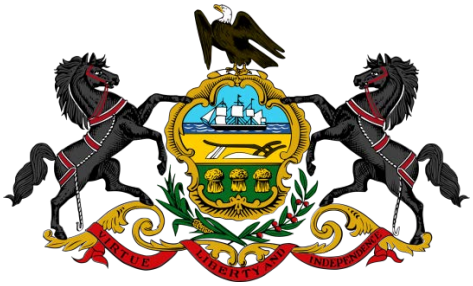
Environmental Hearing Board

Adjudications and Opinions



2018
VOLUME II

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

2018

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: 2018 EHB 1

FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2018.

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

ADJUDICATIONS

OPINIONS

ENVIRONMENTAL HEARING BOARD

SUBJECT MATTER INDEX – 2018 EHB DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MEGAN M. GLANCE AND MARY E. GLANCE	:	
v.	:	**EHB Docket No. 2017-060-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 11, 2018**

OPINION AND ORDER ON
APPELLANTS' MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge

Synopsis

The Board grants in part and denies in part the Appellants' motion for summary judgment in an appeal challenging an order issued by the Department of Environmental Protection alleging violations of the Dam Safety and Encroachments Act. The motion is denied with regard to the Appellants' challenge to the Department's jurisdiction where the Appellants have not demonstrated as a matter of law that the Department does not have jurisdiction to regulate a lake on which the Appellants have a boat dock. The motion is granted with regard to the Appellants' argument that the Department must obtain a warrant or other order from a neutral judicial officer before conducting a search of the Appellants' property.

O P I N I O N

Introduction

Megan M. Glance and Mary E. Glance (the Appellants) own property that borders Lake Pleasant in Venango Township, Erie County. On June 27, 2017, the Department of Environmental Protection (Department) issued an Administrative Order (order) to the Appellants

for alleged violations of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. § 693.1 *et seq*. (Dam Safety Act). The Appellants appealed the order on July 30, 2017 at Environmental Hearing Board (Board) Docket No. 2017-060-R. The matter currently before the Board is a Motion for Summary Judgment filed by the Appellants on February 23, 2018. The Department responded to the motion on March 26, 2018. The Appellants did not file a reply to the Department's response as is permitted by the Board's rules at 25 Pa. Code § 1021.94a(k). This matter is now ripe for decision.

Background

The Appellants' property abuts Lake Pleasant, which the Appellants contend is "a privately-owned lake, controlled by the property owners surrounding the lake." (Appellants' Statement of Undisputed Material Facts, para. 4; Ex. B.) According to the Department's order, on April 21, 2016 the Department inspected the eastern boundary of the Appellants' property and observed a wooden boat dock projecting into Lake Pleasant. (Department's Administrative Order, para. F – Exhibit to Notice of Appeal.) The order directs the Appellants to take certain action to come into compliance with the Dam Safety Act, including the submission of an application for a Water Obstruction and Encroachment Permit or a written proposal to modify the boat dock. Additionally, paragraph 1 of the order directs the Appellants to "allow Department personnel to access the Site during daylight hours to inspect the wooden boat dock located on the eastern boundary of the Site and determine compliance with this Order." (Department's Administrative Order, para. 1 – Exhibit to Notice of Appeal.) The Appellants have not permitted the Department access to their property.

In their motion for summary judgment, the Appellants assert that the Department's demand for access to their property is unconstitutional and violates the Dam Safety Act. They

further assert that the Department lacks jurisdiction over Lake Pleasant's docks and other encroachments.

Discussion

The Board may grant a motion for summary judgment if the record indicates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Property One, LLC v. DEP*, 2017 EHB 1207, 1212 (citing *Lexington Land Developers Corp. v. DEP*, 2014 EHB 741, 742). Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Id.* (citing *Clean Air Council v. DEP and MarkWest Liberty Midstream and Resources*, 2013 EHB 346, 352). In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party, and we resolve all doubts as to the existence of a genuine issue of fact against the moving party. *Id.* (citing *Perkasie Borough Authority v. DEP*, 2002 EHB 76, 81); *Benner Township Water Authority v. DEP*, 2017 EHB 1048, 1050 (citing *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 893). Summary judgment is generally only appropriate when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *Id.* at 1050-51 (citing *PQ Corporation v. DEP*, 2016 EHB 826).

The Appellants contend that the Department's order is both unconstitutional and a violation of Section 16 of the Dam Safety Act which addresses "investigations and searches" conducted pursuant to the Act. Section 16 of the Dam Safety Act states as follows:

> (a) The department is authorized to make such inspections, conduct such tests or sampling, or examine books, papers and records pertinent to any matter under investigation pursuant to this act as it deems necessary to determine compliance with this act and for this purpose, the duly authorized agents and employees of the department are authorized at all reasonable times to enter and examine any property, facility, operation or activity.

> (b) The owner, operator or other person in charge of such property, facility, operation or activity, upon presentation of proper identification and purpose for inspection by the agents or employees of the department, shall give such agents and employees free and unrestricted entry and access, and upon refusal to grant such entry or access, the agent or employee may obtain a search warrant or other suitable order authorizing such entry and inspection. It shall be sufficient probable cause to issue a search warrant authorizing such examination and inspection if there is probable cause to believe that the object of the investigation is subject to regulation under this act, and access, examination or inspection is necessary to enforce the provisions of this act.

32 P.S. § 693.16. Section 16(b) makes it clear that the Appellants were initially entitled to refuse entry to their property, and, when faced with this refusal, the Department was required to obtain "a search warrant or other suitable order" authorizing entry and inspection. It is the Department's contention that its Administrative Order fulfills the requirement of "other suitable order."

The Appellants argue that the Department's order violates the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution, which protect individuals from unwarranted searches and seizures. Specifically, Article I, Section 8 of the Pennsylvania Constitution reads as follows:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, or without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa. Const. Art. I, § 8. The Appellants cite to *Commonwealth v. Gary*, 91 A.3d 102 (Pa. 2014), wherein the Pennsylvania Supreme Court stated, "As a general rule, for a search to be reasonable under the Fourth Amendment or Article I, Section 8, police must obtain a warrant supported by probable cause and issued by an independent judicial officer, prior to conducting the search." *Id.*

at 107 (citing *Horton v. California*, 496 U.S. 128, 134, n. 4 (1990)). The Appellants further direct us to *Warrington Township v. Powell*, 796 A.2d 1061 (Pa. Cmwlth. 2002), in which the Pennsylvania Commonwealth Court held that Fourth Amendment privacy concerns apply not just to criminal searches but also to administrative inspections. *Id.* at 1067 (citing *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528-29, 18 L. Ed. 2d 930 (1967)). In *Warrington Township*, the township sought to conduct a warrantless search of an auto body shop as part of the township's annual fire safety inspection. The Common Pleas Court issued an order directing the owners of the auto body shop to permit the township access to their property. On appeal, the Commonwealth Court affirmed the order of the lower court as to the public portions of the auto body shop but reversed it as to those areas not open to the public. The Court disagreed with the lower court that government agencies may make warrantless administrative searches of all commercial property for any legitimate and important reason. In reaching its ruling, the Commonwealth Court differentiated between closely or heavily regulated businesses, which may be subject to warrantless searches when certain conditions are met, and those that are not closely or heavily regulated, for which there is more of an expectation of privacy. Here, where the subject of the Department's order is the private property of an individual, the expectation of privacy is even higher.

The Appellants argue that the Department's order cannot be characterized as an "other suitable order" as set forth in Section 16(b) of the Dam Safety Act because to do so frustrates the constitutional requirement that the order must be issued by a neutral judicial officer prior to the Department conducting a search. We agree with the Appellants that the Department's reliance on its own order to meet the requirements of Section 16(b) of the Dam Safety Act is problematic. The Department cannot be both the entity issuing the order *and* the entity attempting to use the

order to gain access to private property. Clearly, if the legislature had intended that the Department itself should make the decision about whether it is appropriate to enter private property pursuant to its regulatory authority under the Dam Safety Act, it would not have required the Department to obtain a "search warrant or other suitable order" in the first place. We read the language "other suitable order" as requiring an order obtained from a judicial officer who is tasked with the role of reviewing the evidence to determine if there is probable cause for entry to the property. This role clearly cannot be played by the Department itself. In order to give meaning to the aforesaid language of Section 16(b) of the Dam Safety Act, such "other suitable order" must be issued by "an *independent* judicial officer, *prior* to conducting the search." *Gary, supra* at 107. An order issued by the very agency that is seeking to conduct the search defeats the purpose of Section 16(b).

The Department is not required to obtain a search warrant or court order to enter property in every instance. Where the property in question is subject to a permit, generally one of the conditions of the permit is that the Department has reasonable access to the property. Additionally, a statute may provide the Department with access to property in certain circumstances. *Warrington Township, supra* at 1066-67 (citing *Donovan v. Dewey*, 452 U.S. 594, 600, 69 L. Ed. 2d 262 (1981) ("[A] warrant may not be constitutionally required for an administrative search for commercial enterprises that are highly regulated and where the regulatory scheme is so comprehensive and particular that it in effect secures the protections of the warrant process and serves notice on the regulated business that it will be subject to periodic inspections.") Here, however, where there is no permit providing the Department with access to the Appellants' property, and the statute in question requires the Department to obtain a warrant or other comparable order prior to conducting the search, the Department must comply with the

protections afforded private citizens under the Fourth Amendment; Article I, § 8 of the Pennsylvania Constitution; and Section 16(b) of the Dam Safety Act. Those provisions are set in place to ensure that the Department has probable cause before entering the property of someone who is not subject to a permit.

The Department asserts that the Environmental Hearing Board fulfills the role of neutral judicial officer reviewing the Department's need to conduct a search. However, as the Appellants point out, this review occurs only *after* the order is issued and only if an appeal is taken. The requirement of a neutral judicial officer to review the need for a search is lost when the Department itself issues the order. *Contra Weaver v. DEP*, 2013 EHB 486, 491 (upholding Department order to search appellant's property which was reviewed in the context of a supersedeas hearing). The Appellants in this case have clearly demonstrated that in order to meet the requirements of Section 16(b) of the Dam Safety Act, the Department must obtain a search warrant or other suitable order from a neutral judicial officer, and an after-the-fact appeal to the Environmental Hearing Board does not meet that requirement. Therefore, paragraph 1 of the Department's Administrative Order directing the Appellants to "allow Department personnel to access the Site during daylight hours to inspect the wooden boat dock located on the eastern boundary of the Site and determine compliance with [the] Order" does not meet the requirements of Section 16(b) of the Dam Safety Act, and summary judgment is granted to the Appellants on this issue.

As to the Appellants' contention that the Department lacks jurisdiction over docks or other encroachments on Lake Pleasant, we find that the Appellants have not demonstrated that they are entitled to judgment as a matter of law on this issue. It is the Appellants' position that Lake Pleasant is not a navigable lake and, for that reason, does not fall under the jurisdiction of

the Department. In contrast, the Department argues that it has authority under the Dam Safety Act to regulate "any body of water," including a "lake." 32 P.S. §§ 693.3 and 693.4; 25 Pa. Code §§ 105.1 and 105.3(a)(4). As the Department points out in its response, the Board recently addressed the question of the Department's jurisdiction under the Dam Safety Act in *Corsnitz v. DEP*, EHB Docket No. 2016-030-M (Adjudication issued February 23, 2018). In *Corsnitz*, the appellants argued that the Department did not have jurisdiction over artificial wetlands as a matter of law. The Board disagreed, finding that the Department has jurisdiction over all bodies of water, including artificial wetlands. *Corsnitz, slip op*. at 27-28. The Appellants have provided no legal authority in support of their argument that the Department's authority over a body of water is determined by its navigability. Therefore, the Appellants have not demonstrated that they are entitled to summary judgment on the question of the Department's jurisdiction.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MEGAN M. GLANCE AND MARY E. GLANCE	:	
	:	
v.	:	**EHB Docket No. 2017-060-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 11th day of May, 2018 it is hereby ordered as follows:

1) The Appellants' Motion for Summary Judgment is granted in part and denied in part.
2) If the Department of Environmental Protection wishes to inspect the Appellants' property without permission from the Appellants, it must comply with the requirements of Section 16(b) of the Dam Safety and Encroachments Act, 32 P.S. § 693.16(b), by first obtaining a search warrant or other suitable order from a neutral judicial officer.
3) In all other respects, the Appellants' Motion for Summary Judgment is denied without prejudice.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: May 11, 2018

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THE DELAWARE RIVERKEEPER NETWORK, CLEAN AIR COUNCIL, DAVID DENK, JENNIFER CHOMICKI ANTHONY LAPINA AND JOANN GROMAN	:	
v.	:	**EHB Docket No. 2014-142-B**
	:	**(Consolidated with 2015-157-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and R.E. GAS DEVELOPMENT, LLC	:	**Issued: May 11, 2018**

ADJUDICATION

By Steven C. Beckman, Judge

Synopsis

The Board denies the consolidated appeals challenging the Department's issuance to R.E. Gas Development, LLC of well permits and renewal permits for six unconventional gas wells. The Appellants, Delaware Riverkeeper Network, Clean Air Council, David Denk, Jennifer Chomicki, Anthony Lapina and Joann Groman failed to demonstrate that the Department acted unreasonably or in violation of either the 2012 Oil and Gas Act or any other relevant statutes or regulations. Appellants also failed to demonstrate that the Department's decision to issue the well permits and renewal permits violated the Department's responsibilities under Article 1, Section 27 of the Pennsylvania Constitution.

Background

On September 12, 2014, the Pennsylvania Department of Environmental Protection ("the Department" or "DEP") approved permits for six unconventional gas wells ("Geyer Wells") at a property in Middlesex Township, Butler County, Pennsylvania ("Geyer Well Site"). The permits

were issued to R.E. Gas Development, LLC ("Rex"). Two environmental groups, the Delaware Riverkeeper Network and the Clean Air Council, along with four individuals, David Denk, Jennifer Chomicki, Anthony Lapina and Joann Groman (collectively "Appellants" or "Delaware Riverkeeper") filed an appeal of the Department's approval of the six Geyer Wells permits on October 13, 2014, and filed an amended appeal on November 3, 2014. On September 11, 2015, the Department renewed all six of the Geyer Wells permits under appeal and the Appellants, with the exception of Mr. Lapina, filed an appeal of the permit renewals on October 16, 2015. On October 23, 2015, the Board issued an Order consolidating the two appeals into the above-captioned matter.

In December 2015, Rex began drilling at the Geyer Well Site. Appellants filed an Application for Temporary Supersedeas and a Petition for Supersedeas on December 14, 2015. The Board held a two day supersedeas hearing on January 6 and 7, 2016 ("Supersedeas Hearing"). On January 29, 2016, the Board issued an Order denying the Appellants' Petition for Supersedeas followed by an Opinion in Support of the Order Denying Petition For Supersedeas on February 4, 2016. The matter then proceeded through discovery and the filing of pre-hearing memoranda. A hearing was held in this matter on December 13 through 16, 2016, at the Board's facility in Erie, Pennsylvania ("December 2016 Hearing"). Delaware Riverkeeper filed its Proposed Findings of Fact, Conclusions of Law, and Post-Hearing Brief on March 27, 2017. The Department filed its Post-Hearing Brief and Rex filed its Post-Hearing Memorandum on June 5, 2017. Delaware Riverkeeper followed by filing its Post-Hearing Reply Brief on June 20, 2017, the same day that the Pennsylvania Supreme Court issued its decision in *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF*"). On June 21, 2017, the Board ordered the parties to file a round of supplemental briefs addressing the impact of the Supreme Court's

PEDF decision. The supplemental briefing by the parties concluded in this matter on August 21, 2017. The parties agreed that the record for this matter would consist of the stipulations, testimony and exhibits from both the Supersedeas Hearing held in January 2016 and the December 2016 Hearing.[1]

FINDINGS OF FACT

The Parties

1. The Department is the agency with the duty and authority to administer and enforce the Oil and Gas Act, Act of February 14, 2012, P.L, 87, No. 13, 58 Pa. C.S. §3201- 3274 ("2012 Oil and Gas Act"); 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").

2. The permittee, Rex, is a well operator engaged in various oil and gas well activities in Pennsylvania. Rex's business address is 366 Walker Drive, State College, PA 16801-7639. (DEP Ex. 1)

3. The Delaware Riverkeeper Network ("DRN") is a non-profit organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries, and habitats. (Jt. Stip. – Standing, Para. 15)

4. The Clean Air Council is a non-profit organization started in 1967 with a mission to protect everyone's right to breathe clean air. (Jt. Stip. – Standing, Para. 13)

[1] All references to stipulations, testimony and exhibits from the Supersedeas Hearing will be proceeded by the prefix "S," i.e. a reference to a page in the supersedeas transcript will be identified as "S. T.xx ".

5. Individual Appellants David Denk, Jennifer Chomicki and Anthony Lapina reside with their families in Weatherburn Heights, a residential development east of the Geyer Well Site. (Jt. Stip. – Standing, Para. 2)

6. Individual Appellant Joanne Groman lives approximately 1.3 miles north-northeast of the Geyer Well Site and relies on well water that she is concerned will be impacted by the Geyer Wells. (Jt. Stip. – Standing, Para. 10 and 11)

7. Mr. Denk, Ms. Chomicki, Mr. Lapina, and Ms. Groman are all members of Delaware Riverkeeper Network and the Clean Air Council. (Jt. Stip. – Standing, Para. 12)

8. Four schools in the Mars Area School District with elementary through high school age students are located northwest of the Geyer Well Site. (Jt. Stip. – Standing, Paras. 3-7)

9. The four schools are located between approximately a half mile and a mile from the Geyer Well Site. (T. 379, DEP Ex. 1)

Geyer Wells

10. In early April, 2014, Rex submitted permit applications to the Department to drill and operate six unconventional wells on the Geyer Well Site located in Middlesex Township, Butler County, Pennsylvania. (DEP Ex. 1, 2)

11. On September 12, 2014, the Department issued Rex well permits to drill and operate six unconventional gas extraction wells identified as Geyer Unit 1H through Geyer Unit 6H at the Geyer Well Site. ("Geyer Wells Permits" or "Permits") (S DRN Ex. 1)

12. In August 2015, Rex submitted requests to renew all six of the Geyer Wells Permits and on September 11, 2015, the Department renewed all six of the Geyer Wells Permits for a one year period. ("Renewal Permits") (S DRN Ex. 2; DRN Ex. A-71, A-73, A-75)

13. The Geyer Wells Permits and the Renewal Permits for three of the Geyer Wells, the Geyer Unit 1H, Geyer Unit 2H, and Geyer Unit 6H expired before any drilling for those wells took place. (T. 808)

14. Drilling of the Geyer Unit 3H and Geyer Unit 5H wells by Rex began in June 2015 with the drilling and placement of the conductor pipe at a depth of 120 feet. (DEP Ex. 20, 21)

15. Additional drilling and completion activities for the Geyer Unit 3H and 5H wells took place in December 2015, April 2016, and July 2016. (DEP Ex. 20, 21, 22, 23)

16. The Geyer Unit 3H and 5H wells began production of natural gas on or around August 9, 2016, and remained in production at the time of the December 2016 Hearing. (T. 868-869)

17. The Geyer Unit 4H well was drilled to 120 feet and the conductor pipe was installed in June 2015, but no further drilling or completion activities took place at the Geyer Unit 4H well and it was plugged in May 2016. (T. 808-809; DEP Ex. 19; DRN Ex. A-72)

Permit Application Review

18. Three Department staff, Susan Price, Brian Babb and Craig Lobins were involved on behalf of the Department in the review of Rex's initial permit applications for the Geyer Wells. (T. 194, 209)

19. Ms. Price is a Geologic Specialist and is responsible for the review of drilling permit applications, notices of intent to plug and aquifer test plans. (T. 719-720)

20. Ms. Price was assigned to complete the technical review of the Geyer Wells permit applications by Mr. Babb. (T. 736)

21. Mr. Babb is the Oil and Gas Permits Chief for the Northwest Regional Office of the Department and is responsible for further reviewing the permit applications after they are reviewed by the technical review staff to make sure things were not missed during the application process. (T. 190)

22. If Mr. Babb determines that everything is okay to issue the well permit, he instructs the clerical staff to prepare the actual well permit document for Mr. Lobins to sign. (T. 190)

23. Mr. Lobins is the Northwest District Oil and Gas Manager and is responsible for oil and gas permitting decisions in the 27 northern tier counties of Pennsylvania and oil and gas operations and compliance matters in the 12 northwest counties of Pennsylvania. (T. 752)

24. Mr. Lobins is the final decision maker for the Department on the issuance of oil and gas permits in the region for which he is responsible, as well as for compliance orders and notices of violations related to permits issued by the Oil and Gas Program. (T. 752, 753)

25. Ms. Price commenced her technical review of the initial Geyer Wells permit applications after Department clerical staff completed an administrative review of the applications. (T. 736, 739)

26. Ms. Price's technical review of the initial Geyer Wells permit applications consisted of reviewing the information presented by Rex in the application and ensuring that it was internally consistent and demonstrated compliance with the regulations and the law. (T. 736-741)

27. Beyond the siting criteria required in the law and regulations and set forth in the permit application, Ms. Price did not consider any site-specific considerations such as the

landscape, topography or meteorological conditions at the Geyer Well Site during her technical review of the initial Geyer Wells permit applications. (T. 723-724)

28. Ms. Price was not familiar with and did not consider the air emissions associated with shale gas extraction activities during her technical review of the initial Geyer Wells permit applications. (T. 725)

29. Ms. Price was aware during her technical review that there are various technical requirements for well operators to case and cement wells to isolate the wellbore from any aquifer and expected that the well operators will comply with those requirements. (T. 750)

30. The Department received a number of objections and comments during its review of the initial permit applications for the Geyer Wells. (T. 742, 786-87; DRN Ex. A-76)

31. During her review, Ms. Price received objections to the initial Geyer Wells permit applications, many via e-mail that she printed out and reviewed with Mr. Babb. (T. 742)

32. Ms. Price did not research any health concerns raised by the community as part of her technical review of the initial Geyer Wells permit applications. (T. 725)

33. A group of concerned citizens known as the "Mars Parent Group" along with other individuals provided objections and comments to the Department during the Department's review of the initial Geyer Wells permit applications. (T. 742, 786-87; DRN Ex. A-76)

34. Ms. Price determined that the initial Geyer Wells permit applications met all of the requirements for issuing a permit pursuant to the Oil and Gas Act and the regulations. (T. 747; DEP Ex. 1, 2)

35. Following Ms. Price's technical review, Mr. Babb reviewed the initial Geyer Wells permit applications to ensure that they were internally consistent, complied with the law

and regulations and that nothing was missed in the technical review by Ms. Price. (T. 190, 198-203)

36. Mr. Babb's involvement in the review of the initial Geyer Wells permit applications was considerably greater than normal because of number of comments received by the Department regarding the permit applications. (T. 240; DRN Ex. A-76)

37. Mr. Babb's review of permit applications for well drilling permits does not include an assessment regarding the need for a permit under the Pennsylvania Air Pollution and Control Act ("APCA"). (T. 244)

38. Mr. Babb did not assess the impact of the Geyer Wells on air quality as part of his permit review. (T. 213)

39. During the review of the permit applications, Rex provided the Department with copies of several plans addressing the Geyer Well Site, including the Preparedness, Prevention and Contingency Plan, Emergency Response and Emergency Action Plans, Casing and Cementing Plan and Containment Plan. (T. 213-214, T. 879-880; Rex Ex. P-22).

40. Mr. Babb reviewed the emergency response plans submitted by Rex and compared them to the requirements for those plans found at Chapter 78.55 of the oil and gas regulations. (T. 245)

41. Mr. Babb read some of the health studies that were included in the comments received by the Department on the Geyer Wells permit applications. (T. 220-221; 223)

42. Mr. Babb discussed the public comments received by the Department with Ms. Price and Mr. Lobins. (T. 239)

43. Mr. Babb was primarily responsible for determining what special conditions were added to the Geyer Wells Permits. (T. 196-198)

44. Mr. Babb concluded that the initial Geyer Wells permit applications met the requirements of the oil and gas regulations and the 2012 Oil and Gas Act. (T. 246)

45. Mr. Lobins was responsible for the decision to issue the Geyer Wells Permits and he signed the Geyer Wells Permits on behalf of the Department. (T. 764, 786; S. DRN Ex. 1)

46. Mr. Lobins discussed the Geyer Wells permit applications with Ms. Price, Mr. Babb and Department central office staff. (T. 770-771)

47. The Regulations contain certain requirements governing actions of a well operator, like Rex, that are designed to protect the environment and reduce the potential problems that may occur during natural gas drilling activities including casing and cementing requirements, waste handling and spill control requirements, a requirement to have a blowout preventer on the well and quarterly mechanical integrity testing of the well casing. (T. 810-818)

48. The Department relies on the Regulations governing the drilling and construction of a well and the operator's compliance with the Regulations in determining that a well permit should be issued. (T. 818-819)

49. The Department communicated with and met with Rex regarding the public comments it was receiving about the Geyer Well permit applications. (T. 234-235, 802; DRN Ex. A-82)

50. Mr. Lobins also met with individual members of the Mars Parent Group, specifically Ms. Amy Nassif, on several occasions. (T. 802-03)

51. On July 15, 2014, at the request of the Mars Parent Group, the Department participated in a conference with the Mars Parents Group and Rex in accordance with Section 3251(a) of the 2012 Oil and Gas Act ("3251 Conference"). (T. 803)

52. On August 8, 2014, Rex provided a written response to the Department addressing the concerns raised by the Mars Parent Group during the 3251 Conference. (T. 805; DEP Ex. 7)

53. In Rex's August 8, 2014 response, Rex outlined several actions it was prepared to take at the Geyer Well Site to address public concerns if it received the requested permits. (DEP Ex. 7)

54. On September 12, 2014, the Department issued the Geyer Wells Permits to Rex for the proposed unconventional wells at the Geyer Well Site. The Permits were good for one year from the date of issuance. (S. DRN Ex. 1)

55. The Department included special permit conditions in the Geyer Wells Permits to address some of the issues raised by the public comments, specifically noise concerns and air emissions. (T. 772; S. DRN Ex. 1)

56. A special permit condition addressing noise required Rex to implement necessary noise mitigation measures, including sound abatement walls during drilling and completion of the Geyer Wells and further provided that if Rex's operations created a public nuisance, the Department could require additional remedial measures to abate the nuisance. (S. DRN Ex. 1)

57. A special permit condition addressing air emissions required Rex to minimize releases to the atmosphere during flowback and subsequent recovery by capturing fluids and gas coming back from the wellbore rather than allowing them to be discharged to the atmosphere, or if the gas could not be directed to a flow line, to direct them to a complete combustion device. (T. 806; S. DRN Ex. 1)

58. The method of handling the releases during flowback to minimize air emissions is known as a "green completion" and was not required under federal regulations at the time the Department was considering the Geyer Wells permit applications. (T. 806-807)

59. In a letter signed by Mr. Lobins, addressed to the Mars Parents Group and dated September 12, 2014 (the same day the Department issued the Geyer Wells Permits) ("the September 2014 Letter"), the Department discussed the outcome of the 3251 Conference and provided its response to concerns raised by the Mars Parents Group in the 3251 Conference. (DEP Ex. 12)

60. In the September 2014 Letter, the Department acknowledged that no agreements were reached among the parties at the 3251 Conference, but went on to summarize commitments from Rex to address certain issues discussed during the 3251 Conference. Rex's commitments, as summarized by the Department in the September 2014 Letter, included:

a. Utilization of EPA-approved green completion technologies in accordance with 40 CFR § 60.5375(a) and not flaring during completion operations;
b. Erection of sound abatement walls to mitigate operations-related noise;
c. Work with the Mars Area School District to schedule completion operations during non-school hours;
d. Perform outreach with various interested parties, and governing bodies, to promote communication of the Project through the various stages of development;
e. Consult with local first-responders and provide additional training, if requested.
f. Evaluate the use of additional air monitoring equipment; and
g. Regularly communicate with the Mars Area School District.

(DEP Ex. 12)

61. On August 14, 2015, the Department received requests from Rex to renew the Geyer Wells Permits. (S. DRN Ex. 2)

62. On or about September 1, 2015, the Department became aware of concerns for potential abandoned wells near the Geyer Well Site. (T. 743)

63. On September 4, 2015, the Department requested that Rex provide information regarding the location of abandoned wells near the Geyer Well Site. (T. 743-744; DEP Ex. 15)

64. On September 9, 2015, the Department received a report dated April 22, 2014, and prepared by Moody and Associates for Rex summarizing the results of an investigation and review into the potential presence of abandoned or orphaned wells in the area of the Geyer Well Site. ("Abandoned Well Report"). (T. 745; DEP Ex. 16)

65. Ms. Price reviewed the Abandoned Well Report with Mr. Babb and the Department requested that Rex address additional concerns following the review of the Abandoned Well Report. (T. 745; DEP Ex. 16)

66. The Department was satisfied with Rex's response regarding the abandoned wells near the Geyer Well Site. (T. 749)

67. On September 11, 2015, the Department issued the Renewal Permits for a one year term with the same special conditions as the original Geyer Wells Permits. (T. 749, 795; S. DRN Ex. 2)

68. The Renewal Permits were signed by John Ryder, who is Mr. Lobins' boss, rather than Mr. Lobins because Mr. Lobins was on leave on September 11, 2015. (T. 795)

Water Issues

69. The Geyer Wells are not located in a Special Protection High Quality or Exceptional Value watershed or within a defined 100 year floodplain, or within 100 feet of the

top of the bank of a perennial stream or within 50 feet of the top of the bank of an intermittent stream. (T. 737-738; DEP Exs. 1, 2)

70. The vertical wellbores of Geyer Wells are not located within 500 feet of an existing water supply or within 1,000 feet from an existing water well, surface water intake, reservoir or other water supply extraction point used by a water purveyor. (T. 737-738; DEP Exs. 1, 2)

71. The Geyer Well Site is within 3,000 feet of a number of surface owners with water supplies. (T. 738; DEP Exs. 1, 2)

72. The 2012 Oil and Gas Act and regulations prescribe casing and cementing requirements in unconventional gas wells. (58 Pa. C.S.A. §3217(b); 25 Pa. Code §§ 78.81-78.87; T. 810-813)

73. The Department requires companies to have a casing and cementing plan and that it be available for review at the Department's request. (T. 775)

74. Rex developed a casing and cementing plan for the Geyer Wells and it was on location. (T. 479; T. 880)

75. One purpose of casing and cementing a well is to protect the environment and groundwater by isolating the wellbore from the environment. (S. T. 85; T. 815)

76. Rex cemented the entire wellbore in the two unconventional wells it drilled at the Geyer Well Site. (S. T. 480-481; T. 111)

77. Rex used a cementing method and a type of cement that enhanced the cementing job completed on the 3H and 5H wells. (S. T. 480-481; T. 1284-1285)

78. The well records for the 3H and 5H wells were submitted to the Department and provided information on the casing and cementing that took place on those wells. (T. 820-825; DEP Exs. DEP 20-21)

79. The risk of gas migration around the casing seat is less likely when a wellbore is fully cemented like the 3H and 5H wells. (T. 111)

80. Butler County had previous oil well development in the Mars Oil Field in the general vicinity of the Geyer Well Site. (S. T. 70, 330)

81. The Mars Oil Field wells targeted an oil sand at a depth of 1,900 to 2,000 feet. (S. T. 70, 330, 347, 475)

82. Mr. Daniel Fisher was admitted as an expert during the Supersedeas Hearing in the areas of geology, hydrogeology and contaminant transport monitoring. He also testified during the December 2016 Hearing. (S. T. 31; T. 60-187)

83. Dr. Terry Engelder was admitted as an expert during the Supersedeas Hearing in the area of geosciences. (S. T. 315)

84. Mr. Bryce McKee was admitted as an expert during the December 2016 Hearing as an expert in the fields of geology, shale gas development, hydraulic fracturing and well integrity. (T. 1203)

85. Mr. Fisher relied primarily on historical maps and aerial photos to attempt to identify abandoned wells in the vicinity of the Geyer Well Site and the Geyer Wells. (S.T. 71-73; S. DRN Exs. 6 -10)

86. Mr. Fisher did not attempt to go out and field locate any of the abandoned wells he concluded were present in the vicinity of the Geyer Well Site. (S. T. 162)

87. Moody and Associates investigated whether there were any abandoned wells in the vicinity of the Geyer Well Site on behalf of Rex in 2014 and authored the Abandoned Well Report. (S. T. 470; DEP Ex. 10)

88. Mr. Smith reviewed the Abandoned Well Report and it did not raise any concerns for Rex. (S. T. 478-479)

89. Rex did not uncover anything during the excavation of the access road and well pad at the Geyer Well Site that indicated the presence of historic wells in those locations. (S. T. 478)

90. The Department communicated with Rex about the Abandoned Well Report and abandoned wells during its review for the Renewal Permits. (T. 743-749; DEP Exs. 15. 16)

91. The Geyer Well Site is located in close proximity to a geologic feature that Mr. Fisher labeled the Blairsville-Broadtop cross-strike structural discontinuity ("Blairsville CSD"). (T. 61)

92. A CSD is a large-scale, vertically-fractured zone that extend upwards from the geologic basement. (T. 87-88)

93. Surface geologic features, identified as fracture traces or lineaments, exist in the vicinity of the Geyer Well Site. (S. T. 56–58; 191;S. DRN Ex. Fig. 4-6; T. 117-118)

94. The identification and mapping of fracture traces, is in part an art that requires judgment on the part of the mapper, because one person's perception of a line can be different than another person. (S. T. 191-193)

95. In general, the maximum height that rock fracturing appears to occur above hydraulic fracturing is 1,600 to 1,800 feet. (T. 207-208)

96. The depth to the Marcellus formation in the area of the Geyer Well Site is approximately 6,000 feet. (T. 1231)

97. The Upper Hamilton Group, including the Tully Limestone, sits above the Marcellus shale and acts as a vertical barrier to the fractures created by hydraulically fracturing the Marcellus shale. (T. 1237-1240)

98. Even if fracturing occurs above the Tully Limestone as a result of hydraulic fracturing of the Marcellus shale, the fractures would still be approximately 2,000 feet below the depth of the abandoned wells in the vicinity of the Geyer Well Site. (T. 1302-1303)

99. The Blairsville CSD acts as a seal to the migration of gas and fluid into the groundwater rather than a conduit. (T. 1260)

100. Mr. Fisher had no evidence that Ms. Groman's water well was impacted by Rex's drilling of the 3H and 5H wells at the Geyer Well Site. (T. 104)

101. Mr. Fisher was not aware of any gas migration or release of gas as a result of connection to abandoned wells following the drilling and completion of the 3H and 5H wells. (T. 102-103)

102. There are approximately 80 unconventional wells drilled within a 2.5 mile distance from the Blairsville CSD. (S. T. 518; S. DEP Ex. 1)

103. There are approximately 520 unconventional wells drilled within a 2.5 mile distance from one of the six CSDs in Pennsylvania. (S. T. 520)

104. Rex has drilled over 130 unconventional wells in Butler County and has three other well sites in Middlesex Township other than the Geyer Well Site. (S. T. 456)

Noise Issues

105. Actual site operations at the Geyer Well Site took place in stages with the first phase consisting of the construction phase, which involved general construction activity and general construction equipment such as dump trucks, bulldozers and backhoes. (T. 889-890)

106. On December 7, 2015, Rex began drilling the vertical portion of the 3H and 5H wells. (S T. 489)

107. In December 2015, Ms. Mary Ann Wagner, Ms. Jennifer Chomicki and Ms. Victoria Zaccari (collectively identified as the "Weatherburn Neighbors") resided in the Weatherburn Subdivision located east of the Geyer Well Site. (S. DRN Ex. 12)

108. The Weatherburn Neighbors noticed an increase in noise from the Geyer Well Site associated with the commencement of the vertical drilling of the 3H and 5H wells in December 2015. (S. T. 222, 233-234, 266)

109. The Weatherburn Neighbors' sleep was disrupted by the increased noise from the Geyer Well Site in December 2015. (T. 223-224, 234, 267)

110. Mr. Daniel Gengler and Mrs. Deisha Gengler resided at 344 Denny Road, Valencia, Pa for approximately 14 years, including in December 2015. (S. R-11 at 5)

111. The Genglers can see the Geyer Well Site and the Weatherburn Subdivision from their home. (S. R-10 at 8-9; R-11 at 8)

112. The Genglers home is 200 to 300 yards from the Geyer Well Site and at approximately the same elevation as the homes in the Weatherburn Subdivision. (S. R-10 24-25; R-11 at 23-24

113. Mrs. Gengler did not hear any noise from the Geyer Well Site prior to the December 2015 drilling activity. (S. R-10 at 13).

114. The noise from the December 2015 drilling activity did not have an impact on the Genglers sleep or other activities. (S. R-10 at 17-19; R-11 at 17-18)

115. The increase in noise in December 2015 associated with the vertical drilling at the Geyer Well Site lasted several days but less than two weeks. (T. 223, 235)

116. Rex attempted to mitigate the noise from the Geyer Well Site prior to and during the December 2015 drilling activity by the installation of 16-foot outer sound wall, a secondary interior sound wall and other operational restrictions. (S. T. 464-465, 486-489)

117. Mr. Gage Miller was admitted as an expert in environmental sound at the Supersedeas Hearing. (S. T. 451)

118. Following the December 2015 drilling activity, Rex raised the height of the outer sound wall to 32 feet on the sides of the well pad towards Weatherburn Subdivision and Denny Road. (T. 830, 904-906)

119. Rex took additional measures beyond raising the sound wall to address noise concerns prior to the next phase of drilling in April 2016, including drilling the wells on mud rather than air which lessened the noise from generators, setting an interior sound wall around a compressor and hanging curtains around the upper man-walk areas. (T. 906)

120. In mid-April, 2016, Rex drilled the horizontal portion of the 3H and 5H wells. (T. 897-898, DEP Ex. 20, 21)

121. On April 26, 2016, Rex submitted a Notice of Intent to plug the 4H well and on May 4, 2016, Rex plugged the 4H well. (DEP Ex. 18)

122. Mr. Lobins was not aware of the Department receiving any noise complaints associated with the April-May 2016 drilling and plugging activities at the Geyer Well Site. (T. 831)

123. Rex received noise complaints arising from its activities at the Geyer Well Site in April 2016. (T. 936)

124. Rex conducted hydraulic fracturing of the 3H well and the 5H well at the Geyer Well Site in July 2016. (DEP Exs. 22 23)

125. Rex used a method known as "zipper fracturing" during the hydraulic fracturing of the 3H well and the 5H well at the Geyer Well Site to shorten the length of the hydraulic fracturing process. (T. 920)

126. Mr. Jeffery Swackhammer, Jr. resided in the Weatherburn Subdivision in 2016. (T. 24, 26)

127. Mr. Swackhammer experienced loud and disruptive noise associated with the Geyer Well Site for a week in July 2016. (T. 26)

128. Mr. Swackhammer contacted the Department and his Township about his noise concerns. (T. 30-31, DRN Ex. A-3)

129. After July 2016, Mr. Swackhammer was not bothered by the noise associated with Rex's activities at the Geyer Well Site from September 2016 through the hearing date in December 2016. Mr. Swackhammer could not recall if the noise from the Geyer Well Site bothered him in August 2016. (T. 36)

130. Mr. Frank Thomas resided in the Weatherburn Subdivision starting in 2014. (T. 532)

131. Mr. Thomas first experienced noise from the Geyer Well Site in December 2015 and he complained about the noise to the Township at that time. (T. 536-537)

132. Mr. Thomas found that the noise associated with the horizontal drilling in April 2016 was quieter and tolerable and he did not call the Township in April with any noise complaints. (T. 539)

133. The noise in July 2016 was lower during the evening and overnight but started up again early in the morning (T. 541)

134. Mr. Thomas complained about the noise in July 2016 to the Department and his Township. (T. 544; DRN Ex. A-4)

135. Mr. Thomas could not remember the number of days that he noticed the noise taking place in July 2016. (T. 547)

136. Mr. Douglas Welsh works for the Department as an Oil and Gas Supervisor. (T. 39)

137. Mr. Welsh was aware that the Department received noise complaints during the December 2015 drilling phase. (T. 41, 45-46; DRN Ex. A-128)

138. The Department received 14 noise complaints related to the Geyer Well Site from July 14, 2016 to July 18, 2016 (T. 41; DRN Ex. A-5)

139. Mr. Welsh inspected the Geyer Well Site multiple times during the hydraulic fracturing phase in July 2016. (T. 55)

140. On July 15, 2016, Mr. Welsh recorded noise levels ranging from 30 to 68 units on his phone using an app named Sound Meter HD at four unidentified locations in the vicinity of the Geyer Well Site. (T. 47; DRN Ex. A-5)

141. The phone app used by Mr. Welsh stated that it is not a professional device for measuring decibels and his phone was not calibrated as a sound measurement device. (T. 48; DRN Ex. A-5)

142. Mr. Welsh found that there was a noticeable level of noise associated with the Geyer Well Site at each of the locations he stopped on July 15, 2016, but he found that there was no violation. (T. 48)

143. The Department did not issue a Notice of Violation for the noise from the Geyer Well Site. (T. 59)

144. The Department discussed the noise issues with Rex and Rex cooperated with the Department in trying to respond to the noise issues. (T. 56)

145. During hydraulic fracturing from July 11, 2016 through July 18, 2016, Rex limited the hours of work at the Geyer Well Site in order to comply with the special condition of the Geyer Wells Permits and Renewal Permits. (T. 888)

Air Issues

146. Air pollution from unconventional natural gas extraction is regulated by the Department's Bureau of Air Quality mostly through Air Quality Permit Exemption Category 38 ("Exemption 38"). (Parties Joint Stipulation Regarding Facts and Exhibits ("Jt. Stip.") No. 66)

147. Exemption 38 conditionally exempts unconventional natural gas operations at well sites from the air pollution plan approval or air pollution operating permit requirements. (Jt. Stip. 67)

148. Exemption 38 contains an exemption threshold for certain types of activities and emissions, including: 1) volatile organic compounds (2.7 tons per year "tpy"); 2) hazardous air pollutants ("HAP") (0.5 tpy for a single HAP and 1.0 tpy for a combination of HAPs) and 3)

nitrogen oxides from stationary internal combustion engines (100 pounds per hour, 0.5 tons per day, 2.75 tons per ozone season, and 6.6 tpy). (Jt. Stips. 72, 77, and 80; T. 637-638)

149. Exemption 38 also incorporates federal regulations that apply to certain equipment and includes requirements for leak detection and monitoring as well as reporting requirements. (T. 631-632)

150. The bases for the Department's belief that emissions from unconventional gas well sites are low enough so as to not pose a health risk are the Department's Short Term Air Study, the operator-reported emissions data from the Department's Marcellus air inventory and emission factors. (Jt. Stip. 86)

151. Rex did not have an open impoundment for flowback on the Geyer Well Site. Flowback was put in tanks and removed from the Geyer Well Site. (T. 907)

152. The only impoundment on the Geyer Well Site was a freshwater impoundment that contained purchased drinking water from the local water authority. Rex did not use any additives in the freshwater impoundment at the Geyer Well Site. (T. 900-901)

153. The freshwater impoundment is not a source for VOCs. (T. 401)

154. Rex had equipment on the Geyer Well Site to manage air emissions on the Geyer Well Site including a condensate tank and an EPA-certified combustor to burn emissions from certain tanks. (T. 912-913)

155. Condensate is a source of air emissions but ultimately there was no condensate production from the 3H and 5H wells at the Geyer Well Site because they were primarily dry gas wells. (T. 910-911)

156. Rex used electric-based pneumatic controllers instead of gas-based pneumatic controllers which eliminated the gas-based pneumatic controllers as a source of fugitive air emissions. (T. 913-914)

157. Rex utilized "green completion" measures to reduce air emissions from the completion of the 3H and 5H wells in accordance with the special condition in the Geyer Wells Permit. (Tr. 87, 902, 903, 913-916)

158. Ms. Julie Panko was admitted as an expert in environmental and human health risk assessments and exposure to ambient air pollutants including those related to oil and gas development and production in the December 2016 Hearing (T. 965-966, 972-973)

159. Dr. Ranajit Sahu was admitted as an expert in the December 2016 Hearing in the field of air pollution, including air pollution calculations, controls and compliance and risk assessment and measurement. (T. 561)

160. Dr. Jerome Paulson was admitted as an expert in the December 2016 Hearing in the fields of pediatrics, environmental health and children's environmental health. (T. 290)

161. Dr. Paulson testified regarding specific epidemiological and environmental health studies that he had reviewed. (T. 347-348, 350-354, 355-356, 358, 361-363, 365-368, 370-376, 382-385, 406-409, 412-419, 424-429, 432-435, 437-438, 461-464, 468-473, 484-488, 506, 510-511, 515-522, 527-528; DRN Ex. A-132, Table 2)

162. Epidemiological studies look at a group or groups of people and different co-variables to try to determine what is associated with a particular outcome. (T. 313-314)

163. Finding an association between two things in an epidemiologic study does not show that the one thing caused the other thing. (T. 437)

164. Community-based participatory research organizes community participants to contribute information in a structured way that controls for variables and allows for analysis of the collected information by professionals. (T. 364)

165. Epidemiological studies and community-based participatory research projects have been conducted to look at the potential environmental health impacts of natural gas activities. (T. 375-376; DRN Ex. A-132, Table 2)

166. The epidemiological studies and community-based participatory research generally rely on distance from the natural gas activities as a proxy for exposure to the emissions from the natural gas activity. (T. 370-371, DRN Ex. A-132, Table 2)

167. The distance/proximity to the natural gas activities in the studies varied and that distance/proximity variance makes it harder to compare the various studies. (T. 370; DRN Ex. A-132, Table 2)

168. Proximity to an activity does not necessarily indicate specific exposure to a chemical and therefore proximity is not the best possible surrogate for exposure. (T. 409-410, 995)

169. The type and scope of the natural gas activity taking place would have importance in understanding studies evaluating the impacts on people in close proximity to those activities. (T. 502-504)

170. Many of the epidemiological studies reviewed by Dr. Paulson that were the basis of his testimony did not detail the type and scope of the natural gas activities that were taking place during the studies. (T. 502-508)

171. Ms. Panko testified regarding specific epidemiological and environmental health studies that she had reviewed. Some of the studies were the same as those addressed by Dr.

Paulson during his testimony. (T. 973-1010, 1154-1160, 1163-1167, 1170-1171; Rex Ex. P-46, Tables 1 and 2)

172. Among the published studies discussed by Ms. Panko was one identified as Maskrey et al. 2016 in which she was a participant. (T. 988-989, Rex Ex. P-46, Table 1)

173. The Maskrey et al 2016 studied involved data collected to evaluate the impact of unconventional gas activity, specifically the hydraulic fracturing, flaring and production phases, on VOC emissions at a school site. (T. 957-960, 988-989, Rex Ex. P-46, Table 1)

174. Rex hired Chem-Risk to characterize various air emissions at the Geyer Well Site during certain operational periods of time. (T. 920-921)

175. Chem-Risk conducted what it termed baseline or background air sampling in late August - September 2015 after construction of the access road and well pad at the Geyer Well Site was completed. (T. 1015, Rex Ex. P-23)

176. Chem-Risk conducted air sampling at the Geyer Well Site during the following wellpad activities and time periods: 1) Background – Light Pad Activity 6/24/2016 to 7/10/2016 and 7/19/2016 to 7/29/2016; 2) Completions – 7/11/2016 to 7/18/2016; 3) Flowback – 7/30/2016 to 8/8/ 2016 and 4) Production – 8/9/2016 to 9/19/2016. (T. 1027-1029; Rex Ex P-46, Summary of Wellpad Activity Periods Monitored)

177. Chem-Risk did not do any air sampling during the vertical or horizontal drilling phases at the Geyer Well Site. (T. 1108-1111)

178. Chem Risk had five sampling sites identified as Sites A through E where it placed the air monitoring equipment on the Geyer Well Site. (T. 1019, 1059; Rex Ex. P-46, Figure 1)

179. Sites C and D were located north and west of the drill pad in the vicinity of the high school. (T. 1020, Rex Ex. P-46, Figure 1)

180. Chem-Risk sampled for H2S, NO2, PM10, PM2.5, total VOCs and carbon monoxide using continuous monitoring. Individual VOCs were grab sampled using summa canisters for the specific VOCs. (T. 1030, 1041,1085-1086, 1123-1125; Rex Ex. P-24)

181. Chem-Risk identified and monitored for the chemicals of concern that it determined were most likely associated with natural gas development but it did not monitor for all possible chemicals of concern. (T. 1068-1076)

182. Chem-Risk did not do any dispersion modeling or dispersion analysis of the air emissions at the Geyer Well Site. (T. 1065-1067)

183. Ms. Panko compared the air sampling data collected by Chem-Risk at the Geyer Well Site to various benchmarks she concluded were appropriate for evaluating the health impacts of the air emissions. (T. 1037-1054)

184. Ms. Panko could not reach a conclusion regarding the health risks associated with the NO2 air samples at the Geyer Well Site because of limitations related to the sampling equipment. (T. 1079- 1082)

185. Ms. Panko also concluded that while the carbon monoxide concentrations at the Geyer Well Site were lower than the identified health-based standards, the comparison was inappropriate and made it challenging to determine the health risk from the carbon monoxide air emissions data. (T. 1078-1083)

DISCUSSION

Standard of Review

This matter involves a third party appeal by Delaware Riverkeeper of permits issued to Rex by the Department. In a third party permit appeal, in order to be successful, the party or parties challenging the Department's permit decision must show, by a preponderance of the evidence, that the Department acted unreasonably or in violation of the Commonwealth's laws or

the Pennsylvania Constitution in issuing the permit. *United Refining Company v. DEP*, 2016 EHB 442,448; *aff'd., United Refining Company v. Dep't of Envtl. Prot.,* 163 A.3d 1125 (Pa. Cmwlth. 2017). See also *Shuey v. DEP*, 2005 EHB 657, 691 (citing *Zlomsowitch v. DEP*, 2004 EHB 756, 780); *Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot*., 131 A.3d 578, 587 (Pa. Cmwlth. 2016) (In order to prevail, appellants must show that the Department acted unreasonably or contrary to the laws of the Commonwealth or the Pennsylvania Constitution). The preponderance of evidence standard requires that Delaware Riverkeeper meet its burden of proof by showing that the evidence in favor of its proposition is greater than that opposed to it. It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established. Delaware Riverkeeper's evidence must be greater than the evidence that the issuance of the permit was appropriate or in accordance with the applicable law. *United Refining*, 2016 EHB at 449; *Perano v. DEP*, 2011 EHB 623, 633. The party challenging the permit issuance may not simply raise an issue and then speculate that all types of unforeseen calamities may occur. *United Refining*, 2016 EHB at 449 citing *Shuey v. DEP & Quality Aggregates, Inc.*, 2005 EHB 657, 711. 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 2012 Oil and Gas Act at 58 Pa. C.S.A. § 3211(a) provides that no person shall drill a well without having first obtained a well permit under subsections (b), (c), (d) and (e). Under 58 Pa. C.S.A. § 3211 (e), the Department shall issue a permit within 45 days of submission of a

permit application unless the Department denies the permit application for one or more of the reasons set forth in subsection (e.1), and it further provides that the Department may impose permit terms and conditions necessary to assure compliance with the 2012 Oil and Gas Act or other laws administered by the Department. In its NOA and post-hearing briefs, Delaware Riverkeeper argues that the Department should have denied the applications for the Geyer Well Permits under 58 Pa. C.S.A. § 3211 (e.1)(1).[2] This section provides that the Department may deny a permit because the well site for which a permit is requested is in violation of any of this chapter or issuance of the permit would result in a violation of this chapter or other applicable law.

Delaware Riverkeeper set forth two general arguments for why it contends the Department should have denied Rex's applications for the Geyer Wells Permits or Renewal Permits pursuant to 58 Pa. C.S.A. § 3211 (e.1)(1). First, it contends that the Department's issuance of the Geyer Wells Permits and/or Renewal Permits was an abuse of discretion and a violation of specific statutes, associated regulations, and the prohibition against permitting a nuisance. (Appellants' Proposed Findings of Fact, Conclusions of Law, and Post-Hearing Brief, p. 120) ("DRN's Post-Hearing Brief"). Second, it argues that the Department's approvals violate Appellants' inherent rights under Article 1, Section 27 of the Pennsylvania Constitution.[3] *Id.*

[2] Delaware Riverkeeper does not specifically assert that the Department should have denied the Geyer Well Permits or Renewal Permits under any of the other reasons listed in 58 Pa. C.S.A. § 3211 (e.1) and no evidence or testimony was presented at the hearing that would support a conclusion that the Department should have denied the Geyer Well Permits or Renewal Permits under any of the five other reasons identified in 58 Pa. C.S.A. § 3211 (e.1).

[3] DRK's Post-Hearing Brief as well as the initial post-hearing briefs of Rex and the Department extensively discuss Delaware Riverkeeper's claim that the issuance of the Well Permits violated Article 1, Section 27 using the three part test established in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth 1973), aff'd 361 A.2d 263 (Pa. 1976). On the day that the last post-hearing brief in this matter was scheduled to be filed, the Pennsylvania Supreme Court issued its decision in *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) that overruled the three part test in *Payne* and rendered much of the initial post-hearing briefing from the parties on that issue moot. The parties filed supplemental post-hearing briefs

The Department and Rex argue that the issuance of the Geyer Well Permits and the Renewal Permits was reasonable and that Delaware Riverkeeper has not demonstrated that the Department's actions violated any existing laws or regulations including Article 1, Section 27 of the Pennsylvania Constitution.

Statutory and Regulatory Issues

Delaware Riverkeeper asserts that the Department should have denied Rex's applications for the Geyer Wells Permits and Renewal Permits because their issuance results in the violation of the Clean Streams Law, the 2012 Oil and Gas Act, the Administrative Code, associated regulations, and the prohibition against permitting a nuisance. Delaware Riverkeeper points out that the Department has the authority under 58 Pa.C.S. § 3211(e.1)(1) to deny a well permit if the issuance of the permit would result in a violation of the 2012 Oil and Gas Act or other applicable law. In analyzing this position, we start by focusing on the specific statutory and regulatory provisions that Delaware Riverkeeper claims were violated by the Department's permitting decision in this case. This is more difficult than it would first appear because many of Delaware Riverkeeper's claims of potential or actual statutory and regulatory violations are general in nature and do not identify a specific section or sections of the relevant statute or regulation that the permit issuance allegedly violated. After reviewing Delaware Riverkeeper's post-hearing briefs in detail, our understanding of the list of specific statutory and regulatory provisions violated by the issuance of the Geyer Wells Permits and Renewal Permits according to Delaware Riverkeeper are as follows: 1) The Clean Streams Law – 35 P.S. §§ 691.3, 691.307, 691.401, 691.402, 691.611 (DRN's Post-Hearing Brief, p. 116); 2) the 2012 Oil and Gas Act – 58 Pa.C.S.

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addressing the Article 1, Section 27 claims under the direction provided by the Pa Supreme Court in its *PEDF* decision.

§ 3259 (DRN's Post-Hearing Brief, p. 116) and 3) the Administrative Code – 71 P.S. §§ 510-17(1)-(3) 3259 (DRN's Post-Hearing Brief, p. 115-116).

Delaware Riverkeeper states that contamination of the waters of the Commonwealth, both surface water and groundwater, is a violation of the Clean Streams Law citing 35 P.S. §§ 691.307, 691.401, 691.402, 691.611. It also argues that water contamination is a public nuisance because it unreasonably interferes with a right common to the general public and cite 35 P.S. §§ 691.3, 691.401 along with other authorities in support of its position. In its Post-Hearing Brief, Delaware Riverkeeper fails to provide any detailed legal analysis of these statutory provisions or how it contends the issuance of the Geyer Wells Permits or Renewal Permits violated these statutory provisions. In its proposed Findings of Fact, Delaware Riverkeeper asserts that groundwater contamination at the Geyer Well Site can occur through the following agreed-upon mechanisms: wellbore casing failures, communication with nearby abandoned and orphaned wells and methane migration. (DRN's Post-Hearing Brief, FOF No. 472, p. 61). It listed no specific factual findings addressing surface water contamination or explaining the risk of surface water contamination at the Geyer Well Site. Delaware Riverkeeper's argument for denial of the Geyer Wells Permits and Renewal Permits appears to rest on its theory that the unique geologic conditions at the Geyer Well Site, in conjunction with the presence of abandoned wells in the area, created a sufficiently high risk of water contamination through the listed mechanisms that permitting the wells constituted a violation of the Clean Streams Law and its regulations. We disagree with Delaware Riverkeeper's conclusion and find that the issuance of the Geyer Wells Permits and Renewal Permits is not a violation of the Clean Streams Law and its regulations.

Delaware Riverkeeper argued in the Supersedeas Hearing and the December 2016 Hearing that there was a substantial risk of groundwater contamination if the Geyer Wells were

permitted by the Department. The testimony and evidence on this issue were presented by DRN's expert witness, Daniel S. Fisher. Mr. Fisher testified that the setting of the Geyer Well Site was geologically unique because of its location approximately 2.6 miles from the Blairsville-Broadtop Lineament that he described as a cross-strike structural discontinuity ("CSD"). Mr. Fisher theorized that the risks posed by placing the Geyer Wells in proximity of the CSD were enhanced by the presence of abandoned wells in the vicinity of the Geyer Well Site. The Board addressed Mr. Fisher's theory extensively in its Opinion in Support of Order Denying Petition For Supersedeas ("Supersedeas Opinion") and found "that, at most, the concerns raised by Mr. Fisher are speculative and do not amount to a greater level of risk than exists with any other unconventional gas drilling projects." *Delaware Riverkeeper v. DEP*, 2016 EHB 41, 52. In the December 2016 Hearing, Mr. Fisher's testimony on direct largely addressed the expert reports filed by Rex and the Department's experts. On cross-examination, he testified that he had not done anything further to prove his theory in the time since the Supersedeas Hearing and that he stood by the conclusion he offered in that hearing that drilling and producing the Geyer Wells created an extraordinary risk. In his testimony, he also acknowledged that there was no evidence that the drilling or completion of the Geyer Wells had caused groundwater contamination or resulted in any communication between those wells and the abandoned wells that he had identified and discussed in his Supersedeas Hearing testimony. In other words, he had no evidence that the extraordinary risk he raised in his testimony at the Supersedeas Hearing had taken place by the time of the December 2016 Hearing despite the drilling and completion of the 3H and 5H wells at the Geyer Well Site.

The Department and Rex presented testimony addressing Mr. Fisher's theory during the Supersedeas Hearing and the Department offered additional expert testimony on this topic during

the December 2016 Hearing. The Department's expert witness at the December 2016 Hearing, Bryce J. McKee, disputed the testimony offered by Mr. Fisher and stated that the Geyer Well Site is located in a geologically stable and structurally uncomplicated area. While he agreed in general with some of the potential means by which gas migration could occur, he disputed Mr. Fisher's theory that CSDs create a pathway for gas migration and instead testified that the data showed that CSDs are more likely to act as a seal against gas migration rather than a conduit that would permit gas movement. He specifically testified that the Blairsville-Broadtop Lineament that Mr. Fisher was concerned with would act as a seal and would not serve as conduit for gas or fluid migration into groundwater. Further, when Mr. McKee was questioned on cross-examination regarding the risk of stray gas contamination of freshwater aquifers through a suboptimal cement job of the well casing, he acknowledged that possibility but noted that Rex's cementing plan demonstrated that Rex used a state-of-the-art cement technique and material that was more protective than the typical well cement. Delaware Riverkeeper did not provide any evidence that the cement job at the Geyer Wells was inadequate or failed to prevent gas migration.

Following our review of the new testimony from the December 2016 Hearing, our opinion that the Department acted correctly in issuing the Geyer Well Permits and Renewal Permits, despite the concerns regarding potential groundwater contamination raised by Delaware Riverkeeper has not changed from the time of our Supersedeas Opinion. We find that Mr. Fisher's theory remains speculative at best and that the Department's decision to issue the Geyer Well Permits and Renewal Permits did not pose a sufficient risk of groundwater contamination to constitute a violation of the Clean Streams Law. If anything, the lack of any new information from Mr. Fisher to prove his theory, in combination with the new testimony offered by the

Department's expert, strengthens our determination that the Department's actions were not a violation of the statue or the regulations governing protection of the waters of the Commonwealth. In addition, as previously noted, Delaware Riverkeeper presented no testimony or evidence at the hearing that Rex's activities at the Geyer Well Site, which at the time of the hearing consisted of the drilling, completion and production from two unconventional gas wells, resulted in actual contamination of the groundwater (or surface water) in the vicinity of the Geyer Wells. While that alone is not sufficient to disprove the theory offered by Mr. Fisher, given that some of the potential risks to groundwater may take time to develop and/or manifest, it does suggest that the degree of risk which Mr. Fisher described at the time of the Supersedeas Hearing as a "perfect storm" was overstated. As the Board has said previously in the context of a third party challenge to a Department permitting decision, it is not enough to simply raise an issue and then speculate that all types of unforeseen calamities, such as groundwater contamination, may occur. See *United Refining Company v. DEP,* 2016 EHB 442, 449; *aff'd, United Refining Company v. Dep't. of Envtl. Prot.*, 163 A.2d. 1125 (Pa. Cmwlth. Ct. 2017)

Delaware Riverkeeper next argues that the issuance of the Geyer Wells Permits and Renewal Permits violates Section 3259 of the 2012 Oil and Gas Act that makes it unlawful for any person to conduct an activity related to the drilling for or production of oil and gas in any manner as to create a public nuisance or adversely affect public health, safety, welfare or the environment. In raising this argument, Delaware Riverkeeper stated that the approval of the Geyer Wells Permits and Renewal Permits disregarded the protections needed for children and residents and created a nuisance, with a particular focus on alleged nuisances associated with water contamination, noise, and air emissions. As discussed above, Delaware Riverkeeper has failed to demonstrate that water contamination is an issue under the theory it relied on in this

case, and therefore, we find that the Department's decision to issue the Geyer Wells Permits and Renewal Permits was not a violation of the Oil and Gas Act because Rex's activities authorized under the Geyer Wells Permits and Renewal Permits did not create a nuisance or adversely affect public health, safety, welfare or the environment based on potential or actual water contamination.

The issue of noise and whether the noise from Rex's activities at the Geyer Well Site constituted a nuisance was raised in the Supersedeas Hearing. Witnesses testified that many of the commenters during the permit review process raised the issue of noise. As a result of those concerns, the Department placed a special condition in the Geyer Well Permits and Renewal Permits to address the noise issue that stated that:

> The well operator shall implement necessary noise mitigation measures, including sound abatement walls during the drilling and completion of the well. If at any time the oil and gas operations covered under this permit create a public nuisance, the Department may require the well operator to adopt additional, appropriate remedial measures to abate such nuisance.

During the Supersedeas Hearing, the Board heard testimony regarding noise issues from neighbors of the Geyer Well Site, Derek Smith, a health, safety and environment director for Rex and Mr. Gage Miller, an environmental noise expert hired by Rex. The Board evaluated that testimony and applied the Restatement (Second) of Torts §821B. The Board determined that the noise at issue at the time of the Supersedeas Hearing did not constitute a public nuisance.

In the December 2016 Hearing, the Board heard about noise issues from two additional neighbors who had not testified during the Supersedeas Hearing. The Board also heard testimony from a Department Oil and Gas Supervisor, Doug Welsh, who investigated some of the noise complaints received by the Department, along with additional testimony from Derek Smith. The additional neighbors, Jeffrey Swackhammer and Frank Thomas, testified that while

there was some general intermittent noise associated with the Geyer Well Site, the noise was most disruptive during a limited period in July 2016. Mr. Swackhammer testified that the time period of the noise in July was around eight days. Mr. Thomas could not recall the exact length of time although he did testify that the noise was "turned off" in the evenings and at night. (T. 541). Both Mr. Swackhammer and Mr. Thomas testified that the noise was disruptive to their families and prompted them to contact their township and the Department with their concerns. Mr. Swackhammer testified that he was unsure whether he had experienced any noise issues in August 2016 but did not experience any noise issues associated with the Geyer Well Site from September 2016 through the time of the December 2016 Hearing.

Mr. Welsh's testimony focused on the noise issue arising from activities at the Geyer Well Site in July 2016. Mr. Welsh noted that Rex doubled the height of the sound walls from 16 to 32 feet on two sides of the Geyer Well Site between the time of the Supersedeas Hearing and its July 2016 operations. According to Mr. Welsh, the Department received 14 written complaints regarding the Geyer Well Site from July 14 to July 18. Mr. Welsh visited the Geyer Well Site on July 15 to investigate the noise issue and found that there was a noticeable level of noise. He used a cell phone application to take noise readings but testified that he was not able to determine if the readings were accurate because he could not calibrate it and was not sure what units of noise the application was measuring. The Department did not issue Rex a notice of violation related to the noise at the Geyer Well Site in July 2016.

Derek Smith testified that Rex received noise complaints in April 2016 but was not asked about and did not testify about noise complaints from July 2016. Mr. Smith discussed several additional steps Rex undertook to address noise issues since the Supersedeas Hearing. In addition to raising the sound wall on two sides as mentioned by Mr. Welsh, Rex set an interior

sound wall around a compressor and hung curtains on the derrick floor. Rex also conducted drilling on mud as opposed to its usual practice of drilling on air because mud drilling allowed it to hold down noise from generators associated with air drilling. During the hydraulic fracturing process in July 2016, Rex used zipper fracking, a process that involves hydraulic fracturing both wells at the same time rather than in sequence, in an effort to shorten the duration of the hydraulic fracturing process. Rex also limited the hydraulic fracturing process to the daylight hours to reduce the impact of noise on the surrounding areas.

After reviewing all of the additional testimony concerning the noise issue offered by the parties in the December 2016 Hearing, along with further consideration of the earlier Supersedeas Hearing testimony, we remain convinced that the Department did not permit a public nuisance related to noise when it issued and renewed the Geyer Well Permits. In our Supersedeas Opinion, we stated that the Board applies the Restatement (Second) of Torts § 821B when determining whether an activity rises to the level of a public nuisance. Delaware Riverkeeper failed to convince us that the noise at the Geyer Well Site from the activities that had taken place up to that time was unreasonable and unnecessary under the circumstances, was a significant interference with public health, safety, peace, comfort or convenience, or that Rex's activities that were responsible for the noise were continuous in nature or would produce a permanent or long-lasting effect. The December 2016 Hearing testimony regarding the noise that occurred prior to the Supersedeas Hearing was very limited and was consistent with the earlier testimony and did not change our opinion about this issue. However, we need to consider whether any of the noise arising from Rex's activities following the Supersedeas Hearing constitute a nuisance.

The new noise testimony focused on two periods of activity at the Geyer Well Site, horizontal drilling in April 2016 and well completion including the hydraulic fracturing of the 3H and 5H wells in July 2016. Mr. Swackhammer, one of the two neighbors to offer additional testimony on noise issues, testified that he did not experience any significant noise issues in April 2016. The other neighbor, Mr. Thomas stated that the horizontal drilling in April 2016 was much quieter than the site activity in December 2015 and that he was actually very happy with the installation of the higher sound walls which he apparently credited with reducing noise at the Geyer Well Site. The testimony presented by Delaware Riverkeeper failed to support a finding that the noise from April 2016 significantly interfered with public health, safety, peace, comfort or convenience or that the noise produced a permanent or long-lasting effect.

The July 2016 noise associated with the completion of the 3H and 5H wells had a greater impact on the neighbors according to the testimony of both Mr. Swackhammer and Mr. Thomas. However, we hold that the noise did not rise to the level of a public nuisance in large part because the evidence was clear that the noise producing activity was not continuous in nature, and did not have a permanent or long-lasting effect. It lasted eight days and only took place during daylight hours. Mr. Swackhammer testified that he had no noise issues in September 2016 through the hearing date in December 2016 and was uncertain about any noise issues in August 2016. In both the Supersedeas Hearing and the December 2016 Hearing, the evidence demonstrated that while the noise certainly was a legitimate concern, it ultimately was of limited duration and, therefore did not cause a permanent or long-lasting effect or significantly interfere with public health, safety, peace, comfort or convenience. In addition, Rex took several steps above and beyond what was required to try and mitigate noise from the Geyer Well Site. Given those efforts, Delaware Riverkeeper did not demonstrate that the remaining noise from the Geyer

Well Site was unnecessary and unreasonable. The noise resulting from Rex's activities at the Geyer Well Site did not constitute a public nuisance and the Department did not violate Section 3259 of the 2012 Oil and Gas Act when it issued the Geyer Wells Permits and Renewal Permits.

Delaware Riverkeeper argues that Rex's drilling and production activities violate Section 3259 of the 2012 Oil and Gas Act because they generate air emissions that adversely affect public health, safety, welfare and/or the environment. They presented two experts, Dr. Ranajit Sahu and Dr. Jerome Paulson, to testify on the issue of air emissions and the potential for an adverse impact on the public and the environment from those emissions. Both experts were well qualified in their fields of expertise and offered credible testimony to the Board. Dr. Sahu's testimony centered on the need for a risk assessment to determine whether the air emissions from the Geyer Well Site adversely affect public health, safety, welfare or the environment and his concern that an adequate risk assessment of potential air emission impacts was not completed prior to the Department's permitting decision. His stated conclusion was that there was insufficient data available on the particular air emissions associated with the Geyer Well Site to conduct a proper risk assessment and that lack of data lead him to state "I have no knowledge that the Geyer site poses a risk. I don't know." (T. 710). Given that statement, Dr. Sahu's testimony does not support a determination that the Department violated Section 3259 of the 2012 Oil and Gas Act when it issued the Geyer Wells Permits or Renewal Permits.

Dr. Paulson's testimony addressed potential health impacts related to unconventional natural gas extraction. Dr. Paulson testified about the various chemicals used in the natural gas extraction process in general and the types of health impacts that can result from exposure to those chemicals. He also discussed the specific findings of various epidemiological and environmental health studies detailed in papers that he had reviewed on the subject. The studies

generally looked at the health status of various groups of people along with the proximity of the people in the study group to unconventional natural gas extraction activities. He summarized his testimony regarding the various studies by stating that "there are papers that show an association between unconventional gas activities and adverse health outcomes." (T. 436). He further offered his opinion that the siting of the Geyer Wells as permitted by the Department would present a significant risk of adverse health impacts to the people, including children, who live and go to school nearby. (T. 378-79). He concluded that the Geyer Wells should not be allowed to go forward beyond where they already are because "we don't know that the process can be done without creating injury to the population that lives there." (T. 389).

