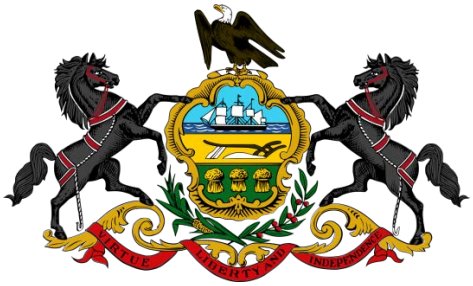
Environmental Hearing Board

Adjudications and Opinions



2015
VOLUME II

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

2015

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	Vincent F. Gustitus, Jr.

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FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2015.

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 – 2015 EHB DECISIONS

SLUDGE FREE UMBT, et al., Appellants, and DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, Intervenors	:	
v.	:	**EHB Docket No. 2014-015-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SYNAGRO, a.k.a. SYNAGRO MID-ATLANTIC, INC., Permittee	:	**Issued: July 1, 2015**

OPINION AND ORDER ON
MOTIONS FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies motions for partial summary judgment from the Department and a Permittee where it is clear that there are numerous disputed issues of material fact and mixed fact and law that can only be appropriately resolved upon the consideration of a record fully developed at a hearing on the merits.

O P I N I O N

On or about November 7 or 8, 2013, Synagro, a.k.a. Synagro Mid-Atlantic, Inc. ("Synagro"), submitted three Notices of First Land Application of exceptional and non-exceptional quality biosolids (the "30-day Notices") to the Department of Environmental Protection (the "Department"). Synagro is a biosolids management company. The 30-day Notices are associated with the placement of biosolids, also known as sewage sludge, on the Potomac, Sunrise, and Stone Church Farms, which are located in Upper Mount Bethel Township, Northampton County. Ron Angle is the owner of all three farms. The parties

sometimes refer to the farms as Angle I (Potomac), Angle II (Sunrise), and Angle III (Stone Church). The Angle Farms are being farmed by Paul Smith.

On December 12, 2013, the Department conducted an inspection of the farms. By letters dated December 23, 2013, the Department advised Synagro that it found the farms to be suitable for the land application of biosolids. The Department's December 23, 2013 determination letters required Synagro to raise the pH to 6.0 or greater on the Potomac and Sunrise Farms. On January 18, 2014, notice of the Department's determinations was published in the *Pennsylvania Bulletin*. 44 Pa.B. 375-77. On February 18, 2014, Sludge Free Upper Mount Bethel Township ("Sludge Free UMBT"), Jim and Donna Dellatore, Mike and Diane Zimmerer, Debra and Tom Bodine, John and Tracy Gorman, and Bob and Terry Schneider filed this appeal of the Department's determination letters. The Appellants amended their notice of appeal on March 10, 2014. The Delaware Riverkeeper Network and Maya Van Rossum, the Delaware Riverkeeper, have intervened on the side of the Appellants. To date no biosolids have been applied to the Angle Farms.

Synagro and the Department have now filed separate but overlapping motions for partial summary judgment. They attack many of the 124 paragraphs contained in the Appellants' amended notice of appeal. The Appellants and Intervenors (hereinafter collectively referred to as "Appellants") have filed an extensive response in opposition to the motions. The Board is empowered to grant summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a (incorporating Pa.R.C.P. Nos. 1035.1 – 1035.5); *Global Eco-Logical Servs., Inc. v. Dep't of Envtl. Prot.*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001); *see also Cnty. of Adams v. Dep't of Envtl. Prot.*, 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Zlomsowitch v. DEP*, 2003 EHB 636, 641. Summary

judgment is only granted in "the clearest of cases," *Consol Pa. Coal Co. v. DEP*, 2011 EHB 571, 576, and usually only in cases where a limited set of material facts are truly undisputed and a clear and concise question of law is presented, *Citizen Advocates United to Safeguard the Env't v. DEP*, 2007 EHB 101, 106. We review the Department's actions *de novo* to determine whether they constitute reasonable exercises of the Department's discretion that are lawful, supported by the facts, and consistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, EHB Docket No. 2013-080-L, slip op. at 6 (Adjudication, Apr. 24, 2015); *Solebury School v. DEP*, 2014 EHB 482, 519. We find that the standard for granting summary judgment has not been met and this matter would benefit greatly from a consideration of the factual and legal issues following a hearing on the merits.

Article I, Section 27

Synagro (but not the Department) has asked us to enter summary judgment against the Appellants on their claim, as manifested in several of the objections in their amended notice of appeal, that the Department's action was inconsistent with Article I, Section 27 of the Pennsylvania Constitution. Article I, Section 27 reads as follows:

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

PA. CONST. art. I, § 27.

Synagro and the Appellants construct very different analytical approaches to how we should evaluate compliance with Article I, Section 27, both of which are wrong. For their part, the Appellants cite several reasons why we should disregard the test announced in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976), in analyzing whether

the Department's action is consistent with Article I, Section 27 of the Pennsylvania Constitution. However, as we said in *Brockway Borough Municipal Authority*, *supra*, and *Tri-County Landfill v. DEP*, EHB Docket No. 2013-185-L, slip op. at 4 (Opinion, May 22, 2015), the Commonwealth Court in *Pennsylvania Environmental Defense Foundation v. Commonwealth* unequivocally held that the *Payne* test is still good law until "a majority opinion from the Supreme Court or a decision of [Commonwealth] Court overruling *Payne*" comes along. *Pa. Envtl. Def. Found. v. Cmwlth.*, 108 A.3d 140, 159 (Pa. Cmwlth. 2015) ("*PEDF"*).

Synagro for its part argues that Article I, Section 27 is satisfied so long as the Department's action complies with the statutes and regulations that were adopted pursuant to that constitutional provision. However, *all* environmental statutes and regulations since 1971, as far as we know, were at least in part adopted pursuant to Article I, Section 27 and were designed to implement that constitutional provision, so Synagro's argument can be shortened to a contention that compliance with the environmental statutes and regulations without more necessarily constitutes compliance with Article I, Section 27. This is incorrect. Synagro only refers us to one of the three questions that we must evaluate under the *Payne* test in analyzing whether the Department's action comports with Article I, Section 27. Those three questions are:

> (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
>
> (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
>
> (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Payne, 312 A.2d 86, 94. *See PEDF*, 108 A.3d 140, 158 (reaffirming the *Payne v. Kassab* test); *Brockway Borough Mun. Auth.*, slip op. at 29. Synagro would have us answer only the first

question, but we cannot assume that the last two parts of the *Payne* test as reaffirmed in *PEDF* are mere surplusage. In order to pass constitutional muster the Department's action must not only comply with all applicable statutes and regulations, it must also evince a reasonable effort to reduce to a minimum the environmental incursion of the project under review, and the environmental harm that will result from that action must not clearly outweigh the benefits to be derived therefrom. *PEDF*; *Payne*; *Brockway*. If the Court in *Payne* believed that regulatory compliance could substitute for a three-pronged inquiry, it would not have created a three-pronged inquiry that very clearly goes beyond an examination of regulatory compliance. Strict compliance with all regulatory requirements is not *necessarily* coextensive with a reasonable effort to reduce the environmental incursion to a minimum, and notwithstanding compliance with all regulatory requirements and the application of a reasonable effort to reduce the environmental incursion to a minimum, the environmental harms remaining might nevertheless clearly outweigh the benefits of the project.

It is true that Synagro's position is consistent with our holding in *City of Scranton v. DEP*, 1997 EHB 985, where we held that the Department is not required to minimize the environmental harm of a project or balance harm against putative benefits if the Department acts pursuant to a statute that implements Article I, Section 27. 1997 EHB at 1020-21. We do not think this holding, which was not disputed by either party in that case, is consistent with *PEDF*, which clearly stated that *Payne* requires us to ask and answer three questions, not one. If compliance with regulatory requirements were enough by itself, we would not have been instructed to answer the second two questions. The Court in *PEDF* repeatedly referred to its "multifactorial test," and it cited with evident approval the parts of the plurality opinion of the Supreme Court in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), that discussed

the need to avoid unreasonable degradation of the environment and balance environmental protection with the benefits of development. 108 A.3d at 156-59. A holding that compliance with Article I, Section 27 requires nothing more than compliance with applicable regulations is also not entirely consistent with the Commonwealth Court's holding in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 892 (Pa. Cmwlth. 1972), *aff'd*, 311 A.2d 588 (Pa. 1973), also reaffirmed in *PEDF*, 108 A.3d at 158 n.38, that Article I, Section 27 has its own value, i.e. that it is self-executing and thus does not require any implementing legislation.

To be sure, environmental regulations are themselves designed to reduce environmental incursions to a minimum and balance harms and benefits. The statutes, regulations, and general permit governing the application of biosolids (as with most environmental programs) broadly require a high degree of environmental protection. For example, under the regulations, "[a] person may not apply sewage sludge in a way that will cause surface or groundwater pollution…." 25 Pa. Code § 271.902. Sewage sludge may not be applied in a way that will cause or allow the attraction, harborage, or breeding of vectors, cause or allow malodorous emissions, adversely affect private or public water supplies, or cause a public nuisance. *Id.* Sludge application may not adversely affect threatened or endangered species or their habitat. 25 Pa. Code § 271.915(a). Nevertheless, the constitutional inquiry may inform the Department's and our application of these broadly worded regulations, and we cannot, as Synagro would have us do, rule out as a matter of law the possibility that the constitutional inquiry may compliment the regulatory inquiry in some cases.

Synagro says it is "inappropriate and unrealistic" to consider the extent of the environmental incursion and balance harms and benefits in a judicial forum such as our own, but

the three-part *Payne* test is actually consistent with the Board's longstanding, overriding standard for reviewing Departmental actions. Our review of the Department's actions has always included a determination of not only whether those actions are supported by the facts and whether they are lawful, but whether they constitute a *reasonable* exercise of its discretion as well. *Solebury School*, 2014 EHB at 519; *Stevens v. DEP*, 2002 EHB 249, 255; *Smedley v. DEP*, 2001 EHB 131, 160; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Thomas F. Wagner, Inc. v. DEP*, 2000 EHB 1032, 1054. Even if we put Article I, Section 27 aside, perfect compliance with minimum regulatory requirements may not always be enough even under our traditional review criteria if the Department is shown to have unreasonably exercised its discretion. As far back as 1983 we held that an "overly blind reliance" on the regulations can constitute an abuse of discretion, particularly where the natural conditions are quite complex. *Coolspring Twp. v. DER*, 1983 EHB 151, 178.

Thus, despite Synagro's and the Appellants' efforts to truncate or disregard the *Payne v. Kassab* test, we will apply it as written. We will address all three questions set forth in *Payne*, not just the first one. In applying the second and third prongs of the test, we will keep in mind the Commonwealth Court's admonition that Article I, Section 27 is a "thumb on the scale," which compels us to give greater weight to the environmental concerns in the decision-making process. *PEDF*, 108 A.3d at 170.

It is instantly apparent that the application of the *Payne* test and determining whether the Department acted reasonably will involve numerous disputed issues of material fact and mixed fact and law that make summary judgment impossible. Not only are there disputed issues relating to whether there has in fact been compliance with all applicable statutes and regulations relevant to the protection of the environment, the first prong of the *Payne* test, the Appellants

also have referenced numerous facts that could support its position that the Department's determinations did not evince a reasonable effort to reduce the environmental incursion to a minimum, the second prong of test, and that the unavoidable harms of the projects clearly outweigh their benefits, the third prong of the test.

With respect to the second prong—reducing the environmental incursion to a minimum—the Department points out that it did in fact go beyond the minimum regulatory requirements in this case, such as imposing buffers larger than what otherwise may have been required. Thus, the Department itself has recognized that minimal compliance with the regulations was not enough in this case. Although it did not address Article I, Section 27 directly in its motion, the Department in effect says it has evinced a reasonable effort to reduce environmental incursions to a minimum.

Synagro, while sticking to its position that nothing more than regulatory compliance is required, argues in the alternative that the record demonstrates that the Department made a reasonable effort to reduce the environmental incursion to a minimum. The Department gave careful attention to the details of the proposed biosolids application and did not rely solely upon the observations and assessments conducted by Synagro, but performed many assessments on its own. The Department conducted its own site inspection on December 12, 2013. In approving the Synagro application, Synagro says the Department performed a comprehensive review of the Angle Farms, and excluded environmentally sensitive application areas, provided additional buffers from wells and other sensitive areas, and otherwise properly applied the regulations to ensure the protection of the values advanced by Article I, Section 27. Thus, there was compliance with the second prong of *Payne* in Synagro's view.

The Appellants respond that the Department did not go far enough. Indeed, in some respects this is the essence of the parties' dispute in this appeal. The Appellants do not believe the sites satisfy the regulatory criteria, but beyond that, they downplay the Department's purported efforts to reduce the environmental incursion to an acceptable level. They say that measures not strictly required by the regulations but more protective of properties, waters, wetlands, and endangered species could have been imposed. They also say the Department's analysis should have addressed such questions as the cumulative impact of closely related projects, the long-term impact of the projects, the impact of the projects on wildlife and wildlife habitat, and the impact of the projects on the natural, scenic, historic, or esthetic values of the environment. As an example of the cumulative impact that the Department is said to have failed to consider, the Appellants note that the three farms of 74, 149, and 43 acres all drain at least in part into the same stream, yet there is no evidence that the Department considered this cumulative impact. What might be suitable if only one site were involved may not be suitable when this cumulative impact is considered, in the Appellants' view. The Department acknowledged that it did not consider this issue, saying only that the regulations do not require it. In our view, we can only fairly resolve this disputed question based upon a complete record developed at a hearing on the merits.

The Appellants similarly complain that the Department failed to assess whether the unavoidable harms of the project will outweigh the benefits, the third part of the *Payne* test.[1] They say that there is sufficient evidence for the Board to find that risks associated with the use of these unsuitable sites clearly outweigh any "benefit that is derived from having a place to put

[1] Although a strong argument can be made that balancing of harms and benefits, if done at all, should be done on the regulatory level as opposed to a site-specific level, the Supreme Court has essentially put that view to rest. *Cf. Eagle Envtl. II, LP v. Dep't of Envtl. Prot.*, 884 A.2d 867, 880 (Pa. 2005) (upholding regulatory harms-benefits test).

biosolids and to make use of the little nutrient content that is in the material." (Appellants' Memo. at 52.)

As previously mentioned, Article I, Section 27 is not part of the Department's motion, so the Department does not address balancing. Synagro stands on its position that no balancing is required, but argues alternatively that, in contrast to the total lack of environmental harm associated with its projects, Commonwealth Court has recognized that "use of sewage sludge to reconstitute soil is a well-established agricultural practice that is encouraged by the U.S. Environmental Protection Agency." *Cmwlth. v. East Brunswick Twp.*, 980 A.2d 720, 724 (Pa. Cmwlth. 2009). The same conclusion holds true here, in their view. Again, although balancing is required we are not ready to perform that balancing in the immediate context. *See generally Gilbert v. Synagro Central, LLC*, 90 A.3d 37 (Pa. Super. 2014), *pet. for allowance of appeal granted*, 101 A.3d 1149 (Pa. 2014) (whether biosolids application is a "normal agricultural operation" involves questions of fact).

Endangered Species

The blue-spotted salamander is an endangered species in Pennsylvania. 58 Pa. Code § 75.1(c)(9). "Sewage sludge may not be applied to the land if it is likely to adversely affect a Federal or Pennsylvania threatened or endangered species, or its designated critical habitat…" 25 Pa. Code § 271.915(a). There does not appear to be any dispute that the blue-spotted salamander and/or its habitat are likely to be present at or near the site(s). The Appellants object that biosolids application should not have been approved because it is likely to adversely affect the blue-spotted salamander and its habitat.

Synagro and the Department move for summary judgment on the Appellants' allegation, saying that the Department adequately accounted for the possible presence of the blue-spotted

salamander. As background, they explain that Synagro's representative conducted a search of the Pennsylvania Natural Diversity Inventory ("PNDI") to determine if there were any species that may be impacted by the proposed land application of biosolids. They concede that the PNDI records showed that, based on documentation maintained by the Pennsylvania Fish and Boat Commission ("PAFBC"), Synagro's proposed land application had a "potential impact" to an endangered species. As a result, Synagro contacted the PAFBC, provided the required documentation, including a signed copy of the PNDI Review Receipt and the Conservation Plan for the Angle Farms, and inquired about "management practices" that could be implemented to reduce the impact of farming operations on the endangered species and/or its habitat. In response to Synagro's inquiry, the PAFBC responded with a finding that "we do not anticipate direct adverse impacts from proposed farming activities on the Blue-Spotted Salamander." PAFBC provided further guidance and suggestions on how to further minimize any impact to the blue-spotted salamander. PAFBC felt that upon review of the documentation thereafter submitted by Synagro, that the management practices proposed by Synagro's Conservation Plan would sufficiently protect the blue-spotted salamander. PAFBC's November 25, 2013 letter was considered a PNDI clearance confirming that Synagro had complied with its obligations for the species under the PAFBC's purview.

In addition, a search of the PNDI records indicated that an avoidance measure was required by the U.S. Fish and Wildlife Service ("Fish and Wildlife"). Synagro agreed to implement the avoidance measure. The Department ensured that the measures required by Fish and Wildlife were reflected in the application areas approved for Synagro. Synagro and the Department conclude that the PAFBC, the agency that is in the best position to make a determination whether the biosolids application would affect a threatened or endangered species,

has advised that it does not anticipate "direct adverse impacts" on the identified threatened or endangered species, that the Department is entitled to rely on the PAFBC's finding, and that the Appellants' objections regarding this issue should be dismissed by way of summary judgment, in their view.

Synagro and the Department's argument essentially boils down to a claim that they are entitled to rely on the clearance provided by PAFBC. At a minimum, once the clearance is in hand, they say it is incumbent upon the Appellants to come forward with evidence of an actual threat, and the Appellants have failed to do so.

The Appellants, of course, disagree. They say that the clearance was based on a woefully inadequate investigation by a PAFBC representative who is not qualified to assess, and who did not assess, such critical things as the chemical constituents of the biosolids or the amount of those constituents that would enter the pertinent habitat, even though it is conceded that the species has a low tolerance for certain substances. They argue that the representative's heavy reliance on buffer zones between the habitat and the areas where biosolids will be applied as her basis for saying the species will not be harmed is misplaced, and they cite expert opinion to support that claim.

It is not clear whether Synagro or the Department intend to present expert opinion testimony on this issue. We do not have a sense based on the limited record currently before us that any of the parties have much in the way of scientific support based on actual field data in support of their positions. Although the record is rather sparse, if it is agreed that the salamander must continue to have pristine conditions in order to thrive, and the Appellants are prepared to present expert testimony that biosolids application will degrade those pristine conditions, it appears that the Appellants have come forward with enough potential evidence to survive

summary judgment. Although the expert opinion that the Appellants rely on appears to relate more to hydrology than the threat to the salamander *per se*, it is enough to fend off summary judgment.[2]

The Appellants add that there is at least one other species of concern that they say may be threatened by the biosolids application. Among other things, they refer to a July 2014 email from Fish and Wildlife, only obtained by a subpoena and not produced in discovery, requesting further investigation regarding that species. The Appellants did not specifically refer to this species in their amended notice of appeal, and they have not asked to amend their appeal. Neither the Department nor Synagro mention any species other than the blue-spotted salamander in their motions or briefs. At this point we know very little about this particular issue. Among other things, we do not know whether the same habitat is implicated. We are not in a position to address the issue any further at this time.

Finally, with respect to endangered species, the Appellants argue that, because the site or sites involve the habitat for endangered species, the Department should have required an individual permit rather than following the site suitability process under a general permit. The Appellants' argument goes something like this: Under 25 Pa. Code Chapter 93, a water source will qualify as "Exceptional Value" if it is a "surface water of exceptional ecological significance." 25 Pa. Code § 93.4b(b)(2). A "surface water of exceptional ecological significance" includes "[w]etlands which are exceptional value wetlands under §105.17(1)." 25 Pa. Code § 93.1. Wetlands can qualify for such status if, *inter alia*, they "serve as habitat for fauna or flora listed as 'threatened' or 'endangered'" under federal or state law, and/or "are hydrologically connected to or located within 1/2-mile of wetlands" that serve as habitat for

[2] As we move forward, one question that we have is why the PAFBC limited its findings to a conclusion that it does not anticipate any "direct" adverse impact. We are not told what that means. The operative regulation cited above, 25 Pa. Code § 271.915(a), is not limited to "direct" impacts.

endangered or threatened species "and that maintain the habitat of the threatened or endangered species within the wetland identified" as habitat. 25 Pa. Code § 105.17(1)(i) & (ii). Under the Clean Streams Law and associated regulations, they say an individual permit is required for biosolids application that impacts EV waters.

The Department concedes the presence of EV wetlands, but argues that the "watershed" as a whole must be designated as EV before an individual permit is required. The "watershed" is not EV unless the stream for the "watershed" is EV, according to the Department. The Allegheny Creek, the receiving stream in this case, is not designated as EV.[3] The Department points out that the sewage sludge regulations specifically say that sludge may not be applied within 100 feet of an EV wetland, 25 Pa. Code § 271.915(c)(6), but that does not answer the issue raised by the Appellants; namely, whether an individual permit or coverage under a general permit is required. The Department refers us to language in the general permit itself, which states that it may not be used in EV watersheds, but again, that does not tell us whether an individual permit was necessary under the regulations and the law for any of these sites. The issue calls for further elucidation after a hearing. If the Department has an institutional interpretation, as opposed to argument of counsel, we need to hear it.

Acts 67 and 68

The Appellants argue that the Department failed to comply with Acts 67 and 68, 53 P.S. §§ 10619.2 and 11105, by not sufficiently considering local comprehensive plans and zoning ordinances in approving the 30-day Notices. As authority for their objection the Appellants cite the Municipalities Planning Code at 53 P.S. § 10619.2(a), which states:

[3] The Appellants suggest that the stream would qualify for a higher designation. The Department disputes that claim on the facts. Synagro says this is not the appropriate forum for redesignating a stream. We note that the Appellants have argued generally that the Department failed to conduct an adequate antidegradation analysis, but neither Synagro nor the Department moved for summary judgment on that objection. (Notice of Appeal ¶ 121.)

> When a county adopts a comprehensive plan in accordance with sections 301 and 302 and any municipalities therein have adopted comprehensive plans and zoning ordinances in accordance with sections 301, 303(d) and 603(j), Commonwealth agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities.

The Department and Synagro both argue in their motions that this provision is not applicable to the land application of biosolids. They focus on the final clause of the provision and argue that the land application of biosolids does not fit under the "funding or permitting of infrastructure or facilities" because biosolids application cannot be considered either infrastructure or facilities. In support of their argument, the Department and Synagro point to the Department's Land Use Policy guidance document. The Department's latest version of the guidance defines "facilities and infrastructure" as "includ[ing] buildings, and permanent structures for transportation, sewer and water, waste management systems, schools, parks and recreation, electric and gas delivery systems, and telecommunications networks." (DEP Ex. 27.)

The Appellants respond that the guidance document is not binding. The Appellants focus on the term "includes" in the guidance definition and argue that what follows is not an exclusive list of what is to be considered to fall under the definition. The Appellants also contend, somewhat in passing, that the Angle Farms are part of a waste management system as that term is used in the guidance definition.

As an initial matter we agree that Departmental guidance is not a legally binding regulation that has the force of law; it is not binding on the Department, let alone the Board. *See DEP v. Weiszer*, 2011 EHB 358, 382; *Thebes v. DEP*, 2010 EHB 370, 407; *Clearview Land Dev. Co. v. DEP*, 2003 EHB 398, 427-28 (citing *Dauphin Meadows, Inc. v. DEP*, 2000 EHB 521). Accordingly, the proper interpretation of "infrastructure or facilities" will not exclusively turn on

the Department's interpretation as expressed in its own guidance document. Although a guidance document provides good evidence of the Department's institutional interpretation, in this case it does not fully answer the question because the document uses the term "including." The parties do not refer us to anything in the document that specifically addresses land application of biosolids one way or the other. It is interesting to note that an earlier version of the guidance document (Synagro Ex. KK) did not contain the word "including."

We are reluctant to delve into this legal issue any further at this stage because the Appellants have not alleged that there are any zoning ordinances that potentially apply here. We are loath to decide purely academic questions. *Milco Indus. v. DEP*, 2002 EHB 723. On this and on some of their other arguments, the Appellants complain that the Department should have considered something, but they do not tell us how that consideration would have made any difference. It is certainly possible for an appellant challenging a Departmental decision to prevail in some cases simply on the basis of a claim that the Department failed to conduct an adequate investigation and analysis. *Blue Mountain Pres. Ass'n v. DEP*, 2006 EHB 589, 605-06 (no showing necessarily required that project will degrade waters; only need to show Department failed to perform proper analysis). However, given the Board's extensive *de novo* review, an appellant who rests on the fact of an inadequate investigation or analysis alone often does so at its peril. *Kiskadden v. DEP*, EHB Docket No. 2011-149-R, slip op. at 34 (Adjudication, Jun. 12, 2015). If Appellants wish to pursue this issue further, they are encouraged to explain why it makes a difference.

Delaware River Basin Commission

Synagro and the Department target certain of the Appellants' objections relating to the Delaware River Basin Commission ("DRBC") and argue that the land application of biosolids is

not an activity that triggers any DRBC review or involvement. They point out that Section 3.8 of the Delaware River Basin Compact provides that no project having a substantial effect on the water resources of the Delaware River basin shall be undertaken unless it is first submitted to and approved by the DRBC. Synagro and the Department then say that, under the DRBC's regulations at 18 C.F.R. § 401.35, the land application of biosolids is not one of those activities deemed to have a substantial effect on the basin's water resources. They point to the affidavit of William Muszynski, Manager of the Water Resources Management Branch of the DRBC, who averred that during his eleven years working at the DRBC it has never reviewed a project for the land application of biosolids. Synagro adds that DRBC's regulations also do not apply because there will be no discharge from the sites. Synagro and the Department conclude that the DRBC has no role in reviewing a biosolids project, and therefore, they are entitled to summary judgment on the Appellants' objections relating to the DRBC.

The Appellants respond that Synagro and the Department misunderstand their objections. They contend that they are not saying that the Angle Farms project should have been referred to the DRBC for its review and approval, but rather that the Department's own anti-degradation regulations obligate *the Department* to ensure that the project complies with the DRBC's water quality standards. They argue that, under Section 93.2 of the Pennsylvania water quality standards regulations, the Department must follow and enforce the DRBC's water quality standards where they are more stringent and otherwise apply. Section 93.2 provides in part, "When an interstate or international agency under an interstate compact or international agreement establishes water quality standards regulations applicable to surface waters of this Commonwealth, including wetlands, more stringent than those in this title, the more stringent standards apply." 25 Pa. Code § 93.2(b). The general permit used for these sites also cites

Chapter 93. The Appellants also cite the chapter of Pennsylvania's regulations that specifically addresses the DRBC. Section 901.2 provides, "The Comprehensive Plan regulations as set forth in 18 CFR Part 401, Subpart A (2014) and the Water Code and Water Quality Standards as set forth in 18 CFR Part 410 (2014) are hereby incorporated by reference and made a part of this title." 25 Pa. Code § 901.2. The Appellants argue that the DRBC's water quality standards are in fact incorporated into Pennsylvania's regulations and, by virtue of the two cited provisions, the Department must apply the DRBC's water quality standards when reviewing projects, even if a project is not one deemed to have a substantial effect on the basin's water resources, thereby triggering *the DRBC's* review.

The Appellants bring their argument full circle by stating that the DRBC's regulations prohibit any detrimental change to existing water quality in Special Protection Waters,[4] that the Angle Farms sites ultimately drain into a portion of the Delaware River that is classified as Special Protection Waters, and that the Department should have evaluated the sites accordingly. The Appellants cite to their expert's opinion that runoff from the biosolids application will in fact measurably degrade the water quality of the receiving streams and the Delaware River, in violation of DRBC's regulations. Finally, the Appellants point to evidence in the record where both Department officials and Synagro representatives confess unfamiliarity with the DRBC regulations and admit not evaluating the regulations during the application preparation and its subsequent review.

In their respective replies, neither Synagro nor the Department addresses the two regulations cited by the Appellants. In fact, the Department did not address the Appellants'

[4] "The applicable state environmental agency shall assure to the extent possible that existing water quality in Special Protection Waters is not measurably changed by pollution discharged into the intrastate tributary watersheds within its jurisdiction." DRBC Water Quality Regulations at Section 3.10.3 A.2.f, http://www.nj.gov/drbc/library/documents/WQregs.pdf.

DRBC arguments anywhere in its reply. Similarly, the DRBC representative's affidavit does not address the Appellants' point. For its part, Synagro maintains that the DRBC should not be involved in a project for the land application of biosolids, and it asserts that the Appellants have not produced any facts or provided any legal basis to support the applicability of the DRBC's water quality standards. In light of our discussion above, this is obviously untrue. Synagro avoids any discussion of 25 Pa. Code § 93.2 and 25 Pa. Code § 901.2. Synagro provides us with no meaningful response to contest the applicability of those provisions.

The Delaware River Basin Compact has been codified into the law of the Commonwealth of Pennsylvania at 32 P.S. § 815.101. Under the Compact, the Department has explicitly agreed to protect the waters of the Delaware River Basin from pollution.[5] If the Appellants are correct, their interpretation of the law could have broad-reaching impacts on the way the Department evaluates projects proposed within the Delaware River Basin. The parties do not refer us to any case law on point. With regard to this specific case, if the Appellants are correct we are left to decide, among other things, whether the Department's review of the Angle Farms biosolids project in the context of the DRBC's water quality standards would make any difference in the final decision. *See Kiskadden, supra*, slip op. at 33 (citing *R.R. Action and Advisory Comm. v. DEP*, 2009 EHB 472, 476); *O'Reilly v. DEP*, 2001 EHB 19, 51. For instance, assuming for the

[5] *See* Compact at Section 5.3:

> Each of the signatory parties covenants and agrees to prohibit and control pollution of the waters of the basin according to the requirements of this compact and to cooperate faithfully in the control of future pollution in and abatement of existing pollution from the rivers, streams, and waters in the basin which flow through, under, into or border upon any of such signatory states, and in order to effect such object, agrees to enact any necessary legislation to enable each such party to place and maintain the waters of said basin in a satisfactory condition, available for safe and satisfactory use as public and industrial water supplies after reasonable treatment, suitable for recreational usage, capable of maintaining fish and other aquatic life, free from unsightly or malodorous nuisances due to floating solids or sludge deposits and adaptable to such other uses as may be provided by the comprehensive plan.

moment that the DRBC's more stringent water quality standards apply, it still remains unresolved at this point whether any potential runoff from the Angle Farms sites that reaches streams draining to portions of the Delaware River classified as Special Protection Waters would measurably change those waters through pollution. *See supra* note 4. At this juncture, the movants have failed to convince us that they are entitled to summary judgment on this question. The Appellants did not move for summary judgment. This issue, like many others, will benefit from further consideration.

Groundwater Contamination

We do not view the 124 paragraphs set forth in the Appellants' amended notice of appeal as 124 stand-alone, independent bases for overturning the Department's action. The Department and Synagro treat the objections that way, but we do not. A good example of this is the Appellants' fundamental objection that biosolids application on the farms will contaminate the groundwater, which will in turn contaminate their nearby drinking water wells. Several paragraphs in their notice of appeal relate to this basic concern. Rather than face this basic concern head on, Synagro and the Department have looked to the fringes of the issue in an understandable attempt to narrow the issues for hearing, but we believe that attempt has been unsuccessful. For example, Synagro and the Department say that, contrary to the 70th paragraph in the amended notice of appeal, nitrate levels in the Appellants' drinking water are below the Maximum Contaminant Level (MCL) of 10 mg/l, and therefore, are not "elevated" as the Appellants claim. The Appellants answer that Synagro misses their point, that point being that the test results show that the land application of fertilizer on the Sunrise Farm is already negatively impacting drinking water supplies. The test results in their view evidence interconnected groundwater, i.e., groundwater vulnerable to nearby surface activities. Biosolids

application will not only exacerbate the nitrate problem, but whatever other contaminants are in the biosolids will also find their way into the wells in their view.

On another underlying point, wells were apparently drilled on the Sunrise Farm years ago that were used to conduct a pumping test for a potential golf course. The golf course was never developed, but the wells are still there. The Appellants object that these and perhaps other wells were not properly identified and considered. Whether the details regarding map preparation are true or not, the overarching question of concern is whether groundwater at the sites has been properly accounted for and protected, in their view. As explained by the Appellants' expert, Matthew Mulhall, P.G., these wells possibly relate to the groundwater issue more generally. He says that the new wells were drilled "to depths ranging from 200 to 400 feet below ground surface and required the installation of casing to depths ranging from 63 to 100 feet below ground surface." "The need to install casing to [these] depths…," he states, "indicates a high likelihood that bedrock beneath the site is not competent and it was difficult to obtain a secure seal between the rock and casing to minimize potential impacts to the quality of water in the wells from shallow or near ground surface concerns." Mulhall also says that "[t]hese wells and any others installed at the sites are potential vertical conduits for contaminants to migrate from ground surface to water-bearing zones used for water supply." He adds that data from the pumping test revealed that "the pumping of the water-supply wells proposed for the golf course affected water levels in the other wells including the residential wells." He concludes that "the multi-layered aquifer beneath the Sunrise site is highly interconnected beneath the site and neighboring properties," and "a significant potential exists for contaminants introduced at the Sunrise Farm site to affect the quality of water derived from nearby residential wells."

Interestingly, the Department and Synagro do not cite any contrary expert opinion. They essentially concede that the Department did not consider site-specific groundwater issues, instead taking the view that it is not required to do so because compliance with the regulatory operating requirements (such as maintaining a 300-foot buffer around water sources) is guaranteed to protect groundwater. The Department, somewhat oddly, also refers us to a fact sheet apparently prepared by the Pennsylvania Biosolids Recycling Alliance in support of the rather bald proposition that "studies have indicated that the use of biosolids will not harm groundwater."

The Appellants' expert appears to have done an extensive study of the matter and concluded that this particular project at these particular sites presents a credible risk to groundwater. He analyzed the local geology, including soils, bedrock, and structural features, such as faults and the general characteristics of the Martinsburg Formation, which underlies the area in question. He concludes that "the bedrock is not sufficiently competent at shallow depths to prevent migration of contaminants applied at or near ground surface from migrating into water-bearing zones used for water supply." Mulhall also noted that, due to characteristics of the geology and hydrogeology, if contamination were to occur, "it would likely be very difficult to replace a well in which the quality of groundwater has been affected by biosolids applied to the fields."

We are certainly not endorsing or adopting any of the Appellants' findings, analyses, or conclusions at this time. We merely cite to them to show that the Appellants, with respect to groundwater contamination and, for that matter, the other technical issues raised in Synagro's and the Department's motions, have pointed to sufficient evidence in the record "which in a jury trial would require the issue to be submitted to a jury," Pa.R.C.P. No. 1035.2, thereby defeating the motions for summary judgment.

The parties also raise an interesting issue of regulatory interpretation regarding the wells on the Sunrise Farm and whether isolation distances must be maintained around those wells. The regulation at 25 Pa. Code § 271.915(5) says that biosolids may not be applied (absent a waiver) within 300 feet of a "water source." A "water source" is defined as "[t]he site or location of a well, spring or water supply stream intake which is used for human consumption." 25 Pa. Code § 271.1. The question presented is, what does the phrase "which is used for human consumption" modify? The Appellants say it only modifies "water supply stream intake." The Department and Synagro argue that it also modifies "wells" and "springs."

This question presumably comes up because Synagro wants to land-apply biosolids within 300 feet of the golf course wells. There is no dispute that the wells are not themselves used for human consumption. Under certain circumstances we must defer to the Department's *institutional* interpretation of an ambiguous regulation if that interpretation is reasonable[6] and consistent with the enabling statute, *Gadinski v. DEP*, 2013 EHB 246, 294-95, but the Department failed to provide us with any record support that it has such an institutional interpretation. The Appellants' interpretation is certainly not unreasonable on its face. Furthermore, as just discussed, the Appellants' greater concern is that these wells provide a conduit for groundwater contamination that will reach their wells, which justifies an isolation distance regardless of whether the regulations require it or a waiver is obtained. The movants have not convinced us that they are entitled to summary judgment on this issue.

Finally, with respect to groundwater issues, Synagro and the Department contest the Appellants' objection that the Department did not adequately consider the depth of local and

[6] Even when applying a deferential standard, we must ensure that the agency operates within the bounds of reasonable interpretation. *Waste Mgmt. Disposal Servs. v. DEP*, 2005 EHB 433, 459-60. *See also Michigan v. EPA*, No. 14-46, 2015 U.S. LEXIS 4256, at *10 (U.S. Jun. 29, 2015) (quoting *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014)).

regional water tables. *See* 25 Pa. Code § 971.915(c)(7) (prohibiting placement of biosolids to land within 11 inches of seasonal high water table and 3.3 feet of regional high water table). They cite field testing done by Department personnel who used a shovel to dig into certain portions of the sites to assess the saturation of soils. The Appellants note what they view as inadequacies in the field testing. They state that the field test only assessed the depth of the seasonal high water table and then used that to extrapolate the presumed depth of the regional high water table without any actual testing. The Appellants further take issue with the fact that the Department did not document the number or location of the shovel tests. At this point, we agree with the Appellants that Synagro and the Department have not met their burden for summary judgment on this issue. While it may be true that the Department's shovel test is adequate, at this juncture that is not clear.[7] We think that issues regarding the adequacy of the field test and the depths of the water tables across the entirety of the sites are technical issues that need to be addressed at a hearing. Further, regardless of the water table depths, it remains to be seen whether the application of biosolids at the sites will have an adverse impact on shallow subsurface or regional groundwater.

Runoff

One of the overarching concerns lying at the heart of the Appellants' case is the potential impact from polluted runoff. The Appellants say that there is already excessive runoff coming off of the sites onto neighboring properties and into waters of the Commonwealth. They argue, with expert support, that, after biosolids are applied to the sites, runoff will pick up whatever pollutants are contained in the biosolids and carry the pollutants beyond the boundaries of the

[7] The Department and Synagro frequently cite cases that hold that, when technical issues are raised, parties must substantiate their claims with technical evidence. *See, e.g.*, *Borough of St. Clair v. DEP*, EHB Docket No. 2013-118-L, slip op. at 25 (Adjudication, May 20, 2015). While we are not disputing this precept, we think that its invocation may often be premature in the context of summary judgment.

sites onto nearby properties and into nearby waters. They cite to expert opinion that none of the purported control measures, whether regulatory required or otherwise required by the Department, are sufficient to prevent this polluted runoff from migrating offsite and causing harm. The Department is also apparently concerned about potential runoff because it has imposed setbacks greater than those required under the regulations.

Synagro and the Department have once again picked at individual components of the Appellants' runoff argument, in a similar way to how they attacked the Appellants' objections relating to groundwater contamination. They seek summary judgment on objections relating to slope analysis, a conservation plan, distance buffers, and cumulative and long term impacts. The Appellants respond with a variety of evidence in the record to rebut the requests for summary judgment. The Appellants have expert opinion that runoff will be a problem at the sites. They have video of water coming off the Angle Farms and onto one of their properties. They have accounts of runoff washing out a gravel driveway, and of a pond overflowing after receiving a high amount of runoff. The Appellants tell us that the Township needed to repair a road to prevent it from caving in due to runoff. While we are not saying that all of this is true, it is more than sufficient evidence to defeat summary judgment. The Appellants have clearly set forth specific facts in the record that show there is a genuine issue for a hearing. 25 Pa. Code § 1021.94a(l).

All of the issues related to runoff present us with the challenge of weighing competing expert opinions from the parties. The resolution of issues that are the subject of competing expert analyses is rarely appropriate for summary judgment. *See Pine Creek Valley Watershed Ass'n v. DEP*, 2011 EHB 90, 94 ("Where there is a legitimate dispute between opposing experts, we have repeatedly refused to resolve such questions in the context of summary judgment

motions.") Our ultimate decision on these issues will be grounded in weighing the credibility of the various experts and assessing the soundness of their analyses after they have been subjected to direct and cross examination. We are unwilling to conduct a trial on paper to reach these assessments. *Pileggi v. DEP*, 2010 EHB 244, 249. Therefore, while we briefly address each of the issues below, we deny summary judgment for these common reasons.

With regard to slopes, Synagro and the Department both point to paragraphs in the notice of appeal that allege the Department failed to adequately consider and account for slopes in excess of 15% on the Sunrise Farm and Stone Church Farm sites. Synagro and the Department argue that, under the regulations, Synagro is only prohibited from applying biosolids to areas with slopes in excess of 25%. 25 Pa. Code § 971.215(d)(1). They argue that no areas with slopes in excess of 25% will receive biosolids and that the Appellants have shown no evidence of environmental harm that would prompt the Department to impose a more stringent requirement. The Department says that it received a report from the Appellants' expert raising concerns over slope steepness, and that in response the Department went out to the sites and collected measurements of the areas identified within the report to confirm that none had slopes in excess of 25%.[8] The Appellants contend that engineering plans of Sunrise Farm from 2005 note certain slopes as being 25% and that even under the Department's new measurements the slopes register just under the threshold at 23% and 24%. The Appellants believe that these slopes are steep enough to warrant additional consideration and/or protective measures.

The Appellants further argue that there has been no analysis of the relationship between slope and other aspects of the sites. For instance, they cite one of their experts who opines that

[8] In its reply, the Department contests the Appellants' assertion that the Department cannot rely on these slope measurements because they were done after the close of discovery. As the Department recognizes, under the Board's *de novo* review, evidence generated after the date of the action under appeal, including tests and sampling, is clearly appropriate for the Board's consideration. *Kiskadden, supra*; *Tri-Realty Co. v. DEP*, EHB Docket No. 2014-107-L, slip op. at 5-6 (Opinion, Mar. 20, 2015).

soil characteristics such as limited water retention and slow water movement in combination with steep slopes make these sites poor choices for the application of biosolids, presumably because these characteristics will only exacerbate the runoff problem. It is clear that there is a factual dispute regarding the steepness of the slopes on the sites and whether that steepness, in combination with other factors, renders these sites unsuitable for biosolids. Such factual disputes are not suited for resolution in the context of a summary judgment motion and must instead be resolved through a factual record developed at a hearing. *Vanscyoc v. DEP*, 2014 EHB 560, 562; *Lower Paxton Twp. v. DEP*, 2001 EHB 753, 769. Further, we anticipate that the consequence of applying biosolids to slopes of this steepness will be the subject of competing expert testimony.

The Department argues that any concerns over runoff have been addressed through a conservation plan. The Department says it relied on a conservation planner certified by the Natural Resource Conservation Service to develop a conservation plan for the Angle Farms, and that this conservation plan did not identify any areas where erosion from runoff was an issue. The Appellants respond that the conservation plan does not actually address runoff, rather it only discusses the movement of soil via erosion, which is not the same as stormwater runoff. The Appellants raise additional issues with the plan. They say that the plan does not analyze the movement of biosolids, only the soil underneath the biosolids. They cite portions of an expert report to support their contention that the plan will not prevent polluted runoff to nearby waterways. According to John A. Miller, P.E., "Sludge sitting bare is exposed to rainfall, causing erosion, and carrying sludge sediment, ungerminated seeds, and contaminants downstream prior to seed germination." The Appellants also argue that there has been no independent review of the adequacy of the conservation plan; instead, they construe it as merely a checklist item for the Department.

The Department argues in its reply that Miller does not have any expertise in the creation or review of a farm conservation plan. This argument all but exemplifies why we are denying summary judgment. Questioning an expert's qualifications goes to the weight and credibility that we afford expert opinion. What we have are differences of opinion between Miller, Eric Rosenbaum of Rose Tree Consulting, and Tim Craven, the Department's soil scientist. These opinions can only be properly considered after a full hearing on the merits. In addition, we find the Department's attack on the Appellants' expert somewhat bizarre when juxtaposed with the Department's reliance on the fact sheet prepared by the Pennsylvania Biosolids Recycling Alliance to support the claim that it is an established fact that biosolids application will not cause harm to surface water and groundwater when done in accordance with regulations. We find the fact sheet almost certainly inadmissible hearsay and far from sufficient to support summary judgment.

The Department also seeks summary judgment on the Appellants' objections that the Department did not establish appropriate distance buffers between areas that will receive biosolids, and dwellings, intermittent streams, and wetlands. The Department argues that the regulations establish isolation distances from, among other things, occupied dwellings, wetlands, water sources, and streams, and that the Angle Farms sites fully comply. 25 Pa. Code § 271.915(c). The Department says that upon inspecting the sites it identified features not previously identified on Synagro's maps, and the Department accordingly required appropriate distance buffers from those features.

The Appellants take issue with the propriety and protectiveness of distance buffers on the whole. They say that the distances required by the regulations do nothing to prevent runoff from flowing over those distances and reaching the features the buffers are intended to protect. The

Appellants say that a more appropriate and protective buffer would include some type of erosion and sediment control mechanisms such as silt socks or hay bales.[9] We view the Appellants' claim as essentially an argument that, regardless of whether all of the regulations were satisfied in terms of distance buffers, it was still unreasonable at these particular sites for the Department to allow the application of biosolids to go forward without requiring measures that are more protective of the adjacent property owners and waters of the Commonwealth. As previously discussed, the wisdom of the Department's decision to not require measures that go above and beyond the minimum regulatory requirements for these particular sites is a question that will need to be decided on a full record. Whether runoff will in fact travel beyond the distance buffers is another area for expert opinion.

Relatedly, Synagro joins the Department in contesting the Appellants' objection that the Department did not require Synagro to adhere to a property line buffer to protect nearby properties. Synagro and the Department point out that the regulation cited by the Appellants in support of this objection, 25 Pa. Code § 275.202, applies only to site specific biosolids permits and not authorizations for coverage under general permits. The Appellants respond that they cited that regulation merely to illustrate what a property line distance requirement might potentially look like if the Department had exercised its discretion to impose one. Furthermore, the Appellants contend that an individual permit should have been required in this case. We are satisfied by the Appellants' response for purposes of summary judgment and we do not believe that extensive discussion on the issue is required at this juncture. As mentioned above, we liberally construe the objections within a notice of appeal.

[9] The Appellants also take issue with proposed vegetated buffers that will be installed to protect wetlands. The Appellants' expert John Miller says that it will be impossible for the vegetated buffers to completely eliminate all pollutants from reaching wetlands. He argues that "[o]ver time, the vegetated buffers will become overloaded and decrease in functionality." This is another issue more appropriately decided on a full record.

Synagro and the Department also move for summary judgment on the Appellants' claims that the Department did not consider and account for the cumulative and long term impacts of applications of biosolids. Synagro and the Department argue that the regulatory and permitting schemes contemplate the effects of successive applications of biosolids. In support of their argument, Synagro and the Department point to regulations governing cumulative pollutant loading rates. *See* 25 Pa. Code § 271.914. They say that the PAG-08 general permit establishes pollutant concentration levels for a spectrum of pollutants that cannot be exceeded. They also cite a requirement for the submission of representative soil chemical analyses for each of the sites so that current pollutant levels of the soils can be assessed against the constituents of the biosolids to be applied. If any of the pollutant levels are reached, biosolids cannot be applied. They further argue that the regulations limit the rate at which biosolids can be applied and tie it to the agronomic rate.[10]

The Appellants respond that Synagro and the Department are construing their objections too narrowly. They say that they are not concerned only with cumulative and long term impacts in terms of pollutant loading and nitrogen amounts, but also with the effects that successive applications of biosolids will have on water quality, e.g., the impact of continued runoff from all three sites on the Allegheny Creek watershed. The Appellants dispute the arguments put forth by Synagro and the Department. They say that the cumulative pollutant loading rates only address pollutant impacts on soil, not impacts on waterways or groundwater. They argue that there is no practical way for Synagro or the Department to determine the pollutant levels in each batch of

[10] Agronomic rate is defined as:

> The annual whole sludge application rate (dry weight basis) designed to do the following:
>
> (1) Provide the amount of nitrogen needed by the food crop, feed crop, fiber crop, silvicultural crop, cover crop, horticultural crop or vegetation grown on the land.
>
> (2) Minimize the amount of nitrogen in the sewage sludge that passes below the root zone of the crop or vegetation grown on the land to the groundwater.

25 Pa. Code § 271.907.

biosolids from the 38 sources that will supply Synagro's operation unless the Department or Synagro sample each batch. They also argue that agronomic rates only deal with the leaching of nitrogen into the groundwater, not any other pollutants, and that those rates are not suited for assessing anything beyond nitrogen. Much like all of the runoff issues, this is another complex technical issue that is not suited for summary judgment. Whether there is a risk of excessive pollutant loading or a threat to water quality through years of biosolids applications on multiple nearby sites is a dispute that will be the subject of competing expert testimony.

Of course, whether there is runoff, excessive or otherwise, would not be of any particular concern if the runoff is innocuous, but the parties obviously disagree on that aspect of the runoff issue as well. Synagro and the Department rely on the two-part process whereby sludge sources are approved as safe for land application pursuant to a separate process without regard to any particular site, and individual sites are determined to be suitable for any approved source. The Appellants, however, among other things complain that 38 different sources for one site is too much, distinguishing our holding in *Stevens v. DEP*, 2002 EHB 249, which involved only one source of sludge for the site at issue. They generally aver that the Department needs to more thoroughly consider impacts to waters from so many different sources that may or may not be adequately tested, and that the Department is too focused on the appropriateness of the sludges from an agricultural point of view. Given the number of sources approved here, the unknowns and variability of sludge quality required greater attention, in their view. They complain that Synagro has not been forthcoming in discovery regarding this issue, which has hampered their ability to develop issues regarding sludge quality. *Cf. Kiskadden v. DEP*, 2014 EHB 380 (sanctions imposed for failure to disclose chemicals used in fracking). The Appellants cite

expert opinion in support of their position regarding sludge quality. The Appellants have shown us enough to defeat the movants' summary judgment motions.

Soil Sampling

The Appellants contend that soil at the three sites is simply too acidic for land application. They question the practice and timing of resolving this problem by raising pH, and they point out that the Department did not do its own soil sampling. Synagro argues that there is no legal requirement for the Department to conduct independent sampling to verify the sampling submitted by Synagro. However, we do not think that is what the Appellants are arguing. Rather, they seem to be arguing that the Department has an obligation to ensure that soil conditions are already or can be made suitable for land application, and the Department has failed to fulfill that obligation, either by having sufficient data upon which to base a scientifically sound decision or by otherwise ensuring that soils are suitable. We do not understand the Appellants to be arguing that the Department has some sort of an independent duty to perform its own sampling, which it clearly does not.

With respect to pH addition, the pertinent regulation states:

> A person may not apply sewage sludge unless the soil pH is 6.0 or greater prior to land application unless the Department allows the increase of pH by application of sewage sludge or other material in which case the soil pH shall be 6.0 or greater within 6 months following the application of sewage sludge, or unless otherwise approved in writing by the Department.

25 Pa. Code § 271.915(e). Synagro and the Department argue that the regulation only requires the Department to ensure a 6.0 pH before biosolids application begins and no biosolids have been applied yet. They also state that the Department's 30-day Notice determination letters are conditioned on Synagro raising pH to 6.0 prior to the first application of biosolids. (DEP Ex. 7.) Section 271.915(e) seems to create a general rule, but allows the Department to approve

exceptions to that rule in its discretion. The Appellants are entitled to challenge the exercise of that discretion, and that is how we interpret their objection.

At a more fundamental level, the Appellants tell us that instead of focusing on how Synagro may have achieved minimal compliance with individual suitability and operational criteria, as Synagro and the Department have done, we should take a more holistic approach. They argue that it is not the acidity question alone that independently justifies a reversal of the Department's action. Rather, they argue that the Department's decision was flawed when one considers *in combination* the acidity, the slopes on the site, the proximity of wells and residential properties, wetlands, waters, and endangered species habitat, and the nature of the sludge to be applied. Based on these and other factors, the sites should have been disapproved, more thoroughly studied, more constricted, and/or subject to individual permitting, they say. This approach is certainly worth considering as we move forward.

Department's Enforcement Authority

Finally, Synagro and the Department point to two objections in the Appellants' notice of appeal that state that the Department has not adequately ensured that Synagro will comply with distance buffers. Synagro and the Department interpret the Appellants' objections to mean that the Department going forward will not ensure compliance, and they argue that the Department's enforcement authority is sufficient to ensure that Synagro will comply with all regulations. The Appellants respond that the Department has a responsibility to prevent environmental harm from occurring in the first place. This suggests that the Appellants are looking backward, not forward, which makes sense. Whether the Department will initiate enforcement action against Synagro in the future is neither here nor there at this point. For our current purposes, we presume that

Synagro will comply with the law and the Department will enforce the law. Without further clarification of the issue we are asked to decide, summary judgment is premature.

Conclusion

The movants view the Appellants' appeal as a "generalized assault" on the Department's regulation of biosolids, but that is not our impression. We do not see any clear facial challenges to the regulations in the Appellants' materials. Instead, we see many variants of the same basic theme, which is that *these particular sites* are not suitable for land application and the Department erred by concluding otherwise. With respect to these particular sites, the essence of the dispute in this case is that the Department and Synagro claim that they complied with all of the applicable regulatory criteria and then some. The Appellants respond that, even if that is true, and even if that is an acceptable approach in most cases, "here the Department had a substantial amount of information that told it that it needed to either prevent sludge application in full at these three sites, require substantial reductions in the acreage that could receive biosolids, and/or require Synagro to employ more protective measures. The most that was done was extend the isolation distances slightly. Movants even refused to include a berm that [Appellant] Ms. Zimmerer requested as a protective measure to divert runoff away from Price Lane." (citations omitted). "Simply because a site is not automatically excluded under the regulations, it does not follow that the site is suitable." (Appellants' Memo. at 58.)

Although we sympathize with the movants' effort to narrow the issues by way of motions for summary judgment, there are simply too many open questions and disputed facts for us to grant the motions. We have carefully reviewed the motions for partial summary judgment in their entirety and all of the contentions contained therein and we have not found anything in the filings to convince us to grant the motions. Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SLUDGE FREE UMBT, et al., Appellants, and DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, Intervenors	:	
v.	:	**EHB Docket No. 2014-015-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SYNAGRO, a.k.a. SYNAGRO MID-ATLANTIC, INC., Permittee	:	

O R D E R

AND NOW, this 1st day of July, 2015, it is hereby ordered that the motions for partial summary judgment filed by Synagro and the Department are **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: July 1, 2015

c: **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 and Intervenors:
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Clair E. Wischusen, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOL PENNSYLVANIA COAL COMPANY, LLC	:	
v.	:	**EHB Docket No. 2014-110-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 6, 2015**

OPINION AND ORDER
ON MOTION TO COMPEL
PRODUCTION OF COMPLIANCE MANUAL

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Board orders the production of a Compliance Manual in discovery where the deposition testimony of the Department's former Monitoring and Compliance Section Chief states that the Manual was relied on in issuing the order that is the subject of this appeal. Although the Department argues that the entire Compliance Manual is not relevant, relevancy for purposes of discovery is to be broadly construed. The Department may raise objections at trial as to the Compliance Manual's relevance or admissibility at that stage of the proceedings.

O P I N I O N

Presently before the Pennsylvania Environmental Hearing Board is a Motion to Compel Production of Compliance Manual (Motion to Compel) filed by the Appellant, Consol Pennsylvania Coal Company, LLC (Consol Coal Company). The issue before us arose during the deposition of Mr. Gregory Prentice, the former Chief of the Monitoring and Compliance Section of the Pennsylvania Department of Environmental Protection (Department) who retired

in January 2015. Mr. Prentice issued the Compliance Order to Consol Coal Company which is under appeal.

In response to a question from counsel for the Appellant, Mr. Prentice testified that in issuing the Compliance Order to Consol Coal Company, he followed a "compliance manual" to cite the regulations for the alleged violation and used "standard language in our compliance manual" associated with the alleged violation. (G. Prentice Deposition, pages 69:12-70:20).

The Compliance Manual had not been earlier produced and after repeated requests for the entire Compliance Manual the Department produced the cover page of the manual and an excerpt of one page. The Department contends that it provided the relevant paragraph of the Compliance Manual and that the "remainder of the compliance manual is not relevant to the subject matter of this appeal." (Department's Response, Paragraph 3). Consol Coal argues that it is entitled to a copy of the entire Compliance Manual.

Discovery in matters before the Pennsylvania Environmental Hearing Board is governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102; *Wallace Twp. v. DEP*, 2002 EHB 841, 844. Generally speaking, parties may obtain through discovery any matter, not privileged, that is related to the subject matter of the action and is reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. 4003.1; *Sludge Free UMBT v. DEP and Synagro*, 2014 EHB 939, 940. The burden is on the party objecting to a discovery request to demonstrate its right to refuse to produce the requested information. *Wallace, supra* at 844. In most cases, we favor and encourage broad discovery. *See DEP v. Allegheny Enterprises, Inc.*, 2014 EHB 338, 340. In overseeing the discovery process we have wide discretion to determine whether discovery is being conducted appropriately. *Northampton Twp. v. DEP*, 2009 EHB 202, 205.

Here, the Department has asserted that the entire Compliance Manual is not relevant.[1] "Relevancy" for purposes of discovery is to be broadly construed. *Wallace, supra* at 845. "It is enough that the evidence might be relevant." *Id.* "[T]his threshold standard of relevancy is exceptionally low." *Bucks County Water and Sewer Authority v. DEP*, 2014 EHB 143, 152 (citing Pennsylvania Evidence Courtroom Manual Ch. 401 (2014 ed. Matthew Bender)).

Given the relatively low threshold that must be met to establish relevancy, we have no basis for finding that the Compliance Manual is not relevant. It was referred to by the Department's former Chief of the Monitoring and Compliance Section of the California District Mining Office in his deposition testimony and was clearly relied on by him in issuing the compliance order that is the subject of this appeal. Even though the Department asserts that Mr. Prentice relied on only one paragraph of the Compliance Manual, there is no affidavit by Mr. Prentice to that effect. Moreover, we find that the production of only one paragraph of the Manual is not enough to allow the Appellant or the Board to make an informed decision as to whether the remainder of the document is relevant or may lead to discoverable information. Since the relevancy of the entire document is uncertain at this time, we are unwilling to prohibit its discovery. The Department may raise specific objections as to any use of the Manual at trial. *Bucks County, supra* at 152.

We, therefore, enter the following order.

[1] The Department has not asserted in its Response that the Compliance Manual is privileged.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOL PENNSYLVANIA COAL COMPANY, LLC	:	
v.	:	**EHB Docket No. 2014-110-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 6th day of July 2015, it is hereby **ORDERED** that:

1) The Department shall produce a copy of the Compliance Manual to the Appellant on or before **July 13, 2015.**

2) Discovery is reopened until **August 5, 2015**. All other pre-hearing deadlines will be extended in a separate order.

ENVIRONMENTAL HEARING BOARD

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

DATED: July 6, 2015

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

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Michael J. Heilman, Esquire
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For Appellant:
Howard J. Wein, Esquire
Robert L. Burns, Esquire
Victoria B. Kush, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-REALTY COMPANY	:	
	:	
v.	:	**EHB Docket No. 2014-107-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and URSINUS COLLEGE, Permittee	:	**Issued: July 7, 2015**

OPINION AND ORDER ON URSINUS COLLEGE'S MOTION TO COMPEL ENTRY UPON PROPERTY

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a discovery motion filed by a party performing an Act 2 cleanup to compel the neighboring property owner to allow access onto its property to install two monitoring wells.

O P I N I O N

Tri-Realty Company filed this appeal from the Department of Environmental Protection's approval of Ursinus College's Remedial Investigation Report ("RIR") that Ursinus submitted pursuant to the Pennsylvania Land Recycling and Environmental Remediation Standards Act, 35 P.S. § 6026.101 *et seq.* ("Act 2"). The RIR concerns a release of No. 6 fuel oil from two underground storage tanks that Ursinus formerly operated on its campus in Collegeville, Montgomery County. Ursinus's release of No. 6 oil has contaminated groundwater underneath both its campus and Tri-Realty's College Arms Apartments property, which is adjacent to the campus. Tri-Realty raises both procedural and substantive challenges to the Department's approval of the RIR. Substantively, Tri-Realty argues that the RIR failed to satisfy the

requirements for a remedial investigation under Act 2. Among other things, it argues that the investigation did not adequately define the extent of groundwater contamination on Tri-Realty's property, presumably because there are not enough monitoring wells.

Although we do not yet have a copy of the RIR, it appears from the limited record that we do have that, from 2004 through 2013, Ursinus installed at least 30 shallow-zone groundwater monitoring wells at the site, including 14 monitoring wells at Ursinus College and 16 monitoring wells on Tri-Realty's property. In addition, 8 shallow-zone monitoring wells were installed in July 2013 to further characterize shallow-zone groundwater quality and hydrogeologic conditions at the site. Four of the additional wells installed in July 2013 were located at Ursinus College and the remaining four, which included replacements for two other wells, were installed at College Arms Apartments. In addition to the shallow groundwater wells, apparently at least three recovery wells have been installed. Ursinus has also installed deep wells, but we cannot tell from the existing materials how many were installed. We suspect there are at least three. The materials also mention peizometers, although they may be the same as the deep wells.

Tri-Realty is not satisfied with this number of wells. Indeed, Tri-Realty was so convinced that more wells were needed that it drilled four more wells of its own. Ursinus College would also now like to drill two more wells on Tri-Realty's property. It asked Tri-Realty for permission and Tri-Realty has refused. Ursinus asks us to issue an order pursuant to the discovery rules regarding entry upon the land of another, Pa.R.Civ.P. 4009.31-.33, forcing Tri-Realty to allow Ursinus to drill the wells.

We agree with Ursinus College that many of Tri-Realty's contradictory arguments in opposition to the discovery requested by the College leave the distinct impression that Tri-Realty

is more intent on punishing the College than working in good faith toward a mutually beneficial cleanup. In the words of the College,

> There is something perverse about Tri-Realty's continued attempts to hinder the College's cleanup of the property pursuant to Act 2 if Tri-Realty truly wants its property remediated in accordance with the law. If the additional sampling that the College plans to pursue through 4009.31 and 4009.32 demonstrates that the College's site investigation and characterization were sufficient, such that the College can and should move to the next stage of the Act 2 process and be one step closer to cleaning up the site, one would expect Tri-Realty to be heartened and eager for the College to proceed. Conversely, if the additional sampling the College plans to pursue through 4009.31 and 4009.32 supports Tri-Realty's case, one would expect Tri-Realty to use that evidence to support its appeal.

(Memorandum at 5.) That said, Tri-Realty's point that Pa.R.Civ.P. 4009.31 and 4009.32 do not envision the installation of permanent monitoring wells on its property under the circumstances presented here is well-taken.

For guidance on this issue we turn to the recent rulings of Chief Judge Thomas W. Renwand in *Kiskadden v. DEP*, EHB Docket No. 2011-149-R. In that litigation, Chief Judge Renwand first observed that the discovery rules regarding entry onto another's property "provide ample opportunity for a party to conduct extensive investigation at a site including inspecting, photographing, and testing." *Kiskadden*, 2012 EHB 391, 394. Later in that case, which, like the case before us, involved the alleged spread of contamination onto the property in question from another site, a party sought to do extensive testing on the property. Although that effort was resisted by the property owner, we granted the request in part:

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

> Range Resources is entitled [to] investigate the Kiskadden property using radar or metal detection. Such testing is minimally invasive and may lead to the discovery of admissible evidence. Range Resources may also conduct tests of Mr. Kiskadden's water well including collecting water samples, camera testing or other non-invasive testing and examination in order to ascertain relevant information, such as the depth of the well, depth of the casing, condition of the well and other related information. We believe that these tests can be performed with little annoyance or hardship to Appellant.
>
> After careful consideration of the parties' arguments, we will allow Range Resources to conduct limited soil testing. These tests shall be limited in scope and in number and shall not exceed a depth of twenty feet. Range Resources, as represented by its Counsel, will repair and replace any damage to Mr. Kiskadden's property caused by its testing.

Kiskadden v. DEP, 2013 EHB 21, 27-28. Thus, we agreed to allow "limited," "minimally invasive" testing, with the property fully restored after the temporary intrusion. The installation and subsequent use of permanent monitoring wells that is requested here can hardly be described using those terms.

The parties do not refer us to any case law other than *Kiskadden*, and our independent research revealed few precedents regarding Pa.R.Civ.P. 4009.31-.33. We note that the overarching standard for allowing any discovery is a showing that it is relevant or reasonably calculated to lead to the discovery of admissible evidence, and responding to it will not cause unreasonable annoyance, embarrassment, oppression, burden, or expense. Pa.R.Civ.P. 4003.1, 4011; *Haney v. DEP*, 2014 EHB 293. In *Ass'n of Property Owners v. DER*, 1987 EHB 560, we denied a citizen group's request for entry to conduct core sampling, in part because the Department had already taken samples and there was no showing that more samples were really necessary. See also *Pa. Game Comm'n v. DER*, 1983 EHB 355, to the same effect.

We believe that, in order to justify an order compelling entry upon property to drill and sample new monitoring wells, a party, at the very least, must come forward with truly

compelling reasons justifying such an invasion of property. Ursinus College has failed to provide us with such compelling reasons. Drilling a well on another person's property is obviously a very significant intrusion. Although it is a mystery to us why Tri-Realty would complain that there are not enough wells and then object when the College offers to drill more wells, the fact remains that there are already an extravagant number of wells associated with this investigation. "Discovery is a valuable tool, but at some point, enough is enough." *Primrose Creek Watershed Ass'n v. DEP*, 2013 EHB 187, 192. If the parties continue to devote their attention and resources to one discovery dispute after another rather than a good faith effort to get this site cleaned up, perhaps the contamination will continue to spread and two more wells will not be enough. Meanwhile, the RIR threatens to become stale. Excessive discovery in this matter also threatens to undermine one of the key goals of Act 2, which is to conduct efficient and effective cleanups that achieve meaningful solutions without overly enriching attorneys and consultants in the process. 35 P.S. § 6026.102 (declaration of policy). Allowing the wells proposed by Ursinus and the sampling that would then be necessary would inevitably delay further proceedings in this appeal.

Ursinus College has the burden of convincing us that its discovery is warranted, and it has failed to show us that two more wells are needed to assess whether the Act 2 process can move forward based on the information already available from the plethora of existing wells. Indeed, such a showing would seem to be inconsistent with the College's basic position in this appeal, which is that there is enough data to support a reasoned cleanup plan, which may explain why its motion amounts to little more than a lament that Tri-Realty is being unfair. The Department has not weighed in on the College's motion or otherwise signaled that more wells

are necessary to support an informed *de novo* review of the Department's decision to approve the RIR.[1]

Accordingly, we issue the Order that follows.

[1] This opinion is limited to discovery among private parties and does not address in any way the *Department's* authority under various statutes to compel a person to allow entry upon property.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-REALTY COMPANY	:	
	:	
v.	:	**EHB Docket No. 2014-107-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and URSINUS COLLEGE, Permittee	:	

O R D E R

AND NOW, this 7th day of July, 2015, it is hereby ordered that Ursinus College's motion to compel entry upon property is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: July 7, 2015

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

TRI-REALTY COMPANY	:	
	:	
v.	:	**EHB Docket No. 2014-107-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and URSINUS COLLEGE, Permittee	:	**Issued: July 9, 2015**

OPINION AND ORDER ON
MOTIONS FOR PROTECTIVE ORDERS AND TO QUASH SUBPOENAS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants motions for protective orders and to quash subpoenas because the discovery requests at issue are disproportionate to any showing of need.

O P I N I O N

Tri-Realty Company ("Tri-Realty") has appealed the Department of Environmental Protection's (the "Department's") approval of a Remedial Investigation Report ("RIR") submitted by Ursinus College pursuant to the Land Recycling and Environmental Remediation Standards Act ("Act 2"), 35 P.S. §§ 6026.101 – 6026.908, following the release of a quantity of Number 6 fuel oil from two underground storage tanks on the Ursinus College campus, located in Collegeville, Montgomery County. Tri-Realty owns the College Arms Apartments, a property adjacent to the College that comprises approximately ten acres and houses around 350 individuals. There is no dispute that the release of the oil contaminated the College Arms property, and Ursinus College has voluntarily taken on the responsibility for cleaning it up.

When persons such as the College elect to undertake a site-specific cleanup under Act 2, they must submit a series of reports to the Department for review and approval. 35 P.S. § 6026.304(l). Although multiple reports may be submitted at once, 35 P.S. § 6026.304(l)(5), the RIR is the first report to be composed. An RIR essentially consists of a detailed site characterization. Act 2 and its corresponding regulations detail what is to be included in the RIR. 35 P.S. § 6026.304(l)(1); 25 Pa. Code § 250.408. An RIR is followed by a risk assessment report, if necessary, a cleanup plan, and a final report. 35 P.S. § 6026.304(l). The Department's approval of an RIR is an appealable action. 35 P.S. § 6026.308. Tri-Realty believes that the Department erred by approving the RIR submitted by the College. Tri-Realty describes in its notice of appeal a number of aspects of the RIR that it believes are inadequate, including that the investigation did not adequately define the extent of groundwater contamination on Tri-Realty's property. Tri-Realty argues that the Department should have required additional investigation before approving the RIR.

On May 22, 2015, the College filed a motion for a protective order and to quash subpoenas that were served by Tri-Realty on the Pennsylvania Insurance Department ("PA Insurance") and the Underground Storage Tank Indemnification Fund (the "Fund"), nonparties to this appeal.[1] On the same date, both PA Insurance and the Fund filed their own motions for protective orders and to quash the subpoenas.[2] The Fund was created by the Storage Tank and Spill Prevention Act, 35 P.S. §§ 6021.101 – 6021.2104, and it indemnifies eligible storage tank

[1] We previously issued an Opinion and Order granting in part and denying in part a motion for a protective order filed by nonparty ICF International requesting relief from fulfilling requests for document production contained in a subpoena served upon it by Tri-Realty. *Tri-Realty Co. v. DEP*, EHB Docket No. 2014-107-L (Opinion, Mar. 20, 2015). ICF International is the third-party claims administrator that investigated and administered the indemnification claims filed by Ursinus College under the Fund.

[2] Both PA Insurance and the Fund are represented by the same counsel and the motions and memoranda of law in support of the motions are essentially the same.

owners for corrective action costs and third party liability that may occur when a release from a tank injures another person or that person's property. 35 P.S. § 6021.704. The Fund operates as a division of PA Insurance, the agency of the Commonwealth charged with the Fund's administration.

The subpoenas request the production of a host of documents and also identify various topics for deposition of representatives to be designated by each nonparty. The subpoenas served on PA Insurance and the Fund are essentially identical except for the inversion of Paragraphs 6 and 7 under the section addressing the request for the production of documents, and changes to names where appropriate. Because of the substantial overlap between the subpoenas at issue, and the overlap in the motions filed by the College, PA Insurance, and the Fund, all three motions will be resolved within this Opinion.

While somewhat extensive, we believe it is useful to quote the relevant portions of the subpoena served on the Fund in their entirety:

> C. Categories of Documents to be Produced
>
> 1. Any and all agreements between You and Ursinus, PADEP, or the Insurance Department regarding the purported confidentiality of any documents you exchanged concerning Claim No, 2004-0023(S), Claim No, 2004-0216(S), the 2012 RlR, and/or the 2014 RIR.
> 2. Any and all agreements between You and any other third party entity for the provision of services involving review of the 2012 RIR, 2014 RIR, or any other remedial actions proposed or taken in connection with the Ursinus College campus and/or College Arms.
> 3. Any and all non-privileged documents in Your possession which relate, refer to, document, or demonstrate any work performed by any third party entity you contracted with to review the 2012 RIR, 2014 RIR, or any other remedial actions proposed or taken in connection with the Ursinus College campus and/or College Arms.
> 4. All documents and oral and written correspondence exchanged by and between You and Ursinus, PADEP, or the Insurance Department regarding Claim No, 2004-0023(S), Claim No, 2004-0216(S), the Ursinus College campus and/or College Arms.

5. All claims reports related to Claim No. 2004-0023(S), Claim No. 2004-0216(S), the Ursinus College Campus and/or College Arms, including but not limited to the April 2013 USTIF Region 1 Claims Report referred to in the April 8, 2013 8:42 AM email from Sarah Pantelidou to Belinda Wilson attached hereto as **Exhibit 1**.

6. Any and all communications between any representative of PADEP and any representative of Your representatives concerning any release of petroleum to the environment which occurred at College Arms during or around 1968 as a result of the failure of any underground storage tank then present at College Arms.

7. The October 27, 2014 decision of USTIF referred to in **Exhibit 2**.

8. For Claim No, 2004-0023(S), any and all documents, including any notes and other communications, whether in electronic or other form, in Your possession, custody or control that reflect, refer or relate to, or identify any Indication of a Release from Tank 1 Ursinus had or received prior to the reporting of such claim to the USTIF and when Ursinus first received such Indication of a Release.

9. For Claim No. 2004-0023(S), any and all documents, including any notes and other communications, whether in electronic or other form, in Your possession, custody or control that reflect, refer or relate to, or demonstrate any Investigation undertaken by or on behalf of Ursinus after Ursinus received any Indication of a Release from Tank 1.

10. For Claim No. 2004-0216(S), any and all documents, including any notes and other communications, whether in electronic or other form, in Your possession, custody or control that reflect, refer or relate to, or identify any Indication of a Release from Tank 2 Ursinus had or received prior to the reporting of such claim to the USTIF and when Ursinus first received such Indication of a Release.

11. For Claim No, 2004-0216(S), any and all documents, including any notes and other communications, whether in electronic or other form, in Your possession, custody or control that reflect, refer or relate to, or demonstrate any Investigation undertaken by or on behalf of Ursinus after Ursinus received any Indication of a Release from Tank 2.

12. For Claim No. 2004-0023(S), any and all documents, including any notes and other communications, whether in electronic or other form, in Your possession, custody or control that reflect, refer or relate to, or demonstrate any systematic and probing inquiry into the facts involved in the release to the Environment of any Oil from Tank 1 which You undertook before determining on or

around May 20, 2004 the eligibility of Claim No. 2004-0023(S) for funding from the USTIF.

13. For Claim No. 2004-0216(S), any and all documents, including any notes and other communications, whether in electronic or other form, in Your possession, custody or control that reflect, refer or relate to, or demonstrate any systematic and probing inquiry into the facts involved in the release to the Environment of any Oil from Tank 2 which You undertook before determining on or around January 17, 2005 the eligibility of Claim No, 2004-0216(S) for funding from the USTIF.

14. Any and all documents in Your possession which relate, refer to, document, or demonstrate any proposal by B&F Petroleum Installations to perform, or any performance by or for B&F Petroleum Installations of, any work, including but not limited to any Investigation, at the Ursinus College campus concerning either Tank 1 or Tank 2 or both Tank 1 and Tank 2.

15. Any and all documents in Your possession which relate, refer to, document, or demonstrate any inquiry made after February 5, 2004 and before August 20, 2004 into the condition, use, operation, testing, examination, or inspection of Tank 2.

16. Any and all documents in Your possession which relate, refer to, document, or demonstrate the opting-in, entry or enrollment of Ursinus in the Voluntary Heating Oil Tank Program.

17. Any and all documents in Your possession which relate, refer to, document, or demonstrate the cancellation or termination of any insurance coverage by USTIF of any UST on the Ursinus College campus which was previously within the Voluntary Heating Oil Tank Program.

18. Any and all documents in Your possession which relate, refer to, document, or demonstrate either Tank 1 or Tank 2 being subjected to any Investigation or tank tightness test by or for You or by or for Ursinus at any time before the end of 2004.

19. Any and all documents in Your possession which relate, refer to, document, or demonstrate the participation by Ursinus between January l, 1995 and December 31, 2003 in the Voluntary Heating Oil Tank Program.

D. Topics for Deposition

Pursuant to Rule 4007.1(e), You shall designate a person, or persons, who shall consent to testify on behalf of You with respect to the following matters:

1. The subjects of the foregoing documents request from You and/or to be produced by You.

2. All claims reports related to Claim No. 2004-0023(S), Claim No, 2004-0216(S), the Ursinus College Campus and/or College Arms, including but not limited to the April 2013 USTIF Region 1 Claims Report referred to in the April 8, 2013 8:42 AM email from Sarah Pantelidou to Belinda Wilson attached hereto as **Exhibit 1**.
3. All documents and oral and written correspondence exchanged by and between You and Ursinus, PADEP, or the Insurance Department regarding Claim No. 2004-0023(S), Claim No, 2004-0216(S), the Ursinus College campus and/or College Arms.
4. Any and all communications between any representative of PADEP and any representative of Your representatives concerning any release of petroleum to the environment which occurred at College Arms during or around 1968 as a result of the failure of any underground storage tank then present at College Arms.
5. The reasons for USTIF's October 27, 2014 decision to tender the coverage amounts remaining to Ursinus and to disclaim any further defense of any claims arising from the release of contamination at Ursinus College campus.
6. The statements and opinions expressed in USTIF's October 27, 2014 decision to tender the coverage amounts remaining to Ursinus and to disclaim any further defense of any claims arising from the release of contamination at Ursinus College campus.
7. The statements and opinions expressed in **Exhibit 2**.

(Fund Mot. for Prot. Order, Ex. A.)[3] Both PA Insurance and the Fund seek a protective order from the entirety of the subpoenas and to have them quashed in whole. The College seeks a protective order, on behalf of PA Insurance and the Fund, for all of the above paragraphs except for Paragraphs 3 and 6 under Section C (meaning all but Paragraphs 3 and 7 of the subpoena served on PA Insurance), and to quash those portions of the subpoena.

The College, PA Insurance, and the Fund all argue that the information requested by Tri-Realty is not relevant or reasonably calculated to lead to the discovery of admissible evidence in this appeal, and that the information is protected by the common interest privilege. In addition,

[3] As noted above, the subpoena served on PA Insurance is identical except for the reversal of Paragraphs 6 and 7 under Section C of the subpoena, and the replacement of "Insurance Department" with "USTIF" where appropriate. References to specific paragraphs will be made in accordance with the numbering of the Fund subpoena, but should be understood to refer to the PA Insurance subpoena as well.

both PA Insurance and the Fund argue that production of the information would be burdensome, that the requests violate the proportionality standard of the Pennsylvania Rules of Civil Procedure, that the requests seek information already precluded by a decision of the Office of Open Records pursuant to the Right to Know Law, and that the information is protected by the attorney-client privilege, the deliberative process privilege, and the work-product doctrine.

On June 8, 2015, Tri-Realty filed responses to each of the motions as well as a consolidated memorandum of law addressing the issues raised by all of the movants.[4] Tri-Realty argues that PA Insurance and the Fund possess relevant information, that they have not demonstrated that any privilege applies (and in any event Tri-Realty is not seeking any information protected by the attorney-client privilege or the work-product doctrine), that they have not demonstrated that the requests are unduly burdensome, and that the Right to Know Law has no application to civil discovery. Tri-Realty also claims that neither the College, PA Insurance, nor the Fund made any effort to confer with Tri-Realty about the resolution of the discovery dispute as required by our rules at 25 Pa. Code § 1021.93(b). For these reasons, Tri-Realty contends that the motions should be denied and PA Insurance and the Fund should be compelled to satisfy the requests in the subpoenas.

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. However, no discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense with regard to the person from whom discovery is sought. Pa.R.C.P. No. 4011.

[4] The Department did not weigh in on the current dispute.

As a general rule, the Board has been liberal in allowing discovery that is either directly related to the contentions raised in the appeal or is likely to lead to admissible evidence that is related to the contentions raised in the appeal. *Consol Pa. Coal Co. v. DEP*, EHB Docket No. 2014-110-R, slip op. at 2 (Opinion, Jul. 6, 2015); *Haney v. DEP*, 2014 EHB 293, 296-97. "[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205. Our charge is the same with respect to discovery sought from nonparties.

The Board authorizes parties to serve subpoenas in accordance with the applicable Rules of Civil Procedure. 25 Pa. Code § 1021.103. Under the Rules, a party may obtain through subpoena on a nonparty any documents that are normally within the scope of discovery under Rules 4003.1 – 4003.6. Pa.R.C.P. No. 4009.1(a). Parties may also request the deposition of nonparties via subpoena. Pa.R.C.P. No. 4007.1. Any party or interested person may seek a protective order from the subpoena under Rule 4012. Pa.R.C.P. No. 4009.21(d)(2). Pursuant to Rule 4012, the Board is empowered to issue a protective order upon good cause shown to protect a person from unreasonable annoyance, embarrassment, oppression, burden, or expense. Pa.R.C.P. No. 4012(a); *Haney, supra*, 2014 EHB at 297; *Chrin Bros. v. DEP*, 2010 EHB 805, 811. The term "good cause" has not been well defined in Pennsylvania law.[5] However, whether to grant or deny a motion for a protective order is within the sound discretion of the trial court, or

[5] *See Dougherty v. Heller*, 97 A.3d 1257, 1267 (Pa. Super. 2014) ("No Pennsylvania appellate court has addressed what constitutes 'good cause' in this context."); *Id.* at 1268 ("As oft used as the term 'good cause' is when discussing protective orders, the phrase is not well defined under Pennsylvania law." (Mundy, J., concurring and dissenting)). The Pennsylvania Supreme Court has granted a petition for allowance of appeal in *Dougherty* to address, among other things, "good cause" (docketed at 6 EAP 2015). *Dougherty v. Heller*, 109 A.3d 675 (Pa. 2015). *See also Allegheny West Civic Council v. City Council of Pittsburgh*, 484 A.2d 863, 866 (Pa. Cmwlth. 1984) ("There are no hard-and-fast rules as to how a motion for a protective order is to be determined by the court.")

here, the Board. *See Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199, 2209 (1984) ("The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders."); *Allegheny West Civic Council v. City Council of Pittsburgh*, 484 A.2d 863, 866 (Pa. Cmwlth. 1984); *see also Cooper v. Schoffstall*, 905 A.2d 482, 492-93 (Pa. 2006) (trial courts should determine the appropriate scope of discovery in individualized circumstances). Likewise, whether a subpoena shall be enforced rests in the judicial discretion of the court. *In re Semeraro*, 515 A.2d 880, 882 (Pa. 1986); *In re Subpoena No. 22*, 709 A.2d 385, 387 (Pa. Super. 1998).

The parties engaged in this discovery dispute all tell us that discovery is governed by a proportionality standard. We agree. Discovery obligations must be "consistent with the just, speedy and inexpensive determination and resolution of litigation disputes." 2012 Explanatory Comment Prec. Rule 4009.1, Part B. The proportionality standard requires us to consider the following factors:

(1) The nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake;

(2) The relevance of the information sought and its importance to the court's adjudication in the given case;

(3) The cost, burden, and delay that may be imposed on the parties to deal with the information;

(4) The ease of producing the information and whether substantially similar information is available with less burden; and

(5) Any other factors relevant under the circumstances.

See id. To a large extent, the proportionality standard is merely a restatement of the general principle that discovery must relate to information that is relevant and reasonably calculated to lead to the discovery of admissible evidence, and it must not be sought in bad faith or cause unreasonable annoyance, embarrassment, oppression, burden, or expense. Pa.R.C.P. Nos. 4003.1, 4011; *Haney*, 2014 EHB at 296-97.

Turning to the first factor, the nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake, Tri-Realty says this is a highly complex case. Tri-Realty has every incentive to make it *seem* like a complex case, but we are not so sure that it really is. It undoubtedly involves review of a lengthy technical study, but unlike many groundwater cases, there are no issues of causation here. The basic source and nature of the contamination is well known. The contaminant at issue is fuel oil. The object of the study is not to attain perfect knowledge, but to form the basis for a reasoned, efficient, effective cleanup. Cleanup options for oil contamination in groundwater are well established and do not involve rocket science, as far as we know.