Rex and the Department challenged Dr. Paulson's conclusions and statements through cross-examination and direct testimony from Rex's expert, Ms. Julie Panko. We found Ms. Panko to also be well qualified and credible in her testimony. Rex and the Department extensively questioned Dr. Paulson on the specifics of the epidemiologic studies he relied on for his opinion. Dr. Paulson acknowledged that there are no perfect studies and that these studies didn't generally measure actual exposure to air emissions but instead relied on proximity as a surrogate for exposure. He also testified that an association between unconventional natural gas activities and negative health impacts does not show that one caused the other. Ms. Panko pointed out issues in a number of the epidemiologic studies relied on by Dr. Paulson including issues with the size of the data set and methodology and identified other studies that reached conclusions contrary to those cited by Dr. Paulson. She testified that the literature did not support the notion that there will be an increase in disease in the community near the Geyer Well Site based on her conclusion that the studies did not properly understand or account for exposure issues. Despite these concerns, Dr. Paulson asserted that his opinion did not rely on any one

study but was based on the weight of the evidence taking into account the range of findings from the available studies. Having heard the testimony regarding the studies reviewed by Dr. Paulson, as well as the criticisms of the studies, we find that the studies are inconclusive in proving an association between unconventional natural gas activities and public health issues as asserted by Delaware Riverkeeper. Further, the studies clearly do not prove causation between natural gas development activities and the alleged health impacts. Even Dr. Paulson acknowledged that this causation is not proven by the studies he testified about in this case.

Ultimately, however, our main issue with Dr. Paulson's testimony is that it reflected his general concerns with unconventional natural gas extraction but did not adequately address the particular situation at the Geyer Well Site. He testified that the proximity of the Geyer Wells to neighborhoods and schools in the area was the basis for his concern since he judged that proximity to be similar or even closer than what was present in some of the studies he reviewed. At the same time, he also acknowledged that proximity alone is not sufficient to determine other important information regarding potential health impacts such as the dose of the toxic substance that may be received, the length of exposure to that substance and what other substances may be coming from other sources. There was no testimony from Dr. Paulson that this other information was considered in forming his opinions regarding the Geyer Well Site. Nor did Dr. Paulson testify to any site specific emissions from the Geyer Wells. The list of potential chemicals in air emissions from unconventional natural gas extraction that Dr. Paulson testified about included emissions from compressor stations and processing plants, facilities that are not present at the Geyer Well Site.

Dr. Paulson acknowledged that the scope and types of natural gas activities that were taking place in the vicinity of a study would be relevant to understanding any public health issues

identified by the study. However, when he was asked about the scope and nature of various activities that were taking place in conjunction with the studies he relied on, he was not able to identify what specific activities took place and acknowledged that the studies in general did not provide detailed information about the activities. In one study where the nature of the activities was discussed, identified as the Macey study, he testified on cross examination that the nearest oil and gas infrastructure for the Pennsylvania samples that were included in the study was a compressor and a pig launcher not a well or wells. He was directly asked whether he had looked at the activity that actually happened on the Geyer Well Site and tried to compare those activities to the activities that took place in any of the studies on which he relied for his conclusion and he stated that he had not done so. (T. 511). He also acknowledged that if the wells at the Geyer Well Site were not flared, the methane was captured, there was no wastewater impoundment, no compressor station and no pigging operation, the connection he attempted to make between the studies he relied on and the situation at the Geyer Well Site would be "less likely." (T. 511-12).

In contrast to Dr. Paulson's more generalized testimony, Rex's expert, Ms. Panko, offered testimony regarding site specific air emissions monitoring conducted at the Geyer Well Site by her company, ChemRisk, on behalf of Rex. The monitoring attempted to characterize background conditions at the Geyer Wells Site (August 27, 2015 to September 30, 2015) and to monitor air emissions during periods of activity on the Geyer Well Site including during completion of Geyer Wells 3H and 5H and subsequent production from those two wells (June 24, 2016 to September 19, 2016). However, no sampling was conducted before or during the construction of the well pad and access road at the Geyer Well Site or during the any of the drilling phases of the Geyer Wells. ChemRisk used both continuous monitoring equipment and grab sampling and monitored for H2S, NO2, PM10, PM2.5, carbon monoxide, and volatile

organic compounds (VOCs). Based on the air monitoring conducted by ChemRisk, Ms. Panko opined that the activities occurring at the well pad for the Geyer Wells were not affecting local air quality beyond the Geyer Well Site for the constituents monitored by ChemRisk. She offered a further opinion that the VOCs, with one exception not related to oil and gas activity, did not exceed the selected health benchmarks.

Delaware Riverkeeper strongly challenged these opinions on cross-examination and raised issues regarding the air emissions monitoring and the conclusions that Ms. Panko reached based on the data. Ms. Panko acknowledged that some operational periods during which Rex's activities at the Geyer Well Site would be likely to generate emissions were not monitored and, therefore, potential air emissions during those periods were not addressed by the ChemRisk study. She also agreed that ChemRisk did not do any dispersion modeling to fully understand how air emissions would travel within and beyond the Geyer Well Site. In addition, she acknowledged that there were chemicals that could potentially be emitted by Rex's activities at the Geyer Well Site, such as radon and sulfur oxides, that were not monitored at all during Rex's activities and, therefore, she could not offer an opinion regarding what health effects might result from the unmonitored chemicals. In light of this testimony, the Board recognizes that there are significant limitations to the ChemRisk study that was the basis of this portion of Ms. Panko's testimony. At the same time, and accepting the limitations, Ms. Panko's testimony is the only site specific information that was presented to the Board addressing the actual conditions and air emissions at the Geyer Well Site. Furthermore, the ChemRisk study did measure major chemicals of concern during operational activities that would account for a significant portion of the likely air emissions from the Geyer Well Site. The levels of the emissions that were monitored generally fell below the health based standards to which they were compared and Ms.

Panko offered reasonable explanations when there were exceedances of those standards. In general, limited as it was, the information presented by Ms. Panko suggests that it is more likely than not that the activities at the Geyer Well Site will not have a significant adverse impact on the air quality at and surrounding the Geyer Well Site. Looking at all the testimony from the experts on the potential and actual air emissions at the Geyer Well Site that may result from the Department's permitting decision, we find that Delaware Riverkeeper has not carried its burden to show that the Department violated Section 3259 of the 2012 Oil and Gas Act in issuing the Geyer Well Permits and Renewal Permits because Delaware Riverkeeper did not demonstrate by a preponderance of the evidence that the air emissions will adversely affect public health, safety, welfare or the environment.

Delaware Riverkeeper argues that the Department should have denied the Geyer Well Permits consistent with its obligations under the separate nuisance provisions in the Administrative Code found at 71 P.S. §§ 510-17(1)-(3). It cites to the Board's prior ruling in *Kwalwasser v. DER*, 1986 EHB 24, in support of this position. The cited provision from the Administrative Code provides that the Department:

> shall have the power and its duty shall be:
> (1) To protect the people of this Commonwealth from unsanitary conditions and other nuisance, including any condition which is declared to be a nuisance by any law administered by the department;
> (2) To cause examination to be made of nuisances, or questions affecting the security of life and health, in any locality, and, for that purpose, without fee or hindrance, to enter, examine and survey all grounds, vehicles, apartments, buildings, and places, within the Commonwealth, and all persons, authorized by the department to enter, examine and survey such grounds, vehicles, apartment, buildings and places, shall have the powers and authority conferred by law upon constables;
> (3) To order such nuisances including those detrimental to the public health to be abated and removed.
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> 71 P.S. §§ 510-17(1)-(3).

Delaware Riverkeeper points out that the language in the 2012 Oil and Gas Act goes further than this Administrative Code section in terms of what is prohibited. In addressing this provision, Delaware Riverkeeper does not set out any additional arguments beyond those previously discussed by the Board with regards to Section 3259 of the 2012 Oil and Gas Act. The Board rejected Delaware Riverkeeper's arguments that the Department's actions in granting the Geyer Wells Permits violated Section 3259 of the 2012 Oil and Gas Act. Since Delaware Riverkeeper's arguments concerning violation of the Administrative Code provision are the same as those already rejected by the Board when addressing nuisance issues under the 2012 Oil and Gas Act, and given that Delaware Riverkeeper concedes that the prohibitions in the 2012 Oil and Gas Act go further than the Administrative Code in addressing nuisances, we find that Delaware Riverkeeper has not persuaded us that the Department violated 71 P.S. §§ 510-17(1)-(3) in issuing the Geyer Wells Permits and Renewal Permits.

Article 1, Section 27

Delaware Riverkeeper's other main argument in this case is that the Department's decision to first issue and later renew the Geyer Wells Permits violated the Department's obligations under Article 1, Section 27 of the Pennsylvania Constitution. Article 1, Section 27 states as follows:

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

PA Const. Article 1, §27

At the time of the hearing and during the initial filing of the parties post-hearing briefs, the arguments set forth by the parties focused on whether the Department had satisfied the

requirements of the three-part *Payne* test set forth in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), aff'd., 361 A.2d 263 (Pa. 1976) ("*Payne*"). The Pennsylvania Supreme Court, in *Pa Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF*") overruled the *Payne* test. In place of the *Payne* test, the Supreme Court ruled that the proper standard of judicial review when reviewing a challenge to the constitutionality of Commonwealth actions under Section 27 "lies in the text of Article 1, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment." *PEDF*, 161 A.3d at 930. The Board allowed the parties to file supplemental post-hearing briefs addressing the facts of this case and Delaware Riverkeeper's claims under Article 1, Section 27 in light of the Pennsylvania Supreme Court's decision in *PEDF*.

In recent decisions, the Board has addressed the nature of the Department's duties and responsibilities under Article 1, Section 27 of the Pennsylvania Constitution in light of the opinion in *PEDF* and its decision to overrule the *Payne* test. In *Center for Coalfield Justice v. DEP*, 2017 EHB 799 ("*CCJ*") and more recently in *Friends of Lackawanna v. DEP and Keystone Sanitary Landfill, Inc.*, 2017 EHB 1123 ("*FOL*"), the Board stated:

> The Supreme Court, citing *Robinson Twshp*., held that Section 27 grants two separate rights to the people of Pennsylvania. 2017 Pa. LEXIS at *38. The first right, which the Supreme Court describes as a prohibitory clause, places a limitation on the state's power to act contrary to the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment. *Id.* The second right reserved under Section 27, according to the Supreme Court, is the common ownership by the people, including future generations, of Pennsylvania's public natural resources. *Id.* The Supreme Court then notes that the third clause of Section 27 creates a public trust, with the natural resources as the corpus of the trust, the Commonwealth as the trustee and the people as the named beneficiaries. *Id*. at *39.
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> The Supreme Court in *PEDF* next turns its attention to defining the Commonwealth's responsibilities as trustee. After discussing private trust law

principles, it finds that the Commonwealth has two basic duties as trustee: 1) prohibit the degradation, diminution, and depletion of our public natural resources, whether the harms result from direct state action or the actions of private parties and 2) act affirmatively via legislative action to protect the environment. 2017 Pa. LEXIS at *41-42. The Supreme Court further states that

> Although a trustee is empowered to exercise discretion with respect to the proper treatment of the corpus of the trust, that discretion is limited by the purpose of the trust and the trustee's fiduciary duties, and does not equate 'to mere subjective judgment.' The trustee may use the assets of the trust 'only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interest of the beneficiaries.'

As previously discussed, the Supreme Court in *PEDF* states that the trust provision in Article I, Section 27 creates two basic duties for the Commonwealth, only one of which applies to the facts of this case. The Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether the harms result from direct state action or the actions of private parties. In performing its trust duties, the Commonwealth is a fiduciary and must act towards the natural resources with prudence, loyalty and impartiality. According to the Supreme Court in *PEDF*, the duty of prudence requires the Commonwealth "to 'exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.'" The duty of loyalty imposes an obligation to manage the corpus of the trust, i.e. the natural resources, so as to accomplish the trust's purpose for the benefit of the trust's beneficiaries. Finally, the duty of impartiality requires the trustee to manage the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust. Putting all of this together, the issue for the Board to decide is whether the Department properly carried out its trustee duties of prudence, loyalty and impartiality to conserve and maintain the streams in the BMEEA by prohibiting their degradation, diminution and depletion

CCJ, 2017 EHB 855-56; 861-62.

As noted by the Board in *CCJ*, the *PEDF* case did not require the Supreme Court to discuss the application of the provisions of Article 1, Section 27 to a Department permitting decision. However, based on our review of the *PEDF* opinion and the plurality decision in

Robinson Township v. Commonwealth, 83 A.3d 901 (Pa. 2013) ("*Robinson Twshp*") that was generally endorsed by the *PEDF* opinion, the Board in *CCJ* and *FOL* set forth its approach to reviewing Department decision making on permit applications under the *PEDF* Article 1, Section 27 regime. We first must determine whether the Department has considered the environmental effects of its action and whether the Department correctly determined that its action will not result in the unreasonable degradation, diminution, depletion or deterioration of the environment. Next, we must determine whether the Department has satisfied its trustee duties by acting with prudence, loyalty and impartiality with respect to the beneficiaries of the natural resources impacted by the Department decision. (See *CCJ*, 2017 EHB at 858-59, 862; *FOL*, 2017 EHB at 1163). There is clearly some overlap in this analysis since, for instance, it is reasonable to conclude that in order to satisfy its obligation to act in a prudent manner, a trustee with responsibility for environmental permitting, such as the Department, should consider the environmental effects of its permitting action before proceeding to grant a permit.

We first look at the issue of whether the Department has considered the environmental effects of its decision to grant the Geyer Wells Permits and correctly determined that issuing these permits will not lead to unreasonable degradation, diminution, depletion or deterioration of the environment. In *CCJ*, we pointed out that the permit application process required the applicant to provide detailed information on the environmental effects of the proposed activity and noted the lengthy and extensive review of that information by the Department. Delaware Riverkeeper argues that the process in this case fell well short of the Department process in *CCJ* that the Board found met the constitutional standard. Our discussion in *CCJ* was not intended to suggest that there was some minimum requirement under Article 1, Section 27 governing the amount of review time that must be undertaken by the Department and the amount of

information that must be considered by the Department. The Department's consideration of the environmental effect of its permitting actions is, we believe, intended to be a flexible standard based on the nature of the activity and the potential impact of the activity on the environmental interests protected under Article 1, Section 27. We think this type of approach is consistent with the statement of the Supreme Court plurality in *Robinson Twshp* that the first right set forth in Article 1, Section 27 requires "each branch of the government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features." *Id*. at 952.

With that general guidance in mind, we turn to the points raised by Delaware Riverkeeper. They argue that "the Department failed to conduct a proper Section 27 pre-action analysis" in this case and therefore, failed to satisfy its constitutional obligation to consider the environmental effects prior to reaching its permitting decision. (Appellants' Supplemental Post-Hearing Reply Brief Regarding Article I, Section 27 Of The Pennsylvania Constitution, p. 24). In order to conduct a proper pre-action analysis, the Department, in Delaware Riverkeeper's opinion, is required to conduct a detailed risk assessment. Delaware Riverkeeper argues that instead of the required analysis, the Department relied on what Delaware Riverkeeper terms "the rote application of minimal regulatory requirements." (DRN's Post-Hearing Brief, p. 104). Further, Delaware Riverkeeper argues that any Department effort to determine the environmental effects of the Geyer Wells Permits was insufficient because it lacked adequate information about Rex's planned operations and the local conditions at the Geyer Wells Site to determine the nature and extent of the environmental effects that would result from the issuance of the Geyer Wells Permits and Renewal Permits. Rex and the Department of course argue that the Department considered the environmental effects of its actions and correctly determined that the permitted

activities would not unreasonably degrade, diminish, deplete or deteriorate the environment at the Geyer Well Site. In support of their position, they emphasize the requirements in the laws and regulations governing the development of the Geyer Well Site and incorporated into the Geyer Wells Permits and Renewal Permits, as well as the additional steps taken by the Department and Rex to address various environmental issues and concerns raised by interested parties.

We start by observing that the 2012 Oil and Gas Act required Rex to submit a permit application containing information about the proposed activity for review by the Department. In the permit application, Rex provided information about the surface locations, proposed drilling depths, bottom hole locations, and proximity of the proposed Geyer Wells to features in the environment such as water bodies, wetlands, landfills, buildings, floodplains and designated public resources (publicly owned parks, game land, wildlife areas, National/State scenic rivers, historical and archaeological sites, etc.). (See DEP Ex. 1). Rex also identified whether the Geyer Wells would be in a special protection high quality or exceptional value watershed and whether the Geyer Wells would be located in a hydrogen sulfide (H_2S) area. Rex stated that none of the environmental concerns identified on the permit application would be impacted by its proposed drilling activity. The applications for the Geyer Wells Permits also required Rex to identify any water supply wells within 3,000 feet of the Geyer Wells Site. All of this information is provided to assist the Department staff in identifying environmental issues that may be associated with the proposed activity. The Department permit reviewers in this case, specifically, Ms. Price, Mr. Babb, and Mr. Lobins testified that they reviewed and considered the information provided by Rex in reaching their permit decision.

The Department staff also stated that in addition to the information in the permit applications, they consider the impact of the existing statutory and regulatory requirements on the proposed activity and the fact that these requirements are designed to minimize and/or eliminate certain environmental effects related to the proposed activity. Rex is required to meet these statutory and regulatory requirements and the Department, in its review process, assumes that Rex will meet these requirements unless there is contrary evidence. The 2012 Oil and Gas Act and the corresponding regulations contain detailed and prescriptive standards for well drilling, well operations, well plugging and other activities associated with well development. These performance standards, such as the casing and cementing requirements, erosion and sedimentation control requirements, and control and disposal planning, to mention just some of the standards, are designed and intended to protect the environment. There was no evidence in this case that Rex failed to comply with any specific statutory or regulatory performance standards or that it was improper for the Department to consider compliance with those standards as part of its consideration of the potential environmental effects of the Geyer Wells.

The Department also received and considered numerous public comments about environmental issues during the permit decision process. According to the testimony and exhibits at the hearing, the Department reviewed and considered various environmental issues raised by the public including the public's concern regarding the proximity of the Geyer Well Site to people located in nearby schools and residential neighborhoods. Among the issues raised were fire and explosion risks and potential health issues associated with emissions from unconventional gas wells. As part of this process, the Department held a 3251 conference involving concerned citizens and Rex during which many of these same concerns were

discussed.[4] Department staff reviewed emergency planning documents from Rex because of the fire and explosion concern that was raised by the public. Department staff also discussed and considered the public health information presented by some of the public commenters. During the Department's review of Rex's permit renewal request, the Department asked for and received a study completed by a consultant for Rex addressing public concern regarding the presence of abandoned wells in the vicinity of the Geyer Well Site. The purpose of this review was to consider the issue raised by the public that abandoned wells might provide a conduit for gas migration or drilling fluids to escape into the groundwater.

The evidence and testimony at the hearing clearly demonstrate that the Department considered the environmental effects in advance of its permit decision. Unlike other governmental entities who may not have the environment as a focus, the Department's mission makes consideration of environmental effects central to its responsibilities and it would be a surprise to us if Department staff failed to do so when they make a permit decision. The evidence presented by Delaware Riverkeeper does not convince us that the Department failed to consider the potential for environmental effects in advance of issuing the Geyer Wells Permits and Renewal Permits in this case. The fact that the consideration did not involve a full blown risk assessment and was not as extensive as Delaware Riverkeeper believes was necessary does not, in our opinion, violate the requirements of Article 1, Section 27. We think that viewing the totality of what was considered, in conjunction with the existing laws and regulations that applied to the activity, as well as the nature and scope of the likely impacts, the review by the

[4] Section 3251(a) of the 2012 Oil and Gas Act provides that a person with a direct interest in a matter subject to the 2012 Oil and Gas Act may request a conference to discuss and attempt to resolve a matter arising under the 2012 Oil and Gas Act. Representatives of the Mars Parents Group, a citizen's group that had provided public comments on the permit applications for the Geyer Wells, requested and participated in the conference.

Department was sufficient to satisfy the constitutional requirement that the Department consider in advance the environmental effects of its action.

After determining that the Department gave adequate consideration to the environmental effects, we are still required to judge whether Delaware Riverkeeper demonstrated that the Department's decision to issue the Geyer Wells Permits and Renewal Permits resulted in the unreasonable degradation, diminution, depletion or deterioration of the environment in violation of the first part of Article 1, Section 27. Delaware Riverkeeper argues that developments at the Geyer Wells Site will result in impacts such as water contamination, fire and explosion risks and air emissions that will violate Article 1, Section 27. The evidence set forth by Delaware Riverkeeper on this issue is generally the same evidence we considered in determining whether the decision to grant the Geyer Wells Permits and Renewal Permits violated relevant statutes and regulations. However, we are required to view that evidence in a different light to determine whether the constitutional standard is satisfied or not. Delaware Riverkeeper has not convinced us that the Department's decision to approve the Geyer Wells Permits and Renewal Permits was likely to cause or did in fact cause unreasonable environmental impacts and/or was contrary to the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic or esthetic values of the environment.

As previously discussed, Delaware Riverkeeper's water contamination theory centered on the presence of the Blairsville CSD that its expert, Mr. Fisher, contends posed a risk for gas migration and groundwater contamination. As we said at the time of the Supersedeas Hearing, we found Mr. Fisher's theory regarding the risk of contamination resulting from the drilling of the Geyer Wells in the vicinity of the CSD to be speculative and nothing about the additional testimony at the later hearing changed our opinion on this point. If anything, the additional

expert testimony from the Department's expert, Mr. McKee and the lack of any evidence of actual groundwater contamination or gas migration supports our determination that the risk was speculative at best. Furthermore, the Department staff can reasonably rely on the requirements found in the 2012 Oil and Gas Act such as the casing, cementing and plugging requirements that are designed to prevent the specific risk raised by Delaware Riverkeeper. We also note that before the Department granted the Renewal Permits, the Department review staff required Rex to provide information on abandoned wells in the vicinity of the Geyer Well Site that showed that any abandoned wells were not likely to create issues. Given the speculative nature of the risk to the groundwater in the area of the Geyer Wells, in conjunction with the provisions in the statute and regulations designed to minimize that risk, along with the steps that Rex took above and beyond those requirements and the lack of any evidence of actual contamination of the groundwater or surface water as a result of the activity at the Geyer Well Site, we find that Delaware Riverkeeper failed to prove that Department's decision to issue the Geyer Well Permits and the Renewal Permits resulted in the unreasonable degradation, diminution, depletion or deterioration of the water resources in the area of the Geyer Well Site or otherwise violated the rights of citizens under Article 1, Section 27.

We view the Delaware Riverkeeper's arguments concerning the potential fire and explosion risk to people near the Geyer Well Site similar to the concern regarding groundwater contamination. The risks are speculative and there was no evidence that any substantial fires or explosions occurred during Rex's activities at the Geyer Well Site. As we have discussed, the Department permit review staff did consider the risk of fire and explosion as part of its review process. The regulations required Rex to prepare an emergency response plan. According to testimony from Mr. Babb, while companies like Rex are required to generate emergency

response plans, these types of plans are not routinely submitted as part of the permit application. In this case, however, Rex did transmit its Preparedness, Prevention and Contingence Plan and Emergency Response and Emergency Action Plans to the Department (See Rex Ex. P-22) and Mr. Babb and Mr. Lobins gave them a limited review. Their review involved assuring that the emergency response plans were in place and contained all of the required elements but did not include a detailed analysis of those elements. Other than noting the proximity of the Geyer Wells Site to the local schools and the neighboring properties, there was no evidence that the Geyer Wells posed a greater than normal risk for a fire or an explosion. Delaware Riverkeeper did not offer any expert testimony that the distances to the schools and neighboring properties posed a level of unreasonable fire or explosion risk that should have received a more detailed evaluation from the Department staff. The evidence that was offered involved questioning the Department staff about their familiarity with other unconventional gas well sites that had experienced either fire or explosions. The fact that a limited number of other sites had experienced fires or explosions is not a sufficient basis to find substantial risk at the Geyer Wells Site. Absent anything further, we find that Delaware Riverkeeper failed to demonstrate that the Department's decision granting the Geyer Well Permits and the Renewal Permits caused the unreasonable degradation, diminution, depletion or deterioration of the environment and violated the people's right to clean air, pure water and to the preservation of the natural, scenic, historic or esthetic values of the environment.

Delaware Riverkeeper argues that air emissions that will result from the Geyer Wells Site violate the first provision of Article 1, Section 27. We disagree. We extensively discussed air emissions and the evidence of the potential health impacts alleged by Delaware Riverkeeper when analyzing whether the Department permit decision violated Section 3259 of the 2012 Oil

and Gas Act and concluded that Delaware Riverkeeper did not show that the air emissions will adversely affect public health, safety, welfare or the environment. That discussion and our conclusion remain relevant here. However, there are additional points that are worth discussing at this time. The first involves the permitting of air emissions from unconventional gas wells in general and the Geyer Wells in particular. The permit applications for the Geyer Wells did not contain any information on the level or type of anticipated air emissions from Rex's proposed activities at the Geyer Wells Site. The Department permitting staff acknowledged during its hearing testimony that they did not evaluate air emissions data as part of its permit review. Air emissions issues and potential health impacts were given some attention by Department staff during the permit review process as a result of various public comments presented to the Department but Mr. Babb stated that he only briefly reviewed the public health studies and Mr. Lobins testified the same. Mr. Lobins did discuss air emission issues with staff from the Department's Central Office.

While not directly part of the oil and gas permitting process, air emissions from the Geyer Well Site are subject to separate air permitting regulations. The Department's air regulations govern and limit many of the air emission activities associated with unconventional gas development. Unconventional gas wells, including those at the Geyer Wells Site, are covered by Exemption 38. Exemption 38 exempts unconventional wells and associated equipment from the requirement to obtain individual plan approvals and operating permits provided that they meet certain criteria set by the Department. (DRK Ex. A-96). Among the applicable criteria are limits on combined VOC emissions including hazardous air pollutants (HAPs) and combined NOx emissions from stationary internal combustion engines located at the wells. Rex is required to demonstrate compliance with the criteria found in Exemption 38

within 180 days of well completion. Delaware Riverkeeper presented no direct evidence that Rex failed to qualify for Exemption 38 or would be unable to meet the limits imposed on air emissions under the exemption.

Delaware Riverkeeper's main argument with the Department's use of Exemption 38 is its claim that the Department lacks the data necessary to conclude that the levels of air emissions permitted by Exemption 38 are protective of human health. The Department and Delaware Riverkeeper stipulated that the bases for the Department's belief that emissions from unconventional well sites are low enough so as not to pose a health risk are the Department's Short Term Air Studies, the operator-reported emissions data from the Department's Marcellus air inventory, and emission factors. (Parties Joint Stipulation Regarding Facts and Exhibits, Jt. Stip. 86). The same two parties stipulated that Exemption 38 does not place any limits on the proximity of an unconventional gas well to human populations and that the impact on human health from air emissions is greater the closer the pollution source is to human dwellings. (Parties Joint Stipulation Regarding Facts and Exhibits, Jt. Stips. 90-91). The Department also stipulated that it is theoretically possible to have an air pollution release that complies with Exemption 38, but that poses a human health risk. (Jt. Stip. 83). Beside the joint stipulations between the Department and Delaware Riverkeeper, there was testimony from Dr. Sahu about Exemption 38. Dr. Sahu expressed some skepticism about the use of Exemption 38, but ultimately he testified that he could not determine whether Rex would meet the criteria found in Exemption 38. As we discussed previously, Dr. Sahu's main conclusion was that there was insufficient data to determine whether the Geyer Well Site posed a risk. Delaware Riverkeeper has certainly raised issues with Exemption 38 and the air regulations but has not presented sufficient evidence to convince us that the Department's issuance of the Geyer Well Permits and Renewal Permits will

cause the unreasonable degradation, diminution, depletion or deterioration of the environment. Delaware Riverkeeper has not shown that the levels of air emissions from the Geyer Wells permitted under Exemption 38 will be exceeded or that emissions at those levels unreasonably degrade, diminish, deplete or deteriorate the environment or otherwise deny the citizens the right to clean air. It comes back to our conclusion that the air health studies presented by Delaware Riverkeeper do not support the conclusion that the air emissions associated with the Geyer Wells will cause health issues. This is consistent with the Pennsylvania Supreme Court's discussion in *Robinson Twshp.* that as a practical matter, air and water have relative rather than absolute attributes, and the fact that the Environmental Rights Amendment should not be read as preventing all impacts to the environment nor does it call for a stagnant landscape. *Id*. at 953-954. Overall, we conclude that Delaware Riverkeeper has not shown that the air emissions from the Geyer Wells Site violate the first part of Article 1, Section 27.

The second issue we must decide is whether the Department has satisfied its trustee duties under Article 1, Section 27 by conserving and maintaining the public natural resources. This requires the Department to act with prudence, loyalty and impartiality with respect to the beneficiaries of the public natural resources impacted by the Department decision. Delaware Riverkeeper again argues that the Department's failure to conduct what it considered a proper pre-action analysis is a violation of the Department's trustee duties of prudence and impartiality. They also argue that the Department breached its duty of impartiality by treating the Geyer Well Site "as if it were no different than any other wellsite, despite the presence of a large, health-sensitive population nearby – children" and by approving an unknown amount of further degradation to local air quality in a community that they assert is already suffering from degraded air. (Appellants' Supplemental Post-Hearing Brief Regarding Article 1, Section 27 of

the Pennsylvania Constitution, p. 45-46). Ultimately, they argue that the Department failed in its trustee duty because it failed to conserve and maintain public natural resources. The Department and Rex assert that the Department's actions in this matter satisfy its trustee obligations.

We have already reviewed the issue of the Department's pre-action analysis, and based on that review, we do not think that the Department's analysis violated its trustee duties of prudence and impartiality as claimed by Delaware Riverkeeper. In *PEDF*, the Supreme Court said that the duty of prudence requires the Commonwealth "to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property" and the duty of impartiality requires the trustee to manage the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust. *PEDF*, 161 A.2d at 932-933. We have discussed Delaware Riverkeeper's arguments regarding the pre-action analysis extensively and disagree with Delaware Riverkeeper that the Department failed to exercise the requisite level of care and skill in evaluating the permit applications for the Geyer Wells Permits. The Department certainly took its responsibilities seriously and conducted its review of the permit applications with the care and skill of a person of ordinary prudence dealing with his or her own property. We also reject Delaware Riverkeeper's argument that the Department did not apply its greater skill and knowledge in reviewing these permit applications. The Department reviewed the Geyer Wells permit applications for over five months, significantly more time than allowed under the 2012 Oil and Gas Act. The Department relied on its regulations and its knowledge regarding the potential impacts from the proposed activity under the terms of the permits and regulations to determine that it was proper to issue the Geyer Well Permits and Renewal Permits. Delaware Riverkeeper has not convinced us that the Department failed to act prudently in reaching its permitting decision.

Delaware Riverkeeper next argues that the Department breached its duty of impartiality by treating this wellsite as if it were no different than any other wellsite. Delaware Riverkeeper contends that the Department failed to consider the children in proximity to the Geyer Well Site and the potential health impacts to those children discussed in the testimony of Dr. Paulson. Delaware Riverkeeper also contends that the Department violated its duty of impartiality by approving further degradation to local air quality in a community already suffering from degraded air. As we noted previously, we are unconvinced that the evidence presented by Dr. Paulson was sufficiently related to the particular circumstances at the Geyer Well Site to require the Department to have given it additional consideration beyond the review it conducted and the requirements outlined in the Geyer Well Permits. Further, we find that Delaware Riverkeeper has not proven that there will be unreasonable degradation of the local air quality as a result of the Department's permitting action. As such, we do not agree that the Department violated its trustee duty of impartiality by granting the Geyer Well Permits. It has not, in our opinion, failed to give due regard to the interests of the various beneficiaries of the public natural resources in the vicinity of the Geyer Well Site.

Ultimately, the Department's responsibility as trustee is to conserve and maintain the public natural resources. Delaware Riverkeeper argued that the Department failed to meet this basic responsibility because in permitting the Geyer Wells, it allowed the air and groundwater that people depend on for health and daily life to be degraded. Our understanding of the trustee responsibility does not require the Department to deny permits to any and all activity that will negatively impact the public natural resources and/or the people who use those resources. To hold otherwise would essentially prevent any permitting activity since it is nigh impossible to have development without some environmental impact. A plurality of the Pennsylvania

Supreme Court recognized as much in *Robinson Twshp.* stating "the trust's express directions to conserve and maintain public natural resources do not require a freeze of the existing public natural resource stock." *Id.* at 958. Further the Board has noted in prior cases, that environmental permitting contemplates some amount of environmental impact, "whether it be a discharge to waters of the Commonwealth, or the surface and subsurface disturbances associated with oil and gas development." *Brockway Borough v. DEP*, 2015 EHB 221, 243; *aff'd, Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot.*, 131 A.3d 578, 587 (Pa. Cmwlth. Ct. 2016). In this case, we find that Delaware Riverkeeper has not proven that the Department's permitting decision allowed unreasonable degradation to the environment contrary to its constitutional responsibilities. At its most fundamental, Delaware Riverkeeper's concerns in this case reflect its general disagreement with the current policy approach in Pennsylvania that permits the drilling and completion of unconventional natural gas wells. We, however, are tasked with looking at a particular decision of the Department and in this case, we find that the evidence presented by Delaware Riverkeeper did not demonstrate by a preponderance of that evidence that the Department's decision to issue the Geyer Wells Permits or the Renewal Permits was unreasonable and/or in violation of either the Commonwealth's laws or the Pennsylvania Constitution.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 6018.108; 35 P.S. § 7514.

2. The Department is the agency with the duty and authority to administer and enforce the Oil and Gas Act, Act of February 14, 2012, P.L. 87, No. 13, 58 Pa. C.S. §3201-3274; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001 ("Clean Streams Law"); Section 1917-A of the Administrative Code of 1929, Act of

April 9, 1929, P.L. 177, as amended, 71 P. S. §510-17; and the rules and regulations promulgated thereunder.

3. The Delaware Riverkeeper Network, the Clean Air Council, David Denk, Jennifer Chomicki, Anthony Lapina and Joann Groman have standing to appeal the Department's issuance of the Geyer Wells Permits at issue in this case. (Jt. Stip. – Standing, Para. 18)

4. In third party appeals of Department actions, the appellant bears the burden of proof. 25 Pa. Code § 1021.122(c)(2).

5. As the appellant in this case, Delaware Riverkeeper must show by a preponderance of the evidence that the Department acted unreasonably or in violation of the Commonwealth's laws or the Pennsylvania Constitution. *United Refining Company v. DEP*, 2016 EHB 442, 448; *aff'd, United Refining Company v. Dep't. of Envtl. Prot.*, 163 A.2d. 1125 (Pa. Cmwlth. Ct. 2017); *Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot*., 131 A.3d 578, 587 (Pa. Cmwlth. Ct. 2016)

6. The preponderance of the evidence standard requires that Delaware Riverkeeper meet its burden by showing that the evidence in favor of its proposition is greater than that opposed to it. It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established. Delaware Riverkeeper's evidence must be greater than the evidence that the Geyer Wells Permits was appropriate or in accordance with the applicable law. Delaware Riverkeeper may not simply raise an issue and then speculate that all types of unforeseen calamities may occur. *United Refining Company v. DEP*, 2016 EHB 442, 449; *aff'd, United Refining Company v. Dep't. of Envtl. Prot.*, 163 A.2d. 1125 (Pa. Cmwlth. Ct. 2017).

7. The Environmental Hearing Board's role in the administrative process is to determine whether the Department's action challenged by Delaware Riverkeeper, the issuance to Rex of permits for the Geyer Wells, was reasonable, lawful and supported by our *de novo* review of the facts. *Friends of Lackawanna* v. DEP, 2017 EHB 1123, 1192.

8. The Environmental Hearing Board's *de novo* review allows the Board to admit and consider evidence that was not before the Department when it made its initial decision, including evidence developed since the filing of the appeal. *United Refining Company v. Dep't. of Envtl. Prot.*, 163 A.2d. 1125, 1136 (Pa. Cmwlth. Ct. 2017).

9. Under the 2012 Oil and Gas Act, the Department shall issue a well permit within 45 days of submission of a permit application unless the Department denies the permit application for one or more of the reasons set forth in subsection (e.1). 58 Pa. C.S.A. § 3211 (e).

10. Under the 2012 Oil and Gas Act, the Department may deny a well permit if the issuance of the permit would result in the violation of the 2012 Oil and Gas Act or other applicable law. 58 Pa.C.S. § 3211(e.1)(1).

11. Delaware Riverkeeper failed to prove by a preponderance of the evidence that Rex's activities at the Geyer Well Site pursuant to the Geyer Wells Permits and Renewal Permits were likely to cause or did cause pollution of the waters of the Commonwealth.

12. The Department's issuance of the Geyer Wells Permits and Renewal Permits did not violate the Clean Streams Law or the regulations implementing the Clean Streams Law.

13. Under the 2012 Oil and Gas Act, it is unlawful for any person to conduct an activity related to drilling for or production of oil and gas in any manner as to create a public

nuisance or adversely affect public health, safety, welfare or the environment. 58 Pa.C.S. § 3259(2)(ii).

14. The Administrative Code provides that the Department shall have the power and its duty shall be to protect the people of the Commonwealth from nuisances. 71 P.S. §§ 510-17(1)-(3).

15. Delaware Riverkeeper failed to demonstrate by a preponderance of evidence that the Department's decision to issue the Geyer Wells Permits and Renewal Permits violated the 2012 Oil and Gas Act because Rex's activities authorized under the Geyer Wells Permits and Renewal Permits did not create a nuisance or adversely affect public health, safety, welfare or the environment as a result of, either potential or actual, water contamination, noise or air emissions.

16. The Department's decision to issue the Geyer Wells Permits and Renewal Permits did not violate the rights of Delaware Riverkeeper to clean air and pure water, and to the preservation of natural, scenic, historic, and esthetic values of the environment set forth in Article 1, Section 27 of the Pennsylvania Constitution, because Delaware Riverkeeper failed to prove by a preponderance of the evidence that the Department did not give proper consideration to the environmental effects of its permitting decision and/or that the permit decision caused the unreasonable degradation, diminution, depletion or deterioration of the environment. *Center for Coalfield Justice v. DEP*, 2017 EHB 799; *Friends of Lackawanna* v. DEP, 2017 EHB 1123; *Pa Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017); *Robinson Township et. al. v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

17. The Department's decision to issue the Geyer Wells Permits and Renewal Permits did not violate the Department's trustee duties set forth in Article 1, Section 27 of the

Pennsylvania Constitution, because Delaware Riverkeeper failed to prove by a preponderance of the evidence that the Department did not act with prudence, loyalty and impartiality with respect to the beneficiaries of the public natural resources impacted by the permit decision. *Center for Coalfield Justice v. DEP*, 2017 EHB 799; *Friends of Lackawanna* v. DEP, 2017 EHB 1123; *Pa Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017); *Robinson Township et. al. v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

18. Delaware Riverkeeper failed to show by a preponderance of the evidence that the Department acted unreasonably or in violation of the Commonwealth's laws or the Pennsylvania Constitution in issuing the Geyer Well Permits and the Renewal Permits.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THE DELAWARE RIVERKEEPER NETWORK, CLEAN AIR COUNCIL, DAVID DENK, JENNIFER CHOMICKI ANTHONY LAPINA AND JOANN GROMAN	:	
v.	:	**EHB Docket No. 2014-142-B**
	:	**(Consolidated with 2015-157-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and R.E. GAS DEVELOPMENT, LLC	:	

O R D E R

AND NOW, this 11th day of May, 2018, it is hereby ordered that the Appellants' appeals of the Geyer Wells Permits and Renewal Permits are 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: May 11, 2018

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

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For Permittee:
Kevin L. Barley, Esquire
Kevin L. Colosimo, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIRI LAWSON	:	
	:	
v.	:	**EHB Docket No. 2017-051-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HYDRO TRANSPORT LLC, Permittee, and FARMINGTON TOWNSHIP, Intervenor, and PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS, Intervenor	:	**Issued: May 17, 2018**

OPINION AND ORDER ON
DEPARTMENT'S MOTION TO DISMISS

By Steven C. Beckman, Judge

Synopsis

The Board dismisses as moot an appeal of a brine spreading plan approval where the plan approval has expired and there is no exception to the mootness doctrine under the unique circumstances of this case. The Department conceded in its Motion to Dismiss that the plan approval was not issued in accordance with the Solid Waste Management Act.

O P I N I O N

Background

On July 6, 2017, Siri Lawson filed a Notice of Appeal appealing the Department of Environmental Protection's ("Department") decision to grant Approval No. NW9517 to Hydro Transport LLC ("Hydro Transport") authorizing brine spreading in Sugar Grove and Farmington Townships in Warren County ("Plan Approval"). Hydro Transport is engaged in providing services for the oil and gas industry, including but not limited to hauling and spreading of brine. In her Notice of Appeal Ms. Lawson contends as follows: 1) the Plan Approval constitutes an

approved discharge of an industrial waste that contributes to or creates a danger of pollution to waters of the Commonwealth; 2) the Plan Approval fails to impose adequate operating requirements to protect waters of the Commonwealth or prevent the deterioration of air quality in violation of Article 1, Section 27 of the Pennsylvania Constitution; 3) the Plan Approval is a violation of the Clean Streams Law and the Solid Waste Management Act; and 4) the Department lacks authority to grant approval for road spreading plans. The Board has granted two petitions to intervene in this appeal allowing Farmington Township and the Pennsylvania State Association of Township Supervisors ("PSATS") to directly participate in this case.

Pending in this matter is a Summary Judgment Motion filed by Ms. Lawson on January 12, 2018 ("Lawson Motion"), a Joint Cross Motion for Summary Judgement filed by Hydro Transport and intervenors Farmington Township and PSATS on February 12, 2018 ("Hydro Transport Cross Motion"), and a Motion to Dismiss filed by the Department on February 12, 2018 ("Department Motion"). At this juncture all responses and replies have been filed in relation to the various motions and they are ripe for a decision. We will start by addressing the Department Motion. As will become apparent, our resolution of the Department Motion eliminates the need for the Board to rule on the Lawson Motion and the Hydro Transport Cross 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.

Discussion

The Department Motion argues that the Board should dismiss Ms. Lawson's appeal of the Plan Approval as moot. There is no dispute between Ms. Lawson, the Department and the other parties concerning the key fact on this point. The Plan Approval expired by its own terms on December 31, 2017. At this point, therefore, the Plan Approval is no longer valid and Hydro Transport is not authorized to conduct any further brine spreading pursuant to the Plan Approval. The Department argues that because the Plan Approval has expired, the Board lacks the ability to grant the relief requested by Ms. Lawson and any effort by the Board to hold a hearing and issue an adjudication would be purely an academic exercise. Ms. Lawson acknowledges that the Plan

Approval has expired but asserts that the Board can still provide effective relief "because the Board may still make a ruling on the legality of the Department's actions." (Appellant's Brief in Support of Her Response to Department's Motion to Dismiss, p. 3). She states that she continues to oppose the spreading of brine in her community and notes that plan approvals are consistently issued on a yearly basis and it is likely that someone will seek brine spreading approval in Farmington Township for 2018.

We find that this appeal is moot because we cannot grant effective relief to the specific action that is being appealed, the issuance of the Plan Approval to Hydro Transport. The Board has previously held that an appeal is moot where the authorization expired by its own terms and as a matter of law the Board can offer no further relief to the appellant. *M & M Stone Co.*, 2009 EHB at 499. At the same time, it is also true that the rescission of a Department action will not always moot an appeal where, for example, concrete continuing obligations exist. *Consol*, 2015 EHB at 55. No party asserts that Hydro Transport has any continuing obligations under the Plan Approval and we see none based on our review. Absent exceptional circumstances we will ordinarily dismiss an appeal when the permit being appealed is no longer viable. *Id.* at 500. Similarly in *Solebury Township v. DEP*, 2004 EHB 23, the Board dismissed the appeal as moot holding that "delving into whether the granting of a now rescinded and gone Section 401 Certification had been granted erroneously in the first place would be a quintessential academic exercise and any opinion issued would be nothing more than an advisory opinion." *Solebury*, 2004 EHB at 34. *See also Borough of Kutztown v. DEP*, 2004 EHB 1115, 1124 ("At the most basic level, the requirement that a Departmental action be an 'action or an adjudication' before this Board may get involved is based on the principle that Board review is unnecessary and inappropriate in academic disputes or in cases where a person does not have anything at stake.").

Any Board ruling on the Department's issuance of the now expired Plan Approval to Hydro Transport would be nothing more than advisory. As explained in *Winegardner v. DEP*, 2002 EHB 790, "Our role is necessarily circumscribed by the Departmental action that has been appealed. 35 P.S. § 7514 … Our responsibility is limited to reviewing the propriety of *that action*." (emphasis in original). The Board cannot vacate or remand the Plan Approval back to the Department and thus there is no effective relief that the Board can provide to Ms. Lawson on the Department action challenged in this matter.

We now turn to the next issue. Having determined that Ms. Lawson's appeal is moot "the question becomes whether it is appropriate to allow the appeal to go forward because of exceptional circumstances." *Consol,* 2015 EHB at 61. Ms. Lawson argues that exceptional circumstances exist in this case because the Department's action, the approval of brine spreading, is capable of repetition but will evade review.[1] Ms. Lawson points out that because the Plan Approval is an annual approval, the appeal process in front of the Board is likely to routinely extend beyond the term of the Plan Approval, leading to a recurring claim of mootness. She notes two prior Board decisions addressing the appeal of annual permits in support of her position. See *Harriman Coal Co. v. DEP*, 2000 EHB 1170 (noting that where the Department's permit renewal is on an annual basis, "it is doubtful whether the Board could review challenges" to conditions within the annual permit); *Keystone Mining Co., Inc. v. DER*, 1985 EHB 542 (holding that an appeal of an annual surface mining license was not moot even after the year for which the license was requested had passed). Ms. Lawson argues that if the Board refuses to hear appeals of annual permits and approvals after the approval has expired, this class of permits and approvals would consistently evade our review.

[1] Ms. Lawson did not argue that any other possible exceptions to the mootness doctrine applied to her situation so the Board will not concern itself with reviewing them.

We agree with Ms. Lawson that annual approvals may evade our review if we were to routinely find that challenges to these types of approvals were moot. That concern regarding the Plan Approval in this case would be persuasive under routine circumstances. However, in addition to the concern about evading review, our jurisprudence requires that the Department action being challenged also be capable of repetition. In a rather unusual concession on its part, the Department states,

> "the brine described in Hydro's 2017 Plan Approval is a residual waste that the Department cannot authorize to be disposed or beneficially used under the Solid Waste Management Act without a permit. … The Department affirms that issuing a brine spreading plan approval to Hydro Transport in the future under the present facts would not be authorized under the Solid Waste Management Act. Therefore, the Department decision subject of this appeal will not recur. … [t]he Department repudiates its authorization under the Solid Waste Management Act based on the specific facts of Hydro's 2017 Plan Approval."

(Memorandum of Law in Support of the Department's Motion to Dismiss, p. 4-5) Further the Department states that "Appellant's appeal is based on the Department exceeding its lawful authority in issuing Hydro's 2017 Plan Approval, which the Department concedes as it relates to the Solid Waste Management Act and the specific facts of this case." (Memorandum of Law, p 5-6).[2]

[2] In further related filings in this case, the Department states "the Department admits that the brine authorized for spreading under the Department's Approval No. NW9517, issued to Hydro Transport, LLC on June 8, 2017 ("Hydro's 2017 Plan Approval"), is a residual waste as defined by the Solid Waste Management Act, 35 P.S. § 6018.103, and its residual waste regulations." (The Department's Response to Appellant's Statement of Undisputed Material Facts, No. 2, pg. 1) and "the Department agrees that, under the particular facts of this case, Hydro's 2017 Plan Approval was not properly issued to Hydro Transport under the authority of the Solid Waste Management Act. Specifically, the Department agrees the brine authorized for spreading under Hydro's 2017 Plan Approval is a residual waste under the Solid Waste Management Act and that the placement of that brine on unpaved roads as approved by the Department under Hydro's 2017 Plan Approval must be authorized under the Solid Waste Management Act and residual waste regulations. See 35 P.S. § 6018.103." (Brief of the Department in Support of its Response to Appellant's Motion for Summary Judgment, p. 3).

Ms. Lawson argues that despite the Department's apparent agreement with her that the brine in question is a residual waste and that it was improper for the Department to authorize its spreading under the Solid Waste Management Act, the Department does not go far enough in disavowing brine spreading. Ms. Lawson discusses other current brine spreading approvals as well as speculative future brine spreading plan approvals and other hypothetical authorizations and scenarios surrounding the Department's permitting of brine spreading including the use of individual permits, re-categorizing brine, and discharge by operators, none of which are at issue in the Plan Approval under appeal. The Board has stated that "we do not believe that speculation about a hypothetical future action of the Department, which may or may not be lawful, creates the type of exceptional circumstance that warrants overcoming a finding of mootness." *Consol,* 2015 EHB at 61. We do not believe that it would be proper to continue this matter challenging a particular Department action because of Ms. Lawson's generalized opposition to the practice of brine spreading. The Department has conceded that it improperly issued the Plan Approval challenged by Ms. Lawson in this action, and it is not likely that the Department's improper action will be or is capable of being repeated. Ms. Lawson has, for all practical purposes, received the relief that she would be entitled to if she prevailed on the Lawson Motion or following a hearing in this matter.[3] Based on the foregoing, we have determined that Ms. Lawson's appeal is moot and the exception to mootness asserted by Ms. Lawson does not apply. Therefore, we will grant the Department's Motion to Dismiss.[4]

[3] In the Lawson Motion, Ms. Lawson requested four items of relief, only one of which was directed at the Plan Approval. She requested that the Plan Approval be vacated as issued in violation of the Solid Waste Management Act and Article 1, Section 27 of the Pennsylvania Constitution. The three remaining requests for relief are arguably requests for injunctive and/or equitable relief and beyond the Board's authority. (Lawson Motion, p. 1-2)

[4] Because we are granting the Department's Motion and dismissing this matter, we do not need to rule on the Lawson Motion or the Hydro Transport Cross Motion.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIRI LAWSON	:	
	:	
v.	:	**EHB Docket No. 2017-051-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HYDRO TRANSPORT LLC, Permittee, and FARMINGTON TOWNSHIP, Intervenor, and PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS, Intervenor	:	

O R D E R

AND NOW, this 17th day of May, 2018, it is hereby ordered that the Department's Motion to Dismiss is **GRANTED** and the Appeal of Siri Lawson 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, 2018

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

DAVID ANSPACH	:	
	:	
v.	:	**EHB Docket No. 2018-010-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, LP	:	**Issued: May 29, 2018**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion to dismiss where an appellant has filed an appeal beyond the jurisdictional 30-day time frame for appeals to be filed with the Board.

O P I N I O N

On October 3, 2017, David Anspach reported to the Department of Environmental Protection (the "Department") that he believed the activities of Sunoco Pipeline, L.P. ("Sunoco") associated with the construction of its Mariner East 2 pipeline project contaminated his water well.[1] On November 7, 2017, Andrea Blosser of the Department informed Anspach that the Department had performed its own investigation and concluded that it was unable to find any link between Sunoco's construction activities and any contamination in Anspach's well. On November 14, 2017, Anspach filed a request with the Department pursuant to the Right to Know Law, 65 P.S. §§ 67.101 – 67.3104, to find out more information. The Department provided Anspach with documents in response to that request on December 20, 2017. The documents

[1] The facts recited herein are taken from Anspach's own filings in this appeal.

included a copy of a November 13, 2017 email from Blosser to a representative of Sunoco that reads as follows:

> The Department of Environmental Protection ("Department") has evaluated Mr. Anspach's complaint along with the information submitted by Sunoco Pipeline LP ("SPLP"). Based on available information, the Department is unable to conclude that SPLP's activities caused pollution or adverse impacts to Mr. Anspach's private water supply source. Therefore, the Department has determined that SPLP is not presently required to satisfy Special Condition 20b of their Water Obstruction and Encroachment Permit, E06-701, for this particular private water supply source. The Department communicated these findings to Mr. Anspach on 11/7/2017. Additionally, on 11/7/2017, Mr. Anspach conveyed to me that he is still waiting for SPLP to follow up with him.

Blosser is referring to Special Condition 20b of Sunoco's Water Obstruction and Encroachment Permit No. E06-701, which was issued to Sunoco in conjunction with its Mariner East 2 pipeline project. That condition provides:

> In the event the permittee's work causes adverse impacts to a public or private water supply source, the permittee shall also immediately notify the Department and implement a contingency plan, to the satisfaction of the public and private water supply owners that addresses all adverse impacts imposed on the public and private water supply as a result of the pollution event, including the restoration or replacement of the impacted water supply.

Anspach tried without success to obtain more information from the Department in addition to what the Department already provided to him, including an unsuccessful appeal to the Office of Open Records.

Anspach filed this appeal on January 29, 2018. He acknowledges in his notice of appeal that he received notice of what he refers to as the Department's decision to "release [Sunoco] from liability of Special Condition 20B of the Water Obstruction and Encroachment Permit E06-071" on December 21, 2017, more than 30 days prior to his filing of the appeal on January 29.[2] He contends that the Department did not conduct an adequate investigation.

[2] Although Anspach in his response to Sunoco's motion says the Department provided documents in response to his Right to Know request on December 20, his notice of appeal identifies December 21 as

Sunoco has now filed a motion to dismiss Anspach's appeal, arguing, among other things, that the appeal is untimely. Sunoco asserts that, even affording Anspach the most generous date of notice of the Department's action, December 21, 2017, his appeal is still untimely and must be dismissed. Anspach, of course, opposes the motion. The Department has filed a letter concurring in Sunoco's motion.

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; *Smedley v. DEP*, 1998 EHB 1281, 1282. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party. *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB 913, 915.

Under the Board's rules, a person must generally file an appeal with the Board within 30 days of receiving notice of the Department action subject to the appeal. 25 Pa. Code § 1021.52(a). Failure to file a timely appeal within the 30-day appeal period deprives the Board of jurisdiction to hear the appeal. *Rostokosky v. Dep't of Envtl. Res.*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976). *See also Maczaczyj v. DEP*, 2017 EHB 19; *Lucey v. DEP*, 2016 EHB 882; *Steward v. DEP*, 2016 EHB 209. The 30-day appeal period deadline is not flexible; the Board is deprived of jurisdiction even if an appeal is filed one day after the expiration of the 30-day period. *Green Global Machine, LLC v. DEP*, 2017 EHB 1069, 1072-73; *Schwab v. DEP*, 2011 EHB 397; *Spencer v. DEP*, 2008 EHB 573. *See also Milford Twp. Bd. Of Supervisors v. Dep't of Envtl. Res.*, 644 A.2d 217 (Pa. Cmwlth. 1993). Because the appeal period is jurisdictional, it

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the date he received Blosser's email to Sunoco. The difference between December 20 and December 21 is not material to the outcome of our Opinion, but we will afford Anspach the later date, December 21, because he explicitly cites that date in his notice of appeal.

cannot be extended as a matter of grace. *Ametek, Inc. v. DEP*, 2014 EHB 65, 68 (quoting *Stoney Creek Techs., LLC v. DEP*, 2007 EHB 624, 626).

Based on the information provided in his own papers, Anspach has clearly missed his filing deadline. It is undisputed that Anspach had actual notice at least as late as December 21, 2017 that the Department had rejected any claim that Sunoco's activities had contaminated his well, but he did not file his appeal until January 29, 2018, 39 days later.

In his response to Sunoco's motion, Anspach does not dispute the fact that his appeal was filed more than 30 days after he received notice of the action. Instead, he says it was only during the course of the Office of Open Records appeal, on January 10, 2018, that he first became aware of the Environmental Hearing Board as a forum for hearing appeals of actions taken by the Department. The Board was apparently referenced in some papers that the Department presented in the course of that proceeding. Second, he says that January 10 is also the date he learned that the Department's investigation "was not only insufficient but non-existent." Anspach says he received certain affidavits from Department staff on that date attesting to the lack of an independent investigation. Thus, Anspach argues that we should be looking at January 10, 2018 as the date for when the appeal period began to run, and that he clearly appealed within 30 days of that date.

We are not persuaded that the January 10 date has any significance or that we can or should ignore the date Anspach identifies in his own notice of appeal as to when he received notice of the Department's action, December 21. We cannot extend our appeal period simply because an individual claims to have not been aware of this Board or his appeal rights before this Board. *See Pickford v. DEP*, 2008 EHB 168, 171, *aff'd*, 967 A.2d 414 (Pa. Cmwlth. 2008) (late realization of the particulars of a Department action or lack of knowledge of Board appeal

requirements are not grounds for excusing a late appeal); *C.W. Brown Coal Co. v. DER*, 1987 EHB 161, 164 (parties are charged with knowledge of the law and of the Board's filing requirements).[3] With regard to Anspach's claim that he did not appreciate just how inadequate the Department's investigation was, the affidavits that he referred to in the Office of Open Records proceeding do not say there was no investigation; they say there were not more documents to disclose regarding the investigation. In any event, again, "a late realization of the particulars of a Department action" is not a valid basis for excusing an untimely appeal. *Pickford, supra*, 2008 EHB 168, 171.

Finally, this case is distinguishable from the situation in *Harvilchuck v. Department of Environmental Protection*, 117 A.3d 368 (Pa. Cmwlth. 2015), where the Commonwealth Court found that an electronic notification received by a third-party appellant through the Department's eFACTS system of an action taken on a permit renewal did not constitute actual notice of the issuance of the renewal permit. The Court held that it was not until the third-party appellant obtained the permit itself through a Right to Know request that he had true actual notice, reasoning that the eFACTS notice "did not contain adequate information for [the third-party appellant] to ascertain whether he was adversely affected and, consequently, whether he should file an appeal." *Id.*, 117 A.3d 368, 373. In *Harvilchuck*, the Court focused on whether the third-party appellant had enough information to know if a gas well permit issued to a permittee would impact him. The Court concluded that without reviewing the permit itself, he could not discern whether the terms and conditions of the permit would adequately protect his interests. Here, the Department action at issue specifically concerned Anspach's own water well. Anspach did not

[3] Anspach's claim that he was "unaware of any such board existing" is curious given that he executed an affidavit dated November 9, 2017 that was filed in a separate Board proceeding. (*See* EHB Docket No. 2017-009-L, Docket Entry No. 116, Appellants' Response to Permittee's Motion for Partial Summary Judgment.)

need to read affidavits from Department program staff regarding the records generated during the Department's investigation to know that he would be adversely affected by the decision to not require Sunoco to take any remedial steps to address his concerns regarding his well. The impact to Anspach was apparent at the time he received notice of the Department's decision on December 21. To paraphrase the Court in *Harvilchuck*, the evidence within Anspach's knowledge was sufficient to put him on inquiry to file an appeal. 117 A.3d at 373 (quoting *Cmwlth. v. Crockford*, 660 A.2d 1326, 1330 (Pa. Super. 1995)).

For these reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID ANSPACH	:	
	:	
v.	:	**EHB Docket No. 2018-010-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, LP	:	

O R D E R

AND NOW, this 29th day of May, 2018, it is hereby ordered that Sunoco Pipeline, L.P.'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 29, 2018

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2014-072-B (Consolidated with 2014-083-B and 2015-051-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	**Issued: May 31, 2018**

OPINION AND ORDER ON
DEPARTMENT MOTION TO QUASH
APPELLANTS' APPLICATION FOR COSTS AND FEES

By Steven C. Beckman, Judge

Synopsis

The Department's Motion to Quash Appellants' Application For Costs and Fees is denied. Appellants submitted their application under the Clean Streams Law, but the Board finds that the sole remedy governing attorney fees and costs in a proceeding involving "coal mining activities" such as this matter is not the Clean Streams Law but the statute found at 27 Pa.C.S. § 7708 entitled "Costs for mining proceedings." However, because there is no demonstrated prejudice to the Department, Appellants' request to amend their Application for Costs and Fees to include a claim under the appropriate statute is granted.

O P I N I O N

Introduction

The matter currently before us relates to the Sierra Club and the Center for Coalfield Justice's (collectively "CCJ/SC") Application for Costs and Fees under Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b) and 25 Pa. Code §§ 1021.181 – 1021.184 ("Fee

Application"). The litigation for which CCJ/SC now seek attorneys' fees and costs involves consolidated appeals of Department approvals of revisions to the Coal Mining Activity Permit issued to Consol Pennsylvania Coal Company, LLC ("Consol") for the Bailey Mine Eastern Expansion Area. CCJ/SC alleged that the Department improperly issued Revisions 180 and 189. Following an eight day hearing in August, 2016, we issued an Adjudication on August 15, 2017, finding that Revision No. 180 was appropriately issued but that Revision No. 189 was issued in violation of the Clean Streams Law, the Mine Subsidence Act, associated regulations, and Article I, Section 27 of the Pennsylvania Constitution. *Center for Coalfield Justice v. DEP*, 2017 EHB 799, 856-857. CCJ/SC filed their Fee Application on September 14, 2017, and now seek an award of $300,571.55 in attorneys' fees and costs allegedly incurred by pursuing their appeal before the Board. The Department responded with a Motion to Quash Appellants' Application on October 13, 2017 ("Motion to Quash"), alleging that the Fee Application was brought under the wrong statute. The parties also filed a Joint Request for Stay which was granted by the Board by an Order dated October 13, 2017. The stay was lifted by an Order dated January 11, 2018, which set forth a filing schedule for responses and replies to the Fee Application and Motion to Quash. The filings have been completed and the Board is now in a position to rule on the Motion to Quash. For the reasons set forth below, the Motion to Quash is denied.

CCJ/SC filed their Fee Application under the Clean Streams Law, which provides that, "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). In its Motion to Quash, the Department argues that the Clean Streams Law fee provision does not apply and that the "Costs for coal mining proceedings" Act of December 20, 2000, P.L. 980, No. 138 § 1, codified at 27

Pa.C.S. § 7708 ("Cost for Coal Mining Proceedings Law") is the "sole basis for a party to seek an award of costs and fees reasonably incurred because of that party's participation in a proceeding involving coal mining activities which results in a final adjudication by the Board." (Department Memorandum of Law In Support of Its Response to Appellants' Application for Costs and Fees, at 3). The Department bases its argument on the statute's "exclusive remedy" provision which states that:

> Except for section 601 of the act of June 22, 1937 (P.L. 1987, No. 394), known as The Clean Streams Law, section 18.3 of the act of May 31, 1945 (P.L. 1198, No. 418), known as the Surface Mining Conservation and Reclamation Act, section 13 of the act of April 27, 1966 (1st Sp.Sess., P.L. 31, No. 1), known as The Bituminous Mine Subsidence and Land Conservation Act, and section 13 of the act of September 24, 1968 (P.L. 1040, No. 318), known as the Coal Refuse Disposal Control Act, **this section shall be the exclusive remedy for the awarding of costs and fees in proceedings involving coal mining activities**.

27 Pa.C.S. § 7708(g) (emphasis added).

CCJ/SC attempt to exclude the Clean Streams Law from the statutorily defined reach of the Costs for Coal Mining Proceedings Law by arguing that the General Assembly "clearly and unambiguously limited the reach of Section 7708 to cases pursuant to Pennsylvania's Surface Mining Conservation and Reclamation Act, … the Bituminous Mine Subsidence Land and Conservation Act, … and the Coal Refuse Disposal Act." (Appellants' Memorandum of Law In Opposition to Motion to Quash Application for Costs and Fees, at 4). We disagree. The Clean Streams Law is referenced several times in the statutory language of the Costs for Coal Mining Proceedings Law, notably as one of the acts defined as "coal mining acts." 27 Pa.C.S. § 7708(h). The Clean Streams Law is also referenced in the "exclusive remedy" provision, which addresses the reach of the Costs for Coal Mining Proceedings Law. The

"exclusive remedy" provision clearly states that, "Except for section 601 of the act of June 22, 1937 (P.L. 1987, No. 394), known as The Clean Streams Law … this section shall be the exclusive remedy for the awarding of costs and fees in proceedings involving coal mining activities." 27 Pa.C.S. § 7708(g). This language implies that the General Assembly did in fact envision that the Costs for Coal Mining Proceedings Law would encompass some claims brought pursuant to the Clean Streams Law.[1] Since we find that the General Assembly did not intend to limit the reach of the Costs for Coal Mining Proceedings Law to just the three statutes highlighted by CCJ/SC, the analysis turns on whether the action under appeal falls under the definition of "coal mining activities."

"Coal mining activities" is a term defined in the Costs for Coal Mining Proceedings Law as:

> The extraction of coal from the earth, waste or stockpiles, pits or banks by removing the strata or material which overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip mining, auger mining, dredging, quarrying and leaching and **all surface activity connected with surface or underground coal mining**, including, but not limited to, exploration, site preparation, coal processing or cleaning, coal refuse disposal, entry, tunnel, drift, slope, shaft and borehole drilling and construction, road construction, use, maintenance and reclamation, water supply restoration or replacement, repair or compensation for damages to structures caused by underground coal mining and all activities related thereto.

27 Pa.C.S. § 7708(h) (emphasis added). To support their argument that the actions in this matter do not fall under the definition of "coal mining activities," CCJ/SC focus on language that is absent from the definition. CCJ/SC point out that the definition does not mention streams, stream

[1] The "exclusive remedy" provision exempts Section 601 of the Clean Streams Law which addresses fees related to claims brought to abate a nuisance, but does not exempt Section 307(b) which deals with costs and fees associated with Department actions under the Clean Streams Law and is the section under which CCJ/SC filed their Fee Application.

uses, or post-mining stream mitigation, arguing that the Legislature could have easily included "subsidence-induced impacts to streams and post-mining stream mitigation" in the definition if it had wanted to do so. This argument again overlooks the actual language of the statute. The Legislature could have included any number of items in the statute, but instead it selected broad language, including the following catchall language in the definition of coal mining activities: "all surface activity connected with surface or underground coal mining, including, **but not limited to**…." *Id.* (emphasis added).

CCJ/SC contend that this appeal did not concern "coal mining activities" but rather addressed the impairment of protected stream uses and is thus based on the Clean Streams Law. It is true that the Board found that the activities approved under Revision 189 constituted impairment and pollution to waters of the Commonwealth, but the basis for that finding was 25 Pa. Code 86.37(a)(3), a mining regulation that governs whether the Department may or may not issue a permit for surface and underground mining. Subsection (a)(3) requires the Department to find that "the applicant has demonstrated that there is no presumptive evidence of potential pollution of the waters of this Commonwealth." We find that the surface activities at issue in this case were directly related to underground mining, and were permitted pursuant to the Department's mining regulations, and therefore, are "coal mining activities" subject to the Costs for Coal Mining Proceedings Law's "exclusive remedy provision."

We find that the appeals and the Adjudication are based on the Clean Streams Law, the Bituminous Mine Subsidence and Land Conservation Act, and their regulations; second, these are "coal mining acts" as that term is defined; and finally, the longwall mining and stream restoration authorized by the Department are "coal mining activities" as that term is defined. These facts, coupled with the language of the "exclusive remedy" provision which contains a

specific carve out for certain Clean Streams Law actions not relevant to this matter, leads us to find that CCJ/SC's exclusive remedy for requesting fees and costs in this matter is under the Costs for Coal Mining Proceedings Law. Therefore, CCJ/SC's claim under the Clean Streams Law is improper.

Having determined that the Costs for Coal Mining Proceedings Law is the sole statute for CCJ/SC to make a claim for costs and fees in this case, the question now is whether CCJ/SC's request to amend their Fee Application should be granted. The Department contends that the Costs for Coal Mining Proceedings Law requires that a petition for fees and costs be filed within 30 days of when the Board's adjudication becomes final and, therefore, an amended application would be untimely and should be rejected. CCJ/SC argue that the Department would not suffer undue prejudice if the Board allows an amendment to the Fee Application because the Department was on notice that they were seeking fees and costs for their successful appeal of Permit Revision No. 189 based on the timely filing of the Fee Application within 30 days of the Adjudication. Consol argues that if CCJ/SC is allowed to amend it Fee Application to assert a claim under the Costs for Coal Mining Proceedings Law, any amended Fee Application should be limited to the claims already asserted against the Department because any expansion of the claim for payment to include Consol would unfairly prejudice Consol.

In support of its argument that it should be allowed to amend its Fee Application, CCJ/SC cite to the Commonwealth Court decision in *Solebury Twshp. v. DEP*, 863 A.2d 607. In that case, the Commonwealth Court was faced with a request to amend a fee petition to add a claim under a different statute and stated that, "Where no prejudice can be shown to result from amending a claim for fees and costs, permission should be granted." *Solebury Twshp.* at 610. Following the Commonwealth Court's guidance, we think CCJ/SC's request to amend turns on

the question of prejudice. The Department did not address the Commonwealth Court's decision in *Solebury Twshp*. or raise any arguments that it would be prejudiced if CCJ/SC's request to amend was granted. It addressed CCJ/SC's request in a single paragraph and simply reiterated its assertion that the 30 day deadline for filing under the Costs for Coal Mining Proceedings Law had passed. (Department's Reply To Petitioner Center For Coalfield Justice and Sierra Club's Response To Department's Motion to Quash, p. 7). In light of the lack of any argument that it would suffer prejudice, and based on our understanding of the claim set forth in the Fee Application, we hold that the Department will not be prejudiced by granting CCJ/SC's request because the Department received actual notice of the claim for fees and costs in a timely manner when CCJ/SC filed the Fee Application within 30 days of the Board's Adjudication. This is consistent with the 30 day time period for filing under the Costs for Coal Mining Proceedings Law. The limited amendment of the Fee Application to bring it under the Costs for Coal Mining Proceedings Law, as opposed to the Clean Streams Law, will not alter the particulars of CCJ/SC's costs and fee petition. In addition, the Department will be free to raise any defenses it may have, either in general or specific to the Costs for Coal Mining Proceedings Law, in its response to the fee petition. Finally, we think the Board's general approach to a fee petition, a determination that the threshold requirements of the relevant statute are satisfied and a consideration of whether the costs and fees are reasonable under the facts of the case, is the same whether that claim is under the Clean Stream Law or the Costs for Coal Mining Proceedings Law.[2] Therefore, we find that there is no prejudice to the Department in granting CCJ/SC's request to amend the Fee Application.[3]

[2] The Clean Streams Law states that the Board may in its discretion award costs and attorney's fees it determines to have been "reasonably incurred" by the party requesting the fees. See 35 P.S. § 691.307(b). The Costs for Coal Mining Proceedings Law states that a party may request costs and fees "reasonably

Accordingly, we issue the following Order.

incurred" as a result of the party's participation in a proceeding in front of the Board and that "[A]ppropriate costs and fees … may be awarded." See 27 P.S. § 7708 (b) & (c).

[3] In its reply to CCJ/SC's Response, Consol raised the issue that it would suffer undue prejudice if we allowed CCJ/SC to amend the Fee Application. In the current Fee Application, CCJ/SC limited its request for payment of the fees and costs to the Department. (Appellants' Application For Costs and Fees, p. 7, Para. 22). Consol states a concern that CCJ/SC may seek to draw Consol into the pending fee litigation as part of any amendment. The Board is not going to address Consol's issue at this time because we find the issue is premature since it would require us to speculate about the contents of a fee application that is not currently in front of the Board in this case.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2014-072-B (Consolidated with 2014-083-B and 2015-051-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	

O R D E R

AND NOW, this 31st day of May, 2018, it is hereby ordered:

1. The Department's Motion to Quash is **denied.**
2. CCJ/SC may submit a revised Application for Costs and Fees on or before **June 15, 2018.**
3. Responses to a revised Application may be submitted on or before **July 16, 2018.**
4. CCJ/SC may submit a reply to any responses on or before **July 31, 2018.**

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 31, 2018

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

For the Commonwealth of PA, DEP:
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Michael J. Heilman, Esquire
Forest M. Smith, Esquire
(via electronic filing system)

For Appellants:
Sarah E. Winner, Esquire
Ryan Hamilton, Esquire
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Permittee:
Howard J. Wein, Esquire
Robert L. Burns, Esquire
Megan S. Haines, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARK SCHNEIDER	:	
	:	
v.	:	**EHB Docket No. 2017-103-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 7, 2018**
	:	

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Judge

Synopsis

The Board grants a motion for summary judgment filed by the Department in an appeal of a Department order where the Appellant has not filed a response to the motion.

O P I N I O N

On November 9, 2017, Mark Schneider filed an appeal of an order issued to him by the Department of Environmental Protection (the "Department"), relating to Schneider's farm in Upper Frederick Township, Montgomery County. The order alleges, among other things, that inspections conducted by the Department and the Montgomery County Conservation District found food debris and containers mixed in with animal feed and a manure compost pile, eroding unvegetated pastures, and sediment and manure-laden runoff from Schneider's farm entering Deep Creek, a trout stocked fishery.[1] The order alleges violations of the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, the Solid Waste Management Act, 35 P.S. §§ 6018.101 – 6018.1003, and Chapters 91 and 102 of the Department's regulations. The order then requires Schneider to perform several corrective measures, including removing manure and compost piles from the

[1] The order asserts that Schneider has stated he operates a swine farm. (Order, ¶G.)

area known as Pasture S2, and designing and installing appropriate best management practices (BMPs) to divert water away from Schneider's manure storage facility and barn. Schneider's notice of appeal takes issue with two of the corrective measures, Paragraphs f. and h., which provide as follows:

> f. Within 90 days of the date of receipt of this Order, Mr. Schneider shall install a Manure Storage Facility ("MSF") large enough to accommodate manure storage all winter, utilizing the services of a Qualified-Technical Service Provider ("TSP") (see attached list), which is designed and installed to published Natural Resource Conservation Service ("NRCS") standards and specifications, along with installation of all appropriate E&S control measures during construction. Obtain all necessary permits for earth disturbance related to the installation of a MSF.
>
> ….
>
> h. Within 90 days of the date of receipt of this Order, Mr. Schneider shall stabilize hillside Pasture S2 with permanent vegetation including appropriate erosion and sediment control measures if needed.

In his notice of appeal, Schneider states with respect to Paragraph f. that the manure storage facility will be 48 x 48 feet in accordance with his manure management plan.[2] With respect to Paragraph h., he says that Pasture S2 is a heavy use pasture, and therefore, it does not require grass.

When Schneider first filed his appeal, he only included one page of the Department's order—the page with the two paragraphs he is challenging. We issued an Order requiring him to perfect his appeal by December 4, 2017 by filing a copy of the complete Department order. When we did not receive anything in response to our Order, we issued a Rule to Show Cause on December 12, requiring Schneider to either file the complete order or provide some justification for his failure to perfect his appeal. The Rule explained that he risked the dismissal of his appeal if he did not comply. *See* 25 Pa. Code §§ 1021.51(d), 1021.52(b). The response to the Rule was

[2] At some point, Schneider submitted to the Conservation District an agricultural erosion and sediment control plan and a manure management plan prepared for him by a consultant, which are attached to the Department's motion. (*See also* Order, ¶J.)

due by January 5, 2018. On January 2, Schneider filed what appeared to be a different Department document than the page of the order he included with his notice of appeal. Upon receipt of this document, we sought to arrange a conference call with Schneider and counsel for the Department. The Board made several telephone calls to Schneider over the course of three days before finally hearing back from him.

We held the conference call with Schneider and the Department on January 12. During the call, we explained to Schneider the appeal process before the Board and explained what he needed to file to perfect his appeal. We extended the date for Schneider to file a copy of the Department order until January 23. We also allotted more time for the parties to arrange a settlement conference in accordance with Paragraph 5 of our Pre-Hearing Order No. 1. On January 22, Schneider again filed the same document that was not the order under appeal. Then, on January 23, Schneider finally filed a complete copy of the order. We deemed the appeal perfected and discharged the Rule to Show Cause. On February 9, the Department filed a statement on behalf of the parties indicating that they had conferred about potential settlement of the appeal but had not reached any settlement at that time.

The Department has now moved for summary judgment, arguing that there are no genuine issues of material fact with respect to the order being properly issued in accordance with the law. The Department filed its motion for summary judgment on April 25, 2018. An opposing party must typically file a response to the motion within 30 days. 25 Pa. Code § 1021.94a(g). However, since Schneider has not registered for electronic filing and must be served by mail, for purposes of calculating the response time a motion is deemed served three days after it is filed with the Board and mailed out. 25 Pa. Code § 1021.35(b)(3). Thus,

Schneider's response was due no later than May 29, 2018, following the Memorial Day holiday. As of the date of this Opinion, Schneider has not responded to the Department's motion.

Under our rules, summary judgment may be entered against a party who fails to respond to a motion for summary judgment. 25 Pa. Code § 1021.94a(*l*). This portion of our rule mirrors the summary judgment provisions of the Pennsylvania Rules of Civil Procedure. *See* Pa.R.C.P. No. 1035.3(d) ("Summary judgment may be entered against a party who does not respond."). In the past, we have not hesitated to grant summary judgment against a non-responding party. *See, e.g., Morris v. DEP*, 2012 EHB 65; *Langille v. DEP*, 2010 EHB 516; *Thornberry v. DEP*, 2010 EHB 61; *Koch v. DEP*, 2010 EHB 42; *J&D Holdings v. DEP*, 2009 EHB 15; *Lucas v. DEP*, 2005 EHB 913; *Brian E. Steinman Hauling v. DEP*, 2004 EHB 846; *Pirolli v. DEP*, 2003 EHB 514; *Hamilton Bros. Coal, Inc. v. DEP*, 2000 EHB 1262. Further, the Commonwealth Court has held that the Board is permitted to grant summary judgment solely upon a party's failure to respond to a summary judgment motion. *Kochems v. Dep't of Envtl. Prot.*, 701 A.2d 281, 283 (Pa. Cmwlth. 1997).

There is nothing about the current situation that would prompt us to act any differently than we have in the above-cited cases. We have been more than lenient with Schneider up until this point, and we do not think it is appropriate here to essentially reward an appellant who has declined to respond to a motion for summary judgment. Therefore, we will grant the Department's motion and dismiss the appeal.[3]

We issue the Order that follows.

[3] Because we are granting the motion based on Schneider's failure to respond, we do not need to address the substantive arguments in the Department's motion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARK SCHNEIDER	:	
	:	
v.	:	**EHB Docket No. 2017-103-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 7th day of June, 2018, it is hereby ordered that the Department's motion for summary judgment 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: June 7, 2018

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

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

For Appellant, *Pro Se*:
Mark Schneider
1466 Snyder Road
Green Lane, PA 18054

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SALVATORE PILEGGI	:	
	:	
	:	
v.	:	**EHB Docket No. 2017-069-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWTON TOWNSHIP, Intervenor	:	**Issued: June 12, 2018**

OPINION AND ORDER ON
DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's Motion for Summary Judgment. There are no genuine issues of material fact and the Department is entitled to judgment as a matter of law. The Appellant, Salvatore Pileggi, submitted a private request to the Department asking that the Department order the Intervenor, Newton Township, to revise its official sewage facilities plan. The Appellant failed to comply with applicable requirements governing private requests, and the Department's denial was properly based on failure to comply with these mandatory requirements.

O P I N I O N

Background

On January 27, 2017, the Appellant submitted a private request to the Department seeking a Department order to direct Newton Township to revise its official sewage facilities plan pursuant to Section 71.14. 25 Pa. Code § 71.14. The Department denied the Appellant's private request by letter July 14, 2017. The Department denied the private request for several

reasons, including the Appellant's failure to properly request that Newton Township revise its official plan through the submission of a planning module as required by Section 71.53. 25 Pa. Code § 71.53. According to the Department, the private request is based upon the Appellant's August 22, 2016, demand to Newton Township. On September 2, 2016, Newton Township responded to the Appellant's demand and indicated that the Appellant's request to revise could not be granted for several reasons, including the reason that the Appellant's request was not accompanied by the Department's current sewage facilities planning module.

The Department filed its Motion for Summary Judgment on April 4, 2018, and the Motion is based on a single premise. The Department asserts that the Appellant was required to submit a completed sewage facilities planning module to Newton Township when it requested that Newton Township revise its official plan prior to submitting the private request to the Department. The Department and the Intervenor assert that no planning module was submitted to Newton Township when the Appellant made his demand on August 22, 2016, as required under the applicable regulations. Because the Appellant failed to submit a completed planning module to Newton Township on August 22, 2016, the Appellant's private request is deficient and the Department asserts it is entitled to summary judgment.

The Appellant disagrees with the Department that Section 71.14 requires the submission of the Department's sewage facility planning module to the municipality prior to filing a private request with the Department. According to the Appellant, the "criteria" for the Department's evaluation of a private request is set forth in 25 Pa. Code § 71.14 which does not require the submission of a planning module to the municipality. In addition, the Appellant asserts that the Department failed to notify the Appellant within 10 days of his submission that the Department considered his private request incomplete and that the Department has not established that

Newton Township is a "delegated agency" within the meaning of 25 Pa. Code § 71.58. Finally, the Appellant alleges that a planning module was ultimately submitted to Newton Township on September 1, 2017, and this fact moots the Department's Motion.

Standard of Review

The Board is empowered to grant summary judgment in appropriate cases. 25 Pa. Code § 1021.94(a); *Center for Coalfield Justice v. DEP*, 2016 EHB 341, 343. The standard for considering summary judgment motions is set forth at 25 Pa. Code § 1035.2, which the Board has incorporated into its own rules. 25 Pa. Code § 1021.94(a)(a). There are two ways to obtain summary judgment. First, summary judgment may be available if the record shows that there are no genuine issues of any material fact as to a necessary element of the cause of action or defense and the movant is entitled to prevail as a matter of law. 25 Pa. Code § 1035.2(1). Second, summary judgment may be available

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

25 Pa. Code § 1035.2(2). Under the first scenario, the record must show that the material facts are undisputed. Under the second scenario, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a *prima facie* case. *See* Note to Pa.R.C.P. No. 1035.2.[1]

In this appeal, summary judgment is "proper where the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of

[1] The Appellant has the burden of proof in this appeal, and therefore the Board will not need to consider the Appellant's motion under the second scenario.

law." *Global Eco-Logical Service, Inc. v. DEP*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001). When deciding summary judgment motions, we view the record in the light most favorable to the nonmoving party, and we resolve all doubts as to the existence of a genuine issue of fact against the moving party. *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 893. Summary judgment usually only makes sense when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *PQ Corporation v. DEP*, EHB Docket No. 2015-198-L, slip op. at 4 (Opinion and Order, Nov. 17, 2016); *Friends of Lackawanna v. DEP and Keystone Sanitary Landfill, Inc., Permittee*, EHB Docket No. 2015-063-L, slip op. at 2 (Opinion and Order, Sept. 2, 2016); *Citizen Advocates United to Safeguard the Env't, Inc. ("CAUSE") v. DEP*, 2007 EHB 101, 106.

In this appeal, the Appellant has the burden of proof under 25 Pa. Code § 1021.122(c)(1). The Department denied the Appellant's private request. The Department is therefore entitled to summary judgment if there are no genuine issues of material fact and the Department is entitled to judgment as a matter of law. For the reasons set forth below the Board grants the Department's Motion for Summary Judgment because there are no genuine issues of material fact and the Department is entitled to judgment as a matter of law.

Discussion

In its Motion, the Department advances a single argument in support of its Motion. According to the Department, Section 71.14 governs the submission of private requests to the Department, and Section 71.14 requires, among other things, the submission of a proper sewage facilities planning module to the municipality prior to the submission of the private request to the Department. When the Appellant made his submission to Newton Township on August 22, 2016, he admits that he did not include a sewage facilities planning module. Because the

Appellant did not provide the sewage facilities planning module to the Township with his August 22, 2016 request, the Department asserts it is entitled to summary judgment as a matter of law under *Pileggi v. DEP and Newton Township*, 2011 EHB 154.[2]

The Intervenor, Newton Township, filed a Memorandum of Law in support of the Department's Motion for Summary Judgment on April 4, 2018. In its Memorandum, Newton Township repeated the Department's argument that the Appellant was required by the Department's sewage facility planning regulations to submit a completed sewage planning module to the Township before filing a private request with the Department to obtain an order to compel the Township to revise its official plan. *See* 25 Pa. Code §§ 71.14, 71.52 and 71.53. Because the Appellant never submitted a sewage facilities planning module to the Township when he made his request to the Township on August 22, 2016, the Intervenor also asserts that the Department is entitled to summary judgment under *Pileggi v. DEP and Newton Township*, 2011 EHB 154, 158.

The Appellant filed a Response to the Department's Motion for Summary Judgment in which he raised a number of legal challenges to the Department's Motion.[3] He argued that the applicable sewage planning regulations do not require that a person submit a sewage planning module to the municipality prior to filing a private request with the Department to compel the Township to revise its official plan. He also asserted that the earlier *Pileggi* Adjudication, which also involved Newton Township and Mr. Pileggi, is distinguishable. In addition, the Appellant claims that the Department failed to perform a required completeness review or failed to provide

[2] In the Department's Reply Brief, the Department also relied upon *Scott Township Environmental Preservation Alliance v. DEP*, 2000 EHB 110 to support its Motion.

[3] The Appellant did not assert that there are genuine issues of material fact to prevent the Board from granting the Department's Motion. He only indicated that discovery is still available and that a motion for summary judgment is therefore premature. In the absence of any genuine issues of material fact, the fact that discovery is still available does not prevent the Board from granting the Department's Motion for Summary Judgment if the Department is entitled to judgment as a matter of law.

evidence that Newton Township is a "delegated agency" within meaning of 25 Pa. Code § 71.58. Finally, while not challenging the fact that he did not submit a sewage facilities planning module to the Township prior to filing a private request with the Department on January 27, 2017, Mr. Pileggi eventually submitted a Component 3 Planning Module to the Township more than a year later on September 1, 2017. The Appellant asserts that his subsequent filing of a planning module moots the Department's Motion even though he made this submission after the Department denied his private request.

The Department filed a Reply Brief in Support of its Motion in which it replied to the arguments raised by the Appellant on May 10, 2018. The Department argued that the Appellant's private request to the Department "may be only made after a prior written demand upon a written refusal by the municipality to so implement or revise its official plan . . ." 25 Pa. Code § 71.14(a). The Department renewed its argument that the private request was deficient in reliance upon the Board's decisions in *Scott Township Environmental Preservation Alliance v. DEP*, 2000 EHB 110, 116 and *Pileggi v. DEP and Newton Township*, 2011 EHB at 158. The Department also disagrees that it has a duty to conduct a completeness review within 10 days from the submission of a private request or that a private request may be deemed approved for lack of Department action. Finally, the Department denies that Newton Township is a delegated agency or needs to be a delegated agency within the meaning of 25 Pa. Code § 71.58.

Because the Appellant only raised legal challenges to the Department Motion for Summary Judgment and did not assert there are any genuine issues of material fact, the Board will only need to evaluate whether the Department is entitled to judgment as a matter of law to evaluate the Department's Motion. The Board will address each of the Appellant's legal

challenges below. For the reasons set forth below, the Board finds that the Department is entitled to judgment as a matter of law.

A proper demand to revise an official sewage facilities plan must be made to a municipality before a person submits a private request to the Department

The parties disagree about the type of written demand a person must make to a municipality before the person submits a private request to the Department under Section 71.14. The Department submits that a close reading of Section 71.14 in connection with Sections 71.52, 71.53 and 71.54 leads to the conclusion that a person must submit the Department's actual completed sewage facilities planning modules to the municipality as part of its written demand required by Section 71.14. 25 Pa. Code §§ 71.14, 71.52, 71.53 and 71.54. The Intervenor agrees with the Department that the Board should apply certain requirements in Section 71.52 and 71.53 to the Appellant's private request submitted to the Department under Section 71.14.

The Appellant disagrees and asserts that the criteria for a private request are only set forth in 25 Pa. Code § 71.14 which does not specifically require the submission of a sewage facilities planning module to the municipality as part of the demand to the municipality that is required before a person submits a private request to the Department. The Appellant argues that the criteria and procedures under Section 71.14 are separate and distinct from those under Sections 71.52 and 71.53 governing the typical submission of a proposed plan to a municipality by a private developer. In effect, the Appellant asserts that there are two different sets of requirements under Sections 71.14, 71.52 and 71.53.

The legal dispute between the parties concerning the type of written demand required under Section 71.14 is the major legal issue among the parties and to resolve the dispute the Board will need to evaluate the actual regulatory language in Section 71.14 governing private requests. Section 71.14 provides, in part:

(a) A 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 or implement 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. This request may be made only after a prior written demand upon and written refusal by the municipality to so implement or revise its official plan or failure of the municipality to reply in either the affirmative or negative within 60 days or, failure of the municipality to implement its official plan within the time limits established in the plan's implementation schedule or failure to revise its official plan within the time limits established in this chapter. The request to the Department shall contain a description of the area of the municipality in question and a list of reasons that the plan is believed to be inadequate. The person shall notify the municipality, official planning agency within the municipality and planning commission with areawide jurisdiction in writing of the filing of the request with the Department at the same time notice is sent to the Department. This notification shall include a copy of the documentation supporting the private request which was submitted to the Department.

(b) Private requests to revise an official plan shall contain evidence that the municipality has refused in writing to revise its plan, is not implementing its plan or has failed to act within the time limits established in § 71.13(a) (relating to Department responsibility to require official plan revisions) for plan updates or § 71.53(b) (relating to municipal administration of new land development planning requirements for revisions) for new land developments.

* * * * *

(d) In arriving at its decision, the Department will consider the following:

(1) The reasons advanced by the requesting person.

(2) The reasons for denial advanced by the municipality.

(3) Comments submitted under this section.

(4) Whether the proposed sewage facilities and documentation supporting the proposed sewage facilities are consistent with this part.

* * * * *

25 Pa. Code § 71.14(a), (b) and (d). Under this provision, a private request "*may be made only after a prior written demand upon and written refusal by the municipality* . . . to revise its official plan within the time limits established in this chapter." 25 Pa. Code § 71.14(a) (emphasis

added). In arriving at its decision, the Department considers whether the proposed sewage facilities and documentation supporting the proposed sewage facilities are consistent with other applicable regulatory requirements. 25 Pa. Code § 71.14(d)(4).

While the Appellant is correct to point out that these regulatory requirements in Section 71.14, set forth above, do not expressly mention that a person submitting a private request must include the sewage facilities planning module to the municipality as part of its prior written demand, the Board agrees with the Department that the requirements for submitting a private request under Section 71.14 should be construed in conjunction with the requirements in Sections 71.52-71.54 that govern the typical submission of a proposed plan revision to a municipality in the first instance and then after municipality action, to the Department. *Pillegi v. DEP and Newton Township*, 2011 EHB 154, 160.

In the earlier *Pileggi* Adjudication, the Board faced a similar legal issue involving the same parties. The issue was whether the planning module submitted to Newton Township was complete, and whether the Department was "correct in denying the planning module submission as incomplete since it was deficient under the requirements of Section 71.54." *Id.* at 161. The Board found that the submission to the Department was incomplete and determined that the Department could not approve the planning module as submitted. The submission to the Department was the same submission that the Appellant made to the Township earlier.[4] To determined whether the submission was complete, the Board considered the requirements in Section 71.54(b). 25 Pa. Code § 71.54(b). Section 71.54(b) states: "A proposed plan revision

[4] The Board specifically declined to decide whether the submission was deemed approved at the Township level. The Board decided:

> Even if there had been deemed approval at the Township level, the Department would still have been correct in denying the planning module submission as incomplete, since it was deficient under the requirements of Section 71.54(b).

Id.

for new land development will not be considered for approval unless accompanied by the information required in § 71.53(d) (relating to municipal administration of new land development planning requirements for revisions)." Section 71.53 sets forth the duties of a municipality when considering proposals to revise their sewage facilities plan to allow new land development, and includes, among other things, information requirements for plan revision proposals submitted for municipal consideration.[5] Section 71.53(d)(1) provides that no proposed plan revision for new land development will be complete unless it contains the information in § 71.52 and the Department's sewage facilities planning module. 25 Pa. Code § 71.53(d)(1). These regulatory requirements identified in the earlier *Pileggi* Adjudication specifically referenced the Department's sewage facilities planning module as a requirement for the submittals to the municipality and the Department.

The Appellant attempts to distinguish the earlier *Pileggi* Adjudication from the current situation by asserting that the earlier appeal did not involve a private request. The Appellant is correct that he did not submit a private request to the Department in the earlier appeal, but this fact is not important if you understand the various regulatory roles of the Department, the municipality and the developer when a developer proposes revisions to a municipality's sewage facility plan to allow new land development. The process Mr. Pileggi used before in the earlier appeal and the process he used in this appeal both began at the same place, with Mr. Pileggi

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[5] Section 71.53(d) provides, in part:

> (d) For purposes of this section, no plan revision for new land development will be considered complete unless it includes the following:
>
> > (1) The information contained in § 71.52 (relating to content requirements – new land development revisions) and the Department's sewage facilities planning module.
>
> * * * * *

25 Pa. Code § 71.53(d)(1).

submitting a request to the municipality to revise its official plan for new land development proposed by the Appellant.

In the earlier appeal, Mr. Pileggi began the process by submitting a proposed planning module to Newton Township to revise Newton Township's Official Plan for a ten-lot subdivision on October 31, 2008. The Township raised an issue about fees and about technical deficiencies. Mr. Pileggi was unable to resolve the issues raised by the municipality, but he submitted his planning module to the Department for review on February 23, 2009, claiming that the planning module was deemed approved by Newton Township.

The Department denied Pileggi's submission of his planning modules after it conducted its completeness review and found two deficiencies.[6] The Board upheld the Department's denial based upon the two deficiencies identified by the Department as part of its completeness review. The Board did not have to reach the issue raised by Mr. Pileggi that he had a deemed approval from Newton Township. The Board found that even if he had secured a deemed approval from Newton Township, the Department acted reasonably and lawfully when it disapproved his proposed planning module for the two deficiencies identified in the completeness review.

Mr. Pileggi's claim that his proposed planning module was deemed approved by Newton Township was the basis of his submission of the proposed planning module to the Department. Under the Department's regulations, as a general rule, the Department does not review a proposed revision to a municipality's sewage facility plan until after it has been approved by the municipality.

In this appeal, Mr. Pileggi has not claimed that he has a deemed approval of his proposed revision to Newton Township's official plan. He has instead opted to follow the procedure to

[6] The two deficiencies were: (1) there was no documentation that the module was submitted to the proper planning agencies as required by 25 Pa. Code § 71.53(d)(2) and (2) there was no documentation that the required public notice and comment was provided pursuant to 25 Pa. Code § 71.53(d)(6).

allow the Department to approve a private request from a person to order a municipality to revise its plan consistent with the proposed revision. The two procedures start at the same place with the private developer submitting something to the municipality to request or demand that the municipality revise its plan. The Department believes the requirements for what needs to be submitted to the municipality in each situation are the same. The Appellant disagrees and asserts that the requirement for what needs to be submitted to the municipality before going to the Department in this appeal are different than the requirements that the Board recognized in the earlier *Pileggi* Adjudication involving an alleged deemed approval. The Appellant in this appeal acknowledges that he was required to submit a complete sewage facilities planning module to Newton Township in the earlier appeal, but he argues that he was not required to submit these materials to Newton Township in this appeal. The Board disagrees for several reasons described below, and the Board finds that the Appellant's argument, which is premised on two sets of different requirements, would lead to an absurd result if it were adopted.

First, it is important to begin with the fact that a sewage facility plan is the municipality's plan. The municipality has the duty under the Sewage Facilities Act to adopt an official plan subject to the Department's approval. *See* 35 Pa. Code § 750.5. The Department has the power and duty under the Act to approve or deny official plans adopted by a municipality in accordance with the Department's regulations. 35 P.S. § 750.10(c). The roles of a municipality and the Department regarding proposed revisions to an official plan to allow new development remain the same. The municipality adopts the proposed revisions and the Department approves the revisions to ensure that the revisions remain in accordance with the Department's regulations. 25 Pa. Code §§71.52-54. The private request procedure to revise a plan is an exception to the normal process if a person is able to establish a basis for the private request under Section

71.14(b) which includes evidence that the municipality has refused in writing to revise its plan. The Department's authority to grant a private request and order a plan revision only exists after a municipality refuses in writing to revise its plan as it was originally proposed to the municipality. Under this approach, the municipality has the right to review and consider a revision to its plan that a private developer later wants the Department to approve after the municipality refuses to approve it.

Second, if a private developer has to submit its proposed plan revision to allow new land development to the municipality first, and to seek its approval before it submits a private request, then its submission to the municipality must comply with applicable requirements for submission of proposed plan revisions. Section 71.52 contains the requirement that an official plan revision for new land development shall be submitted to the Department in the form of a completed sewage facilities module . . . 25 Pa. Code § 71.52(a). Section 71.53 sets forth the requirements for municipal review of proposed revisions for new land development that are requested by a private developer. 25 Pa. Code § 71.53(a). Under these regulatory requirements, the private developer completes the Department's sewage facilities planning module and submits it to the municipality. Under Section 71.53(d)(1), no plan revision will be considered complete unless it includes, among other things, the Department's sewage facilities planning module. 25 Pa. Code § 71.53(d)(1). Under Section 71.54, a proposed plan revision for new land development will not be considered for approval by the Department unless it is accompanied by the information required in Section 71.53(d) that includes the information contained in Section 71.52 and the Department's sewage facilities planning module. 25 Pa. Code § 71.54(b). The requirements in Sections 71.52, 71.53 and 71.54 all specifically contain the requirement to include the Department's sewage facilities planning module as part of a request to revise an official plan for

new land development. To avoid these express requirements, the Appellant suggests that there are different requirements under Section 71.14 when a private developer requests that a municipality revise its plan prior to filing a private request.

If a municipality refuses to revise its plan after a prior written demand upon and a written refusal by the municipality, a private developer may file a private request with the Department requesting that the Department order the municipality to revise its plan. 25 Pa. Code § 71.14. The Appellant filed such a private request with the Department that resulted in this appeal when the Department denied it based upon the Appellant's failure to submit the Department's sewage facilities planning module as required by Section 71.53(d)(1). The Appellant argues that the planning module is not required here because Section 71.14 does not specifically reference Section 71.53(d)(1) in the context of a private request.

The Appellant is correct that there is no express reference to Section 71.53(d)(1) in Section 71.14. The Appellant ignores requirements that a private request "may only be made after a prior written demand and a written refusal by the municipality." 25 Pa. Code §71.14(a). Section 71.53 provides the process and criteria for municipal review and action on a proposed plan revision for new land development from a private developer such as the Appellant. 25 Pa. Code § 71.53. In addition, Section 71.14(d)(4) provides:

> (d) In arriving at its decision, the Department will consider the following:
>
> > 4) Whether the proposed sewage facilities and documentation supporting the proposed sewage facilities are consistent with this part.

25 Pa. Code § 71.14(d)(4). Section 71.53 contains requirements for documentation supporting the proposed sewage facilities to insure consistency with all applicable requirements in Part 1. There is only one set of requirements for the submittal of a proposed plan revision for new land

development to a municipality by a private developer, and it is in Section 71.53. A person who seeks a private request from the Department after the municipality refuses to revise its plan must follow the requirements in Section 71.53 when it makes its initial submittal to the municipality seeking municipal approval of its proposed plan revision.

Neither Section 71.14 or 71.53 contain any language to suggest that a different process or set of requirements are applicable when a private developer anticipates or predicts a municipal refusal to approve the private developer's proposed plan revision for new land development. When the proposed plan revision is initially submitted, the private developer does not know if the municipality will approve the revision, and if it is approved there will be no need for a private request.

Finally, the Appellant's suggestion that there are different requirements for the submission to a municipality when a private request is subsequently filed is an absurd suggestion. When a person initially submits a proposed plan revision to the municipality the person does not know if the municipality will approve or disapprove it, and it is submitted in the hope that it will be approved. To be approved, it has to comply with the regulatory requirements at 25 Pa. Code § 71.53, including the requirement to submit the information contained in the Department's sewage facilities planning module. 25 Pa. Code § 71.53(d)(1). The Appellant's suggestion is premised upon the belief that a person can effectively by-pass municipal review of a proposed revision by submitting a deficient submission to the municipality. After the municipality disapproves the proposed revision because the submission is deficient, the person is allowed to submit a private request to the Department without ever allowing the municipality an opportunity to consider the proposed revision under the process mandated by the Department's regulations.

Under the Appellant's approach, the municipality is not allowed to properly consider revisions to its plans. When the person submits a deficient proposed revision to the municipality, the municipality has no real opportunity to review and approve it under the applicable regulations. Newton Township was entitled to review the Appellant's proposed revision to its plan when it was submitted under the regulatory criteria in the Department's regulations. The proposed revision that the Appellant submitted to Newton Township was deficient under the regulatory criteria for such proposed revisions to Newton Township's official plan to allow new land development. There is only one set of criteria for submittals to municipalities, and these regulatory criteria include the requirement to include the information contained on the Department sewage facilities planning modules. 25 Pa. Code § 71.53(d)(1). The Appellant acknowledges he never submitted the required sewage facilities planning module to Newton Township when he made his initial submission on August 22, 2016. The Appellant's submission to the Department was also deficient because the Appellant earlier denied Newton Township the opportunity to properly consider his proposed plan revision. The Department is entitled to judgment as a matter of law based upon the Appellant's failure to make a proper submittal to Newton Township including the Department's sewage facilities planning module before he pursued a private request.

The Appellant also argues that "[e]ven if 25 Pa. Code § 71.54 applies to the Department's review of a private request . . . Mr. Pileggi submitted a Component 3 Planning Module to Newton Township on or about September 1, 2017." (Appellant's Brief in Opposition at 4). The Appellant believes that the fact that he submitted planning module several months after the Department denied his private request renders the Department's Motion moot because there is no

reason to dismiss this appeal when the Appellant currently has a basis on which to file another private request.

The Department disagrees that its Motion is moot because the Appellant submitted his private request under appeal approximately seven months before he claims to have submitted a planning module to Newton Township. According to the Department, a private request may be made only after a prior written demand and written refusal by the municipality, and a subsequent submission of a planning module cannot cure a deficient prior request. *Scott Township Environmental Preservation Alliance v. DEP*, 2000 EHB 110, 117.

The Board agrees with the Department that the Appellant's subsequent submission of a planning module to Newton Township may, as the Appellant asserts, provide the basis to file another private request, but it cannot cure the procedural defects with the denial of the private request currently pending before the Board. In the *Scott Township Environmental Alliance Preservation* decision, the Board granted a motion for summary judgment under similar circumstances and decided:

> We cannot consider these events which led to the subsequent appeal as curing the procedural defects in the October 22, 1998 letters purporting to be a private request. The timing and content of those letters prevent them from meeting the requirements of a private request as identified in the Act and its regulations.

Id. at 117. Here, the Appellant had to submit the planning module to Newton Township before he filed his private request and not after. The Appellant is free to pursue whatever appeals that result from his action on or about September 1, 2017, to submit a planning module to Newton Township, but this later action does not cure the defects in his private request currently pending before the Board.

Newton Township does not have to be a delegated agency within the meaning of 25 Pa. Code § 71.58

The Appellant asserts that the Department failed to provide evidence that Newton Township is a "delegated agency" within the meaning of 25 Pa. Code § 71.58. Apparently the Appellant believes that Newton Township must be a "delegated agency" under this provision in order to conduct its own sewage facility planning duties under Sections 71.51-71.54. The Board agrees with the Department that the Appellant has grossly misapprehended the purpose of Section 71.58 and the nature of the delegation of the Department's authority to review and approve sewage facility planning modules under Section 71.58. *See* 25 Pa. Code § 71.58.

Under Section 71.58, the Department is allowed to delegate its authority to approve or disapprove sewage facilities planning modules to a local agency, multi-municipal local agency or county or joint county department of health for new land development which are submitted to the Department on planning module forms and other documents. This provision allows one of the designated entities to become a "delegated agency" to assume the Department's role in approving or disapproving sewage facility planning module after it is approved by the municipality. The delegated role does not displace the municipality whose plan is proposed for revision. Before the Department reviews the plan revision, the municipality must review and take action on the proposed plan revision.

That is not the situation here because the Department is still in place to approve or disapprove any sewage facility planning modules. The Department's duty to approve or disapprove has not been delegated to Newton Township. Newton Township has its own independent duty to have an approved sewage facility planning module and its duties are not governed by Section 71.58. Newton Township's duties are governed by Section 71.53 and 71.54 regarding revisions to new land development planning requirements and by Section 71.14

regarding private requests. The requirements in Section 71.58 regarding the delegation of the Department's duties to review, approve or disapprove new land development planning modules submitted by municipalities are not applicable here. The Department has not delegated its authority to review, approve or disapprove sewage facilities planning modules for new land development in Newton Township under either Sections 71.14, 71.53 or 71.54. 25 Pa. Code §§ 71.14, 71.53 and 71.54.

In addition, the Department does not have a duty to perform a completeness review of a private request within 10 days of its submission and failure to do so does not cause deemed approval as the Appellant suggests. In his response to the Department's Motion, the Appellant asserts that the Department has a duty under Section 71.54(b) to conduct a completeness review within 10 working days of its receipt and to communicate the results of its review to the Appellant. 25 Pa. Code § 71.54(b). Under the Department's regulations, failure to act upon a proposed plan revision within a 120-day period deems the revision approved unless an extension of time is needed to complete the review, not to exceed 60 days. 25 Pa. Code § 71.54(e). The Board agrees with the Department that the completeness review and deemed approval requirements in Section 71.54 that are applicable to a proposed plan revision are not applicable to a private request for a Department order to compel a municipality to revise its official sewage facilities plan. As the Board previously discussed, Section 71.14 governs the submission of private requests, and Section 71.14 does not require a completeness review or contain provisions mandating a deemed approval of a private request. 25 Pa. Code § 71.14. Section 71.14 includes a separate requirement to render a decision and inform the person requesting the revision without a specified period, but unlike Section 71.54 it does not include deemed approval provisions if the Department fails to render a decision within the specified period. 25 Pa. Code § 71.14(e). While

other requirements in Sections 71.53 and 71.54 are relevant in determining what needs to be included in a private request or in the demand to the municipality to revise its sewage facility plan prior to the submission of the private request, the time period and the deemed approval requirements in Section 71.54 are not applicable to a private request submitted under Section 71.14.

Accordingly, we find that there are no genuine issues of material fact and the Department is entitled to judgment as a matter of law and we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SALVATORE PILEGGI	:	
	:	
	:	
v.	:	**EHB Docket No. 2017-069-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWTON TOWNSHIP, Intervenor	:	

O R D E R

AND NOW, this 12th day of June, 2018, upon consideration of Department's Motion for Summary Judgment, it is hereby ordered that the motion for summary judgment 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: June 12, 2018

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

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

For Appellant:
David Romine, Esquire
(via electronic filing system)

For Intervenor:
Joseph Sileo, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONNA RUSH AND TERRY RUSH	:	
	:	
v.	:	**EHB Docket No. 2015-194-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CUMBERLAND COAL RESOURCES, LP	:	**Issued: June 14, 2018**

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

By Steven C. Beckman, Judge

Synopsis

The Board finds that Appellants have not met their 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 at their property.

Background

This matter involves an appeal by Donna and Terry Rush ("Rushes" or "Appellants") of a December 1, 2015, Department of Environmental Protection ("Department" or "DEP") determination ("Determination") that alleged damages to their home, land, and outbuildings was not caused by mining activity conducted by Cumberland Coal Resources, LP ("Cumberland" or "Permittee"). The Rushes filed a timely Notice of Appeal of the Determination on December 14, 2015, and a First Amended Notice of Appeal on December 29, 2015. On January 15, 2016, Cumberland filed a Notice of Suggestion of Pendency of Bankruptcy and Automatic Stay of Proceedings requesting an automatic stay of proceedings before the Board. The proceedings were initially stayed at the request of the parties by Order of the Board dated February 25, 2015. Numerous status reports were filed in the intervening months until the bankruptcy matter was

resolved and the parties, on September 12, 2016, proposed a timetable for the completion of discovery and dispositive motions. On January 6, 2017, the parties requested, and we granted, an extension of the deadlines for discovery and dispositive motions. No dispositive motions were filed and the matter proceeded forward towards a hearing.

The Rushes submitted their Pre-Hearing Memorandum on May 22, 2017. The Department and Cumberland submitted their Pre-Hearing Memoranda on June 23, 2017. On July 17, 2017, the Rushes requested a continuance on the matter citing Mr. Rush's health issues. The request was granted and a conference call to reschedule the hearing was held on July 27, 2017. By Order dated July 27, 2017, a previously scheduled site visit to the Rush Property was rescheduled for September 18, 2017, and the hearing was rescheduled to begin on October 30, 2017. The Board, the Rushes and the attorneys for each of the parties conducted the site visit on September 18, 2017. The Rushes filed a Motion for Leave of Court to Amend Appellants' Pre-Hearing Memorandum on October 3, 2017, seeking to amend their pre-hearing memorandum with additional exhibits composed of photographs taken since the initial May 22, 2017 filing of the pre-hearing memorandum. Following responses by the parties, the Motion was granted by Order dated October 12, 2017, and the Rushes filed their First Amended Pre-Hearing Memorandum on October 17, 2017. The parties filed a joint Stipulation of Facts and Exhibits on October 27, 2017 ("Jt. Stip.").

A three day hearing was held in this matter, beginning on Monday, October 30, 2017, in the Board's Pittsburgh office. Following the hearing, the parties filed a List of Stipulated Exhibits ("Stip. Ex.") and requested an extension of time to file their post-hearing briefs that was granted by the Board. After a further request for an extension was granted, the Rushes submitted their Post-Hearing Brief on January 30, 2018. On February 21, 2018, the parties filed a Letter to

the Court Concerning Proposed Hearing Transcript Errata Sheet and a Proposed Eratta Sheet, to correct errors in the transcript related to certain expert witness testimony. The Board deemed the proposed Errata Sheet part of the official record by Order dated February 22, 2018. On March 1, 2018, Cumberland submitted its Post-Hearing Brief, followed by the Department's filing of its Post-Hearing Brief on March 2, 2018. The Rushes filed a Post-Hearing Reply Brief on March 6, 2018. The matter is now ripe for 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. 31, *as amended*, 52 P.S. §§ 1406.1-1406.21 ("Mine Subsidence Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §§ 510-517 ("Administrative Code"); and the regulations promulgated thereunder ("Regulations").

2. Donna and Terry Rush, husband and wife, ("Rushes" or "Appellants"), reside at 1775 Mt. Morris Road, Waynesburg, Pennsylvania, 15379 ("Rush Property"). (Jt. Stip. 1)

3. Mr. Rush is a retired coal miner, working as one from 1975 until his retirement in 2005. (T. 239-240)

4. Cumberland Coal Resources, LP, now known as Cumberland Contura, LLC, ("Cumberland"), currently operates the Cumberland Mine located in Greene County, Pennsylvania. (Jt. Stip. 23)

The Rush Property

5. The Rushes purchased the Rush Property in September 1986. (Jt. Stip. 4)

6. The Rush Property consists of a home (built in 1971), and two adjacent structures; a shed (built in 1988 by Mr. Rush) and an attached garage (built in 2000). (Jt. Stips. 2, 3,5,6)

7. The Rushes have made a number of repairs and improvements to their Rush Property over the years including: replaced gutters (1986); built a back deck and patio (1988); installed a downstairs wood burning stove (1988); built a chimney for the downstairs stove (1990); replaced the garage floor (1998/99); replaced the roof (1998/99), replaced wooden support posts for the back deck (2005); installed a gas stove on the first floor (2010); replaced the drop ceiling below the back deck (2016); installed new windows, refinished wood floors and updated the bathroom and kitchen. (Jt. Stips. 7-11, 14-17)

8. The Rushes purchased Mine Subsidence Insurance for the home in June 1988 and have renewed their Mine Subsidence Insurance every year since 1988. (Jt.Stip. 4; T. 226)

9. The Mine Subsidence Insurance program provides insurance for the repair of structures damaged by mine subsidence that are located over abandoned mines or where there is no viable coal operator. (T. 367-368)

Cumberland Mine

10. Prior to August 3, 2015, Cumberland operated the Cumberland Mine located in Greene County, Pennsylvania, pursuant to the Coal Mining Activity Permit No. 30831303 ("Permit"). (Jt. Stip. 24)

11. The Cumberland Mine is an underground coal mine. Cumberland conducted both development mining and longwall mining in the Cumberland Mine. (Jt. Stip. 27)

12. Development mining is a mining method used to prepare for longwall mining and includes entries to provide access to the coal, ingress and egress for workers, beltways for taking coal out of the mine, and providing access to the working areas of the underground mine. (Jt. Stip. 28)

13. During development mining, coal is left in place at each end of the longwall panel and in the main entries to provide support for the roof and assure long term stability of these areas of the underground mine. (Jt. Stip. 29)

14. Longwall mining removes coal from the seam in long sections known as panels. (Jt. Stip. 30)

15. With longwall mining, coal is removed from the full width of the panel. (Jt. Stip. 31)

16. After the coal is removed, the area above the longwall panel collapses. (Jt. Stip. 32)

17. Subsidence related to longwall mining generally takes place immediately in the area of the longwall panel but may extend for up to a month beyond the edge of the panel. (T. 25-26; 563-564)

18. Development mining in the Cumberland Mine in the vicinity of the Rush Property was completed in May 2004. (Jt. Stip. 38)

19. The Rush Property is located over a large pillar of coal designed to be stable and provide support. (Jt. Stips. 33, 34)

20. There is approximately 580 feet of cover between the Cumberland Mine workings and the Rush Property. (Jt. Stip. 35)

21. Cumberland Mine longwall panel Nos. 50 (completed October 2005), 51 (completed August 2006), 52 (completed June 2007) and 53 (completed June2008) are generally located to the east of the Rush Property. (Jt. Stips. 36, 39-41; Rush Ex. 2A)

22. Panel 51 is the closest to the Rush Property and is approximately 305 feet to the east/southeast of the Rush Property boundary. (Jt. Stip. 37)

23. Cumberland performed a pre-mining survey of the interior and exterior of the Rushes' home, the shed and the detached garage, in late April 2001. (Jt. Stip. 42; Stip. Ex. 8)

24. Mr. Rush believed the description of the Rush Property in the April 2001, pre-mining survey was accurate. (T. 242)

Damage Claim

25. Mr. Rush first considered that there was subsidence damage to his home in 2015 upon noticing that an electrical conduit had pulled away from where it was connected to the upper soffit panel of the attached garage. (T. 246)

26. Prior to filing the claim Mr. Rush noticed other damages to his home but never associated anything with mine subsidence or filed a claim. (T. 247)

27. The attached garage floor has cracks in the concrete that appeared some time in 2007 or 2008. (T. 272)

28. Mr. Rush noticed issues with the gutter draining on the front of the home in 2013. (T. 272)

29. Once Mr. Rush found the issue with the electrical conduit he began looking closely at his home for other signs of damage. (T. 247)

30. In the same area as the damaged conduit pipe, the southeastern portion of the garage, Mr. Rush noted that a telephone line has pulled away from its connection to the house. (T. 267)

31. The Rushes notified Cumberland that they believed their home had been damaged by mine subsidence on October 21, 2015, when they first noticed what they believed to be mine subsidence damage. (Jt. Stip. 43)

32. A representative of Cumberland, Mr. Jeremy Rafferty, spoke with Mr. Rush by phone and inspected the Rush Property on October 21, 2015. (Jt. Stip. 44; T. 493-94)

33. Cumberland notified the Department of the Rush subsidence damage claim through a Fax Report Form dated October 22, 2015. (Jt. Stip. 45, Stip. Ex. 11)

34. In the October 22, 2015 Fax Report Form, Cumberland indicated that it was denying assistance to the Rushes based on its determination that there was no subsidence damage. (Stip. Ex. 11)

35. The Department contacted the Rushes and provided the Rushes with the opportunity to file a subsidence damage complaint by letter dated October 23, 2015. (Jt. Stip. 46; Stip. Ex. 12)

36. The Rushes filed an initial subsidence damage claim with the Department on October 29, 2015 and a supplemental claim on November 16, 2015. (Jt. Stip. 47; Stip. Exs. 13, 14)

37. In the claims filed with the Department, Mr. Rush alleges subsidence related damage including that the gas line connected the Rushes' appliances to the main gas line has shifted, a crooked water faucet in the yard, cracks in the home's chimney, a crooked furnace vent pipe, movement in the vent pipe of the stove. (T. 257, 290, 293, 294, 295)

38. Mr. Rush also alleges subsidence related damage to structural components of the home including bent panels in the basement ceiling, visible floor joists in the unfinished basement, separation in the hardwood floors of the home, kitchen cabinets that are separated from the bulkhead, windows that have lost their seal, and separating siding on the home. (T. 297, 298, 299, 302)

39. Mr. Rush alleges subsidence related damages to other structures on the Rush Property including the self-constructed patio and attached deck which he states is bowing and bent and the stones of the patio are sloping to the south end, the walkway from the home to Route 19 has expansion joint cracks, cracks in the apron of the detached garage, and bowing in the roof of the utility building. (T. 255, 264, 270, 283, 286)

40. The Department notified Cumberland of the Rush subsidence damage claim by letter dated November 5, 2015 and requested information from Cumberland related to the Rushes' subsidence damage claim. (Jt. Stip. 48; Stip. Ex. 15)

41. Cumberland responded to the Department's request by letter dated November 13, 2015. (Jt. Stip. 49; Stip. Ex. 16)

42. The Department conducted an inspection of the Rush Property on November 17, 2015. (Jt. Stip. 50)

43. The Department prepared a report, dated November 25, 2015, that summarized its investigation of the Rush subsidence damage claim and its determination that the Rush home, shed, detached garage and land had not been damaged by mine subsidence. (Stip. 41; Stip. Ex. 17)

44. By letter dated December 1, 2015, the Department denied the Rush subsidence damage claim. (Jt. Stip. 52; Stip. Ex. 18)

45. Dr. Gennaro Marino was admitted as an expert in mine subsidence engineering. (T. 15, 19)

46. Only 10 percent of Dr. Marino's investigative work involving mine subsidence was related to longwall mining. The other 90 percent involved room and pillar mining. (T. 17)

47. The investigation of the Rushes' claim for subsidence damage was Dr. Marino's first investigation of longwall mining related subsidence damage in Southwestern Pennsylvania. (T. 17)

48. Dr. Marino used InSAR data on only one prior investigation where he investigated settling at an abandoned room and pillar mine in Southern Illinois. (T. 18)

49. Dr. Marino relied on PennDOT data for Route 19 to calculate alleged subsidence of approximately 7 inches at the Rush Property resulting from Cumberland's longwall mining in Panel 51. (T. 42-43, 49, 105-106, 110)

50. The PennDOT data used by Dr. Marino consisted of 1924 design survey data and 2006 road survey data. (T. 34-37, 91-92; Rush Ex. 2C)

51. Roy Painter is a District Geotechnical Engineer employed by the Pennsylvania Department of Transportation ("PennDOT"). (T. 447)

52. Mr. Painter conducted the 2006 Route 19 road survey in September 2006 to determine the existing road conditions after the longwall mining in Panel 51. (T. 458)

53. To develop a grading and repair plan for Route 19, Mr. Painter plotted the 2006 survey elevations on a graph with two additional road elevation lines; an as designed line from the original construction of the road in 1924, and the design for the repair work to be completed. (T. 463-464; Stip. Exs. 22, 23)

54. Mr. Painter was not able to find actual as-built elevations for Route 19 from the work completed in the 1920s. (T. 464)

55. Route 19 has been milled and/or repaved several times since it was initially constructed in the 1920s. (T. 464)

56. PennDOT did not do a pre-mining survey of Route 19 and Mr. Painter did not determine an actual elevation of the road prior to the longwall mining of Panel 51. (T. 463-464)

57. Mr. Painter did not see any obvious damage to Route 19 in front of the Rush Property. (T. 467)

58. The last point of damage to Route 19 observed by Mr. Painter was 335 feet east of the Rush Property. (T. 475-476)

59. Mr. Painter determined that the plotted survey elevation lines from the 1924 data and the 2006 data came together at a point 275 feet east of the Rush Property which he interpreted to be the end of the subsidence impact on Route 19. (T. 472-476; Stip. Ex. 23)

60. The 2006 road survey and road repair continued west on Route 19 beyond the Rush Property to provide a smooth transition into the area damaged by the longwall mining. (T. 477)

61. Dr. Abuduwasiti Wulamu was admitted as an expert in InSAR and land deformation related to coal mining. (T. 163, 169-170)

62. InSAR is a satellite-based measurement technique that has been around for 25 years. (T. 157-158)

63. InSAR can provide millimeter-level scale accuracy. (T. 161)

64. His work on behalf of the Rushes was the first time Dr. Walamu had used InSAR data to look at mining subsidence issues in Pennsylvania. (T. 164-165)

65. Dr. Walamu was able to compare his InSAR results with actual measured mine subsidence in room and pillar mines four or five times to evaluate the accuracy of the InSAR data. The difference between the InSAR data and the actual measured data ranged from 1 millimeter to up to 10 millimeter. (T. 168-169, 206-207)

66. Dr. Walamu was not able to determine the accuracy of the InSAR data on this project by comparing it to actual measured mine subsidence because he did not have any ground measurements or survey data to compare with the InSAR data. (T. 169, 201-202)

67. Dr. Walamu used two sets of satellite data to evaluate the Rush Property. The first set of data covered a timeframe from January 2, 2007, to January 12, 2011. The second set of data covered a timeframe from January 19, 2015 to August 29, 2016. (T. 170-171, 179)

68. The first set of satellite data was from after the completion of longwall Panel 51 but included the longwall mining and completion of Panels 52 and 53. (T. 618; Rush Ex. 2H)

69. Dr. Walamu plotted the InSAR data for the first timeframe over a broad area that included the Rush Property. (Rush Ex. 2H)

70. The figure derived from the InSAR data for the first timeframe failed to accurately reflect the actual amount of subsidence that took place in Panels 52 and 53 and the adjacent gate areas. (T. 198, 208-213; 618-625, 746-747; Rush Ex. 2H)

71. Actual subsidence within the panels in this section of the Cumberland Mine was in the range of 5 feet. (T. 209, 621-624; Stip. Exs. 21, 25- Figure 7)

72. Dr. Walamu plotted ground elevation contours across the Rush Property based on the InSAR data for the two separate timeframes. (Rush Exs. 2E, 2F)

73. The InSAR data for the earlier timeframe, 2007 to 2011, showed alleged subsidence ranging from 15.5 mm (0.61 inches) to 21.5 mm (0.85 inches) across the Rush Property dipping to the southwest. (Rush Ex. 2E)

74. The InSAR data for the 2015 to 2016 timeframe showed alleged subsidence ranging from 12.5 mm (0.49 inches) to 17.5 mm (0.69 inches) across the Rush Property dipping to the northwest. (Rush Ex. 2E)

75. Dr. Marino relied on the InSAR data and an extrapolation of the InSAR data for his opinion that there was 2.5 inches of subsidence at the Rush Property from 2007 through August 2016. (T. 105-106)

76. Dr. Marino opinioned that the cause of the alleged subsidence at the Rush Property reflected in the InSAR data was pillar deflection within the Cumberland Mine. (T. 88-89, 149-150)

77. Dr. Yi Luo was admitted as an expert in mine engineering, subsidence and the forces that impact structures in the vicinity of mines. (T. 556-557)

78. Subsidence within a longwall panel generally takes 10 to 15 days to complete and beyond the edge of the panel, subsidence may continue for up to a month. (T. 563-565, 710)

79. Dr. Luo has only seen two cases out of 200 cases where the angle of draw exceeded 12 degrees. One case was 24 degrees, but he attributed that to measurement error, and he could not recall the angle in the second case. (T. 574-575)

80. The Rush residence is located at 28 degrees from the edge of Panel 51, well beyond the 12 degree angle of draw commonly observed by Dr. Luo. (T. 574-578)

81. Dr. Luo has developed a model to predict mine subsidence. (T. 532-534)

82. Dr. Luo has examined mine subsidence and its impact on structures using his prediction model on more than 500 different subsidence cases including 300 cases, that involve mining in the Pittsburgh coal seam, and 50 cases involving the Cumberland Mine that is at issue in this case. (T. 534-536)

83. Dr. Luo's predictive model is generally used to predict whether a structure will be damaged by mine subsidence and to take precautions to protect the structure if required. (T. 540-542)

84. Dr. Luo ran his predictive model to determine if the longwall mining of Panel 51 was likely to have impacted the Rush Property. (T. 579)

85. Using the conservative approach in Dr. Luo's model, the zero subsidence line was located 151 feet from the Rush residence and the zero surface strain line was located 148 feet from the Rush residence. (T. 587-589; Stip. Ex. 25 - Figures 7 and 8)

86. The Bieniawski formula is used in mining engineering to determine the strength of a coal pillar. (T. 141, 566)

87. Using the Bieniawski formula and the overburden depths, the safety factor (a point at which there is no potential to fail) is two (2). The mains in the vicinity of the Rush Property have a safety factor of 4.19 to 5.71. (T. 566-568)

88. For large pillars, like the one directly under the Rush Property, the Bieniawski formula and rock mechanics look at a width to height ratio and if it is greater than 10, it is considered safe. The pillar beneath the Rush Property has a width to height ration of 34.3. (T. 569-570)

89. The mine floor in the Cumberland Mine is limestone and shale. (T. 571)

90. Dr. Luo has been in many mines in the area of the Cumberland Mine and he has not seen mudstone in those mines. (T. 571)

91. Dr. Luo visually inspected the Rush Property on March 24, 2017 and did not observe anything at the Rush Property that he concluded was evidence of mine subsidence. (T. 590-593)

92. Mr. Carl Massini was admitted as an expert in mine subsidence. (T. 708)

93. Mr. Massini is employed as a mining engineer for the Department. (T. 705)

94. Mr. Massini has conducted approximately 4,000 mine subsidence related inspections of structures during his time with the Department. (T. 707)

95. In Mr. Massini's experience, if there is subsidence from longwall mining or room and pillar mining that reaches the surface, the lower parts of the structure such the footings, foundation walls and basement floor, will be impacted before other portions of the structure are damaged. (T. 712)

96. Mr. Massini has not seen cases where the upper portions of a house have been damaged by subsidence but there has not been damage to the lower portions of the house including the foundations or the footings. (T. 712-713)

97. Mr. Massini took over the Department's investigation of the Rushes' claim in January 2017. (T. 714)

98. Mr. Massini reviewed various documents and photos related the Rushes' claim including the Department's pre-policy inspection completed in 1988 and the pre-mining survey that was done in 2001. (T. 714-715)

99. Mr. Massini stated that it was possible to have damages within a 25 degree angle of draw. (T. 751)

100. Mr. Massini inspected the Rush Property in January 2017 and completed an elevation/level survey on portions of the Rush residence. (T. 720; Stip. Ex. 20)

101. Mr. Massini completed level surveys on three different areas of the Rush residence: 1) the visible foundations and the brick veneer on the exterior of the Rush residence; 2) inside the attached garage and 3) inside the basement. (T. 725- 732, 736-738; Stip. Ex. 20)

102. The Rush residence was generally level with only small variations (11/2 inches or less) in the elevations between the survey points. (T. 732-735, 738; Stip. Ex. 20)

103. The level surveys did not show a pattern of displacement that would show the house was out of level and had moved in a particular direction. (T. 736)

104. Mr. Massini did not observe any surface effects of subsidence in the yard of the Rush Property. (T. 740)

105. Mr. Massini observed some of the alleged subsidence damages and concluded that they were not the result of mining subsidence. (T. 740-742)

106. Mr. Joseph Floris is a subsidence investigator for the Department of Environmental Protection. (T. 389)

107. Mr. Floris has been engaged in the investigation of the effects of underground coal mining for 33 years and has conducted over 200 subsidence damage claim investigations since become a Department employee in 2000. (T. 389-391)

108. Mr. Floris conducted the Department's initial review of the Rushes' claim including reviewing the claim form, fax form (Mine Operator Reporting Form), pre-mining survey and mine maps. (T. 407, 431)

109. The Mine Operator Reporting Form requires that the Department determine whether there has been mining within 35 degrees of a structure because that is considered the outside boundary of where you might expect damage to a structure. (T. 431-432)

110. Coal pillars were required to be left in place underneath and adjacent to the Rush Property to protect a gas well located south and west of the Rush Property. (T. 409-413; Stip. Ex. 20)

111. The Rush Property is located above the main entries of the Cumberland Mine. (T. 415-416; Stip. Ex. 20)

112. Mr. Floris participated in the Department's inspection of the Rush Property in November 2015. (T. 416-417)

113. Mr. Floris authored a Department report dated November 25, 2015 that concluded that the damages claimed by the Rushes were not caused by mine subsidence. (T. 422, Stip. Ex. 17)

114. Mr. Floris' November 25, 2015, report was attached to the Department's December 1, 2015 determination letter denying the Rushes' damage claim. (T. 422-423, Stip. Ex. 18)

115. Mr. Floris based his conclusion on the location of the Rush Property to the longwall panel, the depth of cover, distance to the mining, the amount of time elapsed since the mining and the nature of the damages. (T. 423)

116. Mr. Floris did not observe any damage to the foundation of the Rush residence. (T. 424)

117. Mr. Floris has never witnessed subsidence over main entries in a mine. (T. 436)

118. Mr. Jeremy Rafferty is a land agent for Contura Energy, Cumberland Mine. (T. 485)

119. Mr. Rafferty has been a land agent for 12 years and part of his job responsibility is to address potential and actual subsidence issues with homeowners. (T. 485, 487-488)

120. Mr. Rafferty has dealt with between 200 and 250 homeowners/structures on subsidence issues during his 12 years as a land agent. (T. 488)

121. Mr. Rafferty spoke with Mr. Rush on the phone on October 21, 2015 regarding the damage claim and agreed to meet with Mr. Rush that day to review the damages. (T. 493-494)

122. Prior to meeting with Mr. Rush, Mr. Rafferty reviewed files including the mine map showing that the Rush Property was located on a solid block of coal over the 54 north mains. (T. 494-495)

123. Mr. Rafferty met with Mr. Rush at the Rush Property to review the damages on October 21, 2015. (T. 493-495)

124. Mr. Rafferty observed the ground and the foundation of the Rush residence as he and Mr. Rush walked around the Rush Property and he did not see anything that led him to conclude that there was any type of subsidence occurring at the Rush Property. (T. 495-496)

125. Mr. Rafferty concluded that the damages claimed by the Rushes were not the result of mining subsidence and indicated that on the fax report he sent to the Department on October 22, 2015. (Stip. Ex. 11)

126. Mr. Rafferty was not aware of any issues with the conditions in the 54 north mains located below the Rush Property. (T. 512)

127. Mr. Rafferty has never seen subsidence damage related to development mining and/or room and pillar mining. (T. 518)

DISCUSSION

Standard of Review

The Rushes have the burden of proof in this matter. 25 Pa. Code § 1021.122(c)(2). They must demonstrate by a preponderance of the evidence that the Department erred in finding that mining was not the cause of the damage claimed by the Rushes. *Lang v. DEP and Maple Creek Mining, Inc.*, 2006 EHB 7, 17. The preponderance of the evidence standard requires that the Rushes meet their burden of proof by showing that the evidence in favor of their 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 threshold issue for the Board to decide in this case is whether the Rushes have met their burden and demonstrated, by a preponderance of the evidence, that the Department erred in determining that the claimed damages to the Rush Property were not the result of mining related subsidence. The Rushes claim that the damages are the result of subsidence caused by Cumberland's mining activities at the Cumberland Mine. The Rushes argue that the alleged damages to the Rush Property are largely undisputed by the Department and Cumberland. The Rushes offered extensive testimony regarding the timing and nature of the claimed damages and assert that there have been changes to the Rush Property since the pre-mining survey of the Rush Property conducted by Cumberland in April 2001. They argue that the observed damage to the Rush Property is evidence of and consistent with mine subsidence. Two experts, Dr. Marino and Dr. Wulamu, testified on behalf of the Rushes. In their post-hearing brief, the Rushes argue that their experts produced evidence that mine subsidence occurred on the Rush Property and further argue that the testimony supports their claim that the alleged damages were consistent with mine subsidence.

The Department and Cumberland dispute the Rushes' subsidence damage claims and argue that there has been no mine related subsidence at the Rush Property. The Department presented testimony from Department staff who conducted the Department's investigation of the Rushes' claim as well as expert testimony on mine subsidence from Mr. Massini. Cumberland

presented testimony from Mr. Rafferty who conducted an initial investigation of the Rushes' claim on behalf of Cumberland and from Dr. Luo who provided expert testimony on behalf of Cumberland addressing the likelihood of mine subsidence at the Rush Property resulting from Cumberland's mining activity. Our review of the testimony and evidence presented by the parties at the hearing leads us to conclude that the Rushes failed to meet their burden to demonstrate by a preponderance of the evidence that the Department erred in finding that the the alleged damages to the Rush Property were not the result of mining related subsidence. [1]

The Rushes rely on the alleged damages themselves, as well as the testimony of their experts to support their claim that there have been mining-related subsidence damages at the Rush Property. We will first examine the expert testimony regarding subsidence presented by Dr. Marino and Dr. Walamu on behalf of the Rushes. Dr. Marino initially made some general observations regarding the proximity of the Rush Property to the mining activity and the longwall panels of the Cumberland Mine. He acknowledged that the Rush Property was outside the direct area of the longwall panels but argued that it still could be impacted by subsidence related to the longwall mining. He testified that based on his analysis, there had been 9.5 inches of subsidence at the Rush residence. (T. 51). He arrived at this amount using two different sets of data, PennDOT data and InSAR data. The PennDOT data is for Route 19 which runs directly in front of the Rush Property. Dr. Marino plotted relative elevation data from a 1924 document and from a 2006 PennDOT road survey completed about one month after the conclusion of the longwall mining of Cumberland Mine's Panel 51, located to the east of the Rush Property. He overlaid the two road elevation profiles and, based on the relative elevation difference between

[1] The Board need not decide whether the Rushes' claim falls under their Mine Subsidence Insurance Policy or under the Mine Subsidence Act since we determine that the Rushes have not met their burden to show that the alleged damages are the result of subsidence caused by Cumberland's mining activity.

these two sets of road data, he concluded that the Rush Property subsided an estimated 6.9 inches. (T. 49). It was not entirely clear from Dr. Marino's testimony, but it appears that he associated this amount of subsidence with the longwall mining in Panel 51. The remaining subsidence of 2.6 inches claimed by Dr. Marino is based on the InSAR data developed by Dr. Walamu. Dr. Marino extrapolated the rate of subsidence based on the InSAR data to cover time gaps in the InSAR data. This additional subsidence allegedly took place over a period of nine years between September 2006, and October 2015, when the Rushes made the damage claim to the Department.

We find that Dr. Marino's claim of subsidence at the Rush Property resulting from the completion of Panel 51 based on the comparison of the road data is not supported by the evidence in this case. Our initial concern is with the reliability of the 1924 data as an accurate picture of the road elevation of Route 19 prior to the longwall mining in Panel 51. Mr. Painter, the PennDOT representative who testified at the hearing, stated that while the 1924 data was described as "as built" data, it was in fact "as designed" and may not accurately reflect the actual construction. Further, he testified that Route 19 in front of the Rush Property has been milled and repaved numerous times over the 80 plus years between 1924 and the completion of the 2006 road survey. Therefore, it is clearly not reasonable to rely on the 1924 data as accurately depicting the elevation of Route 19 in the area of the Rush Property just prior to the road being impacted by subsidence. The lack of accurate data depicting the true pre-mining elevations of Route19 makes any conclusion about subsidence at the Rush Property based on a comparison of pre-mining and post-mining road data as conducted by Dr. Marino unreliable in our opinion.

In addition to the reliability issue with the pre-mining road elevation data, Dr. Marino made a mistake when he overlaid the elevation profile from the 2006 road survey on top of the

1924 elevation profile. This mistake was acknowledged by the Rushes. As stated in the Rushes' post-hearing brief, "Dr. Marino incorrectly assumed that the repairs to subsidence damage on Route 19 extended west beyond the Rush residence." (Appellants Donna and Terry Rush's Post-Hearing Brief, Proposed Finding of Fact No. 111). Dr. Marino's incorrect assumption of the end point for the subsidence repair on Route 19 caused him to shift that point to a position west of the Rush Property and to interpret the slight separation between the elevation profiles from the 1924 data and the 2006 road survey in the area of the Rush Property as evidence of subsidence at the Rush Property. The fact that Dr. Marino's assumption was incorrect became apparent during the hearing when Mr. Painter testified that the visible subsidence damage to Route 19 ended approximately 335 feet east of the Rush residence and that the elevation profiles based on the 1924 data and the 2006 road survey data first overlapped 275 feet east of the Rush residence. This point east of the Rush Property was the actual end point of the subsidence repair on Route 19. Mr. Painter testified that the 2006 road survey continued west along Route 19 past the Rush Property to provide for repaving of that section of road, not to address subsidence issues. Dr. Marino's mistaken assumption invalidates his conclusion that the comparison of the road elevation data demonstrates that there is 6.9 inches of subsidence at the Rush Property.

Dr. Marino's mistake also created an issue with his testimony concerning the angle of draw associated with Panel 51. Our understanding of the angle of draw, based on the testimony at the hearing, is that it represents the angle created from the end of a longwall panel to a point on the surface at which subsidence impacts cease. As a rule of thumb, the Department considers an angle of draw of 35 degrees when trying to determine potential subsidence impacts prior to longwall mining. However, the Department's expert, Mr. Massini testified that it is possible to have an angle of draw up to 25 degrees and Dr. Luo testified that he generally finds the angle of

draw is 12 degrees or less. Because Dr. Marino assumed that the end point of the subsidence impacts associated with the 2006 road survey were to the west of the Rush Property, he calculated an angle of draw of 43 degrees. The Rush Property is located at an angle of 28 degrees and, therefore, he concluded that the Rush Property was within the 43 degree angle of draw. He relied on this to bolster his conclusion of subsidence impact to the Rush Property. It is clear however that the 43 degree angle of draw is incorrect and that the Rush Property is not within the angle of draw based on the PennDOT data and the testimony of Mr. Painter.

Finally, we also note that the Rushes did not notify anyone of alleged subsidence damage in 2006 following the completion of the longwall mining in Panel 51. If, in fact, there was nearly 7 inches of subsidence at the Rush Property in 2006, an amount that represents over 70% of the total subsidence according to Dr. Marino, we would have expected that to have come to the Rushes' attention and to result in a claim at that time. Dr. Marino testified that he would have expected there to be some damage after the completion of the longwall panel in 2006. However, the Rushes' damage claim was not made until nine years later. Mr. Rush testified that after he noticed the damages in 2015 that led to the claim, he recalled seeing some damaged items in the 2007-2008 time period but did not associate them with subsidence because he had been told that subsidence could not happen at the Rush Property. Overall, we find that the timing of the claimed damages is problematic and combined with the issues surrounding the PennDOT information relied on by Dr. Marino, there is a lack of sufficient proof supporting Dr. Marino's claim of 6.9 inches of subsidence at the Rush Property associated with the longwall mining in Panel 51.

Dr. Marino also testified regarding the InSAR data he relied on for his opinion that there was an additional 2.6 inches of subsidence at the Rush Property. The InSAR data relies on the

measurement of time differences associated with the reflection of satellite signals off the ground surface. The time measurements are used to calculate surface elevations. Changes in the surface elevation of a given location can be determined by comparing InSAR data collected from multiple time periods. In this case, Dr. Wulamu used two time periods of non-continuous data to analyze for surface elevation changes at and in the vicinity of the Rush Property. The first set of data covers a time period from January 2, 2007, to January 12, 2011. This time period began approximately four and a half months after the completion of the longwall mining in Panel 51, the panel closest to the Rush Property, and therefore, it does not capture any major changes in surface elevation associated with that activity. The time period of the first data set does include Cumberland's longwall mining in Panels 52 (completed June 2007) and 53 (completed June 2008) located further southeast from the Rush Property. The second data set covers from January 19, 2015, to August 29, 2016, a time period that is several years after the completion of Cumberland's longwall mining near the Rush Property. Dr. Walamu relied on the InSAR data to create figures that purported to show total accumulated subsidence in the vicinity of the Rush Property during the initial time period (Rush Ex. 2H) and subsidence contours at the Rush Property for both time periods (Rush Exs. 2E and 2F). Dr. Marino relied on these figures and the underlying data in reaching his conclusion that there was 2.6 inches of subsidence at the Rush Property between 2007 and 2016.

We find that the InSAR data and testimony do not support a finding of mine subsidence at the Rush Property. We are not convinced of the reliability of the data for the purposes it is being used in this case. Dr. Walamu was asked whether he had compared the data he collected on other InSAR projects with physical survey data to determine its accuracy. He stated that he had done so four or five times and that the range of difference in those projects between InSAR

and survey data ranged from 1 millimeter up to 10 millimeters. That level of accuracy creates two issues for us. Our first issue is with Dr. Walamu's total accumulated subsidence figure encompassing Cumberland's longwall mining in Panel 52 and Panel 53. This exhibit (Rush Ex. 2H) does not accurately reflect the known facts regarding subsidence associated with longwall mining in panels in that area of the Cumberland Mine. It shows a maximum subsidence in those panels of 156.1 mm (approximately 6 inches) as opposed to actual subsidence which should be in the range of five feet. Furthermore, it shows accumulated subsidence in the area of the gate between Panels 52 and 53 equal to the accumulated subsidence in the center of the two panels. The area of the gate between panels clearly does not subside as much as the area in the center of the longwall panels. Neither Dr. Walamu nor Dr. Marino could adequately explain why the InSAR data failed to capture, or even closely approximate, the subsidence in Panels 52 and 53. Given the accuracy level testified to by Dr. Walamu based on his prior work, the wide discrepancy between the InSAR data and the subsidence in the panels makes us question the reliability of the InSAR data in this case.