Tri-Realty next says that this appeal is extremely important to it because (a) its property is contaminated and it wants to see it properly cleaned up, and (b) the College is seeking an Act 2 release from liability. With respect to the former, Tri-Realty's actions belie its words. Its conduct in this case does not give the impression that it is sincerely interested in working toward a mutually beneficial cleanup. Among other things, we find it striking that Tri-Realty claims that there are not enough monitoring wells supporting the RIR, yet it has blocked the College's offer to drill more wells. *See Tri-Realty Co. v. DEP*, EHB Docket No. 2014-107-L (Opinion, Jul. 7, 2015). With respect to the latter, we are not sure an Act 2 release will preclude Tri-Realty from continuing to sue the College for damages in tort.

With respect to the importance of this case more generally, we believe that it is important that this site gets cleaned up efficiently and effectively, and that the worthy goals of the Act 2 program are not stymied by unnecessarily protracted litigation at every stage of the cleanup process. Act 2 is designed to create incentives to clean up sites quickly. *See* 35 P.S. § 6026.102(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 [Protection] which frequently only serve to delay cleanups and increase their cost."). The success of this legislation is premised upon the release of liability following the completed remediation of the site. 35 P.S. § 6026.501. Tri-Realty's attempt to bury the College, PA Insurance, and the Fund in discovery not only runs counter to the goal of avoiding delays and increased cleanup costs, but it also risks vitiating the willingness of persons to voluntarily participate in the Act 2 program. While we are not saying that each of the steps in the Act 2 process is not important and deserving of scrutiny, we believe that protracted litigation over the various reports runs counter to Act 2's goal of encouraging voluntary cleanup of sites while ensuring the protection of public health and the environment. 35 P.S. § 6026.102(2) and (3). There are at least two more reports that the College must submit to the Department. We fear that years of litigation surrounding each report will mean that the site will never be cleaned up. Tri-Realty has not shown us how its proposed discovery is consistent with these considerations.

The next step in applying the proportionality standard is to evaluate the relevance of the information and its importance to the adjudication. Our role in this appeal is to determine whether the Department's approval of the College's RIR was lawful, reasonable, and supported by the facts. *Solebury School v. DEP*, 2014 EHB 482, 519. Tri-Realty has done little to convince

us that documents in the possession of PA Insurance and the Fund are relevant to assessing the validity of the Department's determination.

So much of what Tri-Realty is seeking we think is bordering on the inconsequential to proceedings under Act 2. Under Act 2, how we got to the point at which we find ourselves is not as crucial. Instead, Act 2 is more forward-looking. It involves the assessment of the contamination as it exists, the evaluation of what is likely to happen in the future, and the proposal of how to clean it up. Inquiries into how spills happen are generally only relevant insofar as they may shed light on the nature, extent, and concentration of a contamination event. Inquiries into conditions before a spill are generally only relevant insofar as they can be used to establish background conditions, an aspect of Act 2 that is not implicated in the site-specific cleanup that is being undertaken by the College in this matter. The fact that Act 2 does not place any time limits on when one may volunteer to undertake an Act 2 cleanup speaks to the diminished importance of considerations such as exactly when the release happened and what measures were taken to discover it. The important consideration under Act 2 is that a release was discovered and now the responsible party must determine the extent of the release and how to proceed with a cleanup.

There is no indication that either PA Insurance or the Fund performed any independent sampling that might be particularly valuable to assist us in evaluating the massive amount of other samples that we are told were taken in this case. Our work in connection with a previous discovery dispute in this appeal suggests that there is no such hard data. In contrast to such hard data and pertinent scientific information, we are far less concerned with, for example, communications surrounding an alleged release from 1968. (Subpoena ¶ C6, D4.) We are not overly concerned with the specific point in time at which the College became aware of the 2004

releases and if they acted with appropriate speed and diligence in response to the releases. (Subpoena ¶¶ C8, C10.) We are not concerned with whether the College had insurance coverage under the Voluntary Heating Oil Tank Program. (Subpoena ¶¶ C16, C17.) Nor are we concerned with its participation in the Voluntary Heating Oil Program from 1995 through 2003. (Subpoena ¶ C19.) We are not a court in equity and we cannot award damages. *Kilmer v. DEP*, 1999 EHB 846, 850. We are not deciding whether or not the College acted negligently in reporting the release, which seems to be what many of the subpoena requests are geared toward. Further, we do not think that the reasons the Fund first decided that the claims were eligible for coverage, and second decided to tender the limits of its coverage have any bearing on the adequacy of the RIR. (Subpoena ¶¶ 7, 12, 13, D5, D6, D7.) Whether or not the Fund extended coverage has little or nothing to do with whether the RIR has adequately characterized the contamination plume. We cannot envision how Tri-Realty would put to proper use most of the information it is requesting in this proceeding before the Board, and Tri-Realty does not provide us with any convincing explanation of how this information will further its appeal. None of this information appears to be reasonably calculated to lead to the discovery of admissible evidence. Rather, many of these requests appear to be forays into collateral matters that are not related to the subject matter on appeal before this Board.

Perhaps revealing how strained some of Tri-Realty's requests are, Tri-Realty opens its relevance argument by calling our attention to a statement in the background section of the RIR claiming that the College submitted timely notices to the Fund concerning the two releases. (RIR at 5.) Apparently, timely notice is a requirement for coverage under the Fund. Tri-Realty disputes this statement, and it says that PA Insurance and the Fund should have information bearing on the veracity of that representation. We have no idea why that matters at all to the

substance of the investigation. Whether or not this isolated statement in the background section of the RIR is true has absolutely no impact on the adequacy of the RIR. Frankly, we do not care if the College submitted timely notices, or if PA Insurance or the Fund has information that can confirm or deny that. Such an issue appears better suited for consideration by the Underground Storage Tank Indemnification Board.

We are not suggesting that all of the information in the hands of the nonparty movants is entirely irrelevant. The nonparty movants may have information, for example, regarding tank system design, inventory records, or tank tightness testing. However, this sort of information likely came from the College, which, as far as we know, has not resisted discovery of its own records regarding these matters. Furthermore, these kernels of marginally relevant information will be buried among the 22,000 documents, the vast majority of which will be irrelevant and/or duplicative.

Tri-Realty argues that information regarding the circumstances of the original release years ago is significant. However, the College has referred us to deposition testimony from knowledgeable sources supporting the notion that precise details regarding the circumstances of the original release are not particularly crucial in choosing among the limited cleanup options, which after all is the *raison d'être* of an RIR. Tri-Realty does not provide any support for the opposite view. For example, Tri-Realty says that determining the amount of oil released is important, but it does not explain why. This is consistent with its general failure to explain how the information it seeks from PA Insurance and the Fund will ultimately make a difference in the cleanup.

With respect to the third factor, the cost, burden, and delay that may be imposed on the parties to produce the information, it is important to point out that Tri-Realty is actually seeking

discovery from *nonparties*. Neither PA Insurance nor the Fund has any stake or interest in this appeal, yet they are being asked to devote considerable resources toward supplying information that Tri-Realty says it needs to pursue its appeal. PA Insurance's expenses are ultimately being borne by the Commonwealth's taxpayers. Complying with Tri-Realty's requests is wholly outside the missions and functions of PA Insurance and the Fund, and is at best described as a distraction. Discovery pursuant to a subpoena is obviously available from nonparties, but the fact that they are nonparties is a relevant consideration when we apply the proportionality standard.

With respect to the actual burden, PA Insurance and the Fund say they will need to review 22,000 pages of documents, many of which are privileged and will require individual attention. They support this claim with an affidavit from the acting executive director of the Fund. Tri-Realty does not dispute that claim but says the fact that they have identified the universe of documents is half the battle. We do not agree that the movants are anywhere near the halfway point. Anyone who has ever walked into a conference room tasked with reviewing 22,000 documents will scoff at the notion that putting the boxes of documents in the room constituted "half the battle." The nonparty movants face a very significant burden responding to Tri-Realty's requests, which is not dispositive but certainly weighs in favor of granting their motions.

We have already spoken to some extent to the fourth factor, the ease of producing the information and whether substantially similar information is available with less burden. In a word, it is. Any hard data going to the scientific validity of the contamination characterization in PA Insurance's and the Fund's possession likely came either directly from or through the

College and is available from the College itself. We are told that Tri-Realty has and will engage in extensive depositions of the scientists that actually worked on and reviewed the RIR.

In conclusion, "the decision to grant or deny a discovery request is almost always a balancing test between one party's right to discovery and another person's right to be free from unreasonable annoyance, oppression or burden." *H.J. Freehand, Inc. v. Smith*, 2008 Pa. Dist. & Cnty. Dec. LEXIS 299 at *10, *aff'd, Freehand v. Smith*, 976 A.2d 1219 (Pa. Super. 2009). Tri-Realty's discovery requests directed to PA Insurance and the Fund are disproportionate to any credible showing of need.

The hailstorm of discovery motions in this case is indicative of a discovery process run amok. The Board has had to spend its limited resources reading long, hopelessly repetitive, and at times entirely unhelpful motions and responses from the parties. It is precisely these types of practices that result in costly, protracted litigation, endlessly delaying the resolution of cases. The goal of the Act 2 process is an efficient and comprehensive cleanup of contaminated sites, and we take the achievement of that goal very seriously. The Board has a duty to resolve cases in a timely fashion. *DEP v. EQT Prod. Co.*, 2014 EHB 797, 799-800; *Pa. Game Comm'n v. DEP*, 2013 EHB 478, 483. We are resolved to do so here. We issue the Order that follows.[6]

[6] Tri-Realty says that the College, the Fund, and PA Insurance failed to make a good faith effort to confer about the possible resolution of the discovery dispute as required by our rules. 25 Pa. Code § 1021.93(b). Accordingly, Tri-Realty asks that we deny the motions on account of the disregard for our rules. While we are not discounting the importance of the meet and confer requirement, at this point we will exercise our discretion to not deny the motions due to a failure to comply with this requirement. We do take notice of it, however, much like we took notice of ICF International's errant reply brief in one of our prior Opinions—ICF International being represented by the same counsel as the Fund and PA Insurance. *See Tri-Realty Co. v. DEP*, slip op. at 3 (Opinion, Mar. 20, 2015). We anticipate counsel not letting such procedural deviations develop into a pattern that may warrant appropriate recourse. *See Borough of St. Clair v. DEP*, 2013 EHB 177, 184.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-REALTY COMPANY	:	
	:	
v.	:	**EHB Docket No. 2014-107-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and URSINUS COLLEGE, Permittee	:	

O R D E R

AND NOW, this 9th day of July, 2015, it is hereby ordered that the motions for protective orders and to quash subpoenas filed by Ursinus College, the Pennsylvania Insurance Department, and the Underground Storage Tank Indemnification Fund are **granted**.

ENVIRONMENTAL HEARING BOARD

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

DATED: July 9, 2015

c: **DEP, General Law Division:**
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For PA Insurance Dept. and USTIF (non-parties):
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(*via electronic mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WAYNE K. BAKER	:	
	:	
v.	:	**EHB Docket No. 2014-151-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC., Permittee	:	**Issued: July 10, 2015**

OPINION AND ORDER
ON MOTION FOR LEAVE TO AMEND NOTICE OF APPEAL
AND MOTION TO CONDUCT DEPOSITIONS

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Appellant's Motion for Leave to Amend Appeal is granted. We find no undue prejudice to the Department and Permittee since they were aware of the new allegations at least as early as March 2015. The Appellant's Motion to Conduct Depositions is granted in part and denied in part. The Appellant is granted leave to depose the Department's Bureau of Investigations Specialist, but the deposition is limited in length. The parties are also directed to supplement any written answers to interrogatories pertaining to the Appellant's allegations of disposal of oil and waste on the property in question.

O P I N I O N

This matter involves an appeal filed by Wayne K. Baker from the Department of Environmental Protection's (Department) approval of Stage I bond release for Amerikohl Mining, Inc. (Amerikohl). Amerikohl conducted surface mining on property owned by Mr. Baker in Springhill Township, Fayette County. A hearing on this matter is scheduled for August

26, 27 and 28, 2015. Prehearing memoranda have been filed. Supplemental prehearing memoranda are due on July 14, 2015 by Mr. Baker and on July 24, 2015 by the Department and Amerikohl.

Presently before the Pennsylvania Environmental Hearing Board (Board) is Mr. Baker's Motion for Leave to Amend Appeal and Motion to Conduct Depositions. Mr. Baker wishes to amend his appeal to add objections regarding the alleged disposal of waste oil and debris on his property by Amerikohl.[1] Mr. Baker's motion avers that in late February 2015 he investigated soil conditions on his property in a location where he witnessed the maintenance, staging and repair of equipment by Amerikohl. He retained American Geosciences, Inc. (AGI) to perform an investigation, which took place on February 25, 2015. AGI prepared a report of its findings on March 10, 2015, which was provided to the Department and Amerikohl on March 11, 2015. According to Mr. Baker, AGI's report indicates the presence of oil and debris. Mr. Baker also avers that the Department conducted an investigation of his property on April 22, 2015. He states that he simply wishes to amend his appeal to add these allegations in response to Amerikohl's intent to preclude evidence on this issue at trial. If he is granted leave to amend his appeal, Mr. Baker also seeks to conduct depositions of representatives of both the Department and Amerikohl.

The Department does not oppose Mr. Baker's request to amend his appeal, but requests that depositions be limited to one Department witness, Bureau of Investigations Specialist, Bruce Gearheart, and that such deposition be limited to one day. The Department also does not oppose the Board ordering the parties to update their prior written discovery responses. Amerikohl opposes both the motion to amend and the motion to conduct depositions. Amerikohl argues that

[1] Mr. Baker also wishes to amend his appeal to refer to Amerikohl as the "Permittee" instead of the "Applicant."

to allow an amendment of the appeal at this late date, slightly more than one month before the hearing in this matter and after the filing of pre hearing memoranda, amounts to undue prejudice. Amerikohl also opposes Mr. Baker's motion to conduct depositions for the same reasons. In the alternative, Amerikohl argues that any reopening of discovery should be limited to the alleged disposal of solid waste, and not any matters raised in the original notice of appeal,[2] and that Amerikohl should be permitted to depose Mr. Baker on this subject.

On July 7, 2015, Mr. Baker filed a reply to Amerikohl's response. In it he asserts that the AGI report, which was provided to Amerikohl on March 11, 2015, confirms the presence of oily waste and debris at the site. Therefore, Mr. Baker argues that Amerikohl is not prejudiced by allowing an amendment that simply articulates what he informed Amerikohl and the Department about in March. He further argues that Amerikohl could have conducted discovery into this matter months ago if it wanted additional information.

The Board's rules on amendment of an appeal are found at 25 Pa. Code § 1021.53. An appeal may be amended as of right within 20 days after its filing. *Id.* at § 1021.53(a). After the 20-day period for amendment as of right, the Board may grant leave for further amendment, guided by the following principle:

> This leave may be granted if no undue prejudice will result to the opposing parties. The burden of proving that no undue prejudice will result to the opposing parties is on the party requesting the amendment.

Id. at § 1021.53(b).

In assessing whether the parties opposing the amendment will suffer undue prejudice, the Board considers such factors as (i) the time when amendment is requested relative to other

[2] Amerikohl asserts that the issue of waste oil was raised in the original notice of appeal and discovery had already been conducted on this issue.

developments in the litigation (including but not limited to the hearing schedule); (ii) the scope and size of the amendment; (iii) whether the opposing party had actual notice of the issue (e.g. whether the issue was raised in other filings); (iv) the reason for the amendment; and (v) the extent to which the amendment diverges from the original appeal. *Rhodes v. DEP*, 2009 EHB 325, 328-29; *Upper Gwynedd Twp. v. DEP*, 2007 EHB 39, 42; *Angela Cres Trust v. DEP*, 2007 EHB 595, 601; *PennFuture v. DEP*, 2006 EHB 722, 726; *Robachele v. DEP*, 2006 EHB 373, 379; *Tapler v. DEP*, 2006 EHB 463, 465.

The Board has generally allowed amendment of an appeal where a hearing has not yet been scheduled or is months away and where the discovery period is still open or no additional discovery is needed with regard to the amendment. *See, e.g., Borough of St. Clair v. DEP*, 2013 EHB 171 (Board granted amendment of appeal to allow the addition of a "straightforward legal issue" requiring no additional discovery and where the hearing was months away); *Henry v. DEP*, 2012 EHB 324 (Board allowed amendment of an appeal where the appellant sought to amend her second appeal to bring it into line with her first appeal and where discovery was still ongoing and no hearing had been scheduled); *Wallace Township v. DEP*, 2002 EHB 870 (Board allowed amendment of appeal where discovery was still ongoing and the proposed amendment had been addressed in discovery).

The Board has denied motions for leave to amend an appeal where the request comes late in the proceeding. *See, e.g., Starr v. DEP*, 2002 EHB 799 (Board denied motion to amend appeal where discovery had been closed for one month, after being extended several times, and amendment of appeal would have required the reopening of discovery); *Delaware Riverkeeper v. DEP*, 2003 EHB 603 (Where motion for leave to amend appeal was filed one month before the

close of discovery, the Board granted the motion to add new legal objections, but denied the motion to add new factual grounds on the basis that it would require additional discovery).

Here, Mr. Baker filed his motion for leave to amend his appeal approximately two months prior to the start of trial. Taking into account the filing time for the Department's and Amerikohl's responses and Mr. Baker's reply, we are now only six and a half weeks from the start of trial. Mr. Baker argues, however, that both the Department and Amerikohl were well aware of the allegation of solid waste disposal months ago, as it had been brought to their attention in March 2015. Therefore, he argues that there is no undue prejudice or element of surprise in adding the objection to his appeal at this time.

Although we are normally reluctant to allow the amendment of an appeal to add new factual grounds at such a late stage in the proceeding, we find that there is no undue prejudice to the Department or Amerikohl to allow the amendment. The Department does not oppose the amendment, and both the Department and Amerikohl have been aware of this allegation since at least March. Therefore, we will grant Mr. Baker's motion for leave to amend his notice of appeal to add the allegations set forth in his motion.

With regard to Mr. Baker's motion to conduct depositions, we agree with both the Department and Amerikohl that any reopening of discovery should be limited. The parties should supplement, as necessary, any responses to written discovery pertaining to Mr. Baker's allegations of oil and solid waste disposal. Pa. R.C.P. 4007.4(3). Additionally, the Department has agreed to produce Bruce Gearheart for deposition. We agree with the Department that Mr. Gearheart's deposition should be limited in length. Mr. Gearheart may be deposed regarding Mr.

Baker's allegations of disposal of both waste oil and solid waste.[3] If the parties wish to work out an agreement to depose additional individuals, they are free to do so.

We enter the following Order.

[3] We understand Amerikohl's concern that any deposition conducted at this late stage of the proceeding should be limited to the new allegations raised in the amended notice of appeal. However, we find that it would be difficult to separate the topic of waste oil disposal from that of solid waste disposal and, therefore, we will allow questions on both topics, but will limit the duration of the deposition.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WAYNE K. BAKER	:	
	:	
v.	:	**EHB Docket No. 2014-151-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC., Permittee	:	

O R D E R

AND NOW, this 10th day of July, 2015, it is hereby **ORDERED** as follows:

1) Mr. Baker's Motion for Leave to Amend Appeal is **granted.**

2) On or before **July 24, 2015**, the parties are directed to supplement their answers to written discovery regarding the allegations of oil and solid waste disposal.

3) Mr. Baker's Motion to Conduct Depositions is granted in part and denied in part. Mr. Baker is granted leave to depose Bruce Gearheart for a period not exceeding 5 hours. The Department and Amerikohl are allotted up to one hour each for follow up questions.

4) The scope of Mr. Gearheart's deposition is limited to the allegations of disposal of waste oil and solid waste on the property in question.

5) The dates for filing supplemental prehearing memoranda are extended as follows: Mr. Baker shall file a supplemental prehearing memorandum on or before **August 6, 2015.** The Department and Amerikohl shall file supplemental prehearing memoranda on or before **August 13, 2015**.

6) Motions in limine, if any, shall be filed on or before **August 20, 2015.**

ENVIRONMENTAL HEARING BOARD

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

DATED: July 10, 2015

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

MERCK SHARP & DOHME CORP.	:	
	:	
v.	:	**EHB Docket No. 2015-011-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 14, 2015**
	:	

OPINION AND ORDER ON
MOTION FOR PARTIAL DISMISSAL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion for partial dismissal because the Department's disapproval of a permittee's PPC Plan in connection with its issuance of an NPDES permit to the permittee is a final, appealable action.

O P I N I O N

Merck Sharp & Dohme Corp. ("Merck") filed this appeal of the Department of Environmental Protection's (the "Department's") issuance to it of an industrial stormwater NPDES permit for its manufacturing facility in West Point, Montgomery County, as well as some of the decisions memorialized in the Department's letter covering the permit. In connection with its permit application, Merck sought permission to revise its Preparedness, Prevention and Contingency Plan ("PPC Plan"). To be precise, Merck's PPC Plan, which it must maintain pursuant to the stormwater permit, is incorporated into its preexisting Environmental Emergency Response Plan ("EERP"), which is Merck's omnibus effort to comply with all of the

various environmental regulations requiring plans for addressing unintended pollution incidents. Therefore, Merck actually sought permission to revise its EERP.

Our attention at the moment is focused on the cover letter enclosing the permit. The Department's letter among other things said, "The revised EERP does not comply with [25 Pa. Code] § 91.33 and, therefore, the Department cannot approve it." Merck's appeal includes objections to this disapproval. The Department asks us to dismiss Merck's appeal of this disapproval, arguing that the disapproval is a nonappealable action.

The Board evaluates motions to dismiss in the light most favorable to the nonmoving party and we will only grant the motion when the moving party is clearly entitled to judgment as a matter of law: "Rather than comb through the parties' filings for factual disputes, for purposes of resolving motions to dismiss, we accept the nonmoving party's version of events as true." *Consol Pa. Coal Co. v. DEP*, EHB Docket No. 2014-027-B, slip op. at 8-9 (Opinion, Feb. 12, 2015). Thus, "[a]s a practical matter, whether or not there are 'factual disputes' on the record is irrelevant with respect to a motion to dismiss, because the operative question is: even assuming everything the nonmoving party states is true, can—or should—the Board hear the appeal?" *Id*. *See also, South v. DEP*, EHB Docket No. 2014-082-L, slip op. at 4 (Opinion, Apr. 16, 2015); *L.A.G. Wrecking, Inc. v. DEP*, EHB Docket No. 2014-126-C, slip op. at 3 (Opinion, May 29, 2015). Motions to dismiss will be granted only when a matter is free from doubt. *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Res., LP v. DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511.

Our initial hesitancy with the Department's motion is that we are not entirely sure that the Department's issuance of the NPDES permit and its rejection of Merck's revised EERP should be treated as if they were separate Department actions such that it is even possible to dismiss the

plan rejection separately on jurisdictional grounds. It might just as easily be said that they were a package deal. They were two parts of the same action. The Department performed one comprehensive review that included both the permit application and the proposed EERP. Although it is early in the case, it is our sense that there may even have been some overlap between the issues implicated in the two components of the Department's review. Certainly, the Department acted on both things together and at the same time and issued one letter to address both topics. Its disapproval is buried in with its various other responses to Merck's comments regarding the draft permit. The two determinations seem to be closely related.

Merck must have a PPC plan in place in order to get a permit. The Department's disapproval of Merck's revised EERP had the effect of leaving Merck's existing EERP in place. It is not clear whether its permit would have been issued without that plan being in place. (*See* Permit, Part C.II.B and 25 Pa. Code § 91.34.) Although the Department says it is not required to approve PPC plans, clearly it believes that it has the authority to disapprove them. Indeed, the permit contains detailed requirements for what must be in a PPC plan. (Permit, Part C.II.B.) Failure to comply with a PPC plan would doubtless support an enforcement action. To separate the Department's simultaneous determinations regarding the permit and the plan in this case seems rather artificial. We will resolve our doubts regarding this question in favor of Merck and conclude that the plan disapproval is not separately dismissible on jurisdictional grounds, which means that the Department's motion must be denied.

Assuming for purposes of a complete discussion that we should address the appealability of the EERP disapproval as a separate action, we end up at the same place: the Department's motion must be denied. We take a multifactorial approach to determining whether Departmental letters are appealable. Among other things, we consider the wording of the letter; the substance,

meaning, purpose, and intent of the letter; the practical impact of the letter (with an eye to what actions a reasonably prudent recipient of the letter would take in response to the letter); the regulatory and statutory context of the letter; the apparent finality of the letter; what relief the Board can offer (i.e. the practical value of immediate Board review); and any other indicia of a letter's impact upon its recipient's personal or property rights. *Borough of Kutztown v. DEP*, 2001 EHB 1115. The Board and the Commonwealth Court have issued a myriad of decisions on whether a particular letter is appealable, and we will not pretend that all of those decisions are perfectly consistent. Where decisions are made on a case-by-case basis based on the individual facts and circumstances of each case, some inconsistency is perhaps inevitable. Ultimately, we ask whether a Department action adversely affects a person. 35 P.S. § 7514(c). In this case, we are satisfied that the portion of the Department's letter that is the subject of its partial motion to dismiss is appealable.

Even if we treat the permit approval and the EERP disapproval as separate actions, the fact that the Department took the two actions together weighs heavily in Merck's favor. This is not a case where a party tried to manufacture jurisdiction by asking for an advisory opinion wholly outside of the formal regulatory process, which is generally not allowed. *Perano v. DEP*, 2011 EHB 587. *See also Sayreville Seaport Assoc. Acq. Co. v. Dep't of Envtl. Prot.*, 60 A.2d 867, 872 (Pa. Cmwlth. 2012); *Pickford v. Dep't of Envtl. Prot.*, 967 A.2d 414, 420 (Pa. Cmwlth. 2008). As previously mentioned, it appears that Merck's application for a permit and proposed EERP revisions were reviewed as a package and acted upon as a package within the formal regulatory process for permit reviews. The fact that the Department may not ordinarily review PPC plans does not mean that it lacks the authority to do so if it chooses and that it exercised that

authority in this case. By attaching its determination to the final permit action, the plan disapproval took on a finality of its own.

We have repeatedly held that we will limit our review to *final* Department actions. In the permitting context this means we will not review the many interlocutory decisions the Department makes during the process of reviewing permit applications. *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747. In the enforcement context this means we will typically not review Notices of Violation (NOVs) or threats of future enforcement. *Borough of Glendon v. DEP*, 2014 EHB 201. Here, there is nothing provisional about the Department's disapproval of Merck's proposed PPC Plan. To the contrary, it appears definitive and final.

The Department relies on our decision in *Corco Chemical Corp. v. DEP*, 2005 EHB 733, where we held that a Department letter requesting more information before the Department would act on a party's Spill Prevention Response Plan was not appealable. However, other than the fact that both this case and that case involved plans, the two cases have little in common. The key fact in *Corco* was that the letter did not represent a final decision on the plan. Rather, it was a letter telling *Corco* that its proposed plan was incomplete. The letter deferred final action pending receipt of additional information.[1] Here, in stark contrast the Department did not say Merck's plan was incomplete. It did not say the Department needed more information. Rather, it clearly stated that the plan cannot be approved. It rejected the revised plan on its merits. It allows for no recourse or review.

The Department says that Merck must wait until the Department takes an enforcement action regarding the PPC Plan before Merck may pursue an appeal. We have always been troubled by the notion that a person should be forced to intentionally violate the law to have

[1] Furthermore, unlike in this case, the Department was not reviewing the proposed plan in connection with a pending permit application. The plan in *Corco* was a stand-alone document required for aboveground tank facilities. *See* 35 P.S. § 6021.901.

appeal rights, but putting that aside, this case involves the Department's disapproval of a legally required document. The Department's disapproval has an immediate effect on Merck. Effective immediately, Merck must comply with its existing EERP instead of its revised plan. There is no practical difference between Merck's obligation to maintain and comply with its EERP and its obligation to comply with the permit itself, yet the Department has not suggested that Merck must deliberately violate its permit and wait for an enforcement action in order to challenge some of the terms of the permit. Nor would we take such a suggestion seriously. The Department's attempt to distinguish between Merck's duty to comply with the EERP and the permit itself is unconvincing.

The Department says that its disapproval requires no action and imposes no obligation on Merck. This language is taken from the *Sayreville* case, where the court said that a Department letter is not appealable if it does not direct any action or impose any obligations **or** grant or deny a pending application or permit. *Sayreville*, 60 A.3d at 872. Obviously, a permit denial does not impose any new obligations, but it is just as obviously an appealable action. Disapproval of Merck's EERP is no different. Along the same lines, a plan disapproval is appealable even though it does not change the status quo.

This Board is clearly in a position at this point to offer meaningful relief. Quite simply, we could, if we find that the Department erred, approve Merck's revised plan. The Department characterizes its disapproval as merely describing its interpretation of the law, but as Merck aptly responds, the Department's citation to legal authority does not convert its disapproval into a mere legal interpretation. The Department finds it notable that Merck did not appeal the permit requirement that there must be a PPC plan, but Merck points out that it has no objection to the

requirement that it prepare a plan. Its dispute with the Department concerns the details of that plan.

We are somewhat perplexed by the Department's statement that the EERP does not create an independent legal obligation. In other words, a permittee is not required to follow its own PPC plan so long as it does not violate any regulations regarding spills. Since compliance is completely optional, and Merck's obligation is to comply with the regulations, there is no new obligation and no appealable action. This is not unlike arguing that Merck's duty to refrain from pollution is really a statutory and regulatory requirement, so compliance with the NPDES permit terms is optional and the permit does not create any new obligations. The Department's argument is devoid of merit. The EERP defines how Merck must address spills. Merck must comply with its permit and its permit expressly requires Merck to not only have a plan but to *implement* it as well. (Permit, Part C. II. B.)

In sum, the criteria that we commonly employ to assess appealability weigh heavily in favor of retaining jurisdiction. Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MERCK SHARP & DOHME CORP.	:	
	:	
v.	:	**EHB Docket No. 2015-011-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 14th day of July, 2015, it is hereby ordered that the Department's motion for partial dismissal 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: July 14, 2015

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Alison Lecker, Esquire
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-REALTY COMPANY	:	
	:	
v.	:	**EHB Docket No. 2014-107-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and URSINUS COLLEGE, Permittee	:	**Issued: July 17, 2015**

OPINION AND ORDER ON
MOTION TO COMPEL DEPOSITIONS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants in part a motion to compel depositions. Although the information sought appears to have very limited relevance, the incremental burden of allowing most of the discovery is slight when compared to the efforts already expended by the parties.

O P I N I O N

Tri-Realty Company ("Tri-Realty") has appealed the Department of Environmental Protection's (the "Department's") approval of a Remedial Investigation Report ("RIR") submitted by Ursinus College pursuant to the Land Recycling and Environmental Remediation Standards Act ("Act 2"), 35 P.S. §§ 6026.101 – 6026.908, following the release of a quantity of Number 6 fuel oil from two underground storage tanks on the Ursinus College campus, located in Collegeville, Montgomery County. Tri-Realty owns the College Arms Apartments, a property adjacent to the College that comprises approximately ten acres and houses around 350 individuals. There is no dispute that the release of the oil contaminated the College Arms property, and Ursinus College has voluntarily taken on the responsibility for cleaning it up.

When persons such as the College elect to undertake a site-specific cleanup under Act 2, they must submit a series of reports to the Department for review and approval. 35 P.S. § 6026.304(l). Although multiple reports may be submitted at once, 35 P.S. § 6026.304(l)(5), the RIR is the first report to be composed. An RIR essentially consists of a detailed site characterization. Act 2 and its corresponding regulations detail what is to be included in the RIR. 35 P.S. § 6026.304(l)(1); 25 Pa. Code § 250.408. An RIR is followed by a risk assessment report, if necessary, a cleanup plan, and a final report. 35 P.S. § 6026.304(l). The Department's approval of an RIR is an appealable action. 35 P.S. § 6026.308. Tri-Realty believes that the Department erred by approving the RIR submitted by the College. Tri-Realty describes in its notice of appeal a number of aspects of the RIR that it believes are inadequate, including that the investigation did not adequately define the extent of contamination on Tri-Realty's property. Tri-Realty argues that the Department should have required additional investigation before approving the RIR.

Tri-Realty has served Ursinus with notices of deposition for a corporate designee of Ursinus and two former employees of Ursinus. Tri-Realty's notice of deposition concerning Ursinus's designee identified several matters to be inquired into. Ursinus agreed to produce a designee to testify on some of the matters, but refused to produce a designee to testify regarding the following subject matters:

> 1. The investigation before, on and after February 5, 2004 of the releases of No. 6 fuel into the environment from two 20,000-gallon underground storage tanks USTs formerly operated by Ursinus (the "Ursinus' USTs").
> 3. All meetings and/or communication between representatives of Ursinus and any representatives of . . . [the] Pennsylvania Department of Insurance, Underground Storage Tank Indemnification Fund or ICF International concerning the investigation or remediation by Ursinus of releases of No. 6 fuel oil to the environment.

10. Ursinus' historical use of No. 6 oil in Ursinus's USTs.

Tri-Realty also served a notice of deposition scheduling the deposition of Ursinus's former Director of Physical Facilities, Frederick Klee. From as early as 1995 through the initial discovery and investigation of Ursinus's releases of No. 6 oil until 2005, Frederick Klee apparently served in that role. Klee is said to be familiar with the USTs. Tri-Realty believes that Klee personally discovered the leak(s) and has knowledge of the duration of the leaks, the excavation made for the new USTs which replaced the failed Ursinus USTs, and the volume of oil that entered the excavation pit.

Tri-Realty also served a notice of deposition scheduling the deposition of Ursinus's former Physical Plant Supervisor, Rick Porter. Tri-Realty believes that Porter measured the oil in the USTs, knew whether the USTs had a leak detection system, and knew the history of the oil in the USTs and the oil's characteristics. Porter apparently also has personal knowledge regarding the leaks.

Ursinus objects to the deposition of a designee on the subjects noted above and to producing the former employees to testify on any subjects. The College complains that Tri-Realty is taking too many depositions. It argues that Tri-Realty already possesses enough information and the additional depositions are intended to and in fact will cause unreasonable burden, annoyance and expense for the College. It says that information concerning the use of oil at the College and the timeliness of the College's investigation and reporting of a release are irrelevant to the matter at issue in this appeal and is improperly sought for use in other proceedings. It says that Tri-Realty is attempting to establish a record that the College failed to timely investigate or report releases of No. 6 oil from its USTs to either use in its federal case or as part of its ongoing efforts to undermine the College's USTIF coverage. It says that the amount of oil and its constituents released from the USTs that remains in the subsurface cannot

be ascertained or estimated with any accuracy, and attempting to perform an inventory reconciliation is not necessary for the proper site characterization to be performed or for a remediation to proceed. Moreover, it is not necessary to know the volume or the timeliness of the College's reporting of a release to properly investigate the site and evaluate and address the impacts of the releases. The College says that the value of any information in the hands of the ex-employees would be outweighed by the burden and expense to the College of having the depositions proceed, particularly given the information Tri-Realty already possesses and the amount of other deposition discovery it has already taken and continues to conduct.

Tri-Realty counters that the effort is worth the cost. It says that Klee and Porter and perhaps another designee are the most knowledgeable about the events from eleven years ago and before that, and that a better understanding of the historical background will help it attack the accuracy of the RIR. It notes that Klee and Porter may be the only individuals with good first-hand knowledge of the events immediately surrounding the leaks and the College's use of the tanks.

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. However, no discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense with regard to the person from whom discovery is sought. Pa.R.C.P. No. 4011.

As a general rule, the Board has been liberal in allowing discovery that is either directly related to the contentions raised in the appeal or is likely to lead to admissible evidence that is

related to the contentions raised in the appeal. *Consol Pa. Coal Co. v. DEP*, EHB Docket No. 2014-110-R, slip op. at 2 (Opinion, Jul. 6, 2015); *Haney v. DEP*, 2014 EHB 293, 296-97. "[T]he Board is charged with overseeing ongoing discovery between parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205. Our charge is the same with respect to discovery sought from nonparties.

The Board authorizes parties to serve subpoenas in accordance with the applicable Rules of Civil Procedure. 25 Pa. Code § 1021.103. Under the Rules, a party may obtain through subpoena on a nonparty any documents that are normally within the scope of discovery under Rules 4003.1 – 4003.6. Pa.R.C.P. No 4009.7(a). Parties may also request the deposition of nonparties via subpoena. Pa.R.C.P. No. 4007.1. Any party or interested person may seek a protective order from the subpoena under Rule 4012. Pa.R.C.P. No. 4009.21(d)(2).

As we recently said in another Opinion in this case (Opinion, July 9, 2015), discovery before the Board is governed by a proportionality standard. Discovery obligations must be "consistent with the just, speedy and inexpensive determination and resolution of litigation disputes." 2012 Explanatory Comment Prec. Rule 4009.1, Part B. The proportionality standard requires us to consider the following factors:

(1) The nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake;

(2) The relevance of the information sought and its importance to the Board's adjudication in the given case;

(3) The cost, burden and delay that may be imposed on the parties to deal with the information;

(4) The ease of producing the information and whether substantially similar information is available with less burden; and

(5) Any other factors relevant under the circumstances.

See id. To a large extent, the proportionality standard is merely a restatement of the general principle that discovery must relate to information that is relevant and reasonably calculated to lead to the discovery of admissible evidence, and it must not be sought in bad faith or cause unreasonable annoyance, embarrassment, oppression, burden or expense. Pa.R.C.P. No. 4003.1, 4011; *Haney,* 2014 EHB at 296-97.

Turning to the first factor, the nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake, Tri-Realty says this is a highly complex case. Tri-Realty has every incentive to make it *seem* like a complex case in order to justify the amount of discovery it is taking, but we are not so sure that it really is. It undoubtedly involves review of a lengthy technical study, but unlike some other contamination cases, we are not told that there are any issues of causation here. The basic source and nature of the contamination is well known. The contaminant at issue is fuel oil. The College has voluntarily agreed to clean it up. The objective of a site characterization is not to attain perfect knowledge, but to form the basis for a reasoned, efficient, effective cleanup. Cleanup options for oil contamination are well established and do not involve rocket science, as far as we know.

Tri-Realty next says that this appeal is extremely important to it because (a) its property is contaminated and it wants to see it properly cleaned up, and (b) the College is seeking an Act 2 release from liability. With respect to the latter, we are not sure an Act 2 release will preclude Tri-Realty from continuing to sue the College for damages in tort. With respect to the former, Tri-Realty's actions belie its words. Its conduct in this case does not give the impression that it

is sincerely interested in working toward a mutually beneficial cleanup. Among other things, we have found it to be striking that Tri-Realty claims that there are not enough monitoring wells supporting the RIR, yet it has blocked the College's offer to drill more wells. *See Tri-Realty Co. v. DEP*, EHB Docket No. 2014-107-L (Opinion, Jul. 7, 2015). In a new twist, Tri-Realty now specifically complains to us for the first time that there are no wells in Bum Hollow Ravine. (Reply at 4.) We fail to see how this has anything to do with its proposed depositions. Rather, the point appears to be directed at our expression of confusion and surprise in our earlier Opinions that Tri-Realty at once argues before this Board that there are not enough wells and that it is sincerely interested in having its property cleaned up, and at the same time strenuously argues that the College should not be allowed to install more wells. Tri-Realty now says it actually "wants *more than* two additional wells installed." (Reply at 8 (emphasis original).) However, Tri-Realty's opposition to the College's proposal to install two more wells was absolute and based entirely on legalistic grounds. Tri-Realty did not point to specific defects in the well proposal or say that two more wells were not enough. It demonstrated no interest in working cooperatively in general or negotiating with the College regarding its proposal in particular. Tri-Realty adds that it wants "soil sampled and surface water analyzed *properly.*" (*Id.* (emphasis original).) We fail to see how this accounts for its inconsistent position regarding the wells, and all of this seems beside the point of the motion at hand. Indeed, it is emblematic of this case that Tri-Realty felt a need to file a reply memorandum in support of a discovery motion.

With respect to the importance of this case more generally, we believe that it is important that this site gets cleaned up efficiently and effectively, and that the worthy goals of the Act 2 program are not stymied by unnecessarily protracted litigation at every stage of the cleanup

process. Act 2 is designed to create incentives to clean up sites quickly. *See* 35 P.S. § 60263102(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 [Protection] which frequently only serve to delay cleanups and increase their cost.") The success of this legislation is premised upon the release of liability following the completed remediation of the site. 35 P.S. § 6026.501. Smothering litigation not only runs counter to the goal of avoiding delays and increased cleanup costs, it also risks vitiating the willingness of persons to voluntarily participate in the Act 2 program. While we are not saying that each of the steps in the Act 2 process is not important and deserving of scrutiny, we believe that protracted litigation over the various reports runs counter to Act 2's goal of encouraging voluntary cleanup of sites while ensuring the protection of public health and the environment. 35 P.S. § 6026.102(2) and (3). There are at least two more reports that the College must submit to the Department. We fear that years of litigation surrounding each report will mean that the site will never be cleaned up.

The next step in applying the proportionality standard is to evaluate the relevance of the information and its importance to the adjudication. Our role in this appeal is to determine whether the Department's approval of the College's RIR was lawful, reasonable, and supported by the facts. *Solebury School v. DEP*, 2014 EHB 482, 519. Tri-Realty believes that it needs to explore the history of the site from eleven years ago and before that to see if the College accurately characterized the site's history in the RIR. What Tri-Realty fails to tell us is how this background information will inform the cleanup. Tri-Realty would have us treat the RIR in isolation and as if it is an end in itself, but we are having difficulty buying into that view, at least for purposes of resolving this discovery dispute. What ultimately matters is whether the RIR is

adequate to form a reasoned basis for choosing among cleanup strategies. We do not doubt that a certain amount of historical perspective is helpful and that the sought after depositions could add to that perspective, but at some point the effort to uncover historical information in perfect detail becomes disproportionate to the issues at stake. "Striving to better, oft we mar what's well." WILLIAM SHAKESPEARE, KING LEAR.

Tri-Realty says the longer No. 6 oil remains in the environment, the more toxic it becomes. If this is true, we would think Tri-Realty would want to show more in the way of cooperation in allowing an expeditious cleanup, but putting that aside, Tri-Realty does not explain how this alleged increased toxicity affects the choice of cleanup options. Furthermore, we would think that the best information regarding the characteristics of the oil would come from samples of the oil. Tri-Realty has not explained how the ex-employees' background will add value to, or is an adequate substitute for, such sampling.

Tri-Realty tells us that No. 6 oil is mostly insoluble. It tells us that separate phase oil needs to be cleaned up. It tells us that No. 6 fuel oil contamination is rare on residential properties. It tells us No. 6 oil may have been mixed with No. 2 oil. What it does not tell us is why any of this helps us decide whether the RIR is reasonably able to serve as a sound basis for designing and implementing a cleanup. The former employees may know whether No. 6 oil was cut with No. 2 oil, but Tri-Realty does not explain how that knowledge will assist in choosing between cleanup option A or cleanup option B. Maybe we will be enlightened down the road, but we must make a prediction of relevance now in order to resolve the motion and Tri-Realty has given us little to go on.

With respect to communications between the College and the Insurance Department, the Tank Indemnification Fund, and ICF International, as we explained in our recent Opinion in this

case, much of what Tri-Realty is seeking we think is bordering on the inconsequential to proceedings under Act 2. *Tri-Realty Co. v. DEP*, EHB Docket No. 2014-107-L, slip op. at 12 (Opinion, Jul. 9, 2015). Under Act 2, how we got to the point at which we find ourselves is not as crucial. Instead, Act 2 is more forward-looking. It involves the assessment of the of the contamination as it exists, the evaluation of what is likely to happen in the future, and the proposal of how to clean it up. Inquiries into how spills happen are generally only relevant insofar as they may shed light on the nature, extent, and concentration of a contamination event. Inquiries into conditions before a spill are generally only relevant insofar as they can be used to establish background conditions, an aspect of Act 2 that is not implicated in the site-specific cleanup that is being undertaken by the College in this matter. The fact that Act 2 does not place any time limits on when one may volunteer to undertake an Act 2 cleanup speaks to the diminished importance of considerations such as exactly when the release happened and what measures were taken to discover it. The important consideration under Act 2 is that a release was discovered and now the responsible party must determine the extent of the release and how to proceed with a cleanup.

Turning to the third and fourth prongs of the proportionality standard—the cost, burden, and delay that may be imposed on the parties to produce the information, and the ease of producing the information and whether substantially similar information is available with less burden—it is important to point out that again Tri-Realty is, in part, seeking discovery from *nonparties*. Neither Klee nor Porter is still employed by the College, and neither has any stake or interest in this appeal as far as we know. Klee left the College ten years ago. Discovery pursuant to a subpoena is obviously available from nonparties, but the fact that they are nonparties is a relevant consideration when we apply the proportionality standard. In contrast,

with respect to the College's corporate designee, the College has not pointed to any significant added burden by allowing the inquiry into the three disputed topics.

We appreciate the College's concern that there has already been a massive amount of discovery in this case, but to some extent that cuts both ways because the College has done little to object until recently and has even sought to conduct additional discovery of its own. The incremental effort demanded by Tri-Realty's request at issue here does not seem that great. We also agree with Tri-Realty that to the limited extent historical information is relevant in this case, the deponents could offer a unique perspective based on personal knowledge that has not been shown to be available elsewhere. As previously mentioned, resolving the parties' discovery disputes requires us to make preliminary predictions regarding potential relevance. Those predictions should not be viewed as binding in any way when it comes to adjudicating the appeal on the merits, and because they are only predictions, we tend to err on the side of allowing the discovery where the burden is not great.

The fifth part of the proportionality standard is "other relevant factors." We think that other relevant factors include the extent to which the parties tried to resolve not only the discovery issue on their own, but in some situations, the parties' good faith efforts to resolve the case in its entirety. We may also wish to consider the extent to which the discovery will delay further proceedings. Tri-Realty has shown that it conferred in good faith on the discovery issue itself, and limited additional depositions do not threaten to result in any delay in moving toward the hearing on the merits, which will begin on December 7. On the other hand, the goal of the Act 2 process is an efficient and comprehensive cleanup of contaminated sites, and we take the achievement of that goal very seriously. We have not seen any evidence that the parties do as well. The amount of time and resources that are being devoted to litigation instead of working

toward a practical compromise in this case is unfortunate. The Board has a duty to resolve cases in a timely fashion. *DEP v. EQT Prod. Co.*, 2014 EHB 797, 799-800; *Pa. Game Comm'n v. DEP*, 2013 EHB 478, 483. This case is already one year old. It is not entirely clear why it has taken a year to get to this point. If the cleanup has stalled out, it may be at least in part because of the pendency of this appeal.

In summary, the extremely low value of information regarding communications between the College and the Insurance Department, the Fund, and ICF that we perceive in this appeal precludes us from granting Tri-Realty's motion to compel a corporate designee to testify regarding that information. Although the historical information that is to be the subject of the designee's deposition has not been shown by Tri-Realty to have much relevance, the College has failed to describe much in the way of added burden, so we will allow it. With respect to the former employees, we are also faced with a case of low value but also relatively low burden when compared to the amount of other discovery that neither the College nor the Department objected to. Accordingly, the College's objection to that discovery is overruled. Of course, as nonparties the former employees need to be subpoenaed, and the College retains the right to object if the depositions go on too long or are scheduled at a time or place that is inconvenient to the witnesses.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-REALTY COMPANY	:	
	:	
v.	:	**EHB Docket No. 2014-107-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and URSINUS COLLEGE, Permittee	:	

O R D E R

AND NOW, this 17th day of July, 2015, in consideration of Tri-Realty's motion to compel and Ursinus's objections to the discovery that is the subject of the motion, it is hereby ordered that the motion is granted in part and denied in part. Tri-Realty may not inquire further into communications with the Pennsylvania Department of Insurance, the Underground Storage Tank Indemnification Fund, or ICF International. The College's objection to the other discovery is overruled without prejudice to its right to object to the duration of the depositions. This Order does not excuse the service of subpoenas if necessary.

ENVIRONMENTAL HEARING BOARD

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

DATED: July 17, 2015

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STANLEY N. BOINOVYCH	:	
	:	
v.	:	**EHB Docket No. 2015-090-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 6, 2015**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants the Department's motion to dismiss the appeal of an assessment of civil penalty where the appeal was filed more than 30 days after the appellant received the assessment.

O P I N I O N

The Department of Environmental Protection (the "Department") issued an assessment of civil penalty to Stanley N. Boinovych for the alleged disposal of construction/demolition waste and municipal waste on his property. On June 25, 2015, Boinovych sent a document titled "Notice of Appeal" to the Department instead of to the Board. The Department transmitted the document to the Board for filing on the same day that the Department received it. Four days later, the Department filed a motion to dismiss. Boinovych did not respond to the Department's motion.

The Board is receptive to 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. *Brockley v. DEP*, EHB Docket No. 2014-092-L, slip op. at 1 (Opinion, Apr. 3, 2015); *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. Motions to dismiss will only be granted when a matter is free from doubt when viewed in the light most favorable to the nonmoving party. *Brockley, supra*; *see also Hanover Twp. v. DEP*, 2010 EHB 788, 789-90; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Cooley v. DEP*, 2004 EHB 554, 558. Where, as here, an appellant does not respond to a motion, we deem all properly pled and supported facts in the motion to be true. 25 Pa. Code § 1021.91(f); *L.A.G. Wrecking, Inc. v. DEP*, EHB Docket No. 2014-126-C, slip op. at 3 (Opinion, May 29, 2015); *Tanner v. DEP*, 2006 EHB 468, 469; *Gary Berkley Trucking, Inc. v. DEP*, 2006 EHB 330, 331-32.

We are presented with the following facts. On April 28, 2015, the Department sent the assessment of civil penalty via first class and certified mail to Boinovych at his residence in Cumberland, Maryland. Boinovych did not sign for the certified mail. On May 7, 2015, the Department sent the assessment to Boinovych via email and received confirmation that the email had been completed. On May 18, 2015, the Department personally served Boinovych at his residence at which time he signed a receipt and acknowledged to Department personnel that he had received and read the previously transmitted email. Because the filing of the appeal on June 25 came more than 30 days later than even the most recent service on Boinovych, the Department now moves to dismiss the appeal for untimeliness.

The Board's rules provide for a distinct time frame in which an appeal must be filed. Section 1021.52 of our rules provides in relevant part:

> (a) Except as specifically provided in § 1021.53 (relating to amendments to appeal or complaint), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, unless a different time is provided by statute:

> (1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.

25 Pa. Code § 1021.52(a)(1).

As we explained in *GEC Enterprises v. DEP*, 2010 EHB 305, 311, and again in *Brockley*, *supra*, slip op. at 2-3, Pennsylvania courts have long held that the failure to timely appeal an administrative agency's action is a jurisdictional defect that mandates the quashing of the appeal. *See Seneca Landfill, Inc. v. Dep't of Envtl. Prot.*, 948 A.2d 916, 922 (Pa. Cmwlth. 2008); *Falcon Oil Co., Inc. v. Dep't of Envtl. Res.*, 609 A.2d 876, 878 (Pa. Cmwlth 1992); *Pennsylvania Game Comm'n v. Dep't of Envtl. Res.*, 509 A.2d 877, 886 (Pa. Cmwlth. 1986), *aff'd*, 555 A.2d 812 (Pa. 1989); *Rostosky v. Dep't of Envtl. Res.*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *Damascus Citizens for Sustainability v. DEP*, 2010 EHB 756, 758; *Weaver v. DEP*, 2002 EHB 273, 276. The untimeliness of an appeal, even if only slightly overdue, deprives the Board of jurisdiction over the appeal and operates as a waiver of all legal rights to contest the violation or the penalty. *See, e.g., Damascus Citizens for Sustainability*, 2010 EHB at 758 (appeal dismissed because it was filed one day too late); *Spencer v. DEP*, 2008 EHB 573, 575 (same); *Tanner v. DEP*, 2006 EHB 468, 469 (dismissing an appeal of a compliance order where the appeal was filed 32 days after receipt of the order); *Hanover Twp.*, 2010 EHB at 791 (dismissing appeal of administrative order where the appeal was filed 36 days after receipt of the order); *Weaver*, 2002 EHB at 279 (dismissing appeal where notice of appeal was filed 41 days after the delivery of a civil penalty assessment to the appellant's residence).

Here, Mr. Boinovych was notified of the Department's assessment by certified mail on April 28, 2015, by email on May 7, 2015, and again in person on May 18, 2015. His appeal did not reach the Board until June 25, 2015. If it was assumed, *arguendo*, that Mr. Boinovych

lacked notice by way of both certified mail and email, a deadline set at 30 days after the event of personal service was June 17, 2015. In this, his best case scenario, Mr. Boinovych's appeal was still eight days tardy.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STANLEY N. BOINOVYCH	:	
	:	
v.	:	**EHB Docket No. 2015-090-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 6th day of August, 2015, it is hereby ordered that the Department of Environmental Protection's motion to dismiss is **granted**. This appeal is **dismissed** for lack of jurisdiction.

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 6, 2015

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

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

For Appellant, *Pro Se*:
Stanley N. Boinovych
11707 Boardwalk Avenue NE
Cumberland, MD 21502

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2014-140-CP-L**
EQT PRODUCTION COMPANY	:	**Issued: August 13, 2015**

OPINION AND ORDER ON MOTION FOR *IN CAMERA* REVIEW AND TO COMPEL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion for an *in camera* review of documents withheld as privileged by the Department regarding all penalty options considered by the Department prior to filing its complaint because the movant failed to make a preliminary showing that the documents are discoverable.

O P I N I O N

The Department of Environmental Protection (the "Department") has asked this Board to impose a civil penalty of $4,532,296 against EQT Production Company ("EQT") for alleged violations of the Clean Streams Law, 35 P.S. § 691.1 *et seq.* EQT has filed a motion that asks us to do two things. First, it asks us to perform an *in camera* review of documents identified in the Department's privilege log that are related to the Department's calculations precedent to its proposed penalty. The Department has withheld the documents based on the attorney-client privilege. EQT wants us to determine whether the claim of privilege is justified. Second, EQT asks us "to compel production of any other documents relating to the Department's calculation of

the civil penalty that may exist but which have not been produced or identified on the privilege log."

With respect to the second request, the Department responds that it has or will produce any nonprivileged documents, so that request does not appear to require any further attention on our part. With respect to the first request regarding assertedly privileged documents, the Department argues that the Board need not reach a decision on privilege because EQT has failed to show that the documents being requested are relevant. Therefore, although the Department has not strongly objected to an *in camera* review, it says it is not necessary.

Although neither party has referred us to any case law governing *in camera* review, our own research has revealed that *in camera* inspection to assess whether a privilege applies does not follow automatically simply because a party asks for it. Rather,

> [w]e presume that the agency's claim of privilege is justified and made in good faith. It is up to the moving party to make a preliminary showing that there is reason to believe that the documents may not be privileged, such that its need to see the documents is likely to outweigh the Department's need to shield the documents from disclosure. Factors relevant to this balancing include the potential relevance of the evidence, whether the evidence is available from other sources, and the importance of the material to the discoverant's case.

Primrose Creek Watershed Association v. DEP, 2013 EHB 187, 190-91. *See also Waste Management Disposal Services v. DEP*, 2005 EHB 97, 110; *Joseph K. Brunner, Inc. v. DEP*, 2004 HB 170, 172.

EQT has failed to make such a preliminary showing here. The Department's proposed penalty in a complaint filed pursuant to the Clean Streams Law is undoubtedly entitled to our due consideration, but it is this Board, not the Department, that actually imposes the penalty; the Department merely expresses its legal opinion on what constitutes a violation of the law and how much of a penalty should be imposed for such a violation. *EQT Production Company v. DEP*,

114 A.3d 438 (Pa. Cmwlth. 2015); *DEP v. Sunoco Logistics Partners*, 2014 EHB 791, 792. Even though the Department's proposal is merely a request, the calculations that it has used to come up with its actual demand are certainly relevant. However, the Department tells us that it has already explained in great detail how it formulated its actual demand. The Department has made its personnel who calculated the actual proposed penalty available for deposition and otherwise committed to produce all documents regarding the calculations not subject to the privilege. EQT has not explained how access to additional documents that explain what the Department has already explained would be anything other than superfluous.

Therefore, what EQT really seems to be after is the Department's various experiments with other numbers that it did not use and its calculations precedent to a settlement proposal. However, EQT has not explained how access to this information will aid this Board in calculating a penalty should it decide that a penalty is warranted. The relevance of the Department's unused calculations is not obvious to us, and we suspect that some of them may even be inadmissible. *See* Pa.R.E. 408. In any event, it was EQT's responsibility to explain their potential relevance and it has failed to do so.

Along the same lines, it is not apparent to us why penalty options considered by the Department but not proposed in its complaint are important to EQT's defense. Even if it were admissible, the fact that the Department offers one amount to settle a case but pursues a higher amount when settlement discussions fail does not suggest that the higher amount is inappropriate. Finally, EQT has given no reason to suspect that the documents referenced in the Department's log are not privileged. The Department's response to EQT's motion is supported by the sworn affidavit of the Program Manager of the Oil and Gas Management Program which supports the Department's claim of privilege. Even an *in camera* review intrudes upon the

privilege, and EQT has failed to convince us that such an intrusion is necessary or appropriate here.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2014-140-CP-L**
EQT PRODUCTION COMPANY	:	

O R D E R

AND NOW, this 13th day of August, 2015, it is hereby ordered that EQT's motion for *in camera* review and to compel production of documents is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: August 13, 2015

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

For the Commonwealth of PA, DEP:
Geoffrey J. Ayers, Esquire
(via electronic filing system)

For Defendant:
Kevin J. Garber, Esquire
Jean M. Mosites, Esquire
Mark K. Dausch, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD L. STEDGE, et al.	:	
	:	
v.	:	**EHB Docket No. 2014-042-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHESAPEAKE APPALACHIA, LLC, Permittee	:	**Issued: August 21, 2015**

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

By Bernard A. Labuskes, Jr., Judge

Synopsis

In an appeal of the Department's approval for coverage under general permit WMGR123 of an oil and gas liquid waste storage and beneficial use facility, in order to correct and clarify any minor deficiencies in the permittee's compliance with notice requirements and the Department's tolerance of ambiguities in the permit application materials, the Board modifies the coverage approval slightly to clarify that the facility in question is limited to storage, and that any change that would expand operations beyond storage must be the subject of a permit modification application. The Board finds that there were no technical deficiencies in the coverage approval.

FINDINGS OF FACT

Stipulated Facts

1. On July 13, 2011, the Department approved Chesapeake Appalachia, LLC's application for coverage under a general permit to conduct earthmoving activities to construct a well pad at the Lamb's Farm site. (Stipulations of the Parties Number ("Stip.") 1.)

2. On August 6, 2011, the Department published notice in the *Pennsylvania Bulletin* of "Modifications and Consolidation of Residual Waste General Permits WMGR119, WMGR121, and WMGR123." (Stip. 2.)

3. On August 20, 2011, the Susquehanna River Basin Commission published notice of its approval of Chesapeake's project involving the consumptive use of 7.500 million gallons of water per day at the Lamb's Farm pad. (Stip. 3.)

4. On March 30, 2013, the Department published notice that it had issued to Chesapeake a permit to drill and operate a gas well at the Lamb's Farm site. (Stip. 4.)

5. In the course of reviewing Chesapeake's registration for coverage under WMGR123 for the Lamb's Farm storage facility, the Department requested Chesapeake to cure various deficiencies in that application. (Stip. 5.)

6. Chesapeake will not manufacture any substances at the Lamb's Farm facility. (Stip. 6.)

7. By letter dated March 13, 2014, the Department approved Chesapeake's registration for coverage under General Permit WMGR123 to operate at the Lamb's Farm facility in Smithfield Township, Bradford County, Residual Waste General Permit No. WMGR123NC027. (Stip. 7.)

8. Chesapeake notified Smithfield Township of its registration for coverage under WMGR123. (Stip. 8.)

9. Chesapeake notified Bradford County of its registration for coverage under WMGR123. (Stip. 9.)

10. The Department copied both the Smithfield Township Supervisors and the Bradford County Commissioners on its March 13, 2014 approval of Chesapeake's registration for coverage under WMGR123. (Stip. 10.)

11. The Department's WMGR123 general permit defines "oil and gas liquid waste" as:

> [L]iquid wastes from the drilling, development and operation of oil and gas wells and transmission facilities. The term includes contaminated water from well sites, the development of transmission pipelines and the facility operating under this general permit, provided the generating facility has satisfied all other permitting requirements that may apply to contaminated water. The term does not include condensate from oil and gas transmission pipeline compressor stations that exhibits a characteristic of hazardous waste under 40 CFR Part 261, Subpart C, as incorporated by reference at 25 Pa. Code § 261a.1.

(Stip. 11.)

12. The Department requested, and Chesapeake supplied, revisions to its Preparedness, Prevention and Contingency Plan ("PPC Plan") and Radiation Protection Action Plan to ensure that the plans reflect the activity Chesapeake sought to be permitted at the Lamb's Farm site. (Stip. 12.)

13. Specifically, the Department requested revisions to Chesapeake's PPC Plan and Radiation Protection Action Plan to reflect that no processing of oil and gas liquid wastes would occur at the Lamb's Farm site. (Stip. 13.)

14. Chesapeake revised its PPC Plan and Radiation Protection Action Plan for the Lamb's Farm site to reflect the fact that its registration for coverage under WMGR123 was limited to the storage of oil and gas liquid waste. Chesapeake submitted the revised plans to the Department in January 2014. (Stip. 14.)

15. The Department published its approval of Chesapeake's registration in the *Pennsylvania Bulletin*. 44 Pa.B. 1925 (Mar. 29, 2014). (Stip. 15.)

16. Although Smithfield Township filed an appeal with the Environmental Hearing Board from the Department's approval of Chesapeake's registration for coverage under WMGR123, the Township withdrew its appeal at EHB Docket No. 2014-044-L. (Stip. 16.)

17. Neither Bradford County nor the Bradford County Planning Commission filed an appeal from the Department's issuance of WMGR123NC027. (Stip. 17.)

18. Chesapeake submitted a traffic impact statement with its registration for coverage under WMGR123. (Stip. 18.)

19. The traffic impact statement evaluates the projected average daily traffic flow based on the number of trucks needed to operate the facility at maximum capacity and vehicles operated by facility workers. (Stip. 19.)

20. The traffic impact statement calculates that if the facility were operating at full capacity, the maximum traffic flow would be 125 vehicles per day. (Stip. 20.)

21. The traffic impact statement concludes that even at maximum operation, "there would be minimal to no impacts on local traffic." (Stip. 21.)

22. The Pennsylvania Department of Transportation (PennDOT) issued a Low Volume Driveway permit to Lamb's Farm & Partnership on June 20, 2011. (Stip. 22.)

23. A Low Volume Driveway permit authorizes up to 750 vehicles per day, which is far greater than the 125 vehicles per day projected for the site. (Stip. 23.)

24. Chesapeake reconstructed State Route 4004 from its intersection with Saco Road (State Route 4001), eastward, past the Lamb's Farm driveway, to the intersection with US 220

(the North-South road west of the Susquehanna River), a distance of approximately 4.5 miles. (Stip. 24.)

25. The newly reconstructed road was approved and designed according to PennDOT standards. (Stip. 25.)

26. Appellant Bruce Kennedy owns and lives on two parcels of land, totaling roughly 340 acres, in Smithfield Township, Bradford County on Hoblet Road and Collins Road. (Stip. 26.)

27. Appellant Bruce Kennedy lives approximately six miles from the Lamb's Farm site. (Stip. 27.)

28. Appellant Bruce Kennedy does not own any property closer to the permitted operation than the land he lives on. (Stip. 28.)

29. The access road to the Lamb's Farm site is near the intersection of Ulster Road and Brosman Road. (Stip. 29.)

30. Ulster Road runs along the east, south, and west of the Lamb's Farm site in a "U" shape fashion. (Stip. 30.)

31. Ulster Road intersects with Reber Road to the west of the Lamb's Farm site. (Stip. 31.)

32. Browns Creek flows to the west of the Lamb's Farm site, and is located to the east of Reber Road. (Stip. 32.)

33. Browns Creek continues to flow south along Brosman Road, as it eventually flows into Sugar Creek, which leads to the Susquehanna River. (Stip. 33.)

34. Chesapeake submitted wetland delineation reports to the Department as part of its applications for coverage under ESCGP-1 and ESCGP-2 for the Lamb's Farm site. (Stip. 34.)

35. Any drainage from the Lamb's Farm site would flow toward Browns Creek. (Stip. 35.)

36. Browns Creek does not flow to Appellant Bruce Kennedy's property. (Stip. 36.)

37. Appellant Bruce Kennedy has never walked Browns Creek. (Stip. 37.)

38. Although some people stop and collect spring water from Browns Creek, Appellant Bruce Kennedy has never done so. (Stip. 38.)

39. Appellant Bruce Kennedy has never fished Browns Creek. (Stip. 39.)

40. Appellant Bruce Kennedy does not hike in the area of Lamb's Farm. (Stip. 40.)

41. Appellant Bruce Kennedy has never been on the Lamb's Farm property. (Stip. 41.)

Additional Findings

The Parties

42. The Pennsylvania Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, No. 394, *as amended*, 35 P.S. §§ 691.1 – 691.1001 ("Clean Streams Law"); the Solid Waste Management Act, *as amended*, 35 P.S. §§ 6018.101 – 6018.1003; Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001 – 4106; and the rules and regulations promulgated thereunder.

43. Chesapeake Appalachia, LLC, ("Chesapeake") is a limited liability company with a place of business at 14 Chesapeake Lane, Sayre, Pennsylvania, 18840. (Chesapeake Exhibit Number ("C. Ex.") 2.)

44. The Appellants—Richard Stedge, Bruce Kennedy, Milda Baiba Guidotti, Ronald Brown, Joyce Brown, and Rose Marie Grzinic—are residents of Smithfield Township, Bradford County. (Notes of Transcript Page ("T.") 241-42, 243, 306.)

45. Appellants Stedge, Guidotti, Grzincic, and the Browns live in close proximity of the Lamb's Farm site. (T. 243, 306.)

The WMGR123 Permit

46. The WMGR123 is a permit encompassing different environmental media, and involving the Department's air, water, solid waste, and storage tank regulations. (T. 767; C. Ex. 1.)

47. An authorization to register for coverage under WMGR123 requires the registrant to comply with all of the Solid Waste Management Act's statutory and regulatory requirements relating to any waste generated at the WMGR123 facility, including any radioactive sludge and sediment. (T. 656; C. Ex. 1 at 000433.)

48. An authorization to register for coverage under the WMGR123 requires the registrant to comply with all of the regulatory requirements relating to storage tanks found in 25 Pa. Code Chapter 299. (T. 648; C. Ex. 1 at 000432.)

49. The Department relied upon prior permits issued for the Lamb's Farm site in its review of Chesapeake's application to register for coverage under WMGR123. (T. 604, 645-46.)

50. The General Information Form included in Chesapeake's permit application states in part that the proposed facility is "[f]or the beneficial use to manufacture hydraulic stimulation fluids to be used as makeup water for further hydraulic fracturing and development of natural gas wells." (T. 614-15; C. Ex. 2 at 000004, 000005.)

51. Chesapeake's inclusion of the phrase "to manufacture hydraulic stimulation fluids" in the General Information Form was an oversight and should not have been in the application. (T. 233-35, 385, 501-02.)

52. The General Information Form serves primarily an administrative function and the Department relies on it to route an application to the appropriate Department programs for purposes of permit coordination. The Department does not rely on the General Information Form for the technical review of an application. (T. 615-16, 620-21, 624-25, 634, 694-95.)

53. Chesapeake's references to "processing," "filtration," "municipal waste," or any chemical buffering in the documents submitted in support of its application for coverage under WMGR123 at the Lamb's Farm facility were oversights or the result of those portions of the application being prepared incorrectly. (T. 390-91, 392-93, 398, 642-44; C. Ex. 7 at 000327.)

54. The Department's approval of Chesapeake's registration for coverage under General Permit WMGR123 to operate at the Lamb's Farm facility only authorizes the *storage* of oil and gas liquid waste to be used as a water supply to develop or hydraulically fracture an oil or gas well. The Department's approval does *not* authorize *any* manufacturing, treatment, disposal, or processing at the facility. (T. 183, 385-88, 392-93, 395-96, 416, 473-74, 576, 579-80, 593, 606-07, 611, 616, 617, 637, 642-43, 664, 666, 714, 750, 799, 812-13, 827; C. Ex. 1 at 000427, C. Ex. 7 at 000321; Department Exhibit Number ("DEP Ex.") 8, DEP Ex. 14.)

55. If Chesapeake tried to manufacture hydraulic fracturing fluids on the site, it would be in violation of the permit. (T. 616.)

56. Form B of the WMGR123 application requires a certification from a registered professional engineer that the information contained within the application and the

accompanying plans, specifications, and reports are true and correct and have been prepared in accordance with accepted practices of engineering. (C. Ex. 2 at 000009.)

57. Christopher McCue, PE, certified the Lamb's Farm application when it was first submitted to the Department. (T. 403.)

58. There is no requirement to recertify an application when none of the engineering design documents are changed during subsequent revisions to the application. (T. 631-32.)

Notice

59. Pursuant to 25 Pa. Code § 287.643, the Department publishes its approval of registrations for coverage under WMGR123 in the *Pennsylvania Bulletin*. (T. 362-63, 630.)

60. Richard Stedge first became aware of the Lamb's Farm facility after returning home from a vacation on March 25, 2014 and finding the Lamb's Farm site illuminated and active. (T. 244.)

61. On March 26, 2014, nearly two weeks after the Department had authorized permit coverage of the Lamb's Farm facility, a newspaper article was published in the *Daily Review* regarding Lamb's Farm. The *Daily Review* is published in Towanda, Pennsylvania and is one of the primary newspapers for residents of the area. (T. 244, 265-66.)

62. The newspaper article was the first actual notice Richard Stedge, Bruce Kennedy, and Milda Baiba Guidotti had of what had been permitted as the Lamb's Farm facility. (T. 250, 289, 346-48.)

63. Over a period of the next several months, Stedge raised questions relating to the Lamb's Farm WMGR123 permit at Smithfield Township supervisor meetings. (T. 276-77.)

64. Although required by 25 Pa. Code § 287.641(g) to notify the Bradford County Planning Commission of its application for registration for coverage under WMGR123, Chesapeake did not send notice directly to the Planning Commission. (T. 456, 662.)

65. The Bradford County Commissioners forwarded to the Bradford County Planning Commission Chesapeake's notice of its application for the Lamb's Farm facility. (T. 382-83, 401-02, 456; C. Ex. 2 at 000063.)

The Lamb's Farm Facility

66. The Lamb's Farm facility consists of 38 watertight wastewater storage tanks constructed of one-quarter inch corrugated steel with continuous welds that each have a capacity of 500 barrels, which is equivalent to 21,000 gallons or 2,866.82 cubic feet. (T. 66, 437, 478, 579, 580-81, 587-88, 721, 724-25, 772; C. Ex. 2 at 000017, 000056.)

67. The tanks are equipped with one section of flexible piping connected to the front of the tanks, which then connects to permanent nipples on a common manifold. (T. 478-79, 576-77, 581, 722.)

68. A valve is installed at each pipe nipple to allow for each tank to be isolated from the other tanks. (T. 478-79, 579-80.)

69. Chesapeake only fills the storage tanks to 430 barrels of their 500 barrel capacity, or approximately 85-percent of capacity. (T. 436, 475.)

70. The site is designed so that the storage tanks sit directly on the containment area. (T. 434, 576, 582-83, 704-05, 726-27; C. Ex. 10.)

71. All piping is above-ground running over multiple layers of containment so that any leaks would be observable and contained. (T. 583.)

72. The site has primary and secondary containment. (T. 582-83, 726-27; C. Ex. 2 at 000058.)

73. The storage tanks are located within an area that is underlain by two 60 mil low-density polyethylene liners. (T. 584-86; C. Ex. 2 at 000058.)

74. The perimeter of this containment area uses water-filled jersey barriers that are draped with a double liner material in its entirety. (T. 582-83, 726-27.)

75. Surrounding the jersey barriers is an additional lined area that utilizes high-density polyethylene (HDPE) pipe wrapped in liner material. This additional level of containment will include the area where trucks will pull in to unload waste into the tanks. (T. 582-83, 726-27.)

76. The containment system provides over 13,000 cubic feet of containment storage capacity. (T. 590; C. Ex. 2 at 000017.)

77. The entire perimeter of the well pad is surrounded by an existing earthen berm, constructed as part of the initial well pad to help prevent any leakage off the pad itself. (T. 727.)

78. Chesapeake's approved registration for coverage under WMGR123 includes a PPC Plan that identifies the procedures that will be followed to properly manage wastes at the Lamb's Farm site and addresses procedures for spills associated with facility operations. (T. 553, 555-56; C. Ex. 7.)

79. The PPC Plan specifies methods and procedures for tank monitoring, overfill and leak detection, and how releases from tanks or associated piping will be addressed. (T. 471-74, 477; C. Ex. 7.)

80. Any time there is water stored at the Lamb's Farm facility, the facility is staffed 24-hours a day. (T. 430-31, 474-75, 477-78, 725.)

81. Between the time that the Lamb's Farm facility became functional in March 2014 and the hearing on the merits in March 2015, the facility had only been used twice. (T. 381.)

82. Chesapeake anticipates that the Lamb's Farm facility will be operated at full capacity only occasionally. (T. 379-80.)

Air Quality

83. On October 30, 2013, the Department approved Chesapeake's Request for Determination of Changes or Minor Significance and Exemption from Plan Approval/Operating Permit ("RFD") for the construction and operation of the proposed Lamb's Farm facility. (T. 794-96, 806-07; DEP Ex. 16, 17.)

84. An RFD is a form prepared by applicants and submitted to the Department for the purpose of obtaining an exemption from air permitting on trivial or *de minimus* sources of air pollution. (T. 765.)

85. The Department's listed exemption limit for insignificant facility emissions is 2.7 tons per year (TPY) of volatile organic compounds (VOCs). (T. 779-81; C. Ex. 14.)

86. The methodology employed by Chesapeake to model the air emissions used the Environmental Protection Agency's "Water9" model, which is the latest model for calculating emissions for these types of facilities, and conservatively overestimated potential emissions to total no more than 680 pounds of mixed VOCs per year, or 0.34 TPY. (T. 774, 789-95, 806, 813; C. Ex. 2 at 000159-160, C. Ex. 19.)

87. The modeling of air emissions relied on two rounds of sampling for which three consecutive days of composited grab samples were taken at two-hour intervals from untreated and treated produced water and untreated and treated drilling water. Forty-eight grab samples were taken in total. (T. 784, 788-89, 802-03, 817-18; C. Ex. 19.)

88. The single highest peak value from any water sample for each speciated VOC was used as a conservative input for the Water9 model. (T. 789-91.)

89. The largest result from all Water9 computer runs was used to estimate the emissions from produced water and emissions from drilling water. These two results were then aggregated to a total of 0.34 TPY of VOCs. (T. 780-81, 790-92; C. Ex. 19.)

90. The actual VOC emissions from the storage facility at Lamb's Farm would typically be no more than 10-15% of the potential emissions, since the methodology used to calculate potential emissions assumes, among other things, that there will be 90-degree Fahrenheit temperatures every day that the facility is in operation, and that the facility will be operating at full storage capacity every day. (T. 787-88; C. Ex. 19.)

Radiation

91. Chesapeake's Radiation Protection Action Plan addresses the management of oil and gas liquid waste and solids generated that contain technologically enhanced naturally occurring radioactive material (TENORM), and includes provisions to be implemented during all phases of operations at the facility. (T. 536-40, 830; C. Ex. 8.)

92. Chesapeake's Radiation Plan sets forth procedures for completing radiation surveys for incoming trucks and the fluids to be stored at the Lamb's Farm facility. (T. 525-26, 534, 537-38; C. Ex. 8.)

93. The Radiation Plan requires the use of a gamma scintillation detector to perform radiation measurements in real time. (T. 534-35; C. Ex. 8.)

94. Gamma radiation is the best choice for field measurements and provides the lowest detection limits to detect low concentrations of naturally occurring radioactive material that may be present in oil and gas liquid waste. (T. 534-35.)

95. The reading from gamma radiation can be used to project the levels of alpha and beta radiation. (T. 536.)

96. When trucks transporting water arrive at the site, the trucks will be scanned using the gamma scintillation detector to perform radiation measurements in real time. (T. 525-26, 536-37; C. Ex. 8.)

97. If a truck transporting water containing elevated radiation levels arrives at the Lamb's Farm site, the Radiation Plan calls for the truck to be segregated to a designated area. (T. 537-38, 543; C. Ex. 8.)

98. When the site is in operation and storing oil and gas liquid waste, radiation levels approximately 15 to 20 feet from the tanks will be indistinguishable from background radiation. (T. 538-40; C. Ex. 18.)

99. Background radiation is the radiation from naturally occurring radioactive materials that are present in an area, such as radiation from the sun, soil, and rock. (T. 528; C. Ex. 18.)

100. The potential radiation exposure to residents who live near the facility is not distinguishable from background radiation. (T. 538-40.)

101. All radioactive solids at the Lamb's Farm facility are associated with water and do not present a pathway for airborne exposures. (T. 542.)

102. There is no direct pathway for radiation exposure to nearby residents, as the impacted water is contained in transport vehicles and storage tanks. (T. 539-40.)

103. Any spills will be handled on a case by case basis in accordance with the general spill provisions of the PPC Plan. (T. 553, 556.)

DISCUSSION

Background

On April 28, 2014, nine appellants filed an appeal of the Department's approval of Chesapeake's registration under General Permit WMGR123 (WMGR123NC027) for the storage and beneficial use of oil and gas liquid waste at the Lamb's Farm facility in Smithfield Township, Bradford County. On May 16, 2014, the appellants filed an amended notice of appeal containing revised objections and adding six new appellants. We dismissed the six new appellants because they were untimely added in the amended appeal in an Opinion granting a motion to dismiss filed by Chesapeake. *See Stedge v. DEP*, 2014 EHB 549. Two appellants subsequently filed letters with the Board withdrawing their appeals, and another appellant was dismissed for failing to respond to a Rule to Show Cause. Six appellants remain in the appeal, four proceeding *pro se*—Rose Marie Grzincic, Milda Baiba Guidotti, Ronald Brown, and Joyce Brown—and Richard Stedge and Bruce Kennedy being represented by counsel (hereinafter collectively the "Appellants," unless otherwise noted). Of the Appellants proceeding *pro se*, only Milda Baiba Guidotti was present for the hearing on the merits and submitted a post-hearing brief. Stedge and Kennedy filed a post-hearing brief on May 21, 2015, titled "Proposed Findings and Conclusions." It consists of 32 numbered paragraphs with sparse citations to the record and little supporting legal authority. Ms. Guidotti filed a three-page statement on May 22, 2015 serving as a post-hearing brief. No other appellant made a post-hearing filing. The Department and Chesapeake filed their post-hearing briefs on June 22, 2015. No appellant filed a reply brief.

Rose Marie Grzinic, Ronald Brown, and Joyce Brown did not appear at the hearing on the merits and did not file post-hearing briefs. Chesapeake and the Department in their post-hearing briefs have maintained their positions, first raised at the hearing on the merits, that these

appellants' appeals must be dismissed either as a sanction for failing to comply with our rules and orders, or simply because the appellants failed to present any evidence or pursue any of their legal challenges to the Department's action. We do not need to decide whether sanctions are appropriate because, by not presenting any evidence and by not filing any post-hearing briefs, these appellants have waived all of their objections regarding the Lamb's Farm facility. 25 Pa. Code § 1021.131(c); *DEP v. Seligman*, 2014 EHB 755, 781 n.13; *Rural Area Concerned Citizens v. DEP*, 2014 EHB 391, 411 n.1; *Jake v. DEP*, 2014 EHB 38, 47 n.3; *Gadinski v. DEP*, 2013 EHB 246, 273 n.7. Accordingly, we have no choice but to dismiss their appeals.

Chesapeake with considerable justification complains that the post-hearing briefs of the remaining Appellants contain extremely limited citation to the record and citation of legal authority. It asks us to essentially disregard the briefs in their entirety, which would require dismissal of the appeals. While there is no question that the deficiencies in the Appellants' briefs greatly reduce their utility, treating all of their arguments as having been waived is too harsh under the circumstances.

In third-party appeals of Department actions the appellants bear the burden of proof. 25 Pa. Code § 1021.122(c)(2). The appellants must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that it is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, EHB Docket No. 2013-080-L, slip op. at 16 (Adjudication, Apr. 24, 2015); *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269; *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976). In this appeal, the Appellants must show by a preponderance of the evidence that the Department erred in approving coverage of Chesapeake's Lamb's Farm facility under

General Permit WMGR123. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Dirian v. DEP*, 2013 EHB 224, 232; *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).

Bruce Kennedy's Standing

In its post-hearing brief Chesapeake renews its challenge to Bruce Kennedy's standing in this appeal, which it first raised in a motion for summary judgment. In our Opinion denying Chesapeake's motion, *Stedge v. DEP*, EHB Docket No. 2014-042-L (Opinion, Jan. 29, 2015), we noted that at that point Kennedy had not provided us with anything more than his subjective apprehensions about how he would be affected by the Lamb's Farm facility. Slip op. at 5. At that point he did not allege any recreational or aesthetic interest in the Lamb's Farm area and he did not explain how a potential spill could affect him or his property approximately six miles away from the Lamb's Farm facility. *Id.* at 4-5. However, because Kennedy alleged that he and other members of Smithfield Township failed to receive notice of the Lamb's Farm facility, and the parties did not adequately brief the issue of whether deficient public notice alone could confer standing, we did not dismiss Kennedy from the appeal.

To have standing, one must have a substantial, direct, and immediate interest in the outcome of the appeal. *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009). A substantial interest is one that is greater than the interest all citizens have in ensuring that others comply with the law. *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). A direct and immediate interest means that the person's interest must not be remote, but rather there must be a sufficiently close causal connection between the asserted interest and the actual or potential harm associated with the challenged action. *Id*. at 282, 286; *see also*

Borough of Glendon v. Dep't of Envtl. Prot., 603 A.2d 226, 231 (Pa. Cmwlth. 1992). An appellant is not required to allege the basis for its standing in its notice of appeal. *Winner v. DEP*, 2014 EHB 135, 140 (quoting *Ziviello v. DEP*, 2000 EHB 999, 1003); *Mayer v. DEP*, 2012 EHB 400, 401; *Riddle v. DEP*, 2001 EHB 417, 419. Indeed, if an appellant's standing is never challenged, it does not need to be proven. *Oley Twp. v. DEP*, 1996 EHB 1098, 1126. However, when standing is challenged in pre-hearing memoranda, and in post-hearing briefs, an appellant must demonstrate by a preponderance of the evidence that it has the requisite interest in the outcome of the appeal. *Greenfield Good Neighbors*, 2003 EHB 555, 564; *Giordano v. DEP*, 2000 EHB 1184, 1187.

During the hearing on the merits, Kennedy testified that he quite often visits Richard Stedge's home, which is very near Lamb's Farm, and that he enjoys the aesthetics of that area, which he contends have been marred by the storage facility. (T. 281, 290.) We have repeatedly held that lessening the aesthetic or recreational value of an area qualifies for purposes of standing. *Tri-County Landfill, Inc. v. DEP*, 2014 EHB 128, 132; *Consol Pa. Coal Co. v. DEP*, 2011 EHB 251, 253; *Drummond v. DEP*, 2002 EHB 413, 414; *LTV Steel Co. v. DEP*, 2002 EHB 605, 606-07; *Giordano*, 2000 EHB at 1186. In addition, Kennedy has consistently maintained throughout this appeal a credible argument that he was entitled to better notice of Chesapeake's application to store oil and gas waste at the Lamb's Farm site. The purpose of the standing doctrine "is not to evaluate whether a particular claim has merit but rather to determine whether an appellant is the appropriate party to file an appeal from an action of the Department." *Giordano*, 2000 EHB at 1186 (quoting *Ziviello*, 2000 EHB at 1005). Whether or not Kennedy's argument regarding improper notice ultimately has merit is of no consequence in the context of assessing standing so long as it is credible enough to satisfy our function as a gatekeeper, which

it is. *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944. In considering these alleged harms together—harm to his enjoyment of the area and failure to receive proper notice—we find that Kennedy has identified a personal interest that is greater than that of the general public and with a sufficient connection between the complained of action and the associated harm in order for him to have standing.