Our second issue arises when we look at the two figures showing the subsidence contours at the Rush Property based on the InSAR data. These figures cause us to further question the reliability of the InSAR data and the mapping created from it. Rush Ex. 2E covers a four year period from 2007 to 2011 and purports to show subsidence ranging from 15.5 mm (0.61 inches) to 21.5 mm (0.85 inches) trending from the northeast of the Rush Property to the southwest of the Rush Property. Rush Ex. 2F covers a 19 month period in 2015 and 2016 and purports to show subsidence ranging from 12.5 mm (0.49 inches) to 17.5 mm (0.69 inches) trending from the south-southeast of the Rush Property to the north-northwest of the Rush Property. Dr. Walamu and Dr. Marino did not offer a plausible explanation why the direction of maximum

alleged subsidence across the Rush Property reversed itself from the earlier period to the later period nor why the rate of subsidence would appear to be greater during the later time period. Further, if we take into account the margin of error of 10 millimeters testified to by Dr. Walamu based on his previous work, these numbers are uncomfortably close to that error range. Overall, given these issues, we find that the InSAR data is too unreliable to support a finding of subsidence at the Rush Property. We do not find Dr. Marino's reliance on the InSAR data to show 2.6 inches of movement at the Rush Property reasonable given the evidence in this case.

Even if we accepted the 2.6 inches of movement claimed by Dr. Marino based on the InSAR data as valid, which we do not, Dr. Marino failed to provide a reasonable explanation of the mechanism that caused this alleged subsidence. During the period of time covered by the InSAR data, the longwall mining at the Cumberland Mine moved farther to the south away from the Rush Property. Recognizing that this made it less likely that longwall mining was the cause of any subsidence, Dr. Marino asserted that the subsidence during this time period was likely the result of issues with the coal pillars in the Cumberland Mine. The Rush Property is located in the area of the Cumberland Mine constructed by development mining, resulting in a system of coal pillars and tunnels known as the mains. The mains are designed to be stable to ensure that the tunnels are safe to move men and equipment throughout the mine complex. The Rush Property sits on a solid oversized block of coal in the mains because the block was sized to protect a gas well in the vicinity of the Rush Property. Dr. Marino testified that he concluded that the cause of the alleged subsidence demonstrated by the InSAR data was pillar deflection caused by weakening of the floor of the mine. He acknowledged that he had no direct evidence that there had been any pillar deflection and his only evidence of this was the alleged subsidence shown by the InSAR data. He also acknowledged that the floor of the coal seam in the

Cumberland Mine was generally limestone or a hard indurated rock which was not prone to failure. He did testify that some areas may have clay stone, which is more susceptible to failure, but he lacked any direct evidence that clay stone was present in the area of the Cumberland Mine near the Rush Property. Overall, we think Dr. Marino's testimony about a possible pillar failure was speculative at best and unsupported by the evidence, as the only evidence for it was the alleged subsidence he concluded had occurred based on the unreliable InSAR data.

In contrast to the unreliable conclusion regarding subsidence at the Rush Property offered by Dr. Marino, Cumberland's expert, Dr. Luo, concluded that the Rush Property could not have been damaged by subsidence from either longwall mining or by pillar deflection. He based this conclusion on a number of factors. He first noted that the Rush Property was located at a 28 degree angle from the nearest longwall panel, Panel 51. Dr. Luo testified that in the over 200 subsidence cases he has reviewed, there were only two cases where the angle of draw exceeded 12 degrees and neither of those were as high as the 28 degrees where the Rush Property was located relative to Panel 51. In addition to this general evidence regarding angle of draw, Dr. Luo ran a subsidence prediction model to look at the likelihood of vertical and horizontal movement in the vicinity of Panel 51 at the Rush Property. The model was developed by Dr. Luo and incorporated data from the Pittsburgh coal seam, including from the Cumberland Mine. Dr. Luo has field validated the results of his model. Using what he described as a conservative approach designed to detect any risk of subsidence, Dr. Luo concluded that the zero strain line and the zero subsidence line, beyond which one would expect there to be no subsidence and no horizontal ground strain, are located east of the Rush residence at a distance of 148 to 151 feet. Dr. Luo also testified that it takes a certain level of strain to actually damage a structure, and he put the conservative distance where there would be enough horizontal ground strain to cause

damage at 219 feet east of the Rush residence. We found his testimony persuasive and note that it is generally consistent with the testimony from Mr. Painter, who stated that the last visible subsidence impact on Route 19 was observed at 335 feet east of the Rush residence. We find that Dr. Luo's conclusion that the longwall mining did not cause subsidence or horizontal ground strain that could cause damages at the Rush Property is well supported based on his testimony.

Dr. Luo and others also testified about Dr. Marino's theory that there was subsidence at the Rush Property as a result of pillar deflection. Dr. Luo relied on a formula known as the Bieniawski formula that is used in mining engineering to determine the strength of a pillar. Dr. Luo also looked at the width to height ratio of the pillar beneath the Rush Property. Based on both approaches, he concluded that the pillar beneath the Rush Property was stable and that there was a significant margin of safety in place to ensure the stability of the pillar. Dr. Luo concluded that there was no potential for development mining to cause subsidence at the Rush Property. He also testified that, in his experience, there is not mud stone[2] on the mine floor in this area as the floors are generally shale. He stated that he had been in many mines in the area and had not seen mud stone in any of those mines. Therefore, he did not agree with Dr. Marino's speculation that there was a possible weakening of the floor due to the presence of clay stone allowing for pillar deflection. Besides Dr. Luo's testimony, others testified concerning the likelihood of a pillar deflection or failure in the Cumberland Mine mains beneath the Rush Property. Mr. Floris, the DEP subsidence investigator, testified that he had never seen nor heard of any subsidence in the area of mine mains and main entries. Mr. Rafferty, Cumberland's land agent, testified that in his 12 years of experience, he had never observed subsidence damage caused by development

[2] Dr. Luo referred to the geologic layer of concern as mud stone while Dr. Marino referred to it as clay stone. Our understanding of the testimony is that they were each referring to the same general type of stone, and that the use of different terms to describe the layer of stone is not significant.

mining in the mains or any pillar failures. The testimony of Dr. Luo regarding pillar strength, as well as the lack of any evidence of the presence of a mud stone floor in this mine, further reinforces our finding that the possibility of pillar deflection as a source of the alleged subsidence based on the InSAR data was speculative and unsupported by the testimony and evidence at the hearing.

We next turn our attention to the damages themselves and whether that information supports the Rushes' claim. Mr. Rush filed the initial subsidence damage claim form with the Department in October 2015 and supplemented the claim with an additional filing in November 2015. Mr. Rush stated that he first became concerned about subsidence damage to his house in October 2015 when he observed a conduit pipe pulling away from the upper soffit panel of his garage. After observing the situation with the conduit pipe, Mr. Rush surveyed his house, outbuildings and surrounding property and identified a list of items that he concluded were damaged as a result of subsidence. He testified that he had observed some of the alleged subsidence damage to the Rush Property as far back as 2007-2008. He also testified that some of the listed subsidence damages had become worse and that there were additional cracks in the chimney and the main floor of the lower garage since the time of the initial claim in 2015. The Rushes presented pictures of the majority of the alleged subsidence damages as exhibits during the hearing testimony. Mr. Rush also testified that he believed the damages he claimed on the subsidence damage claim form were changes to the Rush Property since the time of the pre-mining survey completed in 2001.[3]

[3] The Rushes also raised an incident with methane in their water well that took place in 2004. As a result of that incident Cumberland provided a replacement water supply to the Rushes. There was no testimony addressing how this incident related to or supported the current subsidence damage claim and, therefore, we did not consider it relevant to our decision in this case.

Dr. Marino did not inspect the Rush Property and the alleged subsidence damages. Instead he relied on a list of the damages and a video provided by the Rushes, along with discussions regarding the damages with the Rushes. Dr. Marino testified that some of the listed damages were consistent with mine subsidence. However, when he was asked to identify which of the damages were the result of subsidence, he could not do that and instead testified regarding what type of damages he would normally expect to see as a result of the magnitude of the subsidence that he determined had taken place at the Rush Property. He testified that the nature of cracking claimed by Mr. Rush were of the type and size that he would expect. He described the damages as an "esthetic level of damages" which he defined as damages that impede the esthetics of the property at a level that is not acceptable to the property owner. (T. 54). He contrasted esthetic damage with functional or structural damage and stated that it was possible to have esthetic damage without structural or functional damage taking place. The Department specifically asked Dr. Marino whether he was able to say which of the alleged subsidence damages listed on the Rushes' damage claim were the result of mine subsidence, and he stated that he could not and that he did not believe that anyone could do so. He acknowledged that certain of the damages, including the conduit pipe pulling from the soffit of the house that initially caused Mr. Rush to be concerned about the possibility of subsidence, could result from things other than subsidence. He also acknowledged that the first place affected by ground movement is typically the building foundation.

The Department and Cumberland did not directly challenge the majority of the damages claimed by the Rushes but disputed that the damages were necessarily caused by subsidence as opposed to other possible causes. Department staff reviewed the subsidence damage claim when it was submitted by Mr. Rush in October 2015. They inspected the Rush Property in November

2015, and January 2017, and presented pictures from those inspections during their testimony. Mr. Joseph Floris, an experienced DEP subsidence investigator, participated in the November 2015 inspection and observed the damages alleged by the Rushes. He paid particular attention to the foundation because in his experience that is where one will first observe damage from subsidence and, according to him, one does not have damage upstairs without getting damage in the basement. He observed the foundation of the Rushes' house and credibly testified that he did not observe damage to the foundation. He concluded that the damages identified by Mr. Rush were not related to subsidence.

Mr. Carl Massini, a DEP mining engineer, who was admitted as an expert in mine subsidence in this case, participated in the January 2017 inspection. Similar to Mr. Floris, he testified that in his experience he had not observed subsidence damage to the upper portions of a house without there being damage to the lower portions, foundation or footings of the house. As part of his investigation, Mr. Massini observed the Rush Property and conducted a level survey to determine if the foundation of the Rushes' house was out of level in any particular direction. He completed a level survey on the exterior of the house and integral garage as well as an interior survey in the basement of the house looking at the basement floor and the joists. Mr. Massini concluded that the level surveys did not demonstrate that the house was out of level so he concluded that there was not a subsidence issue. He also testified that the other alleged damages he observed did not indicate mine subsidence in his experience. Mr. Massini reviewed the pre-policy inspection for the mine subsidence insurance policy and the pre-mining inspection and testified that there had not been any meaningful changes to the damages to the Rush Property identified in those documents based on his inspection of the Rush Property. If there had been subsidence at the Rush Property, he opined that these pre-existing damages would have been

weak points in the Rush Property and subsidence should have caused them to be worse than before. He stated that this was not the case as he observed no meaningful changes and, in fact, he noted that some of the damages were less obvious in 2017 than at the time of the pre-mining observations. We found Mr. Massini's testimony credible.

Mr. Jeremy Rafferty inspected the Rush Property in October 2015 on behalf of the owner of Cumberland Mine, Contura Energy. Mr. Rafferty stated that he had been employed as a land agent for 12 years and that he had worked with about 200 to 250 homeowners/structures on subsidence claims during that time. He testified that the company does not restrict his ability to address subsidence damage when he concludes that the mine is responsible for those damages. During the October 2015 inspection, Mr. Rush showed Mr. Rafferty the damages that he alleged were the result of mining subsidence. Mr. Rafferty testified that the foundation of the house, as well as the ground around the house, did not appear to be damaged. Based on his observations of the Rush Property, Mr. Raffety concluded that the alleged damages were not the result of mine subsidence.

The testimony regarding the damages claimed by the Rushes is not conclusive regarding the cause of the damages and whether the damages are the result of alleged subsidence resulting from Cumberland's activities at the Cumberland Mine. The experts generally agreed that foundation damage would be evident in most cases involving subsidence. In this case, however, there was no evidence of the type of foundation damage to the Rush Property that one would expect if there had been subsidence impacts related to the Cumberland Mine. The level survey completed by the Department, and testified to by Mr. Massini, showed the house to be generally level with no discernable trend of displacement. This testimony was not contradicted and it supports the Department's conclusion that the damages claimed by the Rushes were not the

result of mining and subsidence. Even the Rushes' expert, Dr. Marino, could not identify specific damages claimed by the Rushes that he could attribute to subsidence associated with the Cumberland Mine. The most he appeared willing to say in his testimony was that some of the damages were of a type that one might expect from subsidence but he conceded that other things could also cause these types of damages.

We received very little direct testimony comparing the pre-policy survey of the Rush Property completed in 1998 and the pre-mining inspection of the Rush Property completed in 2001 to the damages claimed by the Rushes in 2015. The testimony was rather conclusory and consisted largely of Mr. Rush and Dr. Marino stating that there were differences and Mr. Massini stating that he did not observe any meaningful changes to the Rush Property. The ability to make a meaningful comparison was further complicated by the fact that the Rushes made changes and additions to the Rush Property in the time period between 2001 and the date of their damage claim in 2015. Further, we did not receive a satisfactory explanation for the time gap between the mining activity and the filing of the damage claim. Even if we accept for the sake of argument that the damages claimed by Mr. Rush occurred after the 2001 pre-mining inspection, it is not clear that they were caused by subsidence related to the Cumberland Mine. Witnesses for all sides in this case acknowledged that the damages could have been the result of causes other than subsidence. There was insufficient evidence of any damage to the foundation that one would expect if there had been subsidence at the Rush Property. Overall, we do not think the evidence concerning the damages is sufficient to overcome the lack of evidence of actual subsidence at the Rush Property.

The Rushes bear the burden of proof to show by a preponderance of evidence that the Department erred in finding that Cumberland's mining activity was not the cause of the alleged

damages at the Rush Property. We find that they have not done so in this case. The expert testimony and other evidence concerning subsidence at the Rush Property leads us to conclude that the Rushes have not provided sufficient evidence to convince us that there has been subsidence there as a result of Cumberland's mining activity. The alleged damages are inconclusive at best and because we find there is no reliable evidence of subsidence, the Department's decision to deny the Rushes' claim that their damages were the result of subsidence was not an error. Therefore, we conclude that the Rushes Appeal should be denied and we issue the following Order.

CONCLUSIONS OF LAW

1. The Rushes bear the burden of proof in this appeal. 25 Pa. Code § 1021.122(a).

2. In order to meet their burden of proof, the Rushes must show by preponderance of the evidence that the Department erred when it determined that mining was not the cause of the structural damage at the Rush Property alleged in their claim.

3. The preponderance of the evidence standard requires that the evidence in favor of the proposition is greater than the evidence opposed to it and that the evidence is sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established. *United Refining Company v. DEP*, 2016 EHB 442, 449.

4. The Rushes failed to show by a preponderance of the evidence that the Department erred when it determined that mining was not the cause of the structural damage at the Rush Property alleged in their claim.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONNA RUSH AND TERRY RUSH	:	
	:	
v.	:	**EHB Docket No. 2015-194-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CUMBERLAND COAL RESOURCES, LP	:	

O R D E R

AND NOW, this 14th day of June, 2018, it is hereby ordered the Rushes' 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: June 14, 2018

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

For the Commonwealth of PA, DEP:
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Patrick C. Auth, Esquire
(via electronic filing system)

For Permittee:
Kevin K. Douglass, Esquire
Joseph Kurt Reinhart, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MELVIN FOUST	:	
	:	
v.	:	**EHB Docket No. 2017-047-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and ELK RESOURCES, INC., Permittee	:	**Issued: June 15, 2018**

OPINION AND ORDER
DISMISSING APPEAL

By Michelle A. Coleman, Judge

Synopsis

The Board dismisses an appeal where an appellant has not filed his pre-hearing memorandum, has not responded to orders of the Board, and has not responded to earlier motions from the Department. The appellant has not shown any interest in prosecuting his appeal.

O P I N I O N

Melvin Foust has appealed a letter sent to him by the Department of Environmental Protection (the "Department") dated May 11, 2017. The letter consists of one substantive paragraph followed by three paragraphs advising Mr. Foust of his appeal rights before the Board. The substantive paragraph provides:

> This is to notify you that Elk Resources, Inc.'s request for a Stage I Bond Release was approved on the above-referenced site. We received a letter from you dated March 3, which requested that your property boundary marker be repaired to original condition. The Department does not have authority under its surface mining program over this issue. The property markers are a civil matter between the landowner and the operator. We have notified the operator of your request.

The surface mine at issue is Elk Resources' Solomon Run No. 2 Mine in Richland Township, Cambria County. Mr. Foust claims in his appeal that his permanent property markers were displaced by this mining operation.

On September 25, 2017, the Department filed a motion to compel answers to its interrogatories and requests for production of documents sent to Mr. Foust on July 18, 2017, which the Department asserted had gone ignored. With its motion to compel, the Department attached a follow-up letter it sent to Mr. Foust in August that the Department represented had also been met with no response. Mr. Foust did not file a response to the motion to compel, and we granted the unopposed motion on October 23, giving Mr. Foust until November 10 to serve his answers on the Department.

Mr. Foust did not comply with our Order compelling him to respond to the Department's discovery requests, and on December 14, 2017 the Department filed a motion for sanctions, seeking a sanction dismissing Mr. Foust's appeal, or in the alternative, precluding Mr. Foust from introducing any evidence or calling any witnesses at the hearing on the merits. Mr. Foust did not respond to the motion. We issued an Opinion and Order granting in part the Department's motion for sanctions. *Foust v. DEP*, EHB Docket No. 2017-047-C (Opinion and Order, Jan. 11, 2018). We declined at that time to dismiss Mr. Foust's appeal as a sanction and reserved ruling on the imposition of more specific sanctions until the Department provided full documentation of the unanswered discovery requests it served on Mr. Foust. Nevertheless, to the extent there was any ambiguity in the burden of proceeding in the appeal, we affirmatively placed it on Mr. Foust.

We then issued our Pre-Hearing Order No. 2, scheduling the hearing to begin on July 12, 2018. Mr. Foust's pre-hearing memorandum was due on May 29, 2018. When Mr. Foust did

not file his pre-hearing memorandum, we issued a Rule to Show Cause giving Mr. Foust until June 11, 2018 to file his memorandum or explain why he had not filed it. We advised in our Rule to Show Cause that a failure to file a pre-hearing memorandum could result in the dismissal of his appeal. To date, Mr. Foust has not filed his pre-hearing memorandum or otherwise responded to the Rule to Show Cause.

Our rules of practice and procedure authorize us to impose sanctions upon parties for failing to abide by Board orders and/or the Board's rules. 25 Pa. Code § 1021.161. Included within these sanctions is the dismissal of an appeal. We have consistently held that dismissal is appropriate where a party has shown a disinterest in proceeding with an appeal evinced by a failure to submit filings or respond to Board orders. *Slater v. DEP*, 2016 EHB 380, 381; *Mann Realty Associates, Inc. v. DEP*, 2015 EHB 110, 113; *Casey v. DEP*, 2014 EHB 908, 910-911; *Nitzschke v. DEP*, 2013 EHB 861, 862; *Recreation Realty, Inc. v. DEP*, 1999 EHB 697, 698.

We see no reason to proceed any differently here. Mr. Foust has repeatedly failed to respond to filings in this matter and he has failed to comply with multiple orders of the Board. He has shown no interest in continuing with his appeal despite several opportunities to do so. Therefore, dismissal of the appeal is appropriate.

We issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MELVIN FOUST	:	
	:	
v.	:	**EHB Docket No. 2017-047-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and ELK RESOURCES, INC., Permittee	:	

O R D E R

AND NOW, this 15th day of June, 2018, in consideration of the Appellant's failure to comply with the Board's rules and orders, and his apparent disinterest in proceeding with his appeal, it is hereby ordered that this appeal is **dismissed** as a sanction. The hearing previously scheduled to begin on July 12, 2018 is cancelled.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 15, 2018

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

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Stevan Kip Portman, Esquire
(*via electronic filing system*)

For Appellant, *Pro Se*:
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For Elk Resources, Inc.:
30 Pounds Road
West Lebanon, PA 15783

Court Reporter:
Commonwealth Reporting Company, Inc.
(*via electronic mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHITEHALL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2015-109-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COPLAY AGGREGATES, INC., Permittee	:	**Issued: June 21, 2018**

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

By Richard P. Mather, Sr., Judge

Synopsis

The Appellant challenges the Department's approval of the permittee's application for coverage to operate under General Permit No. WMGR096. The General Permit authorizes the use of regulated fill as a construction material, and the approval allowed the permittee to use regulated fill as a construction material as part of the plans to develop a particular portion of its site. The Board dismisses the appeal because the appellant failed to satisfy its burden to establish that the approval was unlawful or unreasonable and not supported by the facts.

Parties

1. The Department of Environmental Protection ("Department") is the agency with the duty and authority to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003 ("SWMA"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"); the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. §§ 4000.101, *et seq.* ("Act 101"), The Land Recycling and Environmental Remediation Standards Act, Act of May 19, 1995, P.L. 4, 35 P.S. §§ 6026.101-6026.908 ("Act 2"); the Pennsylvania Oil

Reduction Act, 58 P.S. §§ 471-480; 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.

2. Permittee, Coplay Aggregates, Inc. ("Permittee or Coplay") is a Pennsylvania corporation that is in the process of reclaiming an abandoned, pre-NonCoal Surface Mining Conservation and Reclamation Act, (52 P.S. § 3301 *et. seq*.) limestone quarry located in Whitehall Township, Lehigh County ("Abandoned Quarry" or "Site"). (Joint Stipulation ¶29.)

3. Whitehall Township ("Township") is a Township of the first class located in Lehigh County, Pennsylvania.

4. General Permit WMGR096 ("GP 096") is a Department initiated general permit which authorizes the beneficial use of regulated fill as a construction material when moved offsite or received onsite. (DEP-1; Notes of Transcript ("N.T.") 119, 124.)

5. 25 Pa. Code § 287.1 defines construction material as:

> The engineered use of residual waste as a substitute for a raw material or a commercial product in a construction activity, if the waste has the same engineering characteristics as the raw material or commercial product for which it is substituting. The term includes the use of residual waste as a road bed material, for pipe bedding, and in similar operations. The term does not include valley fills, the use of residual waste to fill open pits from coal or other fills, or the use of residual waste solely to level an area or bring the area to grade where a construction activity is not completed promptly after the placement of the solid waste.

6. GP 096 defines "regulated fill" as soil, rock, stone, dredged material, used asphalt, historic fill, and brick, block or concrete from construction and demolition activities. (DEP-1, Condition No. 2.)

7. Under GP 096, regulated fill may only be moved to a property that is approved for construction and that is zoned and used exclusively for commercial and industrial uses or that is

unzoned but is exclusively used for commercial and industrial uses (excluding parks, playgrounds, nursing homes, child care facilities, schools or other residential-style facilities or recreation areas). (DEP-1, Condition No. 1.)

8. GP 096 sets maximum levels for a list of metals and other constituents, establishes sampling, testing, reporting, and record-keeping protocols, establishes application requirements, and sets forth numerous other terms and conditions regarding the beneficial use of regulated fill. (DEP-1; N.T. 121-123.)

9. The concentration limits set forth in GP 096 are based upon the Department's Act 2 State-wide Health Standards for non-residential use. (N.T. 122-123.)

10. Notice of the issuance of GP 096 on a state-wide basis was published in the *Pennsylvania Bulletin* on Saturday, April 24, 2004. (34 Pa.B. 2155 (April 24, 2004).)

11. GP 096 was most recently renewed by the Department on December 23, 2013. (DEP-1.)

12. Notice of the Department's renewal of GP 096 was published in the *Pennsylvania Bulletin* on January 11, 2014. (DEP-2; 44 Pa.B. 256 (January 11, 2014).)

13. On April 24, 2004, the Department adopted the Technical Guidance Document No. 258-2182-773, amended on August 7, 2010, entitled "Management of Fill." (40 Pa.B. 4457 (August 7, 2010); DEP-3.)

14. The Management of Fill Policy sets forth the constituent limits fill is required to meet in order to qualify as either clean or regulated fill. (DEP-3.)

15. Appendix A of the Department's Management of Fill Policy requires that testing be in accordance with the most current version of the EPA, RCRA Manual, SW-846 (Test Methods for Evaluating Solid Waste, Physical/Chemical Methods). (40 Pa.B. 4457 (August 7,

2010); DEP-3; N.T. 122-123.)

16. GP 096 is based upon the Management of Fill Policy. (DEP-1-4.)

17. The Department's Management of Fill Question and Answer document states: "… Regulated fill may be used for any purposes that are connected with a construction project. It may be used for property improvements such as to construct berms or embankments, for landscaping, or for building foundations or sub-bases for roads and parking facilities." (Joint Stipulation ¶10.)

18. Condition 25 of GP 096 establishes that "All activities conducted under the authorization granted in this permit shall be conducted in accordance with the permittee's application. Except to the extent that the permit states otherwise, the permittee shall use the regulated fill as described in the approved application. (DEP-1, Condition No. 25.)

19. The Abandoned Quarry is located adjacent to Coplay's active non-coal surface mining site; however, it is not permitted as part of that operation's surface mining permit. (Joint Stipulation ¶30.)

20. The area approved for placement of regulated fill within the Abandoned Quarry includes a portion of the property in which the two lot subdivision is located but is not limited to the two lot subdivision. (Coplay-12, 18; N.T. 239, 291-292, 313.)

21. The 9.6 acre area approved for placement of regulated fill has been previously reclaimed. (Coplay-11; N.T. 134-136, 267-268.)

22. The Abandoned Quarry is located in the OS2 (open space/limited industrial) zoning district in Whitehall Township. (N.T. 125.)

23. The Site is in an area zoned and used exclusively for commercial and industrial uses. (N.T. 125.)

24. On March 17, 2014, the Department received Coplay's determination of applicability application for coverage under GP 096 for the use of regulated fill as a construction material. (Joint Stipulation ¶34.)

25. The portion of the Site approved for regulated fill placement includes, but is not limited to, a two lot subdivision. (Coplay-12, 18; N.T. 239, 291-292, 313.)

26. Coplay's Application indicates that all material testing will be performed in conformance with the sampling and analysis requirements of Appendix A of the Department's Management of Fill Policy, GP 096 and the Sampling and Analysis plan submitted in its Application. (Coplay-1.)

27. Condition 8 of GP 096 states: "Notice to municipalities. A person that applies for coverage under this general permit shall submit a copy of the determination of applicability application to each municipality in which the beneficial use activities will be located a minimum of 60 days prior to initiating operations." (DEP-1, Condition No. 8.)

28. A copy of Coplay's application was submitted to Whitehall on March 26, 2014, and signed for by Whitehall Mayor Edward D. Hozza, Jr. ("Mayor Hozza"). (DEP-11; T. 258-259.)

29. On April 26, 2014, the Department published notice of its receipt of Coplay's Application in the Pennsylvania Bulletin and opened a sixty (60) day public comment period for interested persons to provide comments on the Application. (Joint Stipulation ¶35.)

30. Whitehall provided written comments on Coplay's Application to the Department on June 2, 2014 and September 12, 2014. (DEP-12-13; N.T. 264-265.)

31. In November 2014, representatives of Whitehall, Coplay and the Department participated in a meeting at the Department's Northeast Regional Office in Wilkes-Barre,

Pennsylvania to discuss the Application. (TWP-7; DEP Response to Interrogatories No. 3; N.T. 268-269.)

32. The Application was reviewed by personnel in the Department's Northeast Regional Office. (TWP-7, DEP Response to Interrogatories No. 5-7, 22; N.T. 139.)

33. As part of its review of Coplay's Application, the Department issued two technical deficiency letters to Coplay. (Coplay-3, 8; N.T. 259-261, 266-268, 306-307.)

34. Coplay responded to and addressed the Department's Technical Deficiency letters on August 8 and December 19, 2014. (Coplay-6, 9.)

35. Coplay's responses to the Department's Technical Deficiency Letters included responses to comments provided by Whitehall Township. (Coplay-5-7, 9, 11; N.T. 259-272.)

36. The Department's review of the Application was not limited to that portion of the Department's Coplay file containing the Application. (N.T. 139, 196.)

37. The Department considered all available, relevant information prior to approving Coplay's Application, including the comments provided by Whitehall on June 2, 2014, as well as those submitted by Whitehall after the public comment period had expired. The Department received and considered comments from the Township submitted on September 12, 2014 and during the meeting held in November, 2014. (N.T. 139.)

38. Coplay responded to each of the technical deficiency letters. (Coplay-6, 9.)

39. The Site is zoned and used exclusively for commercial and industrial uses. The Department's Form 20RF Attachment 6, Section C.3 states: "Is the receiving site approved for construction? If answer is yes, submit a certified copy of the approved plan or construction permit issued by the applicable state, county or municipal authority that has jurisdiction for the property." (Joint Stipulation ¶5.)

40. On February 3, 2014, the Department, through its authority delegated to the Lehigh County Conservation District, issued to Coplay NPDES Permit No. PAG02003912017 for the discharge of stormwater associated with construction activities. This NPDES Permit covers 35.7 acres which includes the Abandoned Quarry and the 9.6 acre portion of the Site approved for placement of regulated fill. (Coplay-14; DEP-8; N.T. 125, 255–257, 309, 313.)

41. On April 26, 2015, the Lehigh County Conservation District approved a Minor Modification to NPDES Permit No. PAG02003912017 to account for the use of regulated fill at the Site. (Coplay-14; DEP-9; N.T. 255-257.)

42. Whitehall did not appeal the Department's issuance or modification of NPDES Permit No. PAG02003912017. (N.T. 259.)

43. NPDES Permit No. PAG02003912017, including the subsequent modification, was obtained for the purposes of stormwater management associated with the construction of roadways, parking lots and all utility installations that would be required as part of land development. (Coplay-14; N.T. 255–257.)

44. Whitehall granted subdivision approval [for the two lots located within the area approved for the placement of regulated fill] to Coplay on May 15, 2013. (Joint Stipulation ¶1.)

45. On January 7, 2013, the Whitehall Township Zoning Hearing Board granted approvals for two variances associated with the development of the two lot subdivision. (DEP-6; Coplay-6, Attachment 1.e. Land Use/Zoning.)

46. The Department reviewed and considered the Township of Whitehall Zoning Hearing Board's Opinion dated January 7, 2013, which granted two variances to Coplay as part of its review of the Application. (DEP-6; N.T. 125, 146.)

47. The Department reviewed and considered the December 18, 2012 Notes of

Testimony which were incorporated into the January 7, 2013 Township of Whitehall Zoning Hearing Board Opinion as part of its review of the Application. (N.T. 146.)

48. The December 18, 2012 Notes of Testimony were incorporated into the Zoning Hearing Board's January 7, 2013 Opinion as findings of fact. (DEP-6; Coplay-6, Attachment 1.e. Land Use/Zoning.)

49. Coplay's Application indicates that it will take up to 10 years to reach final grade. (Joint Stipulation ¶12.)

50. The Department has previously granted approval to applicants requesting coverage under GP 096 where the placement of regulated fill will exceed one year in duration. (DEP-18-19, 21-22; N.T. 129-134, 152.)

51. The Department has been granting coverage under GP 096 for projects exceeding one year in duration since the permit was first issued back in 2006. (N.T. 126-127, 129, 143-144.)

52. Coplay intends to re-develop the Abandoned Quarry into a mix of commercial and/or industrial uses. (N.T. 225.)

53. Upon completion of the construction activities listed above, Coplay intends to build a flex commercial building and a self-storage facility on the two lots. Both uses are permitted in the OS2 zoning district. (Coplay-1; N.T. 232-233.)

54. As grades are reached, the construction of infrastructure, roadways and buildings will commence. (Coplay-1; N.T. 229-230.)

55. Coplay has represented that the entire construction project will be complete within a year of final placement of regulated fill to meet grades. (Coplay-1, Form 20 RF, Attachment 6.)

56. Coplay's compliance with State and Federal environmental statutes, rules and regulations of the Department, Orders, conditions of permits and other approvals were all considered as part of the Department's Application review process. (N.T. 138, 141-142.)

57. Each of the violations identified in the Coplay's Application were resolved. (N.T. 138.)

58. The Department's process for reviewing an applicant's compliance history is not limited to just "no open violations." The Department considered the applicant's entire compliance record before making a determination. (N.T. 142.)

59. On September 13, 2005, the Department entered into a Consent Order and Agreement ("CO&A") with Coplay to resolve violations associated with the placement of residual waste and soil contaminated with mercury and lead in the Abandoned Quarry. (DEP-25; N.T. 165.)

60. The September 13, 2005 CO&A required Coplay to address the contaminated soil and residual waste brought to the Site in accordance with a Department approved plan and to take measures to ensure that fill brought to the Site to reclaim the Abandoned Quarry in the future met clean fill standards as established in the Department's Management of Fill Policy, Document No. 258-2182-773. (DEP-25; N.T. 165-166.)

61. The September 13, 2005 CO&A was extended on October 12, 2010, and January 19, 2016. (DEP-26-27; N.T. 166-167.)

62. Pursuant to the CO&A, the regulated fill placement area, including the two lot subdivision portion of the Abandoned Quarry, has been reclaimed with clean fill. (Coplay-11; N.T. 267-268.)

63. Coplay has not violated the September 13, 2005 CO&A or the subsequent

amendments. (N.T. 166.)

64. The Sampling and Analysis requirements in Appendix A of the Department's Management of Fill Policy (Guidance Document 258-2182-773) states:

> In lieu of subsection (c), a person may use 95% Upper Confidence Limit (UCL) of the arithmetic mean to determine whether a fill material meets the appropriate concentration limits for use as clean or regulated fill. The calculated 95% UCL of the arithmetic mean must be below the appropriate concentration limit for clean or regulated fill.

(Joint Stipulation ¶16.)

65. Material containing arsenic brought to the Abandoned Quarry from a facility identified as "Port Imperial" was determined to be clean fill utilizing the 95% Upper Confidence Limit analysis allowed under the Department's Management of Fill Policy. (N.T. 137-138.)

66. On July 15, 2011, the Department issued an approval letter to the Permittee authorizing the use of glass aggregate as a construction material and filtration barrier around the sump area on the Abandoned Quarry. (Joint Stipulation ¶18.)

67. The Department's approval letter dated July 15, 2011, required the glass aggregate to pass three quarter (3/4) inch screening. Further, the glass aggregate was required to be free of foreign material and other solid wastes and was also required to meet specifications outlined by Pennsylvania Department of Transportation ("PADOT") Form 408. (Joint Stipulation ¶19.)

68. On July 25, 2011, the Department's glass aggregate approval was further clarified by email to note that the material could not contain more than 5% weight by volume of foreign material. (Coplay-37; N.T. 285.)

69. Despite using the approved specifications, certain unwanted non-glass items were making it through the three quarter (3/4) inch screening process. (Joint Stipulation ¶39.)

70. On January 28, 2015, the Department modified Coplay's glass aggregate approval to clarify that PADOT specifications be used to screen future recycled glass prior to its placement at the site. All current recycled glass must pass through a three eighth (3/8) inch screening rather than three quarter (3/4) inch screening. (Joint Stipulation ¶20.)

71. During a Department October 6, 2014 inspection, the Department observed glass aggregate containing waste material in excess of the permitted limit present on the Site. (DEP-28; N.T. 169-174.)

72. On November 6, 2014, the Department requested that Coplay address the non-glass material observed at the Abandoned Quarry during the Department's October 6, 2014 inspection. (DEP-28; N.T. 169-173.)

73. The non-glass material contained in the glass aggregate placed at the Abandoned Quarry was municipal waste. (N.T. 169-173.)

74. The non-glass material did not include regulated medical waste as alleged by Appellant. (N.T. 169-173.)

75. Coplay properly removed and disposed of the non-glass material. (N.T. 188.)

76. On March 17, 2015, the Department confirmed that the non-glass material that had contaminated some of the glass aggregate was properly removed. (DEP-32; N.T. 169-173.)

77. Glass aggregate has not and is currently not being utilized as "fill", clean or otherwise, at the Site. (N.T. 154-155, 189-190.)

78. On September 1, 2010, August 17, 2011, June 18, 2013, August 21, 2013, and June 3, 2015, Whitehall Mayor, Edward Hozza, provided the Department with complaints of odors originating from the Site. (Joint Stipulation ¶21.)

79. On September 7, 2010, in response to Mayor Hozza's September 1, 2010

complaint, the Department provided a copy of the Department's September 1, 2010 inspection report to Mayor Hozza. The inspection report indicated that no odors were found. (DEP-34; N.T. 181-182.)

80. Additionally, on September 2, 2010, the Department submitted an email to Mayor Hozza requesting that future complaints be submitted to the Department directly. (Joint Stipulation ¶22.)

81. The Department's basis for requesting that complaints be submitted by the complainant through the Department's Complaint Line was to ensure that the Department was able to conduct an adequate and timely response to the odor complaints. (DEP-34; N.T. 181-182.)

82. On August 17, 2011, the Department conducted an inspection pursuant to an odor complaint. The Department found no odors present. Mayor Hozza was provided with a copy of the August 30, 2011 inspection report associated with the Department's investigation. (Joint Stipulation ¶23.)

83. On June 25, 2013, in response to odor complaints from Mayor Hozza received on or about June 18, 2013, and a memorandum dated June 10, 2013, by Mayor Hozza, the Department informed Mayor Hozza no odors were found. Additionally, the Department reiterated its request that future complaints be submitted to the Department directly. (Joint Stipulation ¶24.)

84. On August 21, 2013, the Department conducted an investigation pursuant to an odor complaint provided to the Department through Mayor Hozza. The Department found no odors related to quarry operations. (Joint Stipulation ¶25.)

85. On April 11, 22, 25 and 29, 2014, the Department conducted inspections pursuant

to complaints of odors originating from the Abandoned Quarry. (Joint Stipulation ¶26.)

86. The Department's inspections on April 11, 22, 25 and 29, 2014, did not confirm the presence of odors coming from the Abandoned Quarry. (Joint Stipulation ¶27.)

87. On May 2, 2014, the Department submitted a letter to Mayor Hozza informing him of the results of the inspections of April 11, 22, 25 and 29, 2014, and reiterating the Department's request that complaints be submitted directly to the Department by the resident. The Department further recommended that future complaints also be placed with the Permittee. (Joint Stipulation ¶28.)

88. On June 3, 2015, the Department conducted an investigation pursuant to an odor complaint provided to the Department through Mayor Hozza. The Department's June 11, 2015 inspection did not confirm the presence of odors. (DEP-39.)

89. On June 11, 2015, and June 17, 2015, the Department contacted Mayor Hozza to inform him of the Department's findings from the June 11, 2015 inspection. (DEP-39.)

90. The Department explained several times to Mayor Hozza that in order for the Department to adequately investigate odor complaints, calls needed to be from the complainant and made to the Department's complaint line. It was explained that in order to do an adequate investigation, it was important that messages not be left with Department personnel as they would not get the message in a timely manner. (N.T. 181-182.)

91. The Department advised Mayor Hozza of the importance of having odor complaints submitted by members of the public experiencing the odors. (N.T. 182-185.)

92. Whitehall was not prohibited from contacting the Department. (N.T. 186, 190.)

93. On July 2, 2015, the Department granted and issued its Approval. (Joint Stipulation ¶6.)

94. The Department assigned Permit No. WMGR096-NE005 ("NE005") to the approval granted to Coplay. (DEP-16.)

95. Notice of the issuance of WMGR096-NE005 was published in the Pennsylvania Bulletin on August 22, 2015. (45 Pa.B. 4934 (August 22, 2015).)

96. Coplay is required to comply with the terms and conditions of GP 096 and with the representations contained within their Application. (DEP-1, 15-16, Condition Nos. 24-25.)

97. Coplay has been depositing regulated fill material for use as a construction material on the two subdivided lots since the Department issued the approval to operate under GP096-NE005. (Joint Stipulation ¶37.)

98. Condition 9 of GP 096 and WMGR096-NE005 requires that prior to the beneficial use of regulated fill at the Site, Coplay shall perform chemical analysis on representative samples of regulated fill for appropriate parameters in accordance with the protocol (Sampling and Analysis requirements) in Appendix A of the Department's Management of Fill Policy (Guidance Document 258-2182-773). (DEP-1, 15, Condition No. 9; DEP-3, Sampling and Analysis.)

99. Condition 28 of GP 096 and WMGR096-NE005 requires Coplay to notify the Department in writing of new regulated fill sources by submitting information in accordance with subparts (b) and (d) of Condition 26. Coplay may only commence with beneficial use of the new source after 10 working days from the date the information is submitted to the Department, unless otherwise instructed by the Department. (DEP-1, 15, Condition No. 28.)

100. Condition 10 of GP 096 and WMGR096-NE005 states:

> *Deed Acknowledgment for beneficial use of regulated fill.* The permittee shall provide to the Department proof of a recorded deed notice that includes the exact location of the fill placed on the property, including longitude and latitude descriptions, and a description of the types of fill identified by sampling and

> analysis. The location and description shall be made a part of the deed for all future conveyances or transfers of the subject property. This deed notice may be provided as an ongoing part of the project or at the end of the completed project.

(DEP-1, 15, Condition No. 10.)

101. Condition 20 of GP 096 and WMGR096-NE005 requires:

> *Recordkeeping.* Records of analytical evaluations conducted on the regulated fill under this permit, daily records of the weight or volume of the regulated fill received, the placement locations, and the approved construction plans shall be kept onsite by the permittee and at the permittee's place of business. This information shall be available to the Department for inspection and submitted to the Department upon request. This waste analysis information shall be retained by the permittee for a minimum of 5 years.

(DEP-1, 15, Condition No. 20.)

102. Coplay is required to maintain records of all fill material located on Site. (DEP-15; N.T. 123, 156-157, 158-160, 232-233, 246, 247, 310.)

103. The Department has requested that Coplay provide documentation of regulated fill placement on several occasions. (N.T. 158-160, 310.)

104. Condition 3 of GP 096 states: "Concentration limits. Regulated fill may not exceed the values in Table GP-1." (DEP-1, 15, Condition No. 3 and attached table GP-1.)

105. The Department has the authority to inspect the Abandoned Quarry. (DEP-1, 15, Condition No. 22; N.T. 121-122.)

106. The regulated fill material ceases to be a waste if it is used consistent with the terms and conditions of GP 096 and WMGR096-NE005. (DEP-1, 15, Condition No. 31.)

107. Under GP096-NE005, wastes placed at the Site are no longer waste. (DEP-15, Condition No. 31.) *See also* 25 Pa. Code § 287.7(a) (mandatory delisting).

108. Whitehall did not present any credible evidence of the Department's alleged financial inability to oversee operations under WMGR096-NE005. The Department is not

limited in its oversight and regulation of the Abandoned Quarry due to budgetary constraints. (N.T. 88-89, 316-321.)

109. There is no evidence that alleged Department bias toward Whitehall influenced the Department's decision to grant coverage under GP 096 to Coplay. The Department does not hold any biases against Appellant. (N.T. 140, 186.)

110. Whitehall conducted a review of the Department's file containing the Application on July 31, 2015. (N.T. 58, 67.)

111. Other than the General Permit 096 Application file, Whitehall did not request to review any other files related to Coplay or its operations at the Abandoned Quarry. (N.T. 64.)

112. The Department produced the file requested for review by Whitehall on July 31, 2015. (N.T. 58, 67.)

113. Condition 21 of GP 096 and WMGR096-NE005 states:

> Relationship to local law. Nothing in this permit shall be construed to supersede, amend, or authorize a violation of any of the provisions of any valid and applicable local law, ordinance, or regulation, providing that said local law, ordinance, or regulation is not preempted by the Solid Waste Management Act, 35 PS § 6018.101 *et seq*.; and the Municipal Waste Planning, Recycling and Waste Reduction Act of 1988, 53 P.S. § 4000.101 *et seq*.

(DEP-1, Condition No. 21.)

114. The property on which the Abandoned Quarry and active mine site is located originally consisted of about one hundred fifty (150) acres bounded by MacArthur Road, Chestnut Street, West Coplay Street and Beekmantown Road ("Property"). (Permittee Exhibit 18; N.T. 210-211.)

115. The Property was a mining site dating back to the late 1800s when it was owned and operated by Coplay Cement. Coplay Cement was the first company in the United States to get patents to make Portland cement which, prior to that time, was made only in Europe. There

was a point in time where the Property supplied the raw material for ninety percent (90%) of the Portland cement for the whole United States. (N.T. 215.)

116. The Property was purchased in 1989 from Coplay Cement by Joseph Ciccone and Sons, a family owned partnership involved in construction business. Mr. Kolbe's and Mr. Ciccone's family were involved the partnership. (N.T. 210-214.)

117. In the early 1990s, Mr. Ciccone and Mr. Kolbe subsequently entered into a lease with an option to buy the Property from Joseph Ciccone and Sons and purchased it from them in the mid-1990s. (N.T. 214, 215.)

118. The Property, which is currently comprised of approximately 91.25 acres, is currently owned by Coplay Quarry, LLC, a company also owned by Mr. Kolbe and Mr. Ciccone. (Permittee Exhibit 1, Form E-GP, Contractual Consent of Landowner for a General Permit, Form 20RF Attachment 1.)

119. For approximately twenty-two (22) years, Coplay has been in the process of reclaiming the Abandoned Quarry with clean fill imported to the site per approvals from the Department. This was initially done pursuant to a 1995 letter approval and then beginning in 2005, pursuant to a Consent Order and Agreement ("COA") with the Department that has been revised several times. (Permittee 19, 20, 21, 22; DEP-25; N.T. 165-166.)

120. Coplay intends to re-develop approximately 37.5 acres of the Property, which includes the Abandoned Quarry, into a commercial/industrial park. (Permittee Exhibit 56; Permittee Exhibit 1, Form 20RF Attachment 1; N.T. 212, 221-223.)

121. Coplay has already redeveloped and sold off several lots that were originally part of the Property. One lot was developed into an office building, one into a Caterpillar dealership and one into an over 50 residential community and Sheetz gas station. (Exhibit 18; N.T. 211.)

122. Coplay has completed reclamation, via the placement of clean fill, of a portion of the Abandoned Quarry. (Permittee Exhibit 1, Form 20RF Attachment 1; Permittee Exhibit 11; N.T. 225, 226, 267, 268, 271, 272.)

123. A 10.9 acre portion of the Property, a part of which previously had been included in Coplay's active surface mining permit and part of which had been part of the Abandoned Quarry, has been subdivided from the remaining portion of the Property into two separate lots. The Property now consisted of three lots. (Form 20RF Attachment 1; Permittee Exhibit 17 and 18; N.T. 36, 44, 211.)

124. Coplay has obtained the 10.9 acre subdivision/land development approval from the Township dated May 15, 2013, for the construction of two lots and associated roads and necessary infrastructure. (Form 20 RF Attachment 1; Permittee Exhibit 17 and 18; N.T. 36, 44, 211.)

125. The subdivision/land development approval does not address the placement of construction material or fill, either clean or regulated. (Form 20RF Attachment 1; Permittee Exhibit 17 and 18; N.T. 36, 44, 211.)

126. There is no condition contained in the subdivision/land development approval requiring the submission of a construction plan. (Permittee Exhibit 17; N.T. p. 36.)

127. Per the Township Zoning Ordinance ("Zoning Ordinance"), the Abandoned Quarry and Property is located in the OS2 (open space/limited industrial) zoning district. (Permittee Exhibit 23; N.T. 53, 1-13.)

128. Coplay has also previously obtained zoning approval for a variance for the development of the two subdivided lots, totaling 6.87 acres, from the Township Zoning Hearing Board ("ZHB") dated January 7, 2013. Coplay presented the plans to the Township zoning

officer who determined that two variances would be required. The variance approvals required per the Township zoning officer related to road frontage and slope requirements. The zoning officer never questioned the use of fill and the Zoning Ordinance does not regulate construction materials. The variance approval does not contain any conditions addressing the placement of construction material or fill, either clean or regulated. (Permittee Exhibit 15; N.T. 47-51; 275, l. 20-23.)

129. No zoning changes were sought for the residual lot. No zoning approval is required to obtain subdivision/land development approval or for the placement of fill material. (Permittee Exhibit 15, 23.)

130. The January 7, 2013 ZHB variance approval incorporated the notes of testimony from the December 18, 2012 variance hearing as findings of fact not as a condition of approval. (Permittee Exhibit 15, 17; N.T. 51.)

131. In responding to questions at the variance hearing from a member of the ZHB concerning matters unrelated to the approvals at issue such as the type and origin of fill material, Brian Hilliard, Director of Compliance for Coplay, testified to Coplay's use of only clean fill material to perform the reclamation activities being conducted at the time of the hearing and that had been historically conducted at the Abandoned Quarry. (Permittee Exhibit 16; N.T. 251, 275-278.)

132. In responding to these questions, Mr. Hilliard did not mention the potential future use of regulated fill as a construction material. This was not done as Coplay was not intending to use regulated fill at the time of the hearing and Coplay believed at the time it would not have been allowed to use regulated fill under the General Permit. (N.T. 278-281.)

133. The subdivision/land development approval and variance approval are the only

municipal approvals required for site construction and were obtained by Coplay with respect to the subdivided lots and associated infrastructure. (Joint Stipulation ¶ 33; Permittee Exhibit 16, 17; N.T. 31-34.)

134. The Township does not have a construction plan approval process separate from the subdivision/land development approval process. (N.T. 32, 33.)

135. The Zoning Ordinance does not require permits for the placement of fill material, either clean or regulated. (Permittee Exhibit 23.)

136. The Zoning Ordinance does not require permits for the construction of a berm. (N.T. 55.)

137. Whitehall has not taken any action against Coplay for violations of its Zoning Ordinance and Coplay has not been found in violation of Whitehall's Zoning Ordinance in the last seventeen (17) years. (N.T. 54.)

138. A person who wishes to obtain coverage under the General Permit must apply for a Determination of Applicability ("DOA"). (25 Pa. Code § 287.642.)

139. On April 26, 2014, the Department published notice of its receipt of Coplay's Application in the Pennsylvania Bulletin and opened a sixty (60) day public comment period for interested persons to provide comments on the Application. (Joint Stipulation ¶ 36.)

140. The NPDES Construction Permit was subsequently amended on April 26, 2015 to account for the placement of regulated fill and its relation to stormwater management. (Joint Stipulation ¶ 34; Permittee Exhibit 14; N.T. 256.)

141. A copy of the NPDES Construction Permit amendment application was submitted to the Township. The Township neither commented on nor appealed the Department's approval of the NPDES Construction Permit Amendment. (N.T. 257.)

142. As part of the NPDES Construction Permit amendment, the infiltration basin that was formerly located in the regulated fill area was relocated outside of the proposed regulated fill area. Regulated fill will not be placed into waters of the Commonwealth. (Permittee Exhibit 12, 14; N.T. 256, 257.)

143. Coplay did not submit its regulated fill Application until nine (9) months after it received subdivision/land development approval and fourteen (14) months after it received zoning approval. (N.T. 281.)

144. In order to demonstrate that the portion of the Property included in the Application was approved for construction under Condition No. 1 of the General Permit, the Application included, among other things, a copy of the NPDES Construction Permit, the zoning approval and a discussion of the subdivision/land development approval. (N.T. 254.)

145. During the permit review process, Coplay responded to two Department technical deficiency letters, two comment letters from the Township and provided the Department with additional information on a number of occasions. (Permittee Exhibits 3-11; N.T. 259-274.)

146. Reclamation grades were achieved on the portion of the Abandoned Quarry to be used for the use of regulated fill. (Permittee Exhibit 6; N.T. 273.)

147. The regulated fill is being used by Coplay as a construction material under 25 Pa. Code § 287.611(g) and the General Permit. (N.T. 125.)

148. Regulated fill can not be used for reclamation. (N.T. 294.)

149. The Township filed a timely appeal from the approval of the NE005 on July 31, 2015. (EHB Docket No. 2015-109-M.)

150. On September 15, 2015, approximately two months after filing its appeal, the Township filed a zoning application with the ZHB requesting the revocation of the above

referenced variance on September 15, 2015. Alternatively, the Township requested in its zoning application that the use of clean fill be imposed as a condition of the variance or the issuance of a favorable interpretation that the variances were granted based upon the use of only clean fill. (Joint Stipulation ¶ 31.)

151. The ZHB rejected the Township's above request based on lack of jurisdiction. (N.T. 51.)

152. The Township did not appeal the December 3, 2015 opinion of the ZHB and the variance decision is final. (Joint Stipulation ¶ 33.)

153. As part of the application process, Coplay submitted a copy of a permit boundary correction from the Department's Bureau of Mining and Reclamation removing the regulated fill permit area from under Coplay's active mining permit. (Permittee Exhibit 11, 18; N.T. 271, 272.)

154. The area that was subject to the mine permit boundary correction was removed from the active mine permit area because it was reclaimed or never mined. (N.T. 292.)

155. The change in the active mine permit boundary had nothing to do with the placement of fill in the residual lot - left after the subdivision of the two lots - because the area within the residual lot was not part of the active mine area. (N.T. 292.)

156. During this review process, the regulated fill permit boundaries were revised from 9.6 acres to 8.58 acres. (Permittee Exhibit 6, 18.)

157. Under the General Permit, regulated fill may only be moved to a property that is approved for construction and that is zoned and used exclusively for commercial and industrial uses or that is unzoned but is exclusively used for commercial and industrial uses (excluding

parks, playgrounds, nursing homes, child care facilities, schools or other residential-style facilities or recreation areas). (Permittee Exhibit 13; 34 Pa. Bull. 2155, 2237 (April 24, 2004).)

158. The following documents were submitted by Coplay and considered by the Department in determining that the property is in "an area approved for construction" as that phrase is contemplated by Condition 1 of the General Permit and the GP005:

- January 7, 2013 ZHB Opinion – approving variance to zoning regarding frontage on public streets and steep slopes in the area of proposed development.
- February 3, 2014 District – approved Erosion & Sedimentation Control and Post-Construction Stormwater Management plans and issuance of NPDES Construction Permit.
- October 29, 2013 Department approved Planning Module for Land Development – related to sewage discharge from Site to Northampton Borough Municipal Authority.
- June 14, 2013 Northampton Borough Municipal Authority – document noting available sewage capacity.
- November 12, 2014 letter response to DEP October 9, 2014 technical deficiency letter from Blake Marles, counsel for Coplay.

(Permittee Exhibit 1; Appellant Exhibit No. 7, Answer to Interrogatory No. 16, 17.)

159. In addition, the Department reviewed and considered the December 18, 2012 Notes of Testimony from the ZHB hearing. (Appellant Exhibit 7, Answer to Interrogatory No. 7.)

160. Whitehall submitted the Notes of Testimony described above to the Department on November 24, 2014. (Joint Stipulation ¶ 11.)

161. The Department has accepted documents such as those described above as sufficient evidence that a property is in "an area approved for construction." (N.T. 126-136.)

162. A building permit is not required in order for an applicant to establish that a

property is in "an area approved for construction" as contemplated by Condition 1 of the General Permit and the Department's Management of Fill Q & A. (Permittee Exhibit 13; Joint Stipulation ¶ 10.)

163. Under the Township subdivision/land development approval, Coplay is authorized to begin construction activities and the Township has taken no action to stop this activity. (N.T. 31-38.)

164. The construction activities being undertaken by Coplay on the two subdivided lots, adjacent roadway and support areas under NE005, the NPDES Construction Permit and the variance and subdivision approvals are:

(a) bringing the area to construction grades.

(b) construction of stormwater management controls.

(c) construction of roadways.

(d) installation of utilities.

(e) general site preparation for building of structures.

(Permittee Exhibit 1, 12, 14, 18; N.T. 223, 255.)

165. As grades are reached, the construction of infrastructure, roadways and buildings will commence. (Permittee Exhibit 1, Form 20RF Attachment 6.)

166. The Department determined that the General Permit or its rules and regulations do not require a one-year time limit on the placement for regulated fill. (N.T. 126.)

167. The Department has consistently interpreted the applicable regulations and the General Permit to allow coverage for regulated fill placement to exceed one year in duration despite the language contained in Form 20RF stating that fill placement cannot exceed one year. (Exhibit 1, Form 20RF; N.T. 143, 144, 152.)

168. The one year time limit contained in Form 20RF has not been applied since the first DOA under the General Permit was approved in 2006. (N.T. 152.)

169. Coplay has been depositing regulated fill material on the Property for use as a construction material under NE005. To date approximately 60,000 tons of regulated fill have been deposited. (Joint Stipulation ¶ 38; N.T. 230, 231.)

170. Although the Application indicates that it will take up to ten (10) years to reach final grades, Mr. Hilliard testified that he estimates it will take five (5) years and the placement of 300,000 tons of material to reach final construction grades. (Joint Stipulation ¶ 12; N.T. 306.)

DISCUSSION

Background

On July 2, 2015, the Department approved the application for coverage of Coplay under GP 096. The GP 096 authorizes the beneficial use of regulated fill as a construction material. The approval allowed Coplay to operate under the GP 096 and to use regulated fill as a construction material at its Abandoned Quarry in Whitehall Township, Lehigh County. Coplay is in the process of reclaiming portions of the Abandoned Quarry and developing these areas after they are reclaimed.

On July 31, 2015, Whitehall Township filed an appeal with the Board challenging the Department's decision to approve Coplay's application and to issue the approval (WMGR096-NE005). Following a hearing on the merits, the record in this matter was closed on June 13, 2017 and our Adjudication is limited to the evidence in that record. The Township has raised a number of objections to the Department's decision to approve the application and grant coverage under the General Permit. The Township's main objections are listed below:

1) The Department ignored the notes of testimony from an earlier hearing before the Whitehall Township Zoning Hearing Board concerning the use of clean fill.

2) The Department ignored that false testimony, even when the Department knew it was false.

3) The Department ignored Coplay's prior history of violations concerning glass aggregate and arsenic contaminated soil and misapplied the applicable compliance history review requirements.

4) The Department ignored its clear requirements regarding the one year limitation on placement of regulated fill and the need for a certified copy of an approved plan or construction project.

5) The Department ignored that the Permittee made different representations regarding the size of the two subdivided lots approved for placement of regulated fill.

6) The Department failed to respond to the Township's request for a definition of building permit or construction project approval.

7) The Department ignored the Permittee's failure to maintain records regarding the amount of regulated fill placed and the location of its placement.

8) The Department is biased against the Township.

9) The Department violated the rudimentary principles of fairness and fair play in its dealings with the Township.

The Board will address the Township's objections below. Some of the objections are related or overlapping with others, and the Board will consider some of the objections in connection with others that are related or overlapping to avoid duplication and redundant discussion.

Burden of Proof and Standard of Review

In hearings before the Board, the party with the burden of proof is required to present a *prima facie* case by the close of its case-in-chief. 25 Pa. Code § 1021.117(b). Here, it is the Township that bears the burden of proof in this appeal. 25 Pa. Code § 1021.122(c)(2). The Practice and Procedure Rules of the Environmental Hearing Board provide that "the party appealing an action of the Department has the burden of proof in the following cases . . . when a party who is not the recipient of an action by the Department protests the action." 25 Pa. Code § 1021.122(c)(2). The Township must show by a preponderance of the evidence that the Department did not act lawfully or within a reasonable exercise of its discretion when it took the action under appeal. *See, e.g., County Commissioners of Somerset County v. DER*, 1996 EHB 351.

The Board reviews Department actions *de novo. Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Smedley v. DEP*, 2001 EHB 131, 156. The Board is also able to consider evidence that was not presented to the Department when it made the decision currently under appeal. *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004). In this case, the Board finds that the Department acted reasonably, lawfully, and in accordance with the facts when it issued the approval to Coplay to beneficially use regulated fill under GP 096.

Department's review of Coplay's prior history of violations at the site and application of compliance history requirements

The Township asserts that the Department "ignored the Permittee's prior history of violations and misrepresentations, and issued its approval because there were no outstanding violations at that time. (Township's Post-Hearing Brief at 15.) In particular, the Township

believes that there were "prior issues regarding glass aggregate and arsenic contaminated soil." *Id*. at 14. The Township argues that a proper review of Coplay's history of violations at the site supports its objections and its request to vacate Coplay's approval for coverage under GP 096.

The Department and Coplay disagree that the Department ignored Coplay's prior history of violations at the site. Coplay's Post-Hearing Brief at 32; Department's Post-Hearing Brief at 28-31. Both assert that the Township's objection is unsupported by the record before the Board and is without merit. *Id*. For the reasons set forth below, the Board agrees with the Department and Coplay that the Township failed to meet its burden to establish that the Department failed to properly consider Coplay's compliance history when it issued the approval to Coplay.

The Department has clear statutory authority to conduct a review of a permit applicant's compliance history as part of its review of a permit application prior to making a permit decision. *See* 35 P.S. § 6018.503(c) and (d). The Department's authority extends to the General Permit and the determination of applicability or approval that the Township has challenged in this appeal. *See* 25 Pa. Code § 287.101, 287.124-125, 287.611-612, 287.631-32. (Commonwealth Exhibit 1, ¶ 26 (1) and (m) at page 6.) Under this authority, the Department may deny an application for a permit or an application for coverage under a general permit (application for a determination of applicability) if it finds that an applicant has failed to comply with state or federal environmental statutes or regulations or has shown a lack of intention or ability to comply with those statutes or regulations. 35 P.S. § 6018.503(c) and (d); *cited in Albert H. Wurth, Jr., v. DEP and Easter*n *Waste of Bethlehem, Inc*., 2000 EHB 155, 162. The Department shall deny the application where an applicant or parties related to the applicant have engaged in unlawful conduct under the Solid Waste Management Act except that the Department has the discretion to issue a permit where the applicant "demonstrates to the satisfaction of the

Department that the unlawful conduct has been corrected." *Id*. The Department has similar authority under other state environmental statutes to conduct a review of an applicant's compliance history before making a decision to issue a permit or approval.[1]

The compliance history review entails a two-step review. The first step is to determine if there are any outstanding or continuing violations that could bar issuing the permit or approval. The second, more complicated evaluation, involves the consideration of past violation in the absence of any outstanding violations, to decide whether the applicant "has shown a lack of ability or intention to comply with the laws, regulations or other requirements."

The Board recently applied the compliance history review requirements mandated by Section 503 of the Solid Waste Management Act, 35 P.S. § 6018.503, to the application for coverage under WMGR 123. *Richard L. Stedge v. DEP and Chesapeake Appalachia, LLC*, 2015 EHB 577, 615-617. In *Stedge* the Board stated:

> We have previously discussed compliance history in the context of permits issued pursuant to the Clean Streams Law. *See Belitskus v. DEP*, 1998 EHB 846, 867. The Clean Streams Law provides that the Department shall not issue a permit if the applicant has shown a lack of ability or intention to comply with such laws as indicated by past or continuing violations. 35 P.S. § 691.609(2). Under that scheme, we have held that a third-party appellant "must convince this Board acting in its *de novo* capacity that, based on the record evidence developed in the Board proceeding, the permittee's compliance history is in fact enough of a concern to justify vacating the permit." *O'Reilly, supra*, 2001 EHB at 45. The Solid Waste Management Act similarly provides:
>
> > In carrying out the provisions of this act, the department may deny, suspend, modify, or revoke any permit or license if it finds that the applicant, permittee or licensee has failed or continues to fail to comply with any provision of this act,…"The Clean Streams Law,"…the "Air Pollution Control Act," and…the "Dam Safety and Encroachments Act," or any other state or Federal statute relating to environmental protection or to the protection of the public health, safety and welfare; or any rule or regulation of the

[1] The Clean Streams Law authorizes the Department to conduct a compliance history review of permit applicants applying for permits allowed under the Clean Streams Law. *O'Reilly v. DEP*, 2001 EHB 19, 46; *Belitskus v. DEP*, 1998 EHB 846, 867.

> department; or any order of the department; or any condition of any permit or license issued by the department; or if the department finds that the applicant, permittee or licensee has shown a lack of ability or intention to comply with any provision of this act or any of the acts referred to in this subsection or any rule or regulation of the department or order of the department, or any condition of any permit or license issued by the department as indicated by past or continuing violations.

35 P. S. § 6018.503(c); *see also* 25 Pa. Code § 287.201(a)(7) (criteria for permit issuance or denial).

> Looking to *O'Reilly* and the statutory provisions, Stedge and Kennedy are required to come forward and show us why Chesapeake's compliance history rises to a level that it demonstrates a lack of ability or intention to comply with the law. They have fallen well short of doing so. Simply pointing out that Chesapeake has had violations in the past is not enough. Chesapeake has a host of permits for various operations across the Commonwealth. Based on the record before us, Chesapeake cannot be said to lack either the ability or the intent to comply with all applicable laws at its Lamb's Farm facility.

Stedge, 2015 EHB at 615-617. The Board will follow a similar approach in this appeal when evaluating whether the Department failed to properly evaluate Coplay's compliance history.[2]

In this appeal, the Township has identified a few past violations at the site and asserted that the Department merely determined that there were no outstanding violations when it issued the approval and it ignored Coplay's past violations. The Department and Coplay disagree that the Department did not consider Coplay's past violations and its overall compliance history when it issued the approval to Coplay. The Board agrees with the Department and Coplay and finds that the Department did consider Coplay's past violations.

Even if the Board agreed with the Township that the Department's review was too limited, the Board would nevertheless not agree with the Township that it has satisfied its burden

[2] The general permit in *Stedge* was issued under the authority of the Solid Waste Management Act and the regulations at 25 Pa. Code § 287.101 *et seq*. The only difference is the general permit in this appeal, GP 096, requires a more extensive determination of applicability rather than the regulation process in *Stedge* for WMGR 123. This minor difference in the type of Department approvals does not affect the analysis.

to establish Coplay's past violations demonstrate that it lacks the ability or intention to comply with the law. Under *Stedge*, the Township is required to come forward and show the Board why Coplay's compliance history rises to a level that demonstrates a lack of ability or intention to comply with the law. Simply pointing out that Coplay has had some violations in the past is not enough. *Stedge* 2015 EHB at 615-617.

In this appeal, the Township has merely identified that Coplay violated applicable requirements in two situations in the past. The two situations are arsenic issues with Port Imperial fill and non-glass materials in the approved use of glass aggregate. Other than merely identifying these two situations, the Township offered no additional evidence or argument to demonstrate why these situations rise to a level to show that Coplay lacks the necessary ability or intention to comply with the law.

In contrast to the Township's lack of explanation, the Department at the Hearing and in its Post-Hearing Brief provided a thorough explanation why these two situations did not rise to a level to show that Coplay lacks the necessary ability or intention to comply with the law. Department's Post-Hearing Brief at 28-34.[3] The Board finds that the Department conducted an appropriate review of Coplay's compliance history, including a review of Coplay's past violations. In addition, the Board finds that the two specific situations identified by the Township did not rise to a level to demonstrate that Coplay lacks the necessary ability or intention to comply with the law.

Department's consideration of requirements of one year limitation on placement of regulated fill and of the need for an approved plan or construction project

[3] Even if the Department did not undertake this detailed review as part of its compliance history review before it issued the approval under review, the Board is able to consider this under the Board's *de novo* review.

The Township asserts that the Department ignored its clear requirements regarding the one year limitation on the placement of the regulated fill and the need for a certified copy of an approved plan or construction project. The one year limitation is set forth in Form 20 RF that provides in pertinent part:

> The Department will not approve an application [for coverage under GP 096] where fill placement extends beyond one year or construction is not proposed to start within the one-year limit.

Permittee Exhibit 1, Form 20 RF, ¶ 11. This statement on Form 20 RF identifies two related time limitations. The Department will not grant an approval where either the placement of fill extends beyond one year or construction after placement is not proposed to start within the one year limit. Coplay's application indicates that it will take up to ten (10) years to reach the final construction grades. The Department approved Coplay's application even though its placement of fill activities extended well beyond the one year limit set forth in Form 20 RF.

In addition, Condition 1 of GP 096 provides that an applicant for coverage must establish that the area proposed for placement of the regulated fill is in "an area approved for construction." (Permittee Exhibit 13, Condition 1.) The Department requested that Coplay submit a letter from the Township approving Coplay's construction plan or construction project, but the Township did not provide such a letter to Coplay that Coplay could submit to the Department. The Department subsequently approved Coplay's application without a letter from the Township after receiving a letter from Coplay indicating that a letter from the Township was not necessary to have an approved construction project. The Township argues that the Department's challenged approval of coverage under GP 096 violates both of these clear and unambiguous requirements. A violation of either requirement, according to the Township, is a sufficient basis to sustain the Township's approval.

The Department and Coplay disagree that the Department ignored these requirements for slightly different reasons. The Department and Coplay both assert that the one year limitation has no basis in law, and argue that the Department has the authority to approve Coplay's application for coverage under GP 096 under the facts of this appeal notwithstanding the clear one year limitation on Form 20 RF which is part of the application for coverage.

On the issue of whether the area proposed for placement of the regulated fill is "an area approved for construction" as required under Condition 1 of GP 096, the Department asserts that an NPDES Stormwater Construction Permit, No. PAG02003912017, issued by the Lehigh County Conservation District to Coplay, satisfies this requirement. Although the phrase "area approved for construction" is undefined, the Department asserts that Form 20 RF Attachment 6, Section C.3 provides some guidance.[4] The form states:

> Is the receiving site approved for construction? If answer is yes, submit a certified copy of the approved plan or construction permit issued by the applicable state, county or municipal authority that has jurisdiction over the property.

(Joint Stipulation ¶ 5; Form 20 RF, Section C, Question 3 p 2.) The Department believes that the federally mandated NPDES discharge permit for stormwater associated with construction activities satisfies this requirement.

The Township also questions why the Department requested that "Coplay Aggregates provide a letter from Whitehall Township that approves the proposed construction project," if the application was ultimately determined to be sufficient without it. The request for the letter was in the Department's October 9, 2014 Technical Deficiency letter that the Department sent to Coplay. Coplay never submitted a letter from Whitehall Township that approves the proposed

[4] It is odd that the Department recognizes that its application Form 20 RF provides guidance on this issue, but the Department fails to recognize that the same Form 20 RF also provides guidance on the issue of the one year limitation on the placement of regulated fill discussed earlier.

construction activity, but it did respond to the concern and according to the Department provided additional information to establish that the Site was an area approved for construction as required by Condition 1 of GP 096.

After it received the Technical Deficiency letter, Coplay submitted a number of documents to the Department to support its position that the Site was "an area approved for construction. These documents include:

- January 7, 2013 ZHB Opinion – approving variance to zoning regarding frontage on public streets and steep slopes in the area of proposed development.

- February 3, 2014 District – approved Erosion & Sedimentation Control and Post-Construction Stormwater Management plans and issuance of NPDES Construction Permit.

- October 29, 2013 Department approved Planning Module for Land Development – related to sewage discharge from Site to Northampton Borough Municipal Authority.

- June 14, 2013 Northampton Borough Municipal Authority – document noting available sewage capacity.

- November 12, 2014 letter response to DEP October 9, 2014 technical deficiency letter from Blake Marles, counsel for Coplay.

(Permittee Exhibit 1; Appellant Exhibit No. 7, Answers to Interrogatory Nos. 16-17.) The Department and Coplay assert that these various local approvals establish that the Site is "an area approved for construction."