Chesapeake directs our attention to *Campbell v. Dep't of Envtl. Res.*, 396 A.2d 870 (Pa. Cmwlth. 1979) for what it argues is the precept that appellants must establish issue-specific standing in order to assert error in an appeal, and that lack of notice alone is not sufficient to confer standing. We have previously flatly rejected the notion that one must have issue-specific standing in proceedings before the Board. "Standing is specific to each Departmental action, not whatever objections there may be to the action." *Citizen Advocates United to Safeguard the Env't v. DEP*, 2007 EHB 632, 674; *see also Borough of Roaring Spring v. DEP*, 2004 EHB 889, 904. Furthermore, Commonwealth Court held that the appellants in *Campbell* lacked standing to assert claims of deficient notice *on behalf of persons not a party to the appeal*. 396 A.2d at 871. Here, Kennedy is credibly alleging harm to himself on the basis of deficient public notice. Nothing in *Campbell* changes our decision that Kennedy has standing to pursue his appeal. In any event, harm to his enjoyment of the area as established at the hearing supports his standing as well.

Notice and Application Ambiguity

Turning to the merits of the appeal, the heart of the Appellants' case centers on their claims of a lack of advance notice of the Lamb's Farm facility and ambiguities in the permit application. They point out that (1) Chesapeake did not strictly comply with the regulatory notice requirements by not providing notice to the Bradford County Planning Commission; (2)

the Department tolerated a certain degree of ambiguity in the coverage-approval application materials regarding whether manufacturing or processing can occur at the facility, and what waste streams can be handled by the facility; and (3) the neighboring property owners did not receive any actual advance notice of the coverage-approval application.

Regarding notice, the Appellants' object that they did not have notice of the Lamb's Farm operation until after it was already approved by the Department. (Guidotti Brief at 1; Stedge Brief at 1-3.) Kennedy and Guidotti testified that the first they learned of the Lamb's Farm facility was upon reading a newspaper article published in the *Daily Review* on March 26, 2014. (T. 289, 346-48.) Stedge testified that he first became aware of the Lamb's Farm facility when he came home after being on vacation and saw activity at the Lamb's Farm site, but that he was not aware of what was going on at the site until reading the same newspaper article the following day. (T. 244, 250.) The Appellants argue that they should have received actual notice of the Lamb's Farm application from either the Department or Chesapeake. The Appellants also contend that, had Chesapeake complied with the regulatory requirements and sent notice of the application to the Bradford County Planning Commission, the Planning Commission would have made it an agenda item at a public meeting and the public would have had an opportunity to provide input.

The public notice requirements for a registration under WMGR123 are governed by 25 Pa. Code §§ 287.641 and 287.643. Under 25 Pa. Code § 287.641(g), a person seeking coverage under WMGR123 must submit a copy of its application for registration to the host municipality and the appropriate county, county planning agency, and county health department, if one exists, at the same time the registration is filed with the Department.[1] The Department must then publish notice of each approved registration for coverage in the *Pennsylvania Bulletin*. 25 Pa.

[1] Bradford County does not have a county health department. (T. 401, 463.)

Code § 287.643(c). (T. 630.) The notice provisions for registrations under general permits are much less extensive than the provisions governing applications for individual permits, which, among other things, require that notice be published in a newspaper of general circulation once a week for three consecutive weeks. *See* 25 Pa. Code § 287.151(a).

Chesapeake provided notice to Bradford County and to Smithfield Township of its application for registration for coverage, but it did not as required by the regulation provide notice to the Bradford County Planning Commission. (Stip. 8, 9; T. 382-85; C. Ex. 2 at 000063-076.) Eric Haskins, Chesapeake's Regulatory Operations Manager, testified that it is his experience working in Bradford County that the Bradford County Commissioners would forward the notice to the Planning Commission. (T. 382-83, 400.) The Bradford County Commissioners did just that, forwarding the notice of Chesapeake's application to the Planning Commission on October 4, 2013, two days after the notice was initially mailed out by Chesapeake. (T. 455-57; C. Ex. 11.) Although Chesapeake's actions did not follow the letter of the regulation, its end goal was accomplished—all three entities provided for in the regulation received notice of the Lamb's Farm application. All three entities had ample opportunity to take any action or make any inquiries in response to the notice. In fact, despite receiving notice of the application, the Planning Commission did not view the facility as a land development that would require any action on its part or require it to conduct a public meeting. (T. 258-58, 507-08.)

Questioning from counsel for Stedge and Kennedy during the hearing appeared geared toward challenging the adequacy of notice afforded to the public, including themselves, by publication in the *Pennsylvania Bulletin*. (T. 253-54, 290.) While we are not so naïve as to think that the average citizen diligently reads the *Pennsylvania Bulletin*, Commonwealth Court has held that publication in the *Pennsylvania Bulletin* is sufficient notice for purposes of due process.

See Feudale v. Aqua Pa., Inc., No. 335 M.D. 2014, 2015 Pa. Commw. LEXIS 331, at *6 n.4 (Pa. Cmwlth. Jul. 22, 2015) (citing *Grimaud v. Dep't of Envtl. Res.*, 638 A.2d 299, 301-02 (Pa. Cmwlth. 1994) (rejecting argument that notice of NPDES permit published in *Pennsylvania Bulletin* was insufficient because "it is a 'fiction' that the public reads that publication")). Stedge testified that he felt that he and the other Appellants had been left out of the permit application process and that the permitting of the facility was a violation of their rights under Article I, Sections 1, 25, 26, and 27. (T. 261-62.) To our knowledge, no court has ruled whether *Pennsylvania Bulletin* notice is sufficient without more to pass constitutional muster under all of those sections of the constitution, but the issue was not developed in the Appellants' post-hearing briefs.

We are not completely unsympathetic to the Appellants' position. For example, we are not entirely comforted by the fact that residents living so near the facility would be oblivious to its existence until after it was permitted and the local newspaper just so happened to write an article on it. Even one of Chesapeake's experts testified that it would be better if neighbors were notified despite there being no requirement to do so. (T. 749, 755.) Such notice would provide a far more realistic opportunity for the people who could end up being most affected by a waste storage facility to provide comments that could provide the Department with additional insight in its deliberations. *Cf. Big Spring Watershed Ass'n v. DEP*, EHB Docket No. 2014-028-L, slip op. at 6-7 (Opinion, Mar. 3, 2015) (discussing importance of public having notice of draft NPDES permit to provide informed comments). The Department's actions must not only conform to applicable regulations, they must also be reasonable and consistent with all constitutional requirements.

The Appellants' notice argument is somewhat tied to apprehensions concerning ambiguity in the application regarding whether the Lamb's Farm facility would be used strictly for storage of oil and gas liquid waste, or whether the Department authorized some kind of manufacturing, processing, or handling of municipal or otherwise inadequately identified waste streams. The fear is that absence of effective notice allows for a secretive expansion of facility operations. The Appellants have spent a significant amount of time focusing on inconsistencies within Chesapeake's permit application containing references to processing, manufacturing, treatment, and waste streams. This is of consequence, they argue, because the WMGR123 permit incorporates by reference the permit application: "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 there is a conflict with the regulations or governing statutes." (C. Ex. 1, Permit Operating Condition 15.) The Appellants argue that the inconsistencies in the application are grounds for revoking authorization under the permit.

Stray references to manufacturing and processing and handling of municipal waste remain because the Lamb's Farm application was based on an application reappropriated from a similar facility—the Arnold facility—that was to be used for both storage and processing. (T. 233-34, 385-86, 392, 396.) The references that remain in Chesapeake's final application are mostly but not entirely confined to pro forma project descriptions in the General Information Form, a cover form that the Department states is primarily used for administrative purposes and does not play a role in the technical review of the application. (Finding of Fact ("FOF") 52.)

The Appellants point to these stray references and repeatedly ascribe a nefarious intent to Chesapeake with respect to the operations of the Lamb's Farm facility. The Appellants believe that, because the permit incorporates the application by reference, and the application contains

errant references to processing, Chesapeake may at some point in the future without any real notice be able to utilize the Lamb's Farm facility for manufacturing and processing, presumably in their view without undertaking any further application or review from the Department, and despite Chesapeake's assurances that the Lamb's Farm site will be used only for storage. (T. 163, 171.) The Appellants do not believe Chesapeake's repeated representations before the Board that Lamb's Farm will be used only for storage. (Stedge Brief at 5.) They claim that Chesapeake is being disingenuous about its true motives.

The Department on the record before us says that, if the Lamb's Farm facility would be used for anything other than storage, Chesapeake would be in violation of its permit. (T 616.) The Appellants have not given us any reason to believe that the Department is misrepresenting its position. The Appellants have not outlined a course of action that would allow Chesapeake to process or manufacture fluids at the Lamb's Farm facility as it is currently permitted, without either undertaking some kind of permit revision or additional application. In addition, the Appellants have in fact stipulated that the Lamb's Farm facility will not involve the manufacturing of any substances and that it will be used only for storage. (Stip. 6, 13, 14.) The parties' joint stipulation was signed by all *pro se* appellants individually, and by counsel for all represented parties. *See* Docket Entry 68 (Mar. 4, 2015).

We can appreciate how the residual allusions to manufacturing and processing in the permitting materials could possibly instill concern. There was less than perfect attention to detail on Chesapeake's part in preparing the application. We believe that this Adjudication helps in curing any apprehension on the part of the Appellants by making it abundantly clear that the coverage approval does **not** authorize anything other than storage. We note that the coverage approval currently includes the following condition: "Changes to the facility operation as

described in your application require a modification to be submitted to the Department." In order to add an additional layer of comfort and ensure that the Department's action is lawful **and** reasonable, we revise this condition, for this specific permit only (WMGR123NC027), to read as follows:

> This coverage approval does not authorize any manufacturing, treatment, disposal, or processing of residual waste. Any proposed change to the facility operation requesting permission to engage in manufacturing, treatment, disposal, or processing requires an application for a modification to be submitted to the Department. Notice of any such application shall be provided by certified mail or personal delivery to Richard Stedge, Bruce D. Kennedy, and Milda Baiba Guidotti concurrently with the submittal of the application to the Department.

Technical Issues

In addition to their primary concerns regarding public notice and application errors, Appellants Stedge and Kennedy have also raised a number of technical issues through their expert, Kathy Martin, PE, a registered professional engineer in the state of Oklahoma who has performed consulting work in various environmental programs for 25 years. (Appellants' Exhibit Number ("App. Ex.") 3.) The technical issues involve air quality, radiation, truck traffic, tank design and the spill containment system, and the locational suitability for such an operation. Stedge and Kennedy bring up these issues but provide little in the way of detailed, supported arguments in their post-hearing brief; rather, they unhelpfully and inappropriately refer us to Martin's expert report. Although the cursory references to these issues borders on waiver (*see* 25 Pa. Code § 1021.131(c)), in the interest of a complete record, we will discuss the issues below.

At the outset we note that, while Chesapeake proffered experts who specialize in particularized scientific disciplines, the Appellants proffered only Martin for a wholesale critique on the Lamb's Farm facility. Without any caveat or differentiation as to the degree with which

she was qualified to offer her various opinions, she opined on waste and wastewater, site selection, stormwater controls, storage tank design, traffic, containment systems, air quality, and radiation. The weight that we lend to an expert's opinion depends on a variety of factors, including the expert's qualifications, presentation and demeanor, preparation, knowledge of the field in general and the facts and circumstances of the case in particular, and the quality of the expert's data. *Solebury School v. DEP*, 2014 EHB 482, 530; *Pine Creek Valley Watershed Ass'n, Inc. v. DEP*, 2011 EHB 761, 780 (citing *UMCO v. DEP*, 2006 EHB 489, *aff'd*, 938 A.2d 530 (Pa. Cmwlth. 2007)). We also look to the opinion itself to assess whether it is coherent, cohesive, objective, persuasive, and grounded in the relevant facts of the case. *Pine Creek*, 2011 EHB at 780.

Although we accept Martin's testimony as an expert and find her to be generally qualified as a professional engineer to render opinions, on balance, the opinions offered by the experts for the Department and Chesapeake, with career specializations in highly technical areas such as air quality and radiation, were far more credible. In addition, the basis of each of the opinions Martin expresses in her report are couched in terms of "inconsistencies and deficiencies." (App. Ex. 3 at 3, 6, 9, 12, 13, 15.) Beyond detailing what she believes to be inconsistent and/or deficient in the application, she does not explain why it matters to the actual permit as authorized. She does not tell us why these inconsistencies should prompt us to revoke the permit authorization or take any other action.

Air Quality

Stedge and Kennedy argue that the Air Quality Request for Determination ("RFD") was inadequate and inconsistent with information provided elsewhere in the application. They then refer us to Kathy Martin's expert report. Martin contends that Chesapeake did not provide

information relating to equalization and buffering. (T. 110-13.) She argues that the RFD says it is modeled on a comparable facility, but it does not explain how that facility is similar to Lamb's Farm. (App. Ex. 3 at 15.) Martin also says that the sampling performed is not adequately described in terms of methodology and quality control, and she argues that the number of samples taken was minimal and not statistically significant. (T. 116-21.)

To satisfy the requirements of WMGR123, an applicant must either have an air permit or an approved exemption from air permitting. (T. 767.) The Department has determined that a facility is eligible for an exemption from air quality permitting if it emits volatile organic compounds (VOCs) of less than 2.7 tons per year (TPY). (T. 779; C. Ex. 14.) An RFD is used for obtaining an exemption from air permitting on trivial or *de minimus* sources of air pollution. (T. 765.)

Chesapeake's RFD was composed by Joseph Guzek, PE. Guzek has spent nearly his entire 40-year career working on air quality matters across a broad set of air permits. (T. 763-65.) He estimates that he has prepared over a thousand RFDs over the course of his career. (T. 766.) Guzek testified that he had prepared RFDs for six other WMGR123 applications for Chesapeake. (T. 767.) He relied on his prior work and samples taken from the Arnold facility, which was a prior Chesapeake WMGR123 facility. (T. 791-93.) The Appellants did not show that it was improper for Chesapeake to refer in part to work pertaining to other facilities of the same type serving the same general geographic area. With respect to references to equalization and buffering, Guzek testified that equalization and buffering does not mean any sort of physical or chemical processing, but merely the mixing of solutions from different tanks. (T. 797-99; C. Ex. 19 at 6.)

At the recommendation of Department personnel, Guzek employed EPA's Water9 Model, the latest computer model used for such applications. (T. 789-90.) Guzek explained that he followed EPA sampling protocol to collect 48 samples. (T. 784, 802.) He took grab samples on two-hour intervals over eight hours for three consecutive days, sampling both when the water was pumped into the tanks and when it was taken out. He took two rounds of this sampling, one round in November 2010 and one round in March 2011. The samples consisted of trucks transporting hydraulic fracturing waste water from different well pads. Guzek vehemently disputed Martin's characterization of his sampling as minimal. (T. 799-800.) Guzek ultimately determined that VOCs will be no more than 0.34 TPY—a conservative overestimation that is still approximately 12-percent of the exemptible limit. (T. 780, 795; C. Ex. 2 at 000156, C. Ex. 19 at 5.)

We find Guzek to be well qualified in the field of air quality and we find his testimony to be credible. Martin's critiques have not provided us with reason to doubt the accuracy of the sampling and methodology represented in the RFD. For instance, Martin did not critique the Water9 model or argue that another model would be better suited for estimating emissions from a facility of this type. She did not critique Guzek's sampling protocol, merely the number of samples, which we find to be adequate and thorough. Martin did not explain what circumstances could give rise to VOC emissions that would exceed the exemptible limit of 2.7 TPY for a facility of this type. She did not come forward with any evidence or data that would suggest any oil and gas waste streams would yield an amount of VOC emissions that would require Chesapeake to undertake the full air permitting process. In sum, we find nothing wrong with Chesapeake's RFD or its approval by the Department.

Radiation

Stedge and Kennedy next argue that the Form X Action Plan for Detection of Radioactivity does not adequately quantify the potential for radioactive materials to be transported to the facility. We found Kathy Martin's testimony and expert report to be particularly weak in this area of study, having no formal coursework in radiation, no specific experience with radioactive survey meters, and having never prepared a Radiation Action Protection Plan. (T. 32-33, 163-65.) Even assuming that she is qualified to render opinions in this area, her qualifications pale in comparison to those of the experts proffered by Chesapeake and the Department. Nevertheless, we will briefly address the issues she raises.

The primary concern Martin expressed through testimony regarding the Radiation Plan was that it only addresses the risks radiation poses to individuals working at the Lamb's Farm site, and not the risks radiation poses to members of the general public and those living nearby the facility. (T. 104.) However, the Appellants never explain what the risks are to the public. They do not explain why a plan that is designed to protect individuals in the immediate proximity of the site is inadequate to protect members of the public hundreds of yards to several miles from the site. The Appellants did not identify discrete exposure pathways that pose a particular risk to the public unique from the risk posed to the onsite workers. We have been provided with nothing to suggest that contamination is likely to occur, that Chesapeake has not adequately addressed the contingency of spills, or that there would be any untoward danger of radiation exposure from any such spills. (T. 553, 555, 560-62, 570; C. Ex. 1 at 000439.)

Martin's other critiques are that the Radiation Plan's estimated range of concentration of Radium-226 (200 to 2,000 picocuries per liter) is inexplicably broad, that the Plan does not discuss the appropriateness of the selected radiation detector, and that the process for screening

and segregating trucks with high levels of radiation is inadequate. (App. Ex. 3 at 15-16.) Again, the Appellants do not explain why, even if this is true, this is grounds for revoking the permit authorization.

Chesapeake's Radiation Plan was prepared by Bill Thomas, a certified health physicist and industrial hygienist. (C. Ex. 18 at 13.) We find Thomas's testimony to be far more credible than Martin's. It is without question that Thomas has superior experience and specific qualifications regarding radiation, physics, and industrial hygiene and safety. Thomas has a career specialization in health physics and industrial hygiene. (T. 515-17; C. Ex. 18.) He has prepared numerous other Radiation Protection Action Plans in Pennsylvania. (T. 521.) On the whole, his testimony on the subject of radiation was much more specific and detailed than that of Martin's. Although the Radiation Plan appears to be specifically designed with worker safety in mind, Thomas credibly testified that the Radiation Plan was adequate to also protect public health and safety. (T. 545.) He testified that the potential for exposure for any individual not on the pad of the site is equivalent to background. (T. 539-40.) He opined that there is a very low risk of any airborne exposure of radiation. (T. 542.) His opinions were consistent with and supported by the Department's well-qualified radiation expert, Richard Croll. (T. 828-31.) In short, the Appellants have provided us with no credible reason to find that the Radiation Plan is inadequate and will not effectively guard against any risk of radioactive exposure.

Traffic

Stedge and Kennedy argue that Chesapeake did not provide an adequate analysis of expected truck traffic as a result of the Lamb's Farm facility and its potential adverse impacts to roads and the environment. Martin testified that Chesapeake's traffic impact statement only discusses the number of trucks, but not the routes the trucks will take or any weight restrictions

on those routes. (T. 93-95.) She also contended that there was no analysis of turning radius. (*Id.*) The Department testified that its role in assessing traffic associated with WMGR123 facilities is limited. The WMGR123 permit requires that applicants have a highway occupancy permit from the Pennsylvania Department of Transportation (PennDOT) and the Department views its role with respect to traffic issues as ending upon verification that the highway occupancy permit has been obtained. (T. 650.) Lisa Houser, the Department's Environmental Engineering Manager, testified that the Lamb's Farm facility had a low volume highway occupancy permit. She stated that she was not concerned about traffic from an environmental perspective because the permit allows for a much higher volume of traffic than what will be generated by the Lamb's Farm site. (T. 650-51.) The estimated number of trucks traveling to and from the Lamb's Farm facility if it were operating at maximum capacity is 125 per day. (Stip. 20.) The traffic permit authorizes up to 750 vehicles per day. (Stip. 23.)

Even in the context of landfill permitting, where the Department is specifically charged with evaluating traffic impacts as part of an applicant's environmental assessment (*see* 25 Pa. Code § 271.127(a)), the Department's role and authority in evaluating and regulating traffic impacts is limited. *See generally*, *Borough of St. Clair v. DEP*, 2014 EHB 76, 95-96. Here, the Appellants have not provided us with any evidence to suggest that it was unreasonable for the Department to rely on PennDOT's permit in determining that traffic would have very little impact on the environment. The Appellants have presented us with no traffic study of their own or any other evidence to prompt us to conclude otherwise.

Storage Tanks and Containment

Stedge and Kennedy next contend that Chesapeake did not provide sufficient assurances that the storage tanks would conform to current codes. They also allege that Chesapeake did not

provide enough detail on the containment system as required by 25 Pa. Code Chapter 299. Unfortunately, Stedge and Kennedy never explain what any of those requirements or codes are, or which requirements they believe have not been satisfied, and why that should give us reason to revoke the permit authorization.

With respect to the storage tanks, Martin argued that Chesapeake's application did not contain sufficient information on the tank specifications. (T. 86-88; App. Ex. 3 at 9.) She argued that the leak detection system was inadequate because it did not include a computer-based shutoff and instead relied on human response. (T. 88-89.) She also argued that the system put in place to alert facility personnel that a tank is reaching capacity is inadequate because it utilizes an internal floating device that raises a reflector on the top of the tank, but does not include any sort of audible or visual alarm. (T. 91-92; App. Ex. 3 at 11.)

Through one of its experts, Yves Pollart, PE, who has 35 years of experience working on wastewater issues, Chesapeake responds that the storage tanks are the right type of tanks for this application.[2] (T. 679, 725.) The tanks are watertight, constructed of one-quarter-inch corrugated steel with continuous welds. (T. 721, 724-25.) Pollart testified that they are the same tanks that are used nationally throughout the oil and gas industry. (T. 721.) He stated that the tanks are

[2] Regarding Pollart, the parties stipulated as follows:

> Yves Pollart, P.E., one of Chesapeake's expert witnesses, relies on John Schick, Peter Chronowski, P.G., and Patrick DeNardo, P.E. in rendering his opinions. Messrs. Schick, Chronowski, and DeNardo contributed to Pollart's expert report in the areas of traffic, geology, and the siting of the Lamb's Farm Fluid Storage facility, respectively. The parties stipulate that Mr. Pollart may testify to the contributions of Messrs. Schick, Chronowski, and DeNardo in the areas of traffic, geology, and the siting of the Lamb's Farm Fluid Storage facility, and that those contributions are among those normally relied upon by Mr. Pollart in his proffered area of expertise and that it shall not be necessary for Chesapeake to call as expert witnesses Messrs. Schick, Chronowski, and DeNardo. The parties also stipulate to the qualifications of Messrs. Schick, Chronowski, and DeNardo with respect to their contributions to Mr. Pollart's expert report in the areas of traffic, geology, and the siting of the Lambs Farm Fluid Storage facility, respectively.

Docket Entry 70 (Mar. 10, 2015).

constructed to the Department's regulatory specifications. (T. 721, 723-24.) Chad Glunt, the Department's Environmental Engineering Specialist and lead permit reviewer for the Lamb's Farm facility, inspected the site prior to it being put into service. (T. 609.) Following the inspection, Glunt noted in his memo that "all the tanks were connected properly and the secondary containment structures were present," and he recommended approval of the site. (DEP Ex. 9, 10.) In addition, a subsequent inspection conducted by Dustan Karschner on May 7, 2014 revealed nothing wrong with the tanks or containment. (DEP Ex. 14.)

With respect to the containment system, Martin testified that the application made no mention of what engineering practices were relied upon for the containment's design. (T. 96-97; App. Ex. 3 at 13.) Martin also highlights what she believes is an error in the calculations for the volume of the containment area that she says are based on the dimensions of a rectangle and not the L-shaped arrangement of the storage tanks. (T. 97.) She argues that the regulations require secondary containment to be designed to direct any release to a monitoring point and there is no information in the application materials speaking to this requirement. (T. 97-98; App. Ex. 3 at 14.)

Christopher McCue, PE, oversaw the preparation of the Lamb's Farm application. (T. 574.) Among other things, McCue testified regarding the design of the containment system. McCue stated that two types of containment are implemented at the Lamb's Farm site—a 42-inch high containment area immediately surrounding the storage tanks, and a 24-inch high containment area subsuming the first containment and covering the area where the trucks will pull in.[3] (T. 581-83; C. Ex. 2 at 000056.) The storage tank containment area contains a liner of

[3] Martin also states that there is no analysis of the impact on the liner from trucks coming in and out of the facility. (T. 100; App. Ex. 3 at 14.) However, she never explains in any detail how the liner system chosen by Chesapeake stands to degrade over time due to truck activity, and she does not quantify any period of time over which any such degradation will occur. Given that the Appellants bear the burden of proof, it is

two 60 mil geomembranes and two felt layers. (T. 584; C. Ex. 2 at 000058.) The larger containment area contains a liner of one 60 mil geomembrane running underneath a half-inch rubber mat. (*Id.*) These designs are depicted in cross-section within Chesapeake's application.

McCue determined the calculations for the volumetric capacity of the containment area. McCue tells us that, under the regulations, the containment area must be sized sufficiently to accommodate 110-percent of the volume of the largest storage tank used on the site. (T. 586-87.) *See* 25 Pa. Code § 299.122(b)(14).[4] The containment area of the Lamb's Farm facility is designed to accommodate a volume of more than four times the regulatory requirement.[5] (T. 587-90; C. Ex. 2 at 000017.) The volume of the containment area far exceeds what is required by the regulations. Yves Pollart, who served as a third-party overseer of the Lamb's Farm application (T. 689), verified McCue's containment calculations and determined that they were accurate. (T. 727.) Accordingly, we believe that any doubt raised by Martin's concern about the calculations has been assuaged.

Martin also contends that Chesapeake has not shown that it satisfied 25 Pa. Code § 299.122(b)(10), which states, "Secondary containment under the tank bottom and around underground piping shall be designed to direct any release to a monitoring point." No other

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the Appellants' responsibility to show that there is a likelihood that trucks will in fact damage the liner. *See Borough of St. Clair v. DEP*, EHB Docket No. 2013-118-L, slip op. at 25 (Adjudication, May 20, 2015) ("An appellant cannot simply come forth with a laundry list of potential problems and then rest its case. It must prove by a preponderance of the evidence that these problems have occurred or are likely to occur." (quoting *Shuey v. DEP*, 2005 EHB 657, 712)).

[4] 25 Pa. Code § 299.122(b)(14) provides: "Emergency containment areas, such as dike fields, shall be able to contain 110% of the capacity of the largest tank in the containment area." Chesapeake apparently takes the position that this regulation applies to the sizing of any containment system. (Chesapeake Brief at 39.) However, the regulation appears to treat differently the terms "emergency containment" and "secondary containment." *See* 25 Pa. Code § 299.122(b)(11) and (13) (discussing the permeability requirements of secondary containment versus the permeability requirements of emergency containment). No other party has weighed in on the regulatory requirement for secondary containment volume.

[5] The containment area has been designed to hold a volume of 13,330 cubic feet. Each tank holds approximately 2,807 cubic feet. The regulation would be satisfied with 110% of 2,807 cubic feet—3,088 cubic feet (2,807 x 1.1 = 3,088).

party discusses this regulation. All piping at the Lamb's Farm facility is designed to be aboveground. (T. 583.) We note that the WMGR123 permit obligates those authorized for coverage to comply with the provisions of 25 Pa. Code Chapter 299 (*see* C. Ex. 1, Permit Operating Condition 9; T. 651) and we presume that Chesapeake will abide by those provisions and any other applicable statutory and regulatory requirements.

Furthermore, we believe that Chesapeake has developed appropriate measures to respond to any leaks, spills, or releases through its Preparedness, Prevention, and Contingency Plan ("PPC Plan"). (C. Ex. 7.) The site will be monitored 24-hours per day when it is in use. (T. 430-31, 474.) Any spills will be vacuumed out of the containment area. (T. 435.) The PPC Plan addresses how Chesapeake will guard against the overfilling of the tanks through the use of reflective marker floats and the measuring of tank levels twice per day. (T. 474-75; C. Ex. 7 at 000323.) Tanks will only be filled to 85-percent of their capacity. (T. 474.) All rainwater falling in the containment area is collected via vacuum truck so that the containment area has adequate capacity for any spills. (T. 476; C. Ex. 7 at 000324.) All the tanks are independently valved so that any tank can be isolated in the event of a leak from one of the tanks. (T. 478-79.) The Appellants have not shown that there are any flaws with Chesapeake's tanks or containment system.

Site Selection

Stedge and Kennedy's final technical point concerns the site selection of the Lamb's Farm facility. They contend that Chesapeake did not perform an adequate environmental evaluation of the proposed facility that would prove the Lamb's Farm pad is a suitable location for a waste storage facility. Martin argues that the topographic map contained in Chesapeake's application does not reflect setback distances from surface waters and wetlands. (T. 78; App. Ex.

3 at 6.) Likewise, she says that the Facility Map, among other things, does not provide the slopes, grades, and dimensions of access roads, nor does it identify any stormwater control features. (App. Ex. 3 at 8.) Martin notes that Chesapeake's application did not include a hydrogeologic study and water quality assessment to demonstrate fulfillment of the regulation at 25 Pa. Code § 299.116(c), requiring that waste not be stored in a way that would cause groundwater degradation. (T. 81-82; App. Ex. 3 at 8.) Martin also argues that there is a lack of stormwater runoff controls appropriate for this type of facility. (T. 83; App. Ex. 3 at 8-9.)

The WMGR123 permit requires that a facility comply with various setbacks specified in Operating Condition 20. For example, the permit requires that a facility shall not be located within a 100-year floodplain, within 300 feet of an exceptional value wetland, within 150 feet of high quality or exceptional value waters, within 100 feet of any perennial stream, within 300 feet of an occupied dwelling, or within 900 feet of a school, park, or playground. (C. Ex. 1 at 000434-435.) The Appellants argue that Chesapeake's application did not adequately demonstrate that all of the setbacks were satisfied. This argument is emblematic of the Appellants' approach to this case in general: they criticize the application for not showing setbacks but then fail to show that any setbacks have in fact been violated. This is just the sort of criticism directed toward the permit *application* as opposed to the *permit itself* that we have repeatedly said will rarely justify correction of the Department's action on our part, *O'Reilly v. DEP*, 2001 EHB at 51, and part of the laundry list of potential but unsubstantiated problems that also will not support a correction on our part, *Shuey v. DEP*, 2005 EHB at 712. The Appellants never presented any evidence demonstrating that any of these setbacks were not in fact met with respect to the Lamb's Farm facility. The Appellants never demonstrated that, even if all setback requirements were met, it is still unreasonable to permit the Lamb's Farm facility at this location in Smithfield Township.

They have pointed us to no unique circumstances that would suggest that this is a poor location for a waste storage facility.

Furthermore, and perhaps ironically given the attention that has been devoted to this matter, the Lamb's Farm site has already been subject to a number of other unappealed permits, including a well permit to drill an unconventional gas well (DEP Ex. 1, 2), which is arguably a more environmentally invasive operation than the waste storage facility at issue here. Martin's critique of stormwater controls did not evaluate or consider the erosion and sedimentation controls contained in the ESCGP-1 and ESCGP-2 permits for the site. (*See* DEP Ex. 3; DEP Ex. 13.) The maps submitted with the ESCGP permits show wetlands in relation to the facility utilizing two-foot contour lines, pursuant to a wetland delineation completed by Chesapeake. (T. 378, 591-93; C. Ex. 15.) Chad Glunt testified that because there would be no new construction, he could rely on the ESCGP permits when reviewing the Lamb's Farm application. (T. 602-04.) Nevertheless, the Department required Chesapeake to revise the erosion and sedimentation plans to correspond with the change from an unconventional well site to an oil and gas waste storage site. (DEP Ex. 11.)

With respect to the regulation requiring that waste be stored in a way to not cause groundwater degradation, we view it as a prohibitory regulation that provides the Department with authority to impose a violation if groundwater pollution were to result from the facility. Further, given the information Chesapeake has provided regarding the storage tanks, containment system, and PPC Plan, the Appellants did not give us any reason to believe that waste being stored will cause groundwater pollution.

Remaining Issues

Stedge and Kennedy raise, but again do not seriously pursue, two other issues; namely, that Chesapeake did not have an engineer recertify the revised application, and that Chesapeake's compliance history demonstrates that it has an inability to comply with environmental laws and regulations. They argue that either one of these issues justifies the revocation of the permit authorization.

Stedge and Kennedy criticize Chesapeake for not having an engineer recertify the application after changes had been made following its initial submission to the Department in October 2013. Form B of the application requires a certification from a registered professional engineer that the information contained within the application and the accompanying plans, specifications, and reports are true and correct and have been prepared in accordance with accepted practices of engineering. (C. Ex. 2 at 000009.) The regulation at 25 Pa. Code § 287.122(d) requires that the design section of an application bear the seal of a Pennsylvania professional registered engineer. Christopher McCue was the engineer who certified the application when it was first submitted. (T. 403.) After the application was submitted, changes were made to the PPC Plan, the Radiation Plan, and the bonding requirements. (T. 405.) Lisa Houser, the Department's Environmental Engineering Manager, testified on behalf of the Department that the changes that were made to the application were not changes to the actual design, but rather the supporting documentation, and therefore, the Department's interpretation is that the application did not need to be recertified under 25 Pa. Code § 287.122(d). (T. 631-32.) The Appellants did not challenge this interpretation as unreasonable, and it is not unreasonable on its face.

With respect to compliance history, Stedge and Kennedy point us to the section of the application where Chesapeake lists the violations for all of its sites in Pennsylvania. (C. Ex. 2 at 000021-036.) They also refer us to Chesapeake's Spill Incident History. (C. Ex. 7 at 000335-337.) 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 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.

Article I, Section 27

Finally, Stedge and Kennedy assert that the Department failed to exercise its duty to protect the public's right to clean air, water, and soil as guaranteed by the Pennsylvania Constitution Article I, Section 27. That constitutional provision reads as follows:

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

PA. CONST. art. I, § 27. In order to assess whether the Department has fulfilled its constitutional obligations under Article I, Section 27, we ask the following three questions:

> (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
>
> (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
>
> (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Brockway Borough Mun. Auth. v. DEP, EHB Docket No. 2013 080-L, slip op. at 29 (Adjudication, Apr. 24, 2015) (quoting *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973),

aff'd, 361 A.2d 263 (Pa. 1976)); *see Pa. Envtl. Def. Found. v. Cmwlth.*, 108 A.3d 140, 159 (Pa. Cmwlth. 2015) ("*PEDF*") (holding that the *Payne* test is still good law); *see also Feudale v. Aqua Pa., Inc.*, No. 335 M.D. 2014, 2015 Pa. Commw. LEXIS 331, at *14 (Pa. Cmwlth. Jul. 22, 2015) (analyzing second and third prongs of *Payne* test after finding compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's resources under the first prong).

The burden of showing that the Department acted unconstitutionally in this appeal is on the Appellants. 25 Pa. Code § 1021.122(c)(2). Here, Stedge and Kennedy have not developed their constitutional argument in any detail, instead making rather broad but unsupported statements that the Department failed to protect the public by allowing

> an ill-conceived process for handling extremely dangerous flow-back waste materials by moving it from hydraulic facing [sic] sites across public roads to the Lamb's Farm, a once clean and pastoral environment, to be unloaded by way of hose connections into containers able to hold 756,000 gallons of untreated waste consisting of substances unknown to the public and unknown to public health officials and to local emergency responders.

(Stedge Brief at 8.) Nowhere in their brief do Stedge and Kennedy ever explain exactly how or why approval of the Lamb's Farm facility is contrary to Article I, Section 27. Although Chesapeake's compliance with the regulation regarding notice at 25 Pa. Code § 287.641(g) was less than perfect, that deviation, when viewed together with the permit modifications we impose here, does not amount to a constitutional violation on the part of the Department. The Appellants have not shown any other failure to comply with applicable legal requirements. The Appellants have not described any reasonable measures that would have further reduced the environmental incursion of the project, and we note that Chesapeake has in fact implemented certain protective measures that go beyond what is strictly required under the regulations. The Appellants have not

identified any unique circumstances with regard to the Lamb's Farm facility that would have warranted the Department to impose additional conditions for the operation. The Appellants have not shown that any environmental harm associated with the Lamb's Farm facility so clearly outweighs the benefits of the facility that its authorization from the Department amounts to an abuse of discretion.

CONCLUSIONS OF LAW

1. The Appellants, as third-party appellants, bear the burden of proving by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that it is inconsistent with the Department's obligations under the Pennsylvania Constitution. 25 Pa. Code § 1021.122(c)(2); *Brockway Borough Mun. Auth. v. DEP*, EHB Docket No. 2013-080-L, slip op. at 16 (Adjudication, Apr. 24, 2015); *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269; *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).

2. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Dirian v. DEP*, 2013 EHB 224, 232; *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. Parties waive issues that are not preserved in post-hearing briefs. 25 Pa. Code § 1021.131(c); *DEP v. Seligman*, 2014 EHB 755, 781 n.13; *Rural Area Concerned Citizens v. DEP*, 2014 EHB 391, 411 n.1; *Jake v. DEP*, 2014 EHB 38, 47 n.3; *Gadinski v. DEP*, 2013 EHB 246, 273 n.7.

4. To have standing, one must have a substantial, direct, and immediate interest in the outcome of the appeal. *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009).

5. A substantial interest is one that is greater than the interest all citizens have in ensuring that others comply with the law. *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975).

6. A direct and immediate interest means that the person's interest must not be remote, but rather there must be a sufficiently close causal connection between the asserted interest and the actual or potential harm associated with the challenged action. *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 282, 286 (Pa. 1975); *see also Borough of Glendon v. Dep't of Envtl. Prot.*, 603 A.2d 226, 231 (Pa. Cmwlth. 1992).

7. When standing is challenged in pre-hearing memoranda, and in post-hearing briefs, an appellant must demonstrate by a preponderance of the evidence that it has the requisite interest in the outcome of the appeal. *Greenfield Good Neighbors*, 2003 EHB 555, 564; *Giordano v. DEP*, 2000 EHB 1184, 1187.

8. Lessening the aesthetic or recreational value of an area qualifies for purposes of standing. *Tri-County Landfill, Inc. v. DEP*, 2014 EHB 128, 132; *Consol Pa. Coal Co. v. DEP*, 2011 EHB 251, 253; *Drummond v. DEP*, 2002 EHB 413, 414; *LTV Steel Co. v. DEP*, 2002 EHB 605, 606-07; *Giordano v. DEP*, 2000 EHB 1184, 1186.

9. "Standing is specific to each Departmental action, not whatever objections there may be to the action." *Citizen Advocates United to Safeguard the Env't v. DEP*, 2007 EHB 632, 674; *see also Borough of Roaring Spring v. DEP*, 2004 EHB 889, 904.

10. Bruce Kennedy has standing to pursue this appeal. *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009); *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975); *Tri-County Landfill, Inc. v. DEP*, 2014 EHB 128, 132; *Consol Pa. Coal Co.*

v. DEP, 2011 EHB 251, 253; *Drummond v. DEP*, 2002 EHB 413, 414; *LTV Steel Co. v. DEP*, 2002 EHB 605, 606-07; *Giordano v. DEP*, 2000 EHB 1184, 1186.

11. A person seeking to register under WMGR123 must submit a copy of the registration to the host municipality and the appropriate county, county planning agency, and county health department, if one exists, at the same time the registration is filed with the Department. 25 Pa. Code § 287.641(g).

12. The Department must publish notice of each registration for coverage under WMGR123 in the *Pennsylvania Bulletin*. 25 Pa. Code § 287.643(c).

13. Publication in the *Pennsylvania Bulletin* is sufficient notice for purposes of due process. *Feudale v. Aqua Pa., Inc.*, No. 335 M.D. 2014, 2015 Pa. Commw. LEXIS 331, at *6 n.4 (Pa. Cmwlth. Jul. 22, 2015) (citing *Grimaud v. Dep't of Envtl. Res.*, 638 A.2d 299, 301-02 (Pa. Cmwlth. 1994)).

14. A third-party appellant who challenges a permit based on errors committed during the application process must show us that errors have some continuing relevance. *O'Reilly v. DEP*, 2001 EHB 19, 51.

15. Stipulations are binding judicial admissions; they "have the effect of withdrawing a fact from issue and dispensing it without the need for proof of the fact." *Bituminous Processing Co. v. DEP*, 2001 EHB 489, 497 (quoting *Duquesne Light Co. v. Woodland Hills Sch. Dist.*, 700 A.2d 1038, 1054, (Pa. Cmwlth. 1997)); *see also Mason v. Range Resources-Appalachia LLC*, No. 12-369, 2015 U.S. Dist. LEXIS 97471, at *40-41 (W.D. Pa. 2015).

16. The weight that we lend to an expert's opinion depends on a variety of factors, including the expert's qualifications, presentation and demeanor, preparation, knowledge of the field in general and the facts and circumstances of the case in particular, and the quality of the

expert's data. *Solebury School v. DEP*, 2014 EHB 482, 530; *Pine Creek Valley Watershed Ass'n, Inc. v. DEP*, 2011 EHB 761, 780 (citing *UMCO v. DEP*, 2006 EHB 489, *aff'd*, 938 A.2d 530 (Pa. Cmwlth. 2007)).

17. "An appellant cannot simply come forth with a laundry list of potential problems and then rest its case. It must prove by a preponderance of the evidence that these problems have occurred or are likely to occur." *Borough of St. Clair v. DEP*, EHB Docket No. 2013-118-L, slip op. at 25 (Adjudication, May 20, 2015) (quoting *Shuey v. DEP*, 2005 EHB 657, 712).

18. The Department did not violate Article I, Section 27 of the Pennsylvania Constitution in authorizing coverage under General Permit WMGR123 for the Lamb's Farm Storage Facility. *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).

19. The Appellants did not meet their burden of proof, except that to remove any doubt whatsoever that the Department acted lawfully, reasonably, and constitutionally, the permit is revised to make it clear that no activity other than storage may be conducted at the site, and if there is ever a proposal to engage in any other activity, the permittee must apply for a modification and the remaining Appellants are entitled to concurrent notice of such an application.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD L. STEDGE, et al.	:	
	:	
v.	:	**EHB Docket No. 2014-042-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHESAPEAKE APPALACHIA, LLC, Permittee	:	

O R D E R

AND NOW, this 21st day of August, 2015, it is hereby ordered as follows:

1. The appeals of Rose Marie Grzinic, Ronald Brown, and Joyce Brown are **dismissed**.

2. The authorization for coverage under WMGR123NC027 is revised to include the following condition:

> This coverage approval does not authorize any manufacturing, treatment, disposal, or processing of residual waste. Any proposed change to the facility operation requesting permission to engage in manufacturing, treatment, disposal, or processing requires an application for a modification to be submitted to the Department. Notice of any such application shall be provided by certified mail or personal delivery to Richard Stedge, Bruce D. Kennedy, and Milda Baiba Guidotti concurrently with the submittal of the application to the Department.

3. The Department's action is in all other respects upheld.

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 21, 2015

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

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David M. Chuprinski, Esquire
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THOMAS PECKHAM	:	
	:	
v.	:	**EHB Docket No. 2014-074-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 31, 2015**
	:	

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

By Steven C. Beckman, Judge

Synopsis

The Board dismisses the appeal of an administrative order directing the Appellant to permanently close a compartmentalized underground storage tank. The owner/operator of the tank in question is subject to the closure requirements of the Storage Tank and Spill Prevention Act. The Department reasonably determined that permanently closing one compartment of the storage tank without closing the other is technically impossible and inappropriate.

Background

This matter involves the appeal of Thomas Peckham of a May 12, 2014 administrative order ("May 2014 Order") by the Department of Environmental Protection ("the Department") requiring Mr. Peckham to, among other things, pay registration fees and permanently close the compartmentalized underground storage tank ("Compartmentalized Tank") at his property in Greenfield Township, Erie County, pursuant to the Storage Tank and Spill Prevention Act ("Storage Tank Act"). A one-day hearing was held in this matter on March 30, 2015, at the Board's Northwest Office and Court Facility in Erie, Pennsylvania. Following the hearing, the Department filed a posthearing brief on June 4, 2015. Mr. Peckham filed his posthearing brief

on July 6, 2015, and the Department followed with its reply brief on July 21, 2015. The matter is now ripe for decision.

FINDINGS OF FACT

1. Mr. Peckham owns and operates an underground storage tank system located at 9915 Station Road in Greenfield Township, Erie County, Pennsylvania consisting of one double-walled underground storage tank that contains two compartments separated by a bulkhead (the "Compartmentalized Tank"). T. 19.

2. The Compartmentalized Tank was installed in March 1999. Ex. A, T. 19-20.

3. One compartment of the Compartmentalized Tank is referred to as "Tank 001," and is an 8,000 gallon compartment used to store gasoline. T. 20.

4. One compartment of the Compartmentalized Tank is referred to as "Tank 002," and is a 4,000 gallon compartment also used to store gasoline. T. 20.

5. The Compartmentalized Tank, along with associated piping, fixtures, monitoring devices and other equipment at 9915 Station Road in Greenfield Township, Erie County, Pennsylvania are a "storage tank facility" as that term is defined in Section 103 of the Storage Tank Act, 35 P.S. § 6021.103 (hereinafter the "Facility"). Ex. A.

6. On May 21, 2009, the Department issued a Notice of Violation to Mr. Peckham for failing to have the Facility inspected by January 25, 2009, in violation of 25 Pa. Code § 245.411. T. 22-23, Ex. H.

7. On September 24, 2009, a Department-certified inspector, Daniel Galvin, inspected the Facility and found that Tank 002 had not been operating because of a bad submersible pump, and that the line leak detectors could not be tested. T. 33, 34, Ex. I.

8. On September 30, 2009, the Department issued a Notice of Violation to Mr. Peckham for failing to have release detection records available to show that the automatic line leak detection had been tested within the last year in violation of 25 Pa. Code § 245.435. Ex. J.

9. Mr. Peckham submitted a registration form to the Department registering Tank 002 as temporarily out-of-service as of October 23, 2009. T. 36, Ex. B.

10. Pursuant to 25 Pa. Code § 245.451(h), Tank 002 was required to be permanently closed by October 23, 2012, unless the time for permanent closure was extended by the Department. T. 37.

11. On December 24, 2009, the Department issued a Notice of Violation to Mr. Peckham for having more than two inches of water in Tank 001 in violation of 25 Pa. Code § 245.432, and for failing to empty Tank 002 after it was registered temporarily out-of-service in violation of 25 Pa. Code § 245.451. T. 38, Ex. L.

12. Because Mr. Peckham failed to correct the two violations set forth in the December 24, 2009 NOV, on April 2, 2010, the Department issued an administrative order to Mr. Peckham requiring him to empty Tank 002 within 30 days, continuously maintain Tank 001 so that water does not exceed two inches in accumulation, and pay past due registration fees. T. 40-41, Ex. M.

13. Mr. Peckham eventually complied with the April 2, 2010 Administrative Order but not within the timeframes established in the order. T. 42.

14. Mr. Peckham stopped selling gas from the Compartmentalized Tank in 2010. T. 49.

15. Mr. Peckham stopped using Tank 001 in 2010, but Mr. Peckham did not register Tank 001 as temporarily out-of-service as required by 25 Pa. Code § 245.451(a). T. 49, 50-51.

16. On May 25, 2011, the Department issued an Assessment of Civil Penalty against Mr. Peckham for violations of the Storage Tank Act and that civil penalty remains unpaid. T. 79-80, Ex. O.

17. On April 12, 2012, the Department sent to Mr. Peckham, at the registered address of the Facility, a notification that Tank 002 was required to be closed by October 23, 2012. T. 45, Ex. C.

18. On June 27, 2012, the Department sent to Mr. Peckham, at the registered address of the Facility, a second notification that Tank 002 was required to be closed by October 23, 2012. T. 46, Ex. D.

19. Mr. Peckham was required, under 25 Pa. Code § 245.411 to have an inspection of the Facility by September 24, 2012, and Mr. Peckham did not have the inspection performed. T. 48-49, Ex. P.

20. Mr. Peckham did not request an extension of the deadline to close Tank 002 and did not close Tank 002 before October 23, 2012 as required under 25 Pa. Code § 245.451(h). T. 47-48.

21. On February 22, 2013, the Department sent to Mr. Peckham, at the registered address of the Facility, a Notice of Violation for failing to have the Facility inspected. T. 52, Ex. Q.

22. On March 8, 2013, the Department sent to Mr. Peckham, at the registered address of the Facility, a Notice of Violation for failing to close Tank 002 and for failing to pay overdue registration fees. T. 53-54, Ex. R.

23. By letter dated April 12, 2013, Mr. Peckham requested an extension of the closure deadline for Tank 002, and stated that he would have the Facility inspection done in May, 2013. T. 57, Ex. E.

24. By letter dated April 17, 2013, the Department acknowledged Mr. Peckham's request for an extension of the deadline to close Tank 002, and instructed him to pay all fees, get the Facility inspected, and correct any deficiencies. T. 58, Ex. F.

25. The Department's April 17, 2013, letter also attached a registration form for Mr. Peckham to register Tank 001 temporarily out-of-service. T. 58, Ex. F.

26. Mr. Peckham did not register Tank 001 temporarily out-of-service. T. 60.

27. By letter dated June 4, 2013, the Department denied Mr. Peckham's request to extend the temporarily out-of-service period for Tank 002. T. 59-60, Ex. G.

28. On August 21, 2013, a Department-certified inspector, Daniel Galvin, inspected the Facility and noted several violations including, but not limited to,: 1) the tank top sump on Tank 001 contained up to six inches of water; 2) the annual operational test of the mechanical line leak detector on the piping connected to Tank 001 had not been conducted as required by 25 Pa. Code § 245.441(a); and 3) tank release detection records were not available as required by 25 Pa. Code § 245.435. T. 64-67, Ex. T.

29. During the August 21, 2013 inspection, Mr. Galvin also noted that he was unable to verify that the gauge relied on for tank release detection was operational and that Tank 001 was idle but contained excess liquid in it that should be pumped out. T. 64, Ex. T.

30. On September 3, 2013, the Department sent to Mr. Peckham, at the registered address of the Facility, a Notice of Violation informing him of the violations found by Mr. Galvin on August 21, 2013. T. 67, Ex. U.

31. Mr. Peckham did not respond to the Department's September 3, 2013 Notice of Violation before the Department issued its May 12, 2014 administrative order. T. 69.

32. On May 12, 2014, the Department issued an administrative order to Mr. Peckham requiring him to:

a. Within 10 days, empty Tank 001 so that no more than one inch of regulated substance remains in Tank 001;

b. Within 30 days, pay $100 in registration fees to the Department for the Tanks;

c. Within 30 days, submit a completed Underground Storage Tank System Installation/Closure Notification Form to the Department in accordance with 25 Pa. Code § 245.452(a);

d. Within 90 days, permanently close the Tanks in accordance with 25 Pa. Code §§ 245.452-453;

e. Before permanent closure is completed, measure for the presence of a release of a regulated substance by sampling in a manner consistent with the Department technical document entitled "Closure Requirements for Underground Storage Tank Systems" and as required by 25 Pa. Code § 245.453(a);

f. If contaminated soils, contaminated groundwater or free product as a liquid or vapor is discovered, begin corrective action in accordance with 25 Pa. Code, Subchapter D, and as required by 25 Pa. Code § 245.453(b); and

g. Within 45 days after permanent closure of the Tanks, submit a copy of a properly completed closure report in accordance with the Department technical document entitled "Closure Requirements for Underground Storage Tank Systems," and as required by 25 Pa. Code § 245.452(f).

T. 70-73, Ex. A.

33. Mr. Peckham paid the $100 in registration fees that were required to be paid under the May 2014 Order. T. 112.

34. Properly closing only Tank 002 in place would destroy the outer wall of the Compartmentalized Tank leaving Tank 001 with no containment and no method of doing the interstitial release detection. T. 73-74.

35. Properly closing only Tank 002 in place would also require filling it with concrete which will produce a corrosive environment and eventually result in a release from Tank 001. T. 73.

36. Closing Tank 002 without closing Tank 001 is technically impossible and not appropriate. T. 74-75, 162-163.

37. Since 2009, the Department has issued at least six Notices of Violation and three administrative orders (a field order and two written administrative orders) to Mr. Peckham for violations of the Storage Tank Act at the Facility. T. 79, Ex. A, H, J, L, M, Q, R, U and Y.

DISCUSSION

This appeal concerns the Department's May 2014 Order requiring Appellant Thomas Peckham to address alleged violations of the Storage Tank Act at the Facility. The major provision of the May 2014 Order that remained unaddressed at the time of the hearing was the requirement that the Compartmentalized Tank at the Facility be permanently closed in accordance with the regulations. The Department bears the burden of proof to demonstrate that its issuance of an administrative order is supported by a preponderance of evidence, is authorized by statute, and is a proper exercise of its authority. 25 Pa. Code § 1021.122; *Natiello v. DEP*, 2008 EHB 640, 647. A preponderance of the evidence means that the evidence in favor of the proposition must be greater that the evidence opposed to it. *Perano v. DEP*, 2011 EHB 623, 633. If the Department acts pursuant to a mandatory provision of a statute or regulation, then the only question before the Board is whether to uphold or vacate the Department's action. If the Department acts with its discretionary authority, the Board may substitute its discretion for that

of the Department. *Warren Sand and Gravel v. DEP*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). The Board's scope of review is *de novo*: we are not limited to considering the facts that were available to the Department at the time that it issued its order. *Natiello*, 2008 EHB at 647; *see also Warren Sand & Gravel v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

The Department notes that, under the Board's rules, any issues not argued in the posthearing briefs may be waived and contends that Mr. Peckham raises only one issue in his posthearing brief: that the Compartmentalized Tank does not constitute a threat to human health or the environment. Department's Reply Br. at 1. While it is difficult to discern the exact nature and scope of the arguments in Mr. Peckham's posthearing brief, we do not read his argument as narrowly as the Department. Mr. Peckham certainly contends that the Compartmentalized Tank does not pose a threat to the environment or public health and as such, he should not be required to permanently close it. However, he not only raises that argument, but he also asserts that, contrary to the Department's allegations set forth in the May 2014 Order, he is in full compliance with the Storage Tank Act and that in fact he should be allowed to reopen all of the Compartmentalized Tank for use. Based on our review of the record in this case and more specifically, the post-hearing briefs, it does appear that the sole issue for resolution by the Board in this matter is whether the closure of the Compartmentalized Tank as ordered by the Department is authorized by statute, and is a proper exercise of its authority.

The Department argues that the requirement that Mr. Peckham close the Compartmentalized Tank set forth in its May 2014 Order is indeed a lawful and reasonable exercise of its discretion. The Department's argument that closure of the Compartmentalized Tank is proper is really twofold. The first step in its argument is that Tank 002 is required to be closed under the Department's regulations. The second part of the argument is that properly

closing Tank 002 would destroy the integrity of the Compartmentalized Tank and make it impossible to leave Tank 001 open for use. Therefore, the Department argues it properly exercised its authority to require Mr. Peckham to close and remove the entire Compartmentalized Tank. The Board finds that the Department presented credible evidence in support of its twofold argument and that the weight of the evidence is against the Appellant.

Section 1309 of the Storage Tank Act, 35 P.S. § 6021.1309, authorizes the Department to issue enforcement orders as are necessary to aid in the enforcement of the Storage Tank Act. Pursuant to Section 502 of the Storage Tank Act, 35 P.S. § 6021.502(c), upon discontinuance of the use or active operation of an underground storage tank, the owner or operator shall remove the tank. The Department's Storage Tank Act regulation at 25 Pa. Code § 245.451(a), however, allows for an underground storage tank to be taken temporarily out-of-service by completion and submission of an amended registration form to the Department by the owner within 30 days. 25 Pa. Code § 245.451(a). The Storage Tank Act regulation further requires temporarily out-of-service tanks to be permanently closed within three years, unless the Department grants an extension of the three-year deadline. 25 Pa. Code § 245.451(h).

In October 2009, Mr. Peckham submitted a temporary out-of-service registration form for Tank 002 only. Tank 002 was registered as temporarily out-of-service as of October 23, 2009 and under the regulations was required to be permanently closed by October 23, 2012. Mr. Peckham failed to close Tank 002 by that date. He requested an extension of the closure deadline by letter to the Department dated *April 12, 2013,* well past the October 2012 deadline. The Department denied the extension and Mr. Peckham did not appeal the denial. After he was denied the extension, Mr. Peckham failed to close and remove Tank 002 as required under the

regulations. Mr. Peckham's failure to close and remove Tank 002 is a clear violation of 25 Pa. Code § 245.451(h) and is the basis for the Department's May 2014 Order.

Mr. Peckham offered no direct defense to the Department's contention that he was in violation of 25 Pa. Code § 245.451(h). He asserted that because both Tanks 001 and 002 are currently empty, they did not pose any environmental or health risk and in fact argues that this demonstrates that he is full compliance with the Storage Tank Act. That of course is simply not true. The evidence presented by the Department adequately demonstrated that not only was Mr. Peckham not in compliance with the requirement to close and remove Tank 002 at the time of the May 2014 Order, he continued to be in violation of that provision at the time of the hearing. Furthermore, Mr. Peckham has not complied with numerous operating requirements for the Compartmentalized Tank in the past four years. To name a few, Appellant failed to empty Tank 002 within the proper timeframe, has not performed proper leak detection, has not had routine facility inspections done on time, has not had annual line leak detector testing done, and has not paid registration fees in a timely manner. The course of conduct presented at the hearing evidences Mr. Peckham's lack of interest in and/or ability to comply with the requirements of the Storage Tank Act and its regulations in general and with the specific requirements regarding the closure of Tank 002. The Board finds that the Department has the necessary authority and acted within that authority in requiring Mr. Peckham to close and properly remove Tank 002.

We now turn our attention to the remaining part of the Department's May 2014 Order that requires Mr. Peckham to also close Tank 001. It is clear from the evidence presented at the hearing that there are compliance issues involving Tank 001. However, the Department's did not take the position in the May 2014 Order, or at the hearing for that matter, that these compliance issues required the closure of Tank 001. Instead the Department relied on expert testimony that

the requirement to close Tank 002 by necessity requires the closure of Tank 001. This is because, as we have previously discussed, Tank 001 and Tank 002 are part of a compartmentalized tank with one common outer wall. The Department offered credible evidence that Tank 002 cannot be closed without closing Tank 001. Mr. Hall, testifying as an expert in the operation, installation and closure of underground storage tank systems, stated that closing Tank 002 without closing Tank 001 is "technically impossible." Properly closing only Tank 002 would destroy the outer wall of the Compartmentalized Tank, leaving Tank 001 with no containment and no method of doing interstitial release detection. Beyond the issue of breaching the containment provided by the outer wall of the Compartmentalized Tank, the only option for properly closing Tank 002 without removing it from the ground would require filling it with concrete. Mr. Hall testified that doing so will produce a corrosive environment and will eventually result in a release from Tank 001. Mr. Hall's testimony was corroborated by Mr. Galvin, the president of Jemko Petroleum Equipment and a certified storage tank inspector who had completed the most recent inspection at this Facility, who testified that it would not be appropriate to close only Tank 002 because of the nature of the Compartmentalized Tank. Mr. Peckham did not provide any evidence or testimony to refute the opinions offered by the Department's witnesses that closing Tank 002 required the closing of Tank 001. Based on the testimony provided, the Board finds that the Department has the necessary authority and properly exercised that authority in requiring Mr. Peckham to close Tank 001 along with Tank 002.

As evidenced by the three administrative orders and six Notices of Violation issued to the Mr. Peckham since 2009, he has a long history of noncompliance with the Storage Tank Act and the Department's regulations at this Facility. The Board is doubtful that this chronic noncompliance will change anytime in the future, and it is clearly long past the time required

under the regulations to close the Compartmentalized Tank. The Department's May 12, 2014 Order to close the Compartmentalized Tank sought to address Mr. Peckham's continued noncompliance and the resulting threats to public health and the environment. The Board finds that the May 2014 Order is a lawful exercise of the Department's authority and the closure of the entire Compartmentalized Tank as required by the May 2014 Order is reasonable and appropriate.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this proceeding. 35 P.S. § 6021.1313.

2. The Department is the agency with the duty and authority to administer and enforce the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L., *as amended*,35 P.S. §§ 6021.101-6021.2104; 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 Department bears the burden of proof when it issues an administrative order. 25 Pa. Code § 1021.122(b).

4. Mr. Peckham's failure to close and remove Tank 002 is a violation of 25 Pa. Code § 245.451(h).

5. The closure and removal of Tank 001 is required because the closure and removal of Tank 002 will destroy the outer wall of the Compartmentalized Tank and will prevent Tank 001 from meeting the requirements for the safe operation of an underground storage tank.

6. The Department has met its burden in this appeal by proving by a preponderance of the evidence that the Department's May 12, 2014 Order was lawful, reasonable and appropriate.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THOMAS PECKHAM	:	
	:	
v.	:	**EHB Docket No. 2014-074-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 31st day of August, 2015, it is hereby ordered that the Appeal of Thomas Peckham 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 31, 2015

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

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(via electronic filing system)

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RONALD TESKA AND GIULIA MANNARINO	:	
v.	:	**EHB Docket No. 2015-088-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EQT PRODUCTION COMPANY, Permittee	:	**Issued: August 31, 2015**

OPINION AND ORDER ON
MOTION TO DISMISS

By Steven C. Beckman, Judge

Synopsis

The Board grants a Motion to Dismiss for mootness where the Department action under appeal, the approval of an alternate method of plugging, has been withdrawn by the Department.

O P I N I O N

Introduction

On June 22, 2015, Ronald Teska and Giulia Mannarino (hereinafter "Teska") filed a Notice of Appeal and a Petition for Supersedeas. Following a conference call with the parties, the Board scheduled a supersedeas hearing for July 29, 2015. On July 13, 2015, prior to the supersedeas hearing, EQT Production Company (hereinafter "EQT") filed a Motion to Dismiss stating that, upon EQT's request, the Department had withdrawn its approval of the alternate method of plugging for the G.E. Houston #186 well on July 10, 2015 and, therefore, the matter was moot. The Board issued an Order staying the supersedeas hearing and providing for responses to the Motion to Dismiss. On July 14, 2015, the Department filed a letter concurring with EQT's Motion to Dismiss. Teska filed a response to the Motion to Dismiss on August 12,

2015 requesting that the Board deny EQT's motion. On August 26, 2015, EQT filed a reply to Teska's response to the Motion of Dismiss. All of the filings having now been completed, the matter is ready for decision by the Board.

Discussion

A matter is moot when an event occurs that deprives the Board of the ability to grant effective relief or the appellant has been deprived a necessary stake in the outcome. *Delaware Riverkeeper Network v. DEP and PennDot,* 2012 EHB 215, 216, citing *Horsehead Res. Dev. Co. v. DEP*, 780 A.2d 856, 858 (Pa. Cmwlth. 2001), *appeal denied*, 796 A.2d 987 (Pa. 2002); *Bensalem Township Police Benevolent Assoc., Inc. v. Bensalem Township,* 777 A.2d 1174, 1178 (Pa. Cmwlth. 2001); *Blue Marsh Labs v. DEP*, 2008 EHB 306, 307-08; *Solebury Township v. DEP,* 2004 EHB 23, 28-29. "[T]he Department's rescission of an action under appeal renders the appeal moot." *Gardner v. Cumberland County Conservation Dist.,* 2008 EHB 110, 111. See also *Delaware Riverkeeper Network v. DEP and PennDot,* 2012 EHB 215 (Board found that because the permit under appeal was revoked by the Department, the matter was moot.)

There is no dispute that the Department's approval of EQT's request for an alternate method of plugging is the Department action under appeal. The Notice of Appeal states that the Department action that is the subject of the appeal is "approval of alternate plugging of well." In the section of the Notice of Appeal that addresses how Teska received notice of the Department action, it identifies the source of the notice as a June 19, 2015 e-mail from Department employee Thomas E. Donohue that states "… per your request in the conference, I am letting you know that the Department has approved the Alternate Method of plugging for the G.E. Houston well on 6/15/15." In response to the Motion to Dismiss, Teska further acknowledges this fact in their Memorandum in Opposition to the Motion to Dismiss where they state "the Department's

approval of the alternate method is the subject of the appeal." Memorandum, p. 5. There is also no dispute that the approval has been withdrawn. See Teska's Memorandum at p. 2.

Despite the withdrawal of the approval, Teska argues that the matter is not moot because the issues surrounding EQT's proposed plugging of the well are broader than the Department's approval of the alternate plugging method and that these issues were raised in their Notice of Appeal. In the Notice of Appeal, Teska specifically listed objections to EQT's Notice of Intent to Plug, the location of the gas well, the potential for impact to the water supply from plugging and that the Department was failing to take in to account all circumstances and conditions. However, the fact remains that the only action taken by the Department and the subject of the appeal is the approval of the alternate plugging method. Therefore, that approval is the only action properly in front of the Board. Since that approval has been withdrawn, there is no further relief that the Board can grant and the matter is moot.[1] Under the facts of this appeal, we find the Motion to Dismiss should be granted. Accordingly, we enter the following Order:

[1] There are exceptions to the mootness doctrine but Teska fails to argue that any of these exceptions apply to this matter; therefore, the Board will not address them in this opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RONALD TESKA AND GIULIA MANNARINO	:	
	:	
v.	:	**EHB Docket No. 2015-088-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EQT PRODUCTION COMPANY, Permittee	:	

O R D E R

AND NOW, this 31st day of August, 2015, it is hereby ordered that the Motion to Dismiss filed by EQT Production Company is **granted.** This appeal is **dismissed** as moot.

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 31, 2015

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

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Nicole M. Rodrigues, Esquire
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Giulia Mannarino
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For Permittee:
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Kevin J. Garber, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PATRICIA A. WILSON, et al.	:	
	:	
v.	:	**EHB Docket No. 2013-192-M**
	:	**(Consolidated with 2013-200-M)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: August 31, 2015**
PROTECTION and NEWTOWN TOWNSHIP,	:	
Permittee	:	

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

By Richard P. Mather, Sr., Judge

Synopsis

The Board dismisses the Appellant's challenge to the Department's approval of the Township's 2013 Plan Update. The Appellant did not meet her burden to show that the Department's approval of the Plan was inappropriate or otherwise not in conformance with law.

FINDINGS OF FACT

Parties

1. The Township, Ms. Wilson, and the Department, stipulated to certain facts and submitted to the Hon. Judge Richard P. Mather, Sr. on October 14, 2014. Exhibit ("Ex.") EHB-1; N.T. 8-9.)

2. The Department is the administrative agency vested with the authority and responsibility to administer and enforce the requirements of the Sewage Facilities Act, 35 P.S.§§ 750.1 *et seq*. ("Sewage Facilities Act" or "SFA" or "Act 537") and the rules and regulations promulgated thereunder. Ex. EHB-1, Para.1.

3. Newtown Township, Delaware County ("Township") is a second class township that obtained approval of an Act 537 Plan Update ("2013 Plan Update") from DEP on September 24,

2013. Ex. EHB-1, Para. 2.

4. Patricia A. Wilson ("Appellant" or "Ms. Wilson"), is a resident of Newtown Township. She resides at 4111 Battles Lane, Newtown Square, PA 19073. Ms. Wilson is a resident of the Echo Valley neighborhood of the Township whose residence is served by an on-lot sewage disposal system. Ex. EHB-1, Para. 3.

5. Marc and Therese DeRita, 336 Crum Creek Lane, Newtown Square, PA 19073, Craig and Lara Toerien, 334 Crum Creek Lane, Newtown Square, PA 19073, and Joseph and Victoria Graham, 332 Crum Creek Lane, Newtown Square, PA 19073 ("DeRita Appellants") are residents of the Echo Valley neighborhood of the Township. Ex. WILSON-63.

6. Springton Pointe Estates Homeowners Association ("SPEHOA") is an association composed of all owners of homes in the Springton Pointe Estates residential subdivision in Newtown Township. There are 115 homes in the Springton Pointe Estates subdivision. Ex. WILSON-62.

Procedural History of Legal Challenges to 2013 Plan Update

7. On October 24, 2013, Ms. Wilson filed an appeal of the Township's 2013 Plan Update with the Board. *See* EHB Docket No. 2013-192-M.

8. On November 1, 2013, the DeRita Appellants filed an Appeal of the 2013 Plan Update with the Board. *See* EHB Docket No. 2013-200-M.

9. On November 18, 2013, SPEHOA filed a Petition to Intervene in the *Wilson* Appeal. *See* EHB Docket No. 2013-192-M.

10. The Board granted SPEHOA's Petition to Intervene on January 2, 2014. *Id*.

11. On March 6, 2014, the Board issued an Order consolidating the *Wilson* and *DeRita* appeals. *See* EHB Docket No. 2013-192-M (Consolidated with 2013-200-M).

12. A "Settlement Agreement and Mutual Release" was entered into on October 14, 2014 between Newtown Township, the Department, Marc and Terese DeRita, Craig and Lara Toerien, Joseph and Victoria Graham, Adelio Pierini and Lino A. Pierini to settle the issues raised in EHB Appeal 2013-200-M. Ex. WILSON-62. The Agreement specifically provides that "[t]he appeal brought by the DeRitas, the Toeriens and the Grahams will be withdrawn with prejudice." *Id*., Term 2.j., p. 5.

13. On February 17, 2015, the DeRita Appellants withdrew their Appeal with prejudice. The DeRita Appellants did not participate in, or present any evidence at, the EHB Hearing, and did not file a post-hearing memorandum.

14. A "Settlement Agreement" was entered into between Newtown Township, the Newtown Township Municipal Authority, and SPEHOA on October 14, 2014 to settle the issues raised in SPEHOA's intervention in EHB Appeal 2013-192-M. Ex. WILSON-63. The Agreement specifically provides that "[t]he appeal/intervention of the SPEHOA will be withdrawn with prejudice." *Id*., Term 2.h., p. 7.

15. On February 18, 2015, the SPEHOA Intervenors withdrew their Appeal/Intervention with prejudice. SPEHOA Intervenors did not participate in, or present any evidence at, the EHB Hearing and did not file a post-hearing memorandum.

Prior Act 537 Planning in Newtown Township

16. The Crum Creek Basin of Newtown Township is currently served by an Act 537 Plan, dated May 23, 2002, as supplemented August 13, 2002, and approved by DEP on August 29, 2002 ("2002 Plan"). Ex. TWP-2, Appendix T at Para. M (page 2); DEP-3; EHB-1, Para. 6.

17. The 2002 Plan divides the sewer service area into two sewer districts, Sewer District 1 ("SD-1") and Sewer District 2 ("SD-2"). The 2002 Plan requires that the SD-1 sewer

area be hooked up to the Central Delaware County Authority ("CDCA"), which operates sewer lines that ultimately convey sewage to the Delaware County Regional Water Quality Authority ("DELCORA") for wastewater treatment and discharge into the Delaware River, while the SD-2 sewer area would be served by a regional land application system on the Garrett-Williamson site. (N.T. 380-381); Ex. DEP-3.

18. In 2005, the Township prepared a Plan Update evaluating the concept of land application on the Garrett-Williamson site. The Department's review found that, due to hydrogeologic issues, this was not a viable alternative to meet the Township's sewage disposal needs. (N.T. 381.)

19. In 2007, the Township started to explore membership in the CDCA to meet its sewage disposal needs for the Crum Creek Basin. (N.T. 382.)

20. On May 21, 2007, the Township submitted to DEP a Plan Update to address sewage needs in its Crum Creek Basin. The initial submission was supplemented by information provided by the Township on January 8, 2008, February 21, 2008, April 10, 2008, July 18, 2008, August 11, 2008, September 3, 2008, and September 8, 2008. Ex. TWP-2, Appendix T, Para. U; EHB-1, Para. 12.

21. The Township entered into a contract with CDCA on December 21, 2007 that allows it to send up to 961,975 gallons per day ("gpd") of sewage through CDCA's collection and conveyance system to DELCORA for wastewater treatment and discharge into the Delaware River. Ex. TWP-2 at Appendix W; TWP-2 at pp. 12, 40; EHB-1, at Para. 13.

22. On February 6, 2009, DEP approved the Township's Plan Update ("2009 Plan Update") to its 2002 Plan. Ex. TWP-2 at p. 12; TWP-2, Appendix T, Para. U; EHB-1, at Para. 14.

23. The 2009 Plan Update was appealed by Ms. Wilson and others. *See* EHB Docket Nos. 2009-024-L, 2009-026-L, and 2009-033-L. Ex. EHB-1, at Para. 15.

24. The challenge to the 2009 Plan Update was sustained by the Board on November 1, 2010, on the ground that the Township was not committed to implementing its 2009 Plan Update. *Patricia A. Wilson and Paul I. Guest, Jr. v. DEP and Newtown Township, BPG Entities, The Rouse Group Development Company, LLC, and Ashford Land Company. L.P*, 2010 EHB 827 (Adjudication); Ex. EHB-1, at Para. 16; N.T. 382.

2010 Consent Order and Agreement between DEP and the Township

25. On January 28, 2010, the Department and the Township executed a Consent Order and Agreement ("CO&A") that required the Township to prepare and submit a new Act 537 Plan Update to DEP. Ex. TWP-2, Appendix T; EHB-1, at Para. 17.

26. Ms. Mahoney, a Sewage Facilities Supervisor in the Department's Southeast Regional Office, was involved in preparing the 2010 CO&A. *Id*; (N.T. 383.)

27. The CO&A with the Township compelled the Township to prepare and implement a new sewage facilities plan. *Id*; Ex.TWP-2, Appendix T.

28. The 2010 CO&A requires that the Township prepare and submit an Act 537 Plan Update to DEP within 215 days of its execution. (N.T. 383); Ex. TWP-2, Appendix T.

Township's 2010 Plan Update Submission

29. On April 20, 2010, the Department approved the Township's Plan of Study for evaluating sewage disposal alternatives for areas of future growth and areas with malfunctioning on-lot sewage systems within the Crum Creek watershed. Ex. EHB-1, at Para. 18

30. The Township submitted a 2010 Plan Update to DEP for review in August, 2010. (N.T. 382-383.)

31. On November 29, 2010, DEP issued a review letter identifying numerous deficiencies with the 2010 Plan Update submission. Ex. DEP-4; EHB-1, Para. 20.

Township Development of Post-2010 Plan Update, with DEP Input

32. Following the November 29, 2010 review letter, the Department met with representatives of the Township's Municipal Authority in January and February, 2011; the Authority pushed the idea of Act 537 special studies[1] for Florida Park and Echo Valley as its new Plan Update. The Township prepared a Plan of Study indicating it would pursue the special studies, but never submitted any special studies to DEP for review. (N.T. 385-386.)

33. In June or July of 2011, the Township changed managers. (N.T. 387.)

34. The new Township Manager, Michael Trio, contacted Ms. Mahoney to discuss Act 537 planning issues in the Township. *Id*.

35. On November 28, 2011, Mr. MacCombie, an Engineer working on behalf of the Township, submitted a Plan of Study to DEP indicating that the Township proposed to abandon the Echo Valley and Florida Park Special Studies and instead pursue a sewage facilities plan update for the Township's Crum Creek Basin. Ex. TWP-2, Appendix V; EHB-1, Para. 25.

36. In December, 2011, the Township submitted a new Plan of Study to DEP for review, which the Department approved on February 10, 2012. (N.T. 386-387); Ex.TWP-2, Appendix V.

Mr. MacCombie's Preparation of the Township's 2013 Plan Update

37. Mr. MacCombie prepared the 2013 Plan Update. (N.T. 24.)

[1] A "special study" is defined as a type of Official plan revision that is "A study, survey, investigation, inquiry, research report or analysis which is directly related to an update revision. The studies provide documentation or other support necessary to solve specific problems identified in the update revision." 25 Pa. Code 71.1 (defn. of "Official plan revision" (iii)). The special studies for Florida Park and Echo Valley would have focused on the on-lot malfunctions in those neighborhoods.

38. Mr. MacCombie's opinions with respect to sewage facilities planning in the Township are contained in the 2013 Plan Update. (N.T. 289-290.)

39. Mr. MacCombie was first asked to participate in sewage facilities planning in the Township in June or July of 2011 by new Township Manager Michael Trio. (N.T. 290-291.)

40. Mr. MacCombie was asked to prepare a whole new Act 537 Plan Update for the Township "from scratch" and to do what he felt "was in the best interest of the Township from an economical and environmental standpoint." (N.T. 294.)

41. Mr. MacCombie used the DEP document "Pennsylvania Sewage Facilities Act Guide for Preparing Act 537 Update Revisions" in preparing the 2013 Plan Update. (N.T. 326-327); Ex. TWP-4.

42. Mr. MacCombie used Act 537 in preparing the 2013 Plan Update. (N.T. 327); Ex. TWP-5.

43. In preparing the Plan Update in the area where there were existing homes, Mr. MacCombie and his staff looked at topographic information, including aerial topographic plans, and then physically went out to the areas where sewers were being considered, and met with people out in the field, including various property owners. (N.T. 303.)

44. Mr. MacCombie also met with the owners of parcels in the Township that are either under development, have potential for development, or have preliminary plans for development. (N.T. 304.)

45. In addition, Mr. MacCombie met with representatives of existing institutions, businesses, and corporate campuses to discuss their sewage needs. (N.T. 304-305.)

46. In preparing the 2013 Plan Update, Mr. MacCombie tried to minimize interactions with floodplains, wetlands, and steep slopes. He tried to stay out of areas with

endangered species. (N.T. 309.)

47. One particular area of environmental concern was the possibility of running a pipe along Lewis Run in the Echo Valley area. Mr. MacCombie looked at the impacts of running a pipe along Lewis Run and determined that the Plan would be able to accommodate a gravity system with only "minimal effect" on the stream from a stream crossing. *Id*.

48. Another issue of concern was a proposed force main coming from the Springton Pointe Estates through a wetland in the Hunters Run area. Directional drilling to replace an existing 4 inch force main would eliminate impact to the wetland area. (N.T. 310.)

49. Mr. MacCombie investigated potential costs to the residents of the system set out in the 2013 Plan Update. (N.T. 335-336.)

50. One of the items considered in Mr. MacCombie's cost investigation is the cost of grinder pumps to Marple Township, as offset by a state grant. (N.T. 335-338); Ex. TWP-26.

Township Sewage Flow and Capacity Information for 2013 Plan Update

51. After gathering information on sewer needs, Mr. MacCombie prepared a sewage flow summary. (N.T. 305-306); Ex. TWP-2, Appendix L.

52. In developing the flow information, Mr. MacCombie used census data, physical coordination with developers, site views, metered flows, pump and haul records, topography, and environmental factors. (N.T. 307-309.)

53. A document prepared by Kaplin Stewart, on behalf of BPG Properties ("BPG"), states that 185,000 gallons per day of sewage capacity is sufficient for BPG. This is the type of document upon which an engineer would reasonably rely upon in preparing an Act 537 Plan. (N.T. 328); Ex. TWP-9.

54. A document prepared by Joseph D'Amico, Jr., on behalf of Claude DeBotton,

who owns various properties in the Township, states that their requirements for sewage capacity would be approximately 175,000 gallons per day. (N.T. 328-329); Ex. TWP-10. This is the type of document upon which an engineer would reasonably rely upon in preparing an Act 537 Plan. *Id*.

55. Mr. MacCombie met with Mr. DeBotton, and Mr. DeBotton's consultants, Evans Mill Environmental, regarding needed capacity. *Id*.

56. Mr. MacCombie examined planning modules submitted on behalf of Mr. DeBotton by Evans Mill Environmental, and determined that they were consistent with the Plan Update. (N.T. 330); Ex. TWP-11.

57. Mr. MacCombie also examined the average flow per day being discharged from Episcopal Academy. This is the type of document upon which an engineer would reasonably rely upon in preparing an Act 537 Plan. (N.T. 330-331); Ex. TWP-17.

58. Mr. MacCombie believed he was conservative in calculating anticipated sewage generation because he uses a flow of 262.5 gallons per day for older parts of town, based on an average of 3.5 people per household generating 75 gallons per day. (N.T. 21-22, 332.)

59. Under current Act 57 of 2003, that amends the Municipal Authorities Act, 2010 census data shows 2.49 individuals per household using 90 gallons per day each, equaling 224.1 gallons per day. Mr. MacCombie used a figure of 225 gallons per day for anything built after 2002, which is the advent of low flow toilets. N.T. 21-22, 332-333.)

60. Mr. MacCombie used 262.5 gallons per day for anything built before 2002. He believed there is actually more capacity in the system than the Township is planning for. (N.T. 333.)

61. Mr. MacCombie considered water meter readings to determine anticipated

sanitary sewer flows from a property. (N.T. 333-334); Ex. TWP-18.

62. Melmark has requested a 25,000 gallon per day allocation. (N.T. 335); Ex. TWP-19.

63. Exhibits TWP-18 and TWP-19 are the type of documents upon which an engineer would reasonably rely upon in preparing an Act 537 Plan. (N.T. 335.)

Gravity System vs. Low Pressure Sewer System

64. A force main is "the line that takes the discharge from the pump and takes it to a discharge point. (N.T. 243.) A force main is typically under pressure. *Id.*

65. A low pressure system is typically used in connection with a grinder pump. (N.T. 244.)

66. A grinder pump grinds up waste and puts it through a small diameter pipe at low pressure and then ties into a gravity line. (N.T. 244-245.)

67. A grinder pump can save excavation costs, since it can be installed only three or four feet down, which would be shallower than a gravity system in areas of undulating hills such as Echo Valley. *Id.*

68. One concern about grinder pumps is that anything mechanical can break, particularly if you lose electricity and do not have a backup generator. (N.T. 245.)

69. In Echo Valley, concerns were raised about the electricity issue with grinder pumps. *Id.*

70. Grinder pumps can cost $6,000, for which the homeowner is responsible, along with increased maintenance costs, and the home served by a grinder pump must pay the same tap-in fee as those homes served by a gravity system. (N.T. 245-246.)

71. Because of the concerns with low pressure sewer and grinder pumps, after talking

to residents of Echo Valley, and walking the site, Mr. MacCombie was able to provide a gravity system in the 2013 Plan Update for Echo Valley. *Id*. In a gravity system, sewage flows by means of gravity and there is no need for grinder pumps and use of electricity. *Id*.

Township Efforts in Seeking and Responding to Public Input in Plan Update Development

72. Before the 2013 Plan Update was submitted to DEP, the Township conducted public outreach and meetings including 2 publications (of the Draft Plan Update and the 2013 Plan Update) for comment, on October 17, 2012 and February 14, 2013, respectively; separate meetings with residents that raised concerns about the Draft Plan Update in Echo Valley (December 21, 2012), Springton Pointe Woods and Springton Pointe Estates (January 8, 2013), on the location of the Goshen Road Pump Station (January 2, 2013), and the location of the Newtown Hunt Pump Station (January 14, 2013). Ex. TWP-2, Appendix CC, page 1.

73. Township officials undertook 16 separate public outreach and community meetings seeking input on the Draft Plan Update and the 2013 Plan Update. *Id*.

74. The Township also held five Board of Supervisors meetings about the Draft Plan Update and the 2013 Plan Update including the presentation of Alternative 1 of the Draft Plan Update (December 10, 2012); a meeting with residents to get public comment and respond to questions on the Draft Plan Update (December 27, 2012); a presentation of Alternatives 1 and 2 of the 2013 Plan Update (February 4, 2013); a meeting where the Board passed a motion to move forward with Alternative 2 of the 2013 Plan Update (February 11, 2013); and a meeting to adopt Resolution 2013-10 (Approval of Act 537 Sewage Facilities Plan Update)(March 25, 2013). Ex. TWP-2, Appendix CC, page 1.

75. The Township held at least 3 public meetings with residents in developing the Plan Update; depending upon questions asked at the meetings, follow up meetings were held.

(N.T. 263.)

76. Mr. MacCombie's office reviewed all the public comments that were received and participated in responding to the comments. *Id*.

77. Also, in August, 2012, a meeting was held to discuss the Draft Plan Update with the residents; another meeting with the residents was advertised and held in October, 2012, and yet another meeting with the residents was held in January, 2013. (N.T. 316-318.)

78. The Township published, on January 30, 2013, a Notice in the *County Press* of a special meeting to be held to discuss the Plan Update. Ex. TWP-2, Appendix S.

79. The Board of Supervisors opened the January, 2013 public meeting up to discuss the Plan Update, and made Mr. MacCombie available to answer any questions. (N.T. 317-318.)

80. At that meeting, residents asked a number of questions about different aspects of the Plan Update. *Id*. The Board directed Mr. MacCombie and his staff to follow up by holding additional meetings and further evaluating different issues brought up by residents at the meeting including: (1) the location of sewer line direction and where the lines were going; (2) moving a pump station's location; (3) concerns from residents in Echo Valley about having low pressure sewers; (4) what was going to happen at Springton Pointe Estates with wastewater treatment plant decommissioning and pump station installation; (5) what was going to happen in the area of Hunt Valley Circle; (6) other specific issues concerning residents of Echo Valley; and (7) specific issues on Florida Park. (N.T. 319-321.)

81. After the January, 2013 public meeting on the Plan Update, the Board directed Mr. MacCombie to follow up on outstanding issues by holding breakout sessions in areas of the Township where concerns were raised, including with the residents of Springton Pointe Woods and Springton Pointe Estates, Hunt Valley Circle, Echo Valley, and Florida Park. (N.T. 320-

321.) Attendees included Ms. Wilson. (N.T. 321.)

82. As a result of public comments from the meetings, Mr. MacCombie's staff held field meetings in Hunt Valley Circle to discuss with property owners potential locations for a pump station. (N.T. 321-322.)

83. Mr. MacCombie's staff also participated in field visits with residents of Echo Valley with regard to location of gravity sewers or low pressure sewers. (N.T. 322.) Field visits were also held with the Acciabattis, the Pierinis, and the DeRitas. *Id*.

84. The field visit meetings resulted in changes to the Draft Plan Update. (N.T. 323.)

85. As a result of the meeting with the Hunt Valley Circle residents, the pump station direction was moved to the west. *Id*.

86. From meetings with the homeowners of Echo Valley and Mr. Acciabatti, the pump station along Goshen Road was moved further west onto the Pierini property. *Id*.

87. Echo Valley residents generally preferred a gravity system, so the sewer service area was changed to accommodate this preference and to provide flow to the Ashford Pump Station. (N.T. 323-324.)

88. Another change as a result of the meetings was showing a force main being constructed to discharge up Goshen Road and tie directly to the Ashford pump station. Thus, the whole service area ties into the Ashford pump station. (N.T. 323-324.)

89. After the field visit public meetings, the Board readvertised the 2013 Plan Update on February 14, 2013 and received additional public comment. (N.T. 324-325); Ex. TWP-2, Appendix S, CC.

90. Mr. MacCombie's office reviewed all the public comments that were received and participated in responding to the comments. (N.T. 325.)

91. The Township also sought municipal input on the Plan Update from several municipal entities. The Newtown Township Planning Commission was asked for input (via certified mail dated October 22, 2012) and provided input on December 13, 2012, moving to send the Draft Plan Update to the Board of Supervisors. Ex. TWP-2, Appendix Q.

92. Neighboring townships (Marple Township and Edgmont Township) were asked for input on the Draft Plan Update on October 31, 2012; Marple did not respond, but Edgmont provided comments on November 30, 2012. *Id*. Additionally, input from the Delaware County Planning Department ("DCPD") was sought on October 22, 2012; DCPD responded with general support for the recommendations in the Plan on November 1, 2012. Ex. TWP-2, Appendix R.

Analysis of Sewage Facilities Planning Alternatives

93. Mr. MacCombie performed an analysis of various sewage facilities alternatives. (N.T. 310.)

94. The possible alternatives included new on-site disposal, a drip irrigation system in the area adjacent to Florida Park, the use of existing on-lot disposal systems, and connection via public sewer through CDCA for treatment by DELCORA. (N.T. 311-312.)

95. The CDCA public sewer alternative minimizes the potential damage of seepage or overflows getting into streams. (N.T. 312.)

96. The homes in Florida Park are on small lots with limited space for a grinder pump system, so a gravity approach "would be more cost-effective and more reasonable to serve these areas." (N.T. 313.) This would avoid a pump and haul situation and upgrade water quality in Preston Run by minimizing any overflows or system malfunctions. (N.T. 313-314.)

97. Mr. MacCombie examined different alternatives "to provide adequate sewage but also to make sure it's handled appropriately and you end up with a benefit by decreasing the

probability of discharges into the streams and the surrounding ground water in the area." (N.T. 314.)

98. Mr. MacCombie performed the alternatives analysis for the entire sewer service area. (N.T. 314.)

99. Mr. MacCombie and his staff vetted the alternatives and then prepared a Draft Plan Update for the Board of Supervisors in August, 2012. (N.T. 314-315.)

100. Mr. MacCombie and his staff considered different alternatives and compiled them into a Plan Update to present to the Board that "was a workable plan and a feasible plan." *Id*.

101. The Draft Plan Update was advertised, and public comment was received. (N.T. 315.)

102. Mr. MacCombie and his staff prepared responses to all the public comments. (N.T. 315.)

103. Mr. MacCombie used the DEP document "Sewage Disposal Needs and Identification" in preparing the 2013 Plan Update. (N.T. 326-327); Ex. TWP-6.

Malfunctions in Echo Valley Neighborhood

104. Mr. James Curcio and his family reside at 4114 Battles Lane in the Echo Valley neighborhood of the Township. (N.T. 361.)

105. Mr. Curcio moved into his current residence in 2003. *Id*.

106. The Curcio residence has a failing on-lot septic system. *Id*.

107. Shortly after moving in, Mr. Curcio hired an engineer to examine replacement of the on-lot system. (N.T. 362.)

108. The engineer hired by Mr. Curcio noted the presence of wetland plants and

recommended that he would be better off waiting for public sewer. (N.T. 363.)

109. Mr. Curcio has been pumping sewage from his septic tank more and more frequently, every three weeks. *Id.*

110. Each time Mr. Curcio pays to have his system pumped it costs $90 – 100. *Id.*

111. The cost to replace his on-lot system is $45,000 – 50,000. (N.T. 364.)

112. Mr. Curcio's family is adversely affected by not having public sewer in several ways. (N.T. 365-365.)

113. One way Mr. Curcio and his family are affected by the absence of public sewer is that he could not put a deck in his yard. (N.T. 365.)

114. Another way Mr, Curcio and his family are affected by the absence of public sewer is that his yard is a mushy mess that sometimes "cannot even be mowed." *Id.*

115. Mr. Curcio "absolutely" supports the 2013 Plan Update. (N.T. 366-367.)

116. According to Mr. Curcio, the Township has kept neighbors informed of its plans for public sewer. *Id.*

117. The Township held an on-site meeting in Echo Valley to discuss public sewer options with residents. (N.T. 368.)

118. Mr. Curcio is aware of neighbors that have problems with their on-lot Systems. "More than a handful" are pumping, and he is aware of a holding tank, a stream discharge system, and "some folks discharging their washing fluid out back." (N.T. 368-369.)

119. David Dugery is a resident of the Echo Valley neighborhood of the Township; he resides at 3330 Echo Valley Lane. (N.T. 443.)

120. Mr. Dugery has lived in his residence since the Fall of 2007. (N.T. 444.)

121. Mr. Dugery has a non-functional septic system. *Id.*

122. There are wet areas in Mr. Dugery's yard. *Id.*

123. There are persistent sewage odors that make it difficult to walk outside. *Id.*

124. Mr. Dugery and his family experience smells "when you're walking in and out of the house based on whether someone is utilizing the plumbing." *Id.*

125. Mr. Dugery pumps his septic tank every 10-14 days, at a cost of $220/pumpout, or approximately $6,000 per year. *Id.*

126. According to Mr. Dugery, the Township has kept neighbors informed of its plans for public sewer, listened to public comment, and came out to the neighborhood where neighbors could walk through areas being considered for gravity sewer versus low pressure. N.T. 444 - 445.

127. The non-functioning septic system adversely impacts the value of his home. *Id.*

128. The absence of public sewer adversely impacts the ability to sell his home. *Id.*

129. Mr. Dugery would not have bought his home if he knew then what he knows now. *Id.*

130. Mr. Dugery was advised that it would not be a good investment to install a new on-lot septic system because public sewer would be coming to Newtown Square. (N.T. 446.)

131. Mr. Dugery would "feel cheated" if he installed a replacement on-lot system and then public sewer comes into the neighborhood to which he must connect. *Id.*

132. Ms. Mahoney is currently reviewing an application for an alternate sewage disposal (drip dispersal micromound) system for the Gormley property in Echo Valley. (N.T. 429.)

133. Mr. Gormley is trying to sell his home but needs a functioning septic system for the transaction to go through and his current system is failing. (N.T. 430.)

Further Input from DEP in Township's Development of 2013 Plan Update

134. On August 13, 2012, Dave Porter, of Mr. MacCombie's office, contacted Ms. Mahoney by e-mail about the status of the Plan Update. (N.T. 388); Ex. DEP-14.

135. On September 19, 2012, Mr. Porter contacted Ms. Mahoney by e-mail, attaching a draft of a public notice for the Plan Update. (N.T. 388-389); Ex. DEP-15.

136. On January 16, 2013, Mr. Porter contacted Ms. Mahoney by e-mail with questions regarding the Plan Update. (N.T. 389); Ex. DEP-16.

137. On January 28, 2013, Mr. Porter contacted Ms. Mahoney by e-mail with more questions for Ms. Mahoney regarding the Plan Update. (N.T. 389); Ex. DEP-17.

Township's Submission of 2013 Plan Update to DEP

138. In late March, 2013, the Township's 2013 Plan Update was submitted to Ms. Mahoney for review. (N.T. 390); Ex. TWP-2.

139. The 2013 Plan Update submitted by the Township to DEP in late March, 2013 consists of an Executive Summary that includes 6 Titles: (I) Previous Wastewater Planning; (II) Physical and Demographic Analysis; (III) Existing Sewage Facilities in the Planning Area; (IV) Future Growth and Land Development; (V) Alternatives to Provide New or Improved Wastewater Disposal Facilities; (VI) Evaluation of Alternatives; (VII) Institutional Evaluation; and (VIII) Selected Treatment and Institutional Alternative. TWP-2, Exec. Summary.

140. The submitted 2013 Plan Update also includes two Tables: (1) Projected Dwelling Unit Connections per Year and (2) Population Projections, and Appendices including: (A) Study Area; (B) Zoning Map; (C) 2010 Land Use; (D) Soils, Soil Limitations for on-Lot Disposal Systems; (E) Geology; (F) Topography; (G) Water Resources; (H) Public Water Supply; (I) Schematic of Springton Pointe Estates WWTP; (J) Proposed and Existing Development; (K)

Proposed Collection and Conveyance System; (L) Flow Projection Summary Table; (M) PNDI Response; (N) PHMC Response; (O) Detailed Cost Opinions; (P) Ordinances Being Considered for Adoption; (Q) Municipal Comments and Responses; (R) County Comments and Responses; (S) Proof of Publication; (T) Commonwealth of Pennsylvania Department of Environmental Protection Consent Order and Agreement; (U) Adopted Resolutions; (V) Approved Plan of Study and Task Activity Report; (W) Central Delaware County Authority (CDCA) Agreement; (X) Ashford Agreement; (Y) "7-Party" Agreement; (Z) Marple Township Acknowledgement; (AA) Pennoni Associates, Inc. - Door-to-Door Needs Survey; (BB) Act 537 Sewage Disposal Needs Surveys; and (CC) Public Comments and Responses. Ex. TWP-2.

Township's Ability and Commitment to Implement 2013 Plan Update

141. The Township is an established entity with sufficient staff and administrative resources to implement the 2013 Plan Update. It has adequate financial resources to implement the 2013 Plan Update, including available funding methods such as municipal bonds, bank loans, and commitments from developers, and it has existing legal authority to implement the 2013 Plan Update, including but not limited to the ordinances adopted on October 14, 2014. Ex. TWP-2, Exec. Summary, pp. 47-54; TWP-40, 41.

142. Newtown Township adopted Resolution 2013-10, titled "Approval of Act 537 Sewage Facilities Plan Update," on March 25, 2013. Ex. TWP-2, Appendix U.

143. Resolution 2013-10 provides, in relevant part, that:

> "NOW, THERFORE, BE IT RESOLVED that the Board of Supervisors of the Township of Newtown hereby adopt and submit to the Department of Environmental Protection for its approval as an update to the "Official Plan" of the municipality, the above referenced Facility Plan. **The municipality hereby assures the Department of the complete and timely implementation of the said plan** as required by law."

Id. (emphasis added).

144. Ms. Mahoney is familiar with Appendix U. (N.T. 423); Ex. TWP-2, Appendix U. She reviewed Resolution 2013-10 and found it to be adequate. *Id*.

145. The Board of Supervisors is "[a] hundred percent" committed to the 2013 Plan Update that was adopted. (N.T. 265.)

146. The Township is "absolutely" committed to implementing the 2013 Plan Update, (N.T. 276-277.) The Township is "extremely committed and would like to build it exactly the way it's shown on the Plan…" (N.T. 60.)

147. The Township adopted two ordinances to implement the Township's sewage management program[2] under the 2013 Plan Update on October 14, 2014. (N.T. 268-269, 273); Ex. TWP-40, 41.

148. The 2013 Plan Update that was submitted to the Department in March, 2013, contained proposed versions of those ordinances. (N.T. 345); Ex. TWP-2, Appendix P.

149. Ordinance 2014-2 enacts the Township's sewage management program. Ex. TWP-40; (N.T. 441.)

150. Ordinance 2014-3 details the public sewer connection requirement and connection deferral. Ex. TWP- 41; (N.T. 441.)

151. Ms. Mahoney had the opportunity to review the ordinances adopted by the Township. (N.T. 441-442.)

152. Ms. Mahoney found no problems with the ordinances and found them to be acceptable. (N.T. 442.)

[2] A "sewage management program" is defined as "A program authorized by the official action of a municipality for the administration, management and regulation of the disposal of sewage." 25 Pa. Code §71.1 (defn. of "sewage management program").

153. Ms. Mahoney reviewed the Plan documents and testified that numerous Plan documents, and other information in the record, provide the Department with assurance that the Plan is able to be implemented and the Township is committed to implement it. (N.T. 414.)

154. Ms. Mahoney examined whether the Township is able and committed to implement the 2013 Plan Update by considering: (1) the Resolution adopting the 2013 Plan Update enacted by the Township (*see* TWP-2, Appendix U); (2) the fact that the Township went "above and beyond" in soliciting public input and changing alternatives where the public had requested changes, most notably for Ms. Wilson's Echo Valley neighborhood; and (3) the information contained in the 2013 Plan Update. (N.T. 424.)

155. After her review, Ms. Mahoney determined that that the Township was able to implement the Plan. (N.T. 414.)

156. The Township is able and committed to implement the 2013 Plan Update that was approved by the Department. (N.T. 425.)

Financial Feasibility, Costs, and Cost Effectiveness of 2013 Plan Update

157. The Township prepared a preliminary cost estimate in support of the 2013 Plan Update. (N.T. 410); Ex. TWP-2, Exec. Summary, page 46; Appendix O.

158. The Township is required to use projected or estimated costs, not actual costs, in sewage facilities planning. (N.T. 411.)

159. The "tap in fee" for the 2013 Plan Update is estimated to be between $4,500 and $6,000. Ex. TWP-2, Exec. Summary, page 46; Appendix O; (N.T. 411.)

160. The annual user fee for the 2013 Plan Update is estimated to be between $500 and $750. *Id*.

161. The Township's 2013 Plan Update would cost approximately $27 million. (N.T. 17.)

162. The Township prepared information on how the estimated costs compare to other sewage facilities plans in the area. (N.T. 411-412); Ex. TWP-2, Appendix O, p. 2.

163. Tap-in fees for Easttown Township and Willistown Township range from $15,000 to $19,000. *Id.*

164. In other townships, such as Marple, Haverford and Radnor, which have older public sewer systems, tap-in fees range from $850 - $1,500. *Id.*

165. In a neighboring township, Edgmont Township, that is similar to Newtown because it is a member of CDCA, tap-in fees are between $4,500 and $6,000. *Id.*

166. Based on the cost estimates set forth in the 2013 Plan Update, the tap-in fees and annual fees were in line with what Ms. Mahoney has seen in other Act 537 planning documents. (N.T. 414.)

167. The Township also examined the cost-effectiveness of its 2013 Plan Update. (N.T. 413); Ex. TWP-2, Exec. Summary, page 55.

168. The Township concluded that in areas of the Township where there are sewer malfunctions, and where future development is planned, as described in pages 43-50 of the Executive Summary, the CDCA alternative is the most cost-effective. Ex. TWP-2, Exec. Summary, pp. 43-50, 56.

169. The CDCA alternative is the most cost-effective. (N.T. 413.)

170. Smaller land application or package plants that serve a small number of systems, become very expensive over time due to the limited user base. (N.T. 413-414.)

The 2013 Plan Update is Comprehensive

171. The Township has several mechanisms available to revise a plan including an update revision, as was done by the Township here, or it may do a special study, or planning modules for specific developments, which are like mini plan updates. (N.T. 425-426.)

172. If a Plan is revised by the Township, the Township need not revise the entire Township Plan for the revision to be "comprehensive"; the Township may elect to only revise a portion of the Plan. (N.T. 426.)

173. The Township has the option of focusing on a particular study area. *Id*.

174. The Township focused on its Crum Creek Basin, which "is a natural choice" because that area would be more readily served by CDCA rather than the Radnor, Haverford, Marple Authority that serves the other half of the Township. *Id*.

175. The 2013 Plan Update is "comprehensive" based upon the fact that the Township evaluated not only the needs of existing property owners but also included projections of the needs for new land development projects. (N.T. 426-427.)

Department Review of Township's 2013 Plan Update

176. Ms. Mahoney has been familiar with sewage facilities planning issues in Newtown Township for approximately seven years. (N.T. 380.)

177. Ms. Mahoney reviewed the 2013 Plan Update. *Id*; (N.T. 397.)

178. Ms. Mahoney completed an administrative review of the 2013 Plan Update. She concluded that the 2013 Plan Update was complete as submitted. (N.T. 398.)

179. Ms. Mahoney also performed a technical review of the 2013 Plan Update. She "concluded that the Plan met regulatory requirements, and…recommended it for approval." *Id*.

Department Review of the Township's Need for Public Sewer

180. Ms. Mahoney is familiar with the DEP guidance document titled "Act 537 Sewage Disposal Needs Identification." The document provides guidance to municipalities on how to conduct on-site system surveys in support of Act 537 Plan Updates, and includes a suggested categorization of on-site systems. (N.T. 391-392); Ex. TWP-6.

181. The Sewage Disposal Needs Identification Guidance lists four general classifications. (N.T. 391-393); Ex. TWP-6. The first category is confirmed malfunctions, including actively malfunctioning systems. *Id*. The second category is suspected malfunctions, including systems with abnormally lush grass, absorption areas located in unsuitable soils, and cesspools. *Id*. A third category is potential malfunctions, systems that appear to operate correctly but are installed in areas unlikely to be approved, or are on sites that have limitations for the placement of on-site sewage disposal systems. *Id*. The fourth category is no malfunction. *Id*.

182. Ms. Mahoney is familiar with the October 2, 2009 survey of sewage needs titled the "Echo Valley Area Door-to-Door Needs Survey for On-Lot Sewage Systems." that was prepared by Pennoni Associates for Newtown Township. (N.T. 393-394); Ex. TWP-2, Appendix AA. The survey found 8 percent of the surveyed properties are confirmed malfunctions, 20 percent are suspected malfunctions, 57 percent are potential malfunctions, and 15 percent have no malfunctions. (N.T. 393-394); Ex. TWP-2, Appendix AA.

183. Ms. Mahoney is also familiar with a second sewage needs survey, prepared by Mr. MacCombie's firm for the Township, titled "Act 537 Update Revision Sewage Disposal Needs Identification Survey Report," (N.T. 394-395); Ex. TWP-2, Appendix BB. The survey included areas of the Township other than Echo Valley. (N.T. 395.)

184. Ms. Mahoney noted that the Florida Park and Echo Valley areas of the Township

have the most immediate sewage disposal needs from a public health standpoint. Ex. TWP-2, Exec. Summary, p. 24; (N.T. 393.)

185. Other areas of the Township with sewage disposal needs, such as Llangollen, which has a high number of suspected malfunctions, were not prioritized because there were no confirmed malfunctions in that area. *Id*.

186. In addition to the sewage needs surveys, the Township also looked at studies of soils types and characteristics within the sewer study area covered by the 2013 Plan Update. (N.T. 395); Ex. TWP-2, Appendix D.

187. Ms. Mahoney reviewed the Township's soil information. *Id*.

188. Soils in Florida Park "have severe limitations for on-site sewage disposal," and that Echo Valley soils have "moderate to severe limitations." (N.T. 395-396.)

189. The soils in the Llangollen and Sleepy Hollow areas also have moderate to severe limitations. *Id*.

190. The Township also evaluated other factors, such as the needs of future land development, zoning, lot size, and the age of neighborhoods, to determine sewage needs. (N.T. 396.)

191. The information provided by the Township demonstrates that the study area is in need of public sewers. (N.T. 397.)

192. The Township published notice of its Draft Plan Update and 2013 Plan Update for public comment, respectively, on 2 occasions. (N.T. 398.) The first publication for public comment is required by Chapter 71 of DEP's regulations, and the second publication for public comment was established to advertise changes to the Draft Plan Update. (N.T. 398.)

193. The Township received public comments in response to both publications. (N.T.

398-399.)

194. Ms. Mahoney reviewed the 2013 Plan Update to see if the Township adequately considered the comments, and concluded that they did. (N.T. 399.)

DEP Review of the Township's Identification of Sewage Facility Planning Alternatives

195. Ms. Mahoney described the various sewage disposal alternatives considered by the Township: (1) connection to public sewer via gravity sewer and pump station conveyance system; (2) low pressure sewer grinder pumps, with attendant operation and maintenance requirements; (3) on-site sewage disposal system community disposal; (4) individual on-site sewage disposal system; (5) holding tanks; and (6) a no action alternative. (N.T. 399-400); Ex. TWP-2, Exec. Summary, Page 34.

196. Ms. Mahoney reviewed the alternatives identified by the Township. (N.T. 400.)

197. Ms. Mahoney determined that, the Township satisfied statutory and regulatory requirements for identifying alternatives. (N.T. 400-401.)

DEP Review of the Township's Evaluation of Sewage Facility Planning Alternatives

198. The Township evaluated the alternatives by conducting a two-part analysis. The Township first eliminated infeasible alternatives, such as holding tanks, small-flow sewage treatment facilities, and the regional land application concept. The Township then focused on various options for collection and conveyance through the selected alternative (public sewer). (N.T. 401-402.)

199. Ms. Mahoney reviewed consistency with the Clean Streams Law ("CSL"). (N.T. 402.)

She agreed with the Township's finding that public sewer is consistent with the CSL since the sewage would be conveyed from the Township via public sewer to the DELCORA wastewater

treatment plant for treatment and discharge into the Delaware River. *Id*.

200. Ms. Mahoney reviewed the consistency of public sewer with Chapter 94 (Wasteload Management). She agreed that public sewers are generally consistent with Chapter 94. (N.T. 402-403.)

201. The Chapter 94 wasteload analysis suggested that new connections to the sewer service area might overload the Camelot Pump Station. (N.T. 402-403.)

202. The Township resolved the inconsistency by proposing the expansion of the Camelot Pump Station so that it could accept the anticipated sewage flow. (N.T. 408-409.)

203. The Township evaluated the consistency of public sewer alternative with Comprehensive Plans under the Municipalities Planning Code ("MPC"). She agreed with the Township's conclusion that public sewer was consistent with the MPC. The Township solicited comments from both the local and county planning agencies and neither of those agencies had any adverse comments on the Plan. (N.T. 403-404.)

204. Ms. Mahoney also reviewed whether the public sewer alternative is consistent with the Antidegradation requirements of Chapters 93, 95 and 102. (N.T. 404-405.) She agreed with the Township's conclusion that the selective alternative was consistent with Antidegradation requirements because: (1) the 2013 Plan Update does not propose any discharge to Special Protection streams and (2) implementation of the 2013 Plan Update will improve water quality by eliminating failing on-site septic systems from the immediate needs area. (N.T. 404-405.)

205. Ms. Mahoney also examined whether the public sewer alternative is consistent with the State Water Plan, Prime Agricultural Lands Policies, and the Delaware County Stormwater Management Plan (N.T. 405-406.) She agreed with the Township's conclusion that

there are no conflicts between public sewers and these programs. (N.T. 405-406.)

206. Ms. Mahoney agreed with the Township that there may be some temporary wetland disturbances as a result of sewer construction, but those disturbances would be covered under a separate Department permitting process in 25 Pa. Code Chapter 105. (N.T. 406.)

207. The Township evaluated the consistency of the selected alternative (public sewer) with requirements for the protection of threatened, rare and endangered plant and animal species, and for historic and archaeological resource protection. (N.T. 407-408.) The Township conducted a large project Pennsylvania Natural Diversity Index ("PNDI review"), and contacted the Department of Conservation and Natural Resources, the Fish and Boat Commission, the Game Commission, and the United States Fish and Wildlife Service. (N.T. 407.)

208. Appendix N includes the Township's submittal of information to the Historical and Museum Commission ("PHMC"). Ex. TWP-2, Appendix N; (N.T. 407.)

209. The Township performed an analysis of water quality standards and effluent limits. The Township's conclusion that the selected alternative (public sewer) would not have an adverse impact on public water supplies, and, in fact would likely have a positive impact on such supplies, was reasonable because implementation of the selected alternative will result in "the elimination of confirmed failures, suspected failures, marginal septic systems." (N.T. 409-410.)

210. The public sewer alternative involves no direct discharge of wastewater in the Township, which also is protective of the public water supply. (N.T. 410.)

211. Ms. Mahoney determined that the Township evaluated, for each alternative, cost estimates for construction, financing, ongoing administration, operation and maintenance. (N.T. 412.)

212. The Township's evaluation is a preliminary cost estimate that includes

information on the expected tap-in fee (between $4,500 and $6,000) and the annual user fee (between $500 and $750 per year). Ex. TWP-2, Appendix O; (N.T. 411-412.)

213. Ms. Mahoney examined the cost estimates set forth in the 2013 Plan Update and concluded that "the tap-in fees and annual fees were in line with what I've seen in other Act 537 planning documents." Ex. TWP-2, Appendix O; (N.T. 414.)

214. The Township prepared estimated costs, not actual costs; only estimated costs are required to be prepared for an Act 537 Plan. (N.T. 411.)

215. The Township is not required to choose the least costly option, only an option that is administratively, environmentally, and technically acceptable. (N.T. 412-413.)

216. The CDCA alternative is the most cost-effective sewage alternative for the Township. (N.T. 413.)

217. In Ms. Mahoney's experience, smaller land application or package plants that serve a small number of systems become very expensive to run over time due to the limited user base. (N.T. 413-414.)

218. The Township has the ability to implement the 2013 Plan Update or instruct its Municipal Authority to implement portions of the 2013 Plan Update. (N.T. 414-416, 420.)

219. The Township examined a "no action" alternative and concluded that, by doing nothing, it would not meet its obligations with regard to growth potential, and would not protect drinking water sources, water quality, and public health. (N.T. 416-417.)

220. The selected sewage alternative, the public sewer alternative, will protect the environment and public health and also provide for potential growth within the Township. (N.T. 417.)

221. The Township's selected alternative is technically feasible because CDCA is an

existing authority that provides sewage conveyance infrastructure, DELCORA is an existing wastewater treatment provider, and the Township has the ability to enact ordinances to effect implementation of the Plan, the ability to enter into contracts, and the ability to apply for Department permits and any other approvals that may be needed in order to construct the selected alternative. (N.T. 419-420.)

222. Ms. Mahoney reviewed the 2013 Plan Update to see if the Township selected an alternative that is environmentally, technically and administratively acceptable. She concluded that the 2013 Plan Update satisfied this requirement. (N.T. 433-434); 25 Pa. Code § 71.21(a)(6).

223. The Township is not required to select the "best" alternative, only an alternative that is environmentally, technically and administratively acceptable. (N.T. 433); 25 Pa. Code § 71.21(a)(6).

224. The Township's identification, evaluation, and selection of the public sewer sewage facilities alternative provides adequately for the collection, conveyance, and treatment of sewage from immediate sewage needs areas in the study area, and satisfies statutory and regulatory requirements. (N.T. 420.)

Department Review of the Sewage Capacity of the 2013 Plan Update

225. Appendix L (Flow Projection Summary Table) demonstrates that the Township has sufficient capacity through its current contract with CDCA to meet the needs of its immediate sewer service area. (N.T. 420-421); Ex. TWP-2, Appendix L.

226. 961,975 gallons per day of sewer capacity is adequate for the area covered by the 2013 Plan Update. (N.T. 423.)

227. Mr. MacCombie's approach of reaching out to developers and others, on various capacity items, was a reasonable one. *Id.*

228. Act 537 requires that new land developments prepare their own sewage planning modules. *Id.*

229. If any of the future planning modules come in at or below existing capacity, the Township would not need to secure additional capacity for them. (N.T. 422.)

230. In Ms. Mahoney's expert opinion, to a reasonable degree of scientific certainty, the 2013 Plan Update provides adequate capacity for the immediate sewage needs of the sewer study area. (N.T. 422.)

231. The Township is able and committed to implement the 2013 Plan Update that was approved by the Department. (N.T. 425.)

232. The Township's 2013 Plan Update was "comprehensive" because the Township evaluated not only the needs of existing property owners but also included projections of the needs for new land development projects." (N.T. 426-427.)

233. In Ms. Mahoney's expert opinion, the approved 2013 Plan Update is comprehensive. (N.T. 427.)

Department Approval of 2013 Plan Update

234. On September 24, 2013, the Department approved the 2013 Plan Update submitted by the Township. Ex. DEP-1.

235. Notice of the Department's approval of the 2013 Plan Update was published in the *Pennsylvania Bulletin* on October 5, 2013. 43 Pa.B. 5881- 82; Ex. EHB-1, at Para. 35.

236. The September 24, 2013 approval document was signed by Ms. Mahoney's Program Manager, Jennifer Fields, P.E., upon Ms. Mahoney's recommendation. (N.T. 428); DEP-1.

237. Ms. Mahoney recommended that Ms. Fields sign the September 24, 2013

approval letter because, as a result of Ms. Mahoney's review, Ms. Mahoney concluded that the Township met regulatory requirements in terms of developing the 2013 Plan Update, and selected an alternative that was technically, administratively, and environmentally acceptable. (N.T. 428); Ex. DEP-1.

238. Ms. Mahoney tracked sewage facilities related events in the Township that occurred after September 24, 2013. (N.T. 428.)

239. Nothing since September 24, 2013 has changed Ms. Mahoney's opinion about the viability of the approved 2013 Plan Update. (N.T. 433.)

240. Sewage facilities planning requires development of a general concept of how sewage will be conveyed and disposed of within the relevant area to protect the health, safety and welfare of the community, given the approximate locations of facilities and the anticipated methodologies of sewage conveyance and disposal. (N.T. 149-150, 284-285, 373-374, 409.)

241. Sewage facilities design, on the other hand, determines the exact locations, metes and bounds, and depths of the facilities to be installed. (N.T. 35-36, 150, 285-286.)

242. In order to actually build its system, the Township will have to design the system, at a more pinpoint level, for engineering purposes. *Id*.

243. The Township has not yet sought any design approvals. *Id*.

244. When the prior engineers who developed the 2009 Plan Update engaged in design work before the 2009 Plan Update was final, "it was probably a waste of money by going to the next phase before the approval process was completed." (N.T. 267.)

245. In addition to needing to obtain the various new permits and approvals from DEP, the Township will also need to "re up" its information on PNDI, PHMC, Fish and Boat Commission, Game Commission, and endangered species when it designs and constructs its

sewer system. (N.T. 63.)

246. The Township may also need to obtain federal approvals or permits, should its design proposals come under federal jurisdiction, such as if it proposes as part of the project the dredge and fill of waters of the United States, including wetlands, which would require a permit under Section 404 of the Clean Water Act, 33 U.S.C. §1344; *Id*.

ELIZABETH MAHONEY

247. Ms. Elizabeth Mahoney is a Sewage Facilities Supervisor in the Department's Southeast Regional Office whose duties include the review of Act 537 sewage facilities plans, sewage facilities plan updates, sewage facility planning modules, private requests for sewage facility planning, and overseeing the sewage enforcement officer on-lot program. (N.T. 371-72.)

248. Ms. Mahoney has worked for the Department for over 21 years. She was a Water Quality Specialist from 1993 to 1998 and a Sewage Planning Specialist II from 1998 to 2007. She has been a Sewage Planning Supervisor since 2007. Ex. DEP-21; (N.T. 372.)

249. Ms. Mahoney's job duties include supervising four Sewage Planning Specialists and one Soil Scientist in the Southeast Region; she administers the Act 537 program by reviewing Act 537 plans, plan updates, sewage facility planning modules for new land development, and private requests to revise sewage facility plans. She also oversees the sewage enforcement officer on-lot permitting program. (N.T. 371-72.)

250. Ms. Mahoney has reviewed approximately 90 sewage facilities planning updates or revisions during her 21 plus year DEP career. (N.T. 375.)

251. Ms. Mahoney has reviewed approximately 90 plan of study submittals for sewage facilities planning. (N.T. 387.)

252. Ms. Mahoney has reviewed over 600 revisions to land development plans during

her DEP career. (N.T. 375.)

253. Ms. Mahoney has reviewed approximately 6 private requests during her DEP career. (N.T. 376.)

254. Ms. Mahoney is a certified sewage enforcement officer ("SEO"). She earned the certification in 2003. (N.T. 376-377.)

255. Ms. Mahoney has been involved in sewage facilities planning enforcement including drafting orders requiring municipalities to update their Act 537 plans, and drafting consent orders and agreements with municipalities. (N.T. 376.)

256. Ms. Mahoney has a Bachelor of Science degree in Biology from the Pennsylvania State University. (N.T. 377.)

257. Ms. Mahoney has received continuing education to maintain her SEO certification as well as training in soils. (N.T. 377-78.)

258. Ms. Mahoney's *curriculum vitae* accurately reflects her academic and work record and achievements. Ex. DEP-21; (N.T. 379.)

259. Ms. Mahoney was qualified by the Board as an expert on sewage facilities planning and regulation, including technical and regulatory review and evaluation of municipal sewage facilities plan updates. (N.T. 379-80.)

260. In Ms. Mahoney's expert opinion, to a reasonable degree of scientific certainty, the Township's 2013 Plan Update that was approved by the Department adequately provides for the collection, conveyance and treatment of sewage in the immediate sewage needs areas of the 2013 Plan Update Study Area in the Crum Creek Basin of the Township. (N.T. 434.)

JAMES MACCOMBIE, P.E., P.L.S.

261. James W. MacCombie, P.E., P.L.S., is an engineer and a principal at Herbert E.

MacCombie, Jr., Consulting Engineers and Land Surveyors. (N.T. 279.)

262. Mr. MacCombie has been a registered professional engineer, and a registered professional land surveyor since 1982. *Id*. He has been doing sewage facilities planning for over 30 years. (N.T. 282.)

263. The largest sewage facilities plan prepared by Mr. MacCombie was the plan for West Brandywine Township. (N.T. 16.)

264. Mr. MacCombie represents several sewer authorities and municipal authorities in Chester and Delaware counties in addition to Newtown Township, including Tinicum Township, Avondale Borough, Sadsbury Township, East Fallowfield Township. (N.T. 279-282.)

265. Mr. MacCombie is also the Engineer for the Newtown Township Municipal Authority. (N.T. 329.)

266. Mr. MacCombie has experience in sewage facilities design. (N.T. 284.)

267. Mr. MacCombie was qualified as an expert in sewage facilities planning with respect to the opinions contained in the Act 537 Plan. (N.T. 290.)

268. In Mr. MacCombie's professional opinion, the 2013 Plan Update is technically competent. (N.T. 345); Ex. TWP-2.

269. Mr. MacCombie believes that the 2013 Plan Update is feasible. *Id*.

JOSEPH CATANIA

270. Joseph Catania is chairman of the Board of Supervisors of Newtown Township. (N.T. 259.)

271. Mr. Catania has been on the Board since 2003, and has been Chairman for at least 3 years. (N.T. 259.)

272. Mr. Catania is familiar with the 2013 Plan Update. (N.T. 259.)

273. Mr. Catania and the rest of the Board hired Mr. MacCombie to do the Plan Update, and "left in his hands" how the Plan Update would be developed. (N.T. 259-61.)

274. The Board of Supervisors is "[a] hundred percent" committed to the 2013 Plan Update that was adopted. (N.T. 265.)

275. Mr. Catania testified that he is "absolutely" committed to implement what's in the 2013 Plan Update. (N.T. 276-277.)

PATRICIA A. WILSON

276. Ms. Wilson filed an appeal raising 33 wide-ranging appeal points.

277. Ms. Wilson did not testify at the EHB Hearing.

278. Ms. Wilson submitted 92 comments on the October, 2012 Draft Plan Update the Township was preparing for submission to DEP. Ex. TWP-2, Appendix CC.

279. Ms. Wilson submitted an additional 10 new comments on the February, 2013 Plan Update the Township later submitted to DEP, along with 42 supplemental comments to her October, 2012 comments. *Id*.

DISCUSSION

Background

The matter before the Board today is a consolidated appeal of the Department's approval of the Township's 2013 Plan Update on September 24, 2013. The Crum Creek Basin of Newtown Township is currently served by an Act 537 Plan, dated May 23, 2002, as supplemented on August 13, 2002 and approved by the Department on August 29, 2002 ("2002 Plan"). In 2007, the Township submitted a Plan Update to address sewage needs in the Crum Creek Basin. On February 6, 2009, the Department approved the Township's Plan Update ("2009 Plan Update") to its 2002 Plan. The 2009 Plan Update was appealed by Wilson and

others. *See* EHB Docket Nos. 2009-024-L, 2009-026-L and 2009-033-L. After a hearing, the Board issued an Adjudication and sustained the challenge to the 2009 Plan Update. *Wilson v. DEP*, 2010 EHB 827.

The Department and the Township executed a Consent Order and Agreement dated January 28, 2010, which required the Township to prepare and submit a new Act 537 Plan Update to the Department within 215 days of its execution. In August 2010, the Township submitted a 2010 Plan Update to the Department for review. On November 29, 2010, the Department issued a review letter to the Township identifying numerous deficiencies with the 2010 Plan Update submission. Following the Township's receipt of November 29, 2010 review letter, the Department met with the Township in early 2011 to discuss means to address the numerous deficiencies identified in the 2010 Plan Update submission.

In June of 2011, the Township hired a new Township Manager, J. Michael Trio, who contacted the Department to clarify the Department's planning expectations. The Township hired a new engineer, Mr. MacCombie, to develop a new Plan Update.[3] Mr. MacCombie, on behalf of the Township, submitted a new Plan of Study to the Department for review in December, 2011. The Department approved the new Plan of Study on February 12, 2012. As a result of the Township's hiring of Mr. MacCombie, the Township asked Mr. MacCombie to prepare a whole new Act 537 Plan Update "from scratch" and to do what he believed was necessary to prepare an acceptable plan.

Mr. MacCombie prepared the 2013 Plan Update, with the assistance of his staff. The 2013 Plan Update was submitted to the Department for review in March 2013. On September 24, 2013, the Department approved the Township's 2013 Plan Update. Notice of the

[3] Mr. MacCombie, P.E., P.L.S. is an engineer and a principal at Herbert E. MacCombie, Jr., Consulting Engineer and Land Surveyors. (N.T. 279.)

Department's approval of the 2013 Plan Update was published in the *Pennsylvania Bulletin* on October 5, 2013. 43 Pa. B. 5881-82 (October 5, 2013). On October 24, 2013, Ms. Wilson filed a notice of appeal with the Board. *See* EHB Docket No. 2013-192-M. On November 1, 2013, the De Rita Appellants filed a related appeal with the Board. *See* EHB Docket No. 2013-200-M. On November 18, 2013, the SPEHOA filed a Petition to Intervene in the Wilson Appeal which the Board granted on January 2, 2014. On March 6, 2014, the Board issued an Order consolidating the Wilson and DeRita appeals. Beginning on October 14, 2014, the Board held a hearing on the consolidated appeals. The hearing concluded on October 15, 2014.

On the day before the hearing on October 13, 2014, the Township, the Department and the DeRita Appellants entered into a "Settlement Agreement and Mutual Release" which provided that the DeRita Appellants would withdraw their appeal with prejudice. The DeRita Appellants did not participate at the hearing or file a post-hearing brief. On January 22, 2015, the DeRita Appellants notified the Board that they wished to withdraw their appeal. On February 17, 2015, the Board issued an order granting the DeRita Appellants' request and the appeal was closed and discontinued.

On the day before the hearing on October 13, 2014, the Township, the Newtown Township Municipal Authority and SPEHOA entered into a Settlement Agreement to settle the issues raised by the SPEHOA Intervenors. The Settlement Agreement specifically provided that "the appeal/intervention of the SPEHOA will be withdrawn with prejudice." On February 3, 2015, SPEHOA withdrew its intervention, and on February 18, 2015, the Board issued an order to close and discontinue SPEHOA's intervention in the appeal.

At the hearing in this matter, only Appellant Ms. Wilson presented evidence in support of her appeal. Counsel for the DeRita Appellants and the SPEHOA Intervenors notified the Board

in writing that they would not appear at the hearing or provide any evidence or argument, in light of the separate settlement agreements. Neither parties prepared or submitted a post-hearing brief after the conclusion of the hearing. The Board, therefore, only has to address the objections and issues raised by the remaining Appellant, Ms. Wilson.

In her notice of appeal, Ms. Wilson listed detailed 33 objections. In her Pre-Hearing Memorandum and later in her Post-Hearing Brief, Ms. Wilson only pursued a small subset of these objections. If a party decides to not pursue an issue or objection in the party's Pre-Hearing Memorandum or Post-Hearing Memorandum the issue is waived. *See* 25 Pa. Code §§ 1021.104 and 1021.131(c); *DEP v. Seligman*, 2014 EHB 755-779; *Rural Area Concerned Citizens (RACC) v. DEP*, 2014 EHB 391, 411. The Board will therefore only address those issues or objections that Ms. Wilson preserved in her Post-Hearing Briefs.

The Department and the Township argue that Ms. Wilson lacks standing to raise numerous issues in her notice of appeal.[4] The Board does not have to address this standing argument because, as set forth above, the Board only has to address those issued preserved by a party in their Post-hearing Memorandum. The Department and the Township do not challenge the standing of the Appellant to raise the issues listed in her Post-hearing Memorandum, and they instead focus on those issues earlier listed in her notice of appeal. As a practical matter, the Board will not consider any issues that are not preserved by a party in their Post-hearing Memorandum, so the Board will not consider any of the issues listed in Ms. Wilson's notice of appeal that are not preserved in her Post-hearing Memorandum. The Board's Rule at 25 Pa. Code § 1021.131(c) limits the issues that the Board will address in this Adjudication and not any

[4] The Department and the Township both assert that Ms. Wilson does not have standing to raise issues numbered 2, 3, 5, 8, 9, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30 and 33 in her notice of appeal. Department's Post-hearing Memorandum, Conclusion of Law No. 25, page 85; Newton Township's Post-hearing Brief, Conclusion of Law No. 42, page 40.

lack of standing on the part of the Appellant.[5]

At the hearing, the Appellant only called two witnesses: Mr. MacCombie, who was hired by the Township to prepare the 2013 Plan Update; and Ms. Mahoney, who is the Department employee that conducted the primary review of the Township's 2013 Plan Update. Ms. Wilson did not have any expert witnesses testify on her behalf, and her challenge to the technical aspects of the 2013 Plan Update was limited to her examination and later cross-examination of the witnesses identified above.[6] Ms. Wilson, who is a resident of the Echo Valley neighborhood in the Plan study area, did not testify on her own behalf. Her challenge to the technical merits was, therefore, limited in scope, and her challenges to the Plan focused on regulatory requirements and her claim that either the Township or the Department failed to satisfy its obligations under various Department regulations in Chapter 71 governing the Department's sewage facility planning program.

Ms. Wilson identified eight issues or objections in her Post-Hearing Brief. (Appellant's Post-Hearing Brief at page 3.) Ms. Wilson argues that:

1. Newtown Township did not properly provide public notice of the 2013 Plan Update;

2. Newtown Township did not adequately respond to public comments;

3. The Department did not require the Township to respond or resolve the issues raised by the public comments;

4. The Township's inadequate responses to public comments ultimately resulted in

[5] The Board has serious reservations regarding the merits of the Department's and the Township's challenge to Ms. Wilson's standing. *See Citizens Advocates United to Safeguard the Env't v. DEP*, 2007 EHB 632, 674 (Standing is specific to each Departments action, not whatever objections there may be to the action.) As a homeowner, and likely fee and rate payer who will be subject to the requirements of the 2013 Plan Revision, the Board has some difficulty identifying any aspect of the Plan that she lacks the standing to challenge. For the reasons set forth above, the Board need not address the limited standing arguments raised by the Department and the Township in this appeal.

[6] The Department called Ms. Mahoney as its principal witness and the Township called Mr. McCombie as its principal witness. Ms. Wilson therefore had two opportunities to examine these principal witnesses.

settlement agreements with DeRita Appellants and SPEHOA Intervenors that require further changes to the 2013 Plan Update under appeal;

5. 2013 Plan Update allocates capacity to future development over needs of existing developments;

6. 2013 Plan Update may not be financially feasible;

7. Newtown Township is not committed to implement the 2013 Plan Update as approved; and

8. The Department should not have approved the 2013 Plan Update as submitted.

(Appellant Wilson's Post-Hearing Brief at page 3.) The Board will address each of these preserved objections in order.

The Appellant's outline of her arguments in her initial Brief addressed some, but not all of these issues. *See* Section IV of Appellant Wilson Post-hearing Brief. The Appellant also identifies a few additional issues in the Applicable Legal Authority portion of her Brief. *See* Section III of Appellant's Brief, Paragraphs D, E, F, G, I, J, K and L. While there is significant overlap among the three lists of objections or issues, some of the listed concerns or issues were not developed in the Appellant's Brief or Reply Brief. The Board will, nevertheless, attempt to address all of the issues that the Appellant raised in her Post-Hearing Briefs to the extent that Appellant Wilson developed the issues.

Standard of Review

The Appellant bears the burden of proof in this matter. Under the Board's Rules, a party appealing an action of the Department bears the burden of proof if that party is not the recipient of the action. 25 Pa. Code § 1021.122(c)(2); S*ee e.g., Rural Area Concerned Citizens v. DEP*, 2014 EHB 391, 410*; Gadinski v. DEP*, 2013 EHB 246, 269. Specifically, the Appellant must prove by a preponderance of the evidence that the Department's approval of the Township's 2013 Plan Update was not a lawful and reasonable exercise of the Department's discretion

supported by the evidence presented. *See Pine Creek Valley Water Assoc., Inc. v. DEP*, 2011 EHB 761, 772. In addition, the Appellant may prevail if the Department's decision is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 108 A.3d 140 (Pa. Cmwlth. 2015); *Payne v. Rassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), aff'd, 361 A.2d 263 (Pa. 1976); *Brockway Borough Municipal Authority v. DEP*, Docket No. 2013-080-L (Adjudication issued April 24, 2015).

The Board reviews appeals *de novo*. In the seminal case of *Smedley v. DEP*, 2001 EHB 131, then Chief Judge Michael L. Krancer explained the Board's *de novo* standard of review:

> [T]he Board conducts its hearings *de novo*. We must fully consider the case anew and we are not bound by prior determinations made by DEP. Indeed, we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "de novo review involves full consideration of the case anew. The [EHB], as reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001). Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

Smedley, 2001 EHB at 156. The Board is also entitled to consider evidence that the Department did not consider when it made the decision under appeal.

Public Notice of the 2013 Plan Update

Appellant Wilson asserts that the Township's public notice of the 2013 Plan Update was improper, inaccurate and inadequate. Appellant Wilson's Post-Hearing Brief at 38. The Appellant does little to develop this argument other than to mention that the Township attempted

to improperly restrict public comments, when it sought public comments for a second time, after items in the Plan were changed following the initial public notice. *See* Appellant Wilson's Post-Hearing Brief at 22.

The Department and the Township disagree with Ms. Wilson that the public notices and requests for public comments on the 2013 Plan Update were improper, inaccurate or inadequate. The Board agrees with the Department and the Township that the public notices for the 2013 Plan Update complied with the regulatory requirements for public notice for plans at 25 Pa. Code § 71.31(c). Section 71.31 is entitled "Municipal responsibility to review, adopt and implement official plans" and subsection (c) of this regulation provides:

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

25. Pa. Code § 71.31(c). This provision provides that a municipality preparing a plan shall submit evidence that it has published notice of the proposed plan in a newspaper of general circulation in the municipality. [7] The notice shall contain several specified items and provide for a 30-day public comment period.

There is no dispute that the Township's first public notice of the draft 2013 Plan Update appeared in the *Delaware County Times* on October 17, 2012. Sixty-six sets of comments were

[7] The provision also provides that the municipality shall also submit a copy of all public comments received and the municipal response to each comment to the Department when it submits the plan to the Department. This aspect of subsection 71.31(c) will be addressed in the next portion of this adjudication.

submitted in response to this initial public notice. Ms. Wilson was one of the commentators and she submitted 92 comments to the Township.

The Township made changes to its 2013 Plan Update after receiving these public comments and it published a second notice in the *Delaware County Times* on February 14, 2013 and again requested public comments. [8] The second notice and request for public comments is allowed under the Department's regulations at 25 Pa. Code § 71.31(c), but it is not required. In response to the second public notice and request for public comments, the Township received additional public comments from five persons including Ms. Wilson. She submitted ten new comments on the February 14, 2013 proposal and 42 supplemental comments to her earlier comments on the October 2012 proposal.

In her second set of comments, Ms. Wilson appears to object to the Township's second public notice that in her view "restricted public comments to those items specified in the notice as changed." Wilson Ex. 20; Appellant's Brief at page 22. The Department and the Township disagree and assert that the 2013 Plan Update was properly noticed both times the Township requested public comments. In support of their position, they rely upon the Board's decision in *Don Noll and Stephanie Clark v. DEP*, 2005 EHB 505, 528-532. In this decision the Board stated:

> This Board has addressed issues regarding the adequacy of public notice and participation in the process of developing official plans or revisions of official plans before and stated:
>
> The seminal case in this issue which both parties refer to is *Green Thornbury Committee v. DER*, 1995 EHB 636. Both parties agree that the test under *Green Thornbury* for whether there has been adequate public notice and participation in the module review process is "whether[appellant actually had access to the module to

[8] One of the changes was in the method of sewage disposal for the Echo Valley Neighborhood where Ms. Wilson resides. The Township changed the method in response to public comments.

> comment on it." *Ainjar Trust v. DEP*, 2001 EHB 927, 980; *aff'd* 806 A.2d 482 (Pa. Cmwlth. 2002).

Id. The record is clear that Ms. Wilson actually had access to the revised proposal and submitted new comments on the revised proposal as well as supplemental comments on the initial proposal. In addition, the Department describes the Township's extensive public outreach efforts and community meetings as support for their position that the Township properly noticed the 2013 Plan Update.[9] Department's Brief at pages 50-53.

The Board agrees with the Department and the Township that the public notice for its 2013 Plan Update was adequate under the test that the Board first announced in *Thornbury Committee v. DER*, 1995 EHB 636. In *Don Noll and Stephanie Clark v. DEP*, 2005 EHB at 532, the Board concluded:

> Given the number of meetings over several years at which sewage issues were discussed by the Township Supervisors and the public, including the Appellants, the written comments submitted by both Appellants and the review of the actual plan by the Appellants prior to adoption of the plan, it is clear that the test set forth in *Green Thornbury* and reiterated in *Ainjar Trust* has been met in this case.

Id. In this matter the Board has a similar record before it. The Township conducted extensive public outreach and participation efforts concerning the development and adoption of the 2013 Plan Update. The public, including the Appellant, had two opportunities to submit public comments on the proposed 2013 Plan Update.[10] The Appellant and the public had access to the 2013 Plan Update prior to its adoption. The Appellant took full advantage of both opportunities

[9] The Board agrees with the Department that the Township had an extensive public outreach program as part of its efforts to prepare and develop the 2013 Plan Update. See Finding of Fact Nos.72-92 at pages 11-14.

[10] The regulations at 25 Pa. Code 71.31(c) only require public notice and an opportunity for public comment "at least once." Here, the Township decided that a second public notice and opportunity for public comments was warranted in light of proposed revisions.

to submit public comment. These facts demonstrate that the Township satisfied the test set forth in *Don Noll* and reiterated in *Green Thornbury* and *Ainjar Trust*.

Ms. Wilson also suggests that the Township should have sought additional comments from area planning agencies or other adjacent municipalities when it revised the Plan and sought additional public comments on February 14, 2013. The Department and the Township disagree and assert that the Township did request and obtain input from several municipal entities around the time that the Township published notice of the 2013 Plan Update and for the first time on October 17, 2012. The Township asked for input from the Newtown Township Planning Commission by letter dated October 22, 2012, from neighboring townships (Marple Township and Edgmont Township) on October 31, 2012 and from the Delaware County Planning Department (DCPD) on October 22, 2012. The Board agrees that the Township did not need to request or obtain additional comments or input from the municipal entities listed above when it sought additional public comments on the proposed revisions to the 2013 Plan Update on February 14, 2013.

Newtown Township's Response to Public Comments

The Appellant also asserts that the township did not adequately respond to the numerous public comments it received on its 2013 Plan Update. The Appellant believes that the Township improperly dismissed or ignored public comments in violation of 25 Pa. Code § 71.32(d)(2). As proof of the inadequate response to various public comments, Ms. Wilson asserts that the appeal of the DeRita's Appellants and the intervention of the SPEHOA Intervenors and the subsequent settlement agreements with these parties are evidence that that the Township's responses to certain public comments were inadequate. Finally, Ms. Wilson objects to the Township's

response to some of the public comments that merely stated: "Your comment is noted."[11] She believes that such a response is inadequate on its face.

The Township and the Department disagree with Ms. Wilson that the Township inadequately responded to questions raised by the Appellants. They assert that the Township fully complied with its obligation to adequately respond to all questions raised in comments by the public. *See* 25 Pa. Code §§ 71.31(c) and 71.32(d)(2).

The Board agrees with the Department and the Township that the Township satisfied its regulatory obligation under 25 Pa. Code § 71.31(c) to provide for a public comment period and to submit a copy of all written questions received and the Township's responses to each comment with the Plan. The facts before the Board clearly establish that the Township provided for two public comment periods: after the October 17, 2012 public notice; and after the February 12, 2013 public notice. There is no dispute that the Township submitted all of the public comments it received to the Department when it submitted its 2013 Plan Update to the Department.

The point of contention is the adequacy of the Township's response to some public comments and whether the Township's response to some comments that "Your comment is noted" is inadequate on its face. In this appeal the Appellant has the burden of proof as previously stated, and Ms. Wilson has not identified any facts in the record, other than a facial challenge to the above referenced general response, to support her claim that the Township's responses to some public comments were inadequate under 25 Pa. Code § 71.31(c).

[11] Ms. Wilson also appears to challenge the fact that Mr. MacCombie did not personally review each and every comment. *See* Appellant's Proposed Findings of Fact No. 10, at page 5. Mr. MacCombie was the person retained by the Township to prepare the 2013 Plan Update. While Mr. MacCombie did not personally read each and every comment, he supervised a staff that did. His supervision of the staff directly reviewing the public comments is sufficient to address this concern.

The Board begins the discussion of this point with the well-established observation that an adequate response to a public comment does not require the party receiving the public comment to adopt the comment. In considering the obligation imposed on the Department to consider public comments under the municipal waste regulations at 25 Pa. Code § 271.141(a) the Board decided: "the Department is not required to adopt the comments, but it is required to consider them." *Throop Property Owners Ass'n v. DEP*, 1998 EHB 618, 624; *County Commissioners Somerset County v. DEP*, 1996 EHB 351, 375-76. (The Department did not fail to consider public comments simply because it came to a different conclusion than that advocated by the commentators). The Sewage Facilities Planning regulations impose a similar obligation on a municipality submitting a plan or plan revision to the Department for review under 25 Pa. Code § 71.31(c). The similarity is clear when the Board considers the duty imposed on the Department under 25 Pa. Code § 71.32(d)(2) to consider whether the municipality "adequately considered questions raised in comments" from the general public. The Township was not required to adopt the public comments. It only had to consider them. The Appellant has not identified any specific comments that the Township failed to consider.

The Appellant's facial objection to the general response that "Your comment is noted" is not sufficient to satisfy the Appellant's burden of proof without more. This general response may be inadequate under certain circumstances if an appellant provides the Board with specific evidence regarding a specific comment and response, but Ms. Wilson did not develop this objection at the hearing or in her Post-Hearing Brief. She did not identify any specific comments and related responses where she believed this general response is inadequate. The Appellant has the burden of proof in this appeal, and the lack of proof regarding specific comments and responses defeats her generalized facial objection to the above quoted general response.

Finally, Ms. Wilson asserts that the DeRita Appellants' public comments, their appeal and subsequent settlement are evidence of the Township's inadequate response to the DeRitas' public comments. She raises a similar point regarding the SPEHOA Intervenors' comments, their intervention and subsequent settlement with the Township. The Board disagrees with these assertions. The fact that the Township reached settlement with the DeRitas Appellants and the SPEHOA Intervenors on the eve of trial does not change the Board's view that the Township adequately considered and responded to the DeRitas Appellants' comments and the SPEHOA Intervenors' comments when the Township prepared its response to the public comments. The Township was able to settle the appeal and intervention at a later date without affecting the adequacy of the earlier response and consideration.

In conclusion, the Appellant did not satisfy her burden of proof to establish that the Township failed to comply with 25 Pa Code § 71.31(c). The record before the Board does not support Ms. Wilson's claim that the Township's responses to public comments were inadequate and that the Township failed to consider all public comments. The fact that the parties settled their disputes at a later date is not evidence that the Township failed to adequately consider the public comment submitted earlier.

Department's Review of Newtown Township's Consideration of Public Comments

In a related objection, Ms. Wilson also asserts that the Department failed to comply with its independent regulatory obligation to consider whether the Township had adequately considered questions raised in the comments of the general public. *See* 25 Pa. Code § 71.32(d)(2). Section 71.32(d)(2) provides, in part:

****

> (d) In approving or disapproving an official plan or official plan revision, the Department will consider:

****

> (2) Whether the municipality has adequately considered questions raised in comments, if any, of the appropriate areawide planning agency, the county or joint county department of health, and the general public.

****

Id. This regulation imposes an oversight role on the Department to insure that the Township adequately considered questions raised by the general public.

The Department and the Township disagree with the Appellant that the Department violated its regulatory duty. They assert that the Department met its obligation under 25 Pa. Code § 71.32(d)(2). After the Department received the 2013 Plan Update, including the public comments and the Township's responses, Ms. Mahoney testified that she reviewed these materials to determine that the Township adequately considered these comments.

The Board agrees with the Department and the Township that the Department satisfied its obligation to ensure that the Township adequately considered questions raised by the public comments. The Board has determined that the Township properly considered and responded to the public comments as set forth in the preceding portion of this Adjudication. The Appellant's failure to demonstrate that the Township's responses were inadequate, as set forth above, has a direct bearing on the Department's independent, but related, obligation to ensure that the Township adequately considered questions raised by the public comments. The Department met its obligation because the Township considered all of the questions raised by the public comments, even though the Township did not accept all of the public comments. A municipality may consider all public comments without accepting them. Sections 71.31(c) and 71.32(d)(2) of the Department's regulations only require consideration of the public comments and not acceptance, as the Appellant suggests.

Financial Feasibility of Plan

Ms. Wilson asserts that the Township is not financially able to implement the 2013 Plan Update as approved. She asserts that the Township has not yet entered into contracts with two local developers even though over 50% of the unused capacity in the 2013 Plan Update has been designated for these two developers.[12] According to the Appellant, the financial viability of the plan depends upon their financial contribution and without a legal agreement to reserve this capacity, it is not clear when or if the two developers will use the capacity.

The Department and the Township disagree with the Appellant's challenge and assert that the Appellant has misconstrued the regulatory requirement regarding the evaluation of funding methods. According to the Township and the Department, the regulation at 25 Pa. Code § 71.21(a)(5)(v) sets forth the requirement to evaluate funding methods available to finance all aspects of the proposed alternatives. Under this regulatory requirement, the Department asserts that the municipality shall evaluate, for each proposed alternative, funding methods to finance the proposed alternatives and shall establish the financial alternative of choice and a contingency financial plan to be used if the preferred method of financing is not able to be implemented. Under this provision the Township evaluated three funding methods: 1) Municipal Bonds; 2) Bank Loans; and 3) Direct funding by developers. Ex. Twp-2, Exec. Summary, pp. 47-50, 68. The Township's financial alternative of choice is to borrow $27 million in a bond issue. Ex Twp-2; Appendix O; (N.T. 139). The Department reviewed the Township's financial alternative of choice, the combination of a municipal bond issue, tap-in fees and developer contributions.

[12] In developing flow and capacity information for the 2013 Plan Update, Mr. MacCombie received a document prepared by Kaplin Stewart, on behalf of BPG. The document stated that 185,800 gallons per day of sewer capacity is sufficient for the BPG development in the study area. Mr. MacCombie also received a document prepared by Joseph D'Amico, Jr., on behalf of Claude DeBotton who owns various properties in the Township. The document stated that the DeBotton properties in the study area require approximately 175,000 gallons per day of sewer capacity.

(N.T. 194). The Department decided it was a fairly common financing proposal. *Id.* The Township's evaluation contained a preliminary cost estimate, including expected tap-in fees between $4,500 and $6,000 and annual user fees of between $500 and $750 per year. (N.T. 411-412). The Department's primary plan reviewer, Ms. Mahoney, evaluated these cost estimates and concluded that they were in line with cost estimates she had seen in other Act 537 planning documents for other municipalities. The Department concluded that the Township's evaluation of funding methods complied with 25 Pa. Code § 71.21(a)(5)(v).

The Board agrees with the Department and the Township. At this stage of the Act 537 planning process the regulations do not require that the Township has signed agreements with the two developers that Ms. Wilson identified. At this planning stage under 25 Pa. Code § 71.21(a)(5)(v), the Township needs to identify its financial alternative of choice to finance the proposed alternative, and a contingency financial plan to be used if the preferred method of financing is not able to be used. The Township's 2013 Plan Update contained this information. Ms. Wilson did not offer any evidence to challenge this aspect of the 2013 Plan Update. Instead she pursued a broader attack on the financial feasibility of the Plan and asserts that more detailed financial information is needed at the current planning stage. The regulations do not require the level of financial detail that Ms. Wilson desires at this stage, and the Board rejects her challenge to the financial feasibility of the Township's 2013 Plan Update.

On a related point, the Appellant questions whether Township has included all known costs in their financial estimates in the Plan. Specifically, she asserts the Township should have known that the CDCA will require upgrades to their Crum Creek Pump Station to accept increased flows from the Township under the Plan. Costs to Newtown for the upgrades will be

an additional $800,000 according to the Appellant. Appellant Wilson Post-hearing Brief at page 27-28. The CDCA is currently in the process of revising its Act 537 Plan to upgrade its system.

The Township disagrees with the Appellant's challenge for several reasons. First, the Township asserts that it has a written agreement with the CDCA since 2007 to accept 971,975 gallons of sewage per day that will be treated by DELCORA. See Ex. TWP-2 Appendix W. According to the Township, substantial payments have already been made under this agreement, including payments by developers. Mr. MacCombie testified that the CDCA currently has the ability to accept the additional flows from the Township. While the CDCA is currently in the process of revising its Act 537 Plan, Mr. MacCombie stated that the CDCA is able under its current plan to accept the additional flow from the Township under its current agreement with the Township. Second, as Ms. Mahoney testified it is appropriate for municipalities to revise their plans as necessary and the fact that the CDCA is currently in the process of revising its plan does not block the Township efforts to revise its plan until the CDCA revisions are final. The revisions to the CDCA plan may prompt the Township to further revise its Plan, but that can happen in the future.

The Board agrees with the Township. Mr. MacCombie's uncontested testimony is that the CDCA is currently able to accept Township's additional flow identified in the 2013 Plan Update. In addition, the Board recognizes that Act 537 Plans are not static documents, but they need to be evaluated and revised on a regular basis. *Carrol Twp. v. DER*, 404 A.2d 1378, 1379 (Pa. Cmwlth. 1980). (A municipality is not locked into its initial plan after approval, and it may revise its plan at any time subject to the Department's approval.) Where the Township intends to rely upon the CDCA to accept its flow for treatment and discharge, the Plans need to be compatible, but they do not need to be updated on the same schedule. Here, the CDCA is

currently able to accept the Township's flow, according to Mr. MacCombie, and if the CDCA modifies its Plan in the future, the Township will need to evaluate whether it will need to further revise its plans. The Township is following the CDCA's efforts to upgrade its current system, and the Board agrees with the Township that these ongoing efforts on the part of the CDCA to update its plan do not render the Township's 2013 Plan Update invalid.

Finally, on the issue of financial feasibility, the Appellant asserts that the Township's connection ordinance, which allows building more than 150 feet from a sewer line to avoid mandatory hook-up to the sewer line, calls the financial viability of the Plan into question. Appellant Wilson's Post-hearing brief at page 28. She also asserts that the Department should not have approved the Plan without greater certainty regarding the number of properties that are eligible for the exemption from the mandatory hook-up requirement.

The Township disagrees and asserts that the connection ordinance provides sufficient certainty for the required financial planning. The Township points out that the connection ordinance is consistent with the Second Class Township Code which limits the Township's ability to require connections to public sewers if the principal building is more than 150 feet from a public sewer line. 53 Pa.C.S.A. § 67101. In addition, the Township argues that the ordinance allowing some properties to defer connection for up to 10 years is not without restrictions. To qualify for a deferment a property must be inspected annually, and connection will be required upon sale of the property. A deferment is also contingent upon entry into an agreement to pay the tap-in fee up front, regardless of the duration of the deferment.

The Board agrees with the Township and the Department that the connection ordinance does not establish that the 2013 Plan Update is not financially feasible. At this stage of the

planning process, the regulations do not require the level of detail that the Appellant suggests is necessary.

Settlement Agreements with DeRita Appellants and SPEHOA Intervenors

The Appellant asserts that the Township is not able to implement its 2013 Plan Update as approved on September 24, 2013. In support of her claim, Ms. Wilson relies upon the settlement agreements with the DeRita Appellants and the SPEHOA Intervenors. In addition, the Appellant asserts that the Township does not yet have the CDCA's complete approval to accept the flow that the 2013 Plan Update will send its way.

The Township and the Department disagree with Appellant's assertions. First, they argue that neither settlement agreement alters the Township's commitment to implement the 2013 Plan Update as approved by the Department. They also assert that the Township has a written agreement with the CDCA to accept the allocated flow under the 2013 Plan Update.

The Board agrees with the Township and the Department that neither settlement agreement affects the Township's commitment to implement the 2013 Plan Update, as approved, based upon a closer examination of the terms of the settlement agreements. Neither agreement anticipates changes to the 2013 Plan Update that could in any meaningful way alter the Township's commitment to implement the plan as approved.

The settlement agreement with the DeRita Appellants resolves a dispute regarding the Goshen Road Pump Station. The DeRita Appellants had concerns regarding the placement of the structure containing the pump house on the designated property, and the use of an access road on a cul-de-sac rather than use of an access road from Goshen Road.[13] To resolve the concerns the Township agreed to move the structure closer to Goshen Road and away from

[13] The 2013 Plan Update provides for an access road on the cul-de-sac and did not include an access road from Goshen Road.

homes on the cul-de-sac. The Township also agreed to construct a primary access road to the structure from Goshen Road, and to only use the original access road on the cul-de-sac in the case of emergencies such a flooding on the Goshen Road. The Township will be able to address the DeRita Appellants' concerns regarding the placement of the structure during the design stage. The Township will still use the same property for the pumping station, but it will move the foot print of the structure closer to Goshen Road. The settlement agreement does not add or delete any houses from the Plan, it does not change in any manner how any house will receive sewer service and it does not change how sewage is collected or conveyed. The addition of an alternate primary access road to the pump station will also not affect in any manner the Township's commitment to implement the Plan as approved. It will simply reduce or eliminate additional vehicle traffic on the cul-de-sac in most instances.

The settlement agreement with the SPEHOA Intervenors resolved a dispute with the Intervenors about the use of a new pump station in their neighborhood to convey sewage from outside their neighborhood through their neighborhood to the Camelot pump station. The settlement agreement provides that the Township will evaluate another route for sewage flow that redirects the sewage flow originating outside the SPEHOA neighborhood to the Camelot pump station by a different route that avoids the new pump station in the SPEHOA neighborhood. The Township could consider use this alternative route if it was economically neutral or, more environmentally responsible without any appreciable additional expense to implement. Wilson Ex. 63 at page 5. The Township committed to conduct the evaluation during the design phase of implementing the 2013 Plan Update.

While this evaluation of the possible rerouting of some sewage flow around the new pump station in the SPEHOA neighborhood could affect in a minor manner how some sewage

flow from outside the SPEHOA area is conveyed to the Camelot pump station, the settlement agreement does not evidence a lack of commitment on the part of the Township to implement the 2013 Plan Update as approved. The rerouted sewage flow, which originates outside the SPEHOA neighborhood, will still go to the Camelot pump station for conveyances to the CDCA.

The situation before the Board today is different than the situation in *Patricia A. Wilson and Paul I. Guest, Jr., v. DEP*, 2010 EHB 827. In this earlier Adjudication involving many of the same parties and an appeal of an earlier Department approval of the earlier Township 2009 Plan Update, the Board rescinded a Department approval of the 2009 Plan Update. The Board rescinded the Department's approval because the record developed before the Board at its *de novo* hearing revealed that the Township was not committed to implementing the 2009 Plan Update under appeal. Before the Department approved the 2009 Plan Update, the Township held a public meeting and as a result of the meeting, the Township decided to "change its mind" regarding its commitment for low-pressure systems for certain neighborhoods. The 2009 Plan Update included a commitment for low-pressure systems with grinder pumps in these neighborhoods. After the Department approved the 2009 Plan Update, the Township also adopted an ordinance in direct contradiction to the 2009 Plan Update. Based on these two "glaring examples" and others, the Board concluded that the Township lacked the commitment to implement the 2009 Plan Update as approved by the Department.

In the appeal before the Board today involving the 2013 Plan Update, there are no examples of the Township's lack of commitment to implement the 2013 Plan Update. The evidence presented at the hearing in this appeal supports the Township's claim that it is committed to implement the 2013 Plan Update. The two settlement agreements do not change the Township's commitment to implement the 2013 Plan Update as approved.

Allocation of Capacity to Future Development

The Appellant asserts that the 2013 Plan Update should not have been approved because it allocates capacity for future commercial development instead of existing residential neighborhoods including the Llangollen and Springton Pointe-Sleepy Hollow areas. Appellant Wilson's Post-hearing Brief at pages 34-36. She asserts that such an allocation does not meet the requirements of Act 537 "to ensure the health, safety and welfare of the citizens by providing for a technically competent, integrated and coordinated system of sanitary sewage disposal." *Id*. Ms. Wilson asserts that the Board has the authority under its *de novo* review to order the Township to include the existing development areas including Llangolen and Springton Pointe-Sleepy Hollow as immediate needs planning areas and to change the two future development areas (BPG and DeBotton) to future needs planning areas. The Appellant does not challenge the overall sewage capacity of the 2013 Plan Update, but she disagrees with the manner in which it was allocated among immediate and future planning needs.

According to the Appellant, the 2013 Plan Update "allocates" almost 50% of Newtown's unused available capacity under its agreement with the CDCA to two proposed and ongoing developments. [14] The Appellant objects to the Township's decision to allocate a portion of the unused and available capacity to future development while there are existing developments that have needs.

The Township and the Department disagree that the 2013 Plan Update improperly allocated sewer capacity to future development over existing immediate needs. According to the Department and the Township the 2013 Plan Update properly identified areas of future needs.

[14] The 2013 Plan Update identifies that Mr. DeBotton's properties will need 175,000 gallons per day of capacity, and the BPG properties in the study area will need 185,000 gallons per day of sewer capacity. (N.T. 22, 101, 104, 328.) While there is some current development in these areas, the 2013 Plan Update includes capacity for future development. *Id*.

Some areas of the Township, such as Florida Park and Echo Valley, have immediate needs for public sewers based on high percentages of confirmed, suspected and potential on-lot sewer malfunctions. (N.T. 391-395.) Other areas such as Llangollen did not have confirmed malfunctions (N.T. 191, 393). The 2013 Plan Update identified these areas as future planning needs.[15]

The Board agrees with the Department and the Township that the Township appropriately identified needs of various areas in the study area of the 2013 Plan Update. The Board does not agree that the 2013 Plan Update improperly allocated capacity to future development over the needs of existing neighborhoods. The 2013 Plan Update identified capacity needs for the two areas where development is expected and it included the expected capacity for these areas in the 2013 Plan Update. Without the 2013 Plan Update, there would be no approved plan for the expected development in these areas. The Department testified that the Township is required to identify and address the need of existing property owners, but it is also required to include projections of needs for new land development projects expected in the study area. (N.T. 426-427). That is what the Township did in preparing its 2013 Plan Update regarding the expected land development in the DeBotton and BGP areas. The Board agrees.

The Board also agrees that the Township's 2013 Plan Update properly identified the Llangollen and Springton Pointe-Sleepy Hollow areas as future needs areas rather than immediate needs areas. The 2013 Plan Update included areas of confirmed on-lot sewer malfunction as areas of immediate needs for public sewer, but it included areas of suspected on-lot sewer malfunctions as areas of future needs. The Township also considered other factors

[15] The 2013 Plan Update did not ignore Llangollen and it was identified as a future planning need. The Township has begun steps to coordinate with Edgemont Township and DELCORA to address Llangollen's future needs. (N.T. 27-30, 74-75, 174).

such as an assessment of the soils in these areas, the need for future development, current zoning, lot size and age of the neighborhoods. These other factors supported the Township's decision to identify some areas as immediate needs areas and others as future needs areas.

The Board rejects the Appellant's challenge to the 2013 Plan Update based upon the allocation of capacity to future development. The Township's made the correction decision when it identified needed capacity for future development of the DeBotton and BPG properties and when it identified the Llangollen and the Springton Pointe-Sleepy Hollow areas as future planning needs areas.

At the hearing, Mr. MacCombie testified that he would include Llangollen in the Plan if he were starting the process to update the plan today rather then two years ago. (N.T. 80). Ms. Wilson asserts that this is evidence that the 2013 Plan Update is defective. The Board disagrees when you consider Mr. MacCombie's answer in the context of the entire exchange at the hearing. Mr. MacCombie testified that following submission and approval of the 2013 Plan Update he restarted and pursued discussions with Edgemont Township and DELCORA and their consultants to evaluate the possibility of connecting Llangollen into public sewers. This possibility requires the cooperation of these entities to connect Llangollen into public sewers, and it is not related to the changes approved in the 2013 Plan Update. The Township's ongoing efforts to address future planning needs identified in the 2013 Plan Update do not support a conclusion that the Township's 2013 Plan Update was defective.

Ms. Wilson also appears to question whether the Township's 2013 Plan Update is comprehensive because it did not include Llangollen as an immediate needs area. In support of her concern, she points to Mr. MacCombie's response that if he were beginning process today rather than two years ago, he would include Llangollen. The Department asserts that Ms. Wilson

appears to have a fundamental misunderstanding of what is meant by a "Comprehensive Sewer Plan." Department's Post-Hearing Memorandum at page 76. According to the Department, "comprehensive" in planning terms means the plan must not only evaluate existing needs, but also potential needs of existing development.(N.T. 425.) A Township need not revise the entire plan for a Township to be comprehensive, and a Township may decide to revise only a portion of its plan and focus on a particular study area. In this case, the Township focused on the Crum Creek Basin, which the Department concluded was "a natural choice." *Id*. This area is more readily served by CDCA. Ms. Mahoney decided that the 2013 Plan Update was comprehensive because it evaluated both the needs of existing property owners and the projected needs for new land development within the study area. The Board agrees with the Department that the 2013 Plan Update is comprehensive for these reasons.

Newtown Township's Commitment to Implement 2013 Plan Update

The Appellant asserts that Township is not committed to implementing the 2013 Plan Update. Under the applicable regulations at 25 Pa. Code § 71.31(f), a municipality must have a commitment to implement the plan within the time limit established in an implementation scheduled. Ms. Wilson claims that "a review of the Township's actions and inactions, after approval, prove by a preponderance of the evidence that Newtown is not committed to implement the plan update." Appellant Wilson's Post-hearing Brief at page 36. She claims that the lack of action to construct the approved sewers "is probative" of the Township's lack of commitment.[16] Ms. Wilson also claims that the Township's delay in adopting ordinances to implement the 2013 Plan Update is evidence of the Township's lack of commitment to

[16] Ms. Wilson also claims that the settlement agreements with the DeRita Appellants and the SPEHOA Intervenors are evidence of the Township's lack of commitment. The Board addresses this specific claim in an earlier portion of this Adjudication at 56-59.

implement the Plan. She asserts that there are unresolved and outstanding issues that prevent the Township from meeting its obligation to have a commitment to implement the 2013 Plan Update.

The Department and the Township disagree and assert that the Township has the necessary commitment to implement the 2013 Plan as approved by the Department. The Township adopted Resolution 2013-10 committing the Township to implement the 2013 Plan Update. Ex. TWP-2 Appendix U. Resolution 2013-10 provided the Department with assurance that it was committed to the complete and timely implementation of the Plan. When the Department approved the Plan, it contained proposed ordinances to implement the Township's sewage manage plan under the 2013 Plan Update. The Township adopted Ordinance 2014-2, which enacts the Township's sewage management program and Ordinance 2014-3, which details public sewer connection requirements. The Department has reviewed these ordinances adopted by the Township and has found them acceptable and consistent with the Township's commitment to implement the Plan.[17]

The Chairman of the Board of Supervisors of Newtown Township, Joseph Catania testified at the hearing regarding the Township's commitment to implement the 2013 Plan Update. He testified that the Board of Supervisors is a "hundred percent" committed to the Plan.

The Board agrees with the Department and the Township that the record before the Board supports the Department's decision that the Township is able and committed to implement the 2013 Plan Update that the Department approved. The Resolution and Ordinances, which the Township adopted and the Department reviewed, support the Department's decision that the Township has the necessary commitment to implement the 2013 Plan Update.

[17] These Ordinances were not adopted when the Plan was approved in 2013, but they were enacted in 2014 before the Board held the hearing in this matter.

Ms. Wilson also asserts that the Township has not yet begun to implement the Plan, and this lack of actual implementation is evidence of the Township's lack of commitment. The Township responds that the lack of implementation of the Plan, under these circumstances, do not support Ms. Wilson's claim. The next step in implementation is the design phase, and the Township is entitled to wait to begin the design phase while the appeal is pending. In connection with the 2009 Plan Update, the Township prepared design plans for 2009 Plan Update when the Plan was prepared and these efforts were wasted when the Board rescind the Department's approval of the 2009 Plan Update. The Township testified that it wants to avoid the possibility of repeating this waste of municipal time and resources. The Board agrees that the Township's is able to wait for this appeal to be resolved before beginning further implementation and the design phase for the 2013 Plan Update.

Department's Approval of 2013 Plan Update

The Appellant asserts that the Board should rescind the Department's approval and require under its *de novo* review, that the Township update its 2013 Plan Update. In support of her argument, Ms. Wilson points to four new facts that the Department did not consider: the existence of the settlement agreements with the DeRita Appellants and the SPEHOA Intervenors; the need to include the Llangollen area as an immediate needs area; anticipated upgrades to the CDCA collection system; and the need for updated PNDI and PHNMC approvals. The Board disagrees that these developments provide a basis to overturn the Department's approval of the Township's 2013 Plan Update.

As discussed above, the settlement agreements with the DeRita Appellants and the SPEHOA Intervenors do not provide a basis to overturn the Department's decision to approve the 2013 Plan Revision. The settlement agreements are not evidence of the Township's lack of

commitment to implement the Plan. Neither settlement commits the Township to change its approved plan in any meaningful manner.

The Board also recognizes that there are upgrades to the CDCA collection system that may impact the Township's plan. Changes to the CDCA Plan may in fact prompt additional changes in the Township's Plan in the future. The Sewage Facility Planning process is a dynamic process, and the possibility of the need for future plan revisions is not a basis to rescind the Department's approval of the Township's 2013 Plan Update. *Carrol Twp. v. DER*, 404 A.2d at 1397.

As previously discussed, the Board accepted the Township's decision to identify Llongollen as a future needs planning area rather than as an immediate planning needs areas as the Appellant suggests. The Appellant provided no evidence to support her claim that Llangollen should have been identified as an immediate needs area. The Township's decision to identify Llangollen as a future needs area was supported by the record.

The Board also rejects the Appellant's argument that new PNDI and PHMC reviews are needed to support approval of the 2013 Plan Update. The Appellant asserts that consistency clearances for the protection of threatened, rare, and endangered plant and animal species and for historical and archeological resources have expired. She believes that the Department should have required the Township to resubmit its Plan to the various resource agencies for additional review and updated clearances.[18]

[18] The Department of Conservation and Natural Resources is the resource agency for state protected plants (Wild Resources Conservation Law, 32 P.S. § 5307; the Pennsylvania Fish and Board Commission is the resource agency for state protected fish, amphibians, reptiles and aquatic organisms (Fish and Boat Codes, 30 Pa. C.S.A. § 2305); the Pennsylvania Game Commission is the resource agency for state protected mammals and birds (Game and Wildlife Code, 34 Pa. C.S.A. § 2167); the United State Fish and Wildlife Service is the resource agency for federal protected animals (50 CFR Part 17.11-12), and the Pennsylvania Historic Museum Commission is the resource agency for historic and archeological resources. (History Code, 37 Pa. C.S.A. 101 et seq).

The Department and the Township disagree that an additional round of consistency reviews is still needed at the planning stage. After the planning stage, the Township will begin to implement the Plan, and it will begin the design and permitting stage of the sewer project. They assert that the Township will have to secure new consistency reviews and clearances for the protection of threatened and endangered species and historical and archeological resources during the design and permitting stage of this process.

The Board agrees with the Department and the Township. The Township had the necessary consistency clearances when the Department approved the 2013 Plan Update. The Township will need to obtain new PNDI and PHMC consistency reviews and clearances from the various state and federal resource agencies as it moves forward into design and related permitting phases of implementation of the approved 2013 Plan Update. The need for a new round of PNDI and PHMC reviews for the design and permitting stage does not change the conclusion that the clearances that were previously obtained by the Township were sufficient to support the Department's approval of the 2013 Plan Update.

Changes in 2013 Plan Update for Echo Valley Area

Ms. Wilson is a resident of Newtown Township and she resides in the Echo Valley neighborhood of the Township. Her residence is currently served by an on-lot sewage system. The Echo Valley neighborhood is one of the areas identified in the Township with confirmed on-lot sewage system malfunctions. As a result of the confirmed malfunctions, the 2013 Plan Update identified the Echo Valley neighborhood as an immediate needs area.

The Echo Valley and Florida neighborhoods have the most immediate needs for public sewers based upon their high percentage of confirmed, suspected and potential on-lot sewage systems malfunctions. (N.T. 391-95). As the 2013 Plan Update was developed, the plan for

addressing the immediate needs in the Echo Valley neighborhood changed in response to public comments and further evaluation of site and technical considerations by Mr. MacCombie.

In the initial efforts to address the immediate needs for public sewers in the Echo Valley neighborhood, the Township considered a low pressure sewer system used in connection with a grinder pump.[19] Grinder pumps can cost about $6,000, along with increased maintenance and electricity costs. (N.T. 245-46). These costs are in addition to the costs a homeowner must pay to tap-in and use the sewer system. A homeowner served by a gravity system does not have these additional costs.