In addition, the Department and Coplay assert that Parties' Joint Stipulation of Facts concerning the Department Fill Q&A supports their collective view that an additional building permit is not required for an area to be "an area approved for construction." (Joint Stipulation ¶ 10.) Paragraph 10 of the Parties Factual Stipulation provides:

10. The Department's Management of Fill Q&A states:

> Question: Regulated fill may only be used in conjunction with an approved construction project. Does this mean that a developer must construct something over regulated fill in order for it to be used according to the policy?
>
> Answer: No. Regulated fill may be used for any purposes that are connected with a construction project. It may be used for property improvements such as to construct berms or embankments, for landscaping, or for building foundations or sub-bases for roads and parking facilities.

(*Id.*) This statement indicates that regulated fill may only be used in connection with an approved construction project, but this does not mean the developer must build something over the placed regulated fill. Under the Management of Fill Policy, regulated fill may be used for any purposes that are connected with a construction project including property improvements such as construction berms or embankments, for landscaping or for building foundations or sub-bases for roads or parking facilities.

The Township believes that the one year limitation in the Department's Form 20 RF establishes a binding requirement that the Department violated when it issued the approval to Coplay. To evaluate the Township's position, the Board needs to determine the regulatory nature of the statement in the Form. If the requirement was in a regulation, then it would impose a mandatory standard of conduct or behavior. *See, e.g., Chimenti v. Dep't of Corrections*, 720 A.2d 205, 210-11, (Pa. Cmwlth. 1998) *aff'd*, 740 A.2d 1139 (Pa. 1998) (a properly adopted substantive rule established a standard of conduct that has the force and effect of law.). A general statement of policy, on the other hand, does not establish a "binding norm." *Id.*

In *Chimenti*, Commonwealth Court explained the distinction

> As emphasized by the Supreme Court of Pennsylvania in *Pennsylvania Human Relations Commission v. Norristown Area School District*, 473 Pa. 334, 374 A.2d 671 (1977). The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of

> pronouncements have in subsequent administrative proceedings . . . . A properly adopted substantive rule establishes a standard of conduct which has the force of law . . . . The underlying policy embodied in the rule is not generally subject to challenge before the agency.
>
> A general statement of policy, on the other hand, does not establish a 'binding norm'. . . . A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. 608 A.2d at 581 quoting *Pennsylvania Human Relations Commission v. Norristown Area School District*, 473 Pa. 334, 350, 374 A.2d 671, 679 (1977). This court elaborated on the Supreme Court's distinction by explaining that a 'binding norm' means that the agency is bound by the statement until the agency repeals it, and if the statement is binding on the agency, it is a regulation. . . . In determining whether an agency action is a regulation or a statement of policy, one must look to the extent to which the challenged pronouncement leaves the agency free to exercise discretion to follow or not follow the announcement policy in an individual case. *Department of Environmental Resources v. Rushton Mining Co*., 139 Pa. Commw. 648, 591 A.2d 1168, 1173 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 626, 600 A.2d 541 (1991). 608 A.2d at 581 quoting *Pennsylvania Human Relations Commission v. Norristown Area School District*, 473 Pa. 334, 350, 374 A.2d 671, 679 (1977).

Id. Under these descriptions, it is clear that the one year limitation in Form 20 RF is not a regulation that establishes a binding norm requirement that the Department and the Board are bound to follow. The one year requirement was not adopted as a regulatory requirement, and it is not codified in Title 25 of the Pennsylvania Code. The Department asserts that it has discretion to not follow the one year limitations. The Board finds that the requirements in Form 20 RF is a statement of policy or guidelines that the Department is free to exercise discretion to follow or not follow on a case-by-case basis.[5]

[5] The Department asserts that the statement is also not a statement of policy, but the Board disagrees. The one year limitation in Form 20 RF is clearly a written statement of policy or guidelines. The Joint Committee on documents is the state agency that administers the Commonwealth Documents Law, and it has promulgated regulations in Title 1 of the Pennsylvania Code to aid in understanding the requirements under the Law. The Joint Committee has promulgated a definition of the term "statement of policy" and

The Department and Coplay assert that the limitation has no basis in law and is therefore it does not provide a basis to overturn the approval. The Board disagrees that the one year limitation has no basis in law. Under the Department's regulation governing the beneficial use of residual waste, construction material is defined as:

> The engineered use of residual waste as a substitute for a raw material or a commercial product in a construction activity, if the waste has the same engineering characteristics as the raw material or commercial product for which it is substituting. The term includes the use of residual waste as a road bed material, for pipe bedding, and in similar operations. The term does not include valley fills, the use of residual waste to fill open pits from coal or other fills, or the use of residual waste solely to level an area or bring the area to grade where a construction activity is not completed promptly after the placement of the solid waste.

25 Pa. Code § 287.1 (Definitions) GP 096 authorizes the beneficial use of regulated fill as a construction material, and it is therefore subject to this definition in the Department's regulations. Under the definition of construction material, the term does not include "the use of residual waste solely to level an area or bring the area to grade *where the construction activity is not completed promptly after the placement of the solid waste*. *Id.* (emphasis added)[6] While the regulatory definition of the term "construction material" does not contain the one year limitations as a binding requirement, it does include the requirement to complete the construction activity "promptly."

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it includes the phrase "The term includes, but is not limited to, guidelines and interpretations," which is not included in the statutory definition of statement of policy in the Commonwealth Documents Law. *See* 1 Pa. Code § 1.4 (Definitions); 45 P.S. §§ 1102, 1201-1208 and 1602 and 45 Pa. C.S. Chapters 5, 7 and 9 known as the Commonwealth Document Law. The term "guideline" is defined in Section 1.4 and includes the phrase: The Term includes, but is not limited to: . . . . (iii) Announcement of principles and standards to be applied in future adjudications. *Id.* The one year limitations set forth in Form 20 RF are standards that the Department announced as possible standards that could be applied in future approval decisions.

[6] A similar requirement regarding prompt completion of waste placement and construction activities is also at 25 Pa. Code § 287.611(e)(4).

The Department's Form 20 RF contains the one year limitations as set forth above. The Board views the limitations as a statement of policy or guidelines to the public and regulated entities concerning the regulatory requirement to promptly complete the construction activity after the prompt placement of the solid waste to meet the definition of construction material. The Department's regulations require prompt placement of the waste and the completion of the proposed construction activity to qualify as construction material and to be eligible for coverage under GP 096. The one year limitation in Form 20 RF therefore has a basis in law under the regulatory definition of construction material, but the one year limitation is merely guidance regarding this regulatory requirement and it does not establish a binding norm requirement.

Under the facts of this appeal, the Department had the discretion to vary from the one year limitations in Form 20 RF and to issue the approval that allowed Coplay to take up to 10 years to reach final grade. The approval allows Coplay to beneficially use regulated fill as a construction material to develop portions of the Abandoned Quarry. Coplay intends to redevelop the Abandoned Quarry and will use the regulated fill to accomplish the following construction activities on the Site:

(a) to bring the area to construction grades as established in their approved NPDES Permit and Whitehall Township approvals.
(b) construction of stormwater management controls.
(c) construction of road and cul-de-sac.
(d) installation of utilities.
(e) general site preparation for building of structures.

(Coplay-1; N.T. 225, 227, 229-230, 255-257.) After these construction activities are completed, Coplay intends to build a flex commercial building and a self-storage facility on the Abandoned Quarry. Coplay intends to redevelop approximately 37.5 acres of its property, which includes the Abandoned Quarry, into a commercial/industrial park. Coplay has already redeveloped and sold off several lots that were part of its property. One lot was developed into an office building,

one into a Caterpillar dealership and one into a residential community (over 50 residential units) and a Sheetz gas station. Based upon the conditions at the Abandoned Quarry and Coplay's plans to redevelop its property, the Department did not abuse its discretion in allowing Coplay more than one year to conduct its activities under GP 096. The Department has the discretion to not follow the one year limitations in Form 20 RF under appropriate circumstances that are present in this appeal.[7] In addition, under the facts of this situation, the approval is consistent with the regulatory requirement in the definition of "construction material" at 25 Pa. Code § 287.1 requiring prompt completion of construction activity after placement of the regulated fill. *See also* 25 Pa. Code § 287.611(e)(4).

On the issue of whether the area proposed for placement of the regulated fill is "an area approved for construction" as required under Condition 1 of GP 096, the Board finds that the area in question is such an area as that phrase is contemplated in the permit. The Board agrees with Coplay and the Department that the Site is an area approved for construction based upon the various approvals and documents that Coplay identified and the type of construction activities proposed by Coplay.

The construction activities listed by Coplay[8] are also sufficient to qualify the Site as an area approved for construction under the stipulated statements in the Management of Fill Policy Q&A that provide that construction of a building or structure is not necessary to qualify under the Policy. (Joint Stipulation ¶ 10.) The construction activities that Coplay intends to conduct

[7] The Board notes that the Department has consistently permitted projects under GP 096 that exceed the one year limitations on Form 20 RF since the general permit was first issued in 2006. (N.T. 126-127, 129, 143-144.) There was no indication in the record that the Department has ever applied the one year limitations. The Department should consider elimination of the provision on Form 20 RF because it appears that the Department has not applied the limitations when reviewing application for coverage under GP 096.

[8] These construction activities include bringing the area to construction grades, constructing the stormwater management controls, constructing roads and cul-de-sac, installing utilities and performing general site preparation for building of structures.

now are eligible for coverage under GP 096, and the Township has not identified any additional local permit or approval that Coplay needs to conduct its proposed activities.

The Board does not agree with the Department that the NPDES Stormwater Construction Permit No. PAG02003912017 issued by Lehigh County Conservation District to Coplay satisfies, by itself, the requirements in Condition 1 of GP 096. The NPDES Stormwater Construction Permit is a discharge permit mandated by state and federal law to control stormwater discharges from areas disturbed during construction activities. The Lehigh County Conservation District has a delegation from the Department to issue such approvals and has an important role in approving coverage under NPDES Stormwater Construction Permits, but the NPDES permit only regulates the discharges from construction activities and does not establish that the site is "approved for construction" by the applicable county or municipal authority that has jurisdiction over the property. The NPDES Stormwater Construction Permit No. PAG02003912017 issued by the Lehigh County Conservation District is needed to conduct construction activities from an NPDES permitting perspective but it does not, by itself, provide evidence the area is approved for construction under Condition No. 1 of GP 096 from a county or municipal perspective. The NPDES Stormwater Construction Permit is only evidence that the site is approved for construction from a state perspective. The Board's disagreement with the Department's position is a moot point because Coplay also identified additional local approvals that it secured to conduct the construction activities it proposed for the Site at this time.

The Township also alleges that the Department ignored the Township's request for a definition of a building permit or construction project approval. The Township made the request in connection with its related objection regarding the alleged need for a letter from the Township that approves the proposed construction project. The Board addressed this objection as set forth

above. This new related objection regarding the Township's request for a definition of a building permit or construction project approval is a narrow objection that focuses on the Department's failure to respond to a Township request for a definition of a building permit or construction project approval.

Coplay disagrees that the Department abused its discretion by ignoring the Township's request for a definition of a building permit or construction project approval. Coplay asserts that there is no evidence that the Township even made such a request, let alone had a request ignored by the Department.

At the hearing, Frank Clark testified on cross-examination regarding his earlier deposition. At the deposition he was asked about one of the Township's questions: what does it mean by a building project? (N.T. at 91.) At the hearing, Mr. Clark confirmed he was asked this question and further recalled that he said that the question was not answered by the Department. (*Id*.) There is, therefore, a single reference in the record to the Township's question and the Township's belief that the question was not answered by the Department. Whether the Township actually requested an answer to the question and whether the Department ignored the Township's request, is not important in determining whether the Department abused its discretion. If the Township did not receive a clear answer to its question or one from the Department, the Board's Adjudication resolves the issue and provides the Township with an answer to its question. Coplay's Site was an area approved for construction within the meaning of Condition 1 of GP 096 for the reasons set forth above.

Notes of Testimony from an earlier hearing before the Whitehall Township Zoning Hearing Board regarding the use of clean fill

The Township raised several related objections concerning certain Notes of Testimony from an earlier hearing before the Whitehall Township Zoning Hearing Board. The Township

asserts that the Department ignored the notes of testimony in which a representative of the Permittee stated that it would only use clean fill on its site proposed for variances. In addition, the Township also asserted that the Department ignored that false testimony "even when the Department knew it was false." (Appellant's Post-Hearing Brief at 14.) The Township believes that the Permittee made a statement at the December 18, 2012 hearing of the Whitehall Township Zoning Hearing Board "concerning the use of only clean fill." *Id*. The Township believes that the approval to allow the use of regulated fill under appeal is inconsistent with the Permittee's statement in 2012 thereby making it a false statement.

The Department asserts that it did not ignore the notes of testimony as alleged by the Township. The Department states that it reviewed and considered the December 18, 2012 Notes of Testimony as part of its review of Coplay's application.[9] Coplay agrees with the Department that the Department fully reviewed and considered the Notes of Testimony during the Department's review of its application for coverage. Coplay also asserts that the Township has misconstrued the nature of the statement in 2012 in making its claim that the 2012 statement was a false statement and the Department knew it was false when the Department approved Coplay's application for coverage under GP 096. According to Coplay, the testimony at the 2012 hearing was limited concerning clean fill. Coplays response to a question about the use of clean fill merely described reclamation activities being conducted in 2012 and those historically at the abandoned quarry site. Coplay statements in 2012 did not address potential future use of regulated fill as a construction material under a general permit.

At the Board's hearing, Brian Hilliard, Coplay's Director of Compliance who spoke for Coplay at the earlier December 18, 2012 hearing, described the context in which the question

[9] According to the Department the Notes of Testimony were incorporated into the January 7, 2013 Township of Whitehall Zoning Hearing Board Opinion concerning the approvals for two variances for the two lot subdivision.

about the use of clean fill arose. (N.T. at 275-281.) Mr. Hilliard testified that he was questioned about the use of clean fill by Mr. Jany, who was a member of the Zoning Hearing Board at the time of the December 18, 2012 Hearing. Mr. Jany asked where are you getting your fill from and is it all clean fill. (N.T. at 277-278.) Mr. Hilliard understood the question to relate to ongoing 2012 operations and those occurring before 2012. (N.T. at 277.) He responded that Coplay was getting fill from "all different kinds of places" and that it was all clean fill. (N.T. at 277-278.)

At the time Mr. Hilliard made these statements in 2012, Mr. Hilliard was not addressing whether Coplay had future plans or interest in using regulated fill at the site. Mr. Hilliard's understanding in 2012 was that Coplay was not able to use regulated fill on the site. He became aware of the possibility of using regulated fill after reviewing the application file of Bethlehem Earth in 2014 more than a year after he testified in December 2012.

The Board finds Mr. Hilliard's account of his testimony credible. He did not give false or misleading testimony before the Zoning Hearing Board on December 18, 2012. He merely, in response to Mr. Jany's question, testified honestly that as of December 18, 2012, Coplay had used clean fill from all different places. After he testified in 2012, he became aware that the use of regulated fill was a possibility in 2014 and Coplay subsequently applied for and received coverage under GP 096 to use regulated fill at the Site. Mr. Hilliard's testimony was not false or misleading which is the basis for the Township's objections related to this objection.[10] The Department neither ignored the notes of testimony from the earlier hearing before the Zoning Hearing Board, nor ignored that any false testimony was presented to the Department. No false testimony was supplied to the Department as alleged by the Township. The Board finds that

[10] The Township did not fully brief the basis for these related objections, and the objections are only briefly listed in the Appellant's Post-Hearing Brief at 14-15. The lack of discussion in its Brief is a reflection of the strength (or lack thereof) of its position.

neither of these related objections provide a basis to overturn the Department's decision to issue coverage to Coplay to operate under GP 096.

Disagreements over size of the two subdivided lots approved for placement of regulated fill and recordkeeping records regarding the amount of regulated fill placed and the location of its placement

The Township asserts that the Department ignored several key facts when it approved Coplays application to operate under GP 096. The Township claims that Coplay has placed regulated fill beyond the areas permitted for placement which it believes is limited to the two subdivided lots. The Township believes that the Department has relied on "the Permittee's bald, self-serving assertion that the regulated fill outside the two lot subdivision was placed within the permitted placement area". The Township asserts the Department ignored the fact that the Permittee made different representations regarding the size of the two subdivided lots for placement of the regulated fill (9.6 acres, 10.9 acres or 6.87 acres covered by the Zoning Approval). (Township's Post-Hearing Brief at 15.) Finally, the Township believes that Coplay does not keep records regarding the amount of regulated fill placed outside the two subdivided lots and regarding its placements, despite applicable requirements for the maintenance of such records.

The Department and Coplay disagree with the Township's characterization of disagreements over the size of the two subdivided lots approved for placement of regulated fill and the Township's apparent misunderstanding of the applicable recordkeeping requirements concerning the amount of regulated fill placed and the location of its placement. According to the Department and Coplay the Department did not ignore several key facts as represented by the Township. The Township failed to present any evidence at the hearing to explain how the alleged acreage differences are improper and support its claims that the Department abused its

discretion or acted unreasonably. While the Department recognizes there are differences among the various acreages referenced in Coplay's proposal, the Department asserts that the differences [in acreage] are easily explainable. (Department Post-Hearing Brief at 31.)

According to the Department, the two subdivided lots total 6.87 acres, but the zoning variance includes "frontage on public streets and steep slopes in the area of the proposed development." The zoning variance provides zoning relief to complete the two lot subdivision that includes necessary infrastructures and steep slope area near but outside the two lots. (Permittee Exhibit 15.) The subdivision/land development approval totals 10.9 acres that includes the acreage of the two lots but also the acreage for construction of roads, other necessary improvements and infrastructures. (Permittee Exhibits 17-18.) The Department's approval authorized placement of regulated fill on 8.6 acres to provide the support and slopes to achieve the approved construction grades on the two subdivided lots.

The Board agrees with the Department and Coplay that there is no problem or confusion with the various acreages discussed above. The Township correctly identified the fact that there are several different acreages associated with Coplay's proposal, but the Township failed to understand the explanation for the different acreages contained in Coplays proposal and described by Coplay and the Department at the Hearing.

The Board finds that the explanation provided by Coplay fully addresses the concern raised by the Township regarding the various acreages in its proposal. The acreage for the two subdivided lots is 6.87 acres. The zoning variance approval included the acreage of the two lots and additional acreage to complete the subdivision (necessary infrastructure and steep slope areas). The subdivision/land development approval included 10.9 acres for the two lots and other necessary improvements and infrastructures including public roads and utilities. When

Coplay applied for approval to place regulated fill, it identified 9.6 acres as the acreage in the application. When the Department approved Coplay's application it approved 8.6 acres for placement of regulated fill. The 8.6 acres includes areas outside the acreage for the two subdivided lots which are only 6.87 acres, but the Board agrees with the Department and Coplay that this was not a secret or a problem. The various acreages were included in Coplays proposals and were fully explained in Coplay's application and later to the Board at the Hearing.

The Township made a similar objection about record keeping requirements. The Township asserts that the Department ignores the fact that Coplay does not keep records of how much regulated fill in places outside the two subdivided lots or where it places such regulated fill. The Township believes that there is a requirement to keep such records, and since the Department does not request to see such records, the absence of such records was not discovered until the second day of the hearing. (Township Post-Hearing Brief at 15.)

The Department and Coplay disagree that the applicable record keeping requirements are unreasonable or inadequate. In addition, the Department and Coplay assert that Coplay maintains the records as required by GP 096, and these records include the analytical evaluations of each new source of regulated fill, the daily records of the weight or volume of the regulated fill received and the placement locations.[11] They assert that Coplay tracks the placement of regulated fill by three geo-technical zones: building, roads and landscaping. Using these designations, the locations of the regulated fill can be determined.

[11] GP 096 contains Condition No. 20 "Recordkeeping" that provides:

> "Records of analytical evaluations conducted on the regulated fill under this permit, daily records of the weight or volume of the regulated fill received, the placement locations, and the approved construction plans shall be kept onsite by the permittee and at the permittee's place of business. This information shall be available to the Department for inspection and submitted to the Department upon request. This waste analysis information shall be retained by the permittee for a minimum of 5 years."

(Permittee Exhibit 13, Condition 20.)

The Department also challenges the Township's assertion that the Department does not request to see Coplay's records that are maintained on-site. The Department asserts that it has requested the information on the placement of regulated fill from Coplay several times since the approval was granted.

The Board agrees with the Department and Coplay that GP 096 and the approval issued to Coplay (NE005) includes sufficient record keeping requirements regarding the analytical evaluations of the regulated fill accepted for placement, the placement location and the daily records of the material received.[12] Condition 20 requires that these records are to be maintained on site and are available for Department inspection upon request. Contrary to the Township's assertion, the Department indicated that it has in fact reviewed these records on-site several times. The Township has not met its burden to challenge the recordkeeping requirements that the Department imposed on Coplay under GP 096 when it issued approval NE005 to Coplay.

Township's Other Objections

The Township asserts that the Department is biased against the Township in this matter, and it has "eviscerated even the most rudimentary principles of fairness and fair play." The Board will address these related objections together.

There are two examples of "bias" that the Township identified in its Post-Hearing Brief. First, the Township asserts that the Permittee's counsel of record, Mr. David Gromelski, was

[12] Coplay makes an additional argument that the Township is not entitled to challenge the recordkeeping condition of GP 096 because it is final and cannot be challenged in this proceeding *citing Citizens Advocates United to Safeguard the Environment ("CAUSE") v. DEP*, 2007 EHB 632. Under Coplay's theory the Conditions of GP 096 are administratively final and they cannot be challenged in this appeal, and only the special conditions of the approval issued to Coplay can be challenged. The Board disagrees with Coplay's argument. The *CAUSE* Adjudication does not stand for the proposition that permit conditions of a general permit cannot be challenge when the Department grants approval to operate under it at a later time. The Board has, in fact, decided that permit conditions in general permits may be challenged, in many instances, in the context of an appeal of any approval issued under the general permit in question. *See Army for a Clean Environment, Inc. v. DEP and LCN*, 2006 EHB 698, 700-703.

previously employed by the Department for approximately nine years, and the Permittee's Director of Compliance, Mr. Brian Hilliard, who testified under oath before the Zoning Hearing Board is also a former employee of the Department. Second, the Township asserts that the Department's instructions to the Township to have individuals directly communicate odor complaints to the Department, rather than through the Township, stifled the Township's First Amendment right to petition the Government. The Township believes these instructions "can have no other genesis (other than bias), let alone any other legal or proper justification."

The Township also alleges that the Department's continued deference to the Permittee regarding record keeping and its unauthorized delegation of discretion to the Permittee is an abuse of discretion and is evidence of bias. Relying upon these claims of bias and unfair deference or delegation of discretion, the Township argues it has a legal basis to support revocation of the approval granted to the Permittee to operate under GP 096.

The Department and Coplay disagree with the Township that the Department is biased against the Township and towards Coplay and that the Department improperly defers to Coplay or has improperly delegated its discretion to Coplay. They assert that these objections are unwarranted and are unsupported by the record. The Board agrees with the Department and Coplay that these objections are not supported by records. These claims do not provide the Board with a basis to vacate the Department's decision for the reasons set forth below.

On the issue of bias, the Township did not identify any evidence in the record to support its claim that the Department was biased. The few "examples" of bias alleged by the Township are, in fact, not examples of bias that support the Township's claim. While it is true that the Department requested that the Township's Mayor have individuals who had odor complaints contact the Department directly rather than contact the Township, which in the past had

contacted the Department on the individuals' behalf, this is not evidence of bias or an attempt to stifle "the Township's most precious First Amendment right to petition the Government" as the Township alleges. The Department's malodor regulations and the Board's precedent suggest that a representative of the Department and more than one member of the public must experience the odor at the same time and place. *DER v. Franklin Plastics Corp*., 1996 EHB 645, 661-62; *see also* 25 Pa. Code §§ 121.1 (Definitions of term Malodor – (An odor which causes annoyance or discomfort to the public and which the Department determines to be objectable to the public) and 123.31(b) (A person may not permit the emission into the outdoor atmosphere of an malodorous air contaminant from any source, in such a manner that the malodors are detectable outside the property of the person on whose land the source is located).

To establish a violation of 25 Pa. Code § 123.31(b), the Department must determine that an odor (1) causes annoyance to the public and (2) the Department determines the odor is objectionable to the public. *Frank DePaulo and Martin DeSousa v. DER*, 1997 EHB 137, 145. Contrary to the Township's claims of bias or denial of rights of the Township to petition DEP, the Department's instructions to the Township, to instruct complainant to directly contact the Department with malodor complaints, provide the Department with the means necessary to secure the proof needed to establish violations of the Department's malodor regulations. The Department, not the Township, must establish that the odors cause annoyance and discomfort to the public, and the Department must further determine that the odor is objectionable following an inspection. The Department and more than one member of the public must experience the odor at the same time and place to establish a violation. The Department's instructions to the Township were designed to enable the Department to establish violations of the malodor regulations. The Township's preference to receive odor complaints and to contact the

Department directly on behalf of the complainants impeded the Department from establishing these violations. To establish violations of the malodor regulations the Department needed to know the identities of the complainants, and the Department has to inspect the site at or near the time of the alleged malodors complaints to verify that these odors were objectionable to the public. The Department's instructions to the Township are reasonable and consistent with the burden imposed by the Department's regulations and Board's precedent to establish malodor violations**.**

In its Post-Hearing Brief, the Township also advances a related due process claim that "the right to due process is protected by the rudimentary provisions of fair play, and cannot violate the fundamental principles of fairness," c*iting Taylor v. Weinstein*, 207 Pa. Super. 251, 217 A.2d 817 (1966) and *Morgan v. United States*, 304 U.S. 1, 20-21 (1938). The Board rejects this argument for two reasons. First, to the extent the Township can be said to have constitutionally protected due process rights, the Board disagrees that the Department violated the "fundamental principles of fairness" and violated any such due process rights for the reasons set forth in this Adjudication. Second, an appeal to the Board and the Board's *de novo* review is fully protective of the Township's due process rights. *See Commonwealth v. Derry Township*, 314 A.2d 606 (Pa. 1976) (A party's due process rights are protected by virtue of the party's right to appeal an adverse determination to the Board.); *Warren Sand & Gravel v. DER*, 341 A. 2d 556 (Pa. Cmwlth. 1975) (Board's *de novo* review provides due process hearing that was lacking when Department decision was rendered); *Morcoal Co. v. DEP*, 459 A.2d (Pa. Cmwlth. 1981) (An appeal to the Board resolves any due process concerns when the Department forfeits reclamation bonds without a hearing); *Fiore v. DER*, 655 A.2d 1081 (Pa. Cmwlth. 1995) (Due process rights of the appellant were not violated because he was afforded the opportunity to

appeal to the Board.). Even if the Board agreed with the Township that the Department's action did not protect the Township's due process rights, the Board's *de novo* review would provide the Township with the required due process thereby fully protecting the Township's due process rights. *Id*.

The Board also rejects the Township's claims of bias based upon the stipulated facts that the Permittee's counsel worked for the Department years ago, and that Permittee's Director of Compliance once worked for the Department. The Township introduced no additional evidence to support its claim of bias. The Township provided no further justification other than these two bare stipulated facts. The mere fact that the Permittee's counsel and the Permittee's employee worked for the Department years ago is not sufficient to meet the Permittee's burden of proof to show bias. To support its claim of bias, the Township needed to explain how the Department was biased against the Township, including additional evidence to support its explanation. The Township did not provide any evidence to support its claim of Department bias or to meet its burden of proof to establish bias.

Conclusion

The Township bears the burden to show by a preponderance of the evidence that the Department's action to approve Coplay's application to operate under GP 096 was unreasonable, unlawful or not supported by the facts. Having considered the Township's objections and having determined that the Township has not met its burdens, the Board concludes that the Township's appeal should be denied and we issue the following order.

CONCLUSIONS OF LAW

1. Pursuant to 25 Pa. Code § 1021.122(c)(2), Whitehall bears the burden of proof and burden of proceeding.

2. The Department is the agency with the duty and authority to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§ 6018.101-6018.1003 ("SWMA"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"); the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. §§ 4000.101, et seq. ("Act 101"), The Land Recycling and Environmental Remediation Standards Act, Act of May 19, 1995, P.L. 4, 35 P.S. §§ 6026.101-6026.908 ("Act 2"); the Pennsylvania Oil Reduction Act, 58 P.S. §§ 471-480; 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.

3. Section 104(18) of the Solid Waste Management Act, 35 P.S. 6018.104(18), provides in relevant part:

> The Department… shall have the power and its duty shall be to: … (18) encourage the beneficial use or processing of municipal waste or residual waste when the department determines that such use does not harm or present a threat of harm to the health, safety or welfare of the people or environment of this Commonwealth. The department shall establish waste regulations to effectuate the beneficial use of municipal and residual waste, including regulations for the issuance of general permits for any category of beneficial use or processing of municipal waste or residual waste on a regional or Statewide basis in accordance with the regulations adopted by the Environmental Quality Board. …"

4. 25 Pa. Code § 611(g) provides "[t]he Department may issue a general permit on a regional or Statewide basis for the use, as construction material, of soil and other materials that do not meet the clean fill criteria."

5. GP 096 authorizes persons granted coverage under the general permit to use regulated fill as a construction material.

6. 25 Pa. Code § 287.1 defines "construction material" as:

> The engineered use of residual waste as a substitute for a raw material or a commercial product in a construction activity, if the waste has the same engineering characteristics as the raw material or commercial product for which it is substituting. The term includes the use of residual waste as a road bed material, for pipe bedding, and in similar operations. The term does not include valley fills, the use of residual waste to fill open pits from coal or other fills, or the use of residual waste solely to level an area or bring the area to grade where a construction activity is not completed promptly after the placement of the solid waste.

7. The regulated fill used by Coplay at the Site is a "construction material" as defined by 25 Pa. Code 287.1

8. 25 Pa. Code § 287.641(c) requires that:

> For beneficial use general permits where the residual waste is to be used as a construction material, antiskid material or otherwise placed directly onto the land, as a condition of the general permit, the Department will require persons or municipalities who intend to operate under the general permit to apply for and obtain a determination of applicability from the Department prior to conducting the activity authorized by the general permit….

9. Pursuant to 25 Pa. Code § 287.641(c), Coplay properly obtained a Determination of Applicability from the Department.

10. 25 Pa. Code § 611(e)(4) states that "the Department may not issue a General Permit when the use of residual waste is solely to level an area or bring the area to grade unless construction activity is completed on the area promptly after placement of the waste."

11. The only references to a time limit associated with the placement of solid waste in Department regulations is found at 25 Pa. Code § 287.1 within the definition of "construction material" and within 25 Pa. Code § 287.611(e)(4). More specifically, Section 287.1 definition of construction material, states that the term [construction material] does not include valley fills, the use of residual waste to fill open pits from coal or other fills, or the use of residual waste solely to level an area or bring the area to grade where a construction activity is not completed

promptly after the placement of the solid waste. Similarly, 25 Pa. Code § 287.611(e)(4) provides that the Department may not issue a general permit if the use of residual waste is solely to level an area or bring the area to grade unless construction activity is completed on the area promptly after placement of the waste.

12. The Department properly determined that the applicant has demonstrated to the Department's satisfaction that the proposed activity is consistent with the terms and conditions of GP 096.

13. Under the "binding norm test," distinction between agency rule and mere policy statement is that a properly adopted "rule" establishes a standard of conduct which has force of law, while "policy statement" merely announces an agency's tentative intentions for the future. *Department of Environmental Resources v Rushton Mining Co., et al*., 139 Pa. Commw. 648 (1991).

14. A statement of policy leaves the agency free to decide whether or not to follow the announced policy in an individual case, whereas a regulation does not. *Northwestern Youth Services, Inc. v. Department of Public Welfare*, 1 A.3d 988, 996 (Pa. Commw. 2010) *aff'd* 66 A.3d 301 (Pa. 2013).

15. A pronouncement that leaves an agency with discretion to deviate from its terms is a statement of policy, not a regulation. *Borough of Bedford v. Department of Environmental Protection*, 972 A.2d 53, 64 (Pa. Commw. 2009).

16. The language contained in Form 20 RF limiting projects under GP 096 to one year is not a binding norm. The language announces a guideline.

17. Coplay has demonstrated to the Department's satisfaction that any unlawful conduct has been corrected.

18. The Department had the discretion to not follow the one year limitations in Form 20 RF under the facts of this appeal.

19. The area Coplay proposed for placement of the regulated fill was an area approved for construction as required under Condition 1 of GP 096.

20. The Township failed to meet its burden of proof, by a preponderance of the evidence, that the Department's approval of NE005 was unlawful or not supported by the facts.

21. The Township failed to meet its burden of proof, by a preponderance of the evidence, that the Department is biased against the Township.

22. The Township failed to meet its burden of proof, by a preponderance of the evidence, that the Department violated the Township's constitutionally protected right to petition the government.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 21st day of June, 2018, it is hereby ordered that the appeal of Whitehall Township is dismissed.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 21, 2018

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

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(via electronic filing system)

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For Permittee:
David J. Gromelski, Esquire
(*via electronic filing system*)

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: July 2, 2018**

OPINION AND ORDER ON
CASE MANAGEMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board following a case management conference schedules further proceedings in an appeal brought under the Hazardous Sites Cleanup Act that is limited to a review of the administrative record.

O P I N I O N

We held an in-person case management conference in this appeal with the parties on June 26, 2018 to receive input on the management of this Hazardous Sites Cleanup Act case, which is limited by statute to a review of the administrative record ("AR"). (In another Opinion in this matter, we granted the Department of Environmental Protection's motion to quash the Appellants' discovery requests. We have determined that no discovery will be permitted in this case.) We discussed a schedule for further proceedings at the conference that is more in line with AR review than the procedures that we normally use for a *de novo* review as reflected in our rules and standard prehearing orders.

Because our standard procedures as outlined in the Board's rules and Prehearing Order No. 1 do not jibe well with AR-review, we determined at the case management conference that this appeal would have essentially two phases. The first phase is relatively straightforward and involves defining the AR. The second phase involves our review of the AR to determine whether the record is sufficient to support a finding one way or the other whether the settlement is arbitrary and capricious, and if the record is sufficient for meaningful review, whether the settlement is in fact arbitrary and capricious.

At this point, we actually have no certified AR to review. Therefore, we will order the Department to provide its certified AR to the other parties in an effort to obtain agreement on its contents. The AR should be supported by an affidavit of a responsible Department's official that it is the final and complete AR relied upon by the Department in entering into the settlements. Each page of the AR should be sequentially numbered, and those numbers shall be used for citation in all future filings. If the Riverkeeper or Constitution Drive believe that certain documents are missing from the AR (e.g., a document is referenced in a comment but not included), or documents not considered by the Department in 2017-2018 were improperly included in the record, and all parties are unable to agree, they may move this Board to have those other documents included or excluded as the case may be. The Department may respond to any such motion. Given the restricted definition of the AR for Section 1113 reviews, we are hopeful that this process will not be particularly cumbersome. As we explained at the conference, this is not an opportunity for the Riverkeeper or Constitution Drive to argue that more documents *should* have been considered by the Department and therefore included in the AR. The AR is limited to what the Department *in fact* considered as specified in Section 1113 of HSCA, 35 P.S. § 6020.1113. Following this process, we will issue an order defining the AR.

We will then establish a schedule for comprehensive briefing on the merits of the Department's action.

The Riverkeeper will submit the first brief. The Riverkeeper is entitled at that point to pursue its objections that the record is so deficient that a meaningful judicial review is not possible. The Department has a responsibility to prepare an AR that explains its position and allows for meaningful review. The Riverkeeper may also at this stage develop its case in support of its objection that the settlements are arbitrary and capricious, so long as it limits itself to the AR. If it believes the AR is insufficient to support the Department's action, either due to a lack of support or explanation in the AR or because the AR shows that its action in finalizing the agreements on January 26, 2018 was arbitrary and capricious, the Riverkeeper should not forget to discuss in its brief what remedy it is seeking if the Board finds in its favor. Responsive briefing by the Department and Constitution Drive will follow. There will be no evidentiary hearing. Summary judgment motions are not needed.

Accordingly, we issue the Order that follows.

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 2nd day of July, 2018, following an in-person case management conference, it is hereby ordered as follows:

1) On or before **July 16, 2018,** the Department shall provide the other parties with its proposed Administrative Record (AR).

2) On or before **August 7, 2018,** the Department shall file a copy of the AR with the Board. The Department shall include an affidavit from a responsible official certifying that the filing constitutes the complete and final AR. The pages of the AR shall be numbered sequentially, and all future filings shall cite to those page numbers. The Department shall include a statement from counsel whether the parties were able to agree that the filing in fact constitutes the AR.

3) If the parties are unable to agree, the parties other than the Department may on or before **September 4, 2018,** move that additional documents be included in or certain documents be excluded from the AR. The Department may respond to that motion on or before **September 14, 2018.**

4) The Board will then determine what constitutes the AR and issue an Order scheduling briefing. The briefs shall generally conform to the Board's rule regarding posthearing briefs, 25 Pa. Code § 1021.131. The parties have agreed that the Riverkeeper will have 60 days to file the first brief, the Department and Constitution Drive shall submit their briefs 60 days after the Riverkeeper files its brief, and the Riverkeeper may file a reply brief 15 days after the Department and Constitution Drive have filed their briefs. An Order with specific dates will follow.

5) The parties may request oral argument. No discovery will be permitted. There will be no evidentiary hearing.

6) Prehearing Order No. 1 is superseded by this Order.

7) The Department's motion for summary judgment is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: July 2, 2018

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

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(*via electronic filing system*)

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(*via electronic filing system*)

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: July 2, 2018**

OPINION AND ORDER ON
MOTION TO QUASH DISCOVERY

By Bernard A. Labuskes, Jr., Judge

Synopsis

In a third-party appeal from an amended settlement agreement entered into pursuant to the Hazardous Sites Cleanup Act, the Board holds that the appellants are not entitled to take discovery to supplement the administrative record. The Board's review is limited to the administrative record. Among other things, the Board rejects the appellants' argument that the Board must conduct a *de novo* review to determine whether the Department conformed with its duties under Article I, Section 27 of the Pennsylvania Constitution.

O P I N I O N

The Bishop Tube site is an abandoned tube manufacturing facility located in East Whiteland Township, Chester County. Hazardous substances were released into the soils and groundwater at the property. The Department of Environmental Protection has placed the site on the Pennsylvania Priority List of contaminated sites to be addressed by the Department under the Hazardous Site Cleanup Act ("HSCA"), 35 P.S. § 6020.101 *et seq*.

On March 17, 2005, the Department entered into a Consent Order and Agreement, otherwise known as a Prospective Purchaser Agreement ("PPA"), with Constitution Drive Partners, L.P. ("Constitution Drive") for the site. Constitution Drive initially planned to develop the site for commercial purposes. In exchange for a covenant not to sue and contribution protection from the Department, Constitution Drive agreed to undertake certain remediation of soil at the site necessary to demonstrate attainment with a nonresidential statewide health standard or site-specific standard under the Land Recycling and Environmental Remediation Standards Act ("Act 2"), 35 P.S. § 6026.101 *et seq.*

On April 8, 2005, the Department published notice of the PPA pursuant to Section 1113 of HSCA, 35 P.S.§6020.1113, and opened a 60-day period for public comment. The Department received no comments on the PPA during the public comment period, and the PPA became final when the Department notified Constitution Drive that no comments had been received.

The Department subsequently entered into two separate amendments to the original PPA. In the 1st Amended PPA, dated January 22, 2007, the parties agreed to modify certain performance obligations of Constitution Drive related to investigation and remediation of soils at the site. The modifications of Constitution Drive's performance obligations were made part of the initial PPA, which otherwise remained in full force and effect. The amendment to the PPA called for the design, installation, and operation of an air sparging/soil vapor extraction (AS/SVE) system.

On September 5, 2007, the Department issued a Statement of Decision ("SOD") for a prompt interim response action at the site. Through this SOD, the Department selected a system for treatment of groundwater. The purpose of this interim response was to remove "TCE and related contaminants to reduce dissolved contaminant levels in the shallow (overburden) zone

around the treatment area." The SOD further stated that "under this response tasks and costs would be shared between the Department and [Constitution Drive's] soil vapor system to provide for compatibility and increased efficiency." The interim response was not intended to be a final response action for the site. Further cleanup would be required.

In 2008, Constitution Drive installed and operated the AS/SVE System. The system did not meet performance standards. There were apparently operational difficulties resulting from the shallow water table and system flooding. As a result, operation of the system was halted.

In the 2nd Amended PPA, dated June 4, 2010, the parties agreed to further modify Constitution Drive's performance obligations and provide for a cash-out. As with the 1st Amended PPA, the 2nd Amended PPA provided that the modified performance obligations were made part of the initial PPA, which otherwise remained in full force and effect. Constitution Drive paid $32,000 to the Department. 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.

As a result of what the Department has referred to as an "administrative oversight," the Department never published notice of the PPA amendments as it was admittedly required to do under HSCA. It was not until April 1, 2017 that the Department published notice of the 1st and 2nd Amended PPA in the *Pennsylvania Bulletin.* It published notice in *The Daily Local News* on March 18, April 1, April 29, and June 14, 2017. Written comments were accepted during the comment period. The Appellants, the Delaware Riverkeeper Network and Maya Van Rossum (the "Riverkeeper"), among others, submitted comments. On January 26, 2018, pursuant to Section 1113 of HSCA, the Department issued its response document entitled "Response to

Significant Public Comments Regarding Second Amendment to Prospective Purchaser Agreement Between the Department and Constitution Drive Partners." Under Section 1113, it was on that date that the settlements became final. The Riverkeeper filed this appeal from the settlements.

The Riverkeeper has served the Department with requests for production of documents and interrogatories in this appeal. The discovery requests ask the Department to produce such things as all documents that refer or relate in any way to the 2005 PPA, the 2007 PPA, and the 2010 PPA, all documents that refer to, relate to, or constitute communication between the Department and Constitution Drive with regard to the 2005 PPA, 2007 PPA, and/or 2010 PPA, and all documents and investigational material that discuss, study, and/or analyze the benefits, risk, or impacts to the Department, the Commonwealth, the Commonwealth's natural resources, and/or to the public of entering into the 2005 PPA, 2007 PPA, and/or 2010 PPA.

The Department has filed a motion to quash. The Department has refused to answer the Riverkeeper's discovery requests. It argues that the scope and standard of review in this matter are controlled by Section 1113 of HSCA, 35 P.S. § 6020.1113, because the settlements at issue in this appeal are orders that were issued pursuant to Section 1102 of HSCA, 35 P.S. § 6020.1102, and therefore, are proceedings brought under HSCA. The Department says that no right to discovery exists in an appeal of a settlement under Section 1113 because the statute expressly states that the Board shall uphold such a settlement "unless it is found to be arbitrary and capricious on the basis of the administrative record." 35 P.S. § 6020.1113. The administrative record ("AR") in the Department's view is limited to the notice of the settlement, the written comments to the settlement, and the Department's response thereto. The Department adds that the AR as described in Section 506 of HSCA, 35 P.S. § 6020.506, which would

normally apply to the Board's review of a Department response action, is not applicable to the Board's review of a settlement pursuant to Section 1113.

The Riverkeeper opposes the Department's motion to quash, arguing that it is entitled to discovery for three reasons: (1) the Riverkeeper's Article I, Section 27 challenge to the settlements requires *de novo* review; (2) the Department's own violations of the process outlined in Section 1113 preclude reliance on an abridged and incomplete record; and (3) inquiry beyond the Department's proposed AR is appropriate because the Department acted in bad faith and there are questions regarding the integrity of the record.

Section 1113 of HSCA provides as follows:

> 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. 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.

The Department's entry into a Prospective Purchase Agreement and its entry into amendments to that agreement pursuant to HSCA and other statutes at the Bishop Tube HSCA site constitutes a HSCA "proceeding" within the meaning of Section 1113 of the Act. *Chirico v. DEP*, 2002 EHB 25, 34. Therefore, the statute makes it clear that our review of the settlements is not *de novo*. Rather, our review is limited to the administrative record generated by the Department. Although Section 1113 uses the phrase "written record," we take that phrase to mean the same thing as an administrative record. However, the AR for purposes of our review of a settlement under Section 1113 is not the more comprehensive AR for the review of response

actions described in Section 506 of HSCA. Our holding in *Chirico*, 2002 EHB at 35, that Section 506 AR governed our review of the HSCA settlement in that case was, upon further reflection, incorrect. That portion of *Chirico* is overruled. The AR for purposes of reviewing a HSCA settlement entered into under Section 1113 is specified in Section 1113 itself. The AR in a Section 1113 case consists of (1) the Department's notice of the proposed settlement, which includes the terms of the proposed settlement, (2) written comments to the settlement received by the Department, and (3) the Department's response to those comments. It is on the basis of those documents and those documents alone that we review the settlements, which must be upheld unless we find them to be arbitrary and capricious. 35 P.S. § 620.1113.

Discovery and AR review are two concepts not easily conjoined for purposes of judicial review. One of the key purposes of AR-review is to reduce litigation costs and delays. Discovery contributes to those costs and delays. Furthermore, because we are limited to the AR, we would not be able to rely on any materials disclosed as a result of the Riverkeeper's discovery requests which are not part of the AR anyway, which would seem to make discovery a pointless exercise. Although we cannot say that discovery will never under any circumstances be appropriate in an AR-review appeal under Section 1113, a party seeking discovery in such a case will bear a very heavy burden indeed to convince us that discovery is necessary or appropriate. The Riverkeeper has not done so here.

Aside from its general objection that the AR is woefully incomplete, the Riverkeeper posits that we should disregard the restrictions placed on our review in Section 1113 and conduct our normal *de novo* review because its challenge to the settlements includes a claim that the Department acted inconsistently with its duties under Article I, Section 27 of the Pennsylvania

Constitution.[1] We disagree. The scope and nature of our review under Section 1113 does not turn on what substantive objections are being raised to the Department's action. It is true that the Department must always conform its actions with Article I, Section 27, but we are capable of evaluating whether it has done so by entering into a HSCA settlement based upon an AR. The existence of a constitutional challenge does not trump the strict limits set on our review of a HSCA settlement in Section 1113. The constitutional challenge does not create a basis for allowing the discovery requested by the Riverkeeper.

The Riverkeeper next argues that we are not constrained by Section 1113 administrative record review because the Department itself did not follow the procedure required by Section 1113. Specifically, the Department waited more than ten years to publish notice of the PPA amendments. The Riverkeeper notes that AR-review is only appropriate if interested parties have a meaningful opportunity to provide input into the AR, in other words, are afforded due process.

The Riverkeeper is correct in saying that interested parties must be afforded an opportunity to provide input into the AR in an AR-review case in order to satisfy due process requirements. *DER v. Crown Recycling and Recovery*, 1993 EHB 1571, 1578 (record reopened because potentially responsible parties not given notice and opportunity to comment). However, if they are not provided with such an opportunity, the remedy is to fix the AR, not abandon AR review altogether. *Id.*

[1] That section reads:

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

In point of fact, the Department has followed the procedures outlined in Section 1113, albeit admittedly in an extremely untimely manner. The Riverkeeper was obviously provided with an opportunity to provide input, and it did provide such input. We see that its comments are addressed in the Department's response document. The Riverkeeper complains that the opportunity was a sham because it was only provided with that opportunity several years after the amendments to the PPA were signed. However, Section 1113 makes it very clear that, despite those signatures and those delays, and despite whatever performance has taken place under the provisional agreements, the agreements were not final during the years of delay. If this Board determines that the settlements are arbitrary and capricious, they will not be upheld. The signatories cannot benefit legally from the delay caused by the Department's "administrative oversight."

We understand the Riverkeeper's concern that the Department's perhaps natural reluctance to overturn its own agreement based upon third-party comments might have been further enhanced by the delays, suggesting that the Department would have been even less inclined to overturn an agreement that has already been in place for 10 years in response to public comments. However, the Department is not entitled to any increased deference by this Board in the course of its independent review of the AR solely because of the delay resulting from the Department's "administrative oversight." We will determine whether the settlements are arbitrary and capricious when they became final; namely, January 26, 2018, when the Department issued its response document in compliance with Section 1113.

The Riverkeeper next argues that our review is not limited to the AR because the Riverkeeper has alleged that the Department acted in bad faith *in entering into the settlements*. It says that the settlements are a sweetheart deal that benefit a developer at the expense of the

public interest. However, the bad faith exception to the AR requirement, even if we assume for discussion purposes that it exists, provides that an AR might be supplemented if there is a strong showing of bad faith or improper behavior on the part of the agency in *compiling the record*, not with respect to the underlying action. An example might be deliberately or negligently excluding comments from the AR that do not support the agency's action. The Riverkeeper has made no such allegation regarding the compilation of the record, let alone a "strong showing." Even assuming *arguendo* that discovery would be appropriate in this context on the basis of bad faith or improper behavior, the discovery would be limited to information relating to the compilation of the AR, not that relating to the underlying action, which is the focus of the Riverkeeper's discovery requests.

Thus, none of the grounds alleged by the Riverkeeper have convinced us that discovery is necessary in this AR case. While the absence of discovery and a *de novo* evidentiary hearing and our constricted scope and standard of our review might at first blush appear quite limiting, it is important to remember that we are reviewing a *settlement*. As we said in *Chirico*,

> HSCA's Declaration of Policy expressly declares that the cleanup of 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. 35 P.S. § 6020.102(s), 6020.102(12(vii) and (ix).

Chirico, 2002 EHB at 32. At least initially, Constitution Drive was not ever a responsible party. It did not have anything to do with the historic contamination at the site. When considering a settlement with (at least initially) an innocent developer, we must also keep in mind the Declaration of Policy in the Land Recycling and Remediation Standards Act ("Act 2"), 35 P.S. § 6026.101 *et seq*., which provides in part as follows:

> (1) The elimination of public health and environmental hazards on existing commercial and industrial land across this commonwealth is vital to their use and

> reuse as sources of employment, housing, recreation and open-space areas. The reuse of industrial land is an important component of a sound land-use policy that will help prevent the needless development of prime farmland, open-space areas and natural areas and reduce public costs for installing new water, sewer and highway infrastructure.
>
> (2) Incentives should be put in place to encourage responsible persons to voluntarily develop and implement cleanup plans without the use of taxpayer funds or the need for adversarial enforcement actions by the Department of Environmental Resources which frequently only serve to delay cleanups and increase their cost.

35 P.S. § 6026.102. Board reviews of HSCA settlements based solely upon a limited administrative record is consistent with these goals.

Accordingly, we issue the Order that follows.

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 2nd day of July, 2018, it is hereby ordered that the Department's motion to quash 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: July 2, 2018

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

For the Commonwealth of PA, DEP:
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(*via electronic filing system*)

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(*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

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2018-028-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, LLC Permittee	:	**Issued: July 24, 2018**

OPINION AND ORDER ON
MOTION FOR LEAVE TO AMEND NOTICE OF APPEAL

By Thomas W. Renwand, Chief Judge

Synopsis

A motion for leave to amend the notice of appeal is granted. Amendment of appeals is generally granted early in the litigation process. Whether the appeal, as amended, can survive a mootness challenge will be decided in the context of the permittee's motion to dismiss, and is not a factor in the evaluation of the motion to amend.

O P I N I O N

Introduction

This matter involves an appeal filed by Center for Coalfield Justice and Sierra Club (collectively, Appellants) challenging a permit revision issued by the Department of Environmental Protection (Department) to Consol Pennsylvania Coal Company, Inc. (Consol) in connection with Consol's longwall mining operation at the Bailey Mine Eastern Expansion Area (the mine) in Greene County. Permit Revision 210, issued by the Department on March 7, 2018, authorizes Consol to conduct longwall mining under Polen Run in the 5L Panel of the mine. On

March 21, 2018, the Appellants appealed the issuance of the permit revision and also filed a petition for supersedeas and application for temporary supersedeas. A four-day supersedeas hearing was held on April 5-6, 2018 and April 16-17, 2018. On April 24, 2018, the Pennsylvania Environmental Hearing Board (Board) issued an Opinion and Order denying the petitions for supersedeas and temporary supersedeas, finding that the Appellants had not met the burden of proof required to obtain a supersedeas.

The matter now before the Board is the Appellants' motion for leave to amend their appeal, seeking to add additional objections, filed on May 18, 2018. By letter dated May 30, 2018, the Department notified the Board that it did not oppose the motion to amend. On June 1, 2018, Consol filed a response setting forth its opposition to the motion to amend. One of the grounds for Consol's opposition to the motion to amend was its failure to contain a verification and affidavit as required by the Board's rules of practice and procedure, at 25 Pa. Code § 1021.53(c). By Order dated June 27, 2018, the Board directed the Appellants to comply with the requirements of § 1021.53(c) if they wished to proceed with their request for amendment. On July 13, 2018, the Appellants submitted a corrected motion in accordance with § 1021.53(c). We now proceed to address the Appellants' corrected motion and Consol's remaining objections to the motion.

Discussion

25 Pa. Code § 1021.53 sets forth the standard for allowing amendments to a notice of appeal. An appeal may be amended as of right within 20 days of the filing of the notice of appeal. *Id.* at § 1021.53(a). After the 20-day period, the Board may grant leave for amendment if no undue prejudice will result to the opposing parties. *Id*. at § 1021.53(b); *Sokol v. DEP*, 2016 EHB 427. The Pennsylvania Supreme Court has instructed that the right to amend should be liberally granted unless there is an error of law or undue prejudice to adverse parties. *Kilian v.*

Allegheny County Distributors, 185 A.2d 517, 519 (Pa. 1962) (quoted in *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 279 (Pa. 1975)); *Chester Water Authority v. DEP*, 2016 EHB 358. Amendments to appeals are generally allowed where a hearing has not yet been scheduled or is months away and/or where the discovery period is still open or no additional discovery is needed. *See e.g., Sokol, supra* (Amendment allowed where motion to amend was filed less than three months after issuance of Prehearing Order No. 1 and no hearing had been scheduled); *Harvilchuck v. DEP*, 2013 EHB 670 (Amendment allowed where it was requested early in the litigation process and hearing would not be scheduled for months); *Weaver v. DEP*, 2013 EHB 381 (Amendment allowed where motion to amend was filed early in the appeal process); *Borough of St. Clair v. DEP*, 2013 EHB 171 (Amendment allowed where hearing was months away and no additional discovery was needed); *Henry v. DEP*, 2012 EHB 324 (Amendment allowed where motion to amend was filed early in the litigation process). While the timing of a motion to amend is an important consideration, it is not the only consideration. *Chester Water Authority, supra; Baker v. DEP*, 2015 EHB 535. As explained in *Chester Water Authority*:

> We note that in other civil and administrative contexts, at least conceptually, the rules governing the amendment of pleadings appear to be generally lenient in terms of at what point in a proceeding an amendment can be made and the breadth of the amendment. *See* Pa.R.C.P. No. 1033 (party, by leave of court or through consent of other parties, may at any time amend pleading even if the amendment raises a new cause of action or defense); 1 Pa. Code § 35.48 (GRAPP [General Rules of Administrative Practice and Procedure] rule generally providing for an amendment up to five days before the start of a hearing).

2016 EHB at 364, n. 2.

The burden of proving that no undue prejudice will result to the opposing parties is on the party requesting the amendment, i.e., the Appellants. *Id.* In evaluating the likelihood and extent

of prejudice to opposing parties, the Board generally takes into account the following factors: (1) the time when the amendment is requested relative to other developments in the litigation, including the hearing schedule; (2) the scope and size of the amendment; (3) whether the opposing party had actual notice of the issue; (4) the reason for the amendment; and (5) the extent to which the amendment diverges from the original appeal. *Chester Water Authority*, 2016 EHB at 362; *Baker*, 2015 EHB at 537-38; *Harvilchuck*, 2013 EHB at 673; *Rhodes v. DEP*, 2009 EHB 325, 328-29; *Upper Gwynedd Township. v. DEP*, 2007 EHB 39, 42.

An evaluation of the relevant caselaw and the factors set forth above leads to the conclusion that amendment should be permitted. With regard to the first factor, timing, the motion to amend was filed very early in the litigation process – only two months after the appeal was filed. Discovery is still ongoing, and a hearing has not yet been scheduled. Factor three, notice, also weighs in favor of amendment, since the factual basis for the amendments was brought forth during the supersedeas hearing in April. Factor four involves the reason for the amendment. According to the motion and affidavit of legal counsel, the Appellants' reason for seeking amendment of their appeal is to clarify their objections to the Department's issuance of the permit revision and to include legal challenges based on evidence presented during the supersedeas hearing. Pursuant to Pa. R.C.P. 1033, a party may, by leave of court or with consent of other parties, amend his or her pleading to raise a new legal challenge or defense. *Chester Water Authority, supra* at 364, n. 2.[1] At this early stage of the litigation, factor four weighs in favor of allowing amendment. With regard to factor five, extent of the amendment, the proposed amendments do not diverge dramatically from the objections set forth in the original notice of appeal.

[1] But see *Robachele v. DEP*, 2006 EHB 373, 377-78 (Board did not allow amendment of appeal based on Pa. R.C.P. 1033 where motion to amend was filed *after* the hearing on the merits).

Only factor two, size of the amendments, weighs in favor of Consol because the Appellants set forth a significant number of amendments to their notice of appeal. However, as noted, the newly added objections do not diverge significantly from the original objections and appear to build on claims already raised. While this factor may weigh slightly in favor of Consol, the aggregate consideration of all factors falls on the side of granting leave to amend. *Harvilchuck*, 2013 EHB at 674.

Consol argues that granting the Appellants' motion to amend their appeal would waste judicial resources and those of the parties by prolonging litigation that Consol asserts has been rendered moot by the Board's ruling on the supersedeas petition. Indeed, Consol has filed a motion to dismiss the appeal for mootness on the basis that the objected-to mining is completed. However, as set forth in *Borough of St. Clair*, "a motion to amend does not provide an occasion for debating the underlying merits of the objections that are the subject of the proposed amendment. The merits of the new objections are not a factor in considering whether to allow an amendment." *Borough of St. Clair*, 2013 EHB at 173-74. Whether the Appellants' objections, both original and amended, can survive a mootness challenge will be decided in the context of Consol's motion to dismiss.

Therefore, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2018-028-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, LLC Permittee	:	

O R D E R

AND NOW, this 24th day of July, 2018, it is ordered that the Appellants' Motion for Leave to Amend Notice of Appeal is *granted.*

ENVIRONMENTAL HEARING BOARD

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

DATED: July 24, 2018

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

For the Commonwealth of PA, DEP:
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J. Michael Becher, Esquire
Benjamin M. Barczewski, Esquire
(via electronic filing system)

For Permittee:
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Timothy M. Sullivan, Esquire
Daniel M. Krainin, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHRIS PALUTI	:	
	:	
v.	:	**EHB Docket No. 2018-059-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CUMBERLAND CONTURA, LLC., Permittee	:	**Issued: August 1, 2018**

OPINION AND ORDER
DISMISSING APPEAL

By Steven C. Beckman, Judge

Synopsis

The Board dismisses the appeal of Mr. Chris Paluti where he has demonstrated an intent not to proceed and has failed to follow Board rules and orders.

O P I N I O N

Mr. Chris Paluti sent a letter dated June 2, 2018, to the Environmental Hearing Board ("Board"). The letter was received by the Board on June 7, 2018. In his letter, Mr. Paluti states that he received a letter from the Department of Environmental Protection ("Department") on May 17, 2018, notifying him of the Department's approval of a permit modification addressing the water handling plan for a mine under Coal Mining Activity Permit No. 30831303. Mr. Paluti's main objections to the Department's action appear to be that the approval did not use best engineering practices and technology to ensure public safety along with an insufficient response to his April 7, 2018 public comments and lack of response to his subsequent follow up letter to the Department dated May 17, 2018. He requested that the Board cancel the approval immediately and direct the Department to conduct its operations in a sensible, logical and unbiased manner.

The Board treated Mr. Paluti's June 2, 2018, letter as a Notice of Appeal and issued an Order for Perfection on June 7, 2018, requiring him to file additional information by June 22, 2018. The Board's rule at 25 Pa. Code § 1021.51 requires a notice of appeal to contain the following information: a telephone number, a copy of the written notice of the Department action being appealed (if a written notification has been received), objections to the Department action, and proof of service to various required parties. On June 7, 2018, we also issued our standard Prehearing Order No. 1 setting forth a timetable for discovery and dispositive motions and a separate Order addressing our mandatory electronic filing requirement. We did not receive anything in response to the Notice to Perfect by June 22, 2018, nor did Mr. Paluti register for electronic filing or request to be excused from that requirement. On July 2, 2018, we issued a Rule to Show Cause requiring Mr. Paluti to show cause as to why his appeal should not be dismissed, or alternatively, to comply with the Notice to Perfect by July 24, 2018. On July 9, 2018, we received a letter from Mr. Paluti dated June 30, 2018. The June 30 letter did not comply with either the Notice to Perfect or the Rule to Show Cause but stated that Mr. Paluti had received "an Order to start legal proceedings by the EHB dated June 7, 2018." It is not clear if the June 7, 2018 Order referenced by Mr. Paluti is the Notice to Perfect or the Prehearing Order No. 1. The Board has not received any further filings from Mr. Paluti as of the date of this Opinion and Order.

Mr. Paluti has not complied with the basic requirements for filing an appeal as outlined in our Notice to Perfect nor adequately responded to our Rule to Show Cause. It is not clear to us that he intended his initial letter to constitute a formal appeal to the Board, but it is absolutely clear that Mr. Paluti does not intend to further pursue an appeal at this point. A Board appeal

cannot move forward without further proper action by Mr. Paluti which he apparently has no intention of undertaking. In his June 30, 2018 letter he states:

> The EHB now has the information and concerns I have presented to address this matter. As an individual I do not have the time or expertise to see this legal process thru. I have presented and addressed the problems to the EHB, it should be up to the State of Pennsylvania's governing body, and the EHB to conduct the investigation and any required legal process to assure the DEP is doing the correct and safe design for this permit process.

Mr. Paluti appears to have a misunderstanding of the Board's role as an adjudicative body and his role as an appellant with the burden of proof in an appeal before the Board. The Board does not act unilaterally to investigate or correct Department actions and it is the responsibility of Mr. Paluti to put forth his case before us and to meet his burden of proof as required by 25 Pa. Code § 1021.122. The content of his June 30 letter, and his lack of response to our Orders, makes it apparent that Mr. Paluti does not intend to properly pursue an appeal with the Board.

Our rules authorize sanctions upon parties for failing to abide by Board orders and/or the Board's rules of practice and procedure. *Slater v. DEP*, 2016 EHB 380, 381, citing 25 Pa. Code § 1021.161. Included within these sanctions is the dismissal of an appeal. Further, the Board has consistently held that where a party has shown a demonstrable disinterest in proceeding with an appeal, dismissal is appropriate. *Id.*, citing *Mann Realty Associates, Inc. v. DEP*, 2015 EHB 110, 113; *Casey v. DEP*, 2014 EHB 908, 910-911; *Nitzschke v. DEP*, 2013 EHB 861, 862. When a party evinces an intent to no longer continue an appeal, we have found it is appropriate to consider the dismissal of the appeal. *Id.* Mr. Paluti's stated lack of interest in proceeding with his appeal, along with the failure to follow the Board's rules and orders, makes it appropriate for us to dismiss this case. Based on the foregoing, the Board dismisses this appeal and issues the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHRIS PALUTI	:	
	:	
v.	:	**EHB Docket No. 2018-059-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CUMBERLAND CONTURA, LLC., Permittee	:	

O R D E R

AND NOW, this 1st day of August, 2018, it is hereby ordered the appeal in this matter is dismissed. The docket will be 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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 1, 2018

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

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Katherine Knickelbein, Esquire
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For Permittee:
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P.O. Box 1020
Waynesburg, PA 15370

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KURT A. VANDUZER, JEANNE L. VANDUZER AND VANDUZER'S SERVICE STATION, INC.	:	
v.	:	**EHB Docket No. 2018-066-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 3, 2018**

OPINION AND ORDER
DENYING PETITION FOR SUPERSEDEAS

By: Judge Richard P. Mather, Sr.

Synopsis

The Board denies Appellants' Petition for Supersedeas without a hearing pursuant to 25 Pa. Code § 1021.62(c) because the Appellants failed to state grounds sufficient to support the granting of a supersedeas. The Petition does not explain why the Appellants believes the Department acted unlawfully or unreasonably in issuing the order or why the Appellants are entitled to a supersedeas. In addition, the Appellants have failed to file any affidavits with their Petition or explain their absence, and this failure to comply with the Board's Rules provides an alternatives basis to deny their Petition for Supersedeas. *See* 25 Pa. Code § 1021.62(a)(1)(2).

O P I N I O N

Background

On or about June 21, 2018, the Department of Environmental Protection ("Department") issued an Administrative Order ("June 21, 2018 Order") to the Appellants[1] which required,

[1] The Appellants listed in the Department's June 21, 2018 Order are two individuals (Kurt A. VanDuzer and Jeanne L. VanDuzer) and a Pennsylvania Corporation (VanDuzer's Service Station, Inc.).

among other things that the Appellants retain the services of a certified tank remover to remove underground storage tanks at the VanDuzer's Service Station, at 121 E. Tioga Street, Tunkhannock, PA and complete a site characterization of the property by September 15, 2018. The Department issued its June 21, 2018 Order approximately five years after its receipt of a notice that there had been a release of regulated substances from the storage tanks on Appellants' property in Tunkhannock.

On July 3, 2018, the Appellants filed a Notice of Appeal with the Board challenging the Department's June 21, 2018 Order. In particular, the Appellants assert that the Order required that all tanks be removed within 15 days and that such action is unreasonable and impractical and would negatively affect ongoing activities to complete a proper site characterization of the Appellants' property in Tunkhannock. At the same time that they filed their Notice of Appeal, the Appellants file a Petition for Supersedeas. The Appellants also filed a letter on July 3, 2018 informing the Board that Appellant's counsel was out of the country and not available for a supersedeas hearing until July 23, 2018. The Board issued an order on July 9, 2018 scheduling a conference call with the Parties on July 23, 2018 at 2:00 pm.

Before the call schedule for July 23, 2018, the Department filed a Response to Appellant's Petition for Supersedeas and a Motion to Deny Appellants' Petition for Supersedeas. In its Motion to Deny the Department asserted that the Board should deny Appellants' Petition without a hearing in accordance with 25 Pa. Code § 1021.62(c). According to the Department, the Appellants failed to comply with the requirements in Section 1021.62(a) and (b) and the Board is authorized to deny the pending Petition for Supersedeas because the Appellants' Petition lacks particularity in the facts to support the Petition; lacks particularity in the legal

authority to support its Petition; and the Appellants failed to support their factual allegation by affidavits or explain their failure to provide affidavits.

The Board held the scheduled conference call with the parties on July 23, 2018. The Board ask whether the Appellants could respond to the Department's Motion to Deny by Friday, July 27, 2018. The Appellants indicated that they could respond by July 27, 2018 and the Board issued an Order on July 23, 2018 directing the Appellants to respond to the Department's Motion to Deny by July 27, 2018. The Board wanted to resolve the Department's Motion to Deny the Petition for Supersedeas before it decided whether it was necessary to schedule a supersedeas hearing. The Appellants filed a Reply to New Matter and Response to the Department's Motion to Deny on July 27, 2018. The Board is now in a position to address the Department's outstanding Motion to Deny. For the reasons set forth below, the Board grants the Department's Motion.

Discussion

A supersedeas is an extraordinary remedy that will not be granted absent a clear demonstration of appropriate need. *Mellinger v. DEP*, EHB Docket No. 2012-163-M (Opinion and Order, June 5, 2013); *Rausch Creek Land, LP v. DEP*, 2011 EHB 708, 709; *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802; *Tinicum Twp. v. DEP*, 2002 EHB 822, 827; *Global Eco-Logical Servs. v. DEP*, 1999 EHB 649, 651; *Oley Twp. v. DEP*, 1996 EHB 1359, 1361-1362. Our rules provide that the granting or denying of a supersedeas will be guided by relevant judicial precedent and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a). Among the factors to be considered are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a)(1)-(3); *Dougherty v. DER and*

Southwestern Energy Production Company, 2014 EHB 9, 11; *Neubert v. DEP*, 2005 EHB 598, 601. The issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *UMCO Energy, Inc.*, 2004 EHB at 802; *Global Eco-Logical Servs., supra; Svonavec, Inc. v. DEP*, 1998 EHB 417, 420. *See also Pennsylvania PUC v. Process Gas Consumers Group*, 467 A.2d 805, 808-809 (Pa. 1983). In order for the Board to grant a supersedeas, a petitioner must make a credible showing on each of the three regulatory criteria. *Neubert v. DEP*, 2005 EHB 598, 601; *Pennsylvania Mines Corp. v. DEP*, 1996 EHB 808, 810; *Lower Providence Twp. v. DER*, 1986 EHB 395, 397. If a petitioner fails to carry its burden on any one of the factors listed under 25 Pa. Code § 1021.63(a), the Board need not consider the remaining requirements for supersedeas relief. *Dickinson Twp. v. DEP*, 2002 EHB 267, 268; *Oley Twp. v. DEP*, 1996 EHB 1359, 1369.

Under the Board's Rules, the Board may deny a petition for supersedeas upon motion or *sua sponte* without hearing for lack of particularity in the facts pleaded, lack of particularity in the legal authority cited as the basis for the grant of the supersedeas, an inadequately explained failure to support the petition with affidavits, or a failure to state grounds sufficient for the granting of a supersedeas. 25 Pa. Code § 1021.62(c)(1)–(4); *Doughtery*, 2014 EHB at 12; *Hopewell Twp. Bd. of Supervisors v. DEP*, 2011 EHB 372; *Timber River Dev. Corp. v. DEP*, 2008 EHB 635; *Dickinson Twp. v. DEP*, 2002 EHB 267.

Given the fact that a supersedeas is an extraordinary measure that is not to be taken lightly, it is critical that a petition for supersedeas plead facts and law with particularity and be supported by affidavits setting forth facts upon which issuance of the supersedeas may depend. 25 Pa. Code § 1021.62(a). The pleadings and affidavits must be such that, if the petitioner were able to prove the allegations set forth in its pleadings and affidavits at a hearing, and the

Department and/or permittee did not put on a case, it would be apparent from the filings that the Board would be able, if it so chose, to issue a supersedeas. In other words, the petitioner's papers, on their face, must set forth what is essentially a *prima facie* case for the issuance of a supersedeas. *See Dougherty*, 2014 EHB at 13; *Global Eco-Logical Servs. v. DEP*, 2000 EHB 829, 832; *A&M Composting v. DEP*, 1997 EHB 1093, 1098. A petition that together with its supporting documentation does not provide the Board with a basis for granting a supersedeas will be denied. *Mellinger, supra*.