Many residents of the Echo Valley neighborhood, including the Appellant, expressed concerns with the low pressure sewer and grinder pump system under consideration for the Echo Valley neighborhood. After talking to the residents of Echo Valley and walking the site, Mr. MacCombie was able to provide a gravity sewer system in the 2013 Plan Update for Echo Valley. The use of gravity sewers will eliminate the addition costs for homeowners associated with the use of a low pressure sewer system used in connection with grinder pumps. The approved 2013 Plan Update was changed to address the concern of many residents of the Echo Valley neighborhood, including Ms. Wilson, with the low pressure sewer system with grinder pumps.

Although Ms. Wilson did not testify at the hearing, two residents of the Echo Valley neighborhood testified, Mr. James Carcio testified that he has a failing on-lot system causing him substantial harm and additional costs. See Finding of Facts Nos. 111-121, pages 16-17. He testified that he was in favor of the 2013 Plan Update (N.T. 361-367). Mr. David Dugery also

[19] A grinder pump grinds up waste and pumps it to a higher elevation at low pressure where it can then be tied into a gravely line (N.T. 244-45). A grinder pump can save evacuation costs, but it is subject to breakdown and if you lose electricity it will not work unless you have a backup generator.

testified that he has a failing on-lot sewer system and that he significantly suffered. (N.T. 443-446). See Finding of Facts Nos. 127-133, pages 17-18. He is also strongly supportive of the Plan. The testimony of these two witnesses provided the Board with compelling reasons to support the conclusion that public sewers are needed in the Echo Valley neighborhood to remedy confirmed malfunction of on-lot sewer systems currently in use.[20]

To a great extent Ms. Wilson involvement in the Township's Act 537 planning process has been beneficial and successful. In the prior appeal, she convinced the Board to rescind the Department's approval of the Township's 2009 Plan Update because the Township lacked the required commitment to implement that Plan. In this appeal, the record establishes that the Township revised its 2013 Plan Update in response to public comment to eliminate the low-pressure sewer system with grinder pumps for the Echo Valley neighborhood. She wanted the change. The Township was able to provide a gravity sewer system in the 2013 Plan Update for Echo Valley.

The Appellant has, however, been less successful in this appeal in meeting her burden of proof to sustain her appeal. The Board has also heard from other residents living in the Echo Valley neighborhood about the serious and on-going malfunctions of on-lot sewer systems in use in that neighborhood. The 2013 Plan Update is intended to remedy these problems. The Board has no reason to overturn the Department's decision to approve the Plan.

Additional Issues

In her Post-Hearing Brief, the Appellant raised a few questions in the Applicable Legal Authority portion of her Brief that she did not develop in any meaningful manner. She asked

[20] Ms. Mahoney also discussed the current problems of a third Echo Valley residents, Mr. Gormley. He is currently trying to sell his house, but his current on-lot sewer system is failing. Ms. Mahoney is reviewing an application for an alternative onlot sewer system for Mr. Gormley.

"Did the DEP abuse its discretion in determining that the Township considered and evaluated alternatives to the Plan submitted by the Township to the Department?" Appellant Wilson's Post-hearing Brief at page 21, Paragraph K. Other than this brief question, the Appellant did not pursue this issue in her Brief in any meaningful manner. The Department addressed this question in its Post-hearing Memorandum in some detail. Department's Post-hearing Memorandum, Proposed Finding of Facts Nos. 215-240, pages 30-34 and 66-67. In the absence of any evidence or argument in her Brief, the Board agrees with the Department that the Appellant has not carried her burden to establish that the Department abuse its discretion in determining that the Township considered and evaluated alternatives when preparing the plan. Based upon the record before the Board, it is obvious that the Township did consider alternatives when preparing the Plan.

The Appellant also asked: "Has the DEP ensured that Newtown's plan provides an adequate and accurate assurance of capacity to provide sewage disposal for all those areas included in the plan as required by the Department's regulations?" Appellant Wilson's Post-hearing brief at page 21, paragraph L. Again, Appellant did not pursue this question in any meaningful manner in her Brief. The Department addressed this question in Memorandum in some detail. Department Post-Hearing Memorandum Proposed Finding of Facts Nos. 246-252, page 35, 67-71. The Appellant failed to develop her argument regarding assurances of capacity, and the Department provided a detailed explanation of its review of the Township's efforts to identify an adequate and accurate assurance of capacity. Based upon the record before the Board it is obvious that Township did provide an adequate and accurate assurance of capacity in the approved Plan.

In an appeal where the Appellant has the burden of proof, the Appellant needs to do more than simply raise questions regarding compliance with legal requirements to sustain the burden of proof. *See Shuey v. DEP*, 2005 EHB 657, 712 citing *Giordano v. DEP*, 2001 EHB 713, 736. In cases where the Appellant has the burden of proof, the Appellant needs to present evidence and explain why the Department's action or inaction failed to meet the regulatory standard. Ms. Wilson did not satisfy her burden on these additional issues.

Deference to the Department's Decisions to Approve the Township's 2013 Plan Update

There is one last issue that the Board should address. In its Post-Hearing Memorandum, the Department argues that the "Approval of the Township's 2013 Plan Update should be accorded deference." Department's Post-Hearing Memorandum at page 80. In support of its assertion, the Department relies upon the well-established case law that provides the Department's reasonable interpretation of the environmental regulations it implements is, as a general rule, entitled to great deference. *See, e.g., Tire Jockey Service, Inc. v. DEP*, 915 A.2d 1165, 1190 (Pa. 2007); *DEP v. North American Refractories Company*, 791 A.2d 461, 466 (Pa. Cmwlth. 2002). The Department wants the Board to apply the general rule of deference to an agency's interpretation of its regulations to a broader category of Department decisions implementing those regulations.

The Board disagrees with the Department's assertion that its approval of the 2013 Plan Update should be "accorded deference." While the Board recognizes that the Department's reasonable interpretation of its regulations is entitled to deference, as a general rule, the extension of the deference rule is not warranted in situations where the Department has simply applied various regulations to a set of facts when making a particular decision.[21] Here the

[21] There are exceptions to the general rule. For example, an agency's interpretation of a statutory or regulatory provision is not entitled to deference if the interpretation is simply developed in anticipation of

Department applied various regulations in Chapter 71 of Title 25 of the Pennsylvania Code to approve the Township's 2013 Plan Update. The Department has not identified any interpretation of a particular regulation to claim deference. The Department mistakenly believes its approval of the Plan is entitled to deference because the Department reviewed and applies various unidentified regulatory requirements in making its decision.

To be entitled to deference for a regulatory interpretation, the Department needs to specifically identify the regulatory language in question, and then the Department needs to specifically identify the regulatory interpretation of the specified language. At that point, the Board will be able to determine whether the Department's interpretation is entitled to deference. Deference for a regulatory interpretation is not a blanket to pull over any and all decisions that the Department might make when applying various regulations to a particular situation. The Department's decision to approve the Township's 2013 Plan Update is therefore not entitled to deference. The Board, nevertheless, upholds the Department's decision to approve the 2013 Plan Update and dismisses Ms. Wilson's appeal.

CONCLUSIONS OF LAW

1. Arguments not preserved in the post-hearing brief are waived. 25 Pa. Code 1021.131(c); *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, 291, *aff'd*, 971 C.D. 2004 (Pa. Cmwlth. 2004).

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litigation or if the interpretation is an abrupt change from an earlier interpretation of the provision. *See e.g., Malt Beverages Distributors Ass'n v. Pa. Liquor Control Bd*., 974 A.2d 1144, 1154 (Pa. 2009) (Interpretation developed in anticipation of litigation is not entitled to defense); *Pennsylvania School Boards Ass'n, Inc., v. Public School Retirement* Board, 863 A.2d 432 (Pa. 2004) (New interpretation is an abrupt change from prior interpretation and is not entitled to deference) cited in *RAG Cumberland Resources, LP v. Dep't of Envtl. Prot.*, 869 A.2d 1065, 1072, n. 11 (Pa. Cmwlth. 2005.) The general rule and the exceptions are not applicable in this appeal and the Board does not need to further discuss the exceptions in this Adjudication.

2. The Appellant as a third-party appellant bears the burden of proof. 25 Pa. Code § 1021.122(c)(2).

3. The Appellant must show by a preponderance of the evidence that the Department's action is unreasonable, contrary to law, not supported by the facts, or inconsistent with the Department's obligations under the Pennsylvania Constitution. *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976); *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269.

4. The Board reviews Department actions *de novo*. *Smedley v. DEP*, 2001 EHB 131, 156-160; *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).

5. In an appeal from the Department's approval of an update to a municipality's Act 537 Plan, an Appellant must establish by a preponderance of the evidence "that the Department's approval of the Township's…Plan was inappropriate or otherwise not in conformance with law." *Moosic Lakes Club v. DEP et al*., 2002 EHB 396, 404.

6. The Appellant has not met her burden to demonstrate that the Department's approval of the Newtown Township's 2013 Plan Update is "inappropriate or otherwise not in conformance with law." *Moosic Lakes Club v. DEP et al*., 2002 EHB 396, 404.

7. The Appellant has not met her burden of demonstrating that the Department abused its discretion in approving Newtown Township's 2013 Plan Update. *See Browning-Ferris Industries, Inc. v. DEP et al.*, 819 A.2d 148, 153 (Pa. Cmwlth. 2003) *citing Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998).

8. As a general rule, the Department's reasonable interpretations of laws and regulations are afforded deference by the Board. *See, e.g. Tire Jockey Service, Inc. v.*

Commonwealth of Pennsylvania, Department of Environmental Protection, 591 Pa. 73, 114-15, 915 A.2d 1165, 1190 (2007); *Department of Environmental Protection v. North American Refractories Company*, 791 A.2d 461, 466 (Pa. Cmwlth. 2002); *UMCO Energy, Inc. v. DEP*, 2007 EHB 215, 220; and *County of Schuylkill et al. v. DER*, 1989 EHB 1241, 1267, but deference does not extend to any and all decisions that the Department makes applying the laws and regulations to a specific set of facts.

9. The Department acted reasonably when it determined that the Newtown Township 2013 Plan Update satisfied all applicable laws and regulations and approved the Plan Update on September 24, 2013. 35 P.S. §750.1 et seq., 25 Pa. Code Chapters 71-73.

10. The Department properly determined that the Township satisfied all applicable public notice and comment requirements in preparing its 2013 Plan Update and responding to comments. 25 Pa. Code §§71.31(c), 71.32(d)(2).

11. The Department properly determined that the Township reasonably identified, evaluated, and selected sewage disposal alternatives. 25 Pa. Code §§71.21(a)(6), 71.61(c).

12. The Department properly determined that the 2013 Plan Update is "technically, environmentally and administratively acceptable" for the Township's current and planned sewage disposal needs. 25 Pa. Code § 71.21(a)(6).

13. The Department reasonably determined that the Township's 2013 Plan Update provides adequate sewage disposal capacity for the sewer service area. *Barbara Eisenhardt, et. al v. DEP*, 2001 EHB 563, 575.

14. The Department reasonably determined that the Township was able and committed to implement its 2013 Plan Update when it approved the Plan Update. 25 Pa. Code §§ 71.32(d)(4), 71.31(f).

15. The Department properly determined that the 2013 Plan Update is comprehensive.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PATRICIA A. WILSON, et al.	:	
	:	
v.	:	**EHB Docket No. 2013-192-M**
	:	**(Consolidated with 2013-200-M)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and NEWTOWN TOWNSHIP,	:	
Permittee	:	

O R D E R

AND NOW, this 31st day of August, 2015, 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: August 31, 2015

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

For the Commonwealth of PA, DEP:
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Anthony Scott Pinnie, Esquire
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For Permittee:
Richard C. Sokorai, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARJORIE HUDSON, LORNE SWOPE, DAVID LIPPERT, AND DELORES STEINER	:	
v.	:	**EHB Docket No. 2015-096-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CFC FULTON PROPERTIES, LLC, Permittee	:	**Issued: September 1, 2015**

OPINION IN SUPPORT OF ORDER GRANTING
PETITION FOR SUPERSEDEAS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board issues an Opinion in support of a previous Order granting a petition for supersedeas of the Department's coverage approval of a stormwater permit for a CAFO. The petitioners have made a strong showing of likelihood of success on the merits of their claim that the Department did not comply with applicable regulatory requirements when it approved coverage under the general permit. The Department approved coverage even though the applicant failed to conduct appropriate infiltration and geotechnical studies to demonstrate that its system would meet regulatory criteria and be protective of the environment. The Department's unlawful conduct constitutes irreparable harm *per se*.

O P I N I O N

Marjorie Hudson, Lorne Swope, David Lippert, and Delores Steiner filed this appeal from the Department of Environmental Protection's (the "Department's") July 2, 2015 authorization of CFC Fulton Properties, LLC's ("CFC's") notice of intent for coverage under the NPDES permit for Stormwater Discharges Associated with Construction Activities for CFC's

Concentrated Animal Feeding Operation (CAFO) known as the Bivouac Swine Farm in Ayr Township, Fulton County. The Appellants are neighbors of the proposed facility. CFC is a corporation that, along with its sister companies within the umbrella of the Clemens Family Corporation, is engaged in the development and operation of facilities for the production of pork products. CFC has developed and is operating numerous farm facilities throughout the northeast part of the country. Hatfield Quality Meats is one of its brands. CFC is the company within Clemens that is developing the sow farm that is the subject of this appeal.[1] The fact that CFC is developing a sow farm as opposed to, say, a data processing center or some other project that would result in increased impervious surfaces at the site is largely irrelevant for purposes of analyzing the technical merits of the facility's stormwater management plan.

CFC obtained several permits and approvals from the Department to build its facility and the Appellants or others have appealed most of them. Along with the stormwater authorization that is the subject of this appeal, the Appellants appealed CFC's sewage facilities planning approval. (EHB Docket No. 2015-015-L.) They have since withdrawn that appeal. CFC's odor management plan, which was approved on February 4, 2014, was not appealed. We are presiding over three other active appeals related to this project: EHB Docket Nos. 2014-037-L (nutrient management plan), 2015-115-L (water quality management permit), and 2015-116-L (PAG-12 CAFO permit).

The development site is approximately 224 acres. Existing land cover is a mixture of row crops, meadow, forest, and pasture. The site basically consists of a hill. The front (or east) side of the hill slopes from Great Cove Road up to a ridgeline. The site then drops down on the back

[1] The Appellants allege that "Country View Family Farms" will be the operator of the facility and the Department erred in not including that entity as a co-permittee on the coverage authorization, citing 25 Pa. Code § 102.5(h). This issue was not developed further during the supersedeas proceedings and we are not in a position to address it further at this time.

side of the ridge. The back portion of the site looks like a saddle or bowl. Most of the bowl cannot be seen from the road. Other than a new driveway that will crest the front of the site and the stormwater controls associated with the driveway, all of CFC's development will occur in the bowl area.

The bowl drains to two unnamed tributaries (UNTs) of Big Cove Creek. The streams are classified as cold water fisheries and migratory fisheries. We are told that Big Cove Creek is a popular trout fishing stream. The two UNTs drain the bowl at its north and south ends, flow east and out through low points on the ridgeline, and then down to Big Cove Creek. At least two of the Appellants live next to the UNTs.

The proposed limit of disturbance is 36 acres, which includes 12.3 acres of new impervious area. CFC intends to construct a 71' x 486' gilt barn with a below grade manure tank, a 161' x 767' gestation barn, a 129' x 621' farrowing barn, and associated support facilities such as grain bins and a composting building. In order to build its facility, CFC will need to create a level pad where the back bowl is now located. This will involve excavating up to 35 feet near the top of the ridge and filling other areas with up to 40 feet of fill. The pad will be bounded by steep slopes. The parties disagree whether CFC will be able to control excessive erosion on those slopes. For current purposes the Appellants have not convinced us that there are any critical deficiencies with respect to how stormwater is to be managed during and after construction specific to the pad or its slopes.

Post construction stormwater management on the front (east) side of the site, which appears to be largely associated with driveway construction, consists primarily of a rain garden and three detention basins. A detention basin is designed to control the rate of stormwater discharges. It is not reliant on infiltration. A rain garden is an infiltration Best Management

Practice (BMP). For current purposes the Appellants have not shown us that there are any critical deficiencies with respect to stormwater management measures specific to the east side of the property.

Stormwater on the back (west) side of the site where most of the development will occur will be routed to three basins that have been labeled bioretention basins. CFC's original plan called for two basins (BB-1 and BB-2), but a third basin was added and labeled Bioretention Basin 1-A (BB-1A). The basin is labeled 1A because it is designed to discharge to Bioretention Basin 1 (BB-1). CFC's Post Construction Stormwater Management Plan is somewhat confusing with respect to Basins 1 and 1A, at times referring to both basins as BB-1. Stormwater control on the back side of the site is the primary bone of contention between the parties and it is where we have focused most of our attention.

CFC has not told us how it intends to build BB-1A. The upper layer of soils in the area of the basins is clay. It is not effective at infiltration, so in order to build BMPs that are designed to infiltrate, CFC needs to remove the clay layer. In order to construct Bioretention Basin 2 (BB-2), CFC intends to excavate and remove all of the existing soils down to bedrock, which is approximately 14.5 feet below the surface. It will then refill the excavation "with shale soils from on hillside of site that are stockpiled for this later use." (Plan, Drawing C8.) Those soils will be "consolidated" (Drawing C8) or "compacted" (Plan at 4) to 85-percent minimum density, installed in 8-inch lifts, and tracked in with a track loader until the pit is refilled to just below 2 feet from the bottom of the final basin. The last 2 feet will be filled in with a soil mixture of 30-percent sand, 40-percent compost, and 30-percent top soil. That final layer will not be compacted. The final basin, of course, will continue to be encased in the impermeable clay layer.

CFC has proposed to test the backfill for infiltration every two feet with a double ring infiltrometer "to assure backfill will meet the required minimum infiltration rate of 2"/hr." (Drawing C8.) The plan sheet continues:

> An infiltration test will need to be performed for every 10,000 SF of basin area. If during testing the range exceeds 10"/HR, begin consolidating amendments with roller to reduce voids. If during testing and placement of the soil amendments and the infiltration rate is less than 2"/HR, chisel plow the amendment material to 18" depth and retest.

(Drawing C8.)

BB-1 will be constructed by first removing the top layer of poorly-infiltrating clay, which CFC believes will end 42 inches below the surface. This is based on a narrative description of the test pit that was dug where BB-1 will be located. (Surprisingly, no logs from the test pits are included in the plan.) CFC believes it will then hit "medium to dark brown sandy loam" that might be a viable infiltration material. Whether it will be is not known because CFC did not test it. If it can be used, CFC will fill on top of it to replace the removed clay layer using the process used for BB-2 involving 8-inch lifts, etc. If the "sandy loam" cannot be used, BB-1 will be constructed like BB-2, beginning with an excavation down to bedrock at 9 feet below surface.

BB-1A "will control the discharge from the piping system and will infiltrate 15" of water before overflowing into the lower bio-retention basin with the primary outlet structure." (Plan at 14-15.) The primary outlets in BB-1 and BB-2 will start discharging once 15 inches of water ponds in the basins. The basins also have emergency spillways near the top of the berms. It is not clear to us how the discharged water will flow once it exits the basins, although it is clear that discharges from BB-1 will make it to the southern tributary and discharges from BB-2 will make it to the northern tributary. BB-1 will drain 8.57 acres and BB-2 will drain 8.55 acres.

The Basins were designed and sized with the goal of dewatering a 100-year storm event within 72 hours and meeting the volume, water quality, and rate control requirements of the Pennsylvania Code and Fulton County's Act 167 stormwater management watershed plan. However, and this is a key point, the design was based on an *assumed* infiltration rate of 2 inches per hour. There is no data whatsoever to support this assumption. CFC itself admits that 2 inches per hour is simply an assumption. (Plan at 15.)

In connection with its description of how it will attempt to satisfy the 2-inch per hour rate after the basins are excavated during the backfill process, CFC includes the following statement in its plan: "We will also be utilizing a safety factor of 2 when calculating the final results." (Plan at 15.) We do not know what this means. No safety factor appears on the plan sheets. CFC's expert engineer opined that a 4-inch per hour infiltration rate will need to be met during testing, but we are not sure that is required or if that is what was approved. It might also mean that the basins were sized to meet regulatory criteria even if they only infiltrate one inch per hour. The Department did not say how it interpreted the safety factor in approving the plans. In any event, a "safety factor of 2" based on a purely hypothetical value is itself aspirational. It is not a data-based prediction.

CFC's coverage approval was initially approved by the Fulton County Conservation District pursuant to authority delegated by the Department. In the fall of 2014, the Appellants filed objections to CFC's coverage approval and requested an informal hearing before the Department pursuant to 25 Pa. Code § 102.32(c). After the informal hearing, the Department identified technical deficiencies in the initial plan. The Department's October 21, 2014 technical deficiency letter was critical of virtually every aspect of the plan. (App. Ex. 15.) The letter said that the plan failed to satisfy almost every applicable regulatory requirement. Over the course of

seven pages the Department listed 47 specific deficiencies, some with subparts. Thereafter, CFC submitted additional documentation and plans to the Department in December 2014 and April 2015. The Department issued the PAG-02 authorization on July 2, 2015.

The Appellants complain that the plan that the Department approved on July 2, 2015 is not much different from the plan that the Department was highly critical of in October 2014. It is not clear at this point whether that is true or not. It does not appear that there was any additional site-specific testing to support the application after the technical deficiency letter. Although Department witnesses were asked how or why CFC's follow-up submissions convinced it to change its mind, we did not receive a satisfying or detailed explanation.

CFC would like to start construction immediately and has taken some preliminary steps in that direction. The Appellants have asked us to supersede CFC's coverage authorization, thereby ceasing construction until they have an opportunity to present their case at a hearing on the merits. We held a four-day hearing on the petition for supersedeas on August 14-19, 2015. We conducted a site view on August 20. The parties asked us to rule on the petition without waiting for transcripts from the hearing or post-hearing briefing. We agreed to comply with that approach, but it must be understood that nothing that we say herein in support of our ruling should be considered as a final finding of fact or conclusion of law on the merits of the appeal. On August 27, we granted the petition. This Opinion is issued in support of that Order.

Supersedeas Standard

The Environmental Hearing Board Act of 1988, 35 P.S. §§ 7511 – 7514, and the Board's rules provide that the grant or denial 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); *Neubert v. DEP*, 2005 EHB 598, 601. In order for the Board to grant a supersedeas, a petitioner generally must make a credible showing on each of the three regulatory criteria, with a strong showing of likelihood of success on the merits. *Mountain Watershed Ass'n v. DEP*, 2011 EHB 689, 690-91 (citing *Pa. Mining Corp. v. DEP*, 1996 EHB 808, 810); *Neubert v. DEP*, 2005 EHB at 601; *Lower Providence Twp. v. DER*, 1986 EHB 395, 397. The Environmental Hearing Board Act also provides a distinct limitation that "[a] supersedeas shall not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect." 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b) (Board rule providing same). In circumstances where there will not be pollution or injury to the public, the issuance of a supersedeas is ultimately committed to the Board's discretion based upon a balancing of all of the statutory criteria. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802; *Svonavec, Inc. v. DEP*, 1998 EHB 417, 420; *see also Pa. PUC v. Process Gas Consumers Grp.*, 467 A.2d 805, 808-09 (Pa. 1983). It is important to keep in mind that our ruling on a supersedeas petition is merely a prediction, based on a limited record and under rushed circumstances, of who is likely to prevail at the eventual hearing on the merits. *Tinicum Twp. v. DEP*, 2008 EHB 123, 127; *Global Eco-logical Servs., Inc. v. DEP*, 1999 EHB 649, 651. This is particularly true where, as here, at the parties' request we are working without a transcript of the supersedeas hearing.

Likelihood of Success on the Merits

Data-Based Decisionmaking

CFC's Stormwater Management Plan *must* be based on a "[p]redevelopment site characterization and assessment of soil and geology including appropriate infiltration and

geotechnical studies that identify location and depths of test sites and methods used." 25 Pa. Code § 102.8(g)(1). The studies must be conducted "predevelopment." In order for studies to be "appropriate" in our view they need to produce meaningful data that provide a sound scientific basis for making an informed decision whether the proposed stormwater system will perform properly. The testing and the decisions based thereon should reflect generally accepted good engineering practice. Following collection, the data must *demonstrate* that the BMPs to be used to manage stormwater will be designed in such a way that they will meet regulatory criteria or at least be protective of the environment. 25 Pa. Code §§ 102.6, 102.8(b), (f), (g)(2), (g)(3), and 102.11(a) and (b). A permit applicant clearly has the right to propose novel or alternative approaches, but there still must be a demonstration that the alternative approach will be protective of the environment. 25 Pa. Code §§ 102.8 and 102.11.

The Appellants have a high likelihood of success of proving that the Department failed to comply with these regulations when it approved CFC's plan. The plan is not based on predevelopment, appropriate infiltration and geotechnical studies that provide enough information to make a scientifically sound, data-based demonstration that the BMPs will meet regulatory criteria and otherwise be protective of the environment.

There are literally no appropriate data in this case to support CFC's plan. CFC did no testing at the location of BB-1A. It did not test the shale soils from the hillside of the site that are stockpiled for later use in backfilling the pits.[2] The Appellants claim in their petition that these "shale soils" are "highly impervious," while CFC claims the mystery soils "have a high infiltration rate." Neither statement has *any* empirical support. Also, it was not clear from the

[2] The Appellants' expert credibly opined that such testing would have been of limited value because the *in situ* soil's structure and characteristics would have been changed once it was excavated and then used as backfill and compacted.

testimony where the "shale soils" would come from or how they would be handled. The Department witnesses said they have "no problem with the use of shale soils," which is somewhat disconcerting because the Appellants' expert credibly opined that the term "shale soils" can cover a wide range of materials with vastly different infiltration properties and is too vague to support any conclusion.

CFC did test soil at the location of the detention basins on the front (east side) of the site distant from the bioretention basins and apparently in a different geological formation. One test produced results as high as 982 inches per hour, which means CFC was basically pouring water down a crack. It is not reliable or helpful information.[3] CFC refers us to another testing interval and claims that it determined the infiltration rate of "shale soil" to be 12.3 inches per hour. (Test pit RG1-TP4.) This "shale soil" may or may not be the backfill soil. Sampling of the soil *in situ* is of debatable value. 12.3 inches per hour is actually above the regulatorily preferred rate. To be precise, one run of the test that CFC referred us to produced a rate of 21.8 inches per hour but was not run for an hour, which CFC then averaged with 9.3, 9.0, and 9.3 inches per hour from the other runs to arrive at the 12.3 average. We are not satisfied that this data provides a sound basis for the design of the bioretention basins. And, of course, CFC used an assumed rate rather than any of this data anyway.

CFC's expert engineer testified that it was understandable that CFC did not do any *laboratory* testing of the soils, noting correctly that laboratory tests are strongly discouraged by the Department. (App. Ex. 32, App. C at 4.) Of course, the reason lab testing is discouraged goes to the main problem with CFC's plan, which is that it is not based on any supporting *field*

[3] Also, infiltration that is too fast can be just as problematic as infiltration that is too slow because, *inter alia*, it does not allow for pollutant removal.

testing, which is the gold standard. We are not encouraging lab testing, but we also cannot agree that no testing is better than lab testing.

In the absence of representative testing of any infiltrating soils, CFC and the Department rely heavily if not exclusively upon infiltration of bedrock beneath the basins. This strikes us as highly unusual, at best. 25 Pa. Code § 102.8(g)(1) specifically refers to testing of soil. Bedrock is generally considered to be the limiting zone. Pollutants are to be removed by infiltration through soil before the water hits bedrock. Here, there will be several feet of as yet untested fill above the bedrock. CFC has not used the bedrock data anyway. It instead has simply assumed an infiltration rate of 2 inches per hour and designed its system based on that assumption. This leaves us with the impression that the bedrock testing was done to give the appearance of compliance with the regulatory requirement when in fact the data is essentially meaningless.

There is, however, an even a more serious problem with CFC's bedrock testing. CFC's expert hydrogeologist admitted that his testing method for measuring infiltration in the bedrock was not only "contrived," but generally not accepted. The Appellants' expert confirmed this, and added several additional reasons why the tests were not trustworthy, which we will not belabor here. The results will, therefore, likely be inadmissible and useless for our *de novo* review.

In the absence of data, the Department has basically approved an experiment. It hopes that testing after excavation and during backfilling will show that CFC's assumptions were correct and the design is acceptable. However, for good reason, the regulation requires *predevelopment* testing. By the time of the testing proposed by CFC, the site will already have been substantially altered using a site design based on the assumption that these basins with these dimensions in these locations can be made to work. The Department's approach turns the

scientific method on its head. It is like testing a bridge after it is mostly built. *See also Pa. Envtl. Def. Found. v. Cmwlth.*, 108 A.3d 140, 156 (Pa. Cmwlth. 2015) (quoting *Robinson Twp. v. Cmwlth.*, 83 A.3d 901, 952 (Pa. 2013) ("The first clause of the Environmental Rights Amendment 'requires each branch of government to consider *in advance of proceeding* the environmental effect of any proposed action on the constitutionally protected features.'")) (emphasis added). In addition, the Appellants' expert credibly opined that the testing during construction and before long term settling can only yield suspect data that may not be a reliable indicator of long term performance, particularly when using uncleaned, onsite soils that are likely to contain fine particles. As discussed more fully below, some of this testing, particularly at the lower levels, may be below groundwater levels.

We are trying to imagine why the Department would not insist on appropriate predevelopment testing to verify that a proposed infiltration system will work. It might be that the Department believes that it has the authority to waive the regulatory requirement based on site-specific circumstances. There is nothing in Chapter 102 that we see to support such authority, but in any event, the Department did not specifically contend that it had such authority in the proceedings so far. To the contrary, the Department's permit reviewer testified that no permit coverage can be approved without site-specific testing. To this we would add that the testing results must actually support the design choices that are made. If the Department believes it would be a good idea to change the regulatory language to allow for greater flexibility, it may pursue such a course with the Environmental Quality Board, but this Board does not have the authority to disregard a regulation as written.

The next imagined explanation is that testing can be excused because the applicant has a clear contingency plan in place in case the system does not work as hoped. Here, CFC's plan is

not at all clear on what happens if its assumed rate of infiltration is not met during construction. Chisel plowing will be tried first, but if that does not work the plan merely says "the owner shall contact an engineer and the municipality on replacement and/or repair as required." The plan describes measures to be followed to try and tweak the system as construction proceeds, but there is no Plan B if those tweaks do not work. If the Department is willing to approve an untested experiment based on no data, it should at a minimum insist on a well defined contingency plan. Here, there is no such plan.

It might be that the Department thinks that testing can be excused because the Department has approved such systems many times before and knows from experience that a design such as CFC's will perform as planned. Again, this does not seem to be consistent with the regulatory language, but putting that aside, the factual predicate is not present. To the contrary, CFC's approach is unusual and, based on the existing record, untested. The Department's permit reviewer testified that, out of the 190 permit reviews he had been involved in, only three or so resembled CFC's approach. He did not say whether the Department has verified that those other systems worked. He also said that he could not say one way or the other that situations that he is aware of where systems have failed generally were based on a faulty design as opposed to faulty construction or maintenance.

The Department's other expert witness referred to situations where basins at other sites have needed to be retrofitted, presumably because they were not working. It was not clear from the testimony whether the Department studied the retrofits to see if they had been successful. We expect that it would be preferable to design and build systems that do not need to be retrofitted in the first place.

The Appellants' expert credibly opined that CFC's system is highly unusual and not at all common. We are unable to conclude at this point that CFC's lack of data to support its design is excused due to a substantial experiential basis for concluding that the system will be effective.

Along the same lines, CFC's system departs in multiple and fundamental ways from the Department's guidance manuals. The Department's Erosion and Sediment Pollution Control Manual says that "compaction" (also called layering) results "when machinery or other pressure breaks soil structure and increases its bulk density. Structure is crushed and disintegrates, causing the collapse of large pore spaces *essential for rapid water, air, and root movement*." (App. Ex. 33 at 493 (emphasis added).) Similarly, the Stormwater Manual says "[c]ompaction by people or equipment crushes soil structure, impending air, water, and root movements." (App. Ex. 32 at 483.) The manual describes soil structure and the effects to soil structure from disruption as follows:

> Soil structure is how the individual soil particles (sand, silt, clay) are arranged, aggregated, held, or come together in peds or clods. Thus, the size and form of soil aggregation is known as soil structure. Good soil structure allows for water and air infiltration and movement, as well as for root growth. Soil structure is developed over time through rain, frost, or other weather impacts. It is also affected by the amount and type of organic material that leaches into a soil over time. Although developed over time in nature, structure can be destroyed quickly by machinery, grazing livestock, cultivation, or other human impacts.
>
> ….
>
> Structure is crushed and destroyed by compaction or smashed and destroyed by rough treatment. In soils that have been damaged by construction, structure is often compressed, crushed, or compacted-especially in clay soils. This means soil pore spaces are crushed and a soil becomes layered (platy) and water, air, and roots have a difficult, if not impossible, time moving into and through the soil.

(*Id.* at 486.) CFC does not intend to compact the top two feet of fill in the basins, but all of the deeper layers of fill will be "compacted" to 85-percent minimum density. (Plan at 4.) The

success of CFC's system is said to depend on achieving just the right level of compaction. Too much compaction means not enough infiltration; not enough compaction means fast infiltration with no pollutant removal. Note that the operative variable in CFC's plan is compaction, not soil type. This is exactly the opposite of the theme presented in the manuals.

The Stormwater Manual notes that, "[w]hen soil is disturbed…the soil is compacted, macropores are smashed and the natural soil structure is altered. Soil permeability characteristics are substantially reduced." (App Ex. 32, Chap. 2 at 10.) Disturbance and compaction "destroy the permeability of the natural soil." (*Id.*, Chap. 3 at 2.)

The E&S Manual says, "Transition zones, caused by dumping one type of soil on another, are often impermeable barriers to water, air, and roots." (App Ex. 33 at 484.) CFC's plan calls for as much as three different types of soil to be used in the construction of Bioretention Basin 1 (shaley fill, existing sandy-loam, and amended soils).

The parties dispute whether Section 6.4.2, titled "Infiltration Basin," or 6.4.5, titled "Rain Garden/Bioretention" in the Stormwater Manual applies to CFC's Bioretention Basins. We are not sure labels and semantics are that important. It seems that CFC's basins do not perfectly fit within either type of BMP, and they have certain aspects of both types of infiltration BMPs. The large *basins* that CFC is proposing may not perfectly fit the general conception of a rain *garden*. It is difficult to think of them as "gardens." Infiltration basins actually seem to be a more apt description of CFC's basins. In any event, both sections repeatedly warn against compacting *in situ* soils. (Chap. 6 at 27, 30, 31, 59.) They both tell the designer to rely upon the natural infiltration provided by undisturbed existing soil. (Chap. 6 at 27, 28, 29, 30, 31, 59.) Both sections incorporate Protocols 1 and 2, which discuss site evaluation and soil infiltration testing and infiltration systems design and construction, respectively. Protocol 1 (Appendix C) notes

that many sites are simply not suitable for infiltration BMPs. It says that it is important that test pits provide information related to conditions at the bottom of the proposed infiltration BMP. The protocol "strongly" recommends the use of an infiltrometer. Protocol 2 says yet again, "**Do Not Infiltrate in Compacted Fill**." (Emphasis original.) The existing soil mantle should be preserved to the maximum extent possible. Excessive excavation for the construction of infiltration systems is strongly discouraged.

To the extent Section 6.4.2 (Infiltration Basins) is helpful and provides good advice, it warns against installing basins on recently placed fill (less than 5 years). A two-foot separation to bedrock and the seasonally high water table must be maintained using natural, uncompacted soils with acceptable infiltration capacity.

The manuals advise against the use of compacted soils in infiltration BMPs so many times that they start to sound like a broken record, yet that is what CFC intends to do. The manual emphasizes that meaningful testing is required. There is none here. The manual says not to use recently placed fill, but CFC is going to do that here. The manual suggests a two-foot separation from the seasonal high water table, but whether that is possible here is not clear.

In an effort to conform its plan with the guidance manuals, CFC tells us that the manuals' repeated warnings about employing infiltration on top of compacted fill only refer to the 98% compaction rate used under buildings. We do not see that qualification in the manuals. CFC also says it is not really "compacting" the fill so much as "consolidating" it. Compaction is one form of consolidation, but word play is not particularly significant, and CFC's plan itself refers to compaction (Plan at 4.) CFC's basins could not be built as designed without compaction, in the case of BB-2, down approximately 15 feet.

We understand why CFC would want to explain its deviation from the guidance manuals, but it was strange to watch the Department pooh-pooh its own manuals repeatedly throughout the supersedeas hearing. Although the manuals are the product of considerable study and work and are presumably relied upon daily by the regulated community, the Department told us among other things that its Stormwater Manual is now "dated." It repeatedly emphasized that manuals can and indeed should be disregarded under certain circumstances. It directs our attention to 25 Pa. Code § 102.11, which allows an applicant to propose alternative BMPs and design standards (although we note it does so only after first directing applicants to refer to the manuals, which suggests that the manuals are the best starting point for any design). Despite the Department's efforts to minimize the importance of its own manuals in order to support CFC's efforts in this case, we do not have the sense that the Department is retreating from the fundamental principles that underlie the manuals. In any event, our primary reason for referring to the manuals here is to reinforce our point that our CFC's system is unusual and, therefore, is particularly in need of supporting data.

Groundwater

An understanding of the hydrogeology of a site can be important at some sites in designing a stormwater management system for any number of reasons. *See generally Crum Creek Neighbors v. DEP*, 2009 EHB 548. Among other things, it is desirable to maintain a 2-foot clearance above a regularly occurring seasonally high water table. (App. Ex. 32, App. C at 14.) If groundwater is higher than or just below the surface of the infiltration bed, it could throw off design calculations, affect the operation of the system, and not allow sufficient distance of water movement through the soil to allow adequate pollutant removal.

The Appellants raise the concern that the bioretention basins are located in an inappropriate location because there are strong indications that there may be shallow groundwater in the bottom of the bowl where the basins are located that could alter the design calculations or interfere with the operation of the basins. At a minimum, they complain that the clear possibility of shallow groundwater was not properly discounted by CFC or considered by the Department. The Appellants did not call an expert hydrogeologist as a witness, but through the direct and cross-examination of other witnesses they raised a number of points to support their concern. The Department also did not call a hydrogeologist as a witness. The only geologist to testify was Carl Boyer on behalf of CFC. If the Appellants' groundwater challenge were the only concern, it would not independently support the grant of a supersedeas, but in combination with the other deficiencies in CFC's plan, it provides added support for our ruling.

Infiltration BMPs should not be located where a high water table will interfere with their operation. Mottling is a well known and accepted indicator of a seasonal water table. It is commonly relied upon in, e.g., identifying wetlands and siting septic systems. As previously mentioned, neither we nor the Department have the benefit of any logs for the key test pits of CB1 and CB2. CFC's geologist conceded that mottling was in fact seen in those pits, and he said that that information would have been useful, but he did not report it. He said he did not report it because CFC is removing all of the soils anyway. This may not be true for BB-2, but even if it were true, the fact that the soils are being removed does not render the information any less valuable in assessing whether there is a seasonal high water table.

The Sewage Enforcement Officer (SEO) for the area prepared Site Investigation and Percolation Test Reports in the area of the basins. The test at BB-1 revealed a seep at 11 inches below the surface. There were "faint common medium mottles" between 11 and 18 inches, and

"many coarse prominent mottles" between 18 inches below the surface and the bottom of the test. The perc test for the location of BB-2 revealed "faint common medium mottles" between 9 and 19 inches below surface and "common faint medium mottles, slicken sides" below 19 inches. Thus, CFC proposes to install infiltration BMPs in an area that was not even deemed to be suitable for on-lot sewage disposal due to mottling and a seep indicating the presence of a high water table.

The Department's engineer said that he was not concerned by mottling at this site because unidentified additional documentation was provided and he was advised by the Department's hydrogeologist that the mottles resulted from "water slowly going down, not up." This is of course hearsay testimony from an engineer not expert in hydrogeology, but putting that aside, if there is a seasonal high water table a foot below the surface, we will look forward to additional explanation on why it matters that water at that level "came from down, not up."

CFC and the Department seemed to discount the possibility of a seasonal high water table in significant part because the main aquifer on the site appears to be at least 35 feet below the surface. However, contrary to what CFC avers in its response to the petition for supersedeas, it does not appear that the bioretention basins "are at least twenty feet higher than the shallowest documented water tables at the Property." (Response at 6.) To the contrary, there are several indications that there is a perched aquifer at a higher level in the bowl where the basins are to be located. A seasonal high water table would not be remote from such a perched aquifer.

The topography of the site is consistent with the presence of a shallow aquifer. There is a flowing spring that emerges from the side of the hill at about 800' to 810' above sea level.[4] The

[4] There does not appear to have been any analysis of what, if any, impact the site modifications will have on the spring, which appears to feed the headwaters for the southern UNT and associated wetlands. The Department's Kenneth Murin testified that such an analyses needs to be done but he did not know whether it was done.

narrative of test pits CB1 and CB2 where the basins are to be located showed there was some moisture at the bedrock interface, which is 9 feet below the surface at BB-1 and 14.5 feet below the surface at the location of BB-2. A test boring said to have been completed by a CFC contractor 60 feet north of the wetland area at the headwaters of the southern UNT corresponding with a surface elevation of 808' ASL was said to have encountered rock at 3 feet and groundwater at 33 feet, but measurements taken 30 minutes after construction found a "piezometric surface" at a depth of 9 feet below surface (799' ASL).

The presence of a perched aquifer may raise a unique concern at this site. Here, if the aquifer exists, it appears to exist at the level where CFC proposes to start its backfilling process immediately above bedrock. CFC's plan depends on meeting a 2-inch per hour infiltration rate at all levels, including the level where there may be a preexisting aquifer.

Article I, Section 27

The Appellants argue in their petition that the Department's granting of approval for coverage under the PAG-2 permit is in violation of the Department's obligations under Article I, Section 27 of the Pennsylvania Constitution. Article I, Section 27 provides:

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

PA. CONST. art. I, § 27. In order to assess whether the Department has fulfilled its constitutional obligations under Article I, Section 27, we ask the following three questions:

> (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
>
> (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?

> (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Stedge v. DEP, EHB Docket No. 2014-042-L, slip op. at 40-41 (Adjudication, Aug. 21, 2015) (quoting *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976)); *Brockway Borough Mun. Auth. v. DEP*, EHB Docket No. 2013-080-L, slip op. at 29 (Adjudication, Apr. 24, 2015); *see Pa. Envtl. Def. Found. v. Cmwlth.*, 108 A.3d 140, 159 (Pa. Cmwlth. 2015) (holding that the *Payne* test is still good law); *see also Feudale v. Aqua Pa., Inc.*, No. 335 M.D. 2014, 2015 Pa. Commw. LEXIS 331, at *14 (Pa. Cmwlth. Jul. 22, 2015) (analyzing second and third prongs of *Payne* test after finding compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's resources under the first prong).

The issue we are presented with in this appeal is, how are we to evaluate whether there has been a reasonable effort to reduce the "environmental incursion" to a minimum? Is the "environmental incursion" specific to the stormwater management system that is the subject of this appeal, or the CAFO more generally? Similarly, when we weigh harms and benefits, are we to consider the harms and benefits of the stormwater system by itself or the CAFO as a whole? The Appellants direct us to the CAFO as a whole and point to the many harms allegedly associated with such an operation at this location. CFC argues that we must restrict our review to the stormwater system and coverage approval, and CFC filed a motion in limine in support of that view, but it must also be noted that it also discusses the many benefits of the project.

Although the Appellants' likelihood of success on this important issue would not have by itself justified issuance of a supersedeas, their point may have some merit. Although the evidence at this point is not well developed, our impression is that the Department may not have

considered the broader implications of a CAFO at this location when it approved the stormwater coverage. There have been no less than five permits and approvals relating to this project. We have no sense at this point regarding the extent to which all of the Department's reviews leading up to the issuances of all of these approvals were conducted in a coordinated fashion with an eye toward reducing the environmental incursion (or, perhaps, incursions) to a minimum. The courts and this Board in the cases cited above were focused on an entire project, not individual components of a project. Focusing exclusively on an individual aspect of a project seems rather artificial. The piecemeal review advocated by CFC brings to mind the story of a blind man feeling the trunk of an elephant who thinks he has found a snake.

We may not need to get into the constitutional question because a holistic approach is actually mandated under case law regarding the Department's statutory and regulatory obligations. For example, in *Tinicum Township v. DEP*, 2002 EHB 822, 834-35, in the course of granting a supersedeas, we said, "The Department's highly compartmentalized approach is also inconsistent with this Board's holding in *Oley Township v. DEP*, 1996 EHB 1098, which held that the Department, when reviewing one permit application, should not ignore the effect the project may have on media or conditions typically permitted under other programs." 25 Pa. Code § 92a.36 reads, in part:

> The Department will not issue an NPDES permit unless the application is complete and the documentation submitted meets the requirements of this chapter. The applicant, through the application and its supporting documentation, shall demonstrate that the application is consistent with:
>
> ….
>
> (2) Other applicable environmental laws and regulations administered by the Commonwealth, Federal environmental statutes and regulations, and if applicable, river basin commission requirements created by interstate compact.

CFC's narrow view that we cannot look beyond the stormwater coverage approval is not consistent with this law.

Taking a broader view could very well inure to the benefit of CFC. For example, CFC has pushed for as much infiltration (as opposed to pure rate control) as possible, and it has bunched its project together at the back end of the site, both of which are arguably positive measures but both of which have constrained its stormwater choices. Designing the site this way put more distance between active operations and Big Cove Creek. We are told it is a good placement for odor control. It might be argued that it better preserves the scenic and esthetic values of the area. Of course, we never get to these considerations if regulatory compliance, the first step in the *Payne* analysis, is not achieved, and regulatory compliance requires something more than smoke and mirrors. 25 Pa. Code § 102.8.

Granting the Appellants' supersedeas petition will put this Board in a better position to consider all of the pending appeals relating to this project in a more systematic way and fulfill *our* obligations with respect to Article I, Section 27. We encourage the parties to propose a consolidated case management schedule, and we are very receptive to an expedited timetable.

Harm to Appellants or Public if Supersedeas is Not Granted

Once the first shovel of dirt is turned, this greenfield site will be irrevocably altered. CFC plans to move 190,000 to 200,000 yards of dirt, undertake 30-foot cuts, 40-foot fills, and compact and stabilize 2:1 fill slopes and 1.75:1 cut slopes. That is a considerable amount of imminent earthmoving. We disagree with counsel for CFC's contention that such considerable earthmoving activity is "reversible." We believe that the site will as a practical matter be permanently and irreversibly changed by this earthmoving. We are concerned that finishing the

earthmoving project as planned this fall could as a practical matter render this Board's review essentially meaningless.

If there is a strong likelihood of success on the merits of a claim that the Department violated the law, the analysis of irreparable harm is made easier by the principle that a finding of likely unlawful activity is tantamount to a finding that the Department's action is injurious to the public, which is equivalent to irreparable injury for purposes of evaluating a petition for supersedeas. *Delaware Riverkeeper Network v. DEP*, 2013 EHB 60, 63; *Rausch Creek Land, LP v. DEP*, 2011 EHB 708, 710, 727-28; *Harriman Coal Corp. v. DEP*, 2001 EHB 234, 251-52. *See also SEIU Healthcare Pa. v. Cmwlth.*, 104 A.3d 495, 508 (Pa. 2014); *Pa. Pub. Utility Comm'n v. Israel*, 52 A. 2d 317, 321 (Pa. 1947); *Philips Bros. Elec. Contrs., Inc. v. Valley Forge Sewer Auth.*, 999 A.2d 652, 657-58 (Pa. Cmwlth. 2010); *Cent. Dauphin Educ. Ass'n v. Cent. Dauphin Sch. Dist.*, 792 A.2d 691, 698 (Pa. Cmwlth. 2001). The idea behind this principle is that a petitioner should not be required to prove that the agency acted unlawfully *and* that actual harm will result from that unlawful activity. It is presumed that the Legislature or in this case the Environmental Quality Board was trying to prevent harm in the first place by promulgating the applicable regulations. It is counterintuitive to allow a project to move forward notwithstanding a likely finding that the Department acted unlawfully in approving it. Here, the Appellants have made a strong showing that the Department did not act consistently with the applicable regulations when it approved CFC's plan, which constitutes irreparable harm *per se*.[5]

We would add that, without data, just as CFC and the Department cannot prove the system *will* perform, it is unrealistic to think that the Appellants could or should prove that the facility will *not* perform. The Appellants in this case should not be required to prove the negative of the showing required under the regulations for purposes of a supersedeas. *See Sludge*

[5] A violation of a regulation is, of course, a violation of the statute as well. 35 P.S. § 691.611.

Free UMBT v. DEP, EHB Docket No. 2014-015-L, slip op. at 16 (Opinion, July 1, 2015) (citing *Blue Mountain Pres. Ass'n v. DEP*, 2006 EHB 589, 605-06 (no showing necessarily required that project will degrade waters; only need to show Department failed to perform proper analysis)). The Appellants' likely success in showing that the Department approved the project without the regulatorily required demonstration is sufficient to support a supersedeas.

CFC and the Department argue that there cannot possibly be any harm because post construction inspections and Departmental enforcement coupled with onsite repairs can guarantee there will be no problems. The argument departs even further from regulatory requirements than the Department's argument that testing concurrent with development satisfies the requirement for predevelopment testing. The argument is legally unsound because the Department should not be issuing permits that are not well supported based on the idea that a facility can be repaired after it fails. It is also factually unsound. There is an insufficient record to support a finding that those basins can in fact be repaired or replaced. Inspections post construction are infrequent.[6] A major failure could happen the first day or take years to manifest. As previously mentioned, other than chisel plowing, there is no contingency plan in place if there is a failure.

Although no showing of actual harm is necessary where, as here, there is irreparable harm *per se*, and we have not required the Appellants to prove at this point that the stormwater system will not work, we would like to add that it *is* possible to evaluate worst-case scenarios without regard to how likely it is that those scenarios will come to pass, and in that respect the Appellants' case was weak. CFC's expert engineer testified that it does not matter whether the infiltration basins perform as designed because the regulatory criteria for rate and volume control

[6] The Department incorrectly relied on Part A.2.a. of the permit for the proposition that there must be weekly inspections and inspections after rain events. That provision only applies during active construction. Post construction inspections only occur once or twice a year.

will be met or only exceeded by *de minimus* amounts regardless, so long as loading ratios are met, which they are here. Although the engineer's opinion would suggest that careful study and design is a waste of time, which seems odd and makes us wonder whether the Department is requiring countless permit applicants to incur needless expense in performing superfluous tests, the Appellants did not directly challenge the opinion.

With respect to worst-case scenarios, there is little evidence at this point that even a dramatic failure of the basins would result in increased flooding of downstream properties, a materially adverse thermal impact, or degradation of receiving streams or stream channels. The Appellants' engineer states in his affidavit that the failed system will result in increased runoff volume, rate, frequency of discharge, pollutant load, and thermal impact, and will adversely impact the water quality of the receiving streams and the integrity of nearby stream channels. His theory, as expressed in the affidavit, is that, due to poor infiltration, the water in the basins will sit for a while, accumulate pollutants, heat up, and then overflow in storm events. He adopted and repeated the conclusions set forth in his affidavit during his testimony, but he added little in the way of detail that would flesh out his concerns regarding the threat of harm. He did not quantify any of the postulated consequences of a system failure.

Harm to CFC or Public if Supersedeas is Granted

The Department took an active role in these proceedings and supported CFC's positions throughout without exception. The Department argued against issuance of a supersedeas, but it has not shown why a supersedeas would be harmful to the Commonwealth or the public. We note that the Department has been reviewing aspects of this project since early 2014. We have had an opportunity to consider the project for about a month.

We are not independently aware of any reason why the issuance of a supersedeas would harm the natural, scenic, historic, or esthetic values of the environment or in any way endanger public safety, welfare, or the environment. Denying a supersedeas comes with a risk of harm to the environment, although the actual proven risk to receiving streams appears to be small. Granting a supersedeas comes with no risk of harm to the environment or the public at all.

CFC is clearly harmed by the issuance of a supersedeas. That harm comes in the form of a delayed timetable. CFC did not present any evidence that it would lose its investment if a supersedeas is issued. There is no evidence of a permanent loss of a business opportunity as a result of the delay.

CFC originally hoped to have pigs on the site by this fall. That timetable obviously needed to be adjusted repeatedly, and there is no evidence that CFC was irreparably harmed by those adjustments. An additional adjustment to allow for careful and meaningful Board review is certainly unfortunate from the company's perspective, but it does not seem to rise to the level of causing irreparable harm. Even without a supersedeas, CFC did not plan to lay concrete until the spring, which would establish the foundation for the construction of the facility's buildings. No pigs would have been on site until October or November 2016.

We understand and appreciate that CFC is anxious to get started after a protracted permitting and land development process. However, this is a new greenfield development. This is not a case where an ongoing business is being shuttered, ongoing production or sales have been stopped, or employees are being laid off. *Compare M.C. Res. Dev. v. DEP*, EHB Docket No. 2015-023-C (Opinion, May 7, 2015); *Tri County Waste Water Mgmt., Inc. v. DEP*, 2011 EHB 256; *UMCO Energy, Inc. v. DEP*, 2004 EHB 797; *Tire Jockey Servs., Inc. v. DEP*, 2001 EHB 1141; *Global Eco-logical Servs., Inc. v. DEP*, 1999 EHB 649. There is no evidence that

construction has started or that significant mobilization costs have been incurred. There is no evidence of lost financing or financing opportunities or that CFC would violate any specific contracts. There were vague references to contracts with other farmers who will raise the pigs after a certain age, but no specific evidence that actual contractual commitments are threatened. There was an assertion that these farmers are constructing nurseries and finishing facilities in reliance on CFC's operation, but we have no testimony from any of these farmers or otherwise any other evidence establishing this claim.

CFC presented evidence of the benefits of the project, such as local employment and purchasing, the provision of housing for its pigs that is more humane than that which it currently provides at some of its other facilities, and providing a supply of pigs to raise and manure to use as fertilizer to other local farmers, but again, those benefits are being delayed, not irrevocably lost.[7]

CFC did not claim that delaying this project would have a material adverse effect on the Clemens family of companies. We are told that Clemens has numerous facilities throughout the northeast. We were not told that a supersedeas would result in a closure of any of those facilities or curtailment of company operations or production.

It is at least worth mentioning that CFC may bear some responsibility for the delays to its project. CFC put together a plan that has needed to be revised on multiple occasions, and that in our view still contains virtually no supportive data. The Department's lengthy and strongly worded October 21, 2014 deficiency letter reflects a plan that was not designed from the beginning to withstand vigorous review.[8]

[7] Of course, one person's "benefit" is another person's "harm." For example, the Appellants identify the increased use of pig manure in the local area as a harm, not a benefit.

[8] Interestingly, the parties, including Country View Farms, a Clemens company, have agreed to multiple extensions of prehearing deadlines in the Appellants' appeal of the approval of the nutrient management

CFC argued that it cannot develop the site if the Appellants are correct. There is no proof to support that statement. We suspect it is an overstatement. We were not shown that more appropriate studies are impossible. One thing that immediately comes to mind is CFC's unexplained failure to test the sandy loam soil in BB-1. We were not shown that other designs cannot be engineered. One thing that was alluded to at the hearing was the use of tested, clean offsite materials with established infiltration properties for backfilling. Still further, as far as we know, no alternatives analysis was performed or required. The Department's Stormwater Manual says that many sites will simply not be suitable for infiltration, but that does not mean that stormwater cannot be managed. "The management of post construction stormwater shall be planned and conducted *to the extent practicable*." to meet regulatory goals. 25 Pa. Code § 102.8(b). We were not presented with any evidence on that question.

In the final analysis, our balancing of the criteria to be considered in deciding whether to supersede a Department action pending an adjudication on the merits led us to conclude that a supersedeas was warranted in this case. A copy of our August 27, 2015 Order is attached.

ENVIRONMENTAL HEARING BOARD

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

DATED: September 1, 2015

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plan for the project and have shown anything but a sense of urgency in that appeal. At one point the parties asked for an open-ended extension with no firm dates even after we specifically told them not to do so. These extension requests may be explained by the fact that other permit applications were still pending at the time or because of other unknown reasons, or it may mean nothing at all, but we note it for the record. If the objective was to allow for a more coordinated review, we agree that that objective has merit.

c: **DEP, General Law Division:**
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Scott A. Gould, Esquire
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARJORIE HUDSON, LORNE SWOPE, DAVID LIPPERT, AND DELORES STEINER	:	
v.	:	**EHB Docket No. 2015-096-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CFC FULTON PROPERTIES, LLC, Permittee	:	

O R D E R

AND NOW, this 27th day of August, 2015, it is hereby ordered that the Appellants' petition for supersedeas is **granted**. An Opinion in support of this Order will follow.

ENVIRONMENTAL HEARING BOARD

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

DATED: August 27, 2015

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2014-117-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ANADARKO E&P ONSHORE, LLC, Permittee	:	**Issued: September 10, 2015**

OPINION AND ORDER ON
JOINT MOTION FOR SUMMARY JUDGMENT

By Steven C. Beckman, Judge

Synopsis

The Board denies a Joint Motion for Summary Judgment brought by the Department and the Permittee because the Appellant organization has standing to challenge the ESCGP-2 permit where one of its members has standing. The member has standing because the record, viewed in the light most favorable to the non-moving party, adequately demonstrates that the permitted activities present a realistic potential of harm to the member's aesthetic and recreational interests.

O P I N I O N

Background

Citizens for Pennsylvania's Future ("PennFuture") filed a Notice of Appeal ("NOA") on August 18, 2014, appealing both the issuance of Erosion and Sediment Control General Permit for Earth Disturbance Associated with Oil and Gas Exploration, Production, Processing or Treatment Operations or Transmission Facilities 2 ("ESCGP-2") and the issuance of Authorization Number ESX13-081-0013(03) under ESCGP-2 ("Authorization") by the Department of Environmental Protection ("the Department") to Anadarko E&P Onshore, LLC

("Anadarko"). The Authorization under appeal authorizes earth disturbance activities associated with an Anadarko project in the Frozen Run watershed of the Loyalsock State Forest. The NOA was signed by Mark Szybist, an attorney employed by PennFuture. Discovery in this case closed on May 29, 2015, and the deadline for dispositive motions was June 30, 2015. On June 30, 2015, the Department and Anadarko filed a Joint Motion for Summary Judgment ("Joint Motion") asserting that this matter should be dismissed because PennFuture lacked standing to pursue the appeal. On July 30, 2015, PennFuture filed its response to the Joint Motion. The Department and Anadarko filed a joint reply to PennFuture's response on August 14, 2015.

Standard of Review

The Board may grant a motion for summary judgment if the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Stedge, et al. v. DEP*, EHB Docket No. 2014-042-L, slip op. at 3 (Opinion issued Jan. 29, 2015). The Board views the record in the light most favorable to the non-moving party and resolves all doubts regarding the existence of a genuine issue of material fact against the moving party. *Id.*; *see also City of Phila. v. DEP*, 2014 EHB 156, 159; *Holbert v. DEP*, 2000 EHB 796, 808. When applying this standard to a motion for summary judgment that contests standing, the Board looks to whether there are genuine issues of material fact as to the standing issue and if it is clear that the appellant whose standing is being challenged lacks standing as a matter of law. *Stedge*, slip op. at 3; *Tri-County Landfill v. DEP*, 2014 EHB 128, 131; *Giordano v. DEP*, 2000 EHB 1184, 1187.

Discussion

An organization can have standing either in its own right or as a representative of its members. *Pennsylvania Trout v. DEP*, 2004 EHB 310, 355, *aff'd,* 863 A.2d 93 (Pa. Cmwlth. 2004). There is no dispute that, to the extent PennFuture has standing in this matter, it is as a

representative and not in its own right. Where an organization is acting as a representative for its members, it has standing if at least one of those individuals has been aggrieved by an action of the Department. *Id.*; *Chestnut Ridge Conservancy v. DEP*, 1997 EHB 45; *RESCUE Wyoming v. DER*, 1993 EHB 839.

In response to an interrogatory filed by Anadarko regarding standing, PennFuture stated that its basis for standing in this matter is the recreational use of the Frozen Run watershed by PennFuture member Mark Szybist.[1] (Joint Motion, Para 9; Response to Joint Motion, Para 9). The record also demonstrates that PennFuture could not locate any additional members who used the watershed at issue and therefore, Mr. Szybist's use is the sole basis for standing in this matter. The Department and Anadarko argue that PennFuture lacks standing because it is improper to allow representational standing where PennFuture relies on only one of its members to establish standing. They assert that "[r]epresentative standing has little meaning or justification when the potentially represented parties are a party of one." (Joint Reply Brief, p. 2.) The Department and Anadarko however have failed to offer any cases or persuasive arguments in support of this assertion and our reading of the case law is contrary to their position. We do not read the cases discussing representational standing as requiring more than one member to have standing in order for an organization to have representational standing. *See Malt Beverage Distribs. Ass'n v. Pa. Liquor Control Bd.*, 965 A.2d 1254, 1263 (Pa. Cmwlth 2009) (quoting *Malt Beverage Distribs. Ass'n v. Pa. Liquor Control Bd*, 881 A.2d 37, 42 (Pa. Cmwlth. 2005)) (stating that an organization needs only a single member to establish standing);

[1] Anadarko and the Department argue that Mr. Szybist's status as PennFuture's attorney who filed the NOA somehow should disqualify him from also providing a basis for standing. They provide no legal support for this argument. We do not agree with this position. In evaluating standing, we are only concerned with Mr. Szybist's membership status and there does not appear to be any dispute that he was a member of PennFuture at the time of the filing of the NOA and remained so at the time of the standing challenge.

see also Pa. Med Soc'y v. Dept. of Pub. Welfare, 39 A.2d 267, 278 (Pa. 2012). Where there is only one member who has standing, the organization is entitled to standing as well. Therefore, it is proper to confer standing on PennFuture in its representative capacity if Mr. Szybist has standing.

The Board now turns its attention to the issue of Mr. Szybist's standing. As explained in *Wurth v. DEP*, 2000 EHB 155,

> [t]he purpose of the standing doctrine in the context of proceedings before the Board is to determine whether an appellant is the appropriate party to seek relief from an action of the Department. *Valley Creek Coalition v. DEP*, EHB Docket No. 98-228-MG (Opinion issued December 15, 1999). In order to have standing to challenge a Department action, an appellant must be "aggrieved." *Florence Township v. DEP*, 1996 EHB 282. Accordingly, an appellant must show that he has a "substantial" interest in the subject matter of the particular litigation which surpasses the common interest of all citizens in seeking compliance with the law; a "direct" interest that was harmed by the challenged action; and an "immediate" interest that establishes a causal connection between the action complained of and the injury they suffered.

Wurth, 2000 EHB at 170-71.

The Department and Anadarko contend that Mr. Szybist's interests are neither direct, immediate nor substantial but are merely speculative, and do not rise to a level above the interest in environmental compliance common to the general public. In the context of third-party appeals from the issuance of a permit such as this matter, the Board has held that appellants have standing under the "substantial, direct and immediate" standard if (1) they use the area affected by the permitted activity and (2) the permittee's conduct has (or will) adversely affect that use by, e.g., lessening the aesthetic and recreational values of the area. *Giordano*, 2000 EHB at 1186. Case law on this issue is well-settled that "[a] realistic potential of harm to a person's aesthetic appreciation of an environmental resource is enough to establish a right to appeal." *Citizen Advocates United to Safeguard the Environment, Inc. v. DEP*, 2007 EHB 632, 673.

The facts in this case demonstrate to the Board's satisfaction that Mr. Szybist meets the "substantial, direct and immediate" standard applicable in third-party permit appeals. In his deposition, Mr. Szybist testified that he is an avid hiker and has hiked in the affected area of Frozen Run and in the general area of Anadarko's construction project on several occasions since April 2013. His most recent hike in the project area was on July 4, 2015. Mr. Szybist has expressed an aesthetic appreciation for the area and explained that he spends three or four hours at a time there in order to enjoy the surroundings, bird watch, and take photographs. He further testified that he plans to return to the area from a recent move to Washington, D.C. as often as possible to visit family and to hike in the project area. Mr. Szybist clearly uses the area that will be affected by the permitted activity, satisfying the first part of the requirement.

At this point, we also find that there is a realistic potential of harm to his use of the project area. Whether those alleged impacts will in fact occur is not the issue. It is enough when considering this issue in a challenge to standing that the potential for harm is realistic. Mr. Szybist expressed his concerns regarding the potential harm to the area from this construction project, which include but are not limited to accelerated erosion, inadequate protection of water quality, potential for spills and leaks, and issues related to increased truck traffic in the area. As PennFuture points out in its response brief, the construction of a large well pad and construction and improvement of a nearly mile-long access road through a forested area would "significantly and adversely impact the natural beauty and serenity Mr. Szybist currently enjoys . . ." (PennFuture Response Brief, p. 9.) Anadarko and the Department cite to several Board cases on the issue of potential for harm but we agree with PennFuture that those cases are easily distinguishable. (PennFuture Response Brief, p. 12-13) The alleged potential for harm was much more attenuated in those cases than the situation in this case. We are satisfied that,

viewing the facts in the light most favorable to PennFuture as we are required to do, there is a realistic potential of harm to Mr. Szybist's use of the project area.

Mr. Szybist meets the requirements for standing in this case. Given his status as a member of the organization bringing the appeal, PennFuture satisfies the requirement for standing in a representational capacity.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
	:	
v.	:	**EHB Docket No. 2014-117-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ANADARKO E&P ONSHORE, LLC, Permittee	:	

O R D E R

AND NOW, this 10th day of September, 2015, it is hereby ordered that the Department's and Anadarko E&P Onshore, LLC's Joint Motion for Summary Judgment is **denied.** The Board finds that PennFuture has standing in this case.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 10, 2015

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DARRYL HERNER, MATTHEW F. MERGEL, KEVIN HERNER, LARRY HERNER, DANNI-MARIE HERNER, CHARLES BARNES, CHARMAINE BARNES, DEEANE L. HATTE, TIMOTHY CARLIN, HARVEY C. DEITRICH, MARK COHN, MEL BRITZ, CATHY BRITZ and TOM CATMERINI	:	**EHB Docket No. 2015-098-M**
v.	:	**Issued: September 14, 2015**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

OPINION AND ORDER ON
RULE TO SHOW CAUSE

By: Richard P. Mather, Sr., Judge

Synopsis

The Board dismisses the appeals of the fourteen appellants in the matter. Under Board rules, appellants shall provide a complete Notice of Appeal in compliance with the Board's Orders and the Environmental Hearing Board Rules of Practice and Procedure, 25 Pa. Code § 1021.51. The appeals are dismissed pursuant to 25 Pa. Code § 1021.161 as a sanction for failure to comply with the Board's rules and orders.

O P I N I O N

On July 13, 2015, Appellants filed an appeal objecting to the inclusion of Appellants' village, Lamberson, in Hegins and Hubley Townships Act 537 Sewage Management plan[1]. On

[1] The fourteen Appellants were listed on several sheets of paper that the Board viewed as a Skelton appeal. The fourteen individuals are Darryl Herner, Matthew F. Mergel, Kevin Herner, Larry Herner, Danni-Marie Herner, Charles Barnes, Charmaine Barnes, Deeanne L. Hatte, Timothy Carlin, Harvey C. Deitrich, Mark Cohn, Mel Britz, Cathy Britz, Tom Catmerini.

July 15, 2015, the Board issued an order notifying Appellants that their Notice of Appeal did not supply all information required by 25 Pa. Code § 1021.51. The Notice of Appeal was missing nearly every piece of information required by the Board Rules including complete addresses, telephone numbers of Appellants' Counsel, a copy of the Department action being appealed including the date Appellants received notice of the action, objections to the Department's action, proof of service of the Notice of Appeal, and the names of any affected municipality under Sections 5 or 7 of the Sewage Facilities Act, 35 P.S. §§ 750.5, 750.7. The Board's Order warned that failure to supply the aforementioned information could result in the dismissal of the appeal under 25 Pa. Code § 1021.161. The Board provided Appellants 30 days (by August 14, 2015) to supply the missing information as ordered.

The Appellants did not comply with the Board's Order and perfect their Notice of Appeal by August 21, 2015. On this day, the Board issued a Rule to Show Cause upon Appellants to show cause why its appeal should not be dismissed as a sanction for failing to comply with the Board's orders and the Environmental Hearing Board Rules of Practice and Procedure. See 25 Pa. Code § 1021.51 (commencement, form, and content). Consistent with the Board's July 15 Order, the Rule once again explained that failure to supply the missing information as ordered may result in dismissal of the appeal pursuant to 25 Pa. Code § 1021.161. This Rule was returnable, in writing, to the offices of the Board on or before September 10, 2015. The Appellants have not responded, to date, to the Board's July 15, 2015 Order or its August 21, 2015 Rule.

The Board has the power to impose sanctions, including dismissal of an appeal for failure to comply with Board orders. 25 Pa. Code § 1021.161; *Martin v. DEP*, 1997 EHB 158. Failure to comply with Board orders clearly demonstrates a lack of intent to pursue an appeal and

dismissal is warranted. *Scottie Walker v. DEP*, 2011 EHB 328; *K H Real Estate, LLC v. DEP*, 2010 EHB 151; *Pearson v. DEP*, 2009 EHB 628, 629 (citing *Bishop v. DEP*, 2009 EHB 259; *Miles v. DEP*, 2009 EHB 179, 181; *RJ Rhodes Transit, Inc. v. DEP*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54). Appellants have not filed any correspondence with the Board or perfected their appeal pursuant to the Board's Order or Rule to Show Cause. In light of the Appellants' repeated failure to comply with the board's Rules and Orders, the Board dismisses this appeal as a sanction pursuant to 25 Pa. Code § 1021.161.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DARRYL HERNER, MATTHEW F. MERGEL, KEVIN HERNER, LARRY HERNER, DANNI-MARIE HERNER, CHARLES BARNES, CHARMAINE BARNES, DEEANE L. HATTE, TIMOTHY CARLIN, HARVEY C. DEITRICH, MARK COHN, MEL BRITZ, CATHY BRITZ and TOM CATMERINI	:	
v.	:	**EHB Docket No. 2015-098-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 14th day of September, 2015, 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: September 14, 2015

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF ST. CLAIR	:	
	:	
v.	:	**EHB Docket No. 2015-017-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLYTHE TOWNSHIP, Permittee	:	**Issued: September 15, 2015**

OPINION AND ORDER ON
MOTION IN LIMINE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board holds that the conclusions set forth in a deceased expert witness's report are not admissible to prove the truth of the matters asserted therein. The report is admissible, however, not to prove the truth of the matters asserted therein but because it is incorporated into the permit under appeal and it is part of the Department's record of decision on the permit application.

O P I N I O N

The Borough of St. Clair ("St. Clair") filed this appeal from the Department of Environmental Protection's (the "Department's") reissuance of a solid waste permit to Blythe Township authorizing the construction and operation of the BRADS Landfill in the Township. St. Clair's appeal of the Department's original issuance of the permit resulted in an Adjudication remanding the permit to the Department for further consideration of, among other things, the Township's mine subsidence mitigation plan as it related to Cell 4 of the proposed landfill. *Borough of St. Clair v. DEP*, 2014 EHB 76. On remand, Meiser & Earl, Inc., the Township's

primary consulting geologists on the project, subcontracted with Dr. Christopher Bise, P.E. to evaluate whether the landfill's liner could withstand the potential stress of subsidence in the portion of Cell 4 underlain by mine workings that have not already collapsed. Robert Hershey, P.G. of Meiser & Earl submitted a report entitled "Cell 4 Potential Mine Subsidence Evaluation" to the Department with Dr. Bise's report attached as Appendix VII. Dr. Bise opined in his four-page report as follows:

> If we assume a subsidence far greater that what would be expected under these conditions (say, 3.5 ft), the hypotenuse or extended length of the liner would be 54.11 ft. Clearly, this would represent only a slight length increase of the liner (54.11 / 54 = 1.002) and is readily accommodated by the installation of a liner capable of a 5% strain….Therefore, it is my professional judgment that the Cell 4 area of the BRADS Landfill can be extended without any anticipated problems resulting from subsidence if the appropriate liner is properly installed.

One of the conclusions in Robert Hershey's report to the Department was as follows: "Based on Dr. Bise's conclusion, no remedial measures are necessary in the Cell 4 area with respect to the potential mine subsidence related to the relatively flat lying portion of the Buck Mountain coal deep mine." The Department was not quite satisfied with the Meiser & Earl's first effort and it asked for some follow-up work. Meiser & Earl complied. It does not appear that Dr. Bise was involved in the follow-up work. Unfortunately, Dr. Bise has since passed away.

St. Clair has filed a motion in limine. It argues that neither the Township nor the Department should be permitted to admit into evidence the written report of Dr. Bise at the hearing on the merits. It argues further that any witnesses called by the Township or the Department should be prohibited from "simply incorporating Dr. Bise's conclusions and opinions in their testimony as it relates to subsidence in Cell 4," and that neither the Township nor the Department should be permitted to "substitute a new expert to testify regarding Dr.

Bise's report for purposes of simply repeating Dr. Bise's opinions and conclusions." St. Clair contends that Bise's statements in his report are inadmissible hearsay. The Township and the Department filed a joint response in opposition to the motion. They argue that the entire subsidence report, including Bise's portion, is admissible as part of the Department's record of decision and, indeed, part of the permit itself. They also argue that other experts in the case are permitted to rely on Bise's conclusions in support of their own opinions.

Hearsay is a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Pa.R.E. 801. Subject to many exceptions, hearsay is not admissible. Pa.R.E. 802. Although "[t]he Board is not bound by technical rules of evidence and relevant and material evidence of reasonable probative value is admissible," 25 Pa. Code § 1021.123(a), the Board generally applies the Pennsylvania Rules of Evidence. The rules regarding hearsay are not considered "technical rules of evidence" and must be followed. *Groce v. Dep't of Envtl. Prot.*, 921 A.2d 567, 582-83 (Pa. Cmwlth. 2007). Parties have a right to cross-examination, 25 Pa. Code § 1021.117(a), and the rules regarding hearsay are designed to protect that right, *Groce, supra*.

St. Clair's position as set forth in its motion in limine is largely correct. Dr. Bise's conclusions in his report would be hearsay if the Department or the Township attempted to rely upon them for the truth of the conclusions. St. Clair cannot cross-examine Dr. Bise. Therefore, we would not be able to make a finding in our Adjudication that "the Cell 4 area of the BRADS Landfill can be extended without any anticipated problems resulting from subsidence if the appropriate liner is properly installed" based in whole or even in part on Bise's conclusion. Of course, the rule against hearsay would not prevent us in the course of our *de novo* review from making such a finding based on the testimony of other qualified experts who arrive at their own

conclusions without reference to Bise's work. Thus, for example, if the Township and/or the Department's experts were able to conclude *independent of Bise's work* that the Cell 4 area can be extended without any anticipated problems resulting from subsidence if the appropriate liner is properly installed, the hearsay rule would not be implicated. We would obviously need to evaluate the qualifications and credibility of those other experts and ensure that they are expressing their own opinions, but the rule against hearsay would not preclude us from considering those opinions as part of our *de novo* review.

A more difficult evidentiary issue is whether other experts who are *not* able to testify independent of any reliance on Bise's work may refer to the substance of his work as part of the foundation for their own opinions. An expert may rely on hearsay *facts* or *data* if they are of a type reasonably relied upon by experts in the field, Pa.R.E. 703, and those facts or data may even be described at the hearing. This rule is not really an exception to the hearsay rule because the facts and data being cited are not evidence in and of themselves but merely describe the underlying basis for the expert's opinion. Pa.R.E. 705. The expert's opinion is itself the only evidence in such cases.

The rule that an expert can refer to hearsay in support of his or her opinion so long as it is understood that the hearsay is not itself admissible is easier to state than to apply when an expert attempts to rely on what is arguably more of a nontestifying expert's conclusion than straightforward "facts or data." On the other hand, simply having one expert merely parrot another expert's opinion is generally not allowed. *Luzerne Cnty. Flood Prot. Auth. v. Reilly*, 825 A.2d 779, 784 (Pa. Cmwlth. 2003) (expert not permitted to merely restate another's conclusions without espousing own expertise and judgment); *Primavera v. Celotex Corp.*, 608 A.2d 515, 521 (Pa. Super. 1992) (expert may not act as mere conduit or transmitter of content of extrajudicial

source and should not be permitted simply to repeat another's opinion without bringing in own expertise). Thus, in *Duquesne Light v. Woodland Hills S.D.*, 700 A.2d 1038 (Pa. Cmwlth. 1997), the testifying expert was permitted to use and refer to information contained in a nontestifying expert report regarding soil conditions, but not the nontestifying expert's statement that "[i]t is our opinion that subsurface drainage of the fill embankment is critical." 700 A.2d at 1049-50. *See also Oxford Presbyterian Church v. Weil-McLain Co.*, 815 A.2d 1094, 1101 (Pa. Super. 2003) (expert giving opinion regarding fire's origin permitted to testify regarding facts in the fire marshal's report but not to fire marshal's own opinion regarding fire's origin).

On the other hand, some courts have interpreted the rule rather broadly to allow one expert to rely on and refer to what really does appear to be a conclusion of another nontestifying expert. *See, e.g., Sheely v. Beard*, 696 A.2d 214, 218 (Pa. Super. 1997) (testifying doctor relies in part on diagnoses of other doctors); *Gustison v. Ted Smith Floor Prods.*, 679 A.2d 1304, 1309 (Pa. Super. 1996) (medical expert testifying about findings of other physicians). The courts seem more apt to allow such reliance when medical professionals are involved and when the nontestifying expert is in a different specialization or discipline than the testifying expert and the nontestifying expert's opinion is preliminary to or helps provide a foundation for a broader opinion reached by the testifying expert. EDWARD D. OHLBAUM, OHLBAUM ON THE PENNSYLVANIA RULES OF EVIDENCE § 705.09[1] (2014-2015 ed.).

In this case, Bise did not do any of his own testing, so there is no question of relying upon his "facts or data." Rather, Bise reviewed the data generated by Meiser & Earl, performed some calculations, and concluded that, assuming worst-case subsidence, the landfill could nevertheless be extended "without any anticipated problems." This conclusion does not resemble the preliminary sub-opinion that courts sometimes let slide in. Instead, it goes to the

heart of this matter. We cannot rely on it or other expert testimony based on it without doing what we think would be too much violence to the hearsay rule and interfering with St. Clair's right to cross-examine. Since there is essentially nothing in Bise's brief report other than his conclusions, the report can neither be admitted to prove the truth of his conclusions directly or indirectly through the testimony of other experts. If the Department or the Township intend to prove *de novo* before this Board that Cell 4 can be extended without any subsidence problems, they need to do so without Bise's report.

While Bise's report may not be admitted to prove that subsidence will not be a problem, his report can be admitted for other legitimate purposes. Indeed, it appears that the report must be admitted because it is actually part of the permit under appeal. (Permit 101679 at 29.) Further, it is admissible as part of the record of decision if for no other purpose than to show the basis for the Department's action. *Pine Creek Valley Watershed Ass'n v. DEP*, 2011 EHB 98, 101. Its use for that narrowly conscribed purpose does not violate the hearsay rules. *Groce*, *supra*, 921 A.2d at 582-83.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF ST. CLAIR	:	
	:	
v.	:	**EHB Docket No. 2015-017-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLYTHE TOWNSHIP, Permittee	:	

O R D E R

AND NOW, this 15th day of September, 2015, in consideration of St. Clair's motion in limine and the Township and the Department's response thereto, it is hereby ordered that Dr. Bise's report dated October 1, 2014 will not be admitted to prove the truth of the matters asserted therein and it may not be relied upon by any testifying expert as the basis for that expert's opinion.

ENVIRONMENTAL HEARING BOARD

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

DATED: September 15, 2015

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA	:	
	:	
v.	:	**EHB Docket No. 2015-063-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	**Issued: September 16, 2015**

OPINION AND ORDER ON
MOTION TO COMPEL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants in part and denies in part a permittee's motion to compel more complete responses to discovery. In response to interrogatories, an appellant must make a reasonable effort to identify persons with knowledge of the factual matters giving rise to the appeal.

O P I N I O N

Friends of Lackawanna filed this appeal of the Department of Environmental Protection's (the "Department's") issuance of a solid waste management permit renewal (permit no. 101247) to Keystone Sanitary Landfill, Inc. ("Keystone") for the operation of a municipal waste landfill in Lackawanna County. Friends of Lackawanna alleges, among other things, that the renewal of the permit impacts the organization's mission and work, and that it has members living in close proximity to the landfill that are concerned about things such as health impacts, aesthetic impacts, groundwater contamination, and odors.

Keystone has filed a motion to compel seeking more complete responses to six interrogatories included in its first set of interrogatories served on Friends of Lackawanna. The interrogatories at issue are as follows:

> 1. Identify all persons, other than counsel of record for [Friends of Lackawanna (FOL)], who directly or indirectly participated in the preparation, drafting, review or approval of the Notice of Appeal or one or more of the Additional Averments.
> 2. For each person identified in response to the preceding interrogatory, describe the role that person played with respect to the preparation, review or approval of the Notice of Appeal or the Additional Averments.
> 3. Identify all persons who reviewed Department documents or records, or who otherwise conducted a factual or background investigation of any type, in connection with above-captioned appeal and, for each person identified, identify the date of, and describe, the review or investigation conducted.
> 4. Identify all "members" of FOL. For purposes of this interrogatory, the term "members" shall have the same meaning as used by FOL in Paragraph 6 of Additional Averments.
> 5. Identify the corporate officers of FOL.
>
> ….
>
> 14. Identify all persons, other than current employees or representatives of the Department or Keystone, who FOL has reason to believe have knowledge of facts Related To the factual assertions in the Additional Averments.

Keystone tells us that Friends of Lackawanna responded with numerous objections, and it argues that Friends of Lackawanna provided no meaningful, substantive information in response to the interrogatories. Friends of Lackawanna generally responds that much of the information sought by Keystone is not relevant or reasonably calculated to lead to the discovery of admissible evidence, and that the discovery is being pursued to cause burden, expense, and harassment to Friends of Lackawanna.

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any

matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. However, no discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense with regard to the person from whom discovery is sought. Pa.R.C.P. No. 4011. "[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205.

In its motion Keystone tells us that it is merely seeking the identification of the members that Friends of Lackawanna alleges give it organizational standing in the appeal, and the identification of potential fact witnesses. In actuality, Keystone's interrogatories are broader. Keystone's Interrogatories 4 and 5 seek the identity of all members of Friends of Lackawanna and all of its officers. We have previously stated that "the membership list of an advocacy group is not discoverable unless the need for discovering such information clearly outweighs the chilling effect such disclosure would have on the members' First Amendment right of association." *Sludge Free UMBT v. DEP*, 2014 EHB 939, 950 (quoting *Hanson Aggregates, PMA, Inc. v. DEP*, 2003 EHB 1, 6). *See also Chrin Bros. v. DEP*, 2010 EHB 805, 814-15. In Friends of Lackawanna's response to the motion, it identifies six members that are purportedly affected by the landfill, and it says it has provided Keystone with affidavits for each of those members. Friends of Lackawanna has also provided Keystone with the organization's Articles of Incorporation, which lists the name of Michele Dempsey, President of Friends of Lackawanna. Of course, for purposes of organizational standing, an organization needs only a single member suffering immediate or threatened injury to satisfy the requirement. *See Pa. Med.*

Soc'y v. Dept. of Pub. Welfare, 39 A.3d 267, 278 (Pa. 2012); *Malt Beverage Distribs. Ass'n v. Pa. Liquor Control Bd.*, 965 A.2d 1254, 1263 (Pa. Cmwlth. 2009) (quoting *Malt Beverage Distribs. Ass'n v. Pa. Liquor Control Bd.*, 881 A.2d 37, 42 (Pa. Cmwlth. 2005)); *Citizens for Pa.'s Future v. DEP*, EHB Docket No. 2014-117-B, slip op. at 3 (Opinion, Sep. 10, 2015). Now being in the possession of the names of at least six members and one officer, Keystone has not provided us with any compelling reason for the disclosure of Friends of Lackawanna's full membership list or the names of all of its officers. It appears undisputed at this point that Friends of Lackawanna has provided sufficient information for Keystone to be able to assess Friends of Lackawanna's standing.[1] Accordingly, Keystone's motion is denied with respect to Interrogatories 4 and 5.