Appellant's petition for supersedeas is just such a petition. It is completely inadequate with respect to all of the factors under 25 Pa. Code § 1021.63 to be considered by the Board. In their initial Petition for Supersedeas, the Appellants failed to even mention the three factors that the Board considers when evaluating a petition for supersedeas.[2] In their Reply to New Matter and Response to Department's Motion to Deny, the Appellants briefly discussed the irreparable harm factor, but again the Appellants failed to mention or discussed the two remaining factors that the Board must consider: the likelihood of success on the merits and the likelihood of injury to the public or other parties.

On the issue of irreparable harm, the Appellants claim that the June 21, 2018 Order requires immediate removal of the underground storage tanks and that immediate removal will likely damage existing monitoring test wells, eliminate the preliminary process of site characterization and necessitate redesigning and reinstalling the monitoring wells. The Department disagrees with the Appellants assertion that the Order requires "instant removal of the tanks" within fifteen (15) days. According to the Department, the June 21, 2018 Order

[2] The factor includes (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a)(1)-(3); *Doughterty*, 2014 EHB at 11.

requires that Appellants retain the services of a certified tank handler within fifteen (15) days to provide a copy of the executed contract within thirty (30) days and to provide a full site characterization report of the Department by September 15, 2018. The language in the Department's June 21, 2018 Order supports the Department's position that the Order merely directs the Appellants to contract with a Department certified tank handler for the removal of the five underground storage tanks and to provide the Department with a site characterization report by September 15, 2018. The proper completion and submittal of a site characterization report is a part of the Order. On the one factor that the Appellants mentioned in their Response, the document does not support the Appellant's claim of irreparable harm.

In its Motion to Deny, the Department argued that the Appellants have failed to allege that they are likely to prevail on the merits. The Department instead asserts that they are unlikely to prevail on the merits. In support of its position, the Department details the applicable Storage Tank Regulations at 25 Pa. Code Chapter 245 that it believes the Appellants have violated. These alleged violations support the issuance of the June 21, 2018 Order that directs the Appellants to take the actions set forth in the Order. In their July 27, 2018 Response to the Department's Motion to Deny, the Appellants failed to address the Department's detailed argument that they are unlikely to prevail on the merits or to respond to the allegations of numerous violations of the Storage Tank Regulations in Chapter 245. In light of their silence, the Board finds that the Appellants have not shown that they are likely to prevail on the merits.

In addition, the Board's Rules require that a person seeking a supersedeas "state with particularity the citations of legal authority the petitioner believes form the basis for the grant of supersedeas." 25 Pa. Code § 1021.62(b). The initial Petition for Supersedeas is devoid of any citations to any legal authority, and their Reply to New Matter and Response to Motion to

Dismiss is equally devoid of citations to any legal authority to support their Petition for Supersedeas. Lack of particularity in the legal authority cited is independent basis to deny a petition for supersedeas. 25 Pa. Code § 1021.62(c)(2). Appellants' failure to cite any legal authority to support its petition or in response to the Department's Motion to Deny is an independent basis to grant the Department's Motion. The Department on the other hand has provided the Board with citations to legal authority to support its Motion including the detailed citations to the Storage Tank Regulations in Chapter 245.

The Department also argues in its Motion to Deny that there is risk to the public that prevents the Board from granting the Petition for Supersedeas. 25 Pa. Code § 1021.6(a)(3). The Department points out that it has been "attempting to guide Appellants through the process [Storage Tank Regulations] since 2013, and despite the Department's every effort, Appellants have continued to delay addressing contamination from the property." The Board agrees that five years is a long time to wait for action to address the contamination on Appellants' property. The Appellants reported the release on their property to the Department in April 2013, and they have not, according to the Department, complied with the detailed regulatory requirements listed by the Department in Chapter 245 that govern such situations. In their Response to the Department's Motion to Deny, the Appellants failed to address this point about the five year delay. In the absence of any response, the Board agrees with the Department that the Appellants' failure to adequately respond to the release of contaminants for over five years (since 2013) presents a risk of harm to the public.

The Board finds that the Appellants Petition for Supersedeas is deficient on its face and lacks several key elements. 25 Pa. Code § 10.21(c)(1)(2) and (4). The Board therefore grants the Department's Motion to Deny.

Failure to provide supporting affidavits or explain their absence

When the Appellants filed their initial Petition for Supersedeas, the Appellants failed to provide affidavits supporting the factual allegations in their Petition or to explain why it was unable to supply affidavits. Failure to supply supporting affidavits or to "inadequately" explain their absence is an independent basis to deny a petition for supersedeas without a hearing. 25 Pa. Code § 1021.62(c)(3). The Department identified the Appellants' failure to comply with this requirement as one of several bases to deny the petition for supersedeas without a hearing in its Motion to Deny.

In their Response to the Department's Motion to Deny, the Appellants acknowledged their mistake and indicated that it had secured an affidavit in support of its Petition for Supersedeas from Martin Gilgallon, P.G., who is the Regional Environmental Manager with LaBella Associates, P.C., which has been involved, on behalf of the Appellants, in the efforts between the Appellants and the Department to address the situation at their property over the past five years. According to their Response, the affidavit of Mr. Gilgallon supports the facts in their Petition for Supersedeas, and the Appellants stated that the affidavit was "attached" to its Response. The problem within this statement is that no affidavit was attached to the Appellants' Response. No affidavits were filed with the Appellants' initial Petition for Supersedeas or with their later filed Response. The Appellants' failure to actually supply the Board with supporting affidavits or to adequately explain their absence is an alternative and independent basis to deny their Petition. 25 Pa. Code § 1021.62(c)(3); *Timber River Development Corp. v. DEP and Paint Township*, 2008 EHB 635, 636.

Even if the Appellants had attached the affidavit of Mr. Gilgallon to their Petition or Response, the Board would still grant the Departments' Motion to Deny for the reasons set forth

above.[3] The Petition for Supersedeas was still deficient on its face: lack of particularity in the facts pleaded; lack of particularity in the legal authority cited as the basis for the grant of supersedeas; and a failure to state grounds sufficient for the granting of a supersedeas. 25 Pa. Code § 1021.62(c)(1),(2) and (4). An affidavit supporting the allegations of fact in an otherwise deficient petition would only resolve the concerns with 25 Pa. Code § 1021.62(c)(3) and not with the other listed paragraphs discussed above.

Accordingly, we issue the following Order.

[3] Without reviewing the actual affidavit, the Board is also not able to determine whether the affidavit is in the correct form. *Thomas v. DEP and Lamar Township*, 1998 EHB 778, 780. Under the *Thomas* decision, the Board will not accept an affidavit based upon a person's "knowledge, information or belief" to support a petition for supersedeas. An affidavit is deficient under the Board's Rules if it is not based upon personal knowledge.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KURT A. VANDUZER, JEANNE L. VANDUZER AND VANDUZER'S SERVICE STATION, INC.	:	
v.	:	**EHB Docket No. 2018-066-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 3rd day of August, 2018, pursuant to 25 Pa. Code § 1021.62(c), it is hereby ordered that the Department's motion to deny the Appellant's petition for supersedeas is **granted** and the petition for supersedeas is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: August 3, 2018

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

For the Commonwealth of PA, DEP:
Michael Ferrence, Esquire
(via electronic filing system)

For Appellants:
Raymond W. Ferrario, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CARBON & METAL TECHNOLOGIES, LLC	:	
	:	
v.	:	**EHB Docket No. 2017-036-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 8, 2018**
	:	

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

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal of a Department letter suspending an operator's permit for a coal preparation facility for the operator's failure to comply with two prior Department orders requiring the operator to continuously operate a site that had been largely idle for several years, transfer the permit to another entity, or permanently reclaim the site. The Department was justified in suspending the permit after such prolonged inactivity at the site and the operator's failure to abate longstanding violations.

Background

On April 17, 2017, the Department of Environmental Protection (the "Department") issued a letter to Carbon & Metal Technologies, LLC ("Carbon and Metal") suspending its surface mining permit for the operation of a coal preparation facility in Hubley Township, Schuylkill County, and notifying Carbon and Metal of the Department's intent to forfeit the bonds for the site in 30 days if outstanding violations were not corrected. Carbon and Metal filed an appeal of that letter on May 8, 2017. The Board held a hearing on April 25, 2018. Shortly before the hearing commenced, the parties filed a joint stipulation comprised of 125 stipulated

facts. At the beginning of the hearing, the Department moved into evidence its 176 exhibits. With no objection from Carbon and Metal, we admitted the exhibits. With its exhibits admitted and the stipulations entered into the record, the Department rested without calling any witnesses. Carbon and Metal called two witnesses: its engineering consultant for the site, and the Department's site inspector as if on cross. Carbon and Metal elicited brief testimony and had a group of photographs and two other exhibits admitted into evidence before resting. This Adjudication is based on that record.

FINDINGS OF FACT

1. The Department is the agency having the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, No. 418, as amended, 52 P.S. §§ 1396.1-1396.19b (the "Surface Mining Act"); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1-1001; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated under each of the referenced statutes. (Parties' Joint Stipulation of Facts Number ("Stip.") 1.)

2. Carbon and Metal is a Pennsylvania limited liability company, entity number 3902973, with a registered address of 2525 West Main Street, Spring Glen, Schuylkill County, PA 17978. Carbon and Metal also uses an address of 821 Westwood Avenue, Staten Island, NY 10314-4341. (Stip. 2.)

3. On May 11, 2010, the Department approved the transfer of Anthracite Coal Mining Activity Permit No. 54851603 ("Mining Permit") and National Pollution Discharge Elimination System Permit No. PA0592897 ("NPDES Permit") from Pine Creek Coal Company

to Carbon and Metal. (Stip. 13; Notes of Transcript page ("T.") 21; Department Exhibit Number ("DEP Ex.") 165.)

4. Prior to the permit transfer, Pine Creek Coal Company operated a coal preparation plant on the site pursuant to Mining Permit No. 54851603 and NPDES Permit No. PA0592897, which was referred to as the "Pine Creek Breaker." (Stip. 12.)

5. A coal preparation operation involves subjecting coal to "chemical or physical processing or cleaning, concentrating or other processing or preparation." 25 Pa. Code § 88.1.

6. The site consists of two parcels of real estate in Hubley Township, Schuylkill County identified as Schuylkill County Tax Parcel Nos. 14-07-0021.000 and 14-07-0086.000, which comprise approximately 26.3 acres along with buildings and various improvements. (Stip. 11; Carbon and Metal Exhibit Number ("CM Ex.") 1.)

7. The site contains, among other structures, a fine coal plant, a heavy media plant, and a coal breaker facility. (CM Ex. 1.)

8. After taking possession of the site, Carbon and Metal maintained an active coal preparation operation from May 2010 through April 2011. (DEP Ex. 89-100.)

9. The site was idle from May 2011 through September 2013. (Stip. 19.)

10. On August 19, 2013, the Department approved a temporary cessation of operations for Carbon and Metal through November 18, 2013. (Stip. 22; DEP Ex. 157.)

11. The Department's regulation on temporary cessation of operations in the surface anthracite coal program provides:

> (a) Operations that are temporarily ceased but are to be resumed under the permit, shall be effectively secured. Temporary abandonment, including such factors as equipment removal from the site for reasons of security or maintenance, does not relieve the operator of the obligations to comply with any provision of the permit. Temporary cessation of an operation may not exceed 90 days unless approved by the Department.

(b) As soon as it is known that the operation will temporarily cease for more than 30 days, the operator shall submit a notice of intention to temporarily cease the operation. The notice shall include a statement of the exact number of acres which will have been affected in the permit area, the extent and kind of reclamation of those areas, and identification of the backfilling, regrading, revegetation, monitoring and water treatment activities that will continue during the temporary cessation.

25 Pa. Code § 88.131.

12. The Department noted that the site was idle during an inspection on November 20, 2013. (Stip. 24; DEP Ex. 57.)

13. On December 3, 2013, the Department extended Carbon and Metal's temporary cessation until March 2, 2014. (Stip. 26; DEP Ex. 154.)

14. The site was idle during a Department inspection on January 8, 2014. (Stip. 27; DEP Ex. 54.)

15. On March 24, 2014, the Department extended Carbon and Metal's temporary cessation to May 1, 2014. (Stip. 31; DEP Ex. 52.)

16. Department inspections in March, April, May, June, and July, 2014 noted that the site was idle. (Stip. 32, 33; DEP Ex. 48-52.)

17. During an inspection on August 21, 2014, the Department noted that Carbon and Metal tried to run coal through the breaker. The Department notified Carbon and Metal that the Department was willing to give Carbon and Metal another temporary cessation because the Department viewed the site as being reactivated. (Stip. 35; DEP Ex. 47.)

18. However, the Department inspected the site in September, October, November, and December 2014, as well as in January, February, and March, 2015, and determined that the site was again idle. (Stip. 36, 37, 42, 43; DEP Ex. 37, 38, 41-46.)

19. On March 24, 2015, the Department granted another temporary cessation of operations to Carbon and Metal until June 22, 2015. (Stip. 45; DEP Ex. 137.)

20. The Department noted that the site was idle during inspections in April, May, June, and July, 2015. (Stip. 47, 49, 51, 54; DEP Ex. 33, 34, 35, 36.)

21. On July 29, 2015, the Department granted Carbon and Metal another temporary cessation of operations until October 28, 2015, and notified Carbon and Metal that it would be the final temporary cessation granted. (Stip. 57; DEP Ex. 133.)

22. The Department determined that the site was idle during inspections in August, September, and October, 2015. (Stip. 58, 59, 61, 63; DEP Ex. 29-32.)

23. On October 30, 2015, the Department requested that Carbon and Metal immediately activate the site or submit a reclamation schedule by November 30, 2015. (Stip. 64; DEP Ex. 29.)

24. Department inspections determined that the site was idle in November and December, 2015, as well as in January and February, 2016. (Stip. 65, 66; DEP Ex. 25-28.)

25. On February 10, 2016, the Department and Carbon and Metal held a conference call to discuss Carbon and Metal's plans for the site. The Department requested that Carbon and Metal either activate the site or submit a reclamation schedule to the Department by March 1, 2016. (Stip. 68.)

26. On March 1, 2016, Carbon and Metal requested a 30-day extension to activate the site or submit a reclamation schedule, which the Department granted. (Stip. 69; DEP Ex. 131.)

27. Carbon and Metal requested an additional extension in a letter to the Department dated March 31, 2016, but it does not appear that this request was granted. (Stip. 71; DEP Ex. 22, 130.)

28. The Department noted the site was idle during inspections in March and April, 2016. (Stip. 70, 72; DEP Ex. 22, 24.)

29. On April 13, 2016, the Department issued Compliance Order 16-5-007-S to Carbon and Metal for its failure to operate a site on a continuous basis or to permanently reclaim a site with operations that have permanently ceased, in violation of 25 Pa. Code §§ 88.131, 88.132 (regarding permanent cessation of operations), and 89.81 (same). The Department provided Carbon and Metal a deadline of May 13, 2016 to abate the violations. (Stip. 73; DEP Ex. 23.) The order was not appealed.

30. The Department inspected the site on May 18, 2016 to determine if Carbon and Metal complied with the order, and the Department found that the site was idle and Carbon and Metal had failed to comply with the requirements of the order. (Stip. 74; DEP Ex. 20.)

31. On May 18, 2016, the Department issued Compliance Order 16-5-017-S (FTC) ("Failure to Comply") to Carbon and Metal for violating 25 Pa. Code §§ 88.131, 88.132, and 89.81, and for not correcting those violations since ordered to do so. The Department again directed Carbon and Metal to immediately begin to operate the site on a continuous basis, transfer the permit, or permanently reclaim the site. (Stip. 75; DEP Ex. 21.) The order was not appealed.

32. On June 3, 2016, Carbon and Metal sent to the Department copies of a letter of intent and purchase and sale agreement between Carbon and Metal and a prospective buyer of the site. Based on its receipt of these materials, the Department noted that there was satisfactory progress in addressing Compliance Orders 16-5-007-S and 16-5-017-S (FTC). (Stip. 76, 77; DEP Ex. 127.)

33. The Department determined that the site remained idle during inspections in June, July, August, September, and October, 2016. (Stip. 77, 79, 84, 90, 95; DEP Ex. 15-19.)

34. On October 14, 2016, in response to a communication from the Department on October 11, 2016, Carbon and Metal informed the Department that no sale had taken place of the site. Since Carbon and Metal did not complete a sale of the site, the Department no longer viewed Compliance Orders 16-5-007-S and 16-5-017-S (FTC) as being in satisfactory progress. (Stip. 94, 96; DEP Ex. 15.)

35. On November 9, 2016, Carbon and Metal entered into an agreement with a third party for the sale of the equipment related to the coal breaker. (Stip. 98, 101; DEP Ex. 113.)

36. In an inspection report dated January 24, 2017, the Department noted that breaker equipment had been removed by the third party, that Carbon and Metal had started to remove the briquette plant, and that a reclamation plan had been submitted to the Department. The Department stated in the report that the site must remain active with reclamation conducted on a continuous basis. Due to the removal of breaker equipment, the Department viewed Compliance Orders 16-5-007-S and 16-5-017-S (FTC) as once again being in satisfactory progress toward resolving the issues raised in the two orders. (Stip. 104; DEP Ex. 12.)

37. The Department notified Carbon and Metal on January 25, 2017 that the timelines set forth in its submitted reclamation plan were unacceptable. The Department informed Carbon and Metal that it should begin to regrade areas of the site that consisted mostly of coal refuse/silt, and that, because there was no frost, it should not wait until the spring to begin the work. (Stip. 105, 106; DEP Ex. 12, 110.)

38. Inspections in February and March, 2017 determined that the site was idle and that Carbon and Metal had failed to conduct reclamation on a continuous basis. (DEP Ex. 10, 11.)

39. On March 30, 2017, the Department reiterated the substance of a conversation it had with Carbon and Metal on March 27, informing Carbon and Metal that it had until April 14, 2017 to begin reclamation on a continuous basis, including the removal of all one-ton bags of briquettes, equipment, junk, and buildings, as well as regrading and revegetating the permit area. The Department also stated that the two compliance orders had reached their maximum abatement timeframes. (Stip. 106, 109, 111; DEP Ex. 10, 107.)

40. Carbon and Metal submitted a revised reclamation schedule to the Department on April 13, 2017. (Stip. 112; DEP Ex. 9, 106.)

41. In a letter dated April 17, 2017, the Department suspended Carbon and Metal's surface mining permit. The letter provides in pertinent part:

> The Department has determined that Carbon & Metal Technologies, LLC (Carbon & Metal) has failed to comply with the Surface Mining Conservation and Reclamation Act (Surface Mining Act) and the rules and regulations of the Department. Specifically, the violations noted in Compliance Orders Numbered 16-5-007-S and 16-5-017-S remain unabated. Therefore, the Department hereby SUSPENDS Surface Mining Permit No. 54851603 in accordance with Section 4.3 of the Surface Mining Act, 52 P.S. § § 1396.4c. Reclamation of the mine site is to commence immediately and continue until completed in accordance with the approved reclamation plan contained in Surface Mining Permit No. 54851603.

(Stip. 113; DEP Ex. 105.)

42. The letter also notified Carbon and Metal that the Department intended to forfeit the bonds posted for the site of $256,341 unless the violations were corrected within 30 days. (Stip. 113, 114; DEP Ex. 105.)

43. In its April 18, 2017 inspection report, the Department informed Carbon and Metal that reclamation must consist of removing all one-ton briquette bags from the site, removing all equipment and junk throughout the permit area, revegetating the far eastern end of the site, removing the heavy media building, the coal breaker, the fine coal plant, and all portable screens and crushers, and regrading and revegetating the rest of the permit area. The buildings to remain on-site following reclamation are the garage, scale, office, and three storage buildings. (DEP Ex. 9.)

44. Carbon and Metal appealed the April 17, 2017 letter to the Board on May 8, 2017. (Stip. 117.)

45. Carbon and Metal submitted a site cleanup plan to the Department on July 14, 2017 containing certain tasks with start and end dates. (Stip. 120, 121.)

46. Carbon and Metal did not comply with its own site cleanup plan. (Stip. 122; T. 33.)

47. Department inspections following the issuance of the April 17, 2017 letter under appeal have noted that the site has remained idle and that Carbon and Metal remains in violation of the two compliance orders, the Surface Mining Act, and the Department's regulations. (Stip. 115, 116, 118; DEP Ex. 1-9.)

48. Carbon and Metal did not appeal any of the compliance orders relevant to the current appeal. (Stip. 125.)

49. The coal breaker has been continuously idle since October 28, 2015, and was only operated sporadically before that date. (Stip. 124; T. 21-22.)

50. A limited amount of reclamation was completed by Carbon and Metal between June 2017 and April 2018, including a portion of the fine coal plant being taken down, the

removal of "junk material," the removal of old equipment, and the removal of some storage trailers. (T. 24-25, 26-28, 41; CM Ex. 2B, 2C, 2D, 2E.)

51. Only a minimal amount of regrading and revegetation has been completed within the last two to three years. (T. 34-35.)

52. A significant amount of reclamation work needs to be completed, including the removal of additional equipment and the removal briquette bags of carbonite material that have been stored uncovered on the site. (T. 25-26, 33, 34, 37; CM Ex. 1, 2A, 2B, 2F.)

53. There are holes in the roof and sides of the breaker building where a considerable amount of equipment remains inside. (T. 37, 39.)

54. The site is not secure from access on foot. (T. 38.)

55. Carbon and Metal has not operated the site on a continuous basis since April 2011, nor has it conducted continued or sustained reclamation. (Stip. 19, 22, 24, 26, 27, 31, 32, 33, 36, 37, 42, 43, 45, 47, 49, 51, 54, 57, 58, 59, 61, 63, 65, 66, 70, 72, 74, 77, 79, 84, 90, 95, 115, 116, 118, 124; T. 25, 34-36; DEP Ex. 1-11, 15-20, 22, 24, 25-38, 41-46, 48-52, 54, 57, 133, 137, 154, 157.)

DISCUSSION

The Department letter being appealed by Carbon and Metal contains two components. The first component suspends Carbon and Metal's surface mining permit no. 54851603 for failing to abate the violations detailed in two prior compliance orders, and requires that reclamation of the site begin immediately and continue until completed. The second component of the letter advises Carbon and Metal of the Department's intent to forfeit the bonds posted for the site. The letter warns that the Department will forfeit the bonds within 30 days unless Carbon and Metal corrects the violations in the orders and completes reclamation of areas of the

site where operations are permanently ceased. Carbon and Metal argues that the permit suspension and possible bond forfeiture are unwarranted because it has engaged in certain reclamation activities on the site in accordance with the Department's directives.

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). In cases where the Department suspends or revokes a permit, the Department bears the burden of proof. 25 Pa. Code § 1021.122(b)(3); *M & M Stone Co. v. DEP*, 2008 EHB 24, 57, *aff'd*, No. 383 C.D. 2008 (Pa. Cmwlth. Oct. 17, 2008); *Gonsalves v. DEP*, 2003 EHB 340, 345; *Eagle Envtl., L.P. v. DEP*, 1998 EHB 896, 922, *aff'd*, No. 2704 C.D. 1998 (Pa. Cmwlth. Oct. 19, 2001). The Department must show by a preponderance of the evidence that the Department's decision to suspend Carbon and Metal's permit constitutes a lawful and reasonable exercise of the Department's discretion and that the decision is supported by the facts. *Id.* Despite the Department having the ultimate burden, an appellant must still substantiate the merits of the objections to a Department action raised in its notice of appeal. *See Gonsalves, supra*, 2003 EHB 340, 345 ("Although the Department bears the burden of proof, it is not required to imagine and then dispel every conceivable challenge to its action. As a matter of procedure, it is incumbent upon an appellant to explain why he believes that the Department abused its discretion.").[1]

Permit Suspension

The Department conducted monthly inspections of the Carbon and Metal site between May 2011 and April 2016, and during nearly every one of these inspections over the course of

[1] Carbon and Metal submitted a seven-page post-hearing brief in which it concurred with the proposed findings of fact contained in the Department's brief. The Department elected not to file a reply brief.

five years the Department noted that the site was idle and Carbon and Metal was not running any material through its coal preparation facility. Although over the course of that time period Carbon and Metal obtained a handful of temporary cessations of operations from the Department, all of those approved cessations expired without the site being reactivated in any material way. The last temporary cessation granted to Carbon and Metal expired on October 25, 2015. The Department determined that the site remained idle during its inspections following the end of that cessation. The Department requested that Carbon and Metal either activate the site or submit an acceptable reclamation schedule by March 1, 2016, which was then extended to April 1, 2016. Carbon and Metal did not submit a reclamation schedule by that date.

Following an inspection of the site on April 13, 2016, the Department decided to pursue enforcement action over the prolonged inactivity and it issued Compliance Order No. 16-5-007-S to Carbon and Metal. (DEP Ex. 22, 23.) The Department cites 25 Pa. Code § 88.131, as well as 25 Pa. Code §§ 88.132 and 89.81, as the provisions being violated. Sections 88.132 and 89.81 deal with permanent cessation of operations and require that a permanently ceased operation be permanently reclaimed.[2] Because the site had sat idle for so long without any ongoing operation,

[2] 25 Pa. Code § 88.132 provides:

> Operations that are permanently ceased shall be backfilled or closed or otherwise permanently reclaimed in accordance with this chapter and the permit. All underground openings, equipment, structures or other facilities not required for monitoring, unless approved by the Department as suitable for the postmining land use, shall be removed and the affected land reclaimed.

25 Pa. Code § 89.81 provides:

> (a) The operator shall close or backfill or otherwise permanently reclaim all affected areas, in accordance with this chapter and according to the permit approved by the Department.
> (b) All surface equipment, structures or other facilities not required for monitoring shall be removed and the affected lands reclaimed unless an alternative postmining land use has been approved by the Department.
> (c) Changes in the water quality and quantity, depth to groundwater and location of surface water drainage channels shall be minimized so that the approved postmining land

the Department concluded that Carbon and Metal permanently ceased operations and thus needed to permanently reclaim the site in accordance with Sections 88.132 and 89.81. The description of the violations in the order provides: "The site remains idle and the operator has exceeded the maximum number of temporary cessations authorized by the Department. Operations that are permanently ceased must be backfilled, closed or otherwise permanently reclaimed in accordance with the approved plans in the permit." The order then requires Carbon and Metal to "operate the facility on a continuous basis or transfer the permit or permanently reclaim the affected areas in accordance with the approved plans in the permit." The Department gave Carbon and Metal a month to comply with the order and abate the violations.

The Department conducted another inspection on May 18, 2016 to determine whether Carbon and Metal had complied with the April 2016 order. (DEP Ex. 20.) The Department inspector determined that Carbon and Metal had not taken any action to comply with the order and the Department issued a second order on the date of the inspection for Carbon and Metal's failure to comply with the April 2016 order—Compliance Order 16-5-017-S (FTC) (with FTC standing for "Failure to Comply"). (DEP Ex. 21.) The May 2016 order notes the same violations and requires the same corrective action.

Carbon and Metal eventually made some efforts to sell the site and some of the equipment. Between December 2016 and January 2017, Carbon and Metal sold off coal breaker equipment, which was removed by a third party, and it began to remove portions of the briquette plant. (DEP Ex. 12.) The Department determined that Carbon and Metal was making satisfactory progress in resolving the issues in the two compliance orders. However, the Department instructed Carbon and Metal that it should begin regrading and reclamation work on a continuous basis, and that Carbon and Metal needed to have reclamation equipment on-site by

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use is not adversely affected.

April 14, 2017. Carbon and Metal did not mobilize efforts to complete reclamation and the Department suspended Carbon and Metal's permit in the letter under appeal dated April 17, 2017. (DEP Ex. 105.) We heard testimony that, at some point prior to the April 2018 hearing in this matter, Carbon and Metal had done some additional limited reclamation work, including taking down part of the fine coal plant, and removing some storage trailers, old equipment, and junk material. Nevertheless, Carbon and Metal's own witness testified that a significant amount of reclamation work remains, that the site is in general disrepair, and that Carbon and Metal has not taken an active interest in the site. (T. 25, 34, 36-38.)

Perhaps unsurprisingly given the amount that has been stipulated between the parties, there is remarkably little in dispute in this case. Carbon and Metal has stipulated that the site was idle from May 2011 through September 2013. (Stip. 19.) It has stipulated that the coal breaker has been continuously idle since October 28, 2015. (Stip. 124.) It has stipulated that numerous Department inspections over several years revealed that the site was idle, and it did not object to the admission of any of those inspection reports into evidence. (Stip. 17, 24, 27, 32, 33, 42, 43, 47, 49, 51, 54, 58, 59, 61, 63, 65, 66, 70, 72, 74, 77, 79, 84, 90, 95, 99, 100, 103, 107, 115, 118; T. 20.) Carbon and Metal has not presented any evidence contradicting or calling into question any of these inspection reports. It does not appear to dispute that it is required to reclaim the site. It has not argued that its modest reclamation work has rectified the violations in the Department's two compliance orders. It only appears to argue that it has engaged in sufficient reclamation activities to keep the site active and save it from having its permit suspended.

The issue then boils down to whether Carbon and Metal's occasional and sporadic efforts at reclamation render unreasonable the Department's decision to suspend Carbon and Metal's

permit. Section 4c of the Surface Mining Act authorizes the Department to issue such orders as are necessary to aid in the enforcement of the Act's provisions, including orders modifying, suspending, or revoking permits. 52 P.S. § 1396.4c. Section 18f provides in part that it is "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…." 52 P.S. § 1396.18f. Thus, the Department is vested with broad powers to further the purposes of the Surface Mining Act and to take action against an operator's permit if the operator does not comply with the Department's orders or if it is in violation of the Act and the regulations.

The Department twice issued orders requiring Carbon and Metal to either operate the site on a continuous basis, transfer the permit to someone else, or permanently reclaim the site. Carbon and Metal did not appeal those orders. (Stip. 125.) It cannot now challenge that those orders were unreasonable or contrary to law, or contest the factual predicate laid out in those orders that gave rise to the violations contained within them. *New Hope Crushed Stone, supra*, 2017 EHB 1005, 1019-20 (quoting *New Hope Crushed Stone & Lime Co. v. DEP*, 2016 EHB 666, 684-85). Although Carbon and Metal made some effort to address the violations by trying to sell the site, its efforts were ultimately unsuccessful. Carbon and Metal did not comply with the orders and the Department chose to act on that noncompliance.

We considered a similar situation in *Bituminous Processing Company v. DEP* (*Bituminous Processing II*), 2001 EHB 489. In that case, we upheld the Department's decision to suspend a surface mining operator's permit for the operator's failure to reclaim its site in accordance with the applicable statutes and regulations, failure to complete payment under a

consent assessment of civil penalty, and failure to maintain liability insurance. The operator at the *Bituminous Processing II* site had discontinued mining and coal preparation activities some years earlier and had not promptly reclaimed the site, even in the face of multiple compliance orders from the Department. We found the permit suspension was justified due to the operator's failure to comply with the law and orders of the Department. *See* 52 P.S. § 1396.18f; 35 P.S. § 691.611.

Here, the Department has been more than patient. The Department diligently conducted monthly inspections of the site for years, noting almost every time that the site was inactive. (DEP Ex. 1-20, 22, 24-38, 41-54, 56-101.) While Carbon and Metal undertook *some* reclamation activity during that period, those activities were not regular or continuous, and there remains a long way to go before reclamation is completed. There are obvious benefits to having reclamation proceed on a sustained basis in accordance with a reasoned plan. The overarching intent of reclamation is to not have potentially dangerous mining sites left abandoned, and to restore those sites to be used for another purpose. *See New Hanover Twp. v. DEP*, 2014 EHB 834, 868 (reviewing temporary cessation regulation in the noncoal mining program, 25 Pa. Code § 77.651(a), and finding requirement for reclamation to be conducted on a regular and continuous basis "is designed to prevent the abandonment of mining operations where there are outstanding reclamation obligations which the Commonwealth will be left to perform to avoid public health, safety, welfare and environmental problems"). *See also Ginter Coal Co.*, 1972 EHB 166, 170 (purpose of the Surface Mining Act is to ensure operations are conducted in a way that prevents air and water pollution and ultimately bring about reclamation to enable a site to sustain vegetation and be usable for other purposes post-mining). Carbon and Metal's irregular and infrequent reclamation work has not come close to fulfilling those objectives. We detect

nothing unreasonable about the Department wanting reclamation to proceed on a continuous basis on a site that has been all but abandoned for several years.

Carbon and Metal has presented no compelling argument in the approximately two pages of argument that are contained within its post-hearing brief. Its only argument seems to be that every few years or so it has removed some equipment and parts of buildings from the site. That hardly qualifies as steady progress. Carbon and Metal even concedes that the site is no longer capable of conducting any coal processing. There is no dispute that the site languishes in an unreclaimed, unsecured state. Carbon and Metal has not substantiated the objections in its notice of appeal or otherwise given us any reason to question that the Department's decision was anything but reasonable. *See Gonsalves*, 2003 EHB at 346 (appellant provided no basis for upholding its appeal of permit suspension; it is not the Board's function to fashion factual or legal challenges for an appellant). Thus, we find based on the undisputed facts that the Department acted reasonably and in accordance with the law in suspending Carbon and Metal's permit after years of inactivity and its failure to correct the violations noted in the two compliance orders. *See Bituminous Processing II*; *C.N. & W., Inc. v. DER*, 1989 EHB 432 (finding that a surface mining operator's admitted violations and failure to comply with two Department orders justified suspension of its permit).

Notice of Intent to Forfeit Bonds

Turning to the issue of the notice of intent to forfeit Carbon and Metal's bonds, the Department's April 17, 2017 letter provides in pertinent part:

> By this letter, the Department is giving Carbon & Metal notice of its intent to forfeit the bonds on Surface Mining Permit No. 54851603….
> ….
> Unless the violations set forth above are corrected within thirty days (by May 18, 2017), the Department will take action to declare a forfeiture of the bonds under the provisions of Section 4(h) of the Surface Mining Act, 52 P.S. § 1396.4(h).

(DEP Ex. 105.) The Department represents in its post-hearing brief that, as of the date of the hearing, the Department had not forfeited the bonds for the site. We have no indication that the Department has initiated the bond forfeiture process to date.

It is somewhat unclear what Carbon and Metal's challenge is to this portion of the letter, and whether it has preserved that challenge in its post-hearing brief. *See* 25 Pa. Code § 1021.131(c) (an issue not argued in a post-hearing brief may be waived). Paragraph (e) of Carbon and Metal's notice of appeal complains that the Department has not quickly reclaimed other sites that have had their bonds forfeited and the Department should not forfeit bonds if it cannot reclaim a site more quickly than the operator. At the hearing, Carbon and Metal elicited some limited testimony regarding the bond forfeiture program and other sites that have undergone the forfeiture process. (T. 28-32.) However, Carbon and Metal does not discuss the issue in any detail in its post-hearing brief, apart from touching on bonding momentarily in a few proposed findings of fact. Regardless, to the extent Carbon and Metal has preserved its challenge from being waived, we conclude that the Department's statement in the letter that it *intends* at some point in the future to forfeit Carbon and Metal's bonds for the site is not a final, appealable action.

We previously dealt with this same issue in *Bituminous Processing Company v. DEP* (*Bituminous Processing I*), 2000 EHB 13. In that case, the Department issued a letter to Bituminous Processing that (1) declared the company's surface mining permit to be suspended based on its failure to comply with earlier compliance orders, and (2) included a notice from the Department that the Department would forfeit the company's bonds if it failed to correct certain violations within 30 days. Bituminous Processing appealed both prongs of the letter and the

Department moved to dismiss the portion of the appeal covering the notice of intent to forfeit the bonds, which we granted.

The letter in *Bituminous Processing I* is effectively the same as the letter at issue here. As we have recognized before, the Board only has jurisdiction over final Department actions affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations. 35 P.S. § 7514(a); 25 Pa. Code § 1021.2 (definition of "action"); *Northampton Bucks Cnty. Mun. Auth. v. DEP*, 2017 EHB 84, 85; *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747, 750. Applying that standard in *Bituminous Processing I*, we determined that "[t]he notice of intent does not order Bituminous Processing to take any corrective action. Rather, the notice of intent simply warns Bituminous Processing of possible future Departmental action. This warning alone is not an appealable action of the Department." *Bituminous Processing I*, 2000 EHB 13, 14. *See also Percival v. DER*, 1990 EHB 1077, 1107-08 (notice of intent to forfeit bonds if violations not corrected within 30 days is not an appealable action). The Department eventually did move forward and forfeited Bituminous Processing's bonds, which was an appealable action, and we consolidated the appeal of that action with the appeal of the permit suspension. *See Bituminous Processing II, supra*. Consistent with this precedent, Carbon and Metal's appeal of a notice of some possible future action by the Department to forfeit its bonds is not a final, appealable action. Only if and when the Department actually forfeits the bonds will it crystalize into an action subject to this Board's jurisdiction.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 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. The Department bears the burden of proof when it revokes or suspends a license, permit, approval, or certification. 25 Pa. Code § 1021.122(b)(3); *M & M Stone Co. v. DEP*, 2008 EHB 24, 57, *aff'd*, No. 383 C.D. 2008 (Pa. Cmwlth. Oct. 17, 2008); *Gonsalves v. DEP*, 2003 EHB 340, 345; *Eagle Envtl., L.P. v. DEP*, 1998 EHB 896, 922, *aff'd*, No. 2704 C.D. 1998 (Pa. Cmwlth. Oct. 19, 2001).

4. The Department must show by a preponderance of the evidence that the Department's decision to suspend Carbon and Metal's permit constitutes a lawful and reasonable exercise of the Department's discretion and that the decision is supported by the facts. *M & M Stone Co. v. DEP*, 2008 EHB 24, 57, *aff'd*, No. 383 C.D. 2008 (Pa. Cmwlth. Oct. 17, 2008); *Gonsalves v. DEP*, 2003 EHB 340, 345; *Eagle Envtl., L.P. v. DEP*, 1998 EHB 896, 922, *aff'd*, No. 2704 C.D. 1998 (Pa. Cmwlth. Oct. 19, 2001).

5. The Department is authorized under the Surface Mining Conservation and Reclamation Act to suspend an operator's permit where that operator is in violation of any provision of the Act, any relevant rule or regulation of the Department, or any order of the Department. 52 P.S. §§ 1396.4c and 1396.18f.

6. Carbon and Metal violated the Surface Mining Conservation and Reclamation Act and the rules and regulations of the Department by failing to maintain an active site or permanently reclaim that site, and by failing to comply with two Department orders requiring

Carbon and Metal to activate the site, transfer the permit, or immediately begin reclamation and continue until completed. 52 P.S. § 1396.18f; 25 Pa Code §§ 88.131, 88.132, and 89.81.

7. The Department met its burden of proof to show that its decision to suspend Carbon and Metal's surface mining permit was lawful, reasonable, and supported by the undisputed facts of this case. *See Bituminous Processing Co. v. DEP*, 2001 EHB 489; *C.N. & W., Inc. v. DER*, 1989 EHB 432.

8. A notice of intent to forfeit a surface mining operator's bonds at some point in the future is not a final, appealable action. *Bituminous Processing Co. v. DEP*, 2000 EHB 13, 14; *Percival v. DER*, 1990 EHB 1077, 1107-08.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CARBON & METAL TECHNOLOGIES, LLC	:	
	:	
v.	:	**EHB Docket No. 2017-036-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 8th day of August, 2018, it is hereby ordered that Carbon & Metal Technologies, LLC's appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 8, 2018

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

For the Commonwealth of PA, DEP:
Stevan Kip Portman, Esquire
(*via electronic filing system*)

For Appellant:
Charles B. Haws, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2014-072-B (Consolidated with 2014-083-B and 2015-051-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	**Issued: August 17, 2018**

OPINION AND ORDER ON
APPELLANTS' AMENDED APPLICATION FOR COSTS AND FEES

By Steven C. Beckman, Judge

Synopsis

The Board awards the Center for Coalfield Justice and the Sierra Club costs and attorneys' fees in the amount of $77,817.42 under the Costs for Mining Proceedings law, 27 Pa. C.S. § 7708. The Department of Environmental Protection is the party responsible for satisfying the award.

O P I N I O N

Introduction

The Center for Coalfield Justice and the Sierra Club (collectively "CCJ/SC") filed an Amended Application for Costs and Fees ("Amended Fee Application") under the Costs for Mining Proceedings law, 27 Pa. C.S. § 7708 ("Costs Law") and 25 Pa. Code §§ 1021.181 – 1021.184. The litigation for which CCJ/SC now seek attorneys' fees and costs involves their consolidated appeals of certain permit revisions (Permit Revisions No. 180 and No. 189) granted by the Department of Environmental Protection ("DEP" or the "Department") to Consol Pennsylvania Coal Company, LLC ("Consol") for the Bailey Mine Eastern Expansion Area

("BMEEA"). The consolidated appeal went through discovery and dispositive motions before the Board held an eight-day hearing in August 2016. Following extensive post-hearing briefing by the parties, the Board issued our Adjudication on August 15, 2017. In the Adjudication, we held that Permit Revision No. 180 was properly issued by the Department but that the Department's decision to issue Permit Revision No. 189 was in violation of the Clean Streams Law, the Mine Subsidence Act, associated regulations, and Article I, Section 27 of the Pennsylvania Constitution. *Center for Coalfield Justice v. DEP,* 2017 EHB 799, 856-857.

CCJ/SC filed an initial fee application on September 14, 2017, seeking an award of attorneys' fees and costs under Section 307(b) of the Clean Streams Law. 35 P.S 691.307(b). The Department responded with a Motion to Quash Appellants' Application on October 13, 2017 ("Motion to Quash"), alleging that the fee application was brought under the wrong statute. We agreed with the Department that CCJ/SC's fee application was brought under the wrong statute but allowed CCJ/SC to amend their application and denied the Department's Motion to Quash. *Center for Coalfield Justice v. DEP,* EHB Docket No. 2014-072-B, slip op. (Opinion and Order, May 31, 2018). In that Opinion, we found that "CCJ/SC's exclusive remedy for requesting fees and costs in this matter is under the [Costs Law]." *Id.* at 6. However, because we found the initial application was timely and it provided adequate notice of the claim to the Department, along with our conclusion that the analysis under the Costs Law and the Clean Streams Law was likely to be very similar, we held that there was no prejudice to the Department in granting CCJ/SC's request to amend their fee application. *Id.* at 7. Following our Opinion, CCJ/SC submitted the Amended Fee Application on June 15, 2018, seeking costs and fees from the Department under the Costs Law. The Department filed its Response To Appellants' Amended

Application for Costs and Fees ("DEP Response") on July 16, 2018.[1] CCJ/SC filed a Reply Brief In Support Of Amended Application For Costs and Fees on July 31, 2018 ("Reply Brief"). All of the briefing in this matter is complete and the matter is now ripe for decision.

Standard

CCJ/SC seek $300,571.55 in attorneys' fees and costs from the Department pursuant to the Costs Law. We begin our analysis of the Amended Fee Application in this matter by looking to the Costs Law and the rules governing fee claims before the Board. The Pennsylvania Supreme Court has noted that, "Not all fee-shifting statutes are the same and care is required in comparing such statutes, as the language or purpose of a particular fee shifting provision will affect its construction and hence, its application." *United Mine Workers of America v. DEP*, 2003 EHB 256, 260, citing *Lucchino v. DEP*, 809 A.2d 264, 268 (Pa. 2002). The Costs Law contains a section entitled "General Rule" which provides that, "Any party may file a petition for award of costs and fees reasonably incurred as a result of that party's participation in any proceeding involving coal mining activities which results in a final adjudication being issued by the Environmental Hearing Board… ." 27 Pa. C.S. § 7708 (b). The language of the next section of the Costs Law entitled "Recipients of awards" is not as clear as we would like but, as we read the relevant statutory requirements set forth therein, any party, other than a permittee or his representative, may be awarded, from the Department, appropriate costs and fees incurred for a proceeding concerning coal mining activities if that party (1) initiates or participates in any proceeding concerning coal mining activities, (2) prevails in whole or in part, achieving at least some degree of success on the merits and (3) the party made a substantial contribution to the full and fair determination of the issues. 27 Pa. C.S. § 7708 (c)(2). Our own rules governing fee

[1] Consol filed a limited letter response to the Amended Fee Application noting that CCJ/SC's claim was only directed at the Department.

petitions to the Board require that an application for costs and fees conform to any requirements set forth in the statute under which costs and fees are sought. 25 Pa. Code § 1021.182(a). Board rules further provide that a request for costs and fees shall be by a verified application setting forth sufficient grounds to justify the award, including an affidavit setting forth in detail all reasonable costs and fees incurred, including receipts and other evidence, and where attorneys' fees are claimed, evidence of hours expended, the customary commercial rate in the area and the experience, reputation and ability of the attorneys involved in performing the services. 25 Pa. Code § 1021.182(b). Finally, the Board's rules provide that the Board may deny an application sua sponte if it fails to provide all of the information required in sufficient detail to enable the Board to grant the relief requested. 25 Pa. Code § 1021.182(d).

While the Board has addressed fee applications under the Clean Streams Law ("CSL") several times in recent years, we have only addressed a fee application under the Costs Law in one prior matter, *UMW v. DEP*, 2003 EHB 256 ("*UMW*"). In that case, we denied the fee application because it did not satisfy the statutory requirement that the underlying proceeding concern "coal mining activities" as defined in the Costs Law. As a result, the Board has not yet had the opportunity to fully review a fee application under the Costs Law. CCJ/SC and the Department disagree about how the Board should conduct its review and what approach we should apply to determining the appropriate award in this case. CCJ/SC suggest that we should evaluate their Amended Fee Application in a manner consistent with our review of fee petitions under the CSL using the three-step process we have developed in those cases. *See Crum Creek Neighbors v. DEP*, 2013 EHB 835, 837; *Hatfield Twp. v. DEP*, 2013 EHB 764, *aff'd*, 2014 Pa. Commw. Unpub. Lexis 738* (Pa. Cmwlth. December 23, 2014), *petition for allowance of appeal denied*, No. 69 MAL 2015 *et al.* (Pa. Aug. 31, 2015). ("*Hatfield*"); *Kwalwasser v. DER*, 1988

EHB 1308; *Crum Creek Neighbors*, 2010 EHB 835; *Solebury Twp. v. DEP*, 928 A.2d 990 (Pa. 2007). Amended Fee Application, at 3, 5.

The Department disagrees and believes it is more appropriate for the Board to consider decisions made by the Interior Board of Land Appeals ("IBLA") and the federal court system under Section 525(e) of the federal Surface Mining Control and Reclamation Act ("SMCRA"). In support of this position, the Department notes that the Costs Law was "enacted to provide the same rights to costs and fees as provided for in federal SMCRA." DEP Response, at 5. The Department states that under the decisions addressing Section 525(e) of SMCRA, the party seeking fees must first show it is eligible for fees and costs by demonstrating that it has prevailed either in whole or in part and has achieved at least some degree of success on the merits. *Id.* The party must then establish that it is entitled to the fees by showing that it made a substantial contribution to the determination of the issues. *Id.* The statutory language found in the Costs Law clearly attempts to track this language. *See* 27 Pa. C.S. § 7708 (c)(2).

Ultimately, we are not sure it matters whether you follow the approach suggested by CCJ/SC or the one advocated by the Department. Under either approach, we find that the fundamental issues that the Board must decide in ruling on the Amended Fee Application are the same and are generally consistent with both the three-step approach advocated by CCJ/SC and the eligibility/entitlement language used in the Section 525(e) decisions advocated by the Department. Consistent with the Board's approach in the *UMW* case, the first issue is whether CCJ/SC's Amended Fee Application arises from a proceeding concerning coal mining activities as that term is defined in the Costs Law. We have already determined that the underlying matter here, CCJ/SC's challenge to Permit Revisions No. 180 and No. 189, was a proceeding concerning coal mining activities as that term is defined in the Costs Law. *Center for Coalfield*

Justice v. DEP, EHB Docket No. 2014-072-B, slip op. (Opinion and Order, May 31, 2018). As we explained in that Opinion, the longwall mining and stream restoration activities authorized by the Department under Permit Revisions No. 180 and No. 189 are "coal mining activities" as that term is defined in the Costs Law.

Having satisfied ourselves that CCJ/SC's fee claim meets this initial requirement, we turn to the next step in our analysis, whether they have satisfied the threshold criteria for a fee award under the Costs Law, i.e. are they eligible/entitled to the requested costs and fee award. These threshold criteria are found in the Costs Law and mirror those found in Section 525(e) of SMCRA.[2] The threshold criteria require that the party seeking a fee award show that it has prevailed in its challenge to the agency decision, in whole or in part, achieving at least some degree of success on the merits and has made a substantial contribution to the full and fair determination of the issues. 27 Pa. C.S. § 7708 (c)(2); DEP Response, at 5. It is clear that CCJ/SC prevailed in part in the consolidated appeal and had some degree of success on the merits because the Board ruled in their favor when we held that the Department's issuance of Permit Revision No. 189 was unreasonable and in violation of both governing law and Article I, Section 27 of the Pennsylvania Constitution. *Center for Coalfield Justice v. DEP*, 2017 EHB 799. The Department admits as much in the DEP Response stating that, "it is admitted that CCJ and Sierra Club prevailed, in part, in their appeal of permit revision No. 189 … and are eligible for a limited award of fees and costs." DEP Response, at 6, para. 15. At the same time, it is equally clear that CCJ/SC's challenge in the proceeding was only partially successful as the Board denied their request to find that the Department's decision to issue Permit Revision No.

[2] In deciding that the criteria found in the Costs Law mirror those in Section 525 (e) of SMCRA, the Board has not, consistent with the purpose of the Costs Law, authorized standards that are more stringent than the Federal standards for the award of costs and fees. 27 Pa.C.S.A. Section 7708 (a).

180 violated the law and Article I, Section 27 of the Pennsylvania Constitution. *Id.* Further, there is no disputing that CCJ/SC initiated and participated in the proceeding in front of the Board for which they now seek their fees and costs and we find that they made a substantial contribution to the Board's determination of the legality of the Department's decision to issue Permit Revisions No. 180 and No. 189. Therefore, we find that CCJ/SC have satisfied the threshold requirements set forth in 27 Pa. C.S. § 7708 (c)(2) to proceed with a fees and costs claim under the Costs Law.

The final step is to examine the details of CCJ/SC's Amended Fee Application and determine the reasonable amount of an award under the facts and circumstances of this case. The Board has broad discretion in fashioning an award of costs and fees as both a general matter and under the specific terms of the Costs Law. *See Chalfont-New Britain Joint Sewage Auth. v. DEP*, 24 A.3d 470, 474 n.10 (Pa. Cmwlth. 2011); *Hatfield Twp. Municipal Auth. et al. v. DEP*, 2010 EHB 571, 588 ("In other circumstances, we may decide that particular fees should be disallowed, or that an across-the-board percentage reduction is appropriate."). The Costs Law provides that "appropriate costs and fees … may be awarded …" by the Board. 27 Pa. C.S. § 7708 (c). The use of the term "may" in a fee awards statute has typically been read to grant the Board discretion in determining a proper award. *Hoy v. Angelone*, 720 A.2d 745, 751 (Pa. 1998) ("Use of the term 'may' signals the legislature's intention to rest the award of counsel fees and costs within the discretion of the trial court."). The inclusion of the term "appropriate" in the Costs Law further supports that the Board should exercise that discretion to arrive at a reasonable fee award. Finally, our rules provide that the applicant shall provide an affidavit "setting forth in detail all **reasonable** costs and fees incurred" by the party in connection with the case. 25 Pa. Code. § 1021.182 (b)(3) (emphasis added). Overall, the Board's responsibility is to review the

requested costs and fees, along with any challenges to those costs and fees, to ultimately arrive at what we determine is an appropriate and reasonable award.

Attorneys' Fees

In reviewing the details of a request for attorneys' fees, we start by determining the lodestar: the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hatfield*, 2013 EHB at 779, citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). CCJ/SC listed hours for three attorneys in their Amended Fee Application. Excluding the hours related to the fee application itself which will be addressed separately, CCJ/SC claimed the number of hours in their Amended Fee Application as follows:

Sarah E. Winner – 1003.4 hours

Oday Salim – 183.65 hours

Ryan Hamilton – 94.0 hours

In her declaration included with the Amended Fee Application, Attorney Winner attached time records detailing the work that makes up the claimed hours. She also stated that she reviewed the time records for each attorney and identified that portion of the time "that relates to Permit Revision No. 189 and excluded all other hours (e.g. work related to the Appeal of Permit Revision No. 180; work related to Appellants' Motion for Summary Judgment)." Amended Fee Application, Ex. 2, Declaration of Sarah E. Winner, para. 6. The Department challenged some of the claimed hours citing various reasons including that the hours involved matters outside of the scope of Permit Revision No. 189, were attributed to work related to Dr. Stout, CCJ/SC's expert witness, or involved matters that were not contested, such as standing. DEP Response, at 11, para. 23. The Department did not offer a clear explanation why the Board should reject the hours related to working with Dr. Stout and we find no reason to do so. Similarly, we see no

reason to exclude hours related to standing issues. We do agree with the Department that some of the claimed hours involved matters beyond Permit Revision No. 189 and should not be awarded to CCJ/SC. The main issue, which we will address later, is how to deal with the claimed hours that involve both CCJ/SC's unsuccessful challenge to Permit Revision No. 180 and the successful challenge to Permit Revision No. 189.

After reviewing the detailed time entries and considering the parties arguments about which hours should be included and excluded, we assigned the claimed hours into one of three groups. The three groups are: (1) Included Hours - the claimed hours that clearly and exclusively involve the Permit Revision No 189 appeal and should be fully awarded to CCJ/SC (i.e. Winner entry for 3/31/15 – "revising Notice of Appeal – Permit Revision No. 189'); (2) Excluded Hours - the claimed hours that should be excluded for various reasons, including but not limited to, claimed hours that involve only the Permit Revision No. 180 appeal (i.e. Winner entry for 4/6/15 – "drafting Notice of Appeal Permit rev. 180"), claimed hours that appear unrelated to either Permit Revisions No. 180 or No. 189 (i.e. Winner entry for 12/10/15 – "final prep for public participation presentation – community fair"), claimed hours that appear to be related to the Motion for Summary Judgement that CCJ/SC stated in Attorney Winner's declaration were properly excluded (i.e. Winner entry for 12/18/15 – "outlining potential Motion for Summary Judgment arguments"); and claimed hours that were clearly mistakes or otherwise lacked sufficient detail to allow the Board to determine their relationship to this matter[3] (i.e. Winner entry for 7/30/16 – "I reviewed letter to DEP re witnesses without subpoena" – a

[3] The party seeking fees has the burden of presenting the necessary evidence supporting those fees and if the evidence is "inadequate, it is within the Board's discretion to reduce the award accordingly." *Hatfield*, 2013 EHB at 780. Further, given that the Board, pursuant to 25 Pa. Code §1021.182(d), may sua sponte deny an entire fee application if it fails to provide all the information required in sufficient detail to enable the Board to grant the requested relief, it is beyond question that the Board can exclude individual time entries that lack sufficient detail for the Board to evaluate the requested time.

duplicate time entry for Attorney Oday)(i.e. Winner entry for 12/4/15 – "call with client re: Morgan Worldwide documents" – There were several time entries listing John Morgan and Morgan Worldwide but no explanation of what, if any, role the individual or company undertook relative to the litigation and no witness appeared at the hearing named John Morgan or representing Morgan Worldwide); and (3) Mixed Hours – the claimed hours that involved both Permit Revision No. 180 and Permit Revision No. 189. For the three CCJ/SC attorneys for whom fees are sought, the groups of claimed hours are as follows:

	Included Hours	Excluded Hours	Mixed Hours
Sarah E. Winner	25.0	52.5	925.9
Salim Oday	1.3	3.8	178.55
Ryan Hamilton	0.0	2.1	91.9

The second part of the lodestar calculation is to determine the reasonable hourly rate for the attorneys involved in the fee claim. Our rules require that in addition to evidence of the hours expended on the case, the applicant shall provide evidence of the customary commercial rate of payment for such services in the area and the experience, reputation and ability of the individual or individuals performing the services. 25 Pa. Code 1021.182(b)(4). CCJ/SC is seeking an hourly rate of $225 for Attorneys Winner and Oday and an hourly rate of $163 for Attorney Hamilton. Attorney Winner supported these rates by stating that the "rates are reflective of Fair Shake Environmental Legal Service's normal base rates and are further consistent with, or below, the published Community Legal Services fee schedule. See, Community Legal Services of Philadelphia, Attorney Fees… ." Amended Fee Application, Ex.

2, Declaration of Sarah E. Winner, para. 16. Attorney Winner also included, as exhibits to her declaration, the Curriculum Vitae for all three attorneys outlining their relevant education and work experience. The Department did not directly contest the requested rates but argued that CCJ/SC has not complied with the Board rules because of the citation to the customary commercial rates of payment in the Philadelphia area rather than the Pittsburgh area. DEP Response, at 10-11, para. 21. In their Reply Brief, CCJ/SC point out that while they do cite to the Philadelphia-area Community Legal Services fee schedule, they do so after first stating that the claimed hourly rates are reflective of the normal base rates for Fair Shake Environmental Legal Services, a non-profit law firm located in Pittsburgh. We conclude that the requested rates are appropriate in this case. The rates appear reasonable to us for a case of this nature and the level of experience of the attorneys involved on behalf of CCJ/SC. We are familiar with the work and personnel at Fair Shake and there is no contradictory evidence from the Department that the offered hourly rates do not reflect the customary commercial rates for these services in the greater Pittsburgh area where the matter arose and the hearing took place.

We now calculate the lodestar based on the numbers of hours reasonably expended on the litigation (in this case, the hours we have grouped as the Included Hours and Mixed Hours) and the reasonable hourly rate.[4] For reasons that will become clear as we go forward, we will calculate separate lodestars for the Included Hours and the Mixed Hours. The Included Hours lodestar is as follows:

Sarah E. Winner - 25.0 hours x $225 = $5,625.00

Salim Oday – 1.3 hours x $225 = $292.50

[4] It should be clear that there is no need to calculate the lodestar for the time included in the Excluded Hours group since we have determined that any award of attorney fees based on that work would not be appropriate or reasonable under the Board's rules and the facts and circumstances of this case.

Total - $5,917.50

The Mixed Hours lodestar is as follows:

Sarah E. Winner – 925.9 hours x $225 = $208,327.50

Salim Oday – 178.55 hours x $225 = $40,173.75

Ryan Hamilton – 91.9 hours x $163 = $14,979.70

Total - $263,480.95

Once the lodestar has been calculated, the Board can exercise its discretion to make further adjustments to arrive at a reasonable fee award based on several factors. Among the factors the Board considers are the degree of success, the extent to which the litigation brought about a favorable result, the extent to which the favorable result matches the relief sought, and the size, complexity, importance, and profile of the case. *Hatfield*, 2013 EHB at 781, citing *Hatfield*, 2010 EHB 571, 589. We think that the degree of success is the most significant factor for us to consider in this case. CCJ/SC was successful in challenging the Department's permit decision concerning Permit Revision No. 189 but unsuccessful regarding the permit decision for Permit Revision No. 180. With that in mind, we find that there is no basis for making any further adjustment to the lodestar for the portion of the claimed attorneys' fees we designated as the Included Hours and, therefore, we exercise our discretion to award CCJ/SC the amount of $5,917.50.

How to address the Mixed Hours lodestar is a more difficult issue. CCJ/SC argues that while the Board did not rule in their favor regarding the Department's decision to issue Permit

Revision No. 180, the portion of the Adjudication addressing Permit Revision No. 180 made several important points that CCJ/SC contend were favorable to their efforts to protect streams from the impacts of Consol's longwall mining in BMEEA. CCJ/SC also contend that the time reflected in the Mixed Hours is not easily segregated between Permit Revision No. 180 and Permit Revision No. 189 because the consolidated appeals were based on a common core of facts and identical legal theories. CCJ/SC asserts that, for these reasons, the Board should not apportion fees between the successful challenge to Permit Revision No. 189 and the unsuccessful challenge to Permit Revision No. 180. The Department agrees that the hours associated with Permit Revision No. 189 cannot be easily segregated from the overall request but that the Board should still adjust the fee claim based on the success factor. The Department argues that CCJ/SC are only entitled to the portion of their fees and costs attributed to their challenge to the restoration plan for Polen Run which the Department determined to be 14% of the claimed fees and costs. They arrived at the suggested percentage based on the total number of streams (seven) within the permit boundary for BMEEA, and the fact that Polen Run is one of the seven streams, and therefore "represents 14% of all the streams." DEP Brief in Support of DEP Response, at 8.

We find that the degree of success is the most important factor in determining the reasonableness of the award in this case and, ultimately, CCJ/SC was only partially successful in its efforts to challenge the Department's two permit decisions. Therefore, a downward adjustment in the overall lodestar for the Mixed Hours is an appropriate exercise of our discretion. The issue is how to determine an appropriate reduction to reflect the mixed success on the consolidated challenge to the two permit revisions. We compliment the Department on its creative approach to this question, but we conclude that the suggested apportionment of 14% based on the number of streams does not fairly reflect our opinion of the overall balance between

the successful and unsuccessful efforts by CCJ/SC. The Board has been overseeing this case since it was initially filed back in May 2014. Since that time, we have reviewed thousands of pages of filings, exhibits and transcripts. We have issued numerous intermediate orders and opinions along with a lengthy Adjudication deciding the case. We participated in two site visits to view the streams in the permit area and held an eight-day hearing with numerous witnesses. We find that this effort has given us a reasonable feel for the proper relationship between the effort involved in the Permit Revision No. 180 challenge and the Permit Revision No. 189 challenge. It is clear that the challenge to Permit Revision No. 180, which involved the entire BMEEA permit area, required the more significant effort by CCJ/SC and played a bigger role in the consolidated case. Permit Revision No. 189 was a more limited permit in terms of the area involved and, while it posed some unique issues, there was also significant overlap with the issues involving the larger Permit Revision No. 180 challenge. Based on our involvement with this case over the years, we find that a proper apportionment of the Mixed Hours lodestar between the successful challenge to Permit Revision No. 189 and the unsuccessful challenge to Permit Revision No. 180 is 25% to the successful challenge and 75% to the unsuccessful challenge. Applying that to the total Mixed Hours lodestar amount of $263,480.95, we exercise our discretion to award a reasonable attorneys' fee of $65,870.24. In combination with our prior award related to the Included Hours lodestar, we make a total award of **$71,787.74** for the portion of the attorneys' fees claimed in the Amended Fee Application for the main litigation of this case.

Costs

CCJ/SC also seek an award of $15,461.50 in costs related to their consolidated appeal of Permit Revisions No. 180 and No. 189. These costs involve two separate items. The first item is

a request for $10,000 arising from the services of Dr. Benjamin Stout as CCJ/SC's expert in this case. Dr. Stout prepared an expert report and provided expert testimony on behalf of CCJ/SC in the hearing in this case. Invoices from Dr. Stout totaling $9,950.00 are attached to Attorney Winner's declaration as evidence of the claimed amount. CCJ/SC offer no explanation why the requested amount is not equal to the amount of the invoices, and because the $10,000.00 request is not fully documented, we will reduce the claimed amount to the amount of the invoices, $9,950.00. The Department argues that the request for these costs should be denied for two reasons. They assert that the documentation provided to support these claimed costs, Dr. Stout's invoices, are "wholly inadequate." DEP Brief In Support of DEP Response, at 11. They also argue that the fees should be denied because they contend the Board did not accept the majority of the Dr. Stout's testimony at the hearing and that his report discussed issues rejected by the Board or not part of the appeal.

We reject the Department's arguments regarding the Board's acceptance or rejection of Dr. Stout's testimony and the description of his report. It is the rare case in front of the Board where we would accept in full the testimony of any parties' expert witness and we do not see the fact that we did not fully agree with Dr. Stout in this case as a basis to deny all costs associated with his efforts. Any issues with his report are minor. We have reviewed the copies of Dr. Stout's invoices provided by CCJ/SC and share the Department's concern that they lack adequate detail to fully evaluate the work provided by Dr. Stout. In particular, the second invoice which reportedly covers his expert testimony in the case, states the "amount due is $4,200 which includes my time and expenses" but provides no detail regarding the amount of time spent, the hourly rate requested or what expenses he is seeking to have reimbursed. Amended Fee Application, Declaration of Sarah E. Winner, Ex. G. For these reasons, we are

going to reduce the amount of the second invoice by half to $2,100 for a reduced total cost amount of $7,850.00. We reduce this amount further to reflect the fact that Dr. Stout's work covered both the successful challenge to Permit Revision No. 189 and the unsuccessful challenge to Permit Revision No. 180. Consistent with the approach we took with the attorneys' fees claim, we will award 25% of the reduced total cost amount of $7,850.00. Therefore, we exercise our discretion to award CCJ/SC the amount of **$1,962.50** for the costs associated with Dr. Stout's invoices.

The second portion of requested costs involves the cost of transcripts. CCJ/SC is seeking an award of $5,461.50 for the August hearing transcripts. They have provided an invoice supporting the claimed costs. Amended Fee Application, Declaration of Sarah E. Winner, Ex. H. The Department did not contest this cost. We reduce the requested amount to reflect the fact that the August hearing transcripts involved both the successful challenge to Permit Revision No. 189 and the unsuccessful challenge to Permit Revision No. 180. Consistent with our prior discussions on this issue, we will award 25% of the August hearing transcript cost of $5,461.50. Therefore, we exercise our discretion to award CCJ/SC the amount of **$1,365.38** for the costs associated with the August hearing transcripts.

Attorneys' Fees For The Fee and Costs Claim

The Board has routinely granted attorneys' fees and costs incurred by the prevailing party in preparing and proceeding with their fees and costs claim, so called "fees on fees." *See Hatfield*, 2013 EHB at 783-784, citing *Pine Creek Valley Watershed Ass'n, Inc., v. DEP*, 2008 EHB 705; *Solebury Twp. & Buckingham Twp. V. DEP & PennDOT*, 2008 EHB 658. The same reasonableness approach followed by the Board in exercising our discretion applies to the amounts sought by a party related to fee petition preparation. *Hatfield*, 2013 EHB at 783-784.

In their Amended Fee Application, CCJ/SC seek attorneys' fees arising from the preparation of the Amended Fee Application. In her declaration, Attorney Winner claims that she has spent 9.4 hours and that Attorney Hamilton spent 3.6 hours in preparing the Amended Fee Application. They do not mention a specific hourly rate for this work but presumably they are seeking the same rate as their other work, $225 for Attorney Winner and $163 for Attorney Hamilton. The Department states that these fees are not supported or explained and therefore, should not be included in any award to CCJ/SC. We find the requested hours and hourly rates reasonable and adequately documented in Attorney Winner's declaration. Therefore, we will award CCJ/SC the requested attorneys' fees which we determine as follows:

Sarah E. Winner – 9.4 hours x $225 = $2,115.00

Ryan Hamilton – 3.6 hours x $163 = $586.80

Total Award for Preparation of Fee Application - **$2,701.80**

Conclusion

The Board has reviewed the Amended Fee Application and the subsequent filings by the Department and CCJ/SC in detail. We have exercised our discretion to arrive at what we have determined is an appropriate and reasonable award of fees and costs under the Costs Law. We arrived at the total amount of the award by determining the proper award in three areas as follows:

Attorneys' Fees - $71,787.74

Costs - $3,327.88

Attorneys' Fees Arising From The Fee Application - $2,701.80

Therefore, we award CCJ/SC the total amount of **$77,817.42** pursuant to their Amended Fee Application.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2014-072-B (Consolidated with 2014-083-B and 2015-051-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	

O R D E R

AND NOW, this 17th day of August, 2018, it is hereby ordered that the Board awards the Center For Coalfield Justice and the Sierra Club the amount of **$77,817.42** in attorneys' fees and costs from the Department of Environmental Protection under the Costs for Mining Proceedings Law, 27 Pa. C.S. § 7708.

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: August 17, 2018

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

For the Commonwealth of PA, DEP:
Barbara J. Grabowski, Esquire
Michael J. Heilman, Esquire
(via electronic filing system)

For Appellants:
Sarah E. Winner, Esquire
Ryan Hamilton, Esquire
(via electronic filing system)

Permittee:
Howard J. Wein, Esquire
Robert L. Burns, Esquire
Megan S. Haines, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONTGOMERY TOWNSHIP FRIENDS OF FAMILY FARMS	:	
v.	:	**EHB Docket No. 2017-080-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBRUCK POULTRY RANCH, INC., Permittee	:	**Issued: August 20, 2018**

OPINION AND ORDER ON
APPELLANT'S MOTION FOR SUMMARY JUDGMENT
AND DEPARTMENT'S MOTION TO DISMISS

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

Where questions of law and material fact exist, the Board denies dispositive motions filed by both the Department and Appellant.

O P I N I O N

Introduction

This matter involves an appeal filed by Montgomery Township Friends of Family Farms (Appellant) from the issuance of a Water Quality Management Permit and authorization for coverage under the General National Pollution Discharge Elimination System (NPDES) Permit for Concentrated Animal Feeding Operations PAG-12 (PAG-12) by the Department of Environmental Protection to Herbruck Poultry Ranch, Inc. (Permittee). The Permittee plans to operate a concentrated animal feeding operation (CAFO) in Mercersburg, Franklin County, Pennsylvania, consisting of eight layer barns designed to house 2.4 million chickens, as well as a manure storage building. Both the Appellant and the Department have filed dispositive motions

– a Motion for Summary Judgment filed by the Appellant and a Motion to Dismiss filed by the Department[1] – on June 6, 2018. The parties have filed their respective responses and replies and the motions are now ready for disposition. Additionally, the Permittee filed a memorandum in support of the Department's Motion to Dismiss. Because both motions focus on the same issues – specifically, incorrect information submitted by the Permittee with its permit application materials and the Department's subsequent handling of that information – we shall address both motions in this Opinion.

Background

According to the parties' Statements of Undisputed Material Facts and responses thereto, the Permittee submitted a Notice of Intent for coverage under NPDES General Permit PAG-12 and an application for a Water Quality Management Permit in connection with its proposed CAFO operation. Included with the application materials was a General Information Form. The parties are in dispute over whether the General Information Form is a part of the PAG-12 application, with the Department contending it is not, and the Appellant contending that the form is part of the application. In support of its assertion that the General Information Form is, in fact, a part of the application, the Appellant cites the deposition testimony of Department environmental engineer Daniel W. Martin, P.E., the primary reviewer of the PAG-12 application, who testified that the General Information Form is "required as part of the application." (Martin Deposition – Exhibit to Appellant's Motion, p. 57.)

The parties' motions center on the Permittee's response to Question 13 of the General Information Form which asks, "Will the project involve operations (excluding during the

[1] The parties' motions are partial dispositive motions. The Appellant seeks summary judgment with respect to the Department's approval of coverage under General Permit PAG-12, and the Department seeks to dismiss that portion of the Appellant's appeal dealing with air issues.

construction period) that produce air emissions (i.e., NOX, VOC, etc.)? If 'Yes,' identify each type of emissions followed by the amount of that emission." (Exhibit A-7 to Appellant's Motion.) In response to Question 13, the Permittee's Environmental Consulting Services Manager, Jedd Moncavage, answered "No." (*Id*.) Because the "no" box was checked, the Permittee did not submit any estimate of air emissions. Mr. Moncavage certified that his answers were "true and correct to the best of [his] knowledge and information." (*Id.*) In its response to the Appellant's Motion for Summary Judgment and in its own Motion to Dismiss, the Department acknowledges that the Permittee's response to Question 13 was incorrect, and the operation will, in fact, produce air emissions.