Once we have stripped away the standing rationale, we have a hard time figuring out why the information sought in Interrogatories 1, 2, and 3 is relevant or likely to lead to the discovery of admissible evidence. We are not sure how it is at all helpful to know the persons other than counsel who assisted in the preparation of the notice of appeal or what role they played in crafting it. For the purposes of our *de novo* review, and deciding whether the Department acted reasonably and in accordance with the law, this information does not appear to be consequential. Likewise, we have difficulty imagining how it is useful to know who conducted what file reviews at the Department and on what dates. Keystone does not make any convincing argument in its motion as to why this information is relevant or why it is otherwise entitled to the information. Therefore, its motion is denied for Interrogatories 1, 2, and 3.

[1] We note that in addition to having standing derivatively through its members, an organization can also have standing in its own right. *Citizens for Pa.'s Future, supra*, slip op. at 2; *Pa. Trout v. DEP*, 2004 EHB 310, 355, *aff'd*, 863 A.2d 93 (Pa. Cmwlth. 2004); *Barshinger v. DEP*, 1996 EHB 849, 858. Friends of Lackawanna alleges both in its notice of appeal and again in its response to the motion that it has standing as an organization itself, independent of having standing as a representative of its members.

Turning to Interrogatory 14, Friends of Lackawanna's answer to the interrogatory made a number of objections claiming privilege and saying that the request was overbroad and posed an unreasonable burden on Friends of Lackawanna. Friends of Lackawanna then stated, "Subject to and without waiving these objections, Appellant states as follows: See all individuals identified in the documents being identified and produced during discovery." In its response to the motion to compel, Friends of Lackawanna says it was entitled to simply refer Keystone to the individuals disclosed in the 7,600 pages of documents Friends of Lackawanna produced to Keystone. It adds that, due to media attention and general public awareness, there are many people in Lackawanna County who have general knowledge of concerns associated with the landfill and these people are equally available to Keystone as they are to Friends of Lackawanna.

We do not find Friends of Lackawanna's response to this interrogatory to be entirely satisfactory. Under Rule 4003.1(a) parties may obtain the "identity and location of persons having knowledge of any discoverable matter." Interrogatory 14 appears designed to discover exactly that information. Friends of Lackawanna must, in accordance with the Rules of Civil Procedure, make a reasonable effort to identify persons with knowledge of discoverable matter. Friends of Lackawanna has not shown that it made such an effort. It is not an adequate response to simply refer to a large pile of documents, state that many people know about a matter, and be done with it.[2] The key point is not how many people know about the landfill generally, but who

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

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

knows about the specific allegations giving rise to the appeal. Keystone's interrogatory excepts employees of the Department and Keystone, and instead appears tailored to discover the people who provided the factual basis for the concerns giving rise to the appeal. Presumably, Friends of Lackawanna already knows who these people are. Putting a reasonable effort into responding to the interrogatory will not impose an undue burden on Friends of Lackawanna.[3]

Accordingly, we issue the following Order.

Upjohn Co. v. United States, 101 S. Ct. 667, 685-86 (1981) (quoting *Phila. v. Westinghouse Electric Corp.*, 205 F.Supp. 830, 831 (E.D. Pa. 1962)).

[3] We caution that, by not identifying a person who may be a potential witness, a party runs the risk of that person not being able to testify at the hearing on the merits. *See Dirian v. DEP*, 2012 EHB 357, 358-59; *Cnty. Commr's, Somerset Cnty. v. DEP*, 1995 EHB 1015, 1052 (citing *Midway Sewage Auth. v. DER*, 1990 EHB 1554) (a party "may not fail to disclose all persons with knowledge and then also fail to identify its witnesses, too, so that it may ambush its opponents").

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA	:	
	:	
v.	:	**EHB Docket No. 2015-063-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	

O R D E R

AND NOW, this 16th day of September, 2015, it is hereby ordered that the Permittee's motion to compel is **granted in part and denied in part**. The Appellant shall provide a more complete response to Interrogatory 14 in accordance with the foregoing Opinion. The motion to compel is otherwise denied.

ENVIRONMENTAL HEARING BOARD

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

DATED: September 16, 2015

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

WEST BUFFALO TOWNSHIP CONCERNED CITIZENS	:	
v.	:	**EHB Docket No. 2014-078-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EDWARD H. MARTIN, Permittee	:	**Issued: September 28, 2015**

OPINION AND ORDER ON
MOTIONS TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies two motions to dismiss because a transfer of an NPDES permit does not render a third-party appellant's appeal of the underlying permit moot.

O P I N I O N

West Buffalo Township Concerned Citizens ("West Buffalo") has appealed the Department of Environmental Protection's (the "Department's") issuance of an individual NPDES permit (permit number PA0232475) to Edward H. Martin for a concentrated animal feeding operation (CAFO) in West Buffalo Township, Union County. In its appeal West Buffalo alleges, among other things, that Martin's operation does not comply with applicable regulations, that the NPDES permit is not protective of waters of the Commonwealth, and that the Department failed to comply with the public notice requirements associated with the permit.

Martin and the Department have now each moved to dismiss West Buffalo's appeal. They argue that this appeal is moot because the NPDES permit under appeal has been transferred to Andrew A. Reiff. They add that the Board lacks jurisdiction to adjudicate this appeal because

there is now a new permittee and West Buffalo did not appeal the permit transfer. West Buffalo, of course, opposes the motions.

The Board is receptive to 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. *Boinovych v. DEP*, EHB Docket No. 2015-090-L, slip op. at 1 (Opinion, Aug. 6, 2015); *Brockley v. DEP*, EHB Docket No. 2014-092-L, slip op. at 1 (Opinion, Apr. 3, 2015); *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. Motions to dismiss will only be granted when a matter is free from doubt when viewed in the light most favorable to the nonmoving party. *Brockley, supra*; *see also Hanover Twp. v. DEP*, 2010 EHB 788, 789-90; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Cooley v. DEP*, 2004 EHB 554, 558. In assessing a motion to dismiss premised on mootness, we have said:

> "Mootness is a prudential limitation related to justiciability," and, thus generally is an issue 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).

South v. DEP, EHB Docket No. 2014-082-L, slip op. at 4 (Opinion, Apr. 16, 2015) (citing *Consol Pa. Coal Co. v. DEP*, EHB Docket No. 2014-027-B, slip op. at 8 (Opinion, Feb. 12, 2015), *recon. denied*, (Opinion, Mar. 13, 2015)).

The Department and Martin's motions are premised upon the mistaken notion that there is now a new permit. There is not. It is the same permit. Only the identity of the permittee is different. Unlike other cases where the Department nullified its first action and then took a second action and we held that an appeal from the nullified action was moot, *Cooley v. DEP*,

2005 EHB 761; *Kilmer v. DEP*, 1999 EHB 846, the Department's approval of the transfer of Martin's permit did not nullify the permit. To the contrary, the permit has not been superseded and it remains in full force and effect. The Board is still fully capable of providing West Buffalo with effective relief, such as, for example, revocation of the permit. Therefore, this appeal is not moot.

The Department and Martin's argument that the Board somehow now lacks jurisdiction in this appeal is equally flawed. Their argument essentially equates to a claim that West Buffalo's failure to appeal the permit transfer amounts to a failure to join the new permittee as an indispensable party in this appeal. However, there is no such thing as an indispensable party in Board cases. The Board's jurisdiction attaches once an adversely affected party appeals, just as West Buffalo did here. The Board's jurisdiction relates to the Departmental action irrespective of the locus or identity of the multiple persons who may be adversely affected by that action. The Board's jurisdiction over a case filed by at least one interested party (e.g. West Buffalo) obtains regardless of whether other interested parties, such as the permittee, enter an appearance or actually participate in the proceedings.

Martin and the Department raise the concern that any relief granted by the Board could affect the new permittee.[1] This argument is inconsistent with their fallacious theory that the permit transfer created a new permit, but putting that aside, any relief that the Board grants in this case will undoubtedly affect the new permittee, which is why he is free to move to be substituted as a party, 25 Pa. Code § 1021.83, or to be added as an intervenor, 35 P.S. § 7514(e), just like any other interested party. But the fact that there is now another party interested in the fate of the permit does not in any way affect the Board's continuing jurisdiction over the

[1] We do not know whether Martin continues to be an interested party even though he is not the named permittee. He certainly has not sought to be substituted out, and West Buffalo tells us he continues to take an active role in the litigation. West Buffalo obviously remains an interested party.

continuing permit. And the fact that the newly interested party chooses not to participate and protect its interests does not mean that this Board must somehow relinquish its jurisdiction.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WEST BUFFALO TOWNSHIP CONCERNED CITIZENS	:	
v.	:	**EHB Docket No. 2014-078-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EDWARD H. MARTIN, Permittee	:	

O R D E R

AND NOW, this 28th day of September, 2015, in consideration of the motions to dismiss filed by the Department and Edward H. Martin, it is hereby ordered that the motions are **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: September 28, 2015

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA	:	
	:	
v.	:	**EHB Docket No. 2015-063-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	**Issued: October 29, 2015**

OPINION AND ORDER ON
MOTIONS TO COMPEL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants in part an appellant's two motions to compel more complete discovery responses from the Department and permittee where responses were made based on an erroneous conception of the scope of the appeal. Having provided guidance on the scope of the appeal, the Department and permittee must supplement their responses accordingly. However, where discovery may encompass decades of information, discovery requests must be appropriate with respect to the proportionality standard in terms of the burden imposed on other parties.

O P I N I O N

Friends of Lackawanna filed this appeal of the Department of Environmental Protection's (the "Department's") issuance of a solid waste management permit renewal (permit no. 101247) to Keystone Sanitary Landfill, Inc. ("Keystone") for the operation of a municipal waste landfill in Lackawanna County. Friends of Lackawanna alleges a number of concerns in its notice of appeal, including that in the last several years Keystone has begun accepting new waste streams,

that in recent years there have been multiple thermal events, and that there has been damage to some of the landfill's liners over the last few years.

Friends of Lackawanna has now filed motions to compel more complete responses to its interrogatories and requests for documents served on the Department and Keystone. Friends of Lackawanna has identified what it views as various deficiencies in the responses it has received thus far to its discovery requests. The two alleged deficiencies Friends of Lackawanna identifies with respect to the Department's responses are subsumed by the four alleged deficiencies Friends of Lackawanna identifies with respect to Keystone's responses. Therefore, both motions will be addressed within this Opinion. The deficiencies alleged by Friends of Lackawanna are generally as follows:

(1) Both Keystone and the Department have objected to Friends of Lackawanna's discovery requests on the grounds that the requests seek documents that are outside of the scope of the appeal, which Keystone and the Department argue is limited strictly to what was involved in the renewal of the permit.

(2) Both Keystone and the Department have failed to identify all of the people they are aware of who are familiar with the facts and circumstances referred to in the appeal.

(3) Keystone has improperly withheld documents that Keystone alleges contain confidential business information or proprietary information.

(4) Keystone has not specifically acknowledged whether it is in the possession of responsive documents, whether or not the documents are subject to any privilege.

The Department and Keystone generally respond to Friends of Lackawanna's motion by reiterating that the discovery requests are overly broad and not tailored to the specific action under appeal—the renewal of the solid waste management permit. The Department also

responds that it has already provided or made available for inspection all of the information it has pertaining to the Keystone Landfill, and it has identified all of the people it believes have knowledge of the renewal of the landfill's permit. Keystone adds that Friends of Lackawanna's discovery requests violate the proportionality standard, that Keystone has responded appropriately given what it believes is the proper scope of discovery, and that Keystone cannot identify any people with knowledge related to matters contained in Friends of Lackawanna's notice of appeal because Keystone did not draft the appeal.

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. However, no discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense with regard to the person from whom discovery is sought. Pa.R.C.P. No. 4011. "[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205. Part of this oversight requires us to assess discovery in terms of a proportionality standard. *Tri-Realty Co. v. DEP*, EHB Docket No. 2014-107-L (Opinion, Jul. 9, 2015).

Scope of Discovery in this Matter

Friends of Lackawanna tells us that the Department and Keystone have improperly withheld discovery on the basis of their contentions that Friends of Lackawanna's appeal is

limited to the permit renewal and the discovery requests extend beyond what was strictly involved in the renewal. Keystone objected in its response to interrogatories:

> [Friends of Lackawanna's] Notice of Appeal is limited to the Department's renewal of Solid Waste Management Permit No. 101247 ("Permit Renewal"). The alleged background material in [Friends of Lackawanna's] Notice of Appeal has no dispositive bearing on, and cannot expand, the scope of [Friends of Lackawanna's] appeal, which relates solely to the Department's action in issuing the Permit Renewal.

The Department made similar objections. Both the Department and Keystone tell us in their responses to Friends of Lackawanna's motions that the only thing that was changed in the permit renewal was the permit term, which was extended from April 6, 2015 to April 6, 2025. Keystone and the Department contend that no other permit conditions were changed and there were no changes to the landfill's operations or boundaries.[1] Accordingly, the Department and Keystone advance a rather constrained view of the scope of this appeal, our *de novo* review, and the proper scope of discovery.

We have now repeatedly held that a permit renewal not only creates an opportunity for the Department to assess whether continued operation of the permitted facility is appropriate, it creates a duty to do so. *See Solebury School v. DEP*, 2014 EHB 482, 526; *GSP Mgmt. Co. v. DEP*, 2011 EHB 203, 216-17; *Love v. DEP*, 2010 EHB 523, 528-29; *Angela Cres Trust v. DEP*, 2009 EHB 342, 359; *Wheatland Tube v. DEP*, 2004 EHB 131, 135-36; *Tinicum Twp. v. DEP*, 2002 EHB 822, 835. Permits are issued with limited terms for precisely that reason. Indeed, even without a renewal application pending, the Department is required to "from time to time,

[1] The Department and Keystone accuse Friends of Lackawanna of seeking information that is related to Keystone's separate application to expand its landfill (referred to as Phase III), but we see no evidence of that. Instead, Friends of Lackawanna's discovery requests appear specifically tailored to not inquire about the expansion. Friends of Lackawanna's requests for production are all made with the overarching caveat that it is seeking documents "*except to the extent included in the Phase III application materials that are available on the Department's website*." (Emphasis in original.)

but at intervals not to exceed 5 years, review permits issued under [the municipal waste] article." 25 Pa. Code § 271.211(d).

Keystone directs us to *Wheatland Tube Co. v. DEP*, 2004 EHB 131, in support of its argument that Friends of Lackawanna's discovery requests are overly broad. However, in *Wheatland Tube* we again reiterated our support for our holding in *Tinicum Township* that the Department, and in turn the Board, must ensure that the continuation of a permitted activity is still appropriate in the context of current information and standards:

> The Department argued [in *Tinicum Township*] that the Board was only permitted to consider whether the permit limits had changed, and if so, whether the changes were appropriate. We rejected the argument. We explained that, even in the absence of changes to permit terms, the five-year renewal requirement required the Department to ensure that a permit issued years earlier was still appropriate based upon what was known at the time of the proposed renewal. The determinative issue was *not* whether the permit was appropriate in the first place; it was whether it should have continued in place for another five years. Challenges related to the former were barred; challenges related to the latter were held to be properly the subject of Departmental consideration and Board review.

Wheatland Tube, 2004 EHB at 135-36.

With that being said, it is difficult to make broad proclamations about the appropriate scope of an appeal in the relative abstract of a discovery motion. The threshold for relevance in discovery is lower than that at a hearing on the merits. Discovery, of course, is generally available regarding any matter that is not only relevant but also that appears reasonably likely to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1 (incorporated by 25 Pa. Code § 1021.102(a)). We have previously recognized that "it will generally be enough to require information to be divulged if there is a reasonable potential that it will ultimately prove to be relevant." *Borough of St. Clair v. DEP*, 2013 EHB 177, 179 (citing *T. W. Phillips Oil & Gas Co.*

v. DEP, 1997 EHB 608, 610). The exact scope of the Department's review of a permit renewal, and in turn our review, will require further elucidation as we move forward with this appeal,[2] but it is not necessary to precisely define the limit of that review for purposes of resolving a discovery dispute now before us. To be sure, it is broader than what the Department and Keystone are advancing, but the exact outer bounds are difficult to determine at this point.

Keeping this in mind, any discovery must still be governed by a proportionality standard. *Tri-Realty*, *supra*. Discovery obligations must be "consistent with the just, speedy and inexpensive determination and resolution of litigation disputes." 2012 Explanatory Comment Prec. Rule 4009.1, Part B. The proportionality standard requires us to consider the following factors:

(1) The nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake;

(2) The relevance of the information sought and its importance to the court's adjudication in the given case;

(3) The cost, burden, and delay that may be imposed on the parties to deal with the information;

(4) The ease of producing the information and whether substantially similar information is available with less burden; and

(5) Any other factors relevant under the circumstances.

2012 Explanatory Comment Prec. Rule 4009.1, Part B.

The proportionality standard is a particularly important consideration where, as here, an operation has continued for decades. Indeed, the Department states that it has hundreds of

[2] The review would seem to be rather extensive because the permittee of a disposal facility is required to apply for a renewal at least one year before the expiration date of the permit term. 25 Pa. Code § 271.223(a).

thousands of pages of documents pertaining to the Keystone Landfill spanning more than 30 years. The Department contends in its response that it has already provided Friends of Lackawanna all that it has in its possession pertaining to the permit renewal, and that it has provided Friends of Lackawanna the opportunity to inspect and copy all that it has related to the landfill more generally, which the Department says Friends of Lackawanna has done multiple times before filing the appeal. Assuming this is true, it appears that the Department has fulfilled its discovery obligations regardless of what it believes to be the scope of the appeal. Providing access to documents for review and inspection in accordance with Rule 4009.12(a)(2)(i) and (b)(3) is reasonable and appropriate in this circumstance.

With respect to Keystone, it notes that Friends of Lackawanna's discovery requests have no temporal limitations. It says that it will have to look for potentially responsive information going back decades. Such a broad investigation may very well exceed the reasonable limits of the proportionality standard, but without specific discovery requests at issue, it is difficult for us to make a concrete determination. With a more specific example, Keystone points out that under the regulations it was not required to prepare a new environmental assessment for the permit renewal and the Department, in turn, was not required to review a new environmental assessment. This is correct, and may be an illustrative example of the reasonable limits of discovery. The environmental assessment itself is likely contained within the Department's permit file. Extensive inquiry into the research and/or preliminary reports that went into the environmental assessment that were not ultimately submitted to the Department may be beyond the reasonable scope of discovery. We note that no party has suggested a middle ground for the appropriate scope of discovery.

However, having now been dispelled of its conception of a particularly narrow appeal, Keystone must make a reasonable effort to comply with Friends of Lackawanna's discovery requests. If Keystone believes that it is suffering an undue burden, it can seek appropriate relief from the Board. We are by no means authorizing Friends of Lackawanna to pursue unrestrained discovery.

Persons with Relevant Information

In response to Friends of Lackawanna's request to identify all persons with relevant information, the Department identified nine Department employees and briefly stated what each person's role was in reviewing Keystone's renewal application and preparing the renewal permit. Friends of Lackawanna complains that the Department has not identified anyone from Keystone, other governmental bodies or agencies, or other companies that the Department believes may be familiar with the facts and circumstances involved in the appeal. Friends of Lackawanna also complains that the Department appears to have identified only Department personnel involved with the permit renewal, and not personnel familiar with the "broader universe" of what is encompassed by the notice of appeal. The Department responds to the motion by saying that it is not aware of anyone familiar with the appeal beyond the people it has already identified or persons already associated with Keystone or Keystone's consultants.

Keystone responded to the same interrogatory by stating:

> Keystone, of course, did not author [Friends of Lackawanna's] Notice of Appeal and can, therefore, only speculate as to those persons "familiar with the facts and circumstances referred to in the Notice of Appeal and its attachments."
>
> Subject to the foregoing objections, and without waiving them, Keystone identifies: (1) [Friends of Lackawanna], its officers, directors, members, consultants, agents, and attorneys, and individuals or entities that have funded, donated to, or otherwise provided support, financial or otherwise, to [Friends of

> Lackawanna]; and (2) those individuals identified in the Notice of Appeal and its attachments.

Friends of Lackawanna argues that Keystone effectively has not identified anyone.

In our prior Opinion in this matter, we had occasion to evaluate a similar dispute involving Keystone seeking from Friends of Lackawanna the names of people who had information relevant to the allegations contained in Friends of Lackawanna's notice of appeal. *See Friends of Lackawanna v. DEP*, EHB Docket No. 2015-063-L (Opinion, Sep. 16, 2015). In that Opinion, we recognized that under Rule 4003.1(a) parties may obtain the "identity and location of persons having knowledge of any discoverable matter." We stated that a party must make a reasonable effort to obtain the names of persons with knowledge and then provide those names in response to an appropriate discovery request. *Friends of Lackawanna v. DEP*, *supra*, slip op. at 5-6.

Accordingly, given the clarification of the scope of the appeal provided above, the Department must make a reasonable effort to identify people who may have knowledge of discoverable information beyond those strictly involved in the renewal. If it is true that the Department is not aware of anyone outside of those whom it has already identified, then the Department has satisfied its duty.

Keystone, for its part, appears to have made no reasonable effort. Instead, Keystone willfully misreads Friends of Lackawanna's request. Keystone has not identified a single person from either Keystone or its consultants who would have knowledge of the information referenced in the appeal. Keystone contends that its response was appropriate in terms of a plain language reading of the interrogatory. It says that Friends of Lackawanna did not ask for the identification of persons with knowledge of the permit renewal, permit application, or the Department's handling of the application. Keystone's obtuse response attempts to be clever, but

wholly fails to make a good faith effort to be responsive. The response is unnecessarily limited, and even if we adopt its perspective, it is illogical. For instance, Keystone is effectively saying that it has no knowledge of anyone familiar with the waste streams it receives, the liners in place at the landfill, or the aquifers underlying the landfill—all matters discussed in the notice of appeal. We suspect that this cannot possibly be true. We have no indication that making a reasonable effort to identify persons from Keystone, its consultants, or any other appropriate person would impose an undue burden on Keystone. Keystone must make such an effort.

Confidential Business Information

Friends of Lackawanna tells us that in response to its discovery requests, Keystone objected to producing any discovery that seeks confidential business or proprietary information and stated that Keystone would only produce such information, if it in fact exists, subject to a confidentiality agreement. Friends of Lackawanna also tells us that it attempted to find out from Keystone whether any documents were in fact held on this basis, but its correspondence was ignored by Keystone.

Keystone responds that it was merely preserving an objection on the grounds of confidential business or proprietary information. Keystone asserts that to date it has not withheld any documents on the basis of confidential business information. Keystone tells us that after the Board determines the appropriate scope of discovery, Keystone "might" determine that it possesses responsive documents that contain confidential or proprietary information and it will proceed to seek cooperation pursuant to a confidentiality agreement, or a protective order form the Board, if necessary. Having now provided guidance on the scope of the appeal, we direct Keystone to respond to the discovery requests accordingly without prejudice to Keystone seeking appropriate relief from the Board if necessary.

Whether Responsive Documents Exist

Friends of Lackawanna finally argues that Keystone has made an improper objection to discovery requests by failing to acknowledge whether responsive documents exists, and if so, whether those documents are being withheld from production. Friends of Lackawanna points to Keystone's responses, which generally contain a series of objections followed by the statement, "Subject to the foregoing objections, and without waiving them, Keystone will produce non-privileged documents currently in its possession, if any, that are related to the Permit Renewal and responsive to this request." In response to the motion Keystone again says that it will reevaluate its position and supplement its responses as necessary once we determine the scope of the appeal.

We note that thus far Keystone's answers to Friends of Lackawanna's requests for document production have not been in complete conformance with the Rules of Civil Procedure. Rule 4009.12 provides the requirements for answering requests for production of documents. Rule 4009.12(b) provides, among other things, that an answering party shall (1) identify the documents being produced or made available, (2) identify with reasonable particularity all documents not being produced because of the objection that they are not within the scope of permissible discovery and state the basis for not producing those documents, and/or (3) state that after reasonable investigation, it has been determined that there are no documents responsive to the request. Accordingly, Friends of Lackawanna asks that we compel Keystone to provide complete response to confirm whether documents responsive to each request (1) have been identified and produced, (2) have been identified but withheld from production, with a specific assertion of privilege as to each one, or (3) have been determined not to exist.

The Rules require appropriate answers within 30 days, not a vague promise of possible production at some undefined time in the future. Pa.R.C.P. No. 4009.12(a). We see Friends of Lackawanna as asking nothing more than for Keystone to fulfill the requirements of the Rules, and Keystone has provided us with no reason why it should not comply. Therefore, we direct Keystone to answer the requests for production of documents in accordance with Rule 4009.12 and pursuant to the clarified scope of the appeal.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA	:	
	:	
v.	:	**EHB Docket No. 2015-063-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	

O R D E R

AND NOW, this 29th day of October, 2015, it is hereby ordered that the Appellant's motion to compel is **granted in part** in accordance with the preceding Opinion. Keystone and the Department shall supplement their responses to the discovery requests that are the subject of the Appellant's motions on or before **November 18, 2015**.

ENVIRONMENTAL HEARING BOARD

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

DATED: October 29, 2015

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

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

For Appellant:
Jordan B. Yeager, Esquire
Lauren M. Williams, Esquire
(*via electronic filing system*)

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRYAN WHITING AND WHITING ROLL-OFF, LLC	:	
v.	:	**EHB Docket No. 2014-090-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 5, 2015**

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

By Steven C. Beckman, Judge

Synopsis

The Board upholds the majority of a civil penalty assessment by the Department pursuant to the Solid Waste Management Act for violations that include owning and operating a transfer and disposal facility without a permit and storage of waste in improperly labelled containers that were also not covered or leak proof. The Board reduces the civil penalty where the Department failed to prove by a preponderance of the evidence an alleged violation. The Board also finds that the President and sole member of a limited liability company is not personally liable for violations pursuant to the participation theory where the Department did not present sufficient evidence that he actually participated in the violations.

Background

This matter involves an appeal by Bryan Whiting and Whiting Roll-Off, LLC ("Whiting Roll-Off") (jointly the "Appellants") of an $18,148.00 Assessment of Civil Penalty issued by the Department of Environmental Protection (the "Department" or "DEP") on May 27, 2014. A hearing in the matter was held on May 19, 2015, at the Board's Northwest Office and Court Facility in Erie, Pennsylvania. The Department filed its post-hearing brief on July 13, 2015.

Bryan Whiting and Whiting Roll-Off filed their post-hearing brief on August 17, 2015. The Department filed a reply brief on August 27, 2015. 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 Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended,* 35 P.S. §§ 6018.101-6018.1003; Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended,* 71 P.S. § 510-17 and the rules and regulations promulgated thereunder.

2. Whiting Roll-Off[1] is a limited liability company registered and doing business in Pennsylvania. Whiting Roll-Off has a business and mailing address of 1215 West State Street, New Castle, PA 16101. (Notice of Appeal; Appellants' Pre-Hearing Memorandum.)

3. Whiting Roll-Off transports waste in roll-off containers. (Appellants' Pre-Hearing Memorandum, Para. B.2.)

4. Bryan Whiting is the President and sole member of Whiting Roll-Off. (Appellants' Pre-Hearing Memorandum, Para. B.3.)

5. Matthew Cwiklik is a Solid Waste Specialist and has worked for the Department for just under three years. (Notes of Transcript ("T.") 9.)

6. Brian Mummert is the Group Manager for the Operation Section of the Waste Management Program and has worked for the Department for 28 years. At the time of the alleged violations in this matter, Mr. Mummert was a Solid Waste Supervisor. (T. 66-67.)

7. Bryan Whiting is the sole owner of a parcel of land located in Mahoning Township, Lawrence County, which is more particularly described in Deed Book 2039, Pages

[1] The company is also referred to in some of the filings and testimony as Bryan Whiting Roll-Off, LLC and Whiting Rolloffs, LLC, but there is no dispute that each name refers to the same company. We will continue to refer to the company as Whiting Roll-Off, LLC.

177-180, and recorded in the Office of Recorder of Deeds for Lawrence County ("Whiting Property"). (Appellants' Pre-Hearing Memorandum, Para. A.1; DEP Exhibit ("Ex.") A.)

8. The Whiting Property is located on Route 224W, also known as State Street, in Mahoning Township, Lawrence County, Pennsylvania. (T. 49, 51.)

9. Mr. Cwiklik identified the location of the Whiting Property by way of the deed (DEP Ex. A.), tax maps and Google maps. (T. 9-11; 36-38.)

10. Mr. Mummert met with Mr. Whiting on the Whiting Property in 2006 at which time Mr. Whiting stated that he had just recently purchased the Whiting Property and was intending to use it for the roll-off container business. (T. 71, 75-76.)

11. The exact boundaries of the Whiting Property were not identified by the Department. (T. 37-38.)

12. On October 2, 2013, Mr. Cwiklik inspected the Whiting Property and found fifteen (15) roll-off containers labeled Whiting Roll-Offs ("Whiting Containers" or "Containers") filled with municipal/residual waste located on the Whiting Property. The Whiting Containers were not labeled as "municipal waste" and were not covered. (T. 13-14; DEP Ex. F.)

13. On October 2, 2013, five of the Whiting Containers containing municipal/residual waste located on the Whiting Property were leaking from the tailgate on to the ground surface. (T. 13-14; DEP Ex. F.)

14. On October 2, 2013, Mr. Cwiklik observed bags of municipal waste, plastics and carpet dumped on the ground surface of the Whiting Property and also observed piles of shingles and construction/demolition waste along the edge of the area where the Whiting Containers were located. (T. 14; DEP Ex. F.)

15. On October 3, 2013, Mr. Cwiklik inspected the Whiting Property and found fourteen (14) Whiting Containers filled with municipal/residual waste located on the Whiting Property. The Whiting Containers were not labeled as "municipal waste" and were not covered. (T. 14; DEP Ex. F.)

16. On October 3, 2013, the same five Whiting Containers from the prior day were still leaking on to the ground surface. (T. 14; DEP Ex. F.)

17. On October 4, 2013, Mr. Cwiklik inspected the Whiting Property and found ten (10) Whiting Containers filled with municipal/residual waste located on the Whiting Property. The Whiting Containers were not labeled as "municipal waste" and were not covered. (T. 14; DEP Ex. F.)

18. On October 4, 2013, the same five Whiting Containers that were leaking on October 2 and October 3, 2013 were still leaking on to the ground surface. (T. 14; DEP Ex. F.)

19. On October 7, 2013, Mr. Cwiklik inspected the Whiting Property and found ten (10) Whiting Containers filled with municipal/residual waste located on the Whiting Property. The Whiting Containers were not labeled as "municipal waste" and were not covered. (T. 14-15; DEP Ex. F.)

20. On October 7, 2013, four of the Whiting Containers that were leaking during the prior inspections continued to leak on to the ground surface. (DEP Ex. F.)

21. On October 7, 2013, the back door of one of the Whiting Containers was open and waste was spilling out on to the ground surface. (T. 16-17, 28; DEP Ex. F.)

22. On October 7, 2013, during the inspection at the Whiting Property, Mr. Cwiklik observed an employee of Whiting Roll-Off remove a full Whiting Container (Container #61) that

was present during the three prior inspections. He was told it was being transported to the Carbon Limestone Landfill in Ohio. (T. 16-17; DEP Ex. F.)

23. On October 8, 2013, Mr. Cwiklik inspected the Whiting Property and found nine (9) Whiting Containers filled with municipal/residual waste located on the Whiting Property. The Whiting Containers were not labeled as "municipal waste" and were not covered. (T. 17; DEP Ex. F.)

24. On October 8, 2013, three of the Whiting Containers that were leaking during the prior inspections continued to leak on to the ground surface. (DEP Ex. F.)

25. Six of the Whiting Containers filled with municipal/residual waste remained on the Whiting Property from October 2, 2013 through October 8, 2013 and were observed by Mr. Cwiklik during each of the inspections he conducted. (T. 17; DEP Ex. F.)

26. On October 8, 2013, after completing the inspection of the Whiting Property, Mr. Cwiklik met with Bryan Whiting at his office and informed him of the alleged violations at the Whiting Property. Mr. Whiting did not disclaim ownership of the Whiting Property or of the Whiting Containers that were located on the Whiting Property. (T. 31-32; DEP Ex. F.)

27. On October 15, 2013, the Department issued a Notice of Violation addressed to Mr. Whiting stating that the Department had "determined that Bryan Whiting Rolloffs" was in violation of the Solid Waste Management Act ("SWMA") and the PA Municipal Waste Management Rules and Regulations as a result of the five inspections conducted in October 2013. (T. 28-29; DEP Ex. G.)

28. On December 18, 2013, Mr. Cwiklik conducted an inspection of the Whiting Property and observed one Whiting Container (Container #55) filled with municipal waste. Container #55 was not covered. (T. 30; DEP Ex. I.)

29. On December 19, 2013, Mr. Cwiklik conducted an inspection of the Whiting Property and again observed one Whiting Container (Container #55) filled with municipal waste. Container #55 was still not covered. (T. 30; DEP Ex. I.)

30. On December 23, 2013, Mr. Cwiklik conducted an inspection of the Whiting Property and observed that Whiting Container #55 was in a different location on the Whiting Property and appeared to have been emptied of its prior contents. Mr. Cwiklik also observed that there were approximately 5 to 8 bags of municipal waste within Container #55. (T. 30-31; DEP Ex. I.)

31. On January 6, 2014, the Department issued a Notice of Violation addressed to Mr. Whiting stating that the Department had "determined that Bryan Whiting Rolloffs" was in violation of SWMA and the PA Municipal Waste Management Rules and Regulations as a result of the three inspections conducted in December 2013. (T. 31; DEP Ex. J.)

32. No one, including Bryan Whiting and Whiting Roll-Off, had a permit to operate a transfer facility on the Whiting Property at the time of the October 2013 and December 2013 inspections. (T. 34.)

33. On May 27, 2014, Mr. Mummert, on behalf of the Department, issued an Assessment of Civil Penalty in the amount of $18,148.00 against Bryan Whiting Roll-Off, LLC and Bryan Whiting asserting that they were jointly and severally responsible for the civil penalty. (T. 81; DEP Ex. L.)

34. Mr. Mummert calculated the civil penalty using three factors: 1) costs incurred by the Commonwealth; 2) degree of willfulness; and 3) duration of violation. (T.81-86, 96; DEP Ex. K, DEP Ex. M.)

35. Mr. Mummert calculated the costs incurred by the Commonwealth as $2,148.41 based on the number of hours worked by Mr. Cwiklik and Mr. Mummert multiplied by an hourly rate and associated benefits. (T. 84-85; DEP Ex. K.)

36. Mr. Mummert selected negligence as the degree of willfulness for each of the violations used to calculate the civil penalty assessment. (T. 86, DEP Ex. K.)

37. Mr. Mummert took the duration of the violation into account by assessing a civil penalty for each separate day that Mr. Cwiklik inspected the Whiting Property and determined that there were violations. (T. 96; DEP Ex. K.)

38. On June 27, 2014, Bryan Whiting and Whiting Roll-Off filed a Notice of Appeal with the Environmental Hearing Board challenging the Department's Assessment of Civil Penalty. (Notice of Appeal.)

DISCUSSION

The Department bears the burden of proof in an appeal from a civil penalty assessment. 25 Pa. Code § 1021.122(b)(1). The Department must show by a preponderance of the evidence that: (1) the violations that led to the assessment in fact occurred; (2) the imposed penalty is lawful under applicable law; and (3) the penalty was a reasonable and appropriate exercise of the agency's discretion. *Thomas Gordon v. DEP*, 2007 EHB 268; *Clearview Land Development v. DEP*, 2003 EHB 398; *Stine Farms and Recycling, Inc. v. DEP*, 2001 EHB 796; *Farmer v. DEP*, 2001 EHB 271. In reviewing the reasonableness of civil penalty assessments, the Pennsylvania Environmental Hearing Board "must determine whether there is a reasonable fit between each violation and the amount assessed." *Thebes v. DEP*, 2010 EHB 370, 398. Indeed, when reviewing civil penalty assessments, "we do not start from scratch by selecting what penalty we might independently believe to be appropriate. Rather we review the Department's predetermined amount for reasonableness." *Id*. at 398. There must be a reasonable fit between

the violations and the amounts of the civil penalties. *Eureka Stone Quality, Inc. v. DEP*, 2007 EHB 419, 449. If we determine that the Department's calculations are not a reasonable fit, then the Pennsylvania Environmental Hearing Board may substitute its discretion and direct the Department as to the proper assessment. *The Pines at West Penn, LLC v. DEP*, 2010 EHB 412, 420; *B & W Disposal Inc. v. DEP*, 2003 EHB 456, 468.

October 2013 Violations

The civil penalty assessment in this matter is based on alleged violations that occurred during two separate time intervals. The first series of alleged violations took place in October 2013. Violations alleged by the Department during this time period[2] included (1) owning, operating and/or allowing municipal waste and solid waste to be transferred and/or disposed at the Whiting Property without a permit in violation of 35 P.S. §§ 6018.501, 610(1), 610(2), 610(4) and 25 Pa. Code § 271.101; (2) storage of municipal waste and solid waste in containers that were not watertight or leak-proof in violation of 25 Pa. Code § 285.121(b)(4); (3) storage of municipal waste and solid waste in a container that did not have the words "municipal waste" labeled on the container in violation of 25 Pa. Code § 285.121(b)(5) and (4) storage of municipal waste and solid waste in a container that was not covered in violation of 25 Pa. Code § 285.121(b)(3). Based on the testimony at the hearing, including the photographs that were admitted as part of the exhibits, we find that the Department has demonstrated by a preponderance of evidence that the alleged violations during this time period in fact occurred.

The Department inspected the Whiting Property on five separate days from October 2nd through October 8th and, during each inspection, Mr. Cwiklik observed multiple Whiting

[2] The Department was somewhat inconsistent in how it identified and characterized the violations in this matter between the inspection reports, the NOVs, Mr. Mummert's file memo and the May 2014 Assessment of Civil Penalty. Because the appeal is from the May 2014 Assessment of Civil Penalty, we relied on this document for the identification of the relevant violations.

Containers overflowing with municipal/residual waste. While there was some turnover in the specific Whiting Containers on the site, many of the Whiting Containers full of municipal/residual waste remained on the Whiting Property for multiple days. Bags of solid waste and other loose waste material were observed on the ground and appeared to have fallen out of the Whiting Containers. In addition, Mr. Cwiklik noted that there was waste material mixed with dirt in piles along the edge of the parking area. Several of the Whiting Containers were observed to be leaking liquids on to the ground surface. The pictures presented and the testimony of Mr. Cwiklik provided adequate evidence that the Whiting Containers were not leak-proof, were not properly labelled with municipal waste signs, and lacked proper covers.

Mr. Whiting and Whiting Roll-Off did not call any witnesses to provide direct testimony during the hearing and instead relied on their cross-examination of the Department witnesses and legal arguments raised in their post-hearing brief to challenge the alleged violations. The first defense that they raise is that the Department did not prove that the Whiting Containers lacked proper labelling identifying them as containing municipal waste. We disagree. The Department inspector testified that the Whiting Containers were not properly labelled and the pictures from the October 2013 inspections do not show any of the required labelling. Appellants argue that because the Department did not present pictures from all sides of each container it failed to demonstrate that the labels were not present. They also note that the Department admitted that some of the Whiting Containers were labelled. We do not find the lack of photos of each side of each Whiting Container undercuts the testimony that the Whiting Containers observed during the October 2013 inspection lacked proper labelling. The Department did acknowledge that some of the Whiting Containers were labeled but that testimony addressed the inspections from

December 2013. The Department did not allege that the Appellants violated the labelling requirement in December 2013.

The next defense offered by the Appellants is that the Whiting Containers were watertight and leak-proof and the Department relied on insufficient photographs to argue otherwise. Again we disagree with Appellants. The Department inspector testified credibly that he observed liquid he identified as leachate leaking from several Whiting Containers. Furthermore, pictures showing liquid dripping out of the back of several Whiting Containers were presented as exhibits. This is sufficient to convince us that the Department has demonstrated that the Whiting Containers were not leak-proof and therefore in violation of the regulation.

Appellants next claim that the definition of a transfer station is unconstitutionally vague and therefore void and unenforceable against them. In support of this position, they point to the allegedly conflicting testimony of the two Department witnesses regarding a hypothetical situation posed to each one during cross-examination. The witnesses were asked whether the removal of a full roll-off container from a truck at a service station to allow the changing of a flat tire would result in the service station being considered a transfer station. We do not think that there was any significant conflict in the responses to this hypothetical. Both witnesses responded that it could technically be considered a transfer station. The only disagreement was what to do about it, but clearly how to respond to the violation of operating a transfer station without a permit under those facts would be within the Department's enforcement discretion.

Under the solid waste regulations, a transfer station is defined as "[a] facility which receives and processes or temporarily stores municipal or residual waste at a location other than the generation site, and which facilitates the transportation or transfer of municipal or residual

waste to a processing or disposal facility." 25 Pa. Code § 271.1. We do not think this definition is unconstitutionally vague. As the Board said in *John Stull v. DEP*, "[r]egulations satisfy due process so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objective the regulations are meant to achieve, would have fair notice of what the regulations require." 1999 EHB 728, 748. We find that the definition of transfer station easily meets this standard. The definition is clear and readily understood and provides fair notice of what constitutes a transfer station. There is nothing vague about it and we are confident that Mr. Whiting and Whiting Roll-Off, parties involved in the waste hauling business since at least 2006, are fully capable of understanding the straightforward language used in the definition of a transfer station.

The last argument raised by the Appellants regarding the October 2013 violations is that the Department failed to properly identify the Whiting Property because the Department relied only on the deed and did not provide any maps or otherwise determine the exact boundaries of the property. We agree that the lack of a map and defined boundaries made it more difficult to understand the Department's case, but we do not think the lack of that information provides a meaningful defense to the violations. The violations center on the presence and conditions of the Whiting Containers themselves and not the exact nature or location of the property. There is no dispute that the roll-off containers at issue belonged to Whiting Roll-Off and we find that the Department presented sufficient evidence that the Whiting Containers were located on the Whiting Property.

The one portion of the violation that is dependent on the exact boundaries of the Whiting Property involves the waste material mixed with dirt in piles along the edge of the parking area. We agree with the Appellants that because the Department could not testify with a sufficient

degree of certainty that those piles were located on the Whiting Property and/or that Mr. Whiting and Whiting Roll-Off were responsible for creating the piles, the Department did not prove by a preponderance of the evidence that the presence of these piles constituted the operation of a disposal facility without a permit. However, the presence of leachate leaking from the Whiting Containers on to the ground does satisfy the definition of disposal under the SWMA and is sufficient to support the Department's allegation of operation of a disposal facility without a permit.

December 2013 Violations

The Department conducted inspections of the Whiting Property on December 18, 19 and 23, 2013. As a result of those inspections, the Department identified two violations: (1) owning, operating and/or allowing municipal waste and solid waste to be transferred and/or disposed[3] at the Whiting Property without a permit in violation of 35 P.S. §§ 6018.501, 610(1), 610(2), 610(4) and 25 Pa. Code § 271.101 and (2) failure to properly cover each individual roll-off container storing municipal waste in violation of 25 Pa. Code § 285.121(b)(3). The Department's evidence regarding these violations is adequate for the first two dates, December 18 and 19. There was competent testimony that on both the 18th and 19th at least one Whiting Container full of municipal waste, Container #55, was present on the Whiting Property, and lacked a cover. This evidence is sufficient to support the finding of a violation for the operation of a transfer station without a permit on those dates.

[3] The Department offered no testimony that any disposal of wastes was observed during the December 2013 inspections so it is not clear to us why the language about disposal was included in the May 2014 Assessment of Civil Penalty. We want to be clear that we find that there was no violation related to the disposal of solid wastes in December 2013. However, because any alleged disposal violation did not play a part in the amount of the civil penalty, we find its inclusion in the May 2014 Assessment of Civil Penalty was harmless error.

While we agree with the Department's allegation of violations on the first two inspections in December 2013, we do not think that the Department satisfied its burden to demonstrate by a preponderance of evidence that there were violations on December 23, 2013. The alleged violation for that date involves the same Whiting Container, Container #55, that was the basis for the earlier violations. The evidence presented by the Department was that on December 23rd, Container #55 was in a different position from where it was located during the inspections on the 18th and 19th and that it had been emptied. However, at the time of the inspection, it contained a few bags of municipal trash and some loose material. The Appellants raised the possibility that third parties may have placed this material into the emptied Whiting Container in the three days between inspections and the Department witness acknowledged that it would not make sense for a roll-off container to be transported to a landfill and returned with bags of waste material. Under these specific factual circumstances, we find that the Department has not demonstrated by a preponderance of evidence that the Appellants were operating a transfer station without a permit on December 23, 2013.

The Department appears to concede this point in its post-hearing brief. In several paragraphs of the proposed Findings of Fact in its post-hearing brief, the Department no longer discusses any violations occurring on December 23, 2013. *See* Department's Post Hearing Brief, Paras. 28, 31-34. In light of that concession and the lack of evidence presented at this hearing, we find that there is insufficient evidence for the alleged violations for December 23, 2013, and therefore, any civil penalty associated with that date is not proper. The requested civil penalty shall be reduced accordingly.

Penalties are Lawful under Applicable Law

The second step in our review of a civil penalty assessment is to determine if the penalty is lawful. The SWMA provides that the Department may assess a civil penalty for a violation of

any provision of the act or the regulations of the Department. The maximum civil penalty that may be assessed is $25,000 per violation, and each day on which the violation occurs constitutes a separate and distinct violation. The regulations also allow the Department to seek to recover its costs in pursuing the matter as part of its civil penalty action. The Department's decision to assess a civil penalty in this matter is clearly consistent with these provisions and is, therefore, lawful.

Reasonableness and Appropriateness of the Penalty Amount

The third step of our review of a civil penalty assessment is to determine whether the amount assessed by the Department is reasonable and appropriate. We find that, with the exception of the penalty assessed for the alleged violation on December 23, 2013, the amount of the civil penalty is a reasonable fit for the violations. For the violations in October 2013, the Department assessed $1,000 per day for operating a transfer station and disposal facility without a permit, $500 per day for storing municipal waste in containers that were not watertight or leak-proof and $500 per day for storing municipal waste in containers that were not labeled "municipal waste." The Department considered the degree of willfulness of the violations, which it determined were negligent, along with the duration of the violations. Because each of these violations were noted to have occurred on five different days, the per day civil penalty amounts above were multiplied by five to arrive at a total penalty of $10,000 for the October 2013 violations. We think that the factors considered were appropriate and in fact, the degree of willfulness could easily have been higher in our opinion, which would have resulted in a higher civil penalty amount.

For the violations in December 2013, the Department assessed $2,000 per day for operating a transfer station without a permit. For reasons not explained at the hearing, the Department did not seek a separate civil penalty for the failure to store municipal waste in a

container that was not properly covered. The Department sought a higher daily penalty amount because the activities that resulted in the violations were identical to the violations that had occurred in October 2013 and that had been previously brought to Mr. Whiting's attention by the Department. We think doing so was reasonable and appropriate since the Department's earlier meeting with Mr. Whiting regarding violations at the Whiting Property did not prevent them from reoccurring only a few months later. In arriving at the requested civil penalty amount for the December 2013 violations, the Department multiplied the per day penalty amount by three for the three days that the alleged violations took place to arrive at a civil penalty amount of $6,000. In addition to the civil penalty assessment of $16,000 for the October and December 2013 violations, the Department also requested its costs in the amount of $2,148.00 based on the number of hours spent by and the associated benefits of Mr. Cwiklik, a solid waste specialist, and Mr. Mummert, a solid waste supervisor, while working on the matter. The Department assessed a total civil penalty of $18,148.00.

In addition to arguing that certain of the violations did not occur, the Appellants assert that the amount of the civil penalty is unreasonable. They offer two primary arguments in support of their claim that the amount is too high. First they assert that it is impossible to verify the accuracy of the hours claimed to have been spent working on the case. They next claim that the Department picked an arbitrary number of inspections in October 2013 resulting in the higher penalty amount and did so prior to informing Mr. Whiting or Whiting Roll-Off of the alleged violations. We reject both of these arguments. Regarding the number of hours claimed by the Department, the Department witnesses provided credible testimony regarding the hours expended by the Department, and the number of claimed hours do not seem out of line to the Board. We agree with the Appellants that it would have been helpful if the Department had

introduced some documentation in support of the claimed hours, but the lack of documentation is not fatal to the claim in our opinion.

Regarding the second defense offered by the Appellants, there is no issue that the violations occurred on five separate days in October 2013 and that, under the law, the Department is entitled to seek a penalty for each of those days. We understand the argument as presented at the hearing and in the post-hearing brief questioning why the Department did not contact Mr. Whiting or Whiting Roll-Off after the first day or two of the ongoing violations. After the testimony at the hearing, we had the same question. However, that does not change the fact that the Department is not responsible for what occurred with the Whiting Containers at the Whiting Property. This was not an isolated property, and it is clear from the facts at the hearing that Whiting Containers were brought onto and taken off the Whiting Property during the time when the violations occurred in October 2013. The operator has the responsibility to monitor the property and operations and ensure compliance with the SWMA and the waste regulations regardless of what actions the Department may or may not have taken in response to the inspections. The facts clearly show that there was a failure to comply with those obligations.

In conclusion, we find a civil penalty of $16,148.00 to be reasonable and appropriate given the nature and scope of the violations. This amount represents the Department's assessment of $18,148.00 which we have reduced by $2,000.00 for violations that were alleged but not proven to have occurred on December 23, 2013, as discussed earlier in this adjudication.

Joint and Several Liability for the Civil Penalty

Having determined that a civil penalty in the amount of $16,148.00 is reasonable and appropriate, we turn to the issue of whether the Appellants are jointly and severally liable for this entire amount. The Appellants assert that even if the violations occurred, Mr. Whiting is not

liable for the civil penalties arising from the violations because there is no evidence that he personally participated in the violations identified in the May 2014 Assessment of Civil Penalty.[4] For its part, the Department argues in its post-hearing brief that Mr. Whiting personally participated in the matters that are the subject of the Appeal and that this is evidenced by his behavior, statements to the Department and the purchase and management of the Whiting Property. Furthermore, while it is not entirely clear from the post-hearing brief, it also appears that the Department contends that Mr. Whiting is individually liable for certain violations based exclusively on his ownership of the Whiting Property.

We will first address the issue of whether Mr. Whiting is individually liable for the violations merely as an owner of the Whiting Property. We agree with the Department that it presented sufficient evidence that Mr. Whiting is the owner of the Whiting Property and that the activities that lead to the violations took place on the Whiting Property. The issue is whether mere ownership of the Whiting Property is enough to find Mr. Whiting individually liable for those violations. We find that it is not. The Commonwealth Court has previously discussed, in two cases originating in front of the Board, that ownership of the land where the SWMA violations took place is not a sufficient basis for holding a person liable for the violations. In *DER v. O'Hara Sanitation Company et al*., 562 A.2d 973 (1989 Pa. Cmwlth.), the Court rejected the Department's argument that the property owners, the O'Haras, should be held responsible for

[4] There is some question whether the Appellants adequately preserved the issue of Mr. Whiting's individual liability in their post-hearing brief. The failure to do so, of course, would mean that this issue was waived. In Appellants proposed finding of facts, they list proposed fact No. 13 as "There is no evidence that Mr. Whiting personally participated in the matters that are the subject of this Appeal." The Appellants do not address this issue in any detail in the argument section of their post-hearing brief. They do, however, draw some limited distinction between the activities of Mr. Whiting and Whiting Roll-Off as they relate to the alleged violations. We also note that the Department did not argue waiver in its post-hearing reply brief. Reading the Appellants' post-hearing brief in total, we conclude that while there are some clear shortcomings, Appellants did enough not to waive the issue of the personal liability of Mr. Whiting.

violations of SWMA that occurred on their property where the Department relied only on the fact that the O'Haras owned the land. The Court observed that the Department offered no evidence that the property owners had any knowledge of the operations occurring on their land, that the operations did or may have constituted violations of SWMA or that the landowners had given permission for the operations. *Id*. at 976-77. In *Herzog et. al. v. DER*, 645 A.2d 1381 (1994 Pa. Cmwlth.), the Commonwealth Court reiterated its decision in *O'Hara Sanitation* that mere ownership was not enough to find the property owner liable for the violations. However, the Commonwealth Court found under the facts presented in *Herzog* that the individual property owners were liable stating that:

> By virtue of the described landfilling to construct a parking lot, both Shays were operating on the land and altering its condition. We therefore hold that EHB properly found both Judith and Charles Shay, with knowledge of the operations that they themselves contracted for, were liable for the cited violations of the SWMA.

Id. at 1394. Applying these Commonwealth Court decisions, we find that Mr. Whiting is not individually liable for the alleged violations merely as a result of his ownership of the Whiting Property.

The Department's main argument is that Mr. Whiting is individually liable because he personally participated in the violations. In its post-hearing brief, the Department asserts that "Mr. Whiting personally participated in the violations in two ways." (Department's Post-Hearing Brief, p.19). While the arguments set forth by the Department following this statement are not entirely clear, the principal problem for the Board in accepting those arguments is that the record in this case is largely devoid of any evidence that Mr. Whiting participated in or even had knowledge of the specific violations that occurred in October 2013 and December 2013 prior to

being informed of them by the Department. The Department has the burden to provide this evidence and it has failed to do so in this matter.

The first argument addressing personal participation that the Department makes is that Mr. Whiting knowingly used the Whiting Property as an unpermitted transfer station and disposal facility in operating his roll-off business. In support of this position, the Department states "[t]he Record reflects that Mr. Whiting received multiple Notices of Violation over the years, which directed him to cease using the Whiting Property as an illegal transfer facility." (Department's Post-Hearing Brief, p. 19). We are not sure what record the Department is referring to in this argument. The hearing record, including the admitted exhibits and any uncontested facts set forth by the parties in their pre-hearing memorandums, are the only relevant record for the Board's decision.[5] The two Notices of Violation in the hearing record (DEP Exhibits G and J) only address the violations from the October 2013 and December 2013 inspections. Each of these Notices of Violation state that the Department has determined that "Bryan Whiting Rolloffs" is in violation of the statute and regulations. Neither mention the Department's position that Mr. Whiting participated in the violations or that he personally is responsible for the violations. In fact, they say the exact opposite, asserting the company, Whiting Roll-Off, has committed the violations. Furthermore, the NOVs issued in response to the October and December 2013 inspections are evidence of past issues at the property by the time they are received by the alleged violator. They cannot by themselves serve to demonstrate that Mr. Whiting had knowledge of or participated in the violations.

Although some proposed testimony was excluded, the Department did introduce testimony from Mr. Mummert regarding past inspections and activities at the Whiting Property

[5] To the extent the Department takes the position that it was wrongfully prevented from introducing certain information by the Board, we address that issue in the next section of our adjudication.

in the years prior to 2013. That testimony concerned alleged violations of SWMA in 2006 and 2007 similar to the violations that are under consideration in this appeal. The Department further testified that it met with Mr. Whiting in the 2006/2007 timeframe at the Whiting Property and made Mr. Whiting aware of these earlier violations. The problem for the Board is that we do not see how these past issues involving Mr. Whiting and the Whiting Property several years earlier are evidence that he participated in the 2013 violations.

The Department attempts to bolster its position by making the legal argument that, under the participation theory, liability may be imposed on the basis of intentional neglect and does not require affirmative action. The Department argues that these past activities constitute intentional neglect on the part of Mr. Whiting. The Department cites to *Whitemarsh Disposal Corporation v. DEP*, 2000 EHB 300 in support of this argument. The Board discussed the participation theory extensively in *Whitemarsh* stating that the participation theory "recognizes the fundamental point that an individual with authority to direct the affairs of a corporation can be held liable for a violation if he was personally involved in it." *Id*. at 358. The Board went on in *Whitemarsh* to say:

> A key to the application of the theory seems to be whether the individual knew about the violations but intentionally neglected to do anything about them . . . Thus, knowledge seems to be the linchpin. An allegation that an officer "should have known" will not suffice, but an allegation that the officer "actually knew" of the conduct can be adequate to support individual liability.

Id. at 359-360. The Department's argument here appears to be that Mr. Whiting should have known of the 2013 violations because of the past issues at the Whiting Property. As the quoted discussion in *Whitemarsh* makes clear, that is not enough to find liability under the participation theory. In order to establish Mr. Whiting's liability on the basis of intentional neglect, the Department must show that Mr. Whiting had actual knowledge of the improper activities and/or

that the Whiting Property was being used in an improper manner that resulted in the 2013 violations and neglected to do anything about the violations. None of the evidence presented at the hearing about past issues with Mr. Whiting and the Whiting Property comes close to demonstrating that Mr. Whiting had the actual knowledge of the issues that gave rise to the 2013 violations.

The Department's other argument that Mr. Whiting is individually responsible for the violations is that "as a matter of law, Mr. Whiting controls the day to day activities of Whiting Roll-Off, LLC, as the sole member and President." (Department's Post-Hearing Brief, p. 19). It is not clear to the Board exactly what point the Department is trying to make with this statement. If it is the Department's position that Mr. Whiting is personally liable simply because of his status as the President and sole member of Whiting Roll-Off, that is not a correct statement of the law. As discussed previously, it is longstanding law that pursuant to the participation theory, corporate officers are not liable for environmental violations without proof that they personally participated in the activities that led to the violations. *Whitemarsh*, 2000 EHB at 358; *see also Southwest Equipment Rental, Inc. d/b/a Southwest Motor Freight v. DER*, 1986 EHB 46 (corporate officers not liable for SWMA violations absence a showing that they participated in the conduct that gave rise to the violations at issue, they made any decisions resulting in those violations or they had knowledge of the activities leading to the violations); *Kaites v. DER*, 529 A.2d 1148 (1987 Pa. Cmwlth.) (corporate officer not personally liable for violating environmental statutes absent positive proof of wrongful conduct by the officer); *Novak et. al. v. DER*, 1987 EHB 680 (corporate officers not liable under SWMA and CSL where there was insufficient evidence of misconduct or intentional neglect on their part to impose liability under

the participation theory). We see no reason that this longstanding rule would not apply in this case.[6]

The Department's point may be that Mr. Whiting controlled the day-to-day activities of Whiting Roll-Off and the Whiting Property and therefore, by necessity, must have participated in the activities that led to the violations. As evidence of this fact, the Department again discusses its past dealings with Mr. Whiting, but as we have noted previously, we think that is not helpful in demonstrating participation in the events in 2013. The Department also references a meeting with Mr. Whiting that took place in his office which we understand to not be located at the Whiting Property. The only meeting close in time to the relevant violations took place on October 8, 2013 when Mr. Cwiklik met with Mr. Whiting in Mr. Whiting's office. This meeting took place after the October 2013 violations that are the basis for this portion of the civil penalty. In discussing the meeting in its post-hearing brief, the Department states "[h]e was the individual responsible for the illegal activities and he took responsibility for them." (T. 31-32, 76; DEP Ex. F; Department's Post-Hearing Brief, p. 19). There is nothing in the cited testimony supporting the Department's argument that Mr. Whiting took responsibility for the violations. The only place where there is a statement that Mr. Whiting is taking responsibility for the violations is on

[6] The Board has not addressed the participation theory in the context of a member of a limited liability company (LLC) in its prior cases. While we do not wish to go in to a lengthy discussion on that issue since neither party raised or briefed it, we see no reason that the jurisprudence regarding the participation theory would not apply in Board cases involving an LLC. An LLC is a corporate structure specifically designed to provide liability protection to the individual members. The Limited Liability Company Law of 1994 states that "the members of a limited liability company shall not be liable, solely by reason of being a member, under an order of a court or in any other manner for a debt, obligation or liability of the company of any kind or for the acts of any member, manager, agent or employee of the company." 15. Pa.C.S. §8922(a). Other courts have recognized that the participation theory is applicable in cases involving an LLC. *See Parker Oil Company v. Mico Petro Heating and Oil, LLC and Singh*, 979 A.2d 854 (2009 Pa. Super.); *L.R. McCoy & Co. v. Beiler*, No. 10-1301, 2011 U.S. Dist. LEXIS 27553 (E.D. Pa. Mar. 16, 2011).

DEP Ex. F, the inspection report written by Mr. Cwiklik summarizing the five October 2013 inspections. The Department argues that Mr. Whiting's signature on the inspection report is an acknowledgement of Mr. Cwiklik's statement that Mr. Whiting was responsible for the violations. However, the Department's own inspection form contradicts this position. The form states "[s]ignature by the person interviewed does not necessarily imply concurrence with the finding on this report, but does acknowledge that the person was shown . . . the report or that a copy was left with the person." None of the testimony regarding that meeting constitutes sufficient evidence that Mr. Whiting had knowledge of and/or participated in the October 2013 violations. Furthermore, there was no meeting during or following the December 2013 violations. Both the inspection report and the NOV that address the December 2013 events were mailed to Mr. Whiting and Whiting Roll-Off after the violations were observed by the Department.

In the end, we find that the Department failed to meet its burden to demonstrate by a preponderance of the evidence that Mr. Whiting personally participated in the 2013 activities that led to the violations that are the basis of the civil penalty. It is not enough to say, as the Department does here, that because Mr. Whiting is in charge as the President and sole member of Whiting Roll-Off, he must have participated in these violations. Nor is it enough to say that there were issues in the past at the Whiting Property, therefore Mr. Whiting must have known about or been involved in the current violations. As discussed above, the evidence addressing Mr. Whiting and his involvement with the activities at the Whiting Property in October and December 2013 was extremely limited. The only evidence from that time period directly involving Mr. Whiting concerned the meeting that took place after the October 2013 inspections and the testimony about what took place at that meeting is not sufficient to demonstrate

participation in the violations by Mr. Whiting. The Department presented no evidence that Mr. Whiting was present at the Whiting Property when the violations took place or that he was aware the violations were occurring until after the Department completed its inspections. No witness testified that Mr. Whiting directed the Whiting Containers to be stored on the Whiting Property.[7] Because of the lack of sufficient evidence that Mr. Whiting participated in the activities that caused the violations, we find that he is not personally liable for the civil penalties in this matter.

Evidentiary Ruling

Finally, we want to briefly address the Department's footnote in its post-hearing brief that challenges a series of evidentiary rulings by the Board. The Appellants objected to certain testimony from Mr. Mummert dealing with past inspections conducted by the Department at the Whiting Property. The Board allowed some of Mr. Mummert's testimony regarding this issue to be included, but ruled that some of the testimony should be excluded as irrelevant to the current civil penalty action. The Department now asserts that these rulings were incorrect. Specifically, the Department argues that the excluded testimony was relevant to "Mr. Whiting's direct knowledge and participation in the violations, his knowledge of the Solid Waste Management Act and his level of willfulness in violating the Solid Waste Management Act and the Regulations." (Department's Post-Hearing Brief, p. 22). The Department further argues that "Mr. Whiting's compliance history is also relevant to the appropriateness of the Department's penalty calculation under the factors enumerated in Section 605 and the penalty guidance, and the issue of deterrence." *Id*.

[7] The Department failed to call Mr. Whiting or any employee of Whiting Roll-Off to testify during its case, instead relying exclusively on the testimony of two Department employees. These two witnesses could only offer limited testimony about Mr. Whiting's knowledge and participation in the violations given their extremely limited interaction with Mr. Whiting during the time period when the violations took place.

We will first address the Department's second argument that compliance history was relevant to the Department's penalty calculation. During the hearing, the Department was specifically asked about the past compliance history that Mr. Mummert was attempting to testify to and its role in the Department's civil penalty determination. Following an objection by the Appellants, the Board asked the Department's counsel "Did the past violations play any role in the civil penalty assessment?" The Department's response was "No. I mean --". (T. 96). Further, on direct questioning by his counsel, Mr. Mummert testified that he did not assess any portion of the civil penalty based on a deterrence factor. This case was about the civil penalty assessed by the Department. Given that the Department stated that neither the past violations nor deterrence factors played any role in the penalty calculation, we do not agree with the Department's current stated position that the Board was incorrect in ruling that extensive testimony regarding past alleged violations was not relevant.

We also are not persuaded by the Department's argument that the excluded testimony goes to Mr. Whiting's knowledge and participation in the current violations, his knowledge of the SWMA and his level of willfulness. As discussed previously, we do not see how information about Mr. Whiting's actions several years in the past would tell the Board anything meaningful about whether he participated in the violations that took place in 2013. We do agree that the past history may demonstrate certain knowledge on Mr. Whiting's part and impact the level of willfulness. The problem, of course, for the Department is that when the relevance objection was raised, the issue under discussion was whether Mr. Mummert was familiar with the Whiting Property, and if so, how he became familiar with it. Mr. Mummert was allowed to testify that he was familiar with the Whiting Property based on the earlier inspections and meetings with Mr. Whiting. However, when it came to the alleged violations resulting from the earlier inspections,

the Board said the following: "You know, we are here to hear the basis for the violations today; and as long as you can tie it into that, then I will probably allow it." (T. 69). The Department was never able to make that connection and, as discussed above, the alleged violations from the past were not a factor in the Department's penalty calculations.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and the subject matter of this appeal. 35 P.S. § 6018.605.

2. The Department bears the burden of proof in an appeal of the assessment of a civil penalty. 25 Pa. Code § 1021.122(b)(1).

3. With regard to the civil penalty, the Department must show by a preponderance of the evidence that: (1) the violations that led to the assessment in fact occurred; (2) the imposed penalty is lawful under applicable law; and (3) that the penalty was a reasonable and appropriate exercise of the agency's discretion. *Thomas Gordon v. DEP*, 2007 EHB 268; *Clearview Land Development v. DEP*, 2003 EHB 398; *Stine Farms and Recycling, Inc. v. DEP*, 2001 EHB 796; *Farmer v. DEP*, 2001 EHB 271.

4. In reviewing the reasonableness of civil penalty assessments, the Pennsylvania Environmental Hearing Board "must determine whether there is a reasonable fit between each violation and the amount assessed." *Thebes v. DEP*, 2010 EHB 370, 398.

5. With the exception of the alleged violations of December 23, 2013, the Department demonstrated, by a preponderance of evidence, that the violations that formed the basis of the civil penalty occurred as asserted by the Department.

6. The Department failed to demonstrate by a preponderance of evidence that there were any violations on December 23, 2013. Therefore, we reduce the amount of the civil penalty assessment by $2,000.00

7. With the exception of the $2,000.00 penalty requested for alleged violations on December 23, 2013, the Department's assessment of the civil penalty is lawful, reasonable and appropriate.

8. In order to find Mr. Whiting liable under the participation theory, the Department must demonstrate that he personally participated in the actions that led to the violations.

9. The Department did not demonstrate by a preponderance of evidence that Mr. Whiting was personally liable for the violations and therefore, he is not liable for any part of the civil penalty assessment.

10. Whiting Roll-Off is liable for a civil penalty assessment of $16,148.00.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRYAN WHITING AND WHITING ROLL-OFF, LLC	:	
v.	:	**EHB Docket No. 2014-090-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 5th day of November, 2015, it is hereby ordered that this appeal is sustained in part consistent with the foregoing adjudication. Whiting Roll-Off, LLC is liable for and shall pay a civil penalty in the amount of $16,148.00. Bryan Whiting is not liable for any part of the civil penalty. The appeal is dismissed in all other aspects.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 5, 2015

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

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Hope Campbell, Esquire
(via electronic filing system)

For Appellant:
Paul Lynch, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROGER WETZEL, WILLIAM WOLFGANG, RANDY SHADLE, BRUCE KLOUSER, DARRELL HUNTSINGER, KENNETH W. RICHTER, SANDY MCCULLOUGH, KENNETH GRAHAM and HARRY MAUSSER	:	
v.	:	**EHB Docket No. 2015-071-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and HEGINS TOWNSHIP and HUBLEY TOWNSHIP, Permittees	:	**Issued: November 6, 2015**

OPINION AND ORDER GRANTING
MOTION FOR CONTINUANCE

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants in part Appellants' Motion for Continuance to extend case management deadlines concerning discovery and dispositive motions where the extension provides Appellants with additional time to conduct discovery with its recently obtained expert witness and the extension will not prejudice any other party in the appeal.

O P I N I O N

Before the Board is an appeal of the Department's approval of a Joint Act 537 Sewage Facilities Plan Update for the Townships of Hegins and Hubley, both of which are located in Schuylkill County. Shortly after the appeal was filed, the Board issued its Pre-Hearing Order No. 1, which directed the parties to complete all discovery by November 18, 2015 and file all dispositive motions by December 18, 2015.

On October 15, 2015, Appellants filed a Motion for Continuance to extend the case management deadlines concerning discovery and dispositive motions to January 18, 2016, and

February 18, 2016, respectively. Appellants moved for an extension of time for purposes of discovery to allow their recently retained expert the additional time necessary to handle discovery requests and responses. Permittee filed an answer to Appellants' Motion that details its objection to any extension of discovery deadlines. Permittee asserts that Appellant has failed to conduct discovery over the last five (5) months in accordance with the Board's Pre-Hearing Order No. 1. Therefore, Permittee asserts that Appellants have failed to meet their burden to show than an extension of time is warranted.

A party who seeks to extend the deadline for conducting discovery must ordinarily show us either that it has prosecuted the appeal with due diligence or that there are legitimate reasons why it has failed to proceed with due diligence, especially when other parties oppose the request. *McCobin v. DEP*, 2012 EHB 225. While it is important to the integrity of the Board's process that deadlines are viewed as meaningful, and while parties have a right to rely on the Board's orders and the deadlines they impose, the Board still has broad discretion to decide how discovery will and will not be conducted. *Neville Chemical Co. v. DEP*, 2005 EHB 1, 4. The Board must remain mindful that full disclosure of a party's case underlies the discovery process before the Board. *Pennsylvania Trout v. DEP*, 2003.EHB 652, 657.

The Board has no doubt that the Appellants and their recently obtained expert may require additional time to properly proceed with its appeal. The deadlines set in the Pre-Hearing Order No. 1 are imposed almost immediately after a docket is open for consideration and the Board grants nearly every first request to extend discovery deadlines. *Damascus v. DEP*, 2011 EHB 105. This is Appellants' first request for an extension of discovery deadlines and there is no evidence to suggest that Appellants have failed to act diligently in pursuing their pretrial obligations. The Board, however, remains sensitive to Permittee's preference to move this

appeal towards resolution. In a conference call with the Board, the Permittees detailed legitimate concerns that an extension may have on the timing of the plans approval, financial commitments to implement the plan, and the current malfunctioning on-lot sewage systems. The Board will attempt to strike a proper balance between moving this matter to conclusion while also providing both parties with sufficient time to prepare their cases[1]. The Board will grant the Appellants a thirty (30) day extension as opposed to the requested sixty (60) days. Accordingly, we enter the following order.

[1] The Board also scheduled hearing dates with the parties to further advance final disposition of the appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROGER WETZEL, WILLIAM WOLFGANG, RANDY SHADLE, BRUCE KLOUSER, DARRELL HUNTSINGER, KENNETH W. RICHTER, SANDY MCCULLOUGH, KENNETH GRAHAM and HARRY MAUSSER	:	
v.	:	**EHB Docket No. 2015-071-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and HEGINS TOWNSHIP and HUBLEY TOWNSHIP, Permittees	:	

O R D E R

AND NOW, this 6th day of November, 2015, in consideration of a conference call between the Parties regarding Appellants' Motion for Continuance and Permittees' Answer to the Motion objecting to continuance, it is hereby ordered that Appellants' Motion is granted in part, as set forth below:

1. Discovery in this matter shall be completed by **December 18, 2015.**
2. All dispositive motions shall be filed by **January 18, 2016**.

ENVIRONMENTAL HEARING BOARD

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

DATED: November 6, 2015

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*)

For Appellants:
Kevin M. Walsh, Jr., Esquire
Donald G. Karpowich, Esquire
(*via electronic filing system*)

For Permittees:
Paul J. Datte, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETER K. EDWARDSON	:	
	:	
v.	:	**EHB Docket No. 2014-029-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 7, 2015**
	:	

OPINION AND ORDER ON
MOTION TO DISMISS

By: Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's Motion to Dismiss where the record before the Board demonstrates that the Appellant filed his appeal of a Department Order more than thirty days after the Appellant received the Order.

O P I N I O N

The Appellant, Mr. Peter Edwardson, filed an appeal of the Department's February 11, 2014 Order, which directed Mr. Edwardson to undertake certain restoration measures concerning realignment of a stream channel located on Mr. Edwardson's property in Solebury Township, Pennsylvania. The Order required, among other things, the submission of a permit application and subsequent compliance with a permit for restoration of the stream channel on the site. Mr. Edwardson received the Department's Order on about February 13, 2014, and he filed the appeal of the Department's Order on March 24, 2014. In his notice of appeal, Mr. Edwardson asserts that there is no stream channel on his property, that he had no legal interest in the property prior to his purchase in 2013, and that there is no "encroachment" as defined in 25 Pa. Code § 105.1.

Notwithstanding his appeal, Mr. Edwardson complied with certain portions of the Department's Order. On January 8, 2015, Mr. Edwardson obtained coverage under a NPDES general permit for restoration of the stream channel, and on April 17, 2015, the Bucks County Conservation District approved Mr. Edwardson's Erosion and Sedimentation Control Plan for restoration work related to the stream channel.

The Parties subsequently executed a Consent Order and Agreement on May 22, 2015 ("CO&A") to attempt to resolve the appeal without further litigation. The CO&A set a June 30, 2015 deadline for completion of the stream channel restoration. On September 4, 2015, the Department inspected the site in question and determined that Mr. Edwardson had not completed the work to restore the stream channel in accordance with the terms of the CO&A.

The Appellant's inability to complete the stream restoration work under the CO&A prompted the Parties to return to litigation. The Department then filed a Motion to Dismiss the appeal on two separate grounds. First, the Department argued that the Board does not have jurisdiction to hear this appeal because Mr. Edwardson filed his appeal in an untimely fashion. Second, the Department argues that the appeal is moot because the CO&A resolves all of the issues in this appeal, and there is no further relief that the Board may grant Mr. Edwardson.

Mr. Edwardson filed an Answer to the Department's Motion to Dismiss in which he raised several objections. First, he denied that his appeal was untimely filed because the appeal was "deposited in the USPS [United States Postal Service] mail within 30 days after the receipt of the subject Order." Paragraph 5 of Answer to Motion to Dismiss. He also asserted that the Department waived its right to contest jurisdiction because the appeal "has been active and pending for more than a year." Paragraph 6 of Answer to Motion to Dismiss. In addition, Mr.

Edwardson asserted that the Department misrepresented to the Appellant that no actual work on the site was required and that he only had to secure a permit, which he had secured.

The Department filed a response to Mr. Edwardson's Answer in which the Department asserted that the CO&A is directly contrary to Mr. Edwardson's statements in his answer regarding the permit, which he secured, and the work needed to be done on the site. The Department did not contest Mr. Edwardson's assertion that he had no legal interest in the property in question prior to his purchase of the property in 2013 in a tax sale. The Department, in fact, pursued an enforcement action against the prior owner of the property. According to the Department, prior to the tax sale, Heywood Becker, doing business on behalf of the Center Bridge Trust, owned the site. In 2011 and 2012 the Bucks County Conservation District allegedly observed Mr. Becker placing gravel in the stream bank adjacent to the site as well as his alleged unpermitted rerouting of the stream adjacent to the site. Paragraphs I, J, and K of CO&A. These activities, according to the Department, constitute an encroachment, as defined in 25 Pa. Code § 105.1, and were supposedly conducted without a permit required by 25 Pa. Code § 105.11(a). As a result of these statements of the Bucks County Conservation District, the Department issued Mr. Becker an Order which he appealed to the Board. See *Heywood Becker v. DEP*, Docket No. 2013-038-C. This appeal is also pending before the Board.

The Department believes that Mr. Edwardson's acquisition and ownership of the property in question is sufficient to create liability because "Mr. Edwardson has not obtained a permit for the operation and maintenance of the existing onsite encroachment [on the property he acquired in the tax sale in 2013] in violation of 25 Pa. Code § 105.11(a) and Section 693.6(a) of the Encroachment Act, 32 P.S. § 693.6(a)." Paragraph O of CO&A. Mr. Becker allegedly rerouted

the stream prior to Mr. Edwardson's acquisition of the property, and this activity, according to the Department, constitutes the "existing onsite encroachment."

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. *Boinovych v. DEP*, EHB Docket No. 2015-090-L, slip op. at 1 (Opinion, Aug. 6, 2015); *Brockley v. DEP*, EHB Docket No. 2014-092-L, slip op. at 1 (Opinion, Apr. 3, 2015); *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. Applying this standard to the facts of the appeal, the Board finds that the Department is entitled to judgment as a matter of law for the reasons set forth below.

First, we address the Department's argument that the Board lacks jurisdiction over the present appeal because Mr. Edwardson filed his appeal after the thirty (30) day deadline. The Board's jurisdiction extends only to timely-filed appeals. 25 Pa. Code § 1021.52(a); *Hendryx v. DEP*, 2010 EHB 127, 131; *Rostokosky v. DER*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976). For a person to whom the Department action is directed or issued, an appellant shall file an appeal within thirty (30) days after receiving actual notice of the action. 25 Pa. Code § 1021.52(a)(1). In this appeal, Mr. Edwardson claims he received the Department's February 11, 2014 Order "on about February 13, 2014." While Mr. Edwardson may be unsure of the exact date in which he received the Department's Order, he acknowledged receipt of the Order on or about February 13, 2014, and this acknowledgment is sufficient to conclude that his thirty (30) day window to appeal the Department's Order started on about that day. Mr. Edwardson filed his appeal with the Board on March 24, 2014. Mr. Edwardson's appeal should have been filed on March 17,

2014, and his appeal was untimely filed seven (7) days after the thirty (30) day deadline. In his response to the Department's Motion to Dismiss, Mr. Edwardson asserts that he deposited his Notice of Appeal "in the USPS [United States Postal Service] within 30 days after the receipt of the subject Order." Paragraph 5 of Answer to Motion to Dismiss. Mr. Edwardson's deposit of his appeal in the United States Postal Service is not sufficient to constitute timely filing of his appeal under 25 Pa. Code § 1021.52(a). It is well established that the notice of appeal must be received by the Board within the thirty (30) day appeal period. See, e.g., *Burnside Township v. DEP*, 2002 EHB 700, 702 ("An appeal must be received by the Board within the thirty day-limitation period, and not merely mailed within that time frame."). Mr. Edwardson made a mistake about timely filing of his notice of appeal, and this mistake is fatal to his appeal. Because Mr. Edwardson filed an untimely appeal, the Board has no jurisdiction and is able to grant the Department's Motion to Dismiss.

The Department also argues that this matter is moot because the Parties executed the CO&A that addresses all of the factual and legal issues raised in Mr. Edwardson's appeal. The Department's argument assumes that the CO&A has the effect of superseding the Department's original Order. The Department does not cite a provision of the CO&A that specifically indicates that the original Order had been withdrawn. A review of the CO&A shows that no such provision exists. However, at this time the Board will not assess whether this appeal is in fact moot because sufficient grounds already exist to grant the Department's Motion to Dismiss.[1]

[1] Our inability to assess the Department's mootness argument does not mean the Board will not consider mootness arguments raised in a motion to dismiss. To the contrary, "mootness is a prudential limitation related to justiciability," and, thus generally is an issue properly resolved by a motion to dismiss. *Consol Coal Co., LLC v. DEP*, EHB Docket No. 2014-127-B (Opinion and Order granting Motion to Dismiss, issued February 12, 2015) citing *M & M Stone Co. v. DEP*, 2009 EHB 495, 500.

Mr. Edwardson filed his appeal after the legal deadline, thereby stripping the Board of its jurisdiction to hear this matter.[2] Accordingly, we issue the following Order.

[2] The Board also does not have to address the underlying merits of the Department's order under appeal and whether the Department's legal basis for the order, Mr. Edwardson's mere ownership of the property after Mr. Becker's alleged unlawful activity, is sufficient to support the order issued to Mr. Edwardson.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETER K. EDWARDSON	:	
	:	
v.	:	**EHB Docket No. 2014-029-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 7th day of December, 2015, it is hereby ordered that the Department's Motion to Dismiss is **granted** because the appeal was not timely filed with the Board.

ENVIRONMENTAL HEARING BOARD

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

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 7, 2015

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

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

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20 W. Mechanic Street
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN JOSEPH CONTRACTING	:	
	:	**EHB Docket Nos. 2015-046-R**
v.	:	**(Consolidated with 2015-107-R,**
	:	**2015-114-R, 2015-142-R and**
COMMONWEALTH OF PENNSYLVANIA,	:	**2015-155-R)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	**Issued: December 8, 2015**

OPINION AND ORDER ON
MOTION TO COMPEL

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Board grants in part and denies in part the Department's Motion to Compel.[1] Parties are under a duty to provide full and complete answers to interrogatories setting forth all properly discoverable information. In response to interrogatories, an appellant must make a reasonable effort to identify persons with knowledge of the factual matters giving rise to the appeal and must provide a privilege log itemizing all documents withheld under a claim of privilege. Parties are also required to timely answer discovery seeking information about experts and cannot wait until the filing of their Prehearing Memoranda to set forth this information.

O P I N I O N

Background

Following an investigation of the dumping of waste-like material on property ("Site") owned by John Joseph Contracting ("Joseph"), the Department of Environmental Protection ("Department") issued an order ("Order") to Joseph on March 3, 2015. Among other things, the

[1] On October 16, 2015, at the parties' request, this appeal was consolidated with EHB Docket Nos. 2015-107-R, 2015-114-R, 2015-142-R and 2015-155-R. The Department's Motion to Compel was filed under EHB Docket No. 2015-046-R prior to the consolidation.

Order required Joseph to provide the Department with the identities of the generators of the waste-like material found on the Site, other information regarding the transport and dumping of the waste, and documents relating to the waste. The Order also required Joseph to submit a plan to remove and properly dispose of the waste, to sample and, if necessary, remediate the Site and implement the plan upon approval by the Department. Joseph appealed the Department's Order to the Pennsylvania Environmental Hearing Board ("Board") on April 1, 2015.

On April 14, 2015, the Department served its First Set of Interrogatories and First Request for Production of Documents ("April Discovery"), seeking, among other things, clarification of Joseph's objections as set forth in its Notice of Appeal.[2] On June 3, 2015, Joseph responded to the April Discovery with its Objections and Responses. A discovery dispute arose over incomplete responses and after good faith efforts to resolve the dispute between the parties, Joseph served the Department with Appellant's Amended Objections and Responses ("Amended Objections and Responses") on July 16, 2015. The Department alleged that the Amended Objections and Responses are not properly and completely answered. Joseph countered that it provided to the Department all of the discoverable information in its possession and sufficient answers to all discovery requests. After the failure of further good faith efforts on behalf of the parties to again resolve this discovery dispute, the Department filed this Motion to Compel

[2] The Department characterizes these objections as "broad and vague" and summarizes them as follows: the Department incorrectly applied and interpreted Pennsylvania laws and regulations in an unreasonable, arbitrary and capricious manner; the Department's Order infringes on and circumvents Joseph's constitutional and statutory rights to utilize Department and Environmental Hearing Board processes; the Department's factual findings are incorrect and unauthorized; and the Department incorrectly directed all or a portion of the Order to John A. Joseph individually. (Notice of Appeal, Para. 1-6.).

("Motion") on September 3, 2015.[3] Joseph filed its Opposition to the Department of Environmental Protection's Motion to Compel ("Opposition") on October 7, 2015.