On May 22, 2017, following publication of the PAG-12 Notice of Intent in the *Pennsylvania Bulletin*, the Appellant submitted written comments to the Department. In its comments, the Appellant stated that the Permittee's assertion in the General Information Form that there would be no air emissions produced from the project was "patently false," and the Appellant provided information on what it contended to be the type and amount of potential air emissions from the project. (Exhibit A-11 to Appellant's Motion, p. 7.) On July 28, 2017, the Department prepared a Comment/Response Document and, in response to the Appellant's comments regarding potential air emissions, stated that "the Air Pollution Control Act exempts operations for the production of agricultural commodities." (Exhibit A-12 to Appellant's Motion, p. 5.) On August 1, 2017, the Department approved coverage under General Permit PAG-12 and issued a Water Quality Management Permit for the proposed project. The Appellant appealed the permit issuance and grant of coverage under PAG-12 on September 8, 2017. Paragraphs 16-18 of the Notice of Appeal address the Permittee's statement in the General Information Form that its project will generate no air emissions. The Appellant asserts that air

emissions will be generated and that the Permittee is required to obtain an air pollution plan approval and Title V permit under the Federal Clean Air Act and Pennsylvania's Air Pollution Control Act.

The parties' undisputed facts also include the following: Sometime in August 2017, after the Department had approved coverage under the PAG-12 General Permit, Virenda Trivedi, then the Department's Environmental Engineer Manager for the New Source Review Section of the Southcentral Office,[2] was notified about the Appellant's comments asserting that the Permittee's operation was subject to Clean Air Act requirements. (Trivedi Deposition – Exhibit to Appellant's Motion, p. 14-15.) On September 5, 2017, Mr. Trivedi sent an electronic message to Permittee's Corporate Vice President, Greg Herbruck, providing a copy of the Appellant's comments and requesting the Permittee to calculate the facility's proposed air emissions by September 19, 2017. (Exhibit A-13 to Appellant's Motion.) Mr. Trivedi received a response from the Permittee's Compliance Manager on September 8, 2017 stating that they were working on a response. However, according to Mr. Trivedi's deposition testimony, after learning that an appeal had been filed by the Appellant, he advised the Permittee not to send him the requested air emissions information. (Trivedi Deposition – Exhibit to Appellant's Motion, p. 19-20.) To date, the air emissions information for the Permittee's operation has not been submitted to the Department. (*Id.* at 20.)

In its response to the Appellant's Motion for Summary Judgment and in its own Motion to Dismiss, the Department states that it is still evaluating whether the Permittee's proposed CAFO is required to obtain an air pollution plan approval and Title V permit. As such, the

[2] Mr. Trivedi's current position is chief of air pollution permitting statewide in the Department's Central Office. (Appellant's Statement of Undisputed Material Facts, para. 25; Department's Response to Statement of Undisputed Material Facts, para. 25.)

Department argues that there has been no final action with regard to the air quality issues and, therefore, they are not appealable at this time. The Department moves to dismiss paragraphs 16-18 of the Notice of Appeal which deal with air quality. In contrast, the Appellant argues that because the Permittee submitted incorrect information regarding air emissions in its application for coverage under the PAG-12 General Permit, the Department's approval of coverage under the PAG-12 General Permit was in error and must be revoked.

The Board views dispositive motions in the light most favorable to the nonmoving party. *Lawson v. DEP*, EHB Docket No. 2017-051-B (Opinion and Order on Motion to Dismiss issued May 17, 2018), *slip op*. at 2; *Miller v. DEP*, EHB Docket No. 2017-040-R (Opinion and Order on Motion for Summary Judgment issued March 8, 2018), *slip op*. at 4. We may grant a dispositive motion only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lawson*, *supra*; *Mille*r, *supra* at 3. Here, we have dispositive motions filed on both sides, with each party disputing the role of the General Information Form and whether the air issues raised by the Appellant in its Notice of Appeal are properly before the Board.

In our view, the question of whether the General Information Form is part of the PAG-12 application is not clear. What is clear is that it is a document that is required by the Department and relied on by the Department whenever someone applies for coverage under the PAG-12 General Permit, and, therefore, it plays a significant role in the Department's evaluation of the application. Whether the General Information Form is officially part of the permit application or a peripheral document that is required with the application is not the determining factor as to whether the PAG-12 coverage was properly granted in this case. Regardless of whether the General Information Form is an official part of the application or an additional document

reviewed by the Department as part of the application process, there is no question that a permit applicant is required to provide correct, accurate and complete information on the form.

The more relevant question is whether the inaccurate and incomplete information provided by the Permittee in the General Information Form has lasting significance as a basis for overturning the PAG-12 approval. It is the Appellant's contention that the Permittee's failure to provide truthful and accurate information in the General Information Form is a basis for overturning the Department's approval of PAG-12 coverage, while the Department asserts that the incorrect information in the General Information Form is harmless error. As we stated in *O'Reilly v. DEP*, 2001 EHB 19:

> The goal of Board proceedings is not to go back through the entire course of permit application procedures to pick out errors that may have been made along the way. Indeed, the very purpose of a deliberative, interactive permit review process is to correct errors and ensure that, in the end, everything has been done correctly. The Board's objective is to determine whether any action needs to be taken regarding the final permit. There will be errors in virtually any permit application review of even modest complexity. If the errors have been corrected, there is no need to dwell upon them. Errors may have been rendered immaterial or moot by subsequent events or even the passage of time. A party who would challenge a permit must show us that errors committed during the application process have some continuing relevance.

2001 EHB at 51.

The Department contends that once the error in the General Information Form was brought to its attention, the Department's Clean Water Program coordinated with the Air Quality Program in the same manner it would have done if the air emission box on the General Information Form had been correctly checked "yes." (Bebenek Affidavit – Exhibit to Department Response, paragraphs 10-12). Therefore, the Department argues that there is no continuing relevance to the omission in the General Information Form. The Appellant disputes

this argument and points out that the Permittee has never submitted air emissions information to the Department as it would have been required to do had it correctly checked the "yes" box on the General Information Form. The Department's explanation for not requiring this information from the Permittee is that it is waiting for the Environmental Protection Agency to establish an air emissions estimating methodology for CAFOs. According to the Department, "the EPA has indicated in the past that it intends to estimate an air emissions factor for Concentrated Animal Feeding Operations ("CAFOs"), such as Herbruck's Proposed CAFO, which is a highly technical endeavor." (Department's Reply Brief in Support of Motion to Dismiss, p. 3). However, the Department does not explain why it has not required the Permittee to follow the air emissions estimation process that other applicants have presumably been required to follow to date.

Nevertheless, it is the Department's contention that the Appellant has prematurely raised its concerns about air quality issues in its appeal of the PAG-12 and Water Quality Management Permit actions and that such matters are not ripe until the Department has made a decision on whether an air permit is required. The Department asserts that the Appellant is inappropriately using its appeal of the PAG-12 coverage and Water Quality Management Permit to raise challenges regarding air emissions. While we agree with the Department that a party may not use an appeal from one Department action as a vehicle for challenging an entirely separate action, *Sayreville Seaport Associates Acquisition Co. v. DEP*, 2011 EHB 815, 819-20 (citing *PA Waste v. DEP*, 2010 EHB 98, 100; *Jai Mai, Inc. v. DEP*, 2003 EHB 349, 350; *Winegardner v. DEP*, 2002 EHB 790, 793), here the Appellant contends that it is not appealing the question of whether an air plan approval and Title V permit are required, but whether the Department's authorization of coverage under the PAG-12 General Permit was an abuse of discretion or error of law based on a General Information Form that contained incorrect and incomplete information

which, to date, has not been corrected. As we noted in *O'Reilly*, "There will be errors in virtually any permit application review of even modest complexity. *If the errors have been corrected, there is no need to dwell upon them.*" *O'Reilly*, *supra* at 51. Here, the errors have not been corrected. The air emissions information required by the General Information Form has not been supplied and is no longer being sought by the Department.

Ultimately, we find that questions of both law and material fact exist which make it inappropriate to grant either motion. There is no dispute that the Permittee provided incorrect and incomplete information regarding air emissions in the General Information Form. However, the continuing relevance of that error is in dispute, both from a factual and legal standpoint. We are loathe to dismiss objections in an Appellant's appeal where questions of law and fact exist. Likewise, summary judgment is not appropriate where material facts remain in dispute and neither party is clearly entitled to judgment as a matter of law. These questions may be answered as we proceed further with this litigation, and it is possible that dispositive motions may be appropriate at a later time.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONTGOMERY TOWNSHIP FRIENDS OF FAMILY FARMS	:	
	:	
v.	:	**EHB Docket No. 2017-080-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBRUCK POULTRY RANCH, INC., Permittee	:	

O R D E R

AND NOW, this 20th day of August, 2018, it is ordered that the Department's Motion to Dismiss and the Appellant's Motion for Summary Judgment are denied without prejudice.

ENVIRONMENTAL HEARING BOARD

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

DATED: August 20, 2018

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

For the Commonwealth of PA, DEP:
Curtis Sullivan, Esquire
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CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2018-028-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	**Issued: September 5, 2018**

OPINION AND ORDER ON
PERMITTEE'S MOTION TO DISMISS

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Board finds it is prudent to deny a motion to dismiss for mootness where certain issues remain in dispute and where other issues are capable of repetition yet evading review.

O P I N I O N

Introduction

This matter involves an appeal by Center for Coalfield Justice and Sierra Club (collectively Appellants) challenging the issuance of Permit Revision 210 by the Department of Environmental Protection (Department) to Consol Pennsylvania Coal Company, LLC (Consol) in connection with Consol's longwall mining activities at the Bailey Mine, a large underground coal mine complex located in Greene and Washington Counties, Pennsylvania. Consol has conducted development and longwall mining activities at the Bailey Mine since 1985 under CMAP No. 30841316. Permit Revision 210 is the latest in a series of permit revisions authorizing mining activities in a section of the Bailey Mine known as the Bailey Mine Eastern

Expansion Area. The Bailey Mine Eastern Expansion Area is located adjacent to and partially underlies Ryerson Station State Park in Greene County.

A series of appeals have been filed in connection with mining at the Bailey Mine Eastern Expansion Area. In 2014, the Appellants challenged Permit Revision No. 180 which authorized longwall mining in panels 1L through 5L of the permit area, except under two streams, Polen Run and Kent Run, which run through Ryerson Station State Park. In 2015, the Appellants challenged Permit Revision No. 189 which authorized longwall mining under Polen Run in the 1L and 2L panels. After conducting an eight-day hearing on the merits of both appeals, the Board upheld the Department's issuance of Permit Revision 180, but sustained some of the Appellants' challenges to Permit Revision 189. *Center for Coalfield Justice and Sierra Club v. DEP and Consol Pennsylvania Coal Co.*, 2017 EHB 799.

On December 13, 2016, the Department issued Permit Revision No. 204 which authorized longwall mining beneath Polen Run and Kent Run in the 3L panel. On December 19, 2016, the Appellants appealed the issuance of Permit Revision 204 and on December 21, 2016 petitioned for supersedeas. On December 22, 2016, the Board held a conference call with counsel for the purpose of addressing the petition for supersedeas and was informed that Polen Run had already been undermined. By Order of the Board, mining was stayed within 100 feet of Kent Run pending a ruling on the supersedeas. A supersedeas hearing was held on January 10-12, 2017 with respect to the Appellants' claims regarding Kent Run. On February 1, 2017, the Board granted the petition for supersedeas as to Kent Run.

The current appeal involves Permit Revision 210 which was issued by the Department on March 7, 2018. Permit Revision 210 authorized Consol to conduct longwall mining beneath Polen Run in the 5L panel within Ryerson Station State Park. The Appellants appealed the

issuance of Permit Revision 210 on March 21, 2018 and, on the same day, filed petitions for supersedeas and temporary supersedeas. At that time, Consol estimated that mining would be within 500 feet of Polen Run within approximately four weeks. So that a decision could be issued on the supersedeas petition before undermining of the stream occurred, the Board directed mining to be halted within 100 feet of Polen Run in the 5L panel until a hearing was held and a decision issued. A 4-day supersedeas hearing was held on April 5-6, 2018 and April 16-17, 2018, and on April 24, 2018 the Board issued an Opinion and Order denying the petitions for supersedeas and temporary supersedeas. The Board found that the evidence presented at the supersedeas hearing indicated that Polen Run was not likely to be impaired and that any flow loss that might occur could be successfully mitigated. The denial of the supersedeas petitions allowed Consol to proceed with mining underneath Polen Run in the 5L panel. On or about May 10, 2018, Consol's longwall operations advanced more than 100 feet beyond Polen Run in the 5L panel, completing the mining authorized by Permit Revision 210. (Silvis Affidavit, para. 8.) On May 18, 2018, the Appellants filed a motion for leave to amend their notice of appeal, which was granted on July 24, 2018.

Discussion

The matter now before the Board is a Motion to Dismiss filed by Consol. Consol asserts that because mining has been completed beneath Polen Run in the 5L panel, the appeal is moot. The Department filed a memorandum in support of Consol's motion on July 5, 2018, and the Appellants filed a response opposing the motion on July 20, 2018. Replies were filed by the Department and Consol on August 6, 2018, and this matter is now ripe for decision.

As Judge Beckman explained in *Consol Pennsylvania Coal Co. v. DEP and Center for Coalfield Justice*, 2015 EHB 48, 54, *aff'd*, 129 A.3d 28 (Pa. Cmwlth. 2015), "A motion to

dismiss is typically appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, some issue of justiciability, or another preliminary concern." The Board evaluates a motion to dismiss in the light most favorable to the non-moving party and may only grant the motion where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Lawson v. DEP*, EHB Docket No. 2017-051-B (Opinion and Order on Motion to Dismiss issued May 17, 2018), *slip op*. at 2-3 (citing *Burrows v. DEP*, 2000 EHB 20, 22); *Klesic v. DEP*, 2016 EHB 142, 144; *Sludge Free UMBT v. DEP*, 2015 EHB 888, 890. 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. *Lawson*, *slip op.* at 3 (citing *Consol*, 2015 EHB at 54; and *Ehmann v. DEP*, 2008 EHB 386, 390).

Consol argues in its motion that this appeal should be dismissed as moot because the activity which the Appellants objected to – i.e., the longwall mining of the 5L panel beneath Polen Run – is now completed and cannot be reversed. Consol argues there is no longer any effective relief that the Board can grant and, therefore, any objections the Appellants may have are purely academic. The Department concurs with Consol's motion; it asserts that the Appellants had the opportunity to litigate the issuance of Permit Revision 210 in the supersedeas hearing and the issues raised by the Appellants have been addressed by the Board's supersedeas Opinion and Order.

The Appellants disagree with the motion on several grounds. First, they argue that their appeal includes challenges to several post-mining mitigation measures for which the Board may still grant meaningful relief. Second, they argue that exceptions to the mootness doctrine apply because their claims involve issues of great public concern and are capable of repetition yet likely to evade review.

A matter before the Board becomes moot when an event occurs that deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *Klesic,* 2016 EHB at 144; *Sludge Free,* 2015 EHB at 890; *Consol,* 2015 EHB at 55 (citing *Horsehead Res. Dev. Co. v. DEP*, 1998 EHB 1101, 1103, *aff'd*¸780 A.2d 856 (Pa. Cmwlth. 2001)). There are exceptions to mootness, including the following: (1) where the action complained of is capable of repetition but likely to evade review, (2) where issues of great public importance are involved, or (3) where a party will suffer a detriment without a decision by the Board. *Klesic,* 2016 EHB at 144 (citing *Sierra Club v. Pennsylvania Public Utility Comm'n,* 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd* 731 A.2d 133 (Pa. 1999)). Any one of those circumstances may justify retaining jurisdiction. *Sludge Free,* 2015 EHB at 891 (citing *Ehmann,* 2008 EHB at 390). It is important to note that "mootness does not deprive this Board of jurisdiction; rather, where an appeal is moot the Board has the authority based upon its own measure of prudence to proceed." *Id.* (citing *Robinson Coal Co. v. DEP,* 2011 EHB 895, 900 (quoting *Ehmann,* 2008 EHB at 388)).

This case falls within the first exception to the mootness doctrine, i.e., conduct that is capable of repetition yet likely to evade review. In reaching this conclusion, we apply the guidelines set forth by the Commonwealth Court in *Consol Pennsylvania Coal Co. v. Department of Environmental Protection,* 129 A.3d 28 (Pa. Cmwlth. 2015). There the Court instructed that in order for this mootness exception to apply, "(1) the duration of the challenged action must be too short to be fully litigated prior to its cessation or expiration; and (2) there must be a reasonable expectation that the complaining party will be subjected to the same action again." *Id.* at 42 (quoting *Philadelphia Public School Notebook v. School District of Philadelphia,* 49 A.3d 445, 449 (Pa. Cmwlth. 2012); *Sludge Free,* 2015 EHB at 891-92.

There is no question that the first part of this test is met. This is the second time in which a permit revision authorizing the undermining of a stream has been appealed without sufficient time to get to a merits hearing. In the appeal of Permit Revision 204, Polen Run was undermined within a matter of days, even before a hearing on the supersedeas petition could be scheduled; and the undermining of Kent Run had to be halted until the supersedeas hearing could be held and a decision issued. In the current appeal involving Permit Revision 210, the timeframe between the issuance of the permit revision and the date on which mining was expected to reach Polen Run was only a few weeks; once again, it was necessary to order a halt on mining within 100 feet of the stream so that a supersedeas hearing could be scheduled and a decision issued. The logistics of the permitting process place any would-be appellant and longwall mining company in the inevitable position of likely having to go through a supersedeas hearing any time there is a challenge to a permit revision.[1] This process also frequently places the Board in the difficult position of having to halt mining pending a ruling on the supersedeas.

We understand this is the nature of the longwall mining permitting process. Permit revisions authorizing mining are issued piecemeal and in most cases only a matter of weeks or days before mining is set to begin. Because of this process it is virtually impossible to get to a merits hearing before mining takes place. Where the supersedeas is denied, mining proceeds and the merits of the case are fully litigated at a later date. This is a textbook example of the "capable of repetition, yet evading review" exception to the mootness doctrine. In the Appellants' words, "Pushing the decision off to another permit and another appeal only risks that these issues will continually fall prey to piecemeal permitting and the peculiar pace of a longwall

[1] The Board's rules of practice and procedure allow for expedited hearings on the merits, but even an expedited merits hearing cannot be conducted within the very short timeframe at issue here. See 25 Pa. Code § 1021.96a-d (motions for expedited hearings).

mining machine and thus may never be adequately addressed." (Appellants' Response, p. 3.) As stated in the dissenting opinion in *Consol*, 2015 EHB at 74, which dealt with a motion by the Department to dismiss an appeal by Consol, "in cases where we clearly have jurisdiction but are told that it would be 'prudent' to dismiss the appeal anyway, we should hesitate before depriving a party of its right to due process before the only forum that can provide an opportunity to be heard at the only time that party will have the opportunity." (Labuskes, J., dissenting; Renwand, C.J., joining in dissenting opinion.)

Consol and the Department argue that the issues in this case have been fully litigated by means of the supersedeas hearing. Indeed, the supersedeas hearing in this case lasted four days and was as hard-fought as any hearing on the merits. But a supersedeas hearing, by its very nature, is truncated and conducted without the normal safeguards of a full hearing on the merits and, as such, it cannot take the place of a hearing on the merits. A supersedeas is an extraordinary remedy that places a heavy burden on the petitioners to make a clear showing of need. *Emerald Contura, LLC v. DEP*, 2017 EHB 670, 672-73. A hearing on a supersedeas petition is held expeditiously – where feasible, within two weeks of the filing of the petition. 25 Pa. Code § 1021.61(c). Supersedeas hearings are limited in time and format and the parties are generally required to proceed without the opportunity for discovery. *Id*. at § 1021.61(d). In order to obtain a supersedeas, a petitioner must show not only that he or she is likely to prevail on the merits (at a future hearing on the merits) but also that he or she will suffer irreparable harm if the supersedeas is not granted. *Id*. at § 1021.63(a). As we have held many times, "a ruling on a supersedeas is merely a prediction, based on the limited record before the Board and the shortened timeframe for consideration, of who is likely to prevail following a final disposition of the appeal." *The Delaware Riverkeeper Network v. DEP*, 2016 EHB 41, 44 (citing

Weaver v. DEP, 2013 EHB 486, 489; *Tinicum Township v. DEP*, 2008 EHB 123, 127). Given the higher burden that must be met, it is possible that a party may be unsuccessful in obtaining a supersedeas yet meet its burden at a hearing on the merits.

We now turn to the second part of the Commonwealth Court's test – i.e., there must be a reasonable expectation that the complaining party will be subjected to the same action again. Consol argues that the issues raised in the appeal are not capable of repetition because Permit Revision 210 is "the final [coal mining activity permit] revision Consol has sought or plans to seek for the foreseeable future that involves authorization of mining under a stream within a public park." (Consol Reply, p. 15, citing Silvis Affidavit, para. 22-23.) In support of this argument, Consol provides the affidavit of Joshua Silvis, its Manager, Hydrogeology. According to Mr. Silvis, Consol's mining operations at the Bailey Mine will not involve the undermining of streams in Ryerson Station State Park or any other public park through April 2025, with the exception of North Fork of Dunkard Fork and certain of its tributaries which was authorized by previous permit revisions. (Silvis Affidavit, paragraphs 22-23.)

The Appellants argue that their appeal challenges not only the Department's authorization to undermine streams in Ryerson Station State Park but also the post-mining obligations imposed upon Consol by Permit Revision 210. We agree that where continuing obligations exist, dismissal on the basis of mootness is inappropriate. As we held under similar circumstances in *Center for Coalfield Justice v. DEP and Consol Pennsylvania Coal Co.*, 2017 EHB 713, "even though Polen Run had been undermined, we do not think that the Board is prevented from evaluating the various objections the [Appellants] raised regarding the Department's issuance of the permit revision. At least some of those objections clearly raised

issues with post-mining mitigation and the manner in which the mitigation was authorized." *Id*. at 725. Further, as recognized in the dissenting opinion in *Consol*, 2015 EHB at 77:

> It is true that there is nothing in these averments to suggest that there is a 100 percent chance of a future impact. However, that is too strict of a standard in deciding whether prudence compels us to dismiss a case as moot in the context of a motion to dismiss. . . It is certainly possible that nothing will ever come from [the permit condition being appealed.] However, if that were the standard for judging mootness, I suspect that many of the appeals filed before the Board would be moot *ab initio*. Here, it is quite possible that the Department's action could have a lingering effect. This possibility, far from remote, counsels in favor of erring on the side of preserving Consol's appeal rights. Indeed, our case law advises that we should exercise restraint in dismissing appeals as moot if the circumstance is not entirely free from doubt. See *Perano v. DEP*, 2010 EHB 386. . .

Moreover, allowing the appeal to continue now may allow the Board and the parties to avoid similar issues in the future if and when the Department issues another permit revision. *Klesic,* 2016 EHB at 145.

Consol argues that no continuing obligations remain because post-mining monitoring data demonstrates that Polen Run above the 5L panel experienced no adverse effects from mine subsidence. Consol asserts that the post-mining data confirms the Department's and its hydrological analyses and disputes the Appellants' prediction of subsidence-induced flow loss or other adverse effects to Polen Run. According to the affidavit of Hydrogeology Manager Joshua Silvis, Consol monitored the hydrological conditions of Polen Run above the 5L Panel through May 22, 2018, at which point Consol's longwall mining operations had advanced more than 2.5 overburdens beyond Polen Run in the 5L panel. (Silvis Affidavit, para. 10-11.) According to Mr. Silvis, the monitoring data demonstrates there has been no flow loss nor other adverse effects to Polen Run above the 5L panel due to mining-induced subsidence, and, given the absence of subsidence-induced flow loss, Consol has not had to perform any stream restoration

measures. (*Id*. at para. 12, 19.) Mr. Silvis also states that Consol's consultants conducted daily visual investigations of Polen Run above the 5L panel from April 15 to June 4, 2018 and observed no flow loss or bedrock or alluvial ruptures or fractures. (*Id*. at para. 16.) Consol's consultant also collected biological data on or about May 31, 2018 and, according to Mr. Silvis, the data showed that Polen Run above the 5L panel is a biologically diverse stream consistent with pre-mining conditions. (*Id*. at para. 17.) Consol argues that with the longwall mining beneath Polen Run now completed and no actual or anticipated harm having occurred to the stream, the Appellants no longer have a stake in the outcome of the appeal.

Consol and the Department assert that the facts regarding the lack of subsidence-related impact are not in dispute because the Appellants have presented no evidence to the contrary. They point to Section 1021.94 (f) of the Board's rules which states 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) (emphasis added). Consol and the Department argue that the Appellants have not come forward with any evidence to support their claims or counter the statements in Mr. Silvis' affidavit and, therefore, we should not construe the facts in favor of the Appellants for purposes of deciding the motion.

We are hesitant to dismiss an appeal solely on the basis of Mr. Silvis' statement that no flow loss or biological impact has occurred. Although we have no reason to doubt Mr. Silvis' statements or expertise, the data upon which Mr. Silvis relies was not made available to the Appellants and is not before the Board; nor does an affidavit allow any opportunity for cross

examination by the nonmoving party. As we held in *Rohanna v. DEP*, 2017 EHB 287, 289, "Board precedent supports the use of discretion in such matters and emphasizes that Board decisions should be made on the merits and not based on procedural nuances." Certainly, if the Appellants are unable to provide evidence of subsidence-related impact they may have difficulty meeting their burden of proof, but this should be done in the context of a merits hearing, after the opportunity for discovery, rather than a motion to dismiss. At this stage, we are reluctant to dismiss the appeal based solely on an affidavit.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2018-028-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	

O R D E R

AND NOW, this 5th day of September, 2018, it is ordered that the Motion to Dismiss filed by Consol Pennsylvania Coal Company is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: September 5, 2018

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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: September 10, 2018**

OPINION AND ORDER ON
MOTION TO STRIKE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion to strike in its entirety an untimely cross-motion for summary judgment, but grants without prejudice a motion to strike new issues raised for the first time in the cross-motion that were not included in the notice of appeal.

O P I N I O N

Covanta Plymouth Renewable Energy, LLC ("Covanta") operates a municipal waste resource recovery facility in Plymouth Township, Montgomery County pursuant to Title V Operating Permit No. 46-00010 originally issued by the Department of Environmental Protection (the "Department") on December 19, 2001, and renewed on March 19, 2007 and May 15, 2012. On November 21, 2017, the Department renewed Covanta's air permit through November 21, 2022.

Sam Joshi, an individual appearing *pro se*, has filed this appeal from Covanta's latest permit renewal. Mr. Joshi listed four objections to the permit renewal in his notice of appeal: (1) Covanta's permit application was not submitted in time; (2) the application was not signed by a

responsible official; (3) the compliance review form accompanying the application was incorrect and incomplete because it does not include all of Covanta's "related parties"; and (4) "the Department has permitted combustion of non-municipal waste without reviewing its impact on the human health and the environment."

Covanta and the Department have filed a joint motion for summary judgment on all four of Mr. Joshi's objections. The deadline for filing dispositive motions was July 19, 2018. Their joint motion for summary judgment was filed on that date. On August 15, Mr. Joshi not only responded in opposition to the joint motion, he filed his own cross-motion for summary judgment. Covanta and the Department (hereinafter we will refer to both parties as the Department) quickly filed a motion to strike the cross-motion as late, and to strike portions of both Joshi's response to their motion and his cross-motion that go beyond the objections listed in his notice of appeal. We stayed briefing on the underlying motions for summary judgment until we ruled on the motion to strike.

The Department accurately points out that Joshi's cross-motion was filed about a month after the deadline for filing dispositive motions. It adds that Joshi did not seek allowance from the Board for a late filing. In his response Joshi acknowledges that his motion was late, but he argues that the Department will not be prejudiced if the Board approves the late motion, and he says the Board has routinely accepted out-of-time cross-motions, including those filed by the Department.

Our rules do not provide for cross-motions filed after the deadline for filing dispositive motions. Mr. Joshi should have filed a motion asking the Board's permission to file an untimely motion for summary judgment. Any deadline (other than the jurisdictional deadline for filing an appeal) may be extended by the Board for good cause upon motion. 25 Pa. Code § 1021.12(a).

Calling a motion a "cross-motion" has no real legal significance under the Board's rules. For example, calling a motion for summary judgment a "cross-motion" does not entitle the filer to simply disregard the deadline for filing dispositive motions set forth in our rules and orders.

We must decide, then, what consequences should follow from Mr. Joshi's late filing. The Department says the cross-motion should be stricken in its entirety. Whether to grant a motion to strike a late motion implicates essentially the same considerations as whether to grant a motion to allow a late motion. In either case we will exercise our discretion on a case-by-case basis. *See Sokol v. DEP*, 2017 EHB 397 (allowing a late motion); *Leatherwood, Inc. v. DEP*, 2001 EHB 13 (disallowing such a motion). *See also M.C. Resource Development Co. v. DEP*, 2016 EHB 260, 263 (noting Department's failure to seek allowance for a late cross-motion but nevertheless ruling on the merits of the motion); *Drummond v. DEP*, 2002 EHB 413, 422-23 (denying a late cross-motion but only because the issue was moot; noting late motion could have been stricken). Generally we look at the extent to which the other parties will be prejudiced by the lateness of the filing. *Sokol*, 2017 EHB at 399. Relevant criteria that might inform the exercise of our discretion also include the length of and reasons for the tardiness, as well as the status of the underlying litigation. The extent to which the "cross-motion" goes beyond the issues raised in the original motion may also be relevant. The exigencies of the underlying case can obviously be relevant as well. In some cases, it could better serve everybody's interests in the long run to structure the issues for resolution *one way or the other* by allowing the motion. *Id*., 2017 EHB at 400. The Board occasionally finds itself denying a motion for summary judgment in such strong terms that it is clear that the party opposing the motion would actually have been entitled to summary judgment in its favor had it filed its own motion. One thing that we do *not* consider at this juncture is the merits of the late motion.

In light of these criteria, we will not strike Mr. Joshi's cross-motion for summary judgment in its entirety. To the extent Mr. Joshi has simply argued that he is entitled to summary judgment in his favor on the same issues raised in the Department and Covanta's joint motion for summary judgment, issuing summary judgment *either way* on those issues offers the potential for advancing the overall litigation. No hearing has been scheduled, and we have not been made aware of any need to accelerate the proceedings. The Department and Covanta will not be prejudiced in any way by being required to address the issues they themselves have raised. At least some of the Board's case law has shown a tolerance for the practice in the past, which Joshi points to as the reason for proceeding as he has.

Although we will not strike Joshi's cross-motion in its entirety for being late, a motion or cross-motion for summary judgment may not be used as a substitute for a motion for leave to amend a notice of appeal. *Chester Water Authority v. DEP*, 2016 EHB 280, 285. Our rules at 25 Pa. Code § 1021.53 provide for such amendments upon a proper motion. The Department has accurately pointed out that Mr. Joshi has attempted to raise entirely new issues in his summary judgment papers that cannot fairly be said to have been encompassed within the genre of the objections listed in his original notice of appeal. Specifically, he has objected that Covanta's permit was issued without legitimate public participation in the following particulars:

a) The public notice does not meet the minimum standards required relating to public notice.
b) A required public hearing was not held during the public comment period.
c) During the previous renewal in 2012, the Department published a notice of Air Permit issuance to Covanta Plymouth Meeting, LP, but instead issued the permit to Covanta Plymouth Renewable Energy, LP.

Mr. Joshi more or less concedes the point. Concurrently with his response to the motion to strike he has filed a motion for leave to amend his notice of appeal to add the above objections regarding public notice. We will consider that motion after the Department and Covanta have had an opportunity to respond to it. In the meantime, we will grant the joint motion to strike the new objections without prejudice. The stay that is currently in place on further briefing regarding the motions for summary judgment is continued until we have a chance to rule on the motion for leave to amend.

Accordingly, we issue the Order that follows.

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 10th day of September, 2018, it is hereby ordered as follows:

1. The Department and Covanta's joint motion to strike the Appellant's cross-motion in its entirety as untimely is **denied.**
2. The joint motion to strike the Appellant's new objections regarding public notice from his response to the Department and Covanta's summary judgment motion and his own cross-motion is **granted without prejudice** to his pending motion for leave to amend.
3. The Department and Covanta may respond to the motion for leave to amend in accordance with the Board's rules.
4. The stay on further briefing on the motions for summary judgment is continued pending the Board's ruling on the motion for leave to amend.

ENVIRONMENTAL HEARING BOARD

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

DATED: September 10, 2018

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MONTGOMERY TOWNSHIP FRIENDS OF FAMILY FARMS	:	
v.	:	**EHB Docket No. 2018-041-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBRUCK'S POULTRY RANCH, INC., Permittee	:	**Issued: September 26, 2018**

OPINION AND ORDER ON
MOTION TO CONSOLIDATE

By Thomas W. Renwand, Chief Judge

Synopsis

The Permittee's Motion to Consolidate is denied without prejudice. Although the two appeals stem from the Department's reissuance of the PAG-12 General Permit, they involve different appellants, permittees and facilities, which may result in different questions of fact and law such that consolidation would not promote judicial economy. However, given that both the Appellant in this appeal and the Permittee in the other appeal have not ruled out the possibility that consolidation of the cases may be appropriate, we will provide the parties with an opportunity to revisit this issue at a later date after they have fleshed out the issues and witnesses that are likely to be involved in both appeals.

O P I N I O N

Introduction

This matter involves an appeal filed by Montgomery Township Friends of Family Farms (the Appellant) challenging the Department of Environmental Protection's (Department) reissuance and renewal of the National Pollution Discharge Elimination System (NPDES) PAG-

12 General Permit for Operation of Concentrated Animal Feeding Operations (CAFOs) as it relates to Herbruck's Poultry Ranch, Inc. (Herbruck's) and its proposed CAFO in Mercersburg, Franklin County, Pennsylvania.[1] The reissued PAG-12 General Permit provides NPDES permit coverage for owners and operators of CAFOs and applies to all permittees covered under the previous general permit. (Exhibit A to Notice of Appeal.) The Appellant filed its appeal of the PAG-12 General Permit reissuance on April 30, 2018 at Environmental Hearing Board (EHB or Board) Docket No. 2018-041-R. The Appellants also have a pending appeal at EHB Docket No. 2017-080-R challenging Herbruck's initial coverage under the PAG-12 General Permit which was granted on August 1, 2017.[2]

The matter now before the Board is a Motion to Consolidate filed by Herbruck's, seeking to consolidate this appeal with an appeal filed at EHB Docket No. 2018-042-L. That appeal involves a challenge by Friends of York County Family Farms to the reissuance of PAG-12 General Permit coverage to Hillandale Gettysburg, LP (Hillandale) for its CAFO facility in Spring Grove, York County, Pennsylvania. Herbruck's argues that both appeals involve common questions of law and fact which make consolidation appropriate. Herbruck's points out that the appellants in both appeals are represented by the same attorney and many of the objections raised in both appeals are identical. Herbruck's asserts that the appeals "raise the same fundamental issues regarding the legality of the reissued PAG-12 and the process by which the Department took this action." (Herbruck's Memorandum in Support of Motion, p. 3.) As a result, Herbruck's asserts that the Department witnesses are likely to be the same in both cases and written discovery requests are likely to be virtually identical, and, therefore, judicial

[1] Reissuance of the PAG-12 General Permit was published in the March 31, 2018 *Pennsylvania Bulletin*.

[2] For a more detailed discussion of the appeal at Docket No. 2017-080-R see the Board's Opinion at *Montgomery Township Friends of Family Farms v. DEP and Herbruck's Poultry Ranch, Inc.*, EHB Docket No. 2017-080-R (Opinion and Order issued August 20, 2018).

economy would be served by consolidating the two cases so as to avoid piecemeal litigation and duplication of discovery and witness testimony.

The Appellant opposes consolidation, noting that the appeals were filed by two different appellants and involve different permittees and CAFO facilities with a different set of factual circumstances. The Appellant points out that the Hillandale CAFO has been operating for a number of years whereas the proposed Herbruck's CAFO has yet to be constructed. The Appellant acknowledges that the same Department witnesses may testify in both appeals, but states that it cannot be sure who the Department's witnesses will be at this time because written discovery has not been completed. The Appellant urges the Board to deny the motion at this time with the possibility of revisiting the matter at a later date.

Hillandale, the permittee in the appeal at EHB Docket No. 2018-042-L with which Herbruck's wishes to be consolidated, also filed a response to the Motion to Consolidate. Hillandale opposes consolidation on the grounds that the current appeal involves objections unrelated to its facility, specifically the objections set forth in the Appellant's earlier appeal at EHB Docket No. 2017-080-R which challenges Herbruck's initial coverage under the PAG-12 General Permit. Those objections were incorporated into the current appeal by reference. Hillandale states that it would not be opposed to consolidation if the objections from Appellant's earlier appeal are excluded.

The Department filed no response to the motion.

Discussion

The Board's rules authorize the consolidation of appeals as follows:

> The Board, on its own motion or on the motion of any party, may order proceedings involving a common question of law or fact to be consolidated for hearing of any or all of the matters in issue in such proceedings.

25 Pa. Code § 1021.82(a); *Barshinger v. DEP*, 1996 EHB 1021. The Board has broad discretion to manage its cases, specifically with regard to consolidation. *Borough of Danville v. DEP*, 2008 EHB 377, 378. The goal of consolidation is to promote judicial economy and administrative efficiency and act to reduce or limit unnecessary cost and delay to the parties and to the Board. *Barshinger*, 1996 EHB at 1022 (citing *Columbia Gas of Pennsylvania, Inc. v. DEP*, 1996 EHB 22). As explained in *Borough of Danville*:

> There are many considerations that come into play regarding whether to consolidate appeals. There are the practical considerations of judicial efficiency that run tandem with the desire to reduce the inconvenience to witnesses who might need to be deposed or testify multiple times in separate proceedings. . . There are also substantive considerations such as whether appeals involve common questions of law or fact, see 25 Pa. Code § 1021.82, or whether the possibility exists that the appeals may result in inconsistent outcomes. . .

Borough of Danville, 2008 EHB at 378-79 (citations omitted).

Generally, motions to consolidate are filed in matters involving not just common questions of law and fact, but common parties. *See, e.g., Bucks County Water & Sewer Authority v. DEP*, 2013 EHB 203 (Consolidation of three appeals from the same Department action where Bucks County Water & Sewer Authority was the appellant in two of the appeals and the permittee in the third); *Columbia Gas Co., supra* (Consolidation of five appeals involving the Department's approval of a permit revision to Eighty-Four Mining Company, where Eighty-Four was the appellant in one of the appeals and the permittee in the other four). Here, the appeals that Herbruck's seeks to consolidate involve different appellants, different permittees and different facilities. The only party common to both appeals is the Department, which is a party in nearly all appeals before the Board. Although both permittees hold PAG-12 coverage for a CAFO, Hillandale's facility has been in operation for a number of years, while Herbruck's has

yet to construct its facility or begin operation. While some of the objections involved in this appeal are identical to the objections raised by Friends of York County Family Farms against the Hillandale facility, this appeal also incorporates objections relating to the initial grant of PAG-12 coverage to Herbruck's which have no bearing on the appeal of the Hillandale facility. Additionally, the appeals are assigned to two different judges, and no motion to consolidate was filed in the appeal involving the Hillandale facility.[3]

Nonetheless, Herbruck's argues that consolidation is appropriate because both appeals challenge the same Department action, i.e., the reissuance of the PAG-12 General Permit. It directs us to the Board's decision in *Bucks County Water and Sewage Authority v. DEP*, *supra*, in support of its argument. In that case, Bucks County Water and Sewer Authority (Bucks County) filed appeals from two Department letters addressing a projected overload at a sewage pump station. The Northampton Bucks County Municipal Authority (Northampton) also filed an appeal from one of the letters, and Bucks County was automatically entered as a party in Northampton's appeal. Northampton then filed a motion to consolidate its appeal with the two Bucks County appeals. Bucks County opposed consolidation, arguing that the issues raised by Northampton were drastically different from the issues raised in its appeals. The Board granted consolidation and held that any prejudice to Bucks County could be overcome by reopening discovery.

In granting the motion to consolidate, Judge Labuskes stated as follows:

> [W]e are having difficulty imagining any case where it would not be appropriate to consolidate multiple appeals from the same Department action. Our rules provide that we may order proceedings involving common questions of law or fact to be

[3] The appeal at EHB Docket No. 2018-041-R, in which the consolidation motion was filed, is assigned to Judge Renwand. The appeal at EHB Docket No. 2018-042-L, with which consolidation is sought, is assigned to Judge Labuskes.

> consolidated. 25 Pa. Code § 1021.82. Consolidation promotes judicial efficiency, reduces the inconvenience of witnesses who might otherwise need to testify multiple times, eliminates both the possibility of inconsistent outcomes and future claims by the parties of issue preclusion, and promotes global settlements. *Borough of Danville v. DEP*, 2008 EHB 377, 378-79; *White Township v. DEP*, 2005 EHB 722, 723; *Columbia Gas of Pennsylvania v. DEP*, 1996 EHB 22, 23.
>
> We do not agree with [Bucks County's] characterization that the issues raised in the appeals are "drastically different." It seems to us that these appeals all raise the fundamental issue of whether there is a projected overload and, if so, what should be done about it. Common questions of law and fact will predominate.

Bucks County, 2013 EHB at 205-06.

Herbruck's asserts that these appeals, like those in the Bucks County case, are multiple appeals from the same Department action, and, therefore, consolidation is appropriate under the holding of *Bucks County*. The Appellant insists, however, that the nature of the Department's action in the Bucks County cases is fundamentally different from the action involved here; it is the Appellant's position that the reissuance of the PAG-12 General Permit raises different factual and legal issues for Herbruck's and Hillandale because they are at different stages of operation.

In *Barshinger, supra*, the Board denied a motion to consolidate where it found that there were not sufficient common issues of law and fact. That case involved two appeals filed by the same appellants, one challenging the Department's issuance of a water quality certification and the other the transfer and extension of a permit for the replacement of a box culvert, both relating to the same project. The Board found that certain issues raised in one appeal were not part of the other appeal. Additionally, the appeals involved two different locations within the project area. That was enough for the Board to determine that consolidation was not appropriate. In contrast, in *White Township, supra*, the Board found that even though there may be some issues in one

appeal that do not involve one of the parties, that does not necessarily prevent consolidation where it is otherwise warranted.

Here, both the Appellant and Hillandale do not rule out consolidation entirely, particularly if certain conditions are met. Hillandale is willing to move forward with consolidation if Appellant's objections at EHB Docket No. 2017-080-R are not included in the consolidated appeal.[4] The Appellant, for its part, acknowledges that many of the Department witnesses may be the same in both appeals and states that it is willing to revisit the issue of consolidation after a review of the responses to its written discovery.

Both the Appellant and Hillandale have set forth valid reasons why consolidation should not be granted at this time. Given the fact that the appeals involve different appellants, permittees and facilities, it is unclear whether consolidation would promote judicial economy or create confusion. We are not convinced at this time that the appeals involve common questions of law and fact such that consolidation is appropriate. At a minimum, the Appellant should be provided with an opportunity to reply to Hillandale's response in which it agrees to consolidation if the Appellant's objections at EHB Docket No. 2017-080-R are addressed separately from the consolidated appeal. Therefore, at this time, we deny Herbruck's motion without prejudice with the opportunity for Herbruck's to renew its motion at a later date.

[4] The Appellant has had no opportunity to respond to Hillandale's request that the objections of EHB Docket No. 2017-080-R remain separate from any consolidation of the appeals at EHB Docket Nos. 2018-041-R and 2018-042-L since Hillandale's response was filed after the Appellant's response.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONTGOMERY TOWNSHIP FRIENDS OF FAMILY FARMS	:	
v.	:	**EHB Docket No. 2018-041-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBRUCK'S POULTRY RANCH, INC., Permittee	:	

O R D E R

AND NOW, this 26th day of September, 2018, it is ordered as follows:

1) The Motion to Consolidate filed by Herbruck's Poultry Ranch, Inc. is denied without prejudice.

2) If the Appellant wishes to reply to Hillandale's response to the Motion to Consolidate, it may do so on or before **October 26, 2018.**

ENVIRONMENTAL HEARING BOARD

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

DATED: September 26, 2018

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

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For Permittee:
Paul J. Bruder, Esquire
Jacob H. Kiessling, Esquire
Randall G. Hurst, Esquire
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Charles Haws, Esquire
(via electronic mail)

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: October 1, 2018**

OPINION IN SUPPORT OF ORDER
DENYING MOTION FOR LEAVE TO AMEND

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denied a motion for leave to amend a notice of appeal due to prejudice to the opposing parties and the absence of any legitimate excuse for the late amendments.

O P I N I O N

Covanta Plymouth Renewable Energy, LLC ("Covanta") operates a municipal waste resource recovery facility in Plymouth Township, Montgomery County pursuant to Title V Operating Permit No. 46-00010 originally issued by the Department of Environmental Protection (the "Department") on December 19, 2001, and renewed on March 19, 2007 and May 15, 2012. On November 21, 2017, the Department renewed Covanta's air permit through November 21, 2022.

Sam Joshi, an individual appearing *pro se*, has filed this appeal from Covanta's most recent permit renewal. Mr. Joshi listed four objections to the permit renewal in his notice of appeal: (1) Covanta's permit application was not submitted in time; (2) the application was not signed by a responsible official; (3) the compliance review form accompanying the application

was incorrect and incomplete because it does not include all of Covanta's "related parties"; and (4) "the Department has permitted combustion of non-municipal waste without reviewing its impact on the human health and the environment."

Covanta and the Department have filed a joint motion for summary judgment on all four of Mr. Joshi's objections. The deadline for filing dispositive motions was July 19, 2018. Their joint motion for summary judgment was filed on that date. On August 15, Mr. Joshi not only responded in opposition to the joint motion, he filed has own cross-motion for summary judgment. Covanta and the Department quickly filed a joint motion to strike the cross-motion as late, and to strike portions of both Joshi's response to their motion and his cross-motion that went beyond the objections listed in his notice of appeal.

On September 10, 2018, we denied the joint motion to strike Joshi's entire cross-motion, but granted without prejudice the motion to strike the portions of Joshi's filings that attempted to add new issues not mentioned in his notice of appeal. We granted that motion without prejudice because concurrently with his response to the motion to strike Joshi had also filed a motion for leave to amend his notice of appeal to add the new issues. We held that, to the extent Mr. Joshi had simply argued that he was entitled to summary judgment in his favor on the same issues raised in the Department and Covanta's joint motion for summary judgment, issuing summary judgment either way on those issues offers the potential for advancing the overall litigation. We found that neither the Department nor Covanta would be prejudiced by being required to address the issues they themselves had raised.

Although we did not strike Joshi's cross-motion in its entirety for being late, we said that a motion or cross-motion for summary judgment may not be used as a substitute for a motion for

leave to amend a notice of appeal. Our rules at 25 Pa. Code § 1021.53 provide for such amendments upon a proper motion. We continued,

> The Department has accurately pointed out that Mr. Joshi has attempted to raise entirely new issues in his summary judgment papers that cannot fairly be said to have been encompassed within the genre of the objections listed in his original notice of appeal. Specifically, he has objected that Covanta's permit was issued without legitimate public participation in the following particulars:
>
> a) The public notice does not meet the minimum standards required relating to public notice.
> b) A required public hearing was not held during the public comment period.
> c) During the previous renewal in 2012, the Department published a notice of Air Permit issuance to Covanta Plymouth Meeting, LP, but instead issued the permit to Covanta Plymouth Renewable Energy, LP.

Joshi v. DEP, EHB Docket No. 2017-117-L, slip op. at 4-5 (Opinion and Order September 10, 2018).

Mr. Joshi more or less conceded the point that the objections had not been previously raised. Concurrently with his response to the motion to strike he filed a motion for leave to amend his notice of appeal to add the new objections. We granted the joint motion to strike the new objections, but without prejudice to allow us an opportunity to consider the motion for leave to amend.

In his motion for leave to amend, Mr. Joshi contends that his new objections should be allowed because they fall within the scope of the objection in his notice of appeal that Covanta's permit is an "incomplete document." He says he only realized the newest public notice concerns were an issue when he was preparing his response to the summary judgment motion based upon a "subsequent review of the discovery documents." He says the Department and Covanta should not be surprised by his new objections because the Department and Covanta are charged with

enforcing and complying with the Clean Air Act regulations. He points out that no hearing has been scheduled.

The Department and Covanta have filed a joint response in opposition to Joshi's motion to amend. They complain that they have attempted to manage what they say is the inherent uncertainty and inefficiency of a *pro se* appeal by using discovery, including contention and other interrogatories, to provide Mr. Joshi with ample opportunity to articulate all of his objections. They say allowing these additional objections now would undo their efforts to prepare this matter for review and decision by the Board in order to remove the cloud hanging over Covanta's air permit and its ongoing operations. The principles of fundamental fairness should preclude delaying this proceeding to allow Joshi the opportunity to raise new procedural issues that are based on information that was clearly available to him at the time of filing his notice of appeal, they argue.

They point out that the motion for leave to amend was filed more than eleven weeks after the close of discovery and nearly seven weeks after the deadline for filing dispositive motions. They say the argument on which Joshi's motion is premised would justify never ending efforts to amend before a hearing date is set, even if discovery is complete and dispositive motions are filed, so long as an appellant could conceive of allegedly new issues to raise. They also remind us that we already held in our earlier Opinion that Mr. Joshi's new objections cannot fairly be said to have been encompassed within the genre of the objections listed in his original notice of appeal. The objections are also nowhere found in his responses to contention interrogatories. They dispute Mr. Joshi's contention that he only recently could have discovered the issues because that contention is directly contradicted by his own notice of appeal and the exhibits thereto, which demonstrate that he was aware at the time he filed his notice of appeal of both the

language of the public notice and of the Department's determination that no public hearing was needed. Finally, they note that Mr. Joshi made no effort to address the cost of, or delays from, additional discovery or dispositive motion practice relating to his newly asserted objections.

We very recently discussed the principles governing motions to amend in *Center for Coalfield Justice v. DEP*, EHB Docket No. 2018-028-R (July 24, 2018):

> 25 Pa. Code § 1021.53 sets forth the standard for allowing amendments to a notice of appeal. An appeal may be amended as of right within 20 days of the filing of the notice of appeal. After the 20-day period, the Board may grant leave for amendment if no undue prejudice will result to the opposing parties. The Pennsylvania Supreme Court has instructed that the right to amend should be liberally granted unless there is an error of law or undue prejudice to the adverse parties. While the timing of a motion to amend is an important consideration, it is not the only consideration. As explained in *Chester Water Authority v. DEP*, 2016 EHB 358:
>
> > We note that in other civil and administrative contexts, at least conceptually, the rules governing the amendment of pleadings appear to be generally lenient in terms of at what point in a proceeding an amendment can be made and the breadth of the amendment. *See* Pa.R.C.P. No. 1033 (party, by leave of court or through consent of other parties, may be anytime amend pleading even if the amendment raises a new cause of action or defense); 1 Pa. Code § 35.48 (GRAPP [General Rules of Administrative Practice and Procedure] rules generally providing for an amendment up to five days before the start of hearing).
>
> 2016 EHB at 364, n.2.
>
> The burden of proving that no undue prejudice will result to the opposing parties is on the party requesting the amendment, i.e., the Appellants. In evaluating the likelihood and extent of prejudice to opposing parties, the Board generally take into account the following factors: (1) the time when the amendment is requested relative to other developments in the litigation, including the hearing schedule; (2) the scope and size of the amendment; (3) whether the opposing party had actual notice of the issue; (4) the reason for the amendment; and (5) the extent to which the amendment diverges from the original appeal.

Id.; slip op. at 2- 3 (most citations omitted).

We are struck by the lack of any legitimate explanation for, or extenuating circumstances justifying, the proposed late amendment in this appeal. Mr. Joshi says the objections were revealed in discovery, but we are having difficulty finding that averment credible. He has not pointed to the discovery to which he is referring, and it is hard to imagine what that discovery might have been, particularly because the factual bases for alleged deficiencies he has cited were readily apparent in the exhibits he attached to his notice of appeal. Our overriding impression is that this is a simple case of a party doing more research and devising new theories as the case goes along based upon long-known information. The objections are entirely new, and we do not agree that they simply build on the statement in the notice of appeal that the permit is an "incomplete document." Mr. Joshi's contention that the Department and Covanta should not be surprised because they are charged with knowing the law, taken to its logical extreme, would mean that the Department and permittees can never be surprised by late objections. The objections were not identified in response to contention interrogatories.

This case stands in contrast with other cases in which we granted leave to amend notices of appeal. For example, in *Groce v. DEP*, 2006 EHB 289, the permittee failed to produce in discovery certain air modeling files. The appellants needed to file a motion to compel to get the information, which we granted. Once the files were turned over the appellants were able to confirm that there had been modifications to the air modeling program that was used. The appellants then sought leave to amend their notice of appeal to add an objection that the permittee should not have used the modified version of the air modeling program. We granted leave to amend. We found no undue prejudice to the permittee or the Department since it was the permittee's own failure to produce information in discovery that led to the need for amendment of the appeal. *Id.*, 2006 EHB at 293. We added that the new objection was legally

similar to the appellant's other objections. Here, Mr. Joshi's proposed objections were not the result of new information revealed in discovery, let alone information that had been withheld by Covanta. The information relating to public participation was available before the appeal was filed. Indeed, a copy of the public notice was attached to his notice of appeal, along with the comment response document in which the Department refused to hold a public hearing. The new objections are not legally similar to his other objections.

In *Center for Coalfield Justice v. DEP*, *supra*, the request to amend was filed very early in the litigation process – only two months after the appeal was filed. Discovery was ongoing. The factual basis for the amendment was brought forth during a supersedeas hearing and the motion was filed soon after that hearing. The amendments did not diverge dramatically from the objections set forth in the original notice of appeal. The objections tended to build on claims already raised. Here, to repeat, Mr. Joshi has not pointed to any discovery that revealed new information and there has not been a supersedeas hearing. His motion is filed late in the process, including after the deadline for dispositive motions, which the Department and Covanta have already filed. Mr. Joshi offers no credible reason in support of the lateness other than he gave the case further thought and came up with new objections when he was working on his response to dispositive motions. Again, the new objections are unrelated to any of his previous objections.

In granting leave to amend in *Chester Water Authority*, *supra*, we were impressed by the fact that the new objections, although new, were "barely new." The Appellant had essentially tweaked objections regarding issues that had been at the forefront of the dispute since its inception. The underlying facts were generally the same. Objectively speaking there could not have been any surprise to the other parties. Very little additional effort was associated with the incremental changes. Here, Mr. Joshi's new objections cannot fairly be said to be "barely new."

Kresge v. DEP, 2001 EHB 1169, had some bankruptcy complications. We granted an appellant's rather unusual motion to extend the time to file an amended notice of appeal as of right in that case. We held that the appellant did not need to demonstrate that the amendment should be allowed under our discretionary amendment rule, 25 Pa. Code § 1021.53(b). The Appellant filed his motion within the 20-day period for amendment as of right. The facts in *Kresge* have no applicability here.

We granted a motion for leave to amend in a third-party *pro se* appeal in *Harvilchuck v. DEP*, 2013 EHB 670, that was opposed by the permittee but unopposed by the Department. The additional objection involved who the true party-in-interest was. The appellant unsuccessfully sought to join that party as the true permittee in a motion for leave to join the party. After that motion was denied, the appellant asked for leave to amend to add an objection that the Department erred by properly identifying the true permittee. Thus, the objection was on the table from earlier days of the appeal. That cannot be said in this case.

Baker v. DEP, 2015 EHB 535, was an appeal by a landowner from the Department decision to partially release bonds posted by the surface mine operator. The appellant commissioned his own study of the site, which reportedly found that waste oil and debris had been disposed of on the property. He gave the Department and permittee a copy of the report in March. The Department conducted an investigation but took no additional action. He thereafter moved in July for leave to add an objection to his notice of appeal that the bond should not have been released due to the alleged solid waste disposal. We granted leave because the Department and permittee had been aware of the issue purportedly uncovered in the new investigation for months.

Borough of St. Clair v. DEP, 2013 EHB 171, bears some resemblance to *Harvilchuck, supra*, in that the appellant wished to amend his appeal to object that the Department had issued the permit to the wrong entity. In *St. Clair,* as in *Harvilchuck,* the record indicated that the parties had been engaged in discovery and debate regarding the entities generally involved in the project, including the particular issue that was the subject of the objection, for some time. Once again, the instant case lacks any similarity to the key factor that we relied upon there.

It is true that amendment should be liberally granted, but it should not be automatic. In the interest of being fair to the appellant, especially appellants in third-party appeals where this issue seems to come up, we should not lose sight of the increased burden and expense incurred by permittees and the Department as the goalposts are moved. The administrative review process should not be interminable.

Accordingly, we issued an order denying the motion for leave to amend, a copy of which is attached.

ENVIRONMENTAL HEARING BOARD

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

DATED: October 1, 2018

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

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For Permittee:
Adam Cutler, Esquire
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Karen Davis, Esquire
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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 27th day of September, 2018, it is hereby ordered that the Appellant's motion for leave to amend his notice of appeal is hereby **denied.** The Department and Permittee shall file their response(s) to the Appellant's cross-motion for summary judgment and reply brief(s) in support of their own motions on or before **October 26, 2018.** The Appellant may submit a reply brief in support of his cross-motion on or before **November 13, 2018.**

ENVIRONMENTAL HEARING BOARD

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

DATED: September 27, 2018

c: **For the Commonwealth of PA, DEP:**
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For Permittee:
Adam Cutler, Esquire
Christopher Roe, Esquire
Karen Davis, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONROE COUNTY CLEAN STREAMS COALITION	:	
v.	:	**EHB Docket No. 2017-107-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BRODHEAD WATERSHED ASSOCIATION, CITIZENS FOR PENNSYLVANIA'S FUTURE, AND DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER, Intervenors	:	**Issued: October 11, 2018**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion to dismiss an appeal of a periodically updated existing use classification listing for streams. The Board lacks jurisdiction because the listing does not in and of itself affect any individual personal or property rights, privileges, duties, or obligations. The appropriate time to challenge a stream's existing use classification is in the context of an appeal from a Department permit or approval.

O P I N I O N

Monroe County Clean Streams Coalition (the "Coalition")[1] has appealed the posting of an update to a list maintained by the Department of Environmental Protection (the "Department") of existing use classifications of some of the streams in Pennsylvania. The

[1] The Coalition describes itself as an unincorporated association consisting of local businesses and landowners in Monroe County. Its members include Kalahari Resorts & Conventions, Pocono Manor Investors, LP, and Pocono Raceway.

parties refer to the list as the Statewide Existing Use Classification List. The streams at issue in this appeal are Paradise Creek, Devil's Hole Creek, Swiftwater Creek, and Tunkhannock Creek in Monroe County.[2] Those streams are now indicated on the list as having attained existing uses of exceptional value (EV). This is more protective than the streams' current designated uses of high quality (HQ).

The Department has moved to dismiss the Coalition's appeal on the grounds that an update to the list is not a final, appealable action subject to this Board's jurisdiction. Two of the intervenors in this appeal, the Brodhead Watershed Association and Citizens for Pennsylvania's Future (PennFuture), have filed joint memoranda in support of the Department's motion. The Coalition, of course, opposes the motion, contending that the update to the list is appealable because it has significant and immediate impacts on its members. For the reasons set forth below, dismissal of this appeal is appropriate.

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.[3] Motions to dismiss will be granted only when

[2] On August 13, 2018, the Coalition withdrew its appeal as it related to two additional streams, Cranberry Creek and Tank Creek, because the Coalition said its own independent sampling of the two streams indicated they had attained exceptional value uses.

[3] We have disregarded the parties' various contentions regarding who said what at a public meeting before the Independent Regulatory Review Commission.

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.

The Board only has jurisdiction over final Department actions affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations. 35 P.S. § 7514(a); 25 Pa. Code § 1021.2 (definition of "action"); *Northampton Bucks Cnty. Mun. Auth. v. DEP*, 2017 EHB 84, 85; *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747, 750; *Kennedy v. DEP*, 2007 EHB 511, 511-12. There is no bright line rule for what constitutes a final, appealable action. *Chesapeake Appalachia, LLC v. Dep't of Envtl. Prot.*, 89 A.3d 724, 726 (Pa. Cmwlth. 2014); *HJH, LLC v. Dep't of Envtl. Prot.*, 949 A.2d 350, 353 (Pa. Cmwlth. 2008); *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121. The appealability of Department decisions needs to be assessed on a case-by-case basis. *Dobbin v. DEP*, 2010 EHB 852, 858; *Kutztown*, 2001 EHB 1115, 1121. In short, we ask whether a Department decision adversely affects a person. 35 P.S. § 7514(a) and (c); 25 Pa. Code § 1021.2. Department decisions that "do not affect a party's personal or property rights, remedies, or avenues of redress are not appealable actions." *Sayreville Seaport Assocs. Acquisition Co. v. Dep't of Envtl. Prot.*, 60 A.3d 867, 872 (Pa. Cmwlth. 2012).

The list that the Coalition has attempted to appeal relates to Pennsylvania's EPA-approved water quality standards program, which "provides that instream water uses and the level of quality necessary to protect those uses shall be maintained and protected." *Pine Creek Valley Watershed Ass'n v. DEP*, 2011 EHB 761, 772 (citing 25 Pa. Code § 93.4a). Pennsylvania's program is concerned with maintaining and protecting (1) existing uses and (2) designated uses. 25 Pa. Code §§ 93.4a(b), 93.9(a), 96.3(a). Existing uses are defined as "[t]hose uses actually attained in the water body on or after November 28, 1975, whether or not they are

included in the water quality standards." 25 Pa. Code § 93.1. Designated uses are defined as "[t]hose uses specified in §§ 93.4(a) and 93.9a – 93.9z for each water body or segment whether or not they are being attained." *Id.* Section 93.4(a) sets forth statewide water use types related to aquatic life, water supplies, and recreation. Section 93.3 sets forth protected water use types, which include all of the uses contained in Section 93.4(a), as well as additional aquatic uses such as cold water fishes (CWF) and trout stocking (TSF), and the special protection uses of HQ and EV waters.

Designated uses of streams are promulgated by formal rulemaking by the Environmental Quality Board and are listed as regulations in the *Pennsylvania Code*. *See* 25 Pa. Code §§ 93.9a – 93.9z. The process for classifying the *existing* uses of streams, however, is much different. That process is set forth at 25 Pa. Code § 93.4c(a):

> (1) *Procedures.*
>
> (i) Existing use protection shall be provided when the Department's evaluation of information (including data gathered at the Department's own initiative, data contained in a petition to change a designated use submitted to the EQB under § 93.4d(a) (relating to processing of petitions, evaluations and assessments to change a designated use), or data considered in the context of a Department permit or approval action) indicates that a surface water attains or has attained an existing use.
>
> (ii) The Department will inform persons who apply for a Department permit or approval which could impact a surface water, during the permit or approval application or review process, of the results of the evaluation of information undertaken under subparagraph (i).
>
> (iii) Interested persons may provide the Department with additional information during the permit or approval application or review process regarding existing use protection for the surface water.
>
> (iv) The Department will make a **final** determination of existing use protection for the surface water **as part of** the **final** permit or approval action.

(Emphases added.)

The existing use regulation does not say the Department should create and disseminate a list of existing uses. The Department is not required to prepare or publish a list. Nevertheless, the Department maintains a running list subject to constant revision. For example, in addition to the October 2017 update under appeal here, the Department also updated the list as recently as July 2018.[4] The list informs permit applicants and permit reviewers alike of the Department's interim view of a stream's water quality. Although there is no requirement for a list, the Department *is* required to inform permit applicants of its evaluation of a stream's existing uses during the permit review process. 25 Pa. Code § 93.4c(a)(1)(ii). The applicant, and any other "interested person" for that matter, then has an opportunity to show the Department why it is wrong as part of the application process. 25 Pa. Code § 93.4c(a)(1)(iii). Indeed, permit applicants can argue against a Departmental use determination in any permit review process whether a particular stream is on the list or not. If and when a permit is ever applied for, the Department uses the use determination to fashion permit conditions, and it issues a permit. Any person adversely affected by the permit can then attempt to show that the Department's use determination was flawed, but only in the context of an appeal *from the permit*. 25 Pa. Code § 93.4c(a)(1)(iv).

There is no question that the Board can and in fact has reviewed the Department's recommended existing use in the context of an appeal from a permit whose conditions were based in part on the Department's use listing pursuant to Section 93.4c(a)(1). *See, e.g.*, *Zlomsowitch v. DEP*, 2004 EHB 756. However, this appeal does not seek review of the issuance or denial of any permit or the conditions thereof. The question presented in this appeal is

[4] The Coalition complains that updates to the list are difficult to find. Accepting that assertion as true, we do not follow why that fact should factor into our jurisdictional analysis. In any event, the Department is not required to prepare or publish a list at all. The Department is required to advise permit applicants of its recommended use determination, regardless of whether it is on a list. 25 Pa. Code § 93.4c(a)(1)(ii).

whether the Department's lone act of including a stream on its existing use list without any accompanying permit is by itself a separately appealable action.

It is immediately apparent from a review of Section 93.4c(a)(1) that the Department's placement of a stream on the Existing Use Classification List is not independently appealable to the Environmental Hearing Board. Not only is a listing not a "final determination" until a "final permit or approval" is issued, the regulation expressly states that the Department can only make the final use determination "as part of" a final permit or approval action. In other words, the regulation not only describes when a final existing use determination is made, it describes the only context in which that determination must be made.

As to context, the regulation makes clear that an existing use listing disembodied from any Department or permit or approval is inchoate. Unless and until it is used to devise a permit condition, the listing has no independent force or effect. It is not directed at any particular person. It does not require anybody to do anything. It does not limit anybody's activities. It cannot be violated; no penalties can follow from or be based merely upon a listing without something more. Indeed, by simply characterizing the uses of a stream the Department has not created anything to enforce. The Department cannot issue an order to comply with an existing use listing. It is neither a regulation nor an adjudication. It lacks the force of law. It is not binding on permit applicants or reviewers. It is a pronouncement without any corresponding implementation; a bark with no bite. Even if it were a binding norm, it would still not be independently appealable until it was actually implemented.

The Coalition asserts that the use listing in and of itself triggers certain regulatory requirements, but that is simply not true. The Coalition fails to point to a single requirement imposed by law that is triggered based on an existing use listing alone as opposed to a permit that

implements the use listing. The Coalition cites buffer requirements that apply to HQ and EV streams in some cases as an example, but those requirements are actually a good example of how the use determination by itself does *not* trigger any requirements. The buffer requirements are not self-effectuating. Rather, they can only be given effect in the context of a permit. 25 Pa. Code § 102.14(a)(1). If a Coalition member is adversely affected by how the Department applies the riparian buffer requirements to a particular development, the member is free to challenge that implementation in an appeal from the Department's issuance of an earth disturbance permit. No such permitting action implementing the riparian buffer requirements is under appeal in this case. Although the Coalition lists a parade of potential horribles and possible consequences, it has failed to cite a single example of how a use listing in isolation has any independent actual impact on any person's legal rights and liabilities separate and distinct from any permit. It is only when a permit is issued that the underlying use determination can indirectly have that impact.

The Coalition exaggerates the importance and uniqueness of the existing use list. Placing a stream on the list does not make the Department recommendation regarding the use of that stream any more or less significant than it would even if there were no list. In point of fact, the Department must determine the existing use of a receiving stream for *every* water discharge permit, whether that use is on the list or not, because existing uses must always be protected. Existing uses cannot be protected if it is not known what they are. It has never been suggested or held that the use determination that is part of every permit application is independently appealable. Placing a stream on a list without reference to any particular permit is even further removed from the sort of defined process that is at least likely to culminate in a final permit issuance or denial. Placing a stream on the list is simply a heads-up. Legally it is no more significant than the use determinations that must be done as part of the permit application review

process, but it serves to put everyone on a more equal footing to know going into the permit application process what the Department thinks the most recent water quality data shows for the stream in question.

The Department employs the use determination along with numerous other factors to fashion permit terms and conditions. For example, the use determination, along with the flow of the stream, the size of the mixing zone, the quality and quantity of the discharge alone or possible in combination with other discharges, and other factors are all used to produce water-quality based permit terms and conditions. By limiting review of use listings to the permitting process, the procedure outlined in Section 93.4c(a)(1) allows for the fact that the use determination is never actually used in isolation. Since the use determination is not used in isolation, it should not be reviewed by the Board in isolation. Section 93.4c(a)(1) makes it clear that a review of a use determination is likely to be much more meaningful if it is done in the setting where it is implemented. Furthermore, deferring a final decision regarding existing uses until someone applies for a permit allows the Department to not only consider additional information supplied by interested parties, it allows the Department to make a decision with a better understanding and appreciation of the consequences of its decision, both with respect to environmental protection and economic development. Similarly, this Board's review will be more fully informed.

The Coalition places great weight on Subsection (i) of Section 93.4c(a)(1), which says "[e]xisting use protection shall be provided when the Department's evaluation of information…indicates that a surface water attains or has attained an existing use." The Coalition wishes to elevate Subsection (i) to coequal status as an alternative final determination point. Of course, that approach completely disregards Subsection (iv) and renders it essentially

superfluous. In fact, it also renders Subsection (iii) essentially meaningless because that section provides that "[i]nterested persons may provide the Department with additional information during the permit or approval application or review process regarding existing use protection for the surface water." The Department accordingly must consider that additional information in its permit review process and cannot simply rely on its own existing data as constituting a final determination of an existing use of a waterbody. For this reason, 25 Pa. Code § 93.4c(a)(1)(i) cannot constitute a final decision point as the Coalition suggests.

Subsection (i) creates and defines existing use protection, but it is not directed at describing when that protection becomes final. Subsection 93.4c(a)(1)(i) does not create a mandatory duty to conduct an evaluation or make a finding at any particular time. *Contra Kiskadden v. DEP*, 2012 EHB 171 (Department's no-impact finding regarding a certain appellant's water supply appealable because Department required to resolve complaint one way or another). Subsection 93.4c(a)(1)(i) contemplates further action, and that subsequent action is very clearly appealable. *Contra id*. (no-impact finding is the last step in the process). As previously discussed, the "protection" afforded by Subsection (i) is basically theoretical until someone applies for a permit. It is Subsection (iv) that unambiguously defines when and in what context the listing takes its final form. Again, the Coalition has failed to direct us to any case where the "protection" of an existing use classification comes into play sooner than when it is given effect in a Department permit.

The Coalition's assertion that a stream cannot be downgraded from the Department's initial listing as part of the permit review process and, therefore, it must be final, is simply wrong. The regulation contains no such restriction. The Department's failure to consider information supporting an upgrade *or downgrade* in accordance with Subsection 93.4c(a)(1)(iii)

would undoubtedly constitute grounds for an appeal. Even if the Department would irrevocably signal what its final determination will be, the Department's statements about what it intends to do in the future are generally not appealable. *Northampton Bucks Cnty. Mun. Auth. v. DEP*, 2017 EHB 778, 796 (citing *Sayreville*, 60 A.3d 867 (Pa. Cmwlth. 2012)).

The Coalition refers us to the criteria for determining whether a Department communication directed to a named person constitutes an appealable action that we discussed in *Borough of Kutztown v. DEP*, 2001 EHB 1115, but those criteria do not seem to be particularly apposite in this case. *Kutztown* dealt with Department communications that had some marks of informality such as a letter that was sent to a named party. The existing use listings involved in this case are not communications directed at any person in particular so, by their very nature, they do not direct anybody to do anything or constrain anybody from doing anything.

The Coalition's argument that Subsection 93.4c(a)(1)(iv) is an invalid regulatory attempt to constrain the EHB's jurisdiction is not persuasive. That section makes it clear that the Department's evaluations of data pursuant to Subsection (i) are not final *for any purpose*. There is nothing in Section 93.4c(a)(1) that renders unappealable something that would have otherwise been appealable.

Given all of the variables involved in formulating permit conditions, the Department's final existing use determination made in the context of one particular permit application may or may not eventually affect other permittees discharging to the receiving streams. Any adversely affected permittee may choose to appeal the use determination in the context of its own permit appeal. We do not see why such challenges would be barred by, e.g., collateral estoppel if a new permittee is involved. The possibility of multiple viable challenges to the same use determination is inherent in the permit-by-permit adjudicatory review process set forth in Section

93.4c(a)(1). We would add that perfect consistency is rarely attainable in any event. It may not even be desirable if it is used to perpetuate a bad result. Periodic re-review based upon up to date data is not necessarily a bad thing.

Although we are dismissing this appeal now, the dismissal does not impact the Coalition members' ability to challenge the existing use of an affected surface water in the context of any permit they seek. "A person who is deprived of an opportunity to appeal an action is not bound by that action, and that action can have no preclusive effect against the person now or at any time in the future." *Chesapeake Appalachia, LLC v. DEP*, 2013 EHB 447, 459-60, *aff'd*, 89 A.3d 724 (Pa. Cmwlth. 2014). If the Department and a Coalition member disagree on the appropriate existing use of a receiving stream during the permitting process, the member may file an appeal with the Board if the Department issues a permit based on its allegedly flawed determination. The member's rights are preserved. The Department will not be able to come back and argue administrative finality or that the member should have challenged the existing use at any time prior to seeking the permit. *See Chesapeake*, 2013 EHB 447, 460 (Department action that is not final for purposes of appealability is not final for purposes of administrative finality (citing *Kutztown*, 2001 EHB at 1124-25)). The appeal can then play out with a fully developed factual record concerning the project at issue, and the existing use determination can be fully litigated in that appeal.[5]

In sum, it is the permit that affects individual rights, not the listing of a stream's uses that is used to devise the permit. The inclusion of a stream on the Department's unenforceable list has no legal impact by itself. Including a stream on a list does not grant or deny a pending application or permit or direct anyone to take any action or impose any obligations on anyone.

[5] Note that as potentially interested parties the Coalition's members will be able to participate in the process even if it is not their permit application.

Sayreville, 60 A.3d 867, 872. *See also Felix Dam Pres. Ass'n*, 2000 EHB 409, 425-26. This is clearly reflected in the regulatory procedure set forth in 25 Pa. Code § 93.4c(a)(1). There are no pending permit applications in this case. The Department has not commenced any reviews of any permit applications. To our knowledge, no member of the Coalition at this juncture has sought a permit, let alone had the Department take action on a permit. There is no tangible harm of any existing use on any member's interest. In fact, we do not know if the existing use listing will ever reach a point where it concludes in an action that affects the rights and obligations of a person. It is possible that a permit will never be sought for certain waterbodies that are on the list. Accordingly, the Board lacks jurisdiction.

The key point in our minds is that, under Section 93.4c(a)(1), the existing use listing is not separately appealable *at any time*. But if we assume for purposes of discussion that finality is the key, we again find that Board review at this point is premature. Section 93.4c(a)(1) not only says the use determination is only done as part of the permit, it specifies that the *final* determination is only made at the time of the *final* permit. We have repeatedly held that "subsidiary decisions can have a profound and immediate practical effect on a permit applicant, but we nevertheless require the applicant to wait until the Department makes a final decision on the permit before filing an appeal. The Board will not review provisional and interlocutory decisions of the Department." *Lower Salford Twp. Mun. Auth. v. DEP*, 2011 EHB 333, 338. *See also United Refining Co. v. DEP*, 2000 EHB 132, 133-34 ("Any number of the Department's decisions during a permit review could have costly, real-world consequences, but this Board will not review them in a piecemeal fashion….In short, the permit review process must be brought to close before this Board will get involved. Until then, there has been no final action."); *Central Blair Cnty. Sanitary Auth. v. DEP*, 1998 EHB 643, 646 (same). As previously noted, that

precept, which applies to intermediary Department decisions made *during* the permitting process, applies with even greater force to preliminary determinations made *before* the filing of a permit application, like the existing use determinations at issue in this case. Imagine how the already prolonged permit review process would drag on if every subsidiary decision somehow relating to future permits were appealable.

The Coalition's asserted harms are simply too vague, speculative, and generic to be manageable in an appeal at this juncture. The Coalition predicts that the listing will ultimately reduce the amount of usable land, increase operating costs of future development projects, and render certain forms of development infeasible, thus diminishing property values. For example, it says Pocono Raceway might need to run a sewer pipe under Interstate 80. The Coalition references other hypothetical future developments in the vicinity of the streams at issue in the appeal and argues that those hypothetical developments might become more difficult or expensive to develop if, for example, a discharge permit is required. The Coalition's argument is essentially that some landowner member of the Coalition may at some undetermined point in the future consider undertaking a development on property near one of the streams, and the consideration of whether to proceed with that hypothetical development, and in what form, will be influenced by the Department's existing use list. This strained chain of events is far too attenuated to conclude that the Department's listing has any immediate effect on the Coalition's personal or property rights.

Evaluating a challenge to an existing use in the absence of a specific project is too slippery and becomes replete with assumptions of what may or may not happen, which is precisely what we see in the Coalition's arguments. Even if the Department concludes at the end of the permitting process that an EV listing is appropriate, perhaps the project will be shown to

not degrade that use. Perhaps cost-effective nondischarge alternatives will not be required, but if required, can be developed and implemented. At this juncture, we are essentially imagining what might be possible with a development near these streams, when instead we should defer a technical and fact-specific inquiry based on the particulars of a real development in light of an actual permitting action taken by the Department.

The Coalition tries to make its fears more pressing by contending that the effects on the landowners are immediate once the Department updates the list because of market expectations. According to the Coalition, the market immediately adjusts the value of property surrounding streams upon the Department updating the existing use list and uploading the document to its website. We have no record to support that contention, but we can assume it is true for purposes of the dismissal motion. If appealability turned on market reactions and "market expectations," however, we suspect any number of Department pronouncements would be appealable—the announcement of a new cleanup initiative, the establishment of a grant program, the development of a nutrient credit trading auction, a new technology standard, the listing of a new hazardous chemical, etc. There are market expectations that accompany all sorts of government decisions, but that does not necessarily render those decisions final actions that should be appealable to an adjudicatory body such as the Environmental Hearing Board. The test is not whether some expert prognosticator opines that the Department's evaluations of existing uses may cause a subjective reaction on the part of anyone who has become aware of them. The test is whether those evaluations are final actions over which the Board has subject matter jurisdiction. Only when a specific Department action threatens cognizable rights, privileges, and duties of a particular person does that decision become something that can be appealed to this Board. The Coalition's argument is based on debatable market *assumptions* put forth by various

prognosticators of what *could* play out with respect to a possible development near an EV waterbody, but again, because there is no specific project being permitted, all of the assumptions are based on entirely hypothetical adumbrations.

Finally, the Coalition argues that, because the Commonwealth Court conducted a pre-enforcement review of a challenge to a change in a stream's **designated** use, *see Rouse & Assocs. v. Pa. Envtl. Quality Bd.*, 642 A.2d 642 (Pa. Cmwlth. 1994), we should allow this appeal to proceed as a pre-enforcement review of an existing use determination. We put this argument to rest in *Smithtown Creek Watershed Association v. DEP*, 2002 EHB 713, where we observed that the analysis in *Rouse* centered on the propriety of the Commonwealth Court's jurisdiction, not our own. 2002 EHB at 719. We also had this to say:

> Although the Board has ancillary authority to rule on the validity of regulations in the context of our review of a departmental enforcement or permitting action, the courts have many times held that our jurisdiction is expressly limited to post-enforcement review. Stream designations and redesignations are accomplished by the adoption by the EQB through the regulatory process; we can only pass on the validity of the regulation **in the context of an action by the Department applying or otherwise implementing the regulation**.

2002 EHB at 716 (emphasis added) (citations omitted). Thus, even if this appeal had involved designated uses, which it decidedly does not, the Coalition's appeal would have been premature.

For these reasons, we issue the Order that follows.[6]

[6] Because we find that we do not have jurisdiction over this appeal as a whole, we need not reach the argument of the Department and Intervenors that the Coalition's appeal is moot with respect to Swiftwater Creek because its **designated** use has since been changed to EV.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONROE COUNTY CLEAN STREAMS COALITION	:	
	:	
v.	:	**EHB Docket No. 2017-107-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BRODHEAD WATERSHED ASSOCIATION, CITIZENS FOR PENNSYLVANIA'S FUTURE, AND DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER, Intervenors	:	

O R D E R

AND NOW, this 11th day of October, 2018, it is hereby ordered that the Department's motion to dismiss is **granted**. 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: October 11, 2018

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

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Alice R. Baker, Esquire
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Deanna Kaplan Tanner, Esquire
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

B&R RESOURCES, LLC AND RICHARD F. CAMPOLA	:	
	:	
v.	:	**EHB Docket No. 2015-095-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 29, 2018**

OPINION AND ORDER ON APPELLANT'S MOTION TO RECONSIDER ORDER DATED OCTOBER 17, 2018

By Steven C. Beckman, Judge

O P I N I O N

The Board's initial ruling denying Mr. Campola's Motion for Protective Order was an interlocutory ruling on a discovery issue. Mr. Campola now requests that the Board reconsider its interlocutory ruling. The Board's rule addressing reconsideration of an interlocutory order provides that the petitioner must demonstrate extraordinary circumstances that justify reconsideration of the matter by the Board. 25 Pa. Code § 1021.151(a). The comment to this rule states that reconsideration is an extraordinary remedy and is inappropriate for the vast majority of the rulings issued by the Board. Mr. Campola does not cite the Board rule at any point in his Reconsideration Motion and offers no demonstration of extraordinary circumstances to justify the Board granting reconsideration. Instead, he simply sets forth his disagreement with the decision and asserts that the Board's decision allowing the requested discovery is "reversible error." (Reconsideration Motion, at 5). Disagreement with a Board decision is not an extraordinary circumstance, and nothing stated in the Reconsideration Motion rises to that level. The information and arguments set forth by Mr. Campola in the Reconsideration Motion simply

re-hash the information and arguments in the original Motion for Protective Order. The Board gave them full consideration when it ruled on the Motion for Protective Order and sees no reason to reconsider that decision and grant the extraordinary remedy requested by Mr. Campola.[1]

At the end of his Reconsideration Motion, in a numbered paragraph that is composed of a single sentence, Mr. Campola requests, in the alternative, that the Board "certify the controlling question of law, being the scope of this remand, for interlocutory appeal pursuant to 42 Pa. C.S.A. § 702 (b)." (Reconsideration Motion, at 6, Para 26). It is not clear what Mr. Campola contends is the controlling question of law that the Board should certify. The Board, following submittals from the parties, previously set forth its understanding of the scope of remand necessitated by the Commonwealth Court's decision. As cited by Mr. Campola, the Board stated that it would hold an evidentiary hearing limited to the issue of B&R Resources' financial resources to plug the Wells. (Reconsideration Motion, at 4, citing the Board Order dated September 11, 2018). As evidenced by his Motion for Protective Order, Mr. Campola appears not to dispute the scope of remand set forth by the Board. (See Motion for Protective Order, at 4, Paras. 16 and17 ("16. DEP understood after receiving the Board's September 11, 2018 Order that the evidentiary hearing would be limited to the issue of B&R Resources' financial resources." and "17. Despite the clear directive set forth in the September 11, 2018 Order, DEP chose to seek discovery from Select Energy Investments, Inc., and Mr. Campola."). Mr. Campola's evident concern is his belief that the discovery requested by the Department is broader than B&R Resources' financial resources to plug the Wells, but discovery is often broader than what may in fact be admissible at a hearing. The Board determined that the

[1] Mr. Campola requested, in the alternative, that the Board issue a memorandum outlining its reasons for denying Mr. Campola's Motion for Protective Order. The Board's Order denying the Motion for Protective Order briefly set forth the Board's reasoning and we do not intend to expand on it further.

contested discovery was permissible under its liberal approach to discovery and in light of the scope of the issue on remand. Our discovery decision does not change our prior "clear directive" on the scope of the remand but simply applies it to a discovery dispute between the parties. We do not see how this ruling, a interlocutory procedural ruling on the proper scope of discovery, involves a controlling question of law appropriate for certification to the Commonwealth Court or how doing so would materially advance the resolution of this case. See *UMCO Energy, Inc. v. DEP*, 2004 EHB 832; *Concord Res. Grp. Of Pa., Inc. v. DER*, 1993 EHB 156. We, therefore, will not grant Mr. Campola's request.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 29th day of October, 2018, following review of Appellant Richard F. Campola's Motion for Reconsideration Of The Board's Order of October 17, 2018, ("Reconsideration Motion") and the Department's Response, it is hereby ORDERED that the Reconsideration Motion is **DENIED.**

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 29, 2018

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EARTH FIRST RECYCLING, LLC	:	
	:	
v.	:	**EHB Docket No. 2018-063-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 1, 2018**
	:	

OPINION AND ORDER ON
MOTION FOR SANCTIONS IN THE FORM OF DISMISSAL

By Michelle A. Coleman, Judge

Synopsis

The Board grants a motion for sanctions in the form of dismissal where the appellant is not an individual appearing on its own behalf and has failed to obtain counsel in accordance with the Board's rules.

O P I N I O N

On June 22, 2018, Earth First Recycling, LLC ("Earth First") filed an appeal of a civil penalty assessment issued to it by the Department of Environmental Protection (the "Department") in the amount of $19,000 for, among other things, purportedly storing waste tires in violation of its general permit and failing to submit required annual reports. Earth First filed its appeal without being represented by counsel. The notice of appeal form was signed by Randy Tigar of Earth First. The Department has now moved to dismiss Earth First's appeal as a sanction because Earth First has continually failed to obtain counsel.

Under the Board's rules, all parties except individuals appearing on their own behalf are to be represented by an attorney at all stages of the proceedings subsequent to the filing of the

notice of appeal. 25 Pa. Code § 1021.21(a). On June 26, 2018 we issued our standard Pre-Hearing Order No. 1, as well as a letter to Earth First, to the attention of Randy Tigar, informing Earth First of the Board's requirement on representation because Earth First is a limited liability company and thus not an individual appearing on its own behalf. In the letter, we also provided information regarding the Pennsylvania Bar Association's Environmental & Energy Law Section pro bono program for small businesses. We gave Earth First until July 26, 2018 to have counsel enter an appearance, and we advised Earth First that the failure to do so would likely result in the dismissal of its appeal.

On July 31, 2018, having not received anything from Earth First, and recognizing that counsel had not entered an appearance on its behalf, we issued a Rule to Show Cause for Earth First to explain why it had failed to obtain counsel. We gave Earth First until August 20 to have counsel enter an appearance or risk the dismissal of its appeal as a sanction. After again not receiving anything, we held a conference call on August 24 with the Department and Randy Tigar of Earth First. During the call, we explained to Earth First the appeal process before the Board. We explained the requirement to obtain counsel to proceed with the filed appeal, and we referred to the letter and Rule to Show Cause we had previously sent out. Following the call, we issued an Order staying proceedings for 30 days while Earth First explored options for securing representation. We asked for a status report to be filed on September 10 informing us of Earth First's progress in this regard. No status report was filed, and to date no one has entered an appearance for Earth First in this matter.

The Department filed its motion on September 24. The Department styled its motion as a motion for sanctions in the form of dismissal, and it is supported by a memorandum of law. Because the motion seeks dismissal of the appeal, we allowed Earth First 30 days to respond to

the motion in accordance with our rules on motions to dismiss. 25 Pa. Code § 1021.94(c). *See also* 25 Pa. Code § 1021.35(b)(3) (for purposes of calculating response deadlines, documents served by mail are deemed served three days after the date of actual service). Earth First has not responded to the Department's motion and we have received no other filings or communication from Earth First since our conference call.

There is nothing particularly complicated about the motion before us. Earth First is an LLC that is required to be represented by counsel to continue with its appeal. 25 Pa. Code § 1021.21(a); *KH Real Estate, LLC v. DEP*, 2012 EHB 155 (dismissing an appeal filed by an LLC for its failure to obtain counsel). We have given Earth First several opportunities to comply with the Board's rules on representation and it has failed to do so at every turn. This failure justifies the dismissal of its appeal. *Citizens Advocating a Clean Healthy Environment v. DEP*, 2017 EHB 1077, 1078; *L.A.G. Wrecking v. DEP*, 2015 EHB 338, 339; *Falcon Coal and Constr. Co. v. DEP*, 2009 EHB 209, 210. Further, Earth First's failure to comply with our Orders and its non-responsive conduct demonstrate a disinterest in pursuing its appeal, which also justifies dismissal. *Lopez v. DEP*, EHB Docket No. 2017-035-M, slip op. at 6 (Opinion and Order, Jan. 22, 2018); *Slater v. DEP*, 2016 EHB 380, 381-82; *Casey v. DEP*, 2014 EHB 908, 910-11; *Nitzschke v. DEP*, 2013 EHB 861, 862.

We issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EARTH FIRST RECYCLING, LLC	:	
	:	
v.	:	**EHB Docket No. 2018-063-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 1st day of November, 2018, it is hereby ordered that the Department's motion for sanctions in the form of dismissal 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: November 1, 2018

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

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

For Appellant:
Earth First Recycling, LLC
400 Island Park Road
Easton, PA 18042

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: November 16, 2018**

OPINION AND ORDER ON
CROSS MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants in part and denies in part cross motions for summary judgment in a third-party appeal from the renewal of a Title V air quality permit. (1) Summary judgment is granted against the Appellant on his objection that the permit must be revoked because the application for renewal of the air permit was submitted two days late. To the extent the application was late at all, no relief from the Board is warranted. (2) No party has adequately explained the legal support for the Department's contention that a "responsible official" certified the Permittee's renewal application, so summary judgment is denied on that point. (3) The scope of the requirement to include "related parties" in the compliance history portion of the permit application is unclear, which precludes summary judgment on that issue. (4) Summary judgment is denied on the Appellant's fourth objection because at this point it is unclear what the precise objection is, making it ill-suited to resolve in the context of summary judgment.

O P I N I O N

Covanta Plymouth Renewable Energy, LLC ("Covanta") operates a municipal waste resource recovery facility in Plymouth Township, Montgomery County pursuant to Title V Operating Permit No. 46-00010 originally issued by the Department of Environmental Protection (the "Department") on December 19, 2001, and renewed on March 19, 2007 and May 15, 2012. The expiration date of Covanta's permit was May 15, 2017.

On November 15, 2016, Covanta sent the Department, via overnight mail, an air permit renewal application, which was received by the Department on November 16, 2016. Covanta's air permit renewal application was signed by John J. Polidore, Covanta's Facility Manager, in the space for a responsible official's signature. Covanta's air permit renewal application included the Department's Air Pollution Control Act Compliance Review Form. Covanta's compliance review form stated that it is a limited liability company ("LLC"). On November 21, 2017, the Department renewed Covanta's air permit through November 21, 2022.

Sam Joshi, an individual appearing *pro se*, has filed this appeal from Covanta's permit renewal. Mr. Joshi listed four objections to the permit renewal in his notice of appeal: (1) Covanta's permit application was not submitted in time; (2) the application was not signed by a responsible official; (3) the compliance review form accompanying the application was incorrect and incomplete; and (4) "the Department has permitted combustion of non-municipal waste without reviewing its impact on the human health and the environment." With respect to his first objection, Joshi says the application should have been sent in 183 days before it expired, when in fact it was only sent 181 days in advance. With respect to his second objection, Joshi says John J. Polidore, who signed the application, does not qualify as a "responsible official" as that term is used in the regulations. With respect to his third objection, Joshi complains that Covanta's

analysis of its compliance history did not include "related parties" as it must under the law. We will not attempt to paraphrase Joshi's expansion upon his fourth objection but will simply quote it from his notice of appeal with citations omitted:

> The Department's air permit references Permit No. 400588 approved by Waste Management of the Department. The only restrictions on what is burned in the combustors is that no more than 10% of the waste accepted per month be "municipal-like-residual-waste." The "municipal-like-residual-waste" is not defined in the air permit or 25 Pa. Code Article III Air Resources.
>
> The Air Quality Program has referred all compliance from the combustion of "municipal-like-residual-waste" to the Solid Waste Management Program in the recently issued Title V operating permit: Section E, Permit Condition #004(c). The Solid Waste Management Program has made many changes, with a recent major modification pending to the Permit No. 400588. Modifications to the solid waste permit are not addressed in the air permit. The Title V Operating Permit is an incomplete document.
>
> The Department has admitted that the air quality modeling and risk assessment from the facility was undertaken before the combustors were constructed. The risk assessment due to the combustion of "municipal-like-residual-waste" at the rate of 121.6 tons per day, 44,384 tons per year, permitted after the construction of the facility, are not addressed.

Covanta and the Department have filed a joint motion arguing that they are entitled to summary judgment on all four of Joshi's objections. Mr. Joshi responded in opposition to the joint motion and added his own cross motion for summary judgment. He attempted to add some entirely new objections to the permit renewal for the first time in his cross-motion for summary judgment, but we granted the Department and Covanta's motion to strike those issues, so all parties are asking for summary judgment on the same four issues. (Opinion and Order, Sep. 10, 2018.)

Timeliness

Joshi's first objection is that the Department erred in accepting Covanta's permit application for processing because Covanta submitted its renewal application late. He refers us to 25 Pa. Code § 127.446(e), which says renewal applications "shall be submitted at least 6 and not more than 18 months before expiration of the existing permit." 25 Pa. Code § 127.446(e).

Covanta's existing permit was due to expire on May 15, 2017. Covanta submitted its renewal application on November 16, 2017. Joshi contends that "there are 183 days in six months," so the renewal application needed to be submitted on November 14. He arrives at 183, as he explains for the first time in his reply, by reasoning that there are 365 days in a year, and since half of that is 182.5 days, there are 183 days in six months after rounding up. Therefore, he says the permit must be revoked.

The Department and Covanta respond that we must defer to the Department's interpretation of the six-month deadline, but they do not tell us what that interpretation is. They acknowledge in response to one of Joshi's discovery requests that the Department "has not issued a policy memo regarding its interpretation of 25 Pa. Code § 127.446(e)." They admit in their motion that Covanta's application may have been a little late, but say that any error in nevertheless accepting the application for further processing was harmless error.

When a statute or regulation's meaning is unambiguous, the Department's administrative interpretation carries little or no weight and may be disregarded. *Marcellus Shale Coal. v. Dep't of Envtl. Prot.*, No. 573 M.D. 2016, ___ A.3d ___, slip op. at 35 (Pa. Cmwlth. Aug. 23, 2018). Section 127.446(e) is not ambiguous when read in accordance with Pennsylvania's Statutory Construction Act, 1 Pa.C.S. §§ 1501 – 1991, which despite its name applies to the interpretation of regulations as well as statutes. 1 Pa.C.S. § 1502(a)(1)(ii). Section 1910 of that Act reads as follows:

> Whenever in any statute the lapse of a number of months after or before a certain day is required, such number of months shall be computed by counting the months from such day, excluding the calendar month in which such day occurs, and shall include the day of the month in the last month so counted having the same numerical order as the day of the month from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of such month.

1 Pa.C.S. § 1910. *Accord* Pa.R.C.P. No. 108. A period of time designated in terms of months is generally understood to run from the given day in one month to the corresponding date in the specified succeeding month. *See Tyler v. Motorists Mut. Ins. Co*., 779 A.2d 528, 531 (Pa. Super. 2001); *Williams v. Med. College of Pa*., 554 A.2d 72, 75-76 (Pa. Super. 1988).

Covanta's existing permit expired on May 15, 2017. Therefore, the day of the sixth month having the same numerical order was November 15, 2017. Covanta did not submit its application until November 16, 2017, one day late, not two days late as contended by Joshi.[1]

We must decide what the consequences of Covanta's late filing should be. The consequences turn on whether the filing requirement is directory or mandatory. The Commonwealth Court discussed the distinction in *People United to Save Homes v. Department of Environmental Protection* (*PUSH*), 792 A.2d 1 (Pa. Cmwlth. 2001), as follows:

> To hold that a provision is directory rather than mandatory does not mean that it is optional – to be ignored at will. Both mandatory and directory provisions of the legislature are meant to be followed. It is only in the effect of non-compliance that a distinction arises. A provision is mandatory when failure to follow it renders the proceedings to which it relates illegal and void; it is directory when the failure to follow it does not invalidate the proceedings….In determining whether the language of a statute or regulation is mandatory or directory, we must look to the intent behind the enactment of the statute or regulation.

Id., 792 A.2d at 3 (citations omitted).

In *PUSH*, the Court held that the regulatory requirement that a permittee who wishes to continue to operate a coal mine must file a renewal application a certain amount of time before its permit expires is directory, not mandatory. *Id.* at 4. We have held the same way with respect to surface coal mining permits. *Chimel v. DEP*, 2014 EHB 957, 986-87. The goal of the renewal

[1] No party has argued whether the term "submitted" in 25 Pa. Code § 127.446(e) means the date the renewal application was mailed to the Department or the date it was received by the Department. Nevertheless, even giving Joshi the benefit of construing "submitted" as the date on which the Department receives the renewal application, we still find that summary judgment is appropriate in favor of the Department and Covanta.

application deadline is to provide ample time for the Department to conduct its review, provide an opportunity for public notice and comment, and address any necessary permit changes. *Chimel*, 2014 EHB at 987. The requirement is related to administrative convenience. *See Emerald Coal Res., LP v. DEP*, 2008 EHB 532, 543. It should be honored, but the consequences of violating it will not ordinarily justify revocation or remand of any permit that is ultimately issued later. We have no indication that Covanta's filing one day late had any effect on the Department's review, public notice and comment, or the terms of the permit that was issued one year later. We cannot imagine how Covanta's late filing could have had any adverse effect, nor is it our role to try to imagine such effects. Joshi has failed to explain why the late filing should result in any relief from the Board. We are able to conclude as a matter of law that the Department did not act unlawfully or unreasonably in ultimately issuing the permit renewal notwithstanding the fact that the renewal application was submitted one day late. Summary judgment is granted in favor of the Department and Covanta on this point.[2]

Responsible Official

The Department and Covanta next seek judgment on Joshi's contention that Covanta did not have a "responsible official" sign off on its permit renewal application. Section 127.402 of the air quality regulations requires in part that a renewal application for an operating permit contain a certification from a "responsible official" certifying that the statements and information contained in the application are true, accurate, and complete based on that official's information and belief after a reasonable inquiry. 25 Pa. Code § 127.402(d). Both the General Information Form and the Title V Operating Permit application contain sections requiring the execution of certifications. The final page of the General Information Form requires an individual to certify

[2] Whether or not Covanta operated pursuant to an application shield during the Department's review of the application, an issue raised by Joshi, is irrelevant in this appeal now that the permit has been issued.

the following: "I certify that I have the authority to submit this application on behalf of the applicant named herein and that the information provided in this application is true and correct to the best of my knowledge and information." (DEP Ex. 18.) The application form itself at Section 1.4 Certification of Truth, Accuracy and Completeness contains the following:

> Note: This certification must be signed by a responsible official. Applications without a signed certification will be returned as incomplete.
>
> I certify under penalty of law that, based on information and belief formed after reasonable inquiry, the statements and information contained in this application are true, accurate, and complete.

(*Id.*) In both of these sections the certification for Covanta is executed by John Polidore, who is identified as "Facility Manager."

Under Pennsylvania's air quality regulations at 25 Pa. Code § 121.1, it appears that a "responsible official" can be different things depending on the type of entity submitting an application. Covanta is a limited liability company, not a corporation. Pennsylvania's regulations do not define who can act as a "responsible official" for an LLC. The Department and Covanta say the Department made the correct determination that Covanta is not covered by the regulation defining "responsible officials" of corporations. They say Covanta is instead covered by the subsection that defines who a "responsible official" is for "affected sources." That subsection describes a "responsible official" for "affected sources" as follows:

> (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 (definition of "responsible official"). Unfortunately, the Department and Covanta provide no further explanation for why this subsection applies to Covanta as an LLC. They have failed to give us enough to go on to support a ruling in their favor as a matter of law.

Similarly, Joshi has failed to explain in his cross-motion why the Department clearly erred as a matter of law, although he does raise an interesting point that the regulation the Department and Covanta rely on for "affected sources" appears to relate to the acid rain program, and he says Covanta is not subject to that program. The Department and Covanta do not explain what the acid rain program has to do with the Plymouth Township facility at issue in this appeal. They do not explain whether the facility is subject to certain acid rain provisions, or why we should be looking to definitions contained in the federal acid rain program for determining who a responsible official is for the renewal application for this facility. They never explain what an "affected source" means and why the facility qualifies as an affected source. "Affected source" does not at first blush appear to be a catch-all category when the other parts of the definition of responsible official do not apply. This issue requires further explication.

Compliance History

Joshi's next objection is that Covanta's application was incomplete because its compliance review form did not identify any "related parties" or their compliance history. Specifically, he says that Covanta should have at least included Covanta Metals Marketing, LLC, and Covanta Delaware Valley, LP, which he says are subsidiaries of Covanta's immediate parent Covanta Energy, LLC. In his reply, Joshi adds four other companies he found in SEC filings—Covanta Energy Corporation, Covanta Plymouth GP Corp., Covanta Plymouth, Inc., and Covanta Plymouth Investments Corp.—which he says have various ownership interests in Covanta Plymouth Renewable Energy Limited Partnership. However, this limited partnership

entity at least appears to be different than the LLC that is the permittee in this appeal, and Joshi does not explain the apparent difference.

Covanta has provided us with an affidavit that states that Covanta Energy, LLC is its parent company. Covanta Energy LLC's parent is Covanta Holding Corporation. The affidavit does not mention the two subsidiaries mentioned by Joshi, or the other four companies added in his reply. The affidavit says Covanta, as an LLC, has no general partner and no limited partners. The Department and Covanta argue that sister subsidiaries of Covanta parents(s) need not be included in the compliance history review, so their compliance history is irrelevant.

Section 7.1 of the Air Act reads in part:

> (a) The department shall not issue, reissue or modify any plan approval or permit pursuant to this act or amend any plan approval or permit issued under this act and may suspend, terminate or revoke any permit or plan approval previously issued under this act if it finds that the applicant or permittee **or a general partner, parent or subsidiary corporation of the applicant or permittee** is in violation of this act, or the rules and regulations promulgated under this act, any plan approval, permit or order of the department, as indicated by the department's compliance docket, unless the violation is being corrected to the satisfaction of the department.
>
> (b) The department may refuse to issue any plan approval or permit pursuant to this act if it finds that the applicant or permittee **or a partner, parent or subsidiary corporation of the applicant or permittee** has shown a lack of intention or ability to comply with this act or the regulations promulgated under this act or any plan approval, permit or order of the department, as indicated by part or present violations, unless the lack of intention or ability to comply is being or has been corrected to the satisfaction of the department.

35 P.S. § 4007.1 (emphasis added).

The operative regulation describing the Department's compliance review procedures is found at 25 Pa. Code § 127.412. The regulation says the compliance review form that is part of the permit application shall provide information related to the compliance status of "the applicant and related parties." 25 Pa. Code § 127.412(c). Section 121.1 defines "related party" as follows:

> Related party – For purposes of compliance review, **a general partner, parent or subsidiary corporation of the applicant or permittee** for a plan approval or operating permit including a general plan approval and general operating permit.

25 Pa. Code § 121.1 (emphasis added).

The Department and Covanta argue that we should defer to the Department's interpretation of "related parties," but before we can consider whether to defer, we need to know what the Department's interpretation is. Identifying the Department's institutional interpretation of a statute or regulation is a factual inquiry.

Here, we have conflicting evidence regarding the Department's interpretation of what parties are covered by its compliance review. On the one hand we have the affidavit of James Beach, P.E., the Environmental Engineer Manager in the Southeast Regional Office Air Quality Program, wherein Mr. Beach states:

> The Department does not interpret the definition of "related party" in its regulation 25 Pa. Code § 121.1 to mean that subsidiaries of a permittee or applicant's parent company are to be treated as related parties for purposes of compliance review.

The averment is somewhat awkwardly phrased, but we think it means the subsidiaries of Covanta's parent company (or companies?) other than the applicant are not considered to be "related parties." We would have felt more comfortable with the affidavit if it expressly identified the interpretation as the Department's statewide, institutional interpretation, but we are nevertheless willing to accept the statement at face value for current purposes.

On the other hand, when we look to the Department's compliance review form itself, we find that the following is required by the form:

> If applicant is a corporation or a division or other unit of corporation, provide the names, principal places of business, state of incorporation, and taxpayer ID numbers of **all domestic and foreign parent corporations (including the ultimate parent corporation), and all domestic and foreign subsidiary corporations of the ultimate parent corporation with operations in**

> **Pennsylvania**. Please include all corporate divisions or units, (whether incorporated or unincorporated) and privately held corporations. (A diagram of corporate relationships may be provided to illustrate corporate relationships.) Attach additional sheets as necessary.

(DEP Ex. 18 (emphasis added).) The form seems to say precisely the opposite of Mr. Beach's affidavit. It tells the applicant to disclose all parent corporations including the "ultimate parent corporation." It also covers "all domestic and foreign subsidiary corporations of the ultimate parent corporation with operations in Pennsylvania." One would expect that the form that the Department created and that it requires all applicants to complete statewide would be the best expression of its regulatory interpretation. Mr. Beach's affidavit does not explain why the form reads this way. As part of its permit application, there is no dispute that Covanta has not identified its "ultimate parent" or any subsidiaries of any of its parent corporations, if there are any such "corporations," or any parents' subsidiaries. On the other hand, Mr. Joshi has failed to explain why he should prevail even if his interpretation is correct. Further, he has not pointed to any evidence of any sister corporation that would rise to the level of justifying anything other than a renewal of Covanta's permit. Nevertheless, given the lack of clarity underlying the point, we are not in a position to grant summary judgment on the issue.

Municipal-like Residual Waste

Joshi's articulation of his fourth objection has been neither clear nor consistent over time. Although we acknowledge that Mr. Joshi is proceeding *pro se*, the Board should not be required to strain to understand the precise nature of an appellant's objections. His arguments have repeatedly and somewhat frustratingly changed over the course of his filings. He appears to argue that Covanta never modeled and the Department never assessed the impacts of burning "municipal-like residual waste" when the facility was originally permitted in 1998 or during subsequent renewals. It is unclear whether Joshi is arguing that new modeling and a new risk

assessment should have been done in connection with the 2017 renewal or if he is only complaining about the adequacy of earlier assessments. At one point Joshi seems to contest a change in the 2017 renewal that eliminated a list of waste streams to be accepted at the facility and instead incorporates the waste streams by reference to Covanta's waste management permit. Yet in his reply he appears to walk back that argument and says he is only challenging the waste streams as they were originally approved in 1998. As an example of Joshi's shifting arguments and justifications, he sprinkles in references to Article I, Section 27 of the Pennsylvania Constitution in his summary judgment papers even though his notice of appeal is devoid of any reference to that provision, and he did not seek to include any argument related to Article I, Section 27 in his motion for leave to amend his appeal.

It is somewhat tempting to grant summary judgment in favor of the Department and Covanta based on Joshi's slippery and obtuse arguments, and we sympathize with the Department and Covanta's attempts to wrestle with this objection. However, at the same time we are hesitant to grant summary judgment on an objection we do not clearly understand. Therefore, we will deny summary judgment and provide Mr. Joshi an opportunity to articulate a more coherent position within the genre of his objection as set forth in his notice of appeal.

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 16th day of November, 2018, it is hereby ordered that the Department and Covanta's motion for summary judgment on the Appellant's objection that the permit renewal should be vacated because the application was submitted one day late is **granted**. That objection is dismissed. The parties' motions for summary judgment are in all other respects **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: November 16, 2018

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

For the Commonwealth of PA, DEP:
Douglas White, Esquire
Jessica Hunt, Esquire
(*via electronic filing system*)

For Appellant, *Pro Se*:
Sam Joshi
(*via electronic filing system*)

For Permittee:
Adam Cutler, Esquire
Christopher Roe, Esquire
Karen Davis, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARIA PHELPS	:	
	:	
v.	:	**EHB Docket No. 2018-096-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 4, 2018**
	:	

OPINION AND ORDER
DISMISSING APPEAL

By Michelle A. Coleman, Judge

Synopsis

The Board dismisses an appeal where an appellant has not perfected her appeal in accordance with the Board's rules and has not responded to the Board's orders.

O P I N I O N

On October 3, 2018, the Board received a letter from Maria Phelps. The letter reads as follows:

> To whom it may concern:
>
> I am appealing the decision requiring me to change my water system.
>
> I understand what was said to me regarding testing. I am saying that I disagree with the findings of the water sample. Also, it was stated that I would not be required to change systems if I had maintained 12 consecutive months with no ecoli in the drinking water. I believe that was done. I have taken every corrective action that you asked me to do.
>
> Instead of trying to make me change my system, why hasn't anyone went to the source of where the Ecoli may be coming from? I'm assuming that the farm next door would be a bacterial source.
>
> I have done everything thus far to accommodate this department. I believe that the water sample was not correct. When it was tested the next day it came up clear of bacteria.

> I am requesting that you rescind your decision on requiring me to change the current water treatment system that I have.

The Board docketed the letter as an appeal from a *pro se* appellant.

Ms. Phelps did not attach a copy of the Department of Environmental Protection (the "Department") action she references in her letter, or any written notice she may have received of the action. On October 4, 2018, we issued an Order requiring Ms. Phelps to perfect her appeal in accordance with our rules. *See* 25 Pa. Code § 1021.51 (regarding commencement, form, and content of a notice of appeal). Among other things, we asked Ms. Phelps to provide a copy of the action she sought to appeal, the date that she received notice of the action, and proof of service of her appeal on the Department. 25 Pa. Code § 1021.51(d), (f)(2)(vi), (k). Our Order required Ms. Phelps to provide the missing information by October 24. The Order advised that the failure to supply the missing information could result in the dismissal of her appeal.

On October 29, having received nothing in response to our Order, we issued a Rule to Show Cause, requiring Ms. Phelps to show cause why the Board should not dismiss her appeal as a sanction pursuant to 25 Pa. Code § 1021.161 for not supplying all of the information necessary for the perfection of her appeal. We gave Ms. Phelps until November 19 to supply the missing information, which would constitute a discharge of the Rule. To date, we have not received anything from Ms. Phelps in response to our Order or Rule to Show Cause.[1]

Thus, it appears that Ms. Phelps no longer intends to pursue her appeal. We recently dealt with a similar situation in *Kuncio v. DEP*, EHB Docket No. 2018-011-B (Opinion and Order, Mar. 16, 2018). In *Kuncio*, the appellants filed a letter with the Board that appeared to relate to a malfunctioning septic system on a nearby property. The letter did not include the Department action or any written notice of the Department action, or indicate any proof of

[1] No counsel for the Department has entered an appearance in this matter.

service on the Department or other potential parties. The Board issued an Order for the perfection of the appeal, which was met with no response, and then issued a Rule to Show Cause, which also received no response. We found that the Kuncios' appeal could not go forward without necessary action on their part. We dismissed their appeal for failing to respond to Board orders and evincing an intent to no longer continue with their appeal. Our course of action in *Kuncio* is consistent with how we have handled other similar situations in the past. *See, e.g.*, *Lopez v. DEP*, EHB Docket No. 2017-035-M, slip op. at 6 (Opinion and Order, Jan. 22, 2018); *Slater v. DEP*, 2016 EHB 380, 381-82; *Casey v. DEP*, 2014 EHB 908, 910-11; *Nitzschke v. DEP*, 2013 EHB 861, 862. We see no reason to depart from our established precedent in the case before us, and therefore, we find it appropriate to dismiss this appeal.

We issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARIA PHELPS	:	
	:	
v.	:	**EHB Docket No. 2018-096-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 4th day of December, 2018, it is hereby ordered that the appeal in this matter 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: December 4, 2018

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

For the Commonwealth of PA, DEP:
Office of Chief Counsel – Northcentral Region
(*via electronic mail*)

For Appellant, *Pro Se*:
Maria Phelps
(*via U.S. mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAX ROZUM JR. AND CAROL K. ROZUM	:	
	:	
v.	:	**EHB Docket No. 2017-027-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 11, 2018**
	:	

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

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board upholds a civil penalty of $18,000 that the Department assessed against the owners of property on which an unpermitted waste tire pile was located for failing to comply with a Department order to remove the tires.

FINDINGS OF FACT

1. On March 3, 2008, the Department of Environmental Protection (the "Department") issued an order to Max Rozum Jr. and Carol K. Rozum (the "Rozums"). (Commonwealth Exhibit ("C.Ex.") D.)

2. The order required the Rozums to prohibit the disposal of any additional waste tires on a preexisting tire pile on property that they own on Eagle Rock Road in Allegheny Township, Venango County, to remove the waste tires from the property by June 30, 2008, to take the waste tires to an authorized facility using an authorized waste hauler, to submit disposal and/or recycling receipts, and to implement mosquito control measures until all waste tires were removed from the property. *Id.*

3. The Rozums filed an appeal from the order with this Board. EHB Docket No. 2008-082-L.

4. On December 29, 2008, we issued an Opinion and Order in the case granting the Department's motion for summary judgment and dismissing the appeal. *Rozum v. DEP*, 2008 EHB 731. The Rozums did not file an appeal from our order.

5. We made the following administratively final findings in our Opinion and Order, which remain relevant in the instant appeal:

> Max Rozum, Jr. and Carol K. Rozum, (the "Rozums") own a parcel of real estate located adjacent to Eagle Rock Road in Allegheny Township, Venango County (the "Property"). The prior owner of the Property, Jerry Richards, disposed of a large number of waste tires on the Property. There is no record at this point that the Rozums themselves disposed or allowed others to dispose of tires on the Property. Prior to purchasing the Property, the Rozums knew the waste tires were present on the Property. The waste tires have been present on the Property since at least September 15, 2000. There are at least 10,000 waste tires on the Property. Neither the Rozums nor anyone else has a permit from the Department to dispose of waste on the Property. *See* 35 P.S. §§ 6018.301, 6018.501.
>
> The Rozums received a general inspection report dated December 15, 2006 that stated that the waste tires had been on the Property for more than a year in violation of 25 Pa. Code § 299.155(c). The Rozums received another inspection report on or about January 22, 2008 repeating that the waste tires had been on the Property for more than a year in violation of 25 Pa. Code § 299.155(c).

2008 EHB 731, 731-32.

6. We held that the Department had the authority to issue the order to the Rozums as landowners. We also held as follows:

> It is not necessary to show that the tires are creating a nuisance as a prerequisite to the Department's order. Nor is financial inability to comply a defense to the validity of a Department order in a Board proceeding. *Ramey Borough v. DEP*, 351 A.2d 614, 615 (Pa. Cmwlth. 1976); *Starr v. DEP*, 2003 EHB 365, 372. The Rozums do not cite any authority to support their innocent-landowner defense, but even if we assume that such a defense is available in this setting, it would not be available to the Rozums because they admit that they were fully aware of the unlawful tire pile before purchasing the Property. Notably, the Rozums have not argued that any of the specific terms or requirements of the Order are unreasonable in response to the Department's motion.

Id., 2008 EHB at 735-36.

7. The Rozums were aware of the tire pile before purchasing the property. *Id.* (Notes of Transcript page ("T.") 72.)

8. Mr. Rozum is a real estate agent who also owns several investment properties. He has been a real estate agent since 1986. Mrs. Rozum is a teacher. (T. 74, 82-87, 101-102.)

9. The Rozums did not comply with the Department's March 2008 order. (T. 25-27; C.Ex. E.)

10. On May 12, 2009, the Department filed a Petition to Enforce Administrative Order against the Rozums in the Court of Common Pleas of Venango County, Pennsylvania. (C.Ex. F.)

11. On July 7, 2009, after a hearing, the Court granted the Department's petition to enforce against the Rozums, thereby directing them to, among other things, remove all waste tires on the property as required by the Department's order. (C.Ex. H.)

12. On October 26, 2009, the Court in response to a Department petition issued an order finding the Rozums in contempt of the Court's July order and decreeing that, if the Department certified that the Rozums had not removed the waste tires from the property within 90 days after the order, the Court would issue a warrant for their arrest. (C.Ex. K.)

13. On February 5, 2010, the Department certified with the Court that the Rozums had not complied with the October 2009 contempt order. (C.Ex. M.)

14. On March 3, 2010, the Court issued a bench warrant for the arrest of the Rozums as a sanction for their continuing contempt of the Court's orders. (C.Ex. N.)

15. On January 10, 2012, the Department filed a second petition for contempt against the Rozums for their continued failure to remove the waste tires from the property, in violation

of the Department's order and all prior orders of the Venango County Court of Common Pleas. (C.Ex. P.)

16. On January 30, 2012, the Court issued an order finding the Rozums in continuing contempt, superseding the prior bench warrant that had been issued, and directing the Rozums to permit the Department, its employees, contractors, agents, and/or assigns unrestricted access to the property to remove the waste tires. (C.Ex. Q.)

17. Sometime in the summer of 2012, the Rozums had a metal recycler remove what has been estimated as between 250 and 500 tires with metal rims from the site because those tires had scrap value. A small number of solid tires, probably for forklifts, and a few other tires may also have been removed. There are no good records of any of the removals, and no indication whether the tires were properly disposed. (T. 39-42, 78-79, 96-97; C.Ex. R, S; Rozums Exhibit ("R.Ex.") 3.)

18. The vast majority of the thousands of waste tires on the property were never removed from the site by the Rozums. (T. 25-27, 42; C.Ex. D-T.)

19. In September 2012, a contractor hired by the Department conducted the tire removal cleanup at the property, removing thousands of waste tires totaling 627.32 tons from the property at a cost of $72,141.80 to the Commonwealth. (T. 38, 43-45; C.Ex. R, T.)

20. The Department's contractor completed the tire removal on or about September 25, 2012. (C.Ex. R.)

21. On March 20, 2017, the Department issued an assessment of civil penalty in the amount of $18,000 against the Rozums for their failure to comply with the Department's 2008 order. (C.Ex. A.)

22. Brian A. Mummert has been employed by the Department's Waste Management Program for more than 30 years and is currently an Environmental Group Manager for the Department's Northwest Region Waste Management Program. (T. 11-12.)

23. Mummert has inspected numerous waste tire piles in his time with the Department, including the subject site. (T. 12-13.)

24. Mummert prepared the civil penalty assessment against the Rozums and calculated the amount of the civil penalty. (T. 15.)

25. In preparing the assessment, Mummert considered the severity of the Rozums' violation, the degree of willfulness, the potential for harm to public health, safety, and the environment, the volume of tires, and other factors. (T. 15-40, 46-49; C.Ex. B.)

26. Although the Rozums were in violation of the Department's order from July 1, 2008 until on or about September 25, 2012, Mummert calculated the duration of their violation as three years, which was a conservative approximation of the time that elapsed between the Environmental Hearing Board's dismissal of the Rozum's appeal of the order and the date the Department's contractor completed its cleanup of the waste tires from the property. (T. 22, 25-28, 39-40; C.Ex. C.)

27. Mummert assessed $6,000 per year. He chose to assess the civil penalty on a yearly basis because he felt that assessing on a daily, weekly, or monthly basis would have produced a penalty amount that was too high to reasonably fit the violations. (T. 47-49; C.Ex. C.)

28. On December 13, 2017, the Department filed a motion for partial summary judgment in the instant appeal on the issue of the Rozums' liability for their violation of the order, which is the sole violation covered by the civil penalty assessment.

29. On February 6, 2018, the Board granted the Department's motion for partial summary judgment, thereby finding the Rozums liable for violating the Department's order. *Rozum v. DEP*, EHB Docket No. 2017-027-L (Opinion and Order, Feb. 6, 2018).

30. In that Opinion and Order, we held as follows:

> The Rozums' failure to comply with the March 2008 order is apparent. The Rozums even acknowledge in their notice of appeal that the Department had a contractor remove the tires from their property. (Notice of Appeal ¶ 4.) The Solid Waste Management Act makes it unlawful for a person to violate an order of the Department, 35 P.S. § 6018.610, and permits the Department to assess civil penalties for such a violation subject to that person's right to appeal the assessment before the Board to contest the amount of the penalty or the fact of the violation, 35 P.S. § 6018.605. The fact of the violation has been established. Therefore, the only issue left to address in this appeal is the reasonableness of the Department's penalty assessment.

Slip op. at 4-5.

31. The Rozums have been fully aware of all of the Department's enforcement actions over the years. (T. 74, 92-93.)

32. The Rozums have deliberately chosen not to comply with the Department's order because they believe it is unfair. (T. 101.)

33. The Rozums' disregard of the order was at a minimum reckless. (T. 47-48; C.Ex. C.)

34. Tire piles are a potential fire hazard and a breeding ground for mosquitos. (T. 20-21, 46-47.)

DISCUSSION

The Department bears the burden of proof in an appeal from an assessment of a civil penalty. 25 Pa. Code § 1021.122(b)(1). The Department's burden is to show by a preponderance of the evidence that: (1) the violation that led to the assessment in fact occurred; (2) the penalty

is lawful under the applicable law; and (3) the penalty is a reasonable and appropriate exercise of the Department's discretion. *Paul Lynch Investments, Inc. v. DEP*, 2017 EHB 891, 897 (citing *Whiting v. DEP*, 2015 EHB 799, 805); *Taylor Land Clearing, Inc. v. DEP*, 2012 EHB 138, 147-49; *Gordon v. DEP*, 2007 EHB 264, 272. In reviewing the reasonableness of civil penalty assessments, the Board determines whether there is a reasonable fit between the violations and the amount assessed. *Thebes v. DEP*, 2010 EHB 370, 398.

In this case, we have already determined that the violation occurred, namely, failure to comply with the Department's order, which is the sole violation forming the basis of the civil penalty assessment. *Rozum v. DEP*, EHB Docket No. 2017-027-L (Opinion and Order, Feb. 6, 2018). The Rozums have not articulated a challenge to the lawfulness of the penalty. Nor could they. Section 605 of the Solid Waste Management Act authorizes the Department to assess a civil penalty of up to $25,000 per day for each violation of any provision of the Solid Waste Management Act, its regulations, a Department order, or a Department issued permit. 35 P.S. § 6018.605. Further, the Act also provides that "each violation for each separate day and each violation of any provision of this act, any rule or regulation under this act, any order of the department, or any term or condition of a permit shall constitute a separate and distinct offense under this section." 35 P.S. § 6018.605. The Department assessed far less than the law would have allowed for the Rozums' years-long failure to comply. Therefore, our role is limited to determining whether the $18,000 civil penalty is a reasonable fit for the failure-to-comply violation.

The Solid Waste Management Act requires that, "[i]n determining the amount of the penalty, the department shall consider the willfulness of the violation, damage to the air, water, land, or other natural resources of the Commonwealth or their uses, cost of restoration and

abatement, savings resulting to the person in consequence of such violation, and other relevant factors." 35 P.S. § 6018.605. The record shows that the Department considered those statutory factors when it calculated the civil penalty amount. (T. 15-40.) The record shows that the Department's assessment based upon its consideration of those factors is reasonable.

The Rozums were fully aware of the order as soon as it was issued in 2008, and indeed, they appealed it. We dismissed that appeal on the merits in December 2008. Yet, with the minor and belated exception of removing about 250 tires in 2012, the Rozums failed to comply with the order in any material way. As a result, thousands of tires remained on the site illegally for years. The Rozums failed to comply despite multiple court proceedings culminating in a bench warrant for their arrest. They refer us to various "plans" they purportedly were exploring to remove the tires at various times, which included waiting for a proposed waste-tire-to-energy plant that never materialized, but none of the plans came to fruition and we are unable to credit the inference that there was any good faith effort to comply. The Rozums simply refused to comply, mainly because they felt it was unfair for them to be required to clean up tires that they did not put on the property. (T. 101.) This protracted and unexcused failure to comply clearly justifies the Department's $18,000 civil penalty.

The Department categorized the violation as reckless, but the record would certainly have supported a finding of willfulness. A reckless violation is characterized by a conscious disregard of the fact that one's conduct may result in a violation of the law. *DEP v. Pecora*, 2007 EHB 545, 554. The Rozums clearly exhibited such a conscious disregard.

The Rozums' reckless disregard continued for the three years the Department spent before the Venango County Court of Common Pleas attempting to compel them to comply with its order. After the Court issued two orders requiring them to comply with the order, and they

still did not remove the waste tires from the property, the Court issued a bench warrant for their arrest. (It is not clear why the warrant was never executed.) Eventually, the Department determined that the potential for significant environmental harm, coupled with the Rozums' refusal to remove the waste tires from the property, required it to return to court to obtain an order to allow it to pay a contractor to enter the property, remove the tires, and recover its costs from the Rozums.[1]

The Department's penalty also fairly reflects the fact that the unpermitted disposal of thousands of tires must be penalized and deterred. A large illegal tire pile constitutes actual environmental harm. In addition, the Department witness credibly testified that the tire pile posed a constant threat of damage from fire and acted as a breeding ground for mosquitos. As stated by our Legislature in the Waste Tire Recycling Act, 35 P.S. § 6029.102, "[w]aste tires and stockpiled tires continue to be an environmental threat to this Commonwealth," and "[s]tockpiled tires create environmental hazards such as tire fires and heavy mosquito infestations."

Turning to the Rozums' defenses, we find no grounds in the Rozums' arguments for overturning the penalty. Initially, the Rozums' brief cites no legal authorities other than Sections 605 and 610 of the Solid Waste Management Act, 35 P.S. §§ 6010.605 and 6010.610, which they cite in support of the basic proposition that the Department may assess civil penalties for violations of the statute, regulations, or orders of the Department, whether intentional or not, and the amount of the penalty should depend upon the various factors quoted above.

Additionally, the Rozums' arguments largely relate to the order itself, but as discussed above, their liability has already been established. The Rozums do argue that the penalty is inequitable, but we disagree. The Rozums' primary defense going back to 2008 and continuing

[1] The civil penalty does not include any component for cost recovery. The Department has pursued such recovery separately before the Court of Common Pleas.

to this day is that they were entitled to ignore the Department's cleanup order because they did not put the tires on their property. They say they are innocent purchasers. Of course, as we previously held, the Rozums do not qualify as innocent landowners for liability purposes. Mr. Rozum is a seasoned real estate agent and owner of investment properties, and the Rozums bought the property with full knowledge of the tire pile. The fact that the Rozums did not themselves create the pile is arguably worth considering in calculating the penalty, but the penalty amount the Department imposed is consistent with that fact. In other words, had the Rozums created the pile, a much higher penalty would undoubtedly have been warranted.

In another argument that we first heard in 2008, the Rozums claimed they could not afford to clean up the site. To the extent financial inability is relevant at this stage (perhaps relating to willfulness), the Rozums presented no credible evidence to support that claim other than a vague statement that they had children in college and preparing for college. Although not particularly necessary given the lack of any showing by the Rozums, the Department presented evidence that the Rozums were actively engaged in real estate transactions during the period in question. (T. 83-87.)

The Rozums dispute some of the precise details of the tire removal contractor's removal project, such as the exact dates when some of the removal work took place. They estimate that 16,500 waste tires were removed from their property as part of the project, whereas they say the Department personnel over time had widely varying estimates of the number of tires. The only relevance of these points as far as we can tell from the Rozums' brief discussion is that they are offered to show that all of the testimony of the Department's witness, Brian Mummert, is not credible. We see the Rozums' points regarding the precise details of the removal project as irrelevant both on the merits and as a wholly ineffective attack on Mr. Mummert's credibility.

We found Mr. Mummert to be entirely credible and, despite the frustration that must have accompanied the Department's seemingly endless enforcement measures, appropriately measured.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this proceeding. 35 P.S. § 6018.605.

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

3. The Department may assess a penalty of up to $25,000 per day per violation of any provision of the Solid Waste Management Act, the regulations, or a Department order, or a Department-issued permit. 35 P.S. § 6018.605.

4. When assessing a civil penalty, the Department considers the willfulness of the violation, damage to air, water, land, or other natural resources of the Commonwealth or their uses, cost of restoration and abatement, savings resulting to the person in consequence of such violation, and other relevant factors. 35 P.S. § 6018.605.

5. The Rozums' violation of the Department's order was reckless, if not deliberate.

6. The Department has met its burden of proof by establishing by a preponderance of evidence that the assessed penalty amount of $18,000 is lawful and a reasonable fit for the violation.

7. The assessment is lawful, reasonable, and appropriate.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAX ROZUM JR. AND CAROL K. ROZUM	:	
	:	
v.	:	**EHB Docket No. 2017-027-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 11th day of December, 2018, 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: December 11, 2018

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

For the Commonwealth of PA, DEP:
Carl Ballard, Esquire
Michael Braymer, Esquire
(*via electronic filing system*)

For Appellants:
Lawrence E. Bolind, Jr., Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LYNDA WILLIAMS	:	
	:	
v.	:	**EHB Docket No. 2018-067-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ESTATE OF HARRY SIMON, Permittee	:	**Issued: December 18, 2018**

OPINION AND ORDER ON
MOTION TO DISMISS

By Michelle A. Coleman, Judge

Synopsis

The Board denies a motion to dismiss from the Department in a case where an Appellant has attached to her notice of appeal a letter sent to her from the Department informing her that the Department had issued an NPDES permit to a Permittee. Viewed in the light most favorable to the Appellant as the non-moving party, the Board holds that the Appellant has appealed the issuance of the NPDES permit and not the letter itself, as argued by the Department.

O P I N I O N

Before the Board is a motion to dismiss filed by the Department of Environmental Protection (the "Department") seeking dismissal of an appeal filed by Lynda Williams on the grounds that Williams has appealed a Department letter that does not constitute an appealable action subject to the jurisdiction of the Environmental Hearing Board. Ms. Williams filed her appeal *pro se* on July 13, 2018.[1] She filled out the Board's notice of appeal form by hand and attached to the form a letter dated June 14, 2018 that she received from the Department.

[1] Ms. Williams sought pro bono representation after filing her appeal and obtained counsel on September 12, 2018.

Paragraph 2 of the Board's notice of appeal form asks a prospective appellant: (a) What action of the Department do you seek review? (b) Which Department official took the action? (c) What is the location of the operation or activity which is the subject of the Department's action (municipality, county)? and (d) How, and on what date, did you receive notice of the Department's action? Ms. Williams filled out those portions of the form as follows:

> (a) I raised concerns about PAD150046 building and disturbing land in wetlands. Also must prove (we can prove that there is a storm water chamber on property and pipe from spring feed pond [sic]
>
> (b) John Hohenstein, P.E.
>
> (c) 1364 Grove Rd. Sub-division
>
> (d) June 20, 2018

Ms. Williams listed her objections to the action in her appeal as follows:

> The objection is that the engineers Howell & Assoc. have stated in paragraph one that the area to be graded is not within the delineated wetland. This is not true...contradicting Howell's field report by Wolf Bioservices who did on site wetlands report (26 pages)

(Ellipsis in original.)

The Department letter attached to the appeal is addressed to Ms. Williams and contains a subject line of:

> Estate of Harry Simon
> 1364 Grove Road Subdivision
> NPDES File No. PAD 150046
> West Whiteland Township
> Chester County

The letter has three paragraphs:

> This letter in the response [sic] to your comments concerning the above-referenced application for an individual NPDES Permit for Stormwater Discharges Associated with Construction Activates [sic] which was received by the Department of Environmental Protection (DEP).
>
> In the letter dated April 2, 2018, the applicant responded to the issues that were raised by your comments. DEP has determined that the applicant's response demonstrates compliance with Chapter 102 Rules and regulation, which defines

> the requirements for NPFES [sic] Stormwater Constriction [sic] permit. **Accordingly, DEP recently issued the requested permit to the applicant**.
>
> If you are aggrieved by this action of DEP, you have the right to appeal to the Environmental Hearing Board. Questions concerning to the [sic] procedure for appeal should be directed to the Board by calling 717.787.3483.

(Emphasis added.) The letter is signed by John Hohenstein, P.E., Acting Regional Manager of the Department's Waterways and Wetlands Program. Ms. Williams also attached to her notice of appeal a letter dated April 2, 2018 from David W. Gibbons, an engineer with the firm D.L. Howell and Associates, to Molly Deger at the Chester County Conservation District. The Gibbons letter provides a response to issues raised in public comments on behalf of the permittee, Estate of Harry Simon (the "Estate"). Hohenstein included the response to public comment letter with the letter he sent to Williams because she had submitted comments about the Estate's project. (DEP Ex. B, C (at ¶¶ 5c, 5i).) The Department issued individual NPDES permit PAD150046 to the Estate on June 13, 2018 for the earth disturbance and stormwater discharge associated with the 1364 Grove Road Subdivision project. (DEP Ex. C (at ¶ 5h).) The Department's letter was sent to Ms. Williams the following day.

The Department contends in its motion to dismiss that the Board "lacks jurisdiction over a challenge to a Letter informing a third-party recipient of the Department's interpretation of the legal sufficiency of a permit application and informing the recipient that the Department has taken separate action on that application." The Department's motion frames Williams's appeal as an appeal of only the letter it sent to her, not an appeal of the permit that was issued to the Estate. Ms. Williams opposes the motion, arguing that she has in fact appealed the permit and

not merely the letter explicitly notifying her that the permit had been issued.[2] The Estate has not weighed in on the motion.

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. *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.

Viewing the Department's motion in the light most favorable to Ms. Williams, we cannot conclude that she has only appealed the letter and not the permit itself. While we acknowledge that Williams's notice of appeal is not an example of pristine clarity, we think we would need to bend over backwards to reach the Department's interpretation that she is appealing the

[2] In its reply, the Department notes that Williams did not file a paragraph-by-paragraph response to its motion as required under our rules, and therefore, it argues Williams by default has admitted all of the facts contained in its motion. *See* 25 Pa. Code § 1021.91(e) (responses to motions shall set forth in numbered paragraphs corresponding to those in the motion all factual disputes and the reason the opposing party objects to the motion; material facts not denied may be deemed admitted). It is true that Ms. Williams filed only a memorandum in opposition to the Department's motion and not a paragraph-by-paragraph response. However, Williams unquestionably pushes back against the Department's core factual allegation in her memorandum of law by arguing that she has appealed the permit and attached the notification she received of the permit's issuance. *See* 25 Pa. Code § 1021.94(f) ("adverse party's response [to a motion to dismiss] must set forth specific issues of fact or law showing there is a genuine issue for hearing"). While we expect parties to follow our rules governing motions practice, we do not believe that this procedural oversight on behalf of Ms. Williams justifies a harsh sanction such as dismissing her appeal.

statements contained in the letter and not the permit issued to the Estate. Ms. Williams's appeal fully complies with our rule on filing notices of appeal. 25 Pa. Code § 1021.51. That rule, among other things, lays out what needs to be included in an appeal. Most pertinent for our current purposes, it specifies what needs to be attached to a notice of appeal in terms of the Department action being appealed:

> If the appellant has received written notification of an action of the Department, **the appellant shall attach a copy of that notification and any documents received with the notification to the notice of appeal**. If the documents include a permit, the appellant only needs to attach the first page of the permit. Instead of attaching a copy of the notification of the action or related documents, the appellant may provide a link to the publication of the action in the *Pennsylvania Bulletin*.

25 Pa. Code § 1021.51(d) (emphasis added). This is exactly what Williams did. She received a letter from the Department that plainly notified her that the permit on which she previously commented had recently been issued. The letter advised her of her appeal rights. The letter included a response to her comments from the Estate's consultant. Williams attached the notification of the Department's action and all the documents that accompanied the notification and filed an appeal with the Board.

Additionally, Ms. Williams wrote the permit number on her appeal form and indicated her opposition to the activity authorized by the permit with respect to its impact to wetlands. In an affidavit accompanying her response to the Department's motion, Williams avers,

> My intent in filing the appeal was to challenge Permit No. PAD150046 itself, and not Mr. Hohenstein's June 14, 2018 letter. In ¶ 2(a) on the Notice of Appeal Form, I described the action of the Department as "PAD150046 building and disturbing land in wetlands," as I wanted to challenge what the Permit allowed the Estate to do. While I attached a copy of Mr. Hohenstein's letter to the Notice of Appeal, I did so because that was the only proof I had of the DEP's issuance of Permit No. PAD150046—not because I was appealing the letter.

(Williams Affidavit, ¶6.) We cannot imagine why any appellant would appeal merely the letter itself, which unquestionably notifies the recipient that the permit the appellant was interested in, and commented on, has been issued. Although Williams's appeal lacks a certain amount of precision, we cannot endorse the Department's overly narrow interpretation of it. *Cf. Rhodes v. DEP*, 2009 EHB 325, 327 (in the context of construing objections in a notice of appeal in response to a waiver challenge: "[G]iven the strict requirement to file a notice of appeal within 30 days of receiving notice of the Department's action and our general distaste for trap-door litigation, we have been relatively indulgent when it comes to interpreting less than precise notices of appeal.").

The Department repeatedly criticizes Williams for not attaching the permit itself to her notice of appeal, but as noted above, there is no requirement under our rules to attach the permit if the appellant is not in possession of the permit, which she was not. The Department calls attention to the *Pennsylvania Bulletin* notice of the permit's issuance published on July 14, 2018 (48 Pa.B. 4142), and says that Williams could have indicated that she was appealing the permit by referencing the *Bulletin* notice within 30 days of its publication. But again, there is also no requirement to attach the permit if the appellant is relying on notice published in the *Pennsylvania Bulletin*.[3] Further, the *Bulletin* notice was published 30 days after the date of the letter sent to Williams and after she had filed her appeal. Williams states in her affidavit, "Because the only knowledge of the Permit I had came from Mr. Hohenstein's June 14, 2018 letter, I was concerned that my 30 days to appeal the Permit would run out." (Williams Affidavit, ¶5.) Even a member of the public who regularly checks the *Pennsylvania Bulletin* may become concerned that notice of the permit issuance would not be published and appeal rights might be

[3] Query whether the Department's current position would extend to a notice of appeal citing the *Pennsylvania Bulletin* notice for permit issuance, i.e. the appellant has not actually appealed the permit but only the *notice* of the permit as published in the *Bulletin*.

forgone if a timely appeal were not taken of the notice provided by the letter.[4] *See, e.g., Feudale v. DEP*, 2016 EHB 774 (*Bulletin* notice of NPDES permit issuance not published until 16 months after the permit was issued).

The Department maintains that its letter merely expresses the Department's opinion that the Estate's permit application satisfied the regulations at 25 Pa. Code Chapter 102 for permit issuance, and that legal opinions are not appealable actions. First, that is not what the letter actually says. The letter says that the "applicant's response demonstrates compliance with Chapter 102 Rules[,]" with that response being the response to comments. It does not say that the applicant's *application* satisfies the Chapter 102 regulations. We are not aware of any regulation in Chapter 102 defining what needs to be contained in a response to public comments, and the Department has not pointed us to one. To the extent that the Department did express its view that the permit application satisfied the applicable regulations, we presume that the Department makes that determination in advance of every permit it issues, but that does not mean the permit is insulated from appeal. The Department also construes its letter as a mere courtesy. But that courtesy letter provided Ms. Williams notice of the permit being issued and advised her of her appeal rights. We wonder, if we were to grant the Department's motion to dismiss, whether it would incentivize the Department to issue more "courtesy letters" containing "interpretations of legal sufficiency" as traps to unwary appellants.

Finally, in its reply brief the Department relies heavily on the description of Williams's appeal entered on the Board's docket: "Appeal of the Department's June 14, 2018 letter regarding the issuance of an NPDES permit to the Estate of Harry Simon for the Grove Road Subdivision located in West Whiteland Township, Chester County." The Department says that

[4] No party has indicated whether the Department was required to publish notice of a draft NPDES permit for the project under 25 Pa. Code § 92a.82 (public notice of permit applications and draft permits), and if and when that occurred.

the Board has already determined the subject of the appeal via our docket entry and we determined that Williams's appeal is of the letter, not the permit. We do not believe that the docket entry description is necessarily material to the motion to dismiss. The docket description does not represent the Board's legal interpretation of the subject of the notice of appeal. Indeed, with electronic filing now nearly ubiquitous, it is the party making the filing that enters its own docket description, which the Board does not routinely edit. Many electronically-filed notices of appeal are simply docketed as "Notice of Appeal" with no further elaboration. We are unwilling to hold the Board's clerical characterization of an appeal against a non-moving party for purposes of resolving a motion to dismiss.

We issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LYNDA WILLIAMS	:	
	:	
v.	:	**EHB Docket No. 2018-067-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ESTATE OF HARRY SIMON, Permittee	:	

O R D E R

AND NOW, this 18th day of December, 2018, it is hereby ordered as follows:

1. The Department's motion to dismiss is **denied**.
2. Docket entries #1 and #3 pertaining to the Appellant's notice of appeal are hereby revised to state, "Appeal of NPDES Permit No. PAD150046 issued to the Estate of Harry Simon for the 1364 Grove Road Subdivision located in West Whiteland Township, Chester County."
3. The previously ordered stay on discovery is lifted and discovery in this matter shall proceed in accordance with the schedule proposed by the parties and ordered by the Board on November 14, 2018.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: December 18, 2018

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

For the Commonwealth of PA, DEP:
William J. Gerlach, Esquire
(*via electronic filing system*)

For Appellant:
Kenneth T. Kristl, Esquire
(*via electronic filing system*)

For Permittee:
Michael T. Shiring, Esquire
(*via electronic filing system*)