Discovery before the Board is governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. Full disclosure of a party's case underlies the Board's discovery process. *Pa. Trout v. DEP*, 2003 EHB 652, 657. The main purposes of discovery are to allow all sides to accumulate information and evidence, plan trial strategy, and discover the strong points and weaknesses of their respective positions. *DEP v. Neville Chemical Company,* 2004 EHB 744, 746. This Board typically favors and encourages broad discovery. *DEP v. Allegheny Enterprises, Inc.*, 2014 EHB 338, 340; *PA Waste, LLC v. DEP,* 2009 EHB 317, 318; *Raven Crest Homeowners Ass'n v. DEP*, 2005 EHB 803, 806. One of the main purposes underlying discovery is to avoid unfair surprise and trial by ambush. *Kiskadden v.* DEP, 2013 EHB 21, 26 n. 1; *PA Waste, supra,* 2009 EHB at 318 (citing *Pa. Trout v. DEP,* 2003 EHB 652, 657). The Board has wide discretion to determine whether discovery is being conducted appropriately and we may limit discovery where required. *Northhampton Twp. v. DEP,* 2009 EHB 202, 205.

In its Motion, the Department generally seeks more complete information and responses to 39 interrogatories. More specifically, the Department contends that Joseph's Amended Objections and Responses fail to properly and completely answer the Department's legitimate questions regarding the following key issues in the appeal: (1) the specific factual and legal

[3] The Department's Motion complied with our Rules in that it contained certification that the Department attempted to resolve the discovery dispute in good faith and it contained exhibits documenting the discovery requests and responses giving rise to the dispute. 25 Pa. Code § 1021.93(b).

contentions that Joseph is asserting in its appeal; (2) what waste materials were brought onto the Site, when and by whom; (3) what documents exist showing what waste materials were brought onto the Site, when and by whom; (4) the bases of Joseph's experts' opinions to be offered in this case; and (5) the failure to provide a privilege log of withheld documents. See Exhibit D. Joseph objects to providing the information requested on several grounds, including improper use of contention interrogatories, claims of attorney-client/attorney work-product privilege, and confidential business information/protected trade secrets objections.

The Department first addresses Joseph's objections to the Department's use of contention interrogatories in an effort to determine the bases of Joseph's appeal. Joseph asserts that the use of such "contention" interrogatories is disfavored, citing the explanatory note of Pennsylvania Rule of Civil Procedure 4005(a), which reads as follows:

> Interrogatories that generally require the responding party to state the basis of particular claims, defenses or contentions made in pleadings or other documents should be used sparingly and, if used, should be designed to target claims, defenses or contentions that the propounding attorney reasonably suspects may be the proper subjects of early dismissal or resolution or, *alternatively, to identify and to narrow the scope of claims, defenses and contentions made where the scope is unclear*.

Pa.R.Civ.P. 4005(a), explanatory note (emphasis added). The Department acknowledges that contention interrogatories, like other discovery tools, can be abused but argues that in circumstances such as the present case where the Department cannot prepare a defense to Joseph's appeal unless it can determine the specific contentions it asserts, these interrogatories are proper. We agree in part.

As a general rule, the Board has been liberal in allowing discovery that is either directly related to the issues raised in the appeal or is likely to lead to admissible evidence that is related to the contentions raised in the appeal. *Consol Pa. Coal Co. v. DEP*, EHB Docket No. 2014-

110-R, slip op. at 2 (Opinion, Jul. 6, 2015); *Haney v DEP*, 2014 EHB 293, 296-97. In this case where the Department is attempting to narrow the scope of Joseph's contentions where the scope is unclear, the use of contention interrogatories is appropriate.[4] Joseph raises various objections but then does provide what we assume, in most cases, are complete answers such as the identity of witnesses. In our order, we have specifically ruled on the specific interrogatories at issue and we will not discuss each one in the body of this Opinion.

The Department next addresses Joseph's use of the confidential business information objection. Joseph asserts that information pertaining to who brought what waste material onto the Site and when they brought it is protected under Rule 4012(a) as confidential commercial information and that disclosure of such information would have a significant impact on its business.[5] The Department contends that this information is not protected under Pennsylvania law and is instead required to be supplied to the Department under statute and regulation. We agree.

As the Department points out, solid waste management is a highly regulated field. Under the Solid Waste Management Act ("SWMA"), the Department is given the authority to require

[4] In its interrogatory responses, Joseph repeatedly asserts the objection that the material found on the Site is not a solid waste under Pennsylvania law. In its Opposition, Joseph appears to be arguing that this assertion, which it characterizes as a defense, is a sufficient answer to the Department's contention interrogatories. It seems almost as if Joseph expects the Department to take it at its word that the material is not solid waste. The Department acknowledges this objection or defense, but the acknowledgement does not negate the fact that the Department cannot take Joseph's word for it. The identification of the material found on the Site as waste is based in part upon the identity of the generator of the material and the nature of its creation. 35 P.S. § 6018.103; 25 Pa. Code § 287.1. Therefore, all information regarding the origin, transport and disposal of the material is important to the Department's defense of the Order. This information is equally important to the Board who will ultimately make the determination of whether or not the material found on the Site is solid waste.

[5] In its Opposition, Joseph references the Board's authority to grant protective orders and appears to make an argument akin to a request for a protective order. A response to a motion to compel is not the proper vehicle with which to make such a request. As such, the Board declines to address the appropriateness of a protective order at this time.

production of documents and information regarding solid waste. Specifically, the SWMA states that the Department and its agents and employees shall:

> (1) Have access to, and require the production of, books and papers, documents, and physical evidence pertinent to any matter under investigation.
>
> (2) Require any person or municipality engaged in the storage, transportation, processing, treatment, beneficial use or disposal of any solid waste to establish and maintain such records and make such reports and furnish such information as the department may prescribe.

35 P.S. § 6018.608(1)(2). In addition, waste transporters such as Joseph are required to record, maintain and provide to the Department such information as the name and location of all generators of waste, the types or classifications of waste, weight or volume of waste and the name and location of a transfer facility, processing or disposal facility where the waste will be disposed or processed. *See* 25 Pa. Code § 299.219. This type of information is exactly what the Department has requested in discovery in this case. This information is required to be maintained and provided to the Department as part of the Department's regulation of solid waste and therefore, it is not protected from disclosure as confidential business information.

As with the confidential business information objections, Joseph claims that information regarding waste generation, transport and disposal is subject to the attorney-client and attorney work-product privileges. Joseph claims that it is seeking to protect its communications with its counsel relating to the appeal and its counsel's mental impressions. It also claims that the only documents being withheld under this objection are communications between Mr. Joseph and his counsel and that because these are the only documents being withheld from the Department, no privilege log is necessary. The Department contends that Joseph cannot shield basic factual information about waste generation, transport and disposal by simply providing it to his attorneys then claiming it is subject to privilege. The Department also argues that it is not seeking the

attorneys' mental impressions about Joseph's disclosures but is only looking for factual information regarding the material found on the Site, such as who generated it and how Joseph obtained it.

Rule 4003.3 of the Pennsylvania Rules of Civil Procedure states the following:

> Subject to the provisions of Rules 4003.4 [discovery of statements] and 4003.5 [expert discovery], a party may obtain discovery of any matter discoverable under Rule 4003.1 [scope of discovery] even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.

Pa.R.Civ.P. 4003.3. It is clear from the language that Rule 4003.3 makes a distinction between discoverable and undiscoverable information in terms of privilege. To make that distinction clearer, we look at *Friends of Lackawanna v. DEP*, EHB Docket No. 2015-063-L, slip op. at FN 5 (Opinion, Sep. 16, 2015), where the Board quoted the Supreme Court's explanation of the difference between communications between counsel and a client and the facts contained within those communications:

> [The] protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney. *Upjohn Co. v. United States, 101 S. Ct. 667, 685-86 (1981)* (quoting *Phila. v. Westinghouse Electric Corp.*, 205 F.Supp. 830, 831 (E.D. Pa. 1962)).

Clearly, not all information communicated by a client to his or her attorney is privileged, nor is all information prepared in anticipation of litigation. To the extent that Joseph has in its possession information or documents regarding the factual underpinnings of its position and

other factual information that falls within this framework, the information must be provided to the Department and the documents must be produced.

In addition, Joseph must provide to the Department a privilege log of all documents held under a claim of privilege. As we have said previously, a party cannot simply allege attorney-client privilege without attempting to show why the privilege protects otherwise discoverable information. *American Iron Oxide v. DEP*, 2005 EHB 779, 782; *Wheeling-Pittsburgh Steel Corp. v. DEP*, 2005 EHB 788, 791.

As Judge Beckman set forth in *Brawand v. DEP,* 2014 EHB 31, 35, "the Board does not look approvingly upon the provision of discoverable information for the first time in a prehearing memorandum." It is not a proper answer to respond to discovery seeking the identification of witnesses (including expert witnesses) to say that the information will be provided when the party files its prehearing memorandum. Discovery is when the information should be provided so the opposing party may investigate and prepare its case for hearing. Parties should be forewarned that the Board has increasingly excluded witnesses and documents at the hearing that were not timely identified and produced in discovery.

Finally, the Department addresses the issue of Joseph's failure to provide the identities of experts expected to testify and a summary of the grounds for each expert's opinion. Joseph provides the name of a single expert and a one line explanation of what that expert may testify to, which the Department contends does not satisfy the standard set forth in the Pennsylvania Rules of Civil Procedure ("Rules"). In its Opposition, Joseph contends that it is unable to provide the information as it has not yet determined the experts it intends to use to defend this matter. Once Joseph has determined what experts it intends to use at the hearing, it will provide this information and the basis of the experts' opinions to the Department. The Department cites

Pennsylvania Rule of Civil Procedure 4003.5, which does indeed require the identification of each expert the other party expects to call at trial and a summary of the grounds of those experts' opinions. However, the Rules also allow a party who states in his answers to interrogatories that he has not yet retained his experts to supplement his answers when the experts are retained. Indeed, the Rules create a duty on the party to supplement. In this case, Joseph has a duty to supplement its answers and to provide the identities of his experts as well as a summary of the grounds of their opinions once those experts are retained. To facilitate the exchange of this information, the Board will set a schedule for the exchange of expert information.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN JOSEPH CONTRACTING	**:**	
	:	
v.	**:**	**EHB Docket Nos. 2015-046-R**
	:	**(Consolidated with 2015-107-R,**
COMMONWEALTH OF PENNSYLVANIA,	**:**	**2015-114-R, 2015-142-R and**
DEPARTMENT OF ENVIRONMENTAL	**:**	**2015-155-R)**
PROTECTION	**:**	

O R D E R

AND NOW, this 8th day of December, 2015, following review of the Department's Motion to Compel and John Joseph Contracting's (Joseph's) Opposition and all exhibits, it is hereby ordered as follows:

1. The Department's Motion to Compel is ***granted*** as to **Interrogatories 2, 5, 6, 8, 9, 10, 16, 18, 19, 20, 21, 22, 23, 37, 41 and 44.** Joseph shall provide to the Department *full and complete* answers to all interrogatories or before **January 8, 2016.** Additionally, Joseph must provide all of the necessary information required by Pa. R.C.P. 4003.5 in response to **Interrogatories 5 and 6**. If Mr. John Joseph will be the only non-expert witness at trial, the Appellant is not required to supplement **Interrogatory 10**; however, if additional non-expert witnesses will be called at trial, this information must be provided in response to **Interrogatory 10.**
2. The Department's Motion to Compel is ***denied*** as to **Interrogatories 1, 3, 4, 7, 11, 12, 13, 14, 15, 17, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 42, 43 and 45**.

3. With regard to **Interrogatory 3**, Joseph shall be limited at trial to the documents provided in response to Interrogatory 3 unless Joseph supplements its answer on or before **January 8, 2016.**

4. On or before **January 8, 2016**, Joseph shall provide to the Department a *full and complete* privilege log for any document and communication Joseph contends is protected by privilege. The privilege log shall describe the document or communication, its author(s) or speakers, all recipient(s) of the document or communication, date, subject matter, and asserted privilege.

5. On or before **February 29, 2016**, Joseph shall provide the **reports** of all **experts** it intends to call at trial.

ENVIRONMENTAL HEARING BOARD

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

DATED: December 8, 2015

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

For the Commonwealth of PA, DEP:
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For Appellant:
Julie D. Goldstein, Esquire
Philip L. Hinerman, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID VANSCYOC and ANNA P. VANSCYOC	:	
v.	:	**EHB Docket No. 2013-052-R (Consolidated with 2015-053-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMERALD COAL RESOURCES, LP, Permittee	:	**Issued: December 8, 2015**

OPINION AND ORDER ON
NOTICE OF SUGGESTION OF PENDENCY OF
BANKRUPTCY AND AUTOMATIC STAY OF PROCEEDINGS

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

A Department order directing a monetary payment to landowners for alleged damage caused by mining, which was appealed by the landowners, does not fall within the Section 362 exceptions to the automatic stay of bankruptcy. As such, this matter is stayed.

O P I N I O N

On May 2, 2013, the Appellants, David Vanscyoc and Anna P. Vanscyoc, appealed to the Environmental Hearing Board (Board) an order of the Pennsylvania Department of Environmental Protection (Department) directing Emerald Coal Resources, LP (Emerald) to pay the amount of $36,831 to the Appellants as compensation for alleged subsidence damage to structures on property owned by them in Greene County, Pennsylvania. The Department's order found that the damage to the Appellants' property was caused by Emerald's mining. The Appellants contend that the amount ordered by the Department fails to adequately compensate the Appellants for the damage to their property. A second appeal was filed on April 16, 2015

regarding a second order issued by the Department directing Emerald to pay the amount of $4,526.98 as further compensation for alleged damage to the Appellants' property. The appeals are consolidated at EHB Docket No. 2013-052-R.

On August 7, 2015, Emerald filed with the Board a Notice of Suggestion of Pendency of Bankruptcy and Automatic Stay of Proceedings (Notice). The Notice advised the Board that on August 3, 2015, Alpha Natural Resources, Inc., and certain of its subsidiaries, including Emerald, had filed petitions for bankruptcy relief in the United States Bankruptcy Court for the Eastern District of Virginia ("Bankruptcy Court"). The Notice further advised the Board that the Bankruptcy Court had issued an order granting automatic stay protections afforded under Section 362 of the Bankruptcy Code, 11 U.S.C. § 362.

The Department filed its response on August 19, 2015, stating its position that the proceeding before the Board should be stayed in light of the Order of the Bankruptcy Court.

On September 15, 2015, the Appellants filed a response in which they argued that the appeals to the Environmental Hearing Board should proceed because Section 362(b)(4) of the Bankruptcy Code does not operate as a stay as to the commencement or continuation of a proceeding by a governmental agency or unit to enforce the agency's or unit's police or regulatory powers.

The Board has jurisdiction to determine whether proceedings pending before the Board are subject to the automatic stay of bankruptcy. *Department of Environmental Resources v. Ingram*, 658 A.2d 435, 437 (Pa. Cmwlth. 1995); *DEP v. Frisch*, 2008 EHB 105, 106, n. 1. Generally, Section 362 of the Bankruptcy Code operates as a "stay, applicable to all entities, of"

> the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title,

> or to recover a claim against the debtor that arose before the commencement of the case under this title...

11 U.S.C. § 362(a)(a1). "The general policy behind the automatic stay is to grant the debtor complete and immediate, albeit temporary, relief from creditors while preventing the dissipation of the debtor's assets before an orderly distribution can take place." *Frisch, supra* (citing *Penn Terra*, 733 F.2d 267, 271 (3d Cir. 1984)).

There are exceptions to the automatic stay of Section 362, including subsection (b)(4), which states that the stay does not apply to

> the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's . . . police or regulatory power . . .

Id. at § 362(b)(4).

As explained in *Frisch*:

> [T]he automatic stay does not apply to an action or proceeding in which a governmental unit is exercising its police or regulatory powers, unless the government is trying to enforce a money judgment. The police and regulatory powers exception, as it is often referred, protects against the risk of bankruptcy courts becoming a sanctuary for those who violate environmental laws. [*citing U.S. v. Nicolet, Inc.*, 857 F.2d 202, 207 (3d Cir. 1988)].

2008 EHB at 107.

The question of the applicability of the automatic stay protection of Section 362 in proceedings before the Board has been addressed in various contexts. *Frisch, supra*, involved a complaint for civil penalties filed by the Department against a defendant who subsequently filed for bankruptcy. In that case, Judge Labuskes held that the Board's adjudication of a Department complaint for civil penalties did not constitute an action to enforce a monetary judgment and,

therefore, was not stayed under the Bankruptcy Code. In *Ingram, supra*, the Commonwealth Court held that a Department enforcement order directing the bankruptcy petitioner to clean up mine drainage was not subject to the automatic stay of the Bankruptcy Code. In both of those cases, a determination was made that the action fell within the exception of subsection (b)(4) and the stay was not applicable.

In the present case, the Department has ordered the payment of money by Emerald to the Appellants. The Appellants have filed appeals of the Department orders contending they are entitled to additional amounts. The Appellants have not demonstrated how this falls within the exception to the automatic stay of Section 362. The Department is not exercising its police or regulatory powers by issuing a penalty as in *Frisch* or by ordering Emerald to conduct a cleanup or abate pollution as in *Ingram*. Here, what is being sought from Emerald is a monetary payment. Where the duty to repair or clean up a site has been reduced to a monetary obligation, it does not fall under the § 362(b) exceptions to the automatic stay. *Ingram, supra* at 438 (*citing Ohio v. Kovacs*, 469 U.S 274, 105 S. Ct. 705 (1985)). Indeed, the Appellants believe they suffered damages in excess of those ordered by the Department and commenced these appeals before the Environmental Hearing Board seeking additional compensation. We agree that it would be unfair and a violation of due process to allow these third party appeals to proceed absent Emerald's participation in the litigation. Any increased amounts determined by the Board would be paid by Emerald, which has heretofore strongly opposed such claims.

Therefore, this matter is stayed pursuant to the Order of the Bankruptcy Court.

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID VANSCYOC and ANNA P. VANSCYOC	:	
	:	
v.	:	**EHB Docket No. 2013-052-R**
	:	**(Consolidated with 2015-053-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMERALD COAL RESOURCES, LP, Permittee	:	

O R D E R

AND NOW, this 8th day of December, 2015, it is hereby ordered that this matter is stayed pursuant to the Order of the Bankruptcy Court.

ENVIRONMENTAL HEARING BOARD

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

DATED: December 8, 2015

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

For the Commonwealth of PA, DEP:
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For Permittee:
Blair M. Gardner, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JUSTIN SNYDER, STEPHANIE SNYDER, MARIE COHEN, ALEX LOTORTO, GREG LOTORTO, BESS MORAN, MARIE LIU AND ROBIN SCHNEIDER	:	
v.	:	**EHB Docket No. 2015-027-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COLUMBIA GAS TRANSMISSION, LLC, Permittee	:	**Issued: December 21, 2015**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a permittee's motion to dismiss because the permittee has not shown as a matter of undisputed fact that the Department properly approved an air quality plan approval for a natural gas compressor station. The Board's review considers more than whether the Department followed the laws and regulations in taking an action, but also considers whether the action was a reasonable exercise of the Department's discretion and in accordance with the Department's obligations under the Pennsylvania Constitution.

O P I N I O N

On March 2, 2015, a group of appellants—Justin Snyder, Stephanie Snyder, Marie Cohen, Alex Lotorto, Greg Lotorto, Bess Moran, Marie Liu, and Robin Schneider (the "Appellants")—appealed the Department of Environmental Protection's (the "Department's") issuance of Air Quality Plan Approval 52-00001A ("Plan Approval" or "Plan") to Columbia Gas Transmission, LLC ("Columbia") for the Milford compressor station in Milford Township, Pike

County. Upon the filing of the notice of appeal, the Appellants proceeded *pro se*. One of the Appellants filed an amendment to the appeal on March 23, 2015. Thereafter, the Appellants obtained the representation of counsel.

Columbia has now filed a motion to dismiss this appeal. In its motion, Columbia parses out the arguments contained within the original and amended notice of appeal into ten separate objections. Columbia's numbering does not correspond with the arguments as they have been laid out in the notice of appeal. At times Columbia overstates the Appellants' objections and at other times Columbia truncates and oversimplifies the Appellants' objections. Columbia has framed the issues in a way that does not always fairly represent the arguments contained in the notice of appeal. Although the Department and the Appellants have structured their filings to correspond to Columbia's version and numbering of the arguments, we will instead address the challenges to the Appellants' arguments as the arguments have been expressed in the notice of appeal and the amended notice of appeal.[1] Although we discuss each of the objections in more detail throughout the Opinion, we will briefly summarize them here.

The Appellants make a number of objections in support of an overarching contention that the Department's issuance of the Plan Approval was an unreasonable exercise of its discretion, contrary to law, and not in accordance with the Department's obligations under the Pennsylvania Constitution. The Appellants contend that the Plan Approval will allow the Milford compressor station to emit air pollutants in violation of the Air Pollution Control Act because the Plan does not require the implementation of Best Available Technology (BAT). The Appellants argue that the Department did not properly evaluate the potential for temperature inversions and that the

[1] Commonwealth Court has instructed that we read the objections contained in a notice of appeal broadly, *see Croner, Inc. v. Dep't of Envtl. Res.*, 589 A.2d 1183, 1187 (Pa. Cmwlth. 1991), and we do so as a general rule, *see Rhodes v. DEP*, 2009 EHB 325, 327; *Ainjar Trust v. DEP*, 2001 EHB 59, 66, *aff'd*, 806 A.2d 482 (Pa. Cmwlth. 2002). We should hesitate to embrace an opposing party's attempt to unilaterally narrow or redefine the scope of an appellant's objection.

Department should have performed a temperature inversion study based on site-specific monitoring and measurements instead of relying on computer modeling. They contend that the compressor station is ill-suited for its location because residents residing north of the proposed facility do not have a viable exit in the event of an emergency and they also express concern over Columbia and its parent company's compliance histories. They argue that Columbia has not obtained all applicable local permits for the construction of the facility, including local zoning approval. They argue that the public health impacts of the facility have not been adequately considered given the close proximity of the facility to many residents. Finally, the Appellants argue that the issuance of the Plan Approval violates the Appellants' rights under the Pennsylvania Constitution, including Article I, Section I and Article I, Section 27.

Columbia argues in its motion that, in all of these objections, the Appellants have failed to state a claim upon which relief can be granted and their appeal must be dismissed.[2] The Department has filed a memorandum of law pursuant to 25 Pa. Code § 1021.94(b) supporting Columbia's motion to dismiss, although at certain points the Department offers a differing rationale for the dismissal of certain objections. The Appellants, of course, oppose the motion. They argue that none of the issues raised by Columbia and the Department are free from doubt. They also point out that the motion is premature because discovery in this matter is still ongoing. For the reasons set forth below, we deny Columbia's motion to dismiss.

[2] Columbia appears to have imported this concept from a federal 12(b)(6) motion. *See* Fed. R. Civ. P. 12(b)(6). Although we have sparingly dealt with similarly styled motions in the past, *see, e.g., Power Operating Co. v. DER*, 1991 EHB 1015, what these types of motions typically argue is that the Board lacks jurisdiction over an appeal, or that the appeal has been mooted. Here, Columbia seems to seek something akin to a judgment on the pleadings. However, notices of appeal before the Board are not pleadings. 25 Pa. Code § 1021.2 ("Documents filed in appeals, including the notice of appeal, are not pleadings."). We see no reason to deviate from our established standard of review for motions to dismiss discussed *infra*. *See generally*, *Consol Pa. Coal Co. v. DEP*, EHB Docket No. 2014-027-B, slip op. at 7-8 (Opinion, Feb. 12, 2015), *recon. denied*, (Opinion, Mar. 13, 2015), *aff'd*, No. 351 C.D. 2015, ___ A.3d ___ (Pa. Cmwlth. Dec. 15, 2015).

Standard of Review

The Board is receptive to 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. *West Buffalo Twp. v. DEP*, EHB Docket No. 2014-078-L, slip op. at 2 (Opinion, Sep. 28, 2015); *Brockley v. DEP*, EHB Docket No. 2014-092-L, slip op. at 1 (Opinion, Apr. 3, 2015); *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. Motions to dismiss will only be granted when a matter is free from doubt when viewed in the light most favorable to the nonmoving party. *Brockley*, *supra*; *see also Hanover Twp. v. DEP*, 2010 EHB 788, 789-90; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Cooley v. DEP*, 2004 EHB 554, 558. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving a motion to dismiss we accept the nonmoving party's version of events as true. *Consol Pa. Coal Co. v. DEP*, EHB Docket No. 2014-027-B, slip op. at 7 (Opinion, Feb. 12, 2015), *recon. denied*, (Opinion, Mar. 13, 2015), *aff'd*, No. 351 C.D. 2015, ___ A.3d ___ (Pa. Cmwlth. Dec. 15, 2015); *Ehmann v. DEP*, 2008 EHB 386, 390.

Background

At the outset, it is helpful to have some context about the Milford compressor station. The compressor station already exists in some form and has been permitted as a Title V facility at permit number TVOP 52-00001. Columbia is now proposing to demolish the existing compressor station and replace it with another one, which has given rise to the need to obtain the Plan Approval at issue.[3] The proposed work is summarized in the Department's plan approval application review memorandum:

[3] *See* Resp. to Mot., Ex. A at 7, regarding the Milford facility: "Demolition of the existing compressor station and construction of a new compressor station to increase the compression capacity and flow gas bi-directionally. In addition, the interconnect piping between Line 1278 and TGP will be upgraded to accommodate the incremental flow." Appellants' Exhibit A is a portion of a larger document detailing

> Milford Station currently consists primarily of two natural gas-fired engines (Source ID Nos. IC001 and IC002), one emergency generator (Source ID No. GEN01) and a small heater (Source ID No. HTR01). The existing station currently operates under a Title V Operating Permit (TVOP 52-00001).
>
> The company has submitted this Plan Approval application for the replacement of these existing combustion engines (Source ID Nos. IC001 and IC002), with two Solar Centaur 40 simple cycle gas combustion turbines (Source ID Nos. 101 and 102). The existing emergency generator will also be replaced with one 585 HP engine manufactured by Waukesha (Source ID No. GEN02). The turbines and generator will only utilize pipeline quality natural gas as a fuel.
>
> The company will also be installing one (1) 1.25 MMBTU line heater and approximately twelve (12) 0.06 MMBTU space heaters. Also, there will be a new 1,000 gallon wastewater storage tank and a new 2,000 condensate tank. These sources are considered to be minor.

(Mot. to Dismiss, Ex. 4 at 2.)

Similarly, the Plan Approval description reads:

> This Plan Approval is being issued for the installation and operation of two (2) Solar Centaur 40-4700S natural gas fired turbines with SoLoNOx technology, one (1) Waukesha VGF-H24GL natural gas fired emergency generator, one (1) 1.25 MMBtu/hr natural gas fired line heater and twelve (12) 0.060 MMBtu/hr natural gas fired space heaters. Also, there will be one (1) 1,000 gallon wastewater storage tank and one (1) 2,000 gallon condensate tank.
>
> In addition, all existing sources at the station will be removed.

(Mot. to Dismiss, Ex. 2 at 2.) As a result of this project, the Milford facility will change from being a major source for emissions to a minor source. (Mot. to Dismiss, Ex. 4 at 2.) Columbia tells us that the replacement of the equipment is nearly complete.

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broader work being done in the same geographic area by NiSource Gas Transmission and Storage, Columbia's parent company.

Best Available Technology (BAT)

Turning to the Appellants' first contested argument, the Appellants contend that the Milford Plan Approval does not require Columbia to implement Best Available Technology as required by the Air Pollution Control Act, 35 P.S. §§ 4001 – 4015, and the air quality regulations. The Appellants identify three specific measures that they argue should be required by the Plan—utilizing electric compressors instead of natural gas-powered compressors (or turbines as named in the Plan Approval), injecting blowdown gas into interconnected pipelines instead of allowing it to enter the atmosphere, and installing volatile organic compound (VOC) capture systems on tanks and storage vessels. The Appellants contend in their appeal that these measures are recommended best practices by the United States Environmental Protection Agency's Natural Gas Star program and that the implementation of these measures would reduce the air pollution emitted from the compressor station. Columbia and the Department argue that the Plan Approval does require BAT, that the Department had no obligation to impose these specific measures listed by the Appellants, and that BAT cannot be used to alter the design elements of a facility.

There is no dispute that Columbia must employ BAT. Numerous provisions in the Air Pollution Control Act and the regulations impose requirements relating to BAT. Under the Act, the Department "is authorized to require that new sources demonstrate in the plan approval application that the source will reduce or control emissions of air pollutants, including hazardous air pollutants, by using the best available technology." 35 P.S. § 4006.6(c). The regulations require that an application for plan approval[4] must show, among other things, that "the emissions from a new source will be the minimum attainable through the use of the best available

[4] Plan approval is defined as "[t]he written approval from the Department of Environmental [Protection] which authorizes a person to construct, assemble, install or modify any stationary air contamination source or install thereon any air pollution control equipment or device." 35 P.S. § 4003.

technology." 25 Pa. Code § 127.12(a)(5).[5] BAT is then defined in the regulations as "[e]quipment, devices, methods or techniques as determined by the Department which will prevent, reduce or control emissions of air contaminants to the maximum degree possible and which are available or may be made available." 25 Pa. Code § 121.1. Although somewhat differing language is employed across these provisions, the general goal of BAT is to minimize the emission of air contaminants in light of the design and operating features of the control technology. *T.R.A.S.H. Ltd. v. DER*, 1989 EHB 487, 570, *aff'd*, 574 A.2d 721 (Pa. Cmwlth. 1990), *petition for allowance of appeal denied*, 593 A.2d 429 (Pa. 1990).

Accordingly, BAT applies to "sources." The regulations define a source as an air contamination source, which is in turn broadly defined as "[a]ny place, facility or equipment, stationary or mobile, at, from or by reason of which there is emitted into the outdoor atmosphere any air contaminant." 35 P.S. § 4003; 25 Pa. Code § 121.1.[6] "Facility" is somewhat circuitously defined as an "air contamination source or a combination of air contamination sources located on one or more contiguous or adjacent properties and which is owned or operated by the same person under common control." 25 Pa. Code § 121.1.

The parties advance different interpretations of what a source means in terms of applying BAT. In its motion to dismiss, Columbia construes a source as each piece of equipment that is covered by the plan approval—the compressors, the generator, the heaters, and the tanks. Columbia argues that BAT does not apply to the selection of a source itself, but rather to the pollution control equipment that is selected for that source. Therefore, Columbia contends, BAT

[5] *See also* 25 Pa. Code § 127.1, providing in part, "New sources shall control the emission of air pollutants to the maximum extent, consistent with the best available technology as determined by the Department as of the date of issuance of the plan approval for the new source."

[6] Air contaminant is defined as "[s]moke, dust, fume, gas, odor, mist, radioactive substance, vapor, pollen or any combination thereof." 35 P.S. § 4003.

does not require Columbia to change the type of compressors that it is planning to use from natural gas-fueled to electric; the BAT analysis is only appropriate for considering devices that can be installed onto or used in conjunction with the selected compressors. The Department supports this conception of BAT. The Appellants respond that Columbia is defining source too narrowly, and that the proper conception of the source here is the compressor station as a whole, which includes all of the pieces of equipment that Columbia says are individual sources. The Appellants argue that if the source is viewed as the compressor station as a whole, the BAT analysis allows the Department to consider, for instance, whether to require a facility to use compressors that emit lower amounts of pollutants.

Beginning with a plain language reading of the applicable provisions, it appears that the provisions do not exclude either of the parties' interpretations. Under the statutory definition, an air contamination source can be something as small as a piece of equipment, which notably goes undefined in the statute or regulations, or as broad as a facility or even a place. Accordingly, one could read 25 Pa. Code § 127.12(a)(5) to say that an application for a plan approval must show that the emissions from a new *facility* will be the minimum attainable through the use of *equipment* that reduces or controls emissions of air contaminants to the maximum degree possible—how the Appellants approach the issue. Conversely, that same provision could be read to say that a plan approval application must show that the emissions from new *equipment* will be the minimum attainable through the use of *devices, methods, or techniques* that reduce or control emissions of air contaminants to the maximum degree possible—Columbia and the Department's approach. Thus, it appears that the Department, employing its discretion, could lawfully pursue either interpretation, which is largely the Appellants' point—in this case the Department should have evaluated BAT as it relates to the facility as a whole.

The BAT analysis is an expansive, fact-specific inquiry that is undertaken on a case-by-case basis, which allows for a broad exercise of discretion by the Department. BAT in general allows for the consideration of disparate factors such as energy, environmental, and economic impacts.[7] The Department acknowledges both of these points in its memorandum supporting the motion to dismiss. In addition, Columbia directs our attention to the preamble to the 1989 amendments to Pennsylvania's air quality regulations. Portions of those amendments clarified certain aspects of BAT, making the Department's authority more explicit in requiring BAT during the plan approval process and defining the Department's expansive discretion in the BAT analysis:

> The current definition of BAT is amended to clarify the existing language and to explicitly state that the Department determines BAT. The Department determines BAT on a case-by-case basis during the review of a plan approval application. This clarification reinforces the Department's longstanding position that it can consider factors, including energy, environmental and economic impacts in determining what equipment, devices, methods or techniques are available to prevent, reduce or control emissions of air contaminants to the maximum degree possible.

19 Pa.B. 1171 (Mar. 18, 1989); (Mot. to Dismiss, Ex. 1). *See also T.R.A.S.H. Ltd. v. Dep't of Envtl. Res.*, 574 A.2d 721 (Pa. Cmwlth. 1990) (noting with approval the Department's case-by-case determination of BAT). This language supports what we have said in the past, that "BAT is

[7] Indeed, in looking at the Department's plan approval application review memorandum, the Department in fact considered costs and economics in its BAT analysis:

> For the Milford Compressor Station Centaur turbines, the amount of VOC removed by a catalyst would be minimal (likely less than one ton per year). The economic analysis shows that the cost of a catalyst is at least $11,500 per ton of CO removed. Columbia believes this is cost prohibitive. As a result, Columbia proposes good combustion practices in accordance with manufacturer's specifications and procedures as BAT for these units.

(Mot. to Dismiss, Ex. 4 at 6.)

a systemic analysis." *Residents Opposed to Black Bridge Incinerator (ROBBI) v. DER*, 1993 EHB 675, 725.

Accordingly, whether to evaluate BAT as it relates to individual equipment, a facility as a whole, or even as it relates to both would seem to allow for the exercise of reasoned discretion on a case-by-case basis. The individual pieces of equipment in the compressor station are "sources," but so is the station itself. The Department analyzed BAT as it related to the individual pieces of equipment but apparently not in a more holistic fashion as BAT relates to the compressor station as a whole. Whether the Department chose the appropriate approach is a factual question that is inappropriate to resolve in the context of a motion to dismiss. If the Department should have treated the station as a whole as the "source" to which BAT applies, we cannot say as a matter of law that the Appellants' arguments about electric turbines and blowdown have no merit.

Despite the plain language of the legal provisions and the broad discretion afforded by BAT, the Department and Columbia both direct us to federal guidance to convince us of their interpretations. The Department points us to *Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007), which considered EPA's administration of Best Available Control Technology (BACT)[8]—what has been viewed in certain respects as the federal analog of BAT. *ROBBI v. DER, supra*, 1993

[8] Best Available Control Technology is defined as:

> [A]n emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment of innovative fuel combustion techniques.

42 U.S.C. § 7479(3).

EHB at 724. The Department contends that *Sierra Club* supports the argument that BAT cannot be used to change the design elements of a project.

In *Sierra Club,* a permit was issued for a coal-fired power plant that proposed to burn high-sulfur coal that would be transported via conveyor belt from a nearby coal mine approximately a half-mile away from the facility. 499 F.3d at 654. Sierra Club argued that BACT required the power plant to burn low-sulfur coal because the definition of BACT specifies that "clean fuels" are one of the control methods that EPA must consider and, as the term suggests, the burning of low-sulfur coal emits less sulfur dioxide. However, there was no low-sulfur coal near the proposed power plant. Burning low-sulfur coal would have required the power plant to bring in coal located more than a thousand miles away and make changes in the design of a plant. The Court opined that the adjustments in facility design needed to merely change from processing high-sulfur to low-sulfur coal, assuming the coal would otherwise be derived from the same location in the same manner, would still fall under the umbrella of control technology. *Id.* at 656. However, the Court also noted that changing the power plant to one that can no longer accept the nearby high-sulfur coal would require more extensive design changes such as eliminating the conveyor belt and installing a railway track and facilities for unloading coal from rail cars and feeding the coal into the plant. *Id.* at 655. Considering that, the Court held that requiring the power plant to change its design to accommodate long-distance rail car transport of coal as opposed to the conveyor belt transport of nearby coal would be a fundamental design change that goes beyond control technology, and therefore, the EPA acted appropriately in granting the permit. *Id.* at 657.

The Court in *Sierra Club* generally supported the EPA policy that BACT does not permit EPA to require an applicant to change the fundamental scope of its project, and the United States

Supreme Court has also noted that the *Sierra Club* decision supports the proposition that BACT cannot be used to order a fundamental redesign of a facility, *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2448 (2014). But *Sierra Club* does not offer any bright line rules on what types of design changes exceed the scope of BACT. Instead, the Court refers to the situation before it as borderline and defers to EPA's determination in what the Court views as a technically complex area. The "further and crucial question where control technology ends and a redesign of the 'proposed facility' begins" largely goes unanswered.[9] *Id.* at 655. Although the Department cites *Sierra Club*, the Department offers no discussion of what a change in the "fundamental scope" of a project means, or what a "fundamental redesign" means, either in the abstract or how those concepts apply to the situation before us.

Even accepting for the moment the thrust of *Sierra Club*, in the instant case we are not certain whether requiring one type of compressor to be used instead of another type of compressor would constitute a fundamental redesign or a fundamental change in scope for the Milford compressor station. While Columbia notes that the electric compressors utilize an entirely different fuel source, it is unclear at this point whether the use of electric compressors would require any other design changes in the facility, or if they would be unsuitable for use at this particular facility. Similarly, we do not have the information before us about what changes would be required to implement the blowdown measures the Appellants advocate. It is precisely because of these reasons that a full factual record developed at a hearing on the merits is necessary to make such determinations. To be sure, the factual situation presented in *Sierra*

[9] The Court in *Sierra Club* noted that elsewhere in the Clean Air Act, EPA is required to consider alternatives to a proposed facility that are suggested by interested persons, 42 U.S.C. § 7475(a)(2), but the Court did not reach that issue because it was not raised by the petitioners. Similar to *Sierra Club*, the parties here have not discussed whether there is any potentially analogous provision in the Pennsylvania program that applies to the Milford compressor station. *See, e.g.*, 25 Pa. Code § 127.205(5).

Club appears to be somewhat different than the BAT measures that the Appellants advocate should be imposed.

Furthermore, and perhaps more fundamentally, we are not convinced that it is even appropriate to be looking at federal jurisprudence regarding BACT. Pennsylvania has primacy over air quality regulation and its program is in certain respects stricter than the federal program. For instance, in the federal context Prevention of Significant Deterioration (PSD) and BACT only apply to new major sources and major modifications of existing sources, yet Pennsylvania applies BAT to minor sources. Whether Pennsylvania law permits the BAT analysis to look at the design elements of a facility is a separate inquiry from what the federal program allows, and one that is inappropriate to resolve in the context of a motion to dismiss. The definitions of BACT and BAT differ in perhaps small but potentially significant ways, with the definition of BAT also providing for the consideration of equipment and devices. Given these differences, we are not convinced that the wholesale importation of BACT case law is an appropriate aid to assessing BAT. Indeed, although the issue has not been discussed extensively in Board cases, at least once in the past we have assessed BAT in ways that would have had ramifications on the proposed design of a facility. *See ROBBI*, *supra*, 1993 EHB at 721-726 (plan approval authorizing construction of municipal waste incinerator where Board evaluated BAT in terms of proposed types of furnaces and whether Department should have required thermal de-NOx controls, both of which would have required design changes to facility). In *ROBBI* we ultimately held that the Department's BAT analysis was proper, but we never held that the Department could not have considered the emissions control measures advocated by the appellants.

There are also significant differences in the Pennsylvania definition of source and the federal definition. The Clean Air Act defines stationary source as "any building, structure,

facility, or installation which emits or may emit any air pollutant." 42 U.S.C. 7411(a)(2). While the analogous Pennsylvania definition is similar, 35 P.S. § 4003, it contains additional terms, notably, "equipment," which again seems to allow the Department to engage in a broader inquiry.

In *Alabama Power v. Costle*, 636 F.3d 323 (D.C. Cir. 1979), the Court explicitly struck down an EPA regulation that included "equipment" in the definition of a source with respect to EPA's PSD program. The EPA regulation had defined source as "any structure, building, facility equipment, installation or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)." 636 F.3d 323, 394. The Court found no support in the Act for EPA adding the terms "equipment," "operation," or "combination thereof" to the definition of stationary source.[10] The Court held that the term "source" was to be read as having a consistent definition throughout the Act. *Id.* at 396. The Court also found that "EPA has discretion to define the terms reasonably to carry out the intent of the Act, but not to go clear beyond the scope of the Act, as it has done here." *Id.* The Court noted that Congress had clearly envisioned that entire plants could be considered single sources under the PSD program, but regulating individual pieces of equipment under PSD apparently went beyond what Congress intended, and the Clean Air Act did not confer such wide discretion to EPA.

Alabama Power is informative in that Pennsylvania has not removed "equipment" from its definition of source, despite the fact that the Air Pollution Control Act was significantly amended in 1992 (P.L. 460, No. 95 (Jul. 9, 1992)) and amended again in 1996 (P.L. 1150, No. 174 (Dec. 18, 1996)). Where EPA lacked statutory authority under the Clean Air Act to view

[10] The Clean Air Act definition of stationary source has not changed since the time of the *Alabama Power* decision.

equipment as a source, the Department appears to have that authority here under the Air Pollution Control Act. This supports the idea that, because the Department must evaluate BAT as it applies to sources, the Department has the discretion to determine whether BAT applies to a piece of equipment or as a facility as a whole, a discretion that is considerably broader than EPA's discretion to determine BACT. This is entirely consistent with the concept of state primacy of environmental programs and the ability of states to administer programs that are more stringent than federal baselines. *See* 42 U.S.C. § 7416. *See also* 25 Pa. Code § 127.83 ("The adoption of [the PSD, i.e. BACT] requirements *supplements* the requirements of this chapter and *does not supersede or rescind requirements of the act or this article*.") (Emphasis added).

Along the same lines of the Department, Columbia cites to a draft EPA New Source Review workshop manual from 1990 on BACT to support its argument that the BAT analysis should not be used to impose design changes on a facility. Columbia quotes that document as saying that "EPA has *not* considered the BACT requirement as a *means to redefine the design of the* source when considering available control alternatives." (Manual at B. 13 (emphasis supplied by Columbia).)[11] However, Columbia appears to ignore the context from which that statement was cherry-picked. The full passage is worth quoting:

> Historically, EPA has not considered the BACT requirement as a means to redefine the design of the source when considering available control alternatives. For example, applicants proposing to construct a coal-fired electric generator, have not been required by EPA as part of a BACT analysis to consider building a natural gas-fired electric turbine although the turbine may be inherently less polluting per unit product (in this case electricity). **However, this is an aspect of the PSD permitting process in which states have the discretion to engage in a broader analysis if they so desire.** Thus, a gas turbine normally would not be included in the list of control alternatives for a coal-fired boiler. However, **there may be instances where, in the permit authority's judgment, the consideration of alternative production processes is warranted**

[11] Available at: http://www.epa.gov/sites/production/files/2015-07/documents/1990wman.pdf.

> **and appropriate for consideration in the BACT analysis.** A production process is defined in terms of its physical and chemical unit operations used to produce the desired product from a specified set of raw materials. In such cases, the permit agency may require the applicant to include the inherently lower-polluting process in the list of BACT candidates.

(Manual at B. 13 (emphasis added).) To the extent that it is even appropriate to consider EPA's draft workshop manual, it supports the notion articulated above that state permitting authorities have wider discretion than the EPA and may engage in a broader analysis of technology-based emissions requirements.

Columbia, however, argues that the Department has adopted the EPA's BACT approach with respect to how it evaluates BAT. Columbia cites to a document containing the Department's responses to comments for an entirely different compressor station, the Buffalo Compressor station, located in a different county. (Mot. to Dismiss, Ex. 8.) In that document, in response to a comment that the Buffalo Compressor station should employ electric compressors, the Department responded:

> BAT is determined within the category for the source or process proposed by the applicant. In this case the applicant has proposed two natural gas-fired turbines and the source category is considered to be small simple cycle natural gas-fired turbine. Examples of source categories can be found in EPA's RACT/BACT/LAER Clearinghouse website….
>
> The Department is aware of natural gas transmission, processing, and producing facilities that have elected to install electric compression; however, the Department does not have authority granted under the Air Pollution Control Act to eliminate the air contamination source under the BAT provisions.

(*Id.* at 5 (footnote omitted).) If this is in fact the Department's institutional interpretation, that is something we need to hear at a hearing on the merits, and not merely from a comment response document for a different facility or through the argument of counsel. *See Sludge Free UMBT v. DEP*, EHB Docket No. 2014-015-L, slip op. at 14 (Opinion, Jul. 1, 2015). As discussed above,

we question whether the Department's statement is accurate that it does not have the authority under the Air Pollution Control Act to require a facility to use electric compressors.

Columbia also argues that the Department had no legal duty to consider electric compressors. At the risk of belaboring the point, the issue is not whether the Department had a legal duty to require the use of electric compressors, it is whether the Department could have considered electric compressors, and whether not doing so here was a reasonable exercise of its considerable discretion under the BAT analysis. While it is true that there are no legal provisions mandating the selection of a certain BAT measure, *T.R.A.S.H. Ltd. v. DER*, 1989 EHB 487, 570, the constellation of factors that need to be considered requires an analysis that is tailored to the specific facility under review. This may mean that the Department determines that a certain BAT measure or piece of equipment must be implemented for a particular source or facility. At this point, based on the limited briefing from the parties, there appears to be nothing in the statute or the regulations that prevents the Department from applying BAT to a whole facility and mandating that different components be installed at the facility. If the Appellants are correct and the appropriate way to evaluate this project is to consider the facility as a whole, then arguments about ways facility-wide emissions should have been reduced may be viable, including that Columbia should utilize electric compressors and that Columbia should inject blowdown gas into interconnected pipelines.

Finally, the Appellants curiously say in their response to the motion to dismiss that they do not intend to pursue their objection that the Department erred by failing to require the installation of VOC capture systems on two tanks to be installed at the facility because "the tanks are exempt from the plan approval." Although this may not be entirely consistent with the

Appellants' other argument as discussed above that the compressor station itself is the air contamination source, we need not address the tank issue further in this context.

Temperature Inversions

The Appellants included the following objection in their notice of appeal:

> **A temperature inversion study based on monitoring and measurements, not simply based on AERMOD models, has not been completed**. I appeal the Department's decision to approve this facility based on comments regarding the high likelihood of temperature inversion that, in turn, would subject residents to ground-level ozone caused by NOx, VOCs, and carbon monoxide. The Department has failed to show residents and commenters that temperature inversions *will not* create conditions where the National Ambient Air Quality Standards will be exceeded for extended periods of time. AERMOD modeling considered by the Department did not consider the probability of ground-level ozone that occurs during temperature inversion when cooler air at ground-level is trapped by a layer of warmer air, especially during a cold front. In the Delaware Valley region of Pennsylvania, air often remains stagnant, which prevents air emissions from dissipating.

(Emphasis in original.)

Columbia has characterized this objection as an allegation that the Department should have required a temperature inversion study before approving the plan approval. Although the objection seems broader than that to us, the Appellants appear to go along with Columbia's characterization of their objection in their response to the motion to dismiss. The Department, for its part, says that the objection should be dismissed because a temperature inversion study is not a mandatory requirement.

There is no dispute that a temperature inversion study is not mandated by the regulations in this case. However, the Appellants are arguing that the Department could have and should have required such a study in the exercise of its discretion. There does not appear to be any dispute that the Department could have required a study. The only dispute, then, is whether the

Department reasonably exercised its discretion in deciding not to require such a study. Evaluating such a discretionary decision is not the appropriate subject of a dispositive motion. *See Tri-County Landfill v. DEP*, EHB Docket No. 2013.185-L, slip op. at 10 (Opinion, May 22, 2015) ("[O]nce we enter the world of reviewing the Department's discretion, we tend to exit the world where summary judgment is appropriate."); *Cnty. of Schuylkill v. DER*, 1989 EHB 918, 924.

Columbia adds that the Appellants are barred from pursuing their objection regarding a temperature inversion study because they failed to raise the objection during the public comment period, citing *GSP Management Co. v. DEP*, 2011 EHB 203, and *Wheatland Tube v. DEP*, 2004 EHB 131. *GSP* and *Wheatland* address the applicability of the doctrine of administrative finality in appeals brought by permittees from the renewal of their own NPDES permits. They provide no support for Columbia's argument. Columbia has not referred us to any other ruling of this Board holding that third-party appellants' arguments and objections in their appeals before this Board are constrained in any way by the comments they submitted or did not submit to the Department during the Department's public comment period. Nor has Columbia referred us to any statutory or regulatory support for its position. Accordingly, the Appellants are not precluded from pursuing their objection regarding the temperature inversion study even if they did not include the point in their comments to the Department during the public comment period.

Catastrophic Incidents

The Appellants set forth the following objection in their notice of appeal:

> Residents residing north of the proposed location on Fire Tower Rd do not have an emergency exit should an evacuation be ordered due to a catastrophic incident. Fire Tower Rd terminates in State Game Lands 209 at a forest gate. There are three interconnected interstate gas transmission pipelines at the compressor location, the Columbia Pipeline Line 1278, the Tennessee Pipeline 300 Line,

> which was built in the 1950s, and the corresponding Tennessee Pipeline Loop 323.

The Appellants go on to allege that Columbia, and its parent company NiSource, have a history of accidents at their compressor sites, which makes the location of this station all the more concerning. Columbia characterizes this objection as a complaint that the Department erred by failing to require Columbia to submit a plan to address evacuation during air pollution emergencies, which the Department has the authority to do pursuant to 25 Pa. Code § 127.12(a)(9). However, we think the objection might be intended to express a more general criticism regarding the location of the facility; i.e., because residents will be trapped if there is a "catastrophic incident," this is not an appropriate place for a compressor station.

It is difficult for us to attempt to address Columbia's argument in the context of a motion to dismiss regarding the Appellants' notice of appeal when we are not exactly sure what the Appellants are alleging. To the extent Columbia's characterization of the Appellants' objection is correct and the Appellants have in fact limited their scope of this objection to assigning error to the Department's failure to require an emergency evacuation plan, there does not appear to be any dispute that the Department has the discretion to require such a plan under 25 Pa. Code § 127.12(a)(9). Whether the Appellants are correct in asserting that the Department acted unreasonably in its exercise of that discretion is not the appropriate subject of a motion to dismiss.

Local Land Use Requirements

Columbia next asks us to dismiss what it characterizes as the Appellants' objection that Columbia has not obtained the necessary local zoning approvals. Actually, this is a somewhat inaccurate oversimplification of the objections regarding local land use in Appellants' original and amended notices of appeal, which are quite lengthy. In our view, the essence of the

Appellants' objection regarding local land use requirements appears to be that the Department erred by giving no consideration to local land use requirements in the course of its review. Among other things the Appellants cite Article I, Section 27 of the Pennsylvania Constitution in support of the proposition that the Department had an obligation to at least consider local land use in the course of its review.

There appears to be record support for the Appellants' contention that the Department in fact ignored local land use requirements. (Resp. to Mot., Ex. H.) If that turns out to be the case, and for current purposes we assume it to be true, the question presented is whether disregarding local land use requirements was consistent with the Department's duties and responsibilities under the law.

We recently discussed the Department's duty to consider local land use in the course of its permitting decisions in *Tri-County Landfill, Inc. v. DEP*, EHB Docket No. 2013-185-L (Opinion, May 22, 2015), which, although it involved another program area, is nevertheless applicable and worth quoting here:

> The Department and Tri-County's position that the Department can permit a project that it knows violates local land use requirements seems counterintuitive. As we recently held in *Brockway Borough Municipal Authority v. DEP,* EHB Docket No. 2013-080-L (Adjudication, Apr. 24, 2015), the first step in evaluating whether the Department's action passes muster under Article I, Section 27 is: "Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?" *Brockway*, slip op. at 29 (quoting *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976)). *See also Pa. Envtl. Def. Found. v. Cmwlth.*, 108 A.3d. 140 (Pa. Cmwlth. 2015).[1] The Department and Tri-County assume without much discussion that the phrase "all applicable statutes and regulations" is limited to state statutes and regulations. The problem with that position is that the *Payne v. Kassab* test refers to *all* applicable statutes and regulations, not just state statutes and regulations. The question, then, is whether local zoning laws should be considered "applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources." We think that they should.
>
> "[Z]oning in Pennsylvania is implemented through the Municipalities Planning Code (MPC), which provides that each municipality has the authority to enact, amend, and repeal zoning ordinances." *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 1002 (Baer,

J., concurring) (quoting *Hoffman Mining Co. v. ZHB of Adams Twp*., 32 A.3d 587, 603 (Pa. 2011)). *See* 53 P.S. § 10601. The MPC expressly states that one of the purposes of local planning and land use regulation is to promote the preservation of this Commonwealth's natural and historic resources and prime agricultural land. 53 P.S. § 10105. Similarly, one of the authorized purposes of zoning ordinances is "[t]o promote, protect and facilitate…preservation of the natural, scenic and historic values in the environment." *Id*.

Local land use regulations are not entirely preempted by state laws regarding the development and protection of the Commonwealth's natural resources. *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 964 A.2d 855, 865 (Pa. 2009); *New Hanover Twp. v. DEP*, 2011 EHB 645. Rather, zoning focuses on controlling the use of land in a manner that is consistent with local demographic and environmental concerns. *Robinson Twp.*, 83 A.3d 932 (Pa. 2015) (plurality); *Huntley, supra*. Although it is admittedly an oversimplification, state laws tend to prescribe *how* a landfill may be developed and operated while local laws tend to prescribe *where* a landfill may be developed. There is a complimentary role for both state and local regulation, and both levels of regulation play a part in the protection of the Commonwealth's resources. The Solid Waste Management Act frequently mentions cooperation between state and local authorities working together toward comprehensive waste management. *See, e.g*., 35 P.S. §§ 6018.102 (purpose of act includes establishing and maintaining cooperative state and local waste program), 6018.104 (Department duty to cooperate with local units of government), and 6018.504 (host municipality review of permit applications). Of course, much of Act 101 is about empowering municipal involvement in the oversight of waste management. *See, e.g*., 53 P.S. § 4000.304 (powers and duties of municipalities). Both the plurality opinion as well as the concurring opinion of Justice Baer in *Robinson Township, supra*, recognize the important and distinct role of local land use controls in protecting the environment, and the dissenting opinions of Justices Saylor and Eakin are not inconsistent with the conclusion that local land use regulations are relevant to the protection of the environment.[2]

In the joint reply brief, the Department and the Intervenors acknowledge "that DEP should not ignore the role of local government in protecting rights secured by the Pennsylvania Constitution. *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2015)." Clearly, local zoning is "relevant to the protection of the Commonwealth's public natural resources."

While arguing generally that the Department need only measure compliance with state laws, the Department and Tri-County specifically argue that Article I, Section 27 as interpreted in *Payne v. Kassab* does not impose any obligation on the Department greater than that set forth in two statutory provisions that are commonly referred to as Act 67 and 68, 53 P.S. §§ 10619.2 and 11105. Those statutes provide that the Department *must* consider local land use decisions and plans and *may* rely on those local decisions and plans when making permitting decisions. *See New Hanover Twp.*, 2011 EHB 645, 680. Although neither the Department nor Tri-County develop their argument in any detail, they seem to be saying that, because Acts 67 and 68 only say that the Department *may* rely on local decisions, the Department is free to ignore those local decisions if the Department feels like it.

We do not read Acts 67 and 68 that way. Acts 67 and 68 were designed to give Commonwealth agencies such as the Department the express authority to consider or rely on local requirements, an authority that previously was in doubt. *Id*. They were designed to allow state agencies to give greater respect to local decisions, not to disregard those decisions in the guise of "considering" them. In any event, whether or not the Department can ignore local requirements and still technically be in compliance with Acts 67 and 68, we do not read those statutes as being intended to constrain or circumscribe the Department's independent obligation under Article I, Section 27 as interpreted in *Payne v. Kassab* to ensure that there has been compliance with all applicable statutes and regulations relevant to the protection of the environment.

The parties disagree whether the Department had the authority under Acts 67 and 68 to consider local zoning in its review of Tri-County's application due to questions regarding the relative timing of the municipalities' enactment of zoning, passage of the statutes, and the Department's review process. We need not resolve that disagreement because the Department clearly had the authority and indeed the obligation to honor zoning requirements under Article I, Section 27.

Having concluded that local zoning falls within the scope of the first step of the *Payne v. Kassab* test, we need to decide what level of effort is necessary on the part of the Department to ensure that there has been "compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources." Actually, we find that level of effort to be rather limited due, in large part, to the need on the part of the agency to defer to local authorities when it comes to local matters such as zoning. We have frequently held that neither the Department nor this Board has the duty or even the authority to act as a statewide zoning hearing board. To the contrary, local zoning issues must be decided at the local level. *Casey v. DEP*, 2014 EHB 439; *Lyons v. DEP*, 2011 EHB 169; *Cnty. of Berks v. DEP*, 2005 EHB 233. The Department has no role in actually enforcing local land use and zoning requirements. *New Hanover Twp*., 2011 EHB at 680. Indeed, the Department is not required to conduct an independent investigation whether a project complies with local zoning requirements before permitting the project. *Heasley v. DER*, 1991 EHB 1758. It is only where a potential conflict between the project and local laws is brought to its attention in the course of its permit review that the Department must take the local issue into account. The Department is not required to decide the local zoning issue; it is only required to decide what to do about the permit application in light of the zoning issue. In this respect, the Department's role is analogous to its role when a legitimate dispute regarding a permittee's legal right to enter land is identified; the Department must account for the dispute, not decide it. *Empire Coal Mining & Dev. v. DER*, 678 A.2d 1218, 1222-23 (Pa. Cmwlth. 1996); *Rausch Creek Land, LP v. DEP*, 2013 EHB 587, 599-606, 613; *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, 229.

Once a potential conflict between the project and local zoning is identified, the Department must decide what to do about it. The Department has a number of options, and this is where we part company with the Intervenors in this case, who suggest that the only reasonable course once the conflict is identified is to deny the permit. It may be appropriate in some cases to deny the permit, but it might be appropriate in other cases to suspend review of the permit, as was previously done with respect to this project. *See Tri-*

> *County Landfill v. DEP*, 2010 EHB 747.…It may be appropriate under other circumstances to issue the permit with conditions. *See New Hanover, supra*; *Lyons, supra*. Choosing among these options may depend on any number of factors, one of which might involve the degree of the perceived conflict between the project and local requirements.
>
> [1] The other two questions are: Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum; and, does the environmental harm that will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion? *Payne*, 312 A.2d 86, 94.
>
> [2] Rather, Justices Saylor and Eakin would have held that the Legislature has the power, not constrained by any constitutional provision, to supersede some of the duties and responsibilities municipalities would historically exercise in relation to protection of the environment. *See Robinson Township*, 83 A.3d at 1010 (Saylor, J., dissenting).

Id., slip op at 4-8.

According to the Appellants' notices of appeal in this case, which again we accept as accurate for purpose of Columbia's motion, the Department was made aware of a potential issue regarding local land use requirements in the course of its review of the Plan Approval. As discussed in *Tri-County*, the Department has considerable discretion regarding what to do if there appear to be legitimate local land use concerns, but it does not have the discretion to simply ignore such legitimate concerns once they are brought to its attention. Since we assume that is what occurred here, we are obviously not in a position to grant Columbia's motion to dismiss this objection.

Article I, Section 27

Columbia argues that the Appellants' objections must be dismissed to the extent that they allege that the Department failed in its duty to ensure compliance with Article I, Section 27 of the Pennsylvania Constitution. It argues that the Department's compliance with all statutory and regulatory requirements *automatically* constitutes compliance with Article I, Section 27. We rejected this way of thinking in *Sludge Free UMBT v. DEP*, EHB Docket No. 2014-015-L (Opinion, Jul. 1, 2015), where we discussed the issue as follows:

Synagro (but not the Department) has asked us to enter summary judgment against the Appellants on their claim, as manifested in several of the objections in their amended notice of appeal, that the Department's action was inconsistent with Article I, Section 27 of the Pennsylvania Constitution. Article I, Section 27 reads as follows:

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

PA. CONST. art. I, § 27.

Synagro and the Appellants construct very different analytical approaches to how we should evaluate compliance with Article I, Section 27, both of which are wrong. For their part, the Appellants cite several reasons why we should disregard the test announced in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976), in analyzing whether the Department's action is consistent with Article I, Section 27 of the Pennsylvania Constitution. However, as we said in *Brockway Borough Municipal Authority*, *supra*, and *Tri-County Landfill v. DEP*, EHB Docket No. 2013-185-L, slip op. at 4 (Opinion, May 22, 2015), the Commonwealth Court in *Pennsylvania Environmental Defense Foundation v. Commonwealth* unequivocally held that the *Payne* test is still good law until "a majority opinion from the Supreme Court or a decision of [Commonwealth] Court overruling *Payne*" comes along. *Pa. Envtl. Def. Found. v. Cmwlth.*, 108 A.3d 140, 159 (Pa. Cmwlth. 2015) ("*PEDF*").

Synagro for its part argues that Article I, Section 27 is satisfied so long as the Department's action complies with the statutes and regulations that were adopted pursuant to that constitutional provision. However, *all* environmental statutes and regulations since 1971, as far as we know, were at least in part adopted pursuant to Article I, Section 27 and were designed to implement that constitutional provision, so Synagro's argument can be shortened to a contention that compliance with the environmental statutes and regulations without more necessarily constitutes compliance with Article I, Section 27. This is incorrect. Synagro only refers us to one of the three questions that we must evaluate under the *Payne* test in analyzing whether the Department's action comports with Article I, Section 27. Those three questions are:

> (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
>
> (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
>
> (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Payne, 312 A.2d 86, 94. *See PEDF*, 108 A.3d 140, 158 (reaffirming the *Payne v. Kassab* test); *Brockway Borough Mun. Auth.*, slip op. at 29. Synagro would have us answer only the first question, but we cannot assume that the last two parts of the *Payne* test as reaffirmed in *PEDF* are mere surplusage. In order to pass constitutional muster the Department's action must not only comply with all applicable statutes and regulations, it must also evince a reasonable effort to reduce to a minimum the environmental incursion of the project under review, and the environmental harm that will result from that action must not clearly outweigh the benefits to be derived therefrom. *PEDF*; *Payne*; *Brockway*. If the Court in *Payne* believed that regulatory compliance could substitute for a three-pronged inquiry, it would not have created a three-pronged inquiry that very clearly goes beyond an examination of regulatory compliance. Strict compliance with all regulatory requirements is not *necessarily* coextensive with a reasonable effort to reduce the environmental incursion to a minimum, and notwithstanding compliance with all regulatory requirements and the application of a reasonable effort to reduce the environmental incursion to a minimum, the environmental harms remaining might nevertheless clearly outweigh the benefits of the project.

It is true that Synagro's position is consistent with our holding in *City of Scranton v. DEP*, 1997 EHB 985, where we held that the Department is not required to minimize the environmental harm of a project or balance harm against putative benefits if the Department acts pursuant to a statute that implements Article I, Section 27. 1997 EHB at 1020-21. We do not think this holding, which was not disputed by either party in that case, is consistent with *PEDF*, which clearly stated that *Payne* requires us to ask and answer three questions, not one. If compliance with regulatory requirements were enough by itself, we would not have been instructed to answer the second two questions. The Court in *PEDF* repeatedly referred to its "multifactorial test," and it cited with evident approval the parts of the plurality opinion of the Supreme Court in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), that discussed the need to avoid unreasonable degradation of the environment and balance environmental protection with the benefits of development. 108 A.3d at 156-59. A holding that compliance with Article I, Section 27 requires nothing more than compliance with applicable regulations is also not entirely consistent with the Commonwealth Court's holding in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 892 (Pa. Cmwlth. 1972), *aff'd*, 311 A.2d 588 (Pa. 1973), also reaffirmed in *PEDF*, 108 A.3d at 158 n.38, that Article I, Section 27 has its own value, i.e. that it is self-executing and thus does not require any implementing legislation.

To be sure, environmental regulations are themselves designed to reduce environmental incursions to a minimum and balance harms and benefits. The statutes, regulations, and general permit governing the application of biosolids (as with most environmental programs) broadly require a high degree of environmental protection. For example, under the regulations, "[a] person may not apply sewage sludge in a way that will cause surface or groundwater pollution…." 25 Pa. Code § 271.902. Sewage sludge may not be applied in a way that will cause or allow the attraction, harborage, or breeding of vectors, cause or allow malodorous emissions, adversely affect private or public water supplies, or cause a public nuisance. *Id.* Sludge application may not adversely affect threatened or endangered species or their habitat. 25 Pa. Code § 271.915(a). Nevertheless, the constitutional inquiry may inform the Department's and our application of these broadly

> worded regulations, and we cannot, as Synagro would have us do, rule out as a matter of law the possibility that the constitutional inquiry may compliment the regulatory inquiry in some cases.
>
> Synagro says it is "inappropriate and unrealistic" to consider the extent of the environmental incursion and balance harms and benefits in a judicial forum such as our own, but the three-part *Payne* test is actually consistent with the Board's longstanding, overriding standard for reviewing Departmental actions. Our review of the Department's actions has always included a determination of not only whether those actions are supported by the facts and whether they are lawful, but whether they constitute a *reasonable* exercise of its discretion as well. *Solebury School*, 2014 EHB at 519; *Stevens v. DEP*, 2002 EHB 249, 255; *Smedley v. DEP*, 2001 EHB 131, 160; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Thomas F. Wagner, Inc. v. DEP*, 2000 EHB 1032, 1054. Even if we put Article I, Section 27 aside, perfect compliance with minimum regulatory requirements may not always be enough even under our traditional review criteria if the Department is shown to have unreasonably exercised its discretion. As far back as 1983 we held that an "overly blind reliance" on the regulations can constitute an abuse of discretion, particularly where the natural conditions are quite complex. *Coolspring Twp. v. DER*, 1983 EHB 151, 178.
>
> Thus, despite Synagro's and the Appellants' efforts to truncate or disregard the *Payne v. Kassab* test, we will apply it as written. We will address all three questions set forth in *Payne*, not just the first one. In applying the second and third prongs of the test, we will keep in mind the Commonwealth Court's admonition that Article I, Section 27 is a "thumb on the scale," which compels us to give greater weight to the environmental concerns in the decision-making process. *PEDF*, 108 A.3d at 170.

Id., slip op. at 3-7.

In light of this discussion, it is clear that Columbia's argument regarding Article I, Section 27 is based on the incorrect premise that compliance with all regulations necessarily satisfies Article I, Section 27.[12] Accordingly, its motion to dismiss is denied on this point.

Columbia goes on to characterize some of the Appellants' objections as a claim that absolutely no air contaminants may be emitted from the compressor station. Yet again we find ourselves in disagreement with Columbia's characterization of the Appellants' objections. The

[12] We note that the Department states in its memorandum of law that it refrains from taking a position on the Appellants' Article I, Section 27 argument. Despite this, the Department still argues for the wholesale dismissal of the appeal.

Appellants have made no such absolute claim. "Air pollution" is defined very broadly,[13] and the Appellants reference that reality and the fact that Columbia's compressor station will obviously emit what technically constitutes air pollution. However, they do not contend that all air pollution is prohibited. Rather, they contend that the Department, in allowing certain levels of emissions at this location, has failed to give due regard to the public health consequences of the compressor station's permitted emissions. This is an area where the Department has considerable discretion. *Cf. Solebury School v. DEP*, 2014 EHB 482 (protection of public health and safety transcends minimum regulatory requirements in some cases). The Department's exercise of this discretion is not the proper subject of analysis in the context of a motion to dismiss.

Columbia adds that, if the Appellants are facially challenging the constitutionality of the applicable regulations themselves, as opposed to the application of the regulations, this Board lacks jurisdiction to hear such a constitutional challenge. We do not detect such a challenge, but in any event, Columbia is just plain wrong on this point. *Millcreek Manor v. Dep't of Public Welfare*, 796 A.2d 1020, 1025 (Pa. Cmwlth. 2001); *Croner, Inc. v. Dep't of Envtl. Res.*, 589 A.2d 1183 (Pa. Cmwlth. 1991); *St. Joe Minerals Corp v. Goddard*, 324 A.2d 800, 802 (Pa. Cmwlth. 1974); *Goetz v. DEP*, 1998 EHB 955.

---

[13] Air pollution is defined as follows:

> The presence in the outdoor atmosphere of any form of contaminant, including, but not limited to, the discharging from stacks, chimneys, opening, buildings, structures, open fires, vehicles, processes or any other source of any smoke, soot, fly ash, dust cinders, dirt, noxious or obnoxious acids, fumes, oxides, gases, vapors, odors, toxic, hazardous or radioactive substances, waste or any other matter in such place, manner or concentration inimical or which may be inimical to the public health, safety or welfare or which is or may be injurious to human, plant or animal life or to property or which unreasonably interferes with the comfortable enjoyment of life or property.

35 P.S. § 4003.

General Objection

Finally, Columbia asks us to dismiss the Appellants' last objection, which contends generally that the Department otherwise acted unreasonably and unlawfully in approving Columbia's Plan Approval. Columbia says that the objection is too vague to state a claim upon which relief can be granted. It is a common and perhaps even a well-advised practice to include a catch-all objection like the Appellants' objection in a notice of appeal. Notices of appeal must be filed within 30 days of the Department's action, even in complex cases such as this one. It is perfectly understandable that an appellant's case will require refinement as it progresses toward an adjudication, but we do not view Columbia's motion to dismiss as an appropriate vehicle for advancing this refinement in this case.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JUSTIN SNYDER, STEPHANIE SNYDER, MARIE COHEN, ALEX LOTORTO, GREG LOTORTO, BESS MORAN, MARIE LIU AND ROBIN SCHNEIDER	:	
v.	:	**EHB Docket No. 2015-027-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COLUMBIA GAS TRANSMISSION, LLC, Permittee	:	

O R D E R

AND NOW, this 21st day of December, 2015, it is hereby ordered that the Permittee's motion to dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: December 21, 2015

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SLUDGE FREE UMBT, et al., Appellants, AND DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, Intervenors	:	
v.	:	**EHB Docket No. 2014-015-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and SYNAGRO, a.k.a. SYNAGRO MID-ATLANTIC, INC., Permittee	:	**Issued: December 22, 2015**

OPINION IN SUPPORT OF ORDER
DENYING MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a joint motion to dismiss an appeal as moot filed by a permittee and the Department because certain exceptions to the mootness doctrine apply. The notices of first land application of biosolids that precipitated the site suitability notices, which are the subject of this appeal, and which were later withdrawn by the permittee, are likely to be repeated yet evade review, and the appellants are likely to suffer a detriment without a decision after participating in prolonged litigation in this matter.

O P I N I O N

Sludge Free UMBT ("Sludge Free"), a citizens group consisting of residents of Upper Mount Bethel Township in Northampton County, along with five pairs of individual appellants, all of whom are members of Sludge Free, filed an appeal of the Department of Environmental Protection's (the "Department's") approval of three site suitability notices submitted by Synagro, a.k.a. Synagro Mid-Atlantic, Inc. ("Synagro") for the application of biosolids on three farms in

the Township. The three farms are all owned by Ron Angle and they are referred to as: (1) Ron Angle – Potomac Farm Biosolids Site, (2) Ron Angle II – Sunrise Farm Biosolids Site, and (3) Ron Angle III – Stone Church Farm Biosolids Site. The Department administers a general permit (PAG-08) for the beneficial use of biosolids through land application under which these sites are covered. The Department's approval was precipitated by Synagro's submission of three Notices of First Land Application of exceptional and non-exceptional quality biosolids (the "30-day notices"). The Appellants' notice of appeal contains a host of objections in support of an overarching contention that the sites in question are not appropriate for the application of biosolids. The Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper, have intervened on the side of the Appellants. This matter is currently scheduled for a hearing on the merits beginning on January 12, 2016.

Synagro and the Department have now filed a joint motion to dismiss the appeal as moot. They tell us that on November 3, 2015 Synagro withdrew the 30-day notices that were covered by the site suitability determinations subject to this appeal via a letter to the Department. (Mot. to Dismiss, Ex. A.) They say that Synagro began applying Class A biosolids to the farms instead of the Class B biosolids for which it had previously sought approval, which has obviated the need for Class B biosolids. On November 4, 2015, the Department issued a letter in response to Synagro stating that the site suitability determinations are now void because of Synagro's withdrawal of the 30-day notices. (Mot. to Dismiss, Ex. B.) Synagro and the Department argue that Synagro now lacks the legal authority to undertake the application of biosolids as contemplated by the 30-day notices. Consequently, they argue, there is no effective relief the Board can provide and the appeal should be dismissed as moot. They also argue that none of the limited exceptions to the mootness doctrine apply in this circumstance.

The Appellants and Intervenors (hereinafter collectively the "Appellants") respond that the appeal should not be dismissed because the motion is premised on inaccurate statements and, in any event, certain exceptions to the mootness doctrine apply—namely, that it is likely that the issues raised in this appeal will return, that the appeal also raises issues concerning the suitability of the sites for the application of Class A biosolids, and that the appeal raises issues of importance to the public interest. On December 15, 2015, we issued an Order denying Synagro and the Department's motion to dismiss. This Opinion is issued in support of that Order.

The Board is receptive to 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. *West Buffalo Twp. v. DEP*, EHB Docket No. 2014-078-L, slip op. at 2 (Opinion, Sep. 28, 2015); *Brockley v. DEP*, EHB Docket No. 2014-092-L, slip op. at 1 (Opinion, Apr. 3, 2015); *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. Motions to dismiss will only be granted when a matter is free from doubt when viewed in the light most favorable to the nonmoving party. *Brockley*, *supra*; *see also Hanover Twp. v. DEP*, 2010 EHB 788, 789-90; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Cooley v. DEP*, 2004 EHB 554, 558. In assessing a motion to dismiss premised on mootness, we have said:

> "Mootness is a prudential limitation related to justiciability," and, thus generally is an issue 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).

South v. DEP, EHB Docket No. 2014-082-L, slip op. at 4 (Opinion, Apr. 16, 2015); *Consol Pa. Coal Co. v. DEP*, EHB Docket No. 2014-027-B, slip op. at 8 (Opinion, Feb. 12, 2015), *recon.*

denied, (Opinion, Mar. 13, 2015), *aff'd*, No. 351 C.D. 2015, ___ A.3d ___ (Pa. Cmwlth. Dec. 15, 2015). Although the rescission of the Department action under appeal often moots an appeal, the Board has recognized certain exceptional situations where we will retain jurisdiction. These situations may involve cases where the conduct complained of is capable of repetition yet likely to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision. *Sierra Club v. Pa. Pub. Util. Comm'n*, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd*, 731 A.2d 1133, 1134 (Pa. 1999); *Ehmann v. DEP*, 2008 EHB 386, 389; *Tinicum Twp. v. DEP*, 2003 EHB 493, 495-96. Any one of those scenarios may justify retaining jurisdiction. *Ehmann*, *supra*, 2008 EHB at 390. 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. *Robinson Coal Co. v. DEP*, 2011 EHB 895, 900 (quoting *Ehmann*, 2008 EHB at 388).

In this matter, prudence compels us to refrain from dismissing this case. The situation presented falls squarely within exceptions to the mootness doctrine because it is likely to be repeated and evade review, and the Appellants will suffer a detriment without a decision from the Board. We find guidance in the recently decided case of *Consol Pennsylvania Coal Co. v. Department of Environmental Protection*, No. 351 C.D. 2015, ___ A.3d ___ (Pa. Cmwlth. Dec. 15, 2015).[1] In its decision, Commonwealth Court instructed that in order for the first 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

[1] In this case, Consol appealed the permit issued to it by the Department because of the imposition of a permit condition requiring Consol to submit pre-mining biological data for certain streams that could be potentially impacted by mining. However, Consol complied with the permit condition before filing an appeal to the Board. The Department subsequently issued a revised permit without the contested permit condition and then moved to dismiss the appeal as moot. A majority of the Board found the appeal moot, *Consol Pa. Coal Co. v. DEP*, EHB Docket No. 2014-027-B (Opinion, Feb. 12, 2015), and Commonwealth Court affirmed.

complaining party will be subjected to the same action again. *Consol*, slip op. at 25 (quoting *Phila. Pub. Sch. Notebook v. Sch. Dist. of Phila.*, 49 A.3d 445, 449 (Pa. Cmwlth. 2012)). Both of those elements are present here.

Beginning with the second element, there are very strong indications that biosolids will be applied to the Angle Farms in the near future. The Appellants attach two affidavits—one from appellant Robert Schneider and one from John Bermingham (of an organization called Help the Farmer, Heal the Land (*see* Reply, Ex. E))—that provide notable statements made by the landowner, Ron Angle. The affidavit from Schneider reads in pertinent part as follows:

> After the [Upper Mount Bethel Township] Board of Supervisors meeting on November 9th, 2015, Ron Angle approached me and asked if I had heard about the permit. I told him that I was out of town and unaware of any news. He said that I'd better find out. You guys have spent a lot of money and have been duped. He said that he would be applying for a new permit and will be spreading sludge in the spring. Then I moved on.

(Resp., Ex. G.) Similarly, the Bermingham affidavit reads in pertinent part as follows:

> On Monday, November 9, 2015 at the Upper Mount Bethel Board of Supervisors meeting, Ron Angle approached me approximately at 8:45pm, after the meeting had concluded, and informed me that the Appeal to stop the spreading of Biosolids was useless. Furthermore, he stated he would go ahead and apply for a Class-B permit again the following week.

(Resp., Ex. H.)

The Appellants also attach a news article published on Lehigh Valley Live, titled "Sewage−based fertilizer permit canceled for Mount Bethel farms." (Resp., Ex. F.) The article generally discusses the withdrawal of the 30-day notices. It later provides commentary from Angle:

> Angle, however, called Synagro's withdrawal a "strategic move" on his and Synagro's part.

> "It does not mean that sludge will not be spread," he said. "It doesn't mean we can't go back out in the spring and get another permit. ... It is in no way, shape or form a victory for the anti-sludge people."

(*Id.*) The Appellants say that these statements undermine Synagro and the Department's assertion that it is pure speculation that the Angle Farms will receive biosolids in the future. The Appellants argue that withdrawing permit applications shortly before a hearing as a "strategic move" only to reapply a few months down the road is a needless waste of Board resources, an affront to our review, and nothing more than an attempt to evade final review of the issues. We largely agree.

Synagro and the Department argue that Angle's statements do not bind Synagro and the Department. They contend that Angle is not the permittee and he did not submit the 30-day notices. While technically true, it somewhat ignores the realities of applying biosolids. Although Synagro is the permitted entity, Synagro is not indiscriminately applying biosolids without landowner consent. The landowner must want to have biosolids applied to his farm, and he must agree with an entity that can supply biosolids and will undertake the permitting responsibility. Here, Angle has expressed a clear intent to seek out the application of biosolids in the near future on these three farms. If the sites are suitable for Synagro's use, they are likely suitable for any other land applier's use, so the landowner's comments are actually at least as significant as if Synagro made them.

The news article also contains a statement from Department spokesperson Colleen Connolly in which she is quoted as saying:

> 'They're just not going to apply at this time,' DEP spokeswoman Colleen Connolly said. 'They can reapply to do it again in spring.'

(*Id.*) Synagro and the Department characterize Connolly's statement as merely expressing the fact that if biosolids were to be applied the entire application process would have to be undertaken again. We are not convinced of that interpretation. Her statement is qualified with the adverb "just," meaning only, merely, or simply, which suggests that the decision to reapply is more than purely speculative. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1228 (1986). Connolly also provides a distinct indication as to when Synagro may reapply—this coming spring. She does not say that Synagro could reapply next year or at some undefined later time. She explicitly mentions that Synagro can reapply in the spring, a few months away. Notably, in Synagro and the Department's joint reply, they do not attach an affidavit from Connolly that clarifies or elaborates on her prior statement. We have no indication that any or all of the parties have entered into some sort of binding agreement that would preclude future use of the site along exactly the same lines as proposed in this appeal. Such an agreement might well have shown that we would not need to start from scratch a few months from now. Of course, such an agreement may not have limited the ability of some new land applier to use the sites, which have been determined to be suitable, absent participation by the landowner.

In *Consol*, *supra*, the Commonwealth Court discussed an attenuated chain of events that would need to occur in order for Consol to be harmed, which the Court found required it to "engage in pure conjecture." Slip op. at 24. The Court explained that "to find that Consol will be harmed, we must assume that Consol will adversely affect the subject stream segments beyond the extent permitted, that the Department will order post-mining biological data, compare the pre- and post-mining biological scores, detect an excessive change, and order Consol to take action." *Id.* Here, the chain of events is far from conjectural. The landowner has all but

confirmed that he will seek to have biosolids applied on his farms in the near future. Coupled with an approval from the Department, which it has already shown an inclination toward issuing, these are the only two steps that need to occur. Accordingly, there is indeed a reasonable expectation that the Appellants will be subjected to the same action again.

With respect to the second element for this exception, whether the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration, we find that it is also satisfied in this case. First, the process for securing approval for the beneficial use of land application of biosolids under the PAG-08 general permit is not extremely extensive, particularly where, as here, the work has already been done. *See* 25 Pa. Code § 271.913. The Department has already issued site suitability determinations for each of these farms, determining that each of them were suitable for receiving biosolids. We suspect that it is not difficult to resubmit the 30-day notices.

Second, although the regulation requires that adjacent landowners be provided with notice of the intent to apply biosolids at least 30 days prior to land application, 25 Pa. Code § 271.913(g), absent an appeal filed within that time frame accompanied with a petition for supersedeas (and perhaps even an application for temporary supersedeas), 25 Pa. Code §§ 1021.61 – 1021.64, a neighboring landowner has no way of halting the spread of biosolids.[2] As provided in the Environmental Hearing Board Act, 35 P.S. §§ 7511 – 7516, "[n]o appeal shall act as an automatic supersedeas." 35 P.S. § 7514(d)(1). There is no guarantee of a supersedeas and we often characterize it as an extraordinary remedy. *See Dougherty v. DEP*, 2014 EHB 9, 11;

[2] In this case, the Appellants filed supersedeas and temporary supersedeas materials approximately three weeks after filing the appeal. The parties then executed a stipulation effectively staying the consideration of the supersedeas. (*See* Docket Entry 15.) The stipulation also provided that the Appellants would receive notice if Class B biosolids were to be applied during the pendency of the appeal, and allowed them to then reactivate their petition for supersedeas. There is no guarantee of a similar agreement in the future.

UMCO Energy, Inc. v. DEP, 2004 EHB 797, 802; *Oley Twp. v. DEP*, 1996 EHB 1359, 1361-62. If a petition for supersedeas were not filed and subsequently granted, and biosolids were applied during the pendency of the appeal, then the appeal threatens to once again become moot. The effort needed to apply biosolids is not like the effort needed to develop a coal mine or a quarry or to construct a treatment plant. Biosolids can be applied in a much shorter time frame. Indeed, Class A biosolids were apparently applied recently without any notice given to the neighbors or independent knowledge on their part.

In addition, the Appellants will suffer a detriment absent a decision from this Board. The fact that Synagro can start all over again puts a truly unfair burden on the Appellants. That the neighbors of the Angle Farms would be required to litigate this appeal all over again ignores the realities of Board litigation being a long, expensive process that requires significant resources from attorneys and experts. It would be patently unfair and an extreme detriment to the Appellants to force them to go through this entire process all over again in a few months' time. This case is nearing two years since the appeal was filed. We have every indication that the parties have expended significant resources on this matter. We have issued Opinions on intervention, discovery disputes, and on prior dispositive motions. All of these Opinions were issued in response to conduct undertaken by Synagro and/or the Department. As indicated here, the repetition of this process will not only waste the parties' resources, but it also stands to waste judicial resources.

We again look to *Consol* and distinguish it from the instant matter. In the *Consol* case, Consol was the permittee. Consol made a business decision to comply with the later revoked permit condition. Consol was in control of its own destiny; in the Court's view Consol could have waited until it was harmed and then appealed, but instead it chose to comply. Here, any

choice is outside of the control of the Appellants. The Appellants are instead at the mercy of the business decisions of Synagro and Angle. Their position is necessarily reactive to whatever the Department approves to be done at the farms. The sword of Damocles continues to hang over their heads, and their very reasonable fears and concerns have only been inflamed by the landowner and the Department's remarks.

Synagro and the Department argue that there is no effective relief we can provide because Synagro no longer has authority to apply Class B biosolids. We disagree. We could, for instance, conclude that the some or all of sites that have been selected are either not suitable for the application of biosolids or that there has been an insufficient investigation to show that they are suitable. Of course, it is also entirely possible that we could decide that the sites are perfectly suited for biosolids. The Department's determination of suitability in a way has continuing vitality. The Department has vigorously defended this appeal and never admitted to any mistakes or shortcomings. Although the Department's spokesperson said Synagro (or some other applier) would need to apply again, there is every reason to believe the process will be more in the nature of the sort of review brought to bear on a renewal as opposed to an entirely new project.

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 what may be the only time that party will have that opportunity. Our case law advises that we should exercise restraint in dismissing appeals as moot if the circumstance is not entirely free from doubt, at least in the context of a motion to dismiss. *See Perano v. DEP*, 2010 EHB 449 (declining to dismiss an appeal as moot where it is not clear that the subject of the appeal was rescinded by a subsequent Department action); *see also Ehmann, supra*, 2008 EHB 386 (denying motion to dismiss as moot where not

entirely convinced appeal is moot and three exceptions to mootness doctrine apply). This again is such a case. Our decision in this case is driven in part by the fact that it is presented in the context of a motion to dismiss. The parties retain the ability to present evidence regarding mootness at the upcoming hearing and to argue the issue in their post-hearing briefs.

Our prior Order denying the motion to dismiss is appended to this Opinion.

ENVIRONMENTAL HEARING BOARD

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

DATED: December 22, 2015

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For Permittee:
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SLUDGE FREE UMBT, et al., Appellants, AND DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, Intervenors	:	
v.	:	**EHB Docket No. 2014-015-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and SYNAGRO, a.k.a. SYNAGRO MID-ATLANTIC, INC., Permittee	:	

O R D E R

AND NOW, this 15th day of December, 2015, in consideration of Synagro and the Department's joint motion to dismiss, the Appellants' and Intervenors' response thereto, and Synagro and the Department's reply, it is hereby ordered that the motion is **denied**. An Opinion in support of this Order will follow.

ENVIRONMENTAL HEARING BOARD

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

DATED: December 15, 2015

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF ST. CLAIR	:	
	:	
v.	:	**EHB Docket No. 2015-017-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLYTHE TOWNSHIP, Permittee	:	**Issued: December 28, 2015**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion for summary judgment because there are genuine issues of material fact.

O P I N I O N

This appeal is the latest chapter in the ongoing saga of the Borough of St. Clair's ("St. Clair's") fight to prevent Blythe Township ("Blythe") from opening its construction and demolition landfill to be known as the BRADS Landfill. Blythe originally applied for a permit for the landfill in 2004. On July 13, 2012, the Department of Environmental Protection (the "Department") issued Solid Waste Permit No. 101679 to Blythe for the landfill. St. Clair filed its first appeal from the issuance of the permit on August 10, 2012. Following a hearing in that appeal we rejected most of St. Clair's objections, but remanded the permit to the Department to do the following:

1. Complete its review of Blythe's mine subsidence mitigation plan;

2. Revise its review of Blythe's nuisance minimization plan based upon site specific meteorological data;
3. Reevaluate its environmental assessment to ensure that the other revised analyses called for in our Order did not change the Department's ultimate conclusion that the BRADS Landfill satisfied the harms-benefit test set forth in 25 Pa. Code §271.127; and
4. Reissue the permit, if appropriate, to Blythe Township as opposed to BRADS.

Borough of St. Clair v. DEP, 2014 EHB 76 (March 3, 2014).

Following the remand, Blythe submitted new information to the Department regarding meteorological conditions and the potential for mine subsidence under the landfill. The Department evaluated the new information and ultimately decided to reissue the permit, this time to Blythe Township instead of "BRADS", which solved the fourth problem leading to the remand. The instant appeal is St. Clair's appeal of the reissued permit.

Meanwhile, overlapping these developments regarding the landfill permit, on June 18, 2013, the Department issued Water Obstruction and Encroachment Permit No. E54-325 to Blythe, which authorized Blythe to install a pipe under the landfill to be used in case the currently nonexistent Little Wolf Creek was ever restored. On August 9, 2013, St. Clair filed a notice of appeal of the encroachment permit. Following another hearing on the merits, the Board rejected all of St. Clair's objections. *Borough of St. Clair v. DEP*, EHB Docket No. 2013-118-L (Adjudication, May 20, 2015).

In this appeal, St. Clair challenges the way the Department handled all three of its assignments on remand. First, it takes issue with the Department's findings and conclusions regarding meteorological conditions at the site, which the Department relied upon in support of

its conclusion on remand that Blythe's nuisance mitigation plan is adequate. Second, it challenges the Department's conclusion that Blythe's revised mine subsidence plan is adequate. Third, it asserts that the Department failed to reconsider the harms and benefits of the landfill in light of the new meteorological and subsidence studies, as required by our remand order.

Blythe has filed a motion for summary judgment arguing that this appeal should be dismissed in its entirety. It says that St. Clair has failed to come forward with sufficient technical evidence to support its technical objections to the meteorological and subsidence work. It also challenges the legal support for some of the objections, and argues that some of the objections are barred by the doctrine of collateral estoppel. St. Clair in response has withdrawn its Objection Nos. 16a, 16b, 19, 20, 21, 22, and 23 (as No. 23 relates to flooding), but otherwise insists that its objections have enough factual and legal support to overcome Blythe's motion.

Mining Permit

St. Clair argues that the Department erred by approving surface mining of approximately 600 feet of the Buck Mountain coal vein with no condition or requirement that Blythe abide by the regulations regarding surface mining of coal or obtain a surface mining permit. Blythe asks us to grant summary judgment on this claim, arguing that there is no need to include anything in its landfill permit regarding the need to comply with the law or the need to obtain a permit.

It does go without saying that Blythe must comply with the law, and the Solid Waste Management Act does state that the issuance of a solid waste permit does not relieve an operator of the responsibility to comply with all applicable statutes including the Pennsylvania Anthracite Coal Mine Act. 35 P.S. § 6018.502(d). However, the parties have not explained the permitting requirements regarding the incidental removal of coal at a landfill or how those requirements interact (if at all) with the issuance of the solid waste permit. In addition, the incidental mining

appears to be a component of the revised subsidence plan, which is generally open to challenge in this appeal. Accordingly, we are not in a position to grant summary judgment on this claim.

Mine Subsidence

Blythe asserts that St. Clair has not adduced any evidence in support of its contention that the mine subsidence issue was not adequately addressed by the Department or Blythe on remand.[1] However, this is clearly not the case. St. Clair intends to present expert testimony that the subsidence problem has still not been adequately investigated, and that based on the limited information available Cell 4 cannot be extended without potential problems relating to subsidence. St. Clair tells us the expert will testify that there is a risk of unacceptable liner strain and groundwater contamination.

Whether the Board will be persuaded by any of this evidence is beside the point at this juncture. There is clearly a factual dispute as to whether the extensive underground mining under Cell 4 creates a subsidence issue which could affect public safety, the environment or the integrity of the liner. Therefore, summary judgment on this issue is not available.

Meteorological Data

The meteorological investigation is relevant because Blythe is required to prepare and implement a nuisance mitigation plan that includes "[f]or odors, the determination of normal and adverse weather conditions based on site-specific meteorological data." 25 Pa. Code

[1] The operative regulation, 25 Pa. Code § 271.201, provides that a permit application will not be approved unless the applicant affirmatively demonstrates that,

> [w]hen the potential for mine subsidence exists, subsidence will not endanger or lessen the ability of the proposed facility to operate in a manner that is consistent with the act, the environmental protection acts and this title, and will not cause the proposed operation to endanger the environment or public health, safety or welfare.

25 Pa. Code § 271.201(6) (criteria for permit issuance or denial).

§ 273.136(b)(3). The issue comes down to whether the weather data collected is sufficient to demonstrate that the plan to mitigate odors will suffice. Neither the regulations nor our remand order mandates anything more specific than that.

St. Clair tells us it will present expert testimony that the meteorological data submitted by Blythe is neither accurate nor based on reliable collection methods. It also criticizes the Department for continuing to rely in part on older offsite data to bolster what it says are just a few months of inaccurate onsite data. The adequacy of the data cannot be resolved in the context of a motion for summary judgment.

Blythe strenuously objects that St. Clair by challenging several aspects of the meteorological investigation is attempting to go well beyond the scope of the objection stated in its notice of appeal without ever having asked to amend its appeal. It says St. Clair's notice of appeal only specifically complained that there was less than one year of on-site data and an improper reliance on off-site data. Although there is some merit to Blythe's complaint, reading the notice of appeal broadly as we are required to do, *Croner, Inc. v. DER*, 589 A.2 1183, 1187 (Pa. Cmwlth. 1991), coupled with the fact that St. Clair is not springing the issue for the first time at the hearing, we will not dismiss St. Clair's objections regarding the meteorological study at this time.

Collateral Estoppel

We are very sympathetic to Blythe's concern that this appeal may not be used as a vehicle for relitigated issues that have already been addressed or waived in the prior appeals. To its credit, as noted above, St. Clair has withdrawn several of its objections in apparent acknowledgment of this concern. It also has done a good job of describing the three basic issues that are presented in this case that are not barred by the doctrine of collateral estoppel: (1)

whether the odor mitigation plan is supported by adequate meteorological data; (2) whether the mine subsidence plan as revised is adequate, and (3) whether the harms/benefits test is still satisfied in light of the information garnered in the course of revising the nuisance mitigation and mine subsidence plans. We do not detect any continuing effort on St. Clair's part to exceed these issues or relitigate matters already decided or waived. We will, however, consider objections to individual issues on this ground if and when they arise.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF ST. CLAIR	:	
	:	
v.	:	**EHB Docket No. 2015-017-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLYTHE TOWNSHIP, Permittee	:	

O R D E R

AND NOW, this 28th day of December, 2015, in consideration of Blythe Township's motion for summary judgment and the Borough of St. Clair's response thereto, it is hereby ordered as follows:

1. St. Clair's Objection Nos. 16a, 16b, 16d, 19, 20, 21, 22, and 23 (as No. 23 relates to flooding) are marked withdrawn.
2. Blythe Township's motion for summary judgment is in all other respects **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: December 28, 2015

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:
Edward M. Brennan, Esquire
(*via electronic filing system*)

For Permittee:
Andrew Klein, Esquire
Brian Uholik, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NATIONAL FUEL GAS MIDSTREAM CORPORATION AND NFG MIDSTREAM TROUT RUN, LLC, Appellants, and SENECA RESOURCES CORPORATION, Intervenor	:	
v.	:	**EHB Docket No. 2013-206-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 29, 2015**

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

By Steven C. Beckman, Judge

Synopsis

The Board upholds the Single Source Determination in the GP-5 permit issued by the Department where all three regulatory requirements are satisfied and the pollutant-emitting sources collectively meet the common sense notion of a plant. The Board finds that the Bodine Compressor Station and Well Pad E are each properly classified under Standard Industrial Classification Major Group 13. The Board also finds that the Bodine Compressor Station and Well Pad E fall within the common definition of the term "adjacent." Finally, the Board finds that the Bodine Compressor Station and Well Pad E are under common control due to common corporate ownership and ultimate financial control by that common corporate owner.

Background

This matter involves an appeal by National Fuel Gas Midstream Corporation and NFG Midstream Trout Run, LLC (collectively "Midstream"), and intervenor Seneca Resources

* Concurring Opinion by Judge Labuskes
Concurring Opinion by Judge Mather

Corporation ("Seneca") of an October 10, 2013 letter issued to Midstream by the Department of Environmental Protection ("the Department" or "DEP") authorizing the construction and operation of the Bodine Compressor Station in McIntyre Township, Lycoming County, pursuant to the General Plan Approval and/or General Operating Permit for Natural Gas Compression and/or Processing Facilities ("GP-5 permit" or "the permit"). Midstream and Seneca specifically challenge the Department's single source analysis incorporated into the GP-5 permit that resulted in the aggregation of the emissions from Midstream's Bodine Compressor Station with the emissions from Seneca's Well Pad E. The details of the single source analysis are contained in the Department's Application Review Memo for the Bodine Compressor Station dated October 10, 2013 ("2013 Application Review Memo").

On March 31, 2015, following the submittal of additional information by Midstream, the Department issued a "Re-Evaluation of Single Source Analysis" for the Bodine Compressor Station ("2015 Re-Evaluation Memo"). The 2015 Re-Evaluation Memo updated the Department's single source analysis regarding the SIC code, common control and contiguousness/adjacency three part test that governs single source determinations. The 2015 Re-Evaluation Memo reached the same ultimate conclusion as the 2013 Application Review Memo finding that the Bodine Compressor Station and Well Pad E should be treated as a single source and their air contamination emissions must be aggregated. In reaching the single source determination outlined in the 2013 Application Review Memo and re-affirmed in the 2015 Re-Evaluation Memo, Department staff followed the approach outlined in the Department guidance document entitled "Guidance for Performing Single Stationary Source Determinations for Oil and Gas Industries" dated October 6, 2012 ("2012 Guidance Document").

A three-day hearing was held in this matter from May 12, 2015 through May 14, 2015 at the Board's Northwest Office and Court Facility in Erie, Pennsylvania. Following the hearing, both Midstream and Seneca filed a post-hearing brief on August 3, 2015. The Department filed its post-hearing brief on September 2, 2015, and both Midstream and Seneca filed their post-hearing reply briefs on September 17, 2015. The matter is now ready for decision.

FINDINGS OF FACT

1. On or about August 14, 2013, NFG Midstream Trout Run, LLC, a subsidiary of National Fuel Gas Midstream Corporation applied to the Department for a Pennsylvania General Plan Approval and/or General Operating Permit for Natural Gas Compression and/or Processing Facilities ("GP-5 permit") for the construction and operation of a natural gas compressor facility (the "Bodine Compressor Station" facility) located in McIntyre Township, Lycoming County. (Parties' Joint Stipulation ("Jt. Stip.") No. 1).

2. Midstream's GP-5 permit application states that the purpose of the Bodine Compressor Station facility is to condition, compress, meter, and dehydrate gas from upstream production facilities. (DEP Ex. 7, p. C-33; Hearing Transcript ("T.") 109, 126-127).

3. The GP-5 permit authorizes the construction and operation of air contamination sources that an applicant proposes to use at natural gas compression or processing facilities. (Midstream Exhibit ("Ex.") 5; T. 108).

4. The GP-5 permit defines a natural gas compression and/or processing facility as "[a] facility that produces, compresses and/or processes natural gas, coal bed methane or gob gas starting with dehydration, compression, fractionation and storage." (Midstream Ex. 5; T. 108-09).

5. On October 10, 2013, the Department acknowledged Midstream's coverage under the GP-5 permit for the construction and operation of the air contamination sources at the Bodine Compressor Station described in Midstream's application. (Jt. Stip. No. 2).

6. When reviewing an application for a GP-5 permit, the Department must determine what the "stationary source" is and what the "facility" is in order to compare any aggregated emissions to the emission thresholds established in the Prevention of Significant Deterioration, nonattainment New Source Review, and Title V laws and regulations. (T. 34- 35, 113-114).

7. If the emissions from the stationary source or facility trigger the Prevention of Significant Deterioration, nonattainment New Source Review, or Title V permitting requirements, the stationary source or facility would not qualify for coverage under the GP-5 permit. (T. 113).

8. The Department, in connection with its review of Midstream's application, performed a Single Source Determination and Aggregation Analysis. (Jt. Stip. No. 3).

9. The Department's single source analysis with respect to aggregating the emissions from Well Pad E with the emissions from the Bodine Compressor Station is discussed in an October 10, 2013 Application Review Memo for Midstream's GP-5 application. (Midstream Ex. 1; T. 22-23).

10. The October 10, 2013 Application Review Memo was drafted by Air Quality Engineer John Twardowski, and reviewed and approved by Environmental Program Manager Muhammad Zaman. (Midstream Ex. 1; T. 21, 364).

11. The October 10, 2013 Application Review Memo documents the initial recommendation by the Department's permit reviewing staff that a GP-5 permit be issued for the Bodine Compressor Station facility. (Midstream Ex. 1; T. 31-32).

12. The October 10, 2013 Application Review Memo contains a section entitled "Single Source Analysis." (Midstream Ex. 1; T. 33).

13. As a result of the Single Source Analysis, the Department considered Midstream's Bodine Compressor Station facility and Seneca's upstream exploration and production facilities at Well Pad E to be a single source for air permitting purposes, including the Prevention of Significant Deterioration, nonattainment New Source Review and the Title V permitting programs. (Jt. Stip. No. 4).

14. The combined air pollutant emissions from the air contamination sources at the Bodine Compressor Station and Well Pad E do not exceed the regulatory thresholds for review under Prevention of Significant Deterioration, nonattainment New Source Review, or Title V permitting. (Jt. Stip. No. 5).

15. On February 27, 2015, Midstream provided additional information to the Department relevant to the single source analysis as part of settlement negotiations with respect to this appeal. (Midstream Ex. 3, p. 1).

16. After reviewing and considering that additional information, on March 31, 2015, the Department issued a memorandum entitled "Re-Evaluation of Single Source Analysis" in connection with Midstream's GP-5 permit application for the Bodine Compressor Station. (Midstream Ex. 3).

17. The March 31, 2015 Re-Evaluation Memorandum was drafted by Air Quality Engineer John Twardowski with assistance of counsel, reviewed by Permits Chief David Shimmel, and reviewed and approved by Environmental Program Manager Muhammad Zaman. (Midstream Ex. 3, p. 1; T. 36, 307, 313, 367).

18. The March 31, 2015 Re-Evaluation Memorandum confirms and repeats the initial recommendation by the Department's permit reviewing staff that a GP-5 permit be issued for the Bodine Compressor Station facility, and that the emissions from Well Pad E should be aggregated with the emissions from the Bodine Compressor Station. (Midstream Ex. 3).

19. For purposes of making a single source determination with respect to Prevention of Significant Deterioration and Title V, a group of stationary sources belong to the same industrial grouping if they share the first 2-digits of their Standard Industrial Classification ("SIC") code. (Jt. Stip. No. 23).

20. Seneca's operations at Well Pad E meet the description of SIC Code 1311. (Jt. Stip. No. 22).

21. SIC Major Group 13 is entitled Oil and Gas Extraction and includes establishments primarily engaged in producing crude petroleum and natural gas and further states that pipeline transportation of petroleum, gasoline, and other petroleum products (except crude petroleum field gathering lines) is classified in Transportation and Public Utilities, Major Group 46, and pipeline transportation of natural gas is classified in Electric, Gas, and Sanitary Services, Major Group 49. (Midstream Ex. 21, p. 45, p. 284).

22. SIC code 1311 applies to establishments primarily engaged in operating oil and gas field properties including all activities in the preparation of oil and gas up to the point of shipment from the producing property. (Midstream Ex. 21, p. 45).

23. Midstream listed SIC code 4922 for the Bodine Compressor Station in the GP-5 permit application. (DEP Ex. 7).

24. SIC Major Group 49 is entitled Electric, Gas and Sanitary Services and includes establishments engaged in the generation, transmission, and/or distribution of electricity or gas or steam. (Midstream Ex. 21, p. 284).

25. SIC Code 4922 is entitled Natural Gas Transmission and is for establishments engaged in the transmission and/or storage of natural gas for sale. (Midstream Ex. 21, p. 284).

26. Midstream's operations at the Bodine Compressor Station facility meet the description of SIC Code number 1389 entitled "Oil and Gas Field Services, Not Elsewhere Classified, which applies to, among other things, "gas compressing." (Midstream Ex. 21, p. 46).

27. The edge of the developed property at Seneca's Well Pad E is located 0.24 miles from the fence line of Midstream's Bodine Compressor Station. (T. 61-62, 123, 125).

28. The centroid of Seneca's Well Pad E is approximately 0.30 miles from the centroid of the Bodine Compressor Station. (T. 62, 124).

29. There is an access road between the Bodine Compressor Station and Well Pad E. (T. 129).

30. The Bodine Compressor Station and Well Pad E are connected by a gathering pipeline, which transports natural gas produced from the Well Pad E to the Bodine Compressor Station. (Jt. Stip. No. 7).

31. Well Pad E and the Bodine Compressor Station facility do not share common workforces, plant managers or security forces. (Jt. Stip. No. 24).

32. Well Pad E and the Bodine Compressor Station facility lack a common secure perimeter, common work rules, coordinated operations, common safety requirements, or process equipment. (Midstream Ex. 42; Midstream Ex. 44; DEP Ex. 7, pp. C-35, C-36; T. 434-35).

33. National Fuel Gas Midstream Corporation subsidiaries and Seneca do not share purchasing functions, personnel services, benefit plans, maintenance responsibilities, environmental compliance or remediation responsibilities. (Midstream Ex. 42).

34. Neither Seneca nor its employees have the authority to enter Midstream's facility sites without permission. (Midstream Ex. 42).

35. Midstream employees do not have the authority to enter Seneca's exploration and production facilities without permission. (Midstream Ex. 42).

36. The Bodine Compressor Station facility and Well Pad E are unmanned facilities. (Midstream Ex. 42; Midstream Ex. 44; T. 84).

37. The persons who maintain and service the Bodine Compressor Station are third party contractors retained and directed by Midstream. (Midstream Ex. 42).

38. The intervening land use between the Bodine Compressor Station and Well Pad E is DCNR forestland. (Jt. Stip. No. 9).

39. Well Pad E and the Bodine Compressor Station are not visible from one another because of the intervening topography and land use. (Midstream Ex. 42; Midstream Ex. 44; T. 62-63).

40. Raw gas drilled for and removed from the ground at Well Pad E can be directed either to Bodine Compressor Station facility or to another facility, called the Hagerman facility. (Jt. Stip. No. 10).

41. Seneca is a Pennsylvania corporation established in 1913. (Jt. Stip. No. 11).

42. Seneca is an exploration and production company that explores for, develops and produces oil and natural gas. (Jt. Stip. No. 12).

43. Seneca is a wholly-owned subsidiary of National Fuel Gas Company, a publicly traded holding company organized under the laws of the State of New Jersey. (Jt. Stip. No. 13).

44. NFG Midstream Trout Run, LLC ("NFG Trout Run") is a Pennsylvania limited liability company established in 2010. (Jt. Stip. No. 14).

45. National Fuel Gas Midstream Corporation ("NFG Midstream") is a Pennsylvania corporation established in 2008. (Jt. Stip. No. 15).

46. NFG Trout Run is a subsidiary of NFG Midstream. (Jt. Stip. No. 16).

47. NFG Trout Run engages in "the gathering and processing of production natural gas." (DEP Ex. 7, p. B-2).

48. NFG Midstream and its subsidiaries, including NFG Trout Run, operate in the midstream segment of the natural gas industry. (Jt. Stip. No. 17).

49. NFG Midstream is a wholly-owned subsidiary of the National Fuel Gas Company. (Jt. Stip. No. 18).

50. NFG Midstream's subsidiaries, including NFG Trout Run, gather gas produced by exploration and production companies, like Seneca, and move that gas through their gathering pipelines, compressor stations, interconnect facilities and/or other midstream facilities owned and operated by NFG Midstream's subsidiaries for delivery to interstate pipelines. (Jt. Stip. No. 19).

51. NFG Midstream and its subsidiaries currently gather, process, or transport gas for only Seneca and no other producer. (T. 441).

52. Neither NFG Midstream nor its subsidiaries engage in, or have engaged in, drilling for natural gas or in the production of natural gas. (Midstream Ex. 42).

53. Ronald Tanski is the Chief Executive Officer of National Fuel Gas Company and the Chairman of the Board for both NFG Midstream and Seneca. (Jt. Stip. No. 20).

54. David Bauer is the Treasurer for National Fuel Gas Company, NFG Midstream and Seneca. (Jt. Stip. No. 21).

55. National Fuel Gas Company does not engage in the day-to-day operation of NFG Midstream or its subsidiaries. (Midstream Ex. 42; T. 459).

56. National Fuel Gas Company does not engage in the day-to-day operation of Seneca. (T. 257, 267, 458).

57. Ronald Tanski and David Bauer, on behalf of National Fuel Gas Company, are responsible for reviewing and approving the final budgets and business plans of both Seneca and NFG Midstream. (T. 426-28, 451-53).

58. National Fuel Gas Company presents consolidated financial statements which incorporate the financial statements of its subsidiaries, including Seneca, NFG Midstream and NFG Trout Run. (T. 433).

59. National Fuel Gas Company files a consolidated tax return that reflects the revenues and expenses of its subsidiaries, including Seneca, NFG Midstream and NFG Trout Run. (T. 457).

60. In order to pay dividends and interest on its debt, National Fuel Gas Company relies on interest and dividend payments from its 100% owned subsidiaries, including Seneca, NFG Midstream and NFG Trout Run. (T. 443).

61. All of the funding for the operations of National Fuel Gas Company's subsidiaries is conducted at the parent company level. (T. 443).

62. Seneca and NFG Midstream do not independently issue their own loans. (T. 443-44).

63. The assets of Seneca and NFG Midstream are assets of National Fuel Gas Company. (T. 447).

64. The air contamination sources at issue in this case are considered to be part of National Fuel Gas Company's net investment in property, plant and equipment. (DEP Ex. 2, p. 23; T. 444).

DISCUSSION

Introduction

Midstream and Seneca are challenging the Department's determination that Midstream's Bodine Compressor Station and Seneca's Well Pad E should be treated as a single source for air permitting purposes. This determination was incorporated in the GP-5 permit authorization issued to Midstream. The single source determination conducted by the Department serves two related purposes. The first is to determine whether a natural gas compression and/or gas processing facility is eligible for coverage under the GP-5 permit. Under its specific terms, the GP-5 permit may not be used by a source that is subject to the Prevention of Significant Deterioration ("PSD"), Title V and the nonattainment New Source Review ("NSR") permitting requirements that are triggered when a source meets certain emission thresholds. Therefore, the Department must define the source and determine its emission levels before reaching a decision on an application for coverage under the GP-5 permit. The second purpose involves the emission limits governing ongoing operations at the natural gas compression and/or gas processing facility. The operating emission levels from all sources at the facility must not equal or exceed certain levels specified in the GP-5 permit. Department staff testified during the

hearing (and it is stated explicitly in the latest version of the GP-5 permit dated 1/2015) that the emissions limits in the GP-5 permit apply to the emissions from all sources at the natural gas compression and/or gas processing facility, including other sources determined by DEP to be a single source. As such, the single source determination is an integral part of the Department's review and approval/denial of a GP-5 permit.[1]

There is no real dispute between the parties as to the statutory and regulatory framework applicable to determining whether the Bodine Compressor Station and Well Pad E should be treated as a single source. We discuss the statutory and regulatory framework in more detail below, but in order to be considered a single source, the air contamination sources must: 1) belong to the same industrial grouping, 2) be located on one or more contiguous or adjacent properties, and 3) be under the control of the same person (or persons under common control), and, more generally, the sources should meet the common sense notion of a plant. Each part of the three part test must be satisfied before the Department can properly aggregate separate air emission sources into a single source. The Department determined in both its initial review in October 2013 and in the re-evaluation that it conducted in March 2015 that the three part test for aggregation was satisfied and that the Bodine Compressor Station and Well Pad E comport with

[1] In its post-hearing brief, the Department asserts for the first time that "neither NFG Midstream nor Seneca has proven how they have been aggrieved by this interim permitting decision." (Department's Post-Hearing Brief, p.1). The Department fails to develop this assertion any further in its post-hearing brief. To the extent that the Department's statement can be read to challenge Midstream and/or Seneca's standing to bring this appeal, any standing challenge has been waived. *See Jake v. DEP*, 2014 EHB 38, 60 (issue of standing waived where the Department failed to challenge standing until post-hearing briefing). To the extent that the statement was intended to raise an issue regarding the Board's jurisdiction in this matter, we find that we have jurisdiction. In order to have jurisdiction, there must be a final Department action that adversely affects personal or property rights, privileges, immunities, duties, liabilities or obligations of a person. The approval of coverage under the GP-5 permit is a final permit decision by the Department. At a minimum, Midstream is adversely affected by the issuance of the GP-5 permit incorporating the Department's single source determination because, as a result of the aggregation of the emissions from Well Pad E with the emissions from the Bodine Compressor Station, Midstream must account for the Well Pad E emissions in satisfying the emission limits found in the GP-5 permit. Thus, we have everything that is required to support the Board's jurisdiction in this matter.

the common sense notion of a plant. Midstream and Seneca dispute the Department's determination and contend that the Bodine Compressor Station and Well Pad E fail to satisfy each part of the three part test. Furthermore, they argue that even if the three part test is met, the Bodine Compressor Station and Well Pad E do not satisfy the common sense notion of a plant.

The Board reviews all final Department actions *de novo*. *Warren Sand & Gravel Company v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1978). The Board has explained its *de novo* review as follows:

> The Board conducts its trials *de novo*. We must fully consider the case anew and we are not bound by prior determinations made by DEP. Indeed, we are charged to redecide the case based on our *de novo* scope of review. The Commonwealth Court has stated that "*de novo* review involves full consideration of the case anew. The EHB, as reviewing body, is substituted for the prior decision maker, the Department, and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 Pa. Cmwlth. 1991); *O'Reilly v. Department of Environmental Protection*, 2001 EHB 19, 32. Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. Department of Environmental Protection*, 1999 EHB 98, 120 n. 19.

Smedley v. DEP, 2001 EHB 131, 156. Under 25 Pa. Code § 1021.122(a), "[i]t shall generally be the burden of the party asserting the affirmative of the issue to establish it by a preponderance of the evidence." 25 Pa. Code § 1021.122(c) adds that "[a] party appealing an action of the Department shall have the burden of proof … when a party to whom a permit approval or certification is issued protests one or more aspects of its issuance or modification." Since this matter involves an appeal of the authorization of permit coverage issued by the Department, Midstream and Seneca must prove by a preponderance of the evidence that the Department's single source determination regarding Seneca's Well Pad E and Midstream's Bodine Compressor Station that was incorporated into the GP-5 permit is contrary to law or unreasonable.

Regulatory Framework Governing Single Source Determinations

Single source determinations are necessitated by the federal and Pennsylvania regulations implementing the PSD, Title V and the nonattainment NSR permitting programs. The regulatory framework for a single source determination begins with the definition of a "stationary source" found in the federal Clean Air Act ("CAA"). Section 111 of the CAA defines "stationary source" as "any building, structure, facility, or installation which emits or may emit an air pollutant." 42 U.S.C. § 7411(a)(3). In *Alabama Power Company v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), the D.C. Circuit Court found that aggregating the emissions of individual units in a single plant into a single stationary source under the CAA's PSD provisions was permissible. The court, however, rejected an expansive definition of stationary source advocated by EPA and concluded that "EPA cannot treat contiguous and commonly owned units as a single source unless they fit within the four permissible statutory terms" for a stationary source: 1) "building;" 2) "structure;" 3) "facility;" or 4) "installation." *Id.* at 397; 42 U.S.C. § 7411(a)(3). The *Alabama Power* court instructed EPA to define the four statutory terms for "stationary source" in order "to allow an entire plant or other appropriate grouping of industrial activity to be subject as a single unit to PSD, as Congress clearly intended." *Id.*

In response to *Alabama Power*, EPA amended its PSD regulations and specifically amended the definition of "stationary source" to "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant." 40 C.F.R. § 52.21(b)(5). EPA, at the time of the amended PSD regulations, recognized that the *Alabama Power* opinion set boundaries on the components of the stationary source definition such that it must reasonably carry out the purposes of PSD, must approximate the common sense notion of a plant and must avoid aggregating pollutant-emitting activities that as a group would not fit with the ordinary meaning

of “building”, “structure”, “facility” or “installation.” 45 FR 52694-95, August 7, 1980. Pursuant to that approach, the amended PSD regulation went on to define “[b]uilding, structure, facility, or installation” as:

> [A]ll of the pollutant-emitting activities which [1] belong to the same industrial grouping, [2] are located on one or more contiguous or adjacent properties, and [3] are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same first two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U. S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

40 C.F.R. § 52.21(b)(6). The same three-factor analysis contained in the amended PSD regulations was extended to the Title V permitting program. 42. U.S.C. § 7661(2); 40 C.F.R. § 71.2.

Pennsylvania incorporated the federal PSD program in its entirety at 25 Pa. Code § 127.83 but has promulgated its own regulations for the nonattainment NSR and Title V programs. The nonattainment NSR and Title V regulations are found at Subchapters E and G of Chapter 127 of the Pennsylvania Code respectively. In order to treat separate sources of air emissions as a single source under the state regulations governing the PSD and Title V permit programs, the Department must establish that those sources: “[1] belong to the same industrial grouping, [2] are located on one or more contiguous or adjacent properties, and [3] are under the control of the same person (or persons under common control).” 40 C.F.R. § 52.21(b)(6) (defining “facility” for purposes of PSD); 25 Pa. Code § 121.1 (defining “Title V facility”). In order to aggregate sources under the nonattainment NSR program, based on the definition of “facility”, the Department must establish that the sources are located on one or more contiguous

or adjacent properties and are owned or operated by the same person under common control. 25 Pa. Code § 121.1. The requirement that the sources belong to the same industrial grouping in order to be aggregated does not apply to nonattainment NSR program.

The framework for making a single source determination and aggregating emissions covers all types of industrial facilities and was not specifically designed to address the oil and natural gas industry. Regulators have faced a challenge in applying the framework to the oil and gas industry because of the unique nature and distribution of the facilities and emission sources involved in oil and gas operations. EPA issued a memorandum in 2007 entitled "Source Determinations for the Oil and Gas Industries" intended to guide permitting authorities on single source determinations. The 2007 memorandum was withdrawn by EPA in 2009 and replaced by a memorandum that directed permitting authorities to rely on the three part test set out in the regulations. Just recently, EPA released a proposed rule entitled "Source Determination for Certain Emission Units in the Oil and Natural Gas Sector" attempting once again to clarify certain aspects of the three part test as applied to the oil and gas industry. 80 FR 56579-92, September 18, 2015.

In 2012, in the face of an increase in the number of oil and gas facilities in Pennsylvania related to Marcellus Shale development, the Department released its own guidance document entitled "Guidance for Performing Single Stationary Source Determinations for Oil and Gas Industries." In the 2012 Guidance Document, the Department sets forth the approach its permit staff should follow when making single source determinations involving oil and gas operations. Department staff are instructed to make single source determinations based on the following five-step analysis: (1) air emission sources may be treated as a single source for air permitting purposes if they meet the applicable two-or-three part regulatory test; (2) each of the elements

must be met in order to treat separate emission units as a single stationary source; (3) while federal guidance may be instructive, it is not dispositive; (4) the aggregation test must be applied on a case-by-case basis to the specific facts of the matter before the agency; and (5) the plain meaning of the terms "contiguous" and "adjacent," particularly in the context of the "common sense notion of a plant," and the terms "building," "structure," "facility," or "installation," are appropriate considerations in the application of the aggregation test. The 2012 Guidance Document goes further, stating that "properties located a quarter mile or less apart are considered contiguous or adjacent properties for applicability determinations …. Properties located beyond the quarter-mile range may only be considered contiguous or adjacent on a case-by-case basis." The Department offers its standard disclaimer for this guidance document stating that the policies and procedures outlined in the 2012 Guidance Document shall not affect regulatory requirements and are not an adjudication or a regulation. Furthermore, the Department reserves the discretion to deviate from the 2012 Guidance Document if the circumstances under consideration warrant a different approach.

The Board of course is not bound by the Department's guidance document. *See DEP v. Simmons*, 2009 EHB 188 citing *United Refining Co. v. DEP*, 2006 EHB 846 and *Dauphin Meadows v. DEP*, 2001 EHB 521. We also reject the Department's contention that we owe it deference regarding its interpretation of the applicable statutes and regulations. As our prior decisions have made clear, we do not defer to the Department when the Department has failed to adopt a consistent position or has changed its interpretation over time and/or offered a variety of interpretations. *See Tri-State Transfer Co., Inc. v. DEP et al.*, 722 A.2d 1129 (Pa. Cmwlth. 1999); *Waste Management Disposal Services of Pennsylvania, Inc. v. DEP*, 2005 EHB 433; *Brunner, Inc. v. DEP and Beaver Valley Alloy Foundry Company*, 2004 EHB 684;

Environmental & Recycling Services, Inc. v. DEP, 2002 EHB 461. As is evident by the varying interpretations of the regulations and the three part test that the Department relied on in this matter (i.e. the inconsistencies in the approach between the 2013 Application Review Memo and the 2015 Re-Evaluation Memo, the conflicting testimony of various Department officials during the hearing, and the various approaches to this issue advocated in other single source determinations that have come before the Board), the Department has not consistently applied the regulations and there is no settled approach by the Department to which we owe deference.

Despite not being bound by the 2012 Guidance Document, and without deferring to the Department's interpretation, we agree with significant portions of the five-step analysis set forth by the Department in the 2012 Guidance Document. The Board, along with all of the parties in this matter, agrees that each part of the two or three part regulatory test must be satisfied before the Department can properly aggregate the air emissions from the Bodine Compressor Station and Well Pad E. If even one part of the test is not met, the Department's decision to aggregate the emissions at the Bodine Compressor Station and Well Pad E is improper. We agree that federal guidance is not dispositive and that the Board's decision must be based on the specific facts of the Bodine Compressor Station and Well Pad E situation. Finally, when evaluating whether the Department correctly determined that the emission sources at the Bodine Compressor Station and Well Pad E should be treated as a single source under the three part test, we agree that it is important to keep in mind the plain meaning of the relevant terms and ensure that the ultimate decision supports the common sense notion of a plant and the terms "building," "structure," "facility," or "installation" as used in the "stationary source" definition.

This case of course arises from the application of the identified framework and the Department's stated approach to the actual facts concerning the Bodine Compressor Station and

Well Pad E. Following our review of the facts of this matter and applying the statutory and regulatory framework discussed above, we find that the emission sources at the Bodine Compressor Station and Well Pad E are properly aggregated as a single source. As we discuss in more detail below, we have determined that each of the three parts of the test are satisfied, although not necessarily in the manner advocated by the Department. Furthermore, we find that, having met the three part test, the Bodine Compressor Station and Well Pad E satisfy the common sense notion of a plant and reasonably constitute a "facility" as that term is used in the statutes and regulations.

Analysis of the Three Part Test for the Bodine Compressor Station and Well Pad E

SIC Code Determination (Same Industrial Grouping)

A single source determination under the PSD and Title V programs requires that the Department determine the Standard Industrial Classification (SIC) of the pollutant emitting activities. The parties agree that under the PSD and Title V requirements, in order to be considered a single source, the pollutant emitting activities must belong to the same major group (have the same first two digit code) in the Standard Industrial Classification Manual. (Jt. Stip. 23). The parties also agree that Well Pad E is properly identified under SIC code 1311. (Jt. Stip. 22). The parties' dispute is over the proper classification of the Bodine Compressor Station. Midstream contends that the proper SIC code for the Bodine Compressor Station is 4922 and Seneca agrees with Midstream on this point. In the initial single source determination completed in 2013, the Department acknowledged Midstream's use of 4922 for the Bodine Compressor Station but found that there was a support relationship between Well Pad E and the Bodine Compressor Station that overrode any difference in the SIC code. The Department now contends that the Bodine Compressor Station should be classified under SIC code 1311. If the Department

is correct, the first part of the three part test is met because the Bodine Compressor Station and Well Pad E would belong to the same SIC Major Group, Group 13. The Department also maintains its prior position that the alleged support relationship between the Bodine Compressor Station and Well Pad E can override any difference in SIC code if the Board determines that the activities are properly classified under two different SIC codes.

Each of the parties cite to the language of the 1987 Standard Industrial Classification Manual (Midstream Ex. 21) to support its position regarding the proper SIC code for the Bodine Compressor Station. The Department looks to both the general language describing Major Group 13 – Oil and Gas Extraction and the specific language for SIC code 1311 – Crude Petroleum and Natural Gas. The Major Group 13 language relied on by the Department states that it applies to establishments primarily engaged in producing crude petroleum and natural gas and includes activities such as exploration, drilling, oil and gas well operation and maintenance, as well as emulsion breaking and desilting of crude petroleum in the preparation of oil and gas customarily done at the field site. SIC code 1311 covers establishments primarily engaged in operating oil and gas field properties. The Department specifically cites to the language in SIC code 1311 that states that it applies to "all other activities in preparation of oil and gas up to the point of shipment from the producing property." The Department argues that the activities at the Bodine Compressor Station, including the metering, dehydration and compression of the natural gas from Well Pad E, are activities in the preparation of gas up to the point of shipment.

Midstream argues that the Bodine Compressor Station is not involved in any of the activities included in the description of Major Group 13 and instead points to a different section of that description that states that the pipeline transportation of natural gas is properly classified under Major Group 49 – Electric, Gas and Sanitary Services. Midstream further asserts that the

Bodine Compressor Station's activities are not included in the description of SIC code 1311 and rejects the Department's reliance on the catchall provision under SIC code 1311 for all other activities in preparation of gas up to the point of shipment from the producing property. Midstream's position is that the activities at the Bodine Compressor Station occur after the shipment of the gas from the producing property and therefore, the specific language of the catchall provision in SIC code 1311 is not satisfied.

Midstream contends that the activities at the Bodine Compressor Station are best classified under Major Group 49 – Electric, Gas and Sanitary Services. Major Group 49 includes establishments engaged in the generation, transmission and/or distribution of electricity, or gas or steam including combinations of any of the three services and also other types of services, such as transportation, communications and refrigeration. The specific SIC code used by Midstream is 4922 which is entitled Natural Gas Transmission and includes establishments engaged in the transmission and/or storage of natural gas for sale. Midstream argues that its activities at Bodine primarily function to condition, meter and compress natural gas for transportation to downstream third-party pipelines and production facilities and that these activities most closely fit SIC code 4922.

The Department's principal argument against the use of SIC code 4922 is that the Bodine Compressor Station does not simply transmit or store natural gas. Instead the Department notes the same activities referenced by Midstream but concludes that these processing activities are not within the description for Major Group 49 or SIC code 4922, which the Department argues are focused on transmission and transportation of natural gas, not gas processing. The Department also makes an extensive argument that Midstream's use of SIC code 4922 is inconsistent with Midstream's statement in its GP-5 permit application that the Bodine Compressor Station is

subject to 40 CFR 63, Subpart HH that governs sources that process, upgrade and store natural gas prior to the point that it enters the natural gas transmission or storage source category.

The difficulty in determining the proper SIC code for the Bodine Compressor Station arises principally from two issues, one general issue and one specific to the facts of this case. The first issue is that in determining whether two or more facilities qualify as a single source, the Standard Industrial Classification system is being used for a purpose that is entirely different than the one for which it was developed. The SIC system was developed to classify establishments by the type of economic activity in which they are engaged in order to facilitate the collection, tabulation, presentation and analysis of data collected by various government agencies. Therefore, the SIC system speaks in broad general terms about the types of activities that are included in the categories and attempts to ensure that all economic activity is accounted for in one of the codes. When making a single source determination under air quality regulations, the SIC code is being used to assist the regulator in determining whether various activities satisfy the definition of a stationary source, i.e. a "building, structure, facility or installation." This disconnect between the original purpose of the SIC system and its present use in air permitting decisions like this one creates opportunities for inconsistent application and widely varying legal interpretations like we see between the Department, Midstream and Seneca.

The second issue arises from the particulars of this case. The Bodine Compressor Station, although all within one fenced site, actually consists of various pollutant-emitting activities involving several different types of equipment. These include gas gathering lines, compressor engines, dehydration units, MicroTurbines, tanks and fugitive emission sources. The proper SIC code for the Bodine Compression Station is arguably influenced by which activities and equipment sources one chooses to focus on in determining the SIC code. The Department

focuses on the processing activities and equipment at the Bodine Compressor Station in concluding that it fits within the description of SIC code 1311. Midstream focuses more on the gas gathering activity and the overall role of the Bodine Compressor Station in moving gas from the upstream producer to the downstream transmission line. This focus bolsters Midstream's conclusion that SIC code 4922 is the proper classification.

Ultimately, we think that both the Department and Midstream have incorrectly identified the SIC code that should apply to the Bodine Compressor Station. Neither appears to us to be a particularly good fit with the actual activities at the Bodine Compressor Station. As the name implies, the main pollutant-emitting activity at the Bodine Compressor Station is the compression of natural gas. The five compressor engines that were proposed for installation as part of the GP-5 permit application reportedly account for the majority of the potential emissions at the Bodine Compressor Station (83% of NOx, 83% of CO, 78% of VOCs, 53% of HAPs, 0% of Methanol, 60% of Sox, 93% of PM and 75% of CO2e according to the October 10, 2013 Application Review Memo – Midstream Ex. 1.) Because the operation of the compressor engines is the principal pollutant-emitting activity at the Bodine Compressor Station, we think that the proper focus in determining the SIC code for this facility is on the compression of natural gas. In reviewing the SIC manual, we find that the description that best fits the main pollutant-emitting activity at the Bodine Compressor Station is found at SIC code 1389. The 1389 SIC code is entitled Oil and Gas Field Services, Not Elsewhere Classified and is described as establishments primarily engaged in performing oil and gas field services, not elsewhere classified, for others on a contract or fee basis. Among the types of activities described under SIC code 1389 is the following: "gas compressing, natural gas at the field on a contract basis." As discussed, the major pollutant-emitting activity at the Bodine Compressor Station is gas

compression and these services are performed by Midstream pursuant to a contract agreement with Seneca.

The Department makes no reference to SIC code 1389 in its single source determination or in any of its legal filings. Midstream may or may not reference SIC code 1389 in its post-hearing brief. While citing to the pages in the SIC Manual that include the discussion of SIC code 1389, it states "SIC codes 1381, 1382 and 1383 are not applicable because, respectively, Midstream's facilities are not engaged in drilling oil or gas wells, performing exploration services for oil or gas, or performing on-pad oil and gas field services as described." There is no SIC code 1383 so it appears this is intended to be a reference to 1389. In its brief, Midstream adds the term "on-pad" to its paraphrase of the SIC Manual title of Oil and Gas Field Services, Not Elsewhere Classified for SIC code 1389. The term "on-pad" is not used anywhere in the title or description of SIC code 1389. Instead the description of SIC code 1389 speaks of gas compressing at the field level and we do not see any basis for restricting the use of this code to gas compression "on-pad" since the use of the term "field" in the description is clearly intended to cover a broader area than a well pad. The SIC code we determined is appropriate for the Bodine Compressor Station, 1389, is in the same two digit Major Group code as Well Pad E, which the parties stipulated was covered under SIC code 1311. Therefore, we find that the first part of the three part regulatory test for treating Well Pad E and the Bodine Compressor Station as a single source is satisfied.[2]

[2] Because we determined that the first part of the test is met based on the SIC code, we are not required to address the Department's alternative argument that the alleged support relationship between the Bodine Compressor Station and Well Pad E can override any SIC code difference. If we were required to do so, we would likely rule against them on this point. The regulatory language is unambiguous in stating that the first part of the test requires that the pollutant-emitting activities "belong to the same industrial grouping" and "shall be considered as part of the same industrial grouping if they belong to the same 'Major Group' (i.e., which have the same first two digit code) as described in the Standard Industrial Classification Manual, …." 40 C.F.R. § 52.21(b)(6). We do not agree with the Department's position

Common Control

The second part of the three part test that requires separate sources to be under "common control" in order to be aggregated as a single source is expressed in a slightly different manner in the PSD, Title V and NSR regulations. The PSD regulations discuss "all the pollutant-emitting activities which … are under the control of the same person (or persons under common control)." 40 C.F.R. 52.21(b)(6); 25 Pa. Code § 127.83. Title V regulations speak of "sources … which are under common control of the same person (or persons under common control)." 25 Pa. Code § 121.1 (defining "Title V facility"). Finally, the NSR regulations address the issue as sources that are "owned or operated by the same person under common control. *Id.* (defining "facility"). Despite these slight variations in the regulatory language, the second part of the three part test is generally described as requiring a showing that the air contamination sources are under common control.

None of the relevant air permitting regulations provides a specific definition of "control" or "common control" for use in analyzing the second part of the test in a single source determination. In that determination, EPA and DEP rely on the general definition of "control" used by the Securities and Exchange Commission ("SEC") based on EPA's championing of this definition in its 1980 Preamble to the PSD regulations. We are hesitant to support an approach that originates from a regulatory preamble as opposed to a regulation and, furthermore, relies upon a definition from an entirely different regulatory scheme that was clearly not developed to address the same issues as those addressed by the federal Clean Air Act and Pennsylvania's Air Pollution Control Act. We think the terms "control" and "common control" are sufficiently clear and unambiguous and should be given their plain meaning, guided by the purposes of the air

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that it can simply ignore the unambiguous language of the regulation and override any differences in SIC code based on an alleged support relationship.

pollution statutes and regulations, when determining whether pollutant-emitting activities are under the control of the same person or persons under common control.

In the 2013 Application Review Memo, the Department determined that the Bodine Compressor Station and Well Pad E satisfied the common control requirement based on several factors: (1) the common ownership of Seneca and Midstream by their parent company, National Fuel Gas Corporation; (2) a contractual agreement between Seneca and Midstream for gas to be sent to the Bodine Compressor Station and (3) a support/dependency relationship between the Bodine Compressor Station and Well Pad E. In the 2015 Re-Evaluation Memo, the Department determined that common control was established as a result of ownership by a common parent company, National Fuel Gas Company. As a result of this determination, the Department found that there was no need to consider the contractual agreement or the potential support/dependency relationship between the Bodine Compressor Station and Well Pad E in the 2015 Re-Evaluation Memo. The permit reviewer, Mr. Twardowski, testified that he was advised by Ms. Joyce Epps of the Department's Central Office that if common control was established by one of the approaches that the Department relies on, there was no need to go any further in analyzing that issue.

Midstream and Seneca both assert that the common control part of the test must focus on whether a common person or entity controls the air contamination sources and/or pollutant-emitting activities. While acknowledging that they are both subsidiaries of a common parent company, they state that there is no evidence that National Fuel Gas Company exercises any control over the sources or pollutant-emitting activities or the day-to-day operations at the Bodine Compressor Station and/or Well Pad E. They also assert that Midstream and Seneca are distinct legal entities, with their own separate Board of Directors, By-Laws, Officers, etc. that

operate independently of National Fuel Gas Company. Therefore, they contend that the Department was incorrect to rely on common ownership by National Fuel Gas Company to find that there is common control of the Bodine Compressor Station and Well Pad E.

In addressing the Department's additional reasoning for finding common control as spelled out in the 2013 Application Review Memo, Midstream and Seneca argue that the Department cannot rely on the fact that there was a contract for services between Midstream and Seneca or the presence of an alleged support/dependency relationship to satisfy the requirement for common control. They note that it appears that the Department abandoned these additional arguments in the 2015 Re-Evaluation Memo. Even if the Department did not abandon the arguments, they assert that the contract between Midstream and Seneca evidences a commercial relationship but not common control of the nature contemplated by the three part test. They also argue that the use of a support/dependency relationship to support common control is neither legally appropriate nor factually supported in this matter.

In looking at the issue of whether there is sufficient common control to allow two separate sources to be treated as a single source, we find that it is important to keep in mind the purposes for which the determination is undertaken by the regulatory agency. The permit at issue in this matter, the GP-5 permit, and the majority of the regulatory programs in play, specifically PSD and nonattainment NSR, authorize, in part, the initial construction of new air contamination sources. The principal purpose of the single source analysis is to determine whether the proposed new air contamination source or sources will qualify as a minor source or a major source based on whether they meet or exceed certain emission thresholds. Midstream and Seneca's principal arguments regarding the common control issue put the focus on the ongoing operations at the Bodine Compressor Station and Well Pad E. We think that such a

focus is too narrow when analyzing whether there is common control. The analysis should include the broader issue of who controls or has the ability to control preconstruction and construction decisions as well as who controls or has the ability to control the ongoing operation of the air contamination sources at the Bodine Compressor Station and Well Pad E.

There is no dispute that National Fuel Gas Company owns both Midstream and Seneca. The parties stipulated that Midstream and Seneca are wholly-owned subsidiaries of National Fuel Gas Company. (Jt. Stips. 13 and 18). There is also no dispute that NFG Midstream Trout Run, LLC, the entity that received approval for coverage under the GP-5 permit, is a subsidiary of National Fuel Gas Midstream Corporation and therefore, ultimately, a subsidiary of National Fuel Gas Company. The issue is whether common ownership of Midstream and Seneca by National Fuel Gas Company is sufficient to demonstrate control of the pollutant-emitting activities and/or sources by National Fuel Gas Company. In finding that ownership was enough, the Department in the 2015 Re-Evaluation Memo noted that: "(1) a number of executive officers are shared among the three corporate entities; (2) National Fuel Gas Company's operations are integrated to such an extent that its different branches are more like different sections of one organization, as opposed to entirely separate organizations; and (3) National Fuel Gas Company owns 100% of both Seneca Resources Corporation and NFG Midstream Trout Run, LLC." The Department stated in the 2015 Re-Evaluation Memo that it had concluded that "those corporate relationships fulfill the SEC definition of 'control' and that, consequently, the activities at Bodine and Well Pad E are under common control."

We conclude that the Bodine Compressor Station and Well Pad E are ultimately under the control and/or common control of the same person, specifically National Fuel Gas Company, as those terms are used in the relevant statutes and regulations. National Fuel Gas Company's control

arises from its common ownership of Midstream and Seneca. The Oxford Dictionary defines "control" as "the power to influence or direct people's behavior or the course of events." *Control Definition*, Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/control (last visited Dec. 14, 2015). While we agree with the Department that there is common control and that this finding arises from the common ownership by National Fuel Gas Company, we caution that it is not the mere presence of a common ownership interest that demonstrates the necessary control. There must be sufficient information to demonstrate that the common owner has the power to influence or direct the behavior of the entities or the course of events that are relevant to the single source determination. Based on the testimony provided at the hearing, we think there is ample evidence that National Fuel Gas Company has the power to influence and/or direct the behavior of Midstream and Seneca and the course of events with regard to the Bodine Compressor Station and Well Pad E.

The testimony in this case makes it evident that National Fuel Gas Company's control of Midstream and Seneca arises at least in part from the power of the purse. The Department called Mr. David Bauer as a witness at the hearing. Mr. Bauer is the Treasurer for National Fuel Gas Company, Midstream and Seneca. He testified extensively about the financial relationship between the three entities. National Fuel Gas Company owns 100% of the stock of Midstream and 100% of the stock of Seneca. Mr. Bauer explained that Midstream and Seneca implement their own budgets, but those budgets are subject to review by himself and Mr. Ron Tanski, National Fuel Gas Company's CEO, at annual meetings with the subsidiaries. The Department questioned Mr. Bauer about whether he and Mr. Tanski had veto power or final say over the budgets of Midstream and Seneca. Mr. Bauer stated that if there are any disagreements with the proposed budgets presented by Midstream and Seneca, he and the President of the subsidiary

would reach an understanding on the budget issue and proceed on that basis. In addition to questions about budgets, Mr. Bauer was asked about his role in the selection of projects or capital investments by Seneca and Midstream. Mr. Bauer stated that the process for deciding on which projects to support with capital investments is similar to the budget process. As described by Mr. Bauer, Seneca would develop and submit a business plan to Mr. Bauer and Mr. Tanski for review and based on their assessment of the plan, Mr. Bauer and Mr. Tanski would determine whether National Fuel Gas Company wanted to commit capital to that business. The same process would be followed in reviewing a business plan for Midstream.

It is clear from Mr. Bauer's testimony that National Fuel Gas Company, through the financial arrangements with its subsidiaries, Midstream and Seneca, has the power to influence the behavior and/or course of events of both Midstream and Seneca vis-à-vis the Bodine Compressor Station and Well Pad E. While the issue was not as fully developed as we would have liked, we have no doubt that the initial construction of both Well Pad E and the Bodine Compressor Station, including all of the air contamination sources located at these sites, would have been subject to the budget and business plan process discussed by Mr. Bauer in his testimony. National Fuel Gas Company's ability to influence the preconstruction and construction decisions that are part of the GP-5 permitting and the PSD and NSR programs is the type of control/common control that satisfies the requirements of this part of the three part test. Although the evidence at the hearing demonstrated that National Fuel Gas Company does not take an active role in day-to-day operations, we also believe that based on its involvement with the financial arrangements of Midstream and Seneca, it could play a more active role in those operations if it so chooses. That too would satisfy our understanding of control since it is the

possession of the power to influence or direct the behavior of the parties or the course of events, not the actual exercise of that power that satisfies the requirement for common control.[3]

Contiguous/Adjacent

The third part of the single source analysis involves a determination of whether the relevant properties are contiguous or adjacent. Before we address whether the properties are contiguous or adjacent, we think that the first issue we need to resolve is what property or properties we are looking at for this determination. This issue is more complicated in matters involving the oil and gas industry where the property interests rarely involve the type of the relatively compact property interests more typical in the industrial or manufacturing sector. Instead the property interests in oil and gas matters can be divided in multiple ways and frequently involve facilities that are widely spread across the land. While the relevant property interests in this matter were not as complicated as some, in the hearing, we heard testimony regarding 1) DCNR's property interest in the Loyalsock State Forest which is approximately 150,000 acres on which both the Bodine Compressor Station and Well Pad E are located; 2) Seneca's Tract 100 leasehold interest that comprises about 10,000 acres of the Loyalsock State

[3] Because we determined that the second part of the test is met by National Fuel Gas Company's control of Midstream and Seneca through its common ownership, we are not required to address the two other approaches relied on by the Department in its 2013 Application Review Memo. If we were required to do so, we would support the conclusions reached by Mr. Twardowski in his 2015 review in which he reversed his earlier decisions and determined that the contract for service between Midstream and Seneca was not a basis for finding common control based on the specific terms of the contract and that there was not a support/dependency relationship for purposes of common control because the gas from Well Pad E could be sent to a facility other than the Bodine Compressor Station. In general, we are skeptical about the use of these two approaches to demonstrate common control and caution that the Department should look to the specific terms of the contract or the nature of the relationship to find control and not simply rely on the existence of the contract or relationship as appears to have been the case in the 2013 analysis. Any contract terms relied on by the Department should go beyond the standard business arrangements between entities embodied in an arms-length contract. We think the burden is even higher when asserting common control based on a support/dependency relationship because we think these types of relationships are not uncommon in the business world, (i.e. manufacturer and electric supplier) but rarely rise to the level where the type of control exists that we think is required to satisfy this part of the test.

Forest on which Well Pad E is located but not the Bodine Compressor Station; 3) a right of way agreement between DCNR and Seneca to allow for the development of the Bodine Compressor Station off of Tract 100; and 4) the fence line and developed area of the Bodine Compressor Station and Well Pad E.

The property interests considered to be the relevant property for the single source determination may very well be determinative of the third part of the three part regulatory test. For instance, if the relevant property is the Loyalsock State Forest, then both the Bodine Compressor Station and Well Pad E are on the same property. According to the Department's post-hearing brief, this is the position that Mr. Twardowski took in his initial 2013 review. The Department next notes in its post-hearing brief that, based on the additional information presented by Midstream, Mr. Twardowski concluded in his 2015 review that the relevant property was Seneca's Tract 100 leasehold where Well Pad E is located. As a result, he determined that the third part of the test was satisfied because the Bodine Compressor Station is on a contiguous DCNR property that is part of the Loyalsock State Forest.

We find the approach advocated by the Department, adopting either the 150,000 acre Loyalsock State Forest or the 10,000 acre Tract 100 leasehold as the relevant property, is problematic. Such an approach is inconsistent with the idea that one should not aggregate sources that do not fit within the ordinary meaning of "building", "structure", "facility" or "installation." Despite advocating this approach in this matter, we note that the Department rejected defining the relevant property so expansively in the 2013 Application Review Memo. In addition to looking at whether Well Pad E should be aggregated with the Bodine Compressor Station, the Department also considered another Seneca well, Well Pad M. The Department determined that Well Pad M was not contiguous or adjacent because it was approximately two

miles away from the proposed location of the Bodine Compressor Station. It reached this conclusion despite the fact that Well Pad M is located on both the Loyalsock State Forest and on the Track 100 leasehold. This clearly undercuts the positions the Department advocates in its post-hearing brief.

We think that in the oil and gas industry in general, and in this particular matter, the proper way to define the relevant property is by the fence line or developed area of the facility under consideration. This approach is consistent with the regulatory language and the purposes of the permitting programs and avoids a result that would allow the aggregation of sources that were many miles apart but located on a single expansive property such as a state forest. In this matter, the Bodine Compressor Station is contained within a security fence and we find that the fenced in area is the relevant property. In the case of Well Pad E, there is no fence around the facility but there is a clearly visible developed area that defines the relevant property area and its boundary (See Seneca Ex. 19).

Having determined the relevant properties in this matter, we turn our attention to determining whether those two properties are contiguous or adjacent. Since the regulations themselves do not define "contiguous" or "adjacent," we find, and the parties all agree, that the common dictionary definitions of the terms apply. The term "contiguous" means "sharing an edge or boundary; touching; or neighboring." (Department's Post-Hearing Brief, p.26) (citing Midstream's Post-Hearing Brief, p.38). Since Well Pad E and the Bodine Compressor Station are separated by intervening DCNR forestland, it is clear that the properties do not share a common edge or boundary and are not touching or neighboring and are therefore not contiguous.

The question of adjacency requires a more rigorous analysis in this case. The parties agree that the term "adjacent" means "close to; lying near; or next to" and we are comfortable

with that definition. Keeping the definition in mind, along with the language and purpose of the relevant statutes and regulations, we think the proper focus is on physical proximity and the proper question for the Board is whether the property where the Bodine Compressor Station is located is nearby the Well Pad E property. The determination of whether two properties are nearby is certainly subjective even when guided by the purposes of the statutes and regulations. In order to address that subjectivity, the Department has adopted a quarter-mile "rule of thumb" when determining if properties are "adjacent" for purposes of a single source determination. Under the rule of thumb, the Department states that properties located within a quarter mile are considered adjacent and properties located outside a quarter mile may be considered adjacent on a case-by-case basis.

Despite the position articulated in the Department's post-hearing brief regarding the relevant property, Mr. Twardowski testified that what actually occurred when he was evaluating whether the properties were adjacent was that he used a map to measure a distance of .24 miles from the edge of Well Pad E to the fence line of the Bodine Compressor Station. (T. 61-62). Seneca and Midstream contend that the proper measurement for purposes of adjacency in this case is .3 miles: the distance between the pollutant-emitting activities on Well Pad E and the Bodine Compressor Station. As is evident from these two arguments, one consideration when attempting to apply the Department's rule of thumb is what is the proper endpoint for measurement between the two properties. Seneca and Midstream contend that we should measure the distance between the pollutant-emitting activities on each respective property, while the Department adopts the view that we should measure from the fence line of each property to determine whether the properties are adjacent. When referencing the adjacency part of the three-part test, the relevant PSD regulations reference "pollutant-emitting activities" that are ***"located***

on one or more contiguous or adjacent properties." 40 C.F.R. § 52.21(b)(6) (emphasis added). The other regulations use the same language. The particular phrase used by EPA, and adopted in its entirety by DEP, suggests to us that the proper focus is whether the properties are contiguous or adjacent and not the individual "pollutant-emitting activities." Accordingly, we think that the Department's approach regarding measurement is correct and that the proper points for determining the distance in the adjacency analysis are the nearest fence lines of the developed surface properties or, in the absence of fence lines, the nearest edges of the developed surface properties.

We think it is important to articulate that point but our resolution of that issue does not greatly influence our decision in this particular matter. We find it of little consequence whether the resulting measurement is the .24 miles advocated by the Department or the .3 miles advocated by Midstream and Seneca. The Board, of course, is not bound by the Department's rule of thumb and must reach its own determination. It certainly would be useful if the statutes and regulations contained a bright line rule that stated that properties within a certain distance are adjacent and anything outside that distance is not adjacent. Such a bright line rule does not currently exist and, in the end, the Board is left with the task of determining whether these two properties are sufficiently nearby to be considered adjacent as that term is used in the context of single source determinations.

Seneca and Midstream both argue that the intervening land use between Well Pad E and the Bodine Compressor Station should be a factor in our analysis. They contend that the intervening DCNR forestland evidences a lack of adjacency. Furthermore, Seneca and Midstream assert that the two properties are not adjacent because the intervening topography prevents the Bodine Compressor Station from being visible from Well Pad E. While factors such

as intervening land uses and the visibility of one property from another may play a role in looking at the issue of adjacency, they are far from determinative and in this particular matter, we do not think that they are evidence of a lack of adjacency as asserted by Midstream and Seneca. Having looked at the facts in this matter, we conclude that based on physical proximity, the Bodine Compressor Station property is close enough to the Well Pad E property to constitute "adjacent" properties within the general definition of the term.[4] Therefore, we find that the third part of the test for making a single source determination is satisfied.

Common Sense Notion of a Plant

Finally we turn to the issue of whether Well Pad E and the Bodine Compressor Station comport with the common sense notion of a plant. Both Seneca and Midstream contend that a single source determination is improper where the properties and sources involved do not comport with the common sense notion of a plant. They claim that Well Pad E and the Bodine Compressor Station do not comport with a common sense notion of a plant because they do not share "a secure perimeter, security, work rules, coordinated operations, safety requirements, overall management and process equipment that is proximately located and arranged to produce products." (Midstream Ex. 6, p.19). The Department argues that the concept that the sources must satisfy a common sense notion of a plant is not part of any of the relevant regulations and, therefore, cannot trump the three part regulatory test. Instead, the Department suggests that the common sense notion of a plant can be used to inform the case-by-case analysis of each of the parts of the three part regulatory test.

[4] Because we determined the adjacency issue based on the physical proximity of the Bodine Compressor Station and Well Pad E, the Board did not consider the functional interrelatedness of those two sources in deciding this matter and makes no decision at this time on whether functional interrelatedness is a proper consideration when trying to determine whether sources are contiguous or adjacent.

The idea of the common sense notion of a plant and the language defining that notion arose out of the D.C. Circuit's *Alabama Power* decision in 1980. EPA discussed that idea later that same year in the preamble of its amended PSD regulations stating:

> In EPA's view, the December opinion of the court in *Alabama Power* sets the following boundaries on the definition of PSD for purposes of the component terms of "source": (1) it must carry out reasonably the purposes of PSD; (2) it must approximate a common sense notion of "plant"; and (3) it must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of "building," "structure," "facility," or "installation."

45 Fed. Reg. 52676, 52694-95 (Aug. 7, 1980). However, as the Department points out, the concept of a common sense notion of a plant never made it directly in to any of the relevant statutes and regulations and is not a specific part of the three part regulatory test.

We remain skeptical about importing concepts and discussion from regulatory preambles and giving them equal weight with the actual language of the properly promulgated regulations.[5] We agree with the Department that the proper way to think about the common sense notion of the plant is in the context of the requirements of each of the three parts of the regulatory test and the overall definition of a stationary source. As discussed above, we have found that Well Pad E and the Bodine Compressor Station are within the same industrial grouping, under common control, and adjacent to each other; therefore, they collectively satisfy the regulatory definition of a "facility." We do not find the fact that the Bodine Compressor Station and Well Pad E fail to share a "secure perimeter, security, work rules, coordinated operations, safety requirements, overall management and process equipment that is proximately located and arranged to produce products," is a proper basis to override the regulatory criteria. These common characteristics of

[5] We note that each of the parties relied on EPA's 1980 Preamble as support for their actions and positions at different times in this matter. We disfavor an approach to regulatory matters that elevates language from a regulatory preamble to the status of a regulation itself.

a plant do not readily translate to the types of facilities found in oil and gas field operations and, therefore, their absence is not particularly meaningful to our understanding of the common sense notion of a plant in this context. Even if we were to elevate the concept of a common sense notion of a plant to a stand-alone test, we think the facts support that the Bodine Compressor Station and Well Pad E satisfy the common sense notion of a plant.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this proceeding. 35 P.S. § 6021.1313.

2. Department actions are reviewed by this Board *de novo*, meaning that the Board is not bound by the Department's determinations and may make its own findings of fact solely on the record before it. *Warren Sand & Gravel Co., v. DER*, 341 A.2d 556 (Pa. Cmwlth. 1975).

3. Seneca and Midstream must prove by a preponderance of the evidence that the Single Source Determination contained in Midstream's GP-5 was unreasonable, unlawful, or not supported by the facts. 25 Pa. Code § 1021.122(a), (c)(3).

4. In order to treat separate sources of air emissions as a single source under the state regulations governing the PSD and Title V permit programs, the Department must establish that those sources: "[1] belong to the same industrial grouping, [2] are located on one or more contiguous or adjacent properties, and [3] are under the control of the same person (or persons under common control)." 40 C.F.R. § 52.21(b)(6); 25 Pa. Code § 121.1.

5. In order to aggregate sources under the nonattainment NSR program, based on the definition of facility, the Department must establish that the sources are located on one or more contiguous or adjacent properties and are owned or operated by the same person under common control. 25 Pa. Code § 121.1.

6. The Department's Guidance is not a regulation and the Board is not bound to follow it.

7. Well Pad E and the Bodine Compressor Station belong to the "same industrial grouping" because they are both properly identified under Major Group 13 (Oil and Gas Extraction) in the SIC Manual.

8. Well Pad E and the Bodine Compressor Station fall within the common dictionary definition of the term "adjacent."

9. Because Midstream and Seneca are both wholly-owned subsidiaries of National Fuel Gas Corporation and National Fuel Gas Corporation exercises ultimate financial control over both subsidiaries, Midstream and Seneca are under "common control."

10. Well Pad E and the Bodine Compressor Station fit within the common sense notion of a plant to the extent that they collectively fall within the regulatory definition of a "facility."

11. Seneca and Midstream have not met their burden in this appeal by proving by a preponderance of the evidence that the Department's October 10, 2013 issuance of Midstream's GP-5 permit containing the Single Source Determination was unreasonable, unlawful, or not supported by the facts.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NATIONAL FUEL GAS MIDSTREAM CORPORATION AND NFG MIDSTREAM TROUT RUN, LLC, Appellants, and SENECA RESOURCES CORPORATION, Intervenor	:	
v.	:	**EHB Docket No. 2013-206-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 29th day of December, 2015, it is hereby ordered that the appeal of National Fuel Gas Midstream Corporation and NFG Midstream Trout Run, LLC 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 29, 2015

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NATIONAL FUEL GAS MIDSTREAM CORPORATION AND NFG MIDSTREAM TROUT RUN, LLC, Appellants, AND SENECA RESOURCES CORPORATION, Intervenor	:	
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

CONCURRING OPINION OF
JUDGE BERNARD A. LABUSKES, JR.

The only issue raised in this appeal was whether the Department correctly applied the three-part aggregation test to the facts related to Midstream's Bodine Compressor Station and Seneca's Well Pad E. That is exactly what we have done and I agree with everything in the Adjudication regarding SIC Codes, control, and adjacency. I write separately to highlight a few things that we have not decided given the narrow question that we have allowed the parties to put before us.

First, all of the parties have assumed that the three-part test must be applied rigidly in this case. The Department came the closest to questioning its wooden application when it argued that the "support relationship" between the compressor station and the well pad justified overriding any difference in SIC codes. *If* the test applies, it does not seem to be appropriate to pick and choose among its parts. However, I am not entirely convinced that the Department had no choice but to apply the test in the first place. The ultimate purpose of the test is to assess whether what appears to be separate sources should actually be treated as a single source, and

therefore, included in one permit. If it is a single source, it of course follows that all of the emissions should be added up.

Rather than focus exclusively on the three-part test as the parties have done in this case, I think it would have been better to ask the more basic question, which is whether the compressor station and the well pad belong in one permit. Here, I am not sure that they do, and apparently, the Department agrees because only the compressor station is included in the permit coverage that was ultimately approved. Yet, if the station and well pad constitute a single source, I do not understand why only part of the source is included in the permit.

Adding the missing part of the single source, the well pad, to the permit may have been problematic. Well pads benefit from an exemption, and the general permit in question only covers natural gas compression and/or processing facilities. I am not sure how this plays out, but if the two parts of the single source cannot or should not be included in the permit, why are their emissions being aggregated? Either they constitute a single source or they do not.

By including only part of the single source in the permit, the Department has created a rather odd situation. The permittee's activities in general and emissions in particular going forward will now in part be constrained by the emissions and activities of a party that is not subject to or controlled by the permit – Seneca. The third party's emissions and activities are beyond the scope of the permit, yet those emissions and activities directly affect the permittee. Indeed, Seneca, who would otherwise be exempt, is now effectively being regulated indirectly by a permit. The permittee has no direct control over the third party, so the parent of the permittee, which is not a permittee itself, must apparently control the third party for the benefit of the permittee. If the parent does not do that, will the parent be subject to enforcement action? Since the parent is not a permittee, presumably attempting to enforce the permit against it would

require piercing the corporate veil, which is very difficult to do. The Department has placed the compressor station and the well pad in the same bubble for a disembodied aggregation analysis but popped that bubble for what really matters – the permit.

If the Department wanted to impose all of the duties and responsibilities that go along with the permit on the corporate parent and/or Seneca, why not include them in the permit? If the Department was not going to include both the compressor station and well pad in one permit in any event, then why aggregate their emissions?

Whether it turned out that the aggregated emissions exceeded the PSD, NNSR, or Title V thresholds or not, the decision on who to include in the permit is distinct from what permitting requirements apply. A single source should be covered by a single permit.

The issue regarding permitting is also distinct from the common control issue addressed in the Adjudication. My point here is that, if common control justifies treating separate industrial activities as a single source for aggregation purposes, it would seem to justify and indeed require that they be treated as a single source for permitting purposes. There is no record here of any other case where the Department has made a positive single-source determination yet issued the permit to cover only part of that source.

I worry that continued application of the three-part test, particularly in cases such as the one presented here where it does not seem to fit, will continue to result in inconsistent, sometimes result-oriented decisions based on strained analyses dependent upon arbitrary distinctions. Among other things, instead of bringing informed judgment to bear on whether multiple emissions should be covered by the same permit, we are forced to engage in a surrealist debate that only lawyers could love about whether there is "adjacency."

The other point I would like to raise is that the Department has very broad discretion under state law to regulate sources to ensure that they employ best available technology (BAT). 35 P.S. § 4006.6(c). BAT applies to "sources." Sources are defined more broadly under state than federal law. For example, an air contamination source can be a "place." 25 Pa. Code §121.1. The Department's discretion in mandating BAT at sources is not necessarily constrained by the never-ending struggle to define single sources under federal law.[1] Today's Adjudication does not address the Department's authority regarding the application of BAT.

Finally, I agree completely with the Department's argument in its post-hearing brief regarding Article I, Section 27 of the Pennsylvania Constitution. Whether or not it is appropriate to treat multiple sources as one "facility" for purposes of permitting, the Department has the authority pursuant to Article I Section 27 of the Pennsylvania Constitution to ensure that the emissions from the permitted source or sources when considered in the context of other nearby sources will not individually or cumulatively have an adverse impact on the people's right to clean air and the preservation of the natural, scenic, historic, and esthetic values of the environment. Regardless of what the complex regulations governing air quality might otherwise require, the Department is obligated to ensure that reasonable efforts have been made to reduce the environmental incursion of the permitted activity to a minimum, and having done that, ensure that the remaining environmental harms do not clearly outweigh the benefits of the project.

So, in light of all of this, was it appropriate to approve Midstream for coverage under the GP-5 permit? As the Department aptly says in its brief, "NFG Midstream did not appeal the Department's issuance of the General Permit 5 authorization to NFG Trout Run. They only

[1] Similarly, NSPS, NESHAPs, and RACT typically apply to emitting equipment irrespective of total emissions of the source at which the equipment is located, although there may be thresholds for individual types of equipment. *See generally* 80 FR 56579-92 (Sep. 18, 2015).

appealed the Department's consideration of the emissions from Seneca's Well Pad E."

ENVIRONMENTAL HEARING BOARD

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NATIONAL FUEL GAS MIDSTREAM CORPORATION AND NFG MIDSTREAM TROUT RUN, LLC, Appellants, AND SENECA RESOURCES CORPORATION, Intervenor	:	
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

CONCURRING OPINION OF
JUDGE RICHARD P. MATHER, SR.

I am in agreement with the majority opinion to dismiss the appeal of National Fuel Gas Midstream Corporation and NFG Midstream Trout Run, LLC. The Appellants have not met their burden to prove that the issuance of Midstream's GP-5 permit containing the Single Source Determination was unreasonable, unlawful or not supported by the facts. Overall, I agree with the vast majority of the discussion in the majority opinion, however, there is one point of caution that I should mention, even though it does not affect my agreement with the majority opinion to dismiss the appeal.

In its majority opinion, the Board rejects the Department's contention that the Board owes deference to the Department's interpretations of the statutes and regulations. In support of this conclusion, the majority opinion generally asserts: "As is evident by varying interpretations of the regulations and the three-part test that the Department relied on in this matter (i.e. the inconsistencies in the approach between the 2013 Application Review Memo and the 2015 Re-Evaluation Memo, the conflicting testimony of various Department officials during the hearing, and the various approaches to this issue advocated in other single source determinations that

have come before the Board), the Department has not consistently applied the regulations and there is no settled approach by the Department to which we owe deference." Adjudication at page 18. While I am in full agreement with the legal position that the Department is not entitled to deference for its interpretation of a particular regulation where the Department's interpretation of that particular regulation has changed or varied over time, *Pennsylvania School Boards Ass'n, Inc., v. Public School Retirement Board*, 863 A.2d 432 (Pa. 2004) (New interpretation is an abrupt change from prior interpretation and is not entitled to deference) cited in *Rag Cumberland Resources, LP v. Dep't. of Envtl. Prot*., 869 A.2d 1065, 1072, n. 11 (Pa. Cmwlth. 2005.), I raise a cautionary note about the Board's deference discussion for three reasons.

First, the Board's opinion fails to identify any specific Department regulations, any specific Department interpretations of those regulations and any variations or changes in those interpretations. The Board only states that the Department has not "consistently applied the [unidentified] regulations" as the reason to reject the Department's request for deference. I believe more specificity is needed to evaluate a Department claim for deference.

My review of the Department's Post-Hearing Brief indicates that the Department requested deference from the Board regarding its interpretation of the regulatory provisions that establish the "common control" criteria.[2] These regulatory criteria are described in the Department's 2012 Guidance for Performing Single Stationary Source Determinations for Oil and Gas Industries, Document Number 270-0810-006 ("2012 Single Source Guidance"). My review of the Department's 2013 Review memo and the 2015 Re-Evaluation memo on the issue

[2] The "common control" criteria is set forth in three different regulations and is applicable in the context of three distinct air quality regulatory programs: Non-Attainment New Source Program and 25 Pa. Code § 121.1 (definition of "air contamination source"), Title V Permitting Program (definition of "facility") and Prevention of Significant Deterioration Program (25 Pa. Code § 127.83 adopting by reference 40 C.F.R. § 52.21(b)(6)).

of "common control" does not reveal the Department changed or varied its interpretation of the regulatory criteria establishing "common control." In the 2013 Review memo, the Department considered all three bases to establish common control.[3] In the 2015 Re-Evaluation memo the Department simply considered the first basis, ownership, and declined to evaluate the last two bases. I don't believe that this evidence supports a finding that the Department's interpretation of several related regulations containing the "common control" criteria has changed or varied since 2012 when the Department adopted the 2012 Single Source Guidance. 2012 is the critical date when the Department announced its interpretations.

Second, the 2012 Single Source Guidance was adopted by the Department following a public notice and comment period. In 2011, the Department adopted the Single Source Guidance as Interim Final Technical Guidance and published a notice in the Pennsylvania Bulletin in which it requested public comments. 41 Pa. B. 5719 (October 22, 2011). The Department received comments from 366 commentators.[4] Following its review of the comments, the Department adopted the Final Single Source Guidance on October 6, 2012. This Guidance, among other things, contains the Department's interpretations of several regulatory requirements including the three related regulations containing the "common control" criteria. Under the Pennsylvania Commonwealth Documents Law and regulations promulgated by the Joint Committee on Documents, the Department is entitled to set forth regulatory interpretations in guidance documents or statements of policies. See 45 P.S. § 1102; 45 Pa. C.S.A. § 1102; and 25 Pa. Code § 1.4 (definitions of "statement of policy," "guideline" and "interpretations"). I believe

[3] In the 2012 Single Source Guidance, the Department identified three ways to establish common control: 1) ownership, 2) decision-making authority, and 3) support/dependency relationship. Single Source Guidance at page 7.

[4] http://www.portal.state.pa.us/portal/server.pt/document/1424441/aggregation_policy_comment_and_response_document_10-6-2012_pdf_(2)

that such interpretations are entitled to deference, if one of the exceptions to deference is not applicable.[5] Guidance documents, such as the 2012 Single Source Guidance, that are adopted after a public notice and comment period provide the public and regulated community with advanced notice of a Department regulatory interpretation. The public process whereby the Department announced its regulatory interpretation in the 2012 Single Source Guidance enhances its claim for deference in my view.

Finally, I am hesitant to start down a path of evaluating whether to give deference to Department interpretations of regulations in a general, non-specific manner. Such an approach is similar to an approach suggested by the Department in other matters before the Board to give broad deference to Department decisions applying various regulations, which the Board has already rejected. *Wilson v. DEP*, EHB Docket No. 2013-192-M (Consolidated with 2013-200-M), (Opinion, Aug. 31, 2015). As the Board said in *Wilson v. DEP*:

> To be entitled to deference for a regulatory interpretation, the Department needs to specifically identify the regulatory language in question, and then the Department needs to specifically identify the regulatory interpretation of the specified language. At that point, the Board will be able to determine whether the Department's interpretation is entitled to deference. Deference for a regulatory interpretation is not a blanket to pull over any and all decisions that the Department might make when applying various regulations to a particular situation.

Wilson v. DEP, slip op. at 70. Deference is a question that should be evaluated in the context of a particular regulation and a specific Department interpretation of that identified regulatory

[5] The Department's reasonable interpretation of the environmental regulations it implements is, as a general rule, entitled to great deference. *Tire Jockey Service, Inc. v. DEP*, 915 A.2d 1165, 1190 (Pa. 2007); *DEP v. North American Refractories Company*, 791 A.2d 461, 466 (Pa. Cmwlth. 2002). There are exceptions to the general rule. For example, an agency's interpretation of a statutory or regulatory provision is not entitled to deference if the interpretation is simply developed in anticipation of litigation or if the interpretation is an abrupt change from an earlier interpretation of the provision. *See e.g., Malt Beverages Distributors Ass'n v. Pa Liquor Control Board.*, 974 A.2d 1144, 1154 (Pa. 2009) (Interpretation developed in anticipation of litigation is not entitled to deference).

language. Here, the Department has identified the regulations containing the "common control" criteria and provided an interpretation in its 2012 Single Source Guidance. The Board should have evaluated the Department's request for deference in the context of these specific items.

Notwithstanding my concerns with the Board's discussion of deference to the Department's regulatory interpretations, the Board's opinion reached the same conclusion as the Department regarding application of the "common control" criteria to support the correct decision to dismiss the appeal. I therefore concur with the Board's adjudication, with the limited exception of this discussion about deference to the Department's regulatory interpretation.

ENVIRONMENTAL HEARING BOARD

